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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS and E. J. DVASH-BANKS,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State,

Defendants.

No. CV 18-523-JFW-JC

DEFENDANTS' RESPONSE AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

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INTRODUCTION

Plaintiffs' motion for partial summary judgment seeks for this Court to enter judgment in their favor on Plaintiff E.J. Dvash-Banks's claim under 8 U.S.C. §1503(a), in which he seeks a declaration of U.S. citizenship from this Court. Plaintiffs' motion also seeks summary judgment on Plaintiffs' substantive due process claim, in which Plaintiffs argue that Defendants' actions impermissibly infringe on Plaintiff Andrew Dvash-Banks's rights associated with marriage. The Court need not reach the statutory claim and should deny summary judgment on the constitutional claim.

Plaintiffs' claim under section 1503(a) focuses on the purported impropriety of Defendants' actions instead of the actual elements of a claim under that statute, under which this Court would make a *de novo* determination of citizenship. As Defendants have previously explained, however, the Court need not decide this issue because Plaintiffs, in the locality where they currently reside, can obtain the sought-after relief by applying for a certificate of citizenship from U.S. Citizenship & Immigration Services ("USCIS"), which would apply Ninth Circuit precedent as this Court would.

Separately, Plaintiffs' substantive due process claim fails because Plaintiffs do not establish that Defendants' actions infringe upon any fundamental rights possessed by Andrew or E.J. Defendants' determination implicates neither marriage nor any other fundamental right and, in any event, passes rational-basis review because it is rooted in its longstanding statutory interpretation as well as concerns of fraud and child protection.

BACKGROUND

I. The Dvash-Banks family

Relevant factual background can be found in Defendants' Statement of Genuine Disputes of Material Fact, which notes that many of Plaintiffs' statements of fact are undisputed.

Andrew Dvash-Banks ("Andrew") is a United States citizen, married to Elad Dvash-Banks, an Israeli citizen. Defs.' Opp. Stmt. of Facts at ¶¶ 1, 9, 11. Andrew and Elad used Assisted Reproductive Technology ("ART") to conceive children. *Id.* ¶¶ 4–7. In December 2015, Andrew and Elad contracted with a gestational surrogate (the "Gestational Surrogate") for the purpose of carrying one or two embryos during a pregnancy (the "Surrogacy Agreement"). *Id.* ¶ 17. The Gestational Surrogate became pregnant with one embryo created using genetic material from Andrew and one embryo created using genetic material from Elad. *Id.* ¶ 20. On September 16, 2016, the Gestational Surrogate gave birth to those two children, each a boy, E.J. and A.J. *Id.* ¶ 29. On September 28, 2016, an Ontario court entered an order naming Andrew and Elad the legal parents of E.J. and A.J. *Id.* ¶ 41.

II. Andrew and Elad go to Toronto Consulate to apply for Consular Reports of Birth Abroad and U.S. Passports for E.J.

On January 24, 2017, Andrew and Elad appeared in person at the Toronto Consulate in connection with the applications for a CRBA and U.S. passport for each of their children, E.J. and A.J. *Id.* at ¶ 55. Consular officer Terri Nathine Francis Day interviewed the Dvash-Banks family on January 24, 2017. *Id.* ¶ 57. She adjudicated their applications, and, at a later date, made the final decision on each of the applications. *Id.* ¶¶ 57, 58, 93, 98, 113. Andrew and Elad's applications indicated that they had used ART to have E.J. and A.J. *Id.* ¶ 24. During the interview, Day concluded that it was unclear which (if either) of the children, E.J. and A.J., had a biological relationship to the U.S. citizen father (Andrew). *Id.* ¶ 28. Day provided them the option of submitting DNA evidence to prove such

relationship, and a letter outlining relevant steps should they choose to pursue that option. *Id.* ¶¶ 29–32.

The Dvash-Banks family chose to pursue the DNA option, and arranged to have DNA testing conducted and submitted in support of E.J.'s and A.J.'s applications. *Id.* ¶ 33. Ultimately, the adjudicating officer denied E.J.'s applications on the ground that the applicants had failed to establish a biological connection between E.J. and a U.S. citizen parent. *Id.* ¶¶ 35–36.

ARGUMENT

I. Plaintiffs' claim under 8 U.S.C. § 1503(a) incorrectly seeks to put the Department of State's actions and policies at issue and, in any event, need not be decided by this Court.

Plaintiffs' summary judgment motion challenges at length the Department of State's ("the Department") statutory interpretation and associated actions with respect to its Consular Report of Birth Abroad ("CRBA") for Plaintiff E.J. But the reasonableness of Department's actions should not be the focus of any analysis in which the Court may engage under section 1503. As Plaintiffs themselves note, section 1503(a) "authorizes a *de novo* judicial determination of the status of the plaintiff as a United States national." Mem. Of P. & A. in Supp. of Pl.'s Mot. for Partial Summ. J. ("Pls.' Br.") at 14, ECF No. 83-1 (quoting *Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985)). Therefore, "[a] suit under section 1503(a) is *not* one for judicial review of the agency's action." *Richards*, 752 F.2d at 1417 (emphasis added). That is because, while the Department made the citizenship determination in the first instance, "the courts make the real decisions all over again, *see* 8 U.S.C. § 1503(a). This allocation charges the courts with an independent and comprehensive role in determining citizenship." *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1240 (D. Ariz. 2016). Thus, here, where the Department applied its longstanding statutory interpretations of 8 U.S.C. §§ 1401

and 1409 in adjudicating E.J.'s CRBA and passport adjudications abroad—where Ninth Circuit law does not apply—the Court need not pass judgment on the Department's actions in evaluating Plaintiffs' section 1503 claim. Instead, if the claim is reached, 8 U.S.C. § 1503(a) requires the Court to make a *de novo* determination about whether E.J. satisfies the applicable prerequisites to have acquired U.S. citizenship at birth as a foreign-born child. *See Simeonov v. Ashcroft*, 371 F.3d 532, 538 (9th Cir. 2004) ("As a general rule courts . . . are not required to make findings on issues the decision of which is unnecessary to the results they reach." (citation omitted)).

Before doing so, however, the Court should take note that Plaintiffs have another path to the relief they seek through this claim that renders judicial intervention unnecessary. As explained in Defendants' memorandum in support of their motion for partial summary judgment, now that Plaintiffs have relocated to within in the Ninth Circuit, Andrew is free to apply for a certificate of citizenship on behalf of E.J. from USCIS, *see* 8 U.S.C. § 1452. USCIS, as part of the Department of Homeland Security ("DHS"), is charged with making citizenship determinations in the United States, *see* 8 U.S.C. § 1103, distinct from citizenship determinations sought by individuals living abroad, the purview of the Department of State, *see* 8 U.S.C. § 1104; *see also Scales v. INS.*, 232 F.3d 1159, 1165 (9th Cir. 2000) ("Because Petitioner is not a 'person not in the United States,' the State Department is not the agency entrusted with the determination of Petitioner's citizenship."). Under *de novo* review, the court needs to apply the statute applicable to the current situation, which, here, is the statute that USCIS administers. Here, Plaintiffs' changed circumstances "have forestalled any occasion for meaningful relief" from this Court, *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (citation omitted), since they may seek the same relief from USCIS.

If Plaintiffs seek a certificate of citizenship from USCIS, USCIS will apply Ninth Circuit case law to their case since Plaintiffs reside within the Ninth Circuit. In the Ninth Circuit. In the Ninth Circuit, USCIS follows *Scales*, 232 F.3d at 1166; Defs.' Opp. Stmt. of Facts ¶¶ 169–70, which construed the instant statutory provisions differently from the Department of State when reviewing DHS's actions in the context of removal proceedings that occurred in the Ninth Circuit. *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005), and *Scales*, 232 F.3d at 1166. Because a certificate of citizenship is proof of U.S. citizenship (here, at-birth citizenship) equivalent to both a CRBA *and* a court order recognizing U.S. citizenship, *see* 22 U.S.C. § 2705, the availability of USCIS's certificate-of-citizenship process to Plaintiffs should obviate the need for this Court to decide Plaintiffs' 1503 claim, at least until Plaintiffs avail themselves of this alternative administrative procedure.[1] *Cf. Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) ("If we do not decide it now, we may never need to. Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort. Article III courts should not make decisions unless they have to."). Defendants believe that *Scales* and *Solis-Espinoza* were wrongly decided as explained further below, but there is no need at this stage for the Court to apply those cases to the facts here, given the availability of adequate alternative relief.

II. Plaintiffs are not entitled to summary judgment on their substantive due process claim because Defendants' actions pass rational-basis review.

[1] For example, the Court could hold this case in abeyance so that Plaintiffs could apply for a certificate of citizenship from USCIS and only render a decision if USCIS denied the application.

As a separate matter, Plaintiffs are not entitled to summary judgment on their substantive due process claim.[2] They fail to establish a fundamental right at issue, and in resolving this constitutional claim the Court should find that Defendants' actions pass rational-basis review.[3]

Plaintiffs' constitutional claim is that the Department's interpretation of applicable law to require a biological relationship between the foreign-born child seeking to acquire U.S. citizenship at birth and the U.S. citizen parent "denies same-sex married couples and their children the panoply of rights and benefits of marriage." Pls.' Br. at 22. But the Department's legal interpretation distinguishes between biological and non-biological parent-child relationships, *not* between same-sex and opposite-sex couples. *See* 8 FAM 301.4-1(D)(1)(c), (D)(1)(d)(5); *id.* 304.3-1(b) (recognizing as a child's acquisition of citizenship at birth under 8 U.S.C. § 1401(g) where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic

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[2] Plaintiffs appear to move for summary judgment only on Andrew's substantive due process claim. To the extent E.J. raises an independent substantive due process claim in the Complaint, *see* Compl. ¶ 76, and Amended Complaint, Am. Compl. ¶ 76, ECF No. 94, Plaintiffs make no arguments that Defendants' actions have infringed upon any of E.J.'s fundamental rights. *See* Pls.' Br. at 22–25. Summary judgment for Plaintiffs on E.J.'s substantive due process claim would be inappropriate. A foreign-born individual's right to U.S. citizenship at birth has also never been recognized as an independent, fundamental right. *See Rios-Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 393, 401–02 (5th Cir. 2007) (declining to "find that a due process right inheres naturally in a claim to citizenship itself" in part because "the case law does not clearly support such a right"). And the Department's policy passes rational-basis review, as explained *infra.*

[3] The parties agree that to the extent this Court can resolve Plaintiffs' section 1503 claim, this Court need not reach Plaintiffs' constitutional claim. *See* Pls.' Br. at 22 n. 14; Mem. in Supp. of Defs.' Mot. for Partial Summ. J. ("Defs.' Br.") at 19 n.16, ECF No. 89-1.

mother); Defs.' Opp. Stmt. of Facts ¶¶ 165–66. That the biological relationship, or lack thereof, is the fulcrum of this interpretation is underscored by the fact that the Department approved the applications for a CRBA and passport for A.J., the biological child of U.S. citizen Andrew.

Further, an individual's purported right to transmit U.S. citizenship at birth to a foreign-born child who has no biological relationship to the individual has not been recognized as a right and benefit of marriage. Plaintiffs cite *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017), in support of this argument, but *Pavan* is of no help to them here. In *Pavan*, a state law "generally require[d] the name of the mother's male spouse to appear on the child's birth certificate," even if "the couple conceived by means of artificial insemination with the help of an anonymous sperm donor." *Pavan*, 137 S. Ct. at 2077. The law, however, did not require the state to "issue birth certificates including the female spouses of women who give birth in the State." *Id.* The court found that the state's law infringed upon a right of marriage because the state had "chosen to make its birth certificates more than a mere marker of biological relationships," since "when an opposite-sex couple conceives a child by way of anonymous sperm donation," just as the same-sex plaintiffs did, "state law requires the placement of the birth mother's husband on the child's birth certificate." *Id.* at 2078. Here, however, the Department's statutory interpretation requires married U.S. citizens in both same-sex couples and opposite-sex couples—and, indeed, unmarried U.S. citizens, as well—to possess a biological connection to a foreign-born child for the child to acquire U.S. citizenship at birth.[4] Thus the Department's interpretation on this specific issue can

[4] Plaintiffs cursorily argue that it is "beside the point" that the Department applies "the FAM's biological relationship requirement to the children of opposite-sex marriages," but they fail to meaningfully explain why the Court should ignore this salient fact. *See* Pls.' Br. at 24. The Department's interpretation does not foreclose the Department from adjudicating the CRBA or passport applications of children

be seen as "a mere marker of biological relationships," *id.*, precluding Plaintiffs' attempts to paint Defendants' actions as infringing on a fundamental right related to marriage.[5]

Nor do U.S. citizens possess a fundamental right to unconditionally transmit U.S citizenship to a foreign-born child. Plaintiffs rely on *Miller v. Albright*, 523 U.S. 420, 433 (1998), for this proposition. *See* Pls.' Br. at 23. But *Miller* examined a claim brought by an individual seeking to *acquire*, not transmit, U.S. citizenship. Moreover, the decision recognized that "[p]ersons not born in the United States acquire citizenship by birth only as provided by Acts of Congress," *Miller*, 523 U.S. at 424 (Stevens, J. op.), and that "there is no doubt that ensuring reliable proof of a *biological* relationship between the potential citizen and its citizen parent is an important governmental objective," *id.* at 436 (emphasis added). Indeed, the various conditions that Congress imposes for foreign-born children to acquire U.S. citizenship at birth, such as requiring U.S. citizen parents to have years of physical presence in the United States, make clear that any right to transmission of citizenship is contingent (and statutory). *See* 8 U.S.C. §§ 1401, 1409; *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1687 (2017) (describing section 1401's and section 1409's physical-presence requirements).[6] Thus, Plaintiffs fail to

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of male same-sex marriages under section 1401(g), *see* Defs.' Opp. Stmt. of Facts ¶¶ 165, 167, and, in any event, conclusively establishes that the Department's policy focuses on biology, not marriage. *See Pavan*, 137 S. Ct. at 2078.

[5] Nor do *Scales* and *Solis-Espinoza* establish such a fundamental right; both decisions engaged in statutory interpretation of sections 1401 and 1409 and did not examine whether the transmission of U.S. citizenship in those circumstances was a constitutionally protected fundamental right. *See Scales*, 232 F.3d at 1166; *Solis-Espinoza*, 401 F.3d at 1094.

[6] Indeed, while *Morales-Santana* concluded that "the gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c) . . .violates the equal protection

establish that a U.S. citizen's right to transmit U.S. citizenship to a non-biological, foreign-born child is "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty," that it amounts to a fundamental right for the purposes of substantive due process analysis. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

Because Defendants' actions do not infringe upon a fundamental right, rational-basis review applies. *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997). Under rational-basis review, Plaintiffs "have the burden to negate every conceivable basis that might support" Defendants' position. *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 307 (1993).

Plaintiffs claim that Defendants "fail to assert any [governmental] interest" in its position, Pls.' Br. at 25, but that is incorrect. As explained in Defendants' moving brief, the Department's longstanding interpretation of the language "born of . . . parents" in Section 1401(g) to require a biological relationship between the child seeking to acquire U.S. citizenship and her married parents is rooted in its understanding that Congress has, since 1790, generally required that "at least one biological parent must have been a U.S. citizen when the child was born." 8 FAM 301.4-1(B); Defs.' Opp. Stmt. of Facts ¶ 171. The Department's interpretation is further supported by the overall text and structure of the INA, which treats the non-biological children of U.S. citizens differently from their biological children. *See, e.g.*, 8 U.S.C. §§ 1101(c), 1431(b), 1433(c); *see also Acevedo v. Lynch*, 798 F.3d 1167, 1171 (9th Cir. 2015); *Dent v. Sessions*, 900 F.3d 1075, 1082 (9th Cir. 2018).

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principle," *Morales-Santana*, 137 S. Ct. at 1700–01, "Section 1401(a)(7)'s longer physical-presence requirement . . . must hold sway," because Congress likely would have eliminated the shorter physical-presence requirements for unwed mothers over unwed fathers "had it been apprised of the constitutional infirmity," *id.* (citation omitted). This result confirms that any right to the transmission of U.S. citizenship to a foreign-born child is, at best, provisional.

Further, the Department has noted another governmental interest at stake: it has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of fraudulent citizenship claims, because it would be more difficult to identify child smuggling or illegal adoption without requiring a biological link between the child applicant and the transmitting parent. *See* Defs' Stmt. of Facts ¶ 172. Therefore, Defendants have articulated a legitimate interest that is rationally related to its position, and summary judgment for Plaintiffs should be denied on this basis. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015).

Further, depicting E.J.'s claim to acquire U.S. citizenship at birth as turning on Andrew and Elad's status as a married couple and the legal parents of E.J., Plaintiffs gloss over the complicated issue of policy and statutory interpretation at issue in this case. With the advent of assisted reproductive technology (ART) and accompanying surrogate motherhood agreements in the late 20th century and early 21st century,[7] there exist today many more scenarios and possibilities for both biological parenthood and legal parenthood than when the INA was enacted, or when the common law of parentage evolved. Yet at least one fact is essentially unchanged from the time the INA became law through and beyond the time the Department of State applied its provisions to the instant in case: a human child must have a biological mother and a biological father. In this case those biological parents comprise a father, Elad, who is a legal parent but is *not* a U.S. citizen, and a mother who is *not* a legal parent and whose citizenship is not considered relevant

[7] *See generally* The Law of Surrogate Motherhood in the United States, *The American Journal of Comparative Law* Vol. 58, Supplement: Welcoming the World: U. S. National Reports to the XVIIIth International Congress of Comparative Law (2010), pp. 97–114. https://www.jstor.org/stable/20744535?seq=1#page_scan_tab_contents

for the purposes of E.J.'s passport and CRBA applications, either by Defendants or Plaintiffs.[8] Plaintiffs' premise in this case, therefore, is that E.J. should have acquired U.S. citizenship at birth notwithstanding the fact that *neither* of his biological parents is both his legal parent and a U.S. citizen.

In support of this putatively "obvious" position, Pls.' Br. at 16, Plaintiffs point to the face of § 301(g), and decry the Department's supposed "imposition" of a biological relationship requirement with respect to its text, *see, e.g.*, *id.* at 8, 22, 24. It is true that section 1401(g) does not have the express language of section 1409(a), requiring, *inter alia*, a "blood relationship between the person and the father" language in order for citizenship to be acquired at birth. Nevertheless, "*born* of … parents" (emphasis added) has an inherently biological connotation,[9] and can reasonably be read and understood to serve a similar function and purpose to the "blood relationship" language of section 1409(a)—i.e., ensuring a biological connection between a child and his or her parents. Moreover, "parents" as

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[8] *See* 8 FAM 304.3-2(a) ("For purposes of this section, the term 'surrogate' refers to a woman who gives birth to a child, who is not the legal parent of the child at the time of the child's birth in the location of the birth. In such a case, the surrogate's citizenship is irrelevant to the child's citizenship analysis.").

[9] At the time the INA and predecessor statutes were enacted, the term "born of parents" was understood as referring to the reproductive offspring that came from those parents. *See, e.g.*, Note, *Citizenship by Birth*, 41 Harv. L. Rev. 643, 645–46 (1928). Also, the transitive verb "born" means "To cause to be born, to deliver (a child), to bring into existence." *Born*, Oxford English Dictionary (1989), *available at* http://www.oed.com/view/Entry/21673 (last visited Jan. 14, 2019). And the word "of" "[i]ndicat[es] the thing, place, or direction from which something goes, comes, or is driven or moved: from, away from, out of." *Of*, Oxford English Dictionary (3d Ed. 2004), *available at* http://www.oed.com/view/Entry/130549 (last visited Jan. 14, 2019). Historically, use of the word "of" in a figurative sense "[i]ndicat[ed] a situation, condition, or state out of or away from which something moves, or is figured as moving: from, out of." *Id.* Thus, the term "*born of* parents" lends itself to an interpretation that means the biological offspring of parents.

understood by the legislature could only have meant "mother" and "father," the genetic contribution both sexes being necessary to conceive a child, a person who is subsequently "born of . . . parents." *See United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009) ("There can be little doubt that the 'born of' concept generally refers to a blood relationship.").

Seen in this light, the fact that Congress did not include language as express as "blood relationship" in section 1401 should not be regarded as "demonstrat[ing] that Congress intended that there be no biological relationship requirement under Section 301(g)," Pls.' Br. at 16. Rather, the textual treatment should be seen as an indicator that Congress—at least in the context of the law on acquisition of U.S. citizenship at birth—saw no need to be express about circumstances that were entirely unremarkable and therefore could be (and in Defendants' view, was) implicitly assumed without the need for express text: "born of" connoted a biological connection to both parents: mother and father. "There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the *fact of parenthood* have been established []," *Nguyen v. INS*, 533 U.S. 53, 68 (2001) (emphasis added).[10] *See also Miller*, 523 U.S. at 443 (op. of Stevens, J.) "[I]t is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is *an event creating a legal relationship between parent and child—the birth*

[10] The Court in *Nguyen* – a case that this Circuit's *Scales* decision did not take account of since *Nguyen* was decided a year later – made the statement in the context of its analysis of section 1409, but nothing in the Court's opinion suggests that it considered the biological parent-child relationship to be exclusively limited to section 1409. *See Nguyen*, 533 U.S. at 68.

itself for citizen mothers, but postbirth conduct for citizen fathers and their offspring." (emphasis added).

In sum, it is entirely reasonable to construe and understand the language "born of … parents" in section 1401(g) as encompassing *both* the biological and legal elements of parenthood. This is precisely the interpretation the Department of State applied in the instant case and has long held and applied worldwide. In so doing, the Department was not "imposing" a biological relationship requirement with respect to section 1401; it was simply imputing into the statutory text a requirement it believed was, at minimum, implicit—an interpretation reinforced by the statutory scheme and the context of the pre-ART era in which the INA was enacted.

The foregoing analysis notwithstanding, Defendants recognize that the Ninth Circuit has decided, in *Scales*, that "a *straightforward* reading of § 1401 *indicates* . . . that there is no requirement of a blood relationship," *Scales*, 232 F.3d at 1164 (emphasis added); *see also Solis-Espinoza*, 401 F.3d at 1094.[11] Neither of those cases, however, involved a child born through the use of ART, or addressed the constitutional claim raised here.[12]

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[11] Plaintiffs also cite *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018). As a decision of the Second Circuit, *Jaen* does not bind this jurisdiction, and in any event, it too did not involve ART. Further, this case had not been decided at the time of the adjudications at issue in this case.

[12] Indeed, light of the novel facts presented by ART, this constitutional claim can be seen in some ways as a matter of first impression, concerning who counts as a "parent" for purposes of acquisition of citizenship in the light of reproductive technologies of the 21st century. If nothing else, such considerations counsel for the narrowest of decisions in this case. The question of whether Plaintiff E.J. acquired U.S. citizenship birth, and the associated issues and relief that both Plaintiffs present and call for, can and should be resolved on purely statutory grounds, not as a constitutional matter.

Finally, as noted in Defendants' moving brief, should the Court conclude that summary judgment should be granted in favor of Plaintiffs on this claim, it may only order relief that is limited to the parties and not the permanent, universal injunction that Plaintiffs seek. *See* Compl. for Declaratory and Injunctive Relief, Prayer for Relief at iii, ECF No. 1; Proposed First Am. Compl. For Declaratory and Injunctive Relief, Prayer for Relief at iii, ECF No. 79-2. That is because "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 698, 702 (1979); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). "This rule applies with special force where," as here, "there is no class certification." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). Because Plaintiffs have brought only claims on behalf of themselves, relief should accordingly be limited to what is sufficient to redress their injuries.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for partial summary judgment.

Dated: January 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that I am over the age of 18 and not a party to the above-titled action. I am employed as a Trial Attorney at the United States Department of Justice, Civil Division, Federal Programs Branch. My business address is 20 Massachusetts Ave., N.W., Washington, DC 20530.

On January 14, 2019, I served this RESPONSE AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT on each person or entity named below by uploading an electronic version of this document to the Court's ECF system:

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I declare under penalty of perjury under the laws of the United States of America that the following is true and correct.

Executed on January 14, 2019, at Washington, DC.

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	Case No. CV 18-523-JFW(JCx) **Defendants' Statement of Genuine Disputes of Material Fact ("Defs.' Opp. Stmt. of Facts")** In Support of: Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment Hearing Date: Feb. 4, 2019 Hearing Time: 1:30 pm Honorable John F. Walter

Pursuant to Local Rule 56-1, and this Court's Standing Order (ECF No. 27) and Case Management Order (ECF No. 52), Defendants Secretary of State Michael R. Pompeo and the U.S. Department of State (collectively, "Defendants") respectfully submit the following Statement of Genuine Disputes of Material Fact, in response to Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law (ECF No. 83-24).

I. Statement of Uncontroverted Facts

A. "Andrew Dvash-Banks is a United States citizen."	
Uncontroverted Fact	*Supporting Evidence*
1. Andrew Dvash-Banks ("Andrew") is a United States citizen.	Dvash-Banks Dep. 171:3-171:6. ***Undisputed.***
2. Andrew was born in California in 1981.	Dvash-Banks Dep. 13:24-14:2. ***Undisputed.***
3. During his childhood, Andrew lived primarily in Beverly Hills, California.	Dvash-Banks Dep. 14:9-14:14. ***Undisputed.***
4. Andrew attended high school in California.	Dvash-Banks Dep. 15:20-15:22. ***Undisputed.***
5. Andrew attended college in California.	Dvash-Banks Dep. 15:23-15:25. ***Undisputed.***
6. Andrew resided in the United States continuously from 1981 through at least October 2005, as well as during other periods.	Dvash-Banks Dep. 169:13-169:19. ***Undisputed.***
7. In 2007, Andrew enrolled in a master's degree program in Israel.	Dvash-Banks Dep. 18:1-18:4; 19:20-20:2. ***Undisputed.***
8. In 2008, while enrolled in graduate school in Israel, Andrew met his now-husband, Elad Dvash-Banks ("Elad").	Dvash-Banks Dep. 19:6-20:2. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
9. Elad is an Israeli citizen.	CRBA App. ***Undisputed.***
B. "Andrew and Elad marry and make preparations to become parents."	
10. Andrew and Elad moved to Toronto in 2010.	Dvash-Banks Dep. 22:23-22:25. ***Undisputed.***
11. Andrew and Elad were married on August 19, 2010 in Toronto, Canada.	Marriage Lic.; Dvash-Banks Dep. 29:5-29:8. ***Undisputed.***
12. At the time of the marriage of Andrew and Elad, two men, Ontario recognized the validity of same-sex marriages.	Dvash-Banks Dep. 22:10-22:11. ***Undisputed.***
13. Andrew and Elad decided to have children.	Dvash-Banks Dep. 67:25-68:4 ***Undisputed.***
14. Andrew and Elad obtained eggs from an anonymous egg donor (the "Donor").	Dvash-Banks Dep. 79:12-79:16. ***Undisputed.***
15. Andrew and Elad donated their respective genetic material to create embryos using the eggs from the Donor.	Dvash-Banks Dep. 83:17-84:2; 85:3-85:13. ***Undisputed.***
16. Andrew and Elad successfully created embryos using eggs from the Donor.	Dvash-Banks Dep. 83:17-84:10. ***Undisputed.***
17. In December 2015, Andrew and Elad contracted with a	Surrogacy Agmt. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
gestational surrogate (the "Gestational Surrogate") for the purpose of carrying one or two embryos during a pregnancy (the "Surrogacy Agreement").	
18. The Surrogacy Agreement states that "Andrew and Elad (collectively called the 'Intended Parents') are a same-sex married couple who require assisted reproductive technology to have a child."	Surrogacy Agmt. at Section 1.1, AR 023. ***Undisputed.***
19. The Gestational Surrogate agreed to carry eggs "retrieved from the third party anonymous donor and Sperm supplied by Andrew and/or Elad" that was "incubated externally" to create embryos.	Surrogacy Agmt. at Section 1.4, AR 023. ***Undisputed.***
20. The Gestational Surrogate became pregnant with one embryo created using genetic material from Andrew and one embryo created using genetic material from Elad.	Dvash-Banks Dep. 85:3-85:13. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
21. Under the terms of the Surrogacy Agreement, Andrew and Elad "will be recognized as the Child's parents immediately upon the Child's Birth."	Surrogacy Agmt. at Section 1.8, AR 024. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that the Surrogacy Agreement would be binding on anyone other than the contracting parties. • Surrogacy Agmt. at 12, AR 024 ("NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and promises contained in this Agreement and with the intention of being fully bound by its terms, the Parties do hereby covenant and agree as follows.") • *Id.* pt. II ¶ p, AR 026 ("'Parties' means the parties to this Agreement, being ANDREW DVASH-BANKS, ELAD DVASH-BANKS, and AMANDA MARIE ANNE ADAMS, and 'Party' means any one of the Parties individually[.]") Otherwise undisputed.
22. Under the terms of the Surrogacy Agreement, Andrew and Elad, "intend to assume full care of, and all parental responsibility for the Child. . . ."	Surrogacy Agmt. at Section 1.9, AR 024. ***Undisputed.***
23. Under the terms of the Surrogacy Agreement, "Immediately upon	Surrogacy Agmt. at Section 1.10, AR 024. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
the Birth of the Child, the Gestational Carrier will give the Child into the permanent custody of the Intended Parents and as soon as reasonably possible thereafter the Intended Parents will make an application in the Ontario Superior Court of Justice seeking a declaration of parentage on their part, and a declaration of non-parentage on the part of the Gestational Carrier."	
24. Under the terms of the Surrogacy Agreement: "The Parties acknowledge that immediately upon Birth all medical decisions regarding the Child shall be made solely by the Intended Parents."	Surrogacy Agmt. at Section14.4(c), AR 038. ***Undisputed.***
25. The Surrogacy Agreement states that: "For purposes of this Agreement, 'immediately upon birth' means as soon as the umbilical cord is cut."	Surrogacy Agmt. at Section 14.1, AR 038. ***Undisputed***.

Uncontroverted Fact	*Supporting Evidence*
26. Under the terms of the Surrogacy Agreement, "The Gestational Carrier hereby expressly waives all parental, custodial and social rights that she has or may acquire to the Child."	Surrogacy Agmt. at Section 14.4, AR 038. ***Undisputed.***
27. Under the terms of the Surrogacy Agreement, "All Parties to this Agreement wish to maintain confidentialities between themselves, one to another, and between themselves and the public."	Surrogacy Agmt. at Section 1.11 at AR 024. ***Undisputed.***
28. Under the terms of the Surrogacy Agreement, the Surrogacy Agreement is governed by the laws of the Province of Ontario, Canada.	Surrogacy Agmt. at Section 35.1 at AR 051. ***Undisputed.***
C. "The twins are born and Elad and Andrew are named as their parents on their birth certificates and are recognized for all purposes in law to be their parents."	
29. Twins A.J. and E.J. (the "Twins") were born on September 16, 2016 in Ontario, Canada.	E.J. Statement of Live Birth; A.J. Statement of Live Birth. ***Undisputed except to the extent the term "twins" is intended to imply that E.J. is biologically related to Andrew, or that A.J. and***

Uncontroverted Fact	*Supporting Evidence*
	E.J. share the same biological parents.
30. The Twins were born four minutes apart.	Dvash-Banks Dep. 161:13-161:16. ***Undisputed.***
31. Andrew and Elad were married to each other on the day of the Twins' birth.	Dvash-Banks Dep. 171:10- 171:15; E.J. Statement of Live Birth. ***Undisputed.***
32. Andrew was the person who cut E.J.'s umbilical cord.	Dvash-Banks Dep. 143:23-144:15. ***Undisputed.***
33. Andrew and Elad are listed as E.J.'s parents on E.J.'s Statement of Live Birth issued by Ontario, Canada.	E.J. Statement of Live Birth. ***Undisputed.***
34. Andrew and Elad are listed as A.J.'s parents on A.J.'s Statement of Live Birth issued by Ontario, Canada.	E.J. Statement of Live Birth. ***Undisputed.***
35. Andrew and Elad are the only parents listed on E.J.'s Statement of Live Birth.	E.J. Statement of Live Birth. ***Undisputed.***
36. Andrew and Elad are the only parents listed on A.J.'s Statement of Live Birth.	A.J. Statement of Live Birth. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
37. Andrew and Elad have been E.J.'s and A.J.'s legal parents since the Twins' birth in 2016.	E.J. Statement of Live Birth; A.J. Statement of Live Birth; Surrogacy Agmt., at Sections 1.8-1.10, AR 024; Canadian Order. ***This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.*** Undisputed that Andrew and Elad are E.J's and A.J.'s parents.
38. Andrew and Elad have raised the Twins since the day the Twins were born.	Surrogacy Agmt., at Sections 14.1, 14.4, AR 037-38. ***Undisputed.***
39. No other individual has acted as a parent to E.J. or A.J.	Canadian Order; Surrogacy Agmt. at Sections 1.7-1.10, AR 024; Dvash-Banks Dep. 29:21-30:14. ***This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.*** Undisputed that Andrew and Elad are E.J's. and A.J.'s parents. Disputed that no other individual ever acted as a parent. • By providing ova, the egg donor acted as a biological/ genetic mother for E.J. and A.J. *See* Plaintiffs' Response to Defendants' Request for Admission No. 1 (admitting

Uncontroverted Fact	*Supporting Evidence*
	anonymous donor used to conceive E.G. and A.J.) • By carrying and giving birth to E.J. and A.J., the Gestational Carrier acted as a gestational mother/parent and birth mother to the children. *See* Plaintiffs' Response to Defendants' Request for Admission No. 3 (admitting gestational surrogate was used to carry and give birth E.J.) Further disputed to the extent the statement conveys or implies that no other individual ever had legal rights as a parent to E.J. or A.J. under Canadian law. • Canadian Order, AR 021 (listing Amanda Marie Anne Adams as "Respondent"); *id.* at 021–22 (dated September 28, 2018, and not stating that it had retroactive effect). • Surrogacy Agmt. at Section 23.2, AR 042 (containing post-birth condition precedent that would need to occur before "the Gestational Carrier will sign all necessary documents to obtain a legal declaration that she is not the genetic or intended mother of the child") • Surrogacy Agmt. at Section 1.10, AR 024 (Gestational Carrier implied to be a parent

Uncontroverted Fact	*Supporting Evidence*
	until making a post-birth declaration of non-parentage). ***Objection*** to reliance here on Dvash-Banks Dep. 29:21-30:14: hearsay.
40. No other individual has asserted any parental rights with respect to E.J. or A.J.	Canadian Order; Dvash- Banks Dep. 112:19-112:24. ***This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.*** Defendants lack sufficient knowledge as to whether any individual has ever asserted any parental rights with respect to E.J. or A.J. Undisputed that the Gestational Carrier agreed to not to "assert" any parental rights she may have had with respect to babies she carried and gave birth to under the Surrogacy Agreement, assuming the "condition precedent" and any other relevant terms of the agreement were met. Surrogacy Agreement Part XIV, AR 037–39 (regarding "Custody of Child and Parental Rights"); *id.* Part X, AR 033–34 (regarding "Condition Precedent"). ***Objection*** to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay.
41. On September 28, 2016, the Ontario Superior Court of Justice	Canadian Order. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
entered an Order (the "Canadian Order") stating that: "It is declared that the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, are the parents of the child, [E.J.], born September 16, 2016 ("the child"), and that the Applicants are recognized for all purposes in law to be the parents of the child."	
42. The Canadian Order declared that [the Gestational Surrogate] is not the mother of the child.	Canadian Order. ***Undisputed.***
43. The Canadian Order directed the Deputy Registrar General for the Province of Ontario "to register the birth of the child [E.J.] so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child."	Canadian Order. ***Undisputed.***
44. The Canadian court issued a parallel order for A.J.	Dvash-Banks Dep. 112:19-112:24. ***Undisputed.***
45. Under the law of Ontario, Canada, Andrew and Elad are the legal parents of the Twins.	Canadian Order; Dvash- Banks Dep. 112:19-112:24. ***This statement comprises a conclusion of law,***

Uncontroverted Fact	*Supporting Evidence*
	not a statement of fact in part. The cited evidence does not establish the point(s) made in the statement. Undisputed that Andrew and Elad are E.J's and A.J.'s parents**.** ***Objection*** to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay.
46. E.J. was not conceived using Andrew's sperm.	Pls. Disc. Responses at Request For Admission ("RFA") No. 14. ***Undisputed.***
47. A.J. was conceived using sperm from Andrew.	Viaguard A-M Letter; Dvash-Banks Dep. 84:17-85:13. ***Undisputed.***
48. E.J. was conceived using sperm from Elad.	Viaguard A-M Letter; Dvash- Banks Dep. 84:17-85:13. ***Undisputed.***
49. There is no evidence that Andrew supplied genetic material to the conception or birth of E.J.	Viaguard A-M Letter; Pls. Disc. Responses at RFA No. 14. ***Undisputed.***
50. From the time the Twins left the hospital where they were born, they have lived continuously with Andrew and Elad.	Dvash-Banks Dep. 29:21-30:14; 171:16-171:23. ***Undisputed.***
51. Andrew, Elad and the Twins have lived together as a family	Dvash-Banks Dep. 29:21-30:14; 171:16-171:23. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
since the Twins' release from the hospital following their birth.	
52. Andrew and Elad and the Twins now reside in California.	Dvash-Banks Dep. 29:21-29:23; 34:13-34:14. ***Undisputed.***
D. "E.J. and A.J. apply for U.S. passports and for CRBAs in Recognition that the twins are U.S. citizens at birth"	
53. Andrew and Elad submitted to the United States Consulate in Toronto, Canada ("Toronto Consulate") applications for a Consular Report of Birth Abroad ("CRBA") and U.S. passport for each of the Twins.	Dvash-Banks Dep. 117:3-117:11. ***Undisputed.***
54. A CRBA demonstrates that the recipient is a U.S. citizen at birth.	Reffett Dep. 34:21-34:24. ***Undisputed***.
55. On January 24, 2017, Andrew and Elad appeared in person at the Toronto Consulate in connection with the applications for a CRBA and U.S. passport for each of the Twins.	Dvash-Banks Dep. 125:12-126:12; Day Dep. 121:19-122:1. ***Undisputed.***
56. Andrew and Elad provided the Toronto Consulate with the requisite documentation for E.J.'s applications, including	Dvash-Banks Dep. 95:4-97:12; 165:4-166:12; Admin. Record 09-62. ***Disputed in part:*** It is undisputed that Andrew and Elad provided

Uncontroverted Fact	*Supporting Evidence*
E.J.'s Statement of Live Birth, which identified Andrew and Elad as the parents, evidence of Andrew's U.S. citizenship and periods of residency, and Andrew and Elad's marriage certificate.	Consulate Toronto with documentation including E.J.'s Statement of Live Birth, evidence of Andrew's U.S. citizenship and periods of residency, and Andrew and Elad's marriage certificate. Defendants dispute the portion of the statement describing this documentation as "the requisite documentation." • AR 005 (consular officer's case notes indicating: "School transcripts needed to confirm Amcit father's physical presence in the US.") Defendants also dispute the "requisite documentation" portion of the statement to the extent it conveys or implies that the Department of State requires specific documents be submitted with CRBA and/or U.S. passport applications. It is up to applicants to select the specific documents they will submit to the Department to support their claim for citizenship. • Reffett Depo. Tr. 92:06–93:06; 177:04–25 • *See also* 22 CFR §§ 50.2, 50.5, 51.40, 51.41, and 51.43 (burden on applicant)
57. On January 24, 2017, Frances Terri Day, Vice Consul, Toronto Consulate, interviewed the	Day Dep. 94:23-95:25. ***Disputed in part:*** Disputed to the extent the use of the term

Uncontroverted Fact	*Supporting Evidence*
Dvash-Banks family and adjudicated E.J.'s and A.J.'s respective applications for a CRBA and U.S. passport.	"adjudicated" conveys or implies that the adjudication of the applications were completed on January 24, 2017. Undisputed that on January 24, 2017, Terri Nathine Francis Day, Vice Consul, Toronto Consulate, interviewed the Dvash-Banks family in connection with E.J.'s and A.J.'s respective applications for a CRBA and U.S. passport, and that she started to adjudicate those applications that day.
58. Ms. Day had authority to make the final decision as to whether to grant or deny the applications for E.J. and A.J.	Day Dep. 48:6-48:10. ***Undisputed.***
59. Ms. Day accepted Andrew and Elad's marriage license from the Ontario government as sufficient proof of their marriage.	Day Dep. 142:19-142:25;155:24-156:6; 161:24-162:6;Marriage Lic. ***Undisputed.***
60. Ms. Day accepted E.J.'s Statement of Live Birth as a timely-filed Canadian birth certificate.	Day Dep.172:5-172:24; E.J. Statement of Live Birth. ***Disputed in part:*** Disputed to the extent this statement conveys or implies that a "Statement of Live Birth" is the equivalent of "a … birth certificate." • Reffett Depo. Tr. 92:06–93:06; 177:04–25 Otherwise undisputed.

Uncontroverted Fact	*Supporting Evidence*
61. Ms. Day accepted E.J.'s Statement of Live Birth as sufficient proof that Andrew and Elad are E.J.'s legal parents.	Day Dep. 172:5-173:12; Ramsay Dep. 103:7-103:11; E.J. Statement of Live Birth. ***Undisputed.***
62. Ms. Day accepted the Ontario Court order naming Andrew and Elad as the parents of E.J. as sufficient proof that Andrew and Elad were E.J.'s legal parents.	Day Dep. 173:19-174:5; Canadian Order. ***Undisputed.***
63. During their interview at the Toronto Consulate on January 24, 2017, Frances Terri Day asked Andrew and Elad how they had conceived the Twins and whose egg and sperm had been used to conceive each of the Twins.	Ramsay Dep. 45:6-45:11;46:20-46:23; Dvash-Banks Dep. 129:15-129:21; Day Dep. 110:22-112:11. ***Disputed.*** Evidence does not establish that Ms. Day asked Andrew and Elad these questions. • Day Depo. 120:14–121:3 This information was volunteered by Andrew and Elad, at least to the extent their application materials reflected that they had used Assisted Reproductive Technology. • AR 021–56 ***Objection*** to reliance here on Dvash-Banks Dep. 129:15-129:21: hearsay.
64. Andrew had not planned to disclose to others the biological	Surrogacy Agmt. at Section 1.1, AR 024. ***Disputed in part.*** Cited evidence does not establish this point. Disputed to the extent that the statement

Uncontroverted Fact	*Supporting Evidence*
relationships among Elad and Andrew and the Twins.	conveys or implies that other than disclosing this information to the Department of State, Andrew and Elad had always taken steps to keep this information confidential and had never disclosed this information to anyone other than themselves.
65. Ms. Day's role in adjudicating U.S. passport and CRBA applications was to determine whether, according to the State Department's *Foreign Affairs Manual* ("FAM"), the applicant was entitled to be recognized as a U.S. citizen.	Day Dep. 29:17-30:3; 47:12-47:24; 59:2-59:16. ***Disputed in part:*** Defendants dispute this statement to the extent it conveys or implies that the Foreign Affairs Manual provided the only basis for the adjudicative criteria. • Day Depo 29:17–30:3 ("My role was to determine if the applicant had a claim to U.S. citizenship… my job was to determine if that was – according to the Foreign Affairs Manual and the guidelines that we had … if they were entitled to that citizenship.") • *Id.* 233:19–234:20 (explaining that she did not consider FAM completely separated from Immigration and Nationality Act of 1952) Defendants further dispute this statement to the extent it conveys or implies that that any applicant born abroad is "entitled" (automatically or otherwise) to be recognized or documented as a U.S. citizen at birth. *See generally* (22 C.F.R. §§ 50, 51.

Uncontroverted Fact	*Supporting Evidence*
	Otherwise undisputed.
66. During the Dvash-Banks' interview at the Toronto Consulate on January 24, 2017, Ms. Day consulted with another Consular Officer, Margaret Ramsay, and with Larilyn Reffett concerning the applications for E.J. and A.J.	Ramsay Dep. 163:5-164:14; Reffett Dep. 67:19-68:5. ***Undisputed.***
67. Ms. Ramsay provided Ms. Day with the relevant sections of the FAM so that Ms. Day would have the opportunity to consult them in adjudicating E.J.'s and A.J.'s applications.	Reffett Dep. 79:8-79:16; Ramsay Dep. 40:10-40:24; AR 073. ***Disputed in part:*** It is undisputed that Ms. Ramsay provided Ms. Day with a relevant section of the FAM so that Ms. Day would have the opportunity to consult it in adjudicating E.J.'s and A.J.'s applications. Disputed that Ms. Ramsay provided Ms. Day with "relevant sections" (in the plural) of the FAM. • AR 073 (email in which Ms. Ramsay sends Ms. Day a link to 7 FAM 1100 Appendix D) • AR Certification page (indicating that all of the FAM sections included in Administrative Record "were relevant to and were in effect at the time of the adjudication at issue…, and thus would have been considered directly or indirectly by the adjudicator.").

Uncontroverted Fact	*Supporting Evidence*
	• AR 081–106 (FAM sections)
68. Ms. Day referred to the FAM during the time that she was interviewing the Dvash-Banks family.	Day Dep. 217:21-217:24. ***Undisputed.***
69. Ms. Day's typed notes reflect that she may originally have considered the Twins to have been born in wedlock because of the marriage certificate included in the applications.	AR 003; Ramsay Dep. 131:25-132:5. ***Undisputed.***
70. Ms. Day ultimately applied Section 309 of the Immigration and Nationality Act ("INA"),8 U.S.C. § 1409 ("Section 309"), to the adjudication of the Twins' applications.	Ramsay Dep. 131:25-132:5. ***Disputed.*** Cited evidence does not establish this point. • Day Depo. 116:12–19; 231:04-233:18
71. Ms. Ramsay suggested to Ms. Day that she could ask the Dvash-Banks family to provide additional biological evidence, such as DNA testing, in connection with the adjudication of the applications for E.J. and A.J.	Ramsay Dep. 60:5-60:8. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
72. During the Dvash-Banks family's interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that if they wanted to proceed with the Twins' applications, they would have to provide additional information demonstrating the biological relationship between each child and that child's U.S. citizen parent.	Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17. ***Undisputed.***
73. During the Dvash-Banks family's interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that a form of additional information demonstrating the biological relationship required by the Department of State (the "State Department") is DNA evidence.	Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4;72:7-72:17. ***Undisputed.***
74. Ms. Day provided Andrew and Elad with information concerning certain DNA testing establishments from which the	Jan. 24 Letter from Day. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
Toronto Consulate accepts DNA testing results.	
75. By letter dated January 24, 2017 from Ms. Day to Andrew, the State Department informed the Dvash-Banks family that "in reference to your application for a U.S. passport and a [CRBA] for [A.J.] and [E.J.]… The U.S. Consulate General in Toronto has considered the evidence you submitted and concluded that the blood relationship between a U.S. citizen parent and children have not been established by a preponderance of the evidence as required to support a claim to U.S. citizenship."	Jan. 24 Letter from Day; 30(b)(6) Dep. 296:11-297:3; Reffett Dep. At 67:14-69:4. ***Undisputed.***
76. On January 24, 2017, following the completion of the interview of the Dvash- Banks family at the Toronto Consulate, Ms. Day designated the status of each of the Twins' applications as "pending."	Ramsay Dep. 48:24-49:10. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
77. A "pending" designation for CRBA applications is reserved for applications that cannot be finally adjudicated on the day of an applicant's interview and remain open pending submission of additional information requested by the State Department.	Reffett Dep. 67:14-68:11; Day Dep. 37:4-37:23. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that in all (or even any) cases that are put in "pending status" the Department of State has "requested" certain additional information be submitted. • Day Depo 37:4–28 Otherwise undisputed.
78. During the Dvash-Banks family's interview at the Toronto Consulate on January 24, 2017, Andrew told Ms. Day that "these are our children. These are our sons. I'm the dad, and . . . Elad is the dad . . . we're the parents of these boys."	Day Dep. 119:22-120:12. ***Undisputed.***
79. E.J.'s and A.J.'s applications for a CRBA and U.S. passport were adjudicated by Ms. Day under Section 309.	30(b)(6) Dep. 273:2-15; Ramsay Dep. 131:22-132:5;132:22-133:6; 164:9-164:14. ***Disputed in part.*** Cited evidence does not establish the points made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State "appl[ied] the criteria of Section 309 in connection with those adjudications," *i.e.*, the adjudications of E.J.'s and A.J.'s applications. The

Uncontroverted Fact	*Supporting Evidence*
	30(b)(6) witness was not the decision maker in the underlying adjudication. The testimony of Ms. Ramsay does not establish this point. See also: • Day Depo. 116:12–19; 231:04-233:18
80. The State Department applied Section 309 in adjudicating E.J.'s applications for a U.S. passport and CRBA.	30(b)(6) Dep. 273:2-7. ***Disputed.*** Cited evidence does not establish the point(s) made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State "appl[ied] the criteria of Section 309 in connection with those adjudications," *i.e.*, the adjudications of E.J.'s and A.J.'s applications. The 30(b)(6) witness was not the decision maker in the underlying adjudication. • Day Depo. 116:12–19; 231:04-233:18
81. The State Department applies Section 309 to CRBA applications submitted on behalf of children who the State Department considers to have been born "out of wedlock."	30(b)(6) Dep. 186:8-14. ***Undisputed.***
82. The State Department interprets Section 309 to require, among other things, proof of a biological relationship between a	30(b)(6) Dep. 273:2-273:15. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
CRBA applicant and that child's U.S. citizen parent.	
83. The State Department determined that Section 309 was the correct statutory section to apply in adjudicating E.J.'s applications for a U.S. passport and CRBA because E.J.'s biological parents were not married to each other.	30(b)(6) Dep. 273:2-15. ***Disputed in part.*** Cited evidence does not establish the points made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State "appl[ied] the criteria of Section 309 in connection with those adjudications," *i.e.*, the adjudications of E.J.'s and A.J.'s applications. The 30(b)(6) witness was not the decision maker in the underlying adjudication. • Day Depo. 116:12–19; 231:04-233:18
84. The State Department applies Section 301 of the INA, 8 U.S.C. § 1401, ("Section 301") to CRBA applications submitted on behalf of children who the State Department considers to have been born "in wedlock."	30(b)(6) Dep. 186:8-14. ***Undisputed***.
85. The State Department interprets Section 301 to require, among other things, proof of a biological relationship between a CRBA applicant and both of his legal parents.	30(b)(6) Dep. 178:10-178:19. ***Disputed.*** Cited evidence does not establish this point. Also, the question is not the relationship between a CRBA applicant and his/her legal parents at the time of the application, but at the time of his/her

Uncontroverted Fact	*Supporting Evidence*
	birth. • 7 FAM 1120 Appendix E ¶ a(3), AR 088–89 • 7 FAM 1160 Appendix E, AR 092-93 • 7 FAM 1110 Appendix A, AR 095 ("The statutory requirement that an applicant may use DNA testing to prove the relationship between the U.S. citizen parent and the child is in … Section 301(g) INA ('a person born … of parents')." • 7 FAM 1110 Appendix D, AR 77 • 7 FAM 1120 Appendix D, AR 78
86. When she was adjudicating E.J.'s applications for a CRBA and U.S. passport, Ms. Day understood, based on her review of relevant provisions of the FAM, that the State Department interprets both Section 301 and Section 309 to require a biological relationship between a U.S. citizen parent and his child.	Day Dep. 232:23-233:10; 277:18-278:2. ***Undisputed.***
87. After the January 24, 2017 interview, the Dvash-Banks proceeded to have DNA testing conducted by an establishment	Viaguard A-M Letter. ***Disputed in part.*** Disputed to the extent the statement conveys or implies that the Toronto Consulate approved a particular establishment. The cited evidence does

Uncontroverted Fact	*Supporting Evidence*
approved by the Toronto Consulate.	not establish that point. The Consulate would only accept DNA "processed by a lab that is accredited by the American Association of Blood Banks (AABB)," *see* AR 098, but that does not mean that the Consulate "approved" particular DNA testing facilities, *see id.*
88. The Toronto Consulate received DNA results for E.J. and A.J.	Ramsay Dep. 54:4-54:5; Viaguard A-M Letter. ***Undisputed.***
E. "The State Department recognizes A.J. as a U.S. citizen at birth and refuses to recognize E.J.'s U.S. citizenship"	
89. Ms. Day approved A.J.'s applications for a CRBA and U.S. passport.	Reffett Dep. 87:15-22; Day Dep. 166:16-166:24; A.J. CRBA. ***Undisputed.***
90. The State Department issued a CRBA to A.J., dated March 2, 2017.	A.J. CRBA. ***Undisputed.***
91. By letter dated March 2, 2017, on the letterhead of the Toronto Consulate, Ms. Day informed Andrew that E.J.'s "applications [for a CRBA and U.S. passport] are denied."	Mar. 2 Letter from Day; Reffett Dep. 65:6-65:9. ***Undisputed.***
92. Ms. Day's March 2, 2017 letter to Andrew stated, in part, "after careful review of the evidence	Mar. 2 Letter from Day. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
you submitted with your child's application, it has been determined that his claim to U.S. citizenship has not been satisfactorily established, as you are not his biological father. The Immigration and Nationality Act (INA) of 1952, as amended, requires, among other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship."	
93. Ms. Day's March 2, 2017 letter to Andrew denying E.J.'s applications for a U.S. passport and CRBA was the final determination of the applications by the State Department.	Reffett Dep. 77:14-17; 118:6-118:22. ***Undisputed.***
94. Ms. Day's March 2, 2017 letter terminated the application process for E.J.'s requests for a CRBA and U.S. passport with a denial and the State Department closed the files relating to E.J.'s applications.	Reffett Dep. 118:6-22. ***Disputed in part:*** Defendants do not dispute the part of the statement that reads: "Ms. Day's March 2, 2017 letter terminated the application process for E.J.'s requests for a CRBA and U.S. passport with a denial."

Uncontroverted Fact	*Supporting Evidence*
	Disputed to the extent the statement reads: "and the State Department closed the files relating to E.J.'s applications." Cited evidence does not establish this point. • AR 002–008 (case notes)
95. The reason for the State Department's denial of E.J.'s applications for a U.S. Passport and CRBA was that he did not establish a biological relationship to his U.S. citizen parent (Andrew).	Reffett Dep. 78:9-78:20. ***Undisputed.***
96. The State Department acknowledges that E.J.'s lack of a biological relationship to Andrew was the sole reason identified for the denial of E.J.'s applications.	30(b)(6) Dep. 298:24-299:6. ***Undisputed.***
97. Following the Toronto Consulate's receipt of the DNA testing results for the Twins from an approved testing establishment, the Toronto Consulate followed the FAM guidance on applications submitted on behalf of children	Ramsay Dep. 154:16-154:23. ***Disputed in part:*** Disputed to the extent that the statement conveys or implies that the Consulate specifically approved this or any other testing establishment. Cited evidence does not establish this proposition. • AR 098 (FAM provision setting requirement that Department may only accept DNA

Uncontroverted Fact	*Supporting Evidence*
born by means of assisted reproductive technology.	"processed by a lab that is accredited by the American Association of Blood Banks (AABB).")
98. Ms. Day granted A.J.'s applications for a U.S. Passport and CRBA.	Reffett Dep. 87:15-22 ***Undisputed.***
99. As a result of the State Department's denial of E.J.'s application, the Dvash-Banks family has suffered greatly.	Pls.' Disc. Responses at Interrogatory No. 5. ***This statement comprises a conclusion of law, not a statement of fact. Disputed.*** Cited evidence does not establish this point. Defendants lack sufficient knowledge as to what injury this averment refers. Defendants dispute that the Defendants' actions were unlawful.
100. Andrew and Elad feel the indignity of the U.S. Government's refusal to recognize their marriage and the legitimacy of their children.	Pls.' Disc. Responses at Interrogatory No. 5. ***Disputed in part:*** Defendants lack sufficient knowledge as to what Andrew and Elad may subjectively feel. Otherwise disputed that the U.S. government has refused to recognize their marriage or the legitimacy of their children.
101. The Dvash-Banks family's travel is significantly restricted or impaired because E.J. entered the United States on a tourist visa, which has expired, and	Pls.' Disc. Responses at Interrogatory No. 5. ***Disputed.*** • Dvash-Banks Depo at ___ (party admission / testimony that Dvash-Banks family has travelled into and out of the U.S. on at least

Uncontroverted Fact	*Supporting Evidence*
although E.J. now has an Advance Parole document, it does not guarantee re-entry into the United States.	five occasions, and that they did so with minimal trouble, restriction, or impairment).
102. When the Dvash-Banks family has traveled, it always is with the fear that E.J., who does not have a U.S. passport, may not be permitted to re-enter the United States.	Pls.' Disc. Responses at Interrogatory No. 5. ***Disputed in part:*** Defendants lack sufficient knowledge as to what Andrew and Elad may subjectively feel but dispute that the Department of State's actions were unlawful. • Dvash-Banks Depo at ___ (E.J. entered and exited U.S. on a Canadian passport)
103. The Dvash-Banks has spent substantial time consulting with lawyers, their accountant, and others about a range of issues, from E.J.'s immigration status to obtaining medical benefits and a Tax ID number for E.J., who does not have a Social Security number.	Pls. Disc. Responses at Interrogatory No. 5. ***Disputed in part:*** Undisputed that the family has spent time consulting. Dispute the statement to the extent it conveys or implies that Defendants actions were unlawful.
104. The Dvash-Banks family has endured, and continues to endure, the pain and stigma of the State Department's refusal to recognize Andrew's marriage to	Pls. Disc. Responses at Interrogatory No. 5. ***This statement comprises a conclusion of law, not a statement of fact, and is disputed.***

Uncontroverted Fact	*Supporting Evidence*
Elad and status as E.J.'s parent, and its treatment of E.J. as illegitimate.	
105. They also live with the invasion of their privacy resulting from their need to commence this litigation in federal court seeking recognition of E.J.'s U.S. citizenship at birth, which could have been provided privately at the Toronto Consulate.	Pls.' Disc. Responses at Interrogatory No. 5. ***Disputed.*** Allegation that Defendants invaded Plaintiff's privacy not established by cited evidence. • Sept. 2017 (pre-litigation) news story, featuring video, showing that Andrew and Elad sought/allowed publicity, including photos of their children inside their home. • Complaint (showing that Plaintiffs choose to publicly file full names of children, rather than only the children's' initials).
F. The State Department's policies.	
106. At the time of E.J.'s birth, Andrew and Elad were validly married.	Ramsay Dep. 65:15-20; 108:2-7; 108:20-109:3; 30(b)(6)Dep. 260: 13-16. ***Undisputed.***
107. Andrew is E.J.'s legal parent.	Ramsay Dep. 103:7-11;104: 19-105:12; 30(b)(6) Dep.88:12-16; 261:16-18; 268:2-5. ***Undisputed.***
108. Under the State Department's existing policies and procedures, a child is born "in wedlock" only	30(b)(6) Dep. 171:1-4. ***Disputed in part:*** Disputed to the extent that the statement conveys or implies that the Department of State is

Uncontroverted Fact	*Supporting Evidence*
if the two biological parents are married to each other.	applying "policies and procedures" as opposed to applying the Department of State's interpretation of the Immigration and Nationality Act. Otherwise undisputed.
109. The State Department applies this definition of "in wedlock" when a married couple uses assisted reproduction technology.	30(b)(6) Dep. 173:19-174:2. ***Disputed.*** Cited evidence does not establish this point. • 7 FAM 1100 Appendix D ("Acquisition of U.S. Citizenship at Birth - Assisted Reproductive Technology"), AR 077–80 • 7 FAM 1110 Appendix D ¶ b ("A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c)."); *id.* ¶ c ("A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal

Uncontroverted Fact	*Supporting Evidence*
	mother, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien father, with a citizenship claim adjudicated under 301(g).")
110. When a male same-sex couple uses sperm from one parent and an egg from a donor to conceive a child during their marriage, the State Department does not consider the child born "in wedlock."	30(b)(6) Dep. 177:14-177:22;180:2-9. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that a transgendered male in a same-sex relationship could have a child born "in wedlock" even with the use of an egg donor. • 30(b)(6) Dep. 178:20–179:18. Otherwise undisputed.
111. The State Department asserts that its understanding of "in wedlock" is based on the language of Section 301.	30(b)(6) Dep. 178:10-19;180:10-15. ***Disputed.*** Cited evidence does not establish this proposition. • 30(b)(6) Dep. 180:16-181:10.
112. The State Department's understanding of "in wedlock" in interpreting the INA is reflected in 8 FAM § 304.1-2 (previously numbered 7 FAM 1140 Appendix E).	30(b)(6) Dep. 180:16-181:10. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
113. Under the State Department's policies, E.J. and A.J. were born "out of wedlock" within the meaning of Section 309.	30(b)(6) Dep. 188:6-15;271:20-22; 274:25-275:6. ***Disputed in part:*** Disputed to the extent that the statement conveys or implies that the Department of State applies "policies" as opposed to applying the Department of State's interpretation of the Immigration and Nationality Act. Otherwise undisputed.
114. Under the State Department's policies, Andrew and Elad can never have a child "in wedlock" together because they are two men.	30(b)(6) Dep. 274:25-275:6. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by the Department of State to have been established at birth. • Day Depo. 232:01–233:10 (showing that distinction between "in wedlock" and "out of wedlock" did not matter to the outcome of E.J.'s adjudication) • A.J.'s CRBA
115. Under the State Department's policies, two legally married men who have always been men could never have a child "in wedlock" for purposes of	30(b)(6) Dep. 201:2-16. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by

Uncontroverted Fact	*Supporting Evidence*
adjudicating a CRBA application.	the Department of State to have been established at birth. • Depo citations (showing that distinction between "in wedlock" and "out of wedlock" did not matter to the outcome of E.J.'s adjudication)
116. Absent the possibility that the law of the country of birth or domicile of a child born to a married male same-sex couple using assisted reproductive technology provides for the child's legitimation, the State Department does not consider the child as legitimate.	30(b)(6) Dep. 211:23-213:25. ***Disputed.*** The cited evidence does not establish the statement. The Department considered E.J. and A.J. legitimate. • [Lisa/Irene please provide record cites per your comments on our our 5pm phone call on 01/09/2019] []
117. The State Department's policy is that Section 301 requires that a U.S. citizen parent have a biological relationship with a child born outside of the United States in order to transmit U.S. citizenship at birth to the child, even if the parent is the legal parent of the child and was married to the child's other legal	Reffett Dep. 121:22-122:7;124:9-125:3; 157:3-4; 30(b)(6) Dep. 158:25-159:13. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
parent at the time of the child's birth.	
118. The Toronto Consulate follows guidance from the State Department in Washington, D.C. as to the requirements for issuance of a CRBA, and there are no Toronto-specific policies concerning the adjudication of CRBA applications.	Reffett Dep. 30:12-21; Ramsay Dep. 17:22-18:1; Day Dep. 24:2-24:12;30(b)(6) Dep. 92:6-92:15. ***Undisputed.***
119. The Toronto Consulate is expected by the State Department to follow State Department policies and FAM guidance issued by the State Department in Washington, D.C. regarding applications submitted on behalf of children born by means of assisted reproductive technology.	30(b)(6) Dep. 93:3-93:8. ***Undisputed.***
120. The Toronto Consulate follows State Department policies and FAM guidance issued by the State Department in Washington, D.C. regarding the adjudication	Reffett Dep. 60:18-61:6; 30(b)(6) Dep. 92:20-93:8. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
of CRBA and passport applications.	
121. The Toronto Consulate understood the FAM guidance to require a biological relationship between the applicant for a CRBA and/or U.S. passport and the child's U.S. citizen parent.	Ramsay Dep. 154:16-154:23. ***Undisputed.***
122. The State Department interprets Section 301 to require a biological connection between a married U.S. citizen and his child born outside of the United States in order to transmit U.S. citizenship at birth to the child.	30(b)(6) Dep. 158:25-159:13. ***This statement describes as "fact" a legal position taken by the Department of State; otherwise undisputed.***
123. The text of Section 301 does not contain the phrase "in wedlock."	30(b)(6) Dep. 182:21-25; 183:7-183:8. ***Undisputed***.
124. The text of Section 301 contains no reference to a "blood" relationship.	30(b)(6) Dep. 183:9-13; 191:6-14. ***Undisputed***.
125. The State Department's interpretation of Section 301 is based on the State Department's interpretation of the words "born . . . of parents" in Section 301 as	30(b)(6) Dep. 178:13-19; 180:10-15. ***Disputed in part:*** This statement describes as "fact" a legal position taken by the Department of State. Defendants dispute that the Department's

Uncontroverted Fact	*Supporting Evidence*
referring to a biological parent of the child.	interpretation of Section 301 is based only on the language itself. Otherwise undisputed.
126. The State Department changed its interpretation of Section 301 in 2014 to interpret "born . . . of parents" to include not only a genetic parent, but also a gestational mother who did not provide the genetic material (*i.e.*, egg) for the child.	Reffett Dep. 183:4-183:18;30(b)(6) Dep. 166:14-22; Ramsay Dep. at 84:7-84:12. ***Disputed in part:*** In 2014, the Department issued policy guidance on a topic for which it had not previously published policy guidance; the issuance elaborated as to certain circumstances that were within the Department's interpretation. The Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame. • ALDAC dated January 31, 2014, AR 074–76 Otherwise undisputed.
127. Prior to that change, the State Department interpreted Section 301 as excluding from the biological relationship that the State Department requires, a gestational mother who did not provide genetic material for the child.	30(b)(6) Dep. 172:21-173:12. ***Disputed in part.*** The cited evidence does not establish this point. Undisputed that prior to that change (described in row No. 126), the State Department generally applied Section 301 so as to exclude from the biological relationship a gestational mother who did not provide genetic material for the child. In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.

Uncontroverted Fact	*Supporting Evidence*
128. The State Department made this change even though Congress had not made any corresponding amendment of the INA because the State Department simply "changed its mind" as to its interpretation of Section 301.	30(b)(6) Dep. 243:1-4, 15-20. ***Disputed in part.*** Undisputed that Congress had not amended the law. Otherwise disputed. The cited evidence does not establish this point. Disputed that the Department "simply 'changed its mind.'" As new sets of facts and circumstances relating to the use of Assisted Reproductive Technology became more common, the Department reviewed and elaborated upon its relevant policy guidance. • ALDAC dated January 31, 2014, AR 074–76 • In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.
129. The State Department's determination to interpret Section 301 as treating a child born outside the U.S. whose U.S. citizen parent was the child's gestational mother as a U.S. citizen at birth was a policy decision made by the State Department.	30(b)(6) Dep. 175:2-5; ***Disputed.*** The cited evidence does not establish this point. In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.

Uncontroverted Fact	*Supporting Evidence*
130. The State Department's determination to interpret Section 301 as treating a child born outside the U.S. whose U.S. citizen parent was the child's gestational mother as a U.S. citizen at birth was a policy decision made by the State Department.	30(b)(6) Dep. 175:2-5; 219:25-220:8. ***Disputed.*** The cited evidence does not establish this point. In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.
131. The State Department considered changing its interpretation of Section 301 to deem children born through assisted reproductive technology to same-sex couples as U.S. citizens at birth, but did not do so.	30(b)(6) Dep. 225:1-16; 229:1-8. ***Disputed.*** The cited evidence does not establish this point. Further, that individual employees within the Department may have drafted—or started to draft—a memo that would have presented other choices, does not mean the "Department considered changing its interpretation." In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.
132. An individual within the State Department wrote a memorandum to the Secretary of State stating that the State Department's Bureau of Consular Affairs had been	30(b)(6) Dep. 222:11-24. ***Undisputed***.

Uncontroverted Fact	*Supporting Evidence*
"studying whether we can interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through [assisted reproductive technology] in a broader range of circumstances," and was "considering how this would impact children born through [assisted reproductive technology] overseas to same-sex couples."	
133. The State Department's interpretation of the INA as requiring a biological relationship between a married U.S. citizen parent and a child born outside the United States for purposes of recognizing U.S. citizenship at birth is inconsistent with the rulings of various federal circuit courts of appeals.	30(b)(6) Dep. 245:9-19; 250:3-250:15. ***Disputed***. Statement contains a conclusion of law, not a statement of fact. Cited evidence does not establish this point. Undisputed that some courts, including the Ninth Circuit, have concluded that that (1) "a blood relationship between a child and a U.S. citizen [is] not required to establish citizenship under 8 U.S.C. § 1401(g)" if the child was born in wedlock, *Solis-Espinoza*, 401 F.3d 1090, 1091 (9th Cir. 2005); and (2) a child is born in wedlock if his or her parents were married to each other at the time of the birth.

Uncontroverted Fact	*Supporting Evidence*
134. The State Department does not follow the decisions of any federal circuit court of appeals holding that Section 301 does not include a biological relationship requirement and does not consider itself bound to do so.	30(b)(6) Dep. 251:4-9. Statement contains a conclusion of law, not a statement of fact. Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301 by interpreting the statute in a different manner. *See Scales v. I.N.S.*, 232 F.3d 1159, 1166 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005).
135. The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.	30(b)(6) Dep. 249:6-20. Statement contains a conclusion of law, not a statement of fact. Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301.
136. The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000), which held that Section 301 does not require a	30(b)(6) Dep. 251:4-9. Statement contains a conclusion of law, not a statement of fact. Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301.

Uncontroverted Fact	*Supporting Evidence*
biological relationship between a U.S. citizen parent and his child.	
137. The State Department does not follow the ruling of the Court of Appeals for the Second Circuit in *Jaen* v. *Sessions*, 899 F.3d 182 (2d Cir. 2018), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.	30(b)(6) Dep. 251:4-9. Statement contains a conclusion of law, not a statement of fact. Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301.
138. The State Department's rationale for its interpretation of Section 301 is not rooted in a concern that interpreting Section 301 as not requiring a biological relationship between an applicant for a CRBA or U.S. passport who was born outside the United States and the child's United States citizen parent would create or increase the risk of fraud in connection with applications for recognition of U.S. citizenship.	30(b)(6) Dep. 317:2-8. ***Disputed.*** The cited evidence does not establish the point(s) made in the statement. • 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • Reffett Depo 167:18–168:19.
139. The State Department's interpretation of Section 301 as	30(b)(6) Dep. 171:18-172:20. ***Undisputed***.

Uncontroverted Fact	*Supporting Evidence*
requiring a genetic or gestational relationship between a U.S. citizen parent and a child is memorialized in 8 FAM § 304.1-2 (previously numbered 7 FAM 1140 Appendix E).	
140. The FAM is not subject to notice-and- comment rule making.	30(b)(6) Dep. 244:13-18. ***Undisputed.***
141. The FAM is not approved by Congress.	30(b)(6) Dep. 244:5-6. ***Undisputed.***
142. The State Department acknowledges that the FAM policies regarding recognition of U.S. citizenship include requirements not specifically set out in the INA.	30(b)(6) Dep. 103:5-11; 104:8-11. ***Disputed.*** Disputed as incomplete. The statement refers to procedural requirements, not legal elements. Additionally, portions of the FAM replicate
143. The FAM does not have the force of law.	30(b)(6) Dep. 244:20-244:25. Statement contains a conclusion of law, not a statement of fact. Cited evidence does not establish this point.
144. The State Department does not track how frequently CRBA applicants are asked to undergo	30(b)(6) Dep. 315:10-13; 320:20-321:3. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
DNA testing or how often CRBA applications submitted on behalf of children of same-sex couples are granted or denied.	
145. The State Department acknowledges that Andrew is E.J.'s legal parent.	30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5. ***Undisputed.***
146. The State Department considers Andrew to be E.J.'s legal parent at birth under Ontario law.	30(b)(6) Dep. 268:2-5. ***Disputed in part.*** [Not something they were called upon to consider. It only mattered to the adjudication that he was a legal parent at the time of the applications.]
147. The State Department acknowledges that Andrew and Elad are E.J.'s only legal parents.	30(b)(6) Dep. 261:16-261:18. ***Undisputed*** except to the extent that the statement conveys or implies that Andrew and Elad have always been the only persons who Ontario law recognized as legal parents of the child. *See supra*, Defendants' Statement of Genuine Issues of Material Facts Nos. 37, 39, 40.
148. The State Department acknowledges that Andrew and Elad are identified as E.J.'s parents on E.J.'s Statement of Live Birth.	30(b)(6) Dep. 260:21-261:1. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence*
149. The State Department acknowledges that Andrew and Elad were validly married at the time of the Twins' birth.	30(b)(6) Dep. 260:17-260:20. ***Undisputed.***

DEFENDANTS' ADDITIONAL, RELEVANT, UNCONTROVERTED FACTS.

Uncontroverted Fact	• *Supporting Evidence*
150. California recognized the validity of same-sex marriages from June 16, 2008, until the passage of Proposition 8 on November 5, 2008, and then again following the U.S. Supreme Court's June 26, 2013 decision in *Hollingsworth v. Perry*.	The Court can take judicial notice of this fact based on the background information described in *Hollingsworth v. Perry*, 570 U.S. 693, 701–04 (2013) (describing *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) and Proposition 8), and the outcome of *Hollingsworth*, *id.* 570 U.S. at 715.
151. The FAM incorporates elements the INA.	• *See e.g.*, 7 FAM 1131.1-1(b), AR 081; 7 FAM 1131.4-1(b), AR 083; 7 FAM 1131.4-1(a), 089.
152. Under the terms of the Surrogacy Agreement, Andrew and Elad "acknowledge[d] and agree[d] that the procedure contemplated by this Agreement are novel and new and that the	• Surrogacy Agmt. at Section 35.3, AR 051–52.

Uncontroverted Fact	*Supporting Evidence*
law applicable to such procedures and relationships is developing and unsettled."	
153. The Surrogacy Agreement recognized that "the possibility exists that this Agreement may be declared void as against public policy, in whole or in part, and may be held unenforceable, in whole or in part, by an Ontario Court… ."	• Surrogacy Agmt. at Section 35.3, AR 051–52.
154. The documentation submitted with E.J.'s application materials on January 24, 2017 was insufficient to show that Andrew met the residency requirements necessary to demonstrate that E.J. met the elements for recognition of citizenship at birth.	• AR 005 (consular officer's case notes indicating: "School transcripts needed to confirm Amcit father's physical presence in the US.")
155. Ms. Day testified that it would not have made a difference to her final adjudication decision for E.J.'s applications whether she had considered the children	• Day Depo. 232:01–233:10

Uncontroverted Fact	*Supporting Evidence*
to be born "in wedlock" or whether she had considered them to be born "out of wedlock."	
156. Ms. Day testified that it would not have mattered to the outcome of the adjudication if E.J.'s applications had been adjudicated pursuant to INA 301(g) rather than INA 309(a).	• Day Depo. 232:23–233:12; 277:12–278:02.
157. Ms. Ramsay also testified that it would not have made a difference to the outcome of the adjudication if Ms. Day had adjudicated EJ's applications under INA 301 instead of INA 309	• Ramsay Depo. 131:22–133:23
158. The Surrogacy Agreement was a contract between contacting parties consisting of Andrew, Elad, and the gestational surrogate.	• Surrogacy Agreement at 1 (AR 023) (THIS IS AN AGREEMENT made on this 21st day of December, 2015, among ANDREW DVASH-BANKS (herein called 'Andrew') –and- ELAD DVASH-BANKS (herein called 'Elad') -and- AMANDA MARIE ANNE ADAMS (herein called the 'Gestational Carrier'); *id.* Pt. II ¶ p, AR 026 (defining "Parties").

Uncontroverted Fact	*Supporting Evidence*
159. The Surrogacy Agreement did not purport to override the local law as to legal parentage.	• Surrogacy Agmt. at Section XXXV ("Governing Law"), AR 051–52.
160. The Surrogacy Agreement acknowledged that it was subject to Ontario Law	• Surrogacy Agmt. at Section XXXV ("Governing Law"), AR 051–52.
161. The Surrogacy Agreement stated that the procedure contemplated by the Agreement "are novel and new and that the law applicable to such procedures and relationships is developing and unsettled."	• Surrogacy Agmt. at Section 35.3, AR 051–52.
162. On January 24, 2017, Consulate Toronto provided Andrew with a letter, the "purpose" of which was "to provide you with information concerning DNA testing as an option to establish the requisite blood relationship between the child and the citizenship-transmitting U.S. citizen parent."	• Dvash-Banks000000031
163. The letter explained, "Should you wish to undergo DNA testing, which could	• Dvash-Banks000000031

Uncontroverted Fact	*Supporting Evidence*
conclusively establish whether both children are the biological children of a U.S. citizen parent, please review the enclosed flyer explaining DNA testing and the procedures under which the samples must be collected and the test conducted, including chain of custody procedures, in order for the results to be considered in connection with a citizenship claim.	
164. The letter also stated that "DNA testing must be conducted at a lab accredited by the American Association of Blood Banks in the United States," and it "[e]nclosed … a list of laboratories in the United States accredited by the AABB."	• Dvash-Banks000000031
165. The Department treats the children of same-sex couples as "born of . . . parents" for the purposes of Section 1401 when both parents have a biological connection to the children.	• 30(b)(6) Dep. 202:17–23; 333:4–17 • Defs.' Response to Pls.' First Set of Requests for Admission 10 (denying that "under the State Department's] current interpretation and application of" 8 U.S.C §§ 1401 and 1409, "Defendants would never conclude

Uncontroverted Fact	*Supporting Evidence*
	that two men who are married to each other may have a child in wedlock for purposes of" 8 U.S.C. § 1401.").
166. Where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic mother, the Department adjudicates the child's citizenship claim under INA 301(c).	• 30(b)(6) Dep. 202:17–23 • January 31, 2014 ALDAC, AR 074–75 • 7 FAM 1110 Appx. D, AR 077-78.
167. The Department also recognizes that a child of transgender and cisgender males can have a child born in wedlock, assuming that both parents have a biological relationship to the child.	• 30(b)(6) Dep. 178:20–179:18
168. The Dvash-Banks family may pursue another avenue for documenting E.J.'s citizenship.	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11 • 8 U.S.C. § 1452 ("A person who . . . is a citizen of the United States by virtue of . . . paragraph . . . (g) of section 1401 of this title . . . may apply" to the Secretary of Homeland Security[1] "for a certificate of

Uncontroverted Fact	*Supporting Evidence*
	citizenship" and "[u]pon proof to the satisfaction of" the Secretary, she may receive a citizenship certification if she is within in the United States at the time.").
169. USCIS adjudicates applications for certificates of citizenship domestically, and considers the jurisdiction where the applicant lives when adjudicating an application.	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11
170. For applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000).	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11 • 30(b)(6) Depo. 335:10–14
171. The INA was enacted in 1952, a time when it was commonly understood, that outside the adoption context, 'parent' at birth referred to a biological parent.	• Defs.' Second Resp. to Pls.' First Set of Interrogatories at 22

Uncontroverted Fact	*Supporting Evidence*
172. The Department has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of fraudulent citizenship claims, because it would be difficult to identify child smuggling or illegal adoption without requiring a biological link between child applicant and the transmitting parent.	• 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • *See also* Reffett Depo 167:18–168:19.

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	Case No. CV 18-523-JFW(JCx) **Memorandum in Support of Evidentiary Objections Stated in Defendants' Statement of Genuine Disputes of Material Fact** In Support of: Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment Hearing Date: Feb. 4, 2019 Hearing Time: 1:30 pm Honorable John F. Walter

Pursuant to section 4(c) of this Court's Case Management Order (ECF No. 52, at 14–15), Defendants Secretary of State Michael R. Pompeo and the U.S. Department of State (collectively, "Defendants") respectfully submit this memorandum addressing evidentiary objections stated by Defendants in their Statement of Genuine Disputes of Material Fact.

Statement of Genuine Disputes of Material Fact Paragraph 39. Objection to the supporting deposition testimony of Andrew Dvash-Banks (Q: "And you -- do you currently live with your husband and your children A I do, yes. Q Do you live with anybody else? A No. Q Since the four of you have become a family unit, have you lived with anybody else? A Since the four of us have become a family unit, have we lived with anyone else? And by 'live' you mean -- I just want to make sure I'm going to answer the question correctly -- like, under the same roof for any period of time? Q For a month or longer. A For a month or longer. Yes, we have. Q Was it one of your parents? A Yes. Q Other than that, was there anybody else that you've lived with as a family? A No.") at 29:21-30:14 on the grounds that the statement constitutes inadmissible hearsay and no exception applicable. Fed. R. Evid. 801.

Statement of Genuine Disputes of Material Fact Paragraph 40. Objection to the supporting deposition testimony of Andrew Dvash-Banks ("Q: Do you have any under-- do you know the result of this court order? A: Yes. Q: What was the result? A. The result was affirming Elad and myself's parentage to our twin boys.") at 112:19-112:24 on the grounds that the statement constitutes inadmissible hearsay and no exception applicable. Fed. R. Evid. 801.

Statement of Genuine Disputes of Material Fact Paragraph 45. Objection to the supporting deposition testimony of Andrew Dvash-Banks ("Q: Do you have any under-- do you know the result of this court order? A: Yes. Q: What was the result? A. The result was affirming Elad and myself's parentage to our twin boys.") at 112:19-112:24 on the grounds that the statement constitutes inadmissible hearsay and no exception applicable. Fed. R. Evid. 801.

Statement of Genuine Disputes of Material Fact Paragraph 63. Objection to the supporting deposition testimony of Andrew Dvash-Banks ("Q What other questions do you remember? A There were several. Obviously one really sticks out to me just because it was a really emotionally charged question. When she asked are your children genetically connected -- she asked me, Andrew, are your children both genetically

connected to you?") at 129:15-129:21 on the grounds that the statement constitutes inadmissible hearsay and no exception applicable. Fed. R. Evid. 801.

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al.,

Plaintiffs,

v.

MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al.,

Defendants.

Case No. CV 18-523-JFW(JCx)

Declaration of Lisa Zeidner Marcus

n Support of: Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment

Hearing Date: Feb. 4, 2019
Hearing Time: 1:30 pm

Honorable John F. Walter

DECLARATION OF LISA ZEIDNER MARCUS

I, Lisa Zeidner Marcus, hereby declare:

1. I serve as trial attorney for the U.S. Department of Justice, Civil Division, Federal Programs Branch, a position I have held since October 2007. My colleague Vinita Andrapalliyal and I serve as co-counsel representing Defendants in the above-captioned case. The statements set forth in this Declaration are based on my personal

knowledge as well as information provided to me in my official capacity.

2. I submit this declaration in support of Defendants' opposition to Plaintiffs' motion for partial summary judgment, and specifically to authenticate evidence cited by Defendants in their Statement of Genuine Disputes of Material Fact ("Defs.' Opp. Stmt. of Facts"), including deposition transcripts, written discovery responses, and the receipt of certain documents.

3. Attached hereto are true and correct copies of the following documents:

Ex. H Excerpts of Plaintiffs' Responses to Defendants' Requests for Admission, including all such responses—specifically Plaintiffs' Responses to Defendants' Request for Admission Nos. 1 and 3—cited in Defendants' Statement of Genuine Disputes of Material Fact.

Ex. I Excerpts of Defendants' Responses to Plaintiffs' Requests for Admission, including all such responses—specifically Defendants' Responses to Plaintiffs' Request for Admission Nos. 10 and 11—cited Defendants' Statement of Genuine Disputes of Material Fact.

Ex. J Excerpts of Defendants' Responses to Plaintiffs' Interrogatories, including all such responses—specifically Defendants' Second Resp. to Pls.' First Set of Interrogatories at 22— cited in Defendants' Statement of Genuine Disputes of Material Fact.

Ex. K Excerpts of the transcript of Terri Nathine Francis "Frankie" Day, including all such portions Defendants rely on in their Defendants' Statement of Genuine Disputes of Material Fact.

Ex. L Excerpts of the transcript of Andrew Dvash-Banks, including all such portions Defendants rely on in their Statement of Genuine Disputes of Material Fact.

Ex. M Excerpts of the transcript of Margaret Ramsay, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. N Excerpts of the transcript of Larilyn Reffett, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. O Excerpts of the transcript of Paul Peek, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. P DEFS001648-49 (Aug. 29, 2014 letter from Consul General, U.S. Embassy Bangkok, describing rationale behind asking for DNA testing at Embassies and Consulates worldwide)

4. In support of their motion for partial summary judgment, Defendants also rely on the Certified Administrative Record that I filed on the docket for this case, at ECF No. 80. The documents I filed at ECF No. 80 (including ECF Nos. 80-1, 80-2, 80-3,

80-4, 80-5, 80-6, 80-7, and 80-8) comprise a true and correct copy of the Certified Administrative Record that was provided to me by the Department of State, except that before filing the record I ran OCR'ing (optical character recognition) on it to make the scanned pages text-searchable in accordance with the Local Rules of this Court, and I added Bates-stamping to identify the page numbers of the AR.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 2019 at Pittsburgh, Pennsylvania.

/s/ Lisa Zeidner Marcus
Lisa Zeidner Marcus

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State,

Defendants.

Case No. 2:18-cv-00523-JFW-JCx

PLAINTIFFS' RESPONSES TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS

Defendants' near wholesale failure to respond meaningfully to Plaintiffs' discovery requests or to do so in a timely manner. Plaintiffs reserve the right to modify or supplement their responses and objections to this interrogatory.

Subject to, and without waiver of, the Objections, Plaintiffs respond as follows:

Plaintiffs state that they have not distinguished between Andrew and Ethan for purposes of Interrogatory No. 6, therefore no further response to Interrogatory No. 7 is required.

Interrogatory No. 8:

Identify all bases for your contention that Defendants treated you differently than similarly situated persons, as alleged in paragraph 71 of your complaint and implied throughout your Complaint.

Response to Interrogatory No. 8:

Plaintiffs incorporate their Objections by reference and further object to Interrogatory No. 8 on the grounds that the term "bases," as used in Interrogatory No. 8, is vague and ambiguous. Plaintiffs also object to Interrogatory No. 8 as premature. Plaintiffs have propounded multiple discovery requests to elicit information on this issue to which Defendants have not responded or have done so in a partial and untimely manner. Plaintiffs reserve the right to modify or supplement their responses and objections to this interrogatory. Plaintiffs further object on the grounds that the Complaint speaks for itself and refer Defendants to the Complaint. Plaintiffs also object to Interrogatory No. 8 on the grounds that it is a contention interrogatory to which Plaintiffs need not respond at this stage of the Action.

V. RESPONSES TO REQUESTS FOR ADMISSION

Request for Admission No. 1:

Admit that you (Andrew) and/or your husband (Elad) used an anonymous egg donor to conceive Ethan, as alleged in paragraph 44 of your Complaint.

Response to Request for Admission No. 1:

Plaintiffs incorporate their Objections by reference.

Subject to, and without waiver of, any of the Objections, Plaintiffs admit that Andrew and Elad used an anonymous egg donor to conceive Ethan and Aiden.

Request for Admission No. 2:

Admit that in the summer of 2015 you (Andrew) and your husband (Elad) selected the anonymous egg donor used to conceive Ethan.

Response to Request for Admission No. 2:

Plaintiffs incorporate their Objections by reference.

Subject to, and without waiver of, any of the Objections, Plaintiffs admit that, in June and July of 2015, Andrew and Elad selected the anonymous egg donor used to conceive Ethan and Aiden and proceeded with arrangements to obtain the donor eggs.

Request for Admission No. 3:

Admit that you (Andrew) and/or your husband (Elad) used a gestational carrier to carry and give birth to Ethan.

Response to Request for Admission No. 3:

Plaintiffs incorporate their Objections by reference.

Subject to, and without waiver of, any of the Objections, Plaintiffs admit that Andrew and Elad used a gestational carrier to carry and give birth to Ethan and Aiden.

Request for Admission No. 4:

Admit that Amanda Marie Anne Adams was the gestational carrier who carried Ethan.

Response to Request for Admission No. 4:

Plaintiffs incorporate their Objections by reference and further object to Request for Admission No. 4 on the grounds that it seeks the discovery of private information protected from disclosure by the right to privacy. Plaintiffs also object

twins. (*See* ¶¶ 1.8, 1.9, 1.10 and 14.1 of the Surrogacy Agreement.) Plaintiffs further state that Andrew is listed as a parent of Ethan on Ethan's Statement of Live Birth. Plaintiffs further refer Defendants to the Declaration of Parentage of Ethan, which declared Andrew and Elad to be Ethan's parents "for all purposes in law."

Request for Admission No. 13:

Admit that your (Andrew's) status as a legal parent of Ethan Dvash-Banks was not established until September 28, 2016.

Response to Request for Admission No. 13:

Plaintiffs incorporate their Objections by reference and further object on the grounds that Request for Admission No. 13 calls for a legal conclusion.

Subject to, and without waiver of, any of the Objections, Plaintiffs deny that Andrew's status as a legal parent of Ethan was not established until September 28, 2016, twelve days after Ethan's birth.

Request for Admission No. 14:

Admit that you (Andrew) are not biologically related to Ethan.

Response to Request for Admission No. 14:

Plaintiffs incorporate their Objections by reference.

Subject to, and without waiver of, any of the Objections, Plaintiffs admit that the DNA testing described in Plaintiffs' Response to Request for Admission No. 6 did not find a biological connection between Andrew and Ethan.

Request for Admission No. 15:

Admit that you (Andrew) and/or your husband (Elad) arranged for DNA testing to be conducted in September 2016, after Ethan and Aiden were born, to establish the parentage of Ethan and Aiden.

Response to Request for Admission No. 15:

Plaintiffs incorporate their Objections by reference and further object to Request for Admission No. 15 on the grounds that the phrase "establish the

Defendants' Exhibit 2

(Defendants' Motion for Summary Judgment)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants,	**Case No. 2:18-cv-00523-JFW (JCx)** **Defendants' Responses to Plaintiffs' First Set of Requests for Admission** Dec. 31, 2018

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, and Local Rules 36-1 through 36-3, Defendants hereby respond to Plaintiffs' First Set of Requests for Admission ("RFAs"), which Plaintiffs served on November 29, 2018.

I. OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Defendants note that Plaintiffs did not serve their First Set of Requests for Admission until November 29, 2018, making Defendants' responses due on

Request for Admission 10:

Admit that for purposes of issuing certificates of citizenship in the Ninth Circuit, CIS does not require a biological connection between the child and the child's U.S. citizen parent.

Response:

Upon conducting a reasonable inquiry, Defendants lack knowledge to definitively answer on behalf of the U.S. Citizenship and Immigration Services ("USCIS"), which is a component of the Department of Homeland Security—an Executive agency separate from the Department of State. Defendants understand generally and admit that for those applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000).

Request for Admission 11:

Admit that *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), precludes the State Department from requiring a showing of a biological connection between the U.S. citizen parent and child applicant in deciding applications for Consular Reports of Birth Abroad and U.S. passports by or on behalf of residents of states located in the Ninth Circuit.

Specific Objection:

Defendants object to this RFA because it calls for a legal conclusion, and because it is overly broad, particularly insofar as it seeks a response regarding U.S. passport applications, which include U.S. passport applications for naturalized citizens as well as for individuals who acquired citizenship at birth because they were born in the United States.

Response:

Subject to and without waiving the above-stated objection, Defendants generally deny this statement. Defendants deny the statement with respect to deciding applications for Consular Reports of Birth Abroad ("CRBAs") by or on behalf of residents of states located in the Ninth Circuit because such residents are not eligible for a CRBA. A CRBA, also known as form FS-240, is a consular declaration of the fact of acquisition of U.S. citizenship at birth, and it is only available to individuals who are located abroad. See 8 FAM 101.1-1. With respect to deciding applications for U.S. passports, insofar as the wording of the RFA and the facts presented by this case refer to applications for first-time passports that are submitted to a U.S. Embassy or consulate abroad by individuals who also are applying for a CRBA, such individuals would, again, be located abroad and not in a state within the Ninth Circuit or of any particular state within the United States.

With respect to deciding applications for U.S. passports by or on behalf of residents of states located in the Ninth Circuit, Defendants are not able to either admit or deny the statement because as stated it is so broad that the applicability or non-applicability of *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), cannot be determined.

Request for Admission 12:

Admit that the only basis for the State Department's denial of Ethan's applications for a Consular Report of Birth Abroad and U.S. passport is that Ethan and Andrew are not biologically related.

Response:

Defendants admit that one basis for denying the applications was that there was insufficient evidence of a biological tie between the child applicant and

Response:

Based on the documents provided to Defendants in connection with Plaintiff E.J. D-B.'s CRBA and U.S. passport applications, and the CRBA and U.S. passport applications of A.J. D-B, Defendants admit this statement.

Request for Admission 17:

Admit that Andrew meets all residency requirements of Section 301(g).

Response:

Based on the documents provided to Defendants in connection with Plaintiff E.J. D-B.'s CRBA and U.S. passport applications, Defendants admit this statement.

Request for Admission 18:

Admit that Andrew and Ethan are California residents.

Response:

Based on the testimony provided by Plaintiff Andrew Dvash-Banks at his deposition, Defendants admit that Andrew and E.J. D-B are currently residents of California.

Request for Admission 19:

Admit that Andrew and Elad are married.

Specific Objection:

Defendants object to this RFA to the extent it calls for a legal conclusion.

Response:

Subject to and without waiving the above-stated objection, based on deposition testimony provided by Andrew Dvash-Banks, and the marriage certificate submitted to the Department of State with the application materials

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Terri Nathine Frances Day, Supporting Defendants' Motion for Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order, Defendants hereby file the instant document for deponent Terri Nathine Frances Day. This document contains "only those questions and answers, and any objections made at the time of the deposition to those questions," Order at 11 (Dkt. No. 52), that Defendants are relying on to support their partial motion for summary judgment, "with a citation to the appropriate page(s)

and line number(s) in the deposition transcript," *id.* Ms. Day's deposition was taken Thursday, Deeber 20, 2018, in Charlotte, North Carolina.

***

Frances Day, Terri Nathine, (Page 29:17–30:3)

By Zeidner-Marcus:

17 Q.· ·And what was your role in adjudicating
18· ·those applications?
19· · · · A.· ·My role was to determine if the
20· ·applicant had a claim to U.S. citizenship either
21· ·through their parent or their place of birth or
22· ·whatever reason they were -- you know, whatever
23· ·reason they were claiming was their purpose for
24· ·getting it -- acquiring U.S. citizenship.· So that
25· ·was my -- my job was to determine if that was –

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1 according to Foreign Affairs Manual and the
·2· ·guidelines that we had, if that was -- if they were
·3· ·entitled to that citizenship.

Frances Day, Terri Nathine, (Page 37:4–23)

By Ms. Zeidner-Marcus:

4 Q.· ·And can you explain what you mean by
·5· ·"pending"?
·6· · · · A.· ·"Pending," meaning in process, not
·7· ·determined yet.
·8· · · · Q.· ·And was it common to put applications
·9· ·into this pending status?

10· · · · · A.· ·Could you be a bit more specific?· What
11· ·do you mean by "common"?
12· · · · · Q.· ·Sure.· In your experience, adjudicating
13· ·applications for U.S. passports and CRBA, was it
14· ·your typical practice to put an application into
15· ·pending status?
16· · · · · A.· ·If the application called for it, yes,
17· ·without a doubt I would have put it in a pending
18· ·status, which -- so pending -- pending
19· ·documentation could include a birth certificate, a
20· ·photo, a signature that needed to be done.· It
21· ·could mean a whole list of things.· So it was
22· ·definitely something that was -- that happened
23· ·fairly frequently.

Frances Day, Terri Nathine, (Page 116:12 to 116:19)

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By Ms. Goldsmith:

12 wouldn't be able to issue or deny without that --
13 that DNA test, they were not happy with that.
14 Q. And how did you know that they weren't
15 happy at that point?
16 A. Well, they seemed upset. They were --
17 specifically, I think I spoke the most with Andrew,
18 the AMCIT dad. He was raising his voice. He
19 was -- I believe he began crying at one point.

Frances Day, Terri Nathine, (Page 120:14–121:3)

By Ms. Goldsmith:

Q.· ·And do you remember asking Andrew and
15· ·Elad how they created their family?
16· · · · A.· ·Those specific words or --
17· · · · Q.· ·Or in substance how they created their
18· ·family.
19· · · · A.· ·I don't remember asking that.· If I had
20· ·questions about the surrogate or about the
21· ·surrogacy, about the ART, I would have asked those
22· ·questions, yes.· It's an awkward thing to try to
23· ·say, "Which of you donated sperm to put in an egg
24· ·for a baby?"· So I might have said, like, you know,
25· ·"So how were the boys conceived?"· Something like

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1· ·that, along those lines, yes.
2· · · · · · ·Might we have talked about, like, how
3· ·they met or something?· I don't -- I don't recall.

Frances Day, Terri Nathine, (Pages 231:04 to 233:18)

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By Ms. Zeidner Marcus:

4 Q. Okay. And was it your role to assess
5 whether there was a biological relationship between
6 the AMCIT father and one or both of the applicant
7 children?
8 A. Yes.
9 Q. And you sound fairly clear about that.

Are you clear about that?
A. Yes.
Q. But you also earlier said that you don't remember whether you considered -- you don't remember, sitting here today, whether you considered these children to have been born in wedlock or out of wedlock; is that also correct?
A. Correct.
Q. And -- okay. Would it have been your role to assess whether there is a biological relationship between the AMCIT father and the applicant child under either the framework of wedlock or the framework of out of wedlock?
MS. GOLDSMITH: Objection. Form.
THE WITNESS: Yes, that -- yes.
BY MS. MARCUS:

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Q. Do you understand that it was -- it would have been necessary, and it was necessary, regardless of whether the children were born in wedlock or out of wedlock -- let me start over. I'm sorry.
Regardless of whether the children were born in wedlock or out of wedlock, was it necessary for the children to have a biological connection to the AMCIT father in order for the children to acquire citizenship at birth?
A. Yes.

Q. So is it your testimony that it would not have made a difference to your final adjudication decision for these cases whether you had considered the children to be born in wedlock or whether you had considered them to be born out of wedlock?

A. Yes, that's correct.

Q. To be clear, it would not have made a difference?

A. Correct, it would not have made a difference.

Q. Would it have made a difference whether you had adjudicated these applications under INA 301 versus INA 309 for these cases?

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A. No, it would not have made a difference.

Q. Why not?

A. Because the biological connection is still required.

Q. And your understanding that the biological connection is required, what is that understanding based on?

A. It's based on the FAM, what I read in the FAM.

Q. Is it based on anything else?

A. No.

Q. Was that something that you needed to

seek clarity from, from your supervisor?
A. No.
Q. Was it something that you needed to consult with Maggie Ramsay about?
A. No.

Frances Day, Terri Nathine, (Pages 233:19 to 234:20)

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By Ms. Zeidner Marcus:
Q. Was that the -- would you describe the lack of a -- sorry. Let me start over.
When you're talking about the FAM -- when you've been talking today at various points about the FAM, do you understand the FAM to be something that is completely separated from the Immigration and Nationality Act of 1952?

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A. No.
Q. You don't consider them completely separated?
A. I don't consider them completely separated.
Q. Does the FAM have quotations from the statute within it?
A. As far as my recollection goes, yes.
Q. Does it describe provisions as well in addition to quoting them?
A. As far as my recollection goes, yes.

Q. Would you say that the FAM -- let me start over. I'm sorry.

MS. MARCUS: Apologies to the court reporter and to everybody else.

BY MS. MARCUS:

Q. Would you say that there are FAM provisions that incorporate the Immigration and Nationality Act of 1952?

A. To the best of my recollection, yes.

Frances Day, Terri Nathine, (Pages 277:12 to 278:2)

277

By Ms. Goldsmith:

Q. And you also stated in response to one of Ms. Marcus's questions that, in your opinion, it would not have made a difference whether you had adjudicated E.J.'s application under Section 301 versus Section 309?

A. Based on my understanding, yes.

Q. What is the basis for your opinion that it would not have made a difference whether you had adjudicated E.J.'s application under Section 301 versus 309?

A. Because both require the biological link -- both require the biological connection.

Q. And is your understanding that the basis for that requirement is a provision in the

278

1 FAM?

A. Yes.

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Larilyn Reffett, Supporting Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order, Defendants hereby file the instant document for deponent Larilyn Reffett. This document contains "only those questions and answers, and any objections made at the time of the deposition to those questions," Order at 11 (Dkt. No. 52), that Defendants are relying on to support their partial motion for summary judgment, "with a citation to the appropriate page(s) and line

number(s) in the deposition transcript," *id.* Ms. Reffett's deposition was taken Thursday, December 6, 2018, at the U.S. Consulate, 360 University Avenue, Toronto, Canada.

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Reffett, Larilyn, (Pages 92:06–93:06)

By Ms. Klein:

Q. And in adjudicating applications for a passport for a child born in September of 2016, is it your testimony that if that child was born in Ontario, the consulate would require submission of a Statement of Live Birth?

A. Generally speaking, we would require a statement of some type issued by the Registrar in Ontario.

Q. Okay. And are there written materials stating what documentation needs to be provided to the Toronto Consulate in support of a U.S. passport application for a child?

A. That information is all on our website. When you go to make your appointment for the service, there is a checklist of information that you would need to bring with you.

Q. And does that checklist require that a Statement of Live Birth be brought to the consulate?

A. I don't know how it references the

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document. As I mentioned, it is the equivalent of

a birth certificate and there are many different versions here in Ontario. If you bring one of the versions that doesn't meet the requirements, we will request that you get the more comprehensive version.

Reffett, Larilyn, (Pages 167:18 to 168:19)

167

By Ms. Klein:

Q. What are other circumstances that would give rise to doubt of putative parentage?

A. I mean, every case is going to be different and this is only putative parentage as related by blood. Other things that might cause someone to question whether parentage as related by blood was potentially something they should look into, I don't want to make a huge list of these

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because they are fraud concerns, but things like a birth certificate that was amended later to add potentially a parent or to change some biographical information; that would be something that would be considered a red flag for an adjudicating officer and that would cause a line of questioning that wouldn't be asked of other applicants.

You know, other things about whether there would be questions about whether a putative parent is related by blood, again, anything that

would indicate the use of assisted reproductive technology, that will raise other questions.

Anything on a birth certificate that would seem to indicate an adoption would raise questions.

These all are indicators that we look at when we are looking at documents so that we are asking the correct chain of questions to get the information that we need to make the determination.

Reffett, Larilyn, (Pages 177:04–25)

By Ms. Klein:

Q. For children born in Ontario who are applying for a U.S. passport at the Toronto Consulate, does the consulate require that children provide a document entitled a Notice of Live Birth?

A. No, we require that you provide us with a document that has been issued by the Registrar here that is an official Ontario birth document, and we do require for minor children that that document does include the names of both of the parents for the purposes of meeting the two-parent signature consent requirement so we have to be able to see that on the birth certificate those are the parents listed in order to allow them to sign the application.

That was kind of what I was referencing in saying that there are a couple of different

versions, and there is one version that does not list the parents. That one we cannot accept because we have to be able to identify that the people standing in front of us taking the oath are allowed to sign that application and allowed to authorize documentation for the child.

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Margaret "Maggie" Ramsay, Supporting Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order, Defendants hereby file the instant document for deponent Margaret "Maggie" Ramsay. This document contains "only those questions and answers, and any objections made at the time of the deposition to those questions," Order at 11 (Dkt. No. 52), that Defendants are relying on to support their partial motion for summary judgment, "with a citation to the appropriate page(s) and line number(s) in the deposition transcript," *id.* Ms. Ramsay's deposition was taken

Friday, December 7, 2018, at the U.S. Consulate, 360 University Avenue, Toronto, Canada.

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Ramsay, Margaret, (Page 131:22 to 133:23)

131

By Ms. Zeidner Marcus

Q. Do you know whether Ms. Day considered Ethan Dvash-Banks to be born in wedlock, as that term is used in the FAM and the INA?

A. I think initially, as evidenced by

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her case notes, she may have considered them in wedlock because she saw a marriage certificate, but believe after reviewing the guidance and as evidenced by the final denial letter, ultimately applied 309 of the INA to the decision-making.

Q. Is it your understanding, and if you need to refer to the case notes to refresh your memory on this, then you can do so and then point me to that section, if you do so, but is it your understanding that on the day that they visited, the Dvash-Banks family visited the Consulate Toronto that Ms. Day on that day considered them to be a married couple, the adults in the family?

MS. GOLDSMITH: Objection, leading.

THE WITNESS: I think what may have happened is when she was reviewing all the

documents and she saw a marriage certificate, she started typing her notes, as we often do, and then over the course of the interview discovered that we would have to treat the case as a 309 case instead.

BY MS. ZEIDNER MARCUS:

Q. Do you know whether she communicated to the Dvash-Banks family on that day whether there was a particular provision that she was going to be applying in the case?

133

A. I believe she may have told them about the provisions of INA 309.

Q. What is that belief based on?

A. I think I heard her talk to them about the requirements for it and the requirements for a biological relationship as well.

Q. Is there a requirement for a biological relationship under both 301 and 309, as you understand and apply the -- let me start over. The biological requirement that you were just describing, what is that biological requirement?

A. There must be, in order for a U.S. citizen parent to transmit citizenship to a child at birth, there must be a biological relationship between parent and child.

Q. Is that true for both INA 301 and INA 309, in your understanding?

A. Yes.

Q. So would it have made a difference to the outcome of this case if Ms. Day had adjudicated these applications under INA 301 instead of INA 309?

A. No.

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Andrew Dvash-Banks, Supporting Defendants' Motion for Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order, Defendants hereby file the instant document for deponent Andrew Dvash-Banks. This document contains "only those questions and answers, and any objections made at the time of the deposition to those questions," Order at 11 (Dkt. No. 52), that Defendants are relying on to support their partial motion for summary judgment, "with a citation to the appropriate page(s)

and line number(s) in the deposition transcript," *id.* Mr. Dvash-Banks' deposition was taken Wednesday, December 12, 2018, at 12:00 P.M., at 1888 Century Park East, Los Angeles, California.

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Dvash-Banks, Andrew Mason - Vol. I, (Pages 14:25 to 15:12)

14

By Ms. Zeidner Marcus:

25 Q Okay. And your parents, where were they

15

1 born?

2 A Toronto. Both of them in Toronto.

3 Q What is their citizenship?

4 A My father's deceased.

5 Q Sorry.

6 A Thanks. And my mother is a dual citizen.

7 Q Of what country?

8 A United States and Canada.

9 Q And what is your citizenship status?

10 A Dual citizen.

11 Q Of the same countries?

12 A Of the same countries, yeah.

Dvash-Banks, Andrew Mason - Vol. I, (Page 29:5 to 29:14)

29

By Ms. Zeidner Marcus:

5 Q When did you get married?

6 A In August of 2010.

7 Q Where did you get married?

8 A In Toronto, Canada.
9 Q And you have children?
10 A I do.
11 Q EJ and AJ?
12 A Yes.
13 Q When were they born?
14 A In September of 2016.

Dvash-Banks, Andrew Mason - Vol. I, (Page 36:15 to 36:20)

36

By Ms. Zeidner Marcus:
15 Q So you believe that at some point in late
16 2016, you made the appointment at the Toronto
17 consulate?
18 A Yes.
19 Q How did you make that appointment?
20 A I believe we made it online.

Dvash-Banks, Andrew Mason - Vol. I, (Page 38:6 to 38:20)

38

By Ms. Zeidner Marcus:
6 Q Got it.
7 So were you living in Toronto when you
8 made the appointment at the consulate?
9 MS. LAWSON-REMER: Objection. Vague as to
10 "living."
11 BY MS. ZEIDNER MARCUS:
12 Q You can answer.

A I'm -- I'm just not sure if we were physically in Canada when we made the appointment online or if we were physically in the U.S. We went to the U.S. in December of 2016. And I'm not sure if the appointment was made in, like, October or November when we were in Canada or in December when we were in the U.S. I just can't remember. I'm sorry.

Dvash-Banks, Andrew Mason - Vol. I, (Pages 82:1 to 83:3)

82

BY MS. ZEIDNER MARCUS:

Q Sure. Let me rephrase.

Can you describe with broad strokes what occurred with respect to the surrogate from the time you spoke to the surrogacy agency until the children were born.

A Can I describe with -- with -- what occurred with regard to the surrogate?

Q Yes.

A We -- from when we met the surrogate and then she selected us -- or I guess I should say, like, we selected each other. Probably better way of phrasing it. And then we "dated each other," in quotes, for a few months just to get to know each other and be comfortable with each other. And then -- oh, and then up until the birth you're -- you want to know --

18 Q Yes.
19 A -- like, the time line?
20 Q Yes.
21 A And then she went for medical testing at
22 the fertility clinic and -- and then we did our
23 embryo implantation. And then lots of tests along
24 the way during the pregnancy, some scares along the
25 pregnancy, but luckily everything was fine with my

83

1 twins. And then she gave birth to my twin boys in
2 September. I hope that was, like, not too broad of
3 a stroke.

Dvash-Banks, Andrew Mason - Vol. I, (Page 84:14 to 84:16)

84

By Ms. Zeidner Marcus
14 Q And you used the same egg donor for both
15 of your sons?
16 A We only used one egg donor. Correct.

Dvash-Banks, Andrew Mason - Vol. I, (Page 117:2 to 117:11)

117

2 MS. ZEIDNER MARCUS: Thank you.
3 Q Did you make one or more applications
4 during that visit?
5 A Yes.
6 Q How many total applications did you make
7 during that visit?

8 A Four.
9 Q And of those four, you made two for each
10 of your children?
11 A Yes.

Dvash-Banks, Andrew Mason - Vol. I, (Pages 120:7 to 121:10)

120

By Ms. Zeidner Marcus
7 Q Can you walk me through what occurred
8 during the appointment. What did -- was the
9 appointment scheduled in the morning or in the
10 afternoon?
11 A I believe it was a morning.
12 Q And who went with you to the appointment?
13 A My husband.
14 Q Anybody else?
15 A And -- yeah, my twin boys. My twin sons.
16 Q And where was the appointment located?
17 A At the U.S. Consolate in Toronto, Canada.
18 Q And when you arrived at the U.S. Consolate
19 in Toronto for the appointment, what were the steps
20 that occurred during the appointment? What were
21 the -- broadly speaking, what did the appointment
22 consist of?
23 A It consisted of arriving and waiting
24 outside with my twins in the cold for about 20
25 minutes to get in through security and then getting

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through security and then taking the elevator to -- I don't know what floor -- and then arriving on that floor and -- this is just to the best of my recollection.

Q Sure.

A I mean, two years ago.

And then handing in our applications and paying the fees for the four applications. And then I believe we got a number and took a seat in the waiting area.

Dvash-Banks, Andrew Mason - Vol. I, (Page 152:10 to 152:13)

152

By Ms. Zeidner Marcus:

Q Was it explained to you that you had 90 days to provide anything additional to the consulate in connection with your applications?

A Yes. I believe so. Yes.

Dvash-Banks, Andrew Mason - Vol. I, (Pages 161:1 to 163:4)

161

By Ms. Zeidner Marcus:

Q And do you know what legal claims you are pursuing in connection with this litigation?

A I'm aware of -- I mean, I'm not a lawyer; right? But I'm aware of my claims, yeah.

Q From your perspective, generally speaking, what are your claims against the Department of

State?

A From my perspective, my claim against the Department of State is that my son EJ was refused United States citizenship by the U.S. state department. And my claim is that -- that we were wrong and treated unfairly, and that's an unfair -- how do I say this? And -- and that he was refused American citizenship because he's considered a child born out of wedlock. And his twin brother born four minutes before him was granted American citizenship.

I know our claim is, like, many, many pages long. I hope I did an okay job in summarizing it.

Q It's not a test.

A Okay.

Q Do you have -- do you know whether you have a claim against the Department of State relating to a fundamental right that you have -- that you believe that you have?

MS. LAWSON-REMER: Objection. Calls for a legal opinion, but he can answer if he knows.

THE WITNESS: That I have a --

BY MS. ZEIDNER MARCUS:

Q Do you know whether you have any claims relating to any fundamental rights of yours?

A The claim, I believe, also addresses the discrimination aspects that we -- that we

experienced and that is part of the decision to reject my son's citizenship, if that answers your question.

Q Do you know whether you have any claims relating to your marriage?

A I believe the claim is related to our marriage in the sense that the state department has rejected my son's citizenship because they view him as a child born out of wedlock.

Q Do you think that that harms your marriage?

A Harms my marriage in what way?

MS. LAWSON-REMER: Objection. Vague. Ambiguous.

BY MS. ZEIDNER MARCUS:

Q Does it harm your ability to be married to your husband?

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A It doesn't change the status of my marriage to my husband. It harms us in many other ways. But the marriage -- my marriage to my husband is solid.

Dvash-Banks, Andrew Mason - Vol. I, (Page 172:8 to 172:15)

172

By Ms. Zeidner Marcus:

Q Mr. Dvash-Banks, did the application materials you submitted to the consulate Toronto

prior to your interview with -- by the consular officer identify that you and your husband used assistive reproductive technology to have your children?

A Did the documents that we provided indicate -- I believe so. Yes, they did.

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF STATE, and THE MICHAEL R. POMPEO, Secretary of State,

Defendants.

No. CV 18-523-JFW-JC

[Proposed] Order Denying Plaintiffs' Motion for Partial Summary Judgment

Honorable John F. Walter
United States District Judge

The Court has received Plaintiffs' motion for partial summary judgment. Upon consideration of the motion and the accompanying filings,

It is hereby ordered that:

The motion is DENIED.

Dated _____ ___, ____

_____
HONORABLE JOHN F. WALTER
UNITED STATES DISTRICT JUDGE

Presented by:

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