IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLISON DAWN BLIXT and LUCAS ALEXANDER ZACCARI-BLIXT, Plaintiffs; v. THE UNITED STATES DEPARTMENT OF STATE et al., Defendants.	)	**Civ. Action No. 18-124 (EGS)**

Supplemental Memorandum in Support of Defendants' Motion to Dismiss

INTRODUCTION

Defendants submit this supplemental brief in accordance with this Court's February 25, 2019, Minute Order. That Minute Order referenced the U.S. District Court for the Central District of California's recent decision in *Dvash-Banks v. Pompeo*, 18-cv-523-JFW (C.D. Cal.), which adjudicated cross-motions for partial summary judgment, granting the defendants' motion with respect to the plaintiffs' Administrative Procedure Act claim, granting plaintiffs' motion with respect to the plaintiffs' 8 U.S.C. § 1503 claim, and denying both motions as moot with respect to the plaintiffs' Declaratory Judgement Act substantive due process claim.

In ruling on the Section 1503 claim, the Central District of California court concluded that under Ninth Circuit precedent, Section 301 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1401, "'does not require a person born during their [legal] parents' marriage to demonstrate a biological relationship with both of their married parents.'" Feb. 25 Minute Order (quoting *Dvash-Banks v. Pompeo*, 2019 WL 911799 at *7, 18-cv-523-JFW (C.D. Cal.)). That conclusion should not be followed in this case for two reasons. First, the California court's analysis applied only to the *Dvash-Banks* plaintiffs' Section 1503 claim; Section 1503 provides a *de novo* standard of review, and Plaintiffs have not brought such a claim here. Second, the California court based its conclusion on "controlling Ninth Circuit authority," *id.*, which, of course, does not control in this district, and is flawed in any event, *see* Defs.' Reply Mem. In Support of Mot. To Dismiss ("Defs.' Reply") 14–17, ECF No. 33.

This Court should, however, strongly consider the *Dvash-Banks* court's sound rulings on the APA and DJA claims in that case because the Plaintiffs here bring nearly identical claims.

DVASH-BANKS V. POMPEO

In *Dvash-Banks*, a U.S. citizen, Andrew, and his Israeli citizen spouse, Elad, used Assisted Reproductive Technology ("ART") to conceive children. 2019 WL 911799 at *1. In

September 2016, a surrogate gave birth to two children: E.J., who shared Elad's genetic material, and A.J., who shared Andrew's genetic material. *Id.* An Ontario court entered an order naming Andrew and Elad the legal parents of E.J. and A.J. *Id.* Thereafter, Andrew and Elad applied for a Consular Report of Birth Abroad and U.S. passport for E.J. and A.J. *Id.* at *2. The adjudicating officer denied E.J.'s applications on the ground that the applicants had failed to establish a biological connection between E.J. and a U.S. citizen parent. *Id.*

In January 2018, Andrew filed suit on behalf of himself and E.J., arguing that the denial of E.J.'s applications violated the APA, asserting claims under the DJA alleging violations of their substantive due process and equal protection rights, and pursuing a claim under 8 U.S.C. § 1503(a). Compl., ECF No. 1, *Dvash-Banks*, 18-cv-523-JFW (C.D. Cal.). The court dismissed the APA claim, concluding that the plaintiffs had an adequate remedy at law under Section 1503(a). *Id.* at *5–6. Next, it granted summary judgment for the plaintiffs on the Section 1503 claim. Finally, it dismissed as moot the DJA claim alleging a substantive due process violation. *Id.* at *8–9. The court concluded that because it had decided the Section 1503 claim in the plaintiffs' favor, it "need not and will not reach the constitutional issue raised" under the DJA. [1] *Id.* at *8.

ANALYSIS

I. The *Dvash-Banks* court's decision under 8 U.S.C. § 1503 is of limited relevance to Plaintiffs' claims, which are not brought under that statute.

The *Dvash-Banks* court's conclusions in deciding a claim under 8 U.S.C. § 1503 should not bear on this case because the plaintiffs here do not bring claims under that statute. Under Section 1503, courts examine the question of whether a claimant is a U.S national *de novo*,

[1] On January 14, 2019, the plaintiffs filed a First Amended Complaint, which removed Plaintiffs' DJA claim alleging an equal protection violation. *Compare* Compl. with First. Am. Compl., ECF No. 94, *Dvash-Banks*, 18-cv-523-JFW (C.D. Cal.).

without reviewing the agency actions denying the right or privilege of citizenship at issue. *See Maldonado-Sanchez v. Schultz*, 706 F. Supp. 54, 58 (D.D.C. 1988); *Edwards v. Bryson*, 578 Fed. App'x 81, 83 (3d Cir. 2014); *Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985). In *Dvash-Banks*, the court did not conclude that the defendants violated the APA, the U.S. Constitution, or any other applicable law; thus, its decision on the Section 1503 claim has no direct applicability here.

In any event, in reaching its interpretation of Section 301, the *Dvash-Banks* court relied on Ninth Circuit case law, which does not bind this court. As Defendants explained in their motion-to-dismiss briefing, the conclusions of law in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), should not be followed here. *See* Defs.' Reply 12–17. The phrase "*born* . . . of parents" as set forth in Section 301 (emphasis added) has an inherently biological connotation, and can reasonably be read and understood to serve a similar function and purpose to the "blood relationship" language of Section 309(a)—i.e., ensuring a biological connection between a child and his or her parents.[2] *See* Defs.' Reply 16–17. Moreover, "born … of parents" as understood by Congress must have required a biological relationship, as such a relationship was required to conceive and give birth to a child. *See United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009). Decades

[2] The *Dvash-Banks* court relied on *Scales* for the proposition that the current language in section 309(a), which explicitly requires a "blood relationship" between the U.S. citizen parent and the foreign-born child seeking to acquire U.S. citizenship at birth, precludes an implicit biological relationship in section 301(g). 2019 WL 911799 at *7. But Section 309(a) contained no explicit biological relationship requirement until 1986, while the language of section 301(g) at issue here is unchanged since 1952, and the Ninth Circuit has elsewhere concluded that Congress implicitly required a biological relationship between the U.S. citizen father and child in the previous version of 309(a), which made no mention of a "blood relationship." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009). As explained above, it follows that Congress intended a biological relationship requirement in Section 301(g) as well.

before the existence of ART, Congress would not have contemplated that a man with no biological connection to a child could be the child's parent *at birth*.[3]

Section 301(g)'s language can thus be seen as an indicator that Congress saw no need to be express about a circumstance—a biological link between parents and child—that was unremarkable. "There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the *fact of parenthood* have been established []," *Nguyen v. INS*, 533 U.S. 53, 68 (2001) (emphasis added). *See also Miller*, 523 U.S. at 443 (Stevens, J.).

It is thus entirely reasonable to construe the language "born of … parents" in Section 301(g) as encompassing *both* the biological and legal elements of parenthood. This is the basis for the interpretation the Department of State has long held and applied worldwide. In so doing, the Department was simply imputing into the statutory text a requirement it believed was, at minimum, implicit—an interpretation reinforced by the statutory scheme and the context of the pre-ART era in which the INA was enacted. While, as a policy matter, disagreement may exist about whether a biological connection with the U.S. citizen parent should continue to be a prerequisite in determining whether a child born abroad has acquired U.S. citizenship at birth, the Department's interpretation is not unlawful, for the reasons explained above.

II. The *Dvash-Banks* court's decisions on the overlapping claims are instructive.

By contrast, the *Dvash-Banks* court's rulings on the claims that *are* present in the instant litigation—an APA claim and a DJA claim—are helpful here. First, the court granted summary judgment motion for defendants on the APA claim because it concluded that Section 1503(a)

[3] Further, the Ninth Circuit's decision in *Solis-Espinoza* strains the meaning of acquisition of U.S. citizenship *at birth*. *See* 8 U.S.C. § 1401. The court in that case glossed over the fact that the U.S. citizen "mother" appeared to be neither the biological nor the legal mother of the claimant at the time of birth. *See* 401 F.3d at 1091.

provided an adequate remedy at law. *Dvash-Banks*, 2019 WL 911799 at *5–6. The court correctly noted that the injunctive relief plaintiffs seek is improper, because a claimant may not seek wholesale policy changes under the APA and any relief under that claim should be limited to the plaintiffs. Similarly here, the procedures set forth in Sections 1503(b) and (c) provide a path by which Plaintiffs may ultimately seek an alternative remedy at law. Plaintiffs' requested injunctive relief is also overbroad. As the Supreme Court recently reaffirmed, a court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," and a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury."[4] *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018). Plaintiffs' APA claim should be dismissed. *See* Defs.' Mem. In Supp. of Mot. to Dismiss 20–25, ECF No. 31-1; Defs.' Reply 9–12.

Further, the *Dvash-Banks* court dismissed the remaining DJA claim as moot in light of its decision to grant summary judgment in favor of the plaintiffs on their Section 1503 claim. Similarly, this Court should not reach Plaintiffs' Due Process Clause claim unless it has first considered and rejected the plaintiffs' statutory challenges.[5] *See, e.g.*, *S. Mut. Help Ass'n v. Califano*, 574 F.2d 518, 525 (D.C. Cir. 1977) (citing *Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (per curiam)) (noting that because of the court's "duty to avoid deciding constitutional questions unless essential to the proper disposition of a case," it should consider whether a hearing was required by regulation or statute before considering whether a hearing was required by the Due Process Clause); *AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 431 n.7 (4th Cir. 1998) (citing *Harmon*, 355 U.S. at 581).

[4] Moreover, the APA's equitable remedies are discretionary, *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). There is no equitable reason to enter a nationwide injunction in this case, which was not brought as a class action and does not require such relief to remedy Plaintiffs' injuries.

[5] To the extent this Court reaches Plaintiffs' DJA claims, it should dismiss them under Rule 12(b)(6). *See* Defs.' Mem. in Supp. of Mot. to Dismiss 11–20, ECF No. 31.

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Respectfully submitted,

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