10-3080

To Be Argued By:
DOUGLAS P. MORABITO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-3080

AJMAL MEHDI,
Plaintiff-Appellant,

-vs-

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The district court (Warren W. Eginton, J.) had subject matter jurisdiction under 28 U.S.C. § 1331, because this action arose under federal law, namely, the Federal Tort Claims Act, 28 U.S.C. § 2679. On June 23, 2010, the district court granted the United States' motion for summary judgment, *see* Government's Supplemental Appendix[1] ("GS") at 104, 106-14. On August 3, 2010, the plaintiff filed a timely notice of appeal within the 60 days authorized by Fed. R. App. P. 4(a). GS at 105. This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

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[1] The *pro se* appellant prepared a joint appendix without consulting government counsel and in doing so omitted several critical documents from the record on appeal. As such, the government has submitted a separate appendix with its brief for the United States, which will be referred to as "GS" and the page number.

Statement of Issue Presented for Review

I. Did the district court properly grant summary judgment for the government as to the plaintiff's claim of negligent infliction of emotional distress on the ground that the government's processing of the plaintiff's naturalization application was reasonable and did not create an unreasonable risk of causing the plaintiff emotional distress?

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Preliminary Statement

This appeal presents the issue of whether the district court correctly granted summary judgment for the government in a Federal Tort Claims Act suit, rejecting a claim brought by Ajmal Mehdi of negligent infliction of emotional distress as a result of governmental delays in processing his naturalization application. Mehdi submitted his naturalization application to the United States Citizenship and Immigration Services ("CIS") on September 18, 2003, and his application was granted on

November 15, 2006. In 2008, despite having become a naturalized citizen on December 1, 2006, he sued the government, arguing that the failure to adjudicate his naturalization application more expeditiously resulted in the negligent infliction of emotional distress. The district court (Eginton, J.) held that this claim failed as a matter of law, because the government's conduct in processing Mehdi's naturalization application was reasonable and did not create a risk of causing emotional distress. Because the undisputed record defeated Mehdi's claim, this Court should affirm the grant of summary judgment.

Statement of the Case

This is a civil appeal from a final judgment granting summary judgment by the United States District Court for the District of Connecticut (Warren W. Eginton, J.). The district court dismissed Mehdi's claim of negligent infliction of emotional distress against the defendant-appellee United States of America.

On October 6, 2008, Mehdi filed a complaint against the United States, alleging a claim for negligent infliction of emotional distress under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq*. This action arises from the processing of Mehdi's naturalization application filed with CIS. Mehdi alleges that he suffered emotional distress due to the length of time taken to adjudicate his application. GS at 3-5.

On June 23, 2010, the district court issued a written decision granting the United States' motion for summary judgment, and entered judgment the next day. GS at 106-

14. Mehdi filed a timely notice of appeal on August 3, 2010. GS at 105.

Statement of Facts and Proceedings Relevant to This Appeal

A. General background

The plaintiff-appellant, Ajmal Mehdi, brought this action pursuant to the FTCA, seeking damages arising out of the alleged delay by the United States in processing his naturalization application filed with CIS. GS at 3-5;106-14.[1]

When a lawful permanent resident alien applies for naturalization, the United States Citizenship and Immigration Services ("CIS") conducts several forms of security and background checks to ensure that the alien is eligible for the benefit and that he or she is not a risk to national security or public safety. GS at 31-32. In addition to record checks against the Department of Homeland Security's ("DHS") own immigration systems, these background checks currently include: (a) a Federal Bureau of Investigation ("FBI") fingerprint check for relevant criminal history records on the alien (e.g., arrests and convictions); (b) a check against the DHS-managed Interagency Border Inspection System (IBIS) that contains records and "watch list" information from more than

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[1] The following facts are drawn from the Government's Supplemental Appendix. Specifically, the facts are drawn from the affidavits of Ethan Enzer, GS at 29-33, and Michael A. Cannon, GS at 43-60.

twenty federal law enforcement and intelligence agencies; and (c) an FBI name check, which is run against FBI investigative databases containing information that is not necessarily revealed by the FBI's fingerprint check or IBIS. GS at 32. IBIS includes, but is not limited to, information related to persons who are wanted or under investigation for serious crimes or suspected of terrorism-related activity. No immigration benefit (e.g., adjustment of status, naturalization/U.S. citizenship) is granted unless and until all the above-required background checks have been completed and resolved. GS at 32.

These law enforcement checks can reveal significant derogatory information on alien applicants for immigration benefits, including applicants seeking naturalization, which can result in the alien being found ineligible for the benefit and in CIS's denial of the application. GS at 32. In many instances, the disqualifying information on the alien has not been revealed by a fingerprint check and, instead, may be discovered as a result of the IBIS or FBI name checks. GS at 32. If a background or security check reveals verified derogatory information on the alien, CIS works with other divisions of DHS and other law enforcement and intelligence agencies, as necessary, to obtain all available information concerning the derogatory record. GS at 32. Depending on the information, DHS/ICE may place the alien in immigration proceedings to remove him or her from the United States. GS at 32-33

Although the alien's file may show that an FBI fingerprint check was performed, the fingerprint checks frequently do not reveal the types of derogatory information described above, particularly when it is not

information that has resulted in an arrest or criminal conviction. GS at 33. For example, persons on a "watch list" who are suspected of terrorist activity will not necessarily be identified through an FBI fingerprint check, but could be identified through an IBIS record check or an FBI name check of investigation databases. GS at 33. These FBI name checks require time and resources, and CIS recognizes that the process is slower for some applicants. Due to the sheer volume of security checks CIS conducts and the need to ensure that each applicant is thoroughly screened, some delays in the processing of applications are inevitable. GS at 33. It would potentially risk the safety and security of the nation for CIS to grant United States citizenship without ensuring that the government's law enforcement databases do not contain verified derogatory information about the alien. GS at 34. Once naturalized, a person who is a risk to the public or the nation's security could obtain work in sensitive industries and travel on transportation carriers more easily. GS at 34.

Prior to September 11, 2001, the FBI processed approximately 2.5 million name check requests per year. GS at 53. As a result of the FBI's post-9/11 counter terrorism efforts, the number of FBI name checks has grown. For fiscal year 2007, the FBI processed in excess of 4 million name checks. GS at 53. A significant portion of the incoming name checks submitted over the past few years has been submitted by CIS. In fiscal year 2003, 64% (approximately 3,929,000) of the total incoming name checks were submitted by CIS; in fiscal year 2004, 46% (approximately 1,727,000) of the total incoming name checks were submitted by CIS; in fiscal

year 2005, 45% (approximately 1,512,000) of the total incoming name checks were submitted by CIS; in fiscal year 2006, 45% (approximately 1,633,000) of the total incoming name checks were submitted by CIS; and in fiscal year 2007, 52% (approximately 2,113,000) of the total incoming name checks were submitted by CIS. GS at 53.

In November 2002, heightened national security concerns prompted a review of the former Immigration and Naturalization Service's ("INS") procedures for investigating the backgrounds of individuals seeking immigration benefits. GS at 53. It was determined that deeper, more detailed clearance procedures were required to protect the people and the interests of the United States effectively. One of the procedures identified was the FBI's name check clearance. GS at 53. Before November 2002, only those "main" files that could be positively identified with an individual were considered responsive to the immigration authorities name check requests. Because that approach ran a risk of missing a match to a possible derogatory record, the FBI altered its search criteria to include "reference" files as well. GS at 53-54. From a processing standpoint, this meant the FBI was required to review many more files in response to each individual background check request. GS at 54.

In December 2002 and January 2003, based on a joint agreement between the FBI and the INS, the INS resubmitted 2.7 million name check requests to the FBI for background investigations of all individuals with then-pending applications for immigrations benefits for which the Immigration and Nationality Act ("INA") required

background investigations. GS at 54. Those 2.7 million requests were in addition to the regular submissions by the INS. GS at 54. Although many of the FBI's initial responses to those resubmitted requests indicated that the FBI had no information relating to the specific individual who was the subject of the request, approximately 16 percent of the resubmitted requests (over 440,000) indicated that the FBI may have information relating to the subject of the inquiry. GS at 54. The FBI ultimately completed those 440,000 requests by the Spring 2008. GS at 54.

There are numerous factors that have contributed to delays in the processing of name check requests, including the name check for Mehdi. GS at 54, 60. First, there has been an extremely high volume of incoming name checks. The total volume of incoming name check requests combined with pending name check requests has historically outpaced the National Name Check program's available resources to process this volume. GS at 54. As it concerns submissions by USCIS, for fiscal year 2003, USCIS submitted approximately 3,929,000 name check requests, of which approximately 1,386,000 represented naturalization-related name checks. GS at 54-55. For fiscal year 2004, USCIS submitted approximately 1,727,400 name check requests, of which approximately 726,300 represented naturalization-related name checks. GS at 55. For fiscal year 2005, USCIS submitted approximately 1,512,200 name check requests, of which approximately 612,700 represented naturalization-related name checks. GS at 55. For fiscal year 2006, USCIS submitted approximately 1,633,000 name check requests, of which approximately 718,100 represented

naturalization-related name checks. For fiscal year 2007, USCIS submitted approximately 2,113,000 name check requests, of which approximately 1,112,400 represented naturalization-related name checks. GS at 55.

Mehdi filed an N-400 application for naturalization with CIS on September 18, 2003. GS at 4. CIS initiated the FBI name checks request on the applicant on or about October 10, 2003. GS at 34, 61. FBI fingerprint checks of the applicant were initiated on or about November 15, 2003 and again on or about August 18, 2006. GS at 34. CIS received the results of the fingerprint checks from the FBI on or about November 18, 2003 and August 21, 2006, respectively. GS at 34. IBIS checks were initiated on the applicant and responses received on or about June 30, 2004 and November 1, 2006. GS at 34. Mehdi appeared for an initial interview on June 30, 2004 and his application was continued on that same day based on a request for evidence by CIS and the pending FBI name check. GS at 64-65. Mehdi submitted the requested evidence to CIS and it was reviewed by CIS on or about July 16, 2004. GS at 66-69. On October 12, 2004, CIS advised Mehdi by letter that his application was still pending the name check. GS at 27, 72.

On December 3, 2004, Mehdi again checked the status of his application, and he was promptly advised that his inquiry would be referred to the appropriate unit of CIS. GS at 27, 71. On or about October 24, 2006, Mehdi brought an action against CIS seeking, among other things, to compel adjudication of his naturalization application. GS at 74-99. As part of his complaint against CIS, Mehdi attached a sworn affidavit. In that affidavit, Mehdi stated

that he made approximately eighty-three inquiries by way of email, telephone, correspondence and in-person visits with CIS and that in each instance he was fully advised that his background or name check was still pending. GS at 101-105.

Per USCIS policy, FBI fingerprint checks and IBIS checks need to be valid at the time of approval of an application and at the time of naturalization. GS at 32. FBI fingerprint checks remain current for fifteen months while IBIS checks remain current for six months. GS at 32. Therefore, the FBI fingerprint checks and IBIS checks were re-initiated in 2006 based on this policy. GS at 32. A second expedited manual FBI name check request was submitted on October 23, 2006. GS at 32. CIS received the results of the FBI name check on or around October 25, 2006. GS at 34, 61. The adjudication of Mehdi's application for naturalization was completed November 15, 2006. GS at 33. Mehdi was thereafter was sworn in as a naturalized citizen of the United States on December 1, 2006. GS at 4.

Although Mehdi claims that the time taken to adjudicate his naturalization application caused him emotional distress, he himself concedes that CIS kept him fully apprised of the status of his application while the application was pending. GS at 101-105. In fact, Mehdi states that on at least seventy separate occasions he inquired of CIS by email, telephone and correspondence inquiries, and at least thirteen other times he inquired in person with CIS regarding the status of his naturalization application. GS at 104. Mehdi also states that he contacted U.S. Senators, the Vice President, the Congress

and the President regarding the processing of his application. GS at 104. He admits in his sworn affidavit, that, each time he made an inquiry, he was advised by CIS that his application was pending because the FBI name check had not yet been completed. GS at 104. These contacts with Mehdi kept him reasonably updated on the status of his application, including the reason for the delay, which was a substantial backlog in completing background checks. GS at 45-62.

On December 10, 2007, Mehdi filed an administrative claim against CIS, alleging that the agency's negligent failure to timely process his application caused him to suffer emotional distress. GS at 3. On October 6, 2008, Mehdi filed the present action making the same allegations. GS at 3-5.

B. The government's motion for summary judgment

By ruling dated June 23, 2010, the district court granted the government's motion for summary judgment as to all claims. GS at 106-14. In reaching its conclusion, the court analyzed the elements under Connecticut law for negligent infliction of emotional distress. As to that claim, the court concluded that, even viewing the evidence in the light most favorable to Mehdi, there was no evidence that the government's conduct in processing his naturalization application was unreasonable or that it created an unreasonable risk of causing him emotional distress and thus, his negligent infliction of emotional distress claim failed as a matter of law. GS at 112-14. Specifically, the court found that the government had kept Mehdi fully

apprised of the status of his application and that he was advised of the reason for any such delay. GS at 110.

Moreover, the court concluded that the delay was reasonable in light of the size and complexity of the naturalization process, along the severe workload such a program places on CIS. GS at 110-11. The court went on to state that the plaintiff failed to produce any evidence supporting his claim that the delay was unreasonable. GS at 111.

In making this finding, the court relied on this Court's unpublished decision in *Lavoie v. United States*, 361 Fed. Appx. 206 (2d Cir. Jan. 19, 2010) (unpublished decision). The district court noted that, in *Lavoie*, this Court concluded that "the government did not negligently inflict emotional distress upon the plaintiff even where it delayed a decision on payment to the plaintiff under the Energy Employees Occupational Illness Compensation Program for seven years." GS at 112. The district court quoted the portion of the *Lavoie* decision in which it noted that the delay was "entirely reasonable considering the complexity and size of the new compensation program." GS at 112 (internal quotation marks omitted).

Comparing the facts of this case to the facts in *Lavoie*, the district court made the following findings:

> Plaintiff here was kept updated on the status of his application and was told in response to each inquiry that it remained under review. In both cases, the evidence shows that the government is large and complex. Plaintiff does not dispute the

> government's description of CIS's burden in processing naturalization applications with the FBI. In light of the severe workload and the size of CIS, the delay was reasonable.

GS at 112-113.

Summary of Argument

The district court correctly granted the government's motion for summary judgment as to Mehdi's claim under the FTCA because the government's conduct in processing his naturalization application was reasonable and did not create an unreasonable risk of emotional distress. In short, there was no evidence in the record that established these elements, which are required to prove a claim for negligent infliction of emotional distress claim. Connecticut law regarding negligent infliction of emotional distress fully supports the court's ruling in granting the government's motion for summary judgment. Although it took a little over three years for the government to grant Mehdi's naturalization application, the government's conduct during the application processing period was entirely reasonable in light of the size and importance of the application process required to become a naturalized citizen, as well as the fact that Mehdi was provided with notice of his application's status throughout the processing period. This notice served to mitigate any claim that the government's conduct created a risk of emotional distress.

Argument

I. The district court correctly held that Mehdi failed as a matter of law to establish a genuine issue of material fact necessary to support a claim of negligent infliction of emotional distress.

A. Governing law and standard of review

1. Standard governing summary judgment

This Court reviews *de novo* a district court's grant of summary judgment. *See Town of Southold v. Town of East Hampton,* 477 F.3d 38, 46 (2d Cir. 2007) (citing *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

When ruling on a motion for summary judgment, the district court must construe the facts in a light most favorable to the non-movant, and must draw all reasonable inferences against the moving party. *See Anderson,* 477 U.S. at 255; *see also Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F.3d 279, 282 (2d Cir. 2005) (citing *Anderson, supra*, and *Maguire v. Citicorp Retail Servs.,* 147 F.3d 232, 235 (2d Cir. 1998)).

"If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. Nat'l Board of Med. Examiners*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)). "[T]he existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." *Powell*, 364 F.3d at 84. Accordingly, "'[c]onclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.'" *Shannon v. NYC Transit Auth.*, 332 F.3d 95, 99 (2d Cir. 2003) (quoting *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)).

2. Negligent infliction of emotional distress

Actions brought under the Federal Tort Claims Act are governed by the substantive law of the state in which the alleged tort occurred. *See Castro v. United States*, 34 F.3d 106, 110-111 (2d Cir. 1994). To prevail on a claim of negligent infliction of emotional distress under Connecticut law, a plaintiff must establish that: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was so severe that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 444 (2003)).

As the Connecticut Supreme Court has explained, "in order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that 'the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm.'" *Scanlon v. Connecticut Light & Power Co.,* 258 Conn. 436, 446 (2001) (quoting *Montinieri v. Southern New England Telephone Company*, 175 Conn. 337, 345 (1978)). The "test essentially requires that the fear or distress experienced by the plaintiffs be reasonable in light of the conduct of the defendants. If such a fear were reasonable in light of the defendants' conduct, the defendants should have realized that their conduct created an unreasonable risk of causing distress, and they, therefore, properly would be held liable. Conversely, if the fear were unreasonable in light of the defendants' conduct, the defendants would not have recognized that their conduct could cause this distress and, therefore, they would not be liable." *Barrett v. Danbury Hospital,* 232 Conn. 242, 261-62 (1995).

B. Discussion

1. The district court correctly concluded that Mehdi failed to establish a claim for negligent infliction of emotional distress because there is no evidence that the government's conduct was unreasonable or that it created a risk of causing Mehdi emotional distress

As an initial matter, Mehdi argues to this Court that the government's delay in processing his naturalization application was based on impermissible grounds such as his religious faith, his race, his national origin, and in violation of the Patriot Act. Mehdi never raised these arguments below to the district court, GS at 3-5, and thus they should be rejected by this Court on appeal. Mehdi also claims that the delay in processing his application caused him to suffer emotional distress. The undisputed evidence, however, reflects that the government acted reasonably in processing Mehdi's naturalization application. The undisputed evidence further shows that the government's conduct did not create a risk of causing Mehdi emotional distress. The district court thus correctly entered summary judgment on this basis as to Mehdi's negligent infliction of emotional distress claim.

The record shows that, although it took a little more than three years for Mehdi's application to be granted, the government's conduct during the application processing period was reasonable in light of the size and the importance of properly completing all appropriate background checks prior to making a formal decision on

whether to grant his naturalization application. GS at 31-62. As explained in the affidavit of Ethan Enzer, no immigration benefits such as the granting or denying of naturalization applications can be granted prior to background checks being fully completed. GS at 32. Additionally, as explained in the declaration of Michael Cannon, there are numerous factors that have contributed to delays in the processing of name check requests, including the name check for Mehdi. GS at 53-59. One principal contributing factor is the volume of name checks submitted to the FBI – the total volume of incoming name check requests combined with pending name check requests has historically outpaced the National Name Check Program's available resources to process this volume. GS at 54.

Again, for the fiscal year 2003, CIS submitted approximately 3,929,000 name check requests, of which approximately 1,386,000 represented naturalization-related name checks. GS at 54. In the fiscal year 2004, CIS submitted approximately 1,727,400 name check requests, of which approximately 726,300 represented naturalization-related name checks. GS at 54-55. For fiscal year 2005, CIS submitted approximately 1,512,200 name check requests, of which approximately 612,700 represented naturalization-related name checks. GS at 53. For fiscal year 2006, CIS submitted approximately 1,633,000 name check requests, of which approximately 718,100 represented naturalization-related name checks. GS at 53. In light of the substantial number of name check requests submitted to the FBI by CIS, a period of three years to complete Mehdi's name check was not unreasonable.

There is no evidence in the record to show that other reasonable alternatives exist to resolve pending background checks which as outline above are a prerequisite to granting or denying naturalization applications. To the contrary, the record establishes and the district court was correct in concluding that there was nothing improper regarding the government's processing of Mehdi's application. Indeed, in light of the importance of properly completing all appropriate background checks prior to making a formal decision on whether to grant his naturalization application, the government's conduct was reasonable. *See Barrett*, 232 Conn. at 261-62.

The district court also correctly concluded that the government's conduct in processing Mehdi's application did not create an unreasonable risk of emotional distress. That is, the records shows that, throughout the processing period, the government provided Mehdi with updates regarding the status of his application. GS at 106-14. Moreover, the record establishes that Mehdi himself admitted that on at least eighty-three separate occasions he was advised by CIS that his application was pending due to the fact that the name check with the FBI had yet to be completed. GS at 101-105. Indeed, the evidence establishes that the alleged delay in processing his naturalization application was in large part due to factors outside of CIS's control and that Mehdi was always advised of this fact. GS at 101-105. This notice served to mitigate any claim that CIS's conduct created a risk of emotional distress. As such, the district court correctly concluded that there was no evidence that CIS acted unreasonably given the large number of naturalization applications filed with CIS, the importance of properly

reviewing the applications, the national security concerns implicated by adjudicating such applications, the fact that most of the delay had to do with pending name checks before the FBI, and the fact that Mehdi was fully aware of the reason why his application had not yet been adjudicated. GS at 101-105.

Finally, there is no evidence in the record that CIS was unprofessional or abrasive in any of its communications to Mehdi or his representatives. There is no evidence that CIS failed to inform him of the status of his application. Furthermore, there is no evidence that CIS could have anticipated or foreseen that, despite its efforts to efficiently adjudicate Mehdi's application and periodically update him, the delay in processing his application would create an unreasonable risk of emotional distress to Mehdi. *See Scanlon*, 258 Conn. at 446 (requiring evidence that a defendant must realize that its conduct creates a risk of emotional distress).

In sum, although it is unfortunate that it took a little over three years to adjudicate Mehdi's application for naturalization, the district court correctly concluded that the government acted reasonably throughout the application processing period in light of the size and importance of properly completing all appropriate background checks prior to making a formal decision on whether to grant his naturalization application.

Conclusion

For the foregoing reasons, the judgment of the district court for the defendant-appellee United States of America, should be affirmed.

Dated: March 17, 2011

Respectfully submitted,

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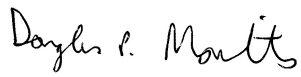
DISTRICT OF CONNECTICUT



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