IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff,

vs.

DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al.*,

Defendants.

Case No. 1:18-cv-3636-ELH

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

Plaintiff Mayor and City Council of Baltimore ("Baltimore") respectfully submits this memorandum in opposition to Defendants' motion to stay this case (ECF No. 12) pending the conclusion of the partial government shutdown that commenced on December 22, 2018.

This case challenges Defendant U.S. Department of State's ("State") decision to amend a provision of the Foreign Affairs Manual—the document that dictates how consular officers adjudicate visa applications—governing the "public charge" inadmissibility ground (the "FAM changes"). As Baltimore has alleged, the FAM changes make it more difficult for immigrants who have accepted public benefits, or whose sponsors or family members have accepted public benefits, to obtain visas to the United States. *See* Compl. ¶¶ 121-170 (ECF No. 1). Every day the FAM changes remain in effect does considerable harm to Baltimore by deterring its residents and their families from accepting the federal, state, and local benefits to which they are entitled. *See id*. Staying this litigation pending the end of the government shutdown—a problem internal to

Defendants and lacking a known or knowable end date—will only compound the injury to Baltimore. This case should therefore proceed.

In support of their motion, Defendants assert that a stay is necessary because, under the Antideficiency Act, "Department of Justice attorneys are prohibited from working, even on a voluntary basis, except in very limited circumstances." ECF No. 12 at 1. However, two provisions of that Act each permit Defendants and their attorneys to continue litigating this case.

First, Defendants are permitted to continue working with respect to "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. The Department of Justice ("DOJ") has interpreted that statutory exception to mean circumstances "where there is a reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question." *FY 2019 Contingency Plan*, U.S. Dep't of Justice 1 (Jan. 10, 2019), https://www.justice.gov/jmd/page/file/1015676/download [hereinafter *DOJ Contingency Plan*]. DOJ has therefore recognized that "a significant portion of the Department's mission relates to the safety of human life and the protection of property, and primarily for this reason, the Department has a high percentage of activities and employees that are excepted from the Antideficiency Act restrictions and can continue during a lapse in appropriations." *Id.*

This case relates both to the safety of human life and the protection of property interests. As for human life, Baltimore's Complaint explains at length how the FAM changes chill immigrants and their families from taking benefits that they need and for which they remain eligible under federal and state law. *See* Compl. ¶¶ 121-132.[1] Indeed, the Department of

[1] Although the State Department is subject to the lapse in appropriations, it is Plaintiff's understanding that consulates have continued to process visa applications, pursuant to the FAM

Homeland Security ("DHS") has already admitted in a related context that "when eligibility rules change for public benefits programs there is evidence of a 'chilling effect' that discourages immigrants from using public benefits programs for which they are still eligible." *See id.* ¶ 122 (citing *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,226 (Oct. 10, 2018)). Defendants' attempts to change public charge rules, including the FAM changes, have in fact caused immigrants nationwide—and in the City of Baltimore—to stop taking benefits like SNAP, WIC, Medicaid, and other forms of public assistance. *Id.* ¶ 126. That chilling effect, in turn, leads to "worse health outcomes" for immigrants and their families, as DHS has again recognized. *See id.* ¶ 168 (citing 83 Fed. Reg. at 51,270). Particularly in instances of contagious illnesses, the health of the city as a whole is harmed when individual members of the public suffer poor health. This litigation is therefore closely related to public safety and health.

The FAM changes also harm Baltimore's property interests by draining the city's budget. As explained in the Complaint, the FAM changes force Baltimore to devote staff time and funding to "familiarizing city officials with the FAM change, training staff and promulgating guidance, engaging in outreach to immigrant communities, and advising immigrants about the potential consequences of taking benefits." Compl. ¶ 56; *see also id.* ¶¶ 157-161. Moreover, some city programs are experiencing increased demand—and increased costs—as immigrants and their families drop off other, more appropriate, federal benefits programs, as would be the

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changes, because those processes are funded by fees. State's guidance provides that "[c]onsular operations domestically and abroad will remain operational as long as there are sufficient fees to support operations." *Guidance on Operations During A Lapse in Appropriations*, U.S. Dep't of State (Dec. 6, 2018), https://www.state.gov/m/2018/287909.htm. Consistent with that interpretation, the State Department's website notes that "[a]t this time, scheduled passport and visa services in the United States and at our U.S. Embassies and Consulates overseas will continue during the lapse in appropriations as the situation permits." Bureau of Consular Affairs, *Operations During A Lapse in Appropriations*, U.S. Dep't of State (Dec. 22, 2018), https://travel.state.gov/content/travel/en/traveladvisories/ea/lapse-in-appropriations.html.

case where immigrants withdraw from Medicaid and instead use the city's free or reduced-fee health clinics. *Id.* ¶¶ 162-166. Thus, this litigation relates to the protection of property as well.

Since the beginning of the partial government shutdown, multiple courts have denied stay motions in cases that, like this one, implicate safety and property concerns. Indeed, this Court denied a stay in *Maryland v. United States*, which involves the constitutionality of the Affordable Care Act, because of the case's "potential significance … to the health and well-being of the citizens of Maryland." Letter to Counsel at 1, *Maryland v. United States*, No. 1:18-cv-2849-ELH (D. Md. Jan. 3, 2019), ECF. No. 49. This case similarly implicates the availability of health and other benefits to Baltimore residents. *Compare* Compl. ¶¶ 121-161 *with* Pl.'s Opp. to Defs.' Mot. to Dismiss Am. Compl. at 9-10, *Maryland*, ECF No. 27. Chief Judge Bredar also denied a stay in a case involving the Baltimore Police Department consent decree, finding that it involved "[d]eeply serious matters involving the safety and well-being of the citizens of Baltimore." Memorandum & Order at 1, *United States v. Balt. Police Dep't*, No. 1:17-cv-0099-JKB (D. Md. Dec. 26, 2018), ECF No. 173; *accord* Order at 1, *New York v. Dep't of Labor*, No. 1:18-cv-1747-JDB (D.D.C. Dec. 28, 2018), ECF No. 71. The same is true here.

Second, counsel for Defendants may continue working if otherwise "authorized by law." 31 U.S.C. § 1341(a)(1)(B). DOJ has interpreted this provision to mean that while DOJ attorneys must generally request stays, "[i]f a court denies such a request and orders a case to continue, the Government will comply with the court's order, which would constitute express legal authorization for the activity to continue." *DOJ Contingency Plan* at 3.

The D.C. Circuit has adopted precisely this interpretation of the Antideficiency Act. In *Kornitzky Group, LLC v. Elwell*, two judges concurring in the denial of a stay relied on DOJ's contingency plan, concluding that a stay denial amounts to legal authorization for DOJ attorneys

to continue working. --- F. 3d ---, 2019 WL 138710, at *1 (D.C. Cir. Jan. 9, 2019) (Srinivasan, J., concurring). Pursuant to that understanding, the judges noted that the D.C. Circuit had denied every one of the federal government's *eighteen* motions to stay briefing or argument up to that point, both during the current shutdown and previous shutdowns.[2] *Id.* at *1-2; *see also* Order, *W. Org. of Res. Councils v. Bernhardt*, No. 9:18-cv-139-DWM (D. Mont. Jan. 11, 2019), ECF No. 37 (citing *Kornitzky Group*). Counsel for Defendants may therefore continue working if the Court denies the requested stay.

Finally, it bears acknowledgment that no other litigant would be permitted to shirk its civil litigation duties indefinitely because of an internal disagreement about whether it should pay its lawyers. As Chief Judge Bredar concluded, government attorneys, whether federal, state, or city, "are required to find the means by which to continue their participation in this litigation on a timely basis regardless of their client's internal issues." Memorandum & Order at 1, *Balt. Police Dep't*, ECF No. 173. Similarly, Judge Hazel held that Defendants' stay request is based on "a dispute internal to the government," and its attorneys must "find the means by which to continue their participation" in accord with existing schedules and deadlines. Order at 1, *Kravitz v. Commerce*, No. 1:18-cv-1570-GJH (D. Md. Dec. 28, 2018), ECF No. 95. Here, where pending litigation relates closely to public safety and property interests, there is no reason for delay.

Thus, Plaintiff respectfully submits that the Court should deny Defendants' motion to stay and maintain Defendants' deadline to respond to the Complaint by February 1, 2019.[3]

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[2] The sole exception was a case in which the court had requested the federal government file an amicus brief, not a case in which it was a party. *See* 2019 WL 138710, at *2.

[3] Defendants' contention that their response to the Complaint is not due February 1 is incorrect. The U.S. Attorney for the District of Maryland was served on December 3 (ECF No. 10-1 at 2), meaning that their response is due February 1 pursuant to Rule 12(a)(2). Although Defendants do not dispute that they received service on that date, Defendants split hairs,

Dated: January 16, 2019

Respectfully submitted,

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claiming that it was insufficient because the envelope was not addressed to the "Civil Process Clerk." However, the text of Rule 4(i)(1)(A)(ii) does not impose the formalistic requirement that Defendants assert, and requires only that service be *sent* to the civil-process clerk. Moreover, multiple courts have held that service is sufficient even where it was not specifically addressed to the clerk. *See, e.g.*, *Campbell v. Nitelines USA Corp.*, 2008 WL 11429668, at *2 (W.D. Mo. June 24, 2008); *Munson v. England*, 2008 WL 162774, at *2 (E.D. Cal. Jan. 17, 2008), *report and recommendation adopted*, 2008 WL 3850072 (E.D. Cal. Aug. 15, 2008); *In re Swanson*, 343 B.R. 678, 684 (Bankr. D. Kan. 2006).

Regardless, Plaintiff subsequently sent a second mailing addressed to the civil-process clerk on December 19, 2018, the day that counsel for Defendants notified Plaintiff of the purported issue, which was delivered on December 20, meaning that Defendants' response would be due on February 18, 2019 at the latest. Plaintiff will promptly file an amended proof of service attesting to that fact should the Court deem it necessary.