The Honorable David G. Estudillo

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Ilai Kanutu KOONWAIYOU, Plaintiff, v. Anthony BLINKEN, Secretary of State; U.S. DEPARTMENT OF STATE, Defendants.	Case No. 3:21-cv-05474-DGE **RESPONSE TO MOTION TO DISMISS** Noting Date: November 19, 2021 **Oral Argument Requested**

INTRODUCTION

Plaintiff Ilai Kanutu Koonwaiyou (Mr. Koonwaiyou) is a noncitizen currently detained at the Northwest Detention Center awaiting deportation despite his claim to U.S. national status. He was born in 1967 to a noncitizen father and American Samoan mother, who later became a U.S. national pursuant to Public Law 99-396. That law permitted Mr. Koonwaiyou's mother to acquire U.S. national status and specified that once she established eligibility, she would be considered a national "at [her] birth." 8 U.S.C. § 1408. As the Ninth Circuit has explained, such language "describes the point at which one's [nationality] status, if successfully established, takes effect." *Friend v. Holder*, 714 F.3d 1349, 1352 (9th Cir. 2013). Because Mr. Koonwaiyou has pleaded facts that show his mother obtained U.S. nationality status and was considered a national at her birth, the same is true for Mr. Koonwaiyou, who has lived in American Samoa

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and the United States for his entire life. Accordingly, this Court should deny Defendants' motion to dismiss and make clear the facts pleaded in the complaint establish that Mr. Koonwaiyou is a U.S. national, and as such, can be neither detained nor deported.

BACKGROUND

Plaintiff Ilai Kanutu Koonwaiyou is a noncitizen who was born in Western Samoa on November 19, 1967, to a Western Samoan father and his mother, Feagiai Uti (Ms. Uti). Dkt. 6 ¶¶ 22–23. Ms. Uti was born on October 12, 1943, in Lotofaga, Western Samoa, to a Western Samoan father and an American Samoan mother. *Id.* ¶ 22. She lived in American Samoa for much of her life, including at least seven years from 1958 to 1967. *Id.*

At the time of Mr. Koonwaiyou's birth, Ms. Uti traveled to Western Samoa for approximately two weeks to give birth before returning with him to American Samoa. *Id.* ¶ 23. Thereafter, Mr. Koonwaiyou spent his entire life in American Samoa before arriving in the mainland United States. *Id.*

In 1986, Congress enacted Public Law 99-396, which amended 8 U.S.C. § 1408, the statutory provision that determines the circumstances by which a person is considered a U.S. national "at birth." Pub. L. No. 99-396 § 15(a), 100 Stat. 837, 842–43 (1986) (codified at 8 U.S.C. § 1408(4)). Prior to its enactment, the statute required a person born abroad to have two U.S. national parents to obtain derivative nationality at birth. *See* Nationality Act of 1940, Pub. L. No. 76-853, § 204(b), 54 Stat. 1137, 1139. Ms. Uti was later declared to be a U.S. national pursuant to 8 U.S.C. § 1408(4) at an unknown date, but after the amendment creating § 1408(4) came into effect in 1986 and before 2006. Dkt. 6 ¶ 24.

In 2006, Mr. Koonwaiyou was placed in removal proceedings in Eloy, Arizona, where he asserted his claim that as a U.S. national he is not removable. *Id.* ¶ 27. An Immigration Judge (IJ)

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terminated his removal proceedings, finding that Mr. Koonwaiyou was born outside of the United States to a U.S. national mother who, prior to his birth, had met the physical presence requirements of 8 U.S.C. § 1408(4)(A) and (B), rendering Mr. Koonwaiyou a U.S. national. *Id.* The Department of Homeland Security (DHS) appealed to the Board of Immigration Appeals (BIA). *Id.* ¶ 28. The BIA subsequently remanded the case back to the IJ to consider the retroactivity of § 1408(4) and whether Mr. Koonwaiyou's nationality claim was undermined because he had not applied for a U.S. passport or Consular Report of Birth Abroad. *Id.* On remand before the IJ, the parties jointly moved to administratively close the proceedings, as Mr. Koonwaiyou was serving a sentence in prison. *Id.* ¶ 29. The IJ agreed and administratively closed the proceedings in 2008. *Id*.

In 2019, after Mr. Koonwaiyou finished serving his sentence, DHS moved to reopen removal proceedings in Tacoma, Washington. *Id.* ¶ 30. Mr. Koonwaiyou once more asserted U.S. nationality, moving to terminate the proceedings. *Id.* ¶ 31. This time, however, the IJ denied Mr. Koonwaiyou's motion and ordered him removed to Western Samoa. *Id.* Mr. Koonwaiyou appealed that decision to the BIA, which dismissed his appeal on December 4, 2019. *Id.* ¶ 32. Mr. Koonwaiyou subsequently filed a Petition for Review with the Ninth Circuit Court of Appeals, which dismissed his petition on December 4, 2020. *See Koonwaiyou v. Barr*, 830 F. App'x 566, 568 (9th Cir. 2020). The Ninth Circuit denied the petition by interpreting subsection 15(b) of Public Law 99-396 to require those born after the amendment's enactment to first seek approval of their U.S. nationality from the Secretary of State, either by applying for a U.S. passport or Consular Report of Birth Abroad. *Id.* at 567.

On January 21, 2021, following the Ninth Circuit's order, Mr. Koonwaiyou applied for a certificate of noncitizen national status with the State Department. Dkt. 6 ¶ 34. The State

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Department denied the application on February 26, 2021. *Id.* ¶ 35. According to the State Department, Mr. Koonwaiyou is not a U.S. national, and cannot become one, because his U.S. national mother "did not acquire nationality until after [his] birth." *Id.* Mr. Koonwaiyou subsequently filed this lawsuit, asserting the plain language of § 1408 renders him a national because § 1408 deems qualifying individuals—including his mother—as "nationals . . . of the United States at birth." Mr. Koonwaiyou remained detained throughout his removal proceedings as he pursued his nationality claim. He continues in detention today, as DHS has not yet been able to arrange for his removal to Western Samoa.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), Mr. Koonwaiyou need only show that the "complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation omitted).

ARGUMENT

I. Mr. Koonwaiyou Has Adequately Pleaded a Claim Pursuant to 8 U.S.C. § 1503(a).[1]

Mr. Koonwaiyou has stated a plausible claim for a declaration of U.S. nationality under 8 U.S.C. § 1503(a). As Mr. Koonwaiyou alleged in his complaint, he has been a U.S. national since birth, yet was denied a certificate of noncitizen national status from Defendants based on their erroneous interpretation of 8 U.S.C. § 1408(4), which confers nationality "at birth" on

[1] Mr. Koonwaiyou pleaded his Administrative Procedure Act (APA) claim in the alternative. Because Defendants have not moved to dismiss Mr. Koonwaiyou's § 1503 claim on jurisdictional grounds, *see* Dkt. 12-1 at 2 n.2, he does not contest Defendants' assertion that 8 U.S.C. § 1503(a) provides an adequate remedy. As a result, he will agree to the dismissal of the APA claim on the condition that he may reassert the claim if Defendants later raise an argument that federal courts lack subject matter jurisdiction over his § 1503 claim.

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eligible individuals. A plain reading of that statute demonstrates that Mr. Koonwaiyou's mother has been a U.S. national since birth, and the facts show she otherwise met the statute's physical presence requirements. Accordingly, Mr. Koonwaiyou also satisfies the statute's requirements, and is therefore entitled to a declaration of U.S. nationality from this Court.

Mr. Koonwaiyou claims nationality pursuant to 8 U.S.C. § 1408(4). Dkt. 6 ¶ 26. That statute decrees that:

> [T]he following shall be nationals . . . of the United States at birth:
>
> ….
>
> (4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years--
>
> (A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and
>
> (B) at least five years of which were after attaining the age of fourteen years.

8 U.S.C. § 1408(4). As mentioned above, the current version of § 1408(4) was enacted in 1986 by section 15(a) of Public Law 99-396. 100 Stat. at 842–43. Prior to that amendment, the statute required that a person born abroad have two U.S. national parents in order to derive nationality. *See* Nationality Act of 1940 § 204(b), 54 Stat. at 1139.

In amending § 1408, Congress specified that it should apply retroactively in the sense that once nationality is established, the individual is considered to have been a national from birth. Section 15(b) of Public Law 99-396 makes this clear, explaining that [t]he amendment made by subsection (a) shall apply to persons born before, on, or after the date of the enactment of this Act." 100 Stat. at 843. Section 15(b) also included a procedural requirement for those born before the amendment's enactment, requiring them to obtain confirmation of their U.S. nationality from the Secretary of State by establishing that they meet § 1408(4)'s requirements.

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Id. ("[T]he status of a national of the United States shall not be considered to be conferred upon the person until the date the person establishes to the satisfaction of the Secretary of State that the person meets the requirements of section [1408(4).]"). However, once that procedural hurdle is met, section 15(b)'s express language mandates that individuals meeting § 1408(4)'s requirements be considered nationals "at birth."

Mr. Koonwaiyou's complaint states facts sufficient to demonstrate that he has met § 1408(4)'s requirements, and that he therefore asserts a plausible claim for relief from Defendants' erroneous denial of his certificate of noncitizen national status under 8 U.S.C. § 1503(a). As Mr. Koonwaiyou explained, his mother was declared a U.S. national pursuant to § 1408(4) between 1986 and 2006. Dkt. 6 ¶ 24. Section 15(b) of Public Law 99-396 guarantees that, after meeting that provision's procedural requirement, Ms. Uti benefitted fully from § 1408(4)'s grant of nationality "at birth." Consequently, once Ms. Uti complied with the procedural requirements and the Secretary of State verified her status, she was recognized as a U.S. national "at birth," which of course occurred prior to Mr. Koonwaiyou's own birth. *See id.* ¶ 23. Because she additionally met § 1408(4)'s continuous physical presence requirements, *id.* ¶ 22, Mr. Koonwaiyou also meets the statute's requirements and is eligible to be conferred status as a U.S. national, *id.* ¶ 26.

Defendants rely on section 15(b) of Public Law 99-396 to argue that, because Mr. Koonwaiyou's mother was not *recognized* as a U.S. national until after his birth, she was not a U.S. national at the time of his birth. Consequently, in their view, he does not satisfy § 1408(4)'s requirements. Yet, as explained above and in Mr. Koonwaiyou's complaint, section 15(b) explicitly states that § 1408(4) applies to those born before its enactment. Pub. L. No. 99-396 § 15(b), 100 Stat. at 843. And in turn, § 1408(4) explains that those who meet its requirements are

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deemed U.S. nationals "at birth." Defendants' conclusion that the statute does not grant Ms. Uti nationality "at birth" ignores "clear statutory language to the contrary," Dkt. 12-1 at 8, "in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Consequently, Defendants commit the very act of which they accuse Mr. Koonwaiyou by "urg[ing] this Court to ignore" the statute's text designating individuals as nationals "at birth." Dkt. 12-1 at 8.

Defendants attempt to sidestep this problem by asserting that the language "at birth" is inapplicable to Ms. Uti because Congress did not provide a clear statement of intent that this specific provision of the statute should be applied retroactively. *Id.* But this argument fails to account for section 15(b)'s "clear statement" that § 1408(4) *does* apply retroactively to those born before its enactment. Pub. L. No. 99-396 § 15(b), 100 Stat. at 843 ("The amendment made by subsection (a) shall apply to persons born before, on, or after the date of the enactment of this Act."). Indeed, Defendants themselves concede that "Congress stated that persons born *before*, on, or after the date § 1408 was enacted are eligible to benefit from the provision." Dkt. 12-1 at 8 (emphasis added) (citing Pub. L. No. 99-396 § 15(b), 100 Stat. at 843). Yet they confusingly attempt to limit this language by suggesting that section 15(b)(1)'s additional procedural requirement for those born prior to enactment indicates the phrase "at birth" does not apply to persons born before the enactment date. *Id.* at 8–9. Indeed, their suggestion that the statute applies retroactively, *except* for the words "at birth," impermissibly seeks to rewrite the statute. But Section 15(b) plainly states that it applies to those born before its enactment. The only qualification is the procedural hurdle in subsection (b)(1), which explains what an individual must accomplish to verify that they indeed qualify pursuant to the terms of the statute.

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Faced with a similar case, the Ninth Circuit has held that a person's acquisition of a citizenship or nationality can be retroactive to the date of birth so long as (1) that person is otherwise eligible to acquire status and (2) Congress included language specifying that the status relates back to birth once obtained. In *Friend v. Holder*, 714 F.3d 1349 (9th Cir. 2013), the Court of Appeals confronted a case involving the Nationality Act of 1940. The noncitizen there argued that the statute's provisions regarding children born out of wedlock applied retroactively to people born before the Act's effective date. The court rejected that claim because the statute "[did] not itself say anything about applying retroactively to individuals born before the 1940 Act's effective date." 714 F.3d at 1351. Here, of course, that objection does not apply, as section 15(b) of Public Law 99-396 states that the statute applies to people born before the date of enactment. *See* Pub. L. No. 99-396 § 15(b), 100 Stat. at 843.

The *Friend* court also went on to analyze the statute's language that allowed a child born out of wedlock to obtain citizenship long after their birth. The statute provided that for an individual who satisfied the eligibility requirements, that person would be considered a citizen "as of the date of [their] birth." 714 F.3d at 1351 (quoting Nationality Act of 1940 § 205, 54 Stat at 1139). The court rejected the contention that this language made the statute retroactive to people born before the statute's date of enactment. *Id.* at 1352. However, it explained that this language *was* retroactive in the sense that it "describes the point at which one's citizenship status, if successfully established, takes effect." *Id.* So too here: just like the language the Ninth Circuit interpreted in *Friend*, § 1408's use of the phrase "at birth" explains when "one's [nationality] status, if successfully established, takes effect." *Id.*[2]

[2] Furthermore, this interpretation is consistent with other areas of immigration law. For example, in the cases of refugee, asylee, and Cuban adjustment of status, the status of lawful permanent resident is conferred upon an individual on the date their application for this status is approved,

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Section 15(b)'s procedural requirement does not compel a different conclusion. Contrary to Defendants' assertion, Mr. Koonwaiyou does not urge this Court to ignore that provision's requirement that those born *before* the enactment date first establish their eligibility for nationality under § 1408(4) to the Secretary of State. Rather, Mr. Koonwaiyou has explained that section 15(b) merely outlines the process by which individuals obtain official recognition that they are in fact a U.S. national. Dkt. 6 ¶¶ 17–18. Applying this process to this specific category of U.S. nationals is logical, as such individuals are newly granted benefits and privileges of U.S. nationality they did not previously possess. This procedure therefore ensures that those within this group do not unilaterally claim those benefits without first permitting the Secretary of State to verify their eligibility. This reading is also supported by section 15(b)(2)'s additional instruction that such individuals are ineligible to vote in any American Samoan general election before January 1, 1987. Pub. L. No. 99-396 § 15(b)(2), 100 Stat. at 843. That provision simply underscores that Congress instituted the procedural requirement to ensure eligibility to claim the benefits commensurate with nationality.

By contrast, Defendants' argument that section 15(b) limits the time frame of U.S. nationality status as beginning on the date the Secretary of State confirms an individual's eligibility, rather than at birth, *id.* at 9, violates the statute's plain language. It also violates traditional rules of statutory interpretation. Such an interpretation renders inoperative and superfluous an essential phrase of § 1408(a) as to these noncitizens, nullifying the statute's bestowal of nationality "at birth." *See, e.g.*, *Colautti*, 439 U.S. at 392; *City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 870 (9th Cir. 2002) ("[I]t is a cardinal principle of statutory

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but the status is retroactively applied (or backdated) to an earlier date. *See* 8 U.S.C. § 1159(a)(2); *id.* § 1159(b); Cuban Adjustment Act, Pub. L. No. 89-732 § 1, 80 Stat. 1161, 1161 (1966); *Matter of Carrillo*, 25 I. & N. Dec. 99, 101 (BIA 2009).

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construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 21 (2001))); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (noting that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme"). The express terms of the statute guarantee that, once an individual demonstrates their eligibility for U.S. nationality, they are recognized to have acquired such status "at birth." 8 U.S.C. § 1408. Verification of U.S. nationality by the Secretary of State is merely confirmation that the requirements of § 1408(4) have been met; once that procedure has been satisfied, the individual's U.S. national status dates back to their birth. *See Friend*, 714 F.3d at 1352. Defendants' contrary interpretation thus fails to give effect to all the terms in the statute, "discard[ing] this provision of law." Dkt. 12-1 at 9.

Finally, the deliberate placement of § 1408(4) within Part 1 of Subchapter III of Chapter 12 of Title 8 further reflects Congress's intent to vest national status at birth rather than on the date that an individual meets section 15(b)'s procedural requirement. Part 1 of Subchapter III relates to nationality and citizenship at birth, while Part 2 addresses naturalization, or the process of obtaining becoming a member of the national community after birth. These distinctions are important, as "[t]here are two sources of citizenship, and two only: birth and naturalization." *Acevedo v. Lynch*, 798 F.3d 1167, 1169 (9th Cir. 2015) (citation omitted). As a result, when an individual establishes citizenship under Part 1—in other words, not through naturalization—that citizenship is backdated to an individual's date of birth. *See, e.g.*, *Friend*, 714 F.3d at 1352; *United States v. Smith-Baltiher*, 424 F.3d 913, 920–21 (9th Cir. 2005) ("Smith was entitled to U.S. citizenship, along with its rights and privileges, from the moment of birth, not upon the

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issuance of a certificate of citizenship or any other formal determination by the INS or any other government official.").

This principle further informs what Congress intended when it drafted § 1408. Where Congress places a statute within the overall legislative scheme is a "[f]amiliar interpretive guide[]" that, as applied here, instructs Congress considered nationality obtained under § 1408 to apply at birth. *Yates v. United States*, 574 U.S. 528, 539–40 (2015) (looking to placement of statute at issue within U.S. Code to help infer the statute's meaning). The same is true of the section's title: "Nationals but not citizens of the United States at birth." Like the section's placement within the INA, "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998) (internal quotation marks omitted). Case law highlights these important distinctions and what they mean for Congress's intent. As with citizenship, courts have consistently explained that one may become a U.S. national "only through birth or by completing the process of becoming a naturalized citizen." *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 969 (9th Cir. 2003) There is "no provision for a third route to nationality." *Id.* at 968; *see also In Re Navas-Acosta*, 23 I. & N. Dec. 586, 587 (BIA 2003) (holding that "birth and naturalization are the only means of acquiring United States nationality under the [Immigration and Nationality] Act"). Indeed, "a person attains national status primarily through birth." *Perdomo-Padilla*, 333 F.3d at 968 (citation omitted). Given that Congress did not prescribe in § 1408(4) a third method of obtaining nationality other than through birth or naturalization, its plain language providing for nationality "at birth" must be given effect.

Accordingly, once the Secretary of State recognized Ms. Uti's eligibility for nationality pursuant to § 1408(4) and conferred this status upon her, that national status dated back to her

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birth. Because Mr. Koonwaiyou was therefore born to a noncitizen and a U.S. national mother who satisfied § 1408(4)'s physical presence requirements, he is a U.S. national. Consequently, he has adequately pleaded a claim for declaratory relief under 8 U.S.C. § 1503(a).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion.

DATED this 15th day of November, 2021.

s/ Matt Adams
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 15th day of November, 2021.

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