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

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

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STATEMENT REQUIRED BY RULE 35(b)

Plaintiffs seek further review of the panel's divided decision reversing and remanding a preliminary injunction that barred enforcement of the Department of Homeland Security (DHS)'s new Public Charge Rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248), because the case presents questions of exceptional importance and because the decision conflicts with Fourth Circuit and Supreme Court precedent.

First, the panel majority's analysis of organizational standing conflicts with the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and with that decision's Fourth Circuit precursor, *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221 (4th Cir. 1981). Even the plaintiffs in *Havens Realty* could not have met the panel majority's new and exceedingly narrow standard. If allowed to stand, the panel's decision would place this circuit out of step with organizational standing law nationwide.

Second, the panel majority permitted a radical reinterpretation of a provision of the Immigration and Nationality Act (INA) that denies admission and adjustment of status to noncitizens who are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4). While courts and administrative agencies consistently have understood the term "public charge" to mean dependence on the

government for subsistence, DHS's Rule goes far beyond that settled scope to define "public charge" to encompass the receipt of a small amount of supplemental public benefits for a short period of time. In upholding DHS's expansive definition, the panel majority ignored key statutory context at odds with the agency's definition as well as contrary Board of Immigration Appeals (BIA) and Attorney General precedent that is binding on DHS. Because the majority's erroneous decision (1) sanctions a Rule that would transform the face of U.S. immigration law and (2) conflicts with Second and Seventh Circuit decisions addressing the same issue, *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020); *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020),[1] further review by the *en banc* Court is warranted.

Finally, the majority's sweeping disavowal of the propriety of nationwide injunctions conflicts with this Court's decisions in *International Refugee Assistance Project (IRAP) v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *vacated as moot* 138 S. Ct. 353 (2017), and *Roe v. Department of Defense*, 947 F.3d 207 (4th Cir. 2020), necessitating *en banc* review.

[1] The majority's decision is consistent in some respects with the Ninth Circuit's decision staying preliminary injunctions against DHS's Rule. *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 2019). But that decision was issued without oral argument and with limited briefing and is, for those reasons and more, not persuasive.

BACKGROUND

The INA denies admission and adjustment of status to noncitizens who are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4). Congress first enacted the public-charge provision in 1882, Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214, and has reenacted the provision repeatedly without substantial modification.

Although Congress has never defined the term "public charge," the provision has been the subject of "extensive" judicial and administrative interpretation, the "general tenor" of which "is that the statute requires more than a showing of a possibility that the alien will require public support" and that a "healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (AG 1964). In 1999, the Immigration and Naturalization Service (INS) formalized that synthesis of the case law in guidance that defined the term 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." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999) (internal quotation marks omitted); *see also* Inadmissibility and Deportability on Public Charge Grounds, 64

Fed. Reg. 28,676 (proposed May 26, 1999) (analogous rule proposed in tandem with the guidance, but never finalized). INS did not purport to adopt a new interpretation of the public-charge provision through this definition. 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. 64 Fed. Reg. at 28,677.

In August 2019, DHS broke sharply from the preexisting understanding of the public-charge provision by promulgating a rule that redefines "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 any 36-month period," with multiple types of benefits received in a single month counting as multiple months of benefits. 84 Fed. Reg. at 41,501 (Aug. 14, 2019) (codified at 8 C.F.R. § 212.21(a)). DHS's Rule also expands the relevant public benefits beyond cash assistance and long-term institutionalization to include Supplemental Nutrition Assistance Program (SNAP) benefits (i.e., food stamps), federal housing assistance, and Medicaid—benefits designed not to ensure recipients' subsistence, but to supplement their earned income. *Id.* (codified at 8 C.F.R. § 212.21(b)). Under DHS's Rule, a noncitizen could be deemed inadmissible based on a

prediction that she might receive little more than $1,500 in average SNAP benefits over a three-year period,[2] or that she might at some point receive multiple benefits for a few months due to a temporary setback.

CASA de Maryland, Inc., and two of its members who intend to seek adjustment of status in the future ("Individual Plaintiffs") filed suit in the District of Maryland challenging the legality of DHS's Public Charge Rule. Plaintiffs challenged the Rule under the Administrative Procedure Act (APA) as (1) contrary to law and (2) arbitrary and capricious, and under the Fifth Amendment as (3) void for vagueness and (4) denying equal protection. JA115–19. In October 2019, the district court preliminarily enjoined DHS from enforcing the Rule, joining four other district courts in doing so. JA236. The court held that CASA has organizational standing to challenge the Rule, JA248; that the Rule is contrary to the INA because the definition adopted by DHS (1) is "unambiguously foreclosed" by traditional tools of statutory interpretation and (2) is "outside the bounds of any ambiguity" inherent in the term "public charge," JA266; and that a nationwide preliminary injunction of the Rule is necessary to remedy CASA's injuries, JA271.

The Government appealed to this Court, JA280, where, over a dissent by Judge Harris, it obtained a stay of the district court's injunction, Dkt. 21. On

[2] In 2019, the average monthly SNAP benefit per recipient was $129.83. Dkt. 113-5.

August 5, 2020, a divided panel reversed and remanded the district court's injunction. Op. 7. Despite holding that the Individual Plaintiffs have standing, the panel majority concluded that CASA lacks organizational standing. Judge King, writing in dissent, would have found that CASA has standing. Dissent 78. On the merits, the majority held that DHS's definition of "public charge" comports with the ordinary meaning of the term, Op. 36, and falls within the bounds of the agency's discretion, Op. 48. Judge King disagreed, concluding that "the statutory term 'public charge' has consistently described aliens significantly dependent on the government" and that DHS's definition "is far too broad and ventures well outside the bounds of any reasonable construction of the term." Dissent 80. Finally, although the majority vacated the district court's injunction in its entirety, it also indicated that the injunction's nationwide scope exceeded the court's equitable power. Op. 57.

ARGUMENT

I. THE PANEL'S ORGANIZATIONAL STANDING ANALYSIS CONFLICTS WITH SUPREME COURT AND FOURTH CIRCUIT PRECEDENT

Despite holding that the Individual Plaintiffs have standing to challenge the Public Charge Rule, Op. 27, the panel majority nonetheless reversed the district court's conclusion that CASA has organizational standing, Op. 26. The majority's position is unique among the courts that have considered organizational challenges

to DHS's Rule. *See New York*, 969 F.3d at 61–62; *Cook Cty.*, 962 F.3d at 219; *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1126 (N.D. Cal. 2019). The majority's conclusion stands alone for good reason: it cannot be reconciled with the foundational Supreme Court decision on organizational standing, *Havens Realty*, 455 U.S. 363, or with that case's Fourth Circuit precursor, *Pac. Legal Found.*, 664 F.2d 1221, and it could eviscerate organizational standing in this circuit if allowed to stand.

In *Havens Realty*, the Supreme Court held that an organization suffers a "concrete and demonstrable injury" when a defendant's unlawful acts "perceptibly impair[]" the organization's efforts to further its mission, causing a "consequent drain on [its] resources." 455 U.S. at 379. There, the Court concluded that Housing Opportunities Made Equal of Virginia (HOME) had standing to sue a real-estate company under the Fair Housing Act for discriminatory practices that "frustrated" HOME's "efforts to assist equal access to housing through counseling and other referral services." *Id.* (internal quotation marks omitted). Because these practices impeded its efforts to advance housing equality, HOME "devote[d] significant resources to identify and counteract" the real-estate company's discrimination, producing a "drain on [its] resources." *Id.* (internal quotation marks omitted).

The Public Charge Rule's impact on CASA is precisely the type that conveys standing under the *Havens Realty* framework. Dissent 76–78. CASA is a nonprofit organization with members of varying immigration statuses that seeks "to create a more just society by building power and improving the quality of life in low-income immigrant communities." JA29. CASA effectuates its mission through programs that assist its members in accessing public benefits to which they are entitled, and through the provision of legal counseling about adjustment of status and other immigration benefits. JA29–30. CASA not only has increased its investment in public education and abandoned other affirmative advocacy efforts in order to counteract the Rule's chilling effect on its members' participation in public-benefit programs, but it also has had to devote additional time and resources to counseling members about whether to receive public benefits and how those choices could affect their or their family members' immigration status. JA32–34. As in *Havens*, DHS's Rule has made more difficult and less effective CASA's core efforts to improve the quality of life in immigrant communities: more CASA members require counseling regarding the impact of the Rule, and counseling each member is more complex, expensive, and time-consuming. JA33. The Rule therefore has "perceptibly impaired" CASA's efforts to achieve its mission and caused a "drain on [its] resources" in the process. *Havens Realty*, 455 U.S. at 379.

Despite these similarities to *Havens Realty*, the panel majority held that CASA lacked standing because its efforts to counteract the Public Charge Rule's negative impacts were not "[]compelled" by the Rule and because the Rule does not inflict "operational harm" that "directly impairs" CASA's "ability . . . to function." Op. 23–26. But HOME itself could not have passed the majority's myopic test. Nothing beyond HOME's organizational mission compelled it to expend resources to counteract the defendant's discriminatory conduct. And although the housing discrimination challenged in *Havens Realty* rendered less effective HOME's efforts to promote housing equality, it did not "directly impair[]" the organization's ability to function. Op. 25.

The panel majority's analysis also conflicts with *Pacific Legal Foundation*, in which this Court held that an organization had standing to challenge a Food and Drug Administration program to reimburse participants in proceedings before the agency. Even though the plaintiff-organization was not harmed directly by reimbursements to other organizations, the Court held that it had standing because the regulation would have indirectly "increased [the] time and expense" for the organization to participate effectively in agency proceedings. 664 F.2d at 1224. The Court also expressly rejected the notion that the organization's *choice* to spend its resources in this way defeated its claim to standing. *Id.* There is simply no way to reconcile that decision with the panel's holding here.

The panel majority's holding flows from a misreading of *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012). Op. 22–23. There, this Court held that the Second Amendment Foundation (SAF) lacked standing to challenge laws and regulations governing interstate handgun transfers. *Id.* at 670. The organization alleged that it had suffered injury by incurring costs responding to inquiries about the challenged laws. *Id.* at 675. But, critically, SAF "did not allege that the [challenged] law[s] impaired its organizational mission," Dissent 78, leading the court to conclude that SAF's decision to respond to inquiries about the laws was merely a "budgetary choice." *Lane*, 703 F.3d at 675 (quoting *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)); *accord Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 361–62 (4th Cir. 2020) (allegations that a law undermined an organization's "purpose and message," without more, do not "explain a way in which [the law] 'perceptibly impaired' its activities" (quoting *Havens Realty*, 455 U.S. at 379)). CASA's complaint clearly pleads organizational harm caused by DHS's Rule, and the Court should grant further review to correct the panel's misreading of *Lane* and reconcile that case's analysis with that of *Havens* and *Pacific Legal Foundation*.

Finally, in addition to being necessary to conform to Supreme Court and Fourth Circuit precedent, further review of this issue is exceptionally important because the majority's narrow test threatens to undermine organizations' ability to

challenge laws and regulations in a wide range of issue areas, including in instances where an organization might be the best or only viable plaintiff.[3]

II. THE PANEL'S HOLDING ON THE MERITS PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

The panel majority's decision also warrants *en banc* review because it validates an interpretation of the statutory term "public charge" that is "far beyond the limits set by Congress" and that radically expands DHS's authority to deny admission and adjustment of status to vast swaths of noncitizens. Dissent 72. Moreover, the majority's decision conflicts with the Second and Seventh Circuits' well-reasoned opinions concluding that the Public Charge Rule "falls outside the statutory bounds" set by the INA. *New York*, 969 F.3d at 75; *see also Cook Cty.*,

[3] *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1266–67 (9th Cir. 2020) (rule restricting availability of asylum to ports of entry); *Common Cause v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (law regulating voter-roll maintenance); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110–11 (2d Cir. 2017) (ordinance regulating roadside employment solicitation); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (law regulating interpretation assistance for voters); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (voter-registration law); *Nnebe v. Daus*, 644 F.3d 147, 156–57 (2d Cir. 2011) (regulation governing suspension of taxi licenses upon criminal conviction); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (voter-registration law); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132–33 (D.C. Cir. 2006) (regulations governing access to experimental treatments); *CASA de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165, at *6, 11 n.7 (D. Md. Sept. 11, 2020) (applying the majority's test and finding that a legal-services provider lacked standing to challenge asylum regulations that posed an existential threat to the organization's funding).

962 F.3d at 229 (DHS's Rule "does violence to the English language and the statutory context" of the public-charge provision).

The majority decision is erroneous in several respects. First, the majority elides distinct analytical frameworks in a way that could undermine doctrinal distinctions in this Court's case law. Sometimes the panel majority describes the term "public charge" as having a single, clear meaning that matches DHS's expansive definition. Op. 29, 34, 36, 37, 44. Elsewhere, the majority treats the term as ambiguous by design and concludes that DHS's interpretation is entitled to *Chevron* deference. Op. 31, 34, 40, 45, 71. Still other times, the majority suggests that courts should have a circumscribed role in *any* matter touching upon immigration, Op. 48, a position that conflicts with this Court's recent rejection of the U.S. Customs and Immigration Services' interpretation of another INA provision. *See Perez v. Cuccinelli*, 949 F.3d 865, 873 (4th Cir. 2020) (en banc).

Second, the panel majority completely ignores key evidence 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. The majority situates its analysis of the public-charge provision in 1952—seven decades after its original enactment. But the 1882 statute that created the public-charge provision also established an "immigrant fund . . . for the care of immigrants arriving in the United States." Act of Aug. 3, 1882, § 1, 22 Stat. at 214; *see also Head Money*

Cases, 112 U.S. 580, 590–91 (1884) (describing the fund as "highly beneficial to the poor and helpless immigrant"). Accordingly, when the law was first enacted, "the prospect of needing some public aid did not—standing alone—render an arriving immigrant an inadmissible public charge."[4] Dissent 84.

Third, in its attempt to show that the term "public charge" either dictates DHS's expansive definition or is ambiguous enough to encompass it, the panel majority distorts cases and other authorities that, "read *in toto*," actually support Plaintiffs' position. Dissent 88. *See e.g.*, *In re Feinknopf*, 47 F. 447, 447–48 (E.D.N.Y. 1891) (noncitizen, despite having only 50 cents in savings, was not inadmissible because he could "find employment in his trade"); *Matter of H-*, 1 I. & N. Dec. 166, 168 (BIA 1948) (noncitizen, despite having been diagnosed with "psychopathic inferiority," was not inadmissible because there was "an assurance that he w[ould] be reemployed"); Charles Gordon, *Aliens and Public Assistance*, 6 Immigr. & Naturalization Service Monthly Rev. 115, 116 (1949) (identifying as the "decisive concept" of public-charge determinations the "desire to become a productive member of the community, coupled with freedom from

[4] Even the Ninth Circuit, which stayed preliminary injunctions against the Rule after erroneously concluding that the meaning of "public charge" changed in the modern era, agreed that the term originally meant "those who were unwilling or unable to care for themselves" to a degree necessitating "hous[ing] in a government or charitable institution, such as an almshouse, asylum, or penitentiary," and *did not* encompass noncitizens who "received merely some form of public assistance." *San Francisco*, 944 F.3d at 793.

serious physical or mental deficiencies," *not* possession of "immediate assets"); Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 Yale L.J. 18, 23 (1939) (identifying cash assistance as "the modern counterpart of the pauper, almshouse and charity concept" because "[d]estitution is the basis" for such aid).

The majority also makes much of a circuit split that emerged in the early twentieth century over whether a noncitizen could be excluded on public-charge grounds based on a likelihood of being incarcerated. Op. 42. Whether or not Congress intended the public-charge provision to encompass such circumstances, an incarcerated individual indisputably depends primarily on the government for subsistence. *New York*, 969 F.3d at 66. Therefore, this dispute is irrelevant to DHS's novel assertion that the term "public charge" encompasses individuals who are not substantially dependent on the government for subsistence.

Finally, the panel majority never even cites the Attorney General opinion in *Martinez-Lopez*, 10 I. & N. Dec. 409, which is binding on DHS and cannot be reconciled with the Public Charge Rule. In *Martinez-Lopez*, the Attorney General summarized and synthesized the "extensive judicial interpretation" of the public-charge provision and held that "the statute requires more than a showing of a possibility that the alien will require public support" and, therefore, that a "healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Id.* at 421. The Public Charge Rule plainly conflicts with that

decision. DHS's definition of "public charge" could apply to more than half of the U.S.-born population,[5] a universe of individuals that necessarily includes many "healthy" people "in the prime of life." Thus, the Rule "ordinarily" would render inadmissible the very sorts of people that *Martinez-Lopez* precludes DHS from treating as likely to become a public charge.

Attorney General and BIA opinions are binding on DHS. 8 C.F.R. § 1003.1(g)(1); *New York*, 969 F.3d at 71. Therefore, even if judicial and administrative decisions over the past 138 years had not consistently interpreted the public-charge provision, DHS still would lack the authority to depart from the statutory bounds recognized in *Martinez-Lopez* and subsequent BIA decisions the panel majority also fails to acknowledge.[6] Accordingly, *en banc* review is warranted to address the Rule's incompatibility with those binding opinions.

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[5] Danilo Trisi, Ctr. on Budget & Policy Priorities, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means a Chance to Come to or Stay in the U.S.* 5 (2019), https://perma.cc/4J72-GF6P.

[6] *See, e.g.*, *Matter of A-*, 19 I. & N. Dec. 867, 870 (BIA 1988) (holding that "undue weight" placed on a noncitizen's low income "overshadow[ed] the more important factors; namely, that the applicant has now joined the work force, that she is young, and that she has no physical or mental defects which might affect her earning capacity"); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (woman currently receiving welfare benefits nevertheless was unlikely to become a public charge because she was 28, healthy, and capable of finding employment).

III. THE PANEL'S DECISION CONFLICTS WITH FOURTH CIRCUIT PRECEDENT ON NATIONWIDE INJUNCTIONS

Despite vacating the district court's injunction, the panel majority nonetheless extended itself to reject the injunction's nationwide scope. According to the majority, nationwide injunctions "transgress . . . traditional notions of the judicial role" and "constitutional and statutory limits on the federal equity power." Op. 57. This unwarranted, sweeping language conflicts directly with this Court's precedential decisions in *IRAP*, 857 F.3d 554, and *Roe*, 947 F.3d 207.

In *IRAP*, the *en banc* Court affirmed a nationwide preliminary injunction against President Trump's second travel ban, holding that "nationwide injunctions are especially appropriate in the immigration context." 857 F.3d at 605. Earlier this year in *Roe*, this Court affirmed a nationwide injunction against the Department of Defense's policies that effectively required the discharge of HIV-positive servicemembers. 947 F.3d at 232. Rejecting the very arguments advanced by the panel majority in this case, the Court held that "binding precedent" establishes that nationwide injunctions are not "categorically beyond the equitable power of district courts." *Id.* (citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)).

By ignoring *IRAP* and *Roe*, the panel majority flouted the rule that "one panel cannot overrule another," let alone a decision of the *en banc* Court. *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004). The Court should

grant *en banc* review to correct the majority's departure from binding circuit authority on nationwide injunctions.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the panel grant rehearing or, in the alternative, that the Court grant rehearing *en banc*.

Dated: September 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Rule 35(b)(2) of the Federal Rules of Appellate Procedure because, excluding the parts of the document excluded by Rule 32(f), it contains 3,897 words. In addition, this motion complies with the typeface and type-style requirements of Rule 32(a)(5)–(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Jonathan L. Backer
Jonathan L. Backer

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 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/ Jonathan L. Backer
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