

1 THE COURTROOM DEPUTY: Your Honor, this is civil
2 action 18-124, Allison Dawn Blixt, et al. versus United States
3 of America Department of State, et al.

4 Will the parties please come forward to this lectern
5 and identify yourselves for the record, please.

6 MS. CASSIDY: Your Honor, Elizabeth Cassidy, with
7 Sullivan & Cromwell, for the plaintiffs.

8 THE COURT: Counsel, good afternoon.

9 MS. CASSIDY: Good afternoon.

10 MS. KLEIN: Good afternoon. Jessica Klein, from
11 Sullivan and Cromwell, for the plaintiffs.

12 THE COURT: All right. Counsel, good afternoon.

13 MR. EDELMAN: Good afternoon, Your Honor. Theodore
14 Edelman, Sullivan and Cromwell, LLP.

15 THE COURT: Good afternoon, Counsel.

16 MS. ANDRAPALLIYAL: Good Afternoon. Vinita
17 Andrapalliyal on behalf of the government.

18 THE COURT: Counsel, good afternoon.

19 MS. ZEIDNER MARCUS: Good afternoon. Lisa Zeidner
20 Marcus, also on behalf of the government.

21 THE COURT: Here's what I'm going to do: Even though
22 there's a motion to dismiss pending, and normally I give the
23 moving party the first opportunity to speak, the plaintiffs
24 have the burden of proof with respect to standing. I have a
25 couple of questions of defense counsel before we start. I'm

1 going to ask whoever is going to argue the motion to come back
2 to the microphone.

3 Let me ask you this: You didn't mention or attempt
4 to distinguish the two California cases and the Second Circuit
5 case that, arguably, are on point in your motion to dismiss.
6 Did you have an obligation, an ethical obligation to at least
7 bring those authorities to the Court's attention?

8 MS. ANDRAPALLIYAL: Your Honor, those cases are not
9 controlling precedent here.

10 THE COURT: I'm sorry?

11 MS. ANDRAPALLIYAL: Can you hear me, Your Honor?

12 THE COURT: Yep.

13 MS. ANDRAPALLIYAL: Those cases are not controlling
14 here. And, you know, even assuming that they were not
15 distinguishable, we did offer arguments as to why they
16 shouldn't be followed in this case.

17 THE COURT: In other words, because they're not
18 binding precedent on this Court, there was no obligation under
19 Professional Conduct Rule 3.3 to bring those cases to the
20 Court's attention, is that your position?

21 MS. ANDRAPALLIYAL: Your Honor, I'll go back and
22 check the complaint, but I do believe they were mentioned by
23 plaintiffs in the complaint, so we didn't think that they were
24 not --

25 THE COURT: I understand that. Plaintiffs mentioned

1 that, but you filed a motion to dismiss in which the government
2 did not attempt to distinguish those cases at all from
3 plaintiffs' claim at all, if I'm correct. It was only in a
4 reply pleading, after being called out by the plaintiff, that
5 the government said anything. My question was whether or not
6 there was an obligation to bring those cases to the Court's
7 attention in your motion to dismiss in an effort to distinguish
8 those cases from this case?

9 MS. ANDRAPALLIYAL: Your Honor, we did not believe
10 so. Our motion to dismiss mostly focused on threshold
11 procedural issues and standing. And as to the APA claim we
12 largely argued --

13 THE COURT: Didn't the judges in those cases find
14 standing in each one of those cases?

15 MS. ANDRAPALLIYAL: Well, Your Honor, those were
16 different claims. They were not brought under the APA and the
17 Declaratory Judgment Act, and they were not challenging this
18 type of determination. They were made in, I believe, the
19 context of removal procedures. So those are different
20 procedural --

21 THE COURT: Posture?

22 MS. ANDRAPALLIYAL: Yes.

23 THE COURT: Okay. Thank you. I'm not trying to get
24 anyone in trouble, but it's always good if counsel do
25 distinguish authorities that, arguably, have an impact on the

1 Court's resolution of an issue.

2 Do you agree with that, what counsel just said?

3 MR. EDELMAN: Well, I agree, Your Honor, that the
4 cases that -- the two decisions in the Ninth Circuit and the
5 *Jaen* decision in the Second Circuit do not address the exact
6 context that brings us here today. I do believe that they are
7 highly pertinent on all of the issues, including the principal
8 question of standing. So that I don't try the Court's
9 patience, I want to make sure I'm being responsive.

10 When I talk about standing, Your Honor, I have two
11 possibilities in mind. The specific standing question that the
12 defendants raised having to do with whether there is a means by
13 which the matter could be remanded to the agency, the agency
14 could apply 301(g) instead of 309, which is what it originally
15 applied, and still come to the same answer.

16 There is also the question, which is the issue of
17 whether 1503 is an adequate remedy such that there wouldn't be
18 a basis for the APA claim. And I'm happy to address both, Your
19 Honor. It is on that second issue --

20 THE COURT: All right. I've read everything. I was
21 actually delighted when there was a motion to postpone, file
22 responsive pleadings early on, etcetera, etcetera, because the
23 parties were in settlement discusses. Without getting involved
24 in the nitty gritty of those discussions, did the parties ever
25 come close to settling?

1 I was actually optimistic, hoping that they would
2 settle this controversy because I think the government's
3 position is completely wrong here. But did you get close at
4 all to settlement?

5 MR. EDELMAN: Well, it wouldn't be -- so that the
6 Court has --

7 THE COURT: I don't want to get into the details.

8 MR. EDELMAN: Understood. So that the Court has the
9 appropriate information, I don't think it would be accurate to
10 describe what transpired as negotiations between the parties.

11 THE COURT: I don't want to do that. I just said
12 that I don't want to hear that.

13 MR. EDELMAN: What I'm saying, Your Honor --

14 THE COURT: My question is simply this: Did the
15 parties get close at all? And if you got close, maybe you just
16 need another push to get to a settlement?

17 MR. EDELMAN: The parties did not get close.

18 THE COURT: That's fine.

19 MR. EDELMAN: If the Court wants to hear me on the
20 question of standing, I'm happy to address that.

21 THE COURT: Briefly. Very briefly. I've read
22 everything and I'm familiar with the issues. Why do you have
23 standing here? Very succinctly.

24 MR. EDELMAN: We have standing here because there is
25 no biological relationship requirement in 301. So, if the

1 matter were to go back --

2 THE COURT: What's the origin of that biological
3 relationship requirement?

4 MR. EDELMAN: Well, the origin comes from the State
5 Department itself, which is in its --

6 THE COURT: What's the authority for it. Don't tell
7 me the State Department. It originated somewhere.

8 MR. EDELMAN: It originates in 309, which is --

9 THE COURT: It's not applicable here.

10 MR. EDELMAN: Which is not applicable here.

11 THE COURT: What's the authority for the State
12 Department to apply the rationale of 309 to a 301 issue?

13 MR. EDELMAN: There is none.

14 THE COURT: There's nothing anywhere?

15 MR. EDELMAN: There is none.

16 THE COURT: Any court ever said it's appropriate for
17 the government to do that?

18 MR. EDELMAN: No, Your Honor.

19 THE COURT: Has the government ever prevailed on any
20 of these motions -- actually, my understanding is the motions
21 to dismiss were not filed in either of the two Ninth Circuit
22 cases or the in the Second Circuit case, is that correct?

23 MR. EDELMAN: That's my understanding. They came up
24 in the immigration context, not in the citizenship context.
25 There was no motion to dismiss filed in the *Dvash-Banks* case

1 either, Your Honor, which is our case. That was in the Central
2 District of California. It is now, as of last week, on appeal
3 to the Ninth Circuit. This is the only case in which a
4 motion -- to my knowledge, of those that the Court has
5 referenced, in which a motion to dismiss has been filed.

6 And there is -- frankly, the government is 0 for
7 everything on the question of biological relationship as it
8 relates to Section 301(g).

9 THE COURT: So there's no authority, no circuit
10 authority, no Supreme Court authority that would even address
11 this kind of intermingling of 309 rationale with application of
12 301?

13 MR. EDELMAN: I'm not aware of any, Your Honor.

14 THE COURT: The government did not cite anything?

15 MR. EDELMAN: The government did cite anything. Its
16 response to us is the State Department is not bound by those
17 decisions except for cases actually in those circuits.

18 THE COURT: So your clients are legally married,
19 correct?

20 MR. EDELMAN: Yes, Your Honor.

21 THE COURT: Recognized by the laws of this country
22 and Supreme Court authority?

23 MR. EDELMAN: (Nods head.)

24 THE COURT: And they're blessed with two children,
25 correct?

1 MR. EDELMAN: Yes, Your Honor.

2 THE COURT: And one is a citizen of this country?

3 MR. EDELMAN: Yes, Your Honor.

4 THE COURT: Because in that circumstance -- actually,
5 are they twins?

6 MR. EDELMAN: They are not twins.

7 THE COURT: So the first born, the first born can
8 point to the biological father, correct?

9 MR. EDELMAN: The first born is the one, of course,
10 who's not the citizen.

11 THE COURT: Right. Right. I'm sorry. The second
12 one is, right?

13 MR. EDELMAN: Right. The second one is the citizen.

14 THE COURT: So what's the practical effect when your
15 clients come to this country? When they travel here, what do
16 they have to do? They have to validate themselves, they have
17 to validate their travel every time they travel here?

18 MR. EDELMAN: Yes, Your Honor, in the sense that it's
19 highly uncertain exactly what would happen now and going
20 forward. But, you have a family in which you have one mother,
21 Allison, who's a U.S. citizen; one child, the second child who
22 is a U.S citizen; you have the other mother who is an Italian
23 citizen but married to a U.S. citizen, and you have the first
24 child whose applications for recognition as a U.S. citizen have
25 been denied by the State Department. So you have this

1 fractured family, which, of course, is exactly what the INA was
2 trying to avoid.

3 THE COURT: All right. Are there cases analogous to
4 this case pending elsewhere in this country now?

5 MR. EDELMAN: I am not aware of any currently that
6 are pending in the sense that you have same-sex family living
7 outside the United States, having children through assisted
8 reproductive technology, who have made applications for
9 recognition of citizenship at birth where that's now under
10 challenge. It's possible, Your Honor, that they're out there,
11 but I'm not aware of them.

12 THE COURT: If, hypothetically, your clients had
13 adopted a child, what would be the status of that child?

14 MR. EDELMAN: So adoption, of course, as I believe
15 the Court knows, is handled in a different way under the INA.
16 There's a different set of procedures that apply to that. And
17 it's unclear to me, Your Honor, how, given everything that's
18 gone on, the State Department would have handled that. But
19 adoption is a different context because there are different
20 rights and relationships that are involved.

21 THE COURT: But nevertheless, though, when there's an
22 adoption, there is the issuance of a new birth certificate.
23 And had there been an adoption here, there would be a new birth
24 certificate listing the names of your clients as the natural
25 parents, correct? I don't see the distinction between how the

1 government handles cases involving adopted children and the
2 facts in this case. I don't profess to know the answer, that's
3 why I'm asking.

4 MR. EDELMAN: I'm not sure, given all the back and
5 forth, that the plaintiffs know the answer either, Your Honor,
6 as to what position the government would take with respect to
7 adoption. But I would emphasize that this, of course, is not
8 an adoption, that you have a situation in which this is --

9 THE COURT: I understand. I understand what it's
10 not. But I'm just looking for an analogous situation. I'm
11 looking for other scenarios in which the government has applied
12 either 301 or 309. And I'll save that question for the
13 government's attorneys; surely they know.

14 MR. EDELMAN: I would suggest to the Court that the
15 cases that the Court referenced at the outset are the most
16 analogous situations, situations in which the issue is: Was an
17 individual who did not have a biological relationship to an
18 American citizen parent, a U.S. citizen at birth?

19 THE COURT: The decision doesn't come up in the
20 context of an adoption case in which the parents don't have a
21 biological relationship to the actual natural parents. So, I
22 don't know.

23 MR. EDELMAN: I don't know, Your Honor.

24 THE COURT: Maybe it's a simple answer here. Why
25 should adopted children be treated differently than the product

1 of a -- it's complicated. I want to be careful how I phrase
2 this. Why would adopted children be treated differently from
3 the natural child? Because the child here is the natural child
4 of these parents, correct --

5 MR. EDELMAN: Yes, Your Honor, we believe so. I
6 could see --

7 THE COURT: -- as an adopted child?

8 MR. EDELMAN: I could see where the United States
9 government could take the position that adopted children have
10 more to show, but not that they would have less to show. And
11 the reason I say that, Your Honor, is because in the adoption
12 context there are other relationships, other family
13 relationships to consider. In this case, the only family is
14 the four people who are in the family, two of which are
15 plaintiffs before this Court. Those are the only people whose
16 rights and relationships are and should be before this Court.

17 THE COURT: Okay. So go ahead and very succinctly
18 tell me the reason why you have standing. Is that it? Have
19 you told me?

20 MR. EDELMAN: Right.

21 THE COURT: 301, not 309?

22 MR. EDELMAN: And there is no biological relationship
23 in 301(g). The other issue that may be on the Court's mind is
24 this question of the APA claim and why 1503 isn't an adequate
25 remedy. The Court said its read our papers. Very briefly,

1 this is not a situation in which the four-year-old plaintiff
2 child has presented himself or been presented at the border,
3 been asked to undergo the process in 1503(b) and 1503(c).

4 This is a situation where a minor child residing
5 outside the United States simply wants to have his citizenship
6 recognized, and should not be made to undergo the uncertainty
7 and the trauma of having to come to the United States to invoke
8 a statutory scheme that isn't necessary and that certainly --
9 at least a Court in this District has held -- is not an
10 exclusive remedy. We believe that the adequacy argument is off
11 the mark and is a misreading of what's happened to the decision
12 in court in subsequent years.

13 THE COURT: So, let's assume, hypothetically, that
14 she survived the standing argument and the Court proceeds to a
15 marriage resolution, what would be the appropriate next step?
16 I mean, you've raised all sorts of claims; statutory,
17 declaratory judgment, there's constitutional allegations here.
18 What would be the next logical step for the Court to address?

19 MR. EDELMAN: For the Court to address?

20 THE COURT: Yeah.

21 MR. EDELMAN: We believe that if the Court were to
22 deny the motion, then we would -- we have a template for what
23 to do, although we hope it will go more smoothly than what
24 happened in the *Dvash-Banks* case in California, in terms of
25 getting the discovery that we need --

1 THE COURT: So there is a need for discovery?

2 MR. EDELMAN: There is a need for discovery. We
3 believe we can be efficient about that. There is some
4 discovery from the other case that we hope that the defendants
5 will agree can be useful in this action, so that we can
6 streamline the discovery in this case. In the other case, as
7 the Court knows, promptly after discovery was concluded the
8 parties made cross motions for summary judgment, the Court
9 adjudicated those and was able to resolve the -- that case on
10 those papers. If that's not possible in this circumstance,
11 what we envisioned is a streamlined trial, if there are any
12 issues of fact for the Court to address that couldn't be
13 addressed on summary judgment, and move in that regard.

14 THE COURT: What's your best guesstimate as to the
15 length of any proposed discovery? How long would it take?

16 MR. EDELMAN: Ideally, discovery could be done in
17 four months, with some period, if there is a need for expert
18 discovery -- there was no expert discovery in the other case --
19 an additional two.

20 I would share with the Court we had some extreme
21 difficulties getting discovery from the defendants in the other
22 case and we did have to make a 220-page motion to compel in
23 that case and have two orders from the magistrate judge in that
24 case. I would hope we could avoid that here, Your Honor. But
25 plaintiffs are prepared to move quickly and be sensible, so as

1 not to be -- to overreach here, to develop the record so the
2 Court can resolve the matter.

3 THE COURT: So it sounds like, then, if you're able
4 to proceed to the merits, then the APA claim is really on the
5 back burner because you would not be entitled to any discovery
6 on the APA claim, is that right?

7 MR. EDELMAN: I believe that most of the discovery
8 would focus on the other claims. We would, of course, believe
9 that we need and should be entitled to receive the
10 administrative record. But -- and in the other case there was
11 a 30(b)(6) deposition and there were a handful of depositions
12 relating to the interview process, etcetera. I think that
13 provides us with a pretty good roadmap of the kind of discovery
14 we're talking about here.

15 THE COURT: Does there exist a basis for the Court to
16 resolve the legal issues without discovery?

17 MR. EDELMAN: I beg your pardon?

18 THE COURT: Does there exist a basis for the Court to
19 resolve the legal issues, cross motions for summary judgment
20 without discovery?

21 MR. EDELMAN: I think the Court could resolve the
22 question of statutory interpretation. But the consequences of
23 that, certainly for the constitutional claims, really need to
24 be fleshed out for the Court to have the record to reach those
25 issues. And even the APA issues, the Court -- the parties

1 would want to have -- and I submit, respectfully, that the
2 Court might want us to have the administrative record, so that
3 we're able to appropriately address those issues and satisfy --

4 THE COURT: The administrative record is one thing,
5 but you agree you're not entitled to discovery for an APA
6 claim?

7 MR. EDELMAN: And we're not seeking it solely --
8 certainly for the APA claim, but there are other serious issues
9 here, Your Honor.

10 THE COURT: What about the Second Circuit case? Was
11 there any discovery in that case as well?

12 MR. EDELMAN: I'm not aware of whether there was or
13 wasn't.

14 THE COURT: Were you involved in the two California
15 cases?

16 MR. EDELMAN: No, Your Honor. We've been involved
17 only in the *Dvash-Banks* case and this case.

18 THE COURT: Right. All right. Anything further on
19 the standing issue?

20 MR. EDELMAN: Not at this time, Your Honor.

21 THE COURT: Let me hear from government counsel.

22 MR. EDELMAN: Thank you.

23 THE COURT: Thank you.

24 MS. ANDRAPALLIYAL: Good afternoon, Your Honor.

25 THE COURT: So why don't they have standing?

1 MS. ANDRAPALLIYAL: Your Honor, plaintiffs don't have
2 standing because their complaint challenges defendants'
3 application of Section 309 to the -- to plaintiffs' CRBA U.S.
4 passport application. However -- and they say in the complaint
5 that 301 should have been applied. However, if 301 were
6 applied, the same result would occur, so plaintiffs' injury
7 would not be addressed.

8 THE COURT: What's the origin of this biological
9 evidence issue?

10 MS. ANDRAPALLIYAL: Your Honor, the biological
11 requirement inherent in Section 301(g) of the INA comes out of
12 the, sort of, bedrock principles of U.S. citizenship, that
13 there are two paths to U.S. citizenship; *jus soli* and *jus*
14 *sanguinis*. *Jus soli* is right of the soil, essentially. If
15 you're born in U.S. -- or, on U.S. soil. And then there's *jus*
16 *sanguinis*, right of blood. And that's if you have -- you know,
17 you're descended from a U.S. citizen, there's certain rights
18 that you can acquire by virtue of that.

19 THE COURT: But the challenging question here, is the
20 product of a lawful marriage recognized by the laws of the
21 United States, correct?

22 MS. ANDRAPALLIYAL: And defendants do not dispute the
23 validity of Miss Blixt's and Miss Zaccari's marriage. This is
24 just a question of whether the child has a biological
25 relationship to a U.S. citizen, and that's not the case here.

1 THE COURT: How are adopted children treated?

2 MS. ANDRAPALLIYAL: Your Honor, we refer, on pages 15
3 and 16 of our reply brief to that point, and there are
4 naturalization procedures that adopted children follow. It's
5 not acquisition of U.S. citizenship at birth.

6 THE COURT: Do they need to participate in the
7 naturalization ceremony and apply for U.S. citizenship?

8 MS. ANDRAPALLIYAL: Your Honor, I'm not all that
9 familiar with the process, but it is a naturalization process.
10 It is a naturalization process, it is not an acquisition at
11 birth process.

12 THE COURT: Even though at the time of the adoption
13 there's a certification that the parents are indeed the natural
14 parents of that child?

15 MS. ANDRAPALLIYAL: They're not the biological
16 parents, Your Honor, they are the adopted parents.

17 THE COURT: So everything goes back to whether or not
18 someone is the actual biological parent?

19 MS. ANDRAPALLIYAL: Exactly. And we emphasize, Your
20 Honor, that citizenship at birth for children born in this
21 country, that's a constitutional guarantee under the 14th
22 Amendment. But acquisition of U.S. citizenship at birth,
23 despite being born abroad, that's a statutory right that's
24 extended.

25 THE COURT: So if the birth had taken place in the

1 United States, we wouldn't be here today?

2 MS. ANDRAPALLIYAL: Exactly.

3 THE COURT: We would probably be here today talking
4 about someone else's case, but we wouldn't be here talking --

5 MS. ANDRAPALLIYAL: We would not be talking about
6 this case.

7 THE COURT: Because the child would have been born --

8 MS. ANDRAPALLIYAL: -- in this country.

9 THE COURT: And the rationale for that goes back to
10 that's the way it's always been?

11 MS. ANDRAPALLIYAL: Well, you know, citizenship was
12 sort of incorporated into the Constitution in the 14th
13 Amendment. And we have a Supreme Court case where we cite
14 multiple cases in our motion to dismiss, Your Honor, saying
15 that, you know, acquisition of citizenship when you're born
16 abroad, that's a statutory privilege that Congress has
17 extended, it's not a constitutional guarantee.

18 THE COURT: If a husband and wife were married in
19 this country and they went to Italy and the wife gave birth to
20 the child of that union, there would not be an issue there with
21 respect to the citizenship of that child, correct?

22 MS. ANDRAPALLIYAL: Assuming there's a biological
23 connection between the U.S. citizen and the child, that's
24 correct. There are, you know, certain residency requirements
25 and so on that must also be met, so those are additional

1 requirements. But it wouldn't be denied on the basis that
2 there's no biological connection.

3 THE COURT: All right. And if the child had been
4 born -- in this case had been born to the American citizen, we
5 wouldn't be here either?

6 MS. ANDRAPALLIYAL: And that's why the other child
7 here, Your Honor, is a U.S. citizen, because there was a
8 biological connection.

9 THE COURT: This is going to be a long opinion. Any
10 other cases pending elsewhere in this country?

11 MS. ANDRAPALLIYAL: Your Honor, I'm not aware of any
12 other case.

13 THE COURT: You would know.

14 MS. ANDRAPALLIYAL: Well, I --

15 THE COURT: Are you with federal programs or civil
16 division?

17 MS. ANDRAPALLIYAL: I'm in the civil division,
18 federal programs branch, Your Honor.

19 And I do want to briefly talk about those other
20 cases, *Jaen*, *Scales*, and *Solis-Espinoza*. I mentioned that
21 those are procedurally distinct from these cases, and that's
22 because those cases aren't handled by my office. Those are
23 removal proceedings, essentially, that, you know, the
24 individual in question was threatened with removal from this
25 country because the government thought, you know, it wasn't a

1 citizen, wasn't lawfully present here. And so the underlying
2 proceedings took place in immigration court and then those
3 cases are appealed directly up to the Circuit Court of Appeals.
4 So there's no -- the fact that motions to dismiss weren't,
5 apparently, filed in those cases I don't think cuts in any
6 direction there for that reason.

7 THE COURT: It's correct that -- am I correct in
8 saying, though, that the government has not prevailed on --
9 have any MTD, motions to dismiss, been filed in analogous cases
10 anywhere else?

11 MS. ANDRAPALLIYAL: I'm not aware, Your Honor. And
12 again, the *Dvash-Banks* case, we did not file a motion to
13 dismiss, but that's because of, sort of, scheduling issues in
14 that case, not for lacking threshold arguments.

15 THE COURT: Right. Right. Is your office involved
16 in the appeal to the Ninth Circuit?

17 MS. ANDRAPALLIYAL: Your Honor, that's handled by the
18 appellate section, appellate branch.

19 THE COURT: All right. Anything else on the standing
20 issue?

21 MS. ANDRAPALLIYAL: Not on the standing issue, Your
22 Honor.

23 THE COURT: All right. With respect to your motion
24 to dismiss, what's your strongest argument for dismissal at
25 this stage?

1 MS. ANDRAPALLIYAL: Well, we do have the threshold
2 standing argument, which we believe would dispose of the whole
3 case. The Declaratory Judgment Act claims, Your Honor, as to
4 the equal protection and substantive due process violations
5 alleged by plaintiff, there are simply no allegations,
6 substantiated allegations to support those claims, particularly
7 with respect to the equal protection claim, which requires
8 intentional or purposeful discrimination to be alleged --

9 THE COURT: Yeah, but all the plaintiffs have to do
10 at this stage, though, is just make allegations though,
11 correct, in good faith?

12 MS. ANDRAPALLIYAL: Yes, Your Honor, but the
13 complaint is devoid of allegations suggesting the defendants
14 are acting intentionally or purposefully to infringe on same-
15 sex marriage rights. Here, again, this is not about marriage,
16 opposite -- you know, opposite sex couples who are married
17 would also have the same requirements applied to them if they
18 had a child using assistive reproductive technology. There's
19 simply no allegations in the complaint to support the idea that
20 defendants are --

21 THE COURT: So the parents in an opposite sex
22 marriage would be treated identical?

23 MS. ANDRAPALLIYAL: The same requirements apply, Your
24 Honor. If there's a biological connection between the U.S.
25 citizen parents and the child born abroad, then, you know,

1 they're adjudicated -- citizenship applications would be
2 granted, but not where that biological relationship is lacking.

3 THE COURT: Right. But in an opposite sex marriage,
4 if the mother is an American citizen, we wouldn't be here,
5 right?

6 MS. ANDRAPALLIYAL: If the mother is an American
7 citizen and had a gestational or a genetic relationship with
8 the child, that's correct.

9 THE COURT: We wouldn't be here. So the only reason
10 we're here is because the mom in this case is of Italian
11 origin, correct?

12 MS. ANDRAPALLIYAL: Correct. Well, the biological
13 mother, correct.

14 THE COURT: And so the mom here is treated
15 differently -- I want to make sure I understand the reason why
16 she's treated differently than the American citizen mom.
17 Because you have the terrible situation here of the one child
18 being a United States citizen because the mom is an American
19 citizen. But then the child sibling -- and they are siblings
20 as a matter of law, correct?

21 MS. ANDRAPALLIYAL: I understand the -- I understand
22 the law treats them that way.

23 THE COURT: But the child's sibling, whose mom is an
24 Italian citizen, is not an American citizen, but nonetheless,
25 recognized as a blood sibling of --

1 MS. ANDRAPALLIYAL: A half sibling, Your Honor.

2 THE COURT: This opinion is going to be extremely
3 long. Anything I can do to get the government to settle this
4 case?

5 MS. ANDRAPALLIYAL: Your Honor, you know, we're
6 always willing --

7 THE COURT: This is going to be an interesting
8 opinion. But, you know, I've heard -- four months of
9 discovery?

10 MS. ANDRAPALLIYAL: Your Honor, we would strongly,
11 you know, oppose discovery in this case.

12 THE COURT: Let me get you back on settlement though.
13 Anything the Court can do? Give you more time? I can appoint
14 whoever you want me to appoint. This case sounds like it cries
15 out for settlement. Think about yourself. You know what? I
16 went to a CVS -- I told my law clerks -- I went to a CVS during
17 Christmastime to buy some gift cards, money cards, and I
18 bought -- was going to buy a number of cards. And I was asked
19 for ID. I said, Beg your pardon? They said, Can we see your
20 ID? And there was no one in the store that looked like me.
21 And I said, Why do I have to validate myself to buy some money
22 cards? Well, that's the way it is. And I said, No, it can't
23 be the way it is. And then I was told that, Well, you know,
24 sometimes these cards walk out of the store, then people bring
25 them back to get money or something. I didn't really

1 understand that.

2 But that's -- that's a horrible feeling, to have to
3 go through that process, this child and his parents have to go
4 through to somehow or another validate who this child is, and
5 the sibling that's on the other side waiting because the
6 sibling is an American citizen? I mean, just, it tugs at the
7 heartstrings. There's no way this case can be resolved?

8 MS. ANDRAPALLIYAL: Your Honor, we're always willing
9 to talk to plaintiffs, you know.

10 THE COURT: I'm sure they would be willing to talk as
11 well. All they're asking for is treat this child the same as
12 his sibling. Doesn't seem like it's asking a lot.

13 MS. ANDRAPALLIYAL: Well, Your Honor, our
14 interpretation of the law has been longstanding, you know, in
15 our family --

16 THE COURT: That's the way it is. That's the way
17 it's always been. The law should be flexible. And apparently
18 there are no other cases -- so it's not like the floodgate is
19 going to be open all of a sudden to these types of cases,
20 unless you know something I don't know.

21 MS. ANDRAPALLIYAL: I'm not aware of the status of
22 other cases, Your Honor.

23 THE COURT: Would you like me to keep the record open
24 for a while and give you a week or two to see if you can settle
25 the case? I don't want to waste your time. If the

1 government's position is there's not going to be any
2 settlement, that's fine. But if you would like me to do that,
3 I'm more than willing to do that, and to provide you with
4 anyone you want, maybe even provide you with one of my
5 colleagues to help bridge the gap. I haven't spoken with any
6 colleagues about it. You know, I'm sure anyone I asked would
7 probably be willing to do that.

8 I don't know. Any interest on the plaintiffs' side?
9 Maybe you've explored it to your satisfaction. But I'm not
10 trying to waste everyone's time. The case has been pending for
11 a while. And actually, when I realized it's been pending for a
12 while, I thought it's probably time to bring counsel in and
13 address the settlement issue, without the details, and at least
14 address the MTD issue, and if we get on to the merits, put in
15 place a briefing schedule. I don't know, would it be a waste
16 of time?

17 Why don't you come forward, Counsel. I'm not trying
18 to drag this out. But, you know, the one thing that the
19 parties can achieve that the Court can't give either side is
20 finality. Whatever I do there's going to be an appeal, I have
21 to tell you, and everyone knows that. But only the folks, only
22 the parties can achieve some finality.

23 MR. EDELMAN: So if the Court may, I'll be direct and
24 answer the Court's question first. And that is, there's always
25 interest on the plaintiffs' side. As the Court has discerned,

1 these are searing, traumatic issues for a family. And we would
2 be remiss if we did not explore whatever opportunities there
3 are to resolve this with the minimum of disruption to the
4 family.

5 I can represent to the Court that the issue with
6 respect to settlement is not a lack of interest or willingness
7 on the part of the plaintiffs. I would note that the
8 government's position on issues such as, well, that's the way
9 it's always been is not only circular, but a bit curious. And
10 I say that, Your Honor, by reference to the *Dvash-Banks*
11 decision itself -- which in the Westlaw version it's Star 5 --
12 recounts the fact that in recent times, within this decade, the
13 State Department has changed its definition of biological
14 relationship. Not because of any statutory change or any
15 action by Congress, but solely by the unilateral decisionmaking
16 within the Department of State.

17 And what it's done, according to the decision itself,
18 which was based on the discovery record, is it has moved from
19 simply -- it has now brought into the rubric of biological
20 relationship this notion of a gestational mother. That was a
21 change. It was a change made by the State Department on its
22 own. It simply changed its mind.

23 THE COURT: Does the State Department have the
24 statutory authority to do that?

25 MR. EDELMAN: Well, our view is the State Department

1 has the requirement to uphold the statute, and the statute is
2 clear, and there is no biological relationship. What the Court
3 has said is that this was a unilateral declaration by the State
4 Department. The other thing that the Court says --

5 THE COURT: So it's almost analogous to an agency
6 promulgating a rule to interpret a statute, that's what it
7 sounds like. You're arguing that the rule is contrary to what
8 the statute says?

9 MR. EDELMAN: It's a little more extreme than that,
10 Your Honor, because this is not rulemaking by an agency, it's
11 not subject to notice and all the provisions that we
12 customarily associate with agency rulemaking. This is simply
13 the declaration of the agency without going through all that
14 process. And indeed, *Scales* and *Jaen* have said for that
15 reason, among others, the family is not entitled to any *Chevron*
16 type deference. But I point this out to note that the idea
17 that that is the way it's always been --

18 THE COURT: Who's imprimatur was on this change?
19 Whose imprimatur? The then secretary of state?

20 MR. EDELMAN: That is my understanding, but I really
21 would have to defer to my colleagues across the aisle, if you
22 would, Your Honor.

23 The other thing that the *Dvash-Banks* decision notes,
24 in the same paragraph, is that State Department employees began
25 drafting a memorandum exploring possible ways to further modify

1 the definition of what is in wedlock, meaning the biological
2 relationship requirement. But the State Department didn't make
3 that change. So again, the idea that this is fixed in some
4 platonic ideal of what family relationships are and what
5 citizenship means is not consistent with the precedent.

6 To go beyond that, Your Honor, the -- sort of the
7 culprit of all of this, if you will, is the family itself,
8 because this is not simply a question of how one conceives a
9 citizenship from the point of view of does a father or a
10 mother, or two mothers for that matter, have the ability to
11 transmit citizenship? It goes to the provision of the family,
12 which is not law, it's just the State Department's declaration.
13 And I quote: To say a child was born in wedlock means that the
14 child's biological parents were married to each other at the
15 time of the birth of the child.

16 What the State Department is declaring is any child
17 who does not have a biological relationship to two married
18 parents -- two parents married to each other -- is
19 illegitimate. This turns the presumption of legitimacy
20 recognized in our nation's jurisprudence on its head. That, in
21 turn, as the Court has essentially noted, has very, very
22 significant and traumatic impact for the plaintiffs, for the
23 entire -- that entire family. And as the Court has also noted,
24 that strain is reinforced every day because you have two
25 brothers who look at each other every day, all day, and it is

1 reenforced for the one who isn't an American citizen that the
2 government of the United States has decided on its own that he
3 is illegitimate.

4 Our contention is that this provision that says in
5 order to be considered legitimate you have to have a biological
6 relationship to your two married parents cuts out all same-sex
7 marriages from the purview of legitimate procreation, if you
8 will. And that is undercut by the Supreme Court marriage
9 cases, *Windsor*, *Obergefell*, etcetera.

10 THE COURT: And the policy has not been revisited
11 since? The same-sex marriages decision?

12 MR. EDELMAN: That I don't know. I believe some of
13 this gestational mother and other activity goes beyond that.
14 But I do believe that's outside, certainly, the motion to
15 dismiss record. And certainly my colleagues from the Justice
16 Department would obviously know much better.

17 But, I think this demonstrates the weightiness of
18 these issues and why the question of substantive due process
19 and equal protection is so important here.

20 Now, the government would say, well, there are
21 circumstances in which opposite sex couples could have children
22 who aren't automatically -- have a biological relationship, and
23 then he's using this hypothetical situation that they brief in
24 which you could have two women married to each other, the eggs
25 from one are implanted in the eggs of another; it's entirely

1 hypothetical. Certainly, a theoretical question of whether it
2 mitigates this harm of, by declaration, cutting out from this
3 notion of legitimacy, you know, an entire category of
4 individuals who have been subject historically to
5 discrimination.

6 And we believe that we're entitled to try to develop
7 the record so that the Court can rule on these questions. And
8 I would point out that the government, in its motion, has tried
9 to do everything it can to avoid having this Court rule on the
10 substantive issues. And we would respectfully submit that that
11 effort by the government is misguided and that these are
12 weighty issues, they have been addressed by other courts.
13 Every one of those courts, as they Court has noted, has come
14 out in a consistent way. And if the government isn't going to
15 discuss these issues with us -- which we are prepared to do --
16 then we submit that we would rely on the good auspices of this
17 Court to have to adjudicate that. Thank you.

18 THE COURT: All right. Thank you.

19 Anything further, Counsel?

20 MS. ANDRAPALLIYAL: Yes, Your Honor. A few more
21 points. So, to move on to the APA claim in this case --
22 briefly discussed that with opposing counsel -- we want to
23 emphasize, again, there's a difference between the *Dvash-Banks*
24 decision and this case, which is the *Dvash-Banks* court ruled on
25 plaintiff's motion for summary judgment as to their claim under

1 Section 1503 of Chapter 8, U.S. Code. That claim is not
2 present here. Plaintiffs have not brought a 1503 claim,
3 they've brought a claim under the APA. And we think this Court
4 should dismiss that claim because there is an adequate remedy
5 at law under the procedures set forth in 8 U.S.C. Section 1503.
6 That statute specifically sets forth how someone who has been
7 denied a right or privilege of citizenship on the grounds that
8 they're not considered a citizen, how they can access judicial
9 review. And that's the procedure that should be followed here.
10 And --

11 THE COURT: If I allow that claim to survive at this
12 point, though, and address the statutory claim and resolve
13 that, then it's quite possible then the Court will never reach
14 the APA claim. That's another option, is that correct?

15 MS. ANDRAPALLIYAL: The statutory claim, Your
16 Honor -- we understand plaintiffs have pled the statutory claim
17 through the APA. The other two claims, Declaratory Judgment
18 Act claims, are alleging constitutional violations. The
19 statutory claim was brought under the APA. We think that was
20 improper. But -- and even if Your Honor were inclined to deny
21 defendant's motion in any way, discovery would be
22 inappropriate.

23 These claims, at bottom, challenge agency action.
24 And the APA does allow for judicial review of, you know, claims
25 that are contrary to constitutional right. And record review

1 principle should govern here. We have an administrative record
2 we could produce in that instance. And we would point Your
3 Honor to other cases in the District of Columbia. For example,
4 *Chiayu Chang versus U.S. CIS*, 254 F.Supp.3d 160, a 2017
5 decision from Judge Bates, holding that even if plaintiff is
6 permitted to proceed with an APA claim, discovery on the equal
7 protection and due process claims are not appropriate.

8 For that reason -- as Your Honor, you know,
9 intimated, this is, at bottom, an issue of what does 8 U.S.C.
10 1401 and 1409 require? We believe that a biological
11 relationship is required under 1401 and 1409. And we do want
12 to put out to Your Honor that even though 1409 or 309 of the
13 INA has a blood relationship -- has language referencing a
14 blood relationship, in contrast to 1401, that language was
15 added in 1986, well after both statutes were developed back in
16 the 50's, I believe. And it appears principally in
17 establishing a standard of review for a preexisting blood
18 relationship requirement.

19 And so the fact that that language appears in 1409 or
20 309 does not mean that it's not required under 1401. It was
21 just -- it wasn't added -- that language was added in 1986 for
22 what appears to be a different purpose, simply codifying what
23 has always been the case.

24 THE COURT: What's the ultimate -- the biological
25 requirement language? How is that promulgated by state?

1 MS. ANDRAPALLIYAL: Your Honor, the State
2 Department's understanding of what 1401 and 1409 require, it's
3 encapsulated in the Foreign Affairs Manual, and the Foreign
4 Affairs Manual mentions multiple times that a biological
5 relationship is required. And the State Department understands
6 that --

7 THE COURT: I understand that. But what's the
8 authority for that? I know it's in a manual, but what's the
9 authority for that? I mean, it could be completely wrong,
10 right?

11 MS. ANDRAPALLIYAL: Well, Your Honor, the State
12 Department has had that interpretation in the Foreign Affairs
13 Manual for at least 20 years, as far as we can tell.

14 THE COURT: You can't just say that it's always been
15 that way; it's always been that way, people. You know, people
16 used to own slaves and everyone said that was great. But, you
17 know, thank goodness -- I think there are places in the world
18 that still do, unfortunately. But that can't be the answer,
19 it's always been that way.

20 MS. ANDRAPALLIYAL: Your Honor, that understanding of
21 what the INA required when, you know, when Congress included
22 1401 and 1409, that comes from, as I said, historical
23 principles of U.S. citizenship, that there is citizenship, you
24 know, by right of soil and then by right of blood. And so when
25 you're not on U.S. soil and you want to become a U.S.

1 citizen --

2 THE COURT: So your answer has to be then that it's
3 required by the Constitution? Is that your answer?

4 MS. ANDRAPALLIYAL: Not the Constitution, Your Honor.

5 THE COURT: What's the authority for it being in this
6 manual?

7 MS. ANDRAPALLIYAL: It is historical citizenship
8 principles that have, sort of, existed for hundreds of years.
9 And then we do explain in our motion to dismiss that our -- you
10 know, the language "born of," in 1401, has inherently
11 biological connotation. Born out of wedlock, in 1409, does not
12 have the connotation that, you know, the parents are unmarried.
13 It simply means that the married mother or father didn't -- was
14 not married to the biological parent of the child at the time.

15 So those are sort of historical principles that we're
16 drawing on here, Your Honor. And if Your Honor is unconvinced
17 by our motion to dismiss, our last point, we would brief that
18 again for Your Honor on summary judgment and develop those
19 arguments further.

20 But again, the Declaratory Judgment Act claims,
21 unsubstantiated allegations, and even if this Court were to
22 deny the motion to dismiss in its entirety, discovery is
23 inappropriate. This case can be resolved on summary judgment
24 with simply reference to the administrative record. And we would
25 point out in the *Dvash-Banks* case that the discovery that was,

1 you know, propounded in that case did not ultimately move a
2 needle on what the Court decided there. So it was a matter of
3 statutory interpretation.

4 THE COURT: All right. Briefly, Counsel. Anything?

5 MR. EDELMAN: I think the Court's been more than
6 patient with us. Unless the Court has questions for us, we'll
7 stand on our papers.

8 THE COURT: I don't know if I've gotten a clear
9 answer for the authority for the manual. Again, I would say
10 can't be just that's the way it's always been. It can't be
11 that. It's been 20 years, 100 years --

12 MR. EDELMAN: Your Honor, I've now been at this since
13 January of last year and I haven't gotten a clear answer
14 either. So I'm pretty sure I'm not going to be able to resolve
15 that to the Court's satisfaction --

16 THE COURT: Let me ask you this: If the Court denies
17 the motion -- which the Court is inclined to do -- why
18 shouldn't the Court at least first attempt to resolve the case
19 on APA grounds? Or would that be a waste of time?

20 MR. EDELMAN: If that is how the Court wishes to
21 proceed, we're happy to proceed --

22 THE COURT: This is a unique case. It's a very
23 unique case, with unique facts, and I don't want to waste the
24 court's judicial resources either. It's going to get a little
25 tricky though because, as I've previously stated, you know,

1 query whether discovery is allowed in all circumstances. I
2 understand what's at issue here. So it may be tricky trying to
3 get the discovery you want.

4 I don't know if it's appropriate or if the Court can
5 resolve the case on strictly APA, final agency action; it's
6 either right or wrong, articulate the reasons, goes to Court of
7 Appeals. Maybe I'm right, maybe I'm wrong; it comes back.
8 Maybe there are other routes. You hate to put all your eggs in
9 one basket. Maybe it makes more sense to press and resolve all
10 the issues that are, arguably, appropriate to be resolved, and
11 not just the APA case.

12 MR. EDELMAN: I would share with the Court that in
13 the *Dvash-Banks* case, that was a concept floated and discussed.
14 It wasn't ultimately pursued. My impression is that the Court
15 in that case wanted all the discovery to be done at once. The
16 defendants can speak for themselves as to what their ultimate
17 position was. From our standpoint, from the standpoint of the
18 plaintiffs, I would note for the Court several things: One, if
19 the Court believes that would be the most efficient way to do
20 that, we would be --

21 THE COURT: I won't know until after the Court of
22 Appeals rules, you know.

23 MR. EDELMAN: I understand that. The second thing I
24 would note is we are conscious that we are, to the extent there
25 is discovery, dealing with a government agency and we do not

1 wish to impose on the important business of the government any
2 more than is necessary, and so if there are ways to be
3 efficient in the conduct of the case and the conduct of
4 discovery, we are absolutely willing to entertain that.

5 But I would note, however, as I mentioned earlier
6 this afternoon, the process of getting discovery from the
7 defendants in the other case, in the *Dvash-Banks* case, was
8 extremely difficult. And we ultimately did have to make a
9 motion to compel, which was granted almost in full.

10 So we're willing to be accommodating, but we would
11 like that accommodation to be reciprocated.

12 THE COURT: All right.

13 MR. EDELMAN: Thank you, Your Honor.

14 THE COURT: All right. I'm going to deny the motion
15 to dismiss at this time. The defendants have moved to dismiss
16 the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal
17 Rules of Civil Procedure for lack of subject matter
18 jurisdiction and failure to state a claim upon which relief can
19 be granted. As we all know, a federal district court may only
20 hear a claim over which it has subject matter jurisdiction.
21 Therefore, Rule 12(b)(1) motion for dismissal is the threshold
22 challenge to the Court's jurisdiction in that regard to Federal
23 Rule of Civil Procedure 12(b)(1). In a motion to dismiss for
24 lack of subject matter jurisdiction plaintiff bears the burden
25 of establishing that the Court has jurisdiction, referencing

1 *Lujan versus Defenders of Wildlife*, 504 U.S. 555.

2 In evaluating the motion the Court must accept all
3 the factual allegations in the complaint as true and give the
4 plaintiff the benefit of all inferences that can be drawn from
5 the facts alleged. However, the Court is, quote, not required
6 to accept inferences unsupported by the facts alleged or legal
7 conclusions that are cast as factual allegations, citing
8 *Cartwright International Van Lines, Inc., versus Doan*, D-O-A-N,
9 525 Fed.Supp.2d 187. Quote, a Rule 12(b)(6) motion tests the
10 legal sufficiency of a complaint, end quote. See *Browning*
11 *versus Clinton*, 292 F.3d 235, D.C. Circuit opinion issued in
12 2002.

13 Quote: The complaint is construed liberally in the
14 plaintiff's favor and the Court grants the plaintiff the
15 benefit of all inferences that can be derived from the facts
16 alleged, citing *Kowal*, K-O-W-A-L, *versus MCI Communications*
17 *Corporation*, 16 Fed.3d 1271, another D.C. Circuit opinion.

18 However, the Court is not bound, quote -- strike
19 that. However, the Court is, quote, not bound to accept as
20 true a legal conclusion couched as a factual allegation, end
21 quote. Relying upon *Papasan*, P-A-P-A-S-A-N, *versus Allain*,
22 A-L-L-A-I-N, 478 U.S. 265.

23 Complaint survives a motion under Rule 12(b)(6) only
24 if it, quote, contains sufficient factual matter accepted as
25 true to state a claim to relief as plausible on its face, end

1 quote. Relying upon the fountainhead case, *Ashcroft versus*
2 *Iqbal*, I-Q-B-A-L, 556 U.S. 662. The claim is facially
3 plausible, quote, when the plaintiff pleads factual content
4 that allows the Court to draw a reasonable inference that the
5 defendant is liable for the misconduct alleged, end quote.
6 Quoting *Bell Atlantic Corporation versus Twombly*,
7 T-W-O-M-B-L-Y, 550 U.S. 544.

8 The complaint alleging facts which are merely --
9 strike that. The complaint alleging facts which are, quote,
10 merely consistent with the defendant's liability stops short of
11 the line between possibility and plausibility of entitlement to
12 relief, end quote, citing *Twombly*.

13 Defendants argue that plaintiffs lack standing to
14 challenge the defendants' application of Section 309 of the
15 Immigration and Nationality Act. To establish Article 3
16 standing plaintiff must demonstrate three prongs: One, injury
17 in fact, which is, A, concrete and particularized, and, B,
18 actual or imminent; two, that there is a causal connection
19 between the complaint of conduct and the injury alleged that is
20 fairly traceable to the defendant, and; three, that it is
21 likely and not merely speculative that a favorable decision
22 will serve to address the injury alleged. See *Lujan*, 504 U.S.
23 at 560.

24 Defendants do not dispute that plaintiffs satisfy the
25 first two requirements. Defendants only challenge the

1 redressability prong. Quote, in determining whether an injury
2 is redressable, a Court must ask whether a plaintiff's injury
3 would be likely to be redressed if the requested relief were
4 granted -- and that's italicized and bold by the Court -- end
5 quote. *Miller versus Christopher*, 96 Fed.3d 1467, another D.C.
6 Circuit opinion.

7 The Court is persuaded at this point that plaintiffs
8 have established that it is likely, rather than speculative,
9 that the injuries will be redressed by a favorable decision
10 because the complaint seeks, among other things, an order from
11 this Court declaring that the minor child, L.Z.-B., acquired
12 citizenship at birth, and that the State Department's
13 interpretation of the INA is unlawful and unconstitutional. I,
14 therefore, find that plaintiffs have standing to bring this
15 lawsuit.

16 I denied defendants' motion to dismiss because
17 plaintiffs have alleged sufficient facts -- and that's what
18 we're talking about at this stage, the allegations of facts
19 that will lay sufficient facts to state claims under the
20 Administrative Procedure Act, the Fifth and 14th Amendments to
21 the Constitution and the Declaratory Judgment Act.

22 Plaintiffs have plausibly alleged that defendants'
23 denial of the minor child's applications for Consular Report of
24 Birth Abroad and a U.S. passport violated the APA. The Court
25 is persuaded that plaintiffs' claims under the Declaratory

1 Judgment Act alleging violations of their rights to equal
2 protection and substantive due process can proceed in light of
3 the *Committee on the Judiciary, U.S. House of Representatives*
4 *versus Miers*, 558 F.Supp.2d 53, in which the Court held that a
5 claim under the Declaratory Judgment Act could proceed on a
6 case, quote, requesting declaratory relief where subject matter
7 jurisdiction is present and a plaintiff's constitutional rights
8 are arguably implicated.

9 Plaintiffs have stated a claim for violation of the
10 Equal Protection Clause of the 14th Amendment because, one,
11 plaintiffs have sufficiently alleged facts to support a
12 reasonable inferences that defendants' refusal to recognize the
13 U.S. citizenship of L.Z.-B. and other children of married
14 same-sex parties has resulted in disparate treatment. And,
15 two, plaintiffs have plausibly pled facts to support an
16 inference that defendants' refusal to consider the minor child,
17 L.Z.-B., as born, quote, in wedlock, end quote, was motivated
18 by discriminatory purpose.

19 Plaintiffs have stated a claim for violation of the
20 due process clause of the Fifth Amendment. Plaintiffs have
21 alleged sufficient facts that defendants have infringed on
22 plaintiffs' fundamental right to marry because defendants'
23 policy has denied them the full benefits to their marriage,
24 that is, legal recognition that plaintiffs are the legal
25 parents of the minor child L.Z.-B., regardless of a biological

1 connection.

2 And for those reasons, the Court will deny the motion
3 to dismiss at this point.

4 I'm going to dispense with what I would normally do
5 and send counsel back to the drawing board and sit around, meet
6 and confer, and talk about discovery and whatever else they
7 want to talk about. I'm going to invite principal counsel to
8 the microphone there and we're going to put in place a fair and
9 appropriate briefing schedule now for further proceedings.

10 I'm going to focus on the need for discovery. And I
11 think -- let me invite you both back to the podium.

12 You know, it's difficult to determine how much time
13 will be needed for fact and expert discovery. I don't know, I
14 certainly don't want to be arbitrary about it. So I want your
15 best thoughts as well: 180 days? Is that sufficient? Not
16 sufficient? Too much?

17 MR. EDELMAN: I think it's exactly right, Your Honor,
18 if --

19 THE COURT: Counsel, let me invite you back to the
20 podium, as well.

21 MR. EDELMAN: -- if defendants will actually go about
22 expeditiously the process --

23 THE COURT: I'm not going to tolerate any foot
24 dragging. It seems like the current administration is engaged
25 in a lot of foot dragging in a lot of courts these days and I'm

1 not going to tolerate it, I can tell you that right now. So, I
2 expect that discovery, fact and expert, will be commenced and
3 concluded within 180 days. And if I detect someone's
4 intentionally dragging feet, I'm going to impose sanctions.
5 And I'm going to redefine the word "sanctions" because I'm just
6 not going to tolerate. This case has been pending since --
7 when was it filed? January. Over a year and a half or so.

8 And again, I sympathize with the plaintiffs having to
9 go through the process they have to go through, which sounds
10 like utter misery anytime they travel to this country. Is
11 that -- what about other countries? What happens there, in
12 other countries?

13 MR. EDELMAN: I'm not aware, Your Honor, that they've
14 been engaged in that kind of travel. I'm not in a position to
15 make any representations.

16 THE COURT: But this son is treated differently than
17 the other son who walks right through.

18 MR. EDELMAN: Well, certainly in the United States
19 they're --

20 THE COURT: He's playing on his iPhone or something
21 while his bother gets peppered with questions and people trying
22 to validate who he is. I think it's outrageous.

23 But anyway, 180 days for discovery, fact and expert.
24 And that's mutual discovery. Then how much more time after
25 that for the preparation and filing of motions -- and I'm not

1 going to certify discovery to be supervised by someone else;
2 I'm going to supervise it. So, I don't expect any foot
3 dragging. You know, hint to the wise should be sufficient.

4 How much more time after the close of discovery for
5 the preparation of filing the motions, the summary judgment
6 motions.

7 MR. EDELMAN: I think, Your Honor, we would be
8 prepared to do it, certainly, within 60 days after the close of
9 discovery.

10 THE COURT: That makes sense. What do you think,
11 Counsel? I think your colleague is trying to get your
12 attention. Go ahead and --

13 MS. ANDRAPALLIYAL: Your Honor, may we be heard --

14 THE COURT: Go ahead, talk to your colleague.

15 MS. ZEIDNER MARCUS: I wasn't going to ask --

16 MS. ANDRAPALLIYAL: Your Honor, may we be heard on
17 the question of whether discovery is required or necessary
18 here? We firmly believe that it's not, and we would be happy to
19 submit briefing on that issue. As we explained, we believe
20 that APA principles of record review govern this case.

21 THE COURT: Maybe it makes sense for the Court to do
22 this: You know, I can't sit here and tell you whether there's
23 a need for discovery on all claims, I can't do that. Maybe it
24 makes sense for the Court to say to the plaintiff, file a
25 proposed discovery order, tell me what you want and the reasons

1 why, and then I'll get the government to respond it that. And
2 I'll put that on the fast track, because I couldn't sit here --
3 it's not like it's a clear, say, FOIA case where there would be
4 no discovery. Is that fair?

5 MR. EDELMAN: We're happy to do that, Your Honor.
6 May I suggest, if this is acceptable to the Court, that before
7 we do that, so that we would be more informed, the parties
8 could exchange initial disclosures. We would be prepared to do
9 that by May 29.

10 THE COURT: I thought I was cutting through a lot of
11 red tape. Maybe I should just let the system work the way it's
12 designed to work, and maybe I should afford both sides an
13 opportunity to sit around the table and discuss it. I'll do
14 that.

15 MS. ZEIDNER MARCUS: Your Honor, I apologize. Just
16 for the sake of efficiency, I wanted to bring to your attention
17 that we were in a discovery hearing in California in December
18 and the plaintiffs had filed a motion to compel because they
19 had sought very broad discovery and we had -- the defendants
20 had indicated that -- we gave a lot of discovery and there were
21 some limitations. And the point is, Your Honor, that the
22 judge, the magistrate judge in California adjusted the
23 plaintiffs' requests in a way that was much more reasonable
24 than how it had been sought from the plaintiffs. And I just
25 want to avoid having the same fight over again.

1 THE COURT: And maybe I should ask that magistrate
2 judge to preside over discovery here.

3 MS. ZEIDNER MARCUS: I think -- I think that we and
4 the plaintiffs' counsel, hopefully, will work together to make
5 things efficient for Your Honor. But, I wasn't trying to take
6 over from my counsel. I just was at that hearing and wanted to
7 let you know that that had occurred. And I am afraid of
8 discovery fights. They're not really fun for anybody.

9 THE COURT: They're not fun, no.

10 MS. ZEIDNERMARCUS: And so, you know, there were -- I
11 know plaintiffs' counsel have said several times that
12 defendants were dragging their feet, but that was not our
13 perspective, Your Honor. They were asking completely --
14 extremely broad requests for policy decisions that had nothing
15 to do with the underlying facts. And the magistrate judge in
16 that case did narrow the discovery requests significantly and
17 that made it more reasonable.

18 THE COURT: Suppose -- in sitting here listening to
19 you, would it make sense to maybe ask one of our magistrate
20 judges to meet with counsel after you've had an opportunity --
21 or maybe it the same time, or before you've had an opportunity
22 to sit down and talk about discovery, see if you can carve out
23 an appropriate discovery path?

24 MR. EDELMAN: We would be happy to do that, Your
25 Honor.

1 MS. ZEIDNERMARCUS: I will say, it's the same counsel
2 in that case that we just had four months of discovery on. So
3 180 days seems like a really long time for discovery.

4 MS. ANDRAPALLIYAL: We would be happy, Your Honor --

5 THE COURT: Court reporter can't hear you, Counsel.

6 MS. ANDRAPALLIYAL: Your Honor, all that to say we
7 would be happy to talk to anyone, Your Honor, which is -- to
8 sort of reach an agreement on issues.

9 THE COURT: We have three wonderful magistrate
10 judges, two of whom have had significant experience in the
11 private sector, actually working with the government. But
12 they're outstanding magistrate judges. How about that? Would
13 you like to sit down?

14 MR. EDELMAN: I think, especially given the comments
15 from the defendants' counsel today, I think it may be
16 helpful -- it certainly would be helpful, it actually may be
17 necessary. We would be very happy to do that, Your Honor.

18 THE COURT: All right. So we'll start out with the
19 magistrate judge, then. All right. So we'll tailor-make the
20 initial filing requirements and I'll ask one of the magistrate
21 judges, probably Judge Meriweather, to assist the parties and
22 meet with them in an effort to try and carve out appropriate
23 discovery in this case.

24 Maybe I should hold off now. I mean, I don't know
25 whether 180 months would be appropriate, or 120 months -- I

1 mean, 120 days or 180 days. Maybe it would be appropriate to
2 hold off putting in place a briefing schedule until I get the
3 best thoughts from the magistrate judge and counsel about
4 discovery, and discovery on what issues.

5 MR. EDELMAN: We're certainly happy -- plaintiffs are
6 happy to proceed how ever the Court wishes in that regard. I
7 do suggest, again, Your Honor, that it may help frame some of
8 the discussion if the parties were to exchange initial
9 disclosures.

10 THE COURT: I agree with that.

11 MR. EDELMAN: We would be prepared to do that by May
12 29, if that would be acceptable to the Court.

13 THE COURT: What about that, Counsel?

14 MS. ANDRAPALLIYAL: Your Honor, again, because we
15 don't believe discovery is appropriate here, we think that
16 initial disclosures are -- administrative records are exempt
17 from -- record review cases are exempt from initial
18 disclosures. So we would be happy to provide the
19 administrative record to get going and then speak to whoever
20 else --

21 THE COURT: Let me ask you this: How long would it
22 take to assemble the administrative record and file it with the
23 Court? Thank you for reminding me.

24 MS. ANDRAPALLIYAL: Sixty days, Your Honor.

25 THE COURT: How long?

1 MS. ANDRAPALLIYAL: Sixty days.

2 THE COURT: It's not prepared already?

3 MS. ANDRAPALLIYAL: Not to my knowledge, Your Honor.

4 THE COURT: I doubt if it's that voluminous though,
5 is it?

6 MS. ANDRAPALLIYAL: I haven't worked with the
7 department that compiled the record yet, but it would comprise
8 the non-privilege documents considered in connection with the
9 applications here.

10 THE COURT: Counsel, what's your answer?

11 MR. EDELMAN: It does seem like longer than I would
12 have anticipated. I just think that the initial disclosure
13 process will help everyone frame what is in bounds and what
14 isn't. I don't understand, I have never understood and I don't
15 think defendants' counsel has explained how, with the
16 constitutional claims out there, they could seek, in this case,
17 as they sought unsuccessfully in *Dvash-Banks*, to prevent any
18 discovery.

19 We're happy to proceed how ever the Court thinks
20 would be most expeditious and, frankly, most favorable to the
21 Court. But we have never understood and still don't understand
22 how the government can continue to take the position that
23 the -- no discovery is appropriate. It didn't work in the
24 *Dvash-Banks* case and we submit there's nothing about this case
25 that makes it different.

1 THE COURT: Would it make more sense to ask the
2 parties to exchange initial disclosures once you see what the
3 administrative record is? Or does it make any difference?

4 MR. EDELMAN: We're prepared to do that. I am
5 worried that, you know, if the 60 days cuts into the
6 schedule -- if there's any way we could expedite that and then
7 work with the Court, either through the magistrate judge or
8 directly with Your Honor, to put in place a schedule that makes
9 sense, that may be the best way to proceed. But, again, if the
10 Court has a different preference, we will accommodate that.

11 THE COURT: Yes, Counsel?

12 MS. ANDRAPALLIYAL: Your Honor, if that's a way to
13 move this case forward, I'll go back to my client and do my
14 best to get a record together within 45 days.

15 THE COURT: All right. I was thinking -- actually,
16 before you came up, I wrote down June 30th. So I'm going to
17 direct that the government -- the record can't be that
18 voluminous, that the government -- I'm going to direct that the
19 government produce and file the administrative record by June
20 30th. Initial disclosures exchanged by May 29th. Any
21 additional requirements I'll set forth in an appropriate order
22 issued later today.

23 I'll hold off on putting in place a briefing schedule
24 for summary judgment. I don't know if there's going to be a
25 delay or not. And all this is subject to reconsideration and

1 adjustment by the magistrate judge. I think both sides would
2 benefit by having a magistrate judge with significant civil
3 litigation experience working with the parties in an effort to
4 head off and potentially resolve any discovery disputes. And I
5 think Judge Meriweather would be the appropriate magistrate
6 judge to do that.

7 MR. EDELMAN: We appreciate that, Your Honor.

8 THE COURT: Sure.

9 MS. ANDRAPALLIYAL: Thank you, Your Honor. One
10 follow-up about the initial disclosures. Would it be possible
11 for us to submit the record and then, you know, work with the
12 magistrate judge and opposing counsel with any other
13 disclosures that are required here? And that would help us
14 with sequencing.

15 THE COURT: That's a good point. Maybe what I should
16 do is just speak with Judge Meriweather and ask her, since I'm
17 burdening her calendar now. I could flip it and have you
18 produce the administrative record by May 30th and initial
19 disclosure by June 30th. Is that what you want?

20 MS. ANDRAPALLIYAL: Your Honor, the State Department
21 has indicated to me that it will take at least that long to put
22 together the records.

23 THE COURT: Let me speak with Judge Meriweather and
24 see what she wants. I wouldn't want someone tying my hands.
25 You're going to get whatever discovery is appropriate, and then

1 we'll get on to the merits. I probably will expand on the oral
2 ruling when I issue a merits resolution, as appropriate. We
3 kind of left settlement dangling. Sounds like both sides --
4 are you more interested in talking now or less interested or --

5 MS. ANDRAPALLIYAL: We're always interested, Your
6 Honor. Plaintiffs have anything to say about that?

7 THE COURT: You know, you could use Judge Meriweather
8 also as someone who can assist with settlement, if you want to,
9 or I can appoint someone else.

10 MR. EDELMAN: We're happy to work with the magistrate
11 judge or anyone else. I -- the issues really have been on the
12 side of the defendants, and so if they're willing to
13 participate, we will be there and participate in good faith.

14 THE COURT: I would suggest Judge Meriweather to the
15 parties. And if you want someone else, let her deal with the
16 discovery issues. I'm going to deal with the merits issues
17 myself. I'm not going to refer it for report and
18 recommendation. I'll deal with this. But, you know, if the
19 parties decided they want someone else to assist with
20 settlement negotiations, that's fine with me as well.

21 But you've given me a lot to think about and talk
22 about with Judge Meriweather. And I'll do that and try to get
23 an order out probably by tomorrow. So, all right?

24 MR. EDELMAN: Thank you, Your Honor.

25 THE COURT: This is a case that cries out for

1 settlement, it really does.

2 MS. ANDRAPALLIYAL: Thank you, Your Honor.

3 THE COURT: All right. All right. Good to see
4 everyone. Everyone is smiling now. You want me to leave you
5 in the courtroom, you can talk about settlement? It really is
6 a case. I mean, go back and tell the people at State
7 Department to keep the crap out of the settlement. You
8 mentioned that little kid. How old is the son now? Four years
9 old?

10 MR. EDELMAN: Yes, Your Honor.

11 THE COURT: You know, kids are so perceptive. He's
12 wondering why his bother gets just to walk through metal
13 detectors and he gets frisked and mom gets questioned.

14 Anyway. All right. It's good to see everyone. Have
15 a nice afternoon.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 18th day of May, 2018.

/s/ _____

Janice E. Dickman, CRR, RMR
Official Court Reporter
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