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 DISMISS

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INTRODUCTION

This case involves Defendants' decision to dramatically alter the rules governing the admission of immigrants who have accepted public benefits without providing any public explanation, notice, or opportunity for comment. In January 2018, Defendants revised the section of the Foreign Affairs Manual that governs how consular officers determine whether a visa applicant is likely to become a public charge—*i.e.*, an individual "primarily dependent" on cash assistance—if admitted to the United States (hereinafter referred to as "the FAM change"). For decades, multiple federal agencies have ***prohibited*** authorities from considering an immigrant's use of supplemental, non-cash benefits, like food stamps. The FAM change now ***requires*** consular officers to consider whether immigrants and their families have used "public assistance of any kind," even where the immigrant's sponsor has agreed to support him or her financially. Defendants' reversal violates the Administrative Procedure Act and was motivated by animus toward immigrants of color, as reflected repeatedly in the President's own statements.

Defendants' motion to dismiss throws everything at the Complaint but the kitchen sink in an attempt to avoid addressing the merits of Baltimore's claims. All of Defendants' arguments founder on the detailed factual allegations of the Complaint and the law.

Defendants assert that Baltimore lacks standing because its claims rely on "speculation" about how immigrants will respond to the FAM change. But Baltimore alleges, at length, how the FAM change deters immigrants from accepting federal, state, and local benefits—a reality the federal government has long acknowledged, and one which Defendants ultimately seek to create. The FAM change thereby frustrates the City's programs, forces the City to divert resources to counteract Defendants' actions, and imposes costs on the City.

Defendants assert that the FAM change isn't reviewable final agency action under the APA because it is an interpretive rule. But the FAM change is a binding, operative regulation,

one that now penalizes immigrants, their families, and their sponsors for accepting the very non-cash benefits that were previously barred from consideration. That dramatic shift in State's practices constitutes a legislative rule, but is reviewable even if construed as an interpretive rule.

Defendants invoke several other bars to consideration of Baltimore's claims, including an imagined prohibition on judicial review of executive immigration policies and an overbroad reading of the APA's foreign affairs exception. But these arguments are wholly inconsistent with the presumption in favor of judicial review of agency action and the requirement that agencies give the public a chance to weigh in on significant agency decisions.

And Defendants claim, finally, that the President's animus against immigrants of color, much of it based on the insidious stereotype that they consume a disproportionate amount of public benefits, cannot be traced to the FAM change. But that animus has driven the decisions of the President's subordinates as they craft federal immigration policy.

Ultimately, the Court has jurisdiction to consider all of Baltimore's claims and all of those claims are plausibly stated. It should therefore deny Defendants' motion to dismiss.

FACTUAL BACKGROUND

A. Statutory and regulatory background.

The Immigration & Nationality Act ("INA") stipulates that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).[1] The INA does not define "public charge." Instead, it directs the adjudicator to engage in a totality of the

[1] Because the vast majority of public charge determinations occur in the context of immigrant visas, this memorandum uses the term "immigrant" to refer to both immigrant and non-immigrant visa applicants, unless otherwise indicated.

circumstances inquiry that considers the applicant's (1) age, (2) health, (3) family status, (4) assets, resources, and financial status, and (5) education and skills. 8 U.S.C. § 1182(a)(4)(B)(i); Compl. ¶¶ 37, 47. Additionally, consular officers may consider an "Affidavit of Support" submitted by the applicant's sponsor. *See* 8 U.S.C. § 1182(a)(4)(B)(ii). The Affidavit is, in essence, a legally enforceable contract with the federal government whereby the sponsor promises to provide for the applicant's support. *Id.* § 1183a.

1. Federal agencies' long-standing interpretation of public charge.

For decades, the agencies that administer the INA, including the State Department, the former Immigration and Nationality Service ("INS"), and the U.S. Department of Homeland Security ("DHS"), have enacted policies distinguishing between cash and non-cash benefits in making public charge determinations. An applicant or their family's receipt of cash benefits—like Temporary Assistance for Needy Families—has served as a potential basis for exclusion. *See* Compl. ¶¶ 44, 54, 61. But the past, present, or anticipated receipt of non-cash benefits—such as the Supplemental Nutrition Assistance Program ("SNAP"), the Special Supplemental Program for Women, Infants, and Children ("WIC"), and Medicaid—has neither been a basis for excluding an applicant nor for overriding a valid Affidavit of Support. *See id.* ¶¶ 44-45, 48, 51-53, 57, 63-68. This understanding was codified first by the State Department in the FAM as early as 1993, and then in 1999 by INS in both a Notice of Proposed Rulemaking and Field Guidance.

a. The former FAM public charge provision. The FAM is "a single, comprehensive, and authoritative source for the Department's organization structure, policies, and procedures that govern the operation of the State Department, the Foreign Service, and, when applicable, other federal agencies." Compl ¶ 42 (quoting *Foreign Affairs Manual and Handbook*, U.S. Dep't of State, http://fam.state.gov/). The FAM thereby constitutes "the official policies of the Department of State" and "binding authority on consulates." *Id.* (quoting Victoria

Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 Yale L.J. 862, 872 (2011)).

Until January 2018, the State Department, through the FAM, defined public charge to mean an individual who "is likely to become … primarily dependent on the U.S. Government for subsistence," as demonstrated by either the "receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense." *Id.* ¶ 44. The FAM barred consular officers from considering either an applicant or their family's receipt of non-cash benefits: "[n]either the past nor possible future receipt of such non-cash or supplemental assistance may be considered in determining whether an alien is likely to become a public charge."[2] *Id.* ¶¶ 44, 46. The FAM further provided that "[a] properly filed [Affidavit of Support] … should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the totality of the circumstances analysis." *Id.* ¶ 47. While consular officers were allowed to consider the sponsor's or their family's use of means-tested benefit programs for the

[2] The FAM provides a non-exclusive list of over fifteen types of non-cash benefit programs that consular officers are barred from considering as benefits in making the public charge determination, but may now consider as part of the totality of the circumstances, including food stamps; Medicaid (other than payments under Medicaid for long-term institutional care); the Child Health Insurance Program ("CHIP"); emergency medical services; WIC; other nutrition and food assistance programs; other health and medical benefits; child-care benefits; foster care; transportation vouchers; job training programs; energy assistance, such as the low-income home energy assistance program; educational assistance, such as Head Start or aid for elementary, secondary, or higher education; job training; in-kind emergency community services, such as soup kitchens and crisis counseling; state and local programs that serve the same purposes as the enumerated Federal in-kind programs; and any other Federal, State, or local programs in which benefits are paid in-kind, by voucher or by any means other than payment of cash benefits to the eligible person for income maintenance. *Id.* ¶ 45. This list, and the bar on considering the enumerated programs as benefits, was likewise reprinted in the 1999 NPRM and Field Guidance (discussed *infra* pages 5-6).

limited purpose of excluding them from the sponsor's household income, using those programs did not invalidate an Affidavit of Support. *See id.* ¶ 48.

b. INS Notice of Proposed Rulemaking and Field Guidance on public charge. In 1999, INS published a Notice of Proposed Rulemaking (the "1999 NPRM") to define public charge. *See Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999). INS explained that "numerous legal immigrants and other aliens are choosing not to apply for [non-cash] benefits because they fear the negative immigration consequences of potentially being deemed a 'public charge.'" *Id.* at 28,676. INS therefore proposed to define public charge in the same way as the State Department, noting that its definition was consistent with the views of federal benefit-granting agencies like the U.S. Department of Health and Human Services, the U.S. Department of Agriculture, and the Social Security Administration. *Id.* at 28,677. Those agencies agreed that "receipt of cash assistance for income maintenance is the best evidence of primary dependence on the Government" because "non-cash benefits generally provide supplementary support … to low-income working families to sustain and improve their ability to remain self-sufficient." *Id.* at 28,677-78; *see* Compl. ¶¶ 50-58.

At the same time, INS published "Field Guidance" on public charge, adopting on an interim basis the definition used by the State Department in the FAM and proposed in the 1999 NPRM. *See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999). Echoing the same concerns about immigrants refusing to take non-cash benefits, INS clarified that "[i]t has never been Service policy that any receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge." *Id.* at 28,962. Instead, INS stressed that "[t]he nature of the public program must be considered." *Id.* The Field Guidance

thus directed officers to "not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." *Id.* at 28,689; *see* Compl. ¶¶ 59-68. For the Affidavit of Support, INS acknowledged that the form "asks whether the sponsor or a member of the sponsor's household has received means-tested benefits within the past 3 years." 64 Fed. Reg. at 28,693. INS clarified, however, that "[t]he purpose of this question is not to determine whether the sponsor is or is likely to become a public charge," but instead to ensure that those programs were not included in the sponsor's household income. *Id.* INS therefore specified that "receipt of [non-cash] means-tested benefits, such as Medicaid, is not disqualifying for sponsorship purposes." *Id.*

2. The Trump Administration's efforts to change the definition of public charge, including through the FAM change.

Since its inception, the Trump Administration has sought to limit the admission of non-citizens, including by expanding the definition of public charge to require authorities to consider the use of non-cash benefits. *See* Compl. ¶¶ 76-91. In January 2018, the State Department revised the FAM's definition to conform to that goal, changing it in three ways. *Id.* ¶ 92.

- **Consideration of an applicant's receipt of non-cash benefits.** While the FAM formerly made clear that "[n]either the past nor possible future receipt of such non cash or supplemental assistance may be considered in determining whether an alien is likely to become a public charge" (*id.* ¶ 99), it now directs consular officers to consider them "as part of the totality of the applicant's circumstances in determining whether an applicant is likely become a public charge" (*id.* ¶ 98).

- **Consideration of family members' receipt of non-cash benefits.** While the FAM formerly instructed that a family member's use of benefits matters only when they "constitute[] the primary means of subsistence of the applicant" (*id.* ¶ 102), it now instructs that "[p]ast or current receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household is relevant to determining whether the applicant is likely to become a public charge in the future" (*id.* ¶ 103), underscoring that the receipt of benefits by a dependent is "a heavily negative factor in the totality of the circumstances" (*id.* ¶ 104).

- **Consideration of the Affidavit of Support.** While the FAM formerly gave virtually determinative weight to Affidavits of Support and treated the sponsor's use of means-tested benefits as one factor, it now treats the Affidavit as "just one part of the holistic determination," and State now considers a sponsor's use of such benefits to be virtually disqualifying (*id.* ¶¶ 105-08).

Defendants provided no advance notice, opportunity for comment, or explanation of the changes, which took effect immediately. *Id.* ¶¶ 115-17.

Relatedly, on October 10, 2018, DHS announced a proposed rule to expand its definition of public charge. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018) (the "DHS Proposed Rule"). The DHS Proposed Rule applies to individuals who are seeking admission, an extension of their approved period of stay, a change of their visa status, or an adjustment of status to become a lawful permanent resident. *Id.* at 51,118. It does, in large measure, three things: (1) proposes a new definition of "public charge"; (2) proposes a new definition for "the types of public benefits that are considered in public charge inadmissibility determinations"; and (3) rescinds the INS's 1999 NPRM. *Id.* at 51,114. The DHS Proposed Rule would redefine "public charge" to mean "an alien who receives one or more public benefits" (*id.* at 51,157), and "public benefit" to include "a limited list of non-cash benefits," one narrower than the benefits now considered under the FAM (*id.* at 51,159-60). *See* Compl. ¶¶ 81-90.

3. The FAM change's harmful effects.

Defendants admit that "application of the new guidance … could potentially lead to individuals being denied visas on 'public charge' grounds more frequently." MTD 31. That is an understatement. On February 26, the government released its FY 2018 visa statistics, which are the first to reflect the January 2018 FAM change.[3] *See Report of the Visa Office 2018*, U.S.

[3] Courts may take judicial notice of documents on government websites (*see United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017)) and may consider such material in deciding a motion to dismiss (*see Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004)).

Dep't of State tbl. XX (2018), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20%20-%20TableXX.pdf. Those statistics show initial public charge ineligibility findings for immigrant visas and resulting denials have risen ***four-fold***. *Compare id.* (13,450 initial findings, of which 5,518 were not overcome) *with Report of the Visa Office 2017*, U.S. Dep't of State tbl. XX (2017), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf (3,237 initial findings, of which 1,221 were not overcome). The percentage of initial findings not overcome also increased from 37.7% in 2017 to 41% in 2018. *Id.*

The FAM change, and the resulting increase in ineligibility findings, deters immigrants, their families, and their sponsors from accepting public benefits—benefits for which they are eligible and which are designed to promote public health and economic self-sufficiency. Compl. ¶¶ 121-32. As explained above, federal agencies have long recognized that changes in public charge rules scare immigrants away from taking benefits; most recently, DHS concluded that the DHS Proposed Rule would lead to "the disenrollment or foregone enrollment of individuals in public benefits programs." 83 Fed. Reg. at 51,260; *see id.* at 51,260-68. That chilling effect is also corroborated by multiple studies (Compl. ¶¶ 121-25), court decisions on related subjects (*id.* ¶ 125 n.74), and reporting on the effects of public charge (*id.* ¶¶ 126-27).

B. Proceedings in this Court.

On November 28, 2018, Baltimore filed suit challenging the FAM change. Baltimore asserts three claims under the APA, alleging that the change is arbitrary and capricious, impermissibly retroactive, and was promulgated without notice and comment (Compl. ¶¶ 171-86), and a claim under the Due Process Clause of the Fifth Amendment, alleging that the change was motivated by discriminatory animus in violation of the Clause's Equal Protection guarantee (*id.* ¶¶ 187-97). Baltimore alleges that the FAM change harms the city by interfering with its

own benefits programs (*id.* ¶¶ 137-55); forcing it to divert resources to counteract the FAM change (*id.* ¶¶ 156-61); and imposing costs on some of its programs as immigrants withdraw from federal and state programs (*id.* ¶¶ 162-70). Baltimore seeks a declaration that the FAM change is unlawful and an injunction barring Defendants from applying the change. *Id.* at 70-71.

On February 25, 2018, Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017). "Indeed, a court cannot 'favor[] its perception of the relevant events over the narrative offered by the complaint,' thereby 'recasting plausibility into probability.'" *Id.* (quoting *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 422 (4th Cir. 2015)).

Although Defendants' jurisdictional arguments arise under Rule 12(b)(1), the court must "accept the facts of the complaint as true as [it] would in context of a Rule 12(b)(6) challenge because defendants' motions to dismiss are facial challenges to standing that do not dispute the jurisdictional facts alleged in the complaint." *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018). "General factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89-90 (4th Cir. 2013) (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992)).

ARGUMENT

I. Baltimore has standing and its claims are ripe.

To start, Baltimore has standing and its claims are ripe. *Cf.* MTD 11-22, 24-26. As alleged in detail (*see* Compl. ¶¶ 133-70), and discussed below, the FAM change deters Baltimore's immigrant residents and their families from accepting public benefits, frustrating Baltimore's programs, diverting its resources, and imposing additional costs on its budget. Thus, the Court has jurisdiction to decide the merits of Baltimore's claims.

A. Baltimore has standing.

"To meet the constitutional minimum requirements for standing to sue, a 'plaintiff must have … suffered an injury in fact, … that is fairly traceable to the challenged conduct of the defendant, and … that is likely to be redressed by a favorable judicial decision.'" *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 240 (4th Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). This burden is not a demanding one: "plaintiffs are required only to state a *plausible* claim that each of the standing elements is present." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018) (quotation omitted). "The bar of standing must not be set too high, lest many regulatory actions escape review contrary to the intent of Congress." *Doe v. Obama*, 631 F.3d 157, 163 (4th Cir. 2011); *see also District of Columbia v. Trump*, 291 F. Supp. 3d 725, 738 (D. Md. 2018) ("Injury-in-fact is not Mount Everest.") (quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (Alito, J.)). Baltimore's allegations—which must be "accept[ed] … as true" (*Kenny*, 885 F.3d at 287)—easily clear this bar, showing that it has suffered three types of injuries that are fairly traceable to the FAM change and redressable by the Court.

1. Baltimore has alleged three plausible theories of injury-in-fact.

Baltimore suffers three forms of ongoing proprietary injury, which courts have long held is a basis for municipal standing. A city has standing "when a harm ***to the city itself*** has been alleged." *Olmsted Falls v. F.A.A.*, 292 F.3d 261, 268 (D.C. Cir. 2002). "The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets," and include "management, public safety, [and] economic" harms. *Sausalito v. O'Neill*, 386 F.3d 1186, 1197-99 (9th Cir. 2004); *see Amador Cty. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011) (finding standing where action "would increase the County's infrastructure costs and impact the character of the community"); *cf. District of Columbia*, 291 F. Supp. 3d at 745 (concluding that District of Columbia and Maryland had "successfully articulated injury-in-fact to at least some of their proprietary interests").

Specifically, Baltimore suffers proprietary injury from the profound interference with its policies and programs caused by Defendants' arbitrary, unexplained decision to alter the FAM in ways that discourage immigrants and their families from accepting public benefits. Defendants misconstrue Baltimore's injuries, reducing them to a single theory that the FAM change "will cause social problems that ultimately impose costs on the city." MTD 15. But in fact, Baltimore alleges ***three*** distinct theories of ***ongoing*** injury, none of which fit that description: (1) its residents are deterred from taking its public benefits, (2) it must divert resources to counter the effects of Defendants' actions, and (3) it pays increased costs in some of its programs.[4]

[4] As the Complaint explains, there is no contradiction between these theories of injury; some immigrants shift from federal programs—like Medicaid—to in-kind local programs—like free or reduced-cost health clinics—while other immigrants go without services at all. Compl. ¶¶ 134-35. That diversity of responses is testament to the profound uncertainty and confusion caused by Defendants' actions. Indeed, DHS expressly noted in the DHS Proposed Rule that its changes would deter immigrants from taking benefits (*see* 83 Fed. Reg. at 51,268), while also imposing "costs to various entities that the rule does not directly regulate, such as hospital systems, state

First, the FAM change deters immigrants and their families from availing themselves of Baltimore's public benefits, including its extensive health, housing, electricity and heating assistance, educational, and other programs. Compl. ¶¶ 121-55. That injury to Baltimore's "ability to function as a municipality in regulating persons and property" constitutes injury-in-fact. *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848-49 (9th Cir. 1985). Indeed, courts have long recognized that local and state governments possess "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quotation omitted); *see also Stieberger v. Heckler*, 615 F. Supp. 1315, 1338 (S.D.N.Y. 1985) (noting the "legitimate interest of such localities in insuring the appropriate and lawful administration" of benefits). As the Complaint details, Baltimore operates, and wants widespread participation in, these programs for the benefit of immigrant families and the City alike. *See* Compl. ¶¶ 141-54. The FAM change therefore disrupts some of the most fundamental aspects of Baltimore's city government.

Second, Baltimore is injured by having to divert resources to adapting its programs to address the FAM change. *See* Compl. ¶¶ 156-61. A municipality suffers injury if it "divert[s] limited resources towards counteracting the injurious effects of" a defendant's conduct, thus "threatening its ability to bear the costs of local government and to provide services." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 618 (S.D.N.Y. 2019) (quoting *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110-11 (1979)); *see also Cty. of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909, 913-14 (N.D. Ill. 2015) ("[U]nder *Gladstone,* that is sufficient to allege a

agencies, and other organizations that provide public assistance" (*id.* at 51,260). Independent studies have likewise noted the resulting costs to other service providers. *See* Compl. ¶ 164. While the ***size*** of each of these injuries may vary, their ***existence*** and their ***causes***—*i.e.*, injury-in-fact and causation—are indisputable.

cognizable injury in fact."). Baltimore alleges four kinds of resources the FAM change has forced or will force it to divert if it remains valid: it has had to devote "substantial time and energy to analyzing the FAM change" (Compl. ¶ 157); it must provide any necessary "guidance and training" to employees (*id.* ¶ 158); it must "devote additional staff time and resources to encouraging" immigrants to take benefits (*id.* ¶ 159); and it must consider what to tell potential recipients about the FAM change (*id.* ¶ 161). These injuries, too, are ones that DHS recognized in its Proposed Rule. *See* 83 Fed. Reg. at 51,118, 51,260, 51,270.

Third, Baltimore suffers increased costs for some of its programs—particularly in-kind benefits programs, like health clinics, that do not track immigration status—as well as downstream costs that result when immigrants cannot get the benefits they need. *See* Compl. ¶¶ 162-70. "[F]inancial harm is a classic and paradigmatic form of injury in fact." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018) (quotation omitted). Government entities therefore have standing where federal action cause them to "incur expenses" they would not otherwise have incurred. *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 158-59 (E.D.N.Y. 2017). For example, the court in *Pennsylvania v. Trump* held that Pennsylvania was injured by the federal government's contraceptive opt-out rules because it would "have to increase its expenditures for State and local programs providing contraceptive services." 281 F. Supp. 3d 553, 567 (E.D. Pa. 2017). Similarly, Baltimore can expect to pay more to fund programs that experience increased demand (Compl. ¶¶ 162-66) and to manage the social problems that result when residents go without needed health, food, housing, and other benefits (*id.* ¶¶ 167-70).

Defendants object that each of these injuries are "indirect" harms, because the FAM change does not "directly regulate[] the City." MTD 15. But that is a red herring. As explained in greater detail with respect to causation, "standing does not require the challenged action to be the

sole or even immediate cause of the injury." *Sierra Club v. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018). Although the FAM change does not "affect any person's eligibility" to take public benefits (MTD 15), it penalizes those that do. And while it does not bar Baltimore from providing benefits, it plainly "affect[s] the City of Baltimore's ability to deliver services" (*id.*) by deterring residents from using them. A barrier by any other name is still a barrier.

Defendants also assert that Baltimore's theories of injury "rel[y] on speculation about what might happen to the City depending on how Baltimore residents react to the guidance." MTD 15-16. But the chilling effect of Defendants' attempts to expand who constitutes a public charge, including the FAM change, is corroborated by ***the federal government's own statements***, including from just months ago—far more than the "speculation" and "conjecture" at issue in *Lujan* and *Clapper.* In its proposed rule released last October, DHS recognized that "[r]esearch shows that when eligibility rules change for public benefits programs there is evidence of a 'chilling effect' that discourages immigrants from using public benefits programs," and that individuals "may choose to disenroll from or forego enrollment in a public benefits program" as a result. 83 Fed. Reg. at 51,268. Those findings echoed findings made by INS nearly 20 years earlier, in its 1999 NPRM and Field Guidance, that immigrants choose not to apply for public benefits when they "fear the negative immigration consequences of potentially being deemed a 'public charge.'" 64 Fed. Reg. at 28,676. DHS therefore concluded—indeed, reaffirmed—that its proposed rule could deter up to hundreds of thousands of individuals from taking benefits. 83 Fed. Reg. at 51,268. Thus, "[t]he government's own statements undermine its argument" that Baltimore's injuries are "speculative." *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, -- F. Supp. 3d --, 2019 WL 1082162, at *10 (D.D.C. 2019).

The Complaint corroborates the chilling effect in three additional ways. ***First,*** the Complaint cites multiple independent studies finding a chilling effect, including studies by USDA, the Urban Institute, the Migration Policy Institute, and the Center on Budget and Policy Priorities. *See* Compl. ¶ 123 & nn.69-72. ***Second,*** several recent court decisions have recognized that fear of immigration consequences deters immigrants from accessing necessary public benefits and services. *See id.* ¶ 125 n.74 (citing *Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 297-300, 341 (E.D. Pa. 2018); *Chicago v. Sessions*, 321 F. Supp. 3d 855, 862 (N.D. Ill. 2018)). ***Third,*** multiple recent news reports and studies have attributed families' decisions to drop out of benefits programs to immigration concerns, including in Baltimore specifically. *See id.* ¶¶ 126-27. The dramatic increase in the number of visa denials following the FAM change only underscores the sweeping effect of Defendants' actions. *See supra* pages 7-8. These factual allegations provide far more than what is required to show injury for standing purposes.

Finally, Defendants offer two responses to Baltimore's diversion-of-resources theory of injury. MTD 18-19. ***First,*** Defendants say that Baltimore's expenditures on "education" and "outreach" do not count because they resulted from the City's "own decision to conduct those activities," citing the Fourth Circuit's decision in *Lane v. Holder*. MTD 18. But *Lane* acknowledged that "[a]n organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission," resulting in a "drain on its resources." 703 F.3d 668, 674-75 (4th Cir. 2012). As *Lane* and the cases on which it relied make clear, the fundamental distinction is between expenditures necessary to avert harm from the defendant's actions, like those here, and circumstances where the plaintiff "would have been totally unaffected if it had simply refrained from making the re-allocation." *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994). Indeed, Fourth Circuit district courts

have made clear that a diversion-of-resources theory like that alleged by Baltimore is consistent with *Lane*. *See, e.g.*, *PETA v. Tri-State Zoological Park of W. Md., Inc.*, 2018 WL 6324806, at *2 n.1 (D. Md. 2018); *Action NC v. Strach*, 216 F. Supp. 3d 597, 616 (M.D.N.C. 2016).

Second, Defendants assert that Baltimore's injuries lack "a nexus to the substantive character of the statute or regulation at issue," without clarifying what they think that standard means or why Baltimore's injuries do not meet it. MTD 18 (quoting *Diamond v. Charles*, 476 U.S. 54, 70 (1986)). On its face, however, Baltimore's need to adjust its programs to counteract the FAM change is related to the substance of the FAM change. *Diamond* held only that a litigant's interest in fees "is wholly unrelated to the subject matter of the litigation" and "only a byproduct of the suit itself," and so does not constitute injury-in-fact. 476 U.S. at 70-71. To the extent *Diamond* has significance outside the context of attorneys' fees, courts have applied it to mean nothing more than what the Fourth Circuit recognized in *Lane*: that a plaintiff "may not allege the drain on its resources from conducting th[e] litigation as injury in fact." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987). Again, Baltimore alleges nothing of the sort. Rather, it alleges that Defendants' actions have "impair[ed]" (*Barnes v. Shalala*, 865 F. Supp. 550, 561 (W.D. Wis. 1994)) and forced it to "adjust" its programs (*Shays v. F.E.C.*, 337 F. Supp. 2d 28, 45-46 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005))—injuries courts have found to possess a sufficient "nexus" under *Diamond*.

In short, Baltimore's injuries—residents withdrawing from city programs, diverted resources, and financial costs—are quintessential injuries-in-fact. Baltimore's factual allegations detailing those injuries amply satisfy its pleading burden.[5]

[5] Defendants also address several theories of standing Baltimore does not assert. Baltimore does not assert a parens patriae theory of standing; it asserts only proprietary theories grounded

2. Baltimore's injuries are fairly traceable to the FAM change and redressable by this Court.

For many of the same reasons that Baltimore has adequately alleged injuries-in-fact, it has adequately connected those injuries to the chilling effect of the FAM change. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (explaining that the prongs of standing "often overlap[]"). The causation requirement "necessitates only that the alleged injury be 'fairly traceable' to the complained-of action." *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 315 (4th Cir. 2013) (quotation omitted).

Defendants object that they are not responsible for Baltimore's injuries because they "depend[] on the independent choices of Baltimore residents." MTD 16. But those choices are, in fact, ***dependent*** on Defendants' actions, and therefore pose no bar to standing. "It is impossible to maintain[] … that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). In fact, "the causation element of standing does not require the challenged action to be the sole or even immediate cause of the injury." *Sierra Club*, 899 F.3d at 284.

Instead, a plaintiff need only demonstrate that third parties will respond to a defendant's actions in a manner that produces plaintiff's injuries. "While the defendant's conduct need not be the last link in the causal chain, the plaintiff must be able to demonstrate that the alleged harm was caused by the defendant, as opposed to the 'independent action of some third party not before the court.'" *Air Evac EMS*, 910 F.3d at 760 (quoting *Frank Krasner Enters., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005)). "What matters is not the 'length of the

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in harm to its policies, programs, and budget. *Cf.* MTD 18-19 & n.9. Baltimore also does not assert that discrimination against Baltimore's immigrant residents independently gives Baltimore ***standing***; it asserts only that, as Defendants seem to concede, a jus tertii theory permits Baltimore to raise the ***rights*** of those residents. *Cf. id.* at 19-20 & n.10.

chain of causation,' but rather the 'plausibility of the links that comprise the chain.'" *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (quoting *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)). Ultimately, the question is whether the plaintiff's injury "can be fairly traced through the third party's intervening action back to [the defendant]" (*District of Columbia*, 291 F. Supp. 3d at 749) through means like "statistical analysis, common sense, or record evidence" (*New York*, 351 F. Supp. 3d at 576).

Baltimore's injuries can be fairly traced to the FAM change in two ways. ***First,*** by penalizing Baltimore residents who take public benefits, the FAM change determines or coerces their actions. The Supreme Court and the Fourth Circuit have both emphasized that one way the causation element of standing can be satisfied is "where the plaintiff suffers an injury that is 'produced by [the] determinative or coercive effect' of the defendant's conduct 'upon the action of someone else.'" *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 197 (4th Cir. 2013) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). In this context, coercion includes conduct that "imposes a powerful incentive" by assessing "large penalties." *Star Sci. Inc. v. Beales*, 278 F.3d 339, 359 (4th Cir. 2002).

Here, Defendants have coerced, and are continuing to coerce, the decisions of Baltimore's immigrant residents by threating them with immigration consequences if they accept public benefits. Indeed, courts applying *Landsdowne* have held that a third party's fear of jeopardizing their immigration status is precisely the kind of "determinative or coercive effect" that establishes causation. In *Kravitz v. Department of Commerce*, Judge Hazel concluded that the plaintiffs had standing to challenge the addition of a citizenship question to the decennial census based on allegations that the Census Bureau could be "perceived as an enforcement agency, which would cause [noncitizen] respondents to misunderstand or mistrust the census and

fail or refuse to respond." 336 F. Supp. 3d 545, 560 (D. Md. 2018). Notably, those allegations included, as the DHS allegations do here, "the Census Bureau's own internal findings." *Id.*; *see also La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 390 (D. Md. 2018) (crediting allegations that "government action will directly cause through 'coercive effect' those individuals to refuse to answer"). Forcing immigrants to choose between risking their status and forgoing public assistance counts as determination and coercion, under any interpretation.

Second, Defendants' actions are a "substantial factor motivating" the decisions of Baltimore's immigrant residents, which independently renders Baltimore's injury traceable and redressable. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001) (quoting *Cmty. for Creative Non–Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987)). Courts do "not require proof that the government conduct had a coercive effect on the third party's action," so long as the court can "predict how the third party would likely act in response." *New York*, 351 F. Supp. 3d at 576. Relatedly, a plaintiff "need not show that a particular defendant is the *only* cause of their injury." *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (emphasis added). As explained above, the chilling effect of the FAM change is predictable, even if other factors might also affect an immigrant's decision to accept benefits.

In response to Baltimore's showing on causation, Defendants largely recite the facts of several cases where plaintiffs failed to meet the standards outlined above. MTD 16-18. But none of them hold that injuries cease to be fairly traceable when they involve third parties. Indeed, Fourth Circuit district courts have distinguished *Frank Krasner Enterprises* and *Friends for Ferrell Parkway* where, as here, the third parties' choices are "sufficiently predictable." *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733, 747 (D.S.C. 2017). *Lane v. Holder* is even further afield; the plaintiffs' injuries there were attributable to the

independent decisions of federal firearms licensees to charge transfer fees, decisions which the defendants did not control or influence at all. *See* 703 F.3d at 674.

Defendants devote more attention to *Frank Krasner Enterprises*, asserting that Baltimore's showing is weaker because the *Krasner* plaintiff showed that the third party's actions "were plainly a direct response" to the challenged county ordinance. MTD 17. But that is only a partial description of the facts in *Krasner*. The plaintiff's injury, increased prices for its gun shows, was several steps removed from the ordinance, which prohibited funding for venues hosting firearm events; the ordinance did not bar the venue from doing business with the plaintiff (401 F.3d at 236); the venue might not receive any county funding in the future anyway (*id.* at 233 n.4); the venue independently wished to "steer clear of taking a political position" (*id.* at 233); and, presumably, the plaintiff could find other space. On those facts, the Court held that a plaintiff lacks standing to challenge "a law [that] only indirectly raises [the plaintiff's] prices by withholding funding to a third party not before the court." *Id.* at 236. In contrast, the FAM change imposes severe, nonmonetary penalties on immigrants who accept benefits.

For these reasons, Baltimore's injuries would also be redressed if Defendants were required to adhere to the previous version of the FAM in adjudicating visas. As the Fourth Circuit has explained, an injury is redressable where "the court's decision would reduce 'to some extent' plaintiffs' risk of additional injury." *Carter v. Fleming*, 879 F.3d 132, 138 (4th Cir. 2018) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)). That is the case here, where an order preventing Defendants from applying the FAM change would allow immigrants and their families to receive federal, state, and local non-cash public benefits without fearing immigration consequences, just as they would otherwise. Thus, Baltimore has adequately pleaded the traceability and redressability elements of Article III standing.

3. Baltimore has prudential standing.

Defendants also challenge several aspects of Baltimore's standing on prudential grounds, including the limits on asserting the rights of a third party via a jus tertii theory (at MTD 19-20 & n.10) and the zone-of-interests test (*id.* at 24-26). *See Craig v. Boren*, 429 U.S. 190, 193 (1976) ("[L]imitations on a litigant's assertion of jus tertii are not constitutionally mandated."); *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.*, 745 F.3d 703, 713 (4th Cir. 2014) (describing the zone-of-interests test as one of "the standing doctrine's judicially imposed, prudential limits on federal jurisdiction"). Neither bars Baltimore's suit.

With respect to third-party standing, by "fail[ing] to develop th[e] argument to any extent in [their] brief" aside from a citation to a single case (*see* MTD 20 n.10), Defendants have waived any challenge to Baltimore's reliance on the rights of its residents. *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012). Regardless, Baltimore adequately pleads a jus tertii theory. It suffers injury-in-fact, for the reasons explained above; it has the requisite "close relationship" to the immigrant residents it serves (*see, e.g.*, *A Helping Hand, LLC v. Baltimore Cty.*, 515 F.3d 356, 364 (4th Cir. 2008); *Stuart v. Loomis*, 992 F. Supp. 2d 585, 610-11 (M.D.N.C.), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)); and its immigrant residents face impediments to bringing their claims (*see Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 732 (S.D. Ind.), *aff'd*, 838 F.3d 902 (7th Cir. 2016)). *See* Compl. ¶¶ 195-97. *Kowalski v. Tesmer* (*see* MTD 20) is inapposite because Baltimore asserts the rights of current residents with ongoing relationships with city agencies, not hypothetical future clients, and because the burdens faced by those residents—including fear of retaliation, language barriers, and logistical barriers to filing suit—are more severe than the criminal defendants in *Kowalski*, some of whom had in fact asserted their claims. 543 U.S. 125, 130-34 (2004).

As for the zone-of-interests test, a plaintiff need only show that their injuries "arguably fall within the zone of interests protected or regulated by the statutory provision … invoked in the suit." *Bennett*, 520 U.S. at 162. The test "is not meant to be especially demanding" (*Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)), and "the word 'arguably' in the test … indicate[s] that the benefit of any doubt goes to the plaintiff" (*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quotation omitted)). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (quotation omitted).

In fact, Baltimore's interest in attracting immigrants who will benefit the city and providing them with assistance to facilitate their integration goes right to the heart of the INA. The INA contains a detailed set of provisions that permit the admission of non-citizens into the United States, recognizing the benefit that immigrants can provide if they are allowed to become fully functioning members of American society. 8 U.S.C. §§ 1153, 1184. Moreover, the public charge provisions of the INA recognize that immigrants can contribute to local communities even if they have previously accepted public benefits. *Id.* §§ 1182, 1183a. Notably, Defendants fail to address any of these specific provisions identified in the Complaint. *See* Compl. ¶ 178.

The decisions in *Hawaii v. Trump* and *Texas v. United States* confirm that Baltimore's injuries fall within the INA's zone of interests. In particular, *Hawaii* confirms that a government's interest in attracting qualified immigrants falls within the zone of interests of the INA's visa-granting provisions. *See* 878 F.3d 662, 682 (9th Cir. 2017), *rev'd and remanded on*

other grounds, 138 S. Ct. 2392 (2018).[6] Defendants split hairs, arguing that *Hawaii* was based solely "on Hawaii's status as the operator of the University of Hawai'i." MTD 26. But that makes no difference. The INA permits visas for immigrants other than students and teachers and public universities are only one of a government's programs. Indeed, *Hawaii* also referenced interests in bringing individuals of exceptional ability, employees, and family members to the United States, all of which are implicated here. 878 F.3d at 681-82; *see also Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 286 (4th Cir. 2018) (Gregory, J., concurring), *rev'd and remanded on other grounds*, 138 S. Ct. 2392 (2018); *id.* at 310 (Keenan, J., concurring)

Defendants offer more of the same on *Texas v. United States*. MTD 25-26. In *Texas*, the court recognized "the importance of immigration policy to the States," and by extension, to the cities that exercise the States' delegated sovereignty. 809 F.3d 134, 163 (5th Cir. 2015) (quoting *Arizona v. United States*, 567 U.S. 387, 397 (2012)). It also relied on 8 U.S.C. § 1621, a statute that—contrary to Defendants' constrained interpretation—readily encompasses Baltimore's claims. Section 1621 recognizes the importance of providing immigrants with public benefits, barring only those without legal status (*id.* § 1621(a)); even then, it exempts "[a]ssistance for health care items and services," "[s]hort-term, non-cash, in-kind emergency disaster relief," "[p]ublic health assistance," and other "[p]rograms, services, or assistance" (*id.* § 1621(b)); and permits States to restore eligibility for other State and local benefits as well (*id.* § 1621(d)). That statute thereby reflects a broader concern for the proper administration of State and local benefits, rather than, as Defendants say, a bare interest in cutting costs.

[6] In reversing the Ninth Circuit's decision (and the Fourth Circuit's related decision) on other grounds, the Court did not reject their holdings on the zone-of-interests test, instead "assum[ing] without deciding that plaintiffs' statutory claims are reviewable[] notwithstanding … any other statutory nonreviewability issue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018); *cf.* MTD 26.

B. Baltimore's claims are ripe.

For many of the same reasons, Baltimore's claims are also ripe for decision. In determining ripeness, the court considers "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) (quotation omitted). As this Court has recognized, often "standing and ripeness boil down to the same question." *Maryland v. United States*, 2019 WL 410424, at *12 (D. Md. 2019) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)). Here, they have the same answer. In particular, Baltimore's claims are "fit for judicial decision" because "the issues are purely legal" (except with respect to whether Defendants' decisions were motivated by animus) and because the FAM change is in effect. *Lansdowne*, 713 F.3d at 198 (quotation omitted). Baltimore faces hardship because Defendants' actions have "already caused 'immediate harm'" to it. *Id.* at 199 (quotation omitted). Defendants' responses (MTD 20) misapprehend the nature of Baltimore's injuries; obviously, Baltimore will never apply for a visa itself, but Baltimore has provided ample evidence that the application of the FAM change produces a chilling effect that harms the city. Nothing more is needed.

C. Baltimore has standing to sue the President.

Finally, Defendants challenge Baltimore's standing to assert its Equal Protection claim against the President because the FAM change was issued by the State Department. MTD 20-22. But Defendants cannot cleave the President from the actions of his subordinates so easily. After all, "[o]ur Constitution vests 'executive Power' in the President, not in the [Secretary of State], who reports to the President and is removable by him at will." *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018) (quoting *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018), in turn citing U.S. Const., art. II, § 1, cl. 1). Regardless, as explained below, the President's animus is a motivating factor in his Administration's efforts to change the rules

governing public charge, including the FAM change. *See infra* pages 39-45. Whether the issue is standing or the plausibility of Baltimore's Equal Protection claim, Baltimore's factual allegations on this score must be "accept[ed] … as true." *Kenny*, 885 F.3d at 280.

Defendants add that Baltimore has not been "personally denied equal treatment" by their actions. MTD 21 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). But that is true in any case where a plaintiff asserts the Equal Protection rights of third parties under a jus tertii theory; the City is obviously not an immigrant of color from a country the President disfavors. What *Allen* rejected was a theory of "abstract stigmatic injury" that "would extend nationwide to all members of the particular racial groups," not, as Baltimore alleges here, concrete discrimination against its immigrant residents of color and their families. 468 U.S. at 755-56. As explained above, Baltimore meets the requirements to assert the rights of those residents, who have been "personally denied equal treatment." *See supra* pages 20-21. Because the President's animus lies at the heart of his Administration's actions, Baltimore has standing to sue him as well.

II. Baltimore has stated Administrative Procedure Act claims.

Baltimore has stated claims under the APA against the State Department and Secretary Pompeo. Each of Defendants' attempts to shield the FAM change from the APA's requirements are unavailing: immigration policies are not categorically exempt from the APA; the FAM change is reviewable final agency action; and the FAM change violates the APA's notice-and-comment requirement and is impermissibly retroactive.[7]

A. Executive immigration policies are subject to APA review.

Defendants first argue that executive immigration policies are either precluded from review by statute or committed to agency discretion by law. MTD 23-24. Even in the

[7] Defendants' motion to dismiss only challenges Baltimore's notice and comment and retroactivity claims. *See* MTD 31-34.

immigration context, however, there remains "a 'strong presumption in favor of judicial review of administrative action.'" *Beshir v. Holder*, 10 F. Supp. 3d 165, 170 (D.D.C. 2014) (quoting *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)). The INA, "far from precluding review, affirmatively provides for it," and "does not commit to unguided agency discretion the decision to exclude an alien." *Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). Consistent with that presumption of review, courts have routinely examined systemic immigration policies even where review of individual determinations might be foreclosed. *See, e.g.*, *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (permitting review because plaintiffs challenged Secretary of State's policies rather than individual visa decisions); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 12 (D.D.C. 2017) (distinguishing "between a challenge to DHS's exercise of discretion and one to an overarching agency policy") (quotation omitted).

Defendants' own cases prove the point. In each, the Court went on to consider the merits of the policies pursuant to which the government excluded the noncitizen in question, including on statutory grounds. *See Fiallo v. Bell*, 430 U.S. 787, 800 (1977) (holding that statute was "not unconstitutional"); *Shaughnessy v. Mezei*, 345 U.S. 206, 215 (1953) ("[W]e do not think that respondent's continued exclusion deprives him of any statutory or constitutional right."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (rejecting "constitutional objections"). That leaves Defendants with Judge Niemeyer's ***dissent*** in *International Refugee Assistance Project*, which reasoned that matters of "immigration policy as to aliens abroad are committed exclusively to the political branches." 883 F.3d at 360. But as Defendants rightly note, five of the judges in the majority ***rejected*** Judge Niemeyer's position. Judge Gregory, joined by Judge Wynn, explained that courts have "inherent authority to review allegations that an executive action has exceeded the Constitution or a congressional grant of authority," including through its

immigration policies. *Id.* at 287. And Judge Keenan, joined by Judges Wynn, Diaz, and Thacker, agreed that executive immigration policies are reviewable where they transcend "discernible textual and structural statutory limits." *Id.* at 310; *see also Hawaii*, 878 F.3d at 681 (holding that similar statutory and APA claims were reviewable); *supra* note 6.

B. The FAM change is final agency action.

Defendants next contend that the FAM change is not final agency action, and is therefore unreviewable under the APA. MTD 26-31. That is incorrect. The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. An agency action is "final" when it marks the "consummation of the agency's decision-making process" and is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (citations omitted). The Supreme Court has "long taken" a "'pragmatic' approach" to finality. *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). What matters is not the label or form the agency attaches to the action but rather its "practical effect." *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 188 (4th Cir. 1999) (quoting *Chamblee v. Espy*, 100 F.3d 15, 17 (4th Cir. 1996)). The FAM change meets both finality requirements.

1. The FAM change marks the consummation of State's decision-making process.

The government does not contest that the FAM change marks the consummation of State's process. *See* MTD 26-31. Nor could it. The FAM change is not "merely tentative or interlocutory." *Fund for Animals, Inc. v. BLM*, 460 F.3d 13, 28 (D.C. Cir. 2006) (quotation omitted). Rather, it is State's "unequivocal statement of [its] position" on public charge. *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004) (quotation omitted); *see also Friedman v. FAA*,

841 F.3d 537, 542 (D.C. Cir. 2016) ("[T]he applicable test is not whether there are further administrative proceedings available, but rather 'whether the impact of the order is sufficiently "final."') (quotation omitted). The FAM change thus satisfies the first *Bennett* prong.

2. The FAM change imposes legal consequences.

The FAM change also gives rise to "direct and appreciable legal consequences." *Hawkes Co.*, 136 S. Ct. at 1814 (quotation omitted). Previously, the FAM provided a safe harbor for immigrants who used non-cash benefits, mandating that "[n]either the past nor possible future receipt of such non-cash or supplemental assistance may be considered in determining whether an alien is likely to become a public charge." Compl. ¶ 44. Now, however, the FAM ***requires*** consular officers to consider non-cash benefits; it states that use of such benefits "is relevant" and, in the case of dependents, "a highly negative factor." *Id.* ¶ 104. In doing so, it dramatically expands the range of benefits a consular officer must consider in making public charge determinations, including health, housing, low-income assistance, food, educational, and other non-cash benefits. Because the FAM change thereby "alter[s] the legal landscape," it constitutes final agency action. *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 433 (4th Cir. 2010); *see also IRAP*, 883 F.3d at 285 ("[A]n agency action is 'immediately reviewable' when it gives notice of how a certain statute will be applied.") (quoting *Hawkes*, 136 S. Ct. at 1815).

The Supreme Court's decision in *Hawkes* is instructive. There, the Court considered whether the Army Corps' determinations pursuant to the Clean Water Act that a parcel of land contains or does not contain jurisdictional "waters of the United States" (so-called "jurisdictional determinations") are final agency action. 136 S. Ct. at 1811. A "negative" jurisdictional determination that the land does not contain such waters precludes federal civil enforcement proceedings and litigation, thereby providing a "safe harbor" to landowners. *Id.* at 1814. Conversely, a positive determination "represent[s] the denial of the safe harbor," making the

landowner subject to federal enforcement actions and penalties for unlawful discharges. *Id.* That effect—the grant or denial of a safe harbor—amounted to a "legal consequence," rendering jurisdictional determinations final agency action. *Id.*

Like a positive jurisdictional determination under the Clean Water Act, the FAM change removed a safe harbor for immigrants, their families, and their sponsors. Before, an immigrant could rest assured that taking non-cash benefits would not jeopardize a subsequent visa application. Now, immigrants are threatened with "significant … penalties" (*id.* at 1815)—ineligibility for a visa—if they, or their families or sponsors, decide to take those benefits. By replacing a safe harbor with troubled waters, the FAM change constitutes final agency action. *Cf. Frozen Foods Express v. United States*, 351 U.S. 40, 44-45 (1956) (holding that an order "classif[ying] commodities as exempt or nonexempt" was final agency action because it "warns every carrier" who carries nonexempt goods "that it does so at the risk of incurring criminal penalties"); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1032 (D.C. Cir. 2016) ("By rendering Rhea Lana a candidate for civil penalties, the Department's Letter establishes legal consequences and is, accordingly, final agency action.").

Defendants argue that the use of non-cash benefits is "simply a factor" in the totality of the circumstances analysis, and so the FAM change is not "outcome determinative." MTD 31. But neither was a negative jurisdictional determination; the government might nonetheless decide not to pursue litigation, or if it did, the landowner might prevail. It was the potential ***exposure*** to liability that made jurisdictional determinations final agency action nonetheless. More broadly, courts have long held that an agency's action can be final without being outcome determinative. In *Bennett*, for example, the Supreme Court concluded that a "biological opinion" assessing the risks of a water project was reviewable final agency action even though the opinion

did not "conclusively determine" how the Interior Department would respond to the opinion, or whether it would follow the opinion at all. 520 U.S. at 170, 177-78 (noting that an agency ignores a biological opinion "at its own peril"); *see also Home Builders Ass'n v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 614 (7th Cir. 2003) ("[T]he presence of some discretion in the system does not necessarily defeat the availability of judicial review over other elements."). Regardless, Defendants' modest description of the FAM change's impact is belied by their own statistics, which show that ineligibility findings are four times higher since the change was enacted. *See supra* pages 7-8. Thus, the FAM change produces legal consequences.

3. The FAM change is reviewable whether it constitutes a legislative rule or an interpretive rule.

Notwithstanding the dramatic shift the FAM change works in how consular officers are required to weigh visa applications, Defendants argue that the change is not reviewable because it is a mere "interpretive rule" rather than a "legislative rule," and therefore "does not carry legal force." MTD 27-31. Defendants' argument would presumably mean that consular officers are free to disregard the Foreign Affairs Manual at their leisure and refuse to consider the use of non-cash benefits. Defendants are incorrect in two respects: the FAM change is properly considered a legislative rule, and regardless, reviewability does not turn on whether an agency's action is deemed to be a legislative rule or an interpretive rule.

First, the FAM change is a legislative rule. Defendants' assertion to the contrary must be considered against the backdrop that DHS is simultaneously proceeding through notice-and-comment rulemaking to implement similar changes to public charge for immigrants seeking to adjust status. *See* 83 Fed. Reg. 51,114. Although an agency's decision to conduct notice-and-comment rulemaking is not binding, the DHS Proposed Rule demonstrates the federal

government's implicit acknowledgement that changes like the FAM change go beyond mere interpretation and effect a substantive change in law that requires notice and comment.

That backdrop aside, the FAM change is a legislative rule analyzed on its own terms. A rule "is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018). There can be no question that the FAM change effects a substantive policy change. Since at least 1999, the State Department did not consider non-cash benefits as part of the public charge determination. Now it does. It has, in other words, "change[d] the rules of the game" (*Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003)) by including within public charge a host of programs that had previously been excluded—a quintessentially legislative action. Similarly, the FAM change cannot be characterized as "deriv[ing] a proposition from an existing document whose meaning compels or logically justifies the proposition," a hallmark of an interpretive rule. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quotation omitted).

The Fourth Circuit's decision in *Jerri's Ceramic Arts v. Consumer Product Safety Commission*—which Defendants bury at the end of their analysis—confirms the point. There, the Court held that a "Statement of Interpretation" issued by the Consumer Product Safety Commission, which banned several small children's toys, constituted a legislative rule. 874 F.2d 205, 206 (4th Cir. 1989). In almost every respect, the Commission's statement is comparable to the FAM change. The rule "altered a long-standing position" (here, the treatment of non-cash benefits); "impose[d] new duties" (here, by requiring consular officers to consider non-cash benefits, and penalizing immigrants if they take such benefits); brought "an enormous range of … products" within the scope of the agency's rules (here, a long list of non-cash benefits); and

had "great[] … effects" (here, four times as many visa denials). *Id.* at 208. Of course, as Defendants say, an agency can change its interpretation through a subsequent interpretive rule. MTD 30. But an agency cannot "ma[ke] a legislative rule and call[] it interpretation." *Jerri's Ceramic Arts*, 874 F.2d at 208. That is precisely what State has done in altering a long-standing position to impose new duties on a regulated community and the agency.

It is irrelevant that the change was published in the FAM. MTD 27-29. An agency's "characterization of its statement as an expansion of its policy or interpretation … does not preclude our finding that it is something more." *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 207 (quotation omitted). Thus, agencies cannot evade notice and comment by announcing their changes in documents less formal than published regulations. As the D.C. Circuit has explained, "[t]o sanction any other course would render the requirements of § 553 basically superfluous in a legislative rulemaking by permitting agencies to alter their requirements for affected public members at will." *NFPRHA v. Sullivan*, 979 F.2d 227, 231-32 (D.C. Cir. 1992). Ultimately, the inquiry is whether the FAM change is a legislative rule, not whether the FAM as a whole or Volume 9 is. *Cf.* 5 U.S.C. § 551(4) (defining a "rule" as "the whole ***or part*** of an agency statement of general or particular applicability and future effect") (emphasis added).[8]

Neither *United States v. Ellen* nor *Chen Zhou Chai v. Carroll* alters the analysis. *Cf.* MTD 29-30. In *Ellen*, the Court held that a manual issued by four agencies to announce the

[8] For this reason, Defendants' reliance on cases holding that the FAM, like other agency manuals, lacks binding force as a general matter is off-base because the question is whether ***this*** provision of the FAM constitutes a legislative rule. Defendants' references (MTD 28) to *Miller v. Clinton*, 687 F.3d 1332, 1341 (D.C. Cir. 2012) and *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) are curious given that, in both cases, the federal government urged the courts to afford *Chevron* deference to the FAM on the theory that it carried the force of law. Both courts held that because the FAM was promulgated without notice and comment, it was not entitled to deference. That determination is irrelevant here, where Baltimore contends that the FAM change otherwise produces legal consequences, and therefore constitutes final agency action.

federal standard for identifying and delineating wetlands was an interpretive rule. 961 F.2d 462, 466 (4th Cir. 1992). The criminal defendant in *Ellen* "presented no reasons" why the manual was legislative rather than interpretive, and nothing in *Ellen* suggests that the manual or the standard at issue effected a substantive change from past practice; rather, it was merely a coordination and recitation of the agencies' then-existing policies. *See id.* at 465-66. *Chen* is also inapposite. The Court there decided that the action at issue was a ***policy statement***—an argument not raised by Defendants here. 48 F.3d 1331, 1341 (4th Cir. 1995). Regardless, the interim rule opened a new discretionary avenue for asylum, rather than imposing new legal consequences on immigrants (and mandatory duties on consular officers), and was promulgated to override a recent Board of Immigration Appeals decision, rather than a longstanding practice. *See id.* at 1336, 1341.

Second, even if the FAM change were considered an interpretive rule, it would still constitute reviewable final agency action. "[L]egislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review," so long as they otherwise fulfill the *Bennett* requirements. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.). The D.C. Circuit has explicitly rejected the argument that final agency action is limited to legislative rules, acknowledging that "an agency's other pronouncements can, as a practical matter, have a binding effect." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *see also Gill v. United States Dep't of Justice*, 913 F.3d 1179, 1186 (9th Cir. 2019) (holding that a "policy guidance statement" was final agency action); *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) ("That the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years."). Ultimately, what matters is whether the action has "legal force or practical effect." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 237 n.13 (4th Cir. 2008) (quotation omitted).

The FAM change possesses several qualities that render it final agency action regardless of the type of rule it is. In *Appalachian Power Company*, the D.C. Circuit held that an EPA guidance document regarding permits under the Clean Air Act constituted final agency action because it "reflect[ed] a settled agency position which has legal consequences" for regulators and companies. 208 F.3d at 1023. In particular, the court noted that a guidance document may be binding if the agency treats it as "controlling in the field," "if it bases enforcement actions on the policies or interpretations formulated in the document," or "if it leads private parties … to believe that it will declare permits invalid unless they comply with the terms of the document." *Id.* at 1021. That description fits the FAM change like a glove; the State Department instructs its employees to apply the FAM in the field, it is used as a basis for individual visa decisions, and immigrants that elect to take non-cash benefits face severe immigration consequences. Thus, whether the FAM change is deemed interpretive or legislative, it remains final agency action.

C. The FAM change violates the APA.

The APA authorizes a reviewing court to set aside agency action that is "arbitrary, capricious, or otherwise not in accordance with law," or which was issued "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D). Baltimore alleges three claims under the APA: that the FAM change is arbitrary and capricious (Compl. ¶¶ 171-78), that it was issued without the requisite notice and comment (*id.* ¶¶ 179-82), and that it is impermissibly retroactive (*id.* ¶¶ 183-86). At this stage, Defendants challenge only the notice-and-comment and retroactivity claims; on both fronts, their arguments lack merit.

1. The FAM change required notice and comment.

Defendants failed to give the public any notice or opportunity to comment before they implemented a change that radically redefines how consular officers consider public charge in adjudicating visa applications. Their response is that notice and comment was not required

because the change was at most an interpretive rule, and was also subject to the APA's foreign affairs exclusion. MTD 31-32. Again, not so.

The notice-and-comment process is a central feature of the APA, requiring agencies to provide "[g]eneral notice of proposed rule making … published in the Federal Register" and "give interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(b), (c). This mandatory process "serves both (1) to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies; and (2) to assure that the agency will have before it the facts and information relevant to a particular administrative problem." *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (quotation omitted). Congress, in creating limited exceptions to this requirement—including, as relevant here, the exception for interpretive rules (5 U.S.C. § 553(b)(3)(A)) and the "foreign affairs exception," (*id.* § 553(a)(1))—"was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose." *American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (citing S. Doc. No. 79-248, at 199, 217, 258 (1946)). Courts have hewed to those warnings, explaining that "[t]he salutary effects of the Act's public comment procedures cannot be gainsaid, so only reluctantly should courts recognize exemptions therefrom." *Id.*

Whether considered against this backdrop or on their own terms, Defendants' arguments for why the FAM change need not have been subjected to notice and comment are unavailing. With respect to their contention that the change was an interpretive rule (MTD 31-32), Baltimore has shown that the change was in fact legislative. *See supra* pages 30-33.

Nor does the foreign affairs exception apply. MTD 32. That exception applies to "only those 'affairs' which so affect relations with other governments that, for example, public

rulemaking provisions would clearly provoke definitely undesirable international consequences," like the revelation of foreign intelligence, the disruption of diplomacy, or excessive delay. S. Rep. No. 79-752, at 199 (1945). Indeed, "[t]he dangers of an expansive reading of the foreign affairs exceptions in [the immigration] context are manifest." *New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010). "While immigration matters typically implicate foreign affairs at least to some extent, it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law." *Id.* (citation omitted); *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980) ("The foreign affairs exception would become distended if applied to INS actions generally.").[9]

Defendants do not even attempt to explain why complying with notice-and-comment procedures in promulgating the FAM change would have resulted in "definitely undesirable international consequences." Indeed, it is hard to imagine how a rule governing the receipt of public benefits could create an international incident. Defendants cite a single Fourth Circuit case applying the foreign affairs exception, but that case is clearly distinguishable: the deportation regulations at issue were promulgated in response to the 1979 takeover of the Tehran embassy during the Iranian revolution, and the subsequent detention of American nationals. *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981)); *see also Rajah v. Mukasey*, 544 F.3d 427, 436 (2d Cir. 2008) (applying the exception to rules enacted in response to the September 11,

[9] Defendants' reliance on the Attorney General's APA Manual is misplaced. While they cite the question-begging statement that the foreign affairs exception is "applicable to most functions of the State Department" (MTD 32), they ignore the Manual's quote of the Senate Report that the exception "is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments." Attorney General's Manual on the Administrative Procedure Act 26 (1947).

2001 attacks). By contrast, where the State Department engages in standard immigration rulemaking, its rules—like those of any other agency—require notice and comment.

2. The FAM change is impermissibly retroactive.

The FAM change retroactively penalizes non-citizens who elected to take non-cash public benefits in the past and is therefore unlawful. As an initial matter, Defendants again insist incorrectly that the FAM change cannot be impermissibly retroactive because it is an interpretive rule. MTD 32-33; *see supra* pages 30-33. Regardless, the D.C. Circuit has held, in striking down an interpretive rule, that "interpretive rules, no less than legislative rules, are subject to [the] ban on retroactivity." *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

In general, "[a] statutory grant of legislative rulemaking authority will not … be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "'[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations' should guide retroactivity analysis," in keeping with "the core principle disfavoring retroactive application of laws: that 'settled expectations should not be lightly disrupted.'" *GTE South, Inc. v. Morrison*, 199 F.3d 733, 741 (4th Cir. 1999) (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265, 270 (1994)). The D.C. Circuit "has recognized the distinction between a rule that imposes new sanctions on past conduct, which is retroactive and invalid unless specifically authorized, and one that merely 'upsets expectations,' which is secondarily retroactive and invalid only if arbitrary and capricious." *Nat'l Petrochemical & Refiners Ass'n v. E.P.A.*, 630 F.3d 145, 159 (D.C. Cir. 2010). The FAM change is impermissibly retroactive in both respects.

First, the FAM change attaches new legal consequences to an immigrant's past decision to take non-cash benefits. The Fourth Circuit (alongside the D.C. Circuit) has explained that a rule is retroactive if it attaches "new legal consequences" to past conduct, like if it "takes away

or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability to past transactions." *GTE South*, 199 F.3d at 741 (quotations omitted). As explained above with respect to final agency action, the FAM change results in legal consequences because it removes a safe harbor for the use of non-cash benefits and exposes immigrants who decided to accept those benefits to new penalties. *See supra* pages 28-30. In other words, it "attaches a new disability"—immigration consequences—"to past transactions"—accepting benefits. *See Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004) (holding that statute was "impermissibly retroactive because it indisputably attached new legal consequences to [an immigrant's] decision to plead guilty" by requiring him to seek readmission).

Second, even if the FAM change is not retroactive in this strict sense, it upsets immigrants' settled expectations without justification. As DHS acknowledges, immigrants are aware of the immigration consequences that attach to the receipt of benefits. *See* 83 Fed. Reg. at 51,260; *cf. St. Cyr*, 533 U.S. at 322 ("There can be little doubt that, as a general matter, alien defendants … are acutely aware of the immigration consequences of their convictions."). Those who relied on the State Department's position that non-cash benefits would have no effect on visa applications should not be penalized because State changed its mind. When a rule possesses this kind of "secondary retroactivity," the Court "review[s] such rules to see whether they are reasonable, both in substance ***and in being made retroactive***." *Celtronix Telemetry, Inc. v. F.C.C.*, 272 F.3d 585, 589 (D.C. Cir. 2001) (quotation omitted). Here, however, the government has not provided any rationale for the FAM change at all, let alone one for why it should apply to past benefits. In contrast, the DHS Proposed Rule expressly opts ***against*** retroactivity (Compl. ¶ 130 (citing 83 Fed. Reg. at 51,206))—thus demonstrating that Defendants lack any rationale for making the FAM change, which aims at the same objectives, retroactive.

The cases Defendants cite are simply inapposite. MTD 33-34. Both *Boniface* and *Matherly* dealt with the effect of past ***criminal convictions*** on future government decisions, not of past ***lawful conduct*** by immigrants to accept public benefits to which they are entitled. *See Boniface v. DHS*, 613 F.3d 282, 288 (D.C. Cir. 2010); *Matherly v. Andrews*, 817 F.3d 115, 119 (4th Cir. 2016). Immigrants' expectations are both far more reasonable and far more settled than the expectations at issue in those cases. *Cf. St. Cyr*, 533 U.S. at 324 (giving considerable weight to "an alien's reasonable reliance on the continued availability of discretionary relief from deportation" in evaluating retroactivity) The substantive effect of the rules at issue is also different: here, the FAM change takes previously sanctioned conduct and subjects it to entirely new consequences, while the regulation at issue in *Boniface* and the statute at issue in *Matherly* merely imposed additional ones. In sum, the FAM change is impermissibly retroactive.

III. Baltimore has stated an Equal Protection claim.

In challenging a facially neutral policy, a plaintiff may establish an Equal Protection violation by showing that "invidious discriminatory purpose was a motivating factor." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).[10] Whatever deference a court might afford a facially neutral law is washed away "[w]hen there is … proof that a discriminatory purpose has been a motivating factor in the decision[.]" *Id.* at 265-66. Evidence of animus thereby shifts the burden "to the law's defenders to demonstrate that the law would have been enacted without this factor." *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d

[10] Defendants assert that "equal protection principles usually are not applicable to Federal Government action pertaining to the adjudication of visa applications" because immigrants abroad and/or "seeking entry into the United States" cannot assert the Fifth Amendment. MTD 34-35. Even if that were so, and it is far from clear that it is, it would have no bearing on this case. Baltimore asserts the rights of its immigrant residents, their families, and their sponsors—*i.e.*, individuals who are already ***in*** the United States, some of whom are citizens—pertaining to how a ***general*** executive policy, not an individual visa denial, discriminates against ***them***.

204, 221 (4th Cir. 2016) (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)). Here, Baltimore has alleged, at length, that racial animus was a motivating factor in the FAM change.

A. Baltimore adequately alleges the President's discriminatory intent.

To start, Baltimore's copious factual allegations demonstrate that the President possesses animus toward immigrants of color based on the mistaken stereotype that they consume a disproportionate amount of public benefits. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Where they are available, as they are here, "[d]erogatory remarks can be direct evidence of intent to discriminate." *Pathways Psychosocial v. Leonardtown*, 223 F. Supp. 2d 699, 710 (D. Md. 2002). Other non-exhaustive factors that courts consider include "[t]he historical background of the decision …, particularly if it reveals a series of official actions taken for invidious purposes"; "[t]he specific sequence of events leading up the challenged decision"; "[d]epartures from the normal procedural sequence"; "Substantive departures … particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and "[t]he legislative or administrative history[.]" *Arlington Heights*, 429 U.S. at 266. Each of these factors corroborate the President's discriminatory intent.

First, the President has repeatedly voiced his disdain for immigrants of color. *See* Compl. ¶¶ 69-75. He has questioned why the United States should admit "all these people from 'shithole countries,'" including Latin American, African, and Asian countries. *Id.* ¶ 69. He has described immigrants of color from poor countries as "infesting" the United States. *Id.* He has asserted that immigrants from Haiti "all have AIDS." *Id.* ¶ 70. He has said that immigrants from Nigeria would never "go back to their huts" once they see the United States. *Id*. In response to these statements, Defendants "do not suggest that President Trump's alleged statements are not

evidence of discriminatory motive on his part, nor could they." *CASA de Maryland*, 2018 WL 6192367, at *12. As Judge Hazel has concluded, "[o]ne could hardly find more direct evidence of discriminatory intent." *Id.* Thus, "[t]hese allegations are more than sufficient to support a plausible inference of the President's animus." *Saget*, 345 F. Supp. 3d at 303.

The President's animus against immigrants of color from "shithole countries" stems directly from his belief that they are uniformly and disproportionately poor, sickly, unable to contribute to American society, and seeking to take advantage of public benefits. Here, we provide only a selection of his statements as set forth in the Complaint: the President has claimed that "illegal immigrant households receive far more in federal welfare benefits - than []native American households" (Compl. ¶ 71(*l*)), that immigrants "come in and just immediately go and collect welfare" (*id.* ¶ 71(o)), that "illegal immigrants … tend to go on the federal dole" (*id.* ¶ 71(q)), that countries like Mexico are not "sending their finest [and] [w]e're sending them the hell back" (*id.* ¶ 71(r)), and that the children of undocumented immigrants are "costing us many, many billions of dollars a year" (*id.* ¶ 71(v)). *See also id.* ¶¶ 71(e)-(v). These same biased views have been expressed by Stephen Miller, one of the President's senior immigration advisors, who has railed against the high costs he believes immigrants impose by taking benefits. *Id.* ¶ 72.

Defendants cherry-pick a few of the President's statements and dismiss them as "simple statements about policy," ignoring the rest. MTD 37. They are not. They demonstrate the President's deeply-rooted belief that immigrants of color are a drain on public resources and seek entrance to the United States solely to leach off the public fisc. Such "[r]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *CASA de Maryland*, 2018 WL 6192367, at *12 (quoting *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085 (8th Cir. 2010)).

Second, the other *Arlington Heights* factors corroborate Baltimore's showing of discriminatory intent. As explained above, the FAM itself was implemented without notice-and-comment rulemaking and without any public announcement or explanation. The FAM change reversed decades of settled understanding. And Defendants have not provided any description of the administrative record or process upon which the FAM change was based. *See Arlington Heights*, 429 U.S. at 266 (considering "[d]epartures from the normal procedural sequence," "[s]ubstantive departures," and "[t]he legislative or administrative history"). Moreover, aside from the FAM change, multiple courts have held that plaintiffs plausibly alleged or produced substantial evidence linking animus to executive immigration decisions. *See id.* (considering "a series of official actions taken for invidious purposes"); *supra* pages 44-45 (collecting cases).

Against this showing, Defendants invoke *Trump v. Hawaii*. MTD 38. But that case is inapposite. It addressed an Establishment Clause claim rather than an Equal Protection claim, and it "implicate[d] national security concerns, a factor the Supreme Court stressed was critical." *Saget*, 345 F. Supp. 3d at 301. While the Supreme Court characterized immigration as at "the core of executive responsibility," it did not call into question decades of precedent holding that executive immigration policies are reviewable, and it analyzed the merits of the plaintiffs' claims. *Hawaii*, 138 S. Ct. at 2418-19. In doing so, it applied a rational basis standard, which is inapplicable to the distinct claims and circumstances here. *Id.* Moreover, the Proclamation in *Hawaii* was backed by a "worldwide review process" (*id.* at 2421) unlike anything Defendants have shown was used to enact the FAM change. Finally, the Court expressly "consider[ed] plaintiffs' extrinsic evidence" in scrutinizing the Proclamation (*id.* at 2420), as have multiple courts since in evaluating Equal Protection challenges to executive action. Thus, *Hawaii* provides Defendants with no help.

B. Baltimore adequately alleges that the President's discriminatory intent was a motivating factor in the FAM change.

Rather than dispute the Complaint's allegations concerning discriminatory intent, Defendants instead argue that the Complaint fails to establish a connection between the President's statements and the FAM change. MTD 38. But a policy that is born of a "discriminatory motivation" cannot be upheld simply because it has been "laundered through the Secretary." *CASA de Maryland*, 2018 WL 6192367, at *12. "An action is not cured of discriminatory taint because it is taken by an unprejudiced decision-maker who is manipulated or controlled by another who is motivated by discriminatory intent." *Id.* Thus, an agency "may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated [the agency's] decisionmaking process" even if the agency head "did not 'personally harbor animus.'" *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1123 (N.D. Cal. 2018).

The Complaint alleges multiple facts that connect the President's animus to the FAM change. Shortly after the President took office, the media obtained a draft executive order entitled "Executive Order on Protecting Taxpayer Resources by Ensuring our Immigration Laws Promote Accountability and Responsibility." *See* Compl. ¶ 77. The Executive Order directed DHS to "rescind any field guidance" and "propose for notice and comment a rule that provides standards for determining which aliens are inadmissible or deportable on public charge grounds." *Id.* It further directed the State Department "to amend the Foreign Affairs Manual to ensure that its public-charge provisions are consistent with the goals of this Order." *Id.* The draft order confirms that the FAM change reached the top of the Administration, even though the President apparently decided not to issue the order and, instead, communicate his intent informally. More broadly, the President's comments, and the animus they reflect, focus on the use of benefits by immigrants of color; "one might reasonably infer" that a President who makes such statements

would "be more likely to engage in similarly bigoted action." *Batalla Vidal*, 291 F. Supp. 3d at 278. Indeed, the President's senior immigration advisor, Mr. Miller, who has voiced the same views, "has forcefully advocated for expanding the definition of public charge, even directing federal agencies to 'prioritize' those changes over 'other efforts.'" Compl. ¶ 72.[11]

The FAM change also "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. As explained above, the FAM change has already resulted in a drastic increase in the number of ineligibility determinations. *See supra* pages 7-8. Given that changes in public charge rules land on Latin American, African, and Asian immigrant communities in particular (*see* Compl. ¶ 128), that increase was likely borne by precisely the racial groups the President wishes to bar from the country. At this stage, "the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy" are "sufficient to allege plausibly that a discriminatory purpose was a motivating factor" in the FAM change. *Centro Presente v. DHS*, 332 F. Supp. 3d 393, 415 (D. Mass. 2018); *accord, e.g.*, *Regents of the Univ. of Cali. v. DHS*, 908 F.3d 476, 518-19 & n.30 (9th Cir. 2018) (holding plaintiffs plausibly alleged "a history of animus toward persons of Hispanic descent"); *id.* at 523-24 (Owens, J., concurring) (concluding that plaintiffs were likely to succeed on their claims); *Saget*, 345 F. Supp. 3d at 303; *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018); *Ramos*, 321 F. Supp. 3d at

[11] Just days before this filing, the President confirmed that he doesn't "want to have anyone coming in that's on welfare," and that "we're not allowing it." Alexander Marlow et al., *Exclusive – President Donald Trump on Immigration: 'I Don't Want to Have Anyone Coming in That's on Welfare,'* Breitbart (Mar. 11, 2019), https://www.breitbart.com/politics/2019/03/11/exclusive-president-donald-trump-on-immigration-i-dont-want-to-have-anyone-coming-in-thats-on-welfare/. While supplemental, non-cash assistance is not "welfare," the President's comments align with the intent of the FAM change, and further tie his animus to Defendants' actions.

1132; *New York v. Dep't of Commerce*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018); *Batalla Vidal*, 291 F. Supp. 3d at 277; *CASA de Maryland*, 2018 WL 6192367, at *12.[12]

C. The Court should not dismiss the President as a defendant.

Finally, Defendants argue that the President should be dismissed because the separation of powers "generally prevents a federal court from issuing an injunction purporting to supervise the President's performance of his duties," citing *Mississippi v. Johnson* and *Franklin v. Massachusetts*. MTD 40. But these cases do not foreclose injunctive relief against the President. The plurality opinion in *Franklin* expressly left open "whether injunctive relief against the President was available," even though it characterized such relief as "extraordinary." 505 U.S. 788, 802-03 (1992). For that reason, multiple courts, including Judges Messitte and Hazel, have declined to dismiss the President as a defendant in challenges to federal action. *See, e.g.*, *District of Columbia*, 291 F. Supp. 3d at 752 ("The Court sees no barrier to its authority to grant either injunctive or declaratory relief."); *CASA de Maryland*, 2018 WL 6192367, at *15 ("[N]one of the authority cited by Defendants requires that the President be dismissed at this early stage."); *accord Saget*, 345 F. Supp. 3d at 297; *Centro Presente*, 332 F. Supp. 3d at 419. While Baltimore may ultimately be able to receive complete relief through injunctions against subordinate officials or declaratory relief, there is no need for the Court to address that question at this stage.

CONCLUSION

Defendants' motion to dismiss should be denied.

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[12] Baltimore's Equal Protection claim does not rest solely on racial discrimination. The City also alleges discrimination based on national origin, nationality, income, and receipt of public benefits. Compl. ¶¶ 190-91; *see also Regents of the Univ. of Cal.*, 908 F.3d at 519 n.29 (recognizing that race and national-origin based discrimination often overlap). Even if the Court were to apply rational-basis review, the FAM change still fails to pass constitutional muster because it was enacted to target those communities, and because it contradicts the longstanding interpretation of public charge, one meant to balance fiscal needs with the public health and welfare concerns that result from families declining benefits. *See supra* pages 3-6.

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Respectfully submitted,

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