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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case perfectly illustrates why the Administrative Procedure Act (APA) requires notice-and-comment rulemaking. With Defendants' belated disclosure of the Administrative Record's contents, we now know that the State Department consulted a total of four documents—including an unrelated Second Circuit decision and two minor regulations relating to specific requirements for photographs submitted by applicants—before adopting without notice and comment an Interim Final Rule that predictably has resulted in a precipitous drop in participation among applicants to the Diversity Visa Program worldwide, particularly among African nationals like Plaintiffs E.B. and K.K. *See* Visas: Diversity Immigrants, 84 Fed. Reg. 25,989 (June 5, 2019) (codified at 22 C.F.R. § 42.33) (hereinafter "Passport Rule"). The APA requires that regulations be adopted through notice-and-comment rulemaking, except under very limited circumstances, precisely to avoid the hasty and unconsidered decisionmaking that appears to have occurred here.

Recognizing the need for the APA's exceptions to notice-comment-rulemaking to be narrowly construed, this Court held in *Capital Area Immigrants' Rights Coalition v. Trump (CAIR)*, Civil Action Nos. 19-2117 (TJK), 19-2530 (TJK), 2020 WL 3542481 (D.D.C. June 30, 2020), that the propriety of an invocation of the APA's foreign affairs exception should be evaluated based on whether the "rule . . . clearly and directly involve[s] activities or actions characteristic to the conduct of international relations." *Id.* at *18. Defendants do not meaningfully or persuasively argue that the Passport Rule meets that standard. Instead, Defendants argue that their invocation of the APA's foreign affairs exception should be evaluated under much broader standards rejected by this Court in *CAIR*. In doing so, however, Defendants fail to respond to any of this Court's explanations for why it—appropriately—rejected those standards. Resisting the normal remedy for procedurally deficient rulemaking—vacatur—Defendants also fail to

address the test that identifies the limited circumstances when departure from that typical approach is warranted. This Court should reject Defendants' unpersuasive arguments and vacate the unlawfully promulgated Passport Rule.[1]

ARGUMENT

I. THE PASSPORT RULE IS UNLAWFUL

The foreign affairs exception exempts from the APA's notice-and-comment requirements rules that "involve[] . . . [a] foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). As this Court held in *CAIR*, "a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations" to justify invocation of the foreign affairs exception. 2020 WL 3542481, at *18. Defendants virtually ignore this standard and resort to speculation and conclusory statements in attempting to shoehorn the Passport Rule into the narrow foreign affairs exception.

A. The Passport Rule Does Not Clearly and Directly Involve Activities or Actions Characteristic of International Relations.

Although Defendants continue to argue for significantly broader interpretations of the foreign affairs exception that this Court has rejected, ECF No. 42, at 11–16, they also unpersuasively contend that the Passport Rule satisfies the narrow standard articulated in *CAIR*, *id.* at 16–18.

As an initial matter, Defendants bafflingly assert that "*CAIR* did not conclude that direct involvement with U.S. foreign policy is necessary" for invocation of the foreign affairs exception to be justified. ECF No. 42, at 17. But that is *precisely* what *CAIR* held. The foreign affairs exception can be applied only to rules that "clearly and *directly involve* activities and actions

[1] Defendants do not contest that Plaintiffs have Article III standing or that they fall within the applicable zone of interests.

characteristic to the conduct of international relations." *CAIR*, 2020 WL 3542481, at *18 (emphasis added). And the exception does not apply to rules that have only "downstream" or "*indirect* effects" on international relations. *Id.* at *19. Defendants do not explain how a rule could meet the standard established in *CAIR* while not "direct[ly] involv[ing] . . . U.S. foreign policy," and Plaintiffs cannot fathom how that could be possible. ECF No. 42, at 17. Defendants also suggest that the *CAIR* standard does not apply when the State Department (rather than some other department or agency) invokes the foreign affairs exception, *id.* at 18, but the identity of the agency claiming the exception played no role in the result reached in *CAIR*.

Defendants argue further that the Passport Rule meets the *CAIR* standard because the Diversity Visa Program "is an important public diplomacy tool" that "helps create allies and goodwill overseas, while simultaneously promoting U.S. foreign policy interests" by providing a pathway to immigration for individuals who would struggle to obtain permanent residency based on family connections or employment opportunities. *Id.* at 18 (quoting 84 Fed. Reg. at 25,990). Relying on a U.S. Ambassador's congressional testimony that was not before the State Department when it promulgated the Passport Rule,[2] *see* ECF No. 42-1, Defendants similarly contend that the Diversity Visa Program "generates goodwill and hope among millions across the globe ravaged by war, poverty, undemocratic regimes, and opacity in government," ECF No. 42, at 18 (quoting

[2] Because Ambassador Young's statement was not before State Department when it promulgated the Passport Rule, it is extra-record evidence that should be excluded from the Court's review. The same is true of the Government Accountability Office report discussed at length by Defendants. ECF. No. 42, at 14 (*citing* U.S. Gov't Accountability Office, GAO-07-1174, Border Security: Fraud Risks Complicate State's Ability to Manage Diversity Visa Program (2007), *available at* https://www.gao.gov/assets/270/267124.pdf). A court may consult such extra-record evidence only to correct "gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review." *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013). The Administrative Record in this case is indeed grossly deficient, *see* ECF No. 42-1, but it would be perverse to allow Defendants to benefit from deficiencies of their own making.

Safe for America Act: Hearing Before the Subcomm. on Immigration and Policy Enforcement, 112th Cong. 45 (2011) (statement of Ambassador Johnny Young)).

But, as Plaintiffs have explained previously, ECF No. 38-1, at 18–19, the *CAIR* standard does not turn on whether the *program* affected by the rule "clearly and directly involve[s] activities or actions characteristic to the conduct of international relations." 2020 WL 3542481, at *18 (emphasis added). Rather, the foreign affairs exception applies only when the *rule* itself meets that standard. *Id.* The Passport Rule addresses largely *domestic* concerns about visa fraud among those who seek to immigrate to the United States, and therefore has no direct connection to international relations. 84 Fed. Reg. at 25,990 ("The Department has historically encountered significant numbers of fraudulent entries for the DV Program each year, including entries submitted by criminal enterprises on behalf of individuals without their knowledge.").

But Defendants do not even make a persuasive case that the Diversity Visa Program as a whole "clearly and directly involve[s] activities or actions characteristic to the conduct of international relations." *Id.* The Diversity Visa Program is a pathway for immigration to the United States. It is not a "mechanism[] through which the United States conducts relations with foreign states." *Id.* at 19. Plaintiffs do not dispute that the Diversity Visa Program "helps create . . . allies overseas," 84 Fed. Reg. at 25,990, or "generate[] goodwill and hope" across the globe, *Safe for America Act: Hearing Before the Subcomm. on Immigration and Policy Enforcement*, 112th Cong. 45 (2011). But warm feelings from the inhabitants of foreign nations merely lay the groundwork for successful diplomacy; they are not in and of themselves the stuff of international relations. And, tellingly, Defendants identify no instance where the Diversity Visa Program played any concrete role in diplomatic relations.

Such "downstream" and "indirect" connections to international relations do not justify invocation of the foreign affairs exception. *CAIR*, 2020 WL 3542481, at *19. Indeed, the alleged effect of the asylum rule challenged in *CAIR* on "ongoing negotiations with other countries" was insufficiently direct to justify the invocation of the foreign affairs exception.[3] *Id.* at *20. Defendants' even more attenuated and speculative basis for invoking the exception therefore fails as well.[4]

B. Promulgation of the Passport Rule Through Notice-and-Comment Rulemaking Would Not Have Provoked Definitely Undesirable International Consequences.

Defendants argue that promulgating the Passport Rule through notice-and-comment rulemaking would have resulted in "undesirable international consequences" because doing so would have likely [led] to 'the public airing of matters that might enflame or embarrass relations with other countries.'" ECF No. 42, at 15 (quoting *Zhang v. Slattery*, 55 F.3d 732, 744 (2d. Cir. 1995)).[5] This Court firmly rejected the "definitely undesirable international consequences" test as a standard for assessing the propriety of invocations of the foreign affairs exception. *CAIR*, 2020

[3] Defendants attempt to distinguish the rule challenged in *CAIR* from the Passport Rule, neither of which "implicate[s] any particular country, or even a narrow subset of foreign nations" ECF No. 42, at 17 (quoting ECF No. 38-1, at 19), by misleadingly claiming that diversity-visa eligible countries actually are a "narrow subset of foreign nations," *id.* at 17. This turns the meaning of "narrow" on its head. There are nearly 200 countries in the world. Nationals from all but 19 may enter the Diversity Visa Program. ECF No. 38-1, at 3.

[4] Even if such attenuated connections to foreign policy were sufficient, the Passport Rule *undermines* the Diversity Visa Program as a "tool of diplomacy," 84 Fed. Reg. at 25,990, because it evaporates any "hope" that millions of would-be applicants like Plaintiffs E.B. and K.K. have of benefiting from the Program, *Safe for America Act: Hearing Before the Subcomm. on Immigration and Policy Enforcement*, 112th Cong. 45 (2011); *see also* ECF No. 38-1, at 7 (noting sharp drop in participation in the DV-2021 lottery).

[5] Defendants state that Plaintiffs failed to address this argument in their Motion for Summary Judgment, but Plaintiffs incorporated by reference the extensive discussion about the "definitely undesirable circumstances" test from their previous filings. ECF No. 38-1, at 21.

WL 3542481, at *18 (stating that the test (1) is "unmoored from the legislative text of the foreign affairs exception"; (2) would render "superfluous" the APA's good-cause exception; and (3) is at odds with D.C. Circuit interpretation of 5 U.S.C. § 553(a)). Defendants do not challenge any of this Court's reasons for rejecting their preferred test. Accordingly, they have effectively conceded that the "definitely undesirable international consequences" test is not the proper standard by which to judge the propriety of their invocation of the foreign affairs exception.

In any event, the Passport Rule does not even satisfy the rejected test. Defendants argue that notice-and-comment rulemaking would have jeopardized the United States' relationships with foreign partners because Defendants acquired information about visa fraud that was the impetus for the Passport Rule through "international law enforcement investigations and information exchanges conducted with different diversity visa eligible countries." ECF No. 42, at 15. But Defendants do not explain why notice-and-comment rulemaking would have required them to expose their sources or single out any particular country as a fraud hotspot.[6] And they identify no other reason why notice-and-comment rulemaking would have harmed the United States' relationships with foreign partners.

[6] Defendants state that Plaintiffs have "take[n] issue with the fact that the State Department promulgated the [Passport Rule] with the goal of reducing fraud in the DV Program application process." ECF No. 42, at 14. Plaintiffs have never questioned Defendants' sincerity in asserting anti-fraud goals or the laudability of reducing fraud in the Diversity Visa Program. Plaintiffs simply challenge Defendants' decision to pursue their goals and preferred policy prescription without adherence to the APA's notice-and-comment requirements. *Cf. CAIR*, 2020 WL 3542481, at *19 ("[T]he narrowness of th[e] [foreign affairs] exception does not mean that . . . agencies cannot take . . . hypothetical actions; it simply means that they are not excused from engaging in notice-and-comment rulemaking when they do.").

The APA's notice-and-comment procedures require an agency to do two things, neither of which is "particularly demanding." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993). First, the agency must "adequately explain its result." *Id.* Second, it must "respond to 'relevant' and 'significant' public comments." *Id.* (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977)). With respect to the latter requirement, the agency's responses to public comments "need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Id.* (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 335 (D.C. Cir. 1968)). Nothing in the APA would have required Defendants to disclose information they claim would cause diplomatic friction with diversity-visa eligible countries. Indeed, Defendants managed to respond to all of the comments submitted during the procedurally infirm post-promulgation comment period without making any harmful disclosures. *See* Supporting Statement for Paperwork Reduction Act Submission, Electronic Diversity Visa Lottery (EDV) Entry Form, OMB Number 1405-0153, DS-5501 (Aug. 29, 2019), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201908-1405-006. There is no reason why Defendants could not have responded to public comments with similar care *before* promulgating the Passport Rule.

Defendants find no support in the cases they tout as reflecting the types of concerns they muster about adopting the Passport Rule through notice-and-comment rulemaking. In *Zhang*, the Second Circuit held that the foreign affairs exception *did not* apply to an interim Immigration and Naturalization Service rule concerning whether China's "One Child" policy was a basis for asylum. 55 F.3d at 744. Notably, part of what drove the court to reach that conclusion was that there was "no record evidence for the view that subjecting the . . . interim rule to notice and comment would have had any undesirable consequences." *Id.* at 745. So too here, where no such

evidence appears—either in the Passport Rule itself or in any other part of the Administrative Record that Defendants have made available.[7]

Rajah v. Mukasey, 544 F.3d 427 (2d Cir. 2008), also is inapposite. 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 in the wake of the 9/11 attacks. *Id.* 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. *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. Adhering to the APA's notice-and-comment requirements in promulgating the Passport Rule therefore would not have posed the same likelihood of impairing relations with any particular nation.

Accordingly, even if this Court were to apply the "definitely undesirable international consequences" test, the foreign affairs exception would not apply to the Passport Rule.

[7] Citing *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008), Defendants contend that the government need not justify the invocation of the foreign affairs exception in the rule's text. ECF No. 42, at 15. 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." 544 F.3d at 437. As explained *supra*, pt. I.A., the Passport Rule's connection to international relations is attenuated at best and not at all obvious.

C. No Support Exists for Defendants' Proposed "Intimate Link" Test.

Defendants also attempt to argue that the APA's foreign affairs exception should apply to any rule that is "linked intimately with the Government's overall political agenda concerning relations with another country." ECF No. 42, at 11 (quoting *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)). But this Court also rejected that proposed standard in *CAIR*, concluding that it is at odds with the APA's text and that the quoted language is dicta from a case that applied the "definitely undesirable international consequences" test.[8] 2020 WL 3542481, at *20 n.23 ("Congress could have—but did not—exempt rulemakings that merely affect or implicate foreign affairs."). Once again, Defendants do not contest any of this Court's reasons for rejecting the "intimate link" test and therefore have effectively conceded that the Court was correct to reject that standard.

Little can be discerned from the very brief discussion of the foreign affairs exception in *Raoof v. Sullivan*, 315 F. Supp. 3d 34 (D.D.C. 2018), on which Defendants continue to place heavy emphasis. Without citing any case law, the court held in *Raoof* that the U.S. Customs and Immigration Services was justified in enacting the challenged rule without public rulemaking because the rule "relate[d] to the foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department." *Id.* at 44. To the extent that *Raoof* can be said to have articulated a standard governing invocation of the foreign affairs function, it is essentially the

[8] The Federal Circuit approved the invocation of the foreign affairs exception in *American Association of Exporters & Importers* because pre-promulgation notice of the rule, which established a quota on the importation of Chinese textiles, would have destabilized the international textile market. 751 F.2d at 1249. That decision therefore was not premised on some nebulous relationship between the challenged rule and international relations. Rather, the court approved the invocation of the foreign affairs exception because notice and comment concerning the rule would have led to the sort of tangible, predictable, and logical foreign policy consequences that Defendants have failed to articulate with respect to the Passport Rule.

"intimate link" test advocated by Defendants. But 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). It also would break sharply with how appellate courts have interpreted the provision and would "eliminate[] public participation in this entire area of administrative law." *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 202 (2d Cir. 2010). 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.

Defendants appear to suggest that *Raoof* might stand for a more limited but nonetheless sweeping and unsupported proposition that the foreign affairs exception can be invoked for any rule promulgated by the State Department. *See* ECF No. 42, at 16. But the exception is targeted at "foreign affairs function[s]," not government organs that execute foreign affairs. 5 U.S.C. § 553(a)(1). And as this case demonstrates, despite its name, the State Department conducts many responsibilities that are not foreign affairs functions. Those responsibilities include overseeing immigration to the United States. For this reason, it is common for the State Department to adopt rules through notice-and-comment rulemaking. *See, e.g.*, Visas: Temporary Visitors for Business or Pleasure, 85 Fed. Reg. 66,878 (proposed Oct. 21, 2020); Schedule of Fees for Consular Services—Documentary Services Fee, 85 Fed. Reg. 65,750 (proposed Oct. 16, 2020); Public Access to Information, 85 Fed. Reg. 13,104 (proposed Mar. 6, 2020). Defendants were required to do so here as well.

This Court should decline to abrogate its previous decision in *CAIR* in order to follow *Raoof*, and should once again reject the "intimate link" test.

D. The Passport Rule's Notice and Comment Process Was Not Legally Sufficient Under the APA.

Just as they mistakenly claimed in their motion to dismiss, Defendants argue that even if no exception were to apply, their publication of the Passport Rule in the federal register and acceptance of comments after the Rule was final and in effect was "legally sufficient." ECF No. 42. at 18. Legally sufficient under what standard, they do not say. Defendants do not claim that the post-promulgation comment opportunity offered in conjunction with the Passport Rule complied with *the APA*, the statute at issue in this lawsuit. In fact, their sufficiency argument makes no mention of the APA's notice-and-comment requirements, and cites not a single case where a court authorized a post-promulgation opportunity for public comment as an adequate substitute for the APA's procedures. Nor do Defendants make any attempt to address the wide body of case law holding that "[p]ermitting 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," *N.J. Dep't of Envtl. Prot. v. U.S. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980), (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214–15 (5th Cir. 1979)), or the fact that their argument has already been rejected by this Court. *CAIR*, 2020 WL 3542481, at *10 n.10 (citing *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1049). Defendants' legal sufficiency argument is, once again, 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. Mortg. Bankers Ass'n*, 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." *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 528 (D.C. Cir. 1982); *see also, e.g.*, *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987) ("Section 553 is designed to give affected parties an opportunity to participate in agency decisionmaking early in the process, when the agency is more likely to consider alternative ideas.").

There can be no meaningful public participation or reasoned decisionmaking in response to public input where, as here, *pro forma* notice and comment are provided *after* publication of the final rule. *See, e.g.*, *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1049 ("Were we to allow [post promulgation notice and comment] we would make the provisions of § 553 virtually unenforceable" (quoting *U.S. Steel*, 595 F.2d at 214-15)); *United States v. Gould*, 568 F.3d 459, 479 (4th Cir. 2009) (post-promulgation notice and comment "makes a sham of the APA's rulemaking procedures"); *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later."). Defendants' process was, simply put, an "empty charade." *Conn. 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, ECF No. 42, at 19, because it was not a meaningful opportunity to participate in the formulation of the already-enacted rule. *Cf. N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1049 ("We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a fait accompli." (quoting *U.S. Steel Corp.*, 595 F.2d at 214–15)).

The cases cited by Defendants provide no support for their avoidance of the APA's rulemaking procedures. It is true that publication in the *Federal Register* may be sufficient notice for other legal purposes. ECF No. 42, at 18–19 (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 provided before promulgation of the Passport Rule. Am. Compl. ¶ 63. None of the cases cited by Defendants addresses this defect.

The problem with a failure to solicit public input early in the rulemaking process is evident here, where the Rule's apparent effect—excluding millions of potential applicants from a congressionally mandated program—differs vastly from its purported intent to combat fraud. As the sparse Administrative Record makes clear, there was virtually no consideration of reasoned input (public or otherwise) at the time this Rule was drafted and put into effect. *See infra,* pt. III. Had Defendants complied with the APA's public rulemaking requirements, affected individuals including Plaintiffs, other potential applicants, members of immigrant communities in the United States, and subject-matter experts could have weighed in to warn Defendants of these adverse consequences at a time before the Rule was a *fait accompli* when those suggestions may have been

seriously considered. The Rule could then have been amended to focus more narrowly on the issue it seeks to address while avoiding the Rule's presumably unintended consequences.

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 and this Court, have uniformly rejected the deficient process Defendants provided the public. Defendants' argument regarding legal sufficiency of their noncompliant process should be soundly rejected.

II. THIS COURT SHOULD VACATE THE PASSPORT RULE.

Defendants argue that this Court should depart from the APA's statutory mandate to "hold unlawful and set aside agency action" that fails to comply with public rulemaking, 5 U.S.C. § 706(2)(d), because doing so would create a "confusing situation." ECF No. 42, at 20. Apparently recognizing the extraordinary nature of their request, in lieu of remand without vacatur, Defendants instead propose either a "temporary stay" or an opportunity to submit additional briefing on the issue. *Id.* But given the impending application deadline, either of Defendants' proposals would have the same devastating effect: allowing the unlawful rule to persist through a second application cycle, denying Plaintiffs and millions of other similarly situated individuals the opportunity to apply for this year's lottery. In effect, Defendants request that, even if this Court determines that their actions were unlawful, it should provide no meaningful relief. There is accordingly little difference here between Defendants' proposed stay and remand without vacatur, a disfavored outcome that "has been viewed with some skepticism." *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 10 (D.D.C. 2003) (citing, *inter alia*, *Checkosky v. SEC*,

23 F.3d 452, 490-93 (D.C. Cir. 1994) (Randolph, J., dissenting) (arguing that remand without vacatur is inconsistent with the APA)); *see also In re Core Commc'ns., Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (questioning wisdom of remand without vacatur and recognizing its "disputed legality"); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278, 301–05 (2005) (describing instances of multi-year delay by agencies in rectifying unlawful rules following remand without vacatur). Defendants' arguments lack merit and do not warrant departure from the standard outcome that "[f]ailure to provide the required notice and to invite public comment . . . is a fundamental flaw that 'normally' requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2003) (citation omitted).

Defendants rely on *Hawaii Longline Ass'n* to argue for a temporary stay, but that case is inapposite. There, the court faced a situation where its vacatur of an unlawful regulation caused immediate concrete harm to Defendants *and* Plaintiffs, and both parties urged the court to reconsider. Facing the decision of whether to remand without vacatur or temporarily stay its mandate, the court opted for a temporary stay because of the problems associated with the first approach. 288 F. Supp. 2d at 9–10. Such is not the case here, where vacatur benefits Plaintiffs, and causes only speculative harm to Defendants by restoring the status quo that had been in place for nearly three decades.

As stated in Plaintiffs' opening brief, the relevant considerations for this Court are (1) "the seriousness of the order's deficiencies"; and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citation omitted). Defendants appear to make no argument regarding the first factor, and focus entirely on a hypothetical parade of horribles that might occur

if the Rule were vacated. According to Defendants, these horribles include "unnecessary reliance by stakeholders, unnecessary expenditures by stakeholders and the government, potential economic disruption, and . . . the inefficient use of government resources." ECF No. 42, at 22. Notably, however, Defendants provide few specifics about how vacatur of a recent rule that modified the decades-long status quo could provoke unnecessary expenditures or economic disruption. The specific examples that Defendants do offer are unconvincing.

First, they warn that the State Department would be required to "accept[] diversity applications from foreign nationals without any proof of their identity[.]" ECF No. 42, at 21. But, as they acknowledge, a passport was not required for application to the lottery from its inception in 1990 until the Passport Rule's implementation in 2019. This is in accord with the Program's statutory language, which has few eligibility requirements for applicants, inviting a wide pool of entrants. *See* ECF No. 38-1, at 3-4; 8 U.S.C. § 1153(c)(2). And any risk presented by applicants lacking a passport at the lottery application stage is mitigated by the stringent requirements for those actually selected, which include a background check, review of biometric data and supporting documentation, and an in-person interview. ECF No. 38-1, at 4.

Second, Defendants express concern that vacatur would "perpetuate the fraud the rule was trying to combat," ECF No. 42, at 21, but Defendants provide no evidence that the Passport Rule has had any effect—good or bad—on application fraud. As the sparse Administrative Record demonstrates, virtually no consideration, let alone analysis, went into the likely effects of the Rule before it was enacted. A purely speculative harm cannot justify departure from the norm of vacatur, particularly when the harm associated with the Rule itself—exclusion of millions of applicants—is concrete. Ultimately, those actually selected will be, and always have been,

required to procure a valid passport before immigrating to the United States, so any fraud in the application process could be addressed before any improper applicant were to be granted a visa.

Finally, Defendants express concern that vacatur would "cause confusion for those who have already submitted their applications with a valid foreign passport, without having adequate adjudicative resources in place." ECF No. 42, at 21. It is unclear what "confusion" the elimination of the Rule would cause for those who were able to procure a passport and have already submitted their applications. Already-submitted applications would be unaffected by vacatur of the Rule, and no adjudication would be necessary. While there may be frustration about wasted effort among a subset of individuals who procured a passport just for the purpose of applying, there is no legitimate basis to keep an unlawful regulation in place in order to spare their disappointment. In any event, the persuasive value of any actions taken by some successful applicants in reliance on the Rule is far outweighed by the harmful operation of the Rule against the much greater number of applicants it has excluded and will continue to exclude absent relief, including Plaintiffs E.B. and K.K. The balance of the equities favors vacatur.

Notably, Defendants do not argue that it is practically infeasible for them to accept applications without a passport number. This is not a situation where "[t]he egg has been scrambled and there is no apparent way to restore the status quo." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2003). Immediate vacatur is the only way for Plaintiffs to get meaningful relief and would, for Defendants, yield nothing more than a return to the status quo of the first 29 years of the Diversity Visa Program. Defendants' speculative harms provide insufficient grounds for this Court to depart from the result mandated by the APA. This Court should vacate the Passport Rule before the current application period ends.

III. THE ADMINISTRATIVE RECORD EXPOSES A LACK OF REASONED DECISIONMAKING UNDERLYING THE PASSPORT RULE.

As a final matter, the index to the Administrative Record that Defendants "inadvertently omitted attaching" to their Motion to Dismiss speaks volumes about the process guiding Defendants' decision to fundamentally change the eligibility requirements governing the millions of people who apply for the Diversity Visa Program each year. ECF No. 42, at 9 n.8; ECF No. 42-1. Notice-and-comment rulemaking is designed specifically to prevent agencies from implementing statutes in the slapdash and predetermined fashion in which Defendants apparently acted in adopting the Passport Rule.

In APA cases, courts review agency action based on the "full administrative record that was before the [agency] at the time [it] made [its] 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); *see also* 5 U.S.C. § 706 (requiring that APA review be based on the "whole record"). "The full administrative record 'include[s] all documents and materials that the agency directly or indirectly considered . . . .'" *UnitedHeathcare Ins. Co. v. Azar*, 316 F. Supp. 3d 339, 345 (D.D.C. 2018) (alteration in original) (quoting *Animal Legal Def. Fund v. Vilsack*, 110 F. Supp. 3d 157, 159 (D.D.C. 2015)). A complete administrative record therefore contains "neither more nor less information than . . . the agency [had] when it made its decision," *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984), and it "delineates the path by which [the agency] reached its decision," *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989).

Assuming that the belatedly produced index reflects the totality of documents considered directly or indirectly by Defendants in promulgating the Passport Rule—something Plaintiffs do not dispute at this time—it reveals agency decisionmaking that resembles not a deliberative path,

but a cul-de-sac. According to Defendants, they considered only four documents before adopting a Rule that has resulted in a 54-percent drop in applications for the Diversity Visa Program worldwide and a 62-percent drop among African applicants. ECF No. 38-1, at 7. Besides the Passport Rule itself, Defendants considered: (1) two prior rules that changed the requirements for photographs that entrants must provide when applying to the Diversity Visa Program, Visas: Diversity Immigrants, 81 Fed. Reg. 63,694 (Sept. 16, 2016); Visas: Documentation of Immigrants Under the Immigration and Nationality Act, As Amended, 73 Fed. Reg. 7,670 (Feb. 11, 2008); (2) an opinion issued by the U.S. Court of Appeals for the Second Circuit that approved the invocation of the foreign affairs exception in a narrow and factually remote context, *Permanent Mission of India to the United Nations*, 618 F.3d 172; and (3) an "Action Memo" submitted to the Assistant Secretary for Consular Affairs.[9] ECF No. 42-1. Nothing else. Defendants therefore do not appear to have engaged in anything remotely approaching reasoned decisionmaking before adopting the Passport Rule.[10]

[9] Defendants urge the Court to refrain from granting Plaintiffs' Motion for Summary Judgment in part because of their decision to continue withholding production of the Administrative Record. ECF No. 42, at 10. The Action Memo is the only document in the Administrative Record that is not a publicly available government record, and at no point in their Memorandum of Law Opposing Plaintiffs' Motion for Summary Judgment do Defendants cite the Action Memo or suggest that it justifies their invocation of the foreign affairs exception. Plaintiffs have requested that Defendants produce the Action Memo, but they steadfastly refuse to do so. *See* Ex. 1. Defendants bear the burden to produce evidence sufficient to defeat summary judgment, *see* Fed. R. Civ. P. 56(e)(3); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (stating that the nonmoving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment"), but the index establishes that there also is no substantive reason why the absence of the Administrative Record should delay final resolution of this case.

[10] Should the Court deny Plaintiffs' Motion for Summary Judgment, Plaintiffs intend to seek leave to amend the First Amended Complaint to add a claim that the Passport Rule was adopted in an arbitrary and capricious manner in light of the lack of reasoned decisionmaking demonstrated by the Administrative Record. *See* 5 U.S.C. § 706(2)(A). For the same reason, in

Because notice-and-comment rulemaking safeguards against the type of reflexive and nondeliberate decisionmaking in which Defendants appear to have engaged, exceptions to the APA's procedural requirements are "narrowly construed and only reluctantly countenanced," *N.J. Dep't of Envtl. Prot. v. U.S. EPA*, 626 F.2d at 1045, and "[a]ny agency faces an uphill battle" when attempting to invoke an APA exception, *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017). And specifically regarding to the foreign affairs exception, this Court has held that it is justified when reasoned decisionmaking is ensured by alternative safeguards not present for the Passport Rule. *CAIR*, 2020 WL 3542481, at *19 (noting that the foreign affairs exception is properly invoked for rules implementing international agreements that have been negotiated with foreign governments). Defendants' capacious interpretation of the foreign affairs exception would allow similarly vacuous agency decisionmaking in other contexts. To prevent opening the door to similar governmental rulemaking without public participation, this Court should vacate the Passport Rule for noncompliance with the APA.

CONCLUSION

For all of the foregoing, Plaintiffs respectfully request that the Court grant their motion for summary judgment, hold unlawful, and vacate the Passport Rule.

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the event that the Court grants Defendants' Motion to Dismiss, ECF No. 28, Plaintiffs request that it do so without prejudice.

Respectfully submitted,

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Attorneys for Plaintiffs.

Dated: October 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2020, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Jonathan L. Backer*
Jonathan L. Backer

EXHIBIT 1

From: **Gruzenski, Nairi (CIV)** Nairi.Gruzenski@usdoj.gov
Subject: RE: Action Memo for Assistant Secretary of Consular Affairs
Date: October 26, 2020 at 8:38 PM
To: Jonathan Backer jb2845@georgetown.edu
Cc: Girdharry, Glenn M (CIV) Glenn.Girdharry@usdoj.gov, Seth Wayne sw1098@georgetown.edu, Mary McCord mbm7@georgetown.edu, Vassanji, Anil avassanji@fklaw.com

NG

Hi Jonathan,

We understand your request. Unfortunately, we are unable to assist with filing a FOIA request to the State Department. Please contact the State Department's FOIA unit, where you can pursue the request administratively.

Here is a link: https://foia.state.gov/request/foia.aspx

The requests can be submitted either of two ways:
https://foia.state.gov/Request/Submit.aspx (this is the preferred method) or by email to FOIARequest@state.gov.

Thank you,

Nairi

From: Jonathan Backer <jb2845@georgetown.edu>
Sent: Monday, October 26, 2020 5:01 PM
To: Gruzenski, Nairi (CIV) <nagruzen@CIV.USDOJ.GOV>
Cc: Girdharry, Glenn M (CIV) <ggirdhar@CIV.USDOJ.GOV>; Seth Wayne <sw1098@georgetown.edu>; Mary McCord <mbm7@georgetown.edu>; Vassanji, Anil <avassanji@fklaw.com>
Subject: Re: Action Memo for Assistant Secretary of Consular Affairs

Hi Nairi,

Thank you for your response. Plaintiffs agree that our motion can be resolved independent of the Administrative Record, but our clients and the public have a strong interest in understanding the State Department's decisionmaking process for a rule that has resulted in a sharp and predictable drop in participation in the DV Program. We could, of course, pursue disclosure of the Action Memo through a FOIA request, but it is our assessment that that would be a waste of time and resources for both us and the State Department (especially since it appears that you already have concluded that the document would not be amenable to any assertion of privilege). If you are unwilling to produce the Action Memo within the confines of this case, will you at least agree to help us obtain an expedited response to a FOIA request?

Thank you,

Jonathan

Jonathan

On Mon, Oct 26, 2020 at 3:27 PM Gruzenski, Nairi (CIV) <Nairi.Gruzenski@usdoj.gov> wrote:

> Hello Jonathan,
>
> Thank you for your message. Plaintiffs moved the court for summary judgment under FRCP 56 unilaterally, indicating that Plaintiffs are "entitled to summary judgment based solely on the information contained in the Passport Rule itself…." ECF No. 38-1 at 9-10. As plaintiffs have asked the court to enter judgment in their favor without the administrative record (in fact noting that the record is not necessary for the court to rule in their favor), the government is under no obligation to provide the administrative record, or any portion of it, at this point in the litigation.
>
> The government also notes that it has not yet answered the operative complaint nor has it been provided an opportunity to present its affirmative defenses (neither of which the government waives).
>
> Kind regards,
>
> Nairi
>
> **From:** Jonathan Backer <jb2845@georgetown.edu>
> **Sent:** Monday, October 26, 2020 3:03 PM
> **To:** Girdharry, Glenn M (CIV) <ggirdhar@CIV.USDOJ.GOV>; Gruzenski, Nairi (CIV) <nagruzen@CIV.USDOJ.GOV>
> **Cc:** Seth Wayne <sw1098@georgetown.edu>; Mary McCord <mbm7@georgetown.edu>; Vassanji, Anil <avassanji@fklaw.com>
> **Subject:** Re: Action Memo for Assistant Secretary of Consular Affairs
>
> Hi Nairi and Glenn,
>
> Could you please advise what your position is regarding production of the Action Memo? I'd appreciate it if you could get back to me by close of business today.
>
> Thank you,
>
> Jonathan
>
> On Sat, Oct 24, 2020 at 5:40 PM Jonathan Backer <jb2845@georgetown.edu> wrote:
>
> > Hi Nairi and Glenn,
> >
> > I hope you are having a good weekend.
> >
> > Could you please produce to Plaintiffs the Action Memo for Assistant Secretary of Consular Affairs referenced in the Index to the Administrative Record in *E.B. v. Department of State*, No. 19-2856 (D.D.C) at your earliest convenience? I presume

> since you listed it in the Index that you already have consulted with the State Department about it and that you do not anticipate invoking any privilege that would prevent its production as part of the Administrative Record.
>
> Thank you,
>
> Jonathan
>
> --
> Jonathan Backer
> Counsel
> Institute for Constitutional Advocacy and Protection
> Georgetown University Law Center
> (202) 662-9835
> jb2845@georgetown.edu
>
> The information contained in this email message may be privileged and is intended for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify me by email, and delete the original message.

--
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