UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALLISON DAWN BLIXT and L. Z.-B. Plaintiffs, v. The UNITED STATES DEPARTMENT OF STATE, *et al.* Defendants.	:	Civ. No. 1:18-cv-00124-EGS

JOINT STATUS REPORT

Plaintiffs Allison Dawn Blixt and L. Z.-B., by and through his *guardian ad litem* (jointly, "Plaintiffs"), together with Defendants the United States Department of State ("State Department") and the Honorable Michael R. Pompeo, in his official capacity as Secretary of State (collectively, "Defendants"; together, with Plaintiffs, the "Parties"), hereby file this joint status report in accordance with the Court's Minute Order of May 15, 2019 in the above-captioned action ("Action").

I. Settlement and ADR

At the May 15, 2019 status hearing, the Court instructed the Parties to consider whether there are reasonable prospects to resolve the Action by means of a negotiated resolution. On May 28, 2019, the Parties met and conferred telephonically regarding the possibility of settlement. At this time, the Parties do not believe that re-engaging in settlement discussions would aid in the resolution of this action. The Parties remain willing to engage in further discussions in the event that circumstances change.

II. Discovery

A. Initial Disclosures

On May 29, 2019, the Parties exchanged initial disclosures.

B. Answer Deadline

The Court extended Defendants' time to answer Plaintiffs' Complaint. *See* Minute Order of May 30, 2019. The answer is now due on or before June 14, 2019.

C. Discovery Plan

Defendants are currently working to compile the administrative record and will file it by June 30, 2019, in accordance with the Court's Minute Order of May 15, 2019.

The Parties met and conferred and are at an impasse regarding the need for discovery in addition to the administrative record. The Parties' respective positions are as follows:

Plaintiffs' Position

Defendants mischaracterize the nature and scope of Plaintiffs' claims in an effort to insulate their actions and determinations from discovery and judicial scrutiny in the Action. That effort not only distorts the gravamen of Plaintiffs' constitutional claims, but also seeks to overturn accepted principles of civil litigation. Rule of Civil Procedure 26 expressly contemplates discovery in civil actions. Under Rule 26(b)(1), "[u]nless otherwise limited by court order, . . . [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its

likely benefit." Contrary to Defendants' position, there is no exception to Rule 26 for constitutional claims. (*See, e.g.*, *Perry* v. *Schwarzenegger*, Case No. 09-cv-02292 (N.D. Cal.), ECF Nos. 1, 160, 178, 196, 288 (allowing extensive discovery in action asserting claims under the Due Process and Equal Protection Clauses)).

In an effort to immunize the State Department's discriminatory policy from judicial review, Defendants have reverted to their play book in *Dvash-Banks, et al.* v. *United States Department of State, et al.*, Case No. 2:18-cv-00523 (C.D. Cal.) ("*Dvash-Banks*"), in which they first objected to providing any discovery, then unsuccessfully sought a court order blocking any discovery, and thereafter delayed and stonewalled in providing discovery, ultimately requiring the plaintiffs to file an omnibus motion to compel that was granted in nearly all material respects. Defendants' efforts were unavailing in that case and should fare no better here. The court in *Dvash-Banks* implicitly recognized the need for, and right to, discovery in civil actions, even when at least some of the focus is on the administrative adjudication of applications for a CRBA and U.S. passport. There, the court permitted discovery to proceed on the plaintiffs' claims, including those asserting due process and equal protection violations, which are substantially similar to those asserted here, and included an Administrative Procedure Act ("APA") claim. *See Dvash-Banks*, ECF No. 52.

Defendants attempt to evade the significance of that determination in a closely-analogous case by arguing that "the court did not clearly articulate its reasons for going beyond record-review principles" (*infra* p. 11), that *Dvash-Banks* involved a claim directly under 8 U.S.C. § 1503, in addition to the APA, and that "the discovery exchanged did not meaningfully bear on the *Dvash-Banks* court's adjudication of plaintiffs' claims." These contentions are both factually inaccurate and legally irrelevant. What Defendants do not state is that the court in that

case ordered the parties to conduct discovery over Defendants' strenuous objections that discovery was inappropriate and unnecessary and that Magistrate Judge Chooljian issued two orders—also over Defendants' strong objections—compelling Defendants to participate meaningfully and reasonably in full discovery on the merits of the claims. (*Dvash-Banks*, 18-cv-523-JFW, ECF Nos. 65, 72.) Defendants further fail to acknowledge that *Dvash-Banks*, like this Action, also involved serious constitutional claims and was not limited (as the Action is not confined) to a review of the State Department's adjudications of E.J. D.-B.'s applications for a CRBA and U.S. passport. And Defendants' contention that the discovery did not relate to the adjudication of the claims at issue in *Dvash-Banks* is flatly wrong. Indeed, the parties filed cross-motions for summary judgment citing extensively from the factual record, including depositions of the consular officers involved in the adjudications at issue in that case and of Defendants' representative pursuant to Fed. R. Civ. P. 30(b)(6). Moreover, the court's decision on the cross-motions for summary judgment expressly referenced the State Department's unilateral about-face on the question of whether a so-called "gestational mother" satisfies the State Department's self-imposed biological relationship requirement for recognition of U.S. citizenship at birth. *Dvash-Banks* v. *Pompeo*, 2019 WL 911799, at *5 (C.D. Cal. Feb. 21, 2019). Information about that action by the State Department was specifically developed through discovery in *Dvash-Banks*, as was the State Department's concession that the State Department's imposition of a biological relationship requirement absent from Section 301(g) of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. § 1401,was not impelled by any concern for fraud. (*Dvash-Banks*, 18-cv-523-JFW, ECF No. 97 at 11.) These issues relate plainly and directly to the claims at issue in both *Dvash-Banks* and this Action. As a result, Defendants' assertions, below, that "the parties' summary judgment motions [in *Dvash-*

Banks] in large part relied on the administrative record" and that "the discovery exchanged [in that action] did not meaningfully bear on the *Dvash-Banks* court's adjudication of plaintiffs' claims" are curious at best.

The significance of developing a factual record to prove discriminatory intent, disparate treatment, and other aspects of the Equal Protection and Due Process claims cannot be lost on Defendants. Indeed, in their Motion to Dismiss the Complaint, Defendants argued that the Complaint failed to plead sufficient facts to allege either a Due Process or Equal Protection claim (ECF No. 31-1). Yet Defendants now argue that Plaintiffs should be precluded from seeking precisely these facts or any others that relate to Defendants' policy of treating all children of same-sex marriages as born "out of wedlock" and therefore "illegitimate."

Here, the Complaint alleges claims under the APA, the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. Irrespective of whether the Court were to limit discovery on the APA claim to the administrative record, there is neither legal justification nor fairness in extending that limitation to Plaintiffs' constitutional claims. The APA claim presents a direct challenge to the State Department's wrongful adjudications of L. Z.-B.'s applications for a CRBA and U.S. passport—which adjudications Defendants likely will argue followed from the State Department's internal policy, as memorialized in the *Foreign Affairs Manual* ("FAM").[1] In contrast, the Due Process and

[1] Defendants' contention that the State Department denied L.B.-Z.'s applications as "on the basis of the Department's statutory interpretation of 8 U.S.C. §§ 1401(g) and 1409" also is incorrect. As Defendants acknowledged in *Dvash-Banks* and courts in other cases have observed, Defendants' imposition of a biological relationship requirement is predicated on the State Department's internal policy embodied in the FAM, and is not mandated by the INA. *See Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000); *Jaen* v. *Sessions*, 899 F.3d 182 (2d Cir. 2018).

Equal Protection claims present a challenge to that policy itself, on the grounds that it discriminates against a suspect class in violation of the Fifth Amendment by classifying the children of same-sex married couples as "born out of wedlock" and "illegitimate." Plaintiffs are entitled to discovery on their constitutional claims, which relate directly to the significant issue of whether the State Department's policy infringes upon the rights of, and disproportionately harms, same-sex couples and that the State Department's discrimination is purposeful.

In support of their effort to censor or curtail inquiry into the policies and procedures that Defendants applied in denying L. Z.-B.'s applications, Defendants attempt to recast the Complaint's allegations as a challenge only to the denial of L. Z.-B.'s CRBA and U.S. passport applications, relying on inapposite decisions recognizing an exception in APA cases to the usual presumption of discovery. In *Bellion Spirits, LLC* v. *United States*, 335 F. Supp. 3d 32 (D.D.C. 2018), for example, the court held that discovery on the plaintiff's constitutional claims was inappropriate where "the gravamen" of those claims was "a decision made by an administrative agency." *Id.* at 43; *see also Alabama-Tombigbee Rivers Coal.* v. Norton, 2002 WL 227032, at *6 (N.D. Ala. Jan. 29, 2002) (describing plaintiffs' constitutional claims as "based on factual allegations identical to those asserted in support of their APA[] claims"). Similarly, in *Chang* v. *United States Citizenship & Immigration Services*, 254 F. Supp. 3d 160 (D.D.C. 2017), in which the court limited discovery on the plaintiffs' APA and non-APA claims to the administrative record, all of the complaint's claims revolved around the "agency's decision" to deny the plaintiffs' visas and alleged "fail[ure] to consider evidence submitted by plaintiffs." *Id.* at 162. In contrast to *Bellion Spirits* and *Chang*, in which the plaintiffs' "constitutional claims fundamentally overlap[ped]" with and were "fundamentally similar to their APA claims," *id.*, here the Complaint's constitutional claims are independent of, and do not

require the Court to reconsider, "the substance of the agency's decision" (*i.e.*, the State Department's denial of L. Z.-B.'s applications).[2] *McKoy* v. *Spencer*, 2019 WL 400615, at *11 (D.D.C. Jan. 31, 2019) (in a case challenging agency action, granting discovery on the plaintiff's Privacy Act, First Amendment, and Fifth Amendment claims because those claims did "not require the Court to evaluate the substance of the Navy's decision made on the administrative record"); *see also Rydeen* v. *Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (in action asserting APA claim, considering affidavits outside of the administrative record with respect to Fifth Amendment claim); *Carlsson* v. *United States Citizenship & Immigration Servs.*, 2015 WL 1467174, at *12 (C.D. Cal. Mar. 23, 2015) (in action asserting APA claim, allowing discovery on non-APA claim).[3]

Defendants erroneously suggest that Plaintiffs' constitutional claims are merely a collateral attack on the State Department's adjudication of L. Z.-B.'s CRBA and U.S. passport applications, and that to allow discovery on Plaintiffs' constitutional claims would incentivize other unsuccessful applicants to an agency to tack on overlapping constitutional claims in an effort to end-run the APA. As is clear on the face of the Complaint, Plaintiffs, through their constitutional claims, seek neither to re-litigate nor reverse the State Department's denial of those applications. Rather, Plaintiffs seek to enjoin the State Department's unconstitutional

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[2] Moreover, the decision in *Chang* turned, in part, on the fact that "[n]o suspect class [wa]s alleged regarding the equal protection claim, meaning that the government need only present a rational basis for its actions." 254 F. Supp. 3d at 162. Here, the Complaint alleges that the State Department's unconstitutional policy discriminates against same-sex married couples on the basis of protected characteristics—sex and sexual orientation.

[3] In various of the decisions cited by Defendants, the plaintiffs did not even assert a standalone constitutional claim. *See*, *e.g.*, *Outdoor Amusement Bus. Ass'n, Inc.* v. *DHS*, 2017 WL 3189446, at *21 (D. Md. July 27, 2017); *Moralez* v. *Perdue*, 2017 WL 2264855, at *3 (E.D. Cal. May 24, 2017).

policy of discriminating against same-sex married couples, to the extent that it would deem any child born of Plaintiff Allison Dawn Blixt and her wife, Stefania Zaccari to have been born "out of wedlock" and excluded from consideration for U.S. citizenship under Section 301 of the INA. Accordingly, Plaintiffs respectfully request that the Court follow the determination in *Dvash-Banks* and permit Plaintiffs appropriate discovery in this Action.[4]

The Court denied in full Defendants' motion to dismiss. (May 15, 2019 Minute Order.) Defendants now must litigate all the claims in the Action, including the constitutional claims. They cannot evade their obligations to participate fairly and meaningfully in the Action by attempting to re-write Plaintiffs' Complaint to cabin all of Plaintiffs' allegations and claims to address only the strict limits review of the administrative adjudications of L. B.-Z.'s applications for a CRBA and U.S. passport.

Defendants' Position:

Discovery beyond the limits of the Administrative Procedure Act ("APA") is inappropriate and unnecessary here. Therefore, this Court should find that this case falls within the scope of Local Rule 16.3(b)(1)'s exemptions from the requirements in Local Rule 16.3 and Fed. R. Civ. P. Rules 16(b) and 26(f) and allow the parties to confer on a schedule for summary-judgment briefing. Plaintiffs characterize Defendants' position as an attempt to "evade judicial review," but such characterization is neither true nor logical.[5] This case presents a challenge to

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[4] As counsel for Plaintiffs expressed during the March 15, 2019 status hearing, Plaintiffs "believe [they] can be efficient about [discovery]" (*See* 5/15/19 Tr. at 14:2-6; 37:23-38:4), and are willing to rely on discovery taken in *Dvash-Banks*, to the extent that it is not specific to the Dvash-Banks family or the plaintiffs in that action and is otherwise relevant to the Action.

[5] On the contrary, Defendants made clear at the May 15, 2019 status conference that they believed the case should proceed on administrative-record review, and that discovery was inappropriate. And this Court, instead of dismissing Defendants' position, indicated that it was open to hearing more about whether and to what extent discovery was needed. May 15, 2019 Status Conf. Tr. 45:21–22 ("I can't sit here and tell you whether there's a need for discovery on

agency actions: namely, the Department of State's denials of the Consular Report of Birth Abroad ("CRBA") and U.S. passport applications filed on behalf of plaintiff L.Z.-B, *see* Compl. ¶¶ 77, 79, 86, 91, on the basis of the Department's statutory interpretation of 8 U.S.C. §§ 1401(g) and 1409. In determining whether those denials were unlawful, including whether they are "contrary to constitutional right," 5 U.S.C. § 706(2)(B), the Court "shall review the whole record," *id.* § 706. As has been the law for almost fifty years, the Court's review should therefore be limited to "the full administrative record that was before the Secretary at the time he made his decision," the default scope of information for review of claims of this kind. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

These fundamental principles of administrative law are not discarded simply because Plaintiffs' Declaratory Judgment Act ("DJA") claims[6] rely on constitutional principles, while their APA claim relies on statutory principles.[7] Judicial review under the APA expressly

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all claims, I can't do that."); *see also id.* 47:19–23; 48:20–23; 49:1–4; 52:25–53:1. Indeed, this Court expressed skepticism about whether discovery was warranted. *See id.* 37:1 (I "query whether discovery is allowed in all circumstances."); *see also id.* 15:18–20.

[6] The DJA does not allow a plaintiff to seek discovery beyond the administrative record; the statute "presupposes the existence of a judicially remediable right," and does not provide plaintiffs with a cause of action. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014); *see Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011).

[7] Plaintiffs pursue three claims. Counts I and II of the Complaint are brought under the Declaratory Judgment Act and challenge Defendants' actions as violating their equal protection and due process rights. Compl. ¶¶ 73–80, 81–89. In Count III, Plaintiffs bring a claim under the Section 706(2)(A) of the APA. *See* Compl. ¶¶ 94, 97. It is immaterial that Plaintiffs do not bring their constitutional claims under the APA; "the gravamen" of Plaintiffs' constitutional claims "fault[] a decision made by an administrative agency"; thus, record-review principles apply. *Bellion Spirits, LLC* v. *United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018); *see also Chiayu Chang* v. *U.SCIS*, 254 F. Supp. 3d at 162 (denying discovery where "plaintiff's constitutional claims . . . are fundamentally similar to their APA claims" and explaining that the information necessary for the Court to decide the claims "will, presumably, be found in the administrative record").

includes claims that agency action is "contrary to constitutional right." 5 U.S.C. § 706(2)(B). Courts in this district and elsewhere therefore routinely restrict review to the administrative record in challenges to agency action that raise constitutional claims.[8]

There are many compelling reasons for so limiting review, even in constitutional cases. Foremost among them is that Congress has directed it. *E.g.*, *Evans v. Salazar*, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010) (The APA "specifically contemplates review of agency actions, findings, or conclusions found to be 'contrary to constitutional right, power, privilege, or immunity,' and limits such review to the administrative record."). Sovereign immunity, of course, generally precludes lawsuits against the United States. *United States v. Testan*, 424 U.S. 392, 399 (1976). The APA operates as a limited waiver of that immunity for suits for nonmonetary relief by a "person suffering legal wrong because of agency action." 5 U.S.C. § 702; *see Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006). The terms of that waiver also dictate the evidence the Court is to evaluate, even when it decides whether the agency action is "contrary to constitutional right." *Cf. Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) ("[T]he APA's waiver of sovereign immunity

[8] *See, e.g.*, *Bellion Spirits*, 335 F. Supp. 3d 32, 44 (D.D.C. 2018); *Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017); *McKoy v. Spencer*, CV 16-1313 (CKK), 2019 WL 400615, at *11 (D.D.C. Jan. 31, 2019); *Outdoor Amusement Bus. Ass'n, Inc.* v. *DHS*, 2017 WL 3189446, at *21 (D. Md. July 27, 2017); *Moralez* v. *Perdue*, 2017 WL 2264855, at *3 (E.D. Cal. May 24, 2017); *Ketcham v. U.S. Nat'l Park Serv.*, 2016 WL 4268346, at *1–2 (D. Wyo. Mar. 29, 2016); *Jarita Mesa Livestock Grazing Ass'n* v. *U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237–38 (D.N.M. 2014); *Tafas* v. *Dudas*, 530 F. Supp. 2d 786, 803 (E.D. Va. 2008); *Harvard Pilgrim Health Care of New England* v. *Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004); *Alabama-Tombigbee Rivers Coal. v. Norton*, 2002 WL 227032, at *5–6 (N.D. Ala. Jan. 29, 2002). While the case law on this issue "is sparse and in some tension," *Bellion Spirits*, 335 F. Supp. 3d 32, 41 (D.D.C. 2018), courts in this district have recently grappled with this issue and have tended to conclude that discovery is inappropriate. *E.g.*, *id.*; *Chiayu*, 254 F. Supp. 3d at 161; *McKoy*, 2019 WL 400615, at *11.

contains several limitations."). In such cases, as in all challenges to agency action, "the court shall review the whole record or those parts of it cited by a party." *Id.* § 706.

Further, courts have reasoned that permitting discovery for constitutional challenges to agency action would "'incentivize every unsuccessful party to agency action to allege . . . constitutional violations' in order to 'trade in the APA's restrictive procedures for the more evenhandedness ones of the Federal Rules of Civil Procedure.'" *Bellion Spirits LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018) (quoting *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1238 (D.N.M. 2014)); *see also Harvard Pilgrim Health Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery."); *Ketcham v. U.S. Nat'l Park Serv.*, No. 16-CV-00017-SWS, 2016 WL 4268346, at *2 (D. Wyo. Mar. 29, 2016) ("To distinguish between a 'stand-alone constitutional challenge' and an 'APA challenge[]' . . . would run afoul of Congress's intent.").

Plaintiffs' argument favoring discovery beyond the administrative record chiefly relies on *Dvash-Banks v. Pompeo*, 18-cv-523-JFW (C.D. Cal.), a case litigated in the U.S. District Court for the Central District of California, which is now on appeal to the U.S. Court of Appeals for the Ninth Circuit. While discovery took place in *Dvash-Banks*, the court did not clearly articulate its reasons for going beyond record-review principles. Further, that case involved a claim brought under 8 U.S.C. § 1503, under which courts examine whether a claimant is a U.S national *de novo*, 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). Here, by contrast, Plaintiffs do not bring a Section 1503 claim and instead solely attack the lawfulness of

Defendants' administrative actions, which should be decided based on the facts in the administrative record.

Finally, as a practical matter, discovery is unnecessary. The material facts regarding Plaintiffs' applications and Defendants' adjudications are not in dispute; rather Plaintiffs' claims turn on the validity of the Department's statutory interpretation of 8 U.S.C. §§ 1401(g) and 1409 as applied to the CRBA and U.S. passport applications at issue. This Court can adjudicate the lawfulness of the Department's longstanding requirement that a child born abroad seeking to be documented as a U.S. citizen must demonstrate a biological connection to a U.S. citizen parent by reference to the applicable statutes and the administrative record. That record will contain all nonprivileged documents relied upon to adjudicate the applications, including the relevant provisions of the Department of State's Foreign Affairs Manual ("FAM") that reflect how the Department interprets and applies those statutory provisions, which will more than suffice to enable the Court to evaluate and rule upon Plaintiffs' precise claims.

Plaintiffs argue that they do not necessarily challenge the application denials but rather challenge Defendants' "policy." In the Complaint's prayer for relief, Plaintiffs ask this Court to "[d]eclare unconstitutional, and a violation of the INA, the State Department's *policy* of classifying the children of same-sex married couples as 'children born out of wedlock,' and its consequent refusal to recognize [L. Z.-B's] citizenship status on that basis, both *on its face* and *as applied to Plaintiffs* . . . ." Compl., Prayer for Relief (i) (emphasis added). But Plaintiffs' sought-after relief does not give Plaintiffs license to go beyond the APA's record-review principles. The (publicly available) FAM presents the Department's so-called policy "on its face" and the remaining content of the administrative record will reflect how that policy was

"applied to Plaintiffs."[9] Indeed, challenges to policies that underlie agency action routinely proceed under the strictures of APA record review, including challenges that raise constitutional claims. *See, e.g.*, *Estes v. U.S. Dep't of the Treas.*, 219 F. Supp. 3d 17, 21 (D.D.C. 2016) (analyzing APA and constitutional challenges to agency policy, as set forth in a rule, on cross-motions for summary judgment filed on the basis of the administrative record; *see* Dkt. Sheet, 1:16-cv-00450-CRC).

Indeed, *Dvash-Banks* supports Defendants' position that discovery is not needed. The parties in that case engaged in four months of extensive extra-record discovery, but although Plaintiffs pursued a due process claim, they ultimately amended their complaint to withdraw their claim of an equal-protection violation after discovery, *see* First. Am. Compl., ECF No. 94, *Dvash-Banks*, 18-cv-523-JFW (C.D. Cal.), and the parties' summary judgment motions in large part relied on the administrative record. Moreover, the discovery exchanged did not meaningfully bear on the *Dvash-Banks* court's adjudication of plaintiffs' claims. Instead, the district court's decision focused on a question of law: whether the statutory requirements at issue contemplate a biological connection for a child born abroad to a U.S. citizen parent, as the Department of State has inferred from the applicable statutes for decades. *See Dvash-Banks v. Pompeo*, 2019 WL 911799 at *7, 18-cv-523-JFW (C.D. Cal.).

The D.C. Circuit has identified four narrow exceptions to the general prohibition on considering extra-record evidence: "(1) when the agency failed to examine all relevant

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[9] Plaintiffs routinely forego seeking discovery in such cases, as well as in other cases brought under the DJA that allege constitutional violations. *See, e.g.*, *Comm. on the Judiciary, U.S. House of Representatives vs. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008) (deciding the plaintiffs' motion for partial summary judgment on constitutional claims under the DJA, which the plaintiffs filed without seeking discovery, *see* Docket Report, Civ. No. 1:08-cv-409) (cited by this Court at the May 15, 2019 Status Conference, Tr. at 42).

factors; (2) when the agency failed to explain adequately its grounds for decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior." *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012) (citing *IMS v. P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997)). The very existence of these exceptions under the law further demonstrates that discovery does not automatically take place whenever plaintiffs frame a challenge to agency action as a constitutional claim. And in any event, Plaintiffs do not establish that any of these exceptions apply, not least because Defendants have not yet completed their compilation of the administrative record. Therefore, to the extent this Court believes that any discovery may be permitted, Defendants alternatively request the opportunity to provide the administrative record to Plaintiffs by June 30, at which point Plaintiffs can argue, and this Court can decide whether, an exception to record review applies. Finally, if the Court ultimately decides that discovery is warranted, discovery should be narrowly targeted within the scope of the appropriate record-review exception. *See Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 327–28 (D.P.R. 1999) (permitting discovery because there was no administrative record for the constitutional claim, but recognizing that "wide ranging discovery is not blindly authorized at a stage in which the administrative record is being reviewed").

Defendants do not resist discovery to "evade their obligations." Discovery is simply inappropriate and unnecessary in these circumstances, as numerous courts have similarly concluded. Thus, barring a clear showing that an exception applies, the introduction of extra-record evidence or full-scale discovery would violate the principles of administrative-record-review of agency action, waste the parties' and this Court's resources, and unnecessarily delay the ultimate resolution of Plaintiffs' claims.

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Respectfully submitted,

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