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

SUPPLEMENTAL BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY

After granting plaintiffs' request for rehearing en banc, this Court ordered supplemental briefing "to address relevant developments concerning the Public Charge Rule." Order (Dec. 14, 2020). There have been two relevant developments since the panel issued its decision in this case. First, the government filed petitions for writs of certiorari in three public-charge cases (two from the Second Circuit; one from the Seventh Circuit) and briefing was completed on December 23, 2020. The Supreme Court is scheduled to consider those petitions at its conference on January 8, 2021, affording the Supreme Court sufficient time to resolve the cases this Term. If the Supreme Court grants certiorari, moreover, it will resolve the central issue involved in this appeal, likely by the end of June. Thus, if the Supreme Court grants one or more of those petitions, this Court might consider placing this case in abeyance until the Supreme Court issues its decision on the merits.

Second, in early December, the Ninth Circuit issued a divided opinion in *City & County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020), in which it affirmed preliminary injunctions barring enforcement of the Rule (though it limited the injunctions' geographic scope). For the reasons given in our briefs and in the panel opinion, the Rule should be upheld. As the panel also recognized, the Supreme Court, after evaluating the government's arguments, issued stays of injunctions against the Rule, "an action which 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 de Maryland v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020) (quotation marks omitted). Nothing in the recent opinion of the Ninth Circuit provides any basis for departing from the panel majority's persuasive reasoning.

STATEMENT

The background of this case and the Rule are set out more fully in the government's opening brief and the panel's opinion. What follows is a brief summary of this case's history and relevant details from other litigation involving the Rule.

A. The Immigration and Nationality Act (INA) provides that an alien is inadmissible if the alien is, in the Executive Branch's opinion, "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). On August 14, 2019, the Department of Homeland Security (DHS) published a final rule implementing this public-charge inadmissibility provision. The Rule defines "public charge" to mean an alien who receives one or more public benefits, as defined in the Rule, including certain noncash benefits, for more than 12 months in the aggregate within any 36-month period.

On October 14, 2020, the district court entered a nationwide preliminary injunction barring DHS from implementing the Rule. JA274. The court concluded that plaintiffs were likely to prevail in showing that the Rule's definition of "public charge" was contrary to the term's unambiguous meaning. JA257-65. In the court's view, the term "public charge" encompassed only aliens who are "primar[ily]

dependent" on the government because they are "destitute and unable to work." JA257, 261, 265.

This Court stayed the preliminary injunction pending the government's appeal. *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 237 (4th Cir. 2020).

On August 5, 2020, this Court entered a decision reversing the district court's injunction. *CASA de Maryland*, 971 F.3d at 230. The panel concluded that the organizational plaintiff in this case (CASA de Maryland) lacked standing to challenge the Rule, but that the two individual plaintiffs had demonstrated standing. *Id.* at 238-41.

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 also concluded that the district court had independently erred in granting nationwide relief. *CASA*, 971 F.3d at 255-56.

Plaintiffs sought, and this Court granted, rehearing en banc. This Court tentatively calendared the en banc oral argument for the week of January 22, 2020. Over plaintiffs' objection, the Court granted the government's request to postpone

the argument. In so doing, the Court ordered the parties to file supplemental briefs addressing "relevant developments concerning the Public Charge Rule." Order (December 14, 2020).

B. Before the panel issued its decision in this case, two courts of appeals issued decisions affirming preliminary injunctions barring DHS from enforcing the Rule. In June 2020, the Seventh Circuit affirmed a preliminary injunction against the Rule within the State of Illinois, over a dissent by then-Judge Barrett. *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). The court concluded that the Rule was likely invalid because its definition of "public charge" fell "outside the boundaries set by the [INA]." *Id.* at 229. Two months later, and a day before the panel published its decision in this case, the Second Circuit issued its ruling in *New York v. Department of Homeland Security*, 969 F.3d 42 (2d Cir. 2020), holding that the Rule was invalid but that the injunctions entered by the district court should be limited to the Second Circuit. The Second Circuit concluded that the Rule was likely contrary to the INA because it was inconsistent with the settled meaning of the term "public charge." *Id.* at 74-80. The Supreme Court had previously stayed the relevant injunctions pending the government's appeals in the Second and Seventh Circuits and the Supreme Court's resolution of any subsequent certiorari petition.

The government has now filed petitions for writs of certiorari in the Supreme Court in those cases. *See Department of Homeland Security v. New York*, No. 20-449 (S. Ct.); *Wolf v. Cook County*, No. 20-450. The plaintiffs filed their responses to those

petitions on December 9, 2020. In each case, the plaintiffs had sought a further extension of time to file a response. The government opposed delay on the ground that the filing of a response by December 9 would allow the Supreme Court to consider the matter at its conference of January 8, 2021, and to decide the issue before the Court adjourns for the summer if the Court grants review. The Supreme Court denied the extension, and the petitions have been distributed for consideration at the conference of January 8, 2021.

Events unfolded differently in the Ninth Circuit. On December 5, 2019, in a lengthy opinion, the court granted the government's request for a stay pending appeal of two injunctions issued within the Circuit. *See City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). One year later, the Ninth Circuit issued a divided opinion rejecting the stay panel's analysis and affirming preliminary injunctions against the Rule (though limiting their geographic scope). *City & County of San Francisco v. USCIS*, Nos. 19-17213, 19-17214, 19-35914, 2020 WL 7052286 (9th Cir. Dec. 2, 2020). A petition for rehearing would be due in the Ninth Circuit on January 19, 2021. The government's deadline for filing a certiorari petition is May 3, 2021. Because the stay the Ninth Circuit had previously entered remains in effect, the Ninth Circuit's decision has not affected DHS's implementation of the Rule.[1]

[1] On December 30, 2020, the government filed a motion to stay the mandate in the Ninth Circuit cases.

Two of the district courts overseeing cases discussed above have also issued subsequent rulings barring enforcement of the Rule, but each has been stayed. The district court presiding over the *New York* litigation entered a second preliminary injunction barring enforcement of the Rule during the COVID-19 crisis. The Second Circuit stayed that injunction, holding that the government was likely to prevail in establishing that the district court lacked jurisdiction to issue a second preliminary injunction while the first injunction was on appeal. *See New York v. DHS*, 974 F.3d 210 (2d Cir. 2020). Meanwhile, the district court overseeing the *Cook County* litigation entered a Rule 54(b) partial final judgment vacating the Rule nationwide. The Seventh Circuit stayed that judgment the next day. *See* Order, *Wolf v. Cook County*, No. 20-3150 (7th Cir. Nov. 19, 2020). The Seventh Circuit also suspended briefing in the Rule 54(b) appeal pending the Supreme Court's evaluation of the government's petitions for writs of certiorari in *New York* and *Cook County*. *See id.*

ARGUMENT

A. As the panel majority recognized, the most relevant aspect of the ongoing litigation around the country regarding the public-charge rule is consideration of the matter by the Supreme Court. At the time of the panel opinion, the Supreme Court had stayed two injunctions against the Rule in cases presenting the same challenge to the Rule that are presented here. Specifically, the central question in each case is whether the Rule represents a reasonable interpretation of the INA's public-charge inadmissibility provision. As the panel explained, moreover, those stay decisions

provide "a window into the Supreme Court's view of the merits," *CASA de Maryland v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020), of that question and strongly support the panel's well-reasoned conclusion that the government is likely to prevail in the public-charge litigation.

The en banc Court need not rely on inferences drawn from the Supreme Court's stay decisions for guidance on the Supreme Court's views, however. The Supreme Court is considering whether to grant plenary review and will likely determine in the near future whether to grant certiorari. Moreover, if it grants review when it first considers the petitions at its January 8, 2021 conference or shortly thereafter, the Supreme Court is almost certain to resolve the cases during its current Term. And because the *New York* and *Cook County* cases present the same issue that is presented here (i.e., whether the Rule adopts a reasonable interpretation of the statutory term "public charge"), the Supreme Court's decision on the merits will likely resolve this case as well. If the Supreme Court grants review, this Court might consider, in the interests of judicial economy, placing the case in abeyance until the Supreme Court issues its merits decision, presumably by the end of June.

B. Although the Ninth Circuit recently issued its decision in *City & County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020), that decision provides no basis for second-guessing the panel's decision in this case. As an initial matter, the Ninth Circuit had no reason to consider and therefore did not address standing of organizational entities. *See id.* at 754 ("Plaintiffs are states and municipalities . . . .").

The decision thus does not cast doubt on the panel majority's conclusion here that the organizational plaintiff lacked standing. Moreover, the Ninth Circuit, like the panel majority here, agreed that a nationwide injunction was inappropriate. *See id.* at 763.

On the merits, the Ninth Circuit majority relied on arguments that this Court considered and properly rejected. Like plaintiffs here, the Ninth Circuit reasoned that the Rule is invalid because, in the court's view, the Rule's definition of "public charge" is inconsistent with the term's purported historical meaning, which Congress implicitly adopted by reenacting the public-charge provision without significant change. *City & County of San Francisco v. USCIS*, 981 F.3d at 756-58. Specifically, the court of appeals held that the term "public charge" had been interpreted historically to mean "dependence on public assistance for survival." *Id.* at 756.

The Ninth Circuit's historical analysis was deeply flawed. While concluding that "[h]istory is a strong pillar supporting plaintiffs' case," the court at the same time noted that there "are relatively few" judicial and administrative decisions interpreting the term "public charge." *City & County of San Francisco*, 981 F.3d at 751, 756. Crucially, none of the few decisions the Ninth Circuit cited adopted the definition of "public charge" that the court hypothesized. *See, e.g.*, *id.* at 751-52; *see also CASA de Maryland*, 971 F.3d at 248 (emphasizing the "notable absence of any express articulation of [plaintiffs' proposed] standard in reported decisions over the relevant time-period"). Instead, those cases adopted broad definitions of "public charge" with which the Rule accords. For example, the Ninth Circuit cited cases holding that

immigration officers must consider the 'totality of an alien's circumstances" in evaluating whether "the burden of supporting the alien is likely to be cast on the public," and must look "to the inherent characteristics of the individual rather than to external circumstances." *City & County of San Francisco*, 981 F.3d at 751-52. The Rule likewise requires that adjudicators evaluate the totality of an alien's circumstances and defines "public charge" to mean only those aliens whose individual circumstances indicate that the alien is likely to rely on public support to meet his or her basic needs for an extended or intense period. *See CASA de Maryland*, 971 F.3d at 245.

As this Court's more thorough and persuasive historical analysis demonstrates, "executive and judicial practice from 1882 to the present rebuts any idea that 'public charge' has been uniformly understood by either branch as pertaining only to those who are 'primarily dependent' on public aid." *CASA de Maryland*, 971 F.3d at 246. Instead, that history reveals 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* our immigration law, not a bug." *Id.* at 250; *see also Cook County*, 962 F.3d at 238-48 (Barrett, J., dissenting) (concluding, after a lengthy historical review, that "[t]he term 'public charge' was broad when it entered federal immigration law in 1882, and it has not been pinned down since").

The conclusion that the term "public charge" lacks a settled meaning and that Congress has entrusted its "interpretation and application" to the executive branch, *CASA de Maryland*, 971 F.3d at 231, is reflected in the Immigration and

Nationalization Service's 1999 Field Guidance, on which the Ninth Circuit placed significant weight, *see City & County of San Francisco*, 981 F.3d at 752. Although the 1999 Guidance adopted a definition of "public charge" that is more in keeping with the Ninth Circuit's assumed definition, the Guidance emphasized "that the term was ambiguous," "that guidance was 'necessary' because of 'confusion over the meaning of [the term]," *CASA de Maryland*, 971 F.3d at 246, and that the Guidance had adopted only a "reasonable" interpretation of the term, 64 Fed. Reg. 28,676, 28,676-77 (May 26, 1999).

In focusing on a limited historical review of the public-charge inadmissibility provision, the Ninth Circuit largely ignored the "text, structure, and statutory context" of the public charge provision, *CASA de Maryland*, 971 F.3d at 244, the ordinary building blocks of statutory interpretation. That was a critical and telling error. As the panel opinion in this case explained, 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.

In disregarding the public-charge provision's statutory context, the Ninth Circuit rejected the government's citation to the INA's affidavit-of-support provision, which requires most aliens subject to the Rule to obtain sponsors who must reimburse the government for any means-tested benefit the alien receives, 8 U.S.C. §§ 1182(a)(4)(C)–(D), 1183a. The Ninth Circuit dismissed the affidavit-of-support provision as having "no historic or functional relationship" to the public-

charge inadmissibility provision. *City & County of San Francisco*, 981 F.3d at 758. That assertion is plainly erroneous. Although affidavits of support have not always been required, the presence or absence of such an affidavit has long been a factor immigration officers have considered in making public-charge inadmissibility determinations. *See id.* (noting that affidavits of support were part of the public-charge calculus prior to 1996). The affidavit-of-support provision states that the purpose of the affidavit is "to establish that an alien is not excludable as a public charge under section 1182(a)(4)." 8 U.S.C. § 1183a(a)(1). Moreover, when it amended the INA in 1996, Congress mandated that most aliens subject to the public-charge provision obtain an affidavit of support and declared any alien who does not obtain a required affidavit to be inadmissible on the public-charge ground, regardless of the alien's individual circumstances. 8 U.S.C. § 1182(a)(4)(C) & (D).

The affidavit-of-support provision thus has a close functional relationship with the public-charge provision—if an alien does not obtain a required affidavit the alien is, by statute, inadmissible on the public-charge ground. Far from being irrelevant to the meaning of "public charge," the affidavit-of-support provision "underscores 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.").

The Ninth Circuit also noted that the Rule "introduces a lack of English proficiency as figuring into the equation." *City & County of San Francisco*, 981 F.3d at 756. But the Rule is quite clear that lack of English proficiency does not *per se* make someone likely to become a public charge, but rather takes it into account in the totality of the circumstances to assess an individual's job prospects. 83 Fed. Reg. 51,114, 51,195-96 (Oct. 10, 2018). To that end, the Rule also specifies that immigration officials will take an alien's proficiency in other languages into account (as a positive factor) when evaluating an alien's employment prospects. 84 Fed. Reg. 41,292, 41,435 (Aug. 14, 2019). It is entirely rational to conclude that individuals who speak more languages, including English, are more likely to secure employment and thus less likely to receive public benefits above the specified threshold.

The Ninth Circuit also erred in concluding that the Rule is likely arbitrary and capricious. *City & County of San Francisco*, 981 F.3d at 758-62. That issue is not presented in this case; it was not addressed by the district court or briefed by the parties on appeal. In any event, the Rule satisfies arbitrary-and-capricious review. Contrary to the Ninth Circuit's conclusion, DHS acknowledged the potential public-health and economic costs of the Rule, took steps to mitigate those costs, and explained why it was adopting the Rule notwithstanding those potential costs. The agency likewise acknowledged it was altering its approach to public-charge determinations and explained why it believed the new approach was warranted. That is all the APA requires. *See City & County of San Francisco v. USCIS*, 944 F.3d 773, 800-

05 (9th Cir. 2019) (explaining at length, in granting a stay, why the Rule complies with the APA and is not arbitrary and capricious).

For the above reasons, the Ninth Circuit's decision does not undermine the panel's decision reversing the district court's injunction.

CONCLUSION

This Court should consider placing this case in abeyance if the Supreme Court grants review of the merits issue presented in this case. In any event, for the reasons explained in the government's briefs and the panel's decision, the district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,205 words. This brief 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
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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 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.

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