

1 SULLIVAN & CROMWELL LLP
2 Alexa M. Lawson-Remer (268855)
3 lawsonr@sullcrom.com
4 1888 Century Park East, Suite 2100
5 Los Angeles, CA 90067-1725
6 Telephone: (310) 712-6600
7 Facsimile: (310) 712-8800

8 Theodore Edelman (pro hac vice)
9 edelmant@sullcrom.com
10 Jessica Klein (pro hac vice)
11 kleinj@sullcrom.com
12 Lauren M. Goldsmith (293269)
13 goldsmithl@sullcrom.com
14 125 Broad Street
15 New York, NY 10004-2498
16 Telephone: (212) 558-4000
17 Facsimile: (212) 558-3588

18 IMMIGRATION EQUALITY
19 Aaron C. Morris (pro hac vice)
20 amorris@immigrationequality.org
21 40 Exchange Place, Suite 1300
22 New York, NY 10005-2744
23 Telephone: (212) 714-2904

24 *Attorneys for Plaintiffs*

25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

19 ANDREW MASON DVASH-
20 BANKS and E.J. D.-B.,

21 Plaintiffs,

22 v.

23 THE UNITED STATES
24 DEPARTMENT OF STATE,
25 and THE HONORABLE
26 MICHAEL R. POMPEO,
27 Secretary of State,

28 Defendants.

Case No. 2:18-cv-00523-JFW-JCx

**EX PARTE NOTICE OF MOTION
AND UNOPPOSED MOTION
UNDER FRCP 15(a) FOR LEAVE
TO REMOVE PLAINTIFFS'
EQUAL PROTECTION CLAIM
VIA AMENDMENT OF THE
COMPLAINT**

Judge: Hon. John F. Walter

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE of Plaintiffs’ unopposed motion under Federal Rule of Civil Procedure 15 for leave to file a First Amended Complaint for the purpose of removing without prejudice their Equal Protection claim (Count II of the operative Complaint). A copy of the proposed First Amended Complaint, along with a redline version identifying the proposed changes from the initial Complaint, are attached for the Court’s review. (*See* Exhibits A and B, respectively, to the Declaration of Alexa M. Lawson-Remer (hereinafter “Lawson-Remer Declaration”). The proposed First Amended Complaint retains the remaining three causes of action as alleged against Defendants in the initial Complaint (specifically, Plaintiffs’ claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702; 8 U.S.C. § 1503 (“Section 1503”); and the Due Process clause of the Fifth Amendment). The parties met and conferred on December 21, 2018 and January 2 and January 3, 2019 and are available for a hearing if the Court so requires; but otherwise intend to submit the matter to the Court on the papers.

This motion will be based on this Notice of Motion and Motion, the annexed Memorandum of Points and Authorities, the Lawson-Remer Declaration and exhibits thereto, Plaintiff’s First Amended Complaint, the [Proposed] Order filed herewith, and on any additional material presented during the hearing on this motion (if any).

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on December 21, 2018 and January 2 and January 3, 2019. During this conference, Defendants’ counsel stated that they do not oppose a motion that allows Plaintiffs to amend the Complaint to remove Plaintiffs’ equal protection claim.

Dated: January 4, 2019

Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SULLIVAN & CROMWELL LLP
Alexa M. Lawson-Remer (268855)
lawsonr@sullcrom.com
1888 Century Park East, Suite 2100
Los Angeles, CA 90067-1725
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Theodore Edelman (pro hac vice)
edelmant@sullcrom.com
Jessica Klein (pro hac vice)
kleinj@sullcrom.com
Lauren M. Goldsmith (293269)
goldsmithl@sullcrom.com
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

IMMIGRATION EQUALITY
Aaron C. Morris (pro hac vice)
amorris@immigrationequality.org
40 Exchange Place, Suite 1300
New York, NY 10005-2744
Telephone: (212) 714-2904

Attorneys for Plaintiffs

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3

Plaintiffs’ counsel certifies that, prior to filing the instant motion, the parties, through counsel, met and conferred on December 21, 2018 and January 2 and January 3, 2019 regarding the contents of the instant motion and the concurrently-filed Joint Stipulation to Modify Scheduling Order Under Rule 16(b), and exchanged drafts of each.

Dated: January 4, 2019

Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

SULLIVAN & CROMWELL LLP
Alexa M. Lawson-Remer (268855)
lawsonr@sullcrom.com
1888 Century Park East, Suite 2100
Los Angeles, CA 90067-1725
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Theodore Edelman (pro hac vice)
edelmant@sullcrom.com
Jessica Klein (pro hac vice)
kleinj@sullcrom.com
Lauren M. Goldsmith (293269)
goldsmithl@sullcrom.com
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

IMMIGRATION EQUALITY
Aaron C. Morris (pro hac vice)
amorris@immigrationequality.org
40 Exchange Place, Suite 1300
New York, NY 10005-2744
Telephone: (212) 714-2904

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Andrew Mason Dvash-Banks (“Andrew”) and his son E.J.D.-B. (“E.J.”; together, “Plaintiffs”), respectfully submit this memorandum of points and authorities in support of their unopposed motion for an order granting Plaintiffs leave to file a First Amended Complaint for the purpose of removing without prejudice their Equal Protection claim (Count II of the operative Complaint) in the above-captioned action (the “Action”).

I. INTRODUCTION

This Action challenges the State Department’s determination not to recognize E.J. as a U.S. citizen at birth. E.J. and his twin brother, A.J.D.-B. (“A.J.”) were born in Canada to Andrew, a U.S. citizen, and his husband, Elad Dvash-Banks (“Elad”), an Israeli citizen, while they were married. The State Department recognizes A.J.’s U.S. citizenship but denies that E.J. is a U.S. citizen.

On January 22, 2018, Andrew and E.J. filed the Complaint in this Action, alleging that under the Immigration and Nationality Act (“INA”), “[a]t birth, both [E.J.] and [A.J.] qualified for United States citizenship pursuant to Section 301(g).” The Complaint alleges four causes of action: (1) violation of due process under the Fifth Amendment (Count I); (2) violation of equal protection under the Fifth Amendment (Count II); (3) violation of Section 706(2)(A) of the Administrative Procedure Act (the “APA”) (Count III); and (4) declaratory judgment pursuant to Section 1503 of the INA that E.J. is a U.S. citizen at birth (Count IV).

Defendants answered the Complaint on July 16, 2018, and the parties submitted their Joint Rule 26(f) Report on August 20, 2018. Thereafter, the Court issued a Scheduling and Case Management Order (“Scheduling Order”) on August 21, 2018, setting out the deadlines in the case. The deadline for amending the pleadings was set at sixty days from the date of the Scheduling Order, or October 20, 2018. The current deadline for moving for summary judgment (as stipulated to

1 by the parties on December 21, 2018 and ordered by the Court on December 26,
2 2018) is January 7, 2019; the parties each intend to cross-move for summary
3 judgment on multiple claims.

4 In connection with those contemplated motions, the parties met and
5 conferred multiple times and, among other things, explored ways to try to
6 streamline the Action by reducing issues and claims for the Court's consideration
7 and adjudication. As part of that effort, the parties agreed, subject to the Court's
8 approval, to eliminate the need for the Court to address Plaintiffs' equal protection
9 claim. Accordingly, Plaintiffs now seek an order permitting them to amend the
10 Complaint to remove their equal protection claim (Count II of the operative
11 Complaint) under Federal Rules of Civil Procedure 15(a) in advance of the January
12 7, 2019 deadline for filing motions for summary judgment.¹ Plaintiffs are seeking
13 this order *ex parte* in an effort to obtain the order before the deadline for filing
14 summary judgment motions. Counsel for Defendants was informed that the instant
15 motion would be made *ex parte* and consented to the filing.²

16
17
18
19
20

21 ¹ The requested relief would have the effect of a dismissal without prejudice of
22 Plaintiffs' equal protection claim. Inasmuch as amendment of the pleadings
23 pursuant to Rule 15, rather than dismissal under Rule 41, is the proper procedure
24 for removing individual claims, Plaintiffs seek to accomplish that result by means
25 of this motion. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683,
26 687-88 (9th Cir. 2005) ("Rule 41, or at least Rule 41(a), governs dismissals of
27 entire actions, not of individual claims [W]ithdrawals of individual claims
28 against a given defendant are governed by Fed.R.Civ.P. 15, which addresses
amendments to pleadings.").

26 ² Defendants in this Action are represented by Lisa Zeidner Marcus and Vinita B.
27 Andrapalliyal of the United States Department of Justice, mailing address P.O.
28 Box 883, Washington DC 20044. Their e-mail addresses are
lisa.marcus@usdoj.gov and Vinita.B.Andrapalliyal@usdoj.gov, respectively.
Defense counsel's contact telephone number is (202) 305-0845.

II. ARGUMENT

A. Legal Standard

Under Fed. R. Civ. P. 15(a), parties are permitted to amend their pleadings with “the opposing party’s written consent” or with leave of court.³ “[L]eave [to amend] shall be freely given when justice so requires.” *Lisker v. City of Los Angeles*, 2011 WL 3420665, at *1 (C.D. Cal. Aug. 4, 2011) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992)). In deciding whether to grant leave to amend, “courts are cautioned to apply the policy of free amendment of pleadings with extreme liberality.” *Id.* (quoting *SAES Getters S.P.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002)). Generally, “amendment of pleadings is to be permitted unless the opposing party makes a showing of undue delay, bad faith, undue prejudice, or futility of amendment on the part of the moving party.” *Id.* (quoting *Aeronex*, 219 F. Supp. 2d at 1086-87).

B. Defendants have consented to Plaintiffs’ amendment of the Complaint, thus amendment is appropriate.

Defendants consented in writing to Plaintiffs’ proposed amendment of the Complaint. (*See* Joint Stipulation to Modify Scheduling Order Under Rule 16(b) at p. 2, filed concurrently with the instant motion). Even if Defendants had

³ Fed. R. Civ. P. 15(a) governs the amendment of pleadings. However, “once the court files a pretrial scheduling order establishing a timetable for amending the pleadings, Rule 16 [also] applies.” *Lisker v. City of Los Angeles*, 2011 WL 3420665, at *1 (C.D. Cal. Aug. 4, 2011). Fed. R. Civ. P. 16(b) allows for modification of a scheduling order upon a showing of “good cause.” Rule 16(b)’s “‘good cause’ standard primarily considers the diligence of the party seeking the amendment . . . Relief may be granted if the court finds that the movant has not unduly delayed the action and that the opponent will not be prejudiced by the modification.” *Lisker*, 2011 WL 3420665, at *1. Once the “party seeking the amendment demonstrates good cause under Rule 16, then th[at] party must demonstrate that amendment is proper under Rule 15.” *Id.* The parties jointly stipulated, subject to the Court’s approval, to modifying the deadline for amending the pleadings in the Court’s Scheduling Order (Dkt. No. 52) on January 4, 2019 and have filed that stipulation concurrently with this motion.

1 not so consented, amendment is appropriate under Rule 15(a) for the following
2 reasons. *First*, Plaintiffs diligently notified Defendants of their intention to remove
3 their equal protection claim before the January 7, 2019 deadline for filing summary
4 judgment motions in an effort to assist the parties and the Court in streamlining
5 this action. *Second*, allowing Plaintiffs to amend the Complaint would not unduly
6 delay the action. To the contrary, it would narrow the issues for the Court to
7 resolve and thus conserve the Court’s and the parties’ resources. *Third*,
8 Defendants would not be prejudiced by Plaintiffs’ proposed amendment, which
9 would reduce the scope of the action and the number of claims for the parties and
10 the Court to address. Because Plaintiffs are seeking to remove a cause of action
11 from the Complaint, there is no risk that Defendants would have to “undertake[] . .
12 . an entirely new course of defense.” *Lisker*, 2011 WL 3420665, at *2 (Defendants
13 “fail[ed] to articulate how the *absence* of certain claims w[ould] undermine their
14 already existing defenses against the remaining claims”). Moreover, because
15 Plaintiffs could achieve the same result by removing the equal protection cause of
16 action at the pretrial conference, there is “little point in precluding Plaintiff[s] from
17 dropping claims [they] no longer wish[] to pursue.” *Id.* (“Defendants cannot force
18 Plaintiff to pursue at trial every cause of action pleaded in the complaint. This is
19 made explicit in the Central District’s pretrial procedures Plaintiff could wait
20 until the pretrial conference and announce that he has abandoned the [] claims in
21 question”). *Fourth*, because Plaintiffs are seeking to remove rather than add a
22 cause of action, there is no concern that amendment would be futile. *Fifth*, there
23 has been no suggestion—nor could any be made—that Plaintiffs’ request to amend
24 is not made in good faith.

25 III. CONCLUSION

26 For the foregoing reasons, Plaintiffs Andrew and E.J. respectfully
27 request that the Court grant this motion and thereby grant them leave to file an
28 amended complaint deleting without prejudice their equal protection cause of

1 action.

2 Dated: January 4, 2019

Respectfully submitted,

3
4 By: /s/ Alexa M. Lawson-Remer

5 SULLIVAN & CROMWELL LLP
6 Alexa M. Lawson-Remer (268855)
7 lawsonr@sullcrom.com
8 1888 Century Park East, Suite 2100
9 Los Angeles, CA 90067-1725
10 Telephone: (310) 712-6600
11 Facsimile: (310) 712-8800

12 Theodore Edelman (pro hac vice)
13 edelmant@sullcrom.com
14 Jessica Klein (pro hac vice)
15 kleinj@sullcrom.com
16 Lauren M. Goldsmith (293269)
17 goldsmithl@sullcrom.com
18 125 Broad Street
19 New York, NY 10004-2498
20 Telephone: (212) 558-4000
21 Facsimile: (212) 558-3588

22 IMMIGRATION EQUALITY
23 Aaron C. Morris (pro hac vice)
24 amorris@immigrationequality.org
25 40 Exchange Place, Suite 1300
26 New York, NY 10005-2744
27 Telephone: (212) 714-2904

28 *Attorneys for Plaintiffs*