No. 19-2222

In the United States Court of Appeals for the Fourth Circuit

CASA DE MARYLAND, *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

MOTION TO RECALL THE MANDATE TO PERMIT INTERVENTION AS APPELLANT

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Local Rule 26.1 Disclosure Statement

No. 19-2222

Casa de Maryland, *et al.*,
Plaintiffs-Appellees,

v.

Joseph R. Biden, in his official capacity as President of the United States, *et al.*,
Defendants-Appellants.

Pursuant to Local Rule 26.1, I am not aware of any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement. I am also not aware of any similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. I represent that the following parties seek to leave to intervene, and that the following attorneys represent, have represented, or expected to represent the States in this matter.

Intervenors:
State of Texas
State of Alabama
State of Arizona
State of Arkansas
State of Indiana
State of Kansas
State of Kentucky
State of Louisiana
State of Mississippi
State of Montana
State of Ohio
State of Oklahoma

State of South Carolina
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INTRODUCTION

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia seek to intervene in this case to defend a duly promulgated rule interpreting the Immigration and Nationality Act's prohibition against immigration by those who would become a public charge (the "Rule"). Two days ago, the named defendants, who are agents or agencies of the United States, filed a stipulated motion to dismiss this appeal. The Court granted that stipulated motion and issued its mandate without offering affected parties, including the States, an opportunity to seek to defend the Rule.

The Rule directly implicates the States' obligations in providing Medicaid and other social services to indigent and low-income individuals. Moreover, the States, especially the border States, have strong interests in enforcing the Rule, which properly interpreted and implemented Congress's long-held policy of immigrant self-sufficiency. This request is timely: until two days ago, the United States and associated federal defendants defended the Rule's legality.

Because the Court issued its mandate just two days after the United States announced that it would no longer defend the Rule, interested parties had no ability to intervene before it did so. And because the United States did not inform the States that it intended to cease defending the Rule before abandoning numerous cases supporting the Rule nationwide, the States did not have an opportunity to intervene at an earlier point. The Court should not allow the federal government to use litigation stipulations to evade the Administrative Procedure Act's strictures on modifying

rules a new Administration finds uncongenial without at least allowing interested parties the opportunity to defend the case.

BACKGROUND

This immigration case concerns the hotly contested public charge rule. Under federal law, "any alien who . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).

In 2019, following extensive notice and comment, the Department of Homeland Security issued a final rule adopting a new definition of "public charge" for purposes of this statute. *Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 234 (4th Cir. 2020), *vacated for rehearing en banc*, 981 F.3d 311, 314. The new rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" *Id.* at 234 (quoting 84 Fed. Reg. at 41,501). The rule further explains that "public benefits" include non-cash benefits that are partially funded by the States, including certain Medicaid benefits. *Id.*

The plaintiffs, CASA de Maryland, Inc. and two individuals, filed this action in the United States District Court for the District of Maryland against the President, the Secretary of Homeland Security, and other Federal Defendants in their official capacities. The plaintiffs alleged that the Rule violates both the APA and the Fifth Amendment. *Id.* at 236. They moved for a preliminary injunction to block the rule from taking effect. *Id.* The district court granted the motion and entered a nation-wide injunction preventing the federal defendants from enforcing the rule anywhere. *Id.*

A panel of this court reversed. It held that that the rule "rests on an interpretation of 'public charge' that comports with a straightforward reading of the [statute]." *Id.* at 242. The panel further ruled that the district court "erred in its choice of remedy" by issuing a "plainly overbroad" nationwide injunction. *Id.* at 255-56.

The plaintiffs moved for rehearing en banc, which the court granted. *Casa de Maryland, Inc. v. Trump*, 981 F.3d 311, 314 (4th Cir. 2020). The court called for supplemental briefing "to address relevant developments concerning the Public Charge Rule." ECF 158 at 2. The defendants responded that on February 2, 2021, President Biden issued an Executive Order directing a review of the DHS rule, so the Defendants suggested that the court postpone en banc oral argument until that review is complete. ECF 188 at 3. The court agreed and removed the case from the oral argument calendar. ECF 208 at 2-3.

On March 9, 2021, without beginning the process to rescind the Rule or providing notice to parties who would normally be entitled to participate in notice-and-comment rulemaking, the defendants filed an unopposed motion to dismiss the appeal. ECF 210 at 1. This Court granted that motion. It also issued its mandate without allowing any potentially interested parties to seek leave to intervene and defend the rule. As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State.

Because the defendants will no longer defend a rule directly implicating the States' interests, the States now move this Court to withdraw its mandate, to reconsider its dismissal, and for leave to intervene in defense of the Rule.

I. The Court Should Recall the Mandate.

The Court should recall the mandate and has the "inherent power" to do so. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998); *see also United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) ("Our authority to recall our own mandate is clear."). Recalling the mandate is appropriate in "extraordinary circumstances" and to prevent injustice. *Calderon*, 523 U.S. at 550.

As described below, extraordinary circumstances justify recalling the mandate where the State Intervenors were presented no opportunity to preserve their interests in this litigation. Until March 9, the State Intervenors' interests were represented by the United States. The United States did not inform the State Intervenors that it intended to withdraw its defense of the Rule, depriving the States of an opportunity to seek leave to intervene prior to its seeking dismissal of this appeal. Likewise, this Court's almost immediate issuance of the mandate following the motion to dismiss prevented the States from seeking leave to intervene prior to dismissal once the intentions of the United States not to defend the Rule became public.

The harms to the State Intervenors—who include multiple border States—from allowing the district court's nationwide injunction to take effect are severe and will hamper state officials' ability to act in a period of great budgetary uncertainty. The mandate should be recalled.

II. The Court Should Stay the Mandate Pending Resolution of Any Petition for a Writ of Certiorari.

Once recalled, the Court should stay further issuance of the mandate until the States obtain review in this Court and, if necessary, on a petition for certiorari.

A motion to stay the mandate pending the filing of a petition for writ of certiorari "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). Under this standard, there must be (1) "a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). This case easily meets that standard.

A. The Supreme Court is likely to grant certiorari.

The Supreme Court is not only likely to grant certiorari—it had already done so. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1. Moreover, the Supreme Court has identified several considerations governing its exercise of discretion in granting certiorari: a conflict among courts on an important matter, the decision of an important federal question in a way that conflicts with Supreme Court decisions, and the decision of an important question of federal law that has not been but should be settled by the Supreme Court. Sup. Ct. R. 10. This case meets each criterion.

1. At the time the Administration decided to abandon the Rule, there was a well-defined split among federal courts over the rule's legality. Over the dissent of then-Judge Barrett, the Seventh Court had concluded it was likely to be held improper. *Wolf*, 962 F.3d at 228. The Second Circuit had similarly found the rule to exceed the scope of DHS's delegated power. *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 74-75 (2d Cir. 2020).

By contrast, a panel of this Court reversed the district court's preliminary injunction against enforcement of the Rule based on the conclusion that "[t]he DHS Rule . . . comports with the best reading of the INA." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 250, *vacated for rehearing en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021). Indeed, the panel went so far as to say that "[t]o invalidate the Rule would . . . entail the disregard of the plain text of a duly enacted statute," and would "visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes." *Id.* at 229. Similarly, in entering a stay pending appeal of preliminary injunctions against the Rule, the Ninth Circuit issued a lengthy published opinion concluding that "[t]he Final Rule's definition of 'public charge' is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious." *City & County of San Francisco v. USCIS*, 944 F.3d 773, 790 (9th Cir. 2019).

2. This question is vitally important. Decisions about whether and under what conditions to admit immigrants implicate a "fundamental sovereign attribute exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As the Second Circuit noted, making these decisions correctly is essential "[b]ecause there is no apparent means by which DHS could revisit adjustment determinations" once made. 969 F.3d at 86-87.

Congress explicitly directed the Executive Branch to deny admission or adjustment of status to aliens who, "in the opinion of the [Secretary of Homeland Security]," are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The Rule provides key guidance in doing so, issuing formal, objective standards by

which that determination will be made. The propriety of the Rule is a question of national importance which the Supreme Court has already once determined merits its attention. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1.

B. There is a significant possibility of reversal.

The State Intervenors are likely to prevail on the merits following a petition for certiorari because the Rule is lawful. For more than a century, it has been "the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs, . . . and (B) the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). That long-held policy formed the basis of the public-charge Rule. Congress never defined the term "public charge," but "[t]he ordinary meaning of 'public charge' . . . was 'one who produces a money charge upon, or an expense to, the public for support and care.'" *CASA de Maryland*, 971 F.3d at 242 (quoting BLACK'S LAW DICTIONARY 295 (4th ed. 1951)). The Rule reflects that ordinary meaning by defining as public charges those individuals who rely on individual benefits for a prolonged period, or multiple benefits for a shorter period of time. 84 Fed. Reg. at 41,501; *id.* at 41,294-95.

That the Rule represents the best—or, at least, a reasonable—reading of the public-charge provision of the INA is confirmed by reading that provision within its larger statutory context. *See CASA de Maryland*, 971 F.3d at 243-44. For example, Congress required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). Those sponsors must, in turn, agree "to maintain the sponsored alien at an annual income

that is not less than 125 percent of the Federal poverty line." *Id.* § 1183a(a)(1)(A). Congress reinforced this requirement for self-sufficiency by allowing federal and state governments to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect, *Id.* § 1183a(a)(1)(B). That provision is not limited to cash support. Aliens who fail to obtain the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of individual circumstances. *Id.* § 1182(a)(4).

Taken together, these provisions of the INA demonstrate that Congress did not mandate a narrow reading of "public charge." Instead, "[t]his sponsor-and-affidavit scheme" shows "that the public charge provision is naturally read as extending beyond only those who may become 'primarily dependent' on public support." *CASA de Maryland*, 971 F.3d at 243; *see also Cook County*, 962 F.3d at 246 (Barrett, J., dissenting) ("[T]he affidavit provision reflects Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance.").

Further, the larger statutory context demonstrates why the Executive Branch could—and indeed should—take non-cash benefits into account in making public-charge determinations. The current public-charge provision was adopted in 1996. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. V, § 531, 110 Stat. 3009-674. In contemporaneous legislation, Congress stressed the government's "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(5);

see also id. § 1601(4) (emphasizing the government's strong interest in "assuring that individual aliens not burden the public benefits system"). Congress equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or *any other similar benefit*." *Id.* § 1611(c)(1)(B) (emphasis added). That is, Congress adopted a broad, plain meaning of the statutory phrase "public charge" as one who receives public benefits, and Congress's statutory policy of ensuring that aliens do "not burden the public benefits system" programs to be "an incentive for immigration to the United States," *Id.* § 1601(2)(B), (4).

Given these statutory provisions, the Supreme Court is likely to agree with this Court's panel decision and the Ninth Circuit's stay decision: The Rule "easily" qualifies as a "permissible construction of the INA." *City & County of San Francisco*, 944 F.3d at 799; *see CASA de Maryland*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"). In applying *Chevron*, the Supreme Court has repeatedly emphasized that the federal courts "may not substitute [their] judgment for that of the [Executive], but instead must confine [themselves] to ensuring that he remained "'within the bounds of reasoned decisionmaking.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted) (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)). Administrative rules passed regarding immigration are given particular deference because "Congress has expressly and specifically delegated power to the executive in an area that overlaps with the executive's traditional constitutional function." *CASA de Maryland*, 971

F.3d at 251 & n.6 (citing *United States v. Curtiss-Wright Export* Corp., 299 U.S. 304, 319-20 (1936)). The public-charge Rule easily passes muster.

To be clear, State Intervenors do not maintain that the Executive may not *change* the definition of "public charge." But the requirements of APA rulemaking apply with equal force whether the Executive is *creating* a rule or *modifying* it. *E.g.*, *Dep't of Comm,* 139 S. Ct. at 2569-71. Because the public-charge Rule was made through formal notice-and-comment procedures, it can only be unmade the same way. *Cf. Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 41, 46-47 (1983). As part of that process, State Intervenors would have had the right to submit input and to protect their interests before the agency. 5 U.S.C. § 553(c). If unsatisfied with the ultimate result, they would have been permitted to challenge whether the Executive "articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Comm.*, 139 S. Ct. at 2569 (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43). The Administration improperly seeks to short-circuit that process by using early court decisions to "set aside" the Rule under 5 U.S.C. § 706(2). Accordingly, State Intervenors are likely to prevail in showing that the order under review was improper.

C. There is a likelihood of irreparable harm absent a stay.

Allowing the mandate to issue and permitting the district court to vacate the rule will cause State Intervenors irreparable harm. As an initial matter, a State suffers an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable

harm when an injunction "would frustrate the State's program"). The district court's judgment reverses a formal rulemaking process upon which States have relied in setting law enforcement and budgetary policies, without allowing them input into the process or the time to adjust that normally follows from a formal rescission process. And it interferes with traditional state prerogatives for the reasons described in the accompanying motion to intervene.

As the Court is undoubtedly aware, this is a time of considerable financial strain on all States, given the unprecedented COVID-19 pandemic and associated economic downturn. Immigration can be a driver of cultural and economic growth. But as Congress has recognized for over a century, it can also significantly strain the public fisc. 8 U.S.C. § 1601(1) ("Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."). By definition, the individuals whose receipt of benefits depends on the definition of "public charge" are among the poorest in our society. Because such benefits can never be recouped, State Intervenors will be irreparably harmed if the Rule cannot be enforced while its legality is resolved here and elsewhere.

Conclusion

The Court should recall and stay issuance of the mandate, reconsider its dismissal of the appeal, and permit the States to intervene as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
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CERTIFICATE OF SERVICE

On March 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Judd E. Stone II
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,009 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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