

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA

James Derek Mize, et al.

Plaintiffs,

v.

Michael R. Pompeo, in his official  
capacity as Secretary of State, et al.

Defendants.

Case No. 19-cv-3331

**Motion to Dismiss for Lack of  
Subject-Matter Jurisdiction**

**I. Introduction**

During the May 26, 2020 hearing on Defendants’ pending motion to dismiss and Plaintiffs’ pending partial motion for summary judgment, Defendants noted that a recent development in this matter “would resolve all of the alleged harms in this case.” Arg. Tr. 54:8-9. As Plaintiffs conceded during the argument, SM-G is now a lawful permanent resident (“LPR”). Thus, if the allegations in the Complaint are true, SM-G satisfies the requirements for U.S. citizenship under 8 U.S.C. § 1431(a)—a provision of the Child Citizenship Act of 2000—and she therefore “automatically” acquired citizenship under that provision. Plaintiffs could apply for documentation, such as a passport, reflecting SM-G’s citizenship, but SM-G is a citizen (again,

assuming the truth of the complaint's allegations) whether or not they choose to do so. Her citizenship under section 1431 resolves Plaintiffs' alleged harms, and thus Plaintiffs' claims should be dismissed as moot. Defendants accordingly move to dismiss this matter under F.R.C.P. 12(b)(1).

## II. Legal Standard

A "motion to dismiss for lack of subject matter jurisdiction pursuant to [FRCP] 12(b)(1) can be based upon either a facial or factual challenge to the complaint." *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). "If the challenge is facial, the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised." *Id.* "Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." *Id.* (internal quotation marks omitted). "The burden for establishing federal subject matter jurisdiction rests with the party bringing the claim." *Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312, 1314 (11th Cir. 2016). "If the plaintiff fails to shoulder that burden, the case must be dismissed." *Id.*

## III. Background and Argument

Mize and Gregg brought suit principally seeking a declaration of citizenship for SM-G. *See* Compl. ¶ 9. As stated in the Complaint, Mize and Gregg – both of whom

are U.S. citizens – are the legal parents of SM-G, who was born in 2018 via gestational surrogacy. *See* Compl. ¶ 2. SM-G was born in England, through assisted reproductive technology, using the genetic material of Gregg and an anonymous egg donor. *See id.* Currently, Mize, Gregg, and SM-G reside in Decatur, Georgia. *See* Compl. ¶ 47.

Plaintiffs claim that SM-G is entitled to U.S. citizenship under 8 U.S.C. § 1401(c), which confers citizenship on certain persons “born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States.” Plaintiffs allege that Defendants’ failure to recognize SM-G’s citizenship has resulted in two main harms: (i) loss of “the rights and privilege of U.S. citizenship, including most urgently the right to reside permanently in the” U.S., Compl. ¶ 7, and (ii) a “stigma[]” against “the Mize-Gregg family,” Compl. ¶ 8. The parties have briefed, and argued, dispositive motions pertaining to the substance of Plaintiffs’ claims.

Meanwhile, Mize and Gregg sought LPR status for SM-G. Arg Tr. 28:9-11 (“Mize-Gregg[] did . . . apply for permanent residency for their daughter. They did that last December.”). As Plaintiffs’ counsel noted during the oral argument, U.S. Citizenship and Immigration Services (“USCIS”) recently granted Plaintiffs’ application. *See* Arg Tr. 29:4 (“She was recently granted that permanent residency.”); Ex. A (notice of approval).

Assuming that the allegations in the Complaint are true, SM-G is now a U.S. citizen under section 1431(a). Section 1431(a) states:

A child born outside of the United States *automatically* becomes a citizen of the United States when all of the following conditions have been fulfilled:

- (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

8 U.S.C. § 1431(a) (emphasis added). Here, based on the Complaint’s allegations, Plaintiffs’ representations during oral argument, and the evidence submitted with this motion, SM-G clearly satisfies each prong of section 1431(a). First, “[a]t least one of” her parents “is “a citizen of the United States, whether by birth or naturalization.” Even if a biological relationship is required to satisfy this requirement,<sup>1</sup> Plaintiffs allege that Gregg – a U.S. citizen – has a biological relationship with SM-G. *See* Compl. ¶ 2. Second, SM-G is under eighteen years of age. *See id.* (SM-G “was born in the summer of 2018.”). And third, SM-G is currently “residing in the United States in the

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<sup>1</sup> Section 1431(a) applies only to a “child,” which, for purposes of section 1431, is defined by the Immigration and Nationality Act to generally include “a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile” and “a child adopted in the United States, if . . . the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.” 8 U.S.C. § 1101(c)(1). USCIS interprets this language to mean that, unless a person is adopted, she must be biologically (genetically or gestationally) related to a parent to be considered his “child.” USCIS Policy Manual, Vol. 12, Part H, Ch. 5. Again as noted, that condition is satisfied here.

legal and physical custody of the citizen parent pursuant to lawful admission for permanent residence.” Plaintiffs allege that in “September 2018, Mr. Gregg and Mr. Mize returned to the United States with” SM-G, and the “family currently lives in Decatur Georgia.” Compl. ¶ 47. Thus, under section 1431(a), SM-G “automatically [became] a citizen” the moment she satisfied the section 1431(a) requirements. Plaintiffs may seek a Certificate of Citizenship from USCIS or a passport from the U.S. Department of State reflecting SM-G’s citizenship,<sup>2</sup> but SM-G is a citizen (again, assuming the truth of the allegations) whether or not they do so. *See, e.g., Boisson v. Pompeo*, 2020 WL 2043889, at \*6 (D.D.C. Apr. 28, 2020) (“[A] passport is merely ‘proof of one’s citizenship’; it does not, in and of itself, confer citizenship on a person.”); 8 U.S.C. § 1453 (cancellation of a “document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued”).

SM-G’s citizenship under section 1431(a) resolves Plaintiffs’ claim for relief that the Court declare her to be a U.S. citizen and thus should moot this case. “It is well established that [u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.” *Flanigan’s Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 868 F.3d 1248, 1255 (11th Cir. 2017) (internal quotation

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<sup>2</sup> Defendant notes that a U.S. passport does not distinguish U.S. citizens based on citizenship acquisition method (i.e., whether by naturalization or at birth.) *See, e.g.,* 22 U.S.C. § 2705.

marks omitted). The “actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Id.* “If the injury ceases, or is rendered unamenable to judicial relief, then the case becomes moot and thereby incapable of further Article III adjudication.” *Checker Cab Operators, Inc. v. Miami-Dade Cty.*, 899 F.3d 908, 915 (11th Cir. 2018).

Here, citizenship under section 1431(a) resolves the alleged injuries Plaintiffs seek to redress through their requested relief. Citizenship under section 1431(a), like citizenship under section 1401(c), would ensure that SM-G has “the rights and privileges of U.S. citizenship, including” the “right to reside permanently in the” U.S., and would remedy any alleged stigma that SM-G’s citizenship status may inflict upon Mize, Gregg, and SM-G. Although Plaintiffs seek broader relief through their Administrative Procedure Act claim – *e.g.*, an order requiring a general modification to Defendants’ citizenship policies and practices, *see* Compl., at 32 – such relief would not be necessary to rectify the specific harms Plaintiffs allege have been inflicted upon Plaintiffs in particular. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“If a less drastic remedy” is “sufficient to redress respondents’ injury, no recourse” to “additional and extraordinary relief” is “warranted.”); *Arg Tr.*, 76:7-9 (“It seems to me as though the APA claim is not the strongest claim, and it would be hard pressed for a nationwide injunction in that situation.”). Accordingly, Plaintiffs have

received relief sufficient to address the alleged harms inflicted upon Plaintiffs, and so their claims are now moot.

**IV. Conclusion.**

For these reasons, the Court should grant Defendants' Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

DATED: June 5, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Kuntal Cholera

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DECLARATION OF KUNTAL CHOLERA

I, Kuntal Cholera, declare as follows:

1. I make this declaration based on my personal knowledge.
2. I am a Trial Attorney in the Federal Programs Branch of the Department of Justice's Civil Division.
3. I am counsel for all Defendants in the matter of *Mize, et al v. Pompeo, et al* (19-cv-3331) in the U.S. District Court for the Northern District of Georgia.
4. Attached hereto as Exhibit A is a true and correct copy of a Notice of Approval from United States Citizenship and Immigration Services in response to SM-G's application for permanent residence. Exhibit A has been redacted to remove references to SM-G's full name, and legal identifying information.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. on June 5, 2020.

/s/ Kuntal Cholera  
Kuntal V. Cholera  
Counsel for Defendants

Receipt Number [REDACTED] 474		Case Type I485 - APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS
Received Date 12/09/2019	Priority Date	Applicant [REDACTED] SM-G
Notice Date 06/01/2020	Page 1 of 1	Beneficiary [REDACTED] SM-G

[REDACTED] SM-G  
 c/o DAN H BERGER  
 CURRAN BERGER AND KLUDT  
 79 MASONIC STREET  
 NORTHAMPTON MA 01060

**Notice Type:** Approval Notice  
**Section:** Immediate Relative of U.S. citizen  
**COA:** IR7

We have mailed an official notice about this case (and any relevant documentation) according to the mailing preferences you chose on Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. **This is a courtesy copy, not the official notice.**

**What the Official Notice Said**

**WELCOME TO THE UNITED STATES OF AMERICA**

This is to notify you that your application for permanent residence has been approved. It is with great pleasure that we welcome you to permanent resident status in the United States.

At the top of this notice you will see a very important number. It is your USCIS A# (A-number). This is your permanent resident account and file number. This permanent account number is very important to you. You will need it whenever you contact us.

We will soon mail you a new *Permanent Resident Card*. You should receive it within the next 3 weeks. You can use it to show your new status. When you receive your card you must carry it with you at all times if you are 18 or older. It is the law.

Please call us at (800) 375-5283 if any of the information about you shown above is incorrect, if you move before you receive your card, or if you don't receive your card within the next 3 weeks. If you call us, please have your A# and also the receipt number shown above available. The receipt number is a tracking number for your application.

Please read the notice that comes with your card. It will have important information about your card, about your status and responsibilities, and about permanent resident services available to you.

Your new card will expire in ten years. While card expiration will not directly affect your status, you will need to apply to renew your card several months before it expires. When the time comes and you need filing information, or an application, or if you ever have other questions about permanent resident services available to you, just call our *National Customer Service Center* at 1-800-375-5283 or visit the USCIS website at [www.uscis.gov](http://www.uscis.gov). (If you are hearing impaired, the NCSC's TDD number is 1-800-767-1833.) The best days to call the NCSC are Tuesday through Friday.

Once again, welcome to the United States and congratulations on your permanent resident status.

**THIS FORM IS NOT A VISA AND MAY NOT BE USED IN PLACE OF A VISA.**

**NOTICE:** Although this application or petition has been approved, USCIS and the U.S. Department of Homeland Security reserve the right to verify this information before and/or after making a decision on your case so we can ensure that you have complied with applicable laws, rules, regulations, and other legal authorities. We may review public information and records, contact others by mail, the internet or phone, conduct site inspections of businesses and residences, or use other methods of verification. We will use the information obtained to determine whether you are eligible for the benefit you seek. If we find any derogatory information, we will follow the law in determining whether to provide you (and the legal representative listed on your Form G-28, if you submitted one) an opportunity to address that information before we make a formal decision on your case or start proceedings.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

National Benefits Center  
 U. S. CITIZENSHIP & IMMIGRATION SVC  
 P.O. Box 648003  
 Lee's Summit MO 64002  
**USCIS Contact Center: [www.uscis.gov/contactcenter](http://www.uscis.gov/contactcenter)**

