[ORAL ARGUMENT NOT YET SCHEDULED]

# United States Court of Appeals
# for the District of Columbia Circuit

Case No. 22-5262

*L'ASSOCIATION DES AMÉRICAINS ACCIDENTELS, ET AL.*

*Plaintiffs-Appellants*,

-v-

*UNITED STATES DEPARTMENT OF STATE, ET AL.*

*Defendants-Appellees*

On Appeal from the Final Memorandum Opinion of the
United States District Court for the District of Columbia
Case No. 1:20-CV-2933 (TNM)

## APPELLANTS' OPENING BRIEF

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# CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

## 1. Parties, Intervenors, and Amici Curiae

The parties to this appeal are Appellants L'Association des Américains Accidentels ("AAA"), [redacted].

The Appellees are the United States Department of State, Antony J. Blinken, in his official capacity as Secretary of State, and Rena Bitter, in her official capacity as Assistant Secretary of State for Consular Affairs.

No *amici* appeared before the district court.

## 2. Rule 26.1 Disclosure Statement

Appellant AAA is a French non-profit organization with no stock to issue and no parent or subsidiary.

## 3. Rulings Under Review

Appellants seek review of the district court's September 28, 2022 Order and Memorandum Opinion *L'Association des Américains*

*Accidentels v. United States Dep't of State*, No. 1:20-CV-02933 (TNM), 2022 WL 4534687 (D.D.C. Sept. 28, 2022), granting Defendants' motion for summary judgment in part and granting its motion to dismiss in part.

**4. Related Cases**

The case on review has not previously been before this Court or any other court. Plaintiffs-Appellants note that the case of *L'Association des Américains Accidentels, et al. v. Department of State, et al.*, 1:20-cv-3573-TSC (D.D.C.), a challenge to the constitutionality and legality of the exorbitant fee charged for voluntary renunciation of U.S. citizenship, is now pending before the district court and involves many of the same issues and parties that are the focus of the present appeal. A hearing on the government's motion to dismiss/motion for summary judgment is scheduled for January 9, 2023. Counsel is not aware of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

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## GLOSSARY OF ABBREVIATIONS

| | |
|---|---|
| Administrative Procedure Act | APA |
| Department of State | DOS |
| Foreign Affairs Manual | FAM |
| Immigration and Nationality Act | INA |

## JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over Plaintiffs' claims under 28 U.S.C. §1331 because this case arises under the Constitution and laws of the United States. Specifically, the lawsuit challenges the suspension and delay of renunciation services under **(a)** the Fifth Amendment's Due Process Clause; **(b)** Section 349 of the Immigration and Nationality Act ("INA"), Pub. L. 89–236, 79 Stat. 911, *codified at* 8 U.S.C. §1481(a); and **(c)** the Administrative Procedure Act, 5 U.S.C. §551 *et seq*. ("APA").

This Court has subject-matter jurisdiction pursuant to 28 U.S.C. §1291 because the order appealed from is a final judgment that disposed of all the parties' claims in the case.

## STATEMENT OF ISSUES

1. Did the district court err in concluding that Plaintiffs' challenge to the *suspension* of voluntary renunciation services is moot?

2. Did the district court err in concluding that Plaintiffs failed to state a viable substantive due process claim based on their fundamental right to voluntarily expatriate?

3. Did the district court err in applying the so-called *TRAC* factors under 5 U.S.C. §706(1) to the government's delay in providing voluntary renunciation services?

## STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in a separate addendum.

## STATEMENT OF THE CASE

### 1. Statutory and regulatory background

Voluntary expatriation has long been recognized as a natural and fundamental right. *Savorgnan v. United States*, 338 U.S. 491, 497-498 n. 11 (1950) (quoting the Act Concerning the Rights of American Citizens in Foreign States," ch. 249, 15 Stat. 223 (1868), *codified* as a Note to 8 U.S.C. §1481 ("Expatriation Act").

The current process by which an individual can exercise his/her right to voluntarily expatriate is governed by 8 U.S.C. §1481(a)(5). That section provides that a U.S. national "shall loose his nationality" by making a "formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State." Pursuant to his authority under §1481, the Secretary of State has issued rules and guidelines that regulate the "manner and form" of renunciation. 22 C.F.R. §50.50.

Renunciation begins by the applicant reading and signing form DS-4080, entitled "Oath/Affirmation of Renunciation of the Nationality of the United States" [7 FAM 1262.4(c)]. *See* JA 15-18 for a detailed description of the renunciation procedure.

Although nothing in the statute indicates that a renunciant must physically appear before a consular officer to take the oath, the DOS requires that all renunciants do so, necessitating an in-person interview.

After signing the DS-4080, the consular officer forwards the form and her recommendations to CA/OCS/ACS[1] for final approval [7 FAM 1264 and 7 FAM 1220]. If approved, the consular officer overseas provides the applicant with a Certificate of Loss of Nationality ("CLN") and the effective date of expatriation is the date that the oath was taken.[2]

[1] "CA/OCS/ACS" is the common abbreviation used in the FAM and refers to the Bureau of Consular Affairs, Overseas Citizens Services, American Citizen Services.

[2] *See also* 26 U.S.C. §877A(g)(4) (establishing criteria for the voluntary renunciation of U.S. citizenship for income tax purposes and providing specifically that no renunciation will be deemed effective until a CLN has been issued.).

## 2. Factual Background

### A. The increase in voluntary renunciations of U.S. citizenship

According to all estimates, since 2010 voluntary renunciations of U.S. citizenship have been on the rise [JA 18-19]. This is the year when the Foreign Account Tax Compliance Act ("FATCA")[3] — a bulk data collection program requiring foreign financial institutions to report to the IRS detailed information about the accounts of U.S. citizens living abroad –- went into effect.[4] FATCA requires foreign governments and financial

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[3] Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111-147, §§ 501-531, 124 Stat. 71 (2010) (codified in scattered sections of the Internal Revenue Code).

[4] *See* Zac Delap, *Too Much Collateral Damage FATCA: The Well-Intentioned, Yet Misguided and Unconstitutional, Tax Law,* 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 212, 230 (2015):

> Americans living overseas now have to face a cruel dilemma: have no bank account or investments and attempt to survive in a solely cash economy, or attempt to find an FFI [foreign financial institution] that is willing to maintain a U.S. account, but give up the legal protections associated with the account that every other non-American enjoys. Given this dilemma, it is no surprise then that the number of Americans renouncing their citizenship has rapidly increased since the passage of FATCA.

*See* Alice Kantor, *Americans Abroad Renounce Citizenship to Escape Tax Law's Clutches,* Bloomberg (September 30, 2022), available at https://www.bloomberg.com/news/articles/2022-09-30/irs-tax-law-

institutions to report to the IRS detailed information about the accounts of U.S. citizens living abroad, including their account balances and account transactions. Although the framers of the legislation sought to justify it on the grounds of proscribing tax evasion, FATCA has swept up thousands, if not millions, of law-biding expatriate Americans who are tax compliant and have nothing to hide, all the while infringing upon their fundamental right to privacy and imposing costly and time-consuming burdens for compliance.[5] FATCA has caused many foreign financial institutions to curtail their business dealings with U.S. citizens

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expats-americans-renounce-citizenship-to-avoid-fatca-rules?leadSource=uverify%20wall ("FATCA, aimed at cracking down on offshore tax evasion, is hurting accidental US citizens who can't open bank accounts."). Unless otherwise stated, all online material referred to in this Brief was accessed last on December 27, 2022.

*See also* Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 185 (2014) ("[…] the timing of the significant increase in renunciations that likely began in mid-2009 correlates much more closely with the IRS enforcement efforts and FATCA.").

[5] Studies have shown that FATCA has failed to produce additional revenues over and above the steep costs of administration. *See e.g.*, William H. Byrnes, IV and Robert Munro, *Background and Current Status of FATCA*. LEXISNEXIS® GUIDE TO FATCA & CRS COMPLIANCE (5th ed., 2017), Texas A&M University School of Law Legal Studies Research Paper No. 17-31, Available at http://dx.doi.org/10.2139/ssrn.2926119.

living abroad because the costs associated with compliance do not warrant keeping U.S. citizens and other U.S. persons as customers [JA 20-21; 144-147; 150-151; 168-172].

### B. The State Department's suspension and waitlist policy for renunciation services

In or around March 2020, under the guise of the COVID-19 global pandemic, U.S. diplomatic missions around the world began suspending voluntary renunciation services, with the result that thousands of individuals were forced to remain U.S. citizens against their will indefinitely. *See* Adam Taylor, *How the Coronavirus Made it Nearly Impossible to Renounce U.S. Citizenship*, WASHINGTON POST (Oct. 31, 2020).[6]

The government's decision to initially suspend renunciation services [while continuing to provide other less essential consular services (*see* below)] is consistent with its predisposition against voluntary expatriation [JA 22-23]. This policy is also evidenced by the government's imposition of the record-high $2,350 fee for voluntary

[6] Available at https://www.washingtonpost.com/world/2020/10/27/us-citizenship-renouncement-fatca/.

renunciation, currently being challenged in the companion case, *L'Association des Américains Accidentels, et al. v. Department of State, et al.*, 1:20-cv-3573-TSC (D.D.C).

Since the commencement of the lawsuit and the subsequent appeal, some, but not all, U.S. missions are no longer suspending renunciation services. In those missions which have ceased suspension of renunciation services, the State Department, for the most part, places potential renunciants on crowded waitlists that can delay the renunciation procedure for well over a year [*see* JA 172; 211].[7] This policy imposes a heavy burden on Plaintiffs' fundamental right to voluntarily expatriate, because without taking the oath before a consular official no renunciation can occur.

[7] *See* **Exhibit A**, attached, for the current status of some U.S. missions around the globe. For example, the U.S. missions in Greece, Latvia and the Czech Republic are still suspending renunciation services. Other U.S. missions, such as those in Israel, Denmark, Georgia, Sweden and Switzerland place applicants on waitlists often resulting in delays exceeding one year. *See also U.S. Embassy and Consulates in China Suspend All Visa Services*, 11 THE NAT. L. REV. 360 (December 26, 2022) (U.S. Mission in China has renewed suspending consular services due to recent spike in COVID-19 cases).

### 3. Procedural Background

Plaintiffs commenced their lawsuit on November 8, 2021, with the filing of a Complaint seeking declaratory and injunctive relief. On December 27, 2021, prior to the government filing a responsive pleading, Plaintiffs filed their First Amended Complaint [JA 1-37]. On April 4, 2022, the government filed its Motion to Dismiss, or, in the Alternative, For Summary Judgment. The government did not file an administrative record. Rather, it submitted the declaration of Douglas Benning, Principal Deputy Assistant Secretary for Consular Affairs, together with ten attachments [JA 38-62, 63-125].

On May 17, 2022, Plaintiffs filed their opposition to the government's motion. In addition, Plaintiffs filed a Cross-Motion for Summary Judgment, as well as declarations and supporting documents [JA 132-174].

On June 15, 2022, the government filed its reply to Plaintiffs' opposition and an opposition to Plaintiffs' Cross-Motion. On June 19, 2022, Plaintiffs filed their reply to the government's cross-motion opposition.

On September 28, 2022, the district court issued its Memorandum Opinion and Order granting the government's motion and denying Plaintiffs' cross-motion [JA 192-211]. The district court held:

(1) Plaintiffs' Fifth Amendment and APA claims related to the government's *suspension* (as opposed to the delay) were moot;

(2) the government is entitled to summary judgment on Plaintiffs' APA claims related to the *delay* because "no factfinder would dispute it has acted reasonably given the circumstances;" and

(3) Plaintiffs' Fifth Amendment claim related to the *delay* warrants dismissal for failure to state a claim under Rule 12(b)(6).

Plaintiffs timely noticed their appeal on September 29, 2022 [JA 213].

## SUMMARY OF ARGUMENT

Plaintiffs' substantive due process challenge to the government's *suspension* of renunciation services is *not* moot, as the district court concluded, because some U.S. missions abroad are continuing to suspend such services and the COVID-19 and other pandemics are likely to recur, and are in fact recurring at the present time.

The district court erred in dismissing Plaintiffs' substantive due process count for failure to state a claim under Rule 12(b)(6). The district court applied the wrong standard – the "shocks-the-conscience" test [*County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)]– in assessing the Fifth Amendment claim. The appropriate test is the so-called "fundamental rights" test, as articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Moreover, the district court improperly defined the right at issue in an overly restrictive fashion as the right to expatriate "within weeks or, at the very most, a few months." [JA 211]. The court should have described the right to expatriate independent of any time-qualifier.

As for Plaintiffs' APA claims under 5 U.S.C. §706(1), the district court failed to consider the nature of the right to expatriate when evaluating the so-called *TRAC* factors, thereby erroneously skewing the factors discussed below in favor of the government instead of Plaintiffs. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

## STANDING

The district court correctly held that Plaintiff AAA has organizational standing [JA 196-198], because:

(a) AAA's members would otherwise have standing to sue in their own right.

(b) The interests AAA seeks to protect are germane to AAA's purpose.

(c) Neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

*Nat'l Assoc. of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011).

All individual Plaintiffs in this action have standing as well. Plaintiffs are all holders of United States citizenship who wish to voluntarily expatriate, but were unable to do so because the DOS has suspended/delayed voluntary expatriation services all over the globe.[8] Plaintiffs have sustained and are continuing to suffer injury-in-fact from Defendants' actions because they are being forced to remain U.S. citizens against their will. *Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir.

[8] Some of the Plaintiffs in this lawsuit have already had their renunciation interview. These Plaintiffs include [redacted]

2014) (being forced to continue association with the United States is sufficient for injury-in-fact requirement), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *accord, Farrell v. Blinken*, 4 F.4th 124, 130 (D.C. Cir. 2021).

In addition to the direct injury to their fundamental right to expatriate, the suspension/delay of voluntary expatriation services has also generated financial and other harm to Plaintiffs — *i.e.*, the expenses, burdens and other obstacles associated with being a United States citizen in foreign countries. Plaintiffs have all suffered injuries in connection with the maintenance of their bank accounts and other financial dealings as a result of holding United States citizenship.

Plaintiffs' actual injury-in-fact is a direct and proximate result of Defendants' actions and inactions as alleged.

As to redressability, the relief Plaintiffs seek is within the power of the Court to grant and, if granted, would eliminate the unconstitutional and illegal burdens imposed upon their fundamental right to expatriate. *Schnitzler*, 761 F.3d 41.

## STANDARD OF REVIEW

An appellate court reviews a district court's dismissal for lack of subject matter jurisdiction on mootness grounds *de novo*. *People for the Ethical Treatment of Animals v. United States Dep't of Agric. & Animal & Plant Health Inspection Serv.*, 918 F.3d 151, 156 (D.C. Cir. 2019).

The Court of Appeals reviews *de novo* the district court's decision to grant a motion to dismiss or motion for summary judgment. *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 944 (D.C. Cir. 2017), *accord Farrell*, 4 F.4th at 135.

## ARGUMENT

### 1. THE CHALLENGE TO THE *SUSPENSION* OF RENUNCIATION SERVICES IS NOT MOOT

The district court held that Plaintiffs' "APA and Fifth Amendment claims related to the Department's suspension of renunciation services are moot" because the government has lifted the suspension at some missions and that the trend across consular posts is that renunciation services are "*increasing*." [JA 199, 200, italics in original].

This ruling ignores the fact that several U.S. missions around the globe – such as those in Greece, Latvia and the Czech Republic – continue to suspend renunciation services. *See also* fn. 7 *supra*.

Moreover, while it is true that certain U.S. posts around the globe no longer suspend renunciation services, the district court should have ruled on the legality of the suspension because it falls into the exception to mootness for situations that are "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911); *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (applying the exception and holding that district court erred in dismissing declaratory judgment action on mootness grounds).

The district court mistakenly concluded that the exception does not apply here because "there is no reason to think the Association's members would be subjected to the same action again." [JA 199]. However, COVID-19 restrictions – like the suspension policy – can easily be reinstated. Those Plaintiffs who have not completed the renunciation process are under constant threat that their right to expatriate will again be curtailed by the government. The AAA currently lists some 2,000

members, which list will continue to grow commensurate with the increasing financial pressures on U.S. citizens abroad. COVID-19 remains a threat for the AAA membership and other similarly situated Americans. Given the government's past practice, it is reasonable to assume that renunciation services will likely be the first to be suspended.

The recent surges in the pandemic in China, Europe and the United States strongly support the contention that the suspension issue is not moot. [9] *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (adjudicating COVID-19 restrictions not moot because applicants remain under constant threat); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (same); *Alaska v. United States Dep't of Agric.*, 17 F.4th 1224, 1229 (D.C. Cir. 2021) ("actions that can be reversed at the stroke of a pen or otherwise face minimal hurdles to re-enforcement can thwart mootness."); *Roman Cath. Archbishop of Washington v. Bowser*, 531 F.

[9] *See, e.g.*, Sammy Westfall, *New Models Predict At Least 1 Million Deaths In China Amid Covid Surge*, WASHINGTON POST (December 18, 2022); Yasmin Tayag, *It's Beginning to Look a Lot Like Another COVID Surge*, THE ATLANTIC (December 9, 2022); Sarah Zhang, *What Europe's COVID Wave Means for the U.S.*, THE ATLANTIC (October 20, 2022); *There's no room for COVID complacency in 2023*, NATURE (December 23, 2022). *See also* fn. 7 *supra*, describing the current suspension of U.S. consular services in China.

Supp. 3d 22, 30 (D.D.C. 2021) (per McFadden, J.), *citing Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230, fn. 1 (9th Cir. 2020) (COVID-19 restriction challenge not moot even though the restriction was no longer in effect because it could "just as easily" be restored.). The district court did not address any of these authorities. Furthermore, the threat of suspension for other reasons, such as the Ukrainian-Russian war or future pandemics, is real, constant and non-speculative.

Accordingly, the district court erred in refraining from determining the legality of such suspension on mootness grounds because it remains in effect at certain missions and, in any event, can be easily reinstated and is, in fact, currently being reimposed in certain U.S. missions.[10]

[10] We note that the government did not raise a mootness defense in the proceedings below, due in part to the government's insistence that suspension and delay are indistinguishable. The government maintained that the "suspension of appointments for CLN services at some posts is a temporary measure, and the Department fully intends to resume those appointments as soon as is safely feasible." [ECF 17-1, at 22-23]. According to the government, the only apparent distinction between a *suspension* and a *delay* is the degree and severity of the wait time. Assuming the government's characterization is correct, this, too, would support rejecting a mootness defense because the current delay is simply the continuation of the suspension policy under a different name.

### 2. THE SUSPENSION AND DELAY OF RENUNCIATION SERVICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The district court concluded that Plaintiffs failed to state a Fifth Amendment claim because – even assuming the right to expatriate is a fundamental right – the delay by the government in rendering renunciation services does not "shock the conscience," citing for support *Lewis*, 523 U.S. at 846.

In so ruling, the district court made two fatal errors. *First*, the court erred by applying the "shock-the-conscience" test to Plaintiffs' substantive due process claim. The appropriate test is the so-called "fundamental rights" test, as articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

*Second*, the district court improperly defined the right at issue in an overly restrictive fashion as the right to expatriate "within weeks or, at the very most, a few months." [JA 211]. The proper description of the right is the right to voluntarily expatriate *vel non*.[11]

[11] We address this matter below in Section 2.C.iii.

### A. The district court applied the wrong standard in dismissing Plaintiffs' substantive due process claim

A Fifth Amendment substantive due process challenge to executive government action can take two forms. The first form protects rights that are "fundamental," whereas the second "protects against the exercise of governmental power that shocks the conscience." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (substantive due process "prevents the government "from engaging in conduct that shocks the conscience [...] ***or*** interferes with rights implicit in the concept of ordered liberty.") (emphasis added), *accord Robinson v. D.C.*, 686 F.App'x 1, 2 (D.C. Cir. 2017).[12]

[12] Following *Salerno*, the Fourth, Sixth and Tenth Circuits apply this two-strand substantive due process analysis when executive action is challenged. *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016); *Pittman v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 640 F.3d 716, 728 n. 6 (6th Cir. 2011) ("Substantive due process claims may be loosely divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that "shock the conscience."); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008) ("Courts should not unilaterally choose to consider only one or the other of the two strands."); *see also Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (Supreme Court analyzed a challenge to executive action [unauthorized police behavior] under strict scrutiny ***and*** the shocks-the-conscience test). *See also* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 340-343 (2010) (discussing the two strands of substantive due process challenges against executive action).

In the proceedings below, both Plaintiffs and the government applied the "fundamental rights" strand of the substantive due process analysis. Nowhere in the pleadings or the briefs did the parties invoke the "shocks-the-conscience" test.[13]

The district court, *sua sponte*, applied the more rigorous "shocks-the-conscience" test, which requires a plaintiff to prove that the infringement on her rights was due to "egregious" executive misconduct. *Lewis*, 523 U.S. at 846; *see also* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 340-343 (2010) (noting that the shocks-the-conscience test is more rigorous). And, because according to the district court, delay, as a matter of law, cannot rise to the level of "egregious" executive conduct, it erroneously concluded that Plaintiffs' Fifth Amendment challenge falters [JA 209-211].

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To date, at least three district courts in this Circuit have adopted the foregoing analysis in adjudicating substantive due process claims involving executive action. *See Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't*, 319 F. Supp. 3d 491, 499 (D.D.C. 2018); *Sabra as next friend of Baby M v. Pompeo*, 453 F. Supp. 3d 291, 318 (D.D.C. 2020); *Barnes v. D.C.*, 793 F. Supp. 2d 260, 277 (D.D.C. 2011). This Court has apparently yet to opine on the issue.

[13] *See* JA 29-34 (Plaintiffs' complaint); Gv't Memorandum in Support of its Motion to Dismiss, ECF 17-1, at 31 (applying strict scrutiny to Plaintiffs' Fifth Amendment claims).

The right to voluntarily expatriate is a ***fundamental*** right. The district court erred by only applying the shocks-the-conscience test. *See Pittman v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 640 F.3d 716, 728 n. 6 (6th Cir. 2011) (holding that the district court "improperly analyzed" the "substantive due process claim under the 'shock the conscience' standard" because plaintiff alleged "a violation of a recognized liberty interest."). The district court should have engaged in fundamental rights analysis and, after concluding that voluntary expatriation is a fundamental right,[14] should have applied strict scrutiny to assess whether the burden stemming from the suspension/delay was necessary to further a compelling government interest.

Nothing in *County of Sacramento v. Lewis* suggests that the shocks-the-conscience test was the sole basis upon which to assess the viability of Plaintiffs' due process claim. *Lewis* concerned a substantive due process challenge to a sheriff's fatal high-speed automobile chase. There,

[14] The district court assumed without deciding that the right to voluntarily expatriate is a fundamental constitutional right [JA 208 ("But even if such a right exists, the Association has failed to state a claim."]. Given that assumption, the court should have analyzed Plaintiffs' suspension/delay claims under strict scrutiny. *Glucksberg*, 521 U.S. at 721; *Chavez*, 538 U.S. at 774. *See* discussion below in Section 2.B.

the Court explicitly recognized that there are ***two*** strands of substantive due process. *Lewis,* 523 U.S. at 847, *quoting Salerno*, 481 U.S. at 746. *Lewis* does not stand for the proposition that courts may ignore the fundamental rights strand in favor of the shocks-the-conscience test.

### B. The "fundamental rights" test is the proper way to analyze Plaintiffs' Fifth Amendment claims

When assessing whether governmental action is unconstitutional under the "fundamental rights" approach, courts must first determine whether the right being invoked is indeed "fundamental." *Glucksberg*, 521 U.S. at 720. The Supreme Court has held that a right is fundamental if it is **(1)** "deeply rooted in this Nation's history and tradition" and **(2)** "implicit in the concept of ordered liberty." *Id.*; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022), *citing Glucksberg*; *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Chavez*, 538 U.S. at 774 (applying *Glucksberg* analysis to executive action).[15]

[15] *See also Hall v. Barr*, 2020 WL 6743080, at *6 (D.D.C. Nov. 16, 2020), *aff'd*, 830 F.App'x 8 (D.C. Cir. 2020) (applying *Glucksberg* analysis to determine whether state prison bureau's 50-day notice of execution implicated a fundamental right); *see also Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (applying *Glucksberg* analysis to determine whether patients have a fundamental right to experimental drugs); *Timbs v. Indiana*, 139 S.Ct.

After determining that the right asserted is "fundamental," the next step in the "fundamental rights" approach is assessing whether the government action being challenged satisfies the so-called strict scrutiny test. Under this test, a government restriction on a fundamental right must be narrowly tailored to promote a compelling government interest. *Glucksberg*, 521 U.S. at 721; *Chavez,* 538 U.S. at 774. If the challenged governmental action does not satisfy this test, it must be stricken as unconstitutional. *Id*.

### C. The right to expatriate is a fundamental right

#### i. The right to expatriate is deeply rooted in this nation's history

The right to voluntarily expatriate has long been recognized in America as a natural and fundamental right. *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898) ("the right of expatriation […] must be considered […] a part of the fundamental law of the United States."); Glenda Burke Slaymaker, *The Right of the American Citizen to*

682, 686-687 (2019) (Eighth Amendment's prohibition against excessive fines is "fundamental to our scheme of ordered liberty"); *see also Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (applying a more flexible substantive due process analysis to the right to same-sex marriage).

*Expatriate*, 37 AM. L. REV. 191, 192 (1903) ("Slaymaker").[16] Actions by the legislative, judicial and executive branches of the government, since the founding of the Republic until this day, demonstrate that the right to voluntarily expatriate is deeply rooted in our society as "old as the American nation itself." CONG. GLOBE, 40th Cong., 2nd Sess. 1103 (1868) (statement by Rep. Godlove Orth). *See also* Michelle Leigh Carter, *Giving Taxpatriates the Boot-Permanently?: The Reed Amendment Unconstitutionally Infringes on the Fundamental Right to Expatriate*, 36 GA. L. REV. 835, 853 (2002) (stating that "the strongest argument for endorsing expatriation as a fundamental right is the history and tradition of expatriation in the United States.").

Congress first codified the natural and fundamental right to expatriate in the 1868 Expatriation Act. The preamble of the Act declares unequivocally:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness [. ...] Therefore any

[16] For a comprehensive review of American jurisprudence, legislation and state practice prior to 1906, *see generally* 3 John Bassett Moore, A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS, §431 *et seq.* (Gov't Printing Office, 1906) (hereinafter: "Moore").

> declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

The above-quoted preamble reflected the longstanding view that voluntary expatriation was a natural and fundamental right of humankind. Congress merely acknowledged the pre-existing fundamental and inherent right of Americans to renounce their citizenship.

The judiciary has also recognized that the right to voluntarily expatriate is fundamental. In *Savorgnan v. United States*, the Supreme Court specifically stated that the language of the Expatriation Act is "broad enough to cover, ***and does cover***, the corresponding natural and inherent right of American citizens to expatriate themselves." *Savorgnan*, 338 U.S. at 497-498 fn. 11 (emphasis added). The Court observed that "the United States has supported the right of expatriation as a natural and inherent right of all people. Denial, restriction, impairment or questioning of that right was declared by Congress, in 1868, to be inconsistent with the fundamental principles of this Government." *Id*. *See also Farrell*, 4 F.4th at 129 (applying the Expatriation Act to voluntary expatriation of Americans); *Wong Kim*

*Ark*, 169 U.S. at 704 (same); *see also Charles Green's Son v. Salas*, 31 F. 106, 112–13 (C.C.S.D. Ga. 1887) (citing the 1868 Expatriation Act and stating, in relation to a native-born American's expatriation, that "[i]n this country expatriation is a fundamental right."); *In re Look Tin Sing*, 21 F. 905, 907-908 (D. Cal. 1884) (applying the Expatriation Act to U.S.-born citizens); *Browne v. Dexter*, 66 Cal. 39, 40, 4 P. 913 (1884) (same).[17]

The Executive Branch of the federal government has also consistently viewed the Expatriation Act as being declarative of the natural right to expatriate, applying with equal force to U.S.-born as well

[17] *See also Boyd v. Nebraska*, 143 U.S. 135, 161 (1892) ("We do not understand the contention to involve, directly, a denial of the right of expatriation, which the political departments of this government have always united in asserting […]"); *United States v. Husband*, 6 F.2d 957, 958 (2d Cir. 1925) (same); *Est. of Lyons v. Comm'r*, 4 T.C. 1202, 1205 (1945) (applying the Act to renunciation of U.S. citizenship); *Kawakita v. United States*, 190 F.2d 506, 511 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952) (same). Significantly, several district courts – including the district court here – have avoided the question as to the status of the right to expatriate by simply assuming the right *is* fundamental, while concluding that dismissal is still warranted. *Farrell v. Pompeo*, 424 F. Supp. 3d 1, 23 (D.D.C. 2019), *rev'd and remanded sub nom. Farrell v. Blinken*, 4 F.4th 124 (D.C. Cir. 2021); *Lozada Colon v. U.S. Dep't of State*, 2 F. Supp. 2d 43, 45 (D.D.C. 1998). *But see Kwok Sze v. Johnson*, 172 F. Supp. 3d 112, 122 (D.D.C. 2016), *aff'd sub nom. Kwok Sze v. Kelly*, 2017 WL 2332592 (D.C. Cir. Feb. 21, 2017) (holding that incarcerated plaintiff has no right to abandon his citizenship under the Due Process Clause).

as naturalized American citizens. For example, Attorney General George Williams, speaking for the Grant Administration, shortly after the Expatriation Act was enacted, opined that the "affirmation by Congress, that the right of expatriation is a 'natural and inherent right of all people' includes citizens of the United States as well as others and the executive should give to it that comprehensive effect." 14 OP. ATT'YS GEN. 295, 296 (1873).[18]

Save for this case and its companion (now pending before Judge Chutkan of the district court)[19], the contemporary practice of the State Department has been consistent with over two centuries of United States expatriation policy. In 1998, for example, the U.S. government submitted responses to the United Nations' Commission on Human Rights, pursuant to its resolution 1998/48 of 17 April 1998, entitled "Human

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[18] *See also* Letter from Thomas F. Bayard, Sec. of State, to Col. Frey, Swiss min., May 20, 1887, *quoted* in 3 Moore at 584:

> This Government maintaining the doctrine of voluntary expatriation has always held that its citizens are free to divest themselves of their allegiance by emigration and other acts manifesting an intention to do so […] This doctrine applies as well to native-born as to naturalized citizens […]

[19] *L'Association des Américains Accidentels, et al. v. Department of State, et al.*, 1:20-cv-3573-TSC (D.D.C.).

rights and arbitrary deprivation of nationality." In its response, the State Department stated that the "United States […] has recognized the right of expatriation as an inherent right of all people." U.N. Secretary General, Rep. on Human Rights and Arbitrary Deprivation of Nationality, ¶39, U.N. Doc. E/CN.4/1999/56 (Dec. 28, 1998) (citing response from the United States (Oct. 9, 1998). *See also* 7 FAM 1290(e), App'x "A", "Later Twentieth Century Developments," (where the State Department states: "The United States has recognized the right of expatriation as an inherent right of all people.").

Accordingly, at this point in the saga of our Republic, there can be little question that the right to expatriate is deeply rooted in the history and tradition of American society.

### ii. The right of expatriation is implicit in the concept of ordered liberty

The Due Process Clause "specially protects those fundamental rights and liberties which are […] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Abigail Alliance*, 495 F.3d at 702, *quoting Glucksberg*, 521 U.S. at 720–21.

In rejecting the British doctrine of perpetual allegiance, the authors of the Declaration of Independence announced that they were "absolved from all Allegiance to the British Crown and that all political connection between them and the state of Great Britain is and ought to be totally dissolved." THE DECLARATION OF INDEPENDENCE, para. 32 (U.S. 1776). The liberty interest of all American citizens emanates from this incipient act of expatriation. Thus, the right of an individual to voluntarily dissolve his allegiance to the United States serves to protect an individual's personal liberty.

This concept was articulated by Slaymaker over a century ago:

> The function of society is to overcome defects in individual existence, and when social, political or other environment ceases to conduce to the good of the individual, then it is that the individual may seek the society which can afford him what the conditions of his welfare and his happiness demand. It is a natural right, included within the larger right of the - pursuit of happiness which the fathers of this nation have declared to be inalienable.

Slaymaker, at 192 (internal quotations omitted).

The right to expatriate serves as a daily reaffirmation of this political and social association.

The United States Constitution grants a citizen the right "to remain a citizen in a free country, *unless he voluntarily relinquishes that citizenship*." *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (emphasis added). Logically, the government can no sooner deprive a citizen of her fundamental right to renounce citizenship than it can deprive her of citizenship in the first place. For without the right to relinquish citizenship – that is, the right to associate with the American political system and social fabric – the right to citizenship itself (the "mother of all rights"), loses all meaning.

The right to voluntarily expatriate is also inherently linked to other fundamental rights such as the individual's right to free speech. Historically, expatriation has been used as an expressive act, reflecting the renunciant's position regarding her association with a body politic. For example, many Japanese Americans who were placed in internment camps during World War II elected to renounce their U.S. citizenship as an "expression of momentary emotional defiance in reaction to years of

persecution." Minoru Kiyota, BEYOND LOYALTY: THE STORY OF A KIBEI (University of Hawaii Press 1997), at 129.[20]

Ordered liberty requires, therefore, that this Court treat the right of voluntary expatriation as an integral aspect of "life, liberty, and the pursuit of happiness." Accordingly, the suspension or delay of voluntary renunciation services must be scrutinized through the lens of the fundamental right to voluntarily expatriate. *See* William Thomas Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FL. TAX REV. 11 (2010) (arguing that voluntary expatriation is a fundamental right).

[20] Similarly, Juan Mari Brás' renunciation of U.S. citizenship in 1994 was an exercise of freedom of speech. By rejecting United States citizenship, "Mari Brás sought to spread his very own view of his pro-independence ideal for Puerto Rico, to express his objection to a citizenship he believes was unlawfully imposed, and to affirm his belief that Puerto Rico is a nation and his sole homeland." *Ramirez de Ferrer v. Mari Bras*, 144 D.P.R. 141, 1997 WL 870836 (S. Ct. P.R., Nov. 18, 1997) (translated from the Spanish).

### iii. The right to voluntarily renounce citizenship is carefully described

In the proceeding below, the government argued – and the district court agreed without analysis – that the Plaintiffs' right be defined as the right to expatriate "within weeks or, at the very most, a few months." [*see* JA 211]. Defined in these overly narrow terms, "the interest" obviously "starts to look less compelling." *See McDonald,* 561 U.S. at 882 n. 25 (Stevens, J., *dissenting*).

Plaintiffs' substantive due process claims are predicated on the fundamental right to expatriate without regard to any particular timeframe. In a semantic slight of hand, the government and the district court sought to circumvent strict-scrutiny review by engrafting onto the asserted right to expatriate a condition that it be exercised expeditiously.

Plaintiffs never argued that their right to renounce was temporally circumscribed. Under its approach, the government will always be able to avoid strict scrutiny by defining the claimed constitutional liberty in a manner that incorporates the challenged restriction.[21]

[21] In a wide array of cases involving other constitutionally-protected liberties, the Supreme Court did not include time-restrictions within the definition of the fundamental right at issue. For example, in *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) the Court balanced the fundamental

*Glucksberg* does not countenance such a narrow definition of Plaintiffs' asserted right. This is because, unlike *Glucksberg* and its progeny, the district court was not being asked to declare a new, unprecedented, fundamental right, *ex nihilo*. The "careful description" requirement ensures that courts will "exercise the utmost care whenever" they "are asked to break ***new ground*** in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993), *quoting Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (emphasis added). That reasoning makes sense when courts are asked to declare a *brand-new* fundamental right, stemming from "abstract concepts of personal autonomy" like the "right to live" or the "right to die" [*Glucksberg*, 521 U.S. at 725; *Abigail All.*, 495 F.3d at 702],

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right to vote with the interests of the state durational residency requirement. The Court did not ask whether there was a fundamental right to vote *within a certain time frame*. The same is true with *Sosna v. Iowa*, 419 U.S. 393, 405 (1975). There, the Court did not ask whether there is a fundamental right to a *quick* divorce. Rather, the resulting delay in a divorce due to state durational residency requirements was analyzed as a restriction on the right. *See also Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (holding that "notice period is a substantial inhibition on speech" without examining whether the First Amendment includes a fundamental right to speech without prior notice.).

or from "vague generalities" like the "right not to be talked to" [*Chavez*, 538 U.S. at 776].

The "careful description" requirement has little significance when a court is simply being asked to recognize what the executive, legislative and judiciary have already deemed a fundamental right. The district court committed reversible error in defining Plaintiffs' right to expatriate as the right to expatriate within a certain time limit. The correct substantive due process analysis requires defining the right to expatriate *vel non*, and then to proceed to examine whether the suspension/delay is an unconstitutional burden on that right.

### D. The suspension and extended delay of renunciation services should be declared unconstitutional under the Fifth Amendment

In applying strict-scrutiny review, we distinguish between **(i)** the government's suspension of all renunciation services and **(ii)** its waitlist/delay policy.

### i. The *suspension* of renunciation services is not narrowly tailored to further a compelling governmental interest

The government's decision to *suspend* voluntary expatriation services is clearly unconstitutional because it is far from *necessary* to achieve a compelling government interest. The government invoked COVID-19 to justify the global suspension of renunciation services, arguing that its practices are "narrowly tailored […] in light of the severe constraints that the COVID-19 pandemic has" generated. ECF 17-1, at 31.

The government's suspension of voluntary renunciation services fails to satisfy strict scrutiny because, first, there is not an iota of evidence that the provision of these services would have contributed to the spread of COVID-19. *See Roman Cath. Diocese*, 141 S. Ct. at 67 (restriction failed to satisfy strict scrutiny when there was no evidence that the underlying activity contributed to the spread of the pandemic).

Second, the government can provide renunciation services without endangering staff or the public, as it does with other services it has not suspended. Safety and health procedures have become standard

operations in all U.S. missions around the globe and would apply to renunciation services as well, even before the COVID-19 pandemic.

All U.S. embassies and consulates separate their staffs from the public behind a thick, bullet-proof glass wall, that permits communications solely by way of a two-way microphone. Interviews are held with the renunciant on the other side of the wall.[22] *Roman Cath. Diocese*, 141 S. Ct. at 67 (restriction on fundamental right not necessary when less restrictive rules are available to combat the spread of COVID-19). Moreover, as this Court itself has recognized, legal proceedings by remote access were required and available at the height of the pandemic. *See* *Court Operations in Light of the COVID-19 Pandemic* (March 17, 2020); *see also United States v. Allen*, 2022 WL 1532371, at *7 (9th Cir. May 16, 2022) (a total ban on public access to courtroom due to COVID-19 is not narrowly tailored because video streaming would have been less restrictive).

[22] *See*, *e.g.*, 7 Foreign Affairs Handbook ("FAH")-1 H-263.8 and 7 FAH-1 H-280, *et seq*. (setting forth State Department standards for physical space at overseas missions, including specifications for interview windows).

Last, the government's continued provision of non-immigrant visa services to foreigners wishing to enter the U.S. for pleasure and business [JA 28, ¶¶69-70] while contemporaneously maintaining the suspension belies the contention that it was ever *necessary* to suspend renunciation services due to COVID-19. *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) (restriction on freedom of religion is not necessary when the restriction does not apply equally to businesses); *Tandon*, 141 S. Ct. at 1297 (government must show that the activity at issue is more dangerous than other activities when the same precautions are applied).

Accordingly, the government's *suspension* of voluntary renunciation services was not necessary and, therefore, unconstitutional under strict scrutiny analysis. In concluding otherwise, the district court committed reversible error.

### ii. The *delay* of renunciation services is not narrowly tailored to further a compelling governmental interest

The waitlist/delay policy also does not survive strict scrutiny because it is not narrowly tailored – and therefore unnecessary – to further the government's compelling interest. If it wanted to, the

government ***could*** provide renunciation services at a much faster rate. But, instead, the government insists that it has unfettered authority to prioritize as it sees fit. According to the government, this broad authority immunizes it from strict scrutiny.

The government's preference for non-immigrant visa services for foreigners over renunciation services for U.S. citizens is problematic. (Frankfurt, Germany, visitor visa, 55 days, **Exhibit B**; Paris, France, visitor visa, 186 days, **Exhibit C**; Bern, Switzerland, visitor visa, 38 days, **Exhibit D**; Tel-Aviv, Israel, visitor visa 149 days, **Exhibit E**; London, England, visitor visa 88 days, **Exhibit F**). Put differently, according to the government, the business and pleasure interests of non-U.S. citizens trump the fundamental rights of U.S. citizens.

Had the government weighed its priorities correctly in deference to the rights of U.S. citizens and devoted even a fraction of the resources it placed on business-and-pleasure services for foreigners, Plaintiffs and thousands of U.S. citizens abroad – suffering daily due to their U.S. citizenship – would have been able to renounce and begin a new chapter in their lives. The government's failure to provide any explanation for

this blatant discrepancy shows that the current waitlist policy is far from necessary to further a compelling government interest.[23]

The government chooses to allocate a larger budget and resources to non-immigrant visa services – which implicate no rights whatsoever – over services that would enable Americans to exercise their fundamental right to expatriate. This blatantly unfair policy – predicated on mere budgetary convenience – has no room in our constitutional scheme. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("The Constitution recognizes higher values than speed and efficiency"); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (when entering "the realm of 'strict judicial scrutiny,' there can be no doubt that administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."); *cf. Sosna v. Iowa*, 419 U.S. 393, 406 (1975) (noting that the Supreme Court

[23] The district court did not address whether the delay was narrowly tailored to further a compelling government interest. The district court did, however, in the context of Plaintiffs' APA claim, conclude that Plaintiffs "offered little evidence to suggest this prioritization was irrational." [JA 207]. The court did not address any of Plaintiffs' claims and supporting evidence, raised here again on appeal, that the government preferred business-and-pleasure non-immigrant visas in detriment to renunciation services for U.S. citizens.

abrogated durational residency requirements when they are justified solely "on the basis of budgetary or recordkeeping considerations.").[24]

Additionally, the government's waitlist/delay policy is not narrowly tailored because it fails to take into consideration other alternatives that would make the renunciation process more efficient, such as remote renunciation appointments. The voluntary renunciation statute does not require renunciants to physically travel to a U.S. post and appear before a consulate official in person. 8 U.S.C. §1481(a)(5). The statutory language simply requires that the renunciation take place "before a diplomatic or consular officer." It does not prohibit appearance by means

[24] The predicament of a renunciant is also analogous to that of a traveler. *See Elhady v. Piehota*, 303 F. Supp. 3d 453, 464 (E.D. Va. 2017) (prolonged delay to the right to travel constitutes deprivation of liberty interest); *El Ali v. Barr*, 473 F. Supp. 3d 479, 508 (D. Md. 2020) (pattern of multi-hour delays constitutes deprivation of liberty interest). In dismissing the complaint, the district court compared Plaintiffs' expatriation right to the Sixth Amendment's Speedy Trial guarantee [JA 210-211]. In that context, the district court said, delays of up to five-years were held to be constitutional [*Id., citing Barker v. Wingo*, 407 U.S. 514 (1972)]; *see Doggett v. United States*, 505 U.S. 647, 652 (1992). The Supreme Court's Speedy Trial cases are inapposite. As the Court recognized in *Barker*, the determination whether a delay in bringing a defendant to trial depends on a multi-factor balancing test, reflecting the competing interests of the defendant and society as a whole. By contrast, a claim of renunciation of citizenship does not entail the same sort of balance. In the renunciation context, the delay is unilaterally imposed by the government without any contribution by the renunciant.

of remote communications, like those permitted by courts, including this one, in judicial proceedings. Courts regularly order parties and witnesses to appear before the court via Zoom video conferencing. *See Sream, Inc. v. Sha Sultana Inc.*, 2020 WL 8816344, at *1 (S.D. Fla. Aug. 20, 2020) ("Mr. Asif Virani shall appear before this Court via Zoom video conference"); *Mays v. Albert M. "Bo" Robinson Assessment & Treatment Ctr.*, 2020 WL 4040843, at *2 (D.N.J. July 17, 2020) (same). If the court system has employed Zoom and similar technology, the State Department can employ the same to assess the voluntariness of an applicant's wish to renounce her U.S. citizenship. *Cf. Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 349, 167 N.E.3d 822, 837 (2021) (virtual evidentiary hearing during the pandemic is not a per se violation of a defendant's right to be present, to confrontation, to a public hearing, or to effective assistance of counsel; videoconferencing technology can create a close approximation of the courtroom setting).[25]

[25] The Massachusetts Supreme Court went on to comment on the future need for remote proceedings:

> Even after video conferencing became widely available, the need for extensive use of this technology in our judicial system was not present until the onset of COVID-19, a disease that is easily transmissible by person-to-person contact. We note that even once

The government's delay in providing renunciation services is not necessary to further its asserted compelling interest. The government can readily remedy the waitlist delays by devoting the resources necessary to make the renunciation process faster and more efficient, including providing for remote interviews.

### 3. PLAINTIFFS ARE ENTITLED TO RELIEF AGAINST THE SUSPENSION AND DELAY UNDER APA §706(1)

The APA empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1). This Court applies a six-factor test – referred to as the *TRAC* factors – to determine whether agency action has been unlawfully withheld or unreasonably delayed. The *TRAC* factors are:

(1) the time agencies take to make decisions must be governed by a rule of reason;

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> the spread of COVID-19 is under control, there may be future pandemics that require the use of video conferencing in our judicial system. As we are learning from COVID-19, pandemics are unpredictable with potentially widespread and catastrophic impacts. It is crucial that we learn from the COVID-19 pandemic and continue to perfect the procedures we have implemented to safeguard our judicial system in the event of another pandemic or natural disaster.

*Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 349 fn. 15, 167 N.E.3d 822, 837 (2021). *See* Section 1, *supra* ("The Challenge To The Suspension Of Renunciation Services Is Not Moot").

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

(3) whether human health and welfare are at stake;

(4) the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the nature and extent of the interests prejudiced by delay; and

(6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

*Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984); *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). These factors "are not ironclad, but rather are intended to provide useful guidance in assessing claims of agency delay." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks omitted).

The district court determined that the first, second and fourth *TRAC* factors favor the government; the third factor "slightly favors" the Plaintiffs; and the fifth and sixth factors are "neutral." [JA 201-208]. "On balance," the court concluded, "the *TRAC* factors strongly favor the

government." The district court failed to correctly apply the *TRAC* factors in assessing the propriety of the delay in providing renunciation services.[26]

### A. The rule of reason and timetable factors weigh in favor of Plaintiffs[27]

Below, Plaintiffs argued that the government was required to consider the fundamental nature of the right to expatriate when determining to institute a delay policy. The court rejected this argument, stating that the "dispositive issue here is […] how quickly *the government* must act," [JA 203 (emphasis in original)], as opposed to other types of cases involving fundamental rights (*e.g.*, First Amendment advance notice cases), where the question is how "quickly a *claimant* can act." [*Id.*, emphasis in original].

[26] Plaintiffs address here *TRAC* factors one, two and four. Plaintiffs reserve the right to address the other factors in their reply, should it be necessary to do so.

[27] Courts typically consider *TRAC* factors one and two together. "In the absence of an explicit timeline" in the relevant statute – as is the case here with respect to §1481(a)(5) – the "APA's general reasonableness standard applies." *Geneme v. Holder*, 935 F.Supp.2d 184, 193 (D.D.C. 2013).

The district court, however, misunderstood the nature of the renunciation process under 8 U.S.C. §1481(a)(5). As Plaintiffs explained in their Complaint, without an appointment, an individual cannot exercise her right to expatriate. While it is true that the relief being sought will ultimately force the government to institute a more efficient and quicker procedure, the basis of Plaintiffs' APA claim is to allow potential renunciants to *act*. The government's role is passive, limited to assessing whether the renunciant's act is done with the intent to expatriate.[28]

Moreover, because §706(1) claims always involve how the government *acts*, the result of the court's conclusion is to neutralize the effect fundamental rights may have on the reasonableness of government delays. That is an irrational and unfair result. The nature of the right at issue certainly must be considered when assessing the reasonableness of a delay.

[28] In voluntary renunciation cases, there is generally no issue as to the intent of the renunciant. *See* 7 FAM 1262(e) (The "execution of the Oath of Renunciation usually is sufficient evidence of intent to lose U.S. nationality.").

The district court also erred in concluding that the complexity of the renunciation process justifies the waitlist policy. *First*, the court ignored the overwhelming evidence proffered by Plaintiffs demonstrating that the renunciation *interview* is not complicated. The interview is straightforward and, relatively, very short. [JA 132-164; 173-174].

*Second*, the court failed to address the failure of the government to explain why renunciation services consume more resources than other consular services, like non-immigrant visa applications. *Compare* 7 FAM 1260 [describing the straightforward renunciation process under §1481(a)(5)] with 9 FAM 402.2 [addressing B visas]; 9 FAM 402.9 [addressing E visas].

*Third* and last, the court failed to appreciate the fact that this litigation concerns renunciation *interview appointments*. It does ***not*** concern the time and resources necessary to issue a CLN. Consequently, all post-interview activities by consular officials are irrelevant and the court's consideration of those activities in assessing the reasonableness of the delay was wrong.

Ultimately, the court's analysis of the first *TRAC* factor simply did not take into consideration the fundamental right of voluntary

expatriation. Therefore, the district court should have weighted this factor in favor of Plaintiffs.

### B. Processing renunciation services without delay will not affect higher priority agency activities

The fourth *TRAC* factor concerns "the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. This factor will weigh in favor of the government where "a judicial order putting [plaintiffs] at the head of the queue simply moves all others back one space and produces no net gain." *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 75–76 (D.C. Cir. 1991).

In the proceedings below, Plaintiffs argued that because they are challenging the system *as a whole*, the fourth *TRAC* factor weighs in their favor. *See Am. Hosp. Ass'n*, 812 F.3d at 192 (broad, systematic relief, not precluded under *TRAC* factor four) [*see also* JA 36-37].

The district court rejected this argument because **(1)** AAA "lacks standing to seek class-wide relief;" and **(2)** granting the relief sought would "simply put those applicants at the head of the queue for consular services while moving other types of application back one space." [JA 206-207, internal quotations omitted].

The district court's first reason is wrong as a matter of law because nothing in Art. III standing requires that AAA and individual Plaintiffs demonstrate standing for each and every potential beneficiary of the ultimate relief. As long as one plaintiff satisfies the standing requirement, Art. III's demands are exhausted. *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 791 (D.C. Cir. 2018), *citing Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.). The fact that there may be individuals who have not suffered an injury from the delay of renunciation services does not affect the court's subject-matter jurisdiction.[29] Thus, the district court's holding that Plaintiffs needed to file a class-action to seek the requested relief was wrong.

[29] The district court's inquiry is relevant, if at all, at the merits stage, when it fashions the injunction and formulates declaratory relief. *Salazar v. Buono*, 559 U.S. 700, 713 (2010) (plurality opinion) (stating that an argument about the scope of the injunction "is not an argument about standing but about the merits"); *see also*, *e.g.*, Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 54 (2017) ("Article III has never required courts to meticulously ensure that no relief reaches anyone beyond the plaintiff.").

The second reason invoked by the court is also erroneous. Even assuming that prioritizing renunciation services as a whole would require the government to reallocate resources at the expense of other consular services – such as non-immigrant visa services – the fourth *TRAC* factor would still tilt in favor of Plaintiffs. Renunciation services facilitate the exercise of a fundamental right and, as such, *should* take priority over services for persons who have no constitutional rights, such as non-immigrant visa applicants [*See also* JA 186-191]. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) (foreign citizens outside the United States cannot assert rights under the U.S. Constitution).

Accordingly, as to the fourth *TRAC* factor, not only do Plaintiffs have standing to seek the relief requested, but such relief would apply to all renunciation applicants with the result that this factor, too, should have been deemed to be in their favor. *Am. Hosp. Ass'n*, 812 F.3d at 192.

In sum, the first, second and fourth *TRAC* factor favor Plaintiffs, and not the government. Because these factors should have been weighed in their favor, district court's grant of summary judgment in favor of the government on Plaintiffs' APA claims should be reversed.

## CONCLUSION

For all the reasons above, the judgment below should be reversed.

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Respectfully submitted,

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1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   **[X]** this document contains 9,549 words. **Exhibit A** to this brief contains 268 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   **[X]** this document has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in Century Schoolbook 14.

## CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2022, a copy of the foregoing document was served electronically through the Court's ECF system on all counsel of record.

*/s/ L. Marc Zell*

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New York, NY 10105

*Counsel for Plaintiffs-Appellants*

**EXHIBIT A TO PLAINTIFFS' OPENING BRIEF**

| | |
|---|---|
| Czech Republic [**Suspension**] | ***IMPORTANT INFORMATION*** *Due to limited staffing and resources during the COVID-19 outbreak, the U.S. Embassy in Prague is unable to accept appointments for Loss of Nationality applications. We cannot provide a timeframe but will update this website when services can resume.*<br><br>https://cz.usembassy.gov/u-s-citizen-services/citizenship-services/loss-of-u-s-citizenship/ |
| Latvia [**Suspension**] | *Due to the COVID-19 pandemic, the U.S. Embassy in Riga is not scheduling routine American Citizen Services appointments.*<br><br>https://lv.usembassy.gov/u-s-citizen-services/citizenship-services |
| Greece [**Suspension**] | ***Currently, the U.S. Embassy in Athens is not accepting appointments for Loss of Nationality Services. Unfortunately, we cannot provide a timeframe for when we will resume this service but will update this website as information becomes available.*<br><br>https://gr.usembassy.gov/u-s-citizen-services/citizenship-services/ |
| Israel [**Delay**] | *As renunciation services had been suspended for more than two years due to COVID-19, the waiting time to receive an appointment will be significant, and there is no mechanism to expedite the process!*<br><br>https://il.usembassy.gov/u-s-citizen-services/renouncing-u-s-citizenship/appointment-and-processing[1] |

[1] All websites were last accessed on December 26, 2022.

**EXHIBIT A TO PLAINTIFFS' OPENING BRIEF**

| | |
|---|---|
| Denmark [**Delay**] | *PLEASE NOTE THAT THERE IS CURRENTLY A WAIT TIME OF OVER ONE YEAR FOR A LOSS OF NATIONALITY APPOINTMENT.*<br>*If you request an appointment, we will provide you with the next available appointment date. Appointments are currently booking from mid-2023 onwards.*<br><br>https://dk.usembassy.gov/u-s-citizen-services/citizenship-services/ |
| Georgia [**Delay**] | *The American Citizen Services unit is currently providing routine services, including for loss of nationality cases. However, capacity remains limited and wait times for appointments may be longer than usual. We may need to cancel or postpone appointments with little notice due to COVID-19 conditions and our resulting staffing and resource limitations.*<br><br>https://ge.usembassy.gov/renounce-citizenship/ |
| Switzerland [**Delay**] | *PLEASE NOTE: Due to COVID19, the waiting time to receive an appointment has increased significantly!*<br><br>https://ch.usembassy.gov/u-s-citizen-services/citizenship-services/lon/appt/ |

# Visa Appointment Wait Times

Advance travel planning and early visa application are important. If you plan to apply for a nonimmigrant visa to come to the United States as a temporary visitor, please review the current wait time for an interview using the tool below. *Not all visa applications can be completed on the day of the interview; please read the information below for more details.*

Check the estimated wait time for a nonimmigrant visa interview appointment at a U.S. Embassy or Consulate.

**Note: Please check the individual Embassy or Consulate website to determine if your case is eligible for a waiver of the in-person interview.**

**Applicants scheduling visa appointments in a location different from their place of residence should check post websites for nonresident wait times.**

**Select a U.S. Embassy or Consulate:**

**Frankfurt**

| Nonimmigrant Visa Type | Appointment Wait Time |
|---|---|
| Interview Required Students/Exchange Visitors (F, M, J) | 18 Calendar Days |
| Interview Required Petition-Based Temporary Workers (H, L, O, P, Q) | 39 Calendar Days |
| Interview Required Crew and Transit (C, D, C1/D) | 9 Calendar Days |
| Interview Required Visitors (B1/B2) | 55 Calendar Days |
| Interview Waiver Students/Exchange Visitors (F, | Same Day |

# Visa Appointment Wait Times

Advance travel planning and early visa application are important. If you plan to apply for a nonimmigrant visa to come to the United States as a temporary visitor, please review the current wait time for an interview using the tool below. *Not all visa applications can be completed on the day of the interview; please read the information below for more details.*

Check the estimated wait time for a nonimmigrant visa interview appointment at a U.S. Embassy or Consulate.

**Note: Please check the individual Embassy or Consulate website to determine if your case is eligible for a waiver of the in-person interview.**

**Applicants scheduling visa appointments in a location different from their place of residence should check post websites for nonresident wait times.**

**Select a U.S. Embassy or Consulate:**

**Paris**

| Nonimmigrant Visa Type | Appointment Wait Time |
|---|---|
| Interview Required Students/Exchange Visitors (F, M, J) | 3 Calendar Days |
| Interview Required Petition-Based Temporary Workers (H, L, O, P, Q) | 32 Calendar Days |
| Interview Required Crew and Transit (C, D, C1/D) | |
| Interview Required Visitors (B1/B2) | 186 Calendar Days |
| Interview Waiver Students/Exchange Visitors (F, | 1 Calendar Day |

# Visa Appointment Wait Times

Advance travel planning and early visa application are important. If you plan to apply for a nonimmigrant visa to come to the United States as a temporary visitor, please review the current wait time for an interview using the tool below. *Not all visa applications can be completed on the day of the interview; please read the information below for more details.*

Check the estimated wait time for a nonimmigrant visa interview appointment at a U.S. Embassy or Consulate.

**Note: Please check the individual Embassy or Consulate website to determine if your case is eligible for a waiver of the in-person interview.**

**Applicants scheduling visa appointments in a location different from their place of residence should check post websites for nonresident wait times.**

**Select a U.S. Embassy or Consulate:**

**Bern**

| Nonimmigrant Visa Type | Appointment Wait Time |
|---|---|
| Interview Required Students/Exchange Visitors (F, M, J) | 15 Calendar Days |
| Interview Required Petition-Based Temporary Workers (H, L, O, P, Q) | 17 Calendar Days |
| Interview Required Crew and Transit (C, D, C1/D) | 15 Calendar Days |
| Interview Required Visitors (B1/B2) | 38 Calendar Days |
| Interview Waiver Students/Exchange Visitors (F, | 3 Calendar Days |

# Visa Appointment Wait Times

Advance travel planning and early visa application are important. If you plan to apply for a nonimmigrant visa to come to the United States as a temporary visitor, please review the current wait time for an interview using the tool below. *Not all visa applications can be completed on the day of the interview; please read the information below for more details.*

Check the estimated wait time for a nonimmigrant visa interview appointment at a U.S. Embassy or Consulate.

**Note: Please check the individual Embassy or Consulate website to determine if your case is eligible for a waiver of the in-person interview.**

**Applicants scheduling visa appointments in a location different from their place of residence should check post websites for nonresident wait times.**

**Select a U.S. Embassy or Consulate:**

**Tel Aviv**

| Nonimmigrant Visa Type | Appointment Wait Time |
|---|---|
| Interview Required Students/Exchange Visitors (F, M, J) | 9 Calendar Days |
| Interview Required Petition-Based Temporary Workers (H, L, O, P, Q) | 21 Calendar Days |
| Interview Required Crew and Transit (C, D, C1/D) | 21 Calendar Days |
| Interview Required Visitors (B1/B2) | 149 Calendar Days |
| Interview Waiver Students/Exchange Visitors (F, | 1 Calendar Day |

# Visa Appointment Wait Times

Advance travel planning and early visa application are important. If you plan to apply for a nonimmigrant visa to come to the United States as a temporary visitor, please review the current wait time for an interview using the tool below. *Not all visa applications can be completed on the day of the interview; please read the information below for more details.*

Check the estimated wait time for a nonimmigrant visa interview appointment at a U.S. Embassy or Consulate.

**Note: Please check the individual Embassy or Consulate website to determine if your case is eligible for a waiver of the in-person interview.**

**Applicants scheduling visa appointments in a location different from their place of residence should check post websites for nonresident wait times.**

**Select a U.S. Embassy or Consulate:**

**London**

| Nonimmigrant Visa Type | Appointment Wait Time |
|---|---|
| Interview Required Students/Exchange Visitors (F, M, J) | 20 Calendar Days |
| Interview Required Petition-Based Temporary Workers (H, L, O, P, Q) | 20 Calendar Days |
| Interview Required Crew and Transit (C, D, C1/D) | |
| Interview Required Visitors (B1/B2) | 88 Calendar Days |
| Interview Waiver Students/Exchange Visitors (F, | 21 Calendar Days |

[ORAL ARGUMENT NOT YET SCHEDULED]

**UNITED STATES COURT OF APPEALS**

**FOR THE**

**DISTRICT OF COLUMBIA CIRCUIT**

Case No. 22-5262

*L'ASSOCIATION DES AMÉRICAINS ACCIDENTELS, ET AL.*

*Plaintiffs-Appellants*,

-v-

*UNITED STATES DEPARTMENT OF STATE, ET AL.*

*Defendant-Appellee*

On Appeal from the Final Memorandum Opinion of the
United States District Court for the District of Columbia
Case No. 1:20-CV-02933 (TNM)

# STATUTORY ADDENDUM

## TABLE OF CONTENTS

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

# Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

End of Document

8 U.S.C.A. § 1481

# § 1481. Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions

Currentness

**(a)** A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality--

**(1)** obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years; or

**(2)** taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or

**(3)** entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or non-commissioned officer; or

**(4)(A)** accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years if he has or acquires the nationality of such foreign state; or

**(B)** accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

**(5)** making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

**(6)** making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

**(7)** committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18, or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

**(b)** Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

**CREDIT(S)**

(June 27, 1952, c. 477, Title III, ch. 3, § 349, 66 Stat. 267; Sept. 3, 1954, c. 1256, § 2, 68 Stat. 1146; Pub.L. 87-301, § 19, Sept. 26, 1961, 75 Stat. 656; Pub.L. 94-412, Title V, § 501(a), Sept. 14, 1976, 90 Stat. 1258; Pub.L. 95-432, §§ 2, 4, Oct. 10, 1978, 92 Stat. 1046; Pub.L. 97-116, § 18(k)(2), (q), Dec. 29, 1981, 95 Stat. 1620, 1621; Pub.L. 99-653, §§ 18, 19, Nov. 14, 1986, 100 Stat. 3658; Pub.L. 100-525, §§ 8(m), (n), 9(hh), Oct. 24, 1988, 102 Stat. 2618, 2622.)

8 U.S.C.A. § 1481, 8 USCA § 1481
Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

**End of Document**

Code of Federal Regulations
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter F. Nationality and Passports
Part 50. Nationality Procedures (Refs & Annos)
Subpart C. Loss of Nationality

22 C.F.R. § 50.50

# § 50.50 Renunciation of nationality.

Currentness

(a) A person desiring to renounce U.S. nationality under section 349(a)(5) of the Immigration and Nationality Act shall appear before a diplomatic or consular officer of the United States in the manner and form prescribed by the Department. The renunciant must include on the form he signs a statement that he absolutely and entirely renounces his U.S. nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

(b) The diplomatic or consular officer shall forward to the Department for approval the oath of renunciation together with a certificate of loss of nationality as provided by section 358 of the Immigration and Nationality Act. If the officer's report is approved by the Department, copies of the certificate shall be forwarded to the Immigration and Naturalization Service, Department of Justice, and to the person to whom it relates or his representative.

**Credits**
[61 FR 29653, June 12, 1996]

SOURCE: Dept. Reg. 108.541, 31 FR 13537, Oct. 20, 1966; 61 FR 43311, Aug. 22, 1996; 63 FR 20315, April 24, 1998; 64 FR 19714, April 22, 1999; 73 FR 41258, July 18, 2008; 73 FR 62197, Oct. 20, 2008, unless otherwise noted.

AUTHORITY: 22 U.S.C. 2651a; 8 U.S.C. 1104 and 1401 through 1504.

Notes of Decisions (3)

Current through Nov. 24, 2022, 87 FR 72357. Some sections may be more current. See credits for details.

**End of Document**

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

# § 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

**(1)** compel agency action unlawfully withheld or unreasonably delayed; and

**(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--

**(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**(B)** contrary to constitutional right, power, privilege, or immunity;

**(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

**(D)** without observance of procedure required by law;

**(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

**(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**CREDIT(S)**

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 706, 5 USCA § 706

Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

End of Document