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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION (LOS ANGELES)

ANDREW MASON DVASH-BANKS and E.J. D.-B.,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State,

Defendants.

Case No. 2:18-cv-00523-JFW-(JCx)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS

Judge: Hon. John F. Walter
Courtroom: 7A
Hearing date: April 22, 2019
Time: 1:30 P.M.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 22, 2019 at 1:30 P.M., or as soon thereafter as the matter may be heard before the Honorable John F. Walter, United States District Judge for the Central District of California, located in Courtroom 7A, 350 W. 1st Street, Los Angeles, California 90012, Plaintiffs Andrew Mason Dvash-Banks ("Andrew") and, by and through his guardian *ad litem*, E.J. D.-B. ("E.J." and collectively with Andrew, "Plaintiffs") will, and hereby do, move for attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place telephonically on March 12, 2019 and included subsequent e-mail exchanges on March 13 and March 19, 2019.

Plaintiffs notice April 22, 2019 as the hearing date for this motion pursuant to Local Rule 6-1 and this Court's February 2, 2018 Standing Order (ECF No. 27), requiring motions be noticed not less than 28 days and not more than 35 days prior to a motion hearing. Because April 22, 2019 falls on the Passover holiday, and because of travel plans of Plaintiffs' Lead Trial Counsel that extend through April 29, 2019 and because Defendants' counsel have notified Plaintiffs' counsel of their unavailability for a hearing during the week of April 22, 2019, Plaintiffs respectfully request that the Court hear this motion on or after May 6, 2019.

Plaintiffs bring this motion and are entitled to such an award because: (1) Plaintiffs are the prevailing party in this litigation ("Action"), having obtained a judgment on the merits recognizing E.J.'s U.S. citizenship at birth under Section 301 of the Immigration and Nationality Act, 8 U.S.C. § 1401(g); (2) the government's position in this Action was not substantially justified; and (3) Plaintiffs seek reasonable attorneys' fees and costs.

This Motion is based on this Notice of Motion and Motion, and the accompanying Memorandum of Points and Authorities, Declaration of Theodore

Edelman In Support of Plaintiffs' Motion for Fees and Costs and exhibits thereto, Declaration of Aaron C. Morris In Support of Plaintiffs' Motion for Fees and Costs and exhibits thereto, Declaration of Andrew Dvash-Banks In Support of Plaintiffs' Motion for Attorneys' Fees and Costs, and Proposed Order; as well as all pleadings and submissions on file in this matter, and any additional evidence or argument properly considered by the Court or to be received by the Court at a hearing of this matter.

Dated: March 20, 2019

Respectfully submitted,

By: */s/ Alexa M. Lawson-Remer*

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v.

THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State,

Defendants.

Case No. 2:18-cv-00523-JFW-(JCx)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Judge: Hon. John F. Walter
Hearing Date: April 22, 2019
Hearing Time: 1:30 P.M.
Courtroom: 7A

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I. INTRODUCTION

This Court's March 6, 2019 Judgment (ECF No. 125) declaring that E.J. D.-B. ("E.J.") acquired U.S. citizenship at birth under Section 301 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1401(g), ("Section 301") marked what hopefully is the end of a long journey for the Dvash-Banks family. Andrew Dvash-Banks ("Andrew," and together with his minor son E.J., "Plaintiffs") and his spouse, Elad Dvash-Banks ("Elad"), applied for a U.S. passport and Consular Report of Birth Abroad ("CRBA") on behalf of each of their twin boys, E.J. and A.J. D.-B. ("A.J."; together with E.J., the "Twins"). (ECF No. 123 at 2.) Although the Twins were born during the valid marriage of Andrew, a United States citizen, and Elad, the United States Department of State ("State Department") refused to recognize that E.J. had acquired U.S. citizenship at birth and improperly denied his applications. (ECF No. 125 at 2.) In reaching those determinations, the State Department apparently relied on an internal policy, which has no legal force, to read into Section 301(g) of the INA a requirement that an applicant for recognition of U.S. citizenship must demonstrate a biological relationship with both the child's parents. Both then and now, the only courts to have addressed the issue have rejected that interpretation of Section 301(g); indeed, by the time of the State Department's determinations, two decisions of the Ninth Circuit, issued respectively in 2000 and 2005, had done so.

The Court's February 21, 2019 Order (ECF No. 123), recognized the binding nature here of those determinations to reach the conclusion that the State Department should have reached when E.J.'s applications were filed in early 2017. That Order granted summary judgment to Plaintiffs on their claim under 8 U.S.C. § 1503(a) ("Section 1503") declaring E.J. to be a U.S. citizen at birth and ordering the State Department to issue him a U.S. passport expeditiously. (ECF No. 123 at 10.) Based on the Court's conclusion that that award adequately remedied the wrong to Plaintiffs, the Court denied as unnecessary Plaintiffs' remaining

challenges to the State Department's decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Due Process Clause of the Fifth Amendment. Because Plaintiffs achieved their central objective in this litigation ("Action"), which bestowed on E.J. the recognition of his U.S. citizenship denied to him by the State Department, Plaintiffs clearly are the prevailing parties in the Action. (*Id.* at 7, 11.) The State Department's refusal to approve E.J.'s applications in the face of binding Ninth Circuit precedent, and its persistence in litigating this Action full-bore to summary judgment was manifestly unreasonable and not substantially justified. This is particularly true given the dilatory and evasive manner in which that defense was conducted. Moreover, the materials submitted with this motion ("Motion") demonstrate that Plaintiffs' counsel were reasonable in their conduct of the litigation and judicious in the nature and amounts of fees and expenses for which they now seek reimbursement. Plaintiffs therefore are entitled to reasonable attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), as described below. As detailed in the accompanying *Declaration of Theodore Edelman In Support of Plaintiffs' Motion for Fees and Costs* ("Edelman Decl."), Sullivan & Cromwell LLP ("Sullivan & Cromwell," "S&C," or the "Firm") intends to donate to Immigration Equality and other non-profit organizations providing legal representation to indigent persons in California any fee award it receives after recouping its out-of-pocket expenses in the Action. (Edelman Decl. ¶ 4.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The State Department Improperly Denied E.J.'s U.S Passport and CRBA Applications.

Andrew and Elad met in Israel in 2008. (ECF No. 123 at 2.) They were married two years later in Toronto, Canada. (*Id.*) Andrew is a citizen of the United States and Elad is an Israeli citizen. (*Id.*) After several years of marriage, Andrew and Elad decided to start a family. (*Id.*) The Twins were conceived using

assisted reproductive technology: Andrew and Elad each provided sperm to fertilize eggs from the same egg donor. (*Id.*) The Twins were born on September 16, 2016. (*Id.*) Because the family was still residing in Canada, Andrew and Elad applied for a U.S. passport and CRBA on behalf of each Twin. (*Id.*) The State Department approved A.J.'s applications on the ground that he is biologically related to Andrew, a U.S. citizen; but denied E.J.'s applications on the ground that he could not establish a biological connection to Andrew. (*Id.* at 3.) At the time of that decision, it had been clear in the Ninth Circuit for more than fifteen years that the controlling legislation, the INA, imposed no such relationship requirement. (*See id.* at 9.)

B. The Dvash-Banks Sought Legal Counsel and Filed a Complaint.

The Dvash-Banks family subsequently moved to California, where Andrew was born and raised. (ECF No. 123 at 2, 8.) A.J. was able to enter the country on his U.S. passport, but E.J. entered the country on a tourist visa. (*See Declaration of Andrew Dvash-Banks in Support of Plaintiffs' Motion for Attorneys' Fees and Costs* ("Dvash-Banks Decl.") ¶ 3.) In September 2017, while Andrew and Elad were living in California with their then-one-year-old Twins, E.J.'s tourist visa was set to expire in three months. (*Id.* ¶ 4.) Facing the possibility that they would have to leave the country or that their family would be divided, Andrew and Elad sought counsel to challenge the State Department's refusal to recognize E.J.'s U.S. citizenship. (*Id.* ¶¶ 3-4.)

After several unsuccessful attempts to secure legal representation, they were put in touch with Immigration Equality, which together with S&C, agreed to represent Plaintiffs *pro bono*. (*Id.* ¶ 4.) On January 22, 2018, Plaintiffs filed the *Complaint for Declaratory and Injunctive Relief* (ECF No. 1) against the State Department and The Honorable Rex W. Tillerson, in his official capacity as

Secretary of State (together, "Defendants").[1] Plaintiffs challenged the State Department's improper denial of E.J.'s applications for a U.S. passport and CRBA because E.J., like his twin brother A.J., met the requirements of Section 301(g) for U.S. citizenship at birth.

In direct contradiction of the holdings of *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), the State Department argued throughout the Action that a biological connection is necessary to transmit U.S. citizenship to a child.[2] (ECF No. 46 at ¶¶ 50, 52; ECF 80-2.) The State Department maintained this position even though A.J. and E.J. are twins, born four-minutes apart and carried during the same pregnancy, who have the same legal parents and who are being raised together in the same home.

The Complaint sought relief on three grounds:[3] (1) that E.J. was entitled to a declaration of the Court that he became a U.S. citizen at birth under Section 1503 when he was born during the marriage of his U.S. citizen parent; (2) that the State Department's policy of requiring a biological tie to a U.S. citizen violates the Due Process Clause of the Fifth Amendment; and (3) that the State Department's denial of E.J.'s applications for a U.S. passport and CRBA was arbitrary, capricious, and unlawful under the APA. (*See* ECF No. 94.)

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[1] Following the appointment of the Honorable Michael R. Pompeo to replace Mr. Tillerson as Secretary of State, Mr. Pompeo was substituted for Mr. Tillerson as a defendant in the Action.

[2] Defendants' determination also conflicts with the Second Circuit's decision in *Jaen* v. *Sessions*, 899 F.3d 182 (2d Cir. 2018), issued after the filing of the Action. Although *Jaen* held that "a child born into a lawful marriage is the lawful child of those parents, regardless of . . . any biological link," *id.* at 185, Defendants persisted with their defense of the denial of E.J.'s passport and CRBA applications.

[3] The initial complaint asserted a fourth claim, seeking a declaratory judgment that the State Department's policy violates the constitutional guarantee of equal protection. After the close of fact discovery, Plaintiffs filed an amended complaint withdrawing their equal protection claim. (*See* ECF No. 94.)

C. Defendants Caused Unnecessary Delay through Their Requests to Stay the Litigation and Subsequent About-Face.

From the outset, Defendants endeavored to delay this Action. After Plaintiffs filed the Complaint, Defendants conveyed an interest in "amicably resolving th[e] lawsuit in the absence of litigation" and stated that they were "engaged in internal discussions regarding approaches which could resolve the issues in this dispute." (ECF No. 40 at 2; *see also* ECF No. 35 at 2; ECF No. 44 at 2). Based on Defendants' representations, Plaintiffs agreed three times to extend Defendants' deadline to answer the Complaint. (ECF No. 35; ECF No. 40; ECF No. 44.) After the Court denied the last of these applications to extend the deadline (ECF No. 45), Defendants abruptly changed their position and informed Plaintiffs that they intended to proceed with full-blown litigation. (*See* ECF No. 50 at 16.)

D. Defendants Delayed and Evaded Plaintiffs' Discovery Efforts.

Defendants then asserted that Plaintiffs were not entitled to discovery and that the Action instead should be decided on the basis of the administrative record and relevant law. (ECF No. 50 at 4, 11.) The Court, by implication, rejected Defendants' position and issued a detailed *Scheduling and Case Management Order*, which included, *inter alia*, a comprehensive framework for the conduct and completion of discovery. (*See* ECF No. 52 at 3-5, 34.)

Having failed to persuade the Court to block discovery, Defendants proceeded to obstruct discovery, routinely resisting Plaintiffs' discovery requests and dodging their efforts to meet and confer to resolve discovery issues. For example, although Plaintiffs served requests for the production of documents on August 14, 2018, Defendants did not produce any documents until October 26, 2018. (Edelman Decl. ¶ 66.) That first installment consisted of a meager seven pages. (*Id.*) As discussed in the Edelman Declaration, Plaintiffs' subsequent efforts to extract responsive documents from Defendants were as labored as pulling teeth. (Edelman Decl. ¶¶ 65-66.)

Defendants similarly evaded depositions and other discovery. (Edelman Decl. ¶¶ 62-69.) For example, Defendants resisted Plaintiffs' efforts to schedule depositions. They refused to make several witnesses available for deposition and to confirm the availability of others. (*See id*. at ¶ 67.) Defendants persisted in their evasion even after Plaintiffs followed up multiple times and reminded Defendants that the delays were making it difficult to arrange travel and court reporters—all of which was rendered more costly because of the delay in confirming the depositions. (*See id*.) Plaintiffs ultimately took four depositions, requiring travel to Toronto, Canada, Washington, D.C., and Charlotte, North Carolina.[4] (*Id*. at ¶ 47.)

Plaintiffs also defended one deposition, of Andrew, in Los Angeles, California, whose scheduling Defendants also made difficult to confirm. (*See id*. at ¶ 67.) Defendants had previously informed Plaintiffs of their intent to depose Elad on December 11, 2018 and Andrew the following day, but waited until Friday, December 7, 2018 to inform Plaintiffs that Elad's deposition would not go forward. (Edelman Decl. ¶ 68.) As a result, Plaintiffs' counsel spent hours preparing for a deposition that did not even happen.

E. Magistrate Judge Chooljian Granted Most of Plaintiffs' Motion to Compel.

After all other avenues had been exhausted, including extensive correspondence between the parties' counsel, multiple meet-and-confer sessions (and even more attempts by Plaintiffs' counsel to meet and confer), Plaintiffs filed an omnibus motion to compel discovery (for, among other things, documents and depositions), which totaled more than 200 pages, excluding exhibits (ECF No. 54). On December 11, 2018, the parties appeared before the Honorable Magistrate

[4] Because Ms. Day no longer works for the State Department and would appear for a deposition only in Charlotte, North Carolina, Plaintiffs' counsel traveled there to take that deposition. (Edelman Decl. ¶ 28.)

Judge Chooljian for a conference on that motion. At the conclusion of the conference, which lasted a full business day, Magistrate Judge Chooljian ordered Defendants to comply with nearly all of Plaintiffs' discovery demands. (ECF No. 65 at 2-6.) Judge Chooljian granted, in whole or in part, Plaintiffs' motion to compel all sixteen contested 30(b)(6) deposition topics and provided relief to Plaintiffs (with some limited narrowing) on essentially all of the document requests on which they had moved, and also ordered Defendants to produce for deposition the individuals whose appearances Plaintiffs sought through the motion to compel. (*See id.*) The Court rejected Defendants' assertion of, among other things, the deliberative process privilege, ordering Defendants to produce "non-attorney-client privileged/work product documents . . . called for by the Court's orders" (*i.e.*, materials that Defendants' improperly had redacted or withheld on the basis of inapplicable privileges). (*Id.* at 6.) Defendants failed to comply in full with Judge Chooljian's order regarding production of documents withheld as privileged, forcing Plaintiffs to raise the issue a second time in a telephonic status conference with Judge Chooljian on December 19. Following that conference, Judge Chooljian issued a second order requiring Defendants' to produce unredacted versions of documents they previously had produced in redacted form. (ECF No. 72.)

F. The Court's Summary Judgment Order and Judgment Granted Plaintiffs' Principal Remedial Request.

After the close of discovery, Plaintiffs moved for partial summary judgment on the Section 1503 and due process claims. (ECF No. 83.) Defendants moved for partial summary judgment on the APA and due process claims. (ECF No. 89, 92-1.) Relying on the "controlling Ninth Circuit authority" cited in Plaintiffs' motion, the Court held that Plaintiffs were entitled to "a declaration pursuant to 8 U.S.C. § 1503 that E.J. acquired U.S. citizen[ship] at birth" (ECF No. 123 at 10), and that "Section 301 does not require a person born during their

parents' marriage to demonstrate a biological relationship with both of their married parents" (*id.* at 8) and rejected Defendants' alternative interpretation of the INA as "strained" (*id.* at 5). The Court confirmed that this result was mandated by the language of Section 301, concluding that "the dramatic difference in the language of Section 301 and Section 309 makes it clear that a biological relationship is not required" (*id.* at 9). Because Plaintiffs had prevailed under Section 1503, the Court held that Plaintiffs had an "adequate remedy" and dismissed the APA claim. (*Id.* at 6-7.) For the same reason, the Court dismissed as moot the due process claim. (*Id.* at 10-11.)

Because Plaintiffs obtained substantially the relief sought—a declaration that E.J. is a U.S. citizen at birth under Section 301(g)—Plaintiffs now move for fees and costs as the prevailing party under the EAJA.

III. PLAINTIFFS ARE ENTITLED TO FEES AND COSTS UNDER THE EAJA.

When, as here, a prevailing party moves for fees and costs under the EAJA, "a court *shall* award" fees and costs "incurred by that party in any civil action . . . including proceedings for judicial review of agency action" brought against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added); *see also* *United States* v. *First Nat. Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984) (the EAJA "creates a presumption of a fee award" for a prevailing party). Courts apply a three-part test to determine whether an award of fees and costs is warranted.[5] *See*, *e.g.*, *Perez-Arellano* v. *Smith*, 279 F.3d 791, 793 (9th Cir. 2002), *as amended* (Feb. 21,

[5] Although not construed as part of the test, the EAJA also states that, in order to be eligible for a fee award, an individual plaintiff may not have a net worth greater than two million dollars. 28 U.S.C. § 2412(d)(2)(B). Plaintiffs have submitted a declaration from Andrew attesting that Plaintiffs meet this criterion. (Dvash-Banks Decl. ¶ 2.)

2002). *First*, the plaintiff must show that he or she is the prevailing party. *Id.* *Second*, the government must show that its position was substantially justified or that special circumstances make an award unjust. *Id.* *Third*, the plaintiff must show that the requested fees and costs are reasonable. *Id.; see also* *Love* v. *Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991) ("Once a party's eligibility has been proven, an award of fees is mandatory under the EAJA unless the government's position is substantially justified or special circumstances exist that make an award of fees unjust.").

Here, Plaintiffs meet all three prongs of the test. *First*, Plaintiffs obtained a victory on a significant issue at the crux of this Action and received a substantial portion of the relief sought when the Court reversed the State Department's improper denial of E.J.'s applications for a U.S. passport and CRBA and declared E.J. to be a U.S. citizen at birth under Section 301(g). *Second*, the Court's decision confirms that Defendants' attempt to read a biological relationship requirement into Section 301(g) was unjustified both under the language of the statute and binding precedent. *Third*, the materials submitted in connection with this Motion demonstrate that Plaintiffs' counsel were reasonable in the conduct of the Action and that their request for an award of a subset of the overall fees and expenses they incurred in the process are both reasonable and justified in these circumstances. Plaintiffs therefore are entitled to an award of the fees and costs sought in this Motion.[6]

A. Plaintiffs Are the Prevailing Party.

Plaintiffs here meet the definition of a "prevailing party" because they received "an enforceable judgment on the merits." *Perez-Arellano*, 279 F.3d at

[6] That Plaintiffs received *pro bono* legal services does not affect the propriety of a fee award. *See* *Greenhill* v. *United States*, 96 Fed. Cl. 771, 776 (2011) ("An award of attorneys' fees under EAJA is 'not necessarily contingent upon an obligation to pay counsel,' and may be awarded when attorneys are working *pro bono*.").

793. An enforceable judgment on the merits "provides the necessary foundation for a plaintiff's status as a prevailing party because the plaintiff has received at least some relief based on the merits of the claim." *Id.*

The Court's Judgment provided the critical relief that Plaintiffs have been seeking since the State Department denied E.J.'s applications for a U.S. passport and CRBA in Toronto more than two years ago: a declaration that E.J. "is a national and citizen of the United States who acquired U.S. citizenship at birth by operation of Section 301(g)" and an order that the State Department must "issue to E.J. a United States passport." (ECF No. 125 at 1-2.) The Judgment also rejected the State Department's interpretation of the INA, which was the basis for its denial of E.J.'s U.S. passport and CRBA applications and refusal to recognize E.J.'s citizenship—the very actions that gave rise to this Action.[7] (*See id.*)

Plaintiffs' status as the prevailing party is not undermined by the dismissal of Plaintiffs' APA and due process claims. *First*, the APA and constitutional due process claims were dismissed specifically because Plaintiffs obtained the relief sought under Section 1503. *Second*, to be considered the prevailing party, "[i]t is enough that [the plaintiff] succeed on any significant claim affording some of the relief sought . . . ." *Ctr. for Food Safety* v. *Vilsack*, 2011 WL 6259891, at *2 (N.D. Cal. Oct. 13, 2011) (internal quotation marks omitted), *report and recommendation adopted*, 2011 WL 6259683 (N.D. Cal. Dec. 15, 2011); *see also* *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) ("plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought

[7] The Dvash-Banks family subsequently moved to California and therefore is not currently in a position to apply for a CRBA, which may be issued only outside of the United States. The Judgment also provides relief in this respect, ordering the State Department "to issue to E.J. a CRBA as soon as practicable" if "E.J. and Andrew and Elad Dvash-Banks elect to apply in person for a [CRBA] for E.J. at the Toronto Consulate General or any other Consular Office of the State Department outside of the United States." (ECF No. 125 at 2.)

in bringing suit." (internal quotation marks omitted)); *Comm'r, INS* v. *Jean*, 496 U.S. 154, 161 (1990) ("absent unreasonably dilatory conduct by the prevailing party in 'any portion' of the litigation, which would justify denying fees for that portion, a fee award presumptively encompasses all aspects of the civil action.").

In these circumstances, it would be neither practicable nor fair to attempt to allocate the fees and costs sought in this motion among Plaintiffs' claims and to limit an award to those specifically, albeit artificially, apportioned to the Section 1503 claim. Courts do not discount for "limited success" if the "[p]laintiffs' claims all were related" and "the 'plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award[.]'" *Sorenson* v. *Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (brackets omitted and quoting *Hensley*, 461 U.S. at 434). Courts have recognized that it "'makes little sense'" to "'scalpel out attorney's fees'" without considering a loss's "'relationship to the ultimate disposition of the case.'" *Orantes-Hernandez* v. *Holder*, 713 F. Supp. 2d 929, 967 (C.D. Cal. 2010) (quoting *Cabrales* v. *Cty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir.1991)).

Here, all of the claims addressed the same essential facts relating to the improper denial of E.J.'s applications for a U.S. passport and CRBA on the ground that he does not share a biological connection with Andrew. All of these facts were sought and developed from the same sets of documents, witnesses and other sources. Document discovery and deposition testimony Plaintiffs obtained in the Action explored, among other topics, the process by, and asserted basis on, which the State Department denied E.J.'s applications; the provision of the INA that the State Department applied; the internal policies and purported statutory interpretation on which Defendants ostensibly relied for those denials; the finality of the denials; and the factual underpinnings of E.J.'s assertion of citizenship—all of which are relevant to each of the claims asserted in the Action. No aspect or phase of discovery was isolated or specific to a single claim. None of the

depositions were specific to a specific claim; nor could Plaintiffs' efforts to obtain discovery through discovery requests, meet-and-confer sessions, and a motion to compel reasonably be parsed on a claim-by-claim basis. The preparation of the mediation statement and participation in the Court-ordered mediation similarly addressed E.J.'s claim of U.S. citizenship, and not specifically which law or laws the State Department violated by the denial of his claim. The ineluctable interrelationship among Plaintiffs' claims is evident, as well, from Defendants' arguments and the Court's decision on the summary judgment motions. The Court granted summary judgment for Defendants on the APA and due process claim precisely because it concluded that its grant of summary judgment to Plaintiffs on the Section 1503 claim provided to Plaintiffs adequate relief.

Having obtained a declaration of E.J.'s citizenship under Section 1503, Plaintiffs are the prevailing parties for purposes of the EAJA. Further, the Court's decision—the first to hold that Section 301 does not require a biological connection between the applicant and his U.S. citizen parent in a same-sex marriage—has precedential value for other same-sex families in similar circumstances.[8] The interrelationship of these claims and the results achieved for Plaintiffs properly result in an award of all the fees and costs requested in the Motion. *See* *Sorenson*, 239 F.3d at 1147.

B. Defendants' Position Was Not Substantially Justified.

The EAJA "creates a presumption of a fee award" for a prevailing party. *First Nat. Bank of Circle*, 732 F.2d at 1447. The Government bears the burden of overcoming the presumption by demonstrating that its position was "substantially justified," which courts have defined as having "a reasonable basis

[8] Given that the State Department maintains that it is bound only by decisions of the United States Supreme Court, this situation is likely to recur. *See* ECF No. 92-1 at 11 n.13 ("U.S. embassies and consulates . . . adhere to . . . Supreme Court case law, but the variable case law of individual circuits in the United States does not control those adjudications taking place in foreign jurisdictions.").

both in law and fact."[9] *Gutierrez* v. *Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001). The Government's position, "'in addition to the position taken . . . in the civil action, [includes] the action or failure to act by the agency upon which the civil action is based.'" *Id.* (quoting 28 U.S.C. § 2412(d)(2)(D)). Defendants' position throughout this Action was not substantially justified, as demonstrated by Defendants' litigating this case to summary judgment based on an interpretation of the INA that the Ninth Circuit had flatly rejected twice, beginning more than fifteen years before the State Department's denial of E.J.'s application.[10]

Here, as the Court's decision on the summary judgment motions confirms, the State Department's denial of E.J.'s applications for a U.S. passport and a CRBA was manifestly unreasonable. The Court concluded that the State Department's insistence on proof of a biological relationship between E.J. and Andrew was neither grounded in the INA nor consistent with controlling law. Indeed, the State Department did not rely on either source in denying E.J.'s applications, but instead on its internal *Foreign Affairs Manual* ("FAM"), which the Ninth Circuit already had held was not entitled to any deference. *See* *Solis-Espinoza*, 401 F.3d at 1093 (holding Section 301 "did not require a blood relationship for citizenship"); *Scales*, 232 F.3d at 1164-66 (finding that a "straightforward reading" of Section 301 indicated "that there is no requirement of

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[9] "To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Pierce* v. *Underwood*, 487 U.S. 552, 566 (1988).

[10] Plaintiffs' presumptive entitlement to a fee award can be overcome by a showing that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). No such special circumstances exist here. *See* *Orantes-Hernandez*, 713 F. Supp. 2d at 942 (holding that Plaintiffs can satisfy the "special circumstances" provision "simply by alleging that . . . no special circumstances exist that make an award unjust."); *Lucas* v. *White*, 63 F. Supp. 2d 1046, 1056 (N.D. Cal. 1999) ("This [special circumstances] provision, however, should only be invoked with caution.") (citing *J & J Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985) (holding that "[a] strong showing of special circumstances is necessary to support a denial of attorney fees.")).

a blood relationship" and rejecting "defer[ence] to the FAM as an agency interpretation of statute" since it "is not specifically an interpretation of [Section 301] and, importantly, it is not an interpretation arrived at after, example, a formal adjudication or notice-and-comment rulemaking." (internal quotation marks omitted)).

Defendants took this unreasonable position to an extreme when they continued to argue throughout this Action that E.J. was not a U.S. citizen, despite binding Ninth Circuit precedent and recent Second Circuit authority to the contrary. *Solis-Espinoza*, 401 F.3d at 1094; *Scales*, 232 F.3d at 1166; *Jaen*, 899 F.3d at 185 (holding that "a child born into a lawful marriage is the lawful child of those parents, regardless of . . . any biological link"). Even if the State Department contends that it is not bound by circuit court decisions when adjudicating applications for U.S. passports and CRBAs outside of the United States (*see* ECF No. 92-1, at 11 n.13)—a far cry from substantial justification for their strained interpretation of the INA—that argument lost any possible merit once Plaintiffs moved to California and this Action was filed in a federal district court sitting in the Ninth Circuit. Defendants nonetheless persisted in a no-holds-barred litigation strategy to the bitter end, refusing to acknowledge E.J.'s U.S. citizenship at birth.[11]

Relying on the "controlling Ninth Circuit authority" (ECF No. 123 at 8) the Court held Defendants' position to be untenable, explaining that "[o]ther than the gender of E.J.'s parents, the factual circumstances in *Scales* and *Solis-Espinoza* are indistinguishable from the facts in this case" (*id.* at 9). Defendants' decision to defend the State Department's action over thirteen months of contentious litigation had no basis in law or fact and therefore Defendants cannot

[11] Defendants even disparaged the nature of the relationship between E.J. and his brother, who was born four minutes apart and carried during the same pregnancy, and of their relationship with Andrew and Elad, inventing the characterization of the Twins as "biological half-brother[s]." (ECF No. 92-1 at 1.)

meet their burden to show that their position was substantially justified. *See* *Ratnam* v. *INS*, 177 F.3d 742, 743 (9th Cir. 1999) (stating that the government lacks substantial justification when a "case [i]s controlled by [a] previous decision," but the government nonetheless litigates against that outcome).

As detailed in the Edelman Declaration, it was not only Defendants' substantive legal positions that were unreasonable. Their conduct—or more precisely efforts to forestall the conduct—of discovery was similarly unwarranted and significantly increased the amount of time and effort Plaintiffs' counsel (not to mention the Court) were required to expend in connection with the Action. (Edelman Decl. ¶¶ 62-69.)

C. Plaintiffs Seek Reasonable Fees and Costs.

The materials submitted with this Motion demonstrate that the fees and costs sought here are reasonable. *See* 28 U.S.C. § 2412(d)(2)(A) (providing for "reasonable" fees). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Sorenson*, 239 F.3d at 1145 (quoting *Hensley*, 461 U.S. at 433). Here, Plaintiffs seek an award for only reasonable subsets of the time and costs incurred in connection with the Action and propose hourly rates that are substantially below S&C's standard rates for commercial clients, consistent with rates awarded to comparable lawyers in other cases, and in line with EAJA awards in this district and other courts. Sullivan & Cromwell seeks attorneys' fees of $1,207,144 and costs of $30,086.75. Immigration Equality seeks attorneys' fees of $69,356.25 and costs of $1,197.00.

As is indicated above, S&C intends to donate to Immigration Equality and other non-profit organizations providing legal representation to indigent persons in California any fee award it receives after recouping its out-of-pocket expenses in the Action.

1. Plaintiffs Seek Fees for Reasonable Hours.

Plaintiffs request fees for time reasonably spent during the pendency of the Action. Defendants' efforts to obstruct discovery and evade communications with Plaintiffs' counsel mandated by the Court and the Local Rules increased these hours unnecessarily, requiring Plaintiffs to expend significant time and energy chasing Defendants to confer on discovery, Court requirements, and other matters and preparing and filing a (successful) motion to compel. Defendants' disruptive approach to the Action rendered what might otherwise have been a relatively straightforward, albeit extensive, undertaking into a constant challenge, compelling Plaintiffs' counsel to invest substantial time and effort and to bring to bear a range of litigation and doctrinal knowledge and initiative.

After review of the billing records and a careful exercise of judgment in the hours included in this Motion, the total number of hours for which Plaintiffs seek to recover attorneys' fees is 3,161.8 hours of time by S&C personnel and 101.25 hours of time by Aaron Morris of Immigration Equality. In an effort to avoid duplication and emphasize efficiency, S&C does not seek attorneys' fees for time spent by associates who worked on this litigation in 2017 and early 2018 but left the Firm thereafter. This represents a reduction of more than 300 hours of time S&C lawyers devoted to the Action. (Edelman Decl. ¶ 25.) (Correspondingly, three of the lawyers whose time is included in the Motion did not work on this matter until March 2018 or later.) (*Id.*) Plaintiffs also do not seek fees for work performed by various S&C personnel who recorded time to the Action, including all research librarians, summer associates, associates who provided coverage when certain team members were away on vacation or parental leave or otherwise were unavailable, and members of S&C's e-discovery team who assisted with processing of Defendants' document productions and collection and production of Plaintiffs' documents. (*Id.* ¶ 32.) In total, members of the Firm's non-legal staff

who are not included in the Motion recorded in excess of 85 hours to the Action. (*Id.*) Further, Plaintiffs do not seek any fees for the many hours devoted to the review of time entries and preparation of the Motion. (*Id.* ¶ 42.)

Plaintiffs' hours include time spent on the following tasks, among other matters:

- Preparing the Complaint;
- Negotiating the possibility of settlement with Defendants, and preparing and filing related stipulations to extend case deadlines while those negotiations occurred;
- Preparing Joint Rule 26(f) Discovery Plan and providing Initial Disclosures;
- Preparing discovery requests, and meeting and conferring with Defendants pursuant to those discovery requests;
- Responding to Defendants' discovery requests;
- Preparing a motion to compel discovery responses, including preparation for and attendance at the court conference on the motion to compel;
- Preparing for, and conducting, three individual depositions, and defending one individual deposition;
- Preparing for, and conducting, a 30(b)(6) deposition;
- Working with Defendants to select a mediator, and preparing for, and participating in, a Court-ordered mediation;
- Researching and preparing Plaintiffs' submissions in support of their motion for partial summary judgment;
- Researching and preparing Plaintiffs' submissions in opposition to Defendants' motion for partial summary judgment;
- Initial trial preparations, including designations of deposition testimony and identification of exhibits; and

- Preparing a proposed judgment and responding to Defendants' counter-proposed judgment, including meeting and conferring with Defendants regarding content of the proposed judgments.

Viewed both in their totality and from a task-by-task perspective, the hours sought in this Motion for the work by Plaintiffs' counsel in the Action is reasonable, given the nature of the issues raised, the result achieved, Defendants' conduct of the litigation, and the import this case could have for others wishing to challenge an improper denial of citizenship documentation by the State Department. *See* Edelman Decl.; *Declaration of Aaron C. Morris In Support of Plaintiffs' Motion for Fees and Costs* ("Morris Decl."); *Moreno* v. *City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). The Ninth Circuit has explained that courts generally should defer to the prevailing lawyer's professional judgment as to the time that was required to litigate the case. *See Moreno*, 534 F.3d at 1112 ("By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.").

2. Plaintiffs Seek Reasonable Rates.

Hourly rates for attorneys seeking fees under the EAJA properly are "based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). The Ninth Circuit publishes a yearly rate adjusting the EAJA cap for the cost of living. For work conducted in 2018, the adjusted statutory cap is $201.60. United States Courts for the Ninth Circuit, "Statutory Maximum Rates Under the Equal Access to Justice Act," *available at* https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039. Here, Plaintiffs seek enhanced rates for four S&C lawyers: $700 for Theodore Edelman,

$550 for Jessica Klein, $480 for Alexa Lawson-Remer, and $430 for Lauren Goldsmith; and $685 for Aaron Morris of Immigration Equality. The Motion seeks fees at the rate of $200, just below the adjusted statutory cap, for the remaining lawyers on Plaintiffs' legal team.

An attorney properly is granted fees above the statutory cap when he or she possesses "distinctive knowledge" or "specialized skill" that was "needful to the litigation" and that was "not available elsewhere at the statutory rate." *Nadarajah* v. *Holder*, 569 F.3d 906, 912 (9th Cir. 2009) (internal quotation marks omitted).

a. Plaintiffs' Attorneys Possess Distinctive Knowledge and Specialized Skill.

Because this Action required a team with knowledge of complex litigation, immigration law, family law, and constitutional law, the skills that each lawyer on the team brought to the case necessarily were different and relevant.[12]

Mr. Morris brought approximately fifteen years of experience dedicated to the legal issues facing lesbian, gay, bisexual, transgender, and queer ("LGBTQ") immigrants and refugees. Mr. Morris's background illustrating the development of this expertise is discussed more fully in the Morris Declaration, filed concurrently with this Motion.

Mr. Edelman, who served as lead counsel for Plaintiffs, was actively involved in setting litigation strategy and in all aspects of the Action. He has more than thirty-five years of legal experience in complex litigation, discovery practice, and trial preparation, developed in part through his work on a wide variety of litigation matters relating to antitrust, commercial contracts, commercial banking,

[12] The Ninth Circuit specifically has recognized as a basis for awarding enhanced hourly rates "distinctive knowledge and specialized skill in immigration law and, in particular, constitutional immigration law . . . ." *Nadarajah*, 569 F.3d at 912.

corporations and securities, criminal investigations and defense, insurance and annuities, intellectual property, and mergers and acquisitions. Mr. Edelman also has a leadership role in S&C's representation of the plaintiffs in a similar action commenced in 2018 in the United States District Court for the District of Columbia, *Blixt, et al.* v. *United States Department of State, et al.*, No. 1:18-cv-00124-EGS (D.D.C.) ("*Blixt* litigation"). Mr. Edelman's relevant background is discussed more fully in the Edelman Declaration. (Edelman Decl. ¶¶ 18-22.)

In Ms. Klein's more than fifteen years of litigation experience, she has worked on and supervised an array of civil and administrative law matters, including immigration cases, civil rights actions under 42 U.S.C. § 1983, family law cases on behalf of domestic violence survivors, a habeas corpus case on behalf of a Tunisian citizen detained at Guantánamo Bay, and cases involving other areas of public interest law. She has represented asylum seekers before the Board of Immigration Appeals and in Immigration Court, in addition to counseling numerous LGBT asylum seekers affirmatively applying for asylum before the New York and New Jersey asylum offices. Prior to and during the Firm's engagement on behalf of Plaintiffs, Ms. Klein gained additional relevant expertise specific to the legal issues presented in this Action through her on-going representation of the Blixt family in the *Blixt* litigation. Ms. Klein's relevant background is discussed more fully in Paragraph 26 of the Edelman Declaration.

During Ms. Lawson-Remer's more than nine years of practice, she has handled complex immigration matters in federal district court, litigated asylum cases in Immigration Court (including an appeal to the Ninth Circuit), and has been recognized for her commitment to LGBT equality as one of the National LGBT Bar Association's Best LGBT Lawyers Under 40. Ms. Lawson-Remer also was a member of the *pro bono* team that represented a class of mentally ill immigrants in government custody, which resulted in a precedent-setting permanent injunction requiring the government to provide legal representation to class members in

immigration proceedings. *Franco-Gonzalez* v. *Holder*, No. 10-cv-02211-DMG (DTBx) (C.D. Cal.). Ms. Lawson-Remer's relevant background is discussed more fully in Paragraph 27 of the Edelman Declaration.

Ms. Goldsmith brought more than five years of legal experience to the Action. Plaintiffs' efforts particularly benefited from Ms. Goldsmith's background in constitutional law and family law. Ms. Goldsmith's relevant background is discussed more fully in Paragraph 28 of the Edelman Declaration.

b. Plaintiffs' Attorneys' Skills Were Necessary.

Because of their respective backgrounds, Plaintiffs' attorneys were particularly suited to litigate this Action to its successful end. Mr. Morris's expertise in law and policy relating to LGBTQ immigrants informed the positions Plaintiffs ultimately took throughout the Action. (*See* Morris Decl. ¶¶ 3-16.) Mr. Edelman supervised, and was involved in, the full range of activities that comprised Plaintiffs' litigation effort. (Edelman Decl. ¶ 23.) Ms. Klein, Ms. Lawson-Remer, and Ms. Goldsmith applied their relevant skillsets in the conduct of all litigation activities and strategy formulation in connection with the Action. (*See id.* ¶¶ 26-28.) Plaintiffs respectfully submit that this combination contributed to the successful result. Accordingly, Plaintiffs seek enhanced hourly rates ranging from $430-$700 for the more senior members of their legal team.

c. Plaintiffs' Attorneys' Skills Were Not Available at the EAJA Statutory Rate.

An enhanced rate determination requires examination of whether qualified counsel would have been available at the statutory rate. The Declaration submitted by Plaintiff Andrew makes clear that no suitably capable attorney would litigate this matter at the statutory rate. (*See* Dvash-Banks Decl. ¶¶ 3-5.) Prior to engaging Immigration Equality and S&C, Andrew and Elad searched for competent counsel to take their case. After various attorneys either declined to represent the Dvash-Banks family or offered to do so at prohibitively high hourly

rates, Plaintiffs contacted Immigration Equality which, along with S&C, agreed to represent Plaintiffs *pro bono*. (*Id.* ¶¶ 3-4.) As the Edelman Declaration demonstrates, these rates are below the market rates for attorneys of "reasonably comparable skill, experience and reputation." *See* Nadarajah, 569 F.3d at 916 (internal quotations omitted). (Edelman Decl. ¶¶ 49-60.)[13] The precedents cited in that declaration similarly demonstrate that the rates requested in the Motion are also in line with awards in other EAJA determinations in this district and elsewhere. (Edelman Decl. ¶ 61.)

3. Plaintiffs' Request For Costs and Other Expenses is Reasonable.

The EAJA authorizes the recovery of litigation expenses and costs in addition to attorneys' fees. 28 U.S.C. §§ 2412(a)(1), (d)(1)(A). Costs include the taxable costs for fees of the clerk, transcript fees, witness fees, copy fees, and docket fees. 28 U.S.C. § 2412(a)(1) (citing 28 U.S.C. § 1920). "'Expenses' includes those that are normally billed a client, such as telephone calls, postage, and attorney travel expenses." *Catholic Soc. Servs., Inc.* v. *Napolitano*, 837 F. Supp. 2d 1059, 1076 (E.D. Cal. 2011). Plaintiffs have submitted an itemization of recoverable costs and expenses sought in the Motion. (Edelman Decl. Exhibit C.) Sullivan & Cromwell incurred costly disbursements on behalf of Plaintiffs, including but not limited to expenses for filing fees; courier fees; a transcript of the

[13] Courts awarding enhanced rates consider whether the requested rates are in line with prevailing market rates for attorneys of comparable skill, experience and reputation. *Pollinator Stewardship Council* v. *U.S. Envtl. Prot. Agency*, 2017 WL 3096105, at *6 (9th Cir. June 27, 2017) ("[T]he rate that is adequate to attract competent counsel for services requiring distinctive knowledge or specialized skill is the prevailing market rate, and awarding the prevailing market rate will not result in a windfall."); *Catholic Soc. Servs., Inc.*, 837 F. Supp. 2d at 1076 (approving enhanced rates "[g]iven the prevailing market rates for specialized and highly experienced private civil rights and immigration attorneys specializing in complex litigation"). When considering the rates charged by Sullivan & Cromwell attorneys, courts have upheld rates double the rates Plaintiffs seek here. (Edelman Decl. ¶ 51.)

December 11, 2018 court conference before Magistrate Judge Chooljian on Plaintiffs' motion to compel discovery; Plaintiffs' half share of the mediator's fee; deposition transcripts; fees for stenographers and videographers for the depositions; travel for depositions in Toronto, Washington, D.C., Charlotte, and Los Angeles; and for a court appearance in Los Angeles. The Motion does not include in its cost calculation, and does not seek recovery of, various smaller costs that the Firm incurred in connection with the Action, such as local transportation, taxis to and from the airport, and evening and out-of-town meals, other than meals included in hotel bills in connection with out-of-town travel relating to the Action. In addition, the Motion seeks recovery of airfare costs reduced by 50% for flights booked in business class. The Motion also seeks recovery of only 50% of bills for hotel stays in Los Angeles and Washington, D.C. The total costs sought by Sullivan & Cromwell is $30,086.75 and the total costs sought by Immigration Equality is $1,197. These expenditures were necessary for the litigation of the Action. Moreover, Plaintiffs determinations to seek only partial reimbursement of the more substantial travel costs and to forego recovery of other costs, illustrates the reasonableness of their award request.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant in full their motion for fees and costs, as specified in the accompanying proposed order.

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Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

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