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

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL

JOSEPH H. HUNT
Assistant Attorney General

ROBERT K. HUR
United States Attorney

DANIEL TENNY
GERARD SINZDAK
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0213

This Court should stay the district court's injunction pending appeal. CASA de Maryland asserts a limitless theory of standing that this Court has already rejected. In addition, the alleged budgetary harm to CASA is irrelevant to the interests protected by the statute. On the merits, plaintiffs identify no provision of the 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 discretion of the Executive Branch. 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 grant of lawful-permanent-resident status to aliens DHS believes should be inadmissible.

A. Standing

CASA's theory of standing runs headlong into this Court's decision in *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012). CASA asserts that it faces a "Sophie's choice" between "maintain[ing] its preexisting priorities" and "counteract[ing]" the Rule's effects, which have been harmful to its policy interests. Response 7-8. Plaintiff thus practically concedes that it seeks standing based on a voluntary decision to refocus its programs. But in *Lane*, the organizational plaintiff argued that "the challenged laws [had] caused it to expend resources in response," 703 F.3d at 671, and this Court held that "[a]lthough 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," *id.* at 675

(quotation marks and brackets omitted). This Court thus properly recognized that organizational standing would be limitless if an organization could manufacture standing to challenge a law by simply choosing to counteract the law's effects.

As for the statute's zone of interests, CASA contends that, because it helps aliens apply for immigration benefits, it "has a vested interest in ensuring that the public-charge inadmissibility ground is not unlawfully broadened." Response 9. But regardless of CASA's abstract interests, a plaintiff "must show that the injury in fact is within the zone of interests protected by the statute." *Pye v. United States*, 269 F.3d 459, 467 (4th Cir. 2001). And CASA's alleged "injury in fact" here has only to do with its own diversion of resources, *see* Response 7-8—an injury not even "marginally related" to the "purposes implicit in the statute." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

B. Merits

Plaintiff's responses to the government's statutory analysis are unpersuasive.

Plaintiff mistakenly suggests that Congress's extensive efforts to ensure that aliens will not become dependent on public benefits show that Congress used means other than the public-charge provision to keep aliens from using benefits. Response 16-17. 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 provide no explanation for why Congress would have wanted—much less

unambiguously required—DHS to admit aliens who were likely to receive public benefits for a significant amount of time, only to deport them once they received the benefits and were unable to repay them.

Plaintiff concedes that the battered-alien provision in 8 U.S.C. § 1182(s) shows that an alien's receipt of noncash benefits is relevant to a public-charge determination. Response 17. Nonetheless, plaintiff argues that the Rule is unlawful because it would render inadmissible aliens who are likely to receive an amount of public benefits that, in plaintiff's opinion, is "small." *Id.* Yet judgment about the amount of public benefits that renders an alien a public charge is precisely the kind of question that Congress delegated to DHS. And in any event the Rule does not define "public charge" to include aliens who are "likely to experience a temporary, isolated need for only a small amount of public benefits," as plaintiff suggests. Response 4, 19. Rather, the Rule defines the term to include only those who receive more than twelve months of enumerated benefits within a 36-month period.

Plaintiff fares no better in noting that Congress has provided support for aliens in limited circumstances. Response 17. Congress's decision to exclude aliens who might rely on public assistance is not inconsistent with its decision to assist aliens who have already been admitted—especially since immigration officials cannot with perfect accuracy predict which aliens would become public charges. And as for the 1882 statute upon which plaintiff relies, Response 13, Congress raised the funds used to support distressed aliens through a head tax on "each and every" alien who arrived in

U.S. ports, Immigration Act of 1882, ch. 376, §§ 1-2, 22 Stat. 214 (Aug. 3, 1882)—hardly an indication that Congress approved of alien use of publicly funded benefits.

Lacking any textual support for its position, plaintiff relies on failed legislative proposals. Response 15. The principle that failed legislative proposals are a dubious means of interpreting a statute is particularly applicable here. To begin, Congress did not "discard[]" the Rule's definition "in favor of other language" eventually enacted. Response 15 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987)). It did not adopt an alternate definition in the 1996 legislation, which left the term undefined, and it enacted no legislation on the subject in 2013. The legislative history also suggests that Congress only dropped the 1996 proposal because the President objected to a rigid definition of the term. *See* 142 Cong. Rec. at S11881-82. In addition, both the 1996 and 2013 proposed definitions were significantly broader than the Rule: the 1996 proposal covered a similar amount of benefits usage within a period of seven years rather than three, *see* H.R. Rep. 104-828, at 138, 240-41, and the 2013 proposal included receipt of *any* amount of public benefits, S. Rep. No. 113-40, at 42, 63.

Plaintiff likewise errs in relying on the purported longstanding meaning of "public charge." *See* Response 10-15. Congress has never defined the term, and therefore has not established its meaning. Rather, the defining feature of Congress's approach to the public-charge inadmissibility provision over the last 135 years has been its repeated and intentional decision to leave the term's definition to the

Executive Branch's discretion. *See* Mot. 13-14. And that approach makes sense in light of the varied circumstances Executive Branch officials confront and the evolving nature of public aid. Plaintiff mischaracterizes the 1999 proposed rule as having disclaimed such discretion by stating that its proposed definition was "dictated by" the history or plain meaning of "public charge." Response 3. In fact, the INS noted that the term was "ambiguous" and had "never been defined in statute or regulation." 64 Fed. Reg. 28,676-77.

Plaintiff's historical analysis is flawed even on its own terms. Plaintiff infers from certain 19th-Century sources that "public charge" meant "one who was so incapable of providing for himself that he depended on the public for long-term subsistence." Response 10-14. Yet the cases on which plaintiff relies do not define the amount or types of aid to be considered, nor could they have taken into account the modern welfare state, in which the government provides for recipients' essential needs through distributed assistance rather than institutionalized care. And, like the district court, Op. 23, plaintiff labels one definition of "charge" the "ordinary meaning" relevant here, even though that definition was just one of several listed in dictionaries at the time. As the government explained, Mot. 14-15, other relevant sources recognized a different meaning. For example, both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge upon, or an expense to, the public for support and care." Public Charge, Black's Law

Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). Those sources belie plaintiff's claim that "public charge" has for over a century been a term of art with the meaning they prescribe.

Plaintiff's textual interpretation of the 1882 statute is likewise erroneous. Plaintiff essentially argues that, because the term "public charge" first appeared in a list that included "idiots, insane persons," and "paupers," then the term must only have included people who would be "housed in public charitable institutions." Response 12. But plaintiff does not explain why the common thread between the items on the list is not simply that all such persons impose expenses on the public. Moreover, plaintiffs' interpretation would in effect make "public charge" coextensive with the other items on the list, impermissibly rendering the term "superfluous in all but the most unusual circumstances." *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001). 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.

Like the district court, plaintiff cites *Gegiow v. Uhl*, 239 U.S. 3 (1915), as evidence that the term "public charge" had a settled historical meaning with which the Rule allegedly conflicts. Response 11-12. But, as the government explained, Mot. 15, *Gegiow* stands simply for the proposition that, under the statute at the time, an alien could not be deemed likely to become a public charge based solely on labor-market conditions in his destination city. *See* Mot. 15. 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. at 41,501 (mandating that individual 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 circumvent *Gegiow*, Mot. 16, further undermining any suggestion that subsequent Congresses embraced the broad interpretation of *Gegiow* that plaintiff asserts.

Plaintiff responds by citing *United States ex rel. Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929), for the proposition that "*Gegiow* . . . remains instructive." *See* Response 12. But far from endorsing plaintiff's interpretation of public charge, the Second Circuit held in that case that the public-charge provision "is certainly now intended to cover cases like *Gegiow v. Uhl*." *Day*, 34 F.2d at 922.

Plaintiff similarly has no answer to the inconsistency between what it deems the obvious "ordinary meaning" of the term and past administrative practice in the deportation context. Since 1948, an alien has been deportable as a public charge for causes not affirmatively shown to have arisen since entry if (1) the government provides a "service[]" for which it has a right to repayment; (2) it "make[s] demand for payment"; and (3) there is "a failure to pay." *Matter of B*, 3 I. & N. Dec. 323, 324 (BIA 1948; AG 1948). That determination has nothing to do with the type or size of the public benefit an alien receives. Indeed, *Matter of B* suggested that the alien involved would have been deportable as a public charge if her relatives had failed to repay the State's costs in providing the alien with "clothing, transportation, and other incidental expenses," because Illinois law permitted the State to recover those

incidentals, even though the law did not permit the State to recover the core costs of institutionalization. *Id.* In response, plaintiffs rely on the 1999 Guidance, which, of course, the Rule at issue here explicitly supersedes. Response 17. And even the 1999 Guidance recognized that an alien's failure to repay a cash-assistance benefit would render the alien deportable under *Matter of B.* *See* 64 Fed. Reg. at 28,690-91.

Plaintiff mistakenly suggests that the Rule is inconsistent with the Attorney General's statement in *Matter of Martinez-Lopez* that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency," 10 I. & N. Dec. 409, 421-22 (BIA 1962; AG 1964). *See* Response 18. Yet nothing in the Rule suggests that DHS will ordinarily find an alien similarly situated to the alien in *Martinez-Lopez*—*i.e.*, a young, able-bodied alien with a U.S. work history and a financially secure sponsor, *id.* at 422-23—to be likely to receive public benefits over the specified period. In fact, DHS cited a hypothetical alien who is "young, healthy, employed, attending college, and not responsible for providing financial support for any household members" as an example of an individual who "would not be found inadmissible" under the Rule. 83 Fed. Reg. at 51,216.

C. Remaining Stay Factors

Plaintiff does not dispute that, unless the Rule is allowed to take effect, DHS will be forced to continue an immigration policy that will result in the likely

irreversible grant of lawful-permanent-resident status to some aliens who are "likely to become . . . public charge[s]," as the Secretary would define that term, and who are likely to receive public benefits. 8 U.S.C. 1182(a)(4)(A). Plaintiff's observation that the injunction preserves the status quo, Response 19-20, is beside the point, as the status quo forces the Secretary to make likely permanent determinations in a manner inconsistent with his lawful exercise of delegated discretion.

Moreover, the government's certain, irreparable harm is not outweighed by CASA's voluntary diversion of resources toward community organizing and education concerning the Rule—the only alleged harm to CASA itself. Response 7, 21. And there is no basis for plaintiff's view that the public interest is served by compelling the Secretary to admit aliens who are likely to become public charges as the Secretary would define that term. Response 20-21.

D. Nationwide Injunction

Plaintiff seeks a nationwide injunction rather than one limited to the States in which its members reside based on speculation that some of its members might relocate, and an unsupported assertion that a partial injunction will cause so much confusion among plaintiff's members that it will have to devote substantial resources toward addressing their concerns. Response 21-22. As the government explained,

Mot. 19, those conjectures are insufficient to outweigh significant and undisputed harm to the federal government from a nationwide injunction.

Contrary to plaintiff's assertion, this Court's statements in a since-vacated decision would not require otherwise even if it were "binding." *See* Response 22 (quoting statement that "nationwide injunctions are especially appropriate in the immigration context" in *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017), *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017)). In that case, the plaintiffs were "dispersed throughout the United States," and this Court held that a partial injunction would not have cured the putative violation of the Establishment Clause, the harms of which were based on the "message that Plaintiffs [were] outsiders." *Id.* at 605 (internal quotation marks omitted). But here, plaintiff's alleged harm is wholly speculative, concentrated in only a few States, and almost certainly would be cured by a limited injunction. The district court's decision to issue a nationwide injunction regardless was an abuse of discretion.

CONCLUSION

The preliminary injunction and stay under 5 U.S.C. § 705 should be stayed pending the federal government's appeal.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT K. HUR
United States Attorney

DANIEL TENNY
GERARD SINZDAK

s/ Joshua Dos Santos
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0213
joshua.y.dos.santos@usdoj.gov

December 2019

CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2518 words. This reply 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/ Joshua Dos Santos
JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, 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/ Joshua Dos Santos
JOSHUA DOS SANTOS