IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

E.B. et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE, et al.,

Defendants.

Civil Action No. 1:19-cv-02856-TJK

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs E.B., K.K., A.K., and W.B. respectfully move for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7. The reasons for this motion are set forth in the accompanying Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and supporting declarations. A proposed order is also attached.

Respectfully submitted,

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Dated: October 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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

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PLAINTIFFS' MEMORANDUM OF LAW AND FACTS
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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October 7, 2020

STATEMENT REGARDING ORAL ARGUMENT

The legal issues in this case are squarely resolved by this Court's recent decision in *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, Civil Action Nos. 19-2117 (TJK), 19-2530 (TJK), 2020 WL 3542481 (D.D.C. June 30, 2020). Because *CAIR* conclusively establishes that the Passport Rule was unlawfully promulgated without adherence to the Administrative Procedure Act (APA)'s notice-and-comment procedures, oral argument is not necessary. Plaintiffs respectfully request that the Court vacate the Passport Rule based on the briefing alone.

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INTRODUCTION

For the past 30 years, the Diversity Visa Program has served as a critical vehicle for diversifying the United States' immigrant population. Each year, millions of people from around the world apply to the Diversity Visa Program, from which up to 55,000 are selected through a lottery to immigrate to the United States. In 2019, the State Department issued an Interim Final Rule that requires—for the first time in the Diversity Visa Program's history—that individuals possess a valid and unexpired passport before applying to the Program. Visas: Diversity Immigrants, 84 Fed. Reg. 25,989 (June 5, 2020) (codified at 22 C.F.R. § 42.33) (the "Passport Rule"). In many countries, passport ownership is rare and the financial and logistical hurdles to obtaining one are prohibitively high. The Passport Rule thus poses an insurmountable barrier to participation in the Diversity Visa Program for large swaths of the world's population. It is therefore unsurprising that participation in the Program declined sharply in the first diversity visa lottery conducted under the auspices of the Passport Rule (the DV-2021 lottery, the application window for which was October 2 to November 5, 2019). Would-be applicants from around the world, particularly those from poor countries, have lost their opportunity to apply for an immigrant visa, their American families have lost the opportunity for family reunification, and their American communities have lost the opportunity for growth.

Despite the predictably significant impact that the Passport Rule has had and continues to have on participation in the Diversity Visa Program, the State Department did not adopt the Rule through notice-and-comment rulemaking, as required by the Administrative Procedure Act (APA). Had the Department promulgated the Rule through notice-and-comment rulemaking, it would have been required to respond to the public's concerns about the Rule. But rather than engage in that process, the Department invoked the APA's "foreign affairs" exception and published its final rule

effective immediately. That was improper. The foreign affairs exception applies only when a rule "clearly and directly involve[s] activities or actions characteristic to the conduct of international relations." *Capital Area Immigrants' Rights Coal. (CAIR) v. Trump*, Civil Action Nos. 19-2117 (TJK), 19-2530 (TJK), 2020 WL 3542481, at *18 (D.D.C. June 30, 2020) . The Passport Rule does not come close to meeting that standard and is—at best—indirectly related to the United States' conduct of foreign affairs.

Because the Passport Rule was improperly adopted without adherence to the APA's notice-and-comment procedures, it is unlawful and must be vacated.

STATEMENT OF FACTS

A. The Diversity Visa Program

The Diversity Visa Program was established by the Immigration Act of 1990, which passed with bipartisan support. Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997 *et seq.* (codified at 8 U.S.C. § 1153(c)). Each year, the United States welcomes approximately one million newcomers.[1] Most immigrants to the United States receive visas by virtue of their family relationships or through employment. As a result, the United States receives large numbers of immigrants from a small number of countries, including India, China, the Philippines, Mexico, and the Dominican Republic, and smaller numbers of immigrants from the rest of the world.[2] The Diversity Visa Program was designed to alleviate this imbalance. The purpose of the Diversity Visa Program is "to diversify the immigrant population in the United States," by allowing immigrants from "low-

[1] *Table 10: Persons Obtaining Lawful Permanent Resident Status by Broad Class of Admission and Region and Country of Last Resident: Fiscal Year 2018, 2018 Yearbook of Immigration Statistics*, U.S. Dep't of Homeland Security (Jan. 6, 2020), https://perma.cc/634F-BAWX.
[2] *Id.*

admission" countries of the world, or places that historically have been adversely affected by U.S. immigration laws, to immigrate to the United States. 84 Fed. Reg. at 25,989–90.

55,000 visas are allocated each year for immigrants arriving through the Diversity Visa Program (5,000 of which are allocated under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(d)). 84 Fed. Reg. at 25,989. The Diversity Visa Program is particularly important to African immigrants; in 2018, the most recent year for which data is available, 15 percent of immigrants from Africa who acquired lawful permanent resident status did so through the Diversity Visa Program.[3] 23 percent of immigrants from Côte d'Ivoire and 17 percent of immigrants from Ethiopia who acquired lawful permanent resident status in 2018 did so through the Diversity Visa Program.[4] Without access to the Diversity Visa Program, people from African nations would lose a key pathway for immigrating to the United States.

Diversity visa recipients are selected by lottery. Consistent with the goal of increasing immigration to the United States from underrepresented countries, the standards for applying to the Diversity Visa Program lottery are not stringent. First, one must be from a "low-admission region," defined as a country with "historically low rates of immigration to the United States," which is in turn defined as having sent fewer than 50,000 immigrants to the United States over the past five years. 8 U.S.C. § 1153(c)(1)(B). All but 19 countries are "low-admission regions," including Ethiopia and Côte d'Ivoire.[5]

Aside from the Passport Rule, the Diversity Visa Program's only other eligibility requirement is either a high school degree or equivalent, or two years of work experience within

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[3] *Id.*
[4] *Id.*
[5] *See* U.S. Dep't of State, *Instructions for the 2022 Diversity Immigrant Visa Program (DV-2022)* 1 (n.d.), https://perma.cc/G9ZT-ZTD6 [hereinafter *DV-2022 Instructions*].

the last five years in an occupation which requires at least two years of training. 8 U.S.C. § 1153(c)(2). Eligible candidates enter the lottery by filling out an electronic form available on the State Department's website. Applicants must fill in their personal and contact details, including name, gender, birth place, place of residence, level of education, marital status, and number of children.[6] Applicants are not required to pay a fee to enter the lottery, and until the DV-2021 lottery, they were not required to provide any passport information at the time of application.[7]

The approximately 55,000 diversity visas distributed each year are allotted among six regions.[8] Based on the number of visas available within each region, the State Department chooses applicants at random to be granted a diversity visa.[9] Individuals selected in the lottery undergo an intensive screening process, including a background check, review of biometric data and supporting documentation, and an in-person interview.[10] Until the DV-2021 lottery, only at this stage in the process of obtaining a diversity visa, i.e. after they had been selected in the lottery, was an individual required to have a passport. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I) (subject to limited exceptions, requiring immigrants to the United States to possess "a valid unexpired passport[] or other suitable travel document" at the time of application for admission). Applicants who are unsuccessful in obtaining a diversity visa in a given year can apply again the following year without prejudice. The Program has operated with few changes to the application

[6] *Id.* at 3–5.
[7] U.S. Dep't of State, *Instructions for the 2021 Diversity Immigrant Visa Program (DV-2021)* 3 (n.d.), https://perma.cc/P87S-L6VT.
[8] *DV-2022 Instructions*, at 1.
[9] *Id.* at 5.
[10] *See Submit Supporting Documents*, U.S. Dep't of State, https://perma.cc/QAT8-67AX (last visited Sept. 30, 2020); *Prepare for the Interview*, U.S. Dep't of State, https://perma.cc/3L42-5PX5 (last visited Sept. 30, 2020).

requirements since its inception in 1990. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997 *et seq*.

B. The Passport Rule

On June 5, 2019, the State Department promulgated the Passport Rule, which requires for the first time in the Diversity Visa Program's nearly 30-year history that individuals possess a passport to apply to the Program. 84 Fed. Reg. 25,989. The Rule took immediate effect without a pre-enactment opportunity for notice and comment. *Id.* Instead, the Department provided a 30-day window for public comment after the Rule had already gone into effect. *Id.* at 25,991; *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), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201908-1405-006 (State Department responses to post-promulgation comments). The Rule requires each of the millions of people who apply to the Diversity Visa Program each year to "include on the electronic diversity visa entry form the unique serial or issuance number associated with the [applicant's] valid, unexpired passport; country or authority of passport issuance; and passport expiration date." 84 Fed. Reg. at 25,989. As a result, applicants must possess a valid passport at the time of application.[11] Owning a passport is not commonplace in many parts of the world, and the cost of

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

obtaining one is oftentimes a significant portion of what individuals typically earn in a given month.[12]

According to the State Department, the Passport Rule is necessary because "[t]he Department has historically encountered significant numbers of fraudulent entries for the [Diversity Visa] Program each year." *Id.* at 25,990. In the Department's view, "[r]equiring that each entry form include a valid passport number at the time of the [Diversity Visa] Program entry will make it more difficult for third parties to submit unauthorized entries, because third parties are less likely to have individuals' passport numbers." *Id.*

To justify its failure to provide an opportunity for public comments before promulgating the Passport Rule, as the APA generally requires, the State Department invoked the APA's "foreign affairs" exception to notice-and-comment rulemaking. 5 U.S.C. § 553(a)(1) (exempting from the APA's notice-and-comment requirement rules that involve a "foreign affairs function of the United States"). According to the State Department, the "rule clearly and directly impacts a foreign affairs function of the United States" because it "pertains to a visa program which serves as a clear tool of diplomacy and outreach to countries around the world" and "helps create allies and goodwill overseas." 84 Fed. Reg. at 25,990. The State Department provided no other justification for its decision to sidestep the APA's notice-and-comment requirement.

C. The DV-2021 Lottery

The DV-2021 lottery, the application window for which ran from October 2 to November 5, 2019, is the only diversity lottery to date conducted under the auspices of the Passport Rule.

[12] *See* African Communities Together, Comment Letter on Interim Final Rule (July 5, 2019), https://www.regulations.gov/document?D=DOS-2019-0014-0027; UndocuBlack Network, Comment Letter on Interim Final Rule (July 5, 2019), https://www.regulations.gov/document?D=DOS-2019-0014-0028.

Only 6.7 million individuals entered the DV-2021 lottery compared to 14.7 million the year prior, a 54-percent drop.[13] This decline was especially pronounced in Africa, where 3.1 million individuals entered the DV-2021 lottery compared to 8.1 million the year prior, a 62-percent drop.[14] No diversity visa lottery since the DV-2010 lottery (the application window for which was in 2008) had such a low level of participation.[15] And among the diversity visa lotteries for which statistics are available, the DV-2021 lottery was a historic low for Ethiopians' participation.[16] Applicants from Côte d'Ivoire have not participated in such low numbers since the DV-2012 lottery (the application window for which was in 2010).[17]

D. Plaintiffs

Plaintiffs K.K. and E.B. (collectively, "Applicant Plaintiffs") are citizens of countries whose nationals are permitted to participate in the Diversity Visa Program (Côte d'Ivoire and Ethiopia, respectively). K.K. Decl. ¶ 1, Ex. 1; ECF No. 3-3, ¶ 1. Both Applicant Plaintiffs have participated in past diversity visa lotteries and intended to participate in the DV-2021 lottery, but they were unable to do so because they lack the financial resources to obtain a passport for the

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[13] U.S. Dep't of State, *Diversity Visa Program, DV 2019-2021: Number of Entries During Each Online Registration Period by Region and Country of Chargeability*, 4 (n.d.), https://perma.cc/57LA-BCLS [hereinafter *DV 2019-2021*].

[14] *Id.* at 1.

[15] *Id.* at 4; U.S. Dep't of State, *Diversity Visa Program, DV 2016-2018: Number of Entries During Each Online Registration Period by Region and Country of Chargeability*, 6 (n.d.), https://perma.cc/NFA5-5SPL [hereinafter *DV 2016-2018*]; U.S. Dep't of State, *Diversity Visa Program, DV 2013-2015: Number of Entries During Each Online Registration Period by Region and Country of Chargeability*, 9 (n.d.), https://perma.cc/PDH8-TTR4 [hereinafter *DV 2013-2015*]; U.S. Dep't of State, *Diversity Visa Program, DV 2010-2012: Number of Entries During Each Online Registration Period by Region and Country of Chargeability*, 9 (n.d.), https://perma.cc/7FTU-VER9 [hereinafter *DV 2010-2012*].

[16] *DV 2019-2021*, at 9; *DV 2016-2018*, at 2; *DV 2013-2015*, at 3; *DV 2010-2012*, at 3; U.S. Dep't of State, *Diversity Visa Program, DV 2007-2009: Number of Entries During Each Online Registration Period by Region and Country of Chargeability*, 3 (n.d.), https://perma.cc/3VJD-8LKG [hereinafter *DV 2007-2009*].

[17] *DV 2019-2021*, at 1; *DV 2016-2018*, at 1; *DV 2013-2015*, at 2; *DV 2010-2012*, at 2.

limited purpose of applying for the diversity lottery. K.K. Decl. ¶¶ 6–7; ECF No. 3-3, ¶¶ 8, 11. They also intend to participate in the DV-2022 lottery (the application window for which is October 7 to November 10, 2020) and subsequent diversity visa lotteries (until they are able to immigrate to the United States), but the Passport Rule continues to present an insurmountable obstacle to their participation. K.K. Decl. ¶ 8; Am. Compl. ¶¶ 11, 53, ECF No. 27. Applicant Plaintiffs' siblings, Plaintiffs A.K. and W.B. (collectively, "Family Plaintiffs") live in the United States and hope that one day the Diversity Visa Program will enable their siblings to join them here. A.K. Decl. ¶¶ 1–3, Ex. 2; W.B. Decl. ¶¶ 1–3, Ex. 3. Because the Passport Rule prevents the Applicant Plaintiffs from participating in diversity visa lotteries, the Diversity Visa Program will not be a vehicle for Family Plaintiffs to reunify with their siblings as long as the Rule is in effect. A.K. Decl. ¶ 8; W.B. Decl. ¶ 8.

PROCEDURAL HISTORY

Plaintiffs filed suit in September 2019, shortly before the application window opened for the DV-2021 lottery—the first diversity visa lottery conducted under the auspices of the Passport Rule. ECF No. 1. Contemporaneously, Plaintiffs moved for a preliminary injunction. ECF No. 3. This Court denied Plaintiffs' motion, holding that although at least Plaintiff K.K. likely had standing to challenge the Passport Rule, Plaintiffs had not demonstrated irreparable harm because the chance of an applicant obtaining a diversity visa in any given lottery is small. ECF No. 21, at 6, 9. Thereafter, Plaintiffs amended their complaint to make clear that the Passport Rule continues to prevent Applicant Plaintiffs from participating in the DV-2022 lottery and future diversity lotteries because neither Applicant Plaintiff can afford to purchase a passport for the

limited purpose of applying to the Diversity Visa Program.[18] ECF No. 27. Defendants moved to dismiss the First Amended Complaint. ECF No. 28. As of February 2020, Defendants' Motion to Dismiss has been fully briefed, *see* ECF Nos. 28-1, 29, 31. Because the application window for the DV-2022 lottery (October 7 through November 10, 2020) opened today, Plaintiffs file this Motion for Summary Judgment to enable the Court to vacate the unlawfully promulgated Passport Rule before it precludes Applicant Plaintiffs from participating in a second diversity visa lottery.

LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a court shall issue summary judgment where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). That standard "does not apply," however, in cases such as this one involving review of final agency action under the APA. *Itserve All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 29 (D.D.C. 2020) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006)). Instead, "[s]ummary judgment . . . serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record." *Cottage Health Sys. v. Sebelius*, 631 F. Supp. 2d 80, 90 (D.D.C. 2009).

Defendants have yet to produce the administrative record in this case.[19] Nevertheless, Plaintiffs are entitled to summary judgment based solely on the information contained in the

[18] In amending their complaint, Plaintiffs voluntarily dismissed Plaintiff Mehatemeselassie Ketsela Desta, who lacked sufficient time to obtain a passport prior to the closure of the application window for the DV-2021 lottery, but who did not face insurmountable financial obstacles to obtaining a passport.

[19] Defendants were required to file with the Court a list of the contents of the administrative record at the same time that they filed their first motion to dismiss. *See* LCvR 7(n)(1). They did not. Nor did Defendants move for relief from LCvR 7(n). *See Farrell v. Tillerson*, 315 F. Supp. 3d 47, 52 (D.D.C. 2018) (defendants filed a motion for relief from LCvR 7(n) in conjunction with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure).

Passport Rule itself, which indisputably would have been included in the administrative record had Defendants produced it. To the extent that Defendants believe that anything in the administrative record defeats summary judgment, it is their burden to produce the record in conjunction with any opposition to this motion. *See Coop. Servs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 562 F.2d 1292, 1295 (D.C. Cir. 1977) ("Only the Government knows what information was before the administrative decisionmaker, and thus only the Government can assemble the record and make it available to the court and to the parties. . . . [S]ince the Government has yet to make any reference to anything in the administrative record . . . that would support its arguments in this case, we may safely assume that the record, if disclosed, would either support [plaintiffs'] case or at least fail to detract from the evidence in their favor which is already in the record of this litigation."). Defendants should not be permitted to use their failure to produce the administrative record as a shield against final resolution of this matter.

ARGUMENT

I. PLAINTIFFS' CLAIM IS JUSTICIABLE

A. Plaintiffs Have Standing to Challenge the Passport Rule

Plaintiffs have shown, based on undisputed facts in their declarations, that they have standing to challenge the Passport Rule. Specifically, they have suffered several cognizable injuries caused by the Passport Rule that can be redressed by the Rule's vacatur.

To establish Article III standing, plaintiffs "must show [they are] suffering an ongoing injury or face[] an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). Plaintiffs must also demonstrate, to a "substantial probability that the challenged acts of the defendant caused their injury." *Ramirez v. U.S. Immigration and Customs Enf't*, 338 F. Supp. 3d 1, 30 (D.D.C. 2018) (internal quotations omitted). Finally, plaintiffs must show their alleged

injury is "likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *see also 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.").

When "litigants attempt to vindicate their 'procedural rights'" under the APA, "such as their right to have notice of proposed regulatory action and to offer comments on such proposal," a "special standing doctrine" applies. *Iyengar v. Barnhart*, 233 F. Supp. 2d 5, 12 (D.D.C. 2002). "To establish injury-in-fact" in such cases, plaintiffs "must show that 'the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'" *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)). Plaintiffs can satisfy this requirement by showing "a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest." *Ctr. For Biological Diversity v. Envtl. Prot. Agency*, 861 F.3d 174, 183 (D.C. Cir. 2017). To establish standing based on a procedural injury, "[p]laintiffs need not demonstrate that but for the procedural violation the agency action would have been different." *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014).

In ruling on Plaintiffs' Motion for a Preliminary Injunction, this Court held that Plaintiff K.K. had demonstrated a substantial likelihood of establishing standing because the Passport Rule requires him to "expend additional time and money merely to enter the [diversity visa] lottery, even if he does not win it." ECF No. 21, at 6. As the Court noted, "a loss of even a small amount

of money is ordinarily an 'injury'" for standing purposes. *Id.* (quoting *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017)). The Passport Rule remains as taxing on K.K.'s time and finances now as it was when Plaintiffs moved for a preliminary injunction one year ago. Obtaining a passport would cost K.K. at least $120, an amount twice his monthly base salary and a little less than what he earns in an especially profitable month, and would require him to take leave from work, imposing additional costs. K.K. Decl. ¶¶ 13–14. The Passport Rule likewise imposes significant time and monetary expenses on Plaintiff E.B. To obtain a passport, E.B. would incur at least 1,460 Ethiopian Birr (ETB) (approximately $39.90) in direct and indirect costs, roughly three-quarters of what he earns in a typical month, and he would have to close his mechanic's shop for several days. *See* ECF No. 3-3, ¶¶ 5, 12–15. As this Court held previously, these injuries are traceable to the Passport Rule and can be remedied by vacatur of the Rule. ECF No. 21, at 6–7.

In addition to the costs imposed on the Applicant Plaintiffs by the Passport Rule, the Rule also has denied them opportunities to obtain visas that would enable them to immigrate to the United States. This, too, is a cognizable Article III injury. *See CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("[A] plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." (emphases in original)); *W. Va. Ass'n of Cmty. Health Ctrs. v. Heckler*, 734 F.2d 1570, 1575 (D.C. Cir. 1984) ("[T]he individual plaintiff's injury was the denial of an opportunity to obtain housing for which he would otherwise be qualified. Certainty of success in seeking to exploit that opportunity was not required." (discussing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977)). This Court has specifically held that a noncitizen's lost opportunity to obtain an immigration benefit such as a diversity visa is a cognizable injury in fact. *Nat'l Venture Capital*

Ass'n v. Duke, 291 F. Supp. 3d 5, 13–14 (D.D.C. 2017) (finding standing based on plaintiffs' lost opportunity to apply for parole into the United States and noting that courts of appeals have "unanimously concluded" that such an injury confers Article III standing); *accord Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016); *Mantena v. Johnson*, 809 F.3d 721, 731 (2d Cir. 2015); *Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156 (3d Cir. 2015); *Kurapati v. U.S. Bureau of Citizenship & Immigration Servs.*, 775 F.3d 1255, 1260 (11th Cir. 2014); *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 638 (6th Cir. 2013); *Abboud v. Immigration & Naturalization Serv.*, 140 F.3d 843, 847 (9th Cir. 1998).

Applicant Plaintiffs both have participated in the diversity visa lottery in past years, and they intended to participate in the DV-2021 lottery, the application window for which closed in 2019. K.K. Decl. ¶¶ 6–7; ECF No. 3-3, ¶ 8. But they were unable to do so because of the exorbitant costs associated with obtaining a passport in Côte d'Ivoire and Ethiopia. K.K. Decl. ¶ 7; Am. Compl. ¶¶ 11, 53;[20] ECF No. 3-3, ¶ 11. Applicant Plaintiffs also intend to participate in the DV-2022 lottery (the application window for which is October 7 to November 10, 2020) and in future diversity lotteries but will not be able to do so unless the Passport Rule is vacated. K.K. Decl. ¶ 8; Am. Compl. ¶¶ 11, 53; *see also* ECF No. 3-3 ¶ 11. The Passport Rule has thus denied them and continues to deny them opportunities to obtain visas that would enable them to immigrate to the United States. Lending credence to Applicant Plaintiffs' sworn statements, the Passport

[20] Plaintiffs' counsel has been in communication with E.B. through his brother-in-law, who lives in the United States, and has confirmed the details concerning E.B. alleged in the First Amended Complaint. ECF No. 25. Logistical difficulties translating a draft declaration into Amharic and coordinating the signing and return of the declaration abroad have made it impossible to file E.B.'s updated declaration with this Motion for Summary Judgment. Plaintiffs will supplement this filing with an E.B.'s signed declaration as soon as it is available. E.B.'s standing can be confirmed based on his declaration filed in conjunction with Plaintiffs' Motion for a Preliminary Injunction. *See* ECF No. 3-3. And standing for the other Plaintiffs can be confirmed based on updated declarations that accompany this filing.

Rule prevented many others besides them from participating in the DV-2021 lottery. Only 6.7 million individuals entered the DV-2021 lottery compared to 14.7 the year prior, a 54-percent drop.[21] This trend was especially pronounced in Africa, where 3.1 million individuals entered the DV-2021 lottery compared to 8.1 million the year prior, a 62-percent drop.[22] Applicant Plaintiffs therefore have standing to challenge the Passport Rule based on their lost opportunities to obtain visas for which the Rule is responsible.

In addition, by denying Applicant Plaintiffs opportunities to obtain visas that would allow them to immigrate to the United States, the Passport Rule also denies their siblings, Family Plaintiffs, opportunities to reunify with their family members. A.K. Decl. ¶ 8; W.B. Decl. ¶ 8. The Supreme Court has held that U.S. citizens' and lawful permanent residents' "interest in being united with [their] relatives [abroad] is sufficiently concrete and particularized to form the basis of an Article III injury in fact." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). Family Plaintiffs therefore have standing to challenge the Passport Rule that is derivative of their siblings' lost opportunities to obtain diversity visas.

Finally, all four plaintiffs have standing based on Defendants' failure to provide them with a pre-enactment opportunity to comment on the Passport Rule. In ruling on Plaintiffs' Motion for a Preliminary Injunction, this Court held that Plaintiff K.K. had suffered a procedural injury sufficient to confer Article III standing because "[t]he procedural right K.K seeks—the opportunity to comment on the Passport Rule to explain why it makes his pursuit of a diversity visa harder—'is quite obviously linked to [his] concrete interest' in participating in the lottery without these added costs." ECF No. 21, at 7 (alteration in original) (quoting *Iyengar*, 233 F. Supp. 2d at 13).

[21] *DV 2019-2021*, at 4.
[22] *Id.* at 1.

Plaintiff E.B. has suffered a procedural injury identical to K.K.'s. Moreover, there is an equally obvious link between the procedural right held by Family Plaintiffs to comment on the Passport Rule and their interest in the Diversity Visa Program remaining unencumbered by an insurmountable barrier to their siblings' participation. Accordingly, Plaintiffs have established standing based on procedural injury.

B. Plaintiffs Fall within the Relevant Zone of Interests

Plaintiffs also fall within zone of interests of the Immigration and Nationality Act (INA), the statute that authorizes the Diversity Visa Program. The zone-of-interests test "is not meant to be especially demanding," especially under the APA, through which Congress sought "to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.*

This Court previously held that at least Plaintiff K.K. fell within the INA's zone of interests because, as "a would-be immigrant who declares that he entered the lottery previously and seeks to do so again[,] . . . his interests are obviously not 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" ECF No. 21, at 8 (quoting *Mendoza*, 754 F.3d at 1017). The same is true for Plaintiff E.B.

Family Plaintiffs, who rely on the Diversity Visa Program as an avenue to one day reunify with their siblings, also are "reasonable—indeed, predictable—challengers" to ensure that Defendants do not transgress their procedural obligations under the APA before erecting a

significant new barrier to their siblings' participation in the program. *Patchak*, 567 U.S. at 227; *see also Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 472 (D.C. Cir. 1995) ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. . . . In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. . . . Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (internal quotations omitted)), *judgment vacated on other grounds*, 519 U.S. 1 (1996). Accordingly, Plaintiffs all fall within the relevant zone of interests.

II. THE PASSPORT RULE IS UNLAWFUL

Before an agency promulgates a rule, with limited exceptions, the APA requires the agency to provide "[g]eneral notice of proposed rule making" in the Federal Register, as well as "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c). Defendants invoked the APA's "foreign affairs" exception as a justification for their failure to adopt the rule with a notice-and-comment process. 84 Fed. Reg. at 25,990. Under that exception, rules that involve a "foreign affairs function of the United States" need not be subjected to pre-enactment notice and comment. 5 U.S.C. § 553(a)(1). Exceptions to the APA's notice-and-comment requirements are "narrowly construed and only reluctantly countenanced," *N.J. Dep't of Envtl. Prot. v. U.S. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980), and "'the onus is on the [agency]'" to overcome the "uphill battle" of establishing "'that notice and comment' should not be given," *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 16 (alteration in original) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)). The foreign affairs exception does not apply to the Passport Rule because the Rule does not "clearly and directly involve activities or actions characteristic to the conduct of

international relations." *CAIR*, 2020 WL 3542481, at *18. Because Defendants promulgated the Passport Rule "without observance of procedure required by law," it must be "set aside." 5 U.S.C. § 706(2)(D).

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

To date, Plaintiffs have argued that the propriety of Defendants' invocation of the foreign affairs exception should be evaluated based on whether promulgation of the Rule through notice-and-comment rulemaking "would clearly provoke definitely undesirable international consequences." ECF No. 3-2, at 16 (quoting *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288, 1290 (D.D.C. 1973)); *see also* ECF No. 17, at 13; ECF No. 29, at 12. In *CAIR*, this Court rejected the "definitely undesirable international consequences" test in favor of a narrower standard.[23] 2020 WL 3542481, at *18. Under the standard adopted in *CAIR*, a rule is exempt from notice-and-comment rulemaking under the foreign affairs exception only when it "clearly and directly involve[s] activities or actions characteristic to the conduct of international relations." *Id.* The Passport Rule plainly does not meet that standard.

The foreign affairs exception, as interpreted in *CAIR*, "covers heartland cases in which a rule itself directly involves the conduct of foreign affairs." *Id.* at *19. The exception therefore

[23] This Court also rejected an even more permissive test proposed by the Government in *CAIR* and by Defendants in this case that would exempt from notice-and-comment rulemaking any rule that is "linked intimately with the Government's overall political agenda concerning relations with another country." *CAIR*, 2020 WL 3542481, at *20 (quoting *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)); *see also* ECF No. 16, at 25; ECF No. 28-1, at 14; ECF No. 31, at 6. As this Court stated, "Congress could have—but did not—exempt rulemakings that merely affect or implicate foreign affairs," and even the case from which Defendants derive their preferred test did not apply it. *CAIR*, 2020 WL 3542481, at *20 n.23; *see also Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249 (applying the "definitely undesirable international consequences" test). Accordingly, the Court should once again refrain from applying the exceptionally broad and misguided test Defendants have proposed.

exempts from notice-and-comment rulemaking "a rule [that] implements an international agreement between the United States and another sovereign state" or "rules that regulate foreign diplomats." *Id.* But the exception does not cover rules that have only "downstream" or "*indirect* effects" on international relations. *Id.* (emphasis in original). Based on this interpretation, the Court held that the foreign affairs exception did not apply to a rule that would have denied asylum to noncitizens who enter the United States at its southern border unless they first seek and fail to receive similar protection in another country along their migration path. *Id.* at *17. The Government claimed that the foreign affairs exception applied to the rule because (1) "the flow of aliens across the southern border directly implicates the foreign policy and national security of the United States" and (2) notice and comment concerning the rule would have hindered "ongoing diplomatic negotiations with foreign countries." *Id.* at *20. But this Court held that such indirect and downstream effects on foreign policy were "not enough to satisfy the foreign affairs function exception." *Id.*

Defendants have argued that the Passport Rule falls within the foreign affairs exception for two reasons similar to those offered in *CAIR*, neither of which warrant a departure from *CAIR*'s holding. First, Defendants contend that the foreign affairs exception applies because the Rule "pertains to [the DV Program] which serves as a clear tool of diplomacy and outreach to other countries around the world." ECF No. 28-1, at 15 (alteration in original) (quoting 84 Fed. Reg. at 25,990). This vague and conclusory explanation shows that far from "clearly and directly involv[ing] activities or actions characteristic to the conduct of international relations," *CAIR*, 2020 WL 3542481, at *18, the Passport Rule is at least two steps removed from the actual conduct of foreign policy. Like the asylum rule in *CAIR*, to which the foreign affairs exception did not apply, the Passport Rule does not implement an international agreement or regulate foreign

diplomats in the United States. *Id.* at *19. Instead, the Rule merely "pertains" to an immigration program that Defendants attempt to characterize as a "tool of diplomacy and outreach to countries around the world." ECF No. 28-1, at 15 (quoting 84 Fed. Reg. at 25,990). And like the improperly promulgated asylum rule in *CAIR*, the Passport Rule does not implicate any particular country, or even a narrow subset of foreign nations. 2020 WL 3542481, at *18.

Further distancing the Passport Rule from the conduct of foreign affairs, Defendants do not even claim that the Diversity Visa Program directly involves U.S. foreign policy. Rather, they contend that the program "build[s] relations with foreign populations around the world" and thus "helps create allies and goodwill overseas." ECF No. 28-1, at 15 (quoting 84 Fed. Reg. at 25,990). In other words, the program is not itself a "mechanism[] through which the United States conducts relations with foreign states." *CAIR*, 2020 WL 3542481, at *19. It is, at most, a diplomatic lubricant that could help create favorable conditions for the actual conduct of international relations, whenever that might occur. Such an attenuated relationship to "activities or actions characteristic to the conduct of international relations" does not justify the invocation of the foreign affairs exception. *Id.* at *18.

Second, Defendants argue that adopting the Passport Rule through notice-and-comment rulemaking would have jeopardized U.S. foreign policy because the State Department received the information concerning fraud in the Diversity Visa Program that spurred its promulgation of the Rule "during its ongoing diplomatic interactions with diversity visa-eligible countries." ECF No. 28-1, at 18. According to Defendants, notice-and-comment rulemaking would therefore, "require the Department to elaborate on international law enforcement investigations and information exchanges conducted with different diversity visa eligible countries," and "likely lead to 'the public airing of matters that might enflame or embarrass relations with other countries."

Id. (quoting *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995)). But these concerns are even further "downstream" and more "indirect" than those this Court found insufficiently direct in *CAIR*. 2020 WL 3542481, at *19. Whereas the Government contended in *CAIR* that adopting the challenged asylum rule through notice-and-comment rulemaking would have negatively impacted "ongoing diplomatic negotiations," *id.* at 4, here, Defendants cite risk of generalized "embarrass[ment]" untethered to any particular diplomatic effort, ECF No. 28-1, at 18. And Defendants have not explained why the only solution to such "embarrass[ments]" is to dispense with the notice-and-comment requirement altogether, instead of a more narrowly tailored approach like redacting certain responses. The concerns raised by Defendants therefore are not grounds for applying the foreign affairs exception.

Because Defendants have identified no way in which the Passport Rule "clearly and directly involve[s] activities or actions characteristic to the conduct of international relations," the foreign affairs exception does not apply to it. *Id.* at *18. Accordingly, Defendants unlawfully promulgated the Rule without pre-enactment notice and comment.

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

As mentioned above, this Court rejected the "definitely undesirable international consequences" test in *CAIR*, concluding that it (1) "is unmoored from the legislative text of the foreign affairs exception," *id.*; (2) would render "superfluous" the APA's good cause exception, *id.*; and (3) would conflict with D.C. Circuit case law interpreting the phrase "to the extent there is involved," as it is used in 5 U.S.C. § 553(a), to mean "*clearly and directly* involved in the regulatory effort at issue," *CAIR*, 2020 WL 3542481, at *18 (emphasis in original) (quoting *Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978)). Accordingly,

Defendants' invocation of the APA's foreign affairs exception should not be evaluated under that test.

But even if this Court were to assess the propriety of Defendants' invocation of the foreign affairs exception under the "definitely undesirable international consequences" test, the Passport Rule does not meet that standard. To the extent that the Court applies the "definitely undesirable consequences" test to the Passport Rule, Plaintiffs incorporate by reference the arguments made in their memoranda in support of their Motion for a Preliminary Injunction and in opposition to Defendants' Motion to Dismiss. ECF No. 3-2, at 15–19; ECF No. 17, at 13–18; ECF No. 29, at 11–20.

C. Post-Promulgation Notice and Comment Did Not Cure the Passport Rule's Procedural Deficiencies

Defendants also have argued that they complied with the APA's notice-and-comment requirements by providing an opportunity for public comments after the Passport Rule had already taken effect. ECF No. 28-1, at 11–14. Not so. Pre-enactment notice-and-comment procedures "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). "Permitting the submission of views after [a rule's] 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.*, 626 F.2d at 1049 (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1978)). Allowing post-promulgation notice and comment to substitute for pre-enactment notice and comment would therefore render 5 U.S.C. § 553 "virtually unenforceable." *Id.* (quoting *U.S. Steel*

Corp., 595 F.2d at 214–15). For those reasons and those provided in Plaintiffs' Opposition to Defendants' Motion to Dismiss, ECF No. 29, at 6–8, which Plaintiffs incorporate by reference, the post-promulgation opportunity for public comment provided by Defendants did not cure the Passport Rule's procedural infirmities.

III. THE COURT SHOULD VACATE THE PASSPORT RULE

Vacatur is the proper remedy for Defendants' promulgation of the Passport Rule without providing a pre-enactment opportunity for public comment. "Failure 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) (quoting *Sugar Cane Growers Co-Op of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002)); *see also CAIR*, 2020 WL 3542481, at *21 ("Having found that the Rule was enacted unlawfully, the Court sees no reason why it should not be vacated."). The appropriateness of vacatur as a remedy follows inexorably from the APA's text, which commands that "[t]he reviewing court *shall* . . . hold unlawful and *set aside* agency action . . . found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D) (emphasis added).

Departure from the APA's plain text is not warranted here. In evaluating whether to remand a procedurally deficient rule without vacating it, courts in this circuit consider two factors: "[1] the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990). When one factor favors vacatur but not the other, courts consider "the overall equities and practicality of the alternatives." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015).

The first factor favors vacatur here because the State Department's failure to provide a pre-enactment opportunity for public comment allowed it to promulgate the Passport Rule without grappling with the negative impact that the Rule would predictably have on the Diversity Visa Program participation, undermining the program's goal of "diversify[ing] the immigrant population of the United States." 84 Fed. Reg. at 25,990. Moreover, promulgating the Rule without notice and comment denied the Department an opportunity to consider alternative means of achieving its anti-fraud aims. It is impossible to know how APA-compliant notice-and-comment rulemaking could have affected the State Department's consideration of the Passport Rule. That is precisely why vacatur is "almost always" the remedy applied to deficient notice. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). Thus, Defendants' failure to promulgate the Passport Rule through notice-and-comment rulemaking was "serious[]," and there remains substantial doubt that the State Department "chose correctly" by adopting the Rule. *Int'l Union*, 920 F.2d at 967.

The second factor also favors vacatur because this is not an instance where the "egg has been scrambled" such that "there is no apparent way to restore the status quo ante." *Sugar Cane Growers Co-Op*, 289 F.3d at 97. Sadly, Defendants cannot rectify Applicant Plaintiffs' exclusion from the DV-2021 lottery, but the Passport Rule will continue to harm plaintiffs year after year, as long as it is in effect. Vacatur of the Rule will restore Plaintiffs' ability to participate in the DV-2022 (the application window for which is October 7 to November 10, 2020) and future diversity visa lotteries. And to the extent that Defendants decide to promulgate the Rule again—this time through notice-and-comment rulemaking—Plaintiffs and other members of the public will have an opportunity to participate in the process, and the Department will be forced to respond to concerns and consider whether to modify or do away with the Rule.

Finally, this is not an instance where "equity demands[] an unlawfully promulgated regulation . . . be left in place while the agency provides the proper procedural remedy." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (remanding without vacating procedurally deficient CERCLA regulations because vacatur might have "affect[ed] the EPA's ability to respond adequately to serious safety hazards"). Diversity lottery selectees must secure a passport before they can obtain a diversity visa that enables them to travel to the United States. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I) (subject to limited exception, requiring immigrants to the United States to possess "a valid unexpired passport[] or other suitable travel document" at the time of application for admission). Vacatur of the Passport Rule therefore entails no additional risk of individuals immigrating to the United States through fraud. Accordingly, the Court should vacate the Passport Rule.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court hold unlawful and vacate the Passport Rule.

Respectfully submitted,

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Dated: October 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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

AUPRÈS DE LA COUR DE DISTRICT DES ETATS-UNIS
POUR LE DISTRICT DE COLUMBIA

E.B. et al., Plaignants, c. DÉPARTEMENT D'ETAT DES ETATS-UNIS, et al., Défendeurs.	Action civile n° 19-2856-TJK

DÉCLARATION DE K.K.

Je, K.K., au meilleur de mes connaissances, soumets par les présentes cette déclaration en vertu du 28 U.S.C. § 1746 et déclare ce qui suit :

1. Je réside à Abidjan, la plus grande ville de Côte d'Ivoire.

2. J'ai vécu toute ma vie en Côte d'Ivoire et je ne me suis jamais rendu dans un autre pays.

3. J'ai 37 ans.

4. Depuis quatre ans, je travaille en tant qu'ouvrier pour une entreprise qui fabrique du plastique pour les pneus. Les huit années qui ont précédé cette période, j'ai travaillé en tant qu'ouvrier pour une compagnie de fabriquation de produits cosmétiques. Dans mon travail actuel, je reçois un salaire de base mensuel d'environ 58 dollars américains (USD). Il y a des mois où je touche plus. Cela peut aller jusqu'à 160 USD.

5. Ma soeur, la Plaignante A.K., son mari et leurs enfants vivent à New York. Hormis eux, je n'ai aucun autre membre de ma famille qui vit aux Etats-Unis.

6. Depuis 2013, j'ai fait cinq demandes dans le cadre du Programme de Visas

Diversité. J'ai raté deux fois la loterie au cours de cette période, en 2018 et celle de 2019.

7. J'avais l'intention de faire une demande en 2019 au titre du Programme de Visas Diversité mais je n'étais pas en mesure de le faire parce que le Département d'Etat Américain a adopté une nouvelle loi du Programme de Visas Diversité exigent au demandeur d'être en possession d'un passeport avant de faire la demande.

8. J'ai l'intention de faire la demande pour le Programme Visas Diversité en 2020 ainsi que les années à venir (jusqu'à ce que j'arrive à immigrer aux Etats Unis), mais je n'y arriverai pas tant que la loi de l'obtention d'un passeport reste en vigueur.

9. Je n'ai jamais eu de passeport ivoirien et je n'en ai jamais demandé. D'après mon expérience, très peu d'Ivoiriens possèdent un passeport.

10. L'exigence de passeport est un obstacle insurmontable à ma participation au Programme de Visa Diversité parce que l'acquisition d'un passeport ivoirien est très coûteux et prend beaucoup de temps. Je ne suis pas le seul à cet égard. Je connais beaucoup de personnes qui ont postulé au Programme de Visa Diversité dans le passé, y compris ma nièce, qui a présenté une demande au programme avec moi au cours des années précédentes. Tous ceux que je connais qui ont déjà postulé au Programme de Visa Diversité et qui ont l'intention de le faire à nouveau ne pourront pas tant que la condition de passeport demeure en vigueur.

11. Un passeport ivoirien coûte 80 USD.

12. En plus, la possession d'une carte d'identité nationale est un prérequis pour obtenir un passeport. Je possède une carte d'identité nationale, mais la photographie n'est pas clairement visible, ce qui rend la carte inutilisable pour les transactions officielles comme la demande d'un passeport. J'aurais donc besoin d'obtenir une carte d'identité nationale avant même de pouvoir demander un passeport ivoirien.

13. L'obtention d'une carte d'identité nationale, en soi, est un processus coûteux et long qui nécessite l'obtention de deux extraits d'acte de naissance originaux, d'une attestation de nationalité et d'un document d'identification temporaire. Chacune de ces étapes du processus impliquerait que je m'absente de mon travail. Etant donné que je travaille six jours par semaine, m'absenter serait compliqué d'un point de vue pratique et représenterait une véritable épreuve pour moi. Le coût total d'obtention des documents nécessaires pour avoir une pièce d'identité nationale est de 40 USD.

14. En tout, l'obtention d'un passeport ivoirien et d'une pièce d'identité nationale me coûterait 120 USD, soit deux fois mon salaire de base et à peine moins que ce que je touche dans un mois particulièrement bon. Ceci sans compter les frais de transport que je devrais engager tout au long du processus et le manque à gagner si je m'absente du travail. Le coût d'obtention d'un passeport ivoirien, ne serait-ce que pour présenter une demande dans le cadre du Programme de visas Diversité, est donc prohibitif car cela représenterait une véritable épreuve pour moi.

15. Je comprends que la possession d'un passeport en cours de validité soit un prérequis pour des personnes souhaitant immigrer aux Etats-Unis. Si j'étais sélectionné dans le cadre du Programme de visas Diversité et que j'avais ainsi la possibilité d'émigrer aux

Etats-Unis, je pourrais engager les frais importants qui sont nécessaires pour obtenir un passeport ivoirien. Je pourrais le faire avec l'aide de mes amis et de ma famille. Mais je ne peux pas engager de tels frais uniquement pour présenter une demande au titre du Programme de visas Diversité.

16. Mis à part la exigence de passeport du Département d'Etat américain, je suis éligible pour présenter une demande au titre du Programme de visas Diversité parce que (1) la Côte d'Ivoire est un des pays dont les ressortissants sont éligibles pour participer au programme et (2) j'ai un diplôme d'études secondaires.

Par la présente, je déclare sous peine de parjure en vertu des lois des Etats-Unis d'Amérique que ce qui précède est véridique et exact.

DATE : Le 18 Septembre 2020

K.K.

TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

E.B. et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	Civil action No. 19-2856-TJK

DECLARATION BY K.K.

I, K.K., to the best of my knowledge, hereby submit this declaration by virtue of the 28 U.S.C. § 1746 and declare the following:

1. I live in Abidjan, the largest city in Ivory Coast (Côte d'Ivoire).

2. I have lived in Ivory Coast (Côte d'Ivoire) all my life and I have never been to another country.

3. I am 37 years old.

4. For four years, I have worked as a laborer for a company that makes plastic for tires. For the eight years preceding this period, I worked as a laborer for a company manufacturing cosmetic products. In my current job, I receive a basic monthly salary of about 58 U.S. dollars (USD). Some months, I get more. It can go up to USD 160.

5. My sister, Plaintiff A.K., her husband and their children live in New York. Apart from them, I have no other family members living in the United States.

6. Since 2013, I have made five applications under the Diversity Visa Program.

I missed the lottery twice during this period, in 2018 and that of 2019.

7. I intended to apply in 2019 under the Diversity Visa Program but I was unable to do so because the U.S. Department of State adopted a new law for the Diversity Visa Program requiring the applicant to be in possession of a passport before applying.

8. I intend to apply for the Diversity Visa Program in 2020 and in future years (until I immigrate into the United States), but I have not done so as the law regarding obtaining a passport remains in force.

9. I have never had an Ivorian passport and I have never applied for one. In my experience, very few Ivorians possess a passport.

10. The requirement for a passport is an insurmountable obstacle to my participation in the Diversity Visa Program as it is very costly and time-consuming to apply for an Ivorian passport. I am not alone in this respect. I know many people who have applied for the Diversity Visa Program in the past, including my niece, who submitted an application for the program with me in previous years. Everyone I know who have already applied for the Diversity Visa Program and who intend to do so again cannot do so while the passport condition remains in force.

11. An Ivorian passport costs USD 80.

12. In addition, possessing a national ID card is a prerequisite to obtain a passport. I possess a national ID card, but the photograph is not clearly visible, which renders the card unusable for official transactions such as applying for a passport. I would therefore need to obtain a national ID card before even being able to apply for an Ivorian passport.

13. Obtaining a national ID card, in itself, is a costly and lengthy process which necessitates obtaining two original extracts of birth certificate, a certificate of nationality and a temporary ID document. Each of these stages of the process would involve me being absent from work. Given that I work six days a week, me being absent would be complicated from a practical point of view and would be a real challenge for me. The total cost of obtaining the documents needed to have a national ID document is USD 40.

14. In all, obtaining an Ivorian passport and a national ID document would cost me USD 120, being twice my basic salary and just under what I receive in an especially good month. This is without taking into account the transport costs that I would have to pay throughout the process and the loss of earnings if I am absent from work. The cost of obtaining an Ivorian passport, even just to submit an application under the Diversity Visa Program, is therefore prohibitive as it would be a real challenge for me.

15. I understand that possessing a valid passport is a prerequisite for anyone wishing to immigrate into the United States. If I were selected under the Diversity Visa Program and I therefore had the possibility of emigrating to the

United States, I could commit to the significant costs needed to obtain an Ivorian passport. I could do so with the help of my friends and my family. However, I cannot commit to such costs only to submit an application under the Diversity Visa Program.

16. Setting aside the U.S. Department of State passport requirement, I am eligible to submit an application under the Diversity Visa Program as (1) Ivory Coast (Côte d'Ivoire) is one of the countries whose nationals are eligible to take part in the program and (2) I have a high school diploma.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is truthful and accurate.

DATE: September [handwritten:] *18*, 2020

[signature]

_____

K.K.

TRANSPERFECT

DATE OF TRANSLATION:	6-Oct-20
ELECTRONIC FILE NAME:	DECLARATION OF DE K.K. Civil Action No. 19-2856-TJK
SOURCE LANGUAGE:	French
TARGET LANGUAGE:	English
TRANSPERFECT JOB ID:	US0808072

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TCert v. 4.0

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

E.B., *et al.* *Plaintiffs*, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, *Defendants*.	Civil Action No. 19-2856-TJK

DECLARATION OF A.K.

I, A.K., upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a resident of New York, NY, where I live with my husband and five children. I am a native of Ivory Coast.

2. My brother, Plaintiff K.K., is a 37-year-old resident of Abidjan, Côte d'Ivoire.

3. I miss my brother and rarely get to see him. My family and I are rooted in the United States. It is our home. Still, it is very difficult to have an ocean separating me from my brother. I therefore hope that one day, my brother will be able to immigrate to the United States.

4. To that end, I have encouraged my brother to apply for the Diversity Visa Program, which helps natives of countries like Côte d'Ivoire that are underrepresented among the U.S. immigrant population come to the United States. At my urging, K.K. has applied for the Diversity Visa Program five times since 2013 (failing to apply only in 2018 and 2019).

5. K.K. intended to apply for the Diversity Visa Program in 2019, but he was unable to do so because that year the U.S. Department of State adopted a new rule that requiresDiversity

Visa Program applicants to possess a passport before applying to the program.

6. It is my hope that my brother will once again apply to the Diversity Visa Program in 2020 and subsequent years(until he is able to immigrate to the United States), but it is my understanding that he will not be able to apply as long as the passport requirement remains in effect.

7. My brother does not possess an Ivorian passport. From what I know of my country of origin, it is very costly and time consuming to obtain an Ivorian passport. It is my understanding that my brother cannot afford the costs associated with obtaining an Ivorian passport or the documentation necessary to apply for one for the limited purpose of applying for the Diversity Visa Program.

8. As long as the passport requirement remains in effect, it will therefore deny my family and me the opportunitythrough the Diversity Visa Program to reunify with my brother.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: September 19, 2020

A.K.S.

A.K.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

E.B. *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,

Defendants.

Civil Action No. 19-2856-TJK

DECLARATION OF W.B.

I, W.B., upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a resident of Rockville, Maryland, where I live with my two children. I am a native of Ethiopia.

2. My brother, Plaintiff E.B., is a 39-year-old resident of Arba Minch. He lives there with his wife and two children.

3. I miss my brother and his family, and I rarely get to see them. My family and I are rooted in the United States. It is our home. Still, it is very difficult to have an ocean separating me from my brother and his family. I therefore hope that one day my brother and his family will be able to immigrate to the United States.

4. To that end, I have encouraged my brother to apply for the Diversity Visa Program, which helps natives of countries like Ethiopia that are underrepresented among the U.S. immigrant population come to the United States. At my urging, E.B. has applied for the Diversity Visa Program three times, most recently in 2016.

5. E.B. intended to apply for the Diversity Visa Program in 2019, but he was unable to do so because that year the U.S. Department of State adopted a new rule that requires Diversity Visa Program applicants to possess a passport before applying to the program.

6. It is my hope that my brother will once again apply to the Diversity Visa Program in 2020 and in subsequent years (until he is able to immigrate to the United States), but it is my understanding that he will be unable to apply as long as the passport requirement remains in effect.

7. My brother does not possess an Ethiopian passport. From what I know of my country of origin, it is very costly and time consuming to obtain a passport. It is my understanding that my brother would have to travel by bus to Awassa, Ethiopia, in order to apply for a passport and that the transportation costs and lost income that he would incur in order to do so, in addition to the passport fee, make it financially infeasible for my brother to obtain an Ethiopian passport for the limited purpose of applying for the Diversity Visa Program.

8. As long as the passport requirement remains in effect, it will therefore deny my family and me the opportunity through the Diversity Visa Program to reunify with my brother and his family.

I hereby declare under penalty of perjury that the foregoing is true and correct.

DATED: September 24, 2020

W.B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

E.B. et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE, et al.,

Defendants.

Civil Action No. 1:19-cv-02856-TJK

[PROPOSED] ORDER

Upon consideration of Plaintiffs' October 7, 2020, Motion for Summary Judgment, it is hereby **ORDERED** that the motion is **GRANTED**. It is further **ORDERED** that Visas: Diversity Immigrants, 84 Fed. Reg. 25,989 (June 5, 2020) (codified at 22 C.F.R. § 42.33) (the "Passport Rule") is **VACATED**.

SO ORDERED.

DATE: _____

_____
HON. TIMOTHY J. KELLY
United States District Judge