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
No. 8:19-cv-02715-PWG
Hon. Paul W. Grimm

BRIEF OF UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF REHEARING EN BANC

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae, the United States House of Representatives,[2] respectfully submits this brief because of its interest in ensuring that immigrants to our Nation are accorded the rights to which the immigration laws entitle them. The Constitution empowers the Legislative Branch to "establish a uniform Rule of Naturalization." Art. I, sec. 8. The formulation of "[p]olicies pertaining to the entry of [noncitizens] and their right to remain here … is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

For more than 100 years, courts, the Executive Branch, and Congress have understood the "public charge" provision to apply to individuals who are likely to become primarily dependent upon public assistance for a significant period. Congress preserved that long-established meaning when it reenacted the public-charge provision without material change in 1996. Congress has an important interest in

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[1] No counsel for a party authored the brief in whole or in part, and no person or entity other than the House and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties consented to the filing of this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives, which "speaks for, and articulates the institutional position of, the House in all litigation matters," has authorized the filing of an *amicus* brief in this matter. Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Minority Leader, and the Honorable Steve Scalise, Minority Whip. The Republican Leader and Republican Whip dissented.

preserving its ability to reenact a statutory term, against the backdrop of that term's settled meaning, without the risk that an administration dissatisfied with Congress's policy judgment will later seek to give the term a meaning that Congress has rejected. Based on these interests, the House filed an *amicus* brief in this appeal at the panel stage and was granted leave to participate in oral argument.

INTRODUCTION

The Department of Homeland Security's new rule drastically limits who may enter this country by redefining the statutory term "public charge" in a way that contravenes decades of Legislative, Judicial, and Executive Branch precedent. DHS's new rule is truly transformative, essentially overhauling the Nation's immigration system and usurping the role of Congress. It is the Legislature's role to make the laws and the Judiciary's role to interpret them, but the panel improperly cedes both powers to DHS. The ruling is incorrect, conflicts with recent decisions of the Second and Seventh Circuits, and involves "a question of exceptional importance." Fed. R. App. P. 35(a)(2) & (b)(1)(B). The case warrants en banc review.

ARGUMENT

I. THE PANEL'S DECISION IS WRONG AND CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS.

A. "Since 1882, … the statutory term 'public charge' has consistently described aliens significantly dependent on the government." Dissent 80. Congress first used the phrase "public charge" in the Immigration Act of 1882. 22 Stat. 214. The

statute's text and historical context demonstrate that "public charge" referred to persons primarily dependent on the government. When the provision was first enacted, a "charge" was defined as a "person or thing committed to another's custody, care or management." WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). A "public charge," therefore, was understood to refer to someone committed to the long-term custody or care of the government.

Congress enacted the public charge statute with that understanding. Congress modeled the statute on state laws directed at "exceptionally impoverished and destitute persons." Hidetaka Hirota, EXPELLING THE POOR 33, 68 (2016). Courts at the time explained that these provisions required proof that individuals would be, "by reason of some permanent disability, … unable to maintain themselves" and would "become a *heavy* and *long continued* charge to the [public]." *City of Boston v. Capen*, 61 Mass. 116, 122 (1851) (emphasis added). The federal version likewise did not apply to noncitizens who merely received some public aid. Notably, the 1882 statute separately created an "immigrant fund" to "provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid." §§ 1-2, 22 Stat. at 214. Thus, Congress understood there to be a difference between a public charge and a person needing some temporary assistance. The courts and the Executive Branch have interpreted the term "public charge" consistent with that understanding ever since.

As the Second Circuit recently held, that uniform interpretation was ratified by Congress in 1996, when it reenacted the public-charge provision. *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 74 (2d Cir. 2020). The Second Circuit explained, "Congress intended the public charge ground of inadmissibility to apply to those non-citizens who were likely to be unable to support themselves in the future and to rely on the government for subsistence." *Id.* The Court thus rejected the view that the public-charge provision could encompass "minimal and temporary public benefits usage," and held that DHS's new rule "falls outside the statutory bounds marked out by Congress." *Id.* at 75.

The Seventh Circuit also rejected DHS's interpretation of "public charge" as unreasonable. *See Cook Cnty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020). The Court explained, "[t]here is a floor inherent in the words 'public charge,' backed up by the weight of history." *Id.* at 229. The term "public charge" has a meaning that "requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency." *Id.*

Judge King echoed this reasoning in his dissent. He noted that ever since Congress first employed the term in 1882, "the term has consistently described aliens who are significantly dependent on the government." Dissent 95. The "Public Charge statute does not exclude from the country any alien who is likely to *need public assistance* during his time in the country, it excludes those 'likely at any time to *become a public charge*.'" Dissent 106 (quoting 8 U.S.C § 1182(a)(4)(A)) (emphasis added).

DHS's "extraordinar[y]" effort to expand the term to encompass receipt of minimal and temporary benefits results "in a definition of staggering breadth" at odds with the statute. Dissent 95.

B. The panel majority discarded ordinary principles of statutory interpretation in upholding the rule. The panel's opinion makes fundamental errors that call out for correction by the full Court.

The panel majority incorrectly defined the "public charge" term by reference to dictionaries in effect in 1952, *see* Op. 29, rather than by reference to the term's "ordinary meaning at the time Congress enacted the statute" in 1882. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (alteration omitted). The overwhelming weight of the evidence regarding the term's meaning in 1882 indicates that "public charge" referred to "a condition of dependence on the public for support." *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927).

The panel theorized that because "public charge" is not defined by statute, it lacks a "fixed and definite meaning." Op. 5; *see also* Op. 71 (likening the provision to an "accordion"). But Congress's decision not to define a term by statute has never been understood to suggest that the term lacks a fixed meaning. In *Wisconsin Central*, for example, the Supreme Court addressed the term "money remuneration" in the Railroad Retirement Tax Act of 1937. 138 S. Ct. at 2070-71. Although the term was undefined by statute, the Supreme Court examined "the words consistent with their ordinary meaning ... at the time Congress enacted the statute," and held that the plain

meaning controlled and was not subject to reinterpretation by an agency claiming *Chevron* deference. *Id.* As the Court explained, "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Id.* at 2074. *Wisconsin Central* was not an anomaly: the Court routinely holds that statutory terms have fixed meanings notwithstanding Congress's decision not to define them by statute. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009).

The panel viewed the Supreme Court's orders staying the preliminary injunctions in two similar cases to be a "daunting obstacle to invalidating the Rule." Op. 5. But "[t]here 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." *Cook Cnty.*, 962 F.3d at 234. The cited stay orders were decided on abbreviated timetables and with limited briefing, and they have no precedential force. The Second and Seventh Circuits therefore correctly held that the stays pose no impediment to reaching the merits and enjoining the rule.

This Court should grant rehearing en banc to correct these errors and bring this Court into conformity with the Second and Seventh Circuits, both of which deemed the DHS rule incompatible with Congress's intent.

II. THE DHS RULE FLOUTS THE ROLE OF CONGRESS.

DHS's rule imposes, without Congressional authorization, new and dramatic limits on who may enter the country or become a lawful permanent resident. The panel majority acquiesced to this overreach because it was reticent to question DHS on an immigration matter. Op. 48. But, as Judge King explained, "this is not a matter of political choice regarding immigration policy; it is a matter of statutory interpretation, which falls within the exclusive bailiwick of the judiciary." Dissent 72. It is undoubtedly the role of the judiciary to determine "whether the executive has ventured beyond the statutory bounds staked out by the legislative branch." Dissent 73. By rendering a noncitizen who receives even *minimal* amounts of public benefits a "public charge," DHS "has ventured beyond the outer limits of the statutory meaning of the term." Dissent 101.

Although the panel majority repeatedly declared that deference is owed to the "political branches" regarding immigration policy, Op. 47, it afforded no respect to the role of Congress, which—unlike the Executive—is the branch of Government the Constitution empowers to regulate the admission of noncitizens. *See* Art. I, sec. 8; *Galvan*, 347 U.S. at 531 ("[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("over no conceivable subject is the legislative power of Congress more complete"). Far from requiring deference to an administrative agency,

separation-of-powers principles make it especially important that courts enforce the law as Congress has written it.

As discussed above, the term "public charge" in 1882 referred to persons who were primarily dependent on government assistance. But if there were any doubt about its meaning, subsequent history erases that doubt. It is difficult to overstate the weight of Judicial Branch and Executive Branch precedent confirming that noncitizens who obtain small amounts of public aid are not public charges.

Early courts recognized that a "public charge" referred to "a condition of *dependence on the public* for support." *Coykendall*, 22 F.2d at 121 (emphasis added); *see also United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (L. Hand, J.) (the term applies where "the alien will become destitute"); *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920) (public charges are "persons who are likely to become occupants of almshouses for want of means with which to support themselves").

The Attorney General similarly understood that "[s]ome specific circumstance … reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present." *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (A.G. 1964) ("[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge").

And the BIA confirmed that "[t]he fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge." *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974). Indeed, we are aware of *no case* in 138

years in which a noncitizen was deemed a public charge because he or she was likely to receive small amounts of public aid.

Congress legislated against this backdrop when it reenacted the public-charge provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009. IIRIRA made substantial immigration reforms but retained the public-charge provision materially unchanged. 8 U.S.C. § 1182(a)(4)(A). In fact, in considering IIRIRA, Congress rejected a proposal to enact a provision that would encompass receipt of temporary supplemental public benefits because the President was unwilling to sign such a law. 142 Cong. Rec. S11872, S11881-82 (daily ed. Sept. 30, 1996). And Congress opted to *retain* eligibility for benefits for some noncitizens, a decision that is difficult to reconcile with DHS's assertion that Congress intended the receipt of even minimal benefits to make a noncitizen inadmissible. *See New York*, 969 F.3d at 77-78 (the Welfare Reform Act is "in considerable tension with the Rule's new interpretation of 'public charge,' which penalizes non-citizens for the possibility that they will access the very benefits [Congress] preserved for them").

Congress must be able to reenact a statutory term that has received a settled interpretation without the risk that an administrative agency dissatisfied with Congress's policy choice will rewrite the law. Where "a word or phrase has been … given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, READING LAW: THE

INTERPRETATION OF LEGAL TEXTS, 322 (2012). As the Supreme Court has repeatedly instructed, when Congress reenacts a statutory phrase that has a settled judicial or administrative interpretation, Congress is presumed to ratify that interpretation. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009); *see also Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019).

This presumption applies with particular force here, where Congress has rejected efforts to modify the term that DHS now seeks to impose by regulation. Congress's rejection of a statutory amendment "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"—particularly where the courts consistently "have interpreted the statute in a manner" contrary to that amendment. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). And this principle is even more compelling where an Executive agency seeks such a transformative change to the law and how it is applied. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (agency interpretation unreasonable where "it would bring about an enormous and transformative [change] … without clear congressional authorization"). Here, DHS's new rule effectively imposes a wealth requirement on immigration for the first time in American history—a decision that Congress did not intend to leave to an administrative agency.

It is vital to the House that the courts adhere to these fundamental rules of statutory construction. If Congress wanted to exclude all people likely to receive any

public assistance, it could have done so. But it did not. The panel's decision acquiescing to DHS's overreach warrants en banc review.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2595 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Garamond 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that 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 on September 18, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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