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)

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

In this case, the Mayor and City Council of Baltimore, Maryland ("City of Baltimore" or "City"), challenge revisions by the Department of State to a section of its Foreign Affairs Manual (FAM)[1] that instructs the Department's consular officers on the adjudication of U.S. visas. The FAM guidance at issue instructs consular officers on how to apply a provision of the Immigration and Nationality Act (INA) under which an applicant whom the consular officer finds is "likely . . . to become a public charge" is ineligible for a visa. 8 U.S.C. § 1182(a)(4)(A). This case should be dismissed because the City of Baltimore is not directly regulated or affected by the challenged FAM guidance; instead, the City's suit is based on its fears of potential harm that might occur—or might not occur—depending on how Baltimore residents react to the guidance. Because it does not allege any direct or immediate injury to itself, the City cannot establish the jurisdictional requirements of standing and ripeness under Article III of the Constitution, and the case must be dismissed for lack of subject matter jurisdiction. Moreover, the City's complaint fails to state a claim on which relief can be granted, because the facts alleged in the complaint could not support a valid claim under either the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, or the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V.

Article III of the Constitution limits federal courts to hearing concrete "cases and controversies" and bars them from ruling on abstract legal or political debates. A key part of this "case or controversy" limitation is the jurisdictional requirement of standing, which demands that every plaintiff seeking to challenge Government action in federal court show a concrete, personal injury that is traceable to the challenged action and will likely be remedied if the court rules in its favor. The City of Baltimore cannot establish standing in this case. The challenged

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

FAM guidance does not affect the City of Baltimore's ability to deliver benefits to residents under federal, state, or local social services programs, or its ability to receive associated funding. The challenged guidance also does not affect any Baltimore resident's ability to receive benefits under any federal, state, or local social services program. Instead, the crux of the City of Baltimore's complaint is that some Baltimore residents, considering the guidance, might choose to forgo needed social services so as to maximize their chances of being found eligible for U.S. visas in the future. Because the City of Baltimore does not allege any concrete, personal injury to itself, and instead complains only of potential harm that might occur depending on the independent actions of Baltimore residents, the City cannot establish standing, and the case should be dismissed.

For similar reasons, the case also fails the jurisdictional requirement of ripeness. The City of Baltimore has not identified any specific factual situation in which the challenged FAM guidance has been applied in a way that brought harm to the City. Again, the City's complaint simply presents a policy disagreement, not a present "case or controversy."

The City's claims against the President in particular fail the requirements of standing for an additional reason: the City does not allege any facts suggesting involvement by the President in the issuance or application of the challenged FAM guidance. Accordingly, the City cannot establish that any harm flowing from the guidance would be fairly traceable to the actions of the President or is likely to be redressed by an order against the President.

While the case should be dismissed for lack of jurisdiction, the complaint also fails to state a claim for which relief can be granted, and that provides a separate reason for dismissal.

The City cannot challenge the FAM guidance based on the Administrative Procedure Act, for three reasons: First, policies relating to admission and exclusion of aliens into the United

States are not subject to judicial review under the APA or other statutes except when Congress has affirmatively authorized review. Second, the City's claims do not fall within the "zone of interests" of the statutory provisions governing visa applications. Third, the FAM guidance does not carry any legal force of its own; rather, it only instructs Department of State personnel on how to apply the legal requirements imposed by the governing statutes and regulations. "Interpretive" guidance of this kind is not subject to judicial review under the APA.

Even if the City could rely on the APA, its claims would be invalid. The notice and comment procedures specified in the Administrative Procedure Act do not apply to interpretive guidance, and they are also inapplicable to agency rules relating to a "foreign affairs function," which includes the processing and adjudication of visa applications. And the City's claim that the FAM guidance has impermissible retroactive effect is based on a mistaken view of the law.

The City's complaint also fails to state a claim under the equal protection component of the Due Process Clause. The guidance does not rely on any suspect classification such as race, and the City does not allege any facts that plausibly suggest that the FAM guidance was motivated by animus on the part of the Department of State or the President.

The City's claims against the President also fail to state a claim, for many of the same reasons discussed above and for several additional reasons. The Administrative Procedure Act is applicable only to federal "agencies" and does not provide a basis for a suit against the President. As for the City's constitutional claim, the City has not alleged any facts connecting the FAM guidance to the President. Moreover, the separation of powers under the Constitution prevents courts from issuing injunctive relief against the President in his performance of official duties.

For the foregoing reasons, this suit should be dismissed for lack of subject matter jurisdiction or failure to state a claim.

BACKGROUND

I. Statutory and regulatory background

A. Applications for U.S. visas

Under the 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.), an alien seeking to enter the United States generally must apply for and be issued a visa.[2] There are two main types of visas: immigrant visas, for persons seeking to reside in the United States permanently, and nonimmigrant visas, for temporary stays in the United States. *See* 8 U.S.C. § 1181(a) (documentation requirements for immigrants applying for admission); *id.* § 1182(a)(7) (documentation requirements for immigrants and nonimmigrants seeking admission).

A person seeking a visa of either type generally must complete the required application and later must schedule an in-person interview before a consular officer at a U.S. embassy or consulate. *See id.* § 1202(a), (e); 22 C.F.R. § 42.62. The consular officer then makes a determination to grant or deny the visa application. *See* 8 U.S.C. § 1201(a)(1); 22 C.F.R. §§ 41.121(a), 42.71, 42.81(a). The applicant bears the burden to demonstrate "to the satisfaction of the consular officer" that he or she is eligible for the type of visa for which he or she is applying. 8 U.S.C. § 1361. No visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa" or if "the consular officer knows or has reason to believe" that the alien is ineligible. *Id.* § 1201(g); *see* 22 C.F.R. § 40.6 (explaining that the term "'reason to believe' . . . shall be considered to require a

[2] This Background section is intended to provide a broad overview of the visa application process and the applicable law as it pertains to this case, not to cover every possible circumstance contemplated under the applicable law and agency procedures. Some aspects of the visa application process contain details and exceptions not relevant to this case.

determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa").

Although a visa normally is necessary for admission, it does not guarantee admission; a visa holder still must be found admissible upon inspection at a port of entry. *See* 8 U.S.C. §§ 1201(h), 1185(d), 1225(a); *see also id.* § 1101(a)(4) (specifying that an application for a visa is distinct from an application for admission).

B. "Public charge" inadmissibility under the Immigration and Nationality Act

Part of a consular officer's determination on a visa application entails examining whether the applicant falls under one of several provisions of the INA that make certain categories of aliens ineligible for visas or admission into the United States. 8 U.S.C. § 1182(a). One of these provisions, 8 U.S.C. § 1182(a)(4), specifies that an applicant is inadmissible if the consular officer determines that the applicant is "likely" "to become a public charge":

> **(4) Public charge**
>
> **(A) In general**
>
> Any alien who, in the opinion of the consular officer at the time of application for a visa . . . is likely at any time to become a public charge is inadmissible.
>
> . . .

Id. The statute specifies that, in determining whether an individual is likely to become a public charge, the consular officer must consider, "at a minimum," five factors: the applicant's (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills. *Id.* § 1182(a)(4)(B)(i). The consular officer may also consider an "affidavit of support" provided by a relative or other sponsor who is willing to assume financial responsibility for an applicant for an immigrant visa. *Id.* § 1182(a)(4)(B)(ii). The statute does not specify that any of these factors is determinative.

A consular officer's determination of whether an applicant is likely to become a public charge is further governed by a Department of State regulation published at 22 C.F.R. § 40.41. The regulation specifies that a determination that an applicant is likely to become a public charge "must be predicated upon circumstances indicating that, notwithstanding any affidavit of support that may have been filed on the alien's behalf, the alien is likely to become a public charge after admission, or, if applicable, that the alien has failed to fulfill the affidavit of support requirement of INA 212(a)(4)(C) [8 U.S.C. § 1182(a)(4)(C)]." 22 C.F.R. § 40.41(a).

C. The Foreign Affairs Manual and the January 2018 revision to 9 FAM § 302.8-2

The Department of State maintains a detailed manual primarily intended for its personnel worldwide, the Foreign Affairs Manual (FAM). As explained within the FAM itself, the FAM "articulates official guidance, including procedures and policies, on matters relating to Department management and personnel." 18 FAM § 201.1-1(A), https://fam.state.gov/FAM/18FAM/18FAM020101.html. Together with the accompanying Foreign Affairs Handbook Series, it provides "a single, comprehensive, and authoritative source . . . for organizational structures, policies, and procedures that govern the operations of the Department [of State], the Foreign Service, and, when applicable, other Foreign Affairs agencies," *id.* § 201.1-1(B)(b)(1), in the interest of making "information available to program management and operating offices so that they can carry out their responsibilities in accordance with statutory and Executive mandates," *id.* § 201.1-1(B)(a). Directives contained within the FAM "derive their authority from statutes, Executive orders, other legal authorities, and Presidential directives, such as OMB circulars, and Department policies," *id.* § 201.1-1(A)(a), but FAM directives do not purport to establish legal requirements in their own right.

Volume 9 of the FAM provides guidance to consular officers on the adjudication of visa applications. More specifically, 9 FAM § 302.8 provides guidance on how to apply the "public charge" provisions of the INA, 8 U.S.C. § 1182(a)(4), and the applicable regulation, 22 C.F.R. § 40.41. This FAM provision was revised in January 2018. *See* U.S. Dep't of State, Update to 9 FAM 302.8 Public Charge—INA 212(A)(4) (Jan. 4, 2018), https://travel.state.gov/content/dam/visas/policy_updates/18_STATE_942.pdf (cable announcing the revision to 9 FAM § 302.8). The version that was in place before the January 2018 revision dated to August 2017.[3]

Both the January 2018 revised version and the previous version of 9 FAM § 302.8 explained that the ultimate inquiry for whether an applicant is likely to become a "public charge" is whether the applicant is likely to become "primarily dependent on the U.S. Government," including State or local government, "for subsistence," either through (a) "[r]eceipt of public cash assistance for income maintenance" or (b) "[i]nstitutionalization for long-term care at U.S. Government expense."[4] Both the current version and the previous version indicated that the consular officer must consider the five required factors identified in 8 U.S.C. § 1182(a)(4)(B)(i) (age; health; family status; assets, resources, and financial status; and education and skills) and, where applicable, an affidavit of support.[5] Both the current version and the previous version

[3] The current version of 9 FAM § 302.8 is available on the Department of State's Web site at https://fam.state.gov/FAM/09FAM/09FAM030208.html. It incorporates the January 2018 revisions as well as some later revisions not challenged in this case. A copy of the August 2017 version of 9 FAM § 302.8 is attached as Exhibit A, with sensitive information redacted. As explained further below, *see infra* pp. 10–11 & n.8, the Court may consider the text of the current and earlier revisions of 9 FAM § 302.8 in evaluating the defendants' motion to dismiss.

[4] *Compare* 9 FAM § 302.8-2(B)(1)(a)(1) (2018) *with* 9 FAM § 302.8-2(B)(1)(a)(1) (2017). *See* 9 FAM 302.8-2(B)(1)(b)(3) (2017) (noting that "public cash assistance" includes "State and local cash assistance").

[5] *Compare* 9 FAM § 302.8-2(B)(1)(a)(2), (B)(2) (2018) *with* 9 FAM § 302.8-2(B)(1)(a)(3), (B)(3) (2017).

instructed that the consular officer should ultimately make a determination based on the "totality of circumstances."[6]

The January 2018 revised version did change the instructions given to consular officers in some respects, in the interest of better aligning the guidance with the analysis required under the statute. For example, the current version explains that a consular officer may consider past receipt of certain noncash or supplemental public benefits such as the Supplemental Nutrition Assistance Program (SNAP) (formerly food stamps), Medicaid, and the Child Health Insurance Program (CHIP), "as part of the totality of the applicant's circumstances in determining whether an applicant is likely to become a public charge." 9 FAM § 302.8-2(B)(1)(d)(1) (2018). The former version had excluded consideration of "non-cash or supplemental assistance." 9 FAM § 302.8-2(B)(1)(c)(1) (2017). The current version further instructs that consular officers should consider such benefits "*only* . . . as part of the totality of . . . circumstances." 9 FAM § 302.8-2(B)(1)(d)(1) (2018) (emphasis added). Accordingly, past receipt of such benefits does not automatically warrant a determination that the applicant is likely to become a "public charge." And such benefits still do not count as "public cash assistance" for purposes of determining whether an individual is likely to become a public charge in the future. *Id.* (explaining that the identified forms of noncash public benefits "should not be considered to be benefits when examining the applicant under INA 212(a)(4) [8 U.S.C. § 1182(a)(4)], and may only be considered as part of the totality of the applicant's circumstances").

The current version also instructs consular officers that, as part of the analysis of an applicant's assets, resources, and financial status, receipt of public benefits by family members

[6] *Compare* 9 FAM § 302.8-2(B)(1)(a)(2), (B)(2), (B)(3)(a) (2018) *with* 9 FAM § 302.8-2(B)(1)(a)(2), (B)(2)(a), (B)(3) (2017).

of an applicant is "relevant to determining whether the applicant is likely to become a public charge in the future," though it also emphasizes that "the determination must be made on the present circumstances." 9 FAM § 302.8-2(B)(2)(f)(1)(b)(i) (2018). The current version also notes that receipt of public benefits by a dependent family member of the applicant "is a heavily negative factor in the totality of circumstances unless the applicant can demonstrate that his or her prospective income and assets with the income and assets of the others in the family will be sufficient for the family to overcome the poverty income guideline for the family." *Id.* § 302.8-2(B)(2)(f)(2)(b)(ii). The earlier version of the FAM had instructed consular officers to consider "[p]ast or current receipt of cash benefits for income maintenance by a family member of the visa applicant . . . only when such benefits also constitute(d) the primary means of subsistence of the applicant." 9 FAM § 302.8-2(B)(3)(b)(1) (2017).

With respect to affidavits of support, the January 2018 revised version instructs that a properly filed affidavit, in a case where an affidavit is required, "is a positive factor," but still must be considered along with all other factors "in the totality of the circumstances." 9 FAM § 302.8-2(B)(2)(a)(3) (2018). The earlier version of the FAM instructed that such an affidavit "should normally be considered sufficient to meet the INA 212(a)(4) [8 U.S.C. § 1182(a)(4)] requirements and satisfy the 'totality of the circumstances' analysis," though it also noted that other factors could lead to a different result "in an unusual case." 9 FAM § 302.8-2(B)(3)(a)(2) (2017); *see also id.* § 302.8-2(B)(2)(c).

II. Proceedings in this case

The plaintiff in this case is the Mayor and City Council of Baltimore, Maryland. The City of Baltimore challenges the January 2018 revisions to 9 FAM § 302.8, raising claims under the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, and the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, and

seeking declaratory and injunctive relief against the President, the Department of State, and the Secretary of State. *See* Compl. for Declaratory and Injunctive Relief ¶¶ 171–197 and at 70–71, ECF No. 1 (Claims for Relief and Request for Relief).[7]

The plaintiff's complaint also extensively discusses a proposed rule published by the Department of Homeland Security in October 2018, Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018), *discussed in* Compl. ¶¶ 83–91. However, the City of Baltimore does not assert any claims in this action directed at the Department of Homeland Security or its rulemaking process, which has not yet been completed. Instead, it appears the complaint challenges only the FAM guidance published by the Department of State. *See* Compl. ¶¶ 171–197 and at 70–71 (Claims for Relief and Request for Relief).

[7] The Court's February 22, 2019, Memorandum to Counsel, ECF No. 15, questioned why the defendants had not yet responded to the complaint given that the City indicated that it had corrected any defect in service on the U.S. Attorney by December 20, 2018. In their January 16, 2019, filing, Defs.' Mot. for a Stay in Light of Lapse of Appropriations, ECF No. 12, the defendants noted that Government attorneys were generally prohibited from working because of the lapse in Government appropriations, and the Government had not yet confirmed whether the City had properly served the U.S. Attorney under Rule 4(i)(1)(A) of the Federal Rules of Civil Procedure. After that filing, the Government's counsel inquired and was informed that the City's corrective mailing had been received December 26, 2018. Based on that information, the Government planned to respond to the complaint by February 25, 2019. The City's counsel later informed the Government's counsel that the mailing received December 26, 2018, was in fact a *third* mailing, and another mailing had been received December 20, 2018. The Government confirmed that the City's counsel was correct, but the mailing received December 20, 2018, did not meet the requirements of Rule 4(i)(1)(A)(ii), because it was not sent by "registered or certified mail." *Id*. Thus, the mailing received December 20, 2018, did not start the time for the defendants' response to the complaint.

ARGUMENT

I. The Court lacks subject matter jurisdiction because the City of Baltimore cannot show that it has suffered any injury caused by the FAM guidance.

A. Standards governing a motion to dismiss for lack of subject matter jurisdiction

"Federal courts are courts of limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994), and a plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court's exercise of jurisdiction is within the bounds of the Constitution and is authorized by statute. *See id.*

When a defendant raises issues of subject matter jurisdiction, the court may approach the jurisdictional issues in any order, but it must resolve all jurisdictional issues before it proceeds to the merits of the plaintiff's claims. *See, e.g.*, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007).

When a defendant contends in a motion to dismiss that the facts alleged in the plaintiff's complaint are insufficient on their face to establish jurisdiction, the court generally does not consider materials outside the complaint in evaluating the motion. *See Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017). However, the court may consider "documents incorporated into the complaint by reference[] and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).[8]

[8] Under these principles, the Court may consider the text of the current and earlier revisions of 9 FAM § 302.8. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (holding that a court considering a motion to dismiss can consider documents attached to the motion that are "integral to and explicitly relied on in the complaint" (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999))). And the Court does not need to assume the truth of allegations in the complaint that are contradicted by the text of the FAM guidance. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167 (4th Cir. 2016) ("When . . . the plaintiff has adopted the contents of the document, crediting the document over conflicting allegations in the complaint is proper." (citing *id.* at 233–35)).

A court's analysis of whether a complaint alleges facts sufficient to establish subject matter jurisdiction employs the same standards as an analysis of whether a complaint fails to state a claim for relief, including the requirements elucidated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See Beck*, 848 F.3d at 270. The court "accept[s] as true . . . allegations for which there is sufficient 'factual matter' to render them 'plausible on [their] face.'" *Id.* (alteration in original) (quoting *Iqbal*, 556 U.S. at 678). But the Court does not have to consider allegations that state only bare assertions or conclusions of law without supporting factual details. *See id.*; *see also Iqbal*, 556 U.S. at 678–79 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); *id.* at 681 (holding that "bare assertions" and "conclusory" allegations were "not entitled to be assumed true").

If the allegations of the complaint are not sufficient to establish subject matter jurisdiction, the case must be dismissed; the court cannot choose to defer ruling on the jurisdictional issues. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998); *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 290 (4th Cir. 2017) ("[A]t any stage of litigation, a federal court must have jurisdiction to resolve the merits of a dispute, as an absence of jurisdiction deprives a court of the power to act. . . . Jurisdiction, when questioned or when questionable, must always be determined first, as it is 'always an antecedent question.'" (quoting *Steel Co.*, 523 U.S. at 101)).

B. The jurisdictional requirements of standing and ripeness

The constitutional separation of powers, as embodied in Article III of the Constitution, restricts the subject matter jurisdiction of the federal courts to the resolution of specific "'cases' and 'controversies'" and prevents courts from taking action to address matters better suited to

legislative or executive action. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The "case or controversy" limitation gives rise to various specific doctrines that impose limits on federal court jurisdiction. *See id.* At least two particular limitations are pertinent in this case: standing and ripeness.

The requirement of "standing" demands that any plaintiff in federal court show "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). Standing entails three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (footnote omitted) (citations omitted). These requirements can be stated more succinctly as "injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (citing *id.*). The plaintiff bears the burden of establishing each of the three elements. *See Defs. of Wildlife*, 504 U.S. at 561.

When a plaintiff asserts multiple claims, the plaintiff must show that it satisfies the requirements for standing with respect to each claim independently; establishing standing for one claim in the case does not excuse the plaintiff from having to establish standing for other claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–53 (2006) (explaining that "a plaintiff must demonstrate standing for each claim he seeks to press" and rejecting the notion that establishing standing for a single claim makes it unnecessary for a plaintiff to establish standing

for other claims based on the same facts). Also, when a plaintiff asserts similar claims against multiple defendants, the plaintiff must meet the requirements of standing separately for each defendant. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (explaining that a plaintiff must separately establish standing for its claims against each defendant).

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). Ripeness depends on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 808. "[A] plaintiff's claim is not ripe for judicial review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013)). Ripeness and standing are closely related, and a plaintiff who does not allege a present injury generally cannot meet either requirement. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (recognizing that in some cases, "standing and ripeness boil down to the same question"); *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) (noting that standing and ripeness are closely related); *Maryland v. United States*, Civil Action No. ELH-18-2849, 2019 WL 410424, at *12 (D. Md. Feb. 1, 2019) (same).

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

The City of Baltimore cannot establish standing because it alleges no direct, immediate injury to itself. Instead, the City of Baltimore's complaint describes only indirect harm that hypothetically could occur—but also might never occur—depending on independent decisions made by residents of the City of Baltimore.

The City of Baltimore does not contend that the FAM guidance directly regulates the City. Indeed, the FAM guidance does not restrict the delivery of social services to Baltimore residents in any way. It does not affect any person's eligibility to participate in any federal, State, or local social services program, nor does it affect the City of Baltimore's ability to deliver services to any person.

The City appears to acknowledge this, but the City claims it is nevertheless injured by the guidance because it "deters immigrants, their family members, and their sponsors from accepting public benefits . . . for which they are legally eligible and are designed to promote public health and economic self-sufficiency." Compl. ¶ 121. The City's theory is that if Baltimore residents choose not to avail themselves of needed social services for fear that it will endanger future visa applications for themselves or their family members, that will cause social problems that ultimately impose costs on the City. Compl. ¶¶ 133–136, 161–170.

This theory does not meet the requirements of standing, for two separate but related reasons: First, the harm described does not qualify as injury under Article III because it relies on speculation about what might happen to the City depending on how Baltimore residents react to the guidance. The injury to the City is only "'conjectural' or 'hypothetical,'" not "actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 n.7 (2013) (holding that suggestions about third parties' reactions to

potential Government surveillance did not establish standing because they were primarily based on "conjecture" and did not establish injury "fairly traceable" to the challenged Government action); *South Carolina v. United States*, 912 F.3d 720, 727 (4th Cir. 2019) ("[A]n alleged harm is too 'speculative' to support Article III standing when the harm lies at the end of a 'highly attenuated chain of possibilities.'" (quoting *id.* at 410)).

Second, the harm described, if it occurs at all, will not be "fairly traceable" to the Government's actions or redressable by a judicial order, because it depends on the independent choices of Baltimore residents. The Supreme Court has explained that "when the plaintiff is not himself the object of the government action . . . he challenges, standing is . . . substantially more difficult to establish." *Defs. of Wildlife*, 504 U.S. at 562. "[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.* Tracing the plaintiff's injury to the Government action is complicated by the "unfettered choices made by independent actors not before the courts," and "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* Thus, the Supreme Court and the Fourth Circuit have frequently found that plaintiffs failed to establish standing when their injuries occurred because of how other persons responded to the challenged Government action.

A prime example is *Frank Krasner Enterprises v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005), in which a gun-show promoter sought to challenge a county law that denied public funding to venues that displayed or sold guns. An exhibition venue called the Ag Center decided that it would no longer lease space to the gun-show promoter, and the court found that it was abundantly clear that the venue's decision was a response to the county law. *See id.* at 232–33,

236. But the court nevertheless found that the gun-show promoter lacked standing because the independent decisions of the Ag Center stood "directly between the plaintiffs and the challenged conduct in a way that [broke] the causal chain." *Id.* at 236. The injury therefore was not fairly traceable to the county law, and it also would not be redressed by a favorable decision, because the court "could not compel the Ag Center to rent space" to the plaintiff or "even direct the County to subsidize the Ag Center in the future." *Id.*

The City of Baltimore's case is even weaker than the case presented in *Frank Krasner Enterprises*. The plaintiffs in *Frank Krasner Enterprises* showed that the Ag Center's actions were plainly a direct response to the county law, but the City of Baltimore has not identified any specific instance in which it has suffered harm from actions taken in response to the challenged FAM guidance. Along the same lines, the City of Baltimore cannot show that a court order would redress the harm the City fears—the Court could not compel Baltimore residents to accept social services for which they are eligible.

The Fourth Circuit has reached similar conclusions in other cases in which plaintiffs claimed they were injured by other persons' responses to Government action. In *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315 (4th Cir. 2002), the plaintiffs sought to challenge a land acquisition by the Fish and Wildlife Service. They claimed they were injured because, among other reasons, the land acquisition would prevent the construction of a needed highway project and a condominium development. *See id.* at 318–21. The court found that the plaintiffs lacked standing, noting that it was "pure conjecture to believe that" the construction projects would have proceeded if the Fish and Wildlife Service had not acquired the property. *Id.* at 322–23. And even assuming that the construction projects would have otherwise moved forward, the court found that the harm was not traceable to the Fish and Wildlife Service because the city

government and the condominium developer had independently chosen to sell the land to the Fish and Wildlife Service. *See id.* at 323–24.

Another example is *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), in which District of Columbia residents challenged federal and State laws that restricted Virginia firearms dealers from selling firearms to them in Virginia. The plaintiffs claimed they were injured in part because they had to pay transfer fees to a firearms dealer in the District of Columbia. *Id.* at 671. The Fourth Circuit held that the plaintiffs lacked standing, noting that the fees were charged by private entities and were not required by law. *See id.* at 674.

The City alternatively argues that the FAM guidance "forces Baltimore to devote time and money to adapting its programs and reaching out to immigrant communities." Compl. ¶¶ 136, 156–161. This claim of injury also cannot support standing, for two reasons. First, expenditures by the City on education or outreach efforts are the result of the City's own decisions to conduct those activities, not the result of the defendants' actions. *See Lane*, 703 F.3d at 675 (holding that expenditures by an advocacy organization did not support standing because they were the result of the organization's own budgetary choices). Second, the Supreme Court has explained that "Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986). An injury "unrelated to the subject matter of the litigation" does not qualify. *Id.* In this case, any injury associated with the City's decisions to spend funds on education or outreach do not have a "nexus to the substantive character" of the challenged guidance and cannot support standing.

The City of Baltimore also argues that it has standing because it has a special interest in protecting the health of its citizens. Compl. ¶¶ 137–39. This is not a valid basis for standing. A suit by a sovereign seeking to "protect the health and well-being" of its citizens—known as a

"parens patriae" action—"cannot be maintained against the Federal Government." *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002); *see also Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268–69 (4th Cir. 2011); *Maryland v. United States*, Civil Action No. ELH-18-2849, 2019 WL 410424, at *17 (D. Md. Feb. 1, 2019).[9] Moreover, a parens patriae action can only be brought by a sovereign such as a State government. A *city* government, such as the City of Baltimore, is not a sovereign and cannot sue as parens patriae. *Bd. of Supervisors of Fairfax Cty. v. United States*, 408 F. Supp. 556, 565–66 (E.D. Va. 1976), *appeal dismissed sub nom. Bd. of Supervisors of Fairfax Cty. v. District of Columbia*, 551 F.2d 305 (4th Cir.) (table), *and appeal dismissed sub nom. Bd. of Supervisors of Fairfax Cty. v. Levi*, 551 F.2d 305 (4th Cir. 1977) (table); *see also, e.g.*, *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) ("[Cities] cannot sue as *parens patriae* because their power is derivative and not sovereign."); *Bd. of Supervisors of Warren Cty. v. Va. Dep't of Soc. Servs.*, 731 F. Supp. 735, 741 (W.D. Va. 1990); *Warren County v. North Carolina*, 528 F. Supp. 276, 283 (E.D.N.C. 1981); *Prince George's County v. Levi*, 79 F.R.D. 1, 4 (D. Md. 1977).

The City of Baltimore's complaint also alludes to "jus tertii," a doctrine that sometimes permits a plaintiff to invoke the constitutional rights of third parties with whom it has a special relationship and who are impeded from bringing suit themselves. Compl. ¶¶ 195–197; *see generally Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). This principle does not establish standing in this case. A plaintiff seeking to rely on jus tertii must show an injury to itself—jus tertii allows a plaintiff to rely on the *rights* of other persons, but not

[9] In *Maryland*, this Court drew a distinction between actions in which a State seeks to protect its citizens from the operation of federal statutes and actions in which a State seeks to assert its own rights under federal law. *See id.* at *17. An action by a State to protect the health and well-being of its citizens would fall within the former category.

the *injuries* of other persons. *See id.* (explaining that when an "entity seeks standing to advance the constitutional rights of others," the first question is whether the litigant has "suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement"). As explained above, the City of Baltimore cannot show an injury to itself.[10]

D. For similar reasons, the City's claims are not ripe.

For similar reasons, the City's claims fail to meet the jurisdictional requirement of ripeness. "[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). The challenged FAM guidance has never been applied to the City of Baltimore, and it will never be—a city obviously is never in the position of applying for a U.S. visa. The City also has not identified any particular instance in which the guidance has been applied in a way that threatens harm to the City.

E. 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 above, all of the City's claims should be dismissed because they fail the requirements of standing and ripeness. These reasons apply to the claims against the President

[10] Even if the City of Baltimore properly alleged an injury, it is doubtful that it could rely on the rights of Baltimore residents under the jus tertii doctrine. *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 130–34 (2004) (holding that attorneys could not rely on the rights of indigent criminal defendants because the attorneys did not show they had a sufficiently close relationship with hypothetical future clients or that those clients were hindered in protecting their own rights).

just as they apply to the claims against the Secretary of State and the Department of State. A further reason to dismiss the claims against the President in particular is that the challenged guidance was issued by the Department of State and the City is not challenging any Presidential action.

A plaintiff must separately establish standing for its claims against each defendant. *See Bostic v. Schaefer*, 760 F.3d 352, 370–71 (4th Cir. 2014). Thus, even if the City's claims against the Department of State met the requirements of standing, the City would have to separately show that it has standing to assert similar claims against the President.

The City does not have standing to sue the President because the challenged guidance was issued by and is used by the Department of State, not by the President. Any injury associated with the guidance is not "fairly traceable" to the President. The fact that the President is the head of the Executive Branch is not enough to make the President a proper defendant. *Cf. Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (holding that the Governor of Virginia was not a proper defendant in an action challenging State statutes because, even though the Governor had a general duty to enforce State laws, he did not have a role in enforcing the challenged statutes in particular).

The City also points to statements allegedly made by the President that, according to the City, exhibit animus against persons from Latin American, Asian, and African countries. But discrimination counts as injury for purposes of standing only when the plaintiff explains how it has been "personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)). As discussed further below, the City does not allege facts that would show that the President's statements are connected to the challenged FAM guidance or to any action taken against the City of Baltimore. The City of Baltimore is not

directly regulated or affected by the challenged FAM guidance and thus cannot establish standing based on discriminatory treatment. Thus, the claims against the President should be dismissed.[11]

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. Standards governing a motion to dismiss for failure to state a claim

Because the City cannot show any present personal injury that satisfies the requirements of standing and ripeness, the case should be dismissed for lack of subject matter jurisdiction. But if the Court does not dismiss the case for lack of jurisdiction, then the Court should dismiss the case for failure to state a claim, because the City does not state any valid claims under the Administrative Procedure Act or the Constitution.

As explained above, a court evaluating a motion to dismiss applies the same basic analysis to determine whether the complaint adequately pleads subject matter jurisdiction and whether it adequately states a claim. The court applies the "facial plausibility requirement" elucidated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), under which the court examines whether the allegations of the complaint, "accepted as true," contain "factual content that allows the court to draw the reasonable inference" that the case establishes the elements of a valid claim. *Iqbal*, 556 U.S. at 678, *quoted in Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255–56 (4th Cir. 2009)). But the court does not have to consider allegations that state only bare assertions or conclusions of law without supporting factual details. *See supra* p. 12. If the allegations of the

[11] In another case pending in this district, another judge of this Court found that it was "extraordinarily unlikely" that claims against the President were appropriate, but nevertheless did not see any reason that would "require[] that the President be dismissed." *CASA de Md., Inc. v. Trump*, Case No.: GJH-18-845, 2018 WL 6192367, at *15 (D. Md. Nov. 28, 2018). In this case, dismissal of the claims against the President is required under the principle that the plaintiff must demonstrate standing against each defendant separately. *See Bostic*, 760 F.3d at 370–71.

complaint cannot support a valid claim for relief, the case must be dismissed; the court cannot defer ruling on the motion to permit discovery or other further proceedings. *See Iqbal*, 556 U.S. at 684–86 (holding that because the plaintiff's complaint did not allege facts sufficient to meet the "facial plausibility" standard, the plaintiff was not entitled to any discovery, even if tightly cabined).

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

The City's claims under the Administrative Procedure Act should be dismissed 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.

The APA does not authorize judicial review when judicial review is precluded by statute or agency action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a). These principles bar judicial review in this case because the Supreme Court "ha[s] long recognized the power to . . . exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). "The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Id.* at 796 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring))). Thus, there is no basis for review of the challenged FAM provisions under the APA. *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 360–62, 365–67 (4th Cir.) (Niemeyer, J., dissenting) (concluding, in light of these principles, that the APA did not permit judicial review of a Presidential Proclamation dealing with entry of aliens into the

United States), *vacated*, 138 S. Ct. 2710 (2018). *But see id.* at 277–79, 283 n.8 (Gregory, C.J., concurring) (concluding that the plaintiffs' statutory claims were not barred); *id.* at 309 (Keenan, J., concurring) (same).[12]

C. 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 cannot seek judicial review under the APA in this case because its claims do not fall within the "zone of interests" of the statutory provisions governing visa applications.

Judicial review under the APA is available only to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. This means that "a plaintiff challenging agency action under the APA must satisfy an additional . . . requirement . . . . [T]he plaintiff's grievance must fall within the 'zone of interests' to be protected or regulated by the statute or the constitutional guarantee in question." *Taubman Realty Grp. Ltd. v. Mineta*, 320 F.3d 475, 480 (4th Cir. 2003)[13]; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (tracing the requirement to 5 U.S.C. § 702).

To identify the interests protected by a statute, the court employs "traditional tools of statutory interpretation." *Lexmark Int'l, Inc.*, 134 S. Ct. at 1387. Thus, although the plaintiff does not need to point to a particular "indication of congressional purpose to benefit the would-be

[12] The Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), did not rule on whether the separation of powers barred statutory claims relating to exclusion of aliens. *See id.* at 2407. The Court rejected the plaintiffs' statutory claims on the merits, which made it unnecessary to decide whether the claims were otherwise barred. *See id.* at 2407, 2415.

[13] This requirement is described in *Taubman* and other past cases as a "prudential standing" requirement, *id.*, but the Supreme Court has explained more recently that the "zone of interests" requirement simply follows from the need for a plaintiff to show that its claim is supported by a statute and thus is a merits issue, not a jurisdictional issue. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

plaintiff," *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987), the language, structure, stated purpose, and legislative history of the statute all may be pertinent. The analysis focuses not on the purpose of the statute as a whole but on the "particular provision of law upon which the plaintiff relies." *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997).

The particular "grievance" underlying this case, according to the City, is the City's desire to ensure that its residents take advantage of available social services when needed. There is no indication that the provisions of the Immigration and Nationality Act were designed to protect or even consider interests of this type.

The City of Baltimore argues that *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), suggest that the City of Baltimore's claims are within the zone of interests of the applicable INA provisions. *See* Compl. ¶ 178. The City of Baltimore is misreading these cases.

In *Texas*, the Fifth Circuit reasoned that *State* government plaintiffs met the zone-of-interests requirement in light of a provision of the INA, 8 U.S.C. § 1621(d), that permits States to control whether aliens unlawfully present in the United States can receive State or local public benefits. *Texas*, 809 F.3d at 163 ("Congress has explicitly allowed *states* to deny public benefits to illegal aliens." (emphasis added)); *id.* at 149 (discussing 8 U.S.C. § 1621(d)). The INA does not afford the same authority to *city* governments such as the City of Baltimore. *See* 8 U.S.C. § 1621(d). Moreover, the specific "grievance" at issue in *Texas* was different in kind from the City of Baltimore's grievance in this case. The State plaintiffs in *Texas* challenged regulations pertaining to aliens unlawfully present in the United States based on a fear that those aliens would impose costs on the State. *See Texas*, 809 F.3d at 163. This case does not deal with

regulations pertaining to aliens unlawfully present in the United States, and the suit is based on the City's desire to ensure that City residents avail themselves of needed social services when they are eligible. The INA does not reflect a concern for any interest of this kind.

Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017) (per curiam), likewise does not support the City of Baltimore's assertion that "governments fall within the INA's zone of interests," Compl. ¶ 178. In *Hawaii*, the Ninth Circuit found that Hawaii fell within the zone of interests of INA provisions relating to admission of students, scholars, and teachers. *See Hawaii*, 878 F.3d at 682. But the ruling was not based on Hawaii's status as a *government*; it was based on Hawaii's status as the operator of the University of Hawai'i system. *See id*. The City of Baltimore does not present a similar "grievance" in this case. Also, the persuasive weight of *Hawaii v. Trump* is limited given that the decision was reversed by the Supreme Court on other grounds.

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

The FAM guidance does not have any legal effect of its own; it only instructs Department of State personnel on how to apply the governing statute and regulations. Because the challenged guidance does not have any independent legal effect, it does not qualify as "final agency action" under the Administrative Procedure Act and therefore is not reviewable under the APA.

The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). "[T]wo conditions . . . generally must be satisfied for agency action to be 'final' under the APA. 'First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from

which legal consequences will flow.'" *Hawkes Co.*, 136 S. Ct. at 1813 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Supreme Court and the Fourth Circuit recognize two types of agency rules: "substantive" or "legislative" rules that shift legal rights and duties, and "interpretive" or "interpretative" rules that merely clarify or explain the operation of existing rules. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203–04 (2015); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018) (explaining that interpretive rules "simply state what the administrative agency thinks the statute means" or provide "clarification or explanation of an *existing statute or rule*" (quoting *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989), and *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995))). Interpretive rules, because they do not determine rights or obligations, do not qualify as final agency action and therefore are not subject to judicial review under the Administrative Procedure Act. *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (recognizing that "interpretative rules or statements of policy generally do not qualify" as final agency action and are not subject to judicial review under the APA "because they are not finally determinative of . . . issues or rights").

In determining whether a rule is an interpretive rule, a court considers the agency's "intent in authoring it, as ascertained by an examination of the provision's language, its context, and any available extrinsic evidence." *Jerri's Ceramic Arts*, 874 F.2d at 208 (quoting *Doe v. Hampton*, 566 F.2d 265, 280–81 (D.C. Cir. 1977). In this case, these factors suggest the FAM guidance is interpretive and not substantive. The Department of State published the guidance in a form that does not carry legal force, and it intended the guidance only to clarify the agency's interpretation of the applicable statutes and regulations. As explained in the Background section

above, *see supra* p. 6, the purpose of the FAM is to instruct Department of State personnel on Department policies and procedures. The FAM provides guidance to Department personnel on how to comply with legal requirements imposed by statutes and regulations, but the FAM does not purport to carry any legal force of its own. The Ninth Circuit and the D.C. Circuit have each treated FAM directives as not carrying "force of law." *See Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (holding that a statement in the FAM interpreting a federal statute lacked "force of law"); *Miller v. Clinton*, 687 F.3d 1332, 1341 (D.C. Cir. 2012) (describing the Foreign Affairs Manual as a "more informal document[]" in contrast to "rules or regulations" carrying "force of law"); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (noting that "interpretations contained in policy statements, agency manuals, and enforcement guidelines" generally "lack the force of law"), *cited in Scales*, 232 F.3d at 1166. A document that lacks "force of law" is an interpretive rule. *United States v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992) (explaining that "force of law" distinguishes a substantive or legislative rule from an interpretive rule); *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 207 (same).

Volume 9 of the FAM is no different from the rest of the FAM in this regard. The introductory sections to 9 FAM explain that the volume provides "directives and guidance for Department of State personnel based on statutes, regulations, Executive Orders, Presidential directives, OMB circulars and other sources," with the intent of "providing consular officers with the guidance needed to make informed decisions based on U.S. immigration law and regulations." 9 FAM § 101.1-1, https://fam.state.gov/FAM/09FAM/09FAM010101.html. One of these introductory sections, titled "9 FAM: Relationship to Statutes and Regulations," explains that the applicable legal rules are supplied by the Immigration and Nationality Act, other federal statutes, and regulations published in Title 22 of the Code of Federal Regulations. *Id.* § 101.1-2.

The provisions of 9 FAM merely draw on those statutes and regulations and do not establish legal rules in their own right. They "provide[] additional guidance outlining specific policies and procedural information regarding the issuance of visas." *Id.* § 101.1-2(b); *see also* 9 FAM § 302.8-1 (identifying the legal authorities applicable to "public charge" determinations).

The Fourth Circuit has held that the contents of agency manuals like the FAM are interpretive rules. The case most similar to this case is *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992). *Ellen* dealt with a manual issued by four federal agencies that established a "uniform national procedure" for determining whether a particular area qualified as "wetlands" under the governing regulations. *See id.* at 464–65. The court concluded that the manual was interpretive in nature, observing that "the four agencies that promulgated the *1989 Manual* intended it to be only an interpretive guide to the regulatory definition of wetlands, primarily for the use of agency personnel." *Id.* at 466. Similarly, in this case, the challenged FAM guidance was published "as an interpretive guide" to the statutory and regulatory definition of "public charge," primarily for the use of U.S. consular personnel processing visa applications.

Another similar case is *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995). The court considered a January 1990 interim rule, published in the Code of Federal Regulations, providing that aliens "may be granted asylum" if they had well-founded fears of forced abortion or sterilization in their home countries. *Id.* at 1336. The court held that the rule should be treated as an interpretive rule or a general statement of policy, not a substantive rule. *See id.* at 1341 & n.8. The court noted that the January 1990 rule "did not create a binding norm but merely provided that the Attorney General *may* grant asylum to aliens who have a well-founded fear that they will be forced to abort a pregnancy or to undergo sterilization." *Id.* at 1341. Likewise, in this case, the challenged FAM guidance does not mandate any particular result if a visa applicant or a

family member has received public benefits in the past. Instead, it only provides for receipt of public benefits to be considered as part of a broad analysis. The ultimate weighing of relevant factors, and the ultimate determination of whether the applicant is likely to become a public charge, is made by the consular officer based on the "totality of the circumstances."

In *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989), the Fourth Circuit found that a rule was substantive, and not interpretive, in part because it "altered a longstanding position." *Id.* at 208. But the court acknowledged that a rule may still qualify as an interpretive rule even if it reflects a change in the agency's interpretation. *Id.* ("Certainly this does not mean that an agency may never reconsider its interpretation of a regulation."). And later Supreme Court precedent has established even more clearly that an interpretive rule may depart from a previously adopted interpretation. *See Mortg. Bankers Ass'n*, 135 S. Ct. at 1206 (holding that an agency may issue an interpretive rule revising an earlier interpretive rule without following the notice and comment procedures required for substantive rules). The deciding factor in *Jerri's Ceramic Arts* was not that the rule represented a shift from past policy, but that the change in the rule made an immediate change to legal rights and obligations—the change to the agency's policy had the effect of banning a wide range of items that had previously been exempted from the rule. *See Jerri's Ceramic Arts*, 874 F.2d at 208. In this case, by contrast, the challenged guidance does not work any immediate change to legal rights or obligations. The current guidance does not mandate that any applicant be denied a visa on "public charge" grounds because the applicant or a family member has received public benefits, or for any other reason. In every case, the ultimate determination of whether a person is likely to become a "public charge" is still to be made by a consular officer based on the totality of circumstances.

The City of Baltimore states that the current version instructs consular officers to "consider . . . receipt of means-tested public benefits—including several non-cash benefit programs—as disqualifying, rendering an otherwise validly-filed affidavit of support irrelevant." Compl. ¶ 93. But that statement is mistaken in at least two major ways. Under the January 2018 guidance, past or present receipt of either cash or noncash benefits is not "disqualifying" for any applicant; it is simply a factor in a consular officer's analysis of the totality of circumstances. *See supra* pp. 8–9. And past or present receipt of either cash or noncash benefits does not "render[] an . . . affidavit of support irrelevant"; a proper affidavit of support is considered a "positive factor" regardless of the applicant's receipt of public benefits. *See supra* p. 9.

It is true that application of the new guidance, compared to the earlier guidance, could potentially lead to individuals being denied visas on "public charge" grounds more frequently. But that does not mean the guidance should be considered substantive rather than interpretive. In *Ellen*, the court noted that the wetlands identification manual had "resulted in a significant increase in lands identified as wetlands" compared to earlier manuals used by the EPA and the Army Corps of Engineers. *Ellen*, 961 F.2d at 465. The court nevertheless found that the wetlands identification manual was interpretive and not substantive.

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

The City of Baltimore cannot state a claim based on the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, *see* Compl. ¶¶ 183–186. The notice and comment requirements of the APA are not applicable to interpretive rules and also are not applicable to rules pertaining to a "foreign affairs function" such as the issuance of visas.

As explained above, the challenged FAM guidance is an interpretive rule that has no legal force of its own and instead merely clarifies how the Department of State interprets the

applicable statute and regulation for the purpose of advising its consular officers and other personnel. Notice and comment is not required for interpretive rules. *See* 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).

In addition, notice and comment are not required for rules that pertain to a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). *See Malek-Marzban v. INS*, 653 F.2d 113, 115–16 (4th Cir. 1981) (holding that an amendment to INS regulations pertaining to deportation was not subject to notice and comment because it involved a foreign affairs function). The Attorney General's Manual on the Administrative Procedure Act,[14] published in 1947, explains that the foreign affairs exception is a "broad" exception "applicable to most functions of the State Department." *Id.* at 26–27. The Supreme Court has held that the Attorney General's Manual is entitled to deference given that the Department of Justice was "heavily involved in the legislative process" that produced the Administrative Procedure Act. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 546 (1978).

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

The challenged FAM guidance also does not have impermissible retroactive effect. The FAM guidance does not attach new legal consequences to past events; rather, it allows for consideration of past events as a factor in visa determinations to be made in the future. That is not the kind of retroactive effect that is prohibited under the Administrative Procedure Act.

As explained above, the guidance does not have legal force of its own; it only instructs Department of State personnel on how to apply the legal requirements imposed by the governing statutes and regulations. Thus, the guidance has no legal effect at all, retroactive or otherwise.

[14] U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act (1947).

But even if the guidance could be viewed as imposing a new substantive rule, it would not have impermissible retroactive effect.

An administrative agency generally may not issue rules with retroactive effect unless specifically authorized by statute. An agency therefore generally cannot issue a rule that "alter[s] the *past* legal consequences of past actions." *Celtronix Telemetry, Inc., v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring)). But a rule that alters the "*future* effect" of past actions is not considered retroactive. *Id.*; *accord Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 10–11 (D.C. Cir. 2006). For example, in *Boniface v. U.S. Department of Homeland Security*, 613 F.3d 282 (D.C. Cir. 2010), the D.C. Circuit considered a regulation that called for consideration of past criminal convictions as part of a determination of whether a driver should be licensed to transport hazardous materials. The court held that even though the regulation drew on events predating the regulation, the regulation was not impermissibly retroactive. *See id.* at 288. The court noted that, under the regulation, a past conviction did not automatically disqualify a driver from obtaining a hazardous-materials endorsement; instead, it only created a rebuttable presumption that the driver posed an unacceptable risk. *Id.*

In *Matherly v. Andrews*, 817 F.3d 115 (4th Cir. 2016), the Fourth Circuit applied a similar analysis in considering whether a statute was retroactive. *Cf. Celtronix*, 272 F.3d at 588 (noting that the analysis of whether a statute is retroactive is similar to the analysis of whether a rule is retroactive under the APA). The statute called for consideration of past conduct in a determination of whether a person should be committed as a "sexually dangerous person." *Matherly*, 817 F.3d at 117, 120. The court held that the statute was not retroactive, because it "'use[d]' prior acts 'solely for evidentiary purposes' to support a finding of a person's mental

abnormality or future dangerousness." *Id.* at 119–20 (quoting *United States v. Comstock*, 627 F.3d 513, 523 (4th Cir. 2010)).

Similarly, in this case, the challenged guidance does not attach immediate legal consequences to a visa applicant's past receipt of social services; instead, it calls for consideration of past receipt of social services as part of a broader analysis of whether a visa applicant is likely to become a public charge. For the same reasons discussed by the courts in *Boniface* and *Matherly*, the 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 constitutional claims should be dismissed because the City has not alleged facts that could establish that the challenged FAM guidance was motivated by racial animus on the part of the Department of State or the President.

Equal protection principles apply to the Federal Government through the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that although the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, does not apply to the Federal Government, equal protection principles are applicable to the Federal Government through the Due Process Clause). The Due Process Clause is part of the Fifth Amendment, and the Supreme Court has held that the Fifth Amendment generally does not apply to aliens outside the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). It has also held more specifically that aliens seeking entry into the United States cannot assert constitutional rights. *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Thus, equal protection principles usually are not applicable to Federal Government

action pertaining to the adjudication of visa applications.[15] But even if there were some way to bring a constitutional claim in this case, the facts alleged in the complaint still could not support an equal protection claim.

As the Supreme Court explained in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313. The City of Baltimore argues that the FAM guidance violates the equal protection component of the Due Process Clause because it discriminates based on "race, national origin, nationality, income, or receipt of public benefits," Compl. ¶ 189. The City does not state a valid claim under any of these theories.

First, "income[] or receipt of public benefits," Compl. ¶¶ 189, 191, is not a suspect classification under equal protection principles. *See Schweiker v. Wilson*, 450 U.S. 221, 232–34 (1981) (holding that heightened scrutiny did not apply to a regulation that classified residents in public institutions based on their receipt of Medicaid benefits).

In the context of Federal Government action related to immigration and foreign policy, classifications based on "nationality" and "national origin" likewise are not subject to heightened scrutiny under equal protection principles. The Supreme Court has explained that the Federal Government may draw classifications based on alienage or nationality for purposes related to foreign policy or immigration policy. *Verdugo-Urquidez*, 494 U.S. at 273 (holding that

[15] Lawful permanent residents—"green card" holders—may have constitutional protections in connection with entry into the United States. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982). But lawful permanent residents typically do not need to apply for visas for entry. *See* 8 U.S.C. § 1101(a)(13)(C) (specifying that lawful permanent residents generally are not "regarded as seeking . . . admission into the United States").

limitations on application of the Fourth Amendment to search and seizure of foreign property owned by a nonresident alien did not violate the equal protection component of the Fifth Amendment); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"); *INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (holding that revocation of naturalization authority held by an American Vice Consul in Manila could not have amounted to impermissible discrimination against nationals of the Phillippines seeking naturalization based on their service in the U.S. armed forces); *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) ("With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, [and] to the federal prerogative to control access to the United States . . . ."); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) ("When the federal government classifies aliens on the basis of nationality, the classification must be sustained if it has a rational basis.").[16] In any event, the challenged FAM guidance does not prescribe different standards to visa applicants based on nationality.

Race is a suspect classification, but the challenged FAM guidance does not draw distinctions based on race. Even if the City could show that the guidance will have some known or predictable disproportionate impact on persons of different races, there would still be no basis for an equal protection claim. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (holding that disproportionate impact on a protected class is not enough to

[16] Equal protection principles may impose greater restrictions on State Government action that draws lines based on nationality or national origin, *see, e.g.*, *Plyler*, 457 U.S. at 219 n.19, and on Federal Government action that draws lines based on nationality or national origin in contexts other than immigration and foreign policy, *see, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (repudiating the decision in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the forcible relocation of U.S. citizens based on their Japanese ancestry).

demonstrate a violation of equal protection). An equal protection claim requires "more than intent as volition or intent as awareness of consequences." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Government action implicates equal protection only when "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*; *see also Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353–54 (D.C. Cir. 1997) (rejecting an equal protection claim despite acknowledging that family members of Vietnamese and Laotian migrants "will more often than not be of Vietnamese or Laotian origins").

The City of Baltimore does not allege any facts that plausibly suggest that the Department of State issued the guidance "'because of,' not merely 'in spite of,' . . . its adverse effects upon an identifiable [racial] group." The City's general allegations that the guidance is motivated by racial animus are not enough to state an equal protection claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680–83 (2009) (holding that general allegations of discriminatory intent on the part of government officials did not state a claim when not supported by specific facts).

The City of Baltimore contends that racial animus is evident in a number of statements allegedly made by the President.[17] That contention is meritless because many of the alleged statements are simple statements about policy. *See, e.g.*, Compl. ¶ 71.e ("ObamaCare gives free insurance to illegal immigrants."); Compl. ¶ 71.p ("Current immigration policy imposes as much as $300 billion annually in net fiscal costs on U.S. taxpayers."). Moreover, the City does not

[17] For purposes of the present motion to dismiss, the Court should simply assume the truth of the allegations of the complaint—that is, the Court should assume that the President made all the statements attributed to him in the complaint. The Government notes, however, that if this case is not dismissed, it may dispute the allegations of the complaint at a later stage.

allege any facts drawing a connection between the President's statements and the guidance issued by the Department of State.

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the plaintiffs challenged a Proclamation by the President that placed entry restrictions on the nationals of eight countries. *Id.* at 2404. The plaintiffs argued that statements made by the President undercut the stated reasons for the Order and revealed "that the primary purpose of the Proclamation was religious animus" against Muslims. *Id.* at 2417. The Supreme Court rejected the claims for reasons that apply with equal or greater force in this case.

First, the Court in *Trump v. Hawaii* noted that the Proclamation dealt with the admission and exclusion of foreign nationals, "a matter within the core of executive responsibility." *Id.* at 2418. The challenged FAM guidance deals with the same general subject matter—entry of foreign nationals into the United States.

Second, the Court observed that the Proclamation at issue in *Trump v. Hawaii* was "neutral on its face" and had a "legitimate grounding in national security concerns, quite apart from any religious hostility." *Id.* at 2418, 2421. Similarly, the FAM guidance is neutral on its face and bears an obvious connection to a legitimate purpose—specifically, implementing a statute passed by Congress to avoid inordinate fiscal burdens on the United States. *See Beach Commc'ns, Inc.*, 508 U.S. at 314–15 (noting that, under rational basis scrutiny, as long as there is some *conceivable* set of facts that would justify a classification, the classification prevails, regardless of the actual rationale underlying the Government's action and regardless of whether the conceivable basis is borne out by evidence); *cf. Diaz*, 426 U.S. at 80, 82–83 (observing that Congress may legitimately distinguish between citizens and noncitizens in distribution of welfare

benefits and upholding a statute that denied Medicare benefits to noncitizens unless they had been admitted for permanent residence and had resided in the United States for five years).

The Court in *Trump v. Hawaii* also noted that the President's Proclamation was backed by a "worldwide review process undertaken by multiple Cabinet officials and their agencies." *Trump v. Hawaii*, 138 S. Ct. at 2421. In this case, the FAM guidance likewise bears the imprimatur of the Department of State and does not merely reflect unilateral action by the President. If anything, the City of Baltimore presents an even weaker case than the plaintiffs in *Trump v. Hawaii*. The target of the plaintiffs' challenge in *Trump v. Hawaii* was a Proclamation issued by the President himself, while in this case the City of Baltimore is challenging agency-level action.

Thus, 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. Because the City does not allege any facts that "plausibly suggest" that the FAM guidance is motivated by animus against particular racial or ethnic groups, the City does not state a claim under the equal protection component of the Due Process Clause.

H. The Administrative Procedure Act is applicable only to federal "agencies" and does not authorize claims against the President.

It is not clear whether the City of Baltimore intends to assert claims against the President under the Administrative Procedure Act, but if it does, the claims should be dismissed for failure to state a claim. The Supreme Court has made clear that the President is not an "agency" under the APA and therefore cannot be sued under the Administrative Procedure Act. *Dalton v. Specter*, 511 U.S. 462, 468–70 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

I. The separation of powers bars injunctive relief against the President.

A further reason to dismiss the City of Baltimore's claims against the President is that the Supreme Court has held that the separation of powers generally prevents a federal court from issuing an injunction purporting to supervise the President's performance of his duties. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties . . . ."); *accord Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality opinion); *id.* at 826–29 (Scalia, J., concurring in part and concurring in the judgment). None of the City's claims is valid, but if any of the claims were valid, they could only be brought against the Department of State and the Secretary of State. As noted by Justice Scalia in *Franklin*, an action of the President may be challenged "in a suit seeking to enjoin the officers who attempt to enforce the President's directive," but not in a suit against the President himself. *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 802 (plurality opinion) (noting that injunctive relief against subordinate Executive officials does not raise the same extraordinary concerns as injunctive relief against the President). The case for permitting suit against the President is especially weak in this case given that the subject of the City of Baltimore's challenge is guidance issued by the Department of State, not action by the President.

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.

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Respectfully submitted,

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