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*.	No. 8:19-cv-2715-PWG
CITY OF GAITHERSBURG, MARYLAND, et al., *Plaintiffs*, **v.** U.S. DEPARTMENT OF HOMELAND SECURITY, et al., *Defendants*.	No. 8:19-cv-2851-PWG

PLAINTIFFS' CONSOLIDATED SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION TO DISMISS

INTRODUCTION

It would be premature to dismiss plaintiffs or their claims based on the Fourth Circuit's divided preliminary injunction decision in the *CASA* litigation. *CASA de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Aug. 5, 2020) ("Op."). *CASA* Plaintiffs intend to petition for *en banc* review of the panel majority's holding on Plaintiffs' contrary-to-INA claim, the myopic rule it articulated for organizational standing, and its sweeping denunciation of nationwide injunctions. Aside from the still-hypothetical impact that the Fourth Circuit's decision might have on Plaintiffs' contrary-to-INA claim absent further review from the *en banc* court, the panel decision is largely irrelevant to this Court's evaluation of Defendants' motion.

Although the Fourth Circuit's majority opinion announced a new and narrow rule for organizational standing that conflicts with Supreme Court and Fourth Circuit precedent, non-organizational plaintiffs in both the *CASA* and *Gaithersburg* litigation have standing to challenge the Public Charge Rule, separate and apart from the panel's opinion. Moreover, several of the *Gaithersburg* Organization Plaintiffs can satisfy the Fourth Circuit's misguided test for organizational standing.

On the merits, the only issue before the Fourth Circuit was *CASA* Plaintiffs' claim that the Public Charge Rule is contrary to the INA. Defendants are wrong to conflate arbitrary-and-capricious review with the *Chevron* Step Two analysis conducted by the Fourth Circuit majority. They also overreach in arguing that dicta from the majority's opinion forecloses arguments that DHS acted arbitrarily and capriciously in adopting its Rule. The Court instead should look to the Second Circuit's decision in *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 4457951 (2d Cir. Aug. 4, 2020), which held that DHS acted arbitrarily and capriciously in adopting the Public Charge Rule for reasons similar to those alleged by Plaintiffs.

Finally, Defendants err in suggesting that the Fourth Circuit majority implicitly concluded that the deferential standard articulated in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), governs Plaintiffs' equal-protection claims. The Fourth Circuit discussed only whether agencies are entitled to heightened deference when engaged in statutory interpretation of immigration laws. It expressed no opinion on what standard of review governs equal-protection claims, like those of Plaintiffs, that concern noncitizens living in the United States.

ARGUMENT

I. *CASA* PLAINTIFFS INTEND TO PETITION FOR *EN BANC* REVIEW

As stated above, Plaintiffs intend to petition for *en banc* review of the Fourth Circuit's preliminary injunction decision. The petition is due on or before September 21, 2020. *See* Fed. R. App. P. 35(c), 40(a)(1). Plaintiffs therefore respectfully request that this Court refrain from dismissing any plaintiffs or claims based on the panel majority's decision until the Fourth Circuit's mandate has issued.

II. IRRESPECTIVE OF THE FOURTH CIRCUIT'S DECISION, PLAINTIFFS IN EACH CASE HAVE STANDING

The divided Fourth Circuit panel ruled that CASA lacks organizational standing, pronouncing a novel and inscrutable rule that limits organizational standing to threats to "a group's ability to *operate* as an organization" and not threats to "its theoretical ability to *effectuate* its objectives in its ideal world." Op. 22, 24. But, as Defendants concede, the panel majority held that the Individual Plaintiffs in the *CASA* litigation have standing to challenge the Rule. Op. 27. By implication, CASA has representational standing to sue, something that Defendants do not meaningfully contest. MTD Opp'n 7. Therefore, the Court need not address any other threshold jurisdictional issues in the *CASA* litigation.

In the *Gaithersburg* litigation, because Gaithersburg has standing to challenge the Rule, MTD Opp'n 4–5,[1] the Court may deny the motion to dismiss without ruling on the Organization Plaintiffs' standing—or, at least, may defer ruling on that question until after the resolution of the *CASA* Plaintiffs' *en banc* petition. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find [one plaintiff] has standing, we do not consider the standing of the other plaintiffs."); *Bostic v. Schaeffer*, 760 F.3d 352, 370 (4th Cir. 2014). Like every circuit court to have considered a lawsuit challenging the Public Charge Rule, the Second Circuit recently held that governmental plaintiffs in that case suffered concrete injuries due to the Rule's chilling effect on non-citizen use of public benefits and its anticipated economic impacts. *See New York*, 2020 WL 4457951, at *9–10; *see also Cook County v. Wolf*, 962 F.3d 208, 218 (7th Cir. 2020); *City and County of San Francisco v. U.S. Customs & Immigration Servs.*, 944 F.3d 773, 787–88 (9th Cir. 2019). The same analysis holds for Baltimore and Gaithersburg, and Defendants correctly do not contend that the Fourth Circuit's divided opinion implicates the Government Plaintiffs' standing.

If the Court is inclined to address the standing of Organization Plaintiffs in the *Gaithersburg* litigation under the panel majority's test, Immigration Law Center of Minnesota (ILCM), Tzedek DC, Jewish Community Relations Council of Greater Washington (JCRC), and the Jewish Council for Public Affairs (JCPA) satisfy that test because the Public Charge Rule has, in fact, impaired each of those organizations' ability to operate.[2]

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[1] Although the Court need not address Baltimore's standing because other plaintiffs in the *CASA* litigation have standing, Baltimore also has standing for the same reasons as Gaithersburg. *See* MTD Opp'n 4–5.

[2] CASA also contends that the Fourth Circuit panel misapplied its own test in concluding that CASA has not shown a cognizable organizational injury, although the Court need not address this issue. The Public Charge Rule imposes direct costs on CASA's efforts to assist its members

ILCM represents low-income immigrants on a wide range of issues, including but not limited to assisting clients with family-based petitions for adjustment of status. *Gaithersburg* Compl. ¶ 15. The Public Charge Rule increases the time required to assist clients in navigating the adjustment-of-status process. *Id.* ¶ 18. Because ILCM's work is funded by grants that are tied to specific types of services, increased time devoted to assisting clients with adjustment of status harms the organization's ability to meet its case quotas under its grants and also prevents it from meeting grant conditions in other areas of its work, jeopardizing critical funding streams. *Id.* The Rule thus impairs ILCM's ability to operate as an organization.

Tzedek DC provides legal assistance on debt-related issues to low-income clients, many of whom are immigrants. *Id.* ¶ 28. DHS's inappropriate consideration of credit reports and scores in determining noncitizens' likelihood of becoming a "public charge" will increase the demand for Tzedek DC's assistance improving its clients' credit scores and correcting errors in their credit reports that could jeopardize their ability to adjust status. *Id.* ¶ 29. If the Rule stands, Tzedek DC therefore will be forced either to turn away clients who require assistance navigating the debt-related aspects of the Public Charge Rule or to divert resources from a recently launched bilingual informational campaign on debtors' rights to free up resources to meet the increased demand. *Id.* Either way, the Rule will continue to have a significant impact on Tzedek DC's operations.

Plaintiffs JCRC and JCPA also have standing on behalf of their member organizations. JCRC represents numerous social-service providers, many of which serve noncitizens. *Id.* ¶¶ 20–21. JCPA, in turn, is a consortium of which JCRC is a member. *Id.* ¶¶ 25–26. The Public

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in accessing public benefits to which they are entitled and to safeguard their ability to adjust status. *CASA* ECF No. 12-1.

Charge Rule's chilling effect on public-benefit usage has increased noncitizens' reliance on social services provided by JCPA's and JCRC's members, straining those organizations' limited resources. *Id.* ¶ 27. Because of the harm suffered by JCPA's and JCRC's members, each consortium has representational standing to challenge DHS's Rule on behalf of their constituents. MTD Opp'n 6 (citing *N.Y. State Club Ass'n v. New York City*, 487 U.S. 1, 9 (1988)). Defendants contend that JCRC and JCPA members' claims of economic injury "are just as speculative as those the governmental Plaintiffs claimed." Defs.' Supp. Br. 3. The Rule's budgetary impact on JCRC and JCPA's members is indeed analogous to the budgetary strain that the Public Charge Rule places on municipalities' limited resources for social services. But as noted above, far from being "speculative," this is precisely the type of harm found to be sufficient to confer standing in other cases challenging the Public Charge Rule. For similar reasons, JCRC and JCPA also have standing in their representative capacities.

Accordingly, plaintiffs in both the *CASA* and *Gaithersburg* litigation have standing to sue, whether or not the Fourth Circuit's divided opinion guides this Court's standing analysis.

III. THE SECOND CIRCUIT CORRECTLY HELD THAT DHS ACTED ARBITRARILY AND CAPRICIOUSLY IN ADOPTING ITS RULE, AND THE FOURTH CIRCUIT'S OPINION IS INAPPOSITE

In analyzing Plaintiffs' arbitrary-and-capricious claims, this Court should look to the Second Circuit's well-reasoned decision in *New York*, which held that DHS acted arbitrarily and capriciously in adopting the Public Charge Rule. 2020 WL 4457951, at *26; *see also Cook County*, 962 F.3d at 233. As relevant to a subset of Plaintiffs' arbitrary-and-capricious arguments, MTD Opp'n 14–18, the court held that DHS failed to "provide[] a reasoned explanation for its changed definition of 'public charge' or the Rule's expanded list of relevant benefits." *New York*, 2020 WL 4457951, at * 26. According to the court, DHS's explanation for

its rejection of the preexisting definition of "public charge" was lacking because DHS "anchor[ed] its decision to change its interpretation in the perceived shortcomings of the prior interpretation[] and then fail[ed] to identify any defect." *Id.* at *27.

The Second Circuit further identified as a "fundamental flaw" of DHS's decisionmaking process that it encompassed within its definition of "public charge" the receipt of Supplemental Nutrition Assistance Program (SNAP) benefits, federal housing assistance, and Medicaid, without providing "*any* factual basis" for its belief that noncitizens receiving one or more of those benefits "would be unable to provide for their basic necessities" without them. *Id.* at *28. This stands in sharp contrast, as the court noted, to the Immigration and Naturalization Service's reliance on the expertise of benefit-granting agencies in developing the guidance that governed public-charge determinations over the past 30 years. *Id.*

Despite conceding that Plaintiffs' arbitrary-and-capricious claims were not before the Fourth Circuit on appeal, Defendants erroneously cast the panel majority's opinion as an "implicit rejection" of the Second Circuit's analysis and Plaintiffs' other arbitrary-and-capricious arguments not addressed by the Second Circuit. Defs.' Supp. Br. 4. Defendants also contend that dicta from the majority opinion forecloses Plaintiffs' arguments for why DHS acted arbitrarily and capriciously. *Id.* at 4–5. Defendants are wrong on both counts.[3]

[3] Defendants also argue that, by staying preliminary injunctions issued by other district courts against the Public Charge Rule, the Supreme Court implicitly concluded that Plaintiffs are unlikely to succeed on the merits of their arbitrary-and-capricious and equal-protection claims. Defs.' Supp. Br. 5, 6 n.2. Plaintiffs have explained why the Supreme Court's view of the merits cannot be gleaned from its stay decisions. MTD Opp'n 11 n.9; *see also Cook County*, 962 F.3d at 234 ("There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute."). Furthermore, the Fourth Circuit panel majority's dicta attempting to divine the Supreme Court's views does not bind this court.

In conducting its analysis under *Chevron* Step Two, the Fourth Circuit panel majority considered only whether DHS's definition of "public charge" is a "permissible construction of the INA." Op. 46. That analysis focused on whether DHS's definition was "arbitrary or capricious in *substance*," *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (emphasis added) (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)), not whether DHS's *process* in adopting that definition was arbitrary and capricious. Specifically, the panel majority did not consider whether (1) DHS provided a reasoned explanation for its departure from past agency practice, MTD Opp'n 14–18; (2) DHS adequately considered its Rule's adverse effects on public health, *id.* at 18–20; (3) DHS adequately considered specific concerns raised in public comments, *id.* at 20–25; or (4) the 12/36 standard adopted in the Final Rule is a logical outgrowth of the multi-pronged standard DHS proposed in its Notice of Proposed Rulemaking, *id.* at 25–28.

Courts frequently set aside agency action adopted in an arbitrary and capricious *manner*, even if, as the Fourth Circuit panel incorrectly concluded in its divided opinion, the contested action is *substantively* within the agency's statutory authority. Just this past term, the Supreme Court held that, although DHS had the power to rescind the Deferred Action for Childhood Arrivals (DACA) program, its decision to do so was nevertheless arbitrary and capricious because the agency "fail[ed] to adequately address important factors bearing on [the] decision." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901, 1905 (2020). And in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the Supreme Court similarly held that the Department of Commerce's decision to add a question about citizenship status to the 2020 census was not "substantively invalid," *id.* at 2576, but the Court nonetheless struck down the addition of the citizenship question because the Department's "contrived

reasons" in support of it prevented the Court from evaluating whether the agency had engaged in "[r]easoned decisionmaking." *Id.* Recent Fourth Circuit decisions also have held that agencies acted arbitrarily and capriciously without questioning the agencies' authority to adopt the challenged policies.[4] Thus, the Fourth Circuit's divided opinion holding that the Public Charge Rule is not contrary to the INA does not implicitly establish that DHS engaged in reasoned decisionmaking in adopting it.

Defendants also read too much into language from the panel majority's recitation of the case's factual background to argue for dismissal of Plaintiffs' arbitrary-and-capricious claims. Defs.' Supp. Br. 4–5. By remarking upon the "procedurally sound" promulgation of the Public Charge Rule, Op. 15, the majority stated only that DHS complied with 5 U.S.C. § 553 by adopting the Rule through notice-and-comment rulemaking, something Plaintiffs do not dispute. And its reference to DHS's "detailed responses" to public comments spanning "200 pages of the Federal Register," Op. 15, says nothing about the *adequacy* of those responses or whether, despite the Rule's length, DHS arbitrarily ignored or glossed over other material comments entirely, MTD Opp'n 18–25.

Moreover, although the majority opined that DHS did not "pluck . . . out of thin air" the 12/36 standard, Op. 15, Plaintiffs do not so allege. Rather, Plaintiffs contend that DHS acted arbitrarily and capriciously by failing to provide an adequate explanation for how the 12/36

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[4] *E.g.*, *Roe v. Dep't of Defense*, 947 F.3d 207, 225 (4th Cir. 2020) (preliminarily enjoining Department of Defense policy to the extent that it categorically bans HIV-positive servicemembers from deploying abroad because of the agency's "fail[ure] to offer an explanation that is reconcilable with the scientific and medical evidence available to it"); *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 299–300 (4th Cir. 2018) (remanding a Board of Immigration Appeals decision for the agency's failure to provide "a reasoned explanation . . . for its change in position" regarding the requisite mental state for a sex crime to constitute a crime of moral turpitude).

standard reasonably serves the agency's putative self-sufficiency goals when it would deny admission to noncitizens whose own earnings might amount to as much as 99.6 percent of their income over a three-year period. MTD Opp'n 16. And although the Fourth Circuit panel majority erroneously concluded as a matter of statutory interpretation that there is no "floor inherent in the words 'public charge,'" Op. 50 (quoting *Cook County*, 962 F.3d at 229), that, too, is irrelevant to Plaintiffs' claims of arbitrariness. Whatever interpretive latitude the INA accords to DHS, it still had an obligation to provide a reasoned explanation for its departure from prior agency practice by drastically reducing the threshold for public-charge determinations, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009). The dicta referenced by Defendants also does not address Plaintiffs' allegation that DHS failed to explain why it implicitly rejected the factual evidence put forward by benefit-granting agencies in 1999 in support of the continuation of a far less expansive standard for public-charge determinations. MTD Opp'n 17.

For these reasons, the Fourth Circuit's divided opinion has no bearing on this Court's analysis of Plaintiffs' arbitrary-and-capricious claims.

IV. THE FOURTH CIRCUIT'S OPINION HAS NO BEARING ON PLAINTIFFS' EQUAL PROTECTION CLAIM

Defendants claim that the Fourth Circuit's panel majority "effectively resolve[d]" the "central dispute" concerning their equal-protection claims by determining that *Hawaii*, 138 S. Ct. 2392, governs the court's analysis of those claims. Defs.' Supp. Br. 5. The majority did no such thing. Defendants seize upon dicta from the majority opinion that suggests erroneously that a heightened form of deference governs statutory interpretation in the immigration context. *Id.* at 6.[5] In justifying its highly deferential review of DHS's interpretation of "public charge," the

[5] *Compare* Op. 4 (identifying immigration policy as "an area where the Constitution commands 'special judicial deference' to the political branches" (quoting *Fiallo v. Bell*, 430 U.S. 787,793

Fourth Circuit panel majority relied on *Fiallo*, Op. 4, a case, like *Hawaii*, that involved an equal-protection challenge to the denial of visas to noncitizens living outside the United States. *Fiallo*, 430 U.S. at 790–91 & n.3; *see also Hawaii*, 138 S. Ct. at 2406.

Any special deference DHS might receive in construing immigration statutes that apply to noncitizens outside the United States does not imply that the agency has license to intentionally discriminate against noncitizens living here. MTD Opp'n 35. As Plaintiffs have explained before, their equal-protection claims pertain only to noncitizens who already live in the United States. MTD Opp'n 35. Accordingly, *Hawaii* does not govern Plaintiffs' equal-protection claims. Even if it does, the Public Charge Rule cannot survive rational-basis review. *Id.*

CONCLUSION

For the foregoing reasons Defendants' motion to dismiss should be denied.

Respectfully submitted,

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(1977))), *with Perez v. Cuccinelli*, 949 F.3d 865, 873, 877–78 (4th Cir. 2020) (en banc) (declining to accord *Chevron* or even *Skidmore* deference to the U.S. Customs and Immigration Services' interpretation of an INA provision).

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Dated: September 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, 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*
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