IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

E.B. et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as Secretary of the U.S. Department of State, et al., Defendants.	Civil Action No. 1:19-cv-2856

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction under Rule 65(a) of the Federal Rules of Civil Procedure. Plaintiffs' motion is based on the attached memorandum of law; Declarations of Plaintiffs E.B., K.K., Mehatemeselassie Ketsela Desta, W.B., and A.K., as well as Attorney Solomon Teshome Retta; and any oral argument presented at the hearing on Plaintiffs' motion.

Respectfully submitted,

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Dated: September 24, 2019

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[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Preliminary Injunction (September 24, 2019), any opposition thereto, and any reply in support thereof, and the entire record herein, it is hereby

ORDERED that Plaintiffs' motion is **GRANTED**; and

a **PRELIMINARY INJUNCTION** is hereby **ISSUED** enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or participating with them from implementing or enforcing the Interim Final Rule: Visas: Diversity Requirements, 84 Fed. Reg. 25,989 (June 5, 2019) (codified at 22 C.F.R. § 42.33 (2019)).

SO ORDERED.

_____ _____

Date United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

E.B. et al., *Plaintiffs,* *v.* MICHAEL R. POMPEO, in his official capacity as Secretary of the U.S. Department of State, et al., *Defendants.*	Civil Action No. 1:19-cv-2856

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs submit this memorandum of law in support of their motion for preliminary injunction.

PRELIMINARY STATEMENT

Immigration and diversity are pillars of America's strength. A new rule issued by Defendants, the U.S. State Department and Secretary of State Michael Pompeo, undermines those twin columns by effectively disqualifying large numbers of aspiring immigrants from seeking a visa through the Diversity Visa Program. Plaintiffs are among those aspiring immigrants. They seek to preliminarily enjoin the enforcement of the new rule, which was promulgated without notice and comment procedures in violation of the Administrative Procedure Act ("APA"), so that they do not lose the short window of opportunity to enter this year's diversity visa program.

Each year, the United States issues about 50,000 immigrant visas through the Diversity Visa Program, 8 U.S.C. § 1153(c). This program, created around thirty years ago and intended to diversify the immigrant pool in the United States, allows citizens of countries that are underrepresented in America's recent immigrant population to enter a lottery to receive an immigrant visa. The standards for entry have always been minimal: anyone with the equivalent of a high school education or two years of qualifying work experience in the last five years can enter. Applicants are chosen at random from the lottery pool, which numbered 14 million last year. Those selected must undergo an extensive background check and in-person interview to be cleared for the visa. Until recently, no passport was needed merely to apply; if selected, a valid passport was required.

On June 5, 2019, Defendants changed those requirements by issuing an Interim Final Rule to require diversity-visa applicants to possess a valid passport at the time of entry into the lottery. The effect of this rule will be to block vast numbers of applicants, including Plaintiffs E.B., K.K., and Desta ("the Applicant Plaintiffs") from participating in this year's

lottery, and perhaps future ones as well. Most people around the world, like the Applicant Plaintiffs, do not own a passport, and in many countries, including Ethiopia and Côte d'Ivoire, obtaining a passport is prohibitively expensive and time-consuming, especially for the slim chance of being chosen in the lottery. Plaintiffs move for a preliminary injunction against the enforcement of the Interim Final Rule, which was adopted without providing notice and comment procedures, in violation of the APA.

The Applicant Plaintiffs, three citizens of Ethiopia and Côte d'Ivoire, and their family members (the "Family Plaintiffs"), are likely to succeed on the merits. Defendants acknowledge that the Interim Final Rule was issued without notice and comment. The "foreign affairs" exception – the sole APA exemption that Defendants invoked in their publication of the rule – is a narrow exception that does not apply automatically to any and all immigration rules. The exception requires a showing that allowing for *notice and comment* would adversely affect foreign or diplomatic affairs, a requirement that Defendants cannot satisfy.

Defendants' issuance of the rule without notice-and-comment rulemaking effectively denies Applicant Plaintiffs the opportunity to apply for a diversity visa in the upcoming lottery. And by barring Applicant Plaintiffs from entering the Diversity Visa Program this year, Defendants have denied the Family Plaintiffs any opportunity to reunite with their family members. An injunction blocking enforcement of the Rule would provide redress for this injury by enabling Applicant Plaintiffs – all "persons" under the APA and within the program's "zone of interests" – to participate in the Diversity Visa Program as they have done in the past. Without it, Plaintiffs' harm is irreparable.

The requested injunction would do no more than maintain the status quo that has existed for the last 30 years. The government has identified no interest that would be furthered

by dispensing with notice-and-comment rulemaking. To the contrary, the rulemaking period would serve to educate the Defendants about the significant barriers that their rule would erect for those seeking the opportunity to immigrate to the United States and to reunite with family. The interests of these aspiring immigrants align with the public's interest in ensuring that rulemaking without notice and comment does not frustrate a key goal of the Immigration Act of 1990: to promote diversity.

FACTS

I. The Diversity Visa and Its Purpose

The Diversity Visa Program was established by the Immigration Act of 1990, which passed with bipartisan support. Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997 *et seq.* (codified at 8 U.S.C. § 1153(c)). The purpose of the Diversity Visa Program is "to diversify the immigrant population in the United States," by allowing immigrants from "low-admission regions" of the world, or places that historically have been "adversely affected" by U.S. immigration laws, to immigrate to the United States. 84 Fed. Reg. 25,989, 25,990. Most immigrants to the United States receive visas by virtue of their family relationships or through employment. As a result, the United States receives large numbers of immigrants from a small number of countries, including India, China, the Philippines, Mexico, and the Dominican Republic, and smaller numbers of immigrants from the rest of the world.[1] For many people from countries that have a small immigrant presence in the United States, the Diversity Visa Program provides the only path toward obtaining permanent residency.

[1] U.S. Department of Homeland Security, Table 11: Persons Obtaining Lawful Permanent Resident Status by Broad Class of Admission and Region and Country of Last Resident: Fiscal Year 2017, 2017 Yearbook of Immigration Statistics, https://www.dhs.gov/immigration-statistics/yearbook/2017/table11 [https://perma.cc/ERQ2-S2VA] (last visited Sept. 21, 2019).

Each year, out of approximately one million newcomers, the United States takes in approximately 50,000 immigrants through the Diversity Visa Program.[2] Many of these immigrants come from African countries; Africans accounted for over 40 percent of new lawful permanent residents (or "green card holders") in 2017, the most recent year for which data is available.[3] That same year, of the nearly 117,000 new lawful permanent residents from Africa, almost a fifth obtained their green cards through diversity visas.[4] For Côte d'Ivoire in particular, the ratio was more than one third.[5] Without the Diversity Visa Program, many of those who ultimately obtain lawful permanent resident status would struggle to immigrate to America.

Consistent with the goal of increasing immigration to the United States from underrepresented countries, the standards for applying for a diversity visa are not stringent. First, one must be from a "low-admission region," defined as a country with "historically low rates of immigration to the United States," which is in turn defined as having sent fewer than 50,000 immigrants to the United States over the past five years. 8 U.S.C. § 1153(c)(1)(B). All but 18 countries are "low-admission regions," including Ethiopia and Côte d'Ivoire.[6]

The Diversity Visa Program's only other eligibility requirement is either a high school degree or equivalent, or two years of work experience within the last five years in an

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] U.S. Department of State, Instructions for the 2020 Diversity Immigrant Visa Program (DV-2020), https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2020-Instructions-Translations/DV-2020-Instructions-English.pdf [https://perma.cc/XLH2-SMFE] (last visited Sept. 21, 2019).

occupation which requires at least two years of training. 8 U.S.C. § 1153(c)(2). Eligible candidates enter a lottery by filling out an electronic form available on the State Department's website. Applicants must fill in their personal and contact details, including name, gender, birth place and place of residence, level of education, marital status, and number of children.[7] Applicants are not required to pay a fee to enter the lottery, and, until this year, were not required to provide any passport information at the time of application.[8]

The approximately 50,000 diversity visas distributed each year are allotted among six regions.[9] Based on the number of visas available within each region, the State Department chooses applicants at random to be granted a diversity visa. *See* 8 U.S.C. §§ 1151(e) (setting number of diversity visas at 55,000); Pub. L. No. 105-100, § 203(d) (1997) (establishing a temporary reduction to 50,000 diversity visas that remains in effect).[10] Those chosen undergo an intensive screening process, including a background check, review of biometric data and supporting documentation, and an in-person interview.[11] Until this year, a passport was not required until this stage of the screening process.[12] Applicants who are not among the approximately 50,000 chosen can apply again the following year without prejudice. The Program

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[7] *Id*.

[8] *Id*.

[9] *Id.*

[10] *See also* U.S. Department of State, Instructions for the 2020 Diversity Immigrant Visa Program (DV-2020), https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2020-Instructions-Translations/DV-2020-Instructions-English.pdf [https://perma.cc/XLH2-SMFE] (last visited Sept. 21, 2019).

[11] *Id*.

[12] *Id*.

has operated with few changes to the application requirements since its inception in 1990. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997 *et seq.*.

II. The State Department Created the Interim Final Rule Without the Notice and Comment Required by the APA

After nearly 30 years of allowing applicants to participate in the visa lottery without a passport, on June 5, 2019, the State Department published an Interim Final Rule (the "Passport Rule"). 84 Fed. Reg 25,989 (codified at 22 C.F.R. § 42.33). The new rule took immediate effect.[13] *Id.* It requires all applicants – 14 million people worldwide, based on last year's numbers[14] – to "provide certain information from a valid, unexpired passport on the electronic entry form." *Id*. As a result, applicants must possess a valid passport at the time of application.[15] The State Department claims that it is promulgating this new rule because it "has historically encountered significant numbers of fraudulent entries for the [diversity visa] program each year . . . . Requiring that each entry form include a valid passport number at the time of the [Diversity Visa] Program

[13] Although the State Department indicated in the rule that it would accept public comment until July 5, 2019, the rule's immediate implementation made such comments superfluous. The State Department has not responded to any of the comments made after its issuance, nor has it made any alterations to the rule as a result of the comments.

[14] U.S. Department of State, Diversity Visa Program, DV 2016-2018: Number of Entries Received During Each Online Registration Period by Country of Chargeability, Diversity Visa Program Statistics, https://travel.state.gov/content/dam/visas/Diversity-Visa/DVStatistics/DV%20AES%20statistics%20by%20FSC%202016-2018.pdf [https://perma.cc/MQC4-DSRW] (last visited Sept. 21, 2019).

[15] The rule contains certain exceptions to the passport requirement. Specifically, passports are not required for individuals who are stateless, a national of a Communist-controlled country and unable to obtain a passport from the government of that country, or "the beneficiary of an individual waiver approved by the Secretary of Homeland Security and the Secretary of State[.]" 84 Fed. Reg. at 25,989. These exceptions do not apply to Plaintiffs, nor the vast majority of applicants.

entry will make it more difficult for third parties to submit unauthorized entries, because third parties are less likely to have individuals' passport numbers." *Id.* at 25,990.

Absent a valid exemption, the APA, 5 U.S.C. § 500, *et seq.*, requires any agency enacting a substantive rule to first provide an opportunity for public "notice and comment." Specifically, "[g]eneral notice of proposed rule making shall be published in the Federal Register," and "shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). "After notice, the agency" promulgating the new rule "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

The State Department dispensed with this requirement. Instead, the State Department invoked the "foreign affairs exception," claiming that notice and comment were not required. *See* 5 U.S.C. § 553(a)(1) (exempting from the APA's notice-and-comment requirements rules involving a "foreign affairs function of the United States"). According to the State Department, the "rule clearly and directly impacts a foreign affairs function of the United States" because it "pertains to a visa program which serves as a clear tool of diplomacy and outreach to countries around the world." 84 Fed. Reg. at 25,990. The State Department did not explain how its rule requiring applicants to possess a passport before entering the visa lottery, as opposed to requiring proof of a passport after their selection, would impact diplomatic relations with other countries. The State Department also did not explain how *publishing the rule without notice and comment* was necessary to protect against negative consequences for foreign affairs, or to preserve the visa program "as a clear tool of diplomacy and outreach to countries around the world." *Id.*

Indeed, the State Department's explanation for why the foreign affairs exception applies barely mentions the required notice-and-comment period.

III. The Passport Rule Prevents Residents of Select Poor Countries From Applying to the Diversity Visa Program

Owning a passport is not commonplace in many parts of the world, including the United States.[16] In many countries obtaining a new passport, particularly on short notice, can be so onerous that it is practically impossible to do so. Cost alone makes obtaining a passport impossible for the majority of people in many African countries, where the average monthly income is less than $1,000 and the cost of a new passport can be a significant portion of that. In Ethiopia, for example, the fee for a passport is approximately $20, the average monthly income for over 80 percent of the Ethiopian population. (Ex. 6, Declaration of Solomon Teshome Retta ("Retta Decl."), at ¶9.)

Obtaining a new passport also can be an arduous undertaking in the many African countries that are ill-equipped to swiftly process and provide new passports. Citizens often must travel long distances, wait in long lines, and wait for understaffed and underfunded passport offices to process and issue their passports.[17] Taking time off from work to apply for a passport imposes

[16] U.S. Department of State, Passport Statistics, https://travel.state.gov/content/travel/en/passports/after/passport-statistics.html

[17] *See, e.g.*, Farai Mutsaka, "We are trapped": Zimbabwe's Economic Crunch Hits Passports, Associated Press News (June 15, 2019), https://www.apnews.com/217ddb22679a4c2f881f0d1e2391239c [https://perma.cc/QDQ5-FXFF] (describing how Zimbabwean passport offices had insufficient materials to make new passports, forcing applicants to sleep outside the offices in wait); Misari Thembo Kahungu, Passport Shortage Hits Labour Export Agencies, Daily Monitor (April 5, 2019), https://www.monitor.co.ug/News/National/Passport-shortage-Siminyu-labour-export-agencies-Kania/688334-5059004-15pvihez/index.html [https://perma.cc/A8NU-ZN2P] (describing how Ugandan passport offices lacked sufficient materials, resulting in lengthy delays for new passports).

an additional financial cost. And the process can take months. In Ethiopia, home to over 100 million, there are only nine cities in which citizens can apply for passports, which they must do in person, a process that can take days. (Retta Decl. ¶ 6.) The processing time alone is 45 days on average. (Retta Decl. ¶ 8.) This does not include the time spent obtaining the supporting materials, such as a resident ID card and birth certificate, which have their own onerous application requirements. (Retta Decl. ¶¶ 10-12.).[18]

Given these lengthy processing times in many African countries, and because the Passport Rule was just issued in June, even those prospective applicants who promptly learned of the rule may be unable to obtain passports in time for this year's diversity visa lottery, which runs from early- or mid-October to early- or mid-November. But most applicants have no way of learning about the new rule. In addition to dispensing with public notice and comment, the State Department has not taken measures to alert potential applicants – many of whom have submitted applications for years without passports – of the new passport requirement. To date, the Diversity Visa Program website does not contain information about the change for the 2020 lottery.[19] The

[18] Although those who are selected in the lottery must have a valid passport before they will be permitted to immigrate to the United States, this is significantly less onerous than requiring a passport merely to apply for the chance of being selected in the diversity visa lottery. Friends and family are often willing to financially assist individuals who have been selected for the program because they will have the opportunity to earn greater income in the United States. (*See* K.K. Decl., ¶ 16; E.B. Decl., ¶ 17.)

[19] *See* U.S. Department of State, Diversity Visa Program – Entry, https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry.html [https://perma.cc/M6TQ-EB97] (last accessed September 23, 2019).

written instructions available on the State Department's website also have not been updated.[20] Neither have the video instructions.[21]

Because the Department has failed to provide any publicity about the issuance of the rule and has not updated any of its materials instructing applicants about the requirements of the program, many potential applicants are unlikely to learn about the rule until they submit their applications (or more likely, when those applications are rejected for non-compliance with the rule). Applicant Plaintiffs, for example, learned about the rule only recently from well-informed family members. (Ex. 1, Declaration of E.B. ("E.B. Decl."), ¶ 10.) And even for those, like Applicant Plaintiffs, who have become aware of the rule or will learn about it before submitting their applications, they will almost certainly have insufficient time to procure a new passport before the end of the short period during which applications are accepted.

Simply put, the requirement that applicants to the Diversity Visa Program possess a valid passport at the time of application subverts the program's purpose by erecting an insurmountable barrier for large numbers of applicants, predominantly from developing countries, and particularly from Africa. Had the State Department complied with the APA's notice-and-comment requirements, potential diversity-visa applicants adversely affected by the proposed rule could have submitted comments advising the State Department of the barriers that prevent them from readily acquiring a passport. Those concerns could have been taken into consideration in

[20] U.S. Department of State, Instructions for the 2020 Diversity Immigrant Visa Program (DV-2020), https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2020-Instructions-Translations/DV-2020-Instructions-English.pdf [https://perma.cc/XLH2-SMFE] (last visited Sept. 21, 2019).

[21] U.S. Department of State, U.S. Diversity Visa Program Tutorial: Submitting an Entry, https://www.youtube.com/watch?v=tOQlh2d2EbQ&feature=youtu.be (last visited Sept. 21, 2019).

order to avoid promulgating a final rule that excluded large swaths of the world's population from participating in the Diversity Visa Program.

IV. This Administration Seeks to Dismantle the Diversity Visa Program

Despite the Diversity Visa Program's success in bringing immigrants from a wide range of countries across the globe to the United States (or perhaps because of it), the current Administration has expressed open hostility to the program. President Trump repeatedly has stated his desire to repeal the Diversity Visa Program. In November 2017, President Trump announced: "We are fighting hard for Merit Based immigration, no more Democrat Lottery Systems," and said that he would be "starting the process of terminating the diversity lottery program," because "we have to get less politically correct."[22] In February 2019, he inaccurately described the diversity visa program as "a horror show, because when countries put people into the lottery, they're not putting you in; they're putting some very bad people in the lottery."[23]

Moreover, although the purpose of the Diversity Visa Program is to enhance diversity in the United States by encouraging immigration from underrepresented parts of the world, President Trump's public comments indicate that, to his Administration, not all diversity is desirable. President Trump has spoken derisively about immigrants from non-European nations, asking: "why do we want all these people from shithole countries coming here?" and "We should

[22] Priscilla Alvarez, The Diversity Visa Program Was Created to Help Irish Immigrants, The Atlantic, (Nov. 1, 2017), https://www.theatlantic.com/politics/archive/2017/11/diversity-visa-program/544646/ [https://perma.cc/WG6M-WKTS].

[23] Calvin Woodward and Hope Yen, AP Fact Check: Trump Spins Fiction About Diversity Visas, Associated Press, (Feb. 18, 2019), https://www.apnews.com/56e8c95dab1345bbac9d065eaa1b8152 [https://perma.cc/63NW-VML2].

have more people from places like Norway."[24] The effect of the Passport Rule would go some way to realizing President Trump's worldview.

V. The Passport Rule Harms Plaintiffs

Applicant Plaintiffs are residents of countries where procuring new passports is prohibitively expensive, arduous, and time consuming.

Plaintiff E.B., who resides in Ethiopia, is a mechanic who, on average, earns less than $70 a month. (E.B. Decl. ¶ 5.) He has applied for the Diversity Visa Program on several occasions in the past, and intends to apply again this October. (E.B. Decl. ¶ 8.) The Passport Rule will make this impossible. He has no passport, and to obtain one he will have to pay at least a month's salary for the passport and associated costs such as bus fares and the lost income from closing his shop for days. (E.B. Decl. ¶¶ 12-13.) This does not include the indirect costs of obtaining the supporting documents for his passport application, including paperwork showing his birth, parentage, residence, and education, each of which will entail further travel, wait times, and expense. (E.B. Decl. ¶ 15.) Even if he could somehow manage the financial cost, it will be impossible for E.B. to receive his new passport before this year's application window closes. (Retta Decl. ¶ 8.) The cost and time of obtaining a passport mean that E.B. will be unable to qualify for this year's Diversity Visa Program, and will have to wait at least another year to participate.

Plaintiff K.K., who resides in Côte d'Ivoire, works at a manufacturing company earning a base salary $58 per month. (Ex. 2, Declaration of K.K. ("K.K. Decl."), at ¶ 4.) He has applied for the Diversity Visa Program numerous times, and intends to apply again this October.

[24] Eli Watkins and Abby Philip, Trump Decries Immigrants from "Shithole Countries" Coming to US, CNN, (Jan. 12, 2018), https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html [https://perma.cc/MB3F-64E7].

(K.K. Decl. ¶ 6.) Because of the Passport Rule, he will be unable to do so. The cost alone for obtaining a passport is prohibitively high. He will have to pay at least $120 to acquire the passport itself and supporting materials, more than double his monthly base income. (K.K. Decl. ¶ 14.) This does not include the time he would have to take off work going to and from the passport office and for obtaining supporting documentation such as a national identification card, birth certificate, citizenship certificate, and temporary ID. (K.K. Decl. ¶¶ 13-14.) In addition to the financial cost, he simply does not have sufficient time to obtain a passport before the application window closes in November. It will take him at least three months just to obtain a national identification card, which he needs before he can apply for a passport. (K.K. Decl. ¶ 15.) The cost and time of obtaining a passport mean that K.K. is effectively barred from applying for this year's Diversity Lottery Program, and will have to wait at least another year to participate.

Plaintiff Mehatemeselassie Ketsela Desta lives in Addis Ababa, Ethiopia, and works as a priest in the Ethiopian Orthodox Church. (Ex. 3, Declaration of Mehatemeselassie Ketsela Desta ("Desta Decl."), at ¶¶ 1, 5.) He has applied for the Diversity Visa Program on numerous occasions, and intends to apply again this October. (Desta Decl. ¶ 8.) The Passport Rule effectively bars him from doing so. Because Defendants did not provide a notice and comment period, Plaintiff Desta did not find out about the passport requirement until September 2019. (Desta Decl. ¶ 11.) Even if he applies for a passport immediately, he will not receive it until after the application window for the Diversity Visa Program has closed, and he will have to wait another year before he can apply again.

Family Plaintiffs are residents of the United States who have family members that reside in countries where procuring new passports is prohibitively expensive, arduous, and time consuming.

W.B., E.B.'s sister, lives in Maryland with her family. (Ex. 4, Declaration of W.B. ("W.B. Decl."), at ¶ 1.) She hopes to reunite with her brother, and has encouraged him to apply for the Diversity Visa Program each year. (W.B. Decl. at ¶¶ 3-4.) Because of the Passport Rule, she will have to wait at least another year before E.B. can apply, and will lose out on the opportunity to reunite with him. A.K., K.K.'s sister, lives in New York with her family. (Ex. 5, Declaration of A.K. ("A.K. Decl."), at ¶ 1.) She too hopes to reunite with her brother, but because of the Passport Rule, she will have to wait at least another year before K.K. can apply for the Diversity Visa Program, and will lose the opportunity to reunite with him. (A.K. Decl. at ¶ 5.)

LEGAL STANDARD

A preliminary injunction is warranted if the moving party shows "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998).

ARGUMENT

The Court should grant a preliminary injunction to prevent the implementation of the Passport Rule for the 2019 application cycle. Plaintiffs meet each element of the test for a preliminary injunction, as they are likely to succeed on the merits, will suffer imminent irreparable harm absent an injunction, and the public interest and balance of equities favor preserving the pre-rule status quo for this application cycle.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE STATE DEPARTMENT'S PASSPORT RULE VIOLATES THE APA

The core issue in this case is straightforward: Defendants failed to comply with the APA's notice-and-comment requirements in issuing the Passport Rule; the sole proffered

exception—that the rule affects foreign affairs—does not apply; and no procedural barriers prevent Plaintiffs from bringing this lawsuit. Absent this Court's swift intervention, Applicant Plaintiffs will be prevented from applying for this year's Diversity Visa Program, a loss that cannot be remedied absent preliminary relief.

A. The Passport Rule Is Subject to the APA's Notice and Comment Requirements

The APA requires any administrative agency that promulgates a new rule to provide notice to the public and an opportunity for the submission of comments before the agency issues a final rule. 5 U.S.C. § 553(b), (c). There are few exceptions to these requirements. Most relevant here, the APA exempts from its notice-and-comment requirements rules involving "a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1).[25]

The State Department did not follow the APA's notice-and-comment requirements before enacting the Passport Rule. The sole exemption claimed by the State Department in its regulatory findings is that the rule falls within the "foreign affairs" exception. 84 Fed. Reg. at 25,990. It does not apply, however, because promulgation of the rule through notice-and-comment procedures would have no significant impact on foreign policy.

1. *The Passport Rule Does Not Fall Within the Foreign Affairs Exception to the APA's Notice and Comment Requirements*

The foreign affairs exception to notice-and-comment rulemaking is a narrow one. It does not automatically apply whenever a rule is related to foreign policy or immigration. The APA permits the rulemaking agency to forgo notice and comment only when diplomatic interests

[25] Other exceptions to the APA's notice-and-comment requirements include instances "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B). To invoke that exception, the agency must "incorporate[] the finding and a brief statement of reasons therefor in the rules issued." *Id.* Here, the State Department has issued no "brief statement" of good cause, and has not invoked this or any other exceptions beyond that for "foreign affairs."

specifically would be implicated by allowing notice and comment. *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288, 1290 (D.D.C. 1973) (stating that the foreign affairs exception applies when "public rule-making provisions would clearly provoke definitely undesirable international consequences" (quoting S. Rep. No. 79-752 (1945)). Although the exception has been applied sparingly to immigration rules, "[t]he foreign affairs exception would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs. . . . For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences." *Zhang v. Slattery,* 55 F.3d 732, 744 (2d Cir. 1995) (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (alterations in original)). As the Senate Report accompanying passage of § 553(a)(1) makes clear, the foreign affairs exception should not be "loosely interpreted" to apply to "any function extending beyond the borders of the United States," lest the exception swallow the rule. S. Rep. No. 79-752 (1945).

The State Department's explanation for why the foreign affairs exception applies to the Passport Rule is unavailing. It claims that the "rule clearly and directly impacts a foreign affairs function of the United States" because it "pertains to a visa program which serves as a clear tool of diplomacy and outreach to countries around the world. . . . A program thus tailored to foster allies and goodwill overseas clearly qualifies as the exercise of diplomacy." 84 Fed. Reg., at 25,990. But the visa program's purported status as a "tool of diplomacy" says nothing about why allowing the public to participate in the rulemaking process would "provoke definitely undesirable international consequences." *Hou Ching Chow*, 362 F. Supp. at 1290 (quoting S. Rep. No. 79-752 (1945)).

The State Department's conclusory language and generalities fail to demonstrate any specific undesirable consequences that could result from complying with the APA's notice-

and-comment requirements. Although the State Department claims that the rule "addresses a vulnerability in the current application process by making it more difficult for third parties to submit fraudulent or unauthorized entries, a practice that has significant consequences," 84 Fed. Reg. at 15,990, this explanation does not connect whatever purported diplomatic effect *the rule itself* might have with any negative consequence of *a notice-and-comment period*. That is what the foreign affairs exception is about. The diversity-visa process has operated without a passport requirement for nearly 30 years. The State Department gives no explanation for why, suddenly, the new rule is so urgently needed for diplomacy that otherwise mandatory public participation must be quashed. The State Department cannot, and does not even attempt to explain how providing a period for notice and comment for a rule designed to limit fraud would harm U.S. diplomacy.

This Court's decision in *Hou Ching Chow* is instructive. There, the Court held that the foreign affairs exception did not apply to the Immigration and Naturalization Service (INS)'s revocation, without notice or comment, of a rule that exempted students from the Immigration and Nationality Act's labor-certification requirement for adjustment of status through an employer-based petition. 362 F. Supp. at 1290-91. The Court reasoned that the INS's change of the visa rules for students did not "affect relations with other Governments," and "public rule-making provisions" would not "clearly provoke definitely undesirable international consequences." *Id.* In the same way, the State Department has offered no reason that negative diplomatic consequences would arise from a notice-and-comment period before implementing new requirements for the diversity visa application. No such reason exists.

Other courts similarly have construed the foreign affairs exception narrowly. In *Jean v. Nelson*, the Eleventh Circuit reviewed the government's newly adopted policy of detaining

Haitian migrants in detention camps or prisons pending removal proceedings. 711 F.2d 1455, 1462 (11th Cir. 1983). The court held that the foreign affairs exception did not apply because "[t]he government . . . offered no evidence of undesirable international consequences that would result if rulemaking were employed." *Id.* at 1478. The court rejected the government's argument that foreign affairs were sufficiently implicated by the President's request for international cooperation, noting that "not all [issues involving the President and national sovereignty] would have undesirable international consequences if rulemaking procedures were followed." *Id.*; *see also Zhang*, 55 F.3d at 745 (holding that interim INS rule concerning China's "One Child Policy" as basis for granting asylum was not exempt from the APA's notice-and-comment requirements under foreign affairs exception because there was "no record evidence [that] notice and comment would have had any undesirable [foreign policy] consequences" and because no such risk was "obvious"); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1251-52 (9th Cir. 2018) (finding that government had presented insufficient evidence that foreign affairs exception applied, because it "requires the Government to do more than merely recite that the Rule 'implicates' foreign affairs"). The State Department's conclusory statements that the foreign affairs exception applies because the diversity visa is "an important public diplomacy tool" is insufficient to warrant avoidance of public notice and comment. *See* 84 Fed. Reg. at 25,990.

In circumstances in which courts have held that the foreign affairs exception applies, the effects on America's international relations have been obvious, and nothing like this case. In *Yassini v. Crosland*, an Iranian national challenged the INS's revocation of deferred departure dates for Iranians in the U.S. in the wake of the Iranian hostage crisis. 618 F.2d 1356, 1358 (9th Cir. 1980). The Ninth Circuit held that the foreign affairs exception applied to the INS's directive because affidavits from the Attorney General and Secretary of State demonstrated that

the "directive was designed to further the policy expressed in the Presidential directive and to aid the President's efforts to secure the release of the hostages" and was "an integral part of the President's response to the crisis." *Id.* at 1361. In so holding, however, the court emphasized that the foreign affairs exception does not exempt all administrative action concerning immigration from the APA's notice-and-comment requirements. "The foreign affairs exception would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs," the court observed. *Id.* at 1360 n.4. Directly contradicting the State Department's stated position here, the Ninth Circuit made clear that mere implication of foreign affairs is an insufficient basis for § 553(a)(1) to be invoked; rather, the exemption applies only when the APA's "public rulemaking provisions should provoke definitely undesirable international consequences." *Id.*; *see also City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) (holding that § 553(a)(1) applied to a State Department Notice exempting permanent missions to the U.N. or Organization of American States and consular posts from taxation because it "implicates matters of diplomacy directly," while warning that "[t]he dangers of an expansive reading of the foreign affairs exception in [the immigration] context are manifest").

As these cases make clear, the critical question for judging whether the APA exempts a new rule from the notice-and-comment requirements is whether public participation in the rule making process would definitely cause negative foreign policy consequences. The State Department's justification for the Passport Rule comes nowhere close to demonstrating that notice-and-comment rulemaking would pose any such threat in this instance.

B. Plaintiffs Have Standing to Challenge the Passport Rule

Applicant and Family Plaintiffs have standing under Article III of the United States Constitution. Plaintiffs have suffered an "injury in fact that is fairly traceable to the challenged

conduct and that will likely be redressed by a favorable decision on the merits." *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). Plaintiffs also have prudential standing under the APA. They are "persons" under the APA who fall within the "zone of interests" of the Diversity Visa Program and therefore possess a cause of action to obtain judicial review. *Am. Inst. of Certified Pub. Accountants v. IRS*, 746 F. App'x 1, 6 (D.C. Cir. 2018).

1. *Plaintiffs Have Article III Standing*

To establish Article III standing, plaintiffs "must show [they are] suffering an ongoing injury or face[ ] an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). Plaintiffs must also demonstrate, to a "substantial probability that the challenged acts of the defendant caused their injury." *Ramirez v. U.S. Immigration and Customs Enforcement*, 338 F. Supp.3d 1, 30 (D.D.C. 2018) (internal quotations omitted). Finally, plaintiffs must show their alleged injury is "likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014).

When "litigants attempt to vindicate their 'procedural rights' under the APA, such as their right to have notice of proposed regulatory action and to offer comments on such proposal," a "special standing doctrine" applies. *Iyengar v. Barnhart*, 233 F. Supp. 2d 5, 12 (D.D.C. 2002). "To establish injury-in-fact" in such cases, "petitioners must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (internal quotations omitted). Plaintiffs can satisfy this requirement by showing "a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest." *Ctr. For Biological Diversity v. Envtl. Protection Agency*, 861 F.3d 174, 183 (D.C. Cir. 2017).

Plaintiffs allege that they have suffered, and will suffer, an injury-in-fact due to the State Department's failure to abide by the APA's notice-and-comment requirements in promulgating the Passport Rule. Specifically, the Passport Rule's new requirement that applicants possess a valid passport at the initial application stage denies Applicant Plaintiffs the opportunity to apply for a diversity visa. If Applicant Plaintiffs were to attempt to obtain a passport before the application window for this year's lottery closes in November, they would have to spend a significant portion of their income to apply for and obtain a new passport. E.B. would have to spend nearly a month's income just to apply for a passport, and would incur additional costs for obtaining all the supporting documents he needs to obtain passport. (E.B. Decl. ¶¶ 13-15.) And K.K. would have to spend nearly double his monthly base salary just to apply for a passport, in addition to costs associated with obtaining the necessary supporting materials for his passport application. (K.K. Decl. ¶ 14.) Obtaining a new passport is also time-consuming, requiring Applicant Plaintiffs to take time off work, which costs them additional income. (E.B. Decl. ¶¶ 14-15; K.K. Decl. ¶ 14.) This would impose significant hardship on Applicant Plaintiffs and the families that they support. Even if they were in a position to incur such economic hardship, Applicant Plaintiffs almost certainly would not receive their new passports in time for this year's application window. (K.K. Decl. ¶ 15; Desta Decl. ¶ 14.) Taken together, the roadblocks Applicant Plaintiffs must navigate to comply with the Passport Rule deny them the opportunity to apply for the diversity visa. The loss of such an opportunity is a cognizable injury in fact.

"When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *N.E. Fla. Chapter of Associated Gen. Contractors*

of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *see also Regents of the University of California v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978) (plaintiff had standing to challenge an affirmative action program in college admissions even if he could not show that he would have been admitted but for the program); *CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("[A] plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." (emphases in original)); *W. Va. Ass'n of Com'ty. Health Ctrs. v. Heckler*, 734 F.2d 1570, 1575 (D.C. Cir. 1984) ("[T]he individual plaintiff's injury was the denial of an opportunity to obtain housing for which he would otherwise be qualified. Certainty of success in seeking to exploit that opportunity was not required." (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977)). Applicant Plaintiffs' lost opportunity to apply for an immigrant visa is therefore sufficient injury for constitutional standing. *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 13-14 (D.D.C. 2017) (holding that a State Department rule postponing the effective date of immigration rule deprived plaintiffs of an opportunity to apply for a visa was a cognizable injury in fact); *see also Patel v. USCIS*, 732 F.3d 633, 638 (6th Cir. 2013) (stating that the "lost opportunity [to receive a visa] is itself a concrete injury").

Similarly, by erecting a barrier that prevents Applicant Plaintiffs from entering the diversity lottery and earning the potential benefit of a visa, Defendants have denied Family Plaintiffs the potential benefit of unifying with their family members in the United States. This is sufficient to demonstrate constitutional standing. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (holding that U.S. citizens' and lawful permanent residents' "interest in being united with

[their] relatives [abroad] is sufficiently concrete and particularized to form the basis of an Article III injury in fact").

The loss of opportunity to receive a diversity visa flows directly from the State Department's adoption of the Passport Rule and failure to provide the public with notice and an opportunity to comment. The rule change means Applicant Plaintiffs will be unable to apply for the Diversity Visa Program. Even if Plaintiffs were in a financial position to incur the substantial direct and indirect costs necessary to obtain passports, the State Department's failure to publicize the rule change or update its materials describing the requirements to enter the lottery has left them with insufficient time to obtain a passport before the application window closes this year.

Plaintiffs' injuries can be redressed if the Court enjoins the Passport Rule, which would enable Applicant Plaintiffs to apply for this year's diversity lottery without the obstacle of the passport requirement, as each of them has done many times before. Each of Plaintiffs E.B., K.K., and Desta have applied for the Diversity Visa Program in the past, and would be able to apply again this year if the Passport Rule were not in effect. (E.B. Decl. ¶¶ 8, 18; K.K. Decl. ¶¶ 6, 17; Desta Decl. ¶¶ 8, 16.) Plaintiffs therefore have constitutional standing.

2. *Plaintiffs Have Prudential Standing*

The APA enables a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" to obtain judicial review. 5 U.S.C. § 702. In order to avail themselves of the APA's cause of action, plaintiffs also must show that their injuries "fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Plaintiffs meet both these requirements.

a. Plaintiffs Are "Persons" Under the APA

The APA allows any "person" to seek judicial review of an "agency action" that causes them harm. 5 U.S.C. § 702. The definitional statute, which applies to both the APA and

the Freedom of Information Act ("FOIA"), does not distinguish between citizen and non-citizen "persons," or resident or foreign "persons." 5 U.S.C. § 551(2); *cf. Arevalo-Franco v. INS*, 889 F.2d 589, 591 (5th Cir. 1989) ("There is nothing in the FOIA to indicate that Congress intended to distinguish between citizens and aliens when it enacted [the statute] and used the word 'person' therein."); *Military Audit Project v. Casey*, 656 F. 2d 724, 730-31 n.11 (D.C. Cir. 1981) (noting that, under FOIA, "the identity of the requester is immaterial," permitting even Soviet agents to file requests for information).

This Court has found that an alien who is "adversely affected" by an agency's action has standing under the APA. *Maramjaya v. U.S. Citizenship and Immigration Servs.*, No. 06–2158 (RCL), 2008 WL 9398947, at *4 (D.D.C. Mar. 26, 2008) (holding that alien challenging the U.S. Citizenship and Immigration Services's denial of immigration petition under APA had prudential standing); *see also Capital Area Immigrants' Rights Coal. v. U.S. Dep't of Justice*, 264 F. Supp.2d 14, 20-22 (D.D.C. 2003) (finding that an association had standing under APA because its members had standing as "immigrants with pending Board [of Immigration Appeals] appeals [who] may be adversely affected by the new regulation"). The APA thus permits Plaintiffs to seek judicial redress.

b. Plaintiffs Fall within the "Zone of Interests" of the Diversity Visa Program

To assess the "zone of interest" requirement for prudential standing, the "'relevant statute' is the statute defining 'the zone of interests to be protected or regulated[.]'" *Am. Inst. of Certified Pub. Accountants*, 746 F. App'x at 7. For the purposes of APA suits asserting a failure

to meet requirements for public rulemaking, the "relevant statute" is the underlying statute, not the APA itself. *Id.*

In this case, Plaintiffs are squarely within the zone of interest of the INA's provisions establishing the Diversity Visa Program. The program permits citizens of countries around the world to apply to receive an immigration visa to the United States. 8 U.S.C. 1153(c). The INA and accompanying regulations describe the procedures and requirements for how applicants should apply for a diversity visa, and the standards by which those visas will be issued to successful applicants. *Id.*; 22 C.F.R. § 42.33. For standing purposes, there is no difference between the diversity visa provisions of the INA and other immigration statutes that courts have held include visa applicants within their zone of interest. *See Ghaly v. INS.*, 48 F.3d 1426, 1434 n.6 (7th Cir. 1995) (holding that a visa applicant had standing under the APA because he was within the "zone of interest" of provisions of the INA prescribing standards for a marital visa); *Maramjaya*, 2008 WL 9398947, at *4-5 (finding an immigrant applicant for change of status was within "zone of interest created by the statutory framework governing Form I-140 petitions"); *see also Sanchez-Trujillo v. INS*, 620 F. Supp. 1361, 1363 (W.D.N.C. 1985) ("The immigrant beneficiary is more than just a mere onlooker; it is [his] own status that is at stake when the agency takes action on a preference classification petition.")

Plaintiffs are within the relevant "zone of interest" and therefore have prudential standing to challenge the State Department's Passport Rule.

II. ABSENT THIS COURT'S JUDICIAL INTERVENTION, PLAINTIFFS WILL SUFFER IRREPARABLE HARM

A preliminary injunction is warranted because all Plaintiffs will suffer irreparable harm if the Court does not grant the requested relief. Irreparable harm constitutes injury that is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence

that there is a clear and present need for equitable relief to prevent irreparable harm." *Beacon Assocs., Inc. v. Apprio, Inc.*, 308 F. Supp. 3d 277, 287 (D.D.C. 2018) (internal quotations and emphasis omitted).

Absent a preliminary injunction, Applicant Plaintiffs will suffer irreparable harm by losing the opportunity to apply for a diversity visa in this year's lottery. The loss of an opportunity can be irreparable harm if, as here, the loss cannot be subsequently redressed. *See Carson v. Am. Brands Inc.*, 450 U.S. 79, 89 n.16 (1981) (loss of opportunities resulting from employment discrimination constitutes "serious or irreparable harm"); *Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011) (loss of opportunity to take the bar exam and thereby pursue one's chosen profession constitutes irreparable harm); *Tanner v. Fed. Bureau of Prisons*, 433 F. Sup. 2d 117, 125 (D.D.C. 2006) (loss of eligibility for participation in certain prison programs constitutes irreparable harm). Obtaining a passport in time for this year's application window is impossible for the Applicant Plaintiffs without inflicting substantial hardship on themselves and their immediate families. It is also almost certainly logistically impossible for them to do so, given the time delays associated with obtaining a passport in Applicant Plaintiffs' countries. As a result, they will suffer the immediate and irreparable injury of being unable to apply for the Diversity Visa Program in 2019.

Although Applicant Plaintiffs are not guaranteed success in the lottery, courts have found irreparable harm in analogous situations involving the loss of opportunity to obtain a potential benefit. In particular, loss of opportunity to bid on projects or compete for contracts, even where a guaranty of success has not been shown, repeatedly has been found to constitute irreparable harm. *See, e.g.*, *Rogers Grp., Inc. v. City of Fayetteville*, 629 F.3d 784, 790 (8th Cir. 2010) (finding irreparable harm where an ordinance would have prevented a company from

expanding and being able to bid on larger projects); *Georgia ex rel. Ga. Vocational Rehab. Agency v. United States ex rel. Shanahan*, No. 2:19-CV-00045, 2019 WL 2320878, at *9 (S.D. Ga. 2019) (loss of opportunity to compete for a contract is irreparable harm); *Kansas v. United States*, 171 F. Supp. 3d 1145, 1155-56 (D. Kan. 2016) (same); *Starlite Aviation Operations Ltd. v. Erickson Inc.*, No. 3:15-CV-00497-HZ, 2015 WL 2367998, *9-11 (D. Or. 2015) (same); *Sci. Applications Int'l Corp. v. CACI-Athena, Inc.*, No. 1:08CV443 (JCC), 2008 WL 2009377, *2 (E.D. Va. 2008) (same); *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 291, 293 (2016) (same) (collecting cases); *see also Howe v. City of Akron*, 723 F.3d 651, 663 (6th Cir. 2013) (loss of opportunity to compete for promotion was irreparable injury).

Similarly, the loss of opportunity to take the bar examination without appropriate accommodations, even though successfully passing the exam is not guaranteed, comprises irreparable injury. *See Enyart*, 630 F.3d at 1165 (loss of opportunity to take bar exam without accommodations and thereby pursue one's chosen profession constitutes irreparable harm); *Jones v. Nat'l Conf. of Bar Exam'rs*, 801 F. Supp. 2d 270, 286 (D. Vt. 2011) (finding a delay in the plaintiff's ability to take the exam with accommodations constituted irreparable harm because it would force her to be tested unfairly based on her ability to work through her disabilities, and not on her aptitude for the law); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 186 (D.D.C. 2011) ("[A]ny delay in taking the MBE deprives [plaintiff] of time to practice her chosen profession. The lost opportunity to engage in one's preferred occupation goes beyond monetary deprivation.").

Courts have also found that the deprivation of an opportunity to fairly pursue a Section 8 housing voucher, paired with the subsequent difficulty of redistributing vouchers once allocated, constitutes irreparable harm. *Langlois v. Abington Hous. Auth.*, No. C.A. 98-12336-

NG, 1998 WL 1029207, *10 (D. Mass. 1998), *aff'd in part*, 207 F.3d 43 (1st Cir. 2000). The denial of an opportunity to fairly compete for a contract, take the bar exam, or seek a housing voucher resembles the denial of Applicant Plaintiffs' ability to participate in the lottery. Although the benefit is not guaranteed, it is a significant tangible benefit that cannot be obtained without participation in the process, and the chance of attainment is eliminated by the challenged rule.

Moreover, much like in *Langlois*, even if Applicant Plaintiffs were to prevail in this litigation, without a preliminary injunction, success would be too late for participation in this year's lottery, leaving Applicant Plaintiffs' injuries without redress. As such, Applicant Plaintiffs' harm would be irreparable, because "if resolution of this case is postponed, and the plaintiffs ultimately prevail in their position, they will have won a Pyrrhic victory." *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 666 (D.D.C. 1988), *order vacated on other grounds sub nom. Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), *judgment vacated*, 498 U.S. 1117 (1991).

For the Family Plaintiffs, the denial of the conditional benefit of family unification through this year's Diversity Visa Program would also comprise an irreparable injury that cannot be remedied once the lottery has taken place, just as it will be for the Applicant Plaintiffs.

Finally, all Plaintiffs already have suffered irreparable procedural injury. In particular, Plaintiffs suffer the ongoing injury of being subject to a rule about which they were unable to comment. Plaintiffs were unable to explain the adverse impacts of the Passport Rule, or otherwise participate in the rulemaking process. As "affected parties" of the diversity visa application process, Plaintiffs were entitled to a notice and comment period to help ensure "fairness" in the adoption of the Passport Rule. *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995).

Although procedural injury "is insufficient, standing alone, to constitute irreparable harm justifying issuance of a preliminary injunction, . . . such procedural harm does bolster plaintiffs' case for a preliminary injunction," when added to other injury. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24-25 (D.D.C. 2009) ("When a procedural violation of [the National Environmental Policy Act] is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury."). The procedural harm of excluding Plaintiffs from the rulemaking process, viewed alongside the loss of opportunity injury, underscores the need for immediate injunctive relief.

III. ENJOINING THE PASSPORT RULE SERVES EQUITY AND ADVANCES THE PUBLIC INTEREST

In seeking a preliminary injunction, Plaintiffs also must show that the balance of equities tips in their favor and that injunctive relief would serve the public interest. *See J.D. v. Azar*, 925 F.3d 1291, 1325, 1337-38 (D.C. Cir. 2019); *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 505, 511-12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 643-44, 652-53 (D.C. Cir. 2013).

Where, as here, private parties seek injunctive relief against the government, these final two factors of the preliminary injunction test generally call for weighing the benefits to Plaintiffs from obtaining the injunction against the harms to the government and the public from the injunction. *See Doe v. Mattis*, 928 F.3d 1, 7, 23 (D.C. Cir. 2019). Here, the government did not attempt to establish *any* interest, much less an interest in avoiding a negative impact on foreign affairs or diplomacy, which would be furthered by promulgating the Passport Rule without the regular notice-and-comment process. Nor can the government show that it will be harmed by issuance of a preliminary injunction that does nothing more than maintain during the pendency of

this case the status quo that has reigned for nearly 30 years. The Plaintiffs, by contrast, have a weighty interest in keeping open an essential channel that allows them and others from countries with historically low levels of immigration to this country an opportunity to enter the United States. Moreover, the public has an interest in not only the diversity fostered by the Diversity Visa Program, but also the government's compliance with the APA's requirements, which are designed to ensure that agencies hear from all interested parties before issuing rules that affect the persons intended to benefit from government programs.

Although the Passport Rule affects the U.S. relatives of millions of potential applicants and the communities in which they live, the Passport Rule was promulgated without any "public participation," depriving stakeholders of the sole opportunity to have their voices heard in agency rulemaking. Providing notice of the rule change, and an opportunity for comment, would have allowed affected applicants and their communities and families to "ensure the [State Department] has all pertinent information" about the rule's effects, including the paucity of passports in numerous countries and the difficulty of obtaining passports there. *See United Steel, Paper, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Fed. Highway Admin.*, 151 F. Supp.3d 76, 85 (D.D.C. 2015) (notice and comment period is needed to ensure "public participation and fairness to affected parties . . . and to assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions" (internal citations omitted)). Dispensing with notice and comment for the Passport Rule excludes the public from having input on a rule that has sweeping effect, and goes against the public interest.

Moreover, "[t]here is generally no public interest in the perpetuation of unlawful agency action," but there is a substantial public interest in having governmental agencies abide by

the federal laws that govern their existence and operations.[26] *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "Forcing federal agencies to comply with the law is undoubtedly in the public's interest." *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015), *aff'd*, 827 F.3d 70 (D.C. Cir. 2016). "The public interest is served both by ensuring that government agencies conform to the requirements of the APA and their own regulations." *Gulf Coast Mar. Supply, Inc. v. United States*, 218 F. Supp. 3d 92, 101 (D.D.C. 2016)), *aff'd*, 867 F.3d 123 (D.C. Cir. 2017).

The role of the Diversity Visa Program in allowing the United States to maintain a mix of citizens with wide-ranging national and cultural backgrounds, and ensuring that the United States remains a place where persons from around the world can make a home, represents a particularly potent expression of fundamental American values. As this Court recently observed in *Wang v. Pompeo*, 354 F. Supp. 3d 13 (D.D.C. 2018), "[t]he public has an interest in maintaining diversity of immigrants, as INA § 202's [8 U.S.C.§ 1152] country cap demonstrates. The public benefits not just from diversity among countries, but also from the types of visas that are allocated."

[26] As in *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), "the relatively minor increase in Congressional appropriations necessary to replace the monies improperly diverted from the Commissary Fund does not outweigh the *greater public interest* in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* at 1103 (emphasis added); *see also Open Cmtys. Alliance v. Carson*, 286 F. Supp. 3d 148, 178-79 (D.D.C. 2017) (granting a preliminary injunction against the U.S. Department of Housing and Urban Development for enacting a regulation without notice and comment or particularized evidentiary findings and stating that "defendants . . . 'cannot suffer harm from an injunction that merely ends an unlawful practice'" (citation omitted)); *de Nolasco v. U.S. Immigration & Customs Enforcement*, 319 F. Supp. 3d 491, 504-05 (D.D.C. 2018) (granting preliminary injunction forcing the government to reunify mother and minor child who were separated while crossing into the United States from Mexico and stating that "the public . . . has an interest in ensuring that its government respects the rights of immigrants to family integrity while their removal proceedings – or in this case, asylum proceedings – are pending"); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018) (same as *de Nolasco*).

Id. at 28. For this reason too, the balance of the equities and public interest tip in favor of this court enjoining the Passport Rule during the pendency of this case.

IV. CONCLUSION

For the reasons articulated above, Plaintiffs' Motion should be granted, and Defendants should be preliminarily enjoined from implementing the Passport Rule.

Respectfully submitted,

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