UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

BRIAN C. SCHMITT
P.O. Box 540 (419 Main St.)
New Windsor, MD 21776
Carroll County Maryland;

BRUCE A. HAKE
P.O. Box 540 (419 Main St.)
New Windsor, MD 21776
Carroll County Maryland;

BRUCE A. HAKE, P.C.
dba Hake & Schmitt
P.O. Box 540 (419 Main St.)
New Windsor, MD 21776
Carroll County Maryland

Plaintiffs,

v.

JEH JOHNSON, Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

LEON RODRIGUEZ, Director
U.S. Citizenship and Immigration Services
Office of the Director MS 2000
20 Massachusetts Ave., N.W.
Washington, D.C. 20529

LAURA DAWKINS, Chief, Regulatory Coordination Division, Office of Policy and Strategy, Department of Homeland Security, U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

Civ. No.

JOHN KERRY,)
U.S. Secretary of State)
U.S. Department of State)
2201 C Street N.W.)
Washington, D.C. 20520)
)
LORETTA E. LYNCH,)
Attorney General of the United States)
U.S. Department of Justice)
950 Pennsylvania Ave., N.W.)
Washington, D.C. 20530)
)
Defendants.)
______________________________________)

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

Plaintiffs by their undersigned lawyer allege as follows:

I. Parties

1. Plaintiff Brian C. Schmitt ("Mr. Schmitt") is a citizen of the United States. He is a Plaintiff in his capacity as a lawyer and a business owner. His business address is P.O. Box 540 (419 Main St.), New Windsor, MD 21776 (Carroll County).

2. Plaintiff Bruce A. Hake ("Mr. Hake") is a citizen of the United States. He is a Plaintiff in his capacity as a lawyer and a business owner. His business address is P.O. Box 540 (419 Main St.), New Windsor, MD 21776 (Carroll County).

3. Bruce A. Hake, P.C. is a Maryland Professional Corporation owned by Plaintiffs Brian C. Schmitt and Bruce A. Hake. The firm does business as Hake & Schmitt, a trade name registered with the State of Maryland. The corporation's business address is P.O. Box 540 (419 Main St.), New Windsor, MD 21776 (Carroll County).

4. Defendant Jeh Johnson is the United States Secretary of Homeland Security, the head of the United States Department of Homeland Security, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of Homeland Security, Washington, D.C. 20528.

5. Defendant Leon Rodriguez is the Director of the United States Citizenship and Immigration Services ("USCIS"), which is part of the Department of Homeland Security and is an agency of the United States. He is named in his official capacity. His address is: Office of the Director MS 2000, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave., N.W., Washington, D.C. 20529.

6. Defendant Laura Dawkins is the Chief, Regulatory Coordination Division, Office of Policy and Strategy, Department of Homeland Security, an agency of the United States. She is named in her official capacity. Her address is: U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, N.W., Washington, D.C. 20529.

7. Defendant John Kerry is the United States Secretary of State, the head of the United States Department of State, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of State, 2201 C Street N.W., Washington, D.C. 20520.

8. Defendant Loretta E. Lynch is the Attorney General of the United States. She is named in her official capacity. Her address is: U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530.

II. Jurisdiction and Venue

9. This is an action to review administrative agency action of the U.S. Citizenship and Immigration Services (USCIS). The action arises under the Immigration and Nationality Act of 1952, as amended (the "Act"), 8 U.S.C. § 1101 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. Subject matter jurisdiction is based on 28 U.S.C. §§ 1331 and 1361 (mandamus). This Court may grant relief pursuant to the Act, the APA, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., 28 U.S.C. § 1361, and 28 U.S.C. § 1651 (the All Writs Act).

10. Defendants Jeh Johnson, Leon Rodriguez, and Laura Dawkins had duties to act in conformity with the Constitution, statute, the regulations, and the legislative history in promulgating the new USCIS Form I-612.

11. Venue is proper in the United States District Court for the District of Maryland under 28 U.S.C. §§ 1391(e) and 1402(a)(1), because all plaintiffs reside in the district and the United States is a defendant.

III. Introduction and Legal Background

12. This section of the complaint gives a brief introduction of what happened and what is at stake, then a summary of the legal procedures involved.

13. Many persons admitted to the United States in J-1 or J-2 status under 8 U.S.C. § 1101(a)(15)(J) are subject to the two-year foreign residence requirement of 8 U.S.C. § 1182(e).

14. Persons subject to that requirement have certain disabilities, including the inability to apply for an H or L visa stamp, the inability to apply for change of status, and the

inability to apply for permanent residence or an immigrant visa. See 8 U.S.C. §§ 1182(e) and 1258.

15. 8 U.S.C. § 1182(e) sets forth three reasons why a J-1 or J-2 nonimmigrant can become subject to the foreign residence requirement, and it sets forth four ways in which such a person can obtain a waiver of the requirement.

16. Two of those waiver categories (exceptional hardship and persecution) require filing of a form called the I-612 with the USCIS. The other two waiver categories (no objection and interested government agency) do not involve the I-612 nor any other kind of USCIS application or petition form.

17. The law firm of Hake & Schmitt has concentrated on Form I-612 hardship and persecution waiver applications for more than 20 years. On information and belief, Hake & Schmitt has filed more I-612s than any other law firm in the world.

18. A new I-612 form went into effect. It was required to be used on or after September 24, 2015. The *Federal Register* notice and request for comments on the proposed changes to Form I-612 were published at 79 Fed. Reg. 53720 (September 10, 2014).

19. Hake & Schmitt was unaware of the *Federal Register* notice and it submitted comments to various USCIS officials on September 29, 2015. The firm insisted that the new form either be withdrawn or revised in accordance with said comments or litigation would commence. This letter was mailed to Defendant Laura Dawkins, Chief, Regulatory Coordination Division, DHS (among others).[1] Hake & Schmitt has yet to receive a response.

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[1] A copy of this letter was also mailed to the following agency officials: Jeh Johnson, Secretary of Homeland Security; Leon Rodriguez, Director, USCIS; Maria M. Odom, Office of the Citizenship and Immigration Services Ombudsman, Department of Homeland Security; and

20. The USCIS does not have legal authority for many of the changes on the new form, and some of the changes on the form are unconstitutional and unlawful.

21. The form's acknowledgment of appointment at USCIS Application Support Center is irrelevant, overbroad, and unnecessary. The new acknowledgment states:

> ***Acknowledgment of Appointment at USCIS Application Support Center***
>
> I, ____, understand that the purpose of a USCIS ASC appointment is for me to provide my fingerprints, photograph, and/or signature and to re-affirm that all of the information in my application is complete, true, and correct and was provided by me. I understand that I will sign my name to the following declaration which USCIS will display to me at the time I provide my fingerprints, photograph, and/or signature during my ASC appointment:
>
> ***By signing here, I declare under penalty of perjury that I have reviewed and understand my application, petition, or request as identified by the receipt number displayed on the screen above, and all supporting documents, applications, petitions, or requests filed with my application, petition, or request that I (or my attorney or accredited representative) filed with USCIS, and that all of the information in these materials is complete, true, and correct.***
>
> I also understand that when I sign my name, provide my fingerprints, and am photographed at the USCIS ASC, I will be re-affirming that I willingly submit this application; I have reviewed the contents of this application; all of the information in my application were [sic] provided by me and all supporting documents submitted with my application are complete, true, and correct; and if I was assisted in completing this application, the person

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Kathy A. Baran, Director of the USCIS California Service Center (CSC). Kathy Baran is the Director of the service center that adjudicates all I-612 waiver applications. The CSC returned the letter to our firm on October 2, 2015 indicating that we must communicate with the National Customer Service Center. We re-sent the letter to the CSC indicating that it was personal and confidential for Kathy Baran. The CSC returned the letter again on December 9, 2015.

> assisting me also reviewed this **Acknowledgment of Appointment at USCIS Application Support Center** with me.

New I-612 at 5.

22. On information and belief, applicants for I-612 hardship and persecution waiver applications have never had to undergo biometrics appointments at a USCIS ASC.

23. The new I-612 instructions, on page 2, state that the USCIS "may" require a biometrics service appointment. We have never seen this happen in more than 20 years of concentrating in this area, although USCIS has general regulatory authority to require an ASC appointment for any applicant, petitioner, beneficiary, or sponsor. 8 C.F.R. § 103.2(b)(9).

24. The following language is overbroad and improperly intrudes into the lawyer-client relationship: "I will be re-affirming that I willingly submit this application; I have reviewed the contents of this application; all of the information in my application were[2] provided by me and all supporting documents submitted with my application are complete, true, and correct. . . ." This language interferes with the lawyer's ability to gather documents for an I-612 hardship or persecution waiver application.

25. One demonstrative example of the improper intrusion is that this law firm routinely gathers background country conditions evidence for many of our cases, including official U.S. Government reports. We frequently gather I-94 data on the U.S. Customs and Border Patrol (CBP) online system. We produce a comprehensive annotated table of exhibits for most of our cases. We also produce a lawyer letter for every case. That letter summarizes the main features of the case, cites relevant administrative and federal court decisional law, and

[2] This is a grammatical error. It should read "was" not "were."

makes legal arguments. A non-lawyer layperson would not have the capability to generate this kind of table of exhibits or lawyer letter. Thus, the new attestation clause harms a client's ability to obtain zealous representation in I-612 hardship and persecution waiver applications.

26. The new attestation clause interferes with the I-612 hardship or persecution waiver applicant's right to representation. 8 C.F.R. § 103.2(a)(3). It also interferes with the I-612 applicant's constitutional right to representation.

27. The new ASC Acknowledgment requires the applicant to review the entire contents of the application prior to making the new re-affirmation, as well as when signing the Form I-612. This now requires the lawyer to prepare and send the entire contents of the application to the client at least once on the eve of filing. If the applicant returns new materials, the lawyer will have to incorporate those and send the entire application back to the applicant yet again for certification.

28. This law firm historically has sent the affidavits and forms for signature. The applicant will send those back with any new documents they have obtained. The new form requires radically revised procedures that are an unduly burdensome intrusion into the lawyer's time and also into the client's time.

29. Such an intrusion into a lawyer's time may reduce the number of waiver cases the lawyer can handle. Thus, the new ASC Acknowledgment can reduce access to lawyers who handle Form I-612 applications. In turn, that will reduce access to the benefits of a successful Form I-612 waiver application. This will cause unwarranted economic and psychological harm to both the clients and the lawyers.

30. An ASC appointment for reviewing and reaffirming the already-filed waiver application is also problematic because the applicant and ASC will not have a copy of the application in front of them. Indeed, the USCIS California Service Center frequently removes binders and rearranges materials in the application. It would be inappropriate to ask an applicant, who has already certified that the contents of the application are true, accurate, and complete, to do so again after the government has initiated the adjudication of the application.

31. The reaffirmation step is also inappropriate because there is a lapse of time between filing and the ASC appointment. An I-612 hardship or persecution waiver applicant is required to notify DHS of changed circumstances material to his or her pending application. See 22 C.F.R. § 41.63(f). An applicant could have any number of non-material or material changes in circumstances from filing to the date of the ASC appointment notice that would make it so the applicant cannot re-affirm that all of the information in the application is still true.

32. The new Applicant's Certification on page 6 states, in pertinent part:

> I furthermore authorize release of information contained in this application, in supporting documents, and in my USCIS records to other entities and persons where necessary for the administration and enforcement of U.S. immigration laws.

New I-612 form.

33. A blanket authorization for the release of such information is inappropriate and could violate the Privacy Act of 1974 in particular cases. See 5 U.S.C. § 552a.

34. One example of a potential Privacy Act violation is that information about a U.S. citizen qualifying relative's medical condition should not necessarily be released to any other federal government agency under the Privacy Act.

35. As another example, the release of materials from an I-612 persecution waiver application could endanger the lives of the applicant, the applicant's family, and/or others not related to the applicant. This is true even if such a release could be said to be necessary to the administration or enforcement of U.S. immigration laws.

36. It is inappropriate to have an applicant execute a blanket release covering a U.S. citizen relative. If executed, the release would not comply with the Privacy Act, because that statute requires the U.S. citizen to personally authorize the release.

37. The new Applicant's Certification on page 6 continues, in pertinent part:

> I certify, under penalty of perjury, that under the laws of the United States of America, that the information in my application and any document submitted with my application were provided by me and are complete, true, and correct.

New Form I-612.

38. Lawyers who represent applicants will frequently submit lawyer letters and other materials summarizing the case and cataloging the evidence. Such letters may included citations to legal authority and legal arguments not provided by the applicant. In 100% of I-612 cases it is impossible for any applicant represented by a lawyer to truthfully sign this certification.

39. Portions of the new Preparer's Certification are overbroad and unnecessary. The new Preparer's Certification states, in pertinent part:

> I completed this application based only on the responses the applicant provided me. After completing the application, I reviewed it and all of the applicant's responses with the applicant who agreed with every answer on the application.

New Form I-612.

40. A competent immigration lawyer with experience in I-612 hardship and persecution waiver applications will rely on materials outside of responses provided by an applicant. For example, the lawyer will cite decisional law and other legal authority, as well as make legal arguments. The lawyer may supply testimony from a non-applicant, such as a spouse, friend, colleague, neighbor, or expert physician. The lawyer will find good background evidence on the Internet, such as additional information about a client's medical condition. These materials are clearly not responses solely provided by the applicant.

41. Properly prepared Form I-612 hardship and persecution waiver applications can run to hundreds of pages. It would be impossible for the lawyer to review with the client every single detail out of hundreds of pages of evidence. Any effort to do that would be incredibly wasteful and inefficient. That demand interferes with the lawyer-client relationship. That demand reduces access to counsel and ultimately reduces access to the benefits of a successful I-612 waiver application.

42. The Preparer's Certification's "read" requirement is improper. The new Preparer's Certification continues, in pertinent part:

> I have also read the Acknowledgment of Appointment at USCIS Application Support Center to the applicant and that applicant has informed me that he or she understands that ASC Acknowledgment.

New Form I-612.

43. The USCIS does not have authority to mandate this kind of wasteful, insulting, and infantilizing speech by a lawyer to his client.

44. It is anticipated that a lawyer must spend approximately half an hour on every case due to this new requirement. That will cost the lawyer thousands of dollars in time and opportunity costs every year.

45. The new certifications needlessly and crudely duplicate established law. For example, 8 C.F.R. § 103.2(a)(2) provides (emphasis added):

> (2) Signature. An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. **By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.** Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

Therefore, the Applicant's Certification is needlessly duplicative.

46. 8 C.F.R. § 103.2(a)(3) already requires the lawyer's signature on the application form. Furthermore, 8 C.F.R. § 292.4 provides that a lawyer's signature on a G-28 already constitutes a representation that he is authorized and qualified to appear as a representative. It is needlessly duplicative for the new Preparer's Certification to require a certification of the applicant's consent to the representation.

47. 8 C.F.R. § 1003.102 provides the grounds for discipline for lawyers who commit some form of misconduct. Lawyers are also subject to discipline under their local state rules of professional responsibility if they act dishonestly, fail to zealously represent their clients, fail to be candid toward a tribunal, or fail to take appropriate action if they discover that any submitted

evidence is materially false. See, e.g., Maryland Rules of Professional Conduct, Preamble (zealous advocacy) and Rules 3.3 (candor toward the tribunal) & 4.1 (truthfulness in statements to others).

48. A lawyer's signature on an application filed with the USCIS is a weighty thing, subject to all of the requirements above. The Preparer's Certification on the new I-612 is insulting, overreaching, and entirely unnecessary in light of the above law.

49. The Preparer's Certification "read" requirement requires that the lawyer ". . . read the Acknowledgment of Appointment at USCIS Application Support Center to the applicant and the applicant has informed me that he or she understands the ASC Acknowledgment." See New I-612 at 7.

50. The "read" requirement of the new form violates the First Amendment of the U.S. Constitution because it requires the lawyer to read language to a client that is specifically mandated by the USCIS.

51. The Supreme Court has held that content-based restrictions are typically reviewed under strict scrutiny. See Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014) and Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

52. To pass strict scrutiny, the form must satisfy the following three-part test: (1) the form must be justified by a compelling governmental interest; (2) the form must be narrowly tailored to achieve that goal or interest; and (3) the form must be the least restrictive means for achieving that interest.

53. There is a compelling interest in ensuring the ASC acknowledgment is understood by the applicant. However, the form fails the second part of the test because the policy behind

the form is not narrowly tailored because the purpose of the "read" requirement is already covered by the ethical rules in the DHS regulations as well as state bar rules of professional conduct. As such, the additional requirement of having the lawyer read language mandated by the government to an applicant and client is overbroad. For this reason alone, the "read" requirement of the Preparer's Certification is unconstitutional.

54. The form cannot meet the third part of the test either because the "read" requirement must be the least restrictive means for achieving the government interest. Again, the ethical rules in the DHS regulations and state bar ethics rules already cover this and are least restrictive. For this reason alone, the "read" requirement of the Preparer's Certification is unconstitutional.

55. In addition, the "read" requirement violates attorney-client privilege and attorney-client confidentiality, which are foundations of the American legal system. It is fundamentally none of the government's business what a lawyer and a client say to each other in confidence, nor may the government compel how a lawyer and a client communicate with each other.

56. An immigrant application or petition has rights to representation under the Fifth Amendment and under USCIS regulations. Interference with the lawyer-client relationship undercuts the fundamental right to representation and it may lead to ineffective assistance of counsel.

57. The "read" requirement in the new I-612 is a patent example of unwarranted state interference with counsel's assistance.

58. 8 C.F.R. § 103.2(a)(1) indicates that form "instructions are incorporated into the regulations requiring its submission." In other words, instructions on USCIS forms have the force of regulation. Unfortunately, the new Form I-612 instructions have many errors of law.

59. The "Who May File Form I-612?" section begins with "Exchange visitors (J-1)." This is incorrect because it is incomplete. See Form I-612 Instructions at 1.

60. It should actually read "anyone subject to the two-year foreign residence requirement." This is true because many individuals depart the United States after participating in a J-1 program and lawfully re-enter in another nonimmigrant status, such as F-1 or O-1, but they continue to be subject to the J-1 foreign residence requirement. Such persons are certainly eligible to file Form I-612, as this firm has done successfully many times.

61. Furthermore, individuals not present in the United States in J-1 status may also be eligible to file a Form I-612 hardship and/or persecution waiver application, as this firm has done successfully many times.

62. The error in describing who may file the I-612 could dissuade thousands of potential applicants from seeking a waiver to which they are legally entitled. This could potentially harm many thousands of U.S. citizens who are related to the applicants or benefit from their presence in the United States.

63. This error in describing who may file the I-612 could result in the loss of clients and revenue for lawyers across the United States.

64. The phrase: "spouses (J-2) who are no longer married to the exchange visitors; or sons and daughters of the J-1 and/or J-2, who married or who are 21 years of age or older, may

file this application to apply for a waiver of the two-year foreign residence requirement. . . ." is incorrect for two separate reasons. See Form I-612 Instructions at 1.

65. The first reason is that the plain language of 8 U.S.C. § 1182(e) does not make J-2 derivatives subject in the context of the principal alien's J-1 admission or acquisition of J-1 status. The legislative history of 8 U.S.C. § 1182(e) contains no indication that Congress intended J-2 derivatives to become subject to the two-year foreign residence requirement.

66. Two administrative decisions (Matter of Gatilao, 11 I. & N. Dec. 893 (BIA 1966) and Matter of Tabcum, 14 I. & N. Dec. 113 (Reg. Comm'r 1972)) show that the INS and the Board of Immigration Appeals (BIA) have held that a J-2 derivative is subject to the two-year foreign residence requirement if the J-1 is subject. The plain language of 8 U.S.C. § 1182(e), however, takes precedence over these administrative decisions.

67. The same day that Matter of Tabcum was decided, the State Department amended its regulations to state that if an alien is subject to the two-year foreign residence requirement, so are his spouse and child. 37 Fed. Reg. 7156 (Apr. 11, 1972). The State Department offered no reason for the change and did not engage in formal rule-making under the APA as required by 5 U.S.C. § 553. This regulation is now found at 22 C.F.R. § 41.62(c)(4).

68. The USCIS has issued a similar regulation at 8 C.F.R. § 212.7(c)(4). The USCIS did not engage in formal rule-making under APA 5 U.S.C. § 553.

69. These regulations run counter to the plain-language interpretation in the statute, set forth above.

70. The USCIS (formerly INS) and the State Department have issued various public statements that if a J-1 is subject, the J-2 is also subject. This public interpretation is improper

under the plain language of 8 U.S.C. § 1182(e). Under the plain language of 8 U.S.C. § 1182(e), J-2 derivatives are not subject even if the J-1 is subject.

71. Given the failure of both agencies to engage in formal rule-making under APA 5 U.S.C. § 553, both regulations should be invalidated. As such, the language concerning J-2 derivatives should be completely removed from the form instructions.

72. Notwithstanding the fact that J-2s are not statutorily subject to the foreign residence requirement, the proper procedure for the J-2 derivatives listed above to obtain a waiver is to ask the State Department Waiver Review Division (WRD) to act as an interested government agency (IGA) and recommend the waiver. See http://travel.state.gov/content/visas/en/study-exchange/student/residency-waiver/ds-3035-faqs.html (which describes eligibility and the process).

73. This is called a "J-2 request." This kind of IGA waiver application is filed directly with the WRD. If the WRD issues a favorable recommendation, it will send it to the USCIS Vermont Service Center (VSC). The VSC will issue a receipt notice followed by an approval notice. There is no need to show hardship or persecution in these interested government agency requests. Form I-612 is never involved in these waiver applications.[3] For

[3] There is some confusion in this area because when the USCIS issues receipt and decision notices in no objection and IGA waiver cases, it prints "I-612" on the I-797 notices. Because no objection and IGA cases are more common than hardship or persecution cases, some lawyers and government officials routinely refer to no objection and IGA decision notices as "I-612s." That is an error, because the I-612 form is not used in those categories of cases, and indeed no USCIS application or petition form is used in those categories of cases. Reportedly the USCIS prints "I-612" on notices in those cases because the I-797-generating software requires that every notice be tied to some official USCIS form.

this reason, the language concerning J-2 derivatives should be removed from the form instructions.

74. The instructions continue: "If you do not include your J-2 spouse or J-2 children, your J-2 spouse or J-2 children will not receive waivers with you and each person will have to file a separate Form I-612." This statement is incorrect given the discussion about why J-2 derivatives are not statutorily subject to the two-year foreign residence requirement.

75. The above statement is internally inconsistent with the form instructions which also state: "**NOTE:** J-2 spouses still married to the J-1 exchange visitor and unmarried children under 21 years of age may not file this application on their own behalf." In essence, the instructions make a misstatement of the law and then the same instructions contradict the original legally erroneous statement with a second legally erroneous statement.

76. Page 2 of the form instructions reads: "If an appointment is necessary, the notice will provide you the location of your local or designated USCIS Application Support Center (ASC) and the date and time of your appointment or, if you are currently overseas, instruct you to contact a U.S. Embassy, U.S. Consulate, or USCIS office outside the United States to set up an appointment. If you fail to attend your biometric services appointment, USCIS may deny your application."

77. The language concerning individuals abroad is impractical. If the applicant is not represented by counsel, it is unclear how the USCIS could direct an applicant abroad to appear

for a biometrics appointment.[4] Denying an application for failure to attend such an appointment due to lack of notice would be a clear due process violation.

78. There is another error on page 7 of the new I-612 instructions. Under the USCIS Privacy Act Statement section there is a paragraph that states:

> PURPOSE: The primary purpose for providing the requested information on this application is to apply for a waiver of the two year foreign residence requirement under INA section 212(e)(iii).

79. INA § 212(e)(iii) makes those coming for graduate medical education subject to the two-year foreign residence requirement. It has nothing to do with the statutory basis for a hardship or persecution waiver.

80. There is another error in the Privacy Act Statement section. The USCIS claims the public reporting burden is estimated to be 20 minutes.

81. It is clearly inaccurate to claim that the reporting burden for this new eight-page form (which was only two pages for decades) is only 20 minutes, especially in light of the fact that it requires the client to review every item of evidence and to waste time listening to the lawyer read the ASC section.

82. There is another problem with the treatment of qualifying relatives in this kind of waiver application. An applicant for an I-612 exceptional hardship waiver must prove exceptional hardship to a U.S. citizen or permanent resident spouse and/or child. If there are several such qualifying relatives, then hardship to all of them counts. For example, if a person subject to the J-1 foreign residence requirement (who might not currently be in J-1 status) has a

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[4] The USCIS sends notices to the attorney of record as well as the applicant, provided said application has a U.S. address. The USCIS has reported to undersigned counsel that it does not send notices abroad.

permanent resident spouse and several U.S. citizen children, the spouse and all of the children are qualifying relatives, the hardships to each of which must be considered.

83. The new I-612 is murky about the way it addresses this basic law. Page 2 states:

> List all J-2 dependents that are included in this application. If you need extra space to complete this section, use the space provided in **Part 8. Additional Information.**

84. The above referenced language is immediately followed by boxes requesting basic information, including immigration information, for a spouse (if any) and for up to three children (if any). This is confusing, because many people (such as one of our key staff members) assumed that those boxes are only for J-2 dependents, when that is obviously not the case.

85. The statement about J-2 dependents is not accurate; it should say "J-2 (or former J-2) dependents."

86. This is confusing enough, but it is especially confusing when read in light of Part 4 of the new form (all of page 4). This section includes boxes for information about only one qualifying relative. This is incorrect and confusing, because as noted above, there may well be more than one qualifying relative. In addition, this section is needlessly duplicative of the boxes for family members on pages 2 and 3.

87. The new I-612 form contains a new *ultra vires* requirement concerning the proof of citizenship of a spouse or child acquired through derivation from parents. Page 4 of the new form states:

> **If your spouse or child acquired U.S. citizenship through parents, provide the following information for your spouse and each child who obtained citizenship through parents.**

> **11.a.** Has your spouse or child obtained a Certificate of Citizenship? Yes/No
>
> * * *
>
> **11.c.** If you answer "No" to **Item Number 11.a.**, submit evidence in accordance with the **"General Requirements"** section of the Instructions.

88. Page 4 of the new instructions states:

> If your spouse or child was born outside the United States, became a U.S. citizen through a parent, and was not issued a certificate of citizenship, you must submit evidence of the citizenship and marriage of the parent, as well as termination of any prior marriages of the parent. Also, you must submit a birth certificate of the child and a separate statement showing the dates, ports-of-entry, and means of all arrivals into and departures from the United States by the spouse or child.

89. The above referenced requirement is erroneous as a matter of law because 22 U.S.C. § 2705 permits the usage of a passport alone to prove U.S. citizenship. Specifically, 22 U.S.C. § 2705 states:

> 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.
>
> (2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States", issued by a consular officer to document a citizen born abroad. For purposes of this paragraph, the term "consular officer" includes any United States citizen employee of the Department of State who is designated by the Secretary of State to adjudicate nationality abroad pursuant to such regulations as the Secretary may prescribe.

90. In addition to the new instructions pertaining to proof of parentally derived citizenship being legally erroneous, the new instructions are also *ultra vires* in that the USCIS does not have legal authority to require such additional information, especially when a statute expressly indicates that a valid passport during its period of validity is sufficient.

91. There are errors with the USCIS I-612 summary page at https://www.uscis.gov/i-612. This page includes information on place of filing and certain other details, and it contains links to the form itself and to the official instructions.

92. First, it provides as follows:

> Purpose of Form. For certain exchange visitors (J-1 and J-2 visas) and their families to apply for a waiver . . . .

93. That is incorrect. As explained above, one does not need to be in J-1 status to apply for a J-1 hardship or persecution waiver, and J-2 derivatives cannot apply directly for a waiver by using Form I-612.

94. Second, it provides as follows:

> If you are filing Form I-612 for one of the following reasons:
>
> 1. A request by an interested U.S. Government agency (IGA); or
>
> 2. A written statement from your country of nationality or last foreign residence that it has no objection (no objection); or
>
> 3. A request from a state's department of public health, or its equivalent, to the Department of State (DOS) to work in a medically underserved area (Conrad Waiver Program)
>
> Information on how to apply can be found on the Department of State website.

95. That is incorrect. As explained above, IGA and no objection waiver applications are not filed on Form I-612 and no official USCIS application or petition form is ever used in such cases. Also, the Conrad waiver program is only one of many such IGA programs for foreign medical graduates that require three years of service.

96. The instructions say "If you are an exchange visitor, you are subject to the foreign residence requirement if . . . ." It should say: "If you are (or were) an exchange visitor . . . ."

97. The instructions state that if you're uncertain about whether you're subject to the foreign residence requirement, you should contact your responsible program officer or the nearest U.S. embassy or consulate. That is bad advice. J-1 responsible officers and U.S. consular officers are not the persons with the expertise and authority to determine whether someone is subject to the foreign residence requirement. Annotations about the foreign residence requirement made by those persons on DS-2019 forms or J-1 visa stamps are often wrong and are not legally binding. Instead, if one is uncertain about whether one is subject, the appropriate course of action is to submit an advisory opinion request to the State Department's WRD, or to make an argument directly to USCIS in a benefit application or petition. The USCIS and the WRD have each separately claimed that it is the agency responsible for determining whether a person is subject.

98. At the bottom of the page, the instructions state: "If you do not include your J-2 spouse or J-2 children, your J-2 spouse or J-2 children will not receive waivers with you and each person will have to file a separate Form I-612." This is incorrect for two reasons. First, as noted above, it should say "J-2 (or former J-2) dependents." A person does not need to be in J-2 status

to obtain a waiver derivatively through an I-612 application. Second, as noted above, J-2s are not permitted to file Form I-612 in any circumstance.

IV. Irreparable Injury

99. Paragraphs 1 through 98 above are repeated and realleged as though fully set forth herein.

100. Based on the foregoing, the new Form I-612 and instructions, if left to stand, will harm many innocent applicants. Many such applicants may suffer irreparable injury.

101. Based on the foregoing, the law firm and its owners have suffered and will continue to suffer financial and other harms if the new Form I-612 and instructions are left to stand.

COUNT ONE: OF THE FIRST AMENDMENT TO THE CONSTITUTION — COMPELLED SPEECH

102. Paragraphs 1 through 101 above are repeated and realleged as though fully set forth herein.

103. The Preparer's Certification "read" requirement requires that the lawyer ". . . read the Acknowledgment of Appointment at USCIS Application Support Center to the applicant and the applicant has informed me that he or she understands the ASC Acknowledgment." New I-612 at 7.

104. The "read" requirement of the new form violates the First Amendment of the U.S. Constitution because it requires the lawyer to read language to a client that is mandated by the USCIS.

105. The Supreme Court has held that such content-based restrictions are reviewed under strict scrutiny. See Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014) and Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

106. To pass strict scrutiny, the government must satisfy the following three-part test: (1) the form must be justified by a compelling governmental interest; (2) the form must be narrowly tailored to achieve that goal or interest; and (3) the form must be the least restrictive means for achieving that interest. See Bernal v. Fainter, 467 U.S. 216 (1984).

107. There is a compelling interest in ensuring the ASC acknowledgment is understood by the applicant. However, the form fails the second part of the test because the policy behind the form is not narrowly tailored because the purpose of the “read” requirement is already covered by the ethical rules in the DHS regulations as well as state bar rules of professional conduct. As such, the additional requirement of having the lawyer read language prescribed by the government to an applicant is overbroad. For this reason alone, the “read” requirement of the Preparer’s Certification is unconstitutional.

108. The form cannot meet the third part of the test either because the “read” requirement must be the least restrictive means for achieving the government interest. Again, the ethical rules in the DHS regulations and state bar ethics rules already cover this and are least restrictive. For this reason alone, the “read” requirement of the Preparer’s Certification is unconstitutional.

COUNT TWO: ABUSE OF DISCRETION AND VIOLATION OF

THE ADMINISTRATIVE PROCEDURE ACT

109. Paragraphs 1-108 above are repeated and realleged as through fully set forth herein.

110. The actions of the defendants in promulgating the new form I-612 and accompanying instructions, as described in paragraphs 18-98, are contrary to the statutory standards, the regulations, the legislative history, and the intent of Congress, and it is therefore arbitrary and capricious, because the defendants failed to produce a form and instructions that comply with established federal law.

111. The defendants acted outside the scope of discretion granted by Congress.

112. The defendants's promulgation of the new form I-612 and instructions therefore violates the Administrative Procedure Act, 5 U.S.C. §§ 702, and 706, and otherwise constitutes an abuse of discretion.

COUNT THREE: RULE-MAKING

AND VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

113. Paragraphs 1 through 112 above are repeated and realleged as though fully set forth herein.

114. The State Department's amendment to its regulations in 37 Fed. Reg. 7156 (Apr. 11, 1972) (amending 22 C.F.R. § 41.65(b) by adding subsection (b)(3) to state: "If an alien is subject to the 2-year foreign residence requirement of section 212(e) of the Act, the spouse or child of such alien shall also be subject to such a requirement if such spouse or child is admitted to the United States pursuant to section 101(a)(15)(J) of the Act for the purpose of accompanying

or following to join such alien.") is a substantive rule that creates law and imposes extra statutory obligations inconsistent with its authority delegated by Congress. The regulation is currently published as 22 C.F.R. § 41.62(c)(4). The State Department did not engage in formal rule-making under APA 5 U.S.C. § 553.

115. The USCIS has issued a similar regulation at 8 C.F.R. § 212.7(c)(4). The USCIS did not engage in formal rule-making under APA 5 U.S.C. § 553.

116. The State Department regulation at 22 C.F.R. § 41.62(c)(4) and the USCIS regulation at 8 C.F.R. § 212.7(c)(4) are both inconsistent with the plain language of 8 U.S.C. § 1182(e).

117. The State Department's and USCIS's amendments and 22 C.F.R. § 41.62(c)(4) and 8 C.F.R. § 212.7(c)(4) violate the Administrative Procedure Act, 5 U.S.C. § 553.

COUNT FOUR: FAILURE TO PROVIDE REASONED ANALYSIS DESCRIBING A MARKED CHANGE IN POLICY IN THE ADJUDICATION OF BENEFIT APPLICATIONS

118. Paragraphs 1 through 117 above are repeated and realleged as though fully set forth herein.

119. Courts have held that an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. See Larus & Bro. Co. v. Federal Communications Com., 447 F.2d 876, 879 (4th Cir. 1971) citing to Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

120. The USCIS previously used a two-page Form I-612 that was effective and generally free of legal errors. As set forth above, the USCIS now mandates the use of a new Form I-612 that is eight pages and is riddled with errors, including a clear First Amendment violation.

121. The USCIS failed to explain why it was necessary to change a perfectly good form to a new form that is riddled with so many errors. The lack of explanation of the change in policy and standards violates federal decisional law that mandates such explanations.

COUNT FIVE: DECLARATORY JUDGMENT

122. Paragraphs 1-121 above are repeated and realleged as though fully set forth herein.

123. This Court has the authority to issue a declaratory judgment regarding the rights, privileges, and duties of the parties under 28 U.S.C. § 2201.

124. This Court should declare that the new Acknowledgment of Appointment at USCIS Application Support Center is irrelevant, overbroad, and unnecessary.

125. This Court should declare that portions of the new Applicant's Certification are overbroad and unnecessary.

126. This Court should declare that the blanket release portion of the new Applicant's Certification could potentially violate the Privacy Act 5 U.S.C. § 552a and that it is wholly improper for the government to extract such a release from a hardship or persecution waiver applicant.

127. This Court should declare that the phrase "the information in my application and any document submitted with my application were provided by me and are complete, true, and correct," is impossible for a client or lawyer to truthfully sign.

128. This Court should declare that the Preparer's Certification's "read" requirement is an unwarranted and improper intrusion into the lawyer-client relationship.

129. This Court should declare that the DHS ethical regulations and State Bar Ethics Rules are a less restrictive means for the government to regulate the contact of lawyers and applicants compared to the preparer's "read" requirement.

130. This Court should declare that the Preparer's Certification's "read" requirement violates the First Amendment of the U.S. Constitution because it compels prescribed speech from a lawyer to a client.

131. This Court should declare that the Preparer's Certification's "read" requirement violates the fundamental principles of attorney-client privilege and attorney-client confidentiality.

132. This Court should declare that J-2 derivatives are not subject to the two-year foreign residence requirement even if the J-1 principal is subject to the requirement.

133. This Court should declare that 22 C.F.R. § 41.62(c)(4) and 8 C.F.R. § 212.7(c)(4) are invalid because both agencies did not engage in formal rule-making under APA 5 U.S.C. § 553.

134. This Court should declare that the new I-612's requirement concerning the proof of citizenship derived from parents is *ultra vires* because of 22 U.S.C. § 2705 and, as such, the requirements set forth in the instructions are invalid.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for the following relief:

A. Declare the defendants's actions in promulgating the new I-612 form to be in violation of the statute, regulations, legislative intent, agency procedures, and the Constitution;

B. Order the blanket release portion of the new Applicant's Certification be stricken from the new form because it has the potential to induce violations of the Privacy Act;

C. Order the USCIS to remove the Preparer's Certification's "read" requirement as it violates the First Amendment to the U.S. Constitution;

D. Order that 22 C.F.R. § 41.62(c)(4) and 8 C.F.R. § 212.7(c)(4) are invalid;

E. Order USCIS to strike all erroneous sections of the instructions to the new Form I-612;

F. Order the USCIS to remove all other erroneous sections from the new Form I-612;

G. Grant an award of attorneys's fees and costs; and

H. Grant such other relief as the Court may deem just and proper.

Dated: March 22, 2016

/s/ Brian C. Schmitt
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