IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASA de Maryland, Inc., et al., *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al., *Defendants*.	Civil Action No. 8:19-cv-2715-PWG

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
<u>MOTION FOR STAY OF INJUNCTION PENDING APPEAL</u>

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INTRODUCTION

Between October 11 and October 14, 2019, five district courts, including this one, preliminarily enjoined enforcement of the Department of Homeland Security (DHS)'s Public Charge Rule—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"]—after provisionally concluding that the Rule cannot be reconciled with the text of the Immigration and Nationality Act (INA). *See* Mem. Op. & Order (Op.) 22, ECF No. 65; Revised Order, ECF No. 68.[1] Two weeks after the Public Charge Rule was enjoined, Defendants moved in each of the five district courts to stay those injunctions pending appeal. *See* Defs.' Mot. Stay of Inj. Pending Appeal & Mem. Law (Mot.), ECF No. 69.[2] Defendants' stay motion in this case rehashes the same arguments that they made in opposing Plaintiffs' motion for a preliminary injunction—and that already were rejected in the Court's thorough and well reasoned opinion. *See* Defs' Mem. Opp'n Pls' Mot. Prelim. Inj. (PI Opp'n), ECF No. 52. Defendants therefore have not carried their burden of showing that the circumstances of this case

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[1] *See also Cook County v. McAleenan*, No. 19 C 6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 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); *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); *Make the Road N.Y. v. Cuccinelli*, No. 19 Civ. 7993 (GBD), 2019 WL 5484638 (S.D.N.Y. Oct. 11, 2019); *City & County 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).

[2] *See also* Mot. Stay Inj. Pending Appeal, *Cook County v. McAleenan*, No. 19 C 6334 (N.D. Ill. Oct. 25, 2019), ECF No. 90; Defs.' Mot. Stay Inj. Pending Appeal & Mem. Law, *Washington v. U.S. Dep't of Homeland Sec.*, No. 4:19-CV-5210-RMP (E.D. Wash. Oct. 25, 2019), ECF No. 169; Mot. Stay Inj. Pending Appeal, *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777 (GBD) (S.D.N.Y. Oct. 25, 2019), ECF No. 111; Mot. Stay Inj. Pending Appeal, *Make the Road N.Y. v. Cuccinelli*, No. 19 Civ. 7993 (GBD) (S.D.N.Y. Oct. 25, 2019), ECF No. 149; Mem. Law Supp. Defs.' Mot. Stay Inj. Pending Appeal, *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, Nos. 19-cv-04717-PJH, ECF No. 120, 19-cv-04975-PJH, ECF No. 125 (N.D. Cal. Oct. 25, 2019).

warrant a discretionary grant of a stay.

ARGUMENT

A stay pending appeal is "an exercise of judicial discretion," not a "matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginia Ry. Co.*, 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, Defendants must (1) make "a strong showing" that they are likely to succeed on the merits and (2) demonstrate that they will be irreparably injured absent a stay. *See id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Moreover, Defendants 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," and the final two factors merge when the government is a party. *Id.* at 434–35. District courts in the Fourth Circuit have divided over whether the party seeking a stay must satisfy each of the factors or whether "a stronger showing on some factors [can] make up for a weaker showing on others."[3] *Rose v. Logan*, No. RDB-13-3592, 2014 WL 3616380, at *1 (D. Md. July 21, 2014). Under either approach, Defendants have not carried their burden.

[3] Prior to 2009, the Fourth Circuit evaluated both motions for preliminary injunctions and stay motions under the latter approach. *See Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977); *Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970). In 2009, the Fourth Circuit held that plaintiffs must satisfy all four of the preliminary-injunction factors to obtain that form of relief. *The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Because "[t]here is substantial overlap between [the stay factors] and the factors governing preliminary injunctions," *Nken*, 556 U.S. at 434, some district courts have applied the *Real Truth* test to stay motions as well, *see Rose*, 2014 WL 3616380, at *1.

I. TEMPORARY MAINTENANCE OF THE STATUS QUO WILL NOT IRREPARABLY HARM DEFENDANTS

Delayed implementation of the Public Charge Rule will not irreparably harm Defendants. According to Defendants, the Court's preliminary injunction forces them to grant lawful-permanent-resident (LPR) status to some noncitizens who would be deemed inadmissible on public-charge grounds if DHS's new Rule were in effect, leading "inevitably" to "additional expenditure of government resources." Mot. 1, 6–7. But the Court's preliminary injunction does nothing more than preserve the status quo that has governed public-charge determinations "for arguably more than a century and at least since 1999." Op. 34. Defendants are not harmed by continuing, on a temporary basis, to conduct public-charge determinations in the same manner that they have for decades, especially where, as here, the Court has concluded that the standard that Defendants wish to adopt likely is legally infirm. *Id.* at 22. Moreover, because public-charge determinations are forward-looking assessments, the likelihood of noncitizens receiving public benefits in the future is speculative and anything but "inevitabl[e]." *See* Mot. 7.

Defendants also are wrong to characterize as a harm any additional expenditures on public benefits that might flow to noncitizens who receive LPR status during the pendency of this lawsuit. *See id.* at 7. Congress has chosen to make some public benefits available to certain foreign-born individuals (in most instances, only after they have obtained LPR status). *See* 8 U.S.C. §§ 1611(b), 1612, 1613, 1615. Therefore, any costs to the government associated with administering those benefits are attributable to policy choices made by Congress, *not* to the Court's preliminary injunction.

Defendants also err by continuing to discuss the public benefits at issue in the Public Charge Rule as if they are widely available to non-LPRs. *See* Mot. 7 (arguing that "the Rule's future effectiveness [will be] reduced" by immigration officials' inability to consider in future

public-charge determinations "any public benefits" currently being received by noncitizens that were not considered under preexisting DHS policy). As Plaintiffs have explained before, federal law prohibits most non-LPRs who might one day be subject to a public-charge determination "from receiving most if not all of the benefits at issue in the Public Charge Rule." Pls.' Reply Mem. Supp. Mot. Prelim Inj. (Reply) 15, ECF No. 59 (citing 8 U.S.C. §§ 1611, 1621(a), (d), 1641(b)); *see also* Final Rule, 84 Fed. Reg. at 41,313 ("Aliens who are unlawfully present and nonimmigrants physically present in the United States . . . are generally barred from receiving federal public benefits other than emergency assistance."). Therefore, there is little if any risk of noncitizens receiving benefits that would be at issue in a future public charge determination under the Public Charge Rule.

Finally, Defendants argue unpersuasively that the preliminary injunction "imposes significant administrative burdens" on them. Mot. 7. But they arguably will incur greater administrative costs by continuing to make preparations to implement a rule that this Court has found likely to be vacated. Moreover, Defendants fail to explain why the "significant time" they have spent "preparing implementation of the Rule" will go to waste if they ultimately prevail on appeal. *See id.* In his declaration, U.S. Customs and Immigration Services (USCIS) Associate Director, Field Operations Directorate Daniel Renaud states that the preliminary injunction has "put on hold" a variety of "outreach plans," including "host[ing] a national engagement," creating "an informational toolkit," and conducting social media outreach. Renaud Decl. ¶ 5, ECF No. 69-1. Defendants are not injured by the deferral of these as-yet unrealized plans. And although contractors hired by USCIS for implementation of the Public Charge Rule might "seek other employment," Defendants have not alleged that any financial consequences will result

from these independent decisions by third parties. *See* Mot. 7; Renaud Decl. ¶ 6. [4]

II. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON APPEAL

Defendants advance no new justiciability or merits arguments in support of their stay motion and therefore are unlikely to succeed on the merits for the reasons set forth in the Court's opinion granting Plaintiffs' motion for a preliminary injunction.

With respect to Article III standing, Defendants argue, as they did in their opposition to Plaintiffs' motion for a preliminary injunction, PI Opp'n 8–9, that Plaintiff CASA de Maryland, Inc. (CASA), lacks organizational standing to challenge the Public Charge Rule because any diversion of resources that it has experienced is the result of its "own budgetary choices." Mot. 2 (quoting *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012)). But, as the Court recognized, the Public Charge Rule threatens CASA's "core mission" by forcing it to divert resources from "affirmative advocacy . . . [,] including, for example, advocating on public health issues at the state and local level in Maryland," to educating and counseling its members about the Public Charge Rule and providing additional legal and other services. Op. 13–14 (citing Am. Compl. ¶¶ 122–24, ECF No. 27); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that an organization had Article III standing based on its counseling and referral services being "perceptibly impaired" by defendants' racial-steering practices and the "consequent drain on the organization's resources"). Defendants fail to appreciate that the Public Charge Rule presents a "Sophie's choice" for CASA. *See* Prelim. Inj. Hr'g Tr. 55:10, Oct. 10, 2019, ECF No. 71 (Defendants arguing that an organizational plaintiff's diversion of

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[4] The severity of the harm that the preliminary injunction allegedly imposes on Defendants is also belied by their two-week delay in filing a motion to stay in any of the five district courts that issued preliminary injunctions. *See supra*. Defendants presumably would have acted more expeditiously in seeking a stay if they truly are harmed by continuing to grant adjustment of status to noncitizens who are admissible under the preexisting and longstanding interpretation of the law.

resources must stem from being "caught between a rock and a hard place" to constitute injury in fact). The organization can maintain its preexisting budgetary priorities and fail to counteract the significant negative impacts of the Public Charge Rule to its members' health and well-being, *see* Escobar Decl. ¶¶ 10–16, ECF No. 12-1, or it can mitigate the Rule's adverse effects through increased spending on education, outreach, legal, and other resources, but only at the expense of its affirmative advocacy efforts, *id.* ¶¶ 23–24. Whichever choice CASA makes, its mission "to create a more just society by building power and improving the quality of life in low-income immigrant communities" would be impaired. *Id.* ¶ 4. Because the Public Charge Rule will undermine CASA's mission no matter what budgetary choices it makes, CASA's injuries are more than "mere expense[s]." *See 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)).

Defendants also continue to argue that Plaintiffs' claims are not ripe, stating that "there is no allegation that [CASA] plans to channel any further resources" to address the Rule. Mot. 3; *see also* PI Opp'n 10. But as the Court recognized, CASA "is already experiencing harms through the frustration of its mission and diversion of funds at the expense of other time-sensitive activities . . . [and] *will continue to bear these costs if judicial review is delayed*." Op. 15 (emphasis added); *see also* Am. Compl. ¶ 121 ("CASA . . . will continue to incur such costs as long as the unlawful and discriminatory Public Charge Rule remains in effect."); Escobar Decl. ¶¶ 20–22 (stating that CASA "will continue to have to devote its limited resources" to increased legal services, that it "will be forced to redirect more of its resources" to combat the Rule's chilling effects, and that the Rule "will continue to consume[] significant resources"). CASA's claims are ripe because they are "purely legal" and are "not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

Defendants further renew their argument that CASA does not fall within the INA public-charge provision's zone of interests. Mot. 3; *see also* PI Opp'n 11–13. They assert that CASA cannot rely on its "derivative" interest in advancing immigrants' health and economic status as a foundation for establishing that it is a proper party to challenge the Public Charge Rule under the Administrative Procedure Act. Mot. 3. But Defendants cite no case law supporting this strained interpretation of the zone-of-interests test. As the Court recognized, the zone-of-interests test is much broader than Defendants suggest, barring suit only when a plaintiff's interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Op. 18 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchack*, 567 U.S. 209, 225 (2012)). And CASA's interests cannot be considered attenuated from those advanced by INA's public-charge provision because, as the Court noted, DHS itself has acknowledged that the Public Charge Rule will spur immigration advocacy groups like CASA to help their members understand and comply with it. *See id.* (citing Final Rule, 84 Fed. Reg. at 41,301).

The merits arguments that Defendants raise in support of their stay motion are no stronger than their justiciability arguments. Although Defendants dispute many of the Court's conclusions of law, one they do not challenge is that *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (A.G. 1964), is binding on DHS. *See* Op. 28 (citing 8 C.F.R. § 1003.1(g)(1)). As they have done previously, *see* PI Opp'n 23, Defendants instead selectively quote *Martinez-Lopez* in their stay motion, *see* Mot. 5, omitting its critical holding 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. Because the Public Charge Rule is "so expansive[] that it could cover as much as 50% of the U.S. population," it would exclude a substantial number of healthy people in the prime of their

lives. Op. 28 (citing Am. Compl. ¶ 68). Accordingly, the Rule cannot be reconciled with *Martinez-Lopez*. On this basis alone, Defendants are unlikely to prevail on appeal.

Defendants' other recycled merits arguments fare no better. Even though Defendants have acknowledged that "pauper" means "a person entirely destitute," PI Opp'n 14 (quoting *Century Dictionary & Cyclopedia* (1911)), they continue to seek refuge in a dictionary definition that equates the term "charge" with the term "pauper," Mot. 4 (citing *Dictionary of American and English Law* (1888); *see also* PI Opp'n 13. Defendants once again fault Plaintiffs for failing to cite a historical source that uses the precise words "primarily dependent" to describe the standard that has governed public-charge determinations for over a century, Mot. 4, but Plaintiffs have explained at length how the primarily dependent standard was distilled from the factual circumstances of a uniform body of judicial and administrative decisions, *see* Am. Compl. ¶¶ 42–48; Pls.' Corrected Mot. Prelim. Inj. & Supp. Mem. (PI Mot.) 13–18, ECF No. 28; Reply 10. By contrast, Defendants have identified no case in which a noncitizen was excluded on public-charge grounds based on her perceived likelihood of receiving some public assistance in the future, but not enough to be considered primarily dependent on the government for subsistence. *See* Op. 28–29. Defendants also continue to characterize the Immigration Act of 1882's immigrant fund as a "retroactive measure" meant only to provide temporary aid to noncitizens already living in the United States. Mot. 5. But, as Plaintiffs have explained, the relevant text from the 1882 act is forward-looking, describing the purpose of the fund as providing for "care of immigrants *arriving* in the United States." Reply 13 (quoting Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. 214, 214 (emphasis added)). Finally, Defendants persist in arguing that Congress overturned *Gegiow v. Uhl*, 239 U.S. 3 (1915), in its entirety, Mot. 5–6, even though the legislative history and subsequent case law make clear that Congress intended to overturn the

case only to the extent that it held the public-charge ground of inadmissibility to be coextensive with exclusions pertaining to noncitizens with physical or mental disabilities, Reply 11–12.

Because Defendants' justiciability and merits arguments are duplicative of those made in the preliminary-injunction briefing that the Court has persuasively rejected, Defendants have not made "a strong showing" that they are likely to prevail on appeal. *Nken*, 556 U.S. at 434.

III. A STAY IS NOT IN THE PUBLIC INTEREST

Citing a non-precedential stay decision issued by Chief Justice Roberts, Defendants argue that "[b]oth the government and the public will be irreparably harmed if the nationwide injunction is not stayed" because "[t]he federal government sustains irreparable injury whenever it 'is enjoined by a court from effectuating statutes enacted by representatives of its people.'" Mot. 6 (quoting *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). But the preliminary injunction does not prevent Defendants from enforcing the public-charge ground of inadmissibility. Indeed, DHS remains legally obligated to deny adjustment of status to any noncitizen "who is likely to become . . . primarily dependent on the government for subsistence." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999) (internal quotation marks omitted); *see also* 8 U.S.C. § 1182(a)(4). The limited effect of the preliminary injunction is to bar Defendants temporarily from implementing a new regulatory interpretation of the public-charge ground of admissibility that the Court has found likely to be "not in accordance with law." Op. 22 (quoting 5 U.S.C. § 706(2)(A)). The public interest therefore does not favor a stay.

In contrast, for the reasons discussed above, Plaintiffs will suffer irreparable harm if the preliminary injunction is stayed. *See supra* Part II. A stay will irreparably harm CASA by forcing it either to continue to divert resources away from affirmative advocacy and other

services or to turn a blind eye to the Public Charge Rule's adverse effects on its membership. And, as discussed at length in Plaintiffs' preliminary-injunction briefing, the Public Charge Rule would harm CASA's members, including the Individual Plaintiffs, by forcing them to make countless financial and life decisions with an eye toward avoiding adverse public-charge determinations and by generating confusion that inevitably will lead CASA's members to disenroll from or forgo public benefits to which they or their U.S. citizen family members are entitled. *See* PI Mot. 38, 40–43; Reply 23.

IV. THERE IS NO BASIS FOR A PARTIAL STAY

The Court correctly held that a nationwide injunction is justified because CASA's members are not permanently rooted in their current geographical locations and therefore might be subject to the Public Charge Rule so long as it remains in effect in any part of the nation. Op. 35. Moreover, a partial injunction will only "create further confusion among CASA's membership," so a partial injunction would not cure the injury that the Rule imposes on CASA as an organization. *Id.*; *see supra* Part II. Furthermore, because vacatur is the ordinary remedy in APA cases, *see Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), the Court was correct to conclude that a nationwide preliminary injunction is appropriate to prevent patchwork application of the Public Charge Rule on an interim basis when Plaintiffs have demonstrated a likelihood that the Rule ultimately will be invalidated. *See* Op. 35–36. Finally, binding Fourth Circuit precedent establishes that "nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that 'the immigration laws of the United States should be enforced vigorously and *uniformly*.'" *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.), *as amended* (June 15, 2017), *vacated and remanded on other grounds*, 138 S. Ct. 353 (2017) (quoting *Texas v. United States*,

809 F.3d 134, 187–88 (5th Cir. 2015) (emphasis in original)). The U.S. District Court for the Northern District of California's discussion of the propriety of enjoining the Public Charge Rule nationwide is therefore irrelevant to this Court's resolution of the matter. *See* Mot. 8 (citing *City & County 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, at *53 (N.D. Cal. Oct. 11, 2019)).

Defendants also make no persuasive arguments in favor of a partial stay that would prohibit DHS, on an interim basis, from applying the Public Charge Rule only to the Individual Plaintiffs and other CASA members identified to Defendants by name, city and state of residence, and phone number (if available). *See* Mot. 1; Defs.' Proposed Limited Inj., ECF No. 61. Many CASA members fear that disclosing their identities to the government might jeopardize their ability to adjust status in the future. Such fears are not unreasonable. The Second Circuit recently held that immigrant-rights activist Ravidath Ragbir had stated a claim under the First Amendment based on allegations that Immigration and Customs Enforcement had selectively enforced a deportation order against him in retaliation for his outspokenness against the government's immigration policies. *Ragbir v. Homan*, 923 F.3d 53, 57, 71 (2d Cir. 2019) ("A plausible, clear inference is drawn that Ragbir's public expression of his criticism, and its prominence, played a significant role in the recent attempts to remove him."). Moreover, this Court permitted plaintiffs to proceed under pseudonyms in *International Refugee Assistance Project v. Trump* because their relatives had "problematic immigration statuses that, if disclosed, could dissuade [the pseudonymous plaintiffs] from pursuing their rights in court." No. TDC-17-0361, 2017 WL 818255, at *2 (D. Md. Mar. 1, 2017). For similar reasons, many of CASA's members are reluctant to disclose their identities to the government. The partial stay that Defendants request is therefore untenable.

CONCLUSION

For all of the foregoing reasons, the Court should deny Defendant's motion for stay pending appeal.

Respectfully submitted,

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Dated: November 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Jonathan L. Backer*
Jonathan L. Backer