IN THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF COLUMBIA

AHMED ALI MUTHANA, individually, and as next friend of Hoda Muthana and Minor John Doe [initials A.M.] *Plaintiff/Petitioner,* vs. **Michael Pompeo, in his official capacity as Secretary of the Department of State, Donald J. Trump, in his official capacity as President of the United States;** and **William Pelham Barr in his official capacity as Attorney General.** *Defendants/Respondents.*	Cause No. 1:19-cv-00445 Judge: Reggie B. Walton CIVIL ACTION

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. BRIEF FACTUAL SUMMARY 2

III. RELEVANT LEGAL STANDARDS 5

A. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(1) 6

B. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) 7

C. Standard Under Federal Rule of Civil Procedure 56 8

IV. NEXT FRIEND STATUS IS APPROPRIATE HERE 10

A. Standard for Need and Identifying an Appropriate Next Friend 10

B. Next Friend Standing May Be Invoked In General Civil Litigation 11

C. Plaintiff Demonstrates Appropriate Grounds for Next Friend Status in This Case 12

V. MS. MUTHANA IS ENTITLED TO DECLARATORY RELIEF BASED ON THE DEPARTMENT OF STATE PREVIOUSLY ISSUING HER TWO PASSPORTS. 17

VI. AS A UNITED STATES CITIZEN, MS. MUTHANA IS ENTITLED TO RETURN TO THE UNITED STATES EVEN WITHOUT A PASSPORT 23

VII. IN THE ALTERNATIVE, PLAINTIFF SEEKS LEAVE TO AMEND TO ADDRESS § 1503 IN AN AMENDED COMLAINT. ANY SUCH AMENDMENT WOULD BE IN THE INTERESTS OF JUSTICE AND NOT FUTILE. 29

A. Legal Standard 29

B. There is No Compelling Reason to Deny Leave to Amend Here 30

a. *Diplomatic Immunity Did Not Apply to Plaintiff at the Time of Ms. Muthana's Birth.* 36

b. This Court, and Plaintiff, are Not Bound to Accept the Determination of the State Department on Immunity in this Situation. 38

VIII. **DEFENDANTS ARE PREVENTED BY ESTOPPEL FROM NOW DISPUTING MS. MUTHANA'S CITIZENSHIP** 39

IX. PLAINTIFF AHMED MUTHANA PROPERLY BRINGS A CLAIM SEEKING DECLARATORY JUDGMENT AS TO MATERIAL SUPPORT 42

A. Defendants Erroneously Dispute Plaintiff's Claims While Asking for Dismissal. 43

B. There Exists a Live Controversy. 44

C. Plaintiff's Request Relates Directly to Ms. Muthana's Constitutional Right to Return. 45

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986) 9, 10
Ashcroft v. Iqbal, 556 U.S. 662 (2009) 8
Califano v. Sanders, 430 U.S. 99 (1977) 28, 29
Conley v. Gibson, 355 U.S. 41 (1957) 7
Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) 24
Firestone v. Firestone, 316 U.S. App. D.C. 152, 76 F.3d 1205 (1996) 30
Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227 (1962) 30
Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 26
Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993) 6
McCarthy v. Madigan, 503 U.S. 140 (1992) 35
Reid v. Covert, 354 U.S. 1 (1957) 23
Scheuer v. Rhodes, 416 U.S. 232 (1974) 6, 7
Tuan Anh Nguyen v. I.N.S., 533 U.S. 53 (2001) 23
Whitmore v. Arkansas, 495 U.S. 149 (1990) 11, 12

CIRCUIT AND DISTRICT COURT CASES

Abigail Alliance for Better Access to Dev. Drugs v. McClellan, 2004 U.S. Dist. LEXIS 29594 (D.D.C. Aug. 30, 2004) at *17 33
ACLU Found. of S. Cal. v. Barr, 952 F.2d 457 (D.C. Cir. 1991) 7
ACLU Found. v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017) 14
Ahmed Salem Bin Jaber v. United States, 155 F. Supp. 3d 70 (D.D.C. 2016) 12, 13, 16
Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) 13, 23
Ali v. Dist. Dir., 743 Fed. Appx. 354 (11th Cir. 2018) 38
Americable Int'l v. Department of Navy, 129 F.3d 1271 (D.C. Cir. 1997) 10
Artis v. Greenspan, 223 F. Supp. 2d 149 (D.D.C. 2002) 34
Atchinson v. District of Columbia, 73 F.3d 418 (D.C. Cir. 1996) 30
Avocados Plus Inc. v. Veneman, 370 F.3d 1243 (D.C. Cir. 2004) 35
Banchong v. Kane, 2009 U.S. Dist. LEXIS 127134 (D. Ariz. Dec. 23, 2009) 20
Barr v. Clinton, 370 F.3d 1196 (D.C. Cir. 2004) 6
Bronner v. Duggan, 324 F.R.D. 285 (D.D.C. 2018) 32
Brown v. FBI, 744 F. Supp. 2d 120 (D.D.C. 2010) 31
Browning v. Clinton, 292 F.3d 235 (D.C. Cir. 2002) 7
*Chacoty v. Tillerson, 285 F. Supp. 3d 293 (D.D.C. 2018) 18, 22, 29
Coleman v. Pension Benefit Guar. Corp., 94 F. Supp. 2d. 18 (D.D.C. 2000) 34

Communications Workers of America v. American Tel. & Tel. Co., 309 U.S. App. D.C. 170, 40 F.3d 426 (D.C. Cir. 1994) 34
Doe v. Bush, 2006 U.S. Dist. LEXIS 79175 (D.D.C. October 31, 2006).......... 11
Dove v. Wash. Metro. Area Transit Auth., 221 F.R.D. 246 (D.D.C. 2004) 31
Edwards v. Bryson, 884 F. Supp. 2d 202 (E.D. Pa. 2012).......... 19
Empagran S.A. v. F. Hoffman-Laroche, Ltd., 315 F.3d 338 (D.C. Cir. 2003).......... 6, 7
Estate of Gaither v. District of Columbia, 272 F.R.D. 248 (D.D.C. 2011) 31
Estate of Gaither v. District of Columbia, 655 F. Supp. 2d 69 (D.D.C. 2009).......... 9
First Chicago Int'l v. United Exch. Co., 836 F.2d 1375 (D.C. Cir. 1988).......... 10
Foreman v. Heineman, 240 F.R.D. 456 (D. Neb. 2007).......... 12
Graham v. SEC, 222 F.3d 994 (D.C. Cir. 2000).......... 39
Harrison v. Rubin, 174 F.3d 249, 253 (D.C. Cir. 1999) 30
Heller v. District of Columbia, No. 08-1289, 2013 U.S. Dist. LEXIS 38833, at *8 (D.D.C. Mar. 20, 2013).......... 31
Hertzberg v. Veneman, 273 F. Supp 2d 67.......... 39
In re Vitamins Antitrust Litigation, 217 F.R.D. 30 (D.D.C. 2003).......... 30
Inc. v. Sanders, 860 F.2d 1104 (D.C. Cir. 1988) 39
Keil v. Triveline, 661 F.3d 981 (8th Cir. 2011).......... 19
Laningham v. U.S. Navy, 813 F.2d 1236 (D.C. Cir. 1987).......... 9
Latif v. Holder, 969 F. Supp. 2d 1293 (D. Or. 2003) 24
Lempert v. Rice, 956 F. Supp. 2d 17 (D.D.C. 2013) 6
Magnuson v. Baker, 911 F.2d 330 (9th Cir. 1990).......... 19, 20, 37
Matter of Villanueva, Interim Decision #2968 (BIA 1984) 18, 19, 20
Maydak v. United States DOJ, 254, F. Supp. 2d 23 (D.D.C. 2003) 9
Mohamed v. Holder, 995 F. Supp. 2d 520 (D. Or. 2014).......... 24, 25
Momenian v. Davidson, 878 F.3d 381 (D.C. Cir. 2017) 8
Muhammad v. United States, 300 F. Supp. 3d 257 (D.D.C. 2018) 8
Nattah v. Bush, 770 F. Supp. 2d 193 (D.D.C. 2001) 6
Northland Capital Corp., v. Silver, 1983 U.S. Dist. LEXIS 18115, *14 (D.D.C. March 30, 1983) 9
Patton Boggs LLP v. Chevron Corp., 683 F.3d 397 (D.C. Cir. 2012).......... 8
Polsby v. Thompson, 201 F. Supp. 2d 45 (D.D.C. 2002).......... 29
Randolph-Sheppard Vendors of America v. Weinberger, 254 U.S. App. D.C. 45, 795 F.2d 90, 105 (D.C. Cir. 1986).......... 33
Raya v. Clinton, No. 09-cv-00169-GEC.......... 38
Samirah v. Holder, 627 F.3d 652 (7th Cir. 2010).......... 28
Settles v. U.S. Parole Comm'n, 429 F.3d 1098 (D.C. Cir. 2005) 7
Tabb v. District of Columbia, 477 F. Supp. 2d 185 (D.D.C. 2007).......... 10
Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987).......... 9
United States v. Clarke, 628 F. Supp. 2d 15 (D.D.C. 2009).......... 20

Wilson v. District of Columbia, 269 F.R.D. 8 (D.D.C. 2010) 6
Worthy v. United States, 328 F.2d 386 (5th Cir. 1964) 23
*Xia v. Tillerson, 865 F.3d 643 (D.C. Cir. 2017) .... passim

STATUTES

18 U.S.C. § 2339B 2
22 U.S.C. § 2705 .... 19, 20
8 U.S.C § 1453 21
8 U.S.C. § 1503 .... passim
8 U.S.C. § 1504 21
8 U.S.C. §1451 .... 21, 36

RULES

Doe v. Mattis, 889 F.3d 745 (D.C. Cir. 2018) 27
Fed. R. Civ. P. 12(b)(6) .... passim
Fed. R. Civ. P. 12(b)1 .... passim
Fed. R. Civ. P. 17(c)(2) 11
Fed. R. Civ. P. 56 .... 2, 8, 9
Fed. R. Civ. Pro. 15(a) 29

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 22, 23
U.S. Const. Amend. XIV 23

I. INTRODUCTION

Plaintiff Ahmed Ali Muthana is a naturalized United States citizen. He is also the father of Hoda Muthana, and the grandfather of Minor John Doe. He brings this action on his own behalf for declaratory judgment, and as proper Next Friend of Hoda Muthana and Minor John Doe seeking declaratory, injunctive and mandamus relief. Plaintiff Muthana's U.S.-born daughter and his grandson are currently in a precarious position by way of their present location in Camp Roj in Syria. The United States has begun its withdrawal of U.S. forces from the Syrian conflict.[1] Upon withdrawal, the ability of the United States to obtain military cooperation from the Syrian Democratic forces, with which they have been previously aligned, will be greatly diminished if even possible. As set forth further in Plaintiff's Complaint and below, the failure of the United States to use reasonable efforts to facilitate the return of Ms. Muthana and her son as it is obligated to do under both the Constitution and the Fourth Geneva Convention will cause immediate and irreparable harm by jeopardizing their ability in the future to return to the United States. Of greater urgency, as reflected in the Declaration of Ahmed Muthana, attached to this Response in Opposition as Exhibit A, the health of Mr. Muthana's young grandson is declining, and he is at increasing risk of serious health decline, up to and including death, the longer he is prevented by the actions of Defendants from leaving his current conditions.

After both President Trump and Secretary of State Mike Pompeo specifically declared Hoda Muthana not to be a citizen of the United States, or entitled to become one or to return at any time, Plaintiff filed this suit. Plaintiff seeks declaratory relief recognizing that Ms. Muthana remains a citizen of the United States, that her son is eligible for United States citizenship, and that

[1] "The Planned U.S. Troop Withdrawal from Syria: Here's the Latest," The New York Times, January 16, 2019 (https://www.nytimes.com/2019/01/16/world/middleeast/syria-us-troops-timeline.html) (last accessed January 20, 2019).

Mr. Muthana will not violate 18 U.S.C. § 2339B{ TA \l "18 U.S.C. § 2339B" \s "18 U.S.C. § 2339B" \c 2 } by helping provide what his daughter and grandson need to survive until they reach the United States; Plaintiff also seeks an order in mandamus instructing the United States to use reasonable good faith efforts to assist in the return travel of Hoda Muthana, along with her minor child, and in the alternative that the Department of State issue a certificate of identity for Ms. Muthana. Defendants now seek dismissal of all claims in this matter by way of a single motion brought under Fed. R. Civ. P. 12(b)(1){ TA \l "Fed. R. Civ. P. 12(b)1" \s "Fed. R. Civ. P. 12(b)1" \c 4 }, Fed. R. Civ. P. 12(b)(6){ TA \l "Fed. R. Civ. P. 12(b)(6)" \s "Fed. R. Civ. P. 12(b)(6)" \c 4 } and Fed. R. Civ. P. 56{ TA \l "Fed. R. Civ. P. 56" \s "Fed. R. Civ. P. 56" \c 4 }. For the reasons set forth below, Plaintiff respectfully requests that this Court deny Defendants' Motion in full; in the alternative, Plaintiff respectfully requests leave of this Court to file an amended complaint, in the interests of justice and judicial economy.

II. BRIEF FACTUAL SUMMARY

The following facts are undisputed. Prior to the birth of his daughter Hoda Muthana, Plaintiff Ahmed Ali Muthana worked as a diplomat for the Yemen Permanent Mission to the United Nations. Doc. 1-5. He held this position beginning on October 15, 1990. Doc. 1-5. He was fired from this position in June 1994. Doc. 19-2 at 12 ("Fired 6/94 SEE CARRDEX"). On June 2, 1994, the Yemeni Ambassador Al-Aashtal required Mr. Muthana to surrender his diplomatic identity card. Doc. 1 at 6; *see also* Ex. A. Mr. Muthana's diplomatic position officially ended no later than September 1, 1994. Doc. 19-2 at 5, 14; *see also* Doc. 1-5. Sometime after his termination,

the United States Mission to the United Nations received notice of both Mr. Muthana's June termination and his official end date of September 1, 1994.[2]

Hoda Muthana was born later, in the state of New Jersey, on [redacted], 1994.[3] Utilizing his daughter's birth certificate, Mr. Muthana applied for a passport for his minor daughter Hoda Muthana in 2004. Doc. 1 at 6. After receiving this application, officials from the United States State Department initially questioned whether Ms. Muthana was eligible for a U.S. passport, based on their records purportedly showing her father's diplomatic status remained in effect until February 6, 1995. In response, Ahmed Ali Muthana provided the government with a letter from the United States Mission to the United Nations, signed by Russell F. Graham, Minister Counselor for Host Country Affairs, and addressed to Bureau of Citizenship and Immigration Services, which confirms that the diplomatic status he had due to his employment at the U.N. was terminated prior to the time of Ms. Muthana's birth.[4] The United States accepted this documentation and issued Hoda Muthana the requested passport on January 24, 2005, listing her nationality as "United States of America."[5] The United States later renewed Ms. Muthana's passport on February 21, 2014.[6]

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[2] Defendants erroneously state that there is no dispute as to the date on which the United States Mission to the United Nations learned of the termination of Mr. Muthana's duties. Doc. 19 at 27. While Plaintiff does not believe the date of official notice to be relevant to the end of his duties and therefore his entitlement to immunity, Plaintiff does not know when, exactly, the United States Mission to the United Nations learned of his termination. Plaintiff notes that the document dated February 6, 1995 provided by Defendants (Doc. 19-2 at p. 14), and presumably compiled in advance of that date, lists Plaintiff and two other individuals on behalf of Yemen as "left the Mission in September 1994" and that, regarding Plaintiff, the typed notation of "No further information available" is crossed out by hand, with a handwritten notation reflecting Plaintiff's plans for the future added, with the date February 11, 1995 also handwritten beneath it. However, other than to strongly indicate that the United States Mission to the United Nations knew of the end of Plaintiff's duties prior to the February 6 publication date of the "blue list" termination excerpt provided, the documents provided by Defendants do not conclusively reveal the date on which the United States first learned of the end of Mr. Muthana's duties.

[3] *See* Doc. 1-4, Ex. B to Plaintiff's Complaint.

[4] Doc. 1-5, Exhibit C to Plaintiff's Complaint.

[5] Doc. 1-6, Exhibit D to Plaintiff's Complaint.

[6] *Id.*

Ms. Muthana traveled to Syria beginning in November 2014, unbeknownst to her family at the time. Plaintiff Ahmed Ali Muthana immediately began working with the FBI to find her, and kept them up to date on any communications he had with her. Doc. 1. In or about November 2018, Ms. Muthana communicated that she was trying to escape ISIS-controlled Syria. Ex. A. By December 2018 she had left her home in Syria with her young son, hoping to turn herself into American forces. By January 2019, she approached Syrian Democratic forces, and was first detained at Camp al-Hawl prior to her relocation to Camp Roj. Ex. A. Ms. Muthana identified herself and her son as United States citizens. Despite this identification, she was not interred with other persons believed to be United States citizens.

She has repeatedly and consistently articulated her desire to return to the United States, her remorse over her prior actions, and her willingness to surrender to United States authorities for any criminal consequences she may face.[7] Nonetheless, on February 20, 2019, the United States Department of State declared on its website that "Ms. Hoda Muthana is not a U.S. citizen and will not be admitted into the United States. She does not have any legal basis, no valid U.S. passport, no right to a passport, nor any visa to travel to the United States."[8] Later on February 20, 2019,

[7] Ex. A, letter from Hoda Muthana, attached to Declaration of Ahmed Muthana; *see also* Martin Chow and Bethlan McKernan, *Hoda Muthana 'deeply regrets' joining Isis and wants to return home,* The Guardian (Feb. 17, 2019), available at https://www.theguardian.com/world/2019/feb/17/us-woman-hoda-muthana-deeply-regrets-joining-isis-and-wants-return-home (where Ms. Muthana stated that "I want to return [to the United States] and I'll never come back to the Middle East" as well as that she "deeply regrets" traveling to Syria to join the Islamic State.); *"I am allowed back," U.S. "ISIS bride" Hoda Muthana tells CBS News*, CBS News (March 4, 2019), available at https://www.cbsnews.com/news/us-isis-bride-hoda-muthana-court-bid-to-come-home-donald-trump-says-not-citizen/ ("Muthana told CBS News she would be willing to go to jail if that's what it takes to get back to America."); Richard Engel, *ISIS bride Hoda Muthana says she'll have 'no problem' returning to U.S.*, NBC News (Feb. 22, 2019), available at https://www.nbcnews.com/news/world/isis-bride-hoda-muthana-says-she-ll-have-no-problem-n974391 ("[w]hen asked what she expects will happen if she is allowed to return to the U.S., Muthana replied, 'Of course I'll be given jail time.'").

[8] Press Release dated February 20, 2019, located on Department of State website (https://www.state.gov/secretary/remarks/2019/02/289558.htm) (last visited February 20, 2019).

President Donald J. Trump tweeted that "I have instructed Secretary of State Mike Pompeo, and he fully agrees, not to allow Hoda Muthana back into the Country!"[9] Secretary of State Pompeo then appeared on national television, proclaiming that Ms. Muthana "is a terrorist. She is not a United States citizen. She ought not return to this country."[10] After prompting that she had been born in the United States, Secretary Pompeo averred that "she may have been born in the United States", but nonetheless made the conclusory assertion, which is not within his authority to make, that "she is not a U.S. citizen, nor is she entitled to U.S. citizenship."[11] As reasoning, Secretary Pompeo stated simply "You have to remember the context" and described the war against ISIS.[12]

Prior to the above proclamations, the United States did not initiate any action in the courts of the United States to revoke Ms. Muthana's citizenship. It has not done so since then either. Defendants did, however, file their Motion to Dismiss or in the Alternative Partial Motion for Summary Judgment in this matter. Doc. 19 ("Defendants' Motion"). Plaintiff hereby submits this Response in Opposition, and for the reasons stated below respectfully requests that Defendants' Motion be denied in its entirety.[13]

III. RELEVANT LEGAL STANDARDS

As Defendants attempt to dismiss Plaintiff's claims under several different standards, Plaintiff will address these in turn below under the appropriate standards.

[9] https://twitter.com/realdonaldtrump/status/1098327855145062411?s=21 (last visited February 20, 2019).

[10] https://www.today.com/video/mike-pompeo-on-hoda-muthana-she-is-not-a-us-citizen-1446009923715 (last visited February 27, 2019).

[11] *Id.*

[12] *Id.*

[13] Plaintiff does not wish to pursue the claim at Count 2 in Plaintiff's Original Complaint, which is derivative of Ms. Muthana's mother's immigration status at the time of Ms. Muthana's birth (Doc. 1 at 13).

A. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(1)

Generally, a reviewing court "consider[] Rule 12(b)(1){ TA \s "Fed. R. Civ. P. 12(b)1" } challenges to its subject matter jurisdiction before assessing the legal sufficiency of a claim under Rule 12(b)(6){ TA \s "Fed. R. Civ. P. 12(b)(6)" }." *Lempert v. Rice*, 956 F. Supp. 2d 17, 27 (D.D.C. 2013){ TA \l "*Lempert v. Rice*, 956 F. Supp. 2d 17 (D.D.C. 2013)" \s "Lempert v. Rice, 956 F. Supp. 2d 17, 27 (D.D.C. 2013)" \c 1 }. In evaluating a motion to dismiss brought under Rule 12(b)(1), courts must "accept as true all of the factual allegations contained in the complaint." *Wilson v. District of Columbia*, 269 F.R.D. 8, 11 (D.D.C. 2010){ TA \l "*Wilson v. District of Columbia*, 269 F.R.D. 8 (D.D.C. 2010)" \s "Wilson v. District of Columbia, 269 F.R.D. 8, 11 (D.D.C. 2010)" \c 1 } (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 164 (1993){ TA \l "*Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993)" \s "Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 164 (1993)" \c 8 }). Reviewing courts are instructed to "review the complaint liberally while accepting all inferences favorable to the plaintiff." *Nattah v. Bush,* 770 F. Supp. 2d 193, 199 (D.D.C. 2001){ TA \l "*Nattah v. Bush,* 770 F. Supp. 2d 193 (D.D.C. 2001)" \s "Nattah v. Bush, 770 F. Supp. 2d 193, 199 (D.D.C. 2001)" \c 1 } (citing *Barr v. Clinton*, 370 F.3d 1196, 1199, 361 U.S. App. D.C. 472 (D.C. Cir. 2004){ TA \l "*Barr v. Clinton*, 370 F.3d 1196 (D.C. Cir. 2004)" \s "Barr v. Clinton, 370 F.3d 1196, 1199, 361 U.S. App. D.C. 472 (D.C. Cir. 2004)" \c 1 }). In other words, a reviewing court "assumes the truth of the allegations made and construes them favorably to the pleader." *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003){ TA \l "*Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003)" \s "Empagran S.A. v. F. Hoffman-Laroche, Ltd., 315 F.3d 338, 343 (D.C. Cir. 2003)" \c 1 } (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974){ TA \l "*Scheuer v. Rhodes,* 416 U.S. 232 (1974)" \s "Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)" \c 8 }). A court may

dismiss a complaint for lack of subject-matter jurisdiction only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Empagran*, 315 F.3d at 343{ TA \s "Empagran S.A. v. F. Hoffman-Laroche, Ltd., 315 F.3d 338, 343 (D.C. Cir. 2003)" } (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957){ TA \l "*Conley v. Gibson*, 355 U.S. 41 (1957)" \s "Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)" \c 8 }). Courts may also consider relevant materials outside the pleadings when evaluating a motion to dismiss brought under Fed. R. Civ. P. 12(b)(1){ TA \s "Fed. R. Civ. P. 12(b)1" }. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005){ TA \l "*Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (D.C. Cir. 2005)" \s "Settles v. U.S. Parole Comm'n, 429 F.3d 1098, 1107 (D.C. Cir. 2005)" \c 1 }.

B. <u>Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)</u>

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6){ TA \s "Fed. R. Civ. P. 12(b)(6)" } challenges the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002){ TA \l "*Browning v. Clinton*, 292 F.3d 235 (D.C. Cir. 2002)" \s "Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002)" \c 1 }. Accordingly, the proper test when assessing 12(b)(6){ TA \s "Fed. R. Civ. P. 12(b)(6)" } motion is not "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974){ TA \s "Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)" }. The Supreme Court has also held that in reviewing a complaint, "it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id{* TA \s "Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)"*}*. All that a reviewing court is required to determine is whether a plaintiff has properly stated a claim. *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991){ TA \l "*ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457 (D.C. Cir. 1991)" \s "ACLU Found. of S. Cal. v. Barr,

952 F.2d 457, 467 (D.C. Cir. 1991)" \c 1 }. In order to survive a motion to dismiss brought under this Rule, the complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and "must suggest a plausible scenario that shows that the pleader is entitled to relief.'" *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012){ TA \l "*Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397 (D.C. Cir. 2012)" \s "Patton Boggs LLP v. Chevron Corp., 683 F.3d 397, 403 (D.C. Cir. 2012)" \c 1 } (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009){ TA \l "*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)" \s "Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)" \c 8 }). Similar to the review of Rule 12(b)(1){ TA \s "Fed. R. Civ. P. 12(b)1" } motions, courts reviewing (12)(b)(6){ TA \s "Fed. R. Civ. P. 12(b)(6)" } challenges must treat a plaintiff's allegations as true, and draw all reasonable inferences in the favor of the plaintiff. *Muhammad v. United States,* 300 F. Supp. 3d 257, 262 (D.D.C. 2018){ TA \l "*Muhammad v. United States,* 300 F. Supp. 3d 257 (D.D.C. 2018)" \s "Muhammad v. United States, 300 F. Supp. 3d 257, 262 (D.D.C. 2018)" \c 1 } (citing *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017){ TA \l "*Momenian v. Davidson*, 878 F.3d 381 (D.C. Cir. 2017)" \s "Momenian v. Davidson, 878 F.3d 381, 387 (D.C. Cir. 2017)" \c 1 }).

C. Standard Under Federal Rule of Civil Procedure 56

In evaluating a motion for summary judgment brought pre-judgment as here, Defendants request summary judgment on Counts 1-8 of Plaintiff's Complaint "in the alternative"; they ask this Court to find that there is no genuine issue of material fact on the question of Ms. Muthana's citizenship. Summary judgment is only appropriate "when no genuine issues of material fact are in dispute." Fed. R. Civ. P 56{ TA \s "Fed. R. Civ. P. 56" }. "[T]o be material, the factual assertion must be capable of affecting the substantive outcome of the litigation," and to be genuine, "the issue must be supported by sufficient admissible evidence that a reasonable trier-of fact could find

for the nonmoving party." Fed. R. Civ. P 56{ TA \s "Fed. R. Civ. P. 56" }; *see also Maydak v. United States DOJ*, 254, F. Supp. 2d 23, 32 (D.D.C. 2003){ TA \l "*Maydak v. United States DOJ*, 254, F. Supp. 2d 23 (D.D.C. 2003)" \s "Maydak v. United States DOJ, 254, F. Supp. 2d 23, 32 (D.D.C. 2003)" \c 1 }; *Estate of Gaither v. District of Columbia,* 655 F. Supp. 2d 69, 78 (D.D.C. 2009){ TA \l "*Estate of Gaither v. District of Columbia,* 655 F. Supp. 2d 69 (D.D.C. 2009)" \s "Estate of Gaither v. District of Columbia, 655 F. Supp. 2d 69, 78 (D.D.C. 2009)" \c 1 }.

The party seeking summary judgment "bears the heavy burden of establishing that the merits of its case are so clear" that summary judgment is appropriate. *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987){ TA \l "*Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294 (D.C. Cir. 1987)" \s "Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)" \c 1 }; *see also Northland Capital Corp., v. Silver,* 1983 U.S. Dist. LEXIS 18115, *14 (D.D.C. March 30, 1983){ TA \l "*Northland Capital Corp., v. Silver,* 1983 U.S. Dist. LEXIS 18115, *14 (D.D.C. March 30, 1983)" \s "Northland Capital Corp., v. Silver, 1983 U.S. Dist. LEXIS 18115, *14 (D.D.C. March 30, 1983)" \c 1 } ("a party who seeks to dispose of an action on a motion for summary judgment bears a heavy burden"). In considering a motion for summary judgment, the non-movant's evidence must be believed, and "all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986){ TA \l "*Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986)" \s "Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986)" \c 8 }. The non-movant's burden at this stage is not to prove his case; he may prevail simply by providing evidence "that would permit a reasonable jury to find [in his favor]." *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242, 259 U.S. App. D.C. 115 (D.C. Cir. 1987){ TA \l "*Laningham v. U.S. Navy*, 813 F.2d 1236 (D.C. Cir. 1987)" \s "Laningham v. U.S. Navy, 813 F.2d 1236, 1242, 259 U.S. App. D.C. 115 (D.C. Cir. 1987)" \c 1 }. The burden for demonstrating the appropriateness of summary judgment is even

heavier in the early stages of litigation, and summary judgment "ordinarily 'is proper only after the plaintiff has been given adequate time for discovery.'" *Americable Int'l v. Department of Navy,* 129 F.3d 1271 (D.C. Cir. 1997){ TA \l "*Americable Int'l v. Department of Navy,* 129 F.3d 1271 (D.C. Cir. 1997)" \s "Americable Int'l v. Department of Navy, 129 F.3d 1271 (D.C. Cir. 1997)" \c 1 } (quoting "*First Chicago Int'l v. United Exch. Co.,* 836 F.2d 1375, 1380 (D.C. Cir. 1988){ TA \l "*First Chicago Int'l v. United Exch. Co.,* 836 F.2d 1375 (D.C. Cir. 1988)" \s "First Chicago Int'l v. United Exch. Co., 836 F.2d 1375, 1380 (D.C. Cir. 1988)" \c 1 }; *see also Tabb v. District of Columbia,* 477 F. Supp. 2d 185, 188, n. 1 (D.D.C. 2007){ TA \l "*Tabb v. District of Columbia,* 477 F. Supp. 2d 185 (D.D.C. 2007)" \s "Tabb v. District of Columbia, 477 F. Supp. 2d 185, 188, n. 1 (D.D.C. 2007)" \c 1 } ("Defendants…sought summary judgment very early in this lawsuit—before any discovery. The Court notes that this is usually a disfavored practice"). No discovery has taken place to date in this matter. Accordingly, this Court finding summary judgment appropriate in this matter at this stage would require that the Court hold that, even at this early pre-discovery stage, the issues presented are "so one-sided that one party must prevail as a matter of law." *Liberty Lobby,* 477 U.S. at 259{ TA \s "Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986)" }. Defendants have fallen significantly short of this burden.

IV. NEXT FRIEND STATUS IS APPROPRIATE HERE

In their Motion to Dismiss, Defendants argue that Plaintiff's Complaint should be dismissed because he "fails to establish that he has standing to sue as next friend of Muthana and A.M." Doc. 19 at 11. The facts do not support this argument.

A. Standard for Need and Identifying an Appropriate Next Friend

Next friend status, which allows a person to bring suit on behalf of the actual party in interest, is appropriate when two conditions are met. First, "a next friend must provide an adequate

explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf," and second the purported next friend "must be truly dedicated to the best interest of the person on whose behalf he seeks to litigate, and it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore v. Arkansas,* 495 U.S. 149, 163 (1990){ TA \l "*Whitmore v. Arkansas,* 495 U.S. 149 (1990)" \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" \c 8 }; *see also Doe v. Bush,* 2006 U.S. Dist. LEXIS 79175 (D.D.C. October 31, 2006){ TA \l "*Doe v. Bush,* 2006 U.S. Dist. LEXIS 79175 (D.D.C. October 31, 2006)" \s "Doe v. Bush, 2006 U.S. Dist. LEXIS 79175 (D.D.C. October 31, 2006)" \c 1 } (noting that "precedent in this circuit does not speak to whether or not the Court should impute a significant relationship requirement to the second prong of *Whitmore{* TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" *}*"). While the burden to satisfy the requirements of next friend standing is on the party seeking to assert it, Plaintiff has clearly done so here. *See Whitmore,* 495 U.S. at 164{ TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" }.

B. <u>Next Friend Standing May Be Invoked In General Civil Litigation</u>

Prior to applying the two prongs set forth in *Whitmore{* TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" *}*, Defendants argue "at the threshold" that the Court should reject Plaintiff's claim of next friend standing because he "has not invoked any applicable statute or rule authorizing his next-friend status." Doc. 19 at 12. Defendants accurately note that "Muthana is not a minor, and Plaintiff has not alleged that she is mentally incompetent…nor is this a habeas corpus proceeding," citing to *Whitmore{* TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" *}* and Fed. R. Civ. P. 17(c)(2){ TA \l "Fed. R. Civ. P. 17(c)(2)" \s "Fed. R. Civ. P. 17(c)(2)" \c 4 }. *Id.* Although Defendants are correct that next friend standing is commonly invoked in habeas proceedings, this Court has expressly held that "the most natural reading of *Whitmore{* TA \s "Whitmore v. Arkansas, 495 U.S.

149, 163 (1990)" *}* is that next friend standing is *not* limited to habeas cases, but instead **may be invoked if plaintiffs can sufficiently demonstrate its necessity.**" *Ahmed Salem Bin Jaber v. United States*, 155 F. Supp. 3d 70, 75-77 (D.D.C. 2016){ TA \l "*Ahmed Salem Bin Jaber v. United States*, 155 F. Supp. 3d 70 (D.D.C. 2016)" \s "Ahmed Salem Bin Jaber v. United States, 155 F. Supp. 3d 70, 75-77 (D.D.C. 2016)" \c 1 } (emphasis added). In *Ahmed Salem Bin Jaber{* TA \s "Ahmed Salem Bin Jaber v. United States, 155 F. Supp. 3d 70, 75-77 (D.D.C. 2016)" *}*, a case involving drone strikes in Yemen, this Court rejected as unpersuasive defendants' claim that "in cases involving mentally competent adults, next friend standing has only been recognized in habeas corpus cases," and instead held that the *Whitmore{* TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" *}* opinion "expressly declined to hold that such statutory authorization is necessary." *Id.* at 75{ TA \s "Ahmed Salem Bin Jaber v. United States, 155 F. Supp. 3d 70, 75-77 (D.D.C. 2016)" }; *see also Foreman v. Heineman*, 240 F.R.D. 456, 516 (D. Neb. 2007){ TA \l "*Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007)" \s "Foreman v. Heineman, 240 F.R.D. 456, 516 (D. Neb. 2007)" \c 1 } (noting that "although *Whitmore's{* TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" *}* next friend analysis was first enunciated in the context of habeas law, it has been extended to general civil litigation"). Defendants' contention that next friend standing should not be available "in a non-habeas case where no statute or rule authorizes suit by a next friend" contradicts this Court's precedent. Doc. 19 at 13. Plaintiff should be permitted to assert next friend standing, as the factual background supports its appropriateness.

C. <u>Plaintiff Demonstrates Appropriate Grounds for Next Friend Status in This Case</u>

Defendants next argue that Plaintiff cannot satisfy the *Whitmore{* TA \s "Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)" *}* test because he fails to provide an "adequate explanation why the real party in interest cannot appear." Doc. 19 at 13, citing *Whitmore,* 495 U.S. at 163{ TA \s "Whitmore

v. Arkansas, 495 U.S. 149, 163 (1990)" }. Defendants assert that Plaintiff's references to receiving communications from Ms. Muthana, as well as Ms. Muthana's conversations with western media, undercut the assertion that she is unable to bring this lawsuit on her own behalf. This argument mischaracterizes the factual basis underlying Plaintiff's claim of next friend standing, as well as the requirement applicable to a motion to dismiss to view all facts in the light most favorable to the non-movant. Unlike in { TA \l "*Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010)" \s "Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 19 (D.D.C. 2010)" \c 1 }*Al-Aulaqi*, where the court found that Plaintiff was voluntarily incommunicado as a "result of his own choice," Ms. Muthana is being held by Kurdish forces and has little to no control over her ability to communicate with the outside world. Compare *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 19 (D.D.C. 2010){ TA \s "Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 19 (D.D.C. 2010)" }. She is not able to text or call home freely, and both Plaintiff and counsel for Plaintiff have no ability to initiate contact with her. Ms. Muthana has not had reliable access to communication since her arrival at Camp Roj, where communication via phone can only be done through the camp's administration phone, using WhatsApp, cannot be arranged in advance, and does not occur at predictable intervals.[14] Accordingly, although Plaintiff has sporadically received text messages from Ms. Muthana, these messages arrive inconsistently and have largely come from unrecognized numbers, with no way to properly verify that Ms. Muthana is in fact the actual sender. *See Ahmed Salem Bin Jaber*, 155 F. Supp. 3d at 76-77{ TA \s "Ahmed Salem Bin Jaber v. United States, 155 F. Supp. 3d 70, 75-77 (D.D.C. 2016)" } (finding that plaintiffs were inaccessible where "telephone contact was sporadic and difficult," despite defendants' speculation that "even if plaintiffs cannot physically leave Yemen, they 'may be able to participate in any court hearings by telephone'"). Plaintiff has received no phone calls from his

[14] *See* the attached declarations of Ahmed Ali Muthana, at Exhibit A.

daughter, and counsel for Plaintiff has been unable to speak directly to Ms. Muthana since her arrival at Camp al-Hawl at the beginning of this year. Since then, multiple critical steps in this lawsuit have occurred, all without counsel's ability to directly or consistently contact the main person on whose behalf this lawsuit has been brought.

Defendants are correct in their assertion that, on a handful of occasions, Ms. Muthana has spoken with members of the western news media; however, those conversations were facilitated by the media outlets themselves, and conducted largely in circumstances where the individual interviewing Ms. Muthana physically traveled to Camp Roj. In light of the national attention garnered by Ms. Muthana's case and the thorough news coverage of the events unfolding in Syria, it would be highly unusual for Ms. Muthana not to be contacted by members of the media. However, since arriving at Camp Roj, Ms. Muthana lacks the freedom of mobility and communication required to arrange such meetings independently, and has not done so on any occasion. Finally, counsel for Plaintiff cannot be reasonably expected to travel to Syria in order to communicate with Ms. Muthana. Not only is travel to Syria highly discouraged by Defendants, as indicated by the level four travel advisory put in place by the U.S. Department of State, but Plaintiff is represented by a nonprofit organization with limited financial resources.[15] Ms. Muthana's rights and status as a U.S. citizen rest on the outcome of this litigation, and requiring her to litigate those rights in circumstances where her counsel cannot physically visit her, initiate contact with her, or reliably count on her ability to access telephone or internet communication would be fundamentally unjust. This is particularly true since Ms. Muthana's inaccessibility comes as a direct result of Defendants' position that she will not be permitted to return to the United States. *See ACLU Found. v. Mattis,* 286 F. Supp. 3d 53, 58 (D.D.C. 2017){ TA \l "*ACLU Found. v. Mattis,*

[15] https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/syria-travel-advisory.html

286 F. Supp. 3d 53 (D.D.C. 2017)" \s "ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 58 (D.D.C. 2017)" \c 1 } (noting that the Defense Departments argument that next friend standing should be denied based on a failure to meet and confer with the detainee was "disingenuous at best, given that the Department is the sole impediment" to counsel's ability to meet with the plaintiff).

Defendants' final argument against the appropriateness of next friend standing rests on their assertion that Plaintiff "has not made an adequate showing that he is acting in accord with Muthana's interests." Doc. 19 at 14. In support of this argument, Defendants rely on statements made by Ms. Muthana in 2015, nearly four years ago.[16] Those statements are not legally relevant to the determination of whether her present interests align with Plaintiff's in this 2019 litigation. In all communications since leaving ISIS-controlled territory, Ms. Muthana has been clear and consistent that she regrets her actions and wishes to return to the United States face justice. This is true of both her conversations with the media, which have been made public, and her limited communications with her father and counsel for Plaintiff.[17] In light of Ms. Muthana's own videotaped, recent and consistent expressions of her interests, as well as her actions involuntarily leaving ISIS-controlled territory and surrendering, Defendants cannot convincingly argue that Ahmed Muthana's interest in bringing Ms. Muthana back to the United States with her son is not aligned with her own, when she has repeatedly stated that same wish. The current harmony in

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[16] Even examining statements purportedly made by Ms. Muthana in 2017 is irrelevant to this analysis. *See https://www.buzzfeednews.com/article/ellievhall/hoda-muthana-isis-instagram-twitter-tumblr-alabama*. Ms. Muthana left ISIS-controlled territory in December of 2018, and has since then voiced nothing but her desire to return to the United States with her son, and willingness to be held accountable for her actions under the U.S. justice system.

[17] *See* letter from Hoda Muthana, attached to Declaration of Ahmed Muthana, Ex. A (the only physical letter received by Plaintiff or Plaintiff's counsel); *See also* https://www.hstoday.us/subject-matter-areas/terrorism-study/american-born-hoda-muthana-tells-all-about-joining-isis-and-escaping-the-caliphate/ ("it was up until the very end that I told my dad and my family that I wanted to come back. And my lawyers." She further states that, in going to the Islamic State, she "found hell on earth."); *see also* https://www.buzzfeednews.com/article/ellievhall/hoda-muthana-isis-instagram-twitter-tumblr-alabama ("Now, she's sitting in a Kurdish refugee camp with her son … who will turn 2 soon, begging to return to her homeland, the United States").

interest between Ms. Muthana and her father is further evidenced by the fact that, since Ms. Muthana left the U.S. in 2015, her father did not attempt at any point to initiate litigation on his daughter's behalf, until she explicitly stated her remorse and her desire to return home in late 2018. Prior to that alignment, and despite being her parent, Mr. Muthana did not attempt to use the courts for what he thought was best for his daughter. Thus, Plaintiff is not merely "a loving parent who wants only what he rationally believes to be in the best interests of his adult child;" he brought this litigation in order to facilitate the precise relief that Ms. Muthana herself has repeatedly requested: her return to the United States with her son. Doc. 19 at 15.

The showing required for a proper assertion of next friend standing is meant to ensure that individuals cannot circumvent constitutional limitations on the courts' jurisdiction by merely declaring themselves a 'next friend;' there is no risk of any such slippery slope in allowing Ms. Muthana to access the courts through her father, who is present in the United States and regularly and reliably communicates with counsel. *See Ahmed Salem Bin Jaber,* 155 F. Supp. 3d at 77{ TA \s "Ahmed Salem Bin Jaber v. United States, 155 F. Supp. 3d 70, 75-77 (D.D.C. 2016)" } ("no slippery slope is likely to result from this Court's decision, which holds only that a close family relative, who has advocated on plaintiffs' behalf for years, is able to survive a motion to dismiss"). This case is based on a set of highly unusual and context-specific facts, unlikely to be repeated in future lawsuits; even if they do recur, next friend status here is consistent with the law. Accordingly, this Court bears no risk in applying next friend standing here, where Plaintiff satisfies the requirements. Conversely, without utilizing next friend standing, Ms. Muthana and her young child are left without a vehicle to fairly challenge the effective revocation of her United States citizenship, and the United States' failure to continue recognizing her as a United States citizen.

V. MS. MUTHANA IS ENTITLED TO DECLARATORY RELIEF BASED ON THE DEPARTMENT OF STATE PREVIOUSLY ISSUING HER TWO PASSPORTS.

Defendants point out that the Department of State only revoked Ms. Muthana's passport, and did not revoke her citizenship.[18] Plaintiff agrees. What matters here is not that the Department of State revoked Ms. Muthana's United States passport in 2016; what matters is that the Department of State issued her one in the first place. The Department of State did this on two occasions: first in January 2005, then again in February, 2014. Doc. 1-6. The Department of State did this after initially raising the question of her father's diplomatic status at the time of Ms. Muthana's, and after considering his response which provided the letter Mr. Muthana received from the then-current Minister Counselor, Host Country Affairs, United States Mission to the United Nations. Doc. 1-5. This passport, issued in 2005 by the Department of State, lists Ms. Muthana's nationality as "United States of America." Ex. A at internal Ex. 1.

Defendants do not, and cannot, dispute any of these facts. And while Defendants may wish the legal impact of these facts were otherwise, they cannot reverse the clock to 2005, or even 2014, to change the facts as they existed at the time, and therefore remain today. With a letter from the official in the very same position which Defendants now claim is such compelling authority, Plaintiff Muthana sufficiently demonstrated to the Department of State his lack of immunity at the

[18] While Plaintiff does not challenge that the Department of State has the right to revoke passports of U.S. citizens, Plaintiff does dispute that Defendants ever provided the proper notice to Ms. Muthana that it was revoking her passport. At the time the Department of State sent the letter in question dated January 15, 2016 addressed to Ms. Muthana (Doc. 1-6), Ms. Muthana had been a legal adult for just over three years. And Ms. Muthana's presence outside the United States at that time, and break in communications with her family at the time, was widely publicized and reported. Doc. 19 at 20, fn. 4. Nonetheless, the Department of State sent this letter to Ms. Muthana's parents' address. Doc. 1-6. Upon receipt of this letter, Mr. Muthana responded that (1) Ms. Muthana no longer resided at that address and was out of the country, and (2) Mr. Muthana was not a diplomat at the time of his daughter Hoda's birth, and he re-sent copies of the materials already provided to the Department of State eleven years prior to that, when the Department of State had first raised any question as to his status as a diplomat at the time of Ms. Muthana's birth. Ex. A. Nonetheless, Defendants now assert that Ms. Muthana "has not followed this process or even attempted to follow this process" – despite Defendants knowing the letter did not reach her. Doc. 19 at 32. Defendants' attempt to place the burden on Ms. Muthana to have appealed from a letter she never received, when she was not in the country, and which the Department of State was notified Ms. Muthana had not received, is disingenuous at best. At the least, it is not grounds for dismissal of Plaintiff's claims in this matter.

time of Ms. Muthana's birth, and therefore her status as a birthright citizen; the Department of State was convinced enough to issue Ms. Muthana a passport. *Cf.* Doc. 1-5 *with* Doc. 19-2; *see also* Doc. 19 at 27 (characterizing the "certification" by the individual in the position of Minister/Counselor for Host Country Affairs issued 25 years after the fact as "contemporaneous" and "conclusive" despite its contradictions to the letter issued by the individual in the same position in 2004, only 10 years after Ms. Muthana's birth).

A. A United States Passport Is Legally Recognized as Proof of U.S. Citizenship.

Defendants recognize the legal import of passports in their Motion: [19] passports "'provide proof of one's status as a citizen.' *Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 298 (D.D.C. 2018){ TA \l "*Chacoty v. Tillerson*, 285 F. Supp. 3d 293 (D.D.C. 2018)" \s "Chacoty v. Tillerson, 285 F. Supp. 3d 293, 298 (D.D.C. 2018)" \c 1 }." Doc. 19 at 31.[20] Multiple courts as well as Congress recognize that a United States passport serves as proof of recognition as a United States citizen. "The INS [Immigration and Naturalization Service, precursor to present USCIS] has recognized … a passport [as] conclusive evidence of citizenship. See *Matter of Villanueva*, Interim Decision #2968 (BIA 1984){ TA \l "*Matter of Villanueva*, Interim Decision #2968 (BIA 1984)" \s "Matter

[19] Defendants assert that they bring both a Motion to Dismiss under Rules 12(b)(1){ TA \s "Fed. R. Civ. P. 12(b)1" } and (6){ TA \s "Fed. R. Civ. P. 12(b)(6)" }, and a partial motion for summary judgment. However, Defendants have failed to comply with this Court's stated preferences for motions for summary judgment, that "[t]he moving party's statement of material facts shall be a short and concise statement, in numbered paragraphs, of all material facts as to which the moving party claims there is no genuine dispute. The statement must contain only one factual assertion in each numbered paragraph." Accordingly, it is difficult for Plaintiff to comply with this Court's counterpart requirement that "[t]he party responding to a statement of material facts must (1) restate the movant's statement of undisputed material fact in numbered paragraphs, and (2) immediately following each numbered paragraph state the opponent's response to the stated fact." Further complicating this task is the intermingled manner in which Defendants present their Motion, which does not readily segregate moving to dismiss from moving for summary judgment. Nonetheless, where clear that Defendants move for summary judgment within this blended Motion, Plaintiff will note the stated and disputed facts.

[20] As discussed in further detail in Section VI. B, *infra*, the *Chacoty*{ TA \s "Chacoty v. Tillerson, 285 F. Supp. 3d 293, 298 (D.D.C. 2018)" } case on which Defendants rely is immensely instructive in showing why a plaintiff who is outside of the United States at the time of bringing an action, as Ms. Muthana is, does not need to exhaust the administrative provisions of 8 U.S.C. § 1503(b) and (c){ TA \l "8 U.S.C. § 1503" \s "8 U.S.C. § 1503(b) and (c)" \c 2 }. *Chacoty*, 285 F. Supp. 3d at 303{ TA \s "Chacoty v. Tillerson, 285 F. Supp. 3d 293, 298 (D.D.C. 2018)" }.

of Villanueva, Interim Decision #2968 (BIA 1984)" \c 1 }. In *Villanueva{* TA \s "Matter of Villanueva, Interim Decision #2968 (BIA 1984)" *}*, the petitioner sought to obtain a preferential visa for his spouse on the basis of his United States citizenship. He proved his citizenship with a passport. The INS held that 22 U.S.C. § 2705{ TA \l "22 U.S.C. § 2705" \s "22 U.S.C. § 2705" \c 2 } made a passport conclusive proof of citizenship." *Magnuson v. Baker*, 911 F.2d 330, n. 7 (9th Cir. 1990){ TA \l "*Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1990)" \s "Magnuson v. Baker, 911 F.2d 330, n. 7 (9th Cir. 1990)" \c 1 }.

Numerous other courts recognize that, pursuant to 22 U.S.C. § 2705{ TA \s "22 U.S.C. § 2705" }, a U.S. passport provides conclusive proof of U.S. citizenship. *See Xia v. Tillerson*, 865 F.3d 643, 656 (D.C. Cir. 2017){ TA \l "*Xia v. Tillerson*, 865 F.3d 643 (D.C. Cir. 2017)" \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" \c 1 } (stating that "[p]resenting proof of a naturalization certificate or passport—even if already administratively cancelled—would seem to satisfy that prima facie requirement [for evidence of citizenship]"); *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir. 2011){ TA \l "*Keil v. Triveline*, 661 F.3d 981 (8th Cir. 2011)" \s "Keil v. Triveline, 661 F.3d 981, 987 (8th Cir. 2011)" \c 1 } (acknowledging that passports are "conclusive proof of citizenship in administrative immigration proceedings."); *Magnuson*, 911 F.2d at 333{ TA \s "Magnuson v. Baker, 911 F.2d 330, n. 7 (9th Cir. 1990)" } (finding that "[t]he statute [22 U.S.C. § 2705{ TA \s "22 U.S.C. § 2705" }] plainly states that a passport has the same force and effect as a certificate of naturalization or citizenship. […]. The holders of these other documents can use them as conclusive evidence of citizenship. Therefore, so can a holder of a passport"); *Edwards v. Bryson*, 884 F. Supp. 2d 202, 206 (E.D. Pa. 2012){ TA \l "*Edwards v. Bryson*, 884 F. Supp. 2d 202 (E.D. Pa. 2012)" \s "Edwards v. Bryson, 884 F. Supp. 2d 202, 206 (E.D. Pa. 2012)" \c 1 } (reasoning that a holder of an expired passport is a U.S. citizen because "[t]o hold otherwise, would lessen the import of a passport as compared to that of

a certificate of naturalization or a certificate of citizenship, which is exactly what § 2705{ TA \s "22 U.S.C. § 2705" } forbids....”); *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009){ TA \l "*United States v. Clarke*, 628 F. Supp. 2d 15 (D.D.C. 2009)" \s "United States v. Clarke, 628 F. Supp. 2d 15, 21 (D.D.C. 2009)" \c 1 } (recognizing that 22 U.S.C. § 2705{ TA \s "22 U.S.C. § 2705" } “puts passports in the same status as certificates of naturalization for the purpose of proving U.S. citizenship.”); *Banchong v. Kane*, 2009 U.S. Dist. LEXIS 127134 (D. Ariz. Dec. 23, 2009){ TA \l "*Banchong v. Kane*, 2009 U.S. Dist. LEXIS 127134 (D. Ariz. Dec. 23, 2009)" \s "Banchong v. Kane, 2009 U.S. Dist. LEXIS 127134 (D. Ariz. Dec. 23, 2009)" \c 1 } (citing 22 U.S.C. § 2705{ TA \s "22 U.S.C. § 2705" } as support for the statement that “passports [are] conclusive proof of citizenship.”); *In re Villanueva*, 19 I. & N. Dec. 101, 103 (B.I.A. 1984){ TA \s "Matter of Villanueva, Interim Decision #2968 (BIA 1984)" } (holding that “unless void on its face, a valid United States passport issued to an individual as a citizen of the United States […] constitutes conclusive proof of such person's United States citizenship.”).

B. <u>Revocation of a Document Does Not Equate to Revocation of Status</u>

With the promulgation of 22 U.S.C. § 2705{ TA \s "22 U.S.C. § 2705" }, if the Department of State discovers that a passport was "illegally, fraudulently, or erroneously obtained," the Secretary of State is authorized to cancel it. “But administrative cancellation of a citizen's passport, like administrative cancellation of a certificate of naturalization, shall affect only the document and not the citizenship status of the person in whose name the document was issued." *Xia*, 865 F.3d at 651-2.{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }

Lest any doubt remain, Congress passed 8 U.S.C. § 1504 in 1994 (coincidentally, the year of Ms. Muthana’s birth). Promulgated in response to the holding in *Magnuson*{ TA \s "Magnuson

v. Baker, 911 F.2d 330, n. 7 (9th Cir. 1990)" } and similar cases which found no right of the Department of State to revoke passports without a pre-deprivation hearing, § 1504{ TA \l "8 U.S.C. § 1504" \s "§ 1504" \c 2 } specifically makes clear that the Department of State is given the power only to revoke the document, not the status of the individual in question:

> The cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued.

8 U.S.C. § 1504(a){ TA \l "8 U.S.C. § 1504" \s "8 U.S.C. § 1504(a)" \c 2 }. This Circuit has in fact specifically clarified that the government cannot make an "end run" around the requirement of obtaining a judicial ruling, supported by clear and convincing evidence, in order to revoke citizenship:

> If the government were correct that a successful administrative challenge to a … passport on the ground that it was unlawfully procured sufficed to reveal the holder's true status as a noncitizen, obviating any need for judicial action under section 1451{ TA \l "8 U.S.C. §1451" \s "1451" \c 2 } to effect denaturalization, the precedents, the process provided by section 1451{ TA \s "1451" }, and the express preservation of citizenship status in sections 1504{ TA \s "8 U.S.C. § 1504(a)" } and 1453{ TA \l "8 U.S.C § 1453" \s "1453" \c 2 } would be illusory.

Xia v. Tillerson, 865 F.3d 643, 654 (D.C. Cir. 2017){ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }. This requirement of judicial action for status, as opposed to documents, is true in all contexts of citizenship. "Section 1421{ TA \l "8 U.S.C. § 1421" \s "Section 1421" \c 1 } grants the Attorney General the power to naturalize individuals. 8 U.S.C. § 1421{ TA \s "Section 1421" }. It says nothing about denaturalization or cancellation of certificates of naturalization." *Id.* at 656{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }. "On the government's logic, anyone whose naturalization the government deemed invalidly obtained would not be protected by the requirement of a court order to denaturalize, but could instead be denaturalized administratively. No court of which we are aware has accepted the contention that, in such circumstances, judicial

process is unnecessary." *Id*. at 655{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }. "The government's theory would appear to allow it to circumvent in every such case its burden to obtain a judicial denaturalization order, based on the theory that the naturalization was never valid to begin with." *Id*. at 653-54{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }.

C. <u>Ms. Muthana is Entitled to Declaratory Judgment of Her Continuing Citizenship Status</u>

In the absence of a judicial ruling to the contrary, based on clear and convincing evidence, Ms. Muthana's citizenship continues despite the prior revocation of her passport. "Assuming, as we must, that plaintiffs were naturalized United States citizens, they retain that citizenship status until the government obtains a court order vitiating it. Administrative actions alone are inadequate to extinguish any United States citizenship plaintiffs may have." *Xia*, 865 F.3d at 655{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }. She is, therefore entitled to a declaratory order from this Court recognizing her continuing status as a United States citizen. *See, e.g., Chacoty*, 285 F. Supp. 3d at 303{ TA \s "Chacoty v. Tillerson, 285 F. Supp. 3d 293, 298 (D.D.C. 2018)" }. As there has been no judicial order to the contrary after a showing of clear and convincing evidence, the citizenship evidenced by Ms. Muthana's previous passports remains in existence. Ms. Muthana is, therefore, entitled to a declaratory action from this Court that she remains a United States citizen.

D. <u>The Public Statements of the Administration Officials Have No Legal Effect on Ms. Muthana's Citizenship</u>

As referenced earlier and in the previous pleadings in this matter, both President Trump and Secretary of State Mike Pompeo have issued conclusory statements that Ms. Muthana is not a United States citizen. Neither has the authority to decide this, and their statements therefore have no legal effect on Ms. Muthana's citizenship status.

The Fourteenth Amendment{ TA \l "U.S. Const. amend. XIV" \s "Fourteenth Amendment" \c 7 } to the U.S. Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."[21] The Constitution, therefore, grants the citizenship which is applicable here for Ms. Muthana. While the Department of State is vested with the authority to issue passports, it has never had the authority to revoke citizenship via administrative process, whether that citizenship is gained through naturalization or birthright.

VI. AS A UNITED STATES CITIZEN, MS. MUTHANA IS ENTITLED TO RETURN TO THE UNITED STATES EVEN WITHOUT A PASSPORT

A. Ms. Muthana Retains the Right to Re-Enter the United States, Passport or Not.

Mandamus relief is appropriate in this matter. As a recognized U.S. citizen, Ms. Muthana has a clear right to relief and is "entitled [to] constitutional protections even when abroad." *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 71 (D.D.C. 2014){ TA \s "Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 19 (D.D.C. 2010)" } (citing Reid v. Covert, 354 U.S. 1, 5-9 (1957){ TA \l "Reid v. Covert, 354 U.S. 1 (1957)" \s "Reid v. Covert, 354 U.S. 1, 5-9 (1957)" \c 8 }). Among the constitutional protections U.S. citizens possess is the absolute and unequivocal right to return back to the United States from overseas travel. *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 67 (2001){ TA \l "*Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001)" \s "Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 67 (2001)" \c 8 } (recognizing the absolute right of United States citizens to enter its borders and stating that citizens "have the right to return to this country at any time of their liking"); *see also Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964){ TA \l "*Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964)" \s "Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964)" \c 1 } ("it is inherent in the concept of

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[21] U.S. Const. Amend. XIV{ TA \l "U.S. Const. Amend. XIV" \s "U.S. Const. Amend. XIV" \c 7 }.{ TA \s "Fourteenth Amendment" }

citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil"). Therefore, "governmental actions taken to prevent or impede a citizen from reaching the border infringe upon the citizen's right to reenter the United States." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 536-537 (D. Or. 2014){ TA \l "*Mohamed v. Holder*, 995 F. Supp. 2d 520 (D. Or. 2014)" \s "Mohamed v. Holder, 995 F. Supp. 2d 520, 536-537 (D. Or. 2014)" \c 1 }.

While the Defendants argue that they do not have an affirmative duty to act in this matter, Defendants actually incurred an affirmative duty to protect Ms. Muthana and her son, due in part to the Defendants' revocation of Ms. Muthana's passport. As the Supreme Court has noted:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e. g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See *Estelle* v. *Gamble, supra*, at 103-104; *Youngberg* v. *Romeo, supra*, at 315-316. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See *Estelle* v. *Gamble, supra*, at 103.

Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 200 (1989){ TA \l "*Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989)" \s "Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 200 (1989)" \c 8 }.

The United States revoked Ms. Muthana's passport, and because of this, any attempt Ms. Muthana would make to travel on the revoked passport would constitute a felony. *See* 18 U.S.C. § 1544. Ms. Muthana should not be forced to choose between subjecting herself to criminal penalty and her "fundamental right to have free ingress" back to the United States as a U.S. citizen. *Worthy*, 328 F.2d at 394. Even in circumstances where individuals are placed on the No Fly List while abroad, the United States must not prohibit their citizens on the No Fly List from returning back. *See generally Latif v. Holder*, 969 F. Supp. 2d 1293, 1298-1300 (D. Or. 2003){ TA \l "*Latif*

v. Holder, 969 F. Supp. 2d 1293 (D. Or. 2003)" \s "Latif v. Holder, 969 F. Supp. 2d 1293, 1298-1300 (D. Or. 2003)" \c 1 } (U.S. government offered "one time" waivers to at least five U.S. citizen plaintiffs on the No Fly List so they could return to the United States). Therefore, because the Defendants revoked Ms. Muthana's passport, the Defendants owe a duty to facilitate Ms. Muthana's return to the United States, or else they will continue to unlawfully infringe upon her right as a U.S. citizen to reenter the country. *See Mohamed*, 995 F. Supp. at 537{ TA \s "Mohamed v. Holder, 995 F. Supp. 2d 520, 536-537 (D. Or. 2014)" }.

In addition, despite Defendants' officials calling for other countries to repatriate their citizens detained in Syria,[22] the aforementioned public statements by Defendants' officials express an unwillingness of the Defendants to accept Ms. Muthana in any circumstance and act in accordance with their own proclamation.[23] In this case, the Syrian Democratic Forces do not want to continue holding individuals like Ms. Muthana or her son, but have no choice as the United States is unwilling to recognize its duty to accept their arrival as citizens.[24] Due to the Defendants' refusal to allow her to return home, Ms. Muthana is unable to care for herself and her son.[25] Accordingly, the Defendants have not only restrained Ms. Muthana's liberty and the freedom to act on her own behalf by revoking her passport, but have also blocked Ms. Muthana's right to

[22] Robert Palladino, Press Statement, *Foreign Terrorist Fighters in Syria*, Department of State (Feb. 4, 2019), available at https://www.state.gov/r/pa/prs/ps/2019/02/288735.htm ("the United States calls upon other nations to repatriate and prosecute their citizens detained by the [Syrian Democratic Forces].").

[24] Vivian Yee, *Thousands of ISIS Children Suffer in Camps as Countries Grapple With Their Fate,* New York times (May 8, 2019), available at https://www.nytimes.com/2019/05/08/world/middleeast/isis-prisoners-children-women.html?searchResultPosition=1 ("In overflowing camps in eastern Syria, the wives and children of ISIS fighters who fled the last shreds of ISIS territory are dying of exposure, malnutrition and sickness. Children are too spent to speak. Women who have renounced the group live in dread of attacks from those who have not.)".

[25] *Id.,* "In overflowing camps in eastern Syria, the wives and children of ISIS fighters who fled the last shreds of ISIS territory are dying of exposure, malnutrition and sickness. Children are too spent to speak. Women who have renounced the group live in dread of attacks from those who have not."

return through public statements that prevent her repatriation, and thereby owes affirmative duties to Ms. Muthana, including recognizing Ms. Muthana's citizenship and facilitating Ms. Muthana's return to the United States.

Defendants also owe Ms. Muthana and her son the exercise of good faith efforts to secure their release and return to the United States, pursuant to the requirements of the Fourth Geneva Convention Relative to the Protections of Civilian Persons in Time of War.[26] Under Articles 4 and 5 of the Fourth Geneva Convention, in the absence of evidence that Ms. Muthana or her young son directly took part in armed hostilities or engaged in espionage, sabotage or other direct hostilities, both Ms. Muthana and her young son are protected persons.[27] As foreign nationals, Ms. Muthana and her son have further protection under Article 48 of the Fourth Geneva Convention, which states that "protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall

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[26] *See* www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf. Over 130 countries have signed the Geneva Conventions of 1949, including Syria, Iran, Turkey, Russia and the United States. The United States signed the Geneva Conventions in 1949, which were ratified by the Senate in 1955. Article 2 of that Convention specifies that it "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." In this case, the Syrian conflict at present has involved multiple High Contracting parties, including the United States, Iran, Russia, and Turkey, all of whom have engaged in armed hostilities within the context of this conflict; accordingly, the Syrian conflict constitutes armed conflict within the scope of the contract, to which the full scope of the Geneva Conventions. The United States Supreme Court has previously acknowledged the legitimacy of invoking the Geneva Convention in order to challenge wartime conduct and sustain fundamental liberties. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S.Ct. 2749, 164 L.Ed. 2d 723 (2006){ TA \l "*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)" \s "Hamdan v. Rumsfeld, 548 U.S. 557, 126 S.Ct. 2749, 164 L.Ed. 2d 723 (2006)" \c 8 } (recognizing that it is permissible for a foreign national to invoke the Geneva Conventions in order to challenge procedures used by military commissions during his criminal trial).

[27] *See* Article 4, stating that "persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *See also* Article 5, excepting persons "definitely suspected of or engaged in activities hostile to the security of the State," and defining such persons as a "spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power." www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.

establish in accordance with the said article." Under Article 35, a detaining state is required to permit the departure of protected persons upon application, unless it is contrary to the security interests of the detaining state.[28]

While this Court has no jurisdiction over the detaining power, or authority to compel the Syrian Democratic Forces' release of Ms. Muthana and her son, this Court may order the United States to use all reasonable and good faith efforts consistent with its treaty obligations under the Geneva Conventions to affect their return, as well as the obligations of the Defendants based on their statements and revocation of Ms. Muthana's passport. This Court also has the authority to compel the Defendants to recognize that she is a U.S. citizen and their duty to accept U.S. citizens, like Ms. Muthana and her son, detained abroad.

As outlined in the foregoing, Plaintiff has a clear right to relief, based on the Defendant's prior recognition of Ms. Muthana's U.S. citizenship. Defendants have a clear duty to act, based in part on their actions in prohibiting Ms. Muthana's rightful return to the United States and the resulting duties owed to her based on those actions, as well as their obligations under Geneva Conventions treaty obligations. Defendants are the only actors who are able to grant Ms. Muthana and her son the relief they seek. Therefore, in order to cure the infringement Defendants brought upon Ms. Muthana's right to return to the United States, which resulted after Defendants revoked Ms. Muthana's passport and through their statements preventing her repatriation, Plaintiff seeks a mandamus order of this Court compelling the Defendants to recognize Ms. Muthana as a U.S.

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[28] As Plaintiff stated previously (Dkt. 15 at 22), there is no reason to believe that the Syrian Democratic forces would oppose the departure of Ms. Muthana or her son upon application, as the Syrian Democratic forces repeatedly permitted journalists to interview Ms. Muthana so that she can communicate her desire to return to the United States. Allowing these interviews to occur is not consistent with a desire to retain her in the country for matters of security. *Compare Doe v. Mattis*, 889 F.3d 745, 748 (D.C. Cir. 2018){ TA \l "*Doe v. Mattis*, 889 F.3d 745 (D.C. Cir. 2018)" \s "Doe v. Mattis, 889 F.3d 745, 748 (D.C. Cir. 2018)" \c 4 } (holding that the Executive branch cannot transfer a United States citizen from one foreign nation to another, if the citizen seeks return to the United States).

citizen and use all reasonable and good faith efforts to affect her return, which includes providing Ms. Muthana with transportation and travel documents to permit her reentry. Courts have compelled the Attorney General of the United States to facilitate the return for other persons who were prevented from returning to the United States while abroad.[29] The same duty of the Defendants is no less required here.

B. Even if Section 1503 Does Apply in this Matter, it is Not an Exclusive Remedy.

Should this Court determines that the provisions of § 1503{ TA \s "8 U.S.C. § 1503(b) and (c)" } do apply to Ms. Muthana, § 1503{ TA \s "8 U.S.C. § 1503(b) and (c)" } is not an exclusive remedy. As noted by Defendants in their Motion, the United States Supreme Court in *Rusk v. Cort* recognized that plaintiffs who are out of the country and seek a judicial determination may do so without exhausting the provisions of § 1503(b) or (c). 369 U.S. at 379-80. The Supreme Court permitted this because the intent of subparts (b) and (c) was to prevent those with "spurious citizenship claims" to enter and litigate simply as a way of getting into the country. *Id*. For those seeking declaratory judgment while still outside the country, however, those actions are consistent with the intent of the statute, barring "clear and convincing" evidence that Congress intended otherwise. *Id*. The Supreme Court found just this clear and convincing evidence in the *{* TA \l "*Califano v. Sanders*, 430 U.S. 99 (1977)" \s "Califano v. Sanders, 430 U.S. 99 (1977)" \c 8 *}Califano* case, noting that Congress had specifically intended that administrative exhaustion occur in the

[29] *See Samirah v. Holder,* 627 F.3d 652, 655 (7th Cir. 2010){ TA \l "*Samirah v. Holder,* 627 F.3d 652 (7th Cir. 2010)" \s "Samirah v. Holder, 627 F.3d 652, 655 (7th Cir. 2010)" \c 1 } (where the U.S. government wrongfully refused to allow an applicant to adjust his status from non-lawful resident to lawful resident the right to return to the United States so that he could adjust status, the appellate court remanded "case to the district court for the issuance of a mandamus commanding the Attorney General to take whatever steps are necessary to enable the plaintiff to reenter the United States for the limited purpose of reacquiring the status, with respect to his application for adjustment of status, that he enjoyed when he left the United States pursuant to the grant of advance parole later revoked. An order couched in terms of "take whatever steps are necessary" may seem vague. But the Attorney General has as we have indicated several means of compliance and we can let him decide which to employ to enable the plaintiff to return.").

limited scope of cases arising under the Social Security Act. *Califano v. Sanders*, 430 U.S. 99 (1977){ TA \s "Califano v. Sanders, 430 U.S. 99 (1977)" }. The facts of *Califano{* TA \s "Califano v. Sanders, 430 U.S. 99 (1977)" *}* arose under the Social Security Act; the facts of this matter do not. The right to seek declaratory judgment without utilizing subparts (b) and (c) was again confirmed in *Chacoty v. Tillerson*: "Congress did not intend to foreclose lawsuits by claimants . . . who do not try to gain entry to the United States before prevailing in their claims to citizenship." 285 F. Supp. 3d 293, 303, n. 5 (D.D.C. 2018{ TA \s "Chacoty v. Tillerson, 285 F. Supp. 3d 293, 298 (D.D.C. 2018)" }) (Moss, J.) (noting that "*Cort's* holding that § 1503{ TA \s "8 U.S.C. § 1503(b) and (c)" } is not an exclusive remedy, however, remains good law").

VII. IN THE ALTERNATIVE, PLAINTIFF SEEKS LEAVE TO AMEND TO ADDRESS § 1503 IN AN AMENDED COMLAINT. ANY SUCH AMENDMENT WOULD BE IN THE INTERESTS OF JUSTICE AND NOT FUTILE.

Should this Court find Defendants' arguments compelling despite the arguments and authorities listed above, Plaintiff respectfully requests leave to amend his Complaint in order to clarify the claims and supporting facts in this matter, and to address any provisions of § 1503{ TA \s "8 U.S.C. § 1503(b) and (c)" } which this Court may deem relevant. Plaintiff makes this request in the alternative to the arguments and authorities set forth in the preceding portions of this Response in Opposition.

A. Legal Standard

Fed. R. Civ. Pro. 15(a){ TA \l "Fed. R. Civ. Pro. 15(a)" \s "Fed. R. Civ. Pro. 15(a)" \c 4 } provides that leave to amend should be freely given when justice requires. *Polsby v. Thompson*, 201 F. Supp. 2d 45, 51-52 (D.D.C. 2002){ TA \l "*Polsby v. Thompson*, 201 F. Supp. 2d 45 (D.D.C.

2002)" \s "Polsby v. Thompson, 201 F. Supp. 2d 45, 51-52 (D.D.C. 2002)" \c 1 }. This Court has previously held that "when a court denies a motion to amend a complaint, the court must base its ruling on a valid ground and provide an explanation." *Id{* TA \s "Polsby v. Thompson, 201 F. Supp. 2d 45, 51-52 (D.D.C. 2002)" *}*. Accordingly, the burden is on the party opposing amendment to show that there is a reason to deny leave. *In re Vitamins Antitrust Litigation*, 217 F.R.D. 30, 32 (D.D.C. 2003){ TA \l "*In re Vitamins Antitrust Litigation*, 217 F.R.D. 30 (D.D.C. 2003)" \s "In re Vitamins Antitrust Litigation, 217 F.R.D. 30, 32 (D.D.C. 2003)" \c 1 }. The Supreme Court found an abuse of discretion where courts deny leave to amend, absent a satisfactory reason for doing so, such as "undue delay, bad faith or dilatory motive…repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party…[or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962){ TA \l "*Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227 (1962)" \s "Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)" \c 8 }; *see also Firestone v. Firestone,* 316 U.S. App. D.C. 152, 76 F.3d 1205, 1208 (1996){ TA \l "*Firestone v. Firestone,* 316 U.S. App. D.C. 152, 76 F.3d 1205 (1996)" \s "Firestone v. Firestone, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1208 (1996)" \c 8 } ("although the grant or denial of leave to amend is committed to a district court's discretion, it is an abuse of discretion to deny leave to amend unless there is sufficient reason").

B. <u>There is No Compelling Reason to Deny Leave to Amend Here</u>

Plaintiff does not make this alternative request after much development in the case; this matter is still in its initial stages. The United States Court of Appeals for the District of Columbia previously held that "where an amendment would do no more than clarify legal theories or make technical corrections…delay, without a showing of prejudice is not a sufficient ground for denying the motion." *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999){ TA \l "*Harrison v. Rubin*, 174

F.3d 249, 253 (D.C. Cir. 1999)" \s "Harrison v. Rubin, 174 F.3d 249, 253 (D.C. Cir. 1999)" \c 1 }; *see also Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996){ TA \l "*Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996)" \s "Atchinson v. District of Columbia, 73 F.3d 418, 426 (D.C. Cir. 1996)" \c 1 } (holding that in order to determine the severity of the delay, courts consider any resulting prejudice the delay may cause); *Estate of Gaither v. District of Columbia*, 272 F.R.D. 248, 252 (D.D.C. 2011){ TA \l "*Estate of Gaither v. District of Columbia*, 272 F.R.D. 248 (D.D.C. 2011)" \s "Estate of Gaither v. District of Columbia, 272 F.R.D. 248, 252 (D.D.C. 2011)" \c 1 } ("the mere passage of time does not preclude amendment—the delay must result in some prejudice to the judicial system or the opposing party").

This Court has held that "delay without requisite prejudice is ordinarily insufficient to justify denial of leave to amend;" here, Plaintiff would seek only to clarify and update the claims in this matter. *Dove v. Wash. Metro. Area Transit Auth.*, 221 F.R.D. 246, 249 (D.D.C. 2004){ TA \l "*Dove v. Wash. Metro. Area Transit Auth.*, 221 F.R.D. 246 (D.D.C. 2004)" \s "Dove v. Wash. Metro. Area Transit Auth., 221 F.R.D. 246, 249 (D.D.C. 2004)" \c 1 }. Because a proposed amendment would still relate to and rely upon predominantly the same underlying facts as the original Complaint, this amendment does not substantially alter the nature or factual basis of Plaintiff's claim, and will not significantly expand the scope of the litigation that Defendant must respond to. *Brown v. FBI*, 744 F. Supp. 2d 120, 123 (D.D.C. 2010){ TA \l "*Brown v. FBI*, 744 F. Supp. 2d 120 (D.D.C. 2010)" \s "Brown v. FBI, 744 F. Supp. 2d 120, 123 (D.D.C. 2010)" \c 1 } (finding that "a court may deny leave to amend if the amendment bears 'only [a] tangential relationship' to the initial claim, which could unduly prejudice the opposing party by expanding the scope of the litigation"). Further, any potential prejudice created by that potential and minimal delay would not be significant where, as here, this case is still at an early stage of litigation. There is no risk of unduly

increasing discovery or delaying trial, where no discovery has occurred and no trial has been set. *Heller v. District of Columbia*, No. 08-1289, 2013 U.S. Dist. LEXIS 38833, at *8 (D.D.C. Mar. 20, 2013){ TA \l "*Heller v. District of Columbia*, No. 08-1289, 2013 U.S. Dist. LEXIS 38833, at *8 (D.D.C. Mar. 20, 2013)" \s "Heller v. District of Columbia, No. 08-1289, 2013 U.S. Dist. LEXIS 38833, at *8 (D.D.C. Mar. 20, 2013)" \c 1 } ("A case's position along the litigation path proves particularly important in that [hardship] inquiry: the further the case has progressed, the more likely the opposing party is to have relied on the unamended pleadings.").

This alternative request is further not brought in bad faith or for dilatory motive. "Preventing a party from amending [his] complaint on the basis of bad faith generally requires an affirmative showing by the nonmoving party," and this typically "entails a showing that 'the proposed amendments are similar to already-rejected claims or otherwise unlikely to succeed on their face." *Bronner v. Duggan*, 324 F.R.D. 285, 292-93 (D.D.C. 2018){ TA \l "*Bronner v. Duggan*, 324 F.R.D. 285 (D.D.C. 2018)" \s "Bronner v. Duggan, 324 F.R.D. 285, 292-93 (D.D.C. 2018)" \c 1 }. No such circumstances exist here. Accordingly, should this Court not be persuaded by the arguments set forth in the earlier sections, Plaintiff respectfully requests leave to amend his pleading in this matter.

C. <u>Amendment under § 1503 Would Not Be Futile</u>.

For the reasons set forth below, allowing leave to amend Plaintiff's Complaint to reflect any relevant provisions of § 1503{ TA \s "8 U.S.C. § 1503(b) and (c)" } would not be futile.

1. <u>Ms. Muthana is, and was, out of the country; therefore, § 1503(a) does not apply to her</u>.

Section 1503(a){ TA \s "8 U.S.C. § 1503(b) and (c)" } applies to "any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he

is not a national of the United States" and allows those individuals to bring claims in the federal courts after exhausting the administrative process contained within 8 U.S.C. § 1503(a){ TA \s "8 U.S.C. § 1503(b) and (c)" }. At the time the Department of State revoked Ms. Muthana's passport, she had already been out of the country for approximately two years. Doc. 1; Ex. A. Accordingly, the provisions contained within 8 U.S.C. § 1503(a){ TA \s "8 U.S.C. § 1503(a)" } do not apply to Ms. Muthana's situation.

2. <u>As Ms. Muthana is seeking declaratory relief prior to attempting to enter the United States, she need not utilize § 1503(b) or (c).</u>

As noted in Section 6(b), supra, the provisions of § 1503 are not exclusive remedies. Plaintiff hereby incorporates by references the citations and authorities included above, which demonstrate that Plaintiff could seek declaratory relief without utilizing the provisions of § 1503.

3. <u>Even if she were required to utilize § 1503(b) or (c), administrative exhaustion under these circumstances would be futile.</u>

Even if § 1503 were an exclusive remedy despite the authority to the contrary cited above, this matter still fits an exception to a plaintiff's requirement to exhaust his or her administrative remedies, under the futility exception, "when following the administrative remedy would be futile because of certainty of an adverse decision." *Abigail Alliance for Better Access to Dev. Drugs v. McClellan*, 2004 U.S. Dist. LEXIS 29594 (D.D.C. Aug. 30, 2004) at *17{ TA \l "*Abigail Alliance for Better Access to Dev. Drugs v. McClellan*, 2004 U.S. Dist. LEXIS 29594 (D.D.C. Aug. 30, 2004) at *17" \s "Abigail Alliance for Better Access to Dev. Drugs v. McClellan, 2004 U.S. Dist. LEXIS 29594 (D.D.C. Aug. 30, 2004) at *17" \c 1 } (citing *Randolph-Sheppard Vendors of America v. Weinberger*, 254 U.S. App. D.C. 45, 795 F.2d 90, 105 (D.C. Cir. 1986){ TA \l "*Randolph-Sheppard Vendors of America v. Weinberger*, 254 U.S. App. D.C. 45, 795 F.2d 90, 105 (D.C. Cir. 1986)" \s "Randolph-Sheppard Vendors of America v. Weinberger, 254 U.S. App. D.C. 45, 795 F.2d 90, 105 (D.C. Cir. 1986)" \c

1 }). A future adverse decision is regarded as certain if the agency "has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider." *Abigail Alliance*, 2004 U.S. Dist LEXIS 29594 at *17{ TA \s "Abigail Alliance for Better Access to Dev. Drugs v. McClellan, 2004 U.S. Dist. LEXIS 29594 (D.D.C. Aug. 30, 2004) at *17" } (quoting *Randolph-Sheppard*, 795 F.2d at 105). In other words, the exception applies when there is "objective and undisputed evidence of administrative bias" (*Artis v. Greenspan*, 223 F. Supp. 2d 149, 154-55 (D.D.C. 2002){ TA \l "*Artis v. Greenspan*, 223 F. Supp. 2d 149 (D.D.C. 2002)" \s "Artis v. Greenspan, 223 F. Supp. 2d 149, 154-55 (D.D.C. 2002)" \c 1 }), or an "indication that resort to the administrative process would be 'clearly useless.'" *Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d. 18, 23 (D.D.C. 2000){ TA \l "*Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d. 18 (D.D.C. 2000)" \s "Coleman v. Pension Benefit Guar. Corp., 94 F. Supp. 2d. 18, 23 (D.D.C. 2000)" \c 1 } (quoting *Communications Workers of America v. American Tel. & Tel. Co.*, 309 U.S. App. D.C. 170, 40 F.3d 426, 431 (D.C. Cir. 1994){ TA \l "*Communications Workers of America v. American Tel. & Tel. Co.*, 309 U.S. App. D.C. 170, 40 F.3d 426 (D.C. Cir. 1994)" \s "Communications Workers of America v. American Tel. & Tel. Co., 309 U.S. App. D.C. 170, 40 F.3d 426, 431 (D.C. Cir. 1994)" \c 1 }). In this case, Plaintiff easily satisfies this standard: the multiple statements of Defendants' officials that Ms. Muthana is not a U.S. citizen and does not even has the right to travel to the United States irrefutably demonstrates futility. These clear statements include the following:

- On February 20, 2019, the United States Department of State issued a press release stating that "Ms. Hoda Muthana is not a U.S. citizen and will not be admitted into the United States. She does not have any legal basis, no valid U.S. passport, no right to a passport, nor any visa to travel to the United States."[30]

[30] Press Release dated February 20, 2019, located on Department of State website (https://www.state.gov/secretary/remarks/2019/02/289558.htm) (last visited May 7, 2019).

- That same day, President Donald J. Trump tweeted that he has "instructed Secretary of State Mike Pompeo, and he fully agrees, not to allow Hoda Muthana back into the Country!"[31]

- Secretary of State Michael Pompeo then appeared on national television, proclaiming that Hoda Muthana "is a terrorist. She is not a United States citizen. She ought not return to this country" and also stating that "she is not a U.S. citizen, nor is she entitled to U.S. citizenship" because "you have to consider the context."[32]

These multiple statements by Defendants provide objective evidence of administrative bias, a very clear position on the issue, and a position on which the government has demonstrated its unwillingness to reconsider.

Courts evaluating futility may also consider whether "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004){ TA \l "*Avocados Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004)" \s "Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247 (D.C. Cir. 2004)" \c 1 } (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992){ TA \l "*McCarthy v. Madigan*, 503 U.S. 140 (1992)" \s "McCarthy v. Madigan, 503 U.S. 140, 146, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)" \c 8 }). As Ms. Muthana is in a precarious position under the authority of Kurdish forces, and her young son is in poor health,[33] the litigants' interests here in proceeding outweigh the government's interests in a futile administrative exercise. Accordingly, Defendants' Motion to Dismiss fails due to the futility of Plaintiff pursuing the remedies provided under 8 U.S.C. §

[31] https://twitter.com/realdonaldtrump/status/1098327855145062411?s=21 (dated February 20, 2019) (last visited May 7, 2019).

[32] https://www.today.com/video/mike-pompeo-on-hoda-muthana-she-is-not-a-us-citizen-1446009923715 (dated February 21, 2019) (last visited May 7, 2019).

1503(b){ TA \s "8 U.S.C. § 1503(b) and (c)" }, as demonstrated by the public and unambiguous statements of Defendants' own officials.[34]

4. As Ms. Muthana Can Establish a Prima Facie Showing in a Judicial Proceeding Under § 1503, Defendants Will Need To Show Clear and Convincing Evidence That She Is Not A Citizen. They Will Be Unable To Do So.

Section 1503{ TA \s "8 U.S.C. § 1503(b) and (c)" } provides for judicial review of denial of any "right or privilege" of citizenship, including invalidations of passports or naturalization certificates. *Xia*, 865 F.3d at 655{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }. The initial burden is on the plaintiff, but only to show a prima facie case: "the minimal initial showing the statute requires of a plaintiff to trigger the government's proof burden" can be met by "[p]resenting proof of a naturalization certificate or passport—even if already administratively cancelled" which then triggers the government's "burden to establish by "clear, unequivocal, and convincing evidence" the plaintiff's lack of entitlement to the disputed "right or privilege" of citizenship." *Id*. at 656{ TA \s "Xia v. Tillerson, 865 F.3d 643, 656 (D.C. Cir. 2017)" }. To do so, the government will have to override its own earlier decision.

a. *Diplomatic Immunity Did Not Apply to Plaintiff at the Time of Ms. Muthana's Birth.*

As previously discussed above, the Department of State considered and ultimately rejected the idea that Mr. Muthana was still serving as a diplomat at the time of Ms. Muthana's birth. *See* Doc. 1-5. In its review at the time closest to Ms. Muthana's birth, the Department of State

[34] Even if Defendants demonstrated a willingness to reconsider their position as to Hoda Muthana's citizenship, which is not the case here for the reasons set forth above, 8 U.S.C. § 1503 is not an applicable administrative avenue to Ms. Muthana's specific circumstances. Under 8 U.S.C. § 1503(a), persons must be within the United States to claim a right or privilege as a national of the United States, so this section does not apply to Ms. Muthana as she is not currently in the country. Additionally, 8 U.S.C. § 1503(b) is not realistic or practical for Ms. Muthana to pursue, given the current situation in Syria and the inability for her to visit a diplomatic or consulate office in the foreign country she currently resides, which is Syria. In any event, Defendants demonstrated their unwillingness to reconsider whether Ms. Muthana is a citizen as evidenced by the unequivocal statements of Defendants' officials, and therefore would not grant Ms. Muthana a Certificate of Identity.

determined that Mr. Muthana was not serving as a diplomat at the time of her birth, and was not covered by diplomatic immunity. *Id.* Defendants produce with their instant Motion several documents which they purport to be "conclusive" and "contemporaneous" but which were, in fact., attested to and compiled more than twenty years after Ms. Muthana's birth. Doc. 19-2. As previously noted in the *Magnuson* case, "Congress in section 1451{ TA \s "1451" } has precluded revocation merely on the basis of having "second thoughts." *Magnuson*, 911 F.2d at 335{ TA \s "Magnuson v. Baker, 911 F.2d 330, n. 7 (9th Cir. 1990)" }. That is simply all the Department of State demonstrated in its January 2016 letter, and all the Defendants attempt now: second thoughts, based on no new evidence which was not available closer to the time in question and at the time of the original decision.

As stated above, it is undisputed that Mr. Muthana was fired from his diplomatic position in June 1994. Doc. 19-2 at p. 12 ("Fired 6/94 SEE CARRDEX"). On June 2, 1994, the Yemeni Ambassador Al-Aashtal required Mr. Muthana to surrender his diplomatic identity card. Doc. 1 at 6; *see also* Ex. A. Mr. Muthana's diplomatic position officially ended no later than September 1, 1994. Doc. 19-2 at pp. 5, 14; *see also* Doc. 1-5. Sometime after his termination, the United States Mission to the United Nations received notice of both Mr. Muthana's June termination and his official end date of September 1, 1994. The documents Defendants produce contain an unclear combination of handwritten notice added at unverifiable times, which list self-contradictory dates for the end of Mr. Muthana's position ranging from "fired 6/94" (Doc. 19-2 at 9 and 12) to February 6, 1995 as a notification date (Doc. 19-2 at 14), to February 10, 1995 (*id.*) to numerous references to a September 1, 1994 end date for his position (the only one which matches with other diplomats from Yemen, whose positions at the UN ended at or near the same time) (Doc. 19-2 at 9, 11, 12, 14). This hardly equates to "clear and convincing" reason to doubt the 2004

determination by the United States Mission to the United Nations that Mr. Muthana's position did in fact end on September 1, 1994. Doc. 1-5.

b. This Court, and Plaintiff, are Not Bound to Accept the Determination of the State Department on Immunity in this Situation.

This Court, and Plaintiff, are not obligated to accept the determination made by the Defendants regarding Mr. Muthana's diplomatic status, particularly when the Department of State documents contradict themselves and the Department of State's own prior determination. *See Ali v. Dist. Dir.*, 743 Fed. Appx. 354, 358 (11th Cir. 2018){ TA \l "*Ali v. Dist. Dir.*, 743 Fed. Appx. 354 (11th Cir. 2018)" \s "Ali v. Dist. Dir., 743 Fed. Appx. 354, 358 (11th Cir. 2018)" \c 1 } (noting that parties dispute the diplomatic records produced by USCIS, and deferring to the determination made after a full trial on the merits). And while Defendants assert in this matter that the date of receipt of notification is what is important for determining immunity, they have previously argued the opposite. *See Raya v. Clinton*, No. 09-cv-00169-GEC{ TA \l "*Raya v. Clinton*, No. 09-cv-00169-GEC" \s "Raya v. Clinton, No. 09-cv-00169-GEC" \c 1 }, March 5, 2010 Reply Brief of Government, Doc. 31 ("accordingly, the date of termination for purposes of privileges and immunities under the Vienna Convention is controlled in this case by the date of termination reported by the Egyptian Embassy to the Department of State" and "thus, applying the plain language of the Vienna Convention, Plaintiff's father maintained privilege and immunities until the date the Egyptian Embassy reported *as his termination date*") (emphasis added) (attached hereto as Exhibit B).

Furthermore, the Government's own documentation states that the US Mission to the United Nations' "Blue List" of resident foreign diplomats entitled to diplomatic immunity, on which Defendants rely in this matter, "should be viewed as a resource, but not the definitive source of information." Ex. C, 7 FAM 1116.2-3(b), Resident Representatives to and Officials of the

United Nations, Acquisition and Retention of U.S. Citizenship and Nationality. At the least, Defendants cannot demonstrate "clear and convincing evidence" that Ms. Muthana is not a birthright citizen; at worst, Defendants demonstrate exactly why courts do not permit the government to simply disregard citizenship due to "second thoughts." *Magnuson*, 911 F.2d at 335.

Finally, Defendants exert great time and effort in their Motion attempting to refute a hypothetical used by counsel for Plaintiff at a prior hearing in this matter. Doc. 19 at 27-29. The net result of these efforts, however, is not to negate the value of the hypothetical discussed at length in Defendants' Motion but to fail to provide more than their own extended hypotheticals in a series of responses. Sticking to the realities of the world in which the relevant laws must be applied, it is clear that diplomatic immunity is tied to duties of a position, not to timeliness of receipt of notification. As discussed above, Defendants have previously adhered to the importance of the duties and positions, until this case.

VIII. <u>DEFENDANTS ARE PREVENTED BY ESTOPPEL FROM NOW DISPUTING MS. MUTHANA'S CITIZENSHIP</u>

The U.S. government should be equitably estopped from disputing Ms. Muthana's previously recognized citizenship based on its earlier determination. The doctrine of estoppel requires a showing that: (1) there was a "definite" representation to the party claiming estoppel; (2) the party relied on its adversary's conduct to his detriment; and (3) the reliance on the representation was "reasonable." Graham v. SEC, 222 F.3d 994, 1007, 343 U.S. App. D.C. 57 (D.C. Cir. 2000){ TA \l "Graham v. SEC, 222 F.3d 994 (D.C. Cir. 2000)" \s "Graham v. SEC, 222 F.3d 994, 1007, 343 U.S. App. D.C. 57 (D.C. Cir. 2000)" \c 1 }. Equitable estoppel is available against the government in the extraordinary circumstances presented here. The case for estoppel against the government requires proof of both the traditional elements of the doctrine as well as "a showing

of an injustice . . . and lack of undue damage to the public interest." Hertzberg v. Veneman, 273 F. Supp 2d 67, 83,{ TA \l "Hertzberg v. Veneman, 273 F. Supp 2d 67" \s "Hertzberg v. Veneman, 273 F. Supp 2d 67, 83," \c 1 } quoting ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988){ TA \l "Inc. v. Sanders, 860 F.2d 1104 (D.C. Cir. 1988)" \s "Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988)" \c 1 }. A showing of injustice requires a demonstration that the government and/or its agents "engage[d]—by commission or omission—in misrepresentation or concealment, or, at least, behave[d] in ways that have or will cause an egregiously unfair result." Grumman Ohio Corp. v. Dole, 776 F.2d 338, 347 (D.C. Cir. 1985) (quoting General Accounting Office v. General Accounting Office Personnel Appeals Board, 225 U.S. App. D.C. 350, 698 F.2d 516, 526 n.57 (D.C. Cir. 1983)).

As set forth above, the United States, in recognition of Ms. Muthana's birthright citizenship, granted Ms. Muthana a United States passport in January 2005, and later renewed that passport in 2014. Prior to issuing her a passport, the U.S. was necessarily aware of Mr. Muthana's prior diplomatic post, and the fact that Yemen had delayed in its duty to notify the United States Permanent Mission to the United Nations of Mr. Muthana's termination, because the office that in 2004 certified his termination date is the same office to which Yemen would have made the notification. Regardless, the United States accepted the proof of termination provided by Mr. Muthana and issued the passport without further inquiry or dispute. Issuing this passport constituted a recognition of Ms. Muthana's status as a United States citizen. Mr. Muthana and his daughter relied on this representation, and as a result did not take further action to procure or clarify her status in the United States, as they would have otherwise, and as they did for their older children. There is no evidence to suggest that Mr. Muthana or his daughter (who was a minor at the time) acted in bad faith or presented anything but accurate information to the United States. Mr. Muthana

simply procured a letter from his previous employer, indicating his termination date, and relied on the U.S. government's determination that this was sufficient.

Conversely, the actions of the U.S. are in bad faith and would create an injustice which does not serve the public interest. The U.S. was aware of all relevant facts at the time that they issued Ms. Muthana a passport in 2005. They failed to raise a specific objection, precluding Mr. Muthana from applying for legal residency, and later, naturalization for his daughter, as he and his spouse did for their older children, who were born prior to their father's loss of diplomatic status. Instead, Mr. Muthana was left with no reason to believe that this process was necessary for Ms. Muthana. The timing of the United States' objection to Ms. Muthana's citizenship further demonstrates bad faith. The government did not raise objections to her citizenship until over a year after Ms. Muthana left the United States, and had allegedly associated herself with ISIS. It was only at this point that the government sought to revisit its previous determination, despite the absence of any new or material facts underlying its previous decision.

In the context of determinations of citizenship under Section 2705, in conjunction with the issuance of a passport, the Ninth Circuit recognized that relief through collateral estoppel was appropriate in Magnuson v. Baker, 911 F.2d 330, n. 12 (9th Cir. 1989). The facts in Magnuson are remarkably similar to the facts presented here. In Magnuson, the plaintiff applied to the State Department for a passport on the basis of his father's citizenship in the United States. His application was initially rejected; thereafter, the plaintiff submitted additional documents and the passport office, after consideration of these documents, determined that the plaintiff was in fact a U.S. citizen entitled a passport. Subsequently, it was discovered that the plaintiff was wanted in Canada for a conviction of tax evasion. After the discovery, the INS attempted to revoke his passport and deport him as a noncitizen to Canada. The plaintiff filed suit contesting the revocation

of his passport and underlying citizenship. In overruling the Secretary of State's revocation of his citizenship, the court found that a determination under Section 2705 was "conclusive proof of citizenship," which the INS could not collaterally attack. Analogizing the determination of citizenship under 2705 to a "final civil determination," which could not be reopened absent "exceptional circumstances such as fraud or misrepresentation," and finding that by limiting revocation of a certificate to cases of fraud or misrepresentation, Congress had likewise "limited successful collateral attacks on citizenship determination." Id. Congress may not revoke citizenship merely on the basis of having "second thoughts." Magnuson, 911 F.2d at 335. That is exactly what the government attempts to do here through its attempt to revisit the earlier decision to issue a passport without evidence of fraud or misrepresentation.

Although Ms. Muthana's case has garnered a significant amount of public attention, hers is not the only case where the United States, if permitted, could seek to rescind its earlier determination of citizenship, without new facts, and without the proper judicial proceeding. Allowing the U.S. government to reconsider and revoke prior findings of citizenship without new facts or adequate due process opens the door for the United States to utilize citizenship and the rights it entails as a weapon against the unpopular and the undesirable.

IX. PLAINTIFF AHMED MUTHANA PROPERLY BRINGS A CLAIM SEEKING DECLARATORY JUDGMENT AS TO MATERIAL SUPPORT

Defendants assert that Plaintiff Ahmed Muthana has no standing to bring the claim for declaratory judgment which he asserts on his own behalf regarding a potential violation of 18 U.S.C. § 2339B if he provides financial support for his daughter and grandson. Defendants ask this Court to dismiss this claim for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

However, Plaintiff has alleged, and his Declaration supports, that he brings this claim based on a live controversy which impacts him directly, and is not seeking an advisory opinion.

A. <u>Defendants Erroneously Dispute Plaintiff's Claims While Asking for Dismissal.</u>

In asking this Court to dismiss Plaintiff's claims seeking declaratory judgment that he will not violate 18 U.S.C. § 2339B, Defendants repeatedly dispute the factual assertions made by Plaintiff. Doc. 19 at 40-42 ("Plaintiff claims that Muthana is no longer a member of ISIS, has ceased support for ISIS, and would use any money Plaintiff provided her to travel … but provides no support whatsoever for these assertions"). However, that is not an appropriate approach when seeking dismissal under Rule 12. In evaluating a motion to dismiss brought under Rule 12(b)(1), courts must "accept as true all of the factual allegations contained in the complaint." *Wilson*, 269 F.R.D. at 11. Reviewing courts are instructed to "review the complaint liberally while accepting all inferences favorable to the plaintiff." *Nattah,* 770 F. Supp. 2d at 199. In other words, a reviewing court "assumes the truth of the allegations made and construes them favorably to the pleader." *Empagran*, 315 F.3d at 343. Furthermore, courts may also consider relevant materials outside the pleadings in evaluating a motion to dismiss brought under Fed. R. Civ. P. 12(b)(1). *Settles*, 429 F.3d at 1107. Mr. Muthana's Declaration, then, and the documentation attached to it sufficiently support the allegations contained in Count 9 of the Complaint that Plaintiff should be allowed to proceed. He identifies, for example, the communications directly from his daughter via a handwritten letter received last month, his communications with the FBI warning him that providing money to his daughter would constitute material support, and his communications with the psychiatrist who recently saw his daughter and grandson, regarding their needs and what she was informed by the FBI regarding providing money or items to them. Ex. A, Declaration of Ahmed Muthana.

B. <u>There Exists a Live Controversy.</u>

Defendants erroneously claim there is no live dispute, and that this claim is merely hypothetical. That, however, disregards the facts as pled and Mr. Muthana's statements to date. A dispute om which a plaintiff seeks relief must be "actual or imminent" to be appropriate. *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 10 (D.D.C. 2010). Plaintiff Ahmed Muthana would have sent money already to his daughter and grandson, for their basic needs such as medication and shoes, were it not for the fact that Mr. Muthana has been informed by United States government agents that if he sends any money to his daughter he will be providing material support for terrorism in violation of 18 U.S.C. 2339B. Ex. A. There continues to be a need on the part of his daughter and grandson, which based on recent communications from the psychiatrist who visited her, and the sole handwritten letter he has received from his daughter since she has been interred at Camp Roj, is rapidly increasing in both degree and risk. Ex. A. Mr. Muthana remains willing to provide support for the survival of his daughter and grandson, but cannot do so without a declaration that, under the exact conditions present currently, he would not be in violation of 18 U.S.C. 2339B.

While it is difficult to conceive how internment at a camp not run by ISIS or its supporters, where Ms. Muthana has now repeated disavowed ISIS and advised others to stay away, and which would clearly go to survival needs of Ms. Muthana and her young son and his health condition, the government still apparently stands by this approach. Doc. 19 at 40. Therefore, Defendants' own motion demonstrates the very real risk to Plaintiff should he try to provide medication, clothing or other basic needs while his daughter continues her quest to return to the United States with her son. Plaintiff does not need to commit an act which he has been told by authorities may be a crime in order to find out if it is.

C. **Plaintiff's Request Relates Directly to Ms. Muthana's Constitutional Right to Return.**

As Plaintiff has consistently stated in filings in this matter, including his Complaint and Memorandum of Law in support of the Complaint (Doc. 15), he wishes to provide assistance to his daughter and grandson to assist with his daughter's exercise of her constitutional right to return to the United States. This fits within the framework contemplated in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010) (holding that "with respect to these claims that gradations of fact or charge would make a difference as to criminal liability, and so adjudication of the reach and constitutionality of the statute must await a concrete fact situation") (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)). Despite Defendants' assertions to the contrary, the very case cited as support in Defendants' Motion demonstrates that this is exactly the sort of constitutional interest which conflicts with "a credible threat of prosecution made thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (holding that where the "plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief'"), quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *cf*. Doc. 19 at 47.

CONCLUSION

For the reasons set forth above, Plaintiff Ahmed Ali Muthana, on behalf of himself and as Next Friend for his daughter Hoda Muthana and his grandson Minor John Doe (A.M.) prays that this Court grant the relief requested herein, in the form of declaratory relief that Ms. Muthana is a United States citizen and retains that presumption of citizenship unless and until proven otherwise by clear and convincing evidence in a judicial proceeding; declaratory relief that Minor John Doe is entitled to a presumption of citizenship; injunctive relief preventing the United States from

taking any further action to revoke the citizenship of Ms. Muthana or, by acquisition, the presumed citizenship of Minor John Doe; mandamus relief compelling the United States to use all reasonable and good faith efforts to affect the return of Ms. Muthana and her young son to the United States; and declaratory relief that Plaintiff Ahmed Ali Muthana will not violate § 2339B by providing funds to his daughter for the return of his daughter, with his grandson, to the United States, or for their necessary survival while they await the ability to exercise this constitutional right to return.

Respectfully submitted,

/s/_Charles D. Swift

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CERTIFICATE OF SERVICE

The undersigned counsel hereby affirms that the foregoing will be served on all counsel of record via ECF filing on this 28th day of February, and served on all listed Defendants.

/s/_*Charles D. Swift*
Charles D. Swift