No. 19-2222

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CASA DE MARYLAND, INC.; ANGEL AGUILUZ; MONICA CAMACHO PEREZ,

Petitioner-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, II, in his official capacity as Acting Director, U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Respondent-Appellants.

On Appeal from the United States District Court for the District of Maryland, Case No. 8:19-cv-02715-PWG, Judge Paul W. Grimm

BRIEF FOR AMICUS CURIAE NAACP IN SUPPORT OF PETITIONER-APPELLEES' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and 26.1, *Amicus Curiae* National Association for the Advancement of Colored People (NAACP) states that it is a non-profit corporation organized under the laws of New York. The NAACP has no parent corporation and no publicly traded company owns 10 percent or more of the corporation.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1909, the National Association for the Advancement of Colored People (NAACP) is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used legal process to champion equality and justice for all persons, including in landmark cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958), among many others.

The NAACP, as well as its state and local affiliates, has long brought cases both on behalf of its members and on its own behalf, *i.e.*, to vindicate its rights and interests as an organization. In doing so, the NAACP has often relied on the doctrine of organizational standing—a key component of civil rights litigation for decades. *See, e.g., National Urban League v. Ross*, No. 20-cv-05799 (N.D. Cal.); *Georgia State Conference of NAACP v. DeKalb Cty. Bd. of Registration & Elections*, No. 20-cv-00879 (N.D. Ga.); *Connecticut State Conference of NAACP Branches v. Merrill*, No. 20-cv-00909 (D. Conn.); *North Carolina State Conference of NAACP v. Cooper*, No. 18-cv-01034 (M.D.N.C.); *Georgia Coal. for*

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus or its counsel made a monetary contribution for its preparation or submission.

the People's Agenda, Inc. v. Raffensperger, No. 18-cv-04727 (N.D. Ga.). It has an institutional interest in preserving the access to courts on which civil rights litigation depends and ensuring the ability of the NAACP and similar organizations to vindicate their rights in the manner long blessed by Supreme Court precedent.

INTRODUCTION

Although the panel's decision errs in several ways that warrant rehearing en banc, *see* Petition for Rehearing (Dkt. 115), the NAACP submits this brief specifically to urge the full court to reconsider the panel's opinion regarding Casa de Maryland's ("CASA") Article III standing. The panel's analysis of standing introduced a novel and stringent test that contradicts the law of this circuit, numerous other circuits, and the Supreme Court—and did so while straying from the issues necessary for disposition of the government's appeal. The issue is of great significance to civil rights litigation and the ability of civil rights organizations to vindicate their rights and interests in federal court. For these reasons, rehearing en banc is warranted. Fed. R. App. P. 35(b).

ARGUMENT

I. CASA PLEADED FACTS ESTABLISHING ARTICLE III STANDING UNDER *HAVENS*

It is beyond cavil—and an important feature of civil rights litigation—that organizations like CASA de Maryland can seek redress for their own injuries under Article III. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429

U.S. 252, 263 (1977). Organizations like CASA have long played a key role in protecting constitutional rights and enforcing essential civil rights laws like the Civil Rights Act of 1964, Voting Rights Act of 1965 and the Fair Housing Act of 1968. Indeed, the controlling precedent here was just such a case.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the civil rights organization Housing Opportunities Made Equal (HOME) brought suit in its own capacity against Havens Realty Corporation, an apartment complex owner that allegedly discriminated against housing applicants. HOME—whose organizational purpose was to "'make equal opportunity in housing a reality'"—alleged that Havens' discriminatory practices "perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers." *Id.* at 368, 379. Without dissent, the Court explained that such "concrete and demonstrable injury to an organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract interests." *Id.* at 379. As such, HOME had standing under Article III. *Id.*

As Judge King's dissent demonstrates, there is no meaningful daylight between HOME's standing in *Havens* and CASA's allegations of standing in this case. In *Havens*, HOME's mission in making "equal opportunity in housing a reality" by providing counseling and referral services was stymied by the racial

discrimination at issue. So too here; CASA's mission, "to create a more just society by building power and improving the quality of life in low-income immigration communities," *Casa de Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 771 (D. Md. 2019), has been impaired by the public charge rule. CASA previously "provide[d] its members assistance in applying for a variety of immigration benefits," just as HOME had assisted those seeking housing. JA65-66. But as a consequence of the public charge rule, CASA has had to shift its efforts and resources towards "educating its members about the Rule and its expected impacts on immigrant families." *Id.* Nor are CASA's harms only programmatic; the complaint also describes the economic costs CASA has had to incur as a consequence of the rule. For example, "CASA has devoted 15 part-time health promoters and 15 to 20 community organizers to answering questions, correcting misinformation, and raising awareness about the Rule." JA112. And those increased efforts come at a cost to CASA's programming elsewhere; "[f]or example, CASA has had to reduce its advocacy for health-care expansion efforts at the state level in Maryland and at the local level in Prince George's County, Maryland." *Id.* In short, consistent with the Supreme Court having found standing where "a nonprofit organization … spent money to combat housing

discrimination,"[2] here "CASA has had to shift its organizational focus from an affirmative posture—seeking to improve conditions for immigrant families—to a defensive one—seeking to mitigate the harm of the Public Charge Rule on the communities it serves." JA112.

CASA thus pleaded facts closely tracking those the Supreme Court has already deemed sufficient under Article III. And those alleged facts were to be assumed true and construed in CASA's favor—as both Judge King and this Court's precedents explain. *See Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187-188 (4th Cir. 2018), *cert. denied*, 140 S. Ct. 111 (2019). Application of *Havens* to CASA's complaint therefore should have sustained CASA's standing.

The panel reached the opposite conclusion by presuming, contrary to CASA's well-pleaded allegations, that CASA's harms were self-inflicted wounds insufficient to meet Article III's requirements. In doing so, the panel invoked *Clapper v. Amnesty International USA*, 568 U.S. 398, 415-417 (2013), which holds that organizations may not manufacture standing by assuming costs "in response to a speculative threat." *Clapper* rests partly on the proposition that an organization's "mere interest in a problem" is insufficient for Article III standing, as the Supreme

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[2] *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

Court made clear in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).[3] And as this Court explained in *Lane v. Holder*, 703 F.3d 668, 674-675 (4th Cir. 2012), an organization that simply "decides to spend its money on educating members, responding to member inquiries, or undertaking litigation" lacks standing—in contrast to an organization whose "efforts to carry out its mission" are "impede[d]."[4]

But the panel expanded *Clapper* and *Lane* far beyond their reach, and in doing so reached a decision that conflicts not only with *Havens* but also several court of appeals decisions upholding organizational standing in similar circumstances. Rather than ask whether CASA made a mere voluntary "'budgetary choice[]'" to address the Public Charge Rule, *see Lane*, 703 F.3d at 675, the panel introduced a new test: whether the Public Charge Rule "forced" CASA to act "*as a matter of law*." Op. 23 (emphasis added). If not, the panel reasoned, any action by CASA was by definition "unilateral and uncompelled" and cannot be cited to "manufacture an Article III injury." *Id.*

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[3] *Clapper* carefully tethered its standing analysis to what it held was a merely "speculative" or "hypothetical" threat of harm. 568 U.S. at 416. In this case, however, CASA's complaint makes clear that CASA is *presently* suffering harm.

[4] *See also NAACP v. Acusport Corp.*, 210 F.R.D. 446, 459 (E.D.N.Y. 2002) ("The generalized grievance argument finds its usual application when the activity challenged is a law or governmental policy, and the plaintiff is suing as a citizen or taxpayer concerned with having the government follow the law.")

That is a rule previously unknown to this Circuit. Indeed, the panel cites no authority for the proposition that an organization must be compelled to act "as a matter of law" to establish standing. Nor would any such rule make sense. All budgetary and programming decisions—including those pleaded by HOME, which *Havens* deemed sufficient—are to some extent volitional; organizations with Article III standing still *choose* to react. For this reason, the Supreme Court did not ask whether HOME was legally compelled to react to racial discrimination, but rather examined the harms that resulted from the challenged behavior.

The panel's rule, if left undisturbed, would make this court an outlier among the courts of appeals. No other circuit has held that an organization has standing to challenge discriminatory action only if that action forces the organization's hand as a matter of law. The Eleventh Circuit, for example, held that the Florida State Conference of the NAACP and other organizations had standing in their own right to challenge a Florida voter registration law that caused them to "divert scarce time and resources from registering additional voters to helping applicants correct the anticipated myriad" consequences the law would bring about. *Florida State Conference of NAACP v Browning*, 522 F.3d 1153, 1164-1165 (11th Cir. 2008). As that court explained: "Instead of 'abstract social interests,' the plaintiffs have averred that their actual ability to conduct specific projects during a specific period of time will be frustrated by the [law's] enforcement." *Id.* at 1166. So too did the

D.C. Circuit hold that an organization had standing where it alleged that a defendant interfered with "community outreach and public education, counseling, and research projects"—injuries the court observed "closely track the claims that the Supreme Court found sufficient in *Havens*." *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-1277 (D.C. Cir. 1994) (noting that while the "particular harm" of investigating potential litigation against a defendant cannot self-referentially create standing to sue that same defendant, any "*other* effect on the [organization's] programs" would constitute standing).[5] Similarly, the Second Circuit held that an organization established standing where it devoted significant resources to "counteract" a defendant's unlawful and discriminatory housing advertisements. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904-905 (2d Cir. 1993). And the Seventh Circuit recently removed all doubt, collecting additional cases from the Fifth, Sixth, Ninth, and Eleventh Circuits each demonstrating that organizations whose resources are drained by their missional efforts to counteract government action have standing to challenge that same government action. *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952-

[5] *See also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("*Havens* makes clear … that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

956 (7th Cir. 2019).[6] As that court explained, where governmental action causes an organization to assume "new burdens" and undertake new endeavors "because of the challenged law," such work is "certainly done willingly or 'voluntarily' but it is not self-inflicted"—and thus satisfies Article III. *Id.* at 955-956.

None of these decisions would require CASA to prove it was compelled "as a matter of law" to assume the demonstrated burdens caused by the Public Charge Rule. Under each of these cases (including this Court's decision in *Lane*, 703 F.3d at 675), CASA would have standing to challenge the Public Charge Rule due to its demonstrated effect on CASA's operations and mission. The panel's decision stands alone in stripping that standing away.[7] En banc review of this new test is accordingly warranted.

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[6] *See Scott v. Schedler,* 771 F.3d 831, 836-839 (5th Cir. 2014); *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016); *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009); *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1243-1244 (11th Cir. 2012)

[7] Moreover, the panel introduced its new "legal compulsion" test without needing to reach the issue, for it found that the individual plaintiffs in this case had standing. It was thus unnecessary for the panel to address CASA's standing at all. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986). At the least, en banc review could reserve the panel's reasoning for a future case where the question is necessarily presented.

II. ORGANIZATIONAL STANDING IS A CRITICAL COMPONENT OF CIVIL RIGHTS LITIGATION

The panel's error threatens seriously to undermine organizational standing, which has long been a key component of civil rights litigation. In relying on organizational standing to redress their own injuries, organizations like the NAACP have been able to secure civil rights for themselves, their members, and society generally. As the Supreme Court observed in *NAACP v. Button* (which the NAACP brought in its own right), litigation by organizations such as the NAACP "is a means for achieving the lawful objectives of equality of treatment … Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." 371 U.S. 415, 429 (1963); *see also NAACP v. Alabama*, 357 U.S. at 460.

Nor are the benefits of organizational standing limited to civil rights plaintiffs; the Supreme Court has specifically acknowledged the gains accrued *to courts* by the "financial resources," "specialized expertise," and "research resources" that organizations bring to bear on litigation. *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289 (1986) (quotation marks omitted). Thus, while Article III demands that courts limit their review to concrete and particularized differences between actual parties to litigation, courts would suffer from unduly precluding organizational

plaintiffs from presenting those (often complicated and difficult) differences in a forceful manner.

Finally, it is no answer that organizations may bring litigation in their representational capacity on behalf of their members—a form of standing not addressed in the panel's decision. The two theories of standing are not substitutes for each other. And representational standing is often attendant with difficulties, including concerns by individual members that they may suffer a loss of privacy or even retaliation for participating in litigation. *See NAACP v. Alabama*, 357 U.S. at 461-462. The panel's decision in fact demonstrates the difficulties of representational standing in a case challenging unlawful government conduct when it suggested that the district court should have enjoined enforcement of the Public Charge Rule only as "against CASA's members"—thus potentially requiring CASA's members to identify themselves to the government in order to obtain the benefit of an injunction against a potentially unlawful rule. Op. 69. In these circumstances, CASA was a proper party to invoke the jurisdiction of the federal courts to invalidate an unlawful regulation, as organizations often are. *See* Pet. 11 n.3.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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September 21, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,545 words.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit via the CM/ECF system this 21st day of September, 2020, and served on all counsel of record via the CM/ECF system.

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