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

Oral Argument Requested

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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STATEMENT REGARDING ORAL ARGUMENT

This case requires the Court to consider whether the government correctly declined to engage in public rulemaking for a rule that may substantially disrupt the functioning of a congressionally mandated immigration program. The Court's decision will involve interpretation of the "foreign affairs exception" to the Administrative Procedure Act's notice-and-comment process, and the outcome may affect the ability of the public to participate in agency rulemaking for an entire area of administrative law. Plaintiffs respectfully submit that oral argument in this case may aid the Court's resolution of this matter.

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PRELIMINARY STATEMENT

This case concerns an interim final rule promulgated by Defendants that is curbing participation in the Diversity Visa Program, which Congress created for the purpose of increasing the geographical diversity of immigration to the United States. *See* Visas: Diversity Immigrants, 84 Fed. Reg. 25,989 (June 5, 2019) (codified at 22 C.F.R. pt. 42) [hereinafter Passport Rule]. Each year, the Diversity Visa Program allows a maximum of 55,000 individuals from countries with historically low rates of immigration to the Unites States to become lawful permanent residents (LPRs) of this country (i.e. "green card holders"). The Passport Rule requires individuals—for the first time in the Diversity Visa Program's history—to possess a passport just to apply to the Program. This new requirement constitutes an insurmountable barrier to participation in the Program for many people like Plaintiffs E.B. and K.K., who come from countries where passport ownership is rare and the cost of obtaining one is extremely high relative to average incomes in those countries. Despite the Passport Rule's significant impact on participation in the Program, Defendants solicited no public input before enacting the Rule, in direct contravention of the Administrative Procedure Act (APA)'s procedural requirements. Notice-and-comment rulemaking would have forced Defendants to justify the Passport Rule's deleterious impact on the Diversity Visa Program and to consider less harmful ways of achieving their policy goals. For that reason, Plaintiffs ask the Court to set aside the Passport Rule and require Defendants, if they wish to reenact the policy, to do so in compliance with the APA.

Defendants contend that this suit can be dismissed for two reasons, neither of which are availing. First, Defendants maintain that they provided a "legally sufficient" opportunity for public input by accepting comments about the Rule after it had already taken effect, but the D.C. Circuit has flatly rejected a post-promulgation comment period as an adequate substitute for the APA's procedural requirements. Second, Defendants argue that the Passport Rule is exempt from the

APA's notice-and-comment requirements because it falls within that statute's foreign affairs exception, 5 U.S.C. § 553(a)(1), but that exception applies only when notice-and-comment rulemaking would have negative diplomatic consequences for the United States. Defendants provide only conclusory explanations for why adopting the Passport Rule through pre-promulgation APA notice-and-comment rulemaking would have jeopardized U.S. diplomacy. Tellingly, the procedurally defective post-promulgation comment period that Defendants tout as adequate presented identical risks to those they claim justify abandoning public rulemaking. Defendants also have failed to produce an administrative record. This Court therefore has no means of evaluating the Defendants' conclusory invocation of the foreign affairs exception. For these reasons, Defendants' Motion to Dismiss should be denied.

FACTS

As set forth at greater length in the Plaintiffs' Memorandum of Law in Support of Motion for a Preliminary Injunction, ECF No. 3-1, each year, the Diversity Visa Program provides immigrant visas to a maximum of 55,000 individuals from countries with historically low levels of immigration to the United States. 8 U.S.C. §§ 1153(c); 1151(e). These diversity visas are distributed through an annual lottery in which around 14 million people participate. 84 Fed. Reg. at 25,989. Consistent with the goal of increasing immigration to the United States from underrepresented countries, the statutory requirements for participation in the lottery are minimal. By statute, an applicant for the Diversity Visa Program must possess a high-school degree or equivalent, or two years of work experience within the last five years in an occupation which

requires at least two years of training. 8 U.S.C. § 1153(c)(2). The program excludes natives of 18 "high-admission" countries. *Id.* § 1153(c)(1)(E)(i).[1]

On June 5, 2019, the State Department promulgated the Passport Rule, effective immediately, without first engaging in notice-and-comment rulemaking under the APA. 84 Fed. Reg. at 25,989. The Rule adds an additional requirement for applying to the Diversity Visa Program beyond what is required by statute. Under the Rule, applicants must possess a passport in order to enter the lottery. 22 C.F.R. § 42.33(b)(1)(viii) (requiring applicants to provide a passport serial or issuance number in their application); *id.* § 42.33(b)(1)(ix) (disqualifying from consideration applicants who fail to provide a passport number in their application).[2] The State Department claims that the Passport Rule is necessary because the Department "has historically encountered significant numbers of fraudulent entries for the program each year" and believes that requiring applicants to provide a valid passport number on the application "will make it more difficult for third parties to submit unauthorized entries." 84 Fed. Reg. at 25,990. Attempting to justify its failure to promulgate the Rule through notice-and-comment rulemaking, the State Department invoked the APA's foreign affairs exception, stating that the Rule "clearly and directly impacts a foreign affairs function of the United States." *Id.* (citing *City of N.Y. v. Permanent Mission of India to the U.N.*, 618 F.3d 172, 202 (2d Cir. 2010)). In support of this claim, the State

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[1] *See also* U.S. Dep't of State, *Instructions for the 2021 Diversity Immigrant Visa Program (DV- 2021)*, https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2021-Instructions-Translations/DV-2021-%20Instructions-English.pdf [https://perma.cc/P87S-L6VT] (last visited Feb. 2, 2020) (listing the 18 countries excluded from the Diversity Visa Program).

[2] By statute, applicants who are selected in a Diversity Visa lottery must have a passport (or other travel document) in order to obtain an immigrant visa. *See* 8 U.S.C. § 1202(b). But this provision does not require applicants to the Diversity Visa Program to have a passport merely to enter the lottery.

Department contended that the Diversity Visa Program "serves as a clear tool of diplomacy and outreach to countries around the world" and "create[s] allies and goodwill overseas, while simultaneously promoting U.S. foreign policy interests." *Id.*

Plaintiffs E.B. and K.K. are, respectively, natives of Ethiopia and Côte d'Ivoire, two countries where the costs associated with obtaining a passport are high relative to average incomes there.[3] Am. Compl. ¶¶ 11-12, 40, ECF No. 25. Both E.B. and K.K. intended to apply for the Diversity Visa lottery that took place in fall of 2019 (known as the "2021 DV lottery" in reference to the year that successful applicants will receive diversity visas), but they were unable to do so because they lacked the financial resources to obtain passports in advance of the lottery. *Id.* ¶¶ 11-12, 49-51, 54-57. E.B. and K.K. intend to apply for the Diversity Visa Program in 2020 and in subsequent years (until they are able to immigrate to the United States), but they will not be able to do so as long as the Passport Rule remains in effect because of their inability to obtain passports for the limited purpose of applying to the Program. *Id.* ¶¶ 11-12, 53, 59. Even if E.B. and K.K. were able to gather the resources necessary to obtain passports, the Rule would harm them by forcing them to expend resources that they would not otherwise have spent in order to apply to the Program. *Id.* ¶¶ 52, 58. E.B.'s and K.K.'s siblings, Plaintiffs W.B. and A.K., live in the United States. *Id.* ¶¶ 13-14. Because the Passport Rule prevents E.B. and K.K. from applying to the Program, it also denies W.B. and A.K. opportunities to reunify in the United States with their siblings. *Id.* ¶¶ 53, 59.

Because of these harms that Plaintiffs have suffered on account of the Passport Rule, they filed suit in this Court, challenging the Rule as violating the APA's procedural requirements, ECF

[3] Mehatemeselassie Ketsela Desta, one of the plaintiffs named in the original complaint, Orig. Compl. ¶ 14, ECF No. 1, has been voluntarily dismissed from this lawsuit.

No. 1, and moved for a preliminary injunction, ECF No. 3. Although this Court held that at least Plaintiff K.K. had established Article III standing,[4] ECF No. 21, at 6-7, it denied Plaintiffs' Motion for a Preliminary Injunction, holding that Plaintiffs' inability to participate in a single year's Diversity Visa lottery did not amount to irreparable harm, *id.* at 9. Plaintiffs filed an Amended Complaint on January 3, 2020, ECF No. 27, which Defendants seek to dismiss in the instant motion, ECF. No. 28.

STANDARD OF REVIEW

To survive a motion to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[I]n most cases, motions to dismiss are limited to the purported deficiencies of a plaintiff's communication of its allegations in the complaint—in other words, the adequacy of the notice." *Brown v. Gov't of District of Columbia*, 390 F. Supp. 3d 114, 123 (D.D.C. 2019). Where, as here, a motion to dismiss attacks a complaint on purely legal grounds, "it is well established that the Court's analysis of any applicable defenses advanced in opposition to claims that have been properly pleaded are to be reserved for later stages of the litigation" if the evaluation of those defenses "require[s] further factual development." *Id.*

[4] Defendants do not renew their challenge to Plaintiffs' Article III standing in their Motion to Dismiss. *See* ECF No. 28-1.

ARGUMENT

I. DEFENDANTS' ARGUMENTS FOR DISMISSAL UNDER RULE 12(B)(6) ARE UNAVAILING

A. The Passport Rule's Notice and Comment Process Was Legally Insufficient Under the APA

Other than the foreign affairs exception discussed below, Defendants claim no exemption from APA notice-and-comment rulemaking pursuant to 5 U.S.C. § 553(b) and (c). Nor do they claim that the comment opportunity offered in conjunction with the Passport Rule—which occurred after the rule was final and in effect—complied with the APA. But, bafflingly, Defendants assert that this noncompliant process was nevertheless "legally sufficient." Defs.' Mem. Law Supp. Mot. Dismiss (Mot.) 12, ECF No. 28-1. In support, they cite not a single case where a court authorized a post-promulgation opportunity for public comment as an adequate substitute for the APA's notice-and-comment procedures. Defendants' legal sufficiency argument is wildly off the mark.

The process for APA notice-and-comment rulemaking is as follows: (1) "[T]he agency must issue a '[g]eneral notice of proposed rule making,' ordinarily by publication in the Federal Register"; (2) "[I]f 'notice [is] required,' the agency must 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and "consider and respond to significant comments received during the period for public comment"; and (3) "[W]hen the agency promulgates the final rule, it must include in the rule's text 'a concise general statement of [its] basis and purpose.'" *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 96 (2015) (quoting 5 U.S.C. § 553) (alterations in original).

An indispensable element of this process is that the notice, comment, and response occur prior to promulgation of the final rule. This requirement ensures that the government meaningfully considers public input as the final rule is being drafted: "The process of notice and comment rule-

making is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 528 (D.C. Cir. 1982). There can be no meaningful public participation or reasoned decision-making in response to public input where, as here, *pro forma* notice and comment are provided after publication of the final rule. *See New Jersey. v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) ("Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rulemaking process in a meaningful way. . . . Were we to allow [post-promulgation notice and comment] we would make the provisions of [5 U.S.C.] § 553 virtually unenforceable." (quoting *U.S. Steel Corp. v. EPA*, 595 F.2 207, 214-15 (5th Cir. 1979))); *accord Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975), *vacated on other grounds sub nom. EPA v. Brown*, 431 U.S. 99 (1977). Defendants' process was, simply put, an "empty charade." *Connecticut Light & Power*, 673 F.2d at 528. For that reason, it is of no moment that Plaintiffs "did not submit any comments" during Defendants' sham post-promulgation comment period because it was not a meaningful opportunity to participate in the formulation of the already-enacted rule. *See* Mot. 13.

The cases cited by Defendants lend them no support. It is true that publication in the Federal Register may be sufficient notice for other legal purposes. *Id.* at 12-13 (citing, *inter alia*, *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (holding that the date of filing a document to be published in the Federal Register is the relevant date for determining presence of a quorum)). But Plaintiffs do not argue deficiency in the form of notice. The gravamen of

Plaintiffs' claim is that the notice was *not timely*, i.e., not before promulgation of the Passport Rule. Am. Compl. ¶ 63. None of the cases cited by Defendants address this defect.

Congress determined what constitutes "legally sufficient" notice-and-comment rulemaking when it enacted the APA. Defendants ask the Court to rule that something less than Congress's prescribed process is good enough. If the process used by Defendants in adopting the Passport Rule were sufficient, it would effectively eviscerate the APA's public rulemaking requirements. For that very reason, courts, including the D.C. Circuit, have uniformly rejected the deficient process Defendants provided the public. Defendants' argument regarding legal sufficiency of their noncompliant process should be soundly rejected.

B. <u>The Foreign Affairs Exception Does Not Apply to the Passport Rule</u>

Defendants additionally claim that, as a matter of law, the Passport Rule is exempt from APA notice-and-comment rulemaking procedures "because the rule involves a foreign affairs function of the United States." Mot. 14. To support this assertion, Defendants offer no evidence, misapply the relevant legal standard, and rely heavily on two non-binding sources of support with little persuasive value, while failing to engage with legislative history and numerous cases that refute their position. This Court should reject Defendants' arguments and find that the Passport Rule is subject to notice-and-comment rulemaking or, at a minimum, defer ruling on the merits of Plaintiffs' claim until Defendants produce an administrative record.

i. <u>Defendants Have Provided No Record Support for the Invocation of the Foreign Affairs Exception</u>

As an initial matter, because Defendants have moved to dismiss Plaintiffs' claim without producing an administrative record, this court lacks an adequate factual basis to grant dismissal based on the foreign affairs exception. The Supreme Court has long held that judicial review under the APA must be "based on the full administrative record that was before the Secretary at the time

he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). While Plaintiffs here allege a procedural defect in the Passport Rule's promulgation and do not bring a claim challenging its substance, the application of the foreign affairs exception implicates substantive questions that require a full administrative record.

Courts evaluating APA claims have consistently required a full administrative record. In *Overton Park*, the plaintiffs challenged a Department of Transportation action funding construction of a highway through a public park. The lower courts upheld the action relying on litigation affidavits introduced by the agency. 401 U.S. at 409. The Supreme Court reversed, finding that the affidavits amounted to "merely '*post hoc*' rationalizations," and, without the full administrative record, that there was an inadequate basis to assess the agency's decision at the time it was made. *Id.* at 419-20 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)). The *Overton Park* rule has been applied rigorously in the D.C. Circuit, where the Court of Appeals has stated plainly that, under the APA, "[i]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (remanding because the full administrative record had not been provided to plaintiffs or the court); *see also Am. Bioscence, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (same). In *Thompson*, the Court of Appeals criticized the district court for relying on "parties' written or oral representations to discern the basis on which the [agency] acted." 243 F.3d at 582. This was "not sufficient" because, in the absence of a record, the court could not determine if "the attorneys were merely speculating." *Id.*

Only a complete record would provide a sufficient basis to assess Defendants' claims that

the foreign affairs exception applies to the Passport Rule. For example, Defendants contend that the State Department concluded that the Rule was necessary to combat fraud "based on information it received during its ongoing diplomatic interactions with diversity visa-eligible countries," Mot. 18, and that notice and comment would "require the Department to elaborate on international law enforcement investigations and information exchanges conducted with different diversity visa eligible countries," *id.* Defendants cite no evidence for these propositions. As in *Thompson*, neither Plaintiffs nor the Court have a record to show whether the government's attorneys are "merely speculating." 243 F.3d at 582. Similarly, Defendants extensively cite the agency's justification in the published text of the Passport Rule itself to support invocation of the foreign affairs exception. *See, e.g.*, Mot. 15 (citing text of the Rule for assertion that the DV Program is "an outreach tool" with a focus "on building relations with foreign populations around the world, particularly with diversity visa eligible countries," 84 Fed. Reg. at 25,990). But the Rule's text—like the affidavits in *Overton Park*—is a conclusory post-hoc rationalization of the agency's invocation of the exception. The Rule's text does not provide the record that was before the agency at the time it made its decision not to proceed with APA notice-and-comment procedures. *See* 401 U.S. at 419-20. If the Court were to find the Rule's accompanying commentary sufficient, the APA's notice-and-comment requirement could be sidestepped by little more than a two-line conclusory summary.

In a number of similar instances, courts of appeals have found insufficient justification for the foreign affairs exception where the government failed to produce adequate evidence in support of its invocation. *See, e.g.*, *Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983), *vacated and rev'd on other grounds*, 727 F.2d 957 (1984) (en banc) (exception did not apply because the "government . . . offered no evidence of undesirable international consequences that would result

if rulemaking were employed."); *Zhang v. Slattery*, 55 F.3d 732, 745 (2d Cir. 1995) (foreign affairs exception did not apply because there was "no record evidence [that] notice and comment would have had any undesirable [foreign policy] consequences"); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775-777 (9th Cir. 2018) (finding the government had presented insufficient evidence to justify foreign affairs exception).

Here, Defendants' failure to produce any evidence whatsoever, much less a full administrative record, demonstrates that their argument for dismissal based on the foreign affairs exception is without adequate factual basis. Accordingly, the Court should apply the *Overton Park* rule requiring a full record for judicial review before assessing Plaintiffs' claim based on Defendants' foreign-affairs-exception defense.[5]

ii. Defendants' *Post Hoc* Rationalizations Do Not Justify the Invocation of the Foreign Affairs Exception

Even on the available record, the foreign affairs exception does not apply. The exception is a narrow one. Generally, "[a]ny claim of exemption from APA rulemaking requirements will be 'narrowly construed and only reluctantly countenanced.'" *Envtl. Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) (quoting *Am. Fed'n of Government Emp. v. Block*, 655 F.2d 1153, 1156 (D.C.Cir.1981)); *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

[5] Citing *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008), Defendants contend that the government need not even justify the invocation of the foreign affairs exception in the rule's text, let alone point to record evidence that supports its position. Mot. 18. But *Rajah* held that the government satisfies its "burden of proof" for the invocation of the foreign affairs exception without such an explanation or record support only where "the relevance to international relations is facially plain." *Id.* at 13. As explained *infra* at 13, the Passport Rule's connection to U.S. diplomacy is not facially obvious.

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))). Virtually every court to consider the foreign affairs exception has concluded that it does not apply automatically whenever a rule is in some way related to immigration. "The 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." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (citation omitted); *accord City of New York v. Permanent Mission of India*, 618 F.3d 172, 201-02 (2d Cir. 2010); *Zhang*, 55 F.3d at 744; *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288, 1290 (D.D.C. 1973).

Defendants concede that the "definitely undesirable international consequences" standard governs the application of the foreign affairs exception. Mot. 17–19 & n.10. And with good reason, as the standard is drawn directly from the exception's legislative history:

> The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences.

S. REP. NO. 79-752, at 13 (1945); *accord* H. R. REP. NO. 79-1980, at 23 (1946). Courts have used this standard to narrowly construe the exception in immigration cases, for, as the Second Circuit advised in *Permanent Mission of India*, "[t]he dangers of an expansive reading of the foreign affairs exception in [the immigration] context are manifest. While 'immigration matters typically implicate foreign affairs' at least to some extent, it would be problematic if incidental foreign

affairs effects eliminated public participation in this entire area of administrative law." 618 F.3d at 202 (quoting *Yassini*, 618 F.2d at 1360 n.4).

Federal appellate courts have recognized the applicability of the foreign affairs exception to immigration rules on just two occasions: responding to the attacks of September 11, 2001, *see Rajah*, 544 F.3d at 437, and to the Iranian hostage crisis, *see Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Yassini*, 618 F.2d at 1360; *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981). In both of these circumstances, rules were directed at a specific country or countries and involved critical incidents that implicated serious and grave concerns of international diplomacy and national security. *See, e.g.*, *Rajah*, 544 F.3d at 438-39 ("The Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria."). The Passport Rule, on the other hand, applies to almost every country in the world, and seeks to address a problem (fraud in applications for the visa lottery) that principally affects the United States by disrupting its immigration system. Defendants argue that the government administers the Diversity Visa Program "as an outreach tool, as its focus is on building relations with foreign populations around the world, particularly with diversity visa eligible countries." 84 Fed. Reg. at 25,990. But the unsupported claim that the Program functions as an "outreach tool" says nothing about why allowing the public to participate in the rulemaking process for the Passport Rule would "clearly provoke definitely undesirable international consequences." *Chow*, 362 F. Supp. at 1290 (quoting S. REP. NO. 79-752 (1945)). There is little public information about diplomatic exchanges related to application fraud, or to the Diversity Visa Program.[6] Application fraud may be a serious issue for the United States, but there is no evidence beyond the government's unsupported

[6] If there are such exchanges happening behind the scenes, they are not described in any detail in the text of the published rule. They may be detailed in the administrative record, but if so, they are hidden from Plaintiffs and the Court.

assertions that it is a serious *diplomatic* issue. And, most importantly, there is no evidence that it is such a serious diplomatic issue that the Rule required immediate implementation before the visa lottery opened in 2019, and therefore merited a rare exception from public APA rulemaking.

For that reason, this case is like those in which courts have rejected the application of the foreign affairs exception. In *Chow*, 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 INA's labor-certification requirement for adjustment of status through an employer-based petition. 362 F. Supp. at 1290-92. 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.* (quoting S. REP. NO. 79-752 (1945)). Similarly, in *Jean*, 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 at 1462. The court held that the foreign affairs exception did not apply for want of "evidence of undesirable international consequences that would result if rulemaking were employed," even though, unlike the Passport Rule, the policy targeted migrants from a specific country and therefore risked greater inflammation of diplomatic tensions. *Id.* at 1478. Moreover, the Eleventh Circuit 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.*

More recently, in *East Bay Sanctuary Covenant*, the Ninth Circuit found that the foreign affairs exception did not apply to an immigration rule that, when taken in conjunction with a presidential proclamation, limited the ability of persons entering the country from Mexico to claim

asylum. 932 F.3d at 775-77. In so doing, the court rejected the government's argument that the rule was "directly relate[d] to . . . ongoing negotiations with Mexico" and other countries, *id.* at 776 (alterations in original), because the government had not shown on the record that negotiations would be affected any less by immediate publication of a final rule than by announcement of a proposed rule followed by a thirty-day period of notice and comment, as the APA prescribes. *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 without record evidence of undesirable foreign policy consequences); *Mayor & City Council of Baltimore v. Trump*, No. 18-cv-3636, 2019 U.S. Dist. LEXIS 161686 at *93-97 (D. Md. Sep. 20, 2019) (rejecting foreign affairs exception's application to immigration rule changing process for determining who is a "public charge" for purposes of an immigrant visa application). Defendants' conclusory statements about the foreign affairs function of the Diversity Visa Program are likewise insufficient to warrant avoidance of public notice and comment. *See* Mot. 15-16.

Nor is there merit to Defendants unsupported claim that "opening the [Passport Rule] to notice and comment . . . would require the Department to elaborate on international law enforcement investigations and information exchanges conducted with different diversity visa eligible countries" and therefore "would likely lead to 'the public airing of matters that might enflame or embarrass relations with other countries.'" Mot. 18 (quoting *Zhang*, 55 F.3d at 744). This is belied by the fact that the government *did* open the rule to public comment—just not in a meaningful way prior to the rule going into effect, and not in compliance with the APA. 84 Fed. Reg. at 25,989 (authorizing a 30-day public-comment period beginning on the Rule's effective date). The government was evidently unconcerned with the "public airing of matters" by

commenters. *Zhang*, 55 F.3d at 744. One supposes, then, that the feared damaging information would come from the government itself. But nothing in the APA requires the government to divulge information related to sensitive investigations or information exchanges. The APA requires only that the agency "consider and respond to significant comments" and incorporate into the final rule "'a concise general statement of [its] basis and purpose.'" *Perez*, 575 U.S. at 96 (quoting 5 U.S.C. § 553 (c)) (alteration in original). In its responses, the government must show only "a consideration of the relevant factors" prior to promulgation of the final rule. *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (quoting *Overton Park*, 401 U.S. at 416).

Here, APA-compliant rulemaking would have required the government to consider the drastic problematic effects of the Passport Rule prior to its implementation, but not to disclose sensitive information concerning the prevalence of visa fraud among immigrants from particular countries. The government easily could have responded to public comments concerning the Rule in a manner that protects U.S. diplomatic interests because it already did so in a statement submitted to the Office of Management and Budget. *See 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.

One of the main advantages that the government derives from dispensing with notice-and-comment rulemaking is more expeditious enactment of its desired policies, at the expense of meaningful public participation. For that reason, where courts have approved the foreign affairs exception, they have noted that the challenged rule required *immediate* implementation to avert negative diplomatic consequences that might occur during the notice-and-comment period. For example, in *American Association of Exporters & Importers Textile & Apparel Group v. United*

States, 751 F.2d 1239 (Fed. Cir. 1985), the Federal Circuit found that prior announcement of the imposition of trade quotas on Chinese textiles would destabilize the international textile market by allowing foreign manufacturers and American importers to manipulate supply during the notice-and-comment period. *Id.* at 1249. In the Iranian hostage cases, the exception was invoked in response to an urgent "international crisis" that required swift action. *Malek-Marzban*, 653 F.2d at 116 (quoting 45 Fed. Reg. 27,917 (April 25, 1980)). And in *Rajah*, the court expressed concern that, in the aftermath of September 11, public rulemaking "would be slow and cumbersome, diminishing our ability to collect intelligence regarding, and enhance defenses in anticipation of, a potential attack by foreign terrorists." 544 F.3d at 437. Here, whatever diplomatic function the Diversity Visa Program might have, Defendants do not claim nor present any evidence that the Rule required immediate implementation to avert diplomatic consequences.

Defendants' reliance on speculation in the Attorney General's Manual that "it would seem clear that the [foreign affairs] exception must be construed as applicable to most functions of the State Department," is unavailing and contrary to its legislative history. *See* Mot. 14-15 (quoting Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 27 (1947)). The relevance of the manual in a highly similar context was recently considered and rejected in *Mayor & City Council of Baltimore*, 2019 U.S. Dist. LEXIS 161686, at *95-97. There, the court found that the government "overstate[d] the importance of the Attorney General's Manual," because the Supreme Court has only considered the Manual to determine legislative intent where House and Senate Reports did not address the issue, or as further confirmation after analyzing the Reports. *Id.* at *96 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) & *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978)). There, as here, the government has in its briefs omitted the language in the House and Senate Reports (which is

quoted in the Manual) showing Congress's intent for the exception to be construed narrowly. *See supra* at 12. Because the legislative history is more instructive on the statute's purpose than an Executive Branch manual, the latter "does not mandate the application of the foreign affairs exception to this case." *Mayor & City Council of Baltimore*, 2019 U.S. Dist. LEXIS 161686, at *96.

Defendants' heavy reliance on *Raoof v. Sullivan*, 315 F. Supp. 3d 34 (D.D.C. 2018), is also misplaced. *See* Mot. 16, 18. 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 public 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. 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. NO. 79-752, at 13 (1945), would break sharply with how appellate courts have interpreted the provision, *see supra* at 13, and would "eliminate[] public participation in this entire area of administrative law," *Permanent Mission of India*, 618 F.3d at 202. Presumably, the short and unsupported treatment of the exception in *Raoof* derives from the fact that the plaintiffs in that case did not brief the issue 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.

Even the government did not urge the broad construction of the foreign affairs exception that the court adopted in *Raoof*. In that case the government conceded that the "definitely undesirable international consequences" test applies to immigration rules, but distinguished the

program at issue in that case (the Exchange Visitor Program) by highlighting the program's explicit diplomatic purpose evident in its legislative history. Mem. P. &. A. Supp. Defs.' Mot. Dismiss, at 29-30, *Raoof v. Sullivan*, 315 F. Supp. 3d 34 (D.D.C. 2018) (No. 1:17-cv-01156-TNM), ECF No. 12-1 ("While [the rule] necessarily touches on immigration, . . . Congress in fact authorized the program to provide the Executive Branch a tool for carrying out certain aspects of U.S. foreign policy."). Defendants here make a similar claim regarding the purpose of the Diversity Visa Program, but cite no such history tethering the Program to a specific diplomatic purpose. Likely, this is because, unlike the Exchange Visitor Program, the Diversity Visa Program is primarily about immigration, and its legislative history shows that its intent is not to serve as a tool of foreign relations, but to provide a domestic benefit to existing communities within the United States. *See, e.g.*, H.R. REP. NO. 101-723, pt. 1, at 58 (1990) (describing the Diversity Visa Program as "correct[ing] ongoing inequities in the current [immigration] law . . . to further enhance and promote diversity within the present system"); 136 Cong. Rec. H8629-02, 1990 WL 144438 (Congressman Morrison describing three goals of bill that created Diversity Visa Program: (1) to "strengthen[] our system of family reunification;" (2) to provide employers and employees a system for the arrival of needed workers; and (3) to ensure that Americans "know that our immigration laws understand their interests and the concerns that they have that people from parts of the world that their ancestors have come from will also be fairly considered under our immigration system."). The Diversity Visa Program was intended to benefit the U.S. populace, and accordingly functions primarily as an immigration program and not a diplomatic tool.

Thus, the Passport Rule would fall within the foreign affairs exception only if promulgating it through notice-and-comment rulemaking would "clearly provoke definitely undesirable

international consequences," as set forth in *Yassini*, *Zhang*, and *Hou Ching Chow*. As discussed *supra*, it does not.

CONCLUSION

For the reasons articulated above, Defendants' Motion should be denied.

Respectfully submitted,

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