UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff v. DONALD J. TRUMP, President, et al. Defendants	)	Civil Action No. 18-cv-3636 (ELH)

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

The plaintiff, Mayor and City Council of Baltimore, Maryland ("City of Baltimore" or "City"), has presented no persuasive arguments against dismissal of this action.

The City cannot meet its burden to establish the jurisdictional requirements of standing and ripeness. The most pertinent Fourth Circuit case, *Frank Krasner Enterprises v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005), compels dismissal of this case because the City's complaint is based on potential harm that may never occur depending on how Baltimore residents and visitors react to the challenged Foreign Affairs Manual[1] guidance. The City's alternative theories of standing also fail; each of those other theories is refuted either by the text of the challenged FAM guidance or by binding Fourth Circuit or Supreme Court precedent.

The Court should thus dismiss this case for lack of subject matter jurisdiction without reaching the merits. But if the Court does not dismiss for lack of subject matter jurisdiction, then it should dismiss the case for failure to state a claim. The challenged FAM guidance is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, for several reasons: review is barred by the separation of powers; the City's grievance is outside the "zone of interests" of the applicable provisions of the Immigration and Nationality Act (INA)[2]; and the challenged FAM guidance has no legal consequences and is accordingly not "final agency action" reviewable under the APA. And the City's contentions that the challenged FAM guidance violated the notice and comment provisions of the APA or is impermissibly retroactive are based on mistaken understandings of the law.

The City's claim under the equal protection component of the Due Process Clause, U.S.

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[1] U.S. Dep't of State, Foreign Affairs Manual (2018) [*hereinafter* FAM], https://fam.state.gov/.

[2] Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

Const. amend. V, also fails to state a claim. The FAM guidance does not employ any suspect classification, and the City's complaint does not allege concrete facts that, if proved, could support a claim that the FAM guidance was motivated by an unlawful discriminatory purpose.

For all these reasons, the complaint should be dismissed for lack of subject matter jurisdiction or for failure to state a claim.

ARGUMENT

I. The City cannot meet the jurisdictional requirements of standing and ripeness.

A. The City cannot establish standing in this case because it does not allege any direct injury to itself.

The City cannot meet the jurisdictional requirement of standing because it has not suffered any harm from the challenged FAM guidance. The City's complaint describes only potential harm that could befall the City depending on how Baltimore residents and visitors react to the guidance. That is not enough to meet the requirements of Article III standing.

The City asserts that it is injured by the FAM guidance because Baltimore residents and visitors will choose not to avail themselves of needed social services for fear that it will endanger future visa applications, and those choices, in turn, will cause social problems that ultimately impose costs on the City. As explained in the defendants' first brief, *see* Defs.' Mem. 15–20, this is not a valid basis for standing, for two major reasons: The harm the City fears is merely "'conjectural' or 'hypothetical,'" not "actual or imminent," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The harm also is not "fairly traceable" to the FAM guidance or redressable by a judicial order, because it depends on the independent choices of Baltimore residents and visitors.

The defendants' first memorandum discussed the most pertinent case from the Fourth Circuit, *Frank Krasner Enterprises v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005), in which the Fourth Circuit held that a gun-show promoter lacked standing to challenge a county

law that denied public funding to exhibition venues that displayed or sold guns. *See* Mem. in Supp. of Mot. to Dismiss for Lack of Subject Matter Jurisdiction or for Failure to State a Claim (Defs.' Mem.) 16–17, ECF No. 17. The plaintiff in *Frank Krasner Enterprises* presented a stronger case for tracing its injury to the challenged Government action than the City presents here—there, the court found that it was clear an exhibition venue had cut off its dealings with the plaintiff in response to the challenged county law. And yet the Fourth Circuit still found that the plaintiff lacked standing. *See* Defs.' Mem. 16–17.

The City argues that *Frank Krasner Enterprises* is not apposite, but its arguments for distinguishing the case collapse under scrutiny. The City points to a case from outside this Circuit, *Tozzi v. U.S. Department of Health and Human Services*, 271 F.3d 301 (D.C. Cir. 2001), in which the D.C. Circuit held that a plaintiff may have standing when the action of the defendant is a "substantial factor" leading to the plaintiff's injury. Pl.'s Mem. 19. The "substantial factor" concept has never been adopted by the Fourth Circuit, and it is at odds with *Frank Krasner Enterprises*—the court in *Frank Krasner Enterprises* found that the challenged county law was not merely a "substantial factor" but an essential factor leading to the harm suffered by the plaintiff. *See Frank Krasner Enters.*, 401 F.3d at 232–33, 236 (finding it was clear that the third party's decision to end its business relationship with the plaintiff was a response to the challenged county law). Yet that was still not sufficient to establish standing.

Moreover, in this case the City could not establish standing even under D.C. Circuit law. The D.C. Circuit has explained that *Tozzi* reflects an uncommon exception. In *Tozzi*, a manufacturer whose products released dioxin challenged Government action that classified dioxin as a "known carcinogen." *Id.* at 306–07. Even though the Government action did not require the manufacturer to change its conduct, the court found that there was "little doubt" that

the "inherently pejorative and damaging" label of "carcinogen" would hurt the manufacturer's business interests. *Id.* at 309. There are no comparable circumstances here. And in less compelling circumstances, the D.C. Circuit has found that possible harm from third parties' responses to Government action was not enough to establish standing. For example, in *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), supporters of collegiate men's wrestling programs sought to challenge antidiscrimination regulations that the plaintiffs contended had led colleges to reduce support for men's wrestling. The court found that the plaintiffs lacked standing, since it was only "speculation" to assume that the colleges' decisions had been driven by the regulations, and that those decisions would be reversed if the regulations were held invalid. *See id.* at 939–40. This case is more similar to *National Wrestling Coaches Ass'n* than to *Tozzi.* It is only speculation to assume that the challenged guidance will lead Baltimore residents and visitors to act in a way that brings harm to the City, or that a ruling for the City would make Baltimore residents and visitors more likely to act in ways that avoid harm to the City.

The City also suggests that *Frank Krasner Enterprises* is distinguishable because the harm to the plaintiff in that case was "several steps removed" from the challenged county ordinance. Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss (Pl.'s Mem.) 20, ECF No. 25. But in this case, any harm to the City is plainly "several steps removed" from the challenged FAM guidance. The City is speculating that hypothetical Baltimore residents who are not U.S. citizens will learn about the 2018 revisions to the FAM guidance and, because of those revisions, will choose not to accept social services that they need, and that they would have accepted under the earlier FAM guidance. Those individuals' decisions to go without assistance, the City speculates, will not only harm those individuals personally but will ultimately impose financial costs or

other harm on the City. That is an even more tenuous chain of speculation than the plaintiff presented in *Frank Krasner Enterprises*, and it is not an adequate basis for standing.

The City also cites *Carter v. Fleming*, 879 F.3d 132 (4th Cir. 2018), which explained in a parenthetical that the "redressability" component of standing may be satisfied when "the court's decision would reduce 'to some extent' plaintiffs' risk of additional injury." *See* Pl.'s Mem. 20. *Carter* does not contradict *Frank Krasner Enterprises.* The Fourth Circuit in *Carter* found that a prisoner could proceed with a religious challenge to meals offered under a prison program even though he had been suspended from that program. *See id.* at 138. The court noted that the prisoner was challenging that suspension as part of the same lawsuit and accordingly found that the plaintiff had alleged "sufficient" "prospects for meaningful redress" from his challenge to the menu. *See id.* Thus, in *Carter*, it was "likely" that the injury would be "redressed by a favorable judicial decision," *id.* at 137 (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)). In this case, it is "merely 'speculative,'" *Defs. of Wildlife*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976)), that a favorable ruling will forestall the kind of harm that the City describes in its complaint.

Sierra Club v. U.S. Department of the Interior, 899 F.3d 260 (4th Cir. 2018), *cited in* Pl.'s Mem. 13–14, 17, is also distinguishable. The Government action challenged in that case authorized third parties to engage in harmful activity that otherwise would have been prohibited. *Id.* at 284 ("Here, without NPS's grant of a right-of-way, the pipeline could not have been authorized in its currently proposed form."). In this case, no such authorization is provided to any third parties—the challenged FAM guidance does not, for example, authorize Baltimore residents and visitors to refuse City services that they otherwise would be legally required to accept. Under the challenged guidance, Baltimore residents and visitors are neither required to accept services

from the City nor prohibited from accepting services. The challenged guidance is no different from the earlier guidance in that regard.

Along similar lines, the City contends that the State Department guidance harms the City directly because it "interfere[s] with its policies and programs," Pl.'s Mem. 11, and "disrupts some of the most fundamental aspects of Baltimore's city government," Pl.'s Mem. 12. The City alternatively contends that the State Department guidance has a "determinative or coercive effect" on the actions of Baltimore residents because it "[f]orc[es] immigrants to choose between risking their status and forgoing public assistance." Pl.'s Mem. 19. These contentions simply misconstrue the challenged guidance. The challenged FAM guidance does not restrict Baltimore or anyone else from delivering social services, nor does it restrict Baltimore residents and visitors or anyone else from receiving social services. It also does not impose any penalty or other negative consequence for receiving social services—it does not direct that any person be denied a visa in any circumstance where that person would or could have been found eligible for and issued a visa under the earlier FAM guidance. Under the new guidance, as under the earlier guidance, a consular officer is instructed to weigh the "totality of circumstances" to determine whether the applicant is likely to become "primarily dependent on the U.S. Government" "for subsistence." *See* Defs.' Mem. 7–9. As explained in the defendants' first memorandum, the Court does not need to accept allegations in the City's complaint as true where they are contradicted by the text of the challenged FAM guidance. *See* Defs.' Mem. 11 n.8.

The City also cannot demonstrate injury based on its own decisions to spend resources on "analyzing" the guidance and educating city employees, residents, and visitors about the guidance, *see* Pl.'s Mem. 12–13. As explained in the defendants' first memorandum, that theory of injury is foreclosed by the Fourth Circuit's decision in *Lane v. Holder*, 703 F.3d 668 (4th Cir.

2012), and the principle that the plaintiff's claimed injury must have "a nexus to the substantive character" of the challenged Government action. Defs.' Mem. 18. Neither of the district court cases cited by the City[3] suggests that a plaintiff can establish injury based on costs associated with analyzing and educating others about the Government action they seek to challenge. To hold that a person can establish standing based on such costs would be a drastic and unwarranted departure from established principles of standing and would have absurd results. Under the City's reasoning, for example, a law professor would have standing to challenge the constitutionality of any federal statute if she spent time analyzing the statute and educating her students about it.

The City also points to statements by the Department of Homeland Security suggesting that fears of being determined likely to become a "public charge" influence individuals' decisions about whether to apply for public benefits. *See* Pl.'s Mem. 14. These statements do not support standing, for at least three major reasons. First, none of the cited statements pertains specifically to the FAM guidance that is the target of the City's challenge. The City is not challenging the entire statutory and regulatory scheme governing "public charge" determinations; it is only challenging the January 2018 revisions to the FAM guidance. Accordingly, the issue for purposes of standing is not whether the City is harmed by "public charge" policies in general; it is whether the City is harmed by the January 2018 revisions to the FAM guidance in particular.

Second, administrative agencies' views about anticipated responses to Government action are not enough by themselves to establish causation and redressability for purposes of standing.

[3] Pl.'s Mem. 16 (citing *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, Civil Action No. 1:17-cv-02148-PX, 2018 WL 6324806, at *2 n.1 (D. Md. Dec. 3, 2018), and *Action NC v. Strach*, 216 F. Supp. 3d 597, 616 (M.D.N.C. 2016)).

Speculation about how the public might react to Government action is a valid consideration for Legislative or Executive Branch action, but it is not an appropriate basis for federal court jurisdiction, which the Constitution confines to concrete "cases" and "controversies." *See United Transp. Union v. ICC*, 891 F.2d 908, 916 (D.C. Cir. 1989) ("[I]n assessing legislative judgments, courts should bear in mind that when Congress predicts that an injury is caused by a certain behavior or phenomenon and when it predicts the likely impact of legislation, it performs a task that is quite different from both the 'fairly traceable' and 'redressability' portions of the Article III standing inquiry."); *Bloomberg L.P. v. Commodity Futures Trading Comm'n*, 949 F. Supp. 2d 91, 122 (D.D.C. 2013) (noting "the important and meaningful difference between (1) the predictive judgments of an agency made to support a prophylactic regulation; and (2) the showing of a likelihood of redressability that is required by Article III to establish standing").

Third, the City's theory of standing requires additional speculative leaps beyond any that are even arguably supported by the cited Department of Homeland Security publications. The City's theory does not stop with the assumption that Baltimore residents will choose not to avail themselves of publicly funded social services because of the challenged FAM guidance. It further assumes that those persons will be not be able to meet their needs in other ways, either through their own efforts or with assistance from family, friends, or private organizations. It then assumes that those persons' decisions to forgo publicly funded social services will cause harm that later spills over and imposes financial costs or other material harm on the City itself.

The City also quotes language from *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), that "[g]eneral factual allegations of injury . . . may suffice" to establish standing. *See* Pl.'s Mem. 9 (quoting *id.* at 89–90). But neither *Liberty University* nor the Supreme Court case it quoted from, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), suggests that a court should

assume the truth of assertions about how third parties will react to Government conduct. Indeed, it was in *Lujan v. Defenders of Wildlife* that the Supreme Court instructed that "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Id.* at 562. Thus, in *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315 (4th Cir. 2002), the Fourth Circuit affirmed the district court's ruling granting the Government's motion to dismiss even though the complaint alleged in general terms that the challenged Government action had caused injury to the plaintiffs. *See* Defs.' Mem. 17–18 (discussing *id.*).

In their first memorandum, the defendants also explained that the City cannot establish standing based on its interest in protecting the health and welfare of its residents and also cannot establish standing based on injuries suffered by Baltimore residents rather than by the City. *See* Defs.' Mem. 18–20. The City has clarified that it does not seek to rely on those theories to support Article III standing. *See* Pl.'s Mem. 16 n.5. Because the City has not alleged facts establishing the required elements of injury, traceability, and redressability, it cannot establish standing, and this case should be dismissed for lack of subject matter jurisdiction.[4]

B. Even if the City met the requirements of constitutional standing, it could rely only upon its own constitutional rights and could not invoke the rights of others.

Even if the City met the requirements of constitutional standing, it could rely only upon its own constitutional rights and could not invoke the rights of others. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Warth*

[4] The defendants explained that many of the factors that prevent the City from establishing standing also prevent the City from meeting the related jurisdictional requirement of ripeness. *See* Defs.' Mem. 20. The City's arguments on ripeness are much the same as their arguments on standing, and they fail for the same reasons. *See* Pl.'s Mem. 24.

v. Seldin, 422 U.S. 490, 499 (1975))).

The City suggests that the defendants "concede" that, if the City properly alleged an injury, the jus tertii doctrine would permit the City to bring claims based on the constitutional rights of Baltimore residents. Pl.'s Mem. 17 n.5. The defendants have not made any such concession. The defendants noted in their first memorandum that it is doubtful that the City could meet its burden to demonstrate that it has a sufficiently close relationship with Baltimore residents affected by the challenged policies and that those residents are hindered in protecting their own rights. *See* Defs.' Mem. 20 n.10. And as noted in the defendants' first memorandum, it is the *City's* burden to establish standing, not the defendants' burden to disprove standing.

This case is not meaningfully different from the case cited in the defendants' first memorandum, *Kowalski v. Tesmer*, 543 U.S. 125 (2004). The Court in *Kowalski* found that even though an attorney's relationship with an existing client could support jus tertii standing, a relationship with a hypothetical future client could not. *Id.* at 130–34. The City argues that it is seeking to invoke the rights of "current residents," not future residents. Pl.'s Mem. 21. But the City does not identify any particular "current resident," and an unidentified, hypothetical current resident is not meaningfully different from an unidentified, hypothetical future resident. And the City has not explained how these hypothetical residents face greater hindrances to protecting their own rights than the hypothetical indigent criminal defendants in *Kowalski*.

C. The claims against the President should be dismissed for the reasons explained above and also because the City does not allege any facts connecting the challenged FAM guidance to any action by the President.

As explained in the defendants' first memorandum, the City must meet the requirements of standing separately with respect to each defendant. *See* Defs.' Mem. 21. The City cannot meet those requirements with respect to any of the defendants, but their case is at its weakest with respect to the claims against the President. The complaint does not allege facts linking the

challenged FAM guidance to the President other than through his overall supervision of the Executive Branch, and as discussed in the defendants' first memorandum, that is not enough to establish that any harm associated with the FAM guidance is "fairly traceable" to the President. *See* Defs.' Mem. 21. Moreover, even if the City could meet the "traceability" requirement, the "redressability" component of standing poses an additional obstacle. The challenged FAM guidance is used only by Department of State personnel, specifically, consular officers processing visa applications. An order directing the President to disregard the challenged FAM guidance would have no practical effect because the President does not have any role in applying the guidance. The claims against the President should be dismissed for lack of standing.

II. The City fails to state a claim because its Administrative Procedure Act claims are invalid and it does not allege facts supporting any constitutional claim.

A. The City cannot rely on the Administrative Procedure Act because policies relating to admission and exclusion of aliens are subject to statutory judicial review only when affirmatively authorized by Congress.

As explained in the defendants' first memorandum, the City cannot proceed with claims under the Administrative Procedure Act because the separation of powers bars statutory challenges to policy decisions relating to the admission and exclusion of aliens except in situations where Congress has affirmatively authorized review. *See* Defs.' Mem. 23–24.

None of the passages the City cites from *Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787 (1977), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); or *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), *see* Pl.'s Mem. 26, held that a statutory challenge concerning entry of aliens into the United States can proceed in the absence of affirmative authorization from Congress. And the nonbinding cases cited in the City's brief did not consider the precise argument presented in this case. The Fifth Circuit decision in *Mulligan v. Schultz*, 848 F.2d 655 (5th Cir. 1988), considered only whether the plaintiffs' claims were barred by the doctrine of

consular nonreviewability. *See id.* at 657. The defendants are not relying on the doctrine of consular nonreviewability, which is related to, but narrower than, the broader separation-of-powers principle the defendants are relying on in this case. As for the District of Columbia decision in *National Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017), the court in that case considered only whether the plaintiffs had Article III standing to challenge certain parole determinations, not whether the separation of powers barred statutory review. *See id.* at 12 (rejecting the Government's argument in part because the cases cited by the Government related to "justiciability (rather than standing)"). The City's claims are not reviewable under the Administrative Procedure Act for the reasons explained in the defendants' first memorandum.

B. The City does not state valid claims under the Administrative Procedure Act because the City is not within the zone of interests of the provisions of the Immigration and Nationality Act governing visa applications.

The City of Baltimore also cannot establish that its grievance falls within the "zone of interests" of the provisions of the Immigration and Nationality Act governing visa applications. As explained in the defendants' first memorandum, those provisions were not designed to protect any interest a city government might have in ensuring that its residents accept public benefits when they need them. *See* Defs.' Mem. 24–26.

The City's memorandum relies on *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016), and *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam), *rev'd on other grounds*, 138 S. Ct. 2392 (2018), *see* Pl.'s Mem. 22–23, but as the defendants explained in their first memorandum, neither case supports the City. The City's arguments simply misunderstand the zone of interests test.

As the defendants explained, the zone of interests test does not turn exclusively on the identity of the plaintiff; it focuses on the specific "grievance" presented by the plaintiff. So even if a city government were to satisfy the "zone of interests" test in one lawsuit, it still might not

satisfy the test in a different lawsuit in which it relies on the same statutory provisions but presents a different "grievance." Also, to discern the relevant "zone of interests," a court does not consider the purposes of the statute as a whole. Instead, it focuses more narrowly on the "particular provision of law upon which the plaintiff relies," *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997).

In this case, the City's "grievance" is that individuals in Baltimore might be deterred from obtaining publicly funded social services for fear of endangering a future visa application. The specific provisions of law on which the plaintiff relies are the provisions of the INA that govern visa applications. The City has not pointed to any indication that Congress tailored these provisions of the INA to encourage individuals in the United States to obtain publicly funded social services when they need them. And while the City argues that the applicable provisions of the INA "recogniz[e] the benefit that immigrants can provide if they are allowed to become fully functioning members of American society" and "that immigrants can contribute to local communities even if they have previously accepted public benefits," Pl.'s Mem. 22, the provisions that the City cites, 8 U.S.C. §§ 1153, 1182, 1183a, 1184, do not line up with that description, and they certainly do not reflect a concern for the interests of a city government seeking more permissive enforcement of the "public charge" provisions. The City's interest in encouraging residents and visitors to avail themselves of needed social services is "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." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Because the City's grievance is not within the zone of interests of the relevant provisions of the INA, the City cannot rely on the Administrative Procedure Act.

C. The challenged FAM guidance does not alter legal rights or obligations and thus is not "final agency action" subject to judicial review under the Administrative Procedure Act.

The challenged FAM guidance is not "final agency action" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704, because it is not an action "by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). The FAM guidance simply instructs consular officers on how to apply the applicable statute and regulations; it does not have any legal effect of its own.

The City argues that the revised FAM guidance has "legal consequences" because it eliminated a "safe harbor" previously available to visa applicants who received noncash public benefits. *See* Pl.'s Mem. 28–29, 38. That simply misinterprets the earlier guidance—the earlier guidance did not establish any "safe harbor." Persons who accepted noncash public benefits never had any assurance that they would not be denied visas on public-charge grounds. Such persons could have been determined likely to become "public charges" based on factors such as their health or financial condition. In many cases these may have been the same factors that led them to apply for the public benefits or made them eligible for the public benefits. Thus, this case is fundamentally different from *Hawkes Co.* and the other cases cited in the City's opposition. In those cases, the challenged agency action determined whether the plaintiff was subject to regulation or not. *See Hawkes Co.*, 136 S. Ct. at 1814 (holding that jurisdictional determinations by the Army Corps of Engineers had legal consequences because they determined whether a property owner would be subject to agency enforcement proceedings and affected the potential scope of civil liability); *Frozen Food Express v. United States*, 351 U.S. 40, 44–45 (1956) (reasoning that an agency order had legal consequences because it determined which activities were subject to regulation and which were exempt); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d

1023, 1028–32 (D.C. Cir. 2016) (holding that an agency letter had legal consequences because, upon having received the letter, the recipient would be subject to penalties for a "willful" violation of the statute). The FAM guidance does no such thing.

The City also argues that visa denials on public-charge grounds appear to have become more frequent after the guidance was issued. But as noted in the defendants' first brief, that kind of practical consequence is not the same as a "legal" consequence. In *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992), the court noted that the adoption of a wetlands identification manual had "resulted in a significant increase in lands identified as wetlands" compared to earlier agency manuals. *Ellen*, 961 F.2d at 465. The court nevertheless found that the wetlands identification manual was interpretive and not substantive in nature. *Id.* at 466; *see also Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) ("[T]he mere fact that [an interpretive] rule may have a substantial impact 'does not transform it into a legislative rule.'" (second alteration in original) (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987))).

The challenged FAM guidance in this case is like other interpretive rules in that it "derive[s] 'from an existing [statute or regulation] whose meaning . . . logically justifies the proposition,'" *Children's Hosp. of the King's Daughters*, 896 F.3d 615, 622 (4th Cir. 2018) (second alteration in original) (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014)). The applicable statutory provision, 8 U.S.C. § 1182(a)(4), "logically justifies" the guidance such that the guidance can be said to be "interpreting" the requirements of the statute. *See Cent. Tex. Tel. Coop.*, 402 F.3d at 212 (explaining that the point of the analysis is to determine whether the policy is "interpreting something").

The City notes that a statement of policy does not necessarily qualify as an interpretive rule solely because an agency has labeled it "guidance" or has published it in a form traditionally

treated as guidance. *See* Pl.'s Mem. 32. The Government does not disagree. But it is also true that, in assessing whether a rule is interpretive, a court should consider the agency's "intent in authoring it" and "its context." *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 208 (4th Cir. 1989). Here, the fact that the Department published its instructions in the Foreign Affairs Manual favors treating it as interpretive guidance. Another important consideration is that the previous version of 9 FAM § 302.8—the version the City is asking the Court to reinstate—also was not adopted through notice-and-comment procedures and was always treated as interpretive guidance within the agency. That weighs in favor of treating the revised guidance as interpretive as well. *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (holding that notice and comment is not required for amendment or repeal of an existing interpretive rule); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995) (holding that notice and comment was not required for issuance of a January 1990 policy statement and also was not later required for the revocation of that statement).

The City also points to cases suggesting that an interpretive rule or guidance document sometimes can be subject to judicial review under the Administrative Procedure Act. *See* Pl.'s Mem. 33–34. But as the City acknowledges, the court in each of these cases found that the agency statement in question had legal consequences and therefore qualified as final agency action under *Bennett v. Spear*, 520 U.S. 154 (1997). *See* Pl.'s Mem. 33 (stating that interpretive rules may be subject to judicial review "so long as they otherwise fulfill the *Bennett* requirements"). As the defendants have explained, in this case the challenged FAM guidance does not have any legal consequences within the meaning of *Bennett v. Spear*.

D. The defendants' motion to dismiss presented grounds for dismissal of all the City's claims under the Administrative Procedure Act.

The City's opposition memorandum states that the "Defendants' motion to dismiss only

challenges Baltimore's notice and comment and retroactivity claims," Pl.'s Mem. 25 n.7; *see also* Pl.'s Mem. 34, and does not challenge their claim that the FAM guidance is "arbitrary" and "capricious" under § 706 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The City is incorrect—the defendants' motion to dismiss seeks dismissal of the entire complaint. The City's claims that the challenged FAM guidance is arbitrary and capricious under APA § 706 are subject to dismissal based on the defendants' jurisdictional arguments, *see* Defs.' Mem. 11–22 (Argument section I), as well as their arguments that judicial review under the APA is entirely unavailable, *see* Defs.' Mem. 23–31, 39 (Argument sections II.B–D, .H).

The defendants also noted that the Administrative Procedure Act does not provide a basis for a suit against the President under any circumstances. *See* Defs.' Mem. 39 (Argument section II.H). The City has not responded to that point at all.

E. The challenged FAM guidance is not subject to the notice and comment requirements of the Administrative Procedure Act, for two separate reasons.

The challenged FAM guidance is not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. *See* Defs.' Mem. 31–32.

The Administrative Procedure Act specifies that notice and comment are not required either for interpretive rules or for rules involving a "foreign affairs function." 5 U.S.C. § 553(a)(1), (b)(A). Both of these exemptions are applicable in this case. The challenged FAM guidance is interpretive for the reasons discussed above, and the processing and adjudication of visas by U.S. consular officers at U.S. embassies and consulates abroad is clearly a "foreign affairs function." *See* U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 26–27 (1947) (explaining that the foreign affairs exception applies to "most functions of the State Department," including diplomatic functions). The City does not cite any case in which a court held that notice and comment were required for rules dealing with the

processing of visa applications or any similar function. It cites only cases in which courts held that the foreign affairs exception applied and notice and comment were not required. The notice and comment requirements of the APA are likewise inapplicable in this case.

The City argues that notice and comment is desirable because it promotes good government. *See* Pl.'s Mem. 35. But the Supreme Court has emphasized that it is improper for a court to require notice and comment based on its own policy judgments when notice and comment is not required under the terms of the Administrative Procedure Act. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015).

F. The challenged FAM guidance does not have impermissible retroactive effect.

The defendants explained that the challenged FAM guidance is not impermissibly retroactive because it does not alter the past legal consequences of any past event. *See* Defs.' Mem. 32–34. *Matherly v. Andrews*, 817 F.3d 115 (4th Cir. 2016), and *Boniface v. U.S. Department of Homeland Security*, 613 F.3d 282 (D.C. Cir. 2010), demonstrate that a change in how past events will be considered in future determinations is not impermissibly retroactive.

The City argues that *Matherly* and *Boniface* are distinguishable because those cases involved consideration of past criminal convictions, rather than other kinds of past events. *See* Pl.'s Mem. 39. But the City does not point to any language within *Matherly* or *Boniface* suggesting that different rules apply with respect to criminal convictions as opposed to other events. Moreover, with respect to *Matherly*, the City's premise is simply incorrect. The civil-commitment scheme challenged in *Matherly* did not consider individuals' past criminal convictions; it considered their past conduct. *See Matherly*, 817 F.3d at 117 (explaining that the challenged scheme authorized civil commitment of persons who had "engaged or attempted to engage in sexually violent conduct or child molestation" (quoting 18 U.S.C. § 4247(a)(5))), *id.* at 120 (stating that the challenged scheme called for consideration of "prior acts" (quoting *United*

States v. Comstock, 627 F.3d 513, 523 (4th Cir. 2010))). The challenged FAM guidance is not impermissibly retroactive.

G. The City's constitutional claims should be dismissed because the City does not allege facts connecting the guidance to discriminatory intent on the part of either the Department of State or the President.

The City's complaint also does not state a claim under the equal protection component of the Due Process Clause.

The City cannot make out any claim of unconstitutional discrimination based on "national origin, nationality, income, [or] receipt of public benefits," Pl.'s Mem. 45 n.12. The defendants cited Supreme Court and Fourth Circuit precedent establishing that "income" and "receipt of public benefits" are not suspect classifications, and that "national origin" and nationality" are not suspect classifications with respect to Federal Government action related to immigration and foreign policy. *See* Defs.' Mem. 35–36. The City has not cited any contrary authority.

The City also cannot make out any claim of unconstitutional racial discrimination. The City cites alleged remarks by the President or White House staff that it believes reflect racial animus, but the City does not allege any facts that connect those alleged remarks even indirectly to the challenged FAM guidance issued by the Department of State. The City's memorandum cites several cases in which courts found that plaintiffs had pointed to circumstances that plausibly suggested that the challenged Government actions were motivated by discriminatory intent. *See* Pl.'s Mem. 43–44. But in this case there are simply no factual allegations that could support such a holding.

The defendants noted that under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), general allegations of discriminatory intent on the part of Government officials are not enough to state a claim. Defs.' Mem. 37. The City does not make any effort to distinguish *Iqbal.* Indeed, it does

not discuss *Iqbal* at all except to recognize it as a principal case on the standards applicable to a motion to dismiss, *see* Pl.'s Mem. 9. The defendants also pointed to *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), in which the Supreme Court rejected claims of unconstitutional discrimination for reasons that apply with equal or greater force in this case. Defs.' Mem. 38–39. The City argues that *Trump v. Hawaii* is distinguishable because it involved a claim of religious discrimination, rather than racial discrimination, and because it involved a decision that the President justified on national security grounds. *See* Pl.'s Mem. 42. Neither of these distinctions provides reason to put *Trump v. Hawaii* aside. Religious discrimination is not treated any more favorably than racial discrimination under the Constitution; both religion and race are treated as suspect classifications for purposes of an equal protection claim. *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992). And while the Court in *Trump v. Hawaii* noted that the action challenged in that case was justified on national security grounds, that only hurts the City's claim. The Court treated "the admission and exclusion of foreign nationals"—equally at issue in this case—as necessarily intertwined with national security. *See Trump v. Hawaii*, 138 S. Ct. at 2418 ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952))).

As in *Trump v. Hawaii*, there is no reason for the Court in this case to judge the FAM guidance "by reference to extrinsic statements" made by the President, *id.* at 2418, especially given that the City does not allege any facts connecting those statements to the issuance of the challenged FAM guidance by the Department of State.

CONCLUSION

For the reasons above, the Court should dismiss this case for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted.

Date: April 25, 2019

Respectfully submitted,

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