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

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR CONSOLIDATED MOTION TO DISMISS

Pursuant to the Paperless Order entered by the Court on August 7, 2020, Defendants hereby file this supplemental memorandum in support of their consolidated Motion to Dismiss (ECF No. 116) and Memorandum of Law in support thereof (ECF No. 116-1) ("Mem.").

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INTRODUCTION

The Fourth Circuit has now confirmed Defendants' position that the regulation at issue here, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) (the "Rule") is "unquestionably lawful" and consistent with the Immigration and Nationality Act ("INA"). *See CASA de Maryland v. Trump*, No. 19-2222, at 48 (4th Cir. Aug. 5, 2020) ("Op."). The Fourth Circuit's opinion also contains several rulings of critical significance to Plaintiffs' claims alleging that the Rule is arbitrary and capricious and that it violates equal protection. Those claims should be dismissed.

The Fourth Circuit also agreed that CASA de Maryland—the only organizational plaintiff before it—lacked organizational standing. The reasoning underlying the Fourth Circuit's opinion on that score, based on well-settled precedent cited by Defendants in their motion, compels dismissal of the organizational plaintiffs in the *Gaithersburg* case: Friends of Immigrants; Immigrant Law Center of Minnesota; Jewish Community Relations Council of Greater Washington; the Jewish Council for Public Affairs; and Tzedek DC.

Lastly, the claims and Plaintiffs not mentioned above should still be dismissed, for the reasons stated in Defendant's consolidated motion to dismiss.

ARGUMENT

I. THE COURT SHOULD DISMISS ORGANIZATIONAL PLAINTIFFS IN *GAITHERSBURG*.

A. Organizational Standing.

The Fourth Circuit reiterated that an organizational plaintiff "may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." Op. 21 (quoting *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Plaintiff CASA de Maryland failed that test because "voluntary 'budgetary choices' like spending money on legal action instead of research are not cognizable Article III injuries." Op. 23 (quoting *Lane*, 703 F.3d at 675). To hold otherwise "would be to imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an

adjudication.'" *Id.* (quoting *Lane*, 703 F.3d at 675 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)). It was irrelevant "whether CASA felt moved to act in a particular manner," for "the DHS Rule forced CASA to do absolutely nothing as a matter of law." Ultimately, the Fourth Circuit reiterated its decision in *Lane* that "a voluntary budgetary decision, however well-intentioned, does not constitute Article III injury." Op. 23-24.

The Fourth Circuit also squarely rejected CASA de Maryland's theory of standing based on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). "Organizational injury, properly understood, is measured against a group's ability to *operate* as an organization, not its theoretical ability to *effectuate* its objectives in its ideal world." Op. 24. But as relevant here, "nothing in the Rule directly impairs CASA's ability to provide counseling, referral, or other services to immigrants." Op. 25. Plaintiffs' reading of *Havens Realty*, just like their reading of *Lane*, would yield an "essentially boundless" theory of organizational standing.

Under both theories, because CASA de Maryland "has not suffered an organizational injury, and thus it lacks organizational standing to bring this case." Op. 26.

Applying that reasoning compels dismissal of the organizational plaintiffs in *Gaithersburg*.[1] Those Plaintiffs made the same diversion-of-resources and impairment-of-mission arguments based on *Lane* and *Havens Realty*, respectively. *See* Pls' Consol. Mem. of Law in Opp'n to Defs' Consol. Mot. to Dismiss (ECF No. 117) ("MTD Opp'n") 6-7 ("Each Organization Plaintiff has met the prerequisites for organizational standing by alleging that the Public Charge Rule has perceptibly impaired its efforts to achieve its mission, thereby requiring it to devote significant resources to identify and counteract the effects of the Rule and satisfying Article III's injury-in-fact requirement.") (quotation marks omitted).

[1] These include Friends of Immigrants; Immigrant Law Center of Minnesota; Jewish Community Relations Council of Greater Washington; the Jewish Council for Public Affairs; and Tzedek DC.

B. Representational Standing.

After concluding that CASA de Maryland lacked organizational standing, the Fourth Circuit posed the questions "whether the two individual plaintiffs to this action possess standing to bring it or whether CASA has standing in a representational capacity." Op. 26. After ruling that both individual plaintiffs had standing, however, the Fourth Circuit never reached the second question.

The only other Plaintiffs to suggest representational standing are the Jewish Council for Public Affairs and Jewish Community Relations Council of Greater Washington, who claim that they "have standing on behalf of their member organizations." But that argument is unavailing, because the economic injuries complained of by these member organizations are just as speculative as those the governmental Plaintiffs claimed. MTD Opp'n 6 (arguing that these plaintiffs have standing "because of the increased expenditures they will face as noncitizens forgo public benefits and instead rely on the social services, counseling, and legal services these organizations provide."). Thus, for reasons stated previously, Mem. 6-7, those members would lack standing. Their membership organizations therefore lack standing too.

Therefore, while the Fourth Circuit's opinion does not compel dismissal of CASA's claims on standing grounds, it does compel dismissal of all claims by Plaintiffs Jewish Council for Public Affairs and Jewish Community Relations Council of Greater Washington.

II. THE COURT SHOULD DISMISS THE CONTRARY-TO-INA CLAIMS.

In a thoroughly reasoned and supported opinion, canvassing the history and arguments recited by the parties heretofore, as well as the text, history, and interpretations of the INA's "public charge" provision, the Fourth Circuit concluded that "the DHS Rule is lawful," Op. 55. The Fourth Circuit added that, "[t]o whatever extent this appeal presents a close question—and again, we think it does not—*Chevron* makes the outcome clear." Op. 45-48.

This holding, which does not depend on any facts or the administrative record, compels dismissal of Plaintiffs' contrary-to-INA claims (*CASA* Compl. ¶¶ 149-54 (Count 1); *Gaithersburg* Compl. ¶¶ 94-102 (Count 1)).

III. THE COURT SHOULD DISMISS THE ARBITRARY-AND-CAPRICIOUS CLAIMS.

The Fourth Circuit did not directly address Plaintiffs' likelihood of success on the merits of their claims that the Rule is arbitrary and capricious, as those claims were not part of this Court's preliminary injunction opinion. Nevertheless, the Fourth Circuit did make several rulings relevant to those claims. In particular, the Fourth Circuit's ruling that the Rule satisfies *Chevron* step two is an implicit rejection of many of Plaintiffs' arguments that the Rule is arbitrary and capricious. Op. 45-48; *Judulang v. Holder*, 565 U.S. 42, 52 & n.7 (2011) (describing similarity between arbitrary and capricious evaluation and inquiry at *Chevron*'s second step).

In addition, the Fourth Circuit noted that the "process that DHS followed in promulgating the Rule was both thorough and procedurally sound." Op. 15. "Many of the changes implemented [following notice and comment] addressed specific comments DHS had received, and its detailed responses spanned nearly 200 pages of the Federal Register." *Id.* The Fourth Circuit's reasoning directly contradicts Plaintiffs' arguments that DHS did not provide a "reasoned explanation" for the definition of public charge, that it did not adequately address the Rule's alleged harms, that it failed to "respond meaningfully to significant comments," and that it "did not engage in reasoned decisionmaking." MTD Opp'n 14-28. Also, contrary to Plaintiffs' claim that DHS provided "unsatisfactory explanation for the 12/36 standard," *id.* at 17, the Fourth Circuit found that "in formulating the Rule's durationally specific definition of 'public charge,' DHS did not simply pluck the operative time period out of thin air. Instead, it relied on several empirical analyses regarding patterns of welfare use in the United States, including studies conducted by the Census Bureau, the Department of Health and Human Services, and DHS itself." Op. 15.

Plaintiffs have faulted DHS's determination that the pre-Rule definition of "public charge" "did not ensure that noncitizens would be 'self-sufficient' at all times." MTD Opp'n 15. Plaintiffs believe DHS's interpretation is unreasonable "because the term 'self-sufficient' appears nowhere in the public-charge provision." *Id.* But the Fourth Circuit confirmed that "the public charge provision ties alien admissibility to prospective alien self-sufficiency." Op. 5. And it explained that other statutory provisions showed that Congress intended "that aliens be self-reliant" and "not

burden the public benefits system." Op. 33. DHS's definition of "public charge" "brings [the public charge inadmissibility] provision into line with this surrounding program and its stated goal that 'aliens within the Nation's borders not depend on public resources to meet their needs.'" Op. 33-34.

In a related argument, Plaintiffs insisted that the Rule's definition of "public charge" is irrational because, in their view, it would include aliens who use benefits in amounts that Plaintiffs deem "de minimis." MTD Opp'n 16. The Fourth Circuit rejected an almost identical argument that there was "a floor inherent in the words 'public charge.'" Op. 50-51 ("But this 'floor' of benefits below which no one may be deemed a public charge is simply nowhere in the text itself.").

The Fourth Circuit also emphasized the significance of the Supreme Court's stay of injunctions in similar challenges to the Rule, and that discussion has relevance to Plaintiffs' arbitrary-and-capricious claims. Op. 5-6. The Supreme Court's stays "would have been improbable if not impossible had the government, as the stay applicant, not made 'a strong showing that it was likely to succeed on the merits.'" Op. 5. The Supreme Court's assessment of the merits included claims that the Rule is arbitrary and capricious for reasons similar to those alleged here. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (staying SDNY preliminary injunctions); *New York v. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 347-49 (S.D.N.Y. 2019) (granting preliminary injunction based in part on claims that the Rule is arbitrary and capricious); *Make the Rd. N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 661-63 (S.D.N.Y. 2019) (same). As the Fourth Circuit explained, "the Supreme Court's stay order necessarily conclude[ed] that the [plaintiffs] were unlikely to" succeed on the merits. Op. 6. The stay order thus bolsters Defendants' arguments in favor of dismissal of the arbitrary-and-capricious claims.

IV. THE COURT SHOULD DISMISS THE EQUAL-PROTECTION CLAIMS.

Although the Fourth Circuit did not directly address the merits of Plaintiffs' equal protection claims, it did effectively resolve the parties' central dispute regarding that claim, namely, what standard of review should apply. Defendants' position is that a highly deferential standard as described in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) and *Fiallo v. Bell*, 430 U.S. 787

(1977), is applicable to this case challenging Executive Branch policy on the inadmissibility of aliens. *See* Mem. 25; Defs' Reply in Supp. of Consol. Mot. to Dismiss (ECF No. 118) 18-19. Plaintiffs dispute that a "more deferential standard" should apply here. MTD Opp'n 34-35.

Plaintiffs' position is untenable, particularly after the Fourth Circuit's decision. The Fourth Circuit explained that the Rule falls within "an area where the Constitution commands 'special judicial deference' to the political branches in light of the intricacies and sensitivities inherent in immigration policy." Op. 4 (citing *Fiallo*, 430 U.S. at 793). "[S]eparation of powers concerns," the Court emphasized, "are at their zenith in the context of immigration, a field that the Constitution assigns to the political branches." Op. 47. "[W]hen 'Congress prescribes a procedure concerning the admissibility of aliens," it is "implementing an inherent executive power[.]" *Id*.

Accordingly, "the judicial role in overseeing the political branches' exercise of the federal immigration power is circumscribed" and courts "should be reluctant to disturb the authority expressly delegated to executive officials by Congress in this field." Op. 48. "To whatever extent the federal courts are empowered to review how the executive discharges this duty, the separation of powers demands careful deference from the judiciary and intervention, if at all, only in truly exceptional situations." *Id*. There can be no serious question, therefore, that Plaintiffs' equal-protection claims are subject to a highly deferential standard of review and that they fail for the reasons Defendants identified in the motion to dismiss briefing.[2]

V. THE SECOND CIRCUIT'S DECISION

The day before the Fourth Circuit ruled in this case, the Second Circuit affirmed preliminary injunctions issued by the Southern District of New York in similar challenges to the Rule. *See New York v. DHS*, 2020 U.S. App. LEXIS 24492 (2d Cir. Aug. 4, 2020). First, the Second Circuit found that the Rule is contrary to the INA. *Id*. at *35-76. That ruling directly conflicts with the Fourth Circuit's ruling, which is binding on this Court.

[2] Plaintiffs' equal protection claims are further undermined by the Supreme Court's stay of the SDNY injunctions, which necessarily determined that similar equal protection claims are unlikely to succeed. *See New York*, 140 S. Ct. 599; *Make the Rd. N.Y.*, 419 F. Supp. 3d at 664-65.

The Second Circuit also found that the plaintiffs are likely to succeed on their claims that the Rule is arbitrary and capricious. *Id*. at *76-89. Again, the Second Circuit's reasoning conflicts with the Fourth Circuit's opinion here. Addressing the arbitrary-and-capricious claims, the Second Circuit referred back to its ruling on the plaintiffs' contrary-to-INA claims (which is inconsistent with the Fourth Circuit's ruling), finding that DHS's reliance on policy statements in the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") was misplaced. *Id*. at 78-79 (DHS's "explanation fails for the same reasons as DHS's related argument that the PRWORA policy statements show that the Rule is consistent with Congress's intended meaning of 'public charge.'"). But the Fourth Circuit addressed PRWORA, too, and it concluded that the policy statements in that statute supported DHS's definition of "public charge." Op. 33-34.

The Second Circuit also disagreed with DHS's assessment that aliens using certain public benefits for more than 12 months in a 36-month period are unable to provide for their basic necessities without governmental support. *New York*, 2020 U.S. App. LEXIS 24492, at *83. But deciding which public benefits programs reflect a lack of self-sufficiency is precisely the type of discretionary determination that Congress entrusted to DHS. The Fourth Circuit discussed at length the "extensive discretion" that DHS has to define the term "public charge," discretion that Congress "baked . . . into the statutory scheme many times over." Op. 31 ("[T]he INA is structured to give the executive discretion to administer the public charge provision[.]"); *id*. 45 ("The only constant feature of the public charge provision seems to be its mutability[.]"). As the Fourth Circuit explained, "the legislature made a conscious choice: keep 'public charge' undefined and vest the executive branch with discretion as to how to best implement the provision[.]" *Id.* 43. That discretion is surely broad enough to allow DHS to determine that use of certain public benefits programs beyond a threshold duration indicates a lack of self-sufficiency.

Moreover, the Second Circuit's belief that certain public benefits cannot be considered by the Rule because they allegedly are "supplemental" in nature, *New York*, 2020 U.S. App. LEXIS 24492, at *84, is similar to an argument that the Fourth Circuit expressly rejected:

> The dissent embraces the Seventh Circuit's divination of "a floor inherent in the words 'public charge.'" But this "floor" of benefits below which no one may be deemed a public charge is simply nowhere in the text itself. The statute contains no threshold of benefits—quantitative, qualitative, or durational—that one must accept before qualifying as a public charge. And even assuming that this floor can be properly divined, it is unclear how an agency could determine what the floor even is or whether an alien is "significantly dependent" on the government.

Op. 50-51 (internal citation omitted).

Accordingly, the Second Circuit's decision cannot be reconciled with the Fourth Circuit's decision, which again controls the outcome of this case.

CONCLUSION

For the foregoing reasons, these cases should be dismissed.

Dated: August 21, 2020

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