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

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL[1]

Plaintiffs' central argument is that a stay pending appeal is not warranted because the issues before the Fourth Circuit are distinct from those that remain in this Court. But the overlap of issues between that appeal and those remaining in this Court are obvious, as is the judicial economy that would flow from granting Defendants' motion to stay. Indeed, the Fourth Circuit could affirm the preliminary injunction on any ground supported in the record, whether relied on by this Court or not. And contrary to Plaintiffs' contention, all issues raised by Defendants at the preliminary-injunction stage are still viable in this Court. Plaintiffs' arguments about relative burdens are expressly based on these misconceptions, and therefore fall flat. At bottom, the three relevant factors favor a stay.

[1] During a telephonic status conference on December 18, 2019, the Court declared that it would treat Defendants' Motion for Stay (ECF No. 84) as a motion to stay this and a related case, *Baltimore v. DHS*, No. 8:19-cv-2851-PWG. The plaintiffs in that case field an opposition on December 19, 2019, and this reply addresses the oppositions in both cases. Because the *Baltimore* plaintiffs have largely incorporated the arguments from the opposition in *CASA*, Defendants will address those arguments and then the *Baltimore* plaintiffs' two additional points.

I. Judicial Economy Counsels In Favor Of A Stay, Because There Are Overlapping Issues Between These Proceedings And The Fourth Circuit Appeal

Irrespective of how the Fourth Circuit resolves the appeal of this Court's preliminary injunction, its ruling will provide obvious guidance to the Parties—and the Court—about further proceedings on the merits of Plaintiffs' challenge to the Rule. Yet Plaintiffs oppose a stay, principally citing an alleged "lack of overlap between the issues that are before the Fourth Circuit and those that are still before this Court." Opp'n (ECF No. 89) at 5; *see also id.* at 6-7 n.3. Plaintiffs' argument depends on two faulty premises: (1) the Fourth Circuit may only address those issues the district court relied on when it granted the preliminary injunction; and (2) this Court cannot, or will not, consider those issues further.

A. Scope of the Fourth Circuit appeal

A court of appeals may affirm a preliminary injunction on any basis supported by the record. *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (observing, in an appeal from a preliminary injunction, that "it is well-settled that we review judgments, not opinions, which allows us to affirm the district court on any ground that would support the judgment in favor of the party prevailing below.") (citing *Everett v. Pitt Cnty. Bd. of Educ.*, 678 F.3d 281, 291 (4th Cir. 2012); *Crosby v. Gastonia*, 635 F.3d 634, 643 n.10 (4th Cir. 2011); *Cochran v. Morris*, 73 F.3d 1310, 1315 (4th Cir. 1996) (en banc)) (quotation marks omitted).

That includes alternative bases or grounds not relied on by the district court below. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 663–64 (2004) ("After considering testimony from witnesses presented by both respondents and the Government, the District Court issued an order granting the preliminary injunction. . . . The Court of Appeals affirmed the preliminary injunction, but on a different ground."). Indeed, a "narrow focus" in a district court's preliminary-injunction order may be "unsurprising" when timeliness is a factor, as it was in this

case. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018). Nonetheless, where "the district court still had a full record before it, developed specifically for the purpose of deciding whether to grant th[at] relief," the court of appeals "may affirm the district court's injunction for any reason supported by the record." *Id.*

Here, the record on appeal comprises all evidence and argument submitted in support of Plaintiffs' motion for preliminary injunction.[2] Even if the Fourth Circuit disagrees with the specific bases on which this Court entered the preliminary injunction, therefore, the Fourth Circuit could nonetheless affirm the injunction based on other grounds in that record. *Contra* Opp'n at 4 ("No conceivable outcome of the preliminary injunction appeal would resolve all of the issues that remain before this Court."). Thus, the Fourth Circuit could issue an opinion rejecting CASA's organizational standing and any alternative theories of standing in the record, obviating the case entirely. Or the Fourth Circuit could hold that none of the Plaintiffs falls within the "zone of interests" protected by the public-charge provision, which would also obviate the case. And because standing goes to a court's subject-matter jurisdiction, the Fourth Circuit would have an independent obligation to assure itself that Plaintiffs' standing theories are sound. *See United States v. Bullard*, 645 F.3d 237, 246 (4th Cir. 2011) (citing *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1223 (4th Cir.1980)). With regard to the merits, the Fourth Circuit's opinion could conceivably narrow this case or, at a minimum, provide guidance on Plaintiffs' various arguments. Judicial economy counsels in favor of granting a stay.

[2] *See* Fed. R. App. P. 10(a) ("The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.").

B. Further litigation in this Court

Plaintiffs also misconstrue the issues that are still live in this Court. They posit that anything addressed in this Court's prior Memorandum Opinion and Order (ECF No. 65), now on appeal, can no longer be litigated below. Plaintiffs are wrong.

They rely solely on a teleconference held October 30, 2019, in which they heard the Court to declare "no intention of revisiting issues addressed in the preliminary injunction decision." Opp'n at 6 n.3. What the Court actually said was that Defendants should not *re-brief* arguments that were addressed in the prior Memorandum Opinion and Order. But the Court expressly allowed Defendants to incorporate by reference arguments made in opposition to the preliminary injunction—*i.e.*, to keep those arguments alive—and confirmed as much during the recent December 18, 2019, telephonic conference.

In any event, it would have been implausible for Plaintiffs to interpret the Court's remark as foreclosing those arguments, because an order entering a preliminary injunction does not create law of the case. *See Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 948 F. Supp. 2d 538, 551 (D. Md. 2013) ("In general, a court's decisions at the preliminary injunction phase do not constitute law of the case in further proceedings and do not limit or preclude the parties from litigating the merits.") (collecting cases). That rule is especially sensible when the preliminary injunction has since been stayed by the court of appeals. Although the Fourth Circuit issued the stay order without written opinion, it must necessarily have found "a strong showing" that the government is likely to succeed on the merits. *Cf.* Pls. Opp'n to Stay, *CASA de Md. v. Trump*, No. 19-2222 (4th Cir. Nov. 25, 2019), ECF No. 18-1 at 7 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).[3]

[3] Plaintiffs have sought rehearing of that decision en banc, but such rehearings "are the exception, not the rule. They are convened only when extraordinary circumstances exist that call

In sum, there *is* overlap between the issues on appeal and those alive below. Contrary to Plaintiffs' understanding, all arguments previously raised by Defendants are within the scope of the appeal and still viable in these proceedings. Absent a stay, the Parties would soon be asking this Court to decide issues that are about to be decided by the Fourth Circuit. Plaintiffs' invocation of *District of Columbia v. Trump*, 344 F. Supp. 3d 828 (D. Md. 2018), Opp'n at 5, is therefore unavailing, and this case is more akin to *IRAP v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018), and the cases it collects. The Court should stay this case pending resolution of the appeal.[4]

II. There Is No Reason For The Parties To Undertake, Or The Court To Consider, Briefing That May Be Overtaken By Events on Appeal

Plaintiffs cite *IRAP*, in which the court suggested that the government "has the resources to litigate" further "without significant hardship or prejudice." Opp'n at 7 (quoting *IRAP*, 323 F. Supp. 3d at 735). But Defendants' point is that any hardship, whether "significant" or not, makes no sense to undertake when it so readily stands to be mooted. That is, in fact, why the court in *IRAP* stayed the case even after finding that the government had sufficient resources:

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for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960). In any event, Defendants' response is due January 6, 2020. Notice, *CASA de Md. v. Trump*, No. 19-2222 (4th Cir. Dec. 27, 2019), ECF No. 30. If the Court would prefer, it could defer ruling on this motion until after the motion for rehearing is resolved.

[4] Plaintiffs would distinguish *IRAP* further because, unlike that case, there is no "brief and certain timeline govern[ing] Defendants' appeal in this case." Opp'n at 6. But if the Fourth Circuit's recent stay order—issued only one week after briefing concluded—is any indication, the court appeals intends to move expeditiously in this case. The Fourth Circuit has set the case tentatively for oral argument in the March 17-20, 2020, sitting. *See* Tentative Calendar Order, *CASA de Md. v. Trump*, No. 19-2222 (4th Cir. Dec. 19, 2019), ECF No. 26. Similarly, the Ninth Circuit issued a 73-page opinion only nine days after briefing concluded. (ECF No. 85-1). And the Second Circuit, the only court of appeals not yet to have ruled on the motion to stay a nationwide preliminary injunction, has ordered an expedited briefing schedule of the appeal. *See* Order, *Make the Road N.Y. v. Cuccinelli* (2d Cir. Nov. 27, 2019). Courts around the country are proceeding with haste, and Plaintiffs needn't worry that these cases will be left languishing.

> As noted above, the immediate litigation of a motion to dismiss, the next step in this case, would likely be wasted once the Supreme Court issues its ruling in *Trump v. Hawaii*, because a renewed round of briefing would almost certainly be required to allow for proper consideration of the Supreme Court's guidance, leaving the parties no closer to a resolution than if the matter were stayed.

Id. at 736. That logic applies equally here.

Notably, Plaintiffs leave open the possibility of seeking burdensome discovery in this case. Although they cast their contrary-to-law claim as "purely legal" and thus "*unlikely* to be the subject of any hypothetical discovery," they won't say the same about their constitutional or arbitrary-and-capricious claims. Opp'n at 7 (emphasis added).[5] The Court can reasonably expect, therefore, that Plaintiffs intend to seek extra-record discovery, heightening the inequity of proceeding this case when it may well be rendered moot or narrowed by the current appeal.

Finally, it is also worth noting that Defendants have already served the administrative record on Plaintiffs. Notice (ECF No. 83) at 2. That record comprises many gigabytes of data spanning hundreds of thousands of pages, *id.* at 1, and will take substantial time to pore over. A stay pending appeal will not preclude Plaintiffs from continuing to assess the facts of this case.

Ultimately, Plaintiffs' argument about relative burdens is expressly tied to their argument about issue overlap. Opp'n at 6 ("For the reasons discussed above, *supra* Pt. I, neither an affirmance nor a reversal of the preliminary injunction decision will obviate the need for this Court to rule on the claims and standing theories that are not on appeal."). As explained, Plaintiffs are wrong about what is technically "on appeal" and what remains in this Court. *Id.* Because there *is* an overlap of issues, it would be unduly burdensome on the Parties and the Court to proceed now.

[5] It is noteworthy that Plaintiffs will not even rule out discovery on this "purely legal" claim.

III. The Alleged Harms To Plaintiffs Are Overstated In This Procedural Posture And, In Any Event, Have Already Been Rejected By The Fourth Circuit

Plaintiffs repeat the harms alleged in their complaint as evidence that they would continue to endure "serious and deleterious effects" should the case be stayed. Opp'n at 7. But those are the same alleged harms put to the Fourth Circuit, which nonetheless stayed this Court's preliminary injunction. *See generally* Appellees' Opp'n to Mot. for Stay, No. 19-2222 (4th Cir. Nov. 25, 2019), ECF No. 18-1, at 21 ("Moreover, if the preliminary injunction is stayed, CASA and its members will be irreparably harmed.") (cataloging alleged harms). The same sorts of harms considered by the Ninth Circuit before it, too, decided to stay a preliminary injunction. *See* Ninth Circuit Order (ECF No. 85-1) at 70-73.

Plaintiffs also ignore that the Rule is still enjoined from operation in Maryland. In their motion to stay, Defendants expressly left open the possibility that, should the Fourth Circuit stay the injunction, the Parties could revisit the issue accordingly. Mot. at 4 n.3. Similarly now, Defendants would not oppose revisiting the stay at such time as the Rule again stands to be enforced in Maryland. At present, that would require the Second Circuit's granting a motion for a stay *and* none of the appellees in the Second, Fourth, or Ninth Circuits obtaining relief from the pertinent en banc circuit court or from the Supreme Court that would reinstate the preliminary injunction. Should that eventuality arise, Plaintiffs would have a more credible claim to prejudice from a stay. Until then, however, the Parties and Court would continue to benefit from appellate courts' rulings on the issues presented in this case without any attendant fear of the Rule's enforcement.

IV. The *Baltimore* Plaintiffs' Two Additional Points Are Unavailing

As an initial matter, the plaintiffs in *Baltimore* can hardly be heard to complain about a stay, at least while the Rule remains enjoined. Since filing their complaint three months ago,

they have never sought to expedite their case: they did not seek a preliminary injunction; they never contested Judge Messitte's decision to "defer ruling on the[ir] Complaint" (ECF No. 28 in *Baltimore*); and, just before the case was transferred to this Court, they had *agreed* to stay the case indefinitely, so long as the Rule could not be implemented in Maryland. *See* Unopposed Mot. to Stay Case (ECF No. 33 in *Baltimore*). They cannot now claim prejudice from a limited stay, pending appeal, while the Rule remains enjoined.

A. Additional standing arguments

The *Baltimore* plaintiffs argue that their particular standing arguments are not before the Fourth Circuit. But even if true, that is a consequence of their own making. Had the *Baltimore* plaintiffs prosecuted their case as the *CASA* plaintiffs did, they would both be on appeal. The *Baltimore* plaintiffs should not be allowed to refrain from pressing their claims and then oppose a stay essentially on the grounds that their claims haven't been pressed.

More importantly, as noted above in Section I.A., Plaintiffs misstate what is, in fact, on appeal. Because it is at least conceivable that the Fourth Circuit could reach issues of associational or individual standing, it is possible that the Fourth Circuit's opinion could preclude any or all of the *Baltimore* plaintiffs' theories of standing. Or the Fourth Circuit could define the public-charge provision's "zone of interests" in a way that clearly excludes the *Baltimore* plaintiffs. At a minimum, the Fourth Circuit's opinion on whether the *CASA* plaintiffs have standing—and on what reasoning—would be valuable guidance as this Court considers whether the *Baltimore* plaintiffs have standing.

B. *Chevron* step two

The *Baltimore* plaintiffs argue that, while this Court held in its preliminary-injunction order that the Rule was illegal at either *Chevron* step one or *Chevron* step two, the Court "did not

address whether the agency's interpretation might also be impermissible under *Chevron* step two *for other reasons*." Opp'n at 2 (emphasis added) (citing *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005)).[6] Although they do not set forth any of these "other reasons," Defendants must assume that they mean other reasons suggested by the *CASA* plaintiffs, as the *Baltimore* plaintiffs never moved for a preliminary injunction.

If so, Defendants will reiterate that the record on appeal includes *all* arguments put to this Court in support of a preliminary injunction.[7] That includes any "other reasons" why the Rule might fail at *Chevron* step two. Thus, should the Fourth Circuit disagree with the reasoning of this Court, it is conceivable that it would affirm on one of more of those other reasons—or consider and reject them in a reversal. Because those "other reasons" remain alive in the Fourth Circuit and in this Court, it makes little sense to proceed with litigating them. The Court should stay the case.

CONCLUSION

Plaintiffs' oppositions are based on a misunderstanding, both about what issues are on appeal and what issues remain before this Court. Their arguments about relative harms are based entirely on that misunderstanding and are, therefore, ill-conceived. Because there is an overlap among the issues on appeal and alive below, judicial economy counsels in favor of staying the case. Plaintiffs have nothing to fear from such a stay, and continuing to litigate would only place undue burden on the Parties and the Court.

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[6] The page cited form *Northpoint Technology* merely describes what *Chevron* step two is and how it relates to step one. The case is neither binding nor persuasive authority on the question whether a stay should issue.

[7] If the *Baltimore* plaintiffs mean to refer to "other reasons" stated in their complaint, then Defendants will merely repeat that they have not heretofore pressed those claims, and should not now reap a windfall from that choice.

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