No. 19-2222

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASA DE MARYLAND, INC., *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland

REPLY BRIEF

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INTRODUCTION AND SUMMARY

The preliminary injunction barring the Department of Homeland Security (DHS) from enforcing the new public-charge Rule should be set aside. Both the Supreme Court and this Court have now granted the government's requests for stays of district-court injunctions against the Rule. In so ruling, both courts have necessarily concluded that the government is likely to prevail on the merits against challenges to the Rule, that the government will suffer irreparable harm so long as the Rule is enjoined, and that the balance of equities and the public interest weigh against an injunction. Nothing in plaintiffs' submission casts doubt on those conclusions.

As a threshold matter, however they might describe it, plaintiffs fundamentally assert standing based on a theory of injury—the voluntary diversion of their resources—that this Court previously rejected and that is irrelevant to the interests protected by the public-charge inadmissibility statute.

On the merits, plaintiffs identify no provision of the Immigration and Nationality Act (INA) with which the Rule is inconsistent, fail to meaningfully address the numerous provisions with which the Rule accords, and ignore Congress's longstanding decision to leave the definition of "public charge" to the Executive Branch's discretion. Plaintiffs instead claim that "public charge" has a uniformly accepted meaning that applies only to a narrow set of aliens. Nothing in the statute's text, context, or history requires that narrow reading, or precludes DHS's natural and

reasonable conclusion that aliens who rely on public support to feed, house, or care for themselves over a protracted or intense period are public charges.

The remaining factors likewise weigh against an injunction. Given the likelihood that the government will prevail on appeal, it should not have to bear the undisputed harm the injunction imposes: the likely irreversible adjustment to lawful-permanent-resident status of individuals DHS believes should be inadmissible.

ARGUMENT

I. Plaintiffs Lack Standing

Plaintiffs cannot distinguish this case from *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), where this Court held that an organization cannot demonstrate standing by alleging that it "decide[d] to spend its money on educating members" or "respond[ed] to member inquiries"—even if the organization's chosen "diversion of resources might harm the organization by reducing the funds available for other purposes." *Id.* at 675. CASA—the only plaintiff held to have standing—alleges harm of the same kind. According to the complaint, CASA has "incurred significant costs in advising its members on the immigration consequences that might flow from applying for or accepting public benefits," has "allocate[d] significant resources to combating the Rule's chilling effects through public education and to counseling and assisting its members," and has "reduce[d] its advocacy for health-care expansion efforts at the state level in Maryland" because it "has had to shift its organizational focus" toward "mitigat[ing] the harm of the Public Charge Rule." JA112. CASA's assertion that the

diversion of resources is not voluntary because it is dictated by the priority of helping CASA's members avoid possible harm, Br. 16, does not distinguish *Lane*, where the organization's decision to expend resources answering members' questions was likewise dictated by its priorities—namely, "education . . . focusing on the Constitutional right to privately own and possess firearms," 703 F.3d at 671.

Nor can asserting that the Rule "has made more difficult and less effective CASA's efforts to improve the quality of life in immigrant communities," Br. 15, satisfy the requirement that organizations show that a challenged regulation will "perceptibly impair[]" the organization's "ability to" provide services, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)—not just that the regulation will lead to less favorable *results*. CASA's interpretation of *Havens* would give an advocacy organization standing whenever a change in law was unfavorable to its clients.

Unable to distinguish *Lane*, plaintiffs resort to inapposite and out-of-circuit cases. In *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221 (4th Cir. 1981), this Court held that an organization's participation in agency rulemaking would become more costly because of a change to the procedures for that rulemaking. Here, as noted, CASA's activities themselves are not impeded. Plaintiffs note that the D.C. Circuit's decision in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994), was "cited approvingly in *Lane*," Br. 16, but the quoted passage is adverse to plaintiffs' position: "Although a diversion of resources might harm the organization by reducing the funds available for other purposes, 'it results

not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices.'" *Lane*, 703 F.3d at 675 (quoting *Fair Emp't Council*, 28 F.3d at 1276). And the D.C. Circuit's holding in that case is just one of a line of cases, starting with *Havens Realty*, stating that discriminatory practices impede the activities of organizations seeking to combat discrimination. *See also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27-28 (D.C. Cir. 1990). Those cases cannot stand for the proposition that an organization can challenge any change in law adverse to its interests.

Plaintiffs' one-sentence footnote is inadequate to preserve an argument that CASA has representational standing or that the individual plaintiffs have standing, questions the district court did not address. Br. 18 n.8; *see Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009) (party waived argument that appeared in one "declarative sentence" in a footnote). In any event, the two individuals plaintiffs have identified are employed college students (one with a forthcoming degree in physics) who do not use public benefits and who have no immediate plans to seek adjustment of status. JA66-67. They cannot plausibly claim that the Rule causes them any actual or imminent injury.

Even if plaintiffs could establish constitutional standing, their alleged injuries are not within the statute's zone of interests. Plaintiffs misconstrue the zone-of-interests inquiry, arguing in effect that a plaintiff is within the zone of interest whenever it has *any* "vested interest" affected by the statute. Br. 19. Yet the ultimate question is whether "Congress intended to permit the suit," *Clarke v. Securities Indus.*

Ass'n, 479 U.S. 388, 399 (1987); "injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier Conference of Am. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 524 (1991). Moreover, the relevant interest is the one implicated by the alleged injury in fact. *See Pye v. United States*, 269 F.3d 459, 467 (4th Cir. 2001).

Here, CASA's alleged injuries—a diversion of resources as well as the costs of learning the new Rule—are not even "marginally related to" the public-charge provision's purpose. *Clarke*, 479 U.S. at 399. Relatedly, CASA's interest in remedying that alleged injury by increasing aliens' receipt of publicly funded benefits is "inconsistent with the purposes implicit" in the public-charge statute. *Id.* The statute's purpose is not to "ensur[e] the health and economic status of immigrants," Br. 19—much less to do so by providing public benefits—but to exclude aliens who are likely to become public charges.

II. Plaintiffs Are Not Likely To Succeed On The Merits

A. The Rule Is Consistent With The INA

DHS reasonably interpreted "public charge" to refer to an alien who charges expenses to the public for his support and care for a sustained period; the agency then established an administrable threshold level of benefits receipt below which an alien will not be considered a public charge. As the Ninth Circuit held, the Rule "easily" qualifies as a reasonable interpretation of the statute. *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773, 799 (9th Cir. 2019). In granting a stay of two injunctions

barring the Rule's enforcement, the Supreme Court, like this Court, has now likewise concluded that the government is likely to prevail against challenges to the Rule's validity. *See Department of Homeland Sec. v. New York*, No. 19A785, 2020 WL 413786 (Jan. 27, 2020).

Much of plaintiffs' contrary argument turns on their erroneous contention that the term "public charge" has a longstanding, fixed meaning that Congress implicitly adopted. Specifically, plaintiffs assert that "public charge" "encompass[es] only individuals who are primarily dependent on the government for subsistence." Br. 22. The public-charge inadmissibility provision's text, context, and history negate plaintiffs' contention.

Plaintiffs ask this Court to ignore strong textual indications of Congress's understanding of the term in 1996, the last time the public-charge inadmissibility provision was amended. Congress made clear that, in enacting welfare and immigration-reform legislation in 1996—which included amendments to the public-charge and related statutory provisions—it sought to ensure that "aliens within the Nation's borders not depend on public resources to meet their needs" and that "the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2).

Plaintiffs seek to sidestep Congress's statements because they were enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (PRWORA), which did not amend the public-charge

provision itself, rather than as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, which was enacted one month later and did amend the public-charge inadmissibility provision. Br. 38-39. Plaintiffs provide no support for their apparent view that the 1996 Congress's understanding of "national policy with respect to welfare and immigration," 8 U.S.C. § 1601, changed in the intervening month.

In any event, there is a direct statutory connection between the public-charge inadmissibility provision, PRWORA, and Congress's statements on immigration policy. PRWORA altered the public-charge determination by introducing the affidavit-of-support provision, 8 U.S.C. § 1183a. *See* Pub. L. No. 104-193, § 423. And, in its statements of policy, Congress expressly identified the "compelling government interest" in enacting stricter "rules" for "sponsorship agreements [(*i.e.*, public-charge-related affidavits of support)] in order to assure that aliens be self-reliant." 8 U.S.C. § 1601(5).

Plaintiffs' contrary argument is of a piece with their general refusal to acknowledge the significance of the affidavit-of-support provision. As the government explained, Appellants' Opening Brief (AOB) 18-19, the affidavit-of-support provision, 8 U.S.C. § 1183a, and the public-charge provision, 8 U.S.C. § 1182(a)(4), require many aliens to obtain sponsors, mandate that those sponsors agree to repay means-tested benefits the alien receives, and declare inadmissible on public-charge grounds any alien who fails to obtain a required affidavit. Thus,

Congress provided that the mere possibility that an alien might receive an unreimbursed, means-tested public benefit—regardless of whether the benefit is cash or in-kind or whether it would provide the alien's primary means of support—was sufficient to render the alien inadmissible on the public-charge ground. *See* AOB 19. Plaintiffs' claim that Congress viewed "public charge" as including only those aliens who are expected to rely primarily on the government for subsistence cannot be squared with that provision.

Plaintiffs underscore the error of their analysis when they point out (Br. 40) that "noncitizens who are required to obtain an affidavit of support must do so no matter how *unlikely* they are to become a public charge." The relevant point is that Congress went to considerable lengths to ensure that it was not admitting aliens who would receive publicly funded benefits, going so far as to insist on an affidavit of support even when an alien's circumstances do not suggest that the alien is likely to receive public benefits. In classifying aliens who fail to obtain a required affidavit-of-support as being inadmissible on the public-charge ground, Congress thus necessarily rejected plaintiff's narrow understanding of "public charge" as limited to aliens who are expected to be primarily dependent on the government.

Plaintiffs are similarly mistaken to suggest (Br. 38-39) that Congress's extensive efforts to ensure that aliens will not become dependent on public benefits show that Congress used other means to keep aliens from using benefits. The more natural inference is that Congress attempted, in a number of ways, to curb aliens' reliance on

public benefits for their basic needs—including by prohibiting the admission of aliens who are likely to rely on such benefits.

Plaintiffs likewise err in asserting (Br. 40-41) that, in authorizing some "qualified aliens" to receive public benefits in some circumstances, "Congress recognize[d] that noncitizens who would be likely to receive such benefits . . . *are admissible*." Br. 40. That argument cannot be correct, because it would apply with equal force to benefits—such as cash-assistance benefits—that plaintiffs concede would be a basis for a public-charge determination. Instead, Congress's expressed intent to exclude aliens who appear from the outset to be likely to rely on public assistance is perfectly consistent with its decision to assist certain aliens who end up needing unanticipated assistance after admission—especially since immigration officials cannot with perfect accuracy predict which aliens will become public charges.

Plaintiffs' criticism (Br. 41) that the Rule requires officers to determine an alien's "perceived likelihood of accepting benefits at *any point* in the rest of their lifetimes" ignores that the statute itself requires DHS to determine whether an alien "is likely *at any time* to become a public charge." 8 U.S.C. § 1182(a)(4)(A) (emphasis added). Thus, it is the INA, not the Rule, that imposes the requirement that DHS officers make "predictive judgments." Br. 24. Indeed, the 1999 Guidance—which plaintiffs fully support—similarly required DHS officers to estimate an alien's likelihood of receiving cash benefits at any point in the future. *See* 64 Fed. Reg. 28,689 (May 26, 1999).

Plaintiffs do not dispute that the INA's battered-alien provision, 8 U.S.C. § 1182(s), and the 1986 amnesty provision, *id.* § 1255a(d), support the inference that an immigration officer ordinarily may consider an alien's past receipt of noncash benefits in making public-charge inadmissibility determinations, and acknowledge that "DHS's Rule is contrary to law not because it considers noncitizens' *past* receipt of benefits." Br. 42-43. Plaintiffs instead assert that the Rule impermissibly requires adjudicators to predict whether noncitizens will receive such benefits "*in the future*." Br. 43. Plaintiffs never explain, however, why Congress would have deemed an aliens' past receipt of noncash benefits relevant to the public-charge determination, but not their expected future receipt of such benefits.

Plaintiffs fare no better in urging that the Rule impermissibly considers future benefit receipt in an amount plaintiffs deem "small." Br. 43. DHS determined that it could best achieve Congress's statutory purposes by setting a threshold of twelve months of enumerated benefits within a 36-month period. That is not, as plaintiffs suggest, a "small" or "temporary" level of support. Br. 42-43. To the extent plaintiffs disagree, judgments about the amount of public benefits that render an alien a public charge are precisely the kind of issue Congress delegated to DHS. *See infra* Part II.B. Especially given the importance Congress attached to ensuring that aliens will "not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), DHS's judgment about the appropriate threshold here is permissible.

Plaintiffs similarly fail in attempting to distinguish *Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948), under which an alien can become deportable as a "public charge" if she receives a public benefit which she is obligated to repay, and she fails to repay that benefit after an agency demands repayment. Plaintiffs first attempt to discount *Matter of B-* on the ground that it addressed deportability under § 1227(a)(5), rather than inadmissibility under § 1182(a)(4). But that distinction only hurts plaintiffs: administrative decisions have long applied the public-charge deportability provision more narrowly than the inadmissibility provision, *see Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974), rendering even more implausible plaintiffs' assertion that the admissibility provision unambiguously encompasses fewer aliens than the deportability provision.

Next, plaintiffs assert that, under current law, an alien can be deported under *Matter of B-* only if the alien fails to repay cash benefits he received. Br. 41-42. But nothing in *Matter of B-* indicates that its rule is limited to an alien's failure to repay cash benefits. To the contrary, the decision indicates that the alien would have been deportable as a "public charge" if her family had not repaid the government for the "clothing, transportation, and other incidental expenses" it had provided. *Matter of B-*, 3 I. & N. Dec. at 326-27. INS introduced the cash-benefit limitation in the 1999 Guidance, Br. 41; that limitation cannot plausibly be attributed to Congress when it revised the relevant provisions three years earlier. Thus, in mandating that sponsors repay means-tested public benefits an alien receives, Congress would have understood

that it was subjecting aliens to potential deportation as public charges for failing to repay such benefits.

Finally, plaintiffs assert (Br. 42) that *Matter of B-* is distinguishable because "it involved a noncitizen who was a long-term resident of a state mental-health institution." But nothing in the relevant portion of *Matter of B-* turned on the plaintiff's institutionalization. In fact, as noted, the decision indicates that the alien would have been deportable as a public charge if she had failed to repay the cost of "clothing" and "transportation" provided by the government. *Matter of B-*, 3 I. & N. Dec. at 327. Thus, *Matter of B-* directly addressed whether the receipt of temporary, noncash benefits can render an alien deportable as a "public charge," and concluded that it can.

B. DHS Has Broad Discretion To Define The Term "Public Charge"

As the Ninth Circuit recognized, the common thread running through Congress's enactment of various public-charge provisions has been its repeated and intentional decision to leave the term's definition to the Executive Branch's discretion, so that the Executive may "adapt" the public-charge provision to "change[s] over time" in "the way in which federal, state, and local governments have cared for our most vulnerable populations." *San Francisco*, 944 F.3d at 792. The Rule falls comfortably within that delegated authority.

Plaintiffs concede that "Congress has never statutorily defined the term 'public charge.'" Br. 3. "Congressional silence of this sort is, in *Chevron* terms, an implicit delegation from Congress *to the agency* to fill in the statutory gaps." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016). And Congress in any event expressly delegated rulemaking authority to DHS. *See San Francisco*, 944 F.3d at 792 (citing 8 U.S.C. § 1103(a)(1), (3)).

The INA's legislative history makes clear, moreover, that Congress both understood that the term lacked a fixed meaning and intentionally declined to cabin the Executive Branch's discretion by giving it one. Plaintiffs acknowledge that the INA's legislative history is a relevant consideration in the *Chevron* inquiry. *See* Br. 28, 31. But plaintiffs do not address, let alone dispute, the most significant piece of the public-charge inadmissibility provision's history. As the government explained, AOB 24, in a report on the country's immigration laws that provided the foundation for the INA, the Senate Judiciary Committee acknowledged that "the elements constituting likelihood of becoming a public charge are varied" and that different Executive Branch officials "enforced [public-charge] standards highly inconsistent with one another." S. Rep. No. 81-1515, at 349 (1950). Yet, the Committee determined that "there should be no attempt to define the term in the law," because the public-charge inadmissibility determination should "rest[] within the discretion of" Executive Branch officials. *Id.*

Consistent with that recommendation, the INA, adopted shortly thereafter, did not define the term "public charge" and further emphasized the discretion afforded the Executive Branch by providing that public-charge determinations are made "in the opinion of" Executive Branch officials. *See* Pub. L. No. 82-414, § 212(a)(15) (1952); *see also San Francisco*, 944 F.3d at 791 ("in the opinion of" is "language of discretion"). The current public-charge inadmissibility provision retains the discretionary "in the opinion of" language. 8 U.S.C. § 1182(a)(4). Moreover, it identifies "various factors to be considered 'at a minimum,' without even defining those factors" or "limit[ing] the discretion of officials to those factors," making it "apparent that Congress left DHS and other agencies enforcing our immigration laws the flexibility to adapt the definition of 'public charge' as necessary." *San Francisco*, 944 F.3d at 792, 797.

Plaintiffs attempt to write off the "in the opinion of" language on the theory that it "delegates discretion to immigration authorities to apply the applicable statutory standard to the facts of a given case," but not to determine what the standard is. Br. 33. But where a statute commits a decision to an agency's discretion, "[t]he standards by which the [agency] reaches [that] decision" are likewise committed to its discretion. *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018). And, as discussed *supra* pp. 12-13, Congress plainly delegated DHS the authority to interpret the ambiguous term "public charge." Nor is the government arguing that the agency's discretion is "unreviewable" or "exempt[] . . . from the inquiry required at *Chevron*

Step One," Br. 32-33, but rather that the agency lawfully exercised its delegated authority, whose breadth Congress has highlighted in numerous ways.

In nevertheless arguing that "public charge" has a fixed meaning that DHS lacks discretion to interpret, plaintiffs assert that "public charge" is "synonymous" with "pauper," "professional beggar," and "vagrant." Br. 28. But, until 1990, the INA and preceding immigration statutes included "paupers, professional beggars, [and] vagrants" as a separate ground for exclusion. *See, e.g.*, Pub. L. No. 82-414, § 212(8) (1952); Pub. L. No. 64-301 § 3 (1917). Thus, as plaintiffs concede, their understanding of "public charge" would mean that Congress included superfluous grounds for exclusion in various immigration statutes for more than 100 years, despite multiple reenactments of those grounds over those years. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (Courts should be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

Nor can plaintiffs' contention be squared with statutory history. In the Immigration Act of 1917, Congress deliberately "change[d]" the "position" of "persons likely to become a public charge" in the list of excluded persons, so that it no longer "appeared between 'paupers' and 'professional beggars.'" S. Rep. No. 64-352, at 5 (1916). "The purpose of [that] change [was] to overcome recent decisions of the courts limiting the meaning of [public charge] because of its position between other descriptions conceived to be of the same general and generical nature." *Id.*

Similarly, when it enacted the INA in 1952, Congress listed the public-charge ground for exclusion separately from the pauper, professional beggar, and vagrant ground, with six other grounds for exclusion in-between. *See* Pub. L. No. 82-414, § 212. That approach hardly suggests that Congress believed the grounds were redundant. Instead, the better reading is that "public charge" was broader than the other items: a catch-all that referred to all persons whose care would impose a "charge" on the public. *See Ex parte Kichmiriantz*, 283 F. 697, 698 (N.D. Cal. 1922) ("[T]he words 'public charge' . . . mean just what they mean ordinarily; that is to say, a money charge upon, or an expense to, the public.").

Like the district court, plaintiffs cite *Gegiow v. Uhl*, 239 U.S. 3 (1915), as evidence that "public charge" had a settled historical meaning with which the Rule allegedly conflicts. Br. 30-31. But *Gegiow* stands simply for the proposition that an alien could not be deemed likely to become a public charge based solely on labor-market conditions in his destination city. *See* AOB 28-30. Instead, the determination was to be based on an alien's personal characteristics, which is precisely the approach the Rule employs, *see* 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances"). And Congress revised the immigration laws in an effort to overcome *Gegiow*, AOB 29, further undermining any suggestion that subsequent Congresses embraced the broad interpretation of *Gegiow* that plaintiffs assert.

Plaintiffs respond by citing *United States ex rel. Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929), for the proposition that *Gegiow* remains good law. *See* Br. 31-32. But far from endorsing plaintiffs' assertion, the Second Circuit held that the public-charge provision "is certainly now intended to cover cases like *Gegiow v. Uhl*." *Iorio*, 34 F.2d at 922; *see also Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) ("'The term 'likely to become a public charge' is not associated with paupers or professional beggars, . . . and is differentiated from the application in *Gegiow v. Uhl*.").

Plaintiffs also cite the tax that the 1882 Immigration Act imposed on shipowners bringing aliens to the United States as evidence that the term "public charge" did not include those aliens who receive "non-comprehensive public assistance." Br. 29-30. But the immigrant fund created by the 1882 tax was funded by those directly involved in and benefiting from the transport of aliens to the United States—*i.e.*, the shipowners, or, in some cases, the aliens themselves. *See* Pub. L. No. 64-301, § 2. Unlike modern-day public benefits such as SNAP and Medicaid, the fund was not financed by the public at-large. The tax and fund are thus analogous to the current affidavit-of-support and sponsor provision, 8 U.S.C. § 1183a. There is in any event no indication that the fund was designed to provide sustained support to those whose need for support was known at the moment of admission, and it certainly provides no evidence of plaintiffs' distinction between cash and in-kind benefits.

Plaintiffs are also incorrect in asserting (Br. 33-35) that BIA and judicial precedent established a settled meaning for the term "public charge" with which the

Rule is inconsistent. Like Congress, the BIA has emphasized that the "elements constituting likelihood of an alien becoming a public charge are varied," and that the term is "not defined by statute," but rather "determined administratively." *Matter of Vindman*, 16 I. & N. Dec. 131, 132 (BIA 1977). Administrative and judicial decisions that have adopted a narrower definition than the Rule simply reflect that variation and confirm Congress's observation that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge.'" S. Rep. No. 81-1515, at 347.

In any event, contrary to plaintiffs' suggestion, courts and the BIA were not of the view that "temporary setbacks do not render an individual likely to become a public charge." Br. 35. In *Ex parte Turner*, 10 F.2d 816 (S.D. Cal. 1926), for example, the court concluded that an alien was properly excludable as likely to become a public charge where there was "no assurance that he will earn or save sufficient [funds] to provide necessities *at all times* for himself, or his wife and children." *Id.* at 817 (emphasis added). As evidence that the alien failed to meet that test, the court cited the fact that he had been hospitalized on two previous occasions, once for two months and once for two weeks. *Id.* at 816-17. The court found it inconsequential that he was employed in the interim. *Id.* at 817. Thus, the alien's "temporary setbacks" were sufficient to render him likely to become a public charge.

Similarly, in *Guimond v. Howes*, 9 F.2d 412, 413 (D. Me. 1925), the court cited an alien's husband's temporary imprisonments of 60 and 90 days, during which time the

alien had to rely on "charitable aid," as evidence that the alien was likely to become a public charge again in the future. In so doing, the court emphasized that "[i]n order to be a public charge, a man may not be a technical pauper." *Id.* at 414. It is sufficient that he is "likely to become a charge . . . upon the public." *Id.* Moreover, as explained *supra* pp. 11-12, the BIA and AG long ago concluded that an alien's receipt of and failure to repay public benefits, even if such receipt was only temporary, could render the alien deportable as a "public charge." *See Matter of B-*, 3 I. & N. Dec. at 323.

Plaintiffs note (Br. 35) that, in some cases, the BIA has concluded that an alien was not likely to become a public charge, even though the alien received public benefits in the past. But the same is true under the Rule. The Rule makes clear that past receipt of public benefits is not outcome determinative, and is but one factor an immigration officer will consider in evaluating the totality of an alien's circumstances. *See* 84 Fed. Reg. at 41,503-04. Other factors, such as the fact that the alien is "authorized to work and is currently employed," *id.* at 41,504, could well outweigh the alien's past benefit receipt. *See id.* at 41,295.

Like the district court, plaintiffs cite (Br. 36-38) two failed legislative proposals as evidence that Congress purportedly did not intend the term "public charge" to encompass receipt of noncash benefits. Failed legislative proposals are a dubious means of interpreting a statute, and that is particularly true here. As plaintiffs concede, Br. 37-38, Congress did not reject the 1996 and 2013 proposals in favor of

alternative language. Rather, in both instances, it left the term "public charge" undefined. "If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge." *San Francisco*, 944 F.3d at 798 n.15.

Moreover, there is no indication that Congress believed that either the 1996 or 2013 proposed definitions of "public charge" were inconsistent with an established meaning of the term. Rather, the history of the 1996 proposal indicates that the President objected to a rigid definition of the term, *see* 142 Cong. Rec. S11872, S11881-82 (daily ed. Sept. 30, 1996). And, in 2013, Congress rejected the committee bill that had rejected the proposal. Efforts to assess a rejected committee proposal that formed a part of a bill subsequently rejected by the full Congress underscore the problems inherent in relying on unenacted legislation.

C. Plaintiffs' Remaining Arguments Lack Merit

Plaintiffs note (Br. 24) that an immigration officer's predictive judgment about an alien's future use of public benefits will be complicated by the fact that most aliens subject to a public-charge inadmissibility determination will not have previously received benefits. That is likewise true of the 1999 Guidance, which required officers to assess whether an alien is likely to receive cash benefits. In any event, one of the primary purposes of the Rule is to establish a framework that will aid officers in assessing whether an alien is likely to become a public charge in the future, even where the alien has not previously received benefits. *See, e.g.*, 84 Fed. Reg. at 41,295.

Plaintiffs next contend that the Rule's definition of "public charge" must be flawed because, according to plaintiffs, "*more than half* of the U.S.-born population" would meet the Rule's definition. Br. 25-26; *see also* Br. 44. Congress has not, of course, applied the term "public charge" to U.S. citizens, and any effort to do so is nonsensical. U.S. citizens are not subject to the numerous other provisions that attempt to ensure that aliens "not depend on public resources to meet their needs," 8 U.S.C. § 1601(2). U.S. citizens need not, for example, have sponsors who must promise to support the individual and reimburse the federal government for any benefits received. And U.S. citizens are not generally obligated to reimburse the government for public benefits and cannot be removed from the country for failing to repay such benefits.

More generally, aliens seeking admission or to adjust status are subject to any number of requirements that a significant number of U.S. citizens would not meet. For instance, the INA bars admission to aliens who have not "received vaccination against vaccine-preventable diseases," including "influenza type B and hepatitis B." 8 U.S.C. § 1182(a)(1)(A)(ii). The Centers for Disease Control and Prevention estimate that only 43% (influenza) and 25% (hepatitis B) of U.S. adults have received such vaccinations.[1]

[1] https://www.cdc.gov/vaccines/imz-managers/coverage/adultvaxview/pubs-resources/NHIS-2016.html

In any event, plaintiffs' statistic is flawed on its own terms. The study on which plaintiffs rely did not purport to apply the Rule's definition of "public charge." Instead, it acknowledged that while an estimated 50% of U.S. citizens participate in public-benefit programs at some point in their lives, "not all citizens who participate in the programs listed in the proposed rule would technically meet the proposed definition of a public charge" and the study could not "appropriately model" the number of U.S. citizens who would meet the Rule's requirements. Study 11-12.[2] The study also included benefits—such as the Children's Health Insurance Program—that are excluded from the Rule. Study 12; 84 Fed. Reg. at 41,501. And it acknowledges that only 16% of "individuals working in the United States" (which includes noncitizens) receive one of the study's enumerated benefits in a year. Study 2. Given that, even under plaintiffs' conception of the "public charge" provision, an alien who is unable or unwilling to work would be properly excluded (Br. 34), benefit use among those who work would be the relevant comparator.

Finally, plaintiffs contend (Br. 43-45) that the Rule is invalid because it is inconsistent with *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (BIA 1962; AG 1964). Plaintiffs point in particular to the Attorney General's statement that a "healthy person in the prime of life cannot ordinarily be considered likely to become a public

[2] Danilo Trisi, Ctr. on Budget & Policy Priorities, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means A Chance To Come To Or Stay In The U.S.* (May 30, 2019), https://perma.cc/4J72-GF6P (Study).

charge." *Id.* at 422. But, as the government explained, AOB 32-33, the Rule is not inconsistent with that statement, as it does not anticipate that healthy individuals in the prime of their working lives will be routinely declared likely to become public charges. Plaintiffs again rely on their erroneous contention that the Rule "encompasses more than half of the U.S.-born population," and therefore must sweep in some "'healthy' people 'in the prime of life.'" Br. 44. As explained *supra* pp. 21-22, that contention is wrong and irrelevant. Absent other factors, a healthy, working alien is not likely to be declared inadmissible under the Rule.

III. The Remaining Factors Weigh Against An Injunction

The remaining preliminary injunction factors also mandate reversal. Even assuming CASA has alleged a cognizable injury, *but see supra* Part I, it cannot show that a preliminary injunction would remedy that injury. To the contrary, CASA alleges that it has already diverted resources and altered its planned advocacy. It does not allege that a preliminary injunction would change that.

Instead, CASA asserts that its education expenditures might "increase if the . . . Rule goes into effect" because "members' fears [will be] made more concrete." Br. 47. That assumes that a member who hears that the Rule is subject to a "preliminary injunction" will have fewer questions than one who hears simply that the Rule is in effect. Such speculation does not justify an injunction. *See* AOB 36.

In any event, a marginal increase in CASA's diversion of resources is insufficient to outweigh the irreparable harm to the government and the public

interest. The injunction bars DHS from exercising its delegated authority, and will result in the likely irreversible grant of lawful-permanent-resident status to aliens who appear likely, "in the opinion of the [Secretary]," 8 U.S.C. § 1182(a)(4)(A), to become public charges. That the injunction preserves a prior exercise of delegated authority is irrelevant; the point is that it interferes with DHS's *current* exercise of authority.

IV. The District Court Abused Its Discretion In Granting A Nationwide Injunction

Plaintiffs have no real answer to the point that, under Article III and equitable principles, injunctions should be no broader than necessary to provide complete relief to the plaintiff. Instead, they note that three other circuits are currently reviewing the Rule, and suggest that the district court's nationwide injunction therefore does not short-circuit judicial inquiry. Br. 55. Plaintiffs' observation only underscores that the injunction inappropriately grants relief to plaintiffs in other jurisdictions, regardless of what those jurisdictions' courts decide, with the result that "the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal." *New York*, 2020 WL 413786, at *2 (Gorsuch, J., concurring).

Plaintiffs cannot show that a universal injunction is "necessary to afford [CASA] relief." *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001). They thus assert that "it was not unreasonable for the district court to *anticipate*" certain possible harms, Br. 52 (emphasis added): namely,

the possibility that a limited injunction would cause greater confusion to CASA's members, and the possibility that some of CASA's members *might* be subject to the Rule at a port of entry outside the reach of a limited injunction. CASA has not attempted to identify any members who are subject to the Rule, who intend to travel abroad and then return through a distant port of entry, and who would be deemed likely to become a public charge under the Rule. An injunction cannot be premised on pure speculation; CASA must show that its harms are likely, rather than merely possible. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21 (2008). Nor can CASA obtain an injunction by voluntarily expending resources to counteract a speculative harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 418 (2013).

Plaintiffs have not met their burden to "present facts sufficient to show that [CASA's] individual need requires the remedy for which [it] asks," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974), and to show that those likely harms outweigh the certain harm the government would suffer from nationwide relief. Indeed, plaintiffs offer no response to the various reasons why a universal injunction is unnecessary. *See* AOB 40-42.

Plaintiffs urge that "the harm CASA is suffering depends on the effects of the Rule on its members, who are dispersed across multiple jurisdictions and can move freely beyond those boundaries." Br. 53. But CASA has alleged that it provides services only in Maryland, Virginia, Pennsylvania, and the District of Columbia—not wherever its members happen to go. JA 65. This case is thus unlike *Richmond Tenants*

Org., Inc. v. Kemp, 956 F.2d 1300 (4th Cir. 1992), where "the plaintiffs were tenants from across the country," *Virginia Soc'y for Human Life*, 263 F.3d at 393 (distinguishing *Richmond Tenants* on that ground).

Plaintiffs are mistaken to suggest that the immigration context justifies a nationwide injunction. The case they cite for that point, *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017), was subsequently vacated and is of no precedential value. In any event, plaintiffs offer no response to the government's argument that the case is inapposite on its own terms. *See* AOB 42. And premising an injunction on a perceived need for uniformity is particularly inappropriate because Congress has long tolerated varied applications of the public-charge ground of inadmissibility. *See supra* p. 13; AOB 24.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7) because it contains 6,487 words. This opposition also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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