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

PETITION FOR REHEARING AND REHEARING *EN BANC* OF MOTIONS PANEL'S STAY DECISION

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STATEMENT REQUIRED BY RULE 35(b)

Appellees respectfully request that the *en banc* Court vacate the motions panel's order staying the preliminary injunction issued in this case and grant an administrative stay of that order while this petition is under consideration.

For over 135 years, a consistent standard has governed how federal immigration authorities determine whether a noncitizen is inadmissible to the United States on the ground that the person is likely to become a "public charge." The Department of Homeland Security (DHS) recently promulgated a Final Rule that would dramatically and unlawfully expand DHS's power to deny admission, and thus lawful-permanent-resident (LPR) status, to any noncitizen deemed likely at any point over a lifetime to accept even a small amount of public benefits for a short period of time.

Appellees and others challenging the Rule sought and received preliminary injunctions from five district courts across the country to safeguard the longstanding status quo that has guided public-charge determinations while their challenges to DHS's new rule can be litigated. Three courts, including the District of Maryland, issued nationwide injunctions, while the others are regional. The government moved to stay all of the preliminary injunctions pending appeal.

With limited briefing and without oral argument, and over the dissent of one judge, the motions panel issued a stay order—unaccompanied by a written

opinion—that lifts the District of Maryland's preliminary injunction during the pendency of this appeal, thereby threatening to upend the status quo. Stay motions remain pending in two other Circuits, while one other has been granted.[1] Should the Second Circuit grant a stay, DHS's new rule would go into effect in all or most of the country before any appellate court rules on the merits of the preliminary injunctions—causing irreparable harm to Appellees and to noncitizens around the country.

Rehearing *en banc* of the panel's stay order is warranted because the order cannot be reconciled with *Nken v. Holder*, 556 U.S. 418 (2009), and because the case raises an exceptionally important question. Under *Nken*, the party seeking a stay pending appeal must demonstrate that it will be irreparably harmed absent a stay. *Id.* at 434. Appellants have utterly failed to establish that they have been irreparably harmed by the preliminary injunction. The panel's stay is in direct conflict with *Nken* and must be vacated.

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[1] On December 5, 2019, the Ninth Circuit stayed the preliminary injunctions issued by the Eastern District of Washington and the Northern District of California. *See* Order, *City & Cty. of San Francisco v. U.S. Customs & Immigration Servs.*, Nos. 19-17213, 19-17214,19-35914 (9th Cir. Dec. 5, 2019), ECF No. 27. The Seventh and Second Circuits have yet to rule on the government's motions for stays of preliminary injunctions issued by the Northern District of Illinois (which is limited to the State of Illinois) and the Southern District of New York (which are nationwide).

Moreover, the question of whether DHS's Final Rule is consistent with its statutory authority is of critical importance, as the Rule gives DHS virtually unfettered discretion to deny admission or LPR status to noncitizens on the basis of a subjective prediction of their future benefits use. Absent correction by the *en banc* Court, untold numbers of noncitizens—including some of Appellee CASA de Maryland, Inc. (CASA)'s members—will be denied admission or LPR status based on an unlawful exercise of agency discretion, and countless more will be deterred from obtaining public benefits that provide critical health, nutritional, and housing supports for noncitizens and their families.

BACKGROUND

Under § 212(a)(4) of the Immigration and Nationality Act (INA), a noncitizen is inadmissible to the United States and ineligible to obtain LPR status if she is "in the opinion of the Attorney General . . . likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The public-charge inadmissibility ground has appeared in U.S. immigration statutes since 1882. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214 (denying admission to "any convict, lunatic, idiot, or any other person unable to take care of himself or herself without becoming a public charge"). Congress has never provided a statutory definition of the term "public charge."

Since its enactment, however, courts and administrative agencies have

understood the statutory term to encompass only individuals who are likely to become primarily dependent on the government for financial support. In line with that understanding, since 1999, immigration officials making public-charge determinations have operated under guidance issued by the Department of Justice (DOJ). Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) [hereinafter Field Guidance]; *see also* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237) [hereinafter 1999 Proposed Rule] (proposing a rulemaking mirroring the Field Guidance). The Field Guidance and 1999 Proposed Rule defined the term "public charge" as a noncitizen "who is likely to become . . . primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." 64 Fed. Reg. at 28,689 (internal quotation marks omitted). In so doing, DOJ did not purport to issue a new interpretation of the public-charge inadmissibility ground. Rather, it concluded that the primarily dependent standard was dictated by "the plain meaning of the word 'charge,'" "the historical context of public dependency when the public charge immigration provisions were first enacted more than a century ago," and "the facts found in the deportation and admissibility cases" dating back more than a century. 1999 Proposed Rule, 64

Fed. Reg. at 28,677.

On August 14, 2019, DHS issued a final rule that departs sharply from the longstanding interpretation of the public-charge inadmissibility ground formalized in the Field Guidance. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248) [hereinafter Public Charge Rule, Final Rule, or Rule]. The Rule defines "public charge" as "an alien who receives one or more" of an enumerated set of public benefits "for more than 12 months in the aggregate within a 36-month period," with multiple benefits received in a single month counting as multiple months of benefits. *Id.* at 41,501 (to be codified at 8 C.F.R. § 212.21(a)). In addition to the cash benefits relevant to public-charge determinations under the Field Guidance, the Public Charge Rule also considers noncitizens' likelihood of receiving (1) Supplemental Nutrition Assistance Program (SNAP) benefits; (2) federal housing assistance; and (3) non-emergency Medicaid benefits (with certain exceptions). *Id.* (to be codified at 8 C.F.R. § 212.21(b)).

Because the public-charge inadmissibility ground is forward-looking (and because most non-LPRs are not eligible for the enumerated public benefits), immigration officers' task under DHS's Rule would *not* be to determine whether a noncitizen has in fact received one or more of those benefits for more than 12 months within a 36-month period, but instead to assess whether she is "more likely

than not" to do so at any point over the rest of her life. *Id.* (to be codified at 8 C.F.R. § 212.21(c)). Thus, under the Rule, a noncitizen could be deemed "likely . . . to become a public charge," and therefore ineligible to become an LPR, based on a prediction that she is likely to experience a temporary, isolated need for only a small amount of public benefits in the near or distant future.

Appellee CASA is a nonprofit membership organization that seeks "to create a more just society by building power and improving the quality of life in low-income immigrant communities." JA29. It does so by providing a wide variety of social, health, job training, employment, and legal services to its members, who have varying immigration statuses. JA30. Even before the Public Charge Rule was finalized, its draft and proposed versions sparked widespread confusion and fear, leading many of CASA's members to disenroll from or forgo federal, state, and local public benefits to which they or their family members, including U.S. citizen children, are entitled. JA31–32. Because these benefits provide recipients with critical food, health, and housing support, CASA has invested significant resources in public education and individual legal and health-counseling services in order to stem the harm caused by the Rule's chilling effect. JA 32–33.

In view of the serious harm that the Public Charge Rule has caused and would continue to cause if permitted to go into effect, CASA and two of its members filed suit in the District of Maryland challenging the legality of the Rule.

CASA and its members moved for a preliminary injunction to prevent the Rule from going into effect as planned on October 15, 2019. After holding a lengthy hearing, JA121–234, the district court entered a preliminary injunction in a carefully reasoned opinion issued on the eve of the Rule's effective date, JA235–74. The district court concluded that CASA has organizational standing to sue, JA248; that its claims are justiciable, JA 249, 251–52; and that it is likely to prevail on the merits of its claim that the Public Charge Rule violates the Administrative Procedure Act (APA) because the Rule is "not in accordance with law," JA266 (quoting 5 U.S.C. § 706(2)(A)).[2] Four other district courts around the country also preliminarily enjoined the Rule based on similar legal conclusions.[3]

After filing their appeal, Appellants moved for a stay of the preliminary injunction pending appeal in the district court. ECF No. 69. In a detailed order,

[2] Appellees have raised several other standing and merits arguments that the district court's preliminary injunction decision did not address. JA248, 266–67.

[3] *See Cook Cty. v. McAleenan*, No. 19 C 6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019), *appeal docketed*, No. 19-3169 (7th Cir. Oct. 31, 2019); *Washington v. U.S. Dep't of Homeland Sec.*, No. 4:19-CV-5210-RMP, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019), *appeal docketed*, No. 19-35914 (9th Cir. Oct. 31, 2019); *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777 (GBD), 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019), *appeal docketed*, No. 19-3591 (2d Cir. Oct. 31, 2019); *Make the Road N.Y. v. Cuccinelli*, No. 19 Civ. 7993 (GBD), 2019 WL 5484638 (S.D.N.Y. Oct. 11, 2019), *appeal docketed*, No. 19-3595 (2d Cir. Oct. 31, 2019); *City & Cty. of San Francisco v. U.S. Customs & Immigration Servs.*, Nos. 19-cv-04717-PJH, 19-cv-04975-PJH, 19-cv-04980-PJH, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019), *appeal docketed*, Nos. 19-17213, 19-17214 (9th Cir. Oct. 31, 2019).

the district court denied a stay. ECF No. 79. Appellants then sought identical relief from this Court, App. B (Mot.), which a motions panel granted by a two-to-one vote in an order unaccompanied by a written opinion, App. A.

ARGUMENT

I. THE PANEL CLEARLY MISAPPLIED *NKEN* BY ENTERING A STAY ABSENT ANY SHOWING OF IRREPARABLE HARM

A stay pending appeal is "an exercise of judicial discretion," not a "matter of right." *Nken*, 556 U.S. at 433 (quoting *Virginia Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. In order to carry this burden, the requesting party must (1) make "a strong showing" that it is likely to succeed on the merits and (2) demonstrate that it will be irreparably injured absent a stay. *See id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Moreover, the requesting party must show that (3) a stay will not "substantially injure other parties interested in the proceedings" and (4) the public interest favors a stay. *See id.* (quoting *Hilton*, 481 U.S. at 776). Of those four factors, the first two "are the most critical." *Id.* Courts assess the final two factors, which merge when the government is a party, only if the requesting party "satisfies the first two factors." *Id.* at 435. Thus, a stay cannot issue if the requesting party fails to establish irreparable harm. *See id.*

Appellants did not carry their burden on any of the stay factors, and in particular they utterly failed to articulate any cognizable harm—let alone an irreparable one—attributable to the district court's preliminary injunction. Appellants' Motion for Stay Pending Appeal devoted a mere four sentences to attempting to set out the irreparable harm that they supposedly would suffer if the preliminary injunction were to remain in place during the pendency of this appeal. Mot. 18. According to Appellants, the district court's preliminary injunction harmed them by forcing DHS to "grant lawful-permanent-resident status to aliens whom the Secretary would deem likely to become public charges in the exercise of his discretion." *Id.* Appellants characterized this harm as irreparable because "DHS currently has no practical means of revisiting public-charge admissibility determinations once made." *Id.*

Appellants' alleged harm amounts to nothing more than a complaint that the preliminary injunction delays implementation of its preferred policy. But if mere delay of the implementation of a regulation constitutes irreparable harm, then the government would be entitled to an automatic stay in APA cases any time a motions panel disagrees with a district court's assessment of the merits. That cannot be so. Appellate courts apply an abuse-of-discretion standard in reviewing the grant of a preliminary injunction. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004); *Mountain Valley Pipeline LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353,

366 (4th Cir. 2019). By contrast, a party can satisfy the merits prong of the stay factors by making a "strong showing" of success on the merits. *Nken*, 556 U.S. at 434. Absent a meaningful irreparable-harm inquiry, a motions panels could lift a preliminary injunction based on what amounts to an accelerated *de novo* review of the district court's decision to issue a preliminary injunction, with limited briefing (as in this case) and usually without oral argument (also as in this case). In other words, the requirement that a party seeking a stay demonstrate *both* a likelihood of success on the merits *and* irreparable harm ensures that stay proceedings do not devolve into "justice on the fly." *Id*. at 427.

Perhaps implicit in Appellants' discussion of the harm caused by the district court's preliminary injunction is an assumption that noncitizens granted LPR status under preexisting law might one day in the future receive public benefits and thereby drain the public fisc. But any harm based on noncitizens' future receipt of benefits is inherently speculative and an insufficient basis for the issuance of a stay. *See Nken*, 556 U.S. at 434 ("[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second [stay] factor." (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998))). Noncitizens "who are unlawfully present and nonimmigrants physically present in the United States . . . are generally barred from receiving federal public benefits other than emergency assistance." Final Rule, 84 Fed. Reg. at 41,313; *see also* 8 U.S.C. §§ 1611, 1621, 1641(b).

Therefore, Appellants cannot rely on noncitizens' past receipt of public benefits to forecast their future receipt of the same. Nor have Appellants made any non-speculative showing that noncitizens who adjust to LPR status during the pendency of this appeal will become eligible for, apply for, or receive public benefits in the future.

Even if the possibility of future receipt of public benefits by noncitizens were a cognizable harm, several provisions of the INA allow the government to recoup its expenditures and mitigate the risk that benefits will be received in the first place. For example, the INA requires certain applicants for LPR status to obtain affidavits of support obligating sponsors to reimburse states and the federal government for noncitizens' receipt of means-tested public benefits. 8 U.S.C. § 1183a(b). The statute also authorizes the removal of "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry." *Id.* § 1227(a)(5). Most noncitizens also are prohibited from receiving many federal benefits during the first five years in which they possess LPR status, *see id.* § 1613, 1641(b), and the INA further restricts LPRs' eligibility for means-tested benefits by attributing their sponsors' income and resources to them, *id.* § 1631(a). To the extent that those provisions do not restrict LPR access to public benefits to Appellants' satisfaction,

Congress at any time could further limit noncitizen eligibility to public benefits—but it has not done so.

Because Appellants have not established any irreparable harm caused by the district court's preliminary injunction, the Court should grant *en banc* review to rectify the motions panel's misapplication of *Nken*.

II. THE STAY THREATENS TO UPEND THE STATUS QUO ON AN ISSUE OF EXCEPTIONAL IMPORTANCE AND TO IRREPARABLY HARM APPELLEES

The panel's stay order unleashes fundamental changes to immigration law correctly held at bay by the preliminary injunction. Although the purpose of a stay is to "suspend[] judicial alteration of the status quo," *Nken*, 556 U.S. at 429 (internal quotation marks omitted), the stay order in this case does exactly the opposite. And it does so on a question of exceptional importance to the many noncitizens, including CASA's members, who seek admission to and adjustment of status in the United States and who will be deterred from obtaining critical public benefits, including for their U.S. citizen children.

As addressed at greater length in Appellees' stay opposition and in the district court's detailed opinion accompanying its grant of a preliminary injunction, DHS's Rule cannot be reconciled with the plain meaning of the phrase "public charge." At the time of the 1882 enactment of the public-charge inadmissibility ground, dictionaries defined the word "charge" as a "person or thing committed to

another[']s custody, care or management; a trust." *Charge*, Webster's Dictionary (1828 online ed.), https://perma.cc/T3CB-5HUT; *see also Charge*, Webster's Dictionary (1886 ed.), https://perma.cc/WJ9Y-CHFG (similar). In ordinary usage, therefore, a "public charge" was a person entrusted to the public's care—one who was so incapable of providing for himself that he depended on the public for long-term subsistence. The 1882 Act also imposed on each noncitizen who entered the United States a 50-cent head tax for the purpose of creating an "immigrant fund." Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. at 214. Because this fund provided for temporary and limited public assistance for noncitizens upon arrival, Congress could not possibly have intended that a noncitizen's perceived likelihood of receiving public assistance of that sort should render her inadmissible.

In line with the unambiguous meaning of "public charge," courts and agencies reviewing public-charge determinations have consistently focused on a noncitizen's ability and willingness to work as it relates to that person's capacity to avoid becoming primarily dependent on the government for support. *See, e.g.*, *Howe v. United States ex rel. Savitsky*, 247 F. 292, 293–94 (2d Cir. 1917) ("physically []fit" noncitizen could not be denied admission on public-charge grounds because "Congress meant the act to exclude persons who were likely to become occupants of almshouses"); *United States ex rel. Barlin v. Rodgers*, 191 F. 970, 973–77 (3d Cir. 1911) (noncitizens were inadmissible on public-charge

grounds due to physical limitations or agedness that, in the judgment of immigration officials, would have prevented them from earning a living). Likewise, *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (A.G. 1964), which remains binding on DHS today, *see* 8 C.F.R. § 1003.1(g)(1), holds that a "healthy person in the prime of life cannot ordinarily be considered likely to become a public charge," 10 I. & N. Dec. at 421.

Not only has Congress repeatedly reenacted the public-charge provision without displacing the longstanding definition of the key term, but it also rejected in 1996 and 2013 attempts to adopt a definition of "public charge" similar to the one DHS now seeks to impose administratively. *See* H.R. Rep. No. 104-828, at 137–40 (1996) (Conf. Rep.); S. Rep. No. 113-40, at 63 (2013). Congress's rejection of analogues to the Public Charge Rule confirms the Rule is inconsistent with the INA's statutory text. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

Moreover, the disruption to the status quo caused by the panel's stay order will result in irreparable harm to an untold number of noncitizens. As DHS acknowledges, the "likely outcome" of the Public Charge Rule "is that some individuals who would may [sic] have been able to immigrate under the 1999 Interim Field Guidance will now be deemed inadmissible as likely public charges."

Final Rule, 84 Fed. Reg. at 41,309. Although Appellants claimed that their inability to "revisit[] public-charge inadmissibility determinations once made" means that the district court's injunction irreparably harms them, Mot. 18, noncitizens—including CASA's members—are the ones who truly will be harmed by adverse public-charge determinations allowed by the panel's stay that cannot later be undone. And because an adverse public-charge determination could be a prelude to deportation, the stay threatens to uproot individuals and split apart families. *See* 8 U.S.C. § 1227(a)(1)(A) (rendering deportable "[a]ny alien who at the time of entry or adjustment of status was" inadmissible).

The stay also will irreparably harm CASA as an organization by forcing it to divert substantial resources to providing increased education to counteract unnecessary disenrollment or forgoing of public benefits and to counseling and legal services to help its members avoid adverse immigration consequences from the Rule. JA32–33. In anticipation of the Rule's enactment, CASA devoted 15 part-time health promoters and 15 to 20 community organizers to mitigating the Rule's chilling effects. JA33. The Rule's complexity also has required extensive training for CASA's staff and has reduced the number of individuals CASA is able to serve in its healthcare and legal clinics on a daily basis. JA32. In addition to significantly impairing CASA's ability to provide direct services to its members, the Rule has frustrated CASA's efforts to engage in time-sensitive affirmative

advocacy for local healthcare expansion. JA33–34. If the panel's stay order remains in effect during the pendency of this appeal, CASA will need to devote additional resources to counteracting the Rule's deleterious impacts on its membership at the continued expense of the organization's affirmative advocacy.

The *en banc* Court should vacate the panel's order to restore the longstanding status quo that the stay has disrupted and to prevent CASA, its members, and other noncitizens from suffering irreparable harm.

III. THE COURT SHOULD SUSPEND THE STAY ORDER WHILE CONSIDERING THIS PETITION

Appellees also request that the Court issue an administrative stay of the motions panel's order during the Court's consideration of this petition. Had a panel of this court reversed the district court's preliminary injunction ruling, the panel's decision would be stayed automatically while Appellees sought *en banc* review. *See* Fed. R. App. P. 41(b). Because the panel's stay order inflicts the same irreparable harm on Appellees, relief similar to that provided by Rule 41(b) is appropriate here. *Cf. Nken*, 556 U.S. at 426 (appellate courts possess inherent power "to hold an order in abeyance while it assesses the legality of the order").

CONCLUSION

For the foregoing reasons, this Court should grant *en banc* review of the motions panel's order staying the district court's preliminary injunction and issue

an administrative stay of that order pending the Court's consideration of this petition.

Dated: December 20, 2019

Respectfully submitted,

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