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United States District Court, S.D.
Texas, Brownsville Division.

Humberto GUTIERREZ, Plaintiff,
v.
John F. KERRY et al., Defendants.
Alejandra Manoella Gonzalez, Plaintiff,
v.
Michael Freeman et al., Defendants.
Arturo Tamez, Plaintiff,
v.
John F. Kerry et al., Defendants.
Itzel Aseneth Alcala et al., Plaintiffs,
v.
John F. Kerry et al., Defendants.
Maria Gregoria Arredondo De Garcia on behalf of her Minor Child, T.J.G., Plaintiff,
v.
Timothy M. Wiesnet et al., Defendants.

CIVIL NO: 1:12–CV–155, CIVIL NO: 1:13–CV–41, CIVIL NO: 1:14–CV–38, CIVIL NO: 1:14–CV–40, CIVIL NO: 1:15–CV–19
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MEMORANDUM AND ORDER

Hilda G. Tagle, Senior United States District Judge

***1** The plaintiffs in these five consolidated cases[1] filed complaints under 8 U.S.C. § 1503(a) seeking a declaration of U.S. citizenship after the U.S. Department of State ("State Department") either denied the plaintiff's application to renew his[2] U.S. passport or revoked it. After these cases commenced, the State Department issued each plaintiff a U.S. passport valid for the maximum period allowed by law. The Court has before it Defendants' motion to dismiss these cases as moot and Plaintiffs' motion for summary judgment. Both motions are based on Plaintiffs' newly issued passports. The Court denies Defendants' motion to dismiss as moot, concluding that they have not carried their burden to show that "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1969)). The Court also denies Plaintiffs' motion for summary judgment because, under *Reyes v. Neelly*, 264 F.3d 673 (5th Cir. 1959), Plaintiffs' passports do not preclude a finding of noncitizenship on this record.

I. Background

Plaintiffs' claims arise under 8 U.S.C. § 1503(a), which provides: "If 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, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States ....”[3] 8 U.S.C. § 1503(a) (2012). In each case, the State Department denied an application to renew a U.S. passport or revoked a passport for the stated reason that the applicant or holder did not prove by a preponderance of the evidence that he or she is a United States citizen.

***2** As explained in more detail in the following paragraphs, the factual dispute in each case calls for resolution of the same ultimate question: where was the Plaintiff born? Each plaintiff alleges that he was born in Texas with the assistance of a midwife, though the particulars of the alleged date, place, and sometimes the identity of the attending midwife differ. Each states that he has a Texas birth certificate signed by the attending midwife. Each plaintiff also alleges that his parents registered his birth in Mexico, and Mexican birth records state that the child was born in Mexico, though some Plaintiffs' Mexican birth records were allegedly later changed in a judicial proceeding to show Texas as the place of birth.[4]

After these cases commenced, the State Department issued a U.S. passport to each plaintiff or real party in interest. Defendants maintain that these cases were rendered moot when the passports were issued. Plaintiffs oppose dismissal as moot and move for summary judgment based on the newly issued passports and 22 U.S.C. § 2705. That statute reads:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:
>
> (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.

22 U.S.C. § 2705 (2012).

A. Gutierrez

Plaintiff Humberto Gutierrez (“Gutierrez”) alleges that he acquired United States citizenship when he was born with the assistance of a midwife in Lubbock, Texas in or around December 1975. *See Gutierrez v. Kerry*, 1:12–CV–155, Dkt. No. 14 ¶ 7. By letter dated November 29, 2011, the State Department ordered Gutierrez to surrender his U.S. passport and passport card. *See id.* ¶ 15; Letter from Jonathan M. Rolbin to Gutierrez, *Gutierrez*, Dkt. No. 15–1 Ex. 11. That letter recited that Gutierrez submitted several documents in support of his passport application dated February 25, 2008, including a 1976 Mexican birth registration document stating that he was born in Lubbock. *See Gutierrez*, Dkt. No. 14 ¶¶ 14–15; *Gutierrez*, Dkt. No. 15–1 Ex. 11 at 1. The letter then informed Gutierrez that, after issuing Gutierrez's passport, the State Department “uncovered that the Mexican birth

registration filed in 1976 originally indicated that you were born in Reynosa, Tamaulipas, Mexico on December 19, 1975." *Gutierrez*, Dkt. No. 15–1 Ex. 11 at 1. The letter continued: "Therefore, you did not acquire U.S. citizenship by virtue of birth in the United States." *Id.*

Gutierrez filed his complaint on August 13, 2012. *Gutierrez*, Dkt. No. 1. Discovery closed on April 30, 2014. *Gutierrez*, Dkt. No. 33 at 2. Defendants filed a motion to dismiss as moot on May 12, 2014, because the State Department issued Gutierrez a passport based on the evidence that came to light during discovery. *Gutierrez*, Dkt. No. 47. Among other things, they relied on the deposition of Jonathan Rolbin ("Rolbin"), who was then the Acting Managing Director for Passport Support[5] and Director of Legal Affairs and Law Enforcement Liaison, at the State Department's passport office. *See Gutierrez*, Dkt. No. 50 App. A at 6:17–7:5. Gutierrez conceded that he received a passport but argued, inter alia, that his claim for declaratory relief was not moot because a passport revocation, rather than an initial denial, gave rise to this action. *Gutierrez*, Dkt. No. 48 at 5–6. This Court denied Defendants' motion to dismiss as moot in a memorandum and order entered August 22, 2014. *Gutierrez*, Dkt. No. 64. The Court found Rolbin's deposition testimony to be insufficient to carry Defendants' burden to show that the voluntary-cessation exception to the mootness doctrine applied. *Id.* At 11–12.

***3** Defendants filed a renewed motion to dismiss as moot on September 8, 2014. *Gutierrez*, Dkt. No. 68. They submitted Rolbin's declaration dated September 8, 2014, *Id.* Ex. A, which they argued addressed the matters raised in the memorandum and order denying their first motion to dismiss as moot. *See Gutierrez*, Dkt. No. 68 at 4–5. Gutierrez responded, inter alia, by moving to strike Rolbin's declaration because Rolbin was not disclosed as a potential witness before the close of the discovery period. *Compare Gutierrez*, Dkt. No. 70 at 3—6 (request to strike in response to motion to dismiss) *with Gutierrez*, Dkt. No. 71 at 3–6 (identical argument in separate motion to strike). In the alternative, Gutierrez asked the Court to reopen discovery to allow him an opportunity to depose Rolbin and the U.S. Citizenship and Immigration Services ("USCIS") agent who allegedly initiated the process that led to the revocation of his passport. *Gutierrez*, Dkt. No. 70 at 19.

In its memorandum and order entered March 18, 2015, this Court found "that consideration of Rolbin's declaration ... after a continuance and reopening discovery would best ameliorate any prejudice" caused by consideration of Rolbin's declaration dated September 8, 2014. *Gutierrez*, Dkt. No. 75 at 6 (citations omitted). Accordingly, the Court reopened discovery for 60 days "limited to the matters raised in Jonathan M. Rolbin's declaration dated September 8, 2014 consistent with this memorandum." *Id.* at 11 (internal citation omitted). The Court denied Defendants' second motion to dismiss as moot insofar as Defendants contended that the voluntary-cessation doctrine is categorically inapposite to the State Department's revocation of a passport on noncitizenship grounds under 8 U.S.C. § 1504(a). *Id.* at 9–11. These cases were consolidated during the ensuing discovery

period, and the subsequent proceedings are chronicled in Part I. G, infra.

B. Gonzalez

Alejandra Manoella Gonzalez ("Gonzalez") alleges that she was born in March 1980, with the assistance of a midwife in Brownsville. *Gonzalez v. Freeman*, No. 1:13–CV–41, Dkt. No. 4 ¶ 16. When Gonzalez was five years old, her parents allegedly registered her in Matamoros as having been born in that city on August 16, 1979, so she could register to attend school in Mexico. *Id.* ¶ 20.

Gonzalez obtained a U.S. passport in 2000; it facially expired November 30, 2010. *Id.* ¶ 21; *Gonzalez*, Dkt. No. 5–1 Ex. 12 (copy of passport). Gonzalez applied to renew her passport in September 2012, *Gonzalez*, Dkt. No. 4 ¶ 23. She states that a State Department website showed that a new passport was delivered to her home on October 29, 2012, but she alleges that she never received it. *Id.* Gonzalez allegedly reported her passport lost to the U.S. consulate in Matamoros in December 2012 and requested a replacement. *See id.* According to Gonzalez's complaint, an investigation ensued in the course of which U.S. Customs and Border Protection ("CBP") officers visited her home and workplace in Brownsville. *See id.* ¶¶ 24, 26–27.

On February 25, 2013, Gonzalez pleads that she was detained and interrogated for approximately 15 hours when she attempted to enter the United States at the Veteran's Bridge in Brownsville. *Id.* ¶¶ 3, 10–11, 28. A criminal complaint was filed against Gonzalez on February 28, 2013, charging her with making a false claim to United States citizenship in violation of 8 U.S.C. § 911. *Id.* ¶ 13. The Honorable Ronald G. Morgan held a preliminary hearing on March 4, 2013, and entered an order dismissing the complaint. *See* Order, *United States v. Alejandro Menoella Gonzalez Pastor*, No. 1:13–MJ–253, Dkt. No. 8 (S.D. Tex. Mar. 34, 2013). Judge Morgan found that "presentment was not made within forty-eight hours, and further, that there is insufficient evidence to show that the defendant falsely and willfully represented herself to be a citizen of the United States as charged in the complaint." *Id.* at 1.

***4** After holding a final pretrial conference on March 4, 2015, the Court set Gonzalez's bench trial to begin on May 14, 2015, *Gonzalez*, Dkt. No. 31 at 1. In a status report filed April 17, 2015, the parties advised the Court that Defendants intended to issue a passport to Gonzalez based on the evidence produced in discovery but that they disagreed about whether the case was moot. *Gonzalez*, Dkt. No. 33 at 1–2.

C. Tamez

Arturo Tamez's ("Tamez") complaint states that he was born in Brownsville, Texas on February 24, 1997, with the assistance of a midwife. *Tamez v. Kerry*, No. 1:14–CV–38, Dkt. No. 1 ¶ 2. He avers that, when he was approximately three months old, his parents incorrectly registered him in Matamoros as having been born in that city. *Id.* ¶ 11. His Mexican birth record was subsequently corrected to show that he was born in Brownsville, according to his complaint. *Id.* (specifying no date of alleged correction).

The State Department issued Tamez a U.S. passport in 2009. *Id.* ¶ 14. A CBP officer allegedly confiscated Tamez's passport when he attempted to enter the United States at the Gateway Bridge in Brownsville on January 7, 2011, for the stated reason that evidence existed that Tamez had applied for public benefits in Mexico. *Id.* ¶ 15. Defendants plead that the State Department sent Tamez a letter dated January 3, 2011, revoking his passport. *Tamez*, Dkt. No. 7 ¶ 17.

Defendants answered Tamez's complaint, *Tamez*, Dkt. No. 7, and this Court entered a scheduling order setting February 27, 2015, as the deadline for completing discovery, *Tamez*, Dkt. No. 9 at 1. On January 22, 2015, Defendants filed their Status Report and Motion to Stay Deadlines. *Tamez*, Dkt. No. 10. They represented that they intended to issue Tamez a U.S. passport. *Id.* at 2. Tamez responded that the case was not moot, *Tamez*, Dkt. No. 11 at 7, and moved for summary judgment based on his U.S. passport issued February 2, 2015, *Tamez*, Dkt. No. 12 Ex. C. Defendants' filed a motion to dismiss as moot on February 24, 2015, *Tamez*, Dkt. No. 15; *see also Tamez*, Dkt. Nos. 17, 18,[6] 21 (responses and replies).

D. Alcala

The two[7] plaintiffs in *Alcala u. Kerry*, No. 1:14–CV–40, (collectively "Alcala Plaintiffs") have the same mother. They allege that they were born in Brownsville or San Benito, Texas in 1995 and 1997, respectively, with the assistance of the same midwife. *Alcala*, Dkt. No. 1 ¶ 3. The complaint in *Alcala* also states that their mother incorrectly registered each plaintiff in Matamoros as having been born in that city. *Id.* ¶¶ 8, 15, 22. Each plaintiff allegedly had not reached the age of two when his birth was registered in Mexico. *See id.*

In 2007, Alcala Plaintiffs applied for and received passports valid for five years. *Id.* ¶¶ 9, 16, 23. According to their complaint, an official in the U.S. consulate in Matamoros confiscated their passports from their mother in 2010 when she would not admit that her children were born in Mexico. *Id.* ¶¶ 11, 18, 25. Alcala Plaintiffs applied for passports in 2012, and the State Department sent them denial letters dated March 8, 2013, stating that they did not carry their burden to prove by a preponderance of the evidence that they are United States citizens. *See id.* ¶¶ 12, 19, 26.

***5** Defendants filed a motion to dismiss *Alcala* as moot on August 20, 2014. *Alcala*, Dkt. No. 11. They represented, and the Court found, that the State Department sent a passport to each plaintiff on August 11, 2015. *See id.* Ex. A; *see also Alcala*, Dkt. No. 19 at 1 (finding that passports received). This Court denied the motion to dismiss as moot on March 19, 2015, *Alcala*, Dkt. No. 19 at 5–6. Based on the evidence presented, the Court found that the denial of a renewal application raised concerns similar to those raised by revocation of a passport, reasoning "Defendants appear to be exercising ... ongoing review" because Defendants did not contend that Plaintiffs' renewal applications were denied based on new evidence Plaintiffs submitted. *Id.* at 5. Instead, the denials resulted from evidence unearthed during Defendants' independent investigations. *Id.*

Alcala Plaintiffs moved for summary judgment and submitted copies of their passports on April 6, 2015. *Alcala*, Dkt. No. 22. This Court denied that motion without prejudice in light of the consolidated briefing schedule in *Gutierrez*. *See Alcala*, Dkt. No. 35 at 7.

E. Arredondo

Maria Arredondo de Garcia ("Arredondo"), brings a § 1503(a) claim on behalf of T.J.G., her minor son. *Arredondo de Garcia v. Wiesnet*, 1:15–CV–19, Dkt. No. 1 at 1. T.J.G. was allegedly born in Hidalgo, Texas, in 2001 with the assistance of a midwife. *Id.* ¶¶ 3, 5. His parents allegedly registered him as having been born in Reynosa, Tamaulipas, Mexico on August 15, 2001, because he was sick and because they believed that doing so would allow him to hold dual citizenship. *Id.* ¶¶ 14, 15.

The State Department issued a passport to T.J.G. on March 14, 2008. *Id.* ¶ 19. T.J.G.'s parents applied to renew his passport in 2013, and on July 23, 2014, the State Department denied his application, finding the documentation submitted to be insufficient to prove that T.J.G. was born in the United States. *Id.* ¶¶ 20, 21. On June 15, 2015, the parties to *Arredondo de Garcia* filed a status report asking the Court to set a briefing schedule on mootness because the State Department issued T.J.G. a passport on that date. *Arredondo de Garcia*, Dkt. No. 19 at 1–2.

F. Consolidations

This Court consolidated *Gonzalez, Alcala*, and *Tamez* with *Gutierrez* on April 29, 2015. *Gutierrez*, Dkt. No. 77. As the consolidation order stated, "in each case, the U.S. Department of State issued the plaintiff a U.S. passport after the filing of the action." *Id.* at 1. The Court found that the parties in each action took similar positions on the consequences of the passport's issuance. *Id.* Each plaintiff moved for summary judgment based on his newly issued passport, citing 22 U.S.C. § 2705, and Defendants took the position that the case must be dismissed as moot.[8] *Id.* Accordingly, this Court determined "that the issuance of a passport ... raised common questions of law." *Id.* (citing Fed. R. Civ. P. 42(a)) (other citation omitted). The order stated that the consolidation was "for the limited purpose of deciding the common questions of law raised by the plaintiffs under 22 U.S.C. § 2705 and defendants' mootness arguments." *Id.*

The Honorable Andrew S. Hanen consolidated *Arredondo de Garcia* with *Gutierrez* on July 17, 2015. *Gutierrez*, Dkt. No. 104. Judge Hanen found that the plaintiffs in *Arredondo de Garcia* and *Gutierrez* sought similar relief and that the question of mootness raised in *Arredondo de Garcia* was being litigated in *Gutierrez*. *Id.* at 1. Arredondo was ordered "consolidated with *Gutierrez*." *Id.*

G. Limited Discovery and Post-Consolidation Proceedings

***6** On May 11, 2015, after the first consolidation order, the parties in *Gutierrez* filed a joint status report and motion for an extension of the discovery deadline. *Gutierrez*, Dkt. Nos. 79, 80. The Court granted the motion and gave the parties until June 30, 2015, to complete discovery. *Gutierrez*, Dkt. No. 81 at 1.

The Court resolved a dispute between the parties in Gutierrez over the scope of discovery at a telephonic hearing held June 11, 2015. After the parties presented their arguments, the Court granted Defendants' amended motion for a protective order, *Gutierrez*, Dkt. No. 83, clarifying that the consolidation order did not expand the scope of the discovery authorized in Gutierrez on March 18, 2015.

On July 10, 2015, Defendants filed a second motion for a protective order. *Gutierrez*, Dkt. No. 102. They argued that Gutierrez's request for production of documents propounded June 28, 2015, (three days before the close of discovery) as untimely. *Id.* at 2. Agreeing with Defendants, this Court granted that motion. *Gutierrez*, Dkt. No. 108.

The parties proposed a schedule for submitting post-discovery motions. *Gutierrez*, Dkt. No. 101. The Court found that "the parties make clear that they intend to file consolidated motions addressing the same matters raised in pending motions in the individual cases, with a view toward the jurisdictional discovery just completed" in that plan and set a schedule for filing motions and responses accordingly. *Gutierrez*, Dkt. No. 108 at 6.

Defendants moved to dismiss the consolidated cases as moot, *Gutierrez*, Dkt. No. 109, and Plaintiffs moved for summary judgment in all cases based on their newly issued passports and 22 U.S.C. § 2705, *Gutierrez*, Dkt. No. 113. They filed their exhibits separately. *Gutierrez*, Dkt. No. 110 (Ex. A–G); Dkt. No. 111 (Ex. H); Dkt. No. 112 (Ex. I); Dkt. No. 115 (Ex. J). On October 9, 2015, Defendants filed a motion to strike certain arguments and exhibits to Plaintiffs' response to Defendants' motion to dismiss as moot and their motion for summary judgment, *Gutierrez*, Dkt. No. 116. Plaintiffs sought and obtained an extension of their deadline to reply to their motion for summary judgment. *See Gutierrez*, Dkt. Nos. 120, 121. On December 7, 2015, they filed a sealed exhibit, *Gutierrez*, Dkt. No. 127, and three requests for the Court to take judicial notice of documents filed in other cases, *Gutierrez*, Dkt. Nos. 124–26. They filed a supplemental exhibit to their motion for summary judgment on December 9, 2015, *Gutierrez*, Dkt. No. 128, and a reply to their motion for summary judgment the next day, *Gutierrez*, Dkt. No. 130. On December 14, 2015, Plaintiffs filed a motion asking the Court to take judicial notice of the transcript of the deposition of Father Ignacio Luna taken December 3, 2014 in *Salinas v. Limon*, No. 1:13–CV–174 (S.D. Tex.). *Gutierrez*, Dkt. No. 132 (motion); *Gutierrez*, Dkt. No. 133 (deposition); *Gutierrez*, Dkt. No. 134 (exhibit to deposition transcript). Defendants responded to Plaintiffs' motions to take judicial notice on December 28, 2015, *Gutierrez*, Dkt. No. 135, and moved to strike those motions.[9]

***7** On January 9, 2016, Plaintiffs amended their motion to take judicial notice filed December 14, 2015, *Gutierrez*, Dkt. No. 137. The parties filed timely responses and replies, the last of which was filed February 1, 2016, *Gutierrez*, Dkt. Nos. 138–41.

II. Mootness

Under Article III of the constitution, the judicial power of the United States extends to deciding "cases and controversies." U.S. Const. Art.

III. In exercising this power, "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.' " *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)) (second alteration in original). Thus, to have standing under Article III, a plaintiff must have "suffered injury (a) to a legally protected interest, and that is actual or imminent, concrete and particularized; (b) that is fairly traceable to the challenged action of the defendant; and (c) that is redressable by the court." *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The parties agree, as does the Court, that each plaintiff had standing at the commencement of these actions because the State Department's had revoked or denied an application to renew the plaintiffs' passports. The dispute here centers on whether the issuance of passports to the plaintiffs moots these actions and, if so, whether Defendants have carried their burden under the voluntary-cessation doctrine.

A. Denial of Right or Privilege

"Even when a plaintiff has standing at the outset, '[t]here must be a case or controversy through all stages of a case[.]' " *Fontenot*, 777 F.3d at 748 (quoting *K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013)) (alterations in original); *see also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)) ("The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."). Hence, "the mootness doctrine is derived from Article Ill's prohibition against federal courts issuing advisory opinions." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 432 (5th Cir. 2011) (citation and footnote omitted). No case or controversy exists, "and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome ... [b]ut a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chaffin*, 133 S. Ct. at 1023 (quoting *Already LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) for language before disjunction and *Knox v. Serv. Emp.*, 132 S. Ct. 2277, 2287 (2012) for language following disjunction) (internal quotation marks omitted). Put another way, if the controversy between the parties "has been 'resolved to the point that they no longer qualify as "adverse parties with sufficient legal interests to maintain the litigation," [federal courts] are without power to entertain the case.' " *Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014) (per curiam) (quoting *Sossamon v. Texas*, 560 F.3d 316, 324 (5th Cir. 2009)).

***8** Plaintiffs contend this case is not moot because a declaratory judgment would be "broader, and more durable, than a U.S. passport." *Gutierrez*, Dkt. No. 114 at 16. They contrast what they deem the greater protections afforded to a judgment by Federal Rule of Civil Procedure 60 with federal regulations stating that a passport must be renewed and surrendered to the United States on demand and that a passport may be revoked without notice and a hearing if the holder is not a national

of the United States. *See* 22 C.F.R. § 51.62(b), 51.70(b)(1) (2008).

The Fifth Circuit twice rejected indistinguishable arguments in unpublished cases decided in 2013. In both, the Fifth Circuit held that the State Department's issuance during litigation of a passport card to the plaintiff mooted her claim for a judgment declaring her to be a United States citizen under 8 U.S.C. § 1503(a). *De Esparza v. Kerry*, 548 Fed.Appx. 216 (5th Cir. 2013) (per curiam, unpublished), *cert. denied*, 134 S. Ct. 1499 (2014); *Garcia v. Freeman*, 542 Fed.Appx. 354 (5th Cir. 2013) (per curiam, unpublished), *cert. denied*, 134 S. Ct. 1499 (2014). Both cases arose out of the State Department's denial of the plaintiff's passport application. *De Esparza*, 548 Fed.Appx. at 217; *Garcia*, 542 Fed.Appx. at 355. After discovery, the State Department concluded that each plaintiff carried her burden to prove her citizenship, issued her a passport, and moved to dismiss as moot. *De Esparza*, 548 Fed.Appx. at 217; *Garcia*, 542 Fed.Appx. at 355.

In *Garcia*, the plaintiff argued she continued to have a concrete interest in the litigation and could still obtain meaningful relief because a judicial declaration of citizenship, unlike a passport, does "not expire and can only be rescinded or modified pursuant to Federal Rule of Civil Procedure 60." *Garcia*, 542 Fed.Appx. at 355. The Fifth Circuit explained that "[a] district court does not have jurisdiction to review claims under § 1503(a) where plaintiff has not been denied a right or privilege as a national of the United States pursuant to a final administrative determination." *Id.* at 356 (citing § 1503(a) and *Parham v. Clinton*, 542 Fed.Appx. 503, 504 (5th Cir. 2010)). Because a U.S. passport can be used as evidence of its holder's United States citizenship, *id.* (citing 22 U.S.C § 2705 and *Manning v. Rice*, No. 4:06CV464, 2008 WL 2008712, at *3 (E.D. Tex. May 8, 2008)), the Fifth Circuit held that the plaintiff "did not have a concrete interest in [the] action ... [and] did not suffer any harm" after the State Department issued her passport. *Id.* In *De Esparza*, the plaintiff pressed the argument that she retained a concrete interest under § 1503(a) because "DOS and Border Patrol Agents have the authority to revoke or confiscate a passport without prior notice or hearing." *De Esparza*, 548 F. Appx at 217. The Fifth Circuit found that argument unavailing "for the same reason the plaintiffs contention in *Garcia* failed. *Id.* at 218. "[E]ssentially, [the plaintiff] seeks an advisory opinion that could be used in the event an official challenges her citizenship in the future." *Id.* (quoting *Garcia*, 542 Fed.Appx. at 355) (first alteration in original). The same reasoning compels the Court to reject plaintiffs' efforts to argue that these cases satisfy the standing elements of an injury in fact and redressability based on Rule 60 and statutes and regulations authorizing the State Department to revoke a passport. *See id.*

B. Voluntary–Cessation Doctrine

***9** The voluntary-cessation doctrine illustrates that "[m]ootness ... is more than 'the doctrine of standing set in a time frame.' " K.P., 729 F.3d at 438 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)) (articulating voluntary-cessation exception after the quoted text). An exception to mootness, "the voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case. If

defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief." *Sossamon*, 560 F.3d at 324; *accord K.P.*, 729 F.3d at 438 ("[A] defendant cannot automatically moot a case simply by ending its [challenged] conduct once sued." (quoting *Already*, 133 S.Ct. at 727) (alterations in original)); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citation omitted) (stating that without the voluntary-cessation exception, a defendant would be "free to return to his old ways" upon the dismissal of an action as moot). The appellants expressly declined to invoke the voluntary cessation doctrine in *De Esparza* and *Garcia*, and the Fifth Circuit, therefore, did not reach the question whether the voluntary-cessation exception applied. *De Esparza*, 548 Fed.Appx. at 217 ("In her reply brief, Martinez concedes she is not asserting that an exception to the mootness doctrine applies."); *Garcia*, 542 Fed.Appx. at 356 ("In her reply brief, Garcia concedes she is not asserting that an exception to the mootness doctrine applies).

1. Applicable Burden

The Court turns first to the parties' dispute over what burden Defendants must shoulder. Plaintiffs argue that Defendants cannot carry their burden under the voluntary-cessation doctrine without showing a formally announced change in policy. *Gutierrez*, Dkt. No. 113 at 18. Defendants concede that no formal change in policy occurred in these cases but nonetheless maintain that their evidence satisfies the strictures of the test for mootness occasioned by a defendant's voluntary cessation of challenged conduct. *Gutierrez*, Dkt. No. 117 at 9. Defendants correctly characterize their burden.

As a general rule, a defendant seeking dismissal as moot based on his voluntary cessation of challenged conduct must meet a burden that has been described as "heavy" and "formidable" to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Compare Sossamon*, 560 F.3d at 325 (citing *Friends of the Earth*, 528 U.S. at 189) ("heavy burden"); *Stauffer*, 741 F.3d at 582; *with Fontenot*, 777 F.3d at 747 (quoting *Friends of the Earth*, 528 U.S. at 190) ("formidable burden"); *K.P.*, 729 F.3d at 438 (quoting *Already*, 133 S. Ct. at 727) ("formidable burden"). In certain circumstances, however, government entities and officials acting in their official capacity must shoulder a " 'lighter burden' ... in proving that the challenged conduct will not recur once the suit is dismissed as moot." *Stauffer*, 741 F.3d at 582 (citing *Sossamon*, 560 F.3d at 325). The difference in burden recognizes that "government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties[, and w]ithout evidence to the contrary, [federal courts] assume that formally announced changes to official governmental policy are not mere litigation posturing." *Id.* (quoting *Sossamon*, 560 F.3d at 325) (alteration omitted). The Fifth Circuit has stated that "[t]he overarching goal [of the voluntary-cessation inquiry] is

to determine whether the defendant's actions are mere 'litigation posturing' or whether the controversy is extinguished." *Fontenot*, 777 F.3d at 748 (citing *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 426 n. 3 (5th Cir. 2013)).

Regarding the necessity of proving an official change in policy, the Fifth Circuit held in *Fontenot*, supra, that "there [were] no formally announced changes to policy" when applying the voluntary-cessation doctrine to a claim against a government official. *Fontenot*, 777 F.3d at 748 (distinguishing *Sossamon v. Texas*, 563 U.S. 277 (2011)). After the plaintiffs in *Fontenot* sued the Director of the Texas Department of Public Safety ("DPS") for declaratory and injunctive relief stemming from the misreporting of the nature of their convictions to DPS, the Director corrected two plaintiffs' records as they requested. *See Fontenot*, 777 F.3d at 744–45, 748. The Fifth Circuit held those plaintiffs' claims against the Director were moot, even though the correction of the records did not formally change policy. *Id.* at 748 ("The very nature of the records correction controversy, which was precipitated by the plaintiffs' failures to produce a driver's license, counsels that the defendant is not likely 'to return to his old ways.' " (citing *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004)). Like the Director in *Fontenot*, the Secretary of State does not enjoy a presumption of good faith here, but the absence of an official change in policy does not necessarily preclude a mootness finding. *See id.* Defendants must therefore carry their "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" without the benefit of a presumption of good faith.[10] *Id.* at 747 (quoting *Friends of the Earth*, 528 U.S. at 190).

***10** Finally, citing cases applying the Article III ripeness doctrine, Defendants argue that the Court should decline to decide these cases for "prudential reasons." *Gutierrez*, Dkt. No. 109 at 13–14 (citations omitted). The cases on which Defendant relies applied the ripeness doctrine to determine whether judicial review was appropriate at the outset of litigation. *See Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008); *Cent. & S. W. Servs., Inc. v. U.S. E.P.A.*, 220 F.3d 683, 690 (5th Cir. 2000). Defendant cites no case finding a case unripe despite the conclusion that a live controversy exists under the stringent test of voluntary cessation. *See Gutierrez*, Dkt. No. 109 at 14. "Different standards" apply to "initial standing and mootness after litigation commences," and "a defendant's voluntary action after suit is filed may not necessarily moot a claim, even though the plaintiff would have lacked initial standing had she filed her complaint after the defendant's voluntary action took place." *Perez v. Texas*, 970 F. Supp. 2d 593, 603 n.9 (W.D. Tex. 2013) (Smith, J.) (citing *Friends of the Earth*, 528 U.S. at 191); *see also K.P.*, 729 F.3d at 438. As Justice Blackmun has explained, the voluntary-cessation doctrine relaxes the requirements that the ripeness doctrine imposes at the outset of litigation as well. *See Vitek v. Jones*, 445 U.S. 480, 503 (1985) (Blackmun, J., dissenting) (explaining that when a case presents mixed questions of mootness, ripeness, and voluntary cessation, the Supreme "Court has lowered the ripeness threshold so as to preclude manipulation by the parties or the mere passage of time from frustrating judicial

review" and citing *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944), which applied the voluntary-cessation standard, as an example). Indeed, the Supreme Court has countenanced consideration of factors that could be characterized as prudential such as "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations" when deciding the merits question of whether to exercise a court's discretion to grant equitable relief after determining that voluntary cessation of challenged conduct does not moot a case.[11] *W.T. Grant Co.*, 345 U.S. at 633; *see Perez*, 970 F. Supp. 2d at 602 ("[A]lthough it may affect the scope of the remedy, 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' " (quoting *Friends of the Earth*, 528 U.S. at 189) (other citation omitted)). The Court therefore confines its analysis to the applicable voluntary-cessation test. *See W.T. Grant Co.*, 345 U.S. at 633–34.

2. Analysis

Defendants rely on two pieces of evidence to support their motion to dismiss these cases as moot: the transcript of Rolbin's deposition taken February 20, 2013, *Gutierrez*, Dkt. No. 109 Ex. B, and his declaration dated September 8, 2014, *id.* Ex. A. Defendants submitted the same evidence in support of their second motion to dismiss as moot in *Gutierrez*. *See Gutierrez*, Dkt. No. 68. In its memorandum and order entered August 22, 2014, this Court found Rolbin's deposition insufficient to carry Defendants' burden to establish mootness occasioned by their voluntary cessation. *Gutierrez*, Dkt. No. 64 at 11–12. Adopting its reasoning in prior cases, this Court distinguished between cases in which the State Department revoked the plaintiffs passport and those in which the plaintiff challenged for the first time an administratively final denial of a passport application. *See id.* at 8–9. That distinction rests on factual findings made in prior § 1503(a) cases that "[the State Department] retain[s] nearly plenary review of a passport holder's citizenship once a passport has been issued."[12] *Id.* at 9–10 (quoting *Castro v. Freeman*, No. 1:09–CV–208, Slip Op. at 19 (S.D. Tex. Dec. 7, 2012)). The Court concluded Rolbin's deposition did not adequately undermine that finding:

> Rolbin's deposition at most evidences a change in formal policy attributable to one arm of the State Department. *See Sossamon*, 560 F.3d at 325 (observing that policy challenged by state inmate changed state-wide and stating that "the fact that the change in policy is now state-wide obviates any concern that local prison officials might change their minds on a whim or that [the plaintiff] might be transferred to a facility with different rules"). When the deposition was taken, Rolbin served as the Acting Managing Director for Passport Support and Director of Legal Affairs and Law Enforcement Liaison, at the State Department's passport office. *See* Dkt. No. 50 App. A at 6:17–7:5. Rolbin opines that "the legal department does not go out and audit or conduct any reviews for revoking passports themselves. The information comes in." *Id.* at 22:19–22.

> By its terms, Rolbin's statement applies at most to the "legal affairs department," not the entire State Department. *Id.* at 22:19. Indeed, Rolbin testifies that the legal affairs department decides whether to revoke passports, *see id.* at 18:1–2, 18:17–22, based on new evidence which is received by mail, "from [Department of Homeland Security] components, law enforcement, passport agencies and centers, overseas posts, [and] the Department of Justice." *Id.* at 21:14–22. Rolbin therefore admits that the actions of other arms of the State Department such as "passport agencies and centers," *Id.* at 22, send evidence to his office which results in passport revocation, but Rolbin's deposition says nothing about whether these entities conduct rolling reviews resulting in passport revocation.

***11** *Gutierrez*, Dkt. No. 64 at 11–12 (footnote omitted). Hence, the Court must decide whether Rolbin's declaration read together with his deposition discharges Defendants' burden on voluntary-cessation.

***12** In his declaration, Rolbin confirms that requests to revoke passports come from arms of the State Department as well as other state and federal agencies. Rolbin Decl. ¶ 4, Dkt. No. 109 Ex. A ("CA/PPT/L receives revocation requests from various government agencies and offices. Requests are submitted by other offices within the State Department as well as other federal agencies including the Justice Department and Department of Homeland Security. Requests may also come to CA/PPT/L from state agencies or law enforcement."). He further states that he reviews all requests to revoke a passport and makes the final decision. *Id.* ¶ 7 (stating that revocation requests are subjected to multiple internal reviews). According to Rolbin, the office he supervises "may reevaluate a decision to issue a passport when [his] office subsequently receives a revocation request that includes new evidence that was not before the Department at the time of passport issuance and sufficiently contradicts the individual's claim to U.S. citizenship." *Id.* ¶ 5. Regarding rolling reviews, Rolbin states:

> CA/PPT/L does not, as part of its standard operating procedures, request that any other "arm" or office of the State Department or any outside federal or state agency conduct rolling reviews of issued passport applications in order to review a passport bearer's claim to U.S. citizenship.
>
> ....
>
> To the best of my knowledge and recollection, having reviewed revocation requests during my nearly five years in this position, noncitizenship revocations are not the result of "rolling reviews" by the Department or by other federal/state agencies of citizenship. Instead, revocation requests we receive are the result of a triggering event of some kind, such as a passport renewal or Consular Report of Birth Abroad application, a criminal prosecution, or an application for an immigration benefit by a family member or by the bearer on behalf of a family member.

Rolbin Decl. ¶¶ 6, 8. Rolbin explains that an application to adjust Gutierrez's wife's status, form I–130, triggered an investigation by U.S. Citizenship and Immigration Services, which in turn led to new evidence and a referral to the State Department for revocation. *Id.* ¶ 9.

Plaintiffs contend that Rolbin's declaration is insufficient to carry Defendants' burden because it does not address the possibility that an application to renew one or more of their passports will be denied. This Court has repeatedly adopted the reasoning of *Manning v. Rice*, No. 4:06CV464, 2008 WL 2008712 (E.D. Tex. May, 2008), which found the possibility of nonrenewal too speculative to keep the controversy live, even under the voluntary-cessation doctrine. *See Manning*, 2008 WL 2008712, at *3 (characterizing a declaratory judgment in these circumstances as "speculative and advisory relief' and stating that "[i]f Plaintiff's passport is not renewed, and if she has exhausted her administrative remedies as to the denial of that renewal, then she—at that time—will have been denied a right or privilege to which she believes she is entitled and a district court should—at that time—have jurisdiction over her claims"); *see e.g., Lopez-Diaz v. Freeman*, No. 1:12–CV–102, Slip Op. at 12 (S.D. Tex. Oct. 1, 2012) (adopting *Manning*).

Nevertheless, Rolbin's declaration and Defendants' pending motion to dismiss leave open the reasonable possibility that the passport of each plaintiff could be subjected to a rolling review and revoked "on a whim" without new evidence. *Sossamon*, 560 F.3d at 325. Rolbin does not state that he will not authorize the revocation of Gutierrez's or any other plaintiffs passport or request a further investigation of a plaintiffs citizenship absent a triggering event. Instead, he qualifies his contention about rolling reviews, stating that his office "does not, *as part of its standard operating procedures*, request ... rolling reviews ...." Rolbin Decl. ¶ 6 (emphasis added). Rolbin's qualification implies that his office requests rolling reviews in nonstandard situations, but Defendants offer no evidence tending to show that there is no reasonable possibility those nonstandard circumstances will present themselves in Plaintiffs' cases. *See id.* Rolbin also precedes his statement that his office "may reevaluate a decision to issue a passport when [his] office receives a request that includes new evidence" with the word "may." Rolbin Decl. ¶ 5. The use of the word "may" can be reasonably interpreted in this context as specifying one of many circumstances in which the State Department has the discretion to revoke a passport without representing that he will not revoke for nonnationality in other circumstances. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion. This commonsense principle of statutory construction is by no means invariable, however." (citations and internal footnote omitted)); *United States v. Damer*, 910 F.2d 1239, 1240–41 (5th Cir. 1990) (concluding use of word "may" in U.S.S.G. § 5K1.1 vests sentencing judge with discretion). Reading Rolbin's declaration as reserving to himself an unfettered discretion to revoke plaintiffs' passports issued after these cases commenced for noncitizenship accords with the position Defendants reiterates in their pending motion to dismiss—that they preserve their argument that the voluntary-cessation doctrine never applies to a decision to revoke a passport because revoking a passport for noncitizenship is never "unlawful conduct" under 8 U.S.C. § 1504(a). *Gutierrez*, Dkt. No. 109 at 15–16.

***13** Defendants have failed to carry their formidable burden to show mootness on this record for two reasons. First, Defendants, and Rolbin specifically, reserve the discretion to request a review of Plaintiffs' citizenship and revoke their passports even absent what Rolbin terms a triggering event, *see* Rolbin Decl. ¶¶ 8–9, and Rolbin does not represent that the discretion he claims will not be exercised in Plaintiffs' cases. *See Parents Involved in Cmty. Sch. u. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (holding school district did not carry its voluntary-cessation burden in part because it did not "suggest[ ] that if this litigation is resolved in its favor it will not resume using race to assign students); *Pederson v. La. State Univ.*, 213 F.3d 858, 874—875 (5th Cir. 2000) (holding university did not carry voluntary-cessation burden when it informed court that it instituted two new women's sports and submitted compliance plan because it "made no representation to this court that they are dedicated to ensuring equal opportunities and fair accommodation for both their female and male athletes in the long run"). Second, even if Rolbin's declaration evinces an intent not to revoke Plaintiffs' passports absent a triggering event on this record, Defendants identify no reason why he could not change his mind or why his successor in office could not exercise the unfettered discretion Defendants claim by requesting a review of Plaintiffs' citizenship and revoking their passports without a triggering event. *See Hernandez v. Cremer*, 913 F.2d 230, 235 (5th Cir. 1990) (holding claim for injunctive relief against Immigration and Naturalization Service was not mooted by change in policy because "current INS policy, absent the injunction, is merely oral and absolutely subject to withdrawal at the discretion of the Service's District Director"); *cf. Spomer v. Littleton*, 414 U.S. 514, 519–23 (1974) (recognizing distinction between challenge to policies personal to particular officeholder sued in his official capacity and those continued by subsequent officeholder: remanding for determination of whether live controversy over former state's attorney's practices existed based on observation that "[n]o charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged, apart from the allegation that ... the incumbent at the time, was then continuing the practices he had previously followed" (citation omitted)).

C. Matters Not Reached

The determination that Defendants' evidence is insufficient to carry their burden to show mootness pretermits consideration of Plaintiffs' arguments that the relief granted does not eradicate the effects of the challenged conduct. Nor need the Court reach Defendants' motion to strike and Plaintiffs' requests to take judicial notice of additional evidence. Accordingly, those motions will be denied as moot. *See, e.g., Poly–Am., Inc. v. Serrot Int'l, Inc.*, No. 300CV1457D, 2002 WL 1996561, at *12 (N.D. Tex. Aug. 26, 2002) (motion to exclude evidence presented by witness Newman denied without prejudice and reasoning that "[i]n view of the court's decisions today, which do not rely on evidence presented by Newman, it appears that this motion is substantially, if not entirely, moot"); *McGriff v. BankOne*, No. 3:99CV1542P, 2000 WL 1013933, at *7 (N.D. Tex. July 24, 2000) ("[T]he Court ... DENIES AS MOOT the objections to evidence upon which the Court did not rely ... [and]

Defendant's motion for leave to file additional evidence ....").

III. Summary Judgment

Plaintiffs move for summary judgment based exclusively on their passports issued after these cases commenced. *Gutierrez*, Dkt. No. 113 at 25 & n.15. Because Plaintiffs' passports were issued based on evidence of citizenship submitted to the State Department but not made part of the summary judgment record, the Court denies summary judgment.

A. Legal Standard

"Summary judgment is appropriate where the competent summary judgment evidence demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (citing *Bolton v. City of Dali.*, 472 F.3d 261, 263 (5th Cir. 2006)); *accord.* Fed. R. Civ. P. 56(c). "A genuine issue of material fact exists when the evidence is such that a reasonable [fact finder] could return a verdict for the non-movant." *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must view all evidence in the light most favorable to the non-moving party. *Brumfield*, 551 F.3d at 326 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)); *Piazza's Seafood World*, 448 F.3d at 752 (citation omitted); *Lockett v. Wal–Mart Stores, Inc.*, 337 F. Supp. 2d 887, 891 (E.D. Tex. 2004) (citation omitted). Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc, per curiam). Plaintiffs' claims under 8 U.S.C. § 1503(a) must be decided by this Court sitting as fact finder. "Although a district court considering motions for summary judgment in a non-jury case has 'somewhat greater discretion to consider what weight it will accord the evidence,' it is not free to disregard 'significant evidence demonstrating the existence of a genuine fact issue.' " *Sch. Bd. of Avoyelles Par. v. U.S. Dep't of Interior*, 647 F.3d 570, 584 (5th Cir. 2011) (quoting *Johnson v. Diversicare Afton Oaks, LLC*, 597 F.3d 673, 675 (5th Cir. 2010)).

***14** The party moving for summary judgment bears the "burden of showing this Court that summary judgment is appropriate." *Brumfield*, 551 F.3d at 326 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The burden of production a party must initially carry depends upon the allocation of the burden of proof at trial. *See Shanze Enters., Inc. v. Am. Cas. Co. of Reading*,—— F. Supp. 3d ——, 2015 WL 8773629, at *3 (N.D. Tex. Dec. 15, 2015) ("Each party's summary judgment burden depends on whether it is addressing a claim or defense for which it will have the burden of proof at trial."). "[I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Tesoros Trading Co. v. Tesoros Misticos, Inc.*, 10 F. Supp. 3d 701, 709 (N.D. Tex. 2014) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)) (emphasis

in *Fontenot*); *accord. Shanze Enters.*, —— F. Supp. 3d ——, 2015 WL 8773629, at *3.

Once the party seeking summary judgment has discharged its initial burden, the nonmovant must come forward with specific evidence to show that there is a genuine issue of fact. *Lockett*, 337 F. Supp. 2d at 891; *see also Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993). The non-movant may not merely rely on conclusory allegations or the pleadings. *Lockett*, 337 F. Supp. 2d at 891. Rather, it must cite specific facts identifying a genuine issue to be tried in order to avoid summary judgment. *See* Fed. R. Civ. P. 56(e); *Piazza's Seafood World*, 448 F.3d at 752; *Lockett*, 337 F. Supp. 2d at 891. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir. 1992)).

B. Analysis

A plaintiff seeking a declaration of nationality under 8 U.S.C. § 1503(a) receives a trial de novo. *See Patel v. Rice*, 403 F. Supp. 2d 560, 562 (N.D. Tex. 2005) (citing *Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985)). The Court sits as fact finder. *See Garcia v. Kerry*, 557 Fed.Appx. 304, 307–08 (5th Cir 2014) (per curiam, unpublished); *Herrin Motor Lines, Inc. v. Jarvis*, 156 F.2d 276, 278 (5th Cir. 1946). At trial, the "plaintiff bears the burden of establishing, by a preponderance of the evidence, that he is a United States national." *Patel*, 403 F. Supp. 2d at 562 (citing *Reyes v. Neelly*, 264 F.2d 673, 674–75 (5th Cir. 1959)).

The passports issued to the plaintiffs here list each holder's place of birth as Texas, and the issuance and expiration date on each demonstrates that it is valid for the maximum period allowed by law. *See Gutierrez*, Dkt. No. 110 Ex. C at 1 (passport of Plaintiff Gutierrez); *Gonzalez*, Dkt. No. 36 Ex. A (Plaintiff Gonzalez); *Gutierrez*, Dkt. No. 110 Ex. D at 2 (Plaintiff Tamez); *Gutierrez*, Dkt. No. 110 Ex. E at 2, 4 (Alcala Plaintiffs); *Gutierrez*, Dkt. No. 110 Ex. F (minor T.J.G., the real party in interest in *Arredondo)*. From the face of the passports in the summary judgment record, the Court finds that they satisfy the predicates for the federal statute providing that they have "the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General ...." 22 U.S.C. § 2705 (2012). Assuming, without deciding, that § 2705 applies at summary judgment in this proceeding under § 1503(a), the passports in the summary judgment record do not discharge Plaintiffs' initial burden to demonstrate the absence of a dispute of material fact on this record.

***15** The Fifth Circuit addressed whether a certificate of citizenship issued to a plaintiff suing under § 1503(a) precludes a district court from finding that the plaintiff is not a national of the United States in *Reyes v. Neelly*, 264 F.2d 673 (5th Cir. 1959). The record of the trial in *Reyes* showed that "the certificate of citizenship was based upon evidence furnished by plaintiff." *Id.* at 675. The Fifth Circuit held that the certificate "could have no greater standing or force than that evidence on which the determination was based." *Id.* Consequently, the Fifth Circuit affirmed the

district court's finding that the plaintiff was not a United States citizen, reasoning that "any force that [the certificate of citizenship] had has been completely dissipated by the evidence ... ; and ... with the finding of the district judge that the fact of plaintiffs birth in the United States, on which the certificate was purportedly based, does not exist, the proof failed, and the certificate of citizenship failed with it." *Id.*

The parties' repeatedly represent in the motions, responses, and replies now before the Court that the State Department issued each passport in the summary judgment record after reviewing evidence. *See, e.g., Gutierrez*, Dkt. No. 113 at 4–13. The predicate that the passports in the summary judgment record were "based on evidence furnished by plaintiff[s]" has, therefore, been established, *see Reyes*, 264 F.3d at 675, yet plaintiffs do not provide any citation to the supporting evidence the State Department had before it, *see Gutierrez*, Dkt. No. 113 at 25. As the Court could reasonably find that the passports carry no greater weight than the supporting evidence, *Reyes*, 264 F.3d at 675, plaintiffs have failed to carry their burden to prove their entitlement to relief under § 1503(a) beyond peradventure. *Cf. Patel*, 403 F. Supp. 2d at 563 (citing *Reyes* to support dictum that U.S. passport would not carry plaintiffs burden to persuade court that he is a U.S. citizen even if it had been valid at time of trial).

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Defendants' motion to dismiss these cases as moot, Gutierrez, Dkt. No. 109, and Plaintiffs' motion for summary judgment, Gutierrez, Dkt. No. 113. The Court **DENIES** the following motions in *Gutierrez* **AS MOOT**: Plaintiffs' Motion to Allow Discovery; Defendants' Motion to Dismiss as Moot; Defendants' Motion to Strike Plaintiffs' Argument and Evidence; Plaintiffs' Opposed Request for Judicial Notice; Defendants' Opposed Motion to Strick and for a Protective Order; and Plaintiffs' Amended Opposed Request for Judicial Notice, Dkt. Nos. 88, 107, 116, 132, 136, 137.

Because the common questions of law raised in these cases have been resolved, each case will henceforth proceed as a separate action. As such, the Court directs the Clerk to reassign *Arredondo*, No. 1:15–CV–19, to Judge Hanen. Separate orders will be entered in the other four consolidated cases.

It is so ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7742793

Footnotes

1 In one of the consolidated cases, the plaintiff sues as next friend of a minor. *Arredondo v. Wiesnet*, 1:15–CV–19, Dkt. No. 1 at 1. The Court's references to the plaintiffs encompass the real party in interest where appropriate.

2 This Court makes every reasonable effort to use the correct pronoun when referring to an individual. *See Alaniz v. H&H Farms, LLC*, No. B–09–113, 2010 WL 4064021, at *1 n.2 (S.D. Tex. Oct. 14, 2010) (Tagle, J.) ("With no other evidence of Jones's gender, the Court will give greater weight to the gender suggested by Jones, who is in the best position to

know, rather than Hutchison when undertaking the admittedly somewhat perilous task of selecting gendered pronouns herein."). The Court sometimes employs the male pronoun "him" or "his" to refer to male and female plaintiffs in these cases solely for ease of reference. *See, e.g., Womack v. Home Depot U.S.A., Inc.*, No. 3:06–CV–0285–D, 2007 WL 496660, at *1 n.2 (N.D. Tex. Feb. 17, 2007) (using collective term to refer to male and female parties aligned as plaintiffs and "us[ing] the male pronoun 'he' for ease of reference"); *Atkin v. Lincoln Prop. Co.*, 991 F.2d 268, 270 n.l (5th Cir. 1993) ("Atkin died November 1990 and his claim was pursued by his wife. For the sake of clarity, however, we will continue to sue male pronouns when referring to the claimant.").

3 The Immigration and Nationality Act defines a "national of the United States" as "a citizen of the United States" or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C.A. § 1101(a)(22) (2014).

4 The complaints describe these changes as correcting the Mexican birth record. *E.g., Tamez v. Kerry*, No. 1:14–CV–38, Dkt. No. 1 ¶. The Court's use of the term "change" should not be taken as implying anything about Plaintiffs' allegations or evidence.

5 When his deposition was taken, Rolbin served as Acting Director. *See Gutierrez*, Dkt. No. 50 App. A at 6:20–22. The designation "acting" has since become inapposite. *See Gutierrez*, Decl. of J. Rolbin ¶ 1, Sept. 8, 2014, Dkt. No. 68 Ex. A.

6 The document entered on the docket as entry 18 is a duplicate of the document docketed as entry 17.

7 The complaint in *Alcala* originally named a third plaintiff, I.A.A., a minor allegedly born in 2000. *Alcala*, Dkt. No. 1 ¶ 3. Given his age, this Court raised the question of I.A.A.'s capacity to sue in an order entered February 25, 2016. *Alcala*, Dkt. No. 39 at 1. A motion to dismiss I.A.A. voluntarily was filed in response, *Alcala*, Dkt. No. 41, which this Court granted, *Alcala*, Dkt. No. 42 at 1.

8 Defendants filed motions to dismiss as moot in all but one of the consolidated cases. The Court explained in its consolidation order that "the parties in *Tamez v. Kerry*, No. 1:14-CV-38, have moved to stay that case pending resolution of the mootness question in *Gutierrez*, suggesting that *Gutierrez* presents common mootness questions." *Gutierrez*, Dkt. No. 77 at 1.

9 Defendants filed this paper twice. *Gutierrez*, Dkt. Nos. 135, 136. They labeled it once as a response, *Gutierrez*, Dkt. No. 135, on the docket sheet and once as a motion, *Gutierrez*, Dkt. No. 136. Plaintiffs similarly double-filed their response and alternative motion to enlarge the scope of discovery filed June 1, 2015. *Compare Gutierrez*, Dkt. No. 85 *with Gutierrez*, Dkt. No. 88. Filing a response that includes an alternative motion twice runs the risk of creating unnecessary confusion. *Cf.* Fed. R. Civ. P. 1. The Court encourages the parties to identify responses seeking relief in the alternative on the docket with a compound label rather than filing the paper twice.

10 This Court applied the "lighter burden" of *Sossamon* in its order entered in *Gutierrez* on August 22, 2014. *See Gutierrez*, Dkt. No. 64 at 12. That order predates *Fontenot*, however.

11 No party discusses these factors in the equitable context, however, nor cites authority concerning the exercise of discretion to grant a declaratory remedy. Accordingly, the Court will not address the issue sua sponte.

12 The Court quoted the following finding as illustrative:

> In the Court's order of September 12, 2012, the Court ordered Defendants to answer three questions. Dkt. No. 174 at 2—3. The first of these questions asked "[w]hat are the criteria for determining whether DOS will reevaluate a decision to issue a passport made on the grounds that the individual has met his burden of proof of United States citizenship under 22 C.F.R. § 51.40?" *Id.* at 2. In response, Rolbin stated, "DOS reevaluates the decision to issue a passport when it subsequently learns of new evidence that was not before it at the time of passport issuance and sufficiently contradicts the individual's claim to U.S. citizenship, or that presents another ground to reevaluate the decision to issue a passport." Dkt. No. 178, Declaration of Jonathan M. Rolbin at 2, p. 2. The Court reads this statement to say that, once DOS issues a passport, the decision to so issue the passport is left semi-open subject to DOS revoking the passport in the future on the basis of new evidence controverting the holder's citizenship. However, in cases in which an individual's passport application is denied, such decision is final unless the applicant re-engages DOS and

> provides new evidence in support of her citizenship. *Id.*, at 2, p.4 ("In addition to reevaluations that occur in context of litigation DOS also reevaluates an individual's application in other situations. For example, at any time following a denial, an applicant may always submit a new application, and may include any evidence not previously provided. Any application, even one previously denied, is always re-adjudicated in full based on the evidence presented and available at the time of that application."). Thus, the distinction between a revocation of an existing passport and an issuance on a previously denied passport application is the scope of DOS's ability to continue to evaluate evidence of an applicant's or holder's citizenship; in the former DOS retains plenary authority to conduct almost rolling review of the evidence of a holder's citizenship (as appeared in *Guerrero*), whereas in the latter, DOS engages in episodic review of evidence of an applicant's citizenship. This distinction is crucial to the voluntary act exception analysis in that episodic review does not permit DOS to return to previous conduct; there is no ongoing evaluation. However, in the cases involving revocation, once a revocation has occurred, as in *Guerrero*, the issuance of passport following revocation is a return to the semi-open status in which a holder's status is constantly under review. At that point, DOS's conduct in its evaluation is being "returned to" and, unless the Defendant can demonstrate with absolute clarity that a return to any allegedly wrongful analysis of the evidence of a holder's citizenship cannot reasonably be expected to recur, such voluntary act of issuing a passport to an individual whose passport was previously revoked does not moot a case.

Gutierrez, Dkt. No. 64 at 10–11 (quoting *Castro,* No. 1:09–CV–208, Slip Op. at 19).

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