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-02856-TJK

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs submit this memorandum of law in further support of their motion for preliminary injunction.[1]

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

A. Plaintiffs Have Article III Standing

In their Complaint, Plaintiffs have established the three elements of constitutional standing. *First*, Plaintiffs allege an injury in fact: the Passport Rule's new requirement that applicants must possess a valid passport prior to entering the Diversity Visa Program will deny the Applicant Plaintiffs the opportunity to participate in that program, and will deny the Family Plaintiffs the opportunity for family reunification. Compl. ¶¶ 48-62. *Second*, these harms are fairly traceable to the State Department's decision to adopt the Passport Rule. Compl. ¶¶ 39-44. *Third*, a ruling enjoining the Passport Rule would return the parties to the status quo ante, enabling the Applicant Plaintiffs to apply for the diversity visa lottery without a passport, as they have been doing for years, and salvaging the Family Plaintiffs' opportunity for family reunification. Nothing more is required for Article III standing. *See Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008).

Defendants' arguments against constitutional standing are unavailing. Defendants do not deny that Applicant Plaintiffs' lost opportunity to enter the Diversity Visa Program is an injury in fact. Nor do they dispute any of the facts alleged by Plaintiffs, including the onerous financial, temporal, and bureaucratic obstacles Applicant Plaintiffs must overcome simply to enter

[1] Unless otherwise indicated, capitalized terms have the same meanings as set forth in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction ("Opening Brief" or "Opening Br.")

the lottery.[2] Defendants also do not deny that, but for Defendants' decision to promulgate the Passport Rule, Applicant Plaintiffs would be able to participate in this year's diversity lottery and future ones. Instead, Defendants argue that Applicant Plaintiffs' inability to apply is a self-inflicted harm that is not fairly traceable to the State Department's actions because Applicant Plaintiffs admit that they would be able to obtain passports with their families' financial assistance if they are selected in the diversity visa lottery. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Dkt. No. 16, ("Opp'n"), at 16-17. Thus, according to Defendants, Applicant Plaintiffs' only complaint is that "they should not have to undertake the alleged inconvenience necessary to obtain a passport . . . *at this stage* of the [Diversity Visa] Program application process." Opp'n at 16. This argument fails as a matter of fact, law, and common sense.

As an initial matter, this argument has no bearing on Mr. Desta, and Defendants do not offer any other reason why he does not have Article III standing. As alleged in his declaration, Mr. Desta did not find out about the Passport Rule until September 2019. Desta Decl. ¶ 11. Even if he had applied for a passport immediately, he "would not receive one before the application window for the Diversity Visa Program closes for this year in early November." Desta Decl. ¶ 14.) Mr. Desta will lose his opportunity to participate in the Diversity Visa Program this year because

[2] As Defendants acknowledge Opp'n at 14, the Court "must accept as true all material allegations of the Complaint, and must construe the Complaint in favor of the complaining party," *Ord v. Dist. of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009). Although when "a defendant [makes] a factual attack on the Court's subject matter jurisdiction . . . the district judge is not obliged to accept the plaintiff's allegations as true and may examine evidence to the contrary," *Finca Santa Elena, Inc. v. United States Army Corps of Engrs.*, 873 F. Supp. 2d 363, 368 (D.D.C. 2012), Defendants have made no such "factual attack" here, and provide no "evidence to the contrary." *Id.*

of Defendants' actions, not because of any "self-imposed" desire to skirt the costly, time-consuming, and arduous process of obtaining a passport at the application stage of the program. Mr. Desta's lost opportunity therefore is fairly traceable to Defendants' promulgation of the Passport Rule and would be redressed by the requested injunction. There is therefore no convincing argument against Mr. Desta's constitutional standing to bring his claim, and his standing alone enables Plaintiffs to succeed on the merits. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650-51 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."); *J.D. v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019) ("Article III's case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing."). Moreover, even if E.B. and K.K. were in a position to endure the economic hardship of obtaining passports at the application stage, they too almost certainly would be unable to obtain passports in time for the current lottery. E.B. Decl. ¶ 10; Retta Decl. ¶ 8; K.K. Decl. ¶ 15. That alone gives them standing as well.

Defendants misrepresent the financial and administrative obstacles to obtaining passports in Ethiopia and Côte d'Ivoire as mere "inconvenience[s]" that Applicant Plaintiffs have chosen to avoid, rather than practical barriers that Applicant Plaintiffs cannot hope to overcome. E.B. would have to pay almost a month's income for a passport. E.B. Decl. ¶¶ 13-15. K.K. would have to pay more than double his monthly base salary. K.K. Decl. ¶ 14. Paying such exorbitant costs just to enter the Diversity Visa Program is not a realistic option, as it would require the Applicant Plaintiffs to forgo basic necessities without the high likelihood of receiving a visa they could expect at a later stage once selected..[3]

[3] Defendants characterize the Applicant Plaintiffs' friends and family as having "decided to withhold the necessary financial assistance" for obtaining passports that would allow them to enter

Under Defendants' theory, erecting a regulatory barrier to a benefit that may be surpassed only by extreme hardship does not injure the regulated party, for the decision to forgo such hardship is the true source of the injury. But that is not the law. The sole case cited by Defendants for this proposition, *Warth v. Seldin*, supports Plaintiffs. 422 U.S. 490, 502-05 (1975). There, low-income individuals challenged a zoning ordinance that increased the cost of housing in a place where they had never lived, and from where, the Court concluded, they had not been excluded from living. Specifically, the Court found the plaintiffs did not have standing to sue because they had not shown that they would have found affordable housing but for the ordinance. *Id.* at 504. However, the Court stated, standing would exist if the plaintiffs had alleged facts "from which it reasonably could be inferred that, absent the respondents' . . . practices, there is a substantial probability that they would have been able to purchase or lease . . . and that, if the court affords the relief requested, the asserted inability of petitioners will be removed." *Id.* at 504. At no point did the Court indicate that the injury would be "self-imposed" because of the low-income individuals' refusal to pay for unaffordable housing. Here, Applicant Plaintiffs have all previously successfully submitted applications to the Diversity Visa Program, and would do so again but for the Passport Rule. They meet every requirement in *Warth*.[4]

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the lottery. Opp'n at 17-18. But if a regulatory change has an effect on third parties whose resulting actions contribute to the alleged harm, this constitutes an injury "fairly traceable" to the regulation itself. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (intervenor who profited from hunting fees had standing to challenge regulation that would prevent hunters from bringing home trophies, which would likely make some hunters decide not to hunt). Moreover, the fact that third parties would make the sacrifices necessary to provide financial support to Applicant Plaintiffs should they be selected in the lottery underscores that it is the Passport Rule itself that is the source of the harm. In any event, as explained *infra*, exorbitant costs are not the sole impediment to obtaining a passport in Ethiopia or Côte d'Ivoire.

[4] Contrary to Defendants' claims, *Warth* says nothing about "compet[ing] equally" for contracts, Opp'n at 19, and the cited portion of the case addressed only whether housing organizations had standing to bring zoning challenges on behalf of their members. *Warth*, 422 U.S. at 516-17.

Defendants also attempt to dismiss a long and well-established line of precedent holding that the lost opportunity to pursue a benefit, even if obtaining the benefit is uncertain, constitutes an injury-in-fact, by simply stating that because many of these cases derive from equal protection claims, they are "distinguishable." Opp'n at 18, referring to Opening Br. at 21 (citing cases). But this principle is not limited to the equal protection context, and has been applied by this Circuit to find standing in APA claims. In *CC Distributors, Inc. v. United States*, the Court of Appeals cited this principle to find Article III standing in an APA suit challenging the cancellation of Air Force contracts. 883 F.2d 146, 150-51 (D.C. Cir. 1989). And in *DIRECTV, Inc. v. FCC*, it was applied in an APA challenge to an FCC decision regarding the distribution of broadcast channels. 110 F.3d 816, 829-30 (D.C. Cir. 1997) ("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 in order to establish standing."). Defendants make no attempt to grapple with this principle, which is dispositive here.

Defendants further argue that the harm Applicant Plaintiffs claim is not fairly traceable to the Passport Rule because it merely changes the stage at which applicants must present a valid passport; thus, the "opportunity remains open." Opp'n at 18. This argument again misses the point. As the allegations make clear, because of the Passport Rule, Applicant Plaintiffs have had insufficient time to obtain a passport for the application stage of the Diversity Visa Program. Thus, the opportunity does not "remain open," and the Passport Rule does more than just shift the timing of a prerequisite. Before the promulgation of the Passport Rule, aspiring immigrants like the Applicant Plaintiffs could apply for the Diversity Visa Program without passports, and if selected in the lottery, there would be sufficient time to apply for and obtain a passport as part of

the visa approval stage. The Passport Rule adds a requirement that Applicant Plaintiffs cannot hope to satisfy. As a direct result of this rule, Applicant Plaintiffs can no longer apply to the program. This lost opportunity is "fairly traceable" to Defendants' actions. *See Ramirez v. U.S. Immigration and Customs Enforcement*, 338 F. Supp. 3d 1, 30 (D.D.C. 2018) (holding that allegations of Department of Homeland Security's failure to make alternative detention programs available to plaintiffs were "inarguably linked" to lost "*opportunity* to be considered for less restrictive placements," and sufficient for standing) (emphasis in original).

Defendants' arguments that the Family Plaintiffs do not have Article III standing are also unconvincing. Defendants argue that the Family Plaintiffs' injury "stems from [Applicant Plaintiffs'] self-imposed injury." Opp'n at 20. But in addition to the fact that Applicant Plaintiffs' injury stems directly from Defendants' promulgation of the Passport Rule, as explained above, Family Plaintiffs' injury is distinct. As the Complaint makes clear, Family Plaintiffs have lost an opportunity to reunite their families. Compl. ¶¶ 53, 58. For the same reason, Defendants are wrong that the Family Plaintiffs "presume that mere submission of an entry or petition for the [Diversity Visa] Program lottery results in the likelihood of actually being selected." Opp'n at 20. The uncertain chance to receive a benefit is sufficient, *DIRECTV*, 110 F.3d at 829-30, and Family Plaintiffs seek only the opportunity for family reunification. By imposing the Passport Rule, Defendants have foreclosed that opportunity for at least this year, if not for longer.

Defendants' assertion that "[a] party ordinarily 'cannot rest his claim to relief on the legal rights or interests of third parties'" Opp'n at 20 (citing *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984)), is beside the point. Family Plaintiffs' lost opportunity for reunification is a harm they themselves will suffer absent relief. Compl. ¶¶ 53, 58. As in *Munson*, where the Court found Article III standing because a contractor potentially would lose business

based on a law regulating the charities with which it contracted, Family Plaintiffs here stand to potentially lose a corollary benefit of a regulation imposed upon other persons, and therefore have a claim in their own right.

Finally, Defendants argue that a preliminary injunction will not "sufficiently redress [Plaintiffs'] self-imposed injuries." Opp'n at 19. This argument makes little sense. Plaintiffs assert that Defendants' actions have caused them to lose their opportunity to enter this year's Diversity Visa Program—not that they will be barred from immigrating to the United States. An order enjoining the Passport Rule would permit the Applicant Plaintiffs to participate in that program, as they have done in prior years. That is the entire purpose of a preliminary injunction: to return the parties to the status quo ante. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties . . .").

B. Plaintiffs Fall Within the Relevant Statute's Zone of Interests

Plaintiffs have established that they fall within the "zone of interests" of the "relevant statute," which in this case is the Immigration Act and supporting regulations that establish the Diversity Visa Program. 8 U.S.C. § 1153(c). *See Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (describing question as whether the interest plaintiff seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute . . . in question"). The Defendants present three arguments for why Plaintiffs allegedly do not fall within the "zone of interests" of the relevant statute, but the first two appear to be a continuation of Defendants' mistaken arguments about Article III standing.[5] First, Defendants argue that the

[5] "The Supreme Court has recently clarified that 'prudential standing is a misnomer,' and that the 'zone of interests' inquiry is in fact a question of whether a plaintiff 'falls within the class of plaintiffs whom Congress has authorized to sue,' not a question of standing." *Sierra Club & La.*

Applicant Plaintiffs do not have "standing" because they are outside the United States and have not been to the United States previously. Opp'n. at 21. Second, they argue that the Family Plaintiffs cannot bring suit for a series of loosely connected reasons, including that the Passport Rule is not the "proximate cause" of losing the opportunity to reunite with their family members. Opp'n. at 22. Finally, they argue that neither the Applicant Plaintiffs nor the Family Plaintiffs fall within the zone of interests of the APA because they are not part of the "public" that Congress contemplated would participate in notice and comment procedures. Opp'n. at 23. All are mistaken.

In this Circuit, there is a three-part test to assess whether plaintiffs are within the applicable zone of interests: the Court "(a) identif[ies] the relevant statute, (b) determine[s] the zone of interests it implicates, and then (c) decide[s] whether the plaintiff's grievance is 'arguably within the zone of interests to be protected or regulated by the statute.'" *AICPA v. IRS*, 746 Fed. App'x. 1, 6-7 (D.C. Cir. 2018) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

Defendants' third argument—the sole argument that actually addresses the zone of interests—is easily disposed of, for it falls at the first step of the test by misidentifying the relevant statute. Defendants mistakenly presume that the relevant statute for the purpose of this case is the APA itself. *See* Opp'n at 24 ("Plaintiffs have not explained how or why they are within the zone of interests here under the APA . . . ."). But in APA litigation, including claims invoking its notice-and-comment requirements, the relevant statute for the purposes of zone-of-interests analysis is always the substantive statute to which the challenged agency action relates—here, the INA's provisions establishing the Diversity Visa Program. *See AICPA*, 746 Fed. App'x at 7 (rejecting

Envtl. Action Network v. EPA, 755 F.3d 968, 976 (D.C. Cir. 2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)).

argument that the APA is the relevant statute, and instead looking to the substantive law underlying the challenged regulation); *see also Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994) ("[A] party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority . . . ."). As such, the D.C. Circuit has looked unfailingly to the underlying substantive statute, not the APA, in cases that include challenges to compliance with notice-and-comment-rulemaking requirements. *See, e.g.*, *AICPA*, 746 Fed. App'x at 7 (relevant statute in case including notice-and-comment claim is statute to which rule relates); *Pena*, 17 F.3d at 1483 (same); *Sierra Club*, 755 F.3d at 976 (same); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 628 (D.C. Cir. 1996) (same).

Unsurprisingly, Defendants find no legal support for their argument. The sole supporting case cited by the Defendants, *Lozansky v. Obama*, involved no APA claim, and the court there looked to the substantive statute forming the gravamen of the complaint when assessing the zone of interests. 841 F. Supp. 2d 124, 133 (D.D.C. 2012) (analyzing plaintiffs' interests as they relate to challenged statutory amendment). Accordingly, the relevant statute for the purpose of this case is the portion of the Immigration Act of 1990 that establishes the Diversity Visa Program, codified at 8 U.S.C. § 1153(c).

Defendants here make no argument that Plaintiffs do not fall within the zone of interests of the Diversity Visa Program, which they plainly do. The Program provides an opportunity for citizens of countries with low rates of immigration to the United States to establish permanent residency. Applicant Plaintiffs—citizens of countries eligible for the Program who seek permanent residency through participation in the Program—are undeniably among those within its zone of interests. *See AICPA*, 746 Fed. App'x at 7 (zone of interests includes persons protected or regulated by a statute). Family Plaintiffs, too, fall within its zone of interests, for a

key purpose of the Program is to benefit residents of the United States through diversification of the immigrant population. *See* 84 Fed. Reg. 25,990 ("The DV Program was established to diversify the immigrant population of the United States . . . ."). Congressional debate surrounding the bill demonstrates that one considered purpose was to ensure that existing immigrant communities in the United States would benefit from additional immigration from their countries of origin.[6] Family Plaintiffs, who stand to benefit from admission of immigrants hailing from their countries of origin in general, and their relatives in particular, are more than "arguably within the zone of interests" of the relevant statute, especially under a test the Supreme Court has described as "not meant to be especially demanding," *Clarke*, 479 U.S. at 399, in which "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). Accordingly, Defendants' third argument fails, and Plaintiffs are eligible under the APA to challenge a rule affecting the Diversity Visa Program.

Moreover, Defendants' first argument—that Applicant Plaintiffs, who are citizens and residents of foreign countries, cannot sue in a U.S. court—is also unavailing. *See* Opp'n. at 21. This argument derives from an outdated line of cases that address whether foreign nationals who are denied visas or entry into the United States by an immigration official can challenge those determinations in court. Those cases have nothing to do with the claims brought by Plaintiffs. *See*

[6] *See, e.g.*, 136 Cong. Rec. H8629-02, H8631, 1990 WL 144438 ("Mr. Speaker, if a Member has Polish, Italian, Irish, or Lebanese constituents in their district, they ought to know that they are very, very interested in this bill. Those committees [sic] have a real interest in this bill, in bringing families together who emanate from those particular constituencies."); *id.* ("It is in the interest of the United States to be a beacon to people from all over the world, and it is absolutely key to political support for our immigration system that all of the diverse groups that make up our country know that our immigration laws understand their interests and the concerns that they have that people from the parts of the world that their ancestors have come from will also be fairly considered under our immigration system.").

Yuk-Ling Wu Jew v. Attorney Gen., 524 F. Supp. 1258 (D.D.C. 1981) (suit challenging denial of visa); *Chinese Am. Civic Council v. Attorney Gen.*, 396 F. Supp. 1250 (D.D.C. 1975) (suit challenging denial of applications to enter country). *Chinese American Civic Council* has not been cited by a court in over 40 years, and *Yuk-Ling Wu Jew* never has. They also have no application here. Plaintiffs do not challenge an adverse immigration determination nor assert a right of entry. They challenge a rule of general applicability that prevents their participation in a program established by Congress for which they are otherwise eligible, indeed, a program that is specifically intended for people like them.

Although the Diversity Visa Program is an immigration program, there is no precedent supporting Defendants' attempt to apply the narrow prohibition offered in *Chinese American Civil Council* (and mentioned in dicta in a footnote in *Yuk-Ling Wu Jew*) to every case that could be said to relate in some way to immigration. There is certainly no general prohibition on foreign nonresidents bringing suit in U.S. courts. *See Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972) (permitting foreign nonresidents to bring suit under the APA). As this is an APA claim challenging the adoption of a general rule affecting an immigration statute and not a challenge to a specific denial of admission, whether Plaintiffs can sue under the APA turns on the statutory language. The APA permits suit by any "person" who has been harmed by an agency action. 5 U.S.C. § 702. And as explained in the Opening Brief, the relevant definition of "person" makes no distinction between residents or non-residents of the United States. Opening Br. at 23-24; 5 U.S.C. § 551(2). If Congress had intended to limit APA judicial review to persons in the United States, it could have done so. Contrary to Defendants' argument, then,

> [a]s persons adversely affected or aggrieved by agency action, the . . . Plaintiffs have a cause of action under the APA for injunctive

> relief against defendant officials. Nonresident aliens located outside the United States qualify as aggrieved persons with standing to obtain review in U.S. courts of the legality of U.S. governmental actions that adversely affect them.

Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993) (internal punctuation and citation omitted).

Finally, Defendants' confusing argument that Family Plaintiffs are unable to bring suit under the APA, Opp'n. at 22-23, lacks merit. Defendants first suggest that Family Plaintiffs cannot sue because they are "not materially affected by an agency's interpretation of the governing law." *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986). But the agency here is not, and does not claim to be, interpreting governing law. Next, Defendants assert that, unlike in *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018), where family members of individuals unable to enter the United States due to an executive order had standing to bring suit, there is an insufficient "nexus" between Defendants' action in this case and the Family Plaintiffs' harm because the rule is "not the proximate cause" of the Family Plaintiffs' ability to reunite with their relatives. This is merely a reassertion of Defendants' argument on Article III standing, which Plaintiffs addressed in Section I.A.1, *supra*. Finally, Defendants assert that the Family Plaintiffs have not met the burden of establishing third-party standing, citing a case in which a father attempted to bring suit as a "next friend" to prevent the government from targeting his son for a drone strike. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). But Family Plaintiffs do not claim to invoke third-party standing by asserting the rights of their family members. They bring suit on their own behalf, for harms they suffer on their own. In any event, *Al-Aulaqi* and the third-party-standing doctrine pertain to constitutional standing, not the zone of interests analysis for this suit under the APA.

A generous reading of Defendants' arguments suggests that the crux of their objection is that they do not believe the Family Plaintiffs are sufficiently "adversely affected or

aggrieved by agency action" to seek judicial review under the APA. 5 U.S.C. § 702. But this also fails. The question of whether a party is "aggrieved" for purposes of the APA and therefore has "prudential" or "statutory" standing is determined by the zone-of-interests test. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224; *see also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 186 (D.C. Cir. 2012) ("To be 'aggrieved' for the purposes of the APA and to have prudential standing, a party must be arguably within the zone of interests to be protected or regulated by the statute. . . .") (Kavanaugh, J., dissenting in the judgment) (internal punctuation and citation omitted). And as explained above, all Plaintiffs fall within the zone of interests of the Diversity Visa Program. Both Applicant and Family Plaintiffs meet the requirements of the APA and are able to bring suit challenging Defendants' failure to comply with its procedural obligations.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Defendants Have Not Demonstrated that Compliance with the APA's Procedural Requirements Would Have Resulted in Negative International Consequences.

To invoke the APA's foreign affairs exception, 5 U.S.C. § 553(a)(1), the government must "do more than merely recite that the Rule 'implicates' foreign affairs." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775 (9th Cir. 2018). "[C]ourts have disapproved the use of the foreign affairs exception where the Government has failed to offer evidence of consequences that would result from compliance with the APA's procedural requirements." *Id.* at 776; *see also Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008) (unless "the relevance to international relations is facially plain" the government must carry the "burden of proof" when invoking the foreign affairs exception); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017) ("Because notice and comment is the default, 'the onus is on the [agency] to establish that notice and comment' should not be given. Any agency faces an uphill battle to meet that burden.") (alteration in original) (quoting *Action on Smoking & Health v. Civil Aeronautics*

Bd., 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)). Relying entirely on generalized and conclusory statements, Defendants have not carried their burden to demonstrate negative consequences for U.S. foreign policy that would flow from complying with notice-and-comment rulemaking.

Defendants' justification for invoking the foreign affairs exception boils down to just two unsupported assertions. First, Defendants claim that complying with the APA's notice-and-comment provisions would require them to "elaborate on international law enforcement investigations and information exchanges conducted with different diversity visa eligible countries," the disclosure of which "'might enflame or embarrass relations with other countries.'" Opp'n at 27-28 (quoting *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995)). Second, Defendants posit that "[d]isclosing information akin to 'sensitive foreign intelligence,' and using a notice and comment period to 'conduct and resolve a public debate over [how] some citizens of particular countries' may be engaging in efforts to defraud the DV lottery application process would undoubtedly result in 'undesirable international consequences' that would follow from notice and comment rulemaking." *Id.* at 28 (quoting *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008)). Neither assertion supports application of the foreign affairs exception.

Defendants do not explain why engaging in notice-and-comment rulemaking would require them to disclose the details of ongoing investigations, or single out particular countries as hotspots for visa fraud in order to justify the need for a policy that would apply globally.[7] Nor do they explain why it would be necessary to disclose what they deem "information akin to sensitive foreign intelligence." A notice and comment period would allow the public to explain the

[7] Agencies often conduct notice-and-comment rulemaking that touches on much more sensitive national-security issues. *See e.g.*, *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, 83 Fed. Reg. 19,196 (proposed May 2, 2018) (to be codified at 47 C.F.R. pt. 54) (addressing concerns about products from Chinese telecommunications companies being used for espionage purposes).

hardships associated with obtaining passports for the application stage of the program, comment on whether submitting passport numbers in advance is actually likely to reduce fraudulent applications, and propose alternatives for preventing fraud, among other things. Indeed, the few comments submitted on the Passport Rule raised these issues, and responding to those comments did not require the disclosure of any of the information the Defendants now claim would be necessitated by notice-and-comment rulemaking. *See, e.g.*, African Communities Together, Comment Letter on Passport Rule (July 5, 2019), Ex. 1; UndocuBlack Network, Comment Letter on Passport Rule (July 5, 2019), Ex. 2; *see also Supporting Statement for Paperwork Reduction Act Submission, Electronic Diversity Visa Lottery (EDV) Entry Form, OMB Number 1405-0153, DS-5501* (Aug. 29, 2019), *available at* https://www.reginfo .gov/public/do/PRAViewDocument?ref_nbr=201908-1405-006 (last visited Oct. 21, 2019).

Moreover, Defendants have provided no declarations from State Department officials setting forth foreign policy concerns or any other evidence supporting the asserted justifications for forgoing notice-and-comment rulemaking. *See, e.g.*, *Yassini v. Crosland*, 618 F.3d 1356, 1361 (9th Cir. 1980) (citing affidavits from the Attorney General and Deputy Secretary of State in approving an invocation of the foreign affairs exception). Defendants do not even claim that visa fraud is concentrated in any particular region, and it is not "facially plain" that diplomatic relations would break down over public comments about foreign criminal activity. After all, foreign nations presumably share the United States' desire to root out fraudulent activity occurring within their borders.

In attempting to justify their invocation of the foreign affairs exception based upon such nebulous and non-substantiated concerns, Defendants rely heavily on *Raoof v. Sullivan*, 315 F. Supp. 3d 34 (D.D.C. 2018). *See* Opp'n at 26, 28. That lengthy opinion devotes a single

paragraph to discussion of the foreign affairs exception within a section largely addressing a separate question of statutory interpretation. *Raoof*, 315 F. Supp. 3d at 43-44. Citing no case law, *Raoof* concludes that the U.S. Customs and Immigration Services was justified in enacting the challenged rule without notice-and-comment rulemaking because of the rule's "relat[ion] to the foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department." *Id.* at 44. The court did not address what, if any, negative consequences would have flowed from notice-and-comment rulemaking. *Id.* Such an unprecedented and unbounded interpretation of the foreign affairs exception would encompass "any function extending beyond the borders of the United States," contrary to Congress's intent, S. Rep. 79-752, at 13 (1945), and breaks sharply with how appellate courts have interpreted the provision. *See* Opening Br. at 17-19 (collecting cases). Moreover, the plaintiffs in *Raoof* raised none of the arguments that Plaintiffs do in this case. Indeed, they failed to address the applicability of the foreign affairs exception at all. *See* Pls.' Mem. P. & A. Opp'n Defs.' Mot. Dismiss, *Raoof v. Sullivan*, 315 F. Supp. 3d 34 (D.D.C. 2018) (No. 1:17-cv-01156-TNM), ECF No. 14. Accordingly, *Raoof* is not an instructive guide to the applicability of the foreign affairs exception.[8]

None of the other cases cited by Defendants support their expansive view of § 553(a)(1). The general global applicability of the Passport Rule is markedly different from the regulation at issue in *Rajah*. In that case, the Second Circuit approved the application of the foreign affairs exception to a program enacted by the U.S. Attorney General requiring male noncitizens from specified Muslim-majority countries (and North Korea) living in the United States without lawful-permanent-resident status to register with and be fingerprinted by immigration authorities

[8] As discussed in Plaintiffs' opening brief, Opening Br. at 17, *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288 (D.D.C. 1973), provides a far more robust and persuasive analysis of the foreign affairs exception, *id.* at 1290–91. Defendants do not discuss *Chow*.

in the wake of the 9/11 attacks. 544 F.3d at 433, 437-38. The court held that the government properly invoked the foreign affairs exception to the Attorney General's designation of countries whose nationals were subject to the program because "public debate over why some citizens of particular countries were a potential danger to our security" might impair relations with the targeted countries.[9] *Id.* at 437. But whereas the designations at issue in *Rajah* singled out particular nations for enhanced security measures, the Passport Rule would apply worldwide. Notice and comment about the Passport Rule therefore does not pose the same likelihood of impairing relations with any particular nation. The Passport Rule also is unlike the challenged notice in *Rajah* because it is neither grounded in "sensitive foreign intelligence" nor responsive to a crisis like the 9/11 attacks that might justify the avoidance of the "slow and cumbersome" rulemaking processes.[10] *See id.*

American Ass'n of Exporters & Importers Textile & Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985), likewise offers little support for Defendants. In that case, a trade group challenged an agency's imposition of a quota on the importation of Chinese textiles without engaging in notice-and-comment rulemaking. *Id.* at 1242-43. The court held that adopting the quota without prior notice prevented destabilization of the international textile market by stopping American importers from increasing their inventories and foreign manufacturers from dumping merchandise into the United States during the notice-and-comment period. *Id.* at 1249.

[9] The Attorney General enacted the registration and fingerprinting program at issue in *Rajah* through notice-and-comment rulemaking. 544 F.3d at 436. He designated the countries whose citizens would be subject to the program without complying with notice and comment procedures. *Id.*

[10] Without elaboration about how information gleaned from "law enforcement investigation and information exchanges conducted with different diversity visa eligible countries," Opp'n at 2, is similar to or dissimilar from foreign intelligence, Plaintiffs cannot evaluate whether it would be subject to any protection from disclosure.

Thus, adoption of the quota without notice and comment prevented a specific negative international consequence for the United States and involved a particular country.

Defendants' position also is at odds with *Zhang*, which involved an attempt by the Department of Justice (DOJ) to overturn a decision by the Board of Immigration Appeals (BIA) that denied asylum to individuals affected by China's "one-child" policy through a rule adopted without notice-and-comment procedures. 55 F.3d at 738-40. The Second Circuit held that the foreign affairs exception did not apply to DOJ's effort to overturn the BIA decision because "no record evidence" supported "the view that subjecting the . . . interim rule to notice and comment would have had any undesirable consequences." *Id.* at 745. Similarly, Defendants have presented no evidence establishing negative ramifications that would result from adopting the Passport Rule through notice-and-comment procedures.

Because Defendants have not carried their burden of proof to establish that adopting the Passport Rule through notice-and-comment rulemaking would negatively affect U.S. diplomacy with any particular country and because no such impact is intuitively obvious, the foreign affairs exception does not apply. *See E. Bay*, 932 F.3d at 775; *Rajah*, 544 F.3d at 437. Plaintiffs are therefore likely to succeed on the merits of their APA claim.

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

Applicant Plaintiffs allege that without a preliminary injunction, they will lose the opportunity to enter this year's Diversity Visa Program, an "irreparable harm" that is otherwise certain to occur. Opening Br. at 25-26. Family Plaintiffs also will suffer the lost opportunity for family reunification absent a preliminary injunction. And all Plaintiffs will suffer a procedural injury if the Court does not enjoin Defendants' decision to enact the Passport Rule as a "final rule" without a notice-and-comment period, as required under the APA.

Defendants do not dispute that the lost opportunity to enter the Diversity Visa Program is a harm to Applicant Plaintiffs, nor do they meaningfully address the many cases cited in Plaintiffs' motion holding that lost opportunity can be irreparable injury. (*See* Opening Br. at 26-28.) Instead, rehashing their standing arguments, Defendants argue that Applicant Plaintiffs' harm is self-inflicted because they "have chosen not to undertake the apparent inconvenience" of applying for a passport. Opp'n at 29-30. But Defendants' argument that Applicant Plaintiffs face merely a self-imposed "inconvenience" is contradicted by Plaintiffs' numerous allegations of the significant financial and practical barriers to obtaining a passport, which the Court must accept as true, particularly in the absence of any contrary facts. *See supra* n. 1. As discussed above, the law does not support Defendants' contention that regulatory barriers imposing extreme hardships cause no harm because the regulated party could choose to suffer such hardships. *See supra* at 3. And Defendants completely ignore the fact that Applicant Plaintiffs simply do not have enough time to obtain a passport and enter the Diversity Visa Program during the current application window. As Applicant Plaintiffs' declarations make clear, even if they were able to overcome the financial barriers to obtaining passports, the length of time it would take them to obtain a passport in their countries will likely cause them to miss this year's application period. K.K. Decl. ¶ 15; Desta Decl. ¶ 14; E.B. Dec. at ¶ 10; Retta Decl. ¶ 8. For Applicant Plaintiffs, acquiring a passport on short notice just to enter the Diversity Visa Program is more than an "inconvenience," it is a practical impossibility. *See supra* at 3.

That Applicant Plaintiffs might be able to obtain a passport later in the process, Opp'n at 30, has no bearing on the immediate harm facing them. Applicant Plaintiffs will have sufficient time to apply for and obtain passports at a later stage if any of them are chosen in the diversity visa lottery. Desta Decl. ¶ 15. And if Applicant Plaintiffs are selected in the diversity

lottery, their substantially greater likelihood of being able to immigrate to the United States and earn greater income would enable them to muster sufficient resources. But they are not able to do so for the small chance of being selected in the diversity lottery, and certainly not in the short time before the application window closes. K.K. Decl. ¶ 16.

Defendants also argue that Family Plaintiffs will not suffer irreparable harm because they assert only the "denial of a conditional benefit of family unification," the possibility of which is "tenuous at best." Opp'n at 30-31. This argument is misplaced. The irreparable harm to Family Plaintiffs is the lost opportunity of family reunification this year. *See* Opening Br. at 28. That loss is not "speculat[ive]"; without a preliminary injunction, Family Plaintiffs will lose this opportunity. And the certain loss of an opportunity, even without guarantee of eventually obtaining the sought benefit, is sufficient to establish irreparable harm. Plaintiffs' opening brief cited numerous cases holding that lost opportunity can be the basis for irreparable injury, even when the benefit sought is not certain. *See* Opening Br. at 26-28 (citing cases related to loss of opportunity to bid on projects, compete for contracts or promotions, take the bar examination, and pursue housing). This injury is irreparable—without an injunction, even if Plaintiffs were to prevail in this litigation, it would be too late to participate in this year's lottery.

Defendants' argument that Plaintiffs fail to establish procedural injury also misses the mark. Defendants claim that the State Department did not "preclude[]" Plaintiffs "from submitting comments during the [Passport Rule's] 30-day comment window." Opp'n at 31. But Defendants do not dispute that they did not provide opportunity to comment prior to the promulgation of the Passport Rule, as the APA requires. Indeed, the State Department openly acknowledges that the Passport Rule did not comply with the APA's notice-and-comment requirement. 84 Fed. Reg. 25,989 (codified at 22 C.F.R. § 42.33) (the rule "is exempt from notice

and comment").[11] Merely providing a comments page for a rule that is already in effect is a far cry from notice-and-comment rulemaking under the APA, which is required in order to "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). To hold otherwise would provide an end-run around the APA's statutory requirements.

Finally, Plaintiffs are not seeking to remedy a "past harm," Opp. at 32, but are seeking an injunction to set aside a procedurally defective rule that precludes them entirely from participating in the current diversity visa lottery. Although procedural injury is alone insufficient to constitute irreparable harm, it bolsters the case for a preliminary injunction. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003). Notice-and-comment rulemaking would permit Plaintiffs and other interested parties or their representatives to participate in the rulemaking process, explain the adverse impacts of the Passport Rule, and propose alternatives for addressing visa fraud.

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR PRELIMINARILY ENJOINING THE PASSPORT RULE

In their opening brief, Plaintiffs demonstrated that the balance of equities tips in their favor with respect to their motion to preliminarily enjoin the Passport Rule, and that such an injunction would serve the public interest. Opening Br. at 29-32. Defendants fail to identify any significant harm that it or the public would suffer from a preliminary injunction. Moreover, Defendants have failed to grapple with the effect the Rule has in frustrating congressional intent for the Diversity Visa Program, and on the public's interest in governmental compliance with the APA.

[11] Nor did it comply with 5 U.S.C. § 553(d) ("publication or service of a substantive rule shall be made not less than 30 days before its effective date").

Plaintiffs do not dispute that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); Opp'n at 32. It is in part because of the "public consequences" of promulgating the Passport Rule that this Court should exercise its discretion to preliminarily enjoin the rule. Without an injunction, the Passport Rule will exclude many individuals like Applicant Plaintiffs who lack the ability to obtain a passport at the application stage of the Diversity Visa Program, harming the Program's goal of promoting diversity among immigrants to the United States. *Weinberger* is inapposite because, in that case, "[a]n injunction [wa]s not the only means of ensuring compliance." *Id.* at 314. Here, an injunction is the only means of ensuring the government's compliance with the APA.[12]

Defendants claim without support that "participants from around the world have been complying with the [Passport Rule] and submitting entries for the current DV lottery using the current electronic entry form." Opp'n Br. at 32. Defendants have provided no evidence to demonstrate how the Rule has impacted such submissions, or the distribution of countries from which such submissions originate. Notably, if, as Plaintiffs allege, the Rule has the effect of diminishing entries from regions where passports are difficult to obtain, it is disserving the public interest by frustrating Congress's intent for the Diversity Visa Program. Contrary to Defendants' characterization, Plaintiffs are not "asking for special treatment." *Id.* They are merely seeking to enjoin a rule of general applicability that harms them (and many other applicants) and was issued in noncompliance with procedural requirements. This does not show that an injunction would

[12] In the other decision cited by the government, *Southdown, Inc. v. Moore McCormack Res., Inc.*, 686 F. Supp. 595, 596-97 (S.D. Tex. 1988); Opp'n at 33, the court granted a preliminary injunction, in part because it was consistent with the interests of the public and affected third parties, just as it would be here.

disserve the public interest, or that it would be "unfair" to applicants who have already submitted their entries or "throw the DV lottery application process into a state of flux." Opp'n Br. at 33. An injunction would not require Defendants to discard already submitted applications. It would only require Defendants to revert to the status quo ante and accept applications that otherwise would be rejected for failing to include passport information.[13] After that, they may conduct the lottery with all combined submissions. Such an order is neither particularly burdensome nor unfair.

And although reducing fraud in the Diversity Visa Program is in the public interest, Defendants provide no support for their contention that the Passport Rule has the actual effect of reducing fraud. As Plaintiffs alleged, there is reason to believe that fraudsters may have an easier time obtaining passport information than many would-be applicants. Compl. ¶ 38. Nor have Defendants shown that other measures already in place, including intensive screening of selected applicants, are insufficient to prevent fraud. If Defendants had participated in the notice-and-comment process, it would have allowed for public debate about the necessity of the Rule to prevent fraud, and the viability of alternative and less harmful regulations. Regardless, even if the Passport Rule has some salutary effects, they are far outweighed by the harm it causes by preventing potentially millions of applicants from entering the lottery.

Finally, although the prospect of preventing a governmental agency from enforcing a statute promulgated by duly elected representatives might weigh against an injunction as a general matter, Opp'n Br. at 34, enjoining an agency rule that *frustrates* the purpose of a statute does not. *See Shays v. FEC*, 337 F. Supp. 2d 28, 65 (D.D.C. 2004) (regulation that undercuts

[13] Some extension of the application period, scheduled to close on November 4, also would be required in order to allow submission of applications by those who do not have valid passport numbers.

statutory purpose entitled to no deference). As Plaintiffs allege, the rule will significantly reduce the diversity of a program that has the core purpose of fostering diversity. Moreover, Plaintiffs here seek to enforce a separate statute promulgated by duly elected representatives: the APA. Defendants have failed to address this crucial aspect of the equities—that there is no public interest in the perpetuation of unlawful agency action, while there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations, as numerous decisions from this District and this Circuit hold. Opening Br. at 31 & n.26.[14]

[14] *See NAACP v. Trump*, 321 F. Supp. 3d 143, 147-48 (D.D.C. 2018) (granting stay pending appeal, noting "[t]he Court is unmoved by the government's assertion of injury resulting from its being 'enjoined from implementing an act of Congress.' As the Court has already explained, DHS has been implementing that act of Congress (the Immigration and Nationality Act) under an ill-considered (and hence possibly incorrect) understanding of its enforcement authority. Unlike an injunction prohibiting the exercise of statutory authority altogether, this Court's order simply corrects the improper exercise of that authority. To the extent that such an injury is cognizable at all, it is insufficient to justify staying the Court's order here") (citations omitted); *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016) (granting preliminary injunction; "I emphasize, as plaintiffs have, that 'enforcement of an unconstitutional law is always contrary to the public interest.' This is the case even though it is otherwise presumed that, 'any time a State is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury'") (citations omitted); *Preterm-Cleveland v. Himes*, No. 18-3329, 2019 WL 5092242, at *13-*14 (6th Cir. Oct. 11, 2019) (same); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 602-04 (4th Cir. 2017) (same); *N.M. Dep't of Game & Fish v. United States DOI*, 854 F.3d 1236, 1254-55 (10th Cir. 2017) (same).

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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