No. 19-2222

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, 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

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES

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INTRODUCTION

Neither of the developments highlighted by Defendants should affect this Court's analysis of the U.S. Department of Homeland Security (DHS)'s Public Charge Rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248), or the timeline for its review. First, if the Supreme Court grants certiorari in the other cases challenging the Public Charge Rule for which petitions are pending, this Court's analysis of the merits will inform the Supreme Court's consideration. The petitions from the Second and Seventh Circuit cases were pending before the Supreme Court when this Court granted en banc review, and nothing has materially changed since that time.[1] This Court should proceed with oral argument as scheduled. Moreover, whatever action the Supreme Court takes on the pending petitions, it will not address the organizational standing issue presented in this case. The need remains for this Court to clarify its organizational standing principles, including its earlier decision in *Lane v. Holder*, 703 F.3d 668 (4th Cir.

[1] Pet. Writ Cert., *U.S. Dep't of Homeland Sec. v. New York*, No. 20-449 (S. Ct. Oct. 7, 2020); Pet. Writ Cert., *Wolf v. Cook County*, No. 20-450 (S. Ct. Oct. 7, 2020). The Government also recently filed a petition for certiorari seeking Supreme Court review of the Ninth Circuit's decision affirming preliminary injunctions against the Public Charge Rule that is identical in all relevant respects to the other two petitions. *See* Pet. Writ Cert., *U.S. Customs & Immigration Servs. v. City & County of San Francisco*, No 20-962 (S. Ct. Jan. 21, 2021).

2012), to ensure that that those principles remain consistent with *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

Second, the Ninth Circuit's affirmance of preliminary injunctions against the Public Charge Rule bolsters the consensus that DHS's definition of the term "public charge" falls outside the statutory bounds set by the Immigration and Nationality Act (INA). Defendants' criticisms of that decision are without merit.

Finally, a recent decision by this Court confirms that the district court did not abuse its discretion by preliminarily enjoining the Public Charge Rule on a nationwide basis. In *Hias, Inc. v. Trump*, No. 20-1160, 2021 WL 69994 (4th Cir. Jan. 8, 2021), this Court affirmed a nationwide injunction against an executive order concerning resettlement of refugees within the United States. The reasons the Court affirmed a nationwide injunction in that case apply with equal force here. This Court therefore should affirm the district court's nationwide injunction without modification.

ARGUMENT

I. THIS CASE SHOULD NOT BE HELD IN ABEYANCE

Defendants argue that this Court should consider holding this case in abeyance while the Supreme Court considers the Government's petitions for certiorari in other cases challenging the Public Charge Rule and, if it grants review, decides those cases. Appellants' Supp. Br. 7. This argument retreads old ground.

In opposing en banc review, Defendants contended that "the Supreme Court's forthcoming consideration of the legal issues at the heart of this case render [sic] further review by this Court unnecessary and an inefficient use of this Court's resources." Opp'n to Panel Reh'g & Reh'g En Banc 9. This Court, in apparent disagreement with Defendants' position, granted en banc review. Defendants' argument is no more persuasive now than it was before. The Supreme Court considered the petitions for certiorari during conferences on January 8 and January 22, 2021, but neither granted nor denied them. There has thus been no meaningful change that warrants delaying consideration of this case.[2]

In the meantime, further delay in this case would be counterproductive for at least two reasons. First, as the Supreme Court has recognized and Defendants have urged, consideration by multiple courts of appeals, including this Court, prior to Supreme Court consideration is the normal and appropriate course. There is no reason to diverge from that norm here. Second, delay could deprive this Court of

[2] Defendants state that if the Supreme Court grants certiorari in one or more of the cases challenging the Public Charge Rule that "it will resolve the central issue involved in this appeal, likely by the end of June." Appellants' Supp. Br. 1. Having declined to act on the petitions thus far, the Court is unlikely to grant or deny certiorari until after its next conference on February 19, 2021. It is therefore unclear whether the Court would be able to hear the case(s) this term—if it hears them at all—and the delay Defendants seek is likely to extend far longer than June 2021.

the opportunity to clarify that its prior opinion in *Lane* did not impose as restrictive a test for organizational standing as the panel majority set forth.

A. Courts of Appeals Should Address Complex Legal Questions Prior to Supreme Court Adjudication

The Supreme Court has stated on numerous occasions that it benefits from consideration of complicated legal questions by multiple courts of appeals before it decides a case raising those issues. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (stating that a rule of nonmutual collateral estoppel against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue" and "would deprive th[e Supreme] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (urging district courts to exercise caution before certifying nationwide classes because "[i]t often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts"). Indeed, in an opinion concurring in the grant of a stay of a preliminary injunction of the Public Charge Rule, Justice Gorsuch, joined by Justice Thomas, emphasized the value of allowing "multiple judges and multiple circuits to weigh in only after careful deliberation," explaining that this process "permits the airing of competing views that aids this Court's own

decisionmaking process." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

Defendants also have made this point in this case in criticizing the nationwide scope of the district court's injunction. Appellants' Br. 39. Plaintiffs disagree that nationwide injunctions necessarily inhibit the development of the law. After all, multiple courts of appeals have considered the legality of the Public Charge Rule despite nationwide injunctions being issued against it by three district courts, and litigation is ongoing in five district courts nationwide. But Defendants' position shows that they recognize the value that the Supreme Court derives from multiple perspectives from lower courts before it decides a legal issue. Defendants have offered no compelling reason why this process of careful consideration should cease now, especially when no decision has yet been made on the petitions for certiorari. This Court therefore should continue to proceed toward a decision on the merits of this case.[3]

[3] Defendants also are wrong that the Supreme Court's decision to stay preliminary injunctions against the Public Charge Rule has any bearing on this case. Appellants' Supp. Br. 6–7. Percolation of legal questions through the courts of appeals would be severely hindered if, as Defendants argue, an unsigned stay decision unaccompanied by any opinion required lower courts to divine and yield to the reasoning behind such an interim decision. *Cook County v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020) ("There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute.").

B. This Court's Organizational Standing Case Law Requires Clarification

As Plaintiffs and several amici stressed in urging this Court to grant en banc review, the panel majority's conclusion that Plaintiff CASA de Maryland lacks Article III standing reveals a need for clarification of this Court's organizational standing case law. *See* Pet. Reh'g & Reh'g En Banc 6–11; Br. Amici Curiae Nat'l Fair Hous. Alliance, Inc. & Hous. Opportunities Made Equal of Va. [hereinafter NFHA & HOME Br.]; Br. Amicus Curiae NAACP; Br. Amicus Curiae People for the Ethical Treatment of Animals, Inc. The panel majority misinterpreted this Court's prior decision in *Lane v. Holder* as holding that an organization has standing to challenge a statute or regulation only when the challenged law has "forced" the organization to do something "as a matter of law," thereby inflicting "operational harm" that "directly impairs" the organization's "ability . . . to function." Op. 23–26.

Lane did not establish such a miserly rule for organizational standing. As Plaintiffs have previously explained, the organizational plaintiff in *Lane*, the Second Amendment Foundation, lacked standing because it failed to allege how—if at all—the laws governing interstate handgun transfers that it challenged frustrated its mission, leading this Court to conclude that the diversion of resources it complained of amounted to a "budgetary choice," rather than an organizational

injury. *Lane*, 703 F.3d at 675 (quoting *Fair Emp't Council of Greater Wash. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)).

Lane could not have established the heightened bar to organizational standing that the panel majority opinion in this case would have imposed because the Supreme Court's bedrock case on organizational standing, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), held that a "perceptibl[e] impair[ment]" of an organization's activities suffices for Article III standing. *Id.* at 379. The facts of *Havens Realty* demonstrate the distinction between that standard and the panel majority's reading of *Lane*. Housing Opportunities Made Equal of Virginia (HOME), the organizational plaintiff in that case (and amicus here), alleged that a real-estate company's discriminatory practices "frustrated . . . its efforts to assist equal access to housing through counseling and other referral services." *Id.* (internal quotation marks omitted). But HOME did not allege that it was "forced . . . as a matter of law" to provide additional housing counseling or referral services, or that the impact of the real-estate company's discriminatory practices was so severe that it "directly impaired [HOME's] ability to operate and to function." Op. 23, 25. Rather, the Supreme Court held that the "perceptibl[e]" impact of the discriminatory practices was "a concrete and demonstrable injury to the organization's activities" sufficient to confer Article III standing. *Havens Realty*, 455 U.S. at 379.

CASA's allegations easily satisfy the *Havens Realty* test, and the panel majority's conclusion to the contrary demonstrates how readily *Lane* may be misinterpreted. The mission of CASA is "to create a more just society by building power and improving the quality of life in low-income immigrant communities." JA29. CASA pursues this mission through programs that assist its members in accessing public benefits to which they are entitled, and through the provision of legal counseling about adjustment of status and other immigration benefits. JA29–30. As CASA has alleged, the Public Charge Rule "perceptibly impair[s]" those activities by making them more difficult and less effective: More CASA members require counseling regarding the impact of the Rule on their decision to receive public benefits or their ability to adjust status, and counseling each member is more expensive, time-consuming, and complex. JA33; *Havens Realty*, 455 U.S. at 379. Thus, just as in *Havens Realty*, the Public Charge Rule has caused a "drain on [CASA]'s resources," which has also adversely affected other aspects of CASA's core activities. 455 U.S. at 379.

Misunderstanding of *Lane* might still linger despite this Court's vacatur of the panel majority opinion. In recent months, courts have relied on broad readings of *Lane* to hold that organizations lack standing. For example, in *CASA de Maryland, Inc. v. Wolf*, the district court held, based primarily on *Lane*, that the plaintiffs failed to demonstrate organizational standing, despite allegations that the

rule challenged there would impair the mission of immigration-law services providers and would impose significant costs on the providers—even, in the case of one organization, "'jeopardiz[ing]' its 'ability to stay open'" because the rule changes would undermine a significant revenue stream. No. 8:20-cv-02118-PX, 2020 WL 5500165, at *6, 11 & n.7 (D. Md. Sept. 11, 2020); *see also, e.g.*, *Know Your IX v. DeVos*, No. RDB-20-01224, 2020 WL 6150935, at *8 (D. Md. Oct. 20, 2020) (holding that an organization that supports survivors of sexual violence lacked standing to challenge a rule interpreting Title IX of the Education Amendments of 1972, despite the organization receiving increased requests for training in anticipation of the rule, because the organization had not shown that those requests "would cause an involuntary reallocation of resources" or would "directly impair[] the organization's ability to operate and to function"). Absent redirection by the en banc Court, misinterpretation of *Lane* might persist, moving this Court's organizational standing case law out of step with both *Havens* and other circuits. *See* NFHA & HOME Br. 6–8.

Finally, this issue will not be resolved by Supreme Court review of the pending petitions for certiorari in the other cases challenging the Public Charge Rule. None of the petitions presents questions about organizational standing. *See* Pet. Writ Cert., *U.S. Citizenship & Immigration Servs. v. City & County of San Francisco*, No. 20-962 (S. Ct. Jan. 21, 2021); Pet. Writ Cert., *U.S. Dep't of*

Homeland Sec. v. New York, No. 20-449 (S. Ct. Oct. 7, 2020); Pet. Writ Cert., *Wolf v. Cook County*, No. 20-450 (S. Ct. Oct. 7, 2020). Thus, even if the Supreme Court grants certiorari in those cases, it will not clarify whether organizational injuries like the ones that the Public Charge Rule has caused CASA to suffer are an adequate basis for standing. Nor would Supreme Court review of those cases address the ongoing misunderstanding of this Court's decision in *Lane*. Accordingly, the pressing need to clarify this Court's organizational standing case law weighs in favor of proceeding to a decision in this case.

II. THE NINTH CIRCUIT'S DECISION BOLSTERS THE CONSENSUS THAT THE PUBLIC CHARGE RULE IS UNLAWFUL

The Ninth Circuit's decision affirming preliminary injunctions against the Public Charge Rule is part of a consensus among the courts of appeals that DHS's rule is unlawful. Apart from the vacated panel majority opinion in this case and a stay decision displaced by the Ninth Circuit's opinion,[4] the courts of appeals are unanimous in concluding that DHS's definition of "public charge" cannot be reconciled with the text, structure, and history of the INA's public-charge provision. *See City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 981 F.3d 742 (9th Cir. 2020) (*San Francisco II*) ("From the Victorian Workhouse through the 1999 Guidance, the concept of becoming a 'public charge'

[4] *See City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 733 (9th Cir. 2019) (*San Francisco I*).

has meant dependence on public assistance for survival. Up until the promulgation of this Rule, the concept has never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance."); *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 75 (2d Cir. 2020) ("We think it plain . . . that the Rule falls outside the statutory bounds marked out by Congress."); *Cook County*, 962 F.3d at 229 ("[I]t does violence to the English language and the statutory context to say that [the term 'public charge'] covers a person who receives only *de minimis* benefits for a *de minimis* period of time.").

Defendants' criticisms of the Ninth Circuit's opinion are not persuasive. They favor the vacated panel majority's canvass of the judicial and administrative decisions interpreting the term "public charge" over the Ninth Circuit's. Appellants' Supp. Br. 9. But as Plaintiffs have noted before, the authorities cited by the panel majority actually are consistent with a definition of "public charge" that encompasses only individuals who are likely to become primarily dependent on the government for subsistence. *See, e.g.*, *In re Feinknopf*, 47 F. 447, 447–48 (E.D.N.Y. 1891) (noncitizen, despite having only 50 cents in savings, was not inadmissible because he could "find employment in his trade"); *Matter of H-*, 1 I. & N. Dec. 166, 168 (BIA 1948) (noncitizen, despite having been diagnosed with "psychopathic inferiority," was not inadmissible because there was "an

assurance that he w[ould] be reemployed"). The Ninth Circuit was therefore correct to conclude that "[h]istory is a strong pillar supporting the plaintiffs' case" and that DHS's definition of "public charge" is "outside any historically accepted or sensible understanding of the term." *San Francisco II*, 981 F.3d at 756–57.

Contrary to what Defendants argue, Appellants' Supp. Br. 9–10, the Immigration and Naturalization Service (INS)'s 1999 Field Guidance does not conflict with the consensus opinion among the courts of appeals that the term "public charge" has a core meaning at odds with the Public Charge Rule. Although INS characterized the term "public charge" as ambiguous when considered in a vacuum, it concluded otherwise after reviewing dictionary definitions of the term "charge," the historical context in which the public-charge provision became part of U.S. immigration law, and the administrative decisions interpreting the provision. When viewed in light of those sources, INS explained that the term means "complete, or nearly complete, dependence on the Government rather than some lesser level of financial support." Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26, 1999). INS's approach was therefore consistent with *Chevron*'s charge that courts exhaust "traditional tools of statutory construction" before concluding that a statutory term is ambiguous. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see also Cuomo v. Clearing House*

Ass'n, 557 U.S. 519, 525 (2009) (holding that although "some ambiguity" inhered in a statutory term, the court could "discern the outer limits of the term . . . through the clouded lens of history").

Defendants also fault the Ninth Circuit for concluding that the INA's affidavit-of-support provision does not support DHS's definition of "public charge." Appellants' Supp. Br. 10–11. The heavy emphasis Defendants place on the affidavit-of-support provision underscores the absence of support for DHS's definition. Congress adopted the affidavit-of-support provision in 1996 at the same time that it made minor changes to the public-charge provision that did not alter the settled meaning of the key statutory term. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 531, 551, 110 Stat. 3009-674 to -680 (codified as amended at 8 U.S.C. §§ 1182(a)(4), 1183a); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Welfare Reform Act"), Pub. L. No. 104-193, § 423, 110 Stat. 2105, 2271–74 (codified as amended at 8 U.S.C. § 1183(a)). Congress's decision to refrain from making meaningful changes to the public-charge provision was no accident. As this case shows, the predictive nature of the public-charge provision makes it too blunt of an instrument to achieve Congress's self-sufficiency goals without fundamentally reshaping the U.S. immigration system. Through IIRIRA and the Welfare Reform Act, Congress therefore sought

to promote self-sufficiency more surgically and with fewer collateral consequences by barring immigrants from receiving most types of public assistance during their first five years in the United States and by making sponsors financially responsible through affidavits of support for family-based (and some employment-based) immigrants' basic needs during their first ten years in the country. *See* 8 U.S.C. §§ 1183a, 1611–13, 1631, 1641. The Ninth Circuit, like the Second and Seventh Circuits, correctly rejected the inference that Congress intended to indirectly alter the meaning of "public charge" through the affidavit-of-support provision when it simultaneously declined to do so directly.[5] *San Francisco II*, 981 F.3d at 757–58, *New York*, 969 F.3d at 79; *Cook County*, 962 F.3d at 222.

[5] As Defendants note, the Ninth Circuit also held that the DHS acted arbitrarily and capriciously in adopting the Public Charge Rule. Appellants' Supp. Br. 12. Plaintiffs also have challenged the Rule on arbitrary-and-capricious grounds, although that claim is not before this Court on appeal. JA116–17. The Ninth Circuit correctly concluded that DHS's discussion of the Rule's chilling effect amounted to "[a] bald declaration of its policy preferences," *San Francisco II*, 781 F.3d at 759; that DHS acknowledged the "substantial evidence" of the Rule's negative impacts on public health only to conclude, "without support," that it would strengthen public health, *id.* at 760; and that DHS "provide[d] no justification, other than the repeated conclusory mantra that the new policy will encourage self-sufficiency," for its departure from the 1999 Field Guidance, *id.* at 761.

III. THE DISTRICT COURT'S NATIONWIDE INJUNCTION SHOULD BE AFFIRMED BASED ON *HIAS, INC. v. TRUMP*

This Court recently affirmed a nationwide preliminary injunction against an executive order that requires states and localities to affirmatively consent before the federal government may resettle refugees within their jurisdiction. *Hias*, 2021 WL 69994, at *11. There, as here, the Government argued that the nationwide injunction was "overbroad" because it applied to parties not before the court (there, other resettlement agencies besides the ones that brought suit). *Id.*; *see also* Appellants' Br. 41 (stating that "a nationwide injunction extending to nonmembers [of CASA] that reside in other parts of the country" than those served by CASA cannot be justified). This Court rejected the Government's rigid position in *Hias*, stating that "a nationwide injunction may be appropriate when the government relies on a 'categorical policy,' and when the facts would not require different relief for others similarly situated to the plaintiffs." *Hias*, 2021 WL 69994, at *11 (quoting *Roe v. Dep't of Def.*, 947 F.3d 207, 232–33 (4th Cir. 2020)). The Court held that the district court did not abuse its discretion by enjoining the executive order on a nationwide basis because: (1) "[t]he refugee resettlement program by its nature impacts refugees assigned to all nine resettlement agencies, which place refugees throughout the country" and (2) because an injunction that applied only to refugees assigned to the agencies that brought case "would cause inequitable

treatment of refugees and undermine the very national consistency that the Refugee Act is designed to protect." *Id.*

The same reasons that led this Court to affirm the district court's nationwide injunction in *Hias* support affirmance here. Just as the Refugee Act is "designed to protect . . . national consistency," *id.*, "the immigration laws of the United States should be enforced vigorously and *uniformly*," *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017), *as amended* (June 15, 2017), *vacated and remanded on other grounds*, 138 S. Ct. 353 (2017) (emphasis in original) (quoting *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015)). Like the executive order at issue in *Hias*, the Public Charge Rule has nationwide effect and applies with equal force to other noncitizens besides the Individual Plaintiffs who intend to adjust status in the future and has the same impact on other organizations like CASA. And a geographically (or otherwise limited) injunction "would cause inequitable treatment" of noncitizens by subjecting those outside the scope of injunctions against the Public Charge Rule to a drastically more restrictive barrier to adjustment of status. *Hias*, 2021 WL 69994, at *11. The district court did not abuse its discretion by concluding that a nationwide injunction is necessary to avoid "a patchwork of immigration policies applied across the nation" with "dramatically different policies . . . enforced depending on location." JA270. Accordingly, the district court's injunction should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should not hold this case in abeyance and should affirm the district court's preliminary injunction without modification.

CERTIFICATE OF COMPLIANCE

This Supplemental Brief complies with the type-volume limits of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, excluding the parts of the document excluded by Rule 32(f), it contains 3,919 words. In addition, this motion complies with the typeface and type-style requirements of Rule 32(a)(5)–(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Jonathan L. Backer
Jonathan L. Backer

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, 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.

/s/ Jonathan L. Backer
Jonathan L. Backer