IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES DEREK MIZE, et al., *Plaintiffs,* v. MICHAEL R. POMPEO, et al., *Defendants.*	Civil Action No. 1:19-cv-3331-MLB

JOINT PRELIMINARY REPORT AND DISCOVERY PLAN

1. Description of Case:

(a) Describe briefly the nature of this action.

PLAINTIFFS' STATEMENT:

This is an action for declaratory and injunctive relief in order to remedy violations of: (i) the Immigration and Nationality Act ("INA"), (ii) Plaintiffs' equality, dignity, protected liberty interests, and fundamental rights guaranteed by the Fifth Amendment to the United States Constitution, and (iii) the Administrative Procedures Act ("APA").

DEFENDANTS' STATEMENT:

This is an action for declaratory and injunctive relief in order to remedy alleged violations of: (i) the Immigration and Nationality Act ("INA"), (ii) Plaintiffs' protected liberty interests and fundamental rights guaranteed by the Fifth Amendment to the United States Constitution, and (iii) the APA.

(b) Summarize, in the space provided below, the facts of this case.

The Complaint (Doc. 1) alleges the following facts. Plaintiffs James Derek Mize and Jonathan Daniel Gregg are a married same-sex couple. They are both U.S. citizens. Plaintiff S.M.-G. is the daughter of Messrs. Mize and Gregg. She was born in the United Kingdom in the summer of 2018 through surrogacy, meaning an embryo created with Mr. Gregg's genetic material was implanted in a gestational surrogate. S.M.-G.'s birth certificate identifies Messrs. Mize and Gregg as her only parents, and a Parental Order issued by the Central London Family Court on March 21, 2019 declares that S.M.-G. "is to be treated in law as the child of the parties to a marriage, Jonathan Daniel Gregg and James Derek Mize."

On April 24, 2019, Plaintiffs applied for a Consular Report of Birth Abroad ("CRBA") and U.S. passport for S.M.-G. at the U.S. Embassy in London. Via letter dated the same date, Defendants declined to issue a CRBA and U.S. passport, stating "it does not appear that your child has a claim to U.S. citizenship." Defendants' letter

stated that Mr. Gregg had failed to meet the U.S. residency requirements of Section 301(g) of the INA.

(c) The legal issues to be tried are as follows:

PLAINTIFFS' STATEMENT:

(i) Whether Plaintiff S.M.-G. has been a U.S. citizen since birth pursuant to Section 301(c) of the INA and should be declared as a U.S. citizen since birth pursuant to 8U.S.C. § 1503.

(ii) Whether the U.S. Department of State's refusal to treat S.M.G. as the marital child of Plaintiffs Mize and Gregg, pursuant to Section 301(c) of the INA, violates Plaintiffs' fundamental rights and protected liberty interests guaranteed by the Fifth Amendment to the U.S. Constitution.

(iii) Whether the U.S. Department of State's policy requiring a biological relationship between a child and both married parents under Section 301 of the INA violates Plaintiffs' equality, dignity, fundamental rights, and protected liberty interests guaranteed by the Fifth Amendment to the U.S. Constitution.

(iv) Whether the U.S. Department of State's policy requiring a biological relationship between a child and both married parents under Section 301 of the INA, published without notice or comment, violates the Administrative Procedures Act because it is arbitrary, capricious, and not in accordance with law.

DEFENDANTS' STATEMENT:

This case involves legal questions of federal public law regarding the acquisition of citizenship at birth by children born abroad who are not biologically related to their citizenship-conferring U.S. parent. As indicated in the U.S. Department of State's Foreign Affairs Manual, Defendants consistently apply the provisions of INA's Sections 301 and 309 with respect to all such children seeking to be documented as U.S. citizens (other than adopted children, for which a different legal framework applies), irrespective of the sexual orientation of the legal parents of such children.

(d) The cases listed below (include both style and action number) are:

(1) Pending Related Cases:

There are no pending related cases pursuant to Fed. R. Civ. P. 42(a). However, the Parties assert there are three cases pending in other jurisdictions raising identical or similar issues: *Kiviti v. Pompeo*, No. 8:19-cv-02665-TDC (D. Md.); *Blixt v. Pompeo*, No. 1:18-cv-00124-EGS-RMM (D.D.C.); *Dvash-Banks v. U.S. Department of State*, No. 19-55517 (9th Cir.).

(2) Previously Adjudicated Related Cases:

There are no previously adjudicated related cases pursuant to Fed. R. Civ. P. 42(a). However, the Parties assert there is one case already adjudicated in the

U.S. District Court for the Central District of California, and for which there is an appeal pending, that raises similar issues: *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCX), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019), *appeal pending*, No. 19-55517 (9th Cir.).

2. This case is complex because it possesses one or more of the features listed below (please check):

____ (1) Unusually large number of parties

____ (2) Unusually large number of claims or defenses

____ (3) Factual issues are exceptionally complex

____ (4) Greater than normal volume of evidence

____ (5) Extended discovery period is needed

____ (6) Problems locating or preserving evidence

____ (7) Pending parallel investigations or action by government

____ (8) Multiple use of experts

____ (9) Need for discovery outside United States boundaries

____ (10) Existence of highly technical issues and proof

____ (11) Unusually complex discovery of electronically stored information

3. Counsel:

The following individually-named attorneys are hereby designated as lead counsel for the parties:

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4. Jurisdiction:

Is there any question regarding this Court's jurisdiction?

_____ Yes __X__ No

If "yes" please attach a statement, not to exceed one page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.

No issues presently exist regarding personal jurisdiction or venue. *See* 28 U.S.C. § 1391(e)(1)(C); 8 U.S.C. § 1503(a). Plaintiffs assert that this Court has subject-matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, 8 U.S.C. § 1503, and 5 U.S.C. § 702.

5. Parties to This Action:

(a) The following persons are necessary parties who have not been joined:

All necessary parties have been joined.

(b) The following persons are improperly joined as parties:

No persons have been improperly joined as parties.

(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted:

No parties' names are inaccurately stated nor are necessary portions of their names omitted, except that, pursuant to Fed. R. Civ. P. 5.2, Plaintiff S.M.-G. is proceeding under her initials.

(d) The parties shall have a continuing duty to inform the Court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.

6. Amendments to the Pleadings:

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed. R. Civ. P. 15. Further instructions regarding amendments are contained in LR 15.

(a) List separately any amendments to the pleadings that the parties anticipate will be necessary:

Pursuant to the Court's July 23, 2019 Order (Doc. 2), Plaintiffs refiled their initial Complaint with Plaintiff S.M.-G.'s full name redacted on July 29, 2019. Plaintiffs do not anticipate any further amendment of the pleadings at this time. However, should the Court grant any portion of Defendants' pending motion to dismiss (Doc. 32), Plaintiffs have requested leave to file an amended complaint. *See* Doc. 35-1.

(b) Amendments to the pleadings submitted LATER THAN THIRTY DAYS after the Joint Preliminary Report and Discovery Plan is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times For Motions:

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY DAYS after the beginning of discovery, unless the filing party has obtained prior permission of the court to file later. Local Rule 7.1A(2).

(a) *Motions to Compel*: before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

Pursuant to the Court's Standing Order Regarding Civil Litigation (Doc. 5), motions to compel, to quash a subpoena, for a protective order, or for sanctions ordinarily may not be filed without a prior conference with the Court.

(b) *Summary Judgment Motions*: no later than thirty (30) days after the close of discovery, unless otherwise permitted by court order. Local Rule 56.1.

(c) *Other Limited Motions*: Refer to Local Rules 7.2A; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) *Motions Objecting to Expert Testimony*: *Daubert* motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rule 7.2F.

8. Initial Disclosures:

The parties are required to serve initial disclosures in accordance with Fed. R. Civ. P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection. NOTE: Your initial disclosures should include electronically stored information. Refer to Fed. R. Civ. P. 26(a)(1)(B).

PLAINTIFFS' POSITION:

Plaintiffs assert that the Parties should file initial disclosures no later than December 17, 2019 (14 days after the Parties' Rule 26(f) conference). Defendants

provide no legal support for their assertion below that Plaintiffs are not entitled to discovery on their Section 1503 and constitutional claims, and that instead these claims should be resolved on the existing administrative record as if they were APA claims. While Plaintiffs expect to file an early summary judgment motion, discovery may become necessary depending on how the Court decides the parties' dispositive motions.

DEFENDANTS' POSITION:

Defendants' position is that the Court should stay discovery pending resolution of Defendants' motion to dismiss the Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 32). Defendants' motion to dismiss seeks to dispose of all of Plaintiffs' claims in this action. It is appropriate to stay discovery when a Rule 12 motion tests the legal sufficiency of a complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery . . . ."); *Nietzke v. Williams*, 490 U.S. 319, 326-27 (1989) (the purpose of a Rule 12(b)(6) motion is to "streamline[] litigation by dispensing with needless discovery and factfinding"). Facial challenges to the legal sufficiency of a complaint, such as motions to dismiss for failure to state a claim, should be resolved before discovery begins. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997).

A stay of discovery pending resolution of dispositive motions would prevent wasting the time and effort of the Parties and would serve the interests of judicial economy. The resolution of Defendants' motion will inform whether any claims remain to be adjudicated, and, if any, whether such claims are properly decided on the basis of the administrative record or whether the Court will allow extra-record discovery. Thus, entering a stay of discovery here is appropriate to avoid inefficiency.

Furthermore, this action concerns the validity of the U.S. State Department's legal interpretation of 8 U.S.C. §§ 1401 and 1409, as manifested in the denials of Plaintiffs' CRBA and U.S. passport applications and in the Department's publicly-available Foreign Affairs Manual, whose guidance embodies the Department's interpretation of the relevant statutes. To the extent they are viable, Plaintiffs' declaratory judgment claims and their APA claim would be subject to record review pursuant to the APA. *See Fla. Power & Light Co.*, 470 U.S. 729, 743-44 (1985) (holding that review of APA claims is restricted to the administrative record, rendering "the factfinding capacity of the district court . . . typically unnecessary to judicial review of agency decisionmaking"); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) (recognizing limit to record review was appropriate even on non-APA constitutional claims); *Outdoor*

Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec., No. CV ELH-16-1015, 2017 WL 3189446, at *2 (D. Md. July 27, 2018) (denying discovery where plaintiff's non-APA statutory claims raised "a pure question of law").

Plaintiffs' claim under 8 U.S.C. § 1503, which allows an individual to seek a judgment declaring the individual to be a U.S. citizen, is the only claim for which discovery could potentially be available under the law, if necessary. But this dispute centers on a question of law—the U.S. State Department's statutory interpretation—and the Parties could stipulate to any material facts regarding S.M.-G. and the applications made on her behalf. There are no disputed material facts preventing the Court from deciding whether S.M.-G. should be accorded judgment declaring her to be "a national of the United States." 8 U.S.C. § 1503. Defendants' position comports with applicable law and ensures that Plaintiffs' claims will be adjudicated in a timely fashion, without wasting time and resources on improper and disproportionate discovery.

9. Request for Scheduling Conference:

Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.

The Parties do not request a scheduling conference with the Court at this time.

10. Discovery Period:

The discovery period commences thirty days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period.

Cases in this Court are assigned to one of the following three discovery tracks: (a) zero month discovery period, (b) four months discovery period, and (c) eight months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing.

Please state below the subjects on which discovery may be needed:

PLAINTIFFS' POSITION:

Plaintiffs anticipate that discovery may be needed, though not necessarily limited to, the following topics:

(i) The history and rationale of the Defendant's policy requiring a biological relationship between a child and both married parents under Section 301 of the INA.

(ii) The history and rationale behind the establishment of Defendant's exception to their policy to treat a non-genetic gestational surrogate who is also a legal parent and declares her to be a "biological" parent. The history and rationale of any amendments, changes, or alterations to the Foreign Affairs Manual, as it relates to Defendants' policy requiring a biological relationship between a child and both married parents under Section 301 of the INA.

(iii) The history and rationale of any amendments, changes, or alterations to U.S. Department of State governmental forms, as it relates to Defendants' policy requiring a biological relationship between a child and both married parents under Section 301 of the INA.

(iv) Any documents or communications relating to Defendants' recognition of U.S. citizenship of the children born abroad of married same-sex couples, at least one of whom is a U.S. citizen.

(v) Any documents or communications relating to Defendants' treatment of same-sex couples and recognition of their valid marriages.

(vi) Any documents or communications relating to Defendants' treatment of same-sex couples in which Defendants do not recognize their valid marriages.

(vii) Defendants' treatment of applications for a Consular Report of Birth Abroad and/or U.S. Passport for the children born abroad to different-sex married couples.

DEFENDANTS' POSITION:

For the reasons set forth by Defendants in response to Item No. 8 above, discovery is not appropriate or necessary in this case. To the extent the Parties are ordered to proceed with discovery, Defendants otherwise object to the subjects identified by Plaintiffs above as they are overbroad, immaterial to the question of law before the Court, and unduly burdensome. Defendants reserve the right to raise specific objections if Plaintiffs propound discovery.

If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery or that discovery should be conducted in phases or be limited to or focused upon particular issues, please state those reasons in detail below:

This Case has been assigned to the four-month discovery track. Plaintiffs believe that the four-month discovery track will be adequate. Defendants believe that, should discovery proceed, the four-month discovery track will be adequate.

11. Discovery Limitation and Discovery of Electronically Stored Information:

(a) What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed?

PLAINTIFFS' POSITION:

No changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court. No other limitations should be imposed.

DEFENDANTS' POSITION:

Should the Parties be ordered to proceed with discovery, and if the Parties cannot agree to a set of stipulated facts on which to proceed to summary judgment, Defendants alternatively propose the following limitations on discovery:

(i) Each side may serve upon the other side no more than 10 requests for the production of documents;

(ii) Each side may serve upon the other side no more than 10 requests for admission;

(iii) Each side may serve upon the other side no more than 15 interrogatories; and

(iv) Each side shall take no more than five depositions.

(b) Is any party seeking discovery of electronically stored information?

__X__ Yes _____ No

If "yes,"

(i) The parties have discussed the sources and scope of the production of electronically stored information and have agreed to limit the

scope of production (e.g., accessibility, search terms, date limitations, or key witnesses) as follows:

Should the Parties be ordered to proceed with discovery, the Parties agree to discuss the sources, scope, and any limitations on ESI on a good-faith basis as discovery proceeds. Because the Parties have not yet made their initial disclosures, the Parties believe that imposition of limits on the scope of production would be premature.

(ii) The parties have discussed the format for the production of electronically stored information (e.g., Tagged Image File Format (TIFF or .TIF files), Portable Document Format (PDF), or native), method of production (e.g., paper or disk), and the inclusion or exclusion and use of metadata, and have agreed as follows:

PLAINTIFFS' POSITION:

The Parties should submit either a jointly proposed ESI order or competing proposed ESI orders to the Court by January 16, 2020.

DEFENDANTS' POSITION:

Should the Parties be ordered to proceed with discovery, the Parties intend to negotiate an agreement setting forth specifications for production of ESI. Defendants propose that the Parties either jointly propose an order regarding the specifications for production of ESI or submit competing proposed orders to the Court within 14 days following entry of an order to proceed with discovery.

In the absence of agreement on issues regarding discovery of electronically stored information, the parties shall request a scheduling conference in paragraph 9 hereof.

12. Other Orders:

What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?

Other than the potential entry of an order regarding the scope and specifications for production of ESI, the Parties do not currently anticipate the need for entry of any other orders under Rule 26(c) or Rule 16(b) and (c), though the need for such orders may arise during the course of discovery.

13. Settlement Potential:

(a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on December 3, 2019, and that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.

For Plaintiffs:

Lead counsel (signature): *<u>/s/ Omar Gonzalez-Pagan</u>*

Co-lead counsel: Susan Baker Manning; Aaron C. Morris

Other participants: John A. Polito; Karen L. Loewy; Tara L. Borelli

For Defendants:

Lead counsel (signature): <u>/s/ Alexis J. Echols</u>

(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

(_____) A possibility of settlement before discovery.
(_____) A possibility of settlement after discovery.
(_____) A possibility of settlement, but a conference with the judge is needed.
(__X__) No possibility of settlement.

(c) Counsel (_____) **do or** (__X__) **do not intend to hold additional settlement conferences among themselves prior to the close of discovery.**

(d) The following specific problems have created a hindrance to settlement of this case.

This case presents statutory, constitutional, and APA claims that are not amenable to settlement.

Defendants assert that Plaintiffs retain the option of pursuing S.M.-G.'s U.S. citizenship pursuant to the Child Citizenship Act of 2000, 8 U.S.C. § 1431, which would obviate the need for litigation.

Plaintiffs note that Defendants' invocation of the "option" of pursuing U.S. citizenship pursuant the Child Citizenship Act of 2000, 8 U.S.C. § 1431, does not obviate the need for this case, as there are significant differences between citizen at birth and naturalized citizenship.

14. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if a part is otherwise entitled to a jury trial.

(a) The parties (_____) do consent to having this case tried before a magistrate judge of this Court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk on this _____ day _____, of 20___.

(b) The parties (__X__) do not consent to having this case tried before a magistrate judge of this Court.

Respectfully submitted this 12th day of December, 2019.

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