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

OPPOSITION TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

JEFFREY BOSSERT CLARK
Acting 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

INTRODUCTION AND SUMMARY

Plaintiffs seek rehearing of this Court's decision in *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), which overturned a preliminary injunction barring the Department of Homeland Security (DHS) from implementing its October 2019 public-charge rule. Further review by this Court is unwarranted, both because the panel correctly determined that plaintiffs are unlikely to prevail in this litigation and because the Supreme Court may well resolve the Rule's lawfulness in the near future, rendering further review by this Court unnecessary.

The Supreme Court has twice granted stays of preliminary injunctions barring DHS from implementing the Rule, one entered by a district court in the Seventh Circuit and two entered by a court in the Second Circuit. The Supreme Court's actions render rehearing unwarranted for at least two independent reasons. First, as the panel stated, the Supreme Court's stay "would have been improbable if not impossible had the government, as the stay applicant, not made a strong showing that it was likely to succeed on the merits." *CASA*, 971 F.3d at 229. That determination underscores the correctness of the panel's conclusion that the Rule represents a permissible construction of the public-charge statute.

Second, by granting stays pending appeal of the underlying injunctions, the Supreme Court signaled that it would likely grant the government's petitions for writs of certiorari were the courts of appeals to affirm those injunctions. The Second and

Seventh Circuits have now affirmed the preliminary injunctions in the relevant cases, and, on October 7, 2020, the government sought Supreme Court review. The Supreme Court therefore may well resolve the very issues presented here shortly. Further review by this Court is thus unnecessary as a practical matter and would needlessly consume this Court's resources.

STATEMENT

A. The Immigration and Nationality Act provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). That assessment "shall at a minimum consider the alien's--(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B). DHS makes public-charge inadmissibility determinations for certain aliens seeking admission at the border and when certain aliens present within the country apply to adjust to lawful permanent resident status.

Although the public-charge ground of inadmissibility dates back to the first immigration statutes, Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive Branch's discretion. In 1999, the Immigration and Naturalization Service, a DHS predecessor, issued guidance defining "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he

receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." 64 Fed. Reg. 28,676, 28,681 (May 26, 1999).

In October 2018, DHS announced a proposed new approach to public-charge inadmissibility determinations. *See* 83 Fed. Reg. 51,114; 84 Fed. Reg. at 41,501. The Rule defines "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* The Rule's definition of "public charge" differs from the 1999 Guidance in that it: (1) incorporates certain noncash benefits; and (2) replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. *Id.* at 41,294-95. The Rule also sets forth the totality-of-circumstances framework DHS officers will use to determine whether an alien is likely at any time to become a public charge.

B. CASA de Maryland, an organization that provides services to immigrant communities, and two individuals challenged the Rule. As relevant here, they allege that the Rule does not reflect a permissible construction of "public charge."

On October 14, 2019, the district court granted plaintiffs' request for a nationwide preliminary injunction barring DHS from implementing the Rule. Dkt. No. 65. The court concluded that CASA's reallocation of resources to educate its clients about the Rule was a sufficient injury to support CASA's standing. *Id.* at 10-14. On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" was not consistent with the statute, because the Rule was at odds with the "history and context" of the term. *Id.* at 23-31.

This Court subsequently granted the government's request for a stay pending appeal. *CASA*, 971 F.3d at 237.

C. On August 5, 2020, this Court entered a decision reversing the district court's injunction. *CASA*, 971 F.3d at 230. Applying this Court's decision in *Lane v. Holder*, the panel first concluded that "CASA's unilateral and uncompelled" decision to reallocate its resources in response to the Rule was insufficient to support the organization's standing. *Id.* at 238. The panel determined that the two individual plaintiffs had standing to challenge the Rule, thus allowing the panel to proceed to the merits. *Id.* at 240-41.

On the merits, the panel concluded that the term "public charge" was "broad and even elusive enough to accommodate multiple views and meanings" and that the "text, structure, and history of the INA in fact all indicate that the Rule . . . rests on an interpretation of 'public charge' that comports with a straightforward reading of the Act." *Id.* at 241-42. In reaching these conclusions, the panel emphasized that

Congress had intentionally left the term undefined and had expressly vested the Secretary of Homeland Security with discretion to define the term. *Id.* at 243. The panel further found that the Rule's interpretation of "public charge" was consistent with the term's plain meaning (i.e., "one who produces a money charge upon, or an expense to, the public for support and care"), with "[s]urrounding sections of the INA," and "related immigration statutes," and with Congress's expressly stated goal that "aliens within the Nation's borders not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A). *CASA*, 971 F.3d at 242-45.

The panel rejected the notion that the term had a narrow historical meaning that Congress had implicitly ratified. After conducting a review of executive actions and judicial decisions interpreting the term, the panel noted that "the only constant feature of the public charge provision seems to be its mutability, a trait that Congress has purposefully codified as a *feature* of our immigration law, not a bug." *CASA*, 971 F.3d at 250.

The panel also determined that the district court erred in entering a nationwide injunction. *CASA*, 971 F.3d at 255-56. The panel reasoned that nationwide injunctions contravene "traditional notions of the judicial role," likely "exceed the constitutional and statutory limits on the federal equity power," and improperly "elevate[] the individual over the collective in a fashion that shuts off other voices to the detriment of sound resolutions and decisionmaking." *Id.* While the panel stated

that such injunctions might be permissible in "extraordinary circumstances," it concluded that such circumstances did not exist here. *Id.* at 262.

Judge King dissented. Judge King would have held that CASA had organizational standing, that the term "public charge" has a narrow, settled meaning with which the Rule conflicts, and that the district court did not abuse its discretion in entering a nationwide injunction. *CASA*, 971 F.3d at 264-84.

D. Other plaintiffs have filed parallel suits challenging the Rule. District courts in New York, California, Washington, and Illinois issued preliminary injunctions barring enforcement of the Rule, some on a nationwide basis and some geographically limited. *See New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 58 n.15 (2d Cir. 2020). Like this Court, the Ninth Circuit granted the government's request for a stay pending appeal. *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). The Second and Seventh Circuits denied the government's requests for a stay, prompting the government to seek the Supreme Court's intervention. *See CASA*, 971 F.3d at 235. The Supreme Court responded by granting the government's request for a stay of the injunctions pending disposition of any petition for writ of certiorari in the Second and Seventh Circuit cases. *See id.*; *DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020).

The Second and Seventh Circuits subsequently issued decisions affirming the relevant preliminary injunctions. *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020) (affirming injunction limited to Illinois); *New York v. U.S. Dep't of Homeland Security*,

969 F.3d 42 (2d Cir. 2020) (affirming injunction but limiting it to States within the Second Circuit). On October 7, 2020, the government filed petitions for writs of certiorari, asking the Supreme Court to grant certiorari in the Second Circuit case and to hold the Seventh Circuit case pending its decision. *Department of Homeland Security v. New York*, No. 20-449 (S. Ct.); *Wolf v. Cook County*, No. 20-450 (S. Ct.).

ARGUMENT

Further review of the panel decision in this case is not warranted. The panel correctly concluded that plaintiffs are not likely to prevail in this litigation. The Supreme Court reached a similar conclusion in granting stays of two parallel injunctions against the Rule, and nothing in plaintiffs' petition provides any reason to second-guess that conclusion. Moreover, in granting stays in the related cases, the Supreme Court has indicated that it is likely to grant certiorari in the near future in those cases and resolve the legal challenges to the Rule that plaintiffs raise here. Reconsideration of the panel's decision by the full Court would thus serve little purpose.

I. The Supreme Court's Actions Render Further Review Imprudent And Unnecessary

The Supreme Court has twice granted stays of preliminary injunctions barring enforcement of the Rule. The legal challenges raised by plaintiffs in those cases and accepted by the relevant district courts are, in relevant respects, identical to the legal

challenges plaintiffs raise here. Thus, the Supreme Court's decision to stay those injunctions renders further review by this Court unwarranted for at least two reasons.

First, the panel here recognized that the Supreme Court's decision to grant a stay "would have been improbable if not impossible had the government, as the stay applicant, not made a strong showing that it was likely to succeed on the merits." *CASA*, 971 F.3d at 229. The panel emphasized that, although this Court is not "technical[ly]" bound by the Supreme Court's conclusion regarding the government's likelihood of success, "every maxim of prudence suggests that [a court] should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so." *Id.* at 230. Plaintiffs would have to muster "powerful evidence" for this Court to conclude that the Supreme Court's stay orders were wrong. *Id.* As the panel's thorough analysis of the public-charge provision's text, history, and context indicates, plaintiffs fall far short of presenting the sort of evidence that would justify departing from the Supreme Court's determination regarding the merits of plaintiffs' challenges. *See infra* Part II.

Second, by granting stays, the Supreme Court has indicated that plenary review is likely in that Court. *See Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers). On October 7, 2020, the government filed certiorari petitions. The Supreme Court therefore may well soon decide the merits issue presented here, obviating the need for this Court's review. Alternatively, even if the Supreme Court

were to deny certiorari, thereby reversing its stay decisions and allowing the Second and Seventh Circuit injunctions to stand, the district court and this Court can take those actions into account when considering whether to grant permanent injunctive relief. In short, the Supreme Court's forthcoming consideration of the legal issues at the heart of this case render further review by this Court unnecessary and an inefficient use of this Court's resources.

II. The Panel's Decision Was Correct

Even if the Supreme Court were not poised to resolve the lawfulness of the Rule, further review by this Court would not be justified. The panel correctly resolved each of the legal issues plaintiffs identify.

A. The panel correctly concluded that CASA de Maryland lacks organizational standing. The panel's decision is on all fours with this Court's decision in *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012). There, a gun-rights organization alleged standing to challenge an unfavorable change to interstate gun-transfer laws because it had been forced to educate its members on "the operation and consequences of interstate handgun transfer provisions." *Id.* at 675. This Court rejected that theory, reasoning that any harm arising from such a "diversion of resources . . . results not from any actions taken by the defendant, but rather from the organization's own budgetary choices." *Id.* "To determine that an organization that decides to spend its money on educating members … suffers a cognizable injury," the Court explained, "would be to

imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an adjudication.'" *Id.*

The panel correctly recognized that CASA's alleged injuries are indistinguishable from those alleged by the organization in *Lane*. *CASA*, 971 F.3d at 238-39. CASA alleges that, in response to the Rule, it "was forced to reallocate resources and, in turn, shift from an 'affirmative advocacy posture' (i.e., advocating for certain policies) to a 'defensive one' (i.e., advising members on the Rule's impact)." *Id.* at 238. Such "voluntary budgetary decision[s], however well-intentioned, do[] not constitute Article III injury, in no small part because holding otherwise would give carte blanche for any organization to manufacture standing by choosing to make expenditures about its public policy of choice." *Id.*; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Plaintiffs wrongly assert (Pet. 7-9) that the panel's standing decision is inconsistent with the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and this Court's decision in *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221 (4th Cir. 1981). As the panel emphasized in distinguishing *Havens*, the Supreme Court's conclusion that the organization in *Havens* had standing turned on the fact that the defendant's actions "perceptibly impaired" the organization's "ability to *function*." *CASA*, 971 F.3d at 239; *see also Havens*, 455 U.S. at 379. Similarly, this Court concluded that the organization in *Pacific Legal Foundation* had standing because the defendant's actions made it more difficult and costly for the organization to

participate in an agency's rulemaking procedures—*i.e.*, it perceptibly impaired the organization's ability to perform one of its core functions.

By contrast, "nothing in the Rule directly impairs CASA's ability to provide counseling, referral, or other services to immigrants." *CASA*, 971 F.3d at 239. While CASA may feel "strongly that it must reallocate resources to best serve its members amidst a changing legal landscape," such "[r]esource reallocations motivated by the dictates of preference, however sincere, are not cognizable organizational injuries." *Id.* at 239. To hold otherwise would mean that "any entity with a policy position and a dollar" would have standing to challenge any action adverse to its policy position, a "boundless" view of organizational standing that neither the Supreme Court nor this Court has endorsed. *Id.* at 240.

B. The panel also correctly concluded that the Rule represents a reasonable interpretation of the public-charge inadmissibility provision. In arguing otherwise (Pet. 12-15), plaintiffs employ a scattershot approach to criticizing the panel's decision, ignoring much of the panel's thorough analysis of the public-charge provision's text, history, and statutory context, *see CASA*, 971 F.3d at 241-51. Indeed, plaintiffs nowhere address—let alone identify any error with—several conclusions that were central to the panel's determination that the Rule is a permissible construction of the public-charge provision. Plaintiffs do not contest the panel's conclusion that the Rule comports with the statute's plain meaning, *id.* at 242. Nor do plaintiffs challenge the panel's well-supported conclusion that Congress has "baked

[Executive Branch] discretion [to interpret the term 'public charge] into the statutory scheme many times over," *id.* at 243. Plaintiffs likewise identify no fault with the majority's analysis of surrounding and related INA provisions (including, in particular, the INA's affidavit-of-support provision), all of which strongly support DHS's interpretation of "public charge," *id.* at 243-44. And, with limited exceptions, plaintiffs offer no objections to the panel's lengthy historical analysis of administrative and judicial decisions interpreting the public-charge provisions, an analysis which "cut against" the idea that courts and the Executive Branch had adopted a uniform, narrow understanding of the term "public charge," *id.* at 245-51.

The limited arguments plaintiffs do present fall well short of establishing that the panel erred in concluding that the Rule is likely lawful. First, plaintiffs contend (Pet. 12) that the panel "elide[d] distinct analytical frameworks," by which plaintiffs appear to mean that the panel was not clear whether it viewed the Rule's interpretation of "public charge" as compelled by the statute or merely a reasonable interpretation of an ambiguous term. Plaintiffs' assertion is baffling. The majority expressly stated that it viewed the statutory phrase "public charge" to be "broad and even elusive enough to accommodate multiple views and meanings," *CASA*, 971 F.3d at 241, and that the Rule represented "a permissible construction of the term," *id.* at 250, not the only such interpretation.

Next, relying on an 1882 statute that created an "immigrant fund" to provide care to immigrants arriving in the country, plaintiffs erroneously contend (Pet. 12)

"that Congress did not intend to exclude noncitizens based on speculation that they might accept a small amount of public benefits for a brief period of time." Contrary to plaintiffs' suggestion, the Rule does not deem individuals who are expected to receive a small amount of public benefits for a brief period of time to be "public charges." Rather, the Rule provides than an alien is inadmissible only if DHS anticipates that the alien will use more than 12 aggregate months of the specified benefits over a 36-month period. Moreover, the 1882 immigrant fund was funded by a "head" tax on shipowners bringing aliens to the country. *See* Pub. L. No. 47-376, § 2 (1882); Pub. L. No. 64-301, § 2 (1917). It was not paid for by the public, and thus was not a "charge" on the "public." Regardless, even if Congress had provided public assistance, a decision to provide a safety net does not entail an intent to admit aliens who are likely to need it. *CASA*, 971 F.3d at 253; *cf. Cook County v. Wolf*, 962 F.3d 208, 247 (7th Cir. 2020) (Barrett, J., dissenting).

Plaintiffs next assert (Pet. 13-14) that the majority failed to give proper weight to two decisions and two law review articles that purportedly support plaintiffs' definition of "public charge," and gave undue weight to an early 20th Century dispute over whether the term "public charge" encompassed incarcerated persons. But the panel's takeaway from its analysis of the provision's history was that different executive officials and courts had interpreted the term differently. *See, e.g., CASA*, 971 F.3d at 247 (concluding that the "only constant feature of the public charge provision seems to be its mutability"); *see also* S. Rep. No. 81-1515, at 347-49 (1950)

(seminal congressional report noting that "[d]ecisions of the courts [and consular officers] have given varied definitions of the phrase 'likely to become a public charge'"). That some courts or law-review authors interpreted the term "public charge" more narrowly than others reflects that variation; it does not indicate that the term had a narrow, settled meaning. Similarly, the majority cited the early circuit split on the scope of the term "public charge," merely to underscore the point that the term "public charge" did not have a "settled judicial meaning" that Congress could be deemed to have ratified. *CASA*, 971 F.3d at 248.

Finally, plaintiffs wrongly claim (Pet. 14) that the majority erred in failing to cite *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (AG 1964), in which the Attorney General opined that the public-charge provision requires "more than a showing of a possibility that the alien will require public support." The Rule is fully consistent with *Martinez-Lopez*. As that case instructs, the Rule does not permit a public-charge inadmissibility finding based on a mere "possibility" that the alien will require public support. It mandates that the alien be found "likely" to become a public charge. Nor does the Rule conflict with the Attorney General's statement 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. at 421-22. Nothing in the Rule suggests that DHS will ordinarily find an alien similarly situated to the alien in *Matter of Martinez-Lopez*—*i.e.*, a young, able-bodied

alien with a U.S. work history and a financially secure sponsor—to be likely to receive public benefits over the specified period. To the contrary, 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." 83 Fed. Reg. at 51,216.

C. The panel's conclusion that the district court erred in entering a nationwide injunction likewise does not merit rehearing. Because the panel invalidated the district court's injunction in its entirety, the panel's discussion regarding the scope of the injunction merely provides guidance to future district courts. Moreover, in providing that guidance, the panel merely applied this Court's prior precedent, in line with the growing judicial consensus that nationwide injunctions are permissible only in those rare circumstances when a nationwide remedy is "necessary to afford relief to the prevailing party." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). *See also DHS v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring); *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). Indeed, although the Second Circuit affirmed an injunction against the Rule, it concluded that the district court should not have issued a nationwide injunction. *New York*, 969 F.3d at 87-88.

En banc review of the panel's discussion of the proper scope of the injunction is unwarranted in any event given that the panel correctly determined that the plaintiffs were not entitled even to a limited injunction. And, contrary to plaintiffs' contention, the panel's discussion does not conflict with this Court's decision in *Roe v.*

Department of Defense, 947 F.3d 207, 232 (4th Cir. 2020). Like the Court in *Roe*, the panel eschewed a categorical rule. *CASA*, 971 F.3d at 262. Any tension between the panel's decision and *Roe* reflects factual differences between the two cases rather than the type of legal conflict that would warrant en banc review. Plaintiffs make no attempt to explain why a nationwide injunction was justified on the facts of this case.

CONCLUSION

The petition for rehearing should be denied.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
ROBERT K. HUR
United States Attorney
DANIEL TENNY
s/ Gerard Sinzdak
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
joshua.y.dos.santos@usdoj.gov

October 2020

CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,899 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 October 16, 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.

s/ Gerard Sinzdak
GERARD SINZDAK