[ORAL ARGUMENT SCHEDULED FOR MAY 3, 2023]

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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Cases

Statutes

Other Authorities

Law Review Articles

Legislative History and Congressional Debates

SUMMARY OF ARGUMENT

1. Plaintiffs challenge (1) the global ***suspension*** of U.S. citizenship renunciation services and (2) the global ***delays*** on U.S. citizenship renunciation services. While several U.S. missions around the globe have started to provide renunciation services, many continue to suspend these services. The challenge, therefore, is not moot. Moreover, because the suspension is capable of repetition, the Court should address the merits of the suspension's constitutionality and legality.

2. The suspension and delay of renunciation services infringes on Plaintiffs' fundamental right to voluntarily renounce their U.S. citizenship. The right to expatriate is a fundamental right and warrants the protections of the Fifth Amendment's Due Process Clause. Any restriction on the right is, therefore, subject to strict scrutiny and must be stricken if it is not narrowly tailored to further a compelling government interest. The suspension and delay of renunciation services do not satisfy this test.

3. The government's failure to provide renunciation services at a

faster rate – while preferencing non-U.S. visa business-and-pleasure services – entitles Plaintiffs to relief under 5 U.S.C. §706(1), which provides that a court "shall compel agency action unlawfully withheld or unreasonably delayed."

ARGUMENT

I. Plaintiffs' challenge to the suspension of services is not moot

Several U.S. missions around the world continue to prevent U.S. citizens from voluntarily renouncing their U.S. citizenship. *See* Plaintiffs' Br., at 8, fn. 7, 14-15.[1] The fact that *some* U.S. missions have begun providing renunciation services does not moot Plaintiffs' underlying challenge because this Court can still provide relief as to the other U.S. missions that continue to maintain the suspension. *Am. Fed'n*

[1] In addition to the U.S. missions listed in the Opening Brief, the U.S. mission in Bermuda also maintains a suspension on renunciation services. https://bm.usconsulate.gov/u-s-citizen-services/citizenship-services/renounce-citizenship/ (last accessed on March 20, 2023) ("Please note: The U.S. Consulate is not currently accepting appointments for Loss of Nationality applications. We cannot provide a timeframe for when this service will resume, but will update this website when services resume.").

of Gov't Emps., AFL-CIO, Loc. 3090 v. Fed. Lab. Rels. Auth., 777 F.2d 751, 754 n. 13 (D.C. Cir. 1985) (court's concomitant ability to afford relief beyond that already obtained, establishes that a live controversy still exists.).

The government ignores this fact. Instead, the government maintains that because the "initial, emergency suspension memorandum has not been operative since May 2020, the district court was correct to conclude that" the challenge was moot. Gv't Br., at 27; *see also* JA 47-48 and 66-71 (addressing the March 2020 initial "memorandum"); *see also* Gv't Br., at 28 (arguing that the claim is moot because the "specific suspension policy" is no longer active).

However, Plaintiffs never challenged the "initial suspension memorandum" which may or may not be formally inoperative at this time. Rather, Plaintiffs seek relief from the State Department's general policy to suspend renunciation services during the pandemic and after. Whether these suspensions are pursuant to formal "memorandums" or *de facto* policy decisions is of little matter. Nowhere in the complaint do Plaintiffs address or mention the "initial, emergency suspension memorandum." Indeed, even after the so-called initial "memorandum"

became inoperative in May 2020, the government continued to prevent its citizens from renouncing by maintaining a widespread suspension policy throughout the globe. *See* JA 20-21 (listing U.S. missions that maintained a suspension as of December 27, 2021).

Even assuming that all U.S. missions are currently allowing U.S. citizens to renounce (which they are not and, where renunciation is permitted, it is at an extremely slow pace), the matter would not be moot because it is the type of issue that is "capable of repetition yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (exception to mootness requires a showing that (1) the challenged action was in its duration too short and (2) party will likely be subject to same action); *Alton & S. Ry. Co. v. Bhd. of Maint. of Way Employes Div./IBT*, 2023 WL 2053073, at *2 (D.C. Cir. Feb. 17, 2023).

The suspension of renunciation services was patently too short to be fully litigated prior to its cessation. Moreover, there is a reasonable expectation that the same complaining party will be subjected once again to a similar or identical suspension policy. *See* Plaintiffs' Brief ("Pl. Br."), at 15-16. This is especially true considering the government's vigorous assertion –apparent from its brief– that the suspension was and remains

legal. *See Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) ("complainant may justifiably project repetition" when the "legality of that conduct is vigorously asserted" by the government.).

The government has, accordingly, failed to satisfy its "heavy" burden of demonstrating mootness.[2] Therefore, the decision of the district court as to mootness should be reversed. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Doe*, 696 F.2d at 112 (defendant has "heavy burden of demonstrating mootness.").

II. Plaintiffs have stated a Substantive Due Process Claim

A. The right being vindicated is the right to voluntarily renounce U.S. citizenship

Relying on *Glucksberg*'s "careful description" requirement, the government urges this Court to define the right being asserted as the "ability to complete an assessment interview and take the oath of renunciation within a particular time frame." Gv't Br., at 33; *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

[2] Recall, that the government never raises a mootness defense in the proceedings below. *See* Pl. Br., at 17, fn. 10.

This argument misconstrues Plaintiffs' theory of the case and misapplies *Glucksberg*. Nowhere in the pleadings or briefs did Plaintiffs allege that they have a fundamental right to take a renunciation "assessment interview" within a particular timeframe. Rather, based on the overwhelming, deep, historical tradition of expatriation – coupled with its place in the concept of "ordered liberty" – Plaintiffs pled and argued that they have a fundamental right to renounce their U.S. citizenship. JA 29-30. Once this fundamental right is established, it naturally flows that any restrictions and limitations must be reviewed under strict scrutiny. *Id*.; *See also* Pl. Br., at 32-34. The government's so-called "assessment interview" is nothing more than a condition/restriction on the exercise of the right to expatriate which should be subject to the protections of the Fifth Amendment's Substantive Due Process Clause.

The government also misapplies *Glucksberg*'s "careful description" requirement. As pointed out in Plaintiffs' Opening Brief, 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). The right to voluntarily expatriate is not "new ground." It is as old as the Republic. JA 29-30; Pl. Br., at 23-28. In their lawsuit, Plaintiffs request that this right be placed on the same level as other fundamental rights and be given the protections of the Substantive Due Process Clause of the Fifth Amendment. The government's "careful description" argument trivializes the right to expatriate into nothing more than an administrative procedure. If the government's argument is accorded any credence, then it can invoke the same semantic game against every challenged restriction on this right or, for that matter, any other constitutionally protected right.

B. The suspension and waitlist policy do not satisfy strict scrutiny

As a fundamental right, the government has the burden to demonstrate that its suspension and waitlist policy are narrowly tailored to advance a compelling governmental interest. *Glucksberg*, 521 U.S. at 721. The government has failed to meet this burden.

Conspicuously, the government has *not* denied that it prioritizes non-immigrant business-and-pleasure visas over renunciation services. Instead, the government highlights other forms of visas that it

prioritizes, such as those for healthcare workers. Gv't Br., at 43. But the record clearly shows – and the government does not deny – that it is faster for an alien to receive a visa to enter the United States for business or pleasure than for a U.S. citizen to renounce his/her citizenship. Pl. Br., at 38.[3] These are not "broad gestures at non-immigrant visa statistics." Gv't Br., at 43. These are undisputed facts. Because it is clear that the government places restrictions on renunciation services that it does not impose on non-immigrant visa services, it cannot be deemed narrowly tailored. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (Gorsuch, J., concurring) (restriction on freedom of religion is not necessary when the restriction does not apply equally to businesses).

To support its position, the government claims that there is a "legal tradition imposing procedural regulations on expatriation." Gv't Br., at 37. Therefore, claims the government, Plaintiffs' argument is difficult to "reconcile with the idea that any constitutional right to expatriate has traditionally included a right" to do so within a specific timeframe. *Id*., at 38. The government is wrong.

[3] Moreover, even when the government began providing non-immigrant visa services, it continued to suspend renunciation services. JA 27-28.

Historically, the right to voluntarily expatriate was almost without any significant limitation whatsoever. The government has identified only ***one*** restriction on this right- the inability of an incarcerated individual to voluntary renounce. Gv't Br., at 39. That can hardly be considered proof of a "legal tradition" of procedural regulations, especially considering the wide range of liberties denied to the incarcerated by virtue of their imprisonment. *See Richardson v. Ramirez*, 418 U.S. 24 (1974) (state has the power to disenfranchise persons convicted of a felony without running afoul of the Fourteenth Amendment).

Tellingly, up until 2010 – when the State Department first charged a fee to renounce – there were virtually no restrictions on this right, save the requirement that renunciation be executed before a diplomatic officer. 8 U.S.C. §1481(a)(5). And even this in-person requirement is not a restriction in the classic sense: it is for the benefit of the renunciant, *i.e.*, to ensure the act is done voluntarily and with the proper intent. *See Farrell v. Blinken*, 4 F.4th 124, 135 (D.C. Cir. 2021) (describing in-person requirement as a "protection against involuntary expatriation."). Formal renunciation under §1481(a)(5) – as opposed to other forms of citizenship

relinquishment under §1481(a)(1)-(4) – has been almost completely without restriction since the founding of the American Republic.

In contrast, the suspension and waitlist policy are restrictions that stem from mere budgetary and financial concerns and are unprecedented in the history of the right to expatriate. *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.").

Because the right to expatriate is a fundamental right and the suspension and waitlist policies are not narrowly tailored to further the government's interest in combatting COVID-19, these restrictions should be stricken as unconstitutional under the Fifth Amendment. The decision below should be reversed.

III. Plaintiffs are entitled to relief under the APA, 5 U.S.C. §706(1)

In addition to infringing on Plaintiffs' fundamental right to expatriate, the suspension and waitlist policy entitles them to relief under 5 U.S.C. §706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* The so-called *TRAC*

factors are used when assessing the legality of agency delays. *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).

A. The government – like the district court – failed to consider the nature of the right in assessing the first *TRAC* factor

As to the first *TRAC* factor, the government – predictably – invokes the COVID-19 pandemic to support the suspension/delay in scheduling renunciation interviews. Gv't Br., at 48. According to the government, the pandemic imposed safety and resource constraints leading to suspensions and delays in renunciation services. *Id.* Yet, the government fails to explain why these considerations are not applicable to other consular services – *i.e.*, non-immigrant business-and-pleasure services – that undeniably do not touch upon any rights, certainly not those approaching the level of the right to expatriate.

Relatedly, the government – and the court below – did not even consider the status of the right at issue in assessing the first *TRAC* factor. In evaluating whether a delay is proper, a court must – and certainly should – consider whether the delays affect an individual's constitutionally and statutorily protected right and, if so, whether that

right is fundamental. Certainly, a delay or withholding of agency action required to exercise a fundamental right should be assessed differently from those that do not affect such rights.

Because the right to expatriate is fundamental and because the government has provided no cognizable explanation as to why this right has been singled out for excessive delays and suspensions, the first *TRAC* factor weighs in favor of Plaintiffs.

B. The government commits the same error as the district court in assessing the fourth *TRAC* factor

Plaintiffs do not seek to jump ahead of the line at the detriment of other renunciants. At most, Plaintiffs seek relief that would require the government to reprioritize certain consular services to the benefit of renunciation services. Should a court grant the relief sought, the government may have to reallocate the resources and manpower it expends on non-immigrant business-and-pleasure visas for the sake of renunciation services which benefit American citizens only.

TRAC factor four should be assessed by evaluating whether the plaintiff will skip ahead of the line of that specific service. It should *not* address whether a plaintiff will skip the line of individuals seeking other

services (especially when those other services do not concern vindicating any constitutional or statutory rights). If it were otherwise, then the fourth *TRAC* factor would always favor the agency because granting relief under §706(1) necessarily involves shifting inter- and intra-agency resources and manpower for the benefit of the plaintiff.

This Court, as well as others, has rejected the very argument that the government advances here. *Am. Hosp. Ass'n*, 812 F.3d at 192 (broad, systematic relief, not precluded under *TRAC* factor four) [*see also* JA 36-37]. *See Godsey v. Wilkie*, 31 Vet. App. 207, 228 (Vet. App. 2019) (fourth *TRAC* factor favors plaintiffs when lawsuit seeks resolution of systematic/class delay claims); *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017) (same); Stephen C. Robin, *Healing Medicare: Enforcing Administrative Law Deadlines in Medicare Appeals*, 95 N.C. L. REV. 1293, 1303 (2017) (by focusing on the whole system – rather than on one claimant – a court can "disregard[ ] the common line-jumping or resource allocation arguments.").

C. The remaining *TRAC* factors favor Plaintiffs

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. Plaintiffs related to the first, second and fourth factors in their Opening Brief and noted that, if necessary, would address the remaining factors in their reply. Pl. Br., at 44. These factors also favor Plaintiffs.[4]

The third and fifth factors – often considered together and require courts to consider the "nature and extent of interests prejudiced by delay" and whether "human health and welfare are at stake," *TRAC*, 750 F.3d at 80 – favor Plaintiffs because, as the record below demonstrates, the inability to renounce U.S. citizenship has caused and is causing them daily harm. Routine bank transactions have become nightmares;

[4] Relying on *CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014), the government argues that these arguments are deemed waived because Plaintiffs did not raise them in their opening brief. Gv't Br., at 47. *CTS*, however, dealt with a petition for review where the petitioner failed to raise the argument before the agency in the first place. Here, however, Plaintiffs noted their opposition to the remaining disposition of the *TRAC* factors and, thus, gave the government ample opportunity to relate to them, which it did. These arguments, therefore, should not be considered waived.

opening and maintaining a bank account have become nearly impossible; annual compliance costs create financial hardship on the millions of U.S. citizens living abroad. The inability to access funds or secure credit has negatively impacted the lives of thousands of Americans living abroad. JA 8-12, 18-21. *See also* Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 197-203 (2017) (discussing the financial and bureaucratic hardships of accidental Americans); *see also* Molly Quell, *'Accidental Americans' Face Uphill Battle to Comply With US Tax Rules*, Courthouse News Service (April 15, 2020) (reporting that "U.S. citizenship [of accidental Americans has] caused them to lose businesses, homes and a lot of their sanity.").

As for the sixth *TRAC* factor, the government's conduct towards the U.S. expatriate community can be described as nothing more than hostile. The government has already actively discouraged and prevented its nationals from renouncing by placing a $2,350 price tag on the exercise of that right.[5] Now, the government tells its citizens that they

[5] Plaintiff AAA, together with additional plaintiffs, challenged the renunciation fee in the companion case, *L'Association des Américains Accidentels et al. v. United States Department of State, et al.*, 1:20-cv-03573 (TSC). After two years of the initial commencement of the lawsuit, the government filed a "Notice of Intent to Pursue Rulemaking to Reduce

must wait over a year to renounce, while at the same time providing visa services to non-U.S. nationals at relative light speed (relative, that is, to renunciation services).

Although the act of expatriation may seem to many as unpatriotic and anti-American, that does not justify the government's antagonistic position. Expatriation has been described by many as "a natural right all men have" [I-Mien Tsiang, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907, Baltimore: John Hopkins Press (1942), at 26, citing Thomas Jefferson] and lies at the very "foundation of our Revolution." 7 ANNALS OF CONG. 354 (1797). That the act of renouncing U.S. citizenship may appear to some to be irrational and even ungrateful, cannot and should not affect the protections this right warrants, based both on its historical pedigree and it unique place in order liberty. *Cf. Texas v. Johnson*, 491 U.S. 397, 414 (1989) (First Amendment protects

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Fee Amount" from the current $2,350 amount to $450. About one month later, on February 10, 2023, the District Court dismissed the lawsuit. Plaintiffs have appealed the dismissal to this Court, case no. 23-5034. As of the date of this filing, the fee to renounce remains at $2,350. The government's proposed rule is currently unavailable and appears to be under review by the Office of Information and Regulatory Affairs, Office of Management and Budget, in accordance with Executive Order 12866, 58 FED. REG. 190 (Oct. 4, 1993). *See* www.reginfo.gov.

expression of an idea even if society finds the idea offensive or disagreeable, citing cases).

Accordingly, while there is no need to make a finding of bad-faith under *TRAC,* the government's general disdain towards renunciants – coupled with the importance of the underlying right – should tilt the balance in favor of Plaintiffs.

CONCLUSION

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

Date: March 20, 2023

Respectfully submitted,

/s/ L. Marc Zell

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, a copy of the foregoing document was served electronically through the Court's ECF system on all counsel of record.

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