No. 19-2222

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASA DE MARYLAND, INC., *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland
No. 8:19-cv-2715-CBD

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN SUPPORTING PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

Allison M. Zieve
Scott L. Nelson
Nandan M. Joshi
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae Public Citizen

September 17, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2222 Caption: Casa de Maryland, Inc. et al. v. Donald J. Trump, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Public Citizen, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Allison M. Zieve Date: 9/17/20

Counsel for: Amicus Curiae Public Citizen, Inc.

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE*

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and the courts. As part of its consumer advocacy efforts, Public Citizen has in numerous instances brought suit challenging agency actions under the Administrative Procedure Act (APA), often requesting vacatur of the rule at issue. Public Citizen therefore has significant expertise in APA litigation and a significant interest in the scope of remedies available under the APA.

Public Citizen submits this brief to urge the Court to grant the petition for rehearing en banc, to address the panel majority's decision that district courts lack authority to award so-called "nationwide injunctions" (*i.e.*, relief that has the effect of benefiting not only the plaintiff, but also persons who are not parties to the case) in cases involving facial challenges to agency rulemaking under the APA. The panel opinion would unduly constrain the district courts' ability to grant nationwide, or even circuit- or state-wide, relief. The panel majority's analysis imposes limits on district court authority

* Public Citizen has filed a consent motion for leave to file this brief. The brief was not authored in whole or part by counsel for a party. No party or counsel for a party, and no person other than the amicus curiae or its counsel, contributed money intended to fund the brief's preparation or submission.

inconsistent with decisions of other courts of appeals that have addressed the propriety of nationwide relief in APA cases, and its analysis fails to take into account the most recent Supreme Court guidance on this subject. Public Citizen is concerned that the panel majority's opinion, if left in place, would disrupt the orderly administration of the federal regulatory system.

ARGUMENT

The district court concluded that plaintiffs-appellees (Casa de Maryland) were likely to succeed on the merits of their claim that defendants-appellees (DHS) issued DHS's "public charge rule" in violation of the APA. *Casa De Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 778–84 (D. Md. 2019). To afford Casa de Maryland "complete relief," the district court preliminarily enjoined DHS from enforcing the rule nationwide and postponed the effective date of the rule pending judicial review pursuant to section 705 of the APA, 5 U.S.C. § 705. *See* 414 F. Supp. 3d at 785–87.

On appeal, a divided panel of this Court reversed the district court's conclusion that Casa de Maryland was likely to succeed on the merits of its APA claim. Although that decision obviated the need to address the geographic scope of the district court's injunction, the panel majority also addressed that subject and characterized nationwide injunctions—indeed,

any "geographically-limited injunction"—as a "drastic" remedy to be issued only in "extraordinary circumstances." Slip op. 57, 59 n.7, 68.

That alternative holding warrants en banc review. The APA does not regard nationwide relief as "drastic" or "extraordinary" in facial challenges to agency rulemaking. Rather, in such cases, the APA presumes that reviewing courts will issue decisions that have nationwide effect, subject to a reviewing court's equitable authority to grant narrower relief in appropriate cases. The panel majority's reasoning, moreover, cannot be reconciled with decisions of the Supreme Court and several other courts of appeals regarding the propriety of nationwide relief in APA rulemaking challenges. En banc review of the remedial question is called for to address that inconsistency.

1. The APA authorizes courts to take two actions with respect to agency actions that are under review. First, a reviewing court may "postpone the effective date of an agency action" pending review. 5 U.S.C. § 705. Second, the reviewing court may "set aside agency action" found to be unlawful. *Id.* § 706(2). When the agency action under review is a rule, a court's exercise of these authorities often will necessarily benefit third parties not before the court: If a court postpones the effective date of a rule pending review, *see id.* § 705, then the rule will not go into effect while judicial review is underway. If a court "sets aside" a rule after review, *id.* § 706(2), the rule is "annul[led]"

or "vacate[d]," and therefore without effect. Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635, 655 (4th Cir. 2018) (vacating agency action found to be "legally deficient").

In addition to authorizing the vacatur of rules and other affirmative actions taken by agencies, section 706 also provides that a court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). When the agency action being unlawfully withheld or unreasonably delayed is a rule, a successful challenge to the agency's failure to act will necessarily benefit both the challenger before the court and all other persons with an interest in the rule.

In much the same way, when a party successfully obtains preliminary or final relief in a challenge to an agency's final rule, the court's decision implicates the interests of all persons affected by the rule, not just the litigants in the case. Indeed, if an agency issues a new proposed rule with opportunity for comment in response to a court decision or revises its rule to conform to a court's decision, those actions necessarily affect litigants and non-litigants alike.

To be sure, the APA permits the reviewing court to issue relief that is narrower in scope. The APA preserves the court's "power [to] deny relief on

any … appropriate legal or equitable ground." 5 U.S.C. § 702. A reviewing court, for example, may have equitable discretion to leave an unlawfully promulgated rule in place pending remand to the agency. *See*, *e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (discussing remedy of remand without vacatur); *but see Sierra Club*, 909 F.3d at 655 ("This Court has never formally embraced the … remand without vacatur approach"). Nonetheless, "[t]he ordinary practice is to vacate unlawful agency action." *United Steel*, 925 F.3d at 1287.

2. The panel majority's analysis upends the APA's remedial framework. In this case, the district court's preliminary injunction had the same effect as the grant of a postponement of the rule's effective date under § 705. *See Casa de Maryland*, 414 F. Supp. 3d at 770. The panel majority concluded, however, that such relief should have nationwide effect "only in extraordinary circumstances." Slip op. 68. The panel majority went further and applied its skepticism to "geographically-limited injunction[s]" of less than nationwide scope. *Id.* at 59 n.7. Under the panel majority's view, the presumptive remedy in APA rulemaking challenges is not postponement of the challenged rule's effective date or setting aside the rule. Instead, the remedy is to treat the rule's effective date as postponed or the rule as set aside *only* with respect to the parties to the lawsuit.

The panel majority's approach to APA remedies would undermine uniform application of agency rules and create confusion and uncertainty among the regulated industry and the public. The panel majority invites greater use of class actions in APA cases as a means of securing comprehensive relief. Slip op. 63. But class actions in the context of an APA rulemaking challenge would divide the regulatory world into persons who are class members and those who are not, thus requiring agencies to implement a system for identifying class members and potentially to maintain different regulatory regimes for class members and non-class members.

The problem would be even more acute when the plaintiff is an association, where distinguishing between those who could benefit from the court's injunction and those who could not would be nigh impossible. Here, for example, the district court noted that the organizational plaintiff Casa de Maryland has over 100,000 members. 414 F. Supp. 3d at 786. The panel majority's approach—under which the court could "have issued a narrower injunction barring the federal government from enforcing the DHS Rule against CASA's members," slip op. 69—would require the development and maintenance of extensive and costly tracking capabilities to ensure that these

members, and only these members, obtain the protection afforded by the court's injunction.

The panel majority's suggestion that judicial relief in APA cases should be limited to the particular litigants to a case ignores entirely the problem of petitions to review agency action that are filed directly in the courts of appeals. *See* slip op. 66, 67, 70 (addressing only the district court's authority); *see also*, *e.g.*, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2053 (2019) (describing review of Federal Communications Commission rules). Congress has directed that petitions for review filed in multiple courts of appeals be consolidated in a single circuit, 28 U.S.C. § 2112, which has the power to stay an agency's rule pending review and "enjoin[], set[] aside, or suspend[]" an agency rule found to be invalid, 28 U.S.C. § 2349. But under the panel majority's approach, which the majority indicated that it believes reflects constitutional limits on the federal courts' powers (*see* slip op. 57–58), direct review in the court of appeals typically would produce no greater relief than district court review—only the parties before the court could benefit from the court's decision and the agency would remain free to apply its rules to third parties who had not secured an injunction for themselves. That result would be incompatible with

Congress's goal in enacting direct review provisions: fostering national uniformity in the application of various regulatory systems.

3. The panel majority's analysis suggests that nationwide injunctions improperly afford relief to persons who are not parties to the litigation. Court judgments, however, commonly benefit persons who are not parties to the litigation. When a court issues a consent decree in a government enforcement action, the decree often "extends relief" to members of the public, even though the public typically cannot enforce the decree directly (*e.g.*, through contempt proceedings). *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). Likewise, a court decision striking down legislative districts as unconstitutional racial gerrymanders affects all the voters of those districts, even voters who are not parties to the lawsuit. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017). And when a court orders an owner of a public accommodation to comply with the Americans with Disabilities Act, the benefits accrue to both the plaintiff and to all other disabled users of the accommodation. *See*, *e.g.*, *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1078 (9th Cir. 2004) (upholding injunction requiring modification to theater's companion-seating policy). Indeed, earlier this month, this Court sitting en banc upheld a state-wide injunction over the government's objection that relief should be limited to the plaintiff

municipality and its subgrantees. *Mayor of Baltimore v. Azar*, No. 19-1614, 2020 WL 5240442, at *25–*26 (4th Cir. Sept. 3, 2020).

Moreover, the panel majority's concern about courts issuing decisions that affect the interests of non-parties makes little sense in the context of an APA challenge to an agency rule. For example, when trade groups challenge an agency regulation designed to benefit consumers, a court decision will necessarily affect the rights of consumers who are not parties. That outcome flows naturally from the nature of APA challenges to agency rules; it does not signify a departure from traditional equitable principles or constitutional constraints on Article III courts.

4. The panel majority's approach toward the scope of injunctive relief conflicts with the approach taken by the Supreme Court and other courts of appeals.

Earlier this year, the Supreme Court confirmed that nationwide relief could be granted through vacatur of agency action. In *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), the Court addressed cases arising from three circuits that had concluded that DHS's rescission of the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious. In the case arising out of the District of Columbia circuit, the district court had vacated the rule.

In the cases arising from the Second and Ninth circuits, the district courts had issued nationwide preliminary injunctions. The Court concluded that the rescission violated the APA and affirmed vacatur of the rule. The Court then explained that its affirmance of the D.C. court's vacatur "ma[de] it unnecessary to examine the propriety of the nationwide scope of the injunctions" issued by the two other district courts, *id.* at 1918 n.7, and it vacated the preliminary injunctions issued by the other two courts, *id.* at 1918. The Court's actions recognized that vacating the DACA rescission under the APA had nationwide effect—the same effect as a nationwide injunction against application of the DACA program—mooting the issue of the scope of the injunctions in the other two cases.

Other courts of appeals have likewise recognized the propriety of nationwide relief in successful APA rulemaking challenges. In the D.C. Circuit, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). That court recognizes that, when a plaintiff successfully challenges a "rule of broad applicability," "a single plaintiff, so long as he is injured by the rule, may

obtain 'programmatic' relief that affects the rights of parties not before the court." *Id.* (internal quotation marks omitted).

Likewise, as the Ninth Circuit recently explained, "there is 'no general requirement that an injunction affect only the parties in the suit.'" *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 856 (9th Cir. 2020) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1169–70 (9th Cir. 1987)). "Vacatur of an agency rule prevents its application to all those who would otherwise be subject to its operation." *Id.* at 856. The Second Circuit, in a separate challenge to DHS's public charge rule, also had "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree[d] that such injunctions may be an appropriate remedy in certain circumstances." *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020).

The Seventh Circuit also recently concluded that "both historical and current practice lends support to a determination that the courts possess the authority to impose injunctions that extend beyond the parties before the court," and that such relief is proper when, for example, it is "necessary 'to provide complete relief to plaintiffs, to protect similarly-situated nonparties, and to avoid the chaos and confusion that comes from a patchwork of injunctions.'" *City of Chicago v. Barr*, 961 F.3d 882, 916–17 (7th Cir. 2020)

(quoting Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1101 (2018)). The Seventh Circuit explained that class actions are not a "realistic alternative" to nationwide relief, *id.* at 917, and it warned that "[a]bsent the ability to grant injunctive relief that extends beyond the particular party, courts will have little ability to check the abuse of power that presents the most serious threat to the rule of law—such as that which is swift in implementation, widespread in impact, and targeted toward those with the least ability to seek redress," *id.* at 918.

Because the panel majority's analysis of a reviewing court's authority under the APA conflicts with these decisions, this Court should grant the petition for rehearing and address the remedial question en banc.

CONCLUSION

This Court should grant the petition for rehearing en banc.

September 17, 2020

Respectfully submitted,

/s/ Allison M. Zieve

Allison M. Zieve
Scott L. Nelson
Nandan M. Joshi
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae Public Citizen

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Amicus Curiae Public Citizen Supporting Plaintiffs-Appellees' Petition for Rehearing En Banc complies with the type-volume limitations of FRAP 32(a)(7)(B) and 29(d). The brief is composed in a 14-point proportional typeface, Georgia. As calculated by my word processing software (Microsoft Word), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 2594 words.

/s/ Allison M. Zieve
Allison M. Zieve