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8 UNITED STATES DEPARTMENT OF JUSTICE

Civil Division, Federal Programs Branch

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11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 ANDREW MASON DVASH-
15 BANKS, et al.,

16 Plaintiffs,

17 v.

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

20 Defendants.

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

**Second Declaration of Lisa Zeidner
Marcus**

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

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22
23 **SECOND DECLARATION OF LISA ZEIDNER MARCUS**

24 I, Lisa Zeidner Marcus, hereby declare:

25 1. I serve as trial attorney for the U.S. Department of Justice, Civil Division,
26 Federal Programs Branch, a position I have held since October 2007. My colleague
27 Vinita Andrapalliyal and I serve as co-counsel representing Defendants in the above-
28

1 captioned case. The statements set forth in this Declaration are based on my personal
2 knowledge.

3 2. This is my second declaration in support of Defendants' opposition to
4 Plaintiffs' motion for partial summary judgment. I submit this declaration to authenticate
5 additional evidence not listed in my first declaration but cited by Defendants in their
6 Statement of Genuine Disputes of Material Fact ("Defs.' Opp. Stmt. of Facts").

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

8 Ex. Q DEFS001382–84 (February 13, 2012, Information Memo to the Secretary on
9 Assisted Reproductive Technology (ART), Citizenship and Visa Law)

10 This document bears the seal of the United States Department of State, and
11 an initialed signature of (then) Assistant Secretary of State for Consular
Affairs Janice L. Jacobs who executed the memoranda; as such, the
document is self-authenticating pursuant to Fed. R. E. 902(1).

12 Ex. R Copy of news article published September 6, 2017, by CBS Los Angeles,
13 titled "DNA Dilemma: Baby Can't Get US Citizenship," containing
14 statements by Plaintiffs Andrew Dvash-Banks. The news story is available
15 on the website <https://losangeles.cbslocal.com/2017/09/06/baby-cant-get-us-citizenship/>
(last visited January 14, 2017), and online it includes a 2 minute,
39 second news video clip also published September 6, 2017, by CBS Los
Angeles.

16 I printed Ex. R into PDF (portable document format) format from the
17 website <https://losangeles.cbslocal.com/2017/09/06/baby-cant-get-us-citizenship/>.
18 In the course of my work as a trial attorney, I regularly locate
19 news stories and news video clips online. Ex. R contains an opposing party's
statements. Defendants do not offer Ex. R to prove the truth of the matter
asserted therein, but rather to show that the Dvash-Banks family agreed to be
interviewed for a public news story in September 2017.

20 Ex. S PDF (portable document format) copy of Immigration Equality webpage
21 titled "Meet the Dvash-Banks Family,"
22 <https://www.immigrationequality.org/dvashbanks/> (last visited January 14,
23 2017). The webpage itself includes a 3 minute, 7 second video published by
Immigration Equality, an organization that—along with Sullivan &
Cromwell, LLP—represents Plaintiffs in this litigation.

24 I printed Ex. S into PDF (portable document format) format from the
25 website <https://www.immigrationequality.org/dvashbanks/>. In the course of
26 my work as a trial attorney, I regularly visit the webpages of organizations
27 and law firms that represent opposing parties. Ex. S contains an opposing
28 party's statements. Defendants do not offer Ex. S to prove the truth of the
matter asserted therein, but rather to show that the Dvash-Banks family
voluntarily publicized details about their lives and images of their children.

Ex. T Complaint filed January 22, 2018.

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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

Defendants' Opposition Exhibit Q

(In Support of Defendants' Opposition to Plaintiffs'
Motion for Partial Summary Judgment)



United States Department of State

*Assistant Secretary of State
for Consular Affairs*

Washington, D.C. 20520

February 13, 2012

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INFORMATION MEMO FOR THE SECRETARY

FROM: CA – Janice L. Jacobs

SUBJECT: Assisted Reproductive Technology (ART), Citizenship and Visa Law

The Immigration and Nationality Act grants authority to the Secretary of State to adjudicate citizenship questions abroad. The Department is receiving an increasing number of citizenship and immigration claims for children born abroad who were conceived through assisted reproductive technology (ART). Adjudicating these claims often is challenging.

Sections 301 and 309 of the Immigration and Nationality Act (INA) provide that a child born abroad acquires U.S. citizenship at birth if the child is “born of” at least one U.S. citizen parent who meets other statutory requirements. The statutory language predates the advent of ART. Under the longstanding interpretation, the term “born of” requires a genetic link (i.e., a DNA link (egg or sperm)) between the U.S. citizen parent transmitting citizenship and the child. For example, under this interpretation, a U.S. citizen mother and U.S. citizen father who use a foreign surrogate cannot transmit citizenship to their child, unless the child was conceived with the egg or sperm of one of the U.S. citizen parents. Similarly, a U.S. citizen mother who gives birth abroad cannot transmit citizenship to her child if she uses donor eggs to conceive (assuming the person providing the sperm is not a U.S. citizen, in which case the sperm donor may be able to transmit citizenship). Although children who are not genetically related to a U.S. citizen parent cannot acquire U.S. citizenship at birth, they are in some circumstances eligible for immigrant visas, which could place them on the path to U.S. citizenship.

CA and L, in consultation with DHS, have been studying whether we can interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through ART in a broader range of circumstances, and in other circumstances, amend visa requirements for such children. Related to this, we are considering how this would impact children born through ART overseas to same-sex couples. Because we regularly encounter people seeking to document

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- 2 -

children who are not theirs, we use DNA testing to verify parentage. We are carefully reviewing any policy changes we recommend for the serious potential fraud implications. We are not the only country evaluating current law and its interpretation in light of modern ART developments and follow developments in the policies of other countries; our law is unique and we must ensure any changes in our policy are consistent with current law. We know of no current Congressional interest in this issue, but believe that significant changes to current policy might well attract Congressional interest. We do not anticipate that we would seek any legislative changes at this time. Our policy and any changes to it is of interest to the LGBT community, to single parents, as well as to many heterosexual couples who have had difficulties conceiving by traditional methods.

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Approved: CA: JJacobs

(17)

Drafted: CA/OCS/PRI- Lisa Vogel, ext. 6-9087 and cell: (703) 307-5207

Cleared:

DP/NR

Defendants' Opposition Exhibit R

(In Support of Defendants' Opposition to Plaintiffs'
Motion for Partial Summary Judgment)

DNA Dilemma: Baby Can't Get US Citizenship

September 6, 2017 at 11:32 pm Filed Under: [Baby](#), [DNA](#), [US Citizenship](#)



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BRENTWOOD (CBSLA.com) — Andrew Dvash-Banks is a United States citizen. His husband is not. Elad is from Israel.

The dads married in Canada seven years ago.

“We had our beautiful twin boys Aidan and Ethan through surrogacy in Canada because that’s where we were living at the time,” said Elad.

The twins share an egg donor but one child has the DNA of Andrew and the other the DNA of Elad.

“We really wanted one kid that is biologically related to each one of us just to have this family that is everyone a part of the family,” said Elad.

When the fathers decided to return to Andrew’s home in Los Angeles, they ran into a problem.

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Only Andrew's biological son gets US citizenship, not his other son who's biologically Elad's, who is not a US citizen.

"I just can't stop thinking about how I'm going to explain to him when he's older that he's different than his twin brother. His twin brother is American but he's a green card holder," said Andrew.

Both fathers' names are on the birth certificates but according to the State Department "... If the child does not have a biological connection to a US citizen parent, the child will not be a US citizen at birth."

"It's 2017 now. There's so many different types of families. Look at us. In the LGBT community there's so many different types of families and I really feel excluded in a way because of this law," said Andrew.

The couple didn't know about the law when they had their boys.

Andrew's now considering applying for his son's green card as a stepson or adopted son.

"I know it's not right in my heart and mind," said Andrew. "I would love the opportunity to have this law changed so the government will recognize him as my son as it should be."

Comments (2)

Defendants' Opposition Exhibit T

(In Support of Defendants' Opposition to Plaintiffs'
Motion for Partial Summary Judgment)

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28 **UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

29 _____)
30 ANDREW MASON DVASH-BANKS and)
31 ETHAN JACOB DVASH-BANKS,)

32 Plaintiffs,)

33 v.)

34 THE UNITED STATES DEPARTMENT OF)
35 STATE, and THE HONORABLE REX W.)
36 TILLERSON, Secretary of State,)

37 Defendants.)
38 _____)

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Docket No. 18-CV-_____

PRELIMINARY STATEMENT

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1. This action challenges a United States Department of State (“State Department”) policy that hurts families and undermines the familial relationships of same-sex parents. The agency’s policy unconstitutionally disregards the dignity and sanctity of same-sex marriages by refusing to recognize the birthright citizenship of the children of married same-sex couples. Plaintiffs are members of a family who have suffered and continue to suffer harm because of the State Department’s policy. The family includes Andrew Mason Dvash-Banks (“Andrew”)—a United States citizen, who was born and raised in this country; Andrew’s husband, Elad Dvash-Banks (“Elad”), an Israeli citizen; and their twin sons, Ethan Jacob Dvash-Banks (“Ethan”) and Aiden James Dvash-Banks (“Aiden”) (collectively, the “twins”).

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2. Both Ethan and Aiden were conceived and born during Andrew’s marriage to Elad. Andrew and Elad conceived the twins using their own sperm and eggs from the same anonymous donor. They used Elad’s sperm to conceive Ethan and Andrew’s sperm to conceive Aiden. A surrogate carried the twins to term together in her womb and gave birth to them moments apart on September 16, 2016, in Canada. Andrew and Elad are the only parents Ethan and Aiden have, and the only people Canadian law¹ recognizes as Ethan and Aiden’s parents. Accordingly, Andrew and Elad have been the twins’ legal parents from the day they came into this world together.

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3. At birth, both Ethan and Aiden qualified for United States citizenship pursuant to Section 301(g) of the Immigration and Nationality Act (“INA”) (codified at 8 U.S.C. § 1401(g)). That clause entitles a person born abroad to citizenship at birth if one of that person’s married parents is a United States citizen

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¹ To the extent necessary to introduce or address issues of non-U.S. law in connection with this action, this hereby constitutes Plaintiffs’ notice pursuant to Federal Rule Civil Procedure 44.1 of reliance on foreign law.

1 and the other is a foreign national, as long as the citizen parent satisfies certain
2 statutorily prescribed periods of residency in the U.S. Andrew is a U.S. citizen
3 who has lived in the United States for over twenty-four years, and so clearly
4 satisfies the residency requirements of Section 301(g). Because Andrew and Elad
5 were married to each other when Ethan and Aiden were born, Ethan and Aiden
6 have been U.S. citizens since birth under Section 301(g).

7 4. The State Department, through the United States Embassy in Toronto,
8 Canada, however, failed to apply Section 301 to Ethan and Aiden. Instead, it
9 applied Section 309 of the INA (codified at 8 U.S.C. § 1409), a provision of the
10 statute which applies only to children born “out of wedlock.” Because the State
11 Department wrongly considered Ethan and Aiden to have been born “out of
12 wedlock,” it erroneously concluded that they could qualify for citizenship at birth
13 only pursuant to provisions applicable to the children of unwed parents. It then
14 incorrectly determined that the twins could acquire citizenship at birth only
15 pursuant to Section 309 and only if Andrew’s sperm had been used to conceive
16 them both.

17 5. Focusing improperly on the biological relationship between each child
18 and the parent who conceived him, the State Department then recognized Aiden’s
19 citizenship and denied Ethan’s. The State Department’s application of Section 309
20 instead of Section 301 is an unlawful, unconstitutional refusal to recognize the
21 validity of Andrew’s and Elad’s marriage and, therefore, that a child born to them
22 during their marriage is the offspring of that marriage. The fact that the State
23 Department’s policy has led children identified by their birth certificates as twins
24 with the same parents to have different nationalities listed on their passports
25 crystallizes both the indignity and absurdity of the policy’s effect.

26 6. The State Department’s failure to recognize and give effect to the
27 marriage between Andrew and Elad also denies Ethan the rights and privileges that
28 accompany U.S. citizenship, including the right to reside permanently in the U.S.,

1 the right to obtain a U.S. passport, and, when he is older, the right to run for
2 political office. Because the State Department does not recognize Ethan's U.S.
3 citizenship, he cannot visit or live in the United States freely as other members of
4 his family can.

5 7. Andrew and Aiden may reside in the U.S. permanently because they
6 are U.S. citizens. Elad may legally reside in the U.S. permanently because he has a
7 family-based immigrant visa through his marriage to Andrew. The State
8 Department's policy, however, renders Ethan the only member of his family
9 without the freedom to live in the U.S. permanently. The State Department's
10 decision to withhold from Ethan the same rights granted to his twin brother means
11 that he will experience the indignity and stigma of unequal treatment imposed and
12 endorsed by the U.S. government. No governmental purpose could justify
13 imposing these indignities on a child of a valid marriage or restricting a family's
14 freedom to live as a family—together.

15 8. The State Department's policy is not only wrong and harmful, it is
16 also contrary to the INA as well as the guarantees of due process and equal
17 protection enshrined in the Fifth Amendment. To the extent that the State
18 Department's policy was adopted before the Supreme Court's recent precedents
19 guaranteeing equality to same-sex married couples and their families, its continued
20 enforcement violates that precedent. The Supreme Court has made clear that the
21 Constitution requires that same-sex marriages receive the same legal effects and
22 respect as opposite-sex marriages. The State Department's policy, or at least its
23 application to Ethan, violates that mandate by restricting eligibility for citizenship
24 under Section 301 of the INA solely to children whose parents are in opposite-sex
25 marriages. These violations create real and significant hardships for the Dvash-
26 Banks family and others like them. Soon, Ethan will be old enough to realize that
27 the U.S. government views him as an alien with no enforceable connection to his
28 father or brother, and discriminates against him based on the sex and sexual

1 orientation of his parents.

2 9. The State Department's policy is arbitrary and capricious and serves
3 no rational, legitimate, or substantial governmental interest. The State
4 Department's policy drives families apart by treating the children of the same
5 married parents differently depending upon which father's sperm was used during
6 fertilization. The threat that this policy poses to family unity confirms that it is
7 contrary to the legislative intent of the INA, which enshrines the preservation of
8 the family unit as a paramount consideration. Neither the INA nor the U.S.
9 Constitution permits the State Department's unlawful policy to stand.

10 10. Plaintiffs bring this action both to challenge the State Department's
11 policy as well as to request that this Court, pursuant to Section 360 of the INA
12 (codified at 8 U.S.C. § 1503), declare that Ethan is a U.S. citizen at birth.

13 **THE PARTIES**

14 11. Plaintiff Andrew is a 36-year-old citizen of the United States. He was
15 born in Santa Monica, California, and currently resides with his husband and their
16 children in Los Angeles, California.

17 12. Plaintiff Ethan is one year old. He was born in Mississauga, Ontario,
18 Canada, and currently resides with his parents Andrew and Elad and twin brother
19 Aiden in Los Angeles—although, as explained below, Ethan's permission to
20 remain in the U.S. recently has expired.

21 13. Andrew brings this action in his individual capacity and on behalf of
22 his son Ethan.

23 14. Defendant the State Department is a department of the government of
24 the United States of America, whose headquarters office is located at the
25 Department of State, 2201 C St. NW, Washington, D.C. 20520. The State
26 Department oversees all U.S. embassies and sets the policy U.S. embassy
27 employees follow in determining whether to recognize the citizenship of the
28 children of U.S. citizens.

1 15. Defendant The Honorable Rex Tillerson is the Secretary of State,
2 whose office is located at the Department of State, 2201 C St. NW, Washington,
3 D.C. 20520, and is being sued in his official capacity.

4 **JURISDICTION AND VENUE**

5 16. This Court has subject matter jurisdiction pursuant to 28 U.S.C.
6 § 1331.

7 17. This Court is authorized to issue a declaratory judgment pursuant to
8 28 U.S.C. §§ 2201 and 2202.

9 18. This Court is authorized to issue a judgment and injunctive relief
10 pursuant to 5 U.S.C. § 702.

11 19. This Court is authorized to make a *de novo* determination and
12 judgment of citizenship pursuant to 8 U.S.C. § 1503(a).

13 20. Venue in this district is proper pursuant to 28 U.S.C. § 1391(e).

14 **STATUTORY AND REGULATORY BACKGROUND**

15 **A. United States Citizenship at Birth**

16 21. There are two pathways to become a United States citizen at birth:
17 one pursuant to the Constitution and another by statute, the INA. The “Citizenship
18 Clause” of the Fourteenth Amendment of the Constitution provides, in part, that
19 anyone born in the United States is a citizen at birth. Under the INA, persons born
20 outside the United States may be considered citizens at birth under certain
21 statutorily prescribed circumstances. If a person born outside the United States
22 does not acquire citizenship at birth, that person can acquire citizenship only
23 through naturalization, and therefore can never be eligible for the presidency as
24 birthright citizens are.

25 22. The provisions governing eligibility for U.S. citizenship at birth by
26 individuals born outside the United States are set forth in Sections 301 through 309
27 of the INA. Section 301 is titled “Nationals and citizens of United States at birth.”
28 Under Section 301(g), a baby born abroad is a U.S. citizen at birth when (1) one of

1 the child's parents is a married United States citizen and (2) the U.S. citizen parent
2 lived in the U.S. for at least five years, at least two of which were after the parent's
3 fourteenth birthday.

4 23. Section 309 is titled "Children born out of wedlock," and its
5 provisions explicitly apply only to a person "born out of wedlock." The
6 requirements for citizenship at birth under that provision differ substantially from
7 those in Section 301, which has long been regarded as applicable to anyone whose
8 parents were lawfully married when the child was born.

9 24. For unwed fathers, Section 309(a) specifies, in part, that certain
10 provisions of Section 301—including Section 301(g)—"shall apply as of the date
11 of birth to a person born out of wedlock if—(1) a blood relationship between the
12 person and the father is established by clear and convincing evidence." In
13 addition, Section 309(a) requires that, for citizenship under Section 301 to be
14 available to an unwed father's child, the father must have (2) acquired U.S.
15 nationality by the time the person seeking citizenship was born, (3) agreed in
16 writing to provide financial support to that person until the age of 18, and (4) while
17 the person is under 18 years old, (a) legitimated the person under the law of that
18 person's residence or domicile, (b) acknowledged paternity in writing under oath,
19 or (c) had paternity established by a court of competent jurisdiction.

20 25. As a result of the different requirements for the children of wed and
21 unwed U.S. citizens, it is possible for people to qualify for citizenship at birth
22 under Section 301 even if they would not qualify under Section 309. Thus, the
23 determination of whether a child is born in or out of wedlock can be dispositive of
24 the ultimate question of whether or not a child acquired U.S. citizenship at birth.

25 26. Since its enactment in 1952, the INA has neither included nor been
26 amended to include definitions of the terms "parent" and "person," as used in
27 Section 301, or the terms "mother," "father," and "out of wedlock," as used in
28 Section 309.

1 27. Before and after the enactment of the INA, the majority of U.S. states
2 have followed the common law in presuming that every child born in wedlock is
3 the legitimate offspring of the child’s married parents. In general, including in
4 California, that presumption applies even when only one spouse is the child’s
5 biological parent. The structure of the INA effectively codifies the common law
6 presumption of parentage for married couples by making Section 301 applicable to
7 any person except for children who are born “out of wedlock.”

8 28. Congress has made clear that the legislative intent behind the INA
9 should be construed liberally because the INA was designed to make it easier—not
10 harder—for families of citizens and non-citizens to stay together. According to
11 Congress, “the legislative history of the Immigration and Nationality Act clearly
12 indicates that the Congress intended to provide for a liberal treatment of children
13 and was concerned with the problem of keeping families of United States Citizens
14 and Immigrants united.” H.R. Rep. 85-1199, at 2020 (1957). Congress has also
15 declared that “the statutory language makes it clear that the underlying intent [is] to
16 preserve the family unit upon immigration to the United States.” *Id.*

17 29. In amending the INA, Congress recognized that the hardships faced
18 by families fractured along citizenship lines were overwhelmingly greater than any
19 harm that could come from the liberal treatment of children with respect to
20 citizenship.

21 **B. The Constitutional Rights of Same-Sex Couples**

22 30. As the Supreme Court has recognized, same-sex couples have long
23 been subjected to illegal institutional discrimination and social stigmatization. The
24 Supreme Court’s precedent makes clear that the Constitution compels equal
25 protection and recognition of, and respect for, the rights of same-sex spouses,
26 including their right to have autonomy over the most personal and intimate of
27 choices—decisions about starting a family and sustaining a partnership in which to
28 raise and nurture a child. Accordingly, the State Department must recognize the

1 “equal dignity of same-sex marriages.” *United States v. Windsor*, 133 S. Ct. 2675,
2 2693 (2013).

3 31. After *Windsor* overturned the statute excluding same-sex marriages
4 from federal recognition, the federal government announced that it would
5 recognize same-sex marriages for immigration purposes. See Statement from
6 Homeland Security Secretary Janet Napolitano on July 1, 2013, available at
7 <https://www.uscis.gov/family/same-sex-marriages> (“As a general matter, the law
8 of the place where the marriage was celebrated determines whether the marriage is
9 legally valid for immigration purposes. Just as [the United States Citizenship and
10 Immigration Services] applies all relevant laws to determine the validity of an
11 opposite-sex marriage, we will apply all relevant laws to determine the validity of
12 a same-sex marriage.”).

13 32. Following *Windsor*, the Supreme Court overturned state laws that
14 barred same-sex couples from marrying as inconsistent with the Constitution’s
15 guarantees of due process and equal protection, including rights central to an
16 individual’s autonomy and dignity, such as one’s choice of intimate life partner.
17 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

18 33. The Court further warned that failure to recognize same-sex marriages
19 “harm[s] and humiliate[s] the children of same-sex couples.” *Id.* at 2590. The
20 Court also recognized that “[w]ithout the recognition, stability, and predictability
21 marriage offers, children suffer the stigma of knowing their families are somehow
22 lesser.” *Id.*

23 34. In *Pavan v. Nathaniel Smith*, the Supreme Court held that married
24 couples must receive the same “constellation of benefits . . . linked to marriage,”
25 regardless of whether the marriage is between spouses of the same or opposite
26 sexes. 137 S. Ct. 2075, 2077 (2017). Those benefits include the legal recognition
27 that same-sex spouses may both be the parents of a child born during their
28 marriage, even if only one spouse is the child’s biological parent.

1 40. After graduating from high school, Andrew attended the University of
2 California at Santa Barbara, graduating with a bachelor's degree in June 2003.
3 Andrew then moved to New York City, where he lived for three years while
4 working for a translation company. In 2005, Andrew moved to Israel; and in July
5 2007, he enrolled in a master's program at Tel Aviv University. In March of 2008,
6 Andrew met Elad Dvash at a holiday party at Tel Aviv University.

7 41. Elad is an Israeli citizen, born in Ramat Gan, Israel, on March 20,
8 1985. Elad had lived in Israel for his entire life when he met and began dating
9 Andrew. Thereafter, the two moved to Toronto, Canada, where they were married
10 by a judge on August 19, 2010. (A copy of Elad and Andrew's marriage certificate
11 is appended to this Complaint at Exhibit B.)

12 42. Then, as now, Canadian law recognizes the validity and equality of
13 same-sex marriages. Although Andrew and Elad wanted to move to the United
14 States to start their family in California, where four of Andrew's five siblings live
15 with their families, at the time of their marriage in August 2010, the Defense of
16 Marriage Act had not yet been ruled unconstitutional by the Supreme Court. The
17 Defense of Marriage Act precluded the United States government from
18 recognizing the validity of Andrew and Elad's marriage, and therefore barred Elad
19 from obtaining permanent residence through his marriage to Andrew.

20 43. Unlike the U.S. government, the Canadian government recognized the
21 validity of Andrew and Elad's marriage. As a result, Elad could become a legal
22 resident of Canada on the basis of his marriage to Andrew. Thus, Andrew and
23 Elad decided to move to Toronto, Canada to begin building their lives—and
24 family—as a married couple.

25 44. In the summer of 2015, Andrew and Elad selected an anonymous egg
26 donor to enable them to have and raise children as a couple.

27 45. In February 2016, the surrogate became pregnant with one embryo
28 created using sperm from Andrew and one embryo created using sperm from Elad.

1 Andrew and Elad intended to be the sole parents of the resulting children.

2 46. On September 16, 2016, Andrew and Elad's children—Ethan and
3 Aiden—were born in Mississauga, a city in Ontario, Canada. Andrew and Elad,
4 *and only* Andrew and Elad, are listed as the parents on both of their sons' birth
5 certificates, and recognized as their sons' parents under Canadian law.

6 47. Ethan and Aiden are part of the same family, with the same parents,
7 who are married to each other now, as they were at the time both children were
8 born. In terms of their relationship to Andrew, the only distinction between Ethan
9 and Aiden is that sperm from Andrew's husband instead of from Andrew was used
10 to conceive Ethan. That distinction should make no difference to Ethan's
11 eligibility for U.S. citizenship at birth because Ethan demonstrably was *not* born
12 out of wedlock. But to the State Department, this is all the difference in the world.

13 **B. The Application of the State Department's Policy to the Dvash-**
14 **Banks Family**

15 48. Shortly after Ethan and Aiden were born, their parents took them to
16 the U.S. consulate in Toronto to apply for their Consular Reports of Birth Abroad
17 and U.S. passports. Andrew and Elad brought both boys' birth certificates, their
18 marriage certificate, declarations of parentage, and payment for the application
19 fees.

20 49. After hours of waiting, Andrew and Elad finally spoke with a consular
21 official. Notwithstanding Andrew's U.S. citizenship, his status as Elad's husband,
22 and his status as a parent of both Ethan and Aiden, the official informed Andrew
23 and Elad that further questions would be required. The official then began to
24 inquire into the highly personal details of how Andrew and Elad—a married
25 couple—had children together. The official asked how the spouses had come to
26 create fertilized embryos with their sperm, the identity of the egg donor, and which
27 spouse had provided sperm for which child. Andrew and Elad had planned to keep
28 the genetic identity of their children private so that both children would feel
equally connected to each of their parents. In the hope of ensuring that the U.S.

1 government would recognize their children's citizenship, however, they disclosed
2 the genetic links they had to Ethan and Aiden.

3 50. When Andrew and Elad explained that Ethan was conceived using
4 Elad's sperm, the consular official required that the children undergo a DNA test to
5 determine whether either child was genetically linked to Andrew. She stated that
6 without the biological link, neither child would qualify for U.S. citizenship at birth.
7 The official did not identify any statutory, regulatory, or other authority supporting
8 this demand.

9 51. Andrew and Elad left the consulate shocked, humiliated, and hurt.
10 They were also deeply offended by the ramifications of what they had heard. The
11 U.S. government did not recognize Andrew as the parent of his son Ethan,
12 regardless of what Ethan's birth certificate and applicable Canadian law said, and
13 regardless of the daily reality of Andrew and Ethan's parent-child relationship.

14 52. Andrew and Elad submitted DNA tests for both Ethan and Aiden to
15 the consulate. Soon thereafter, Andrew and Elad received two letters in the mail,
16 both dated March 2, 2017. One letter granted Aiden's application for his Consular
17 Report of Birth Abroad and a U.S. passport. The other letter (the "Letter") notified
18 Andrew that Ethan's application had been denied. (A copy of this letter is
19 appended to this Complaint at Exhibit C.) It was then that Andrew and Elad
20 finally realized that although they were the legal parents of two boys who were
21 born on the same day, minutes apart from each other, the State Department
22 considered only one of their boys to be a U.S. citizen. To the U.S. government,
23 Ethan was an alien.

24 53. The Letter denying Ethan's application, addressed to Andrew, stated
25 that "after careful review of the evidence you submitted with your child's
26 application, it has been determined that his claim to U.S. citizenship has not been
27 satisfactorily established, as you are not his biological father." The Letter went on
28 to reference the "Immigration and Nationality Act (INA) of 1952," which

1 according to the Letter “requires among other things, a blood relationship between
2 a child and the U.S. citizen parent in order for the parent to transmit U.S.
3 citizenship.” The letter did not include any further citation to more specific
4 statutory provisions or authority.

5 54. The Letter provided Andrew and Ethan no mechanism to appeal the
6 State Department’s denial, and merely suggested Andrew “contact the nearest
7 office of U.S. Citizenship and Immigration Services regarding [Ethan’s]
8 citizenship status.”

9 55. Andrew reached out to his representative, Congressman Ted Lieu, for
10 assistance, and Congressman Lieu’s office contacted the State Department. In an
11 October 2, 2017 letter to Congressman Lieu, the State Department’s Office of
12 American Citizen Services and Crisis Management also failed to cite any statute or
13 regulation to explain the reasons for the Dvash-Banks family’s situation and the
14 denial of a Consular Report of Birth Abroad and U.S. passport for Ethan. (A copy
15 of this letter is appended to this Complaint as Exhibit D.) The State Department’s
16 Office of American Citizen Services and Crisis Management merely suggested that
17 Andrew and Elad find “an immigration lawyer who can help explain the avenues”
18 through which Ethan could “acquire citizenship through naturalization,” or that
19 they should “consider applying for a certificate of citizenship directly from
20 USCIS.”

21 56. The State Department’s Office of American Citizen Services and
22 Crisis Management did not explain how, or why, USCIS would recognize that
23 Ethan had acquired citizenship at birth when the consulate had not. Furthermore,
24 the USCIS application for a certificate of citizenship requires the applicant to have
25 “at least one biological or adoptive U.S. citizen parent.” *Instructions for*
26 *Application for Certificate of Citizenship*, OMB No. 1615-0057. Because Ethan
27 does not have at least one biological or adoptive U.S. citizen parent, Andrew and
28 Elad could not complete an application for citizenship on Ethan’s behalf that

1 would satisfy the requirements of USCIS.

2 57. The denial of Ethan's Consular Report of Birth Abroad meant that
3 Ethan was denied a U.S. passport as well. This has caused difficulties and
4 humiliation for the Dvash-Banks family. After the Supreme Court's decision in
5 *Windsor* reversed the Defense of Marriage Act, ensuring that Andrew and Elad's
6 marriage would be recognized and respected in the U.S., Andrew and Elad decided
7 to fulfill their long-held hope of moving to California so that they could live near
8 Andrew's family, and moved to Los Angeles on June 24, 2017.

9 58. Andrew, Elad, Ethan, and Aiden all live in Los Angeles, California
10 together. Both Andrew and Elad work in Los Angeles and they have no intention
11 of moving from Los Angeles. They must keep their home in Toronto as a
12 contingency because although Andrew and Aiden both have U.S. Citizenship and
13 Elad has permanent residency in the U.S., immigration officials would allow Ethan
14 to enter the United States only on a tourist visa. The stay authorized upon that
15 entry expired on December 23, 2017. All of Andrew and Elad's professional,
16 personal, and familial commitments are in constant jeopardy of being undone if the
17 Department of Homeland Security deports Ethan.

18 59. Given the severity of these consequences, Andrew and Elad have
19 submitted an application for a green card on Ethan's behalf to minimize the risk of
20 deportation proceedings and having to face the choice of staying together as a
21 family or staying in this country. However, Andrew and Elad should not have to
22 bear these additional burdens simply to ensure they can continue to raise their sons
23 together in this country. Their current need to do so highlights the inequality and
24 indignity imposed by the State Department's classification of children born to
25 parents in same-sex marriages as children born out of wedlock.

26 60. Andrew and Elad have also suffered indignity and emotional pain
27 because the U.S. government recognizes neither their marriage nor their parental
28 rights in determining whether their children were born in or out of wedlock.

1 According to the U.S. government, Andrew and Elad could never have children in
2 wedlock because they could not both be married to each other and be the biological
3 parents of the same child. As a result, the U.S. government is undermining,
4 disrespecting, and rendering unequal the intimate relationship between same-sex
5 married couples and the children they have and raise together within family units
6 founded on the sanctity of marriage. They also worry about the obvious inequity
7 the State Department's decision causes between their twin sons, the impact on
8 Ethan and Aiden of their different citizenship status and the awareness that the
9 U.S. government considers them illegitimate notwithstanding their parents' valid
10 marriage.

11 **C. The State Department Erroneously Deemed Ethan to Have Been**
12 **Born "Out of Wedlock"**

13 61. As alleged herein, Ethan acquired U.S. citizenship at birth under
14 Section 301(g) of the INA. Pursuant to Section 301(g), a U.S. citizen at birth
15 includes:

16 a person born outside the geographical limits of the United States and
17 its outlying possessions of parents, one of whom is an alien, and the
18 other a citizen of the United States who, prior to the birth of such
19 person, was physically present in the United States or its outlying
20 possessions for a period or periods totaling not less than five years, at
21 least two of which were after attaining the age of fourteen years.

22 62. Because Ethan is not a child born out of wedlock, his citizenship
23 status is governed by Section 301(g). Ethan clearly satisfies the criteria for U.S.
24 citizenship at birth under Section 301(g). That is so because his father Andrew has
25 lived in the U.S. for most of his life and clearly satisfies the statutory residence
26 requirements of physical presence in the U.S. for no less than five years, including
27 at least two after turning fourteen years old.

28 63. The only way that Ethan would not be a citizen at birth under the INA
is if Ethan were a child born out of wedlock, as the State Department has deemed
him. That determination was erroneous both as a matter of statutory interpretation
and as a matter of the Constitution's guarantees of due process and equal

1 protection.

2 **D. The State Department’s Policy Unconstitutionally Discriminates**
3 **on the Basis of Sex and Sexual Orientation**

4 64. The decision to marry—like the decision to have children—is one of
5 the most deeply personal choices one can make. For the liberty guaranteed by the
6 Constitution to be meaningful and effective, individuals must be able to make these
7 fundamental and personal life choices freely, with dignity and without unwarranted
8 consequences for the individual and his family. Accordingly, the Constitution’s
9 guarantees of due process and equal protection apply with full force to an
10 individual’s fundamental right to marry the spouse of his or her own choosing,
11 including a spouse of the same sex. The Constitution requires not only recognition
12 and protection of the right to enter into same-sex marriages, but also affords same-
13 sex marriages the full constellation of legal rights and benefits—including dignity
14 and respect—that have traditionally flowed from opposite-sex marriages.

15 65. The State Department’s policy and its application to Ethan are
16 unconstitutional because they violate Ethan’s and Andrew’s rights to due process
17 and equal protection under the Fifth Amendment of the Constitution. As discussed
18 above, the State Department refuses to apply Section 301(g) of the INA to Ethan
19 based on its erroneous and demeaning classification of him as a child born out of
20 wedlock. Apparently on that basis alone, it refuses to recognize Ethan’s
21 citizenship.

22 66. Under the State Department’s policy, citizenship through Section 301
23 is presumptively available to any person the State Department deems born “in
24 wedlock”—a class the agency has construed to consist exclusively of children
25 conceived and carried by women who are married to men.

26 67. Nothing in the INA or the Constitution permits the State Department’s
27 limitation of birthright citizenship under Section 301 to the children of U.S.
28 citizens in opposite-sex marriages. The State Department’s requirement is
unfounded and ensures unconstitutionally unequal treatment of the children of

1 same-sex married couples.

2 68. The government has provided no rationale for this discriminatory
3 policy. Furthermore, there is no legitimate governmental purpose that could justify
4 limiting birthright citizenship in this way. To the contrary, such an approach
5 undermines the congressionally established, legitimate, and important government
6 purposes that underlie the INA itself. For example, the State Department’s
7 approach ultimately makes it harder, not easier, for families like the Dvash-
8 Bankses to stay together. This undermines the INA’s statutory intent of
9 “provid[ing] for a liberal treatment of children and . . . keeping families of United
10 States Citizens and Immigrants united.” H.R. Rep. 85-1199, at 2020 (1957).

11 69. In amending the INA, Congress recognized that no harm could come
12 from the liberal treatment of children with respect to citizenship, and that the
13 consequences of such treatment would fulfill “the clearly expressed legislative
14 intention to keep together the family unit wherever possible.” *Id.* at 2021.

15 70. Although the State Department’s policy may in theory apply to
16 marriages between spouses of opposite sexes, its overwhelming effect is to deprive
17 spouses in same-sex marriages—and their children—of fundamental rights and
18 equal dignity as citizens under the law. The fact that *some* opposite-sex married
19 couples *may* use assisted reproductive technology to conceive a child does not
20 change the discriminatory nature or harmful effects of the government’s policy on
21 same-sex couples.

22 71. In addition to discriminating against Ethan, the State Department’s
23 policy discriminates against Andrew by denying him the ability to transmit
24 citizenship to a child conceived with his husband’s sperm, born during their
25 marriage, and raised as a child of that marriage. This right is available to similarly
26 situated citizens—*i.e.*, U.S. citizen women who are married to foreign national
27 men. A woman who is a U.S. citizen has the right to confer citizenship on a child
28 conceived with her husband’s sperm, born during their marriage and raised as a

1 child of that marriage, even if she did not conceive or carry the child. Therefore, in
2 denying Andrew this right, the State Department's policy also discriminates
3 against him based on his sex and/or that of his spouse, Elad.

4 **COUNT I – DECLARATORY JUDGMENT**
5 **THE STATE DEPARTMENT'S POLICY VIOLATES THE DUE PROCESS**
6 **GUARANTEE OF THE FIFTH AMENDMENT**

7 72. Plaintiffs repeat, reallege, and incorporate by reference the allegations
8 contained in paragraphs 1 through 71 as if fully set forth herein.

9 73. The Fifth Amendment of the Constitution prohibits the federal
10 government from depriving individuals of their rights without due process of law.

11 74. The Due Process Clause of the Fifth Amendment prohibits the federal
12 government from depriving any person of life, liberty, or property without due
13 process of law, as well as from depriving any person of equal protection under the
14 law.

15 75. Section 301 of the INA entitles U.S. citizens to confer citizenship at
16 birth on their children born abroad in wedlock. The INA does not require U.S.
17 citizens to be in opposite-sex marriages to confer citizenship under Section 301.
18 Nor does the INA require a child's biological parents to be married to each other
19 for the child to be considered born in wedlock, and therefore eligible for
20 citizenship under Section 301. The INA merely requires that the child is *not* born
21 out of wedlock.

22 76. Defendants have violated and continue to violate the Fifth
23 Amendment of the United States Constitution by enforcing a policy that excludes
24 U.S. citizens in same-sex marriages from conferring citizenship pursuant to
25 Section 301, while restricting access to citizenship under that provision to the
26 children of opposite-sex married couples. Defendants' policy has deprived and
27 continues to deprive Plaintiffs of their rights to acquire and confer citizenship at
28 birth pursuant to INA Section 301. As a result of Defendants' policy, Plaintiffs
have suffered, and will suffer, irreparable harm to their protected interest in

1 conferring, and having recognized, Ethan's U.S. citizenship.

2 77. There is no rational, legitimate, or substantial government interest
3 served by denying the children of same-sex married couples access to citizenship
4 at birth pursuant to Section 301 of the INA based on the sex and/or sexual
5 orientation of the child's citizen-parent. Nor is there any rational, legitimate, or
6 substantial government interest served by denying U.S. citizens in same-sex
7 marriages the right to confer citizenship on children born abroad during their
8 marriage based on the citizen's sex and/or sexual orientation or exercise of the
9 protected right to enter into a same-sex marriage. Defendants have offered no
10 justification for precluding Andrew from conferring on Ethan citizenship pursuant
11 to Section 301.

12 78. As a result of Defendants' arbitrary, discriminatory, and unlawful
13 implementation and enforcement of its policy prohibiting U.S. citizens in same-sex
14 marriages from conferring U.S. citizenship on their children born in wedlock
15 outside the United States, Plaintiffs have suffered injuries and will suffer further
16 irreparable harm to their constitutional rights under the Fifth Amendment if the
17 State Department's policy is not declared unconstitutional and enjoined.

18 79. Plaintiffs have no adequate remedy at law.

19 **COUNT II – DECLARATORY JUDGMENT**
20 **THE STATE DEPARTMENT'S POLICY VIOLATES THE**
21 **CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION UNDER**
22 **THE LAW**

23 80. Plaintiffs repeat, reallege, and incorporate by reference the allegations
24 contained in paragraphs 1 through 71 as if fully set forth herein.

25 81. The Due Process Clause of the Fifth Amendment prohibits the federal
26 government from denying persons the equal protection of its laws.

27 82. Under the State Department's interpretation of Sections 301 and 309,
28 no child could be considered born in wedlock to spouses in same-sex marriages,
even if the child's parents are married to each other and are the sole individuals
identified on the child's birth certificate as his or her parents.

1 83. The State Department has offered no rationale to explain why it bars
2 same-sex parents from relying upon Section 301.

3 84. The State Department’s interpretation has a disparate impact on same-
4 sex married couples, because under that policy they can *never* confer upon a child
5 U.S. citizenship pursuant to Section 301.

6 85. Defendants’ Letter, denying the application for a Consular Report of
7 Birth Abroad by deeming Ethan to be a child born out of wedlock, discriminates
8 against Ethan and Andrew based on sex and sexual orientation, without lawful
9 justification, in violation of the Equal Protection component of the Due Process
10 Clause of the Fifth Amendment.

11 86. Defendants’ above-described discrimination against people who
12 desire to have an intimate relationship with a partner of the same sex—a discrete
13 and insular group with a long history of discrimination and degradation including
14 by those acting under the color of law—does not advance any rational, legitimate,
15 or substantial governmental interest.

16 87. As a result of Defendants’ implementation and enforcement of its
17 discriminatory policy of excluding the children of same-sex married couples from
18 qualifying for citizenship at birth as children born in wedlock outside the United
19 States, Plaintiffs have suffered injuries and will suffer further irreparable harm to
20 their constitutional rights under the Fifth Amendment if the State Department’s
21 policy is not declared unconstitutional and enjoined.

22 88. Plaintiffs have no adequate remedy at law.

23 **COUNT III – ADMINISTRATIVE PROCEDURE ACT**

24 89. Plaintiffs repeat, reallege, and incorporate by reference the allegations
25 contained in paragraphs 1 through 71 as if fully set forth herein.

26 90. Plaintiffs have suffered a “legal wrong because of agency action.”
27 5 U.S.C. § 702.

28 91. The Administrative Procedure Act bars any agency action that is

1 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
2 law.” 5 U.S.C. § 706(2)(A).

3 92. Defendants’ interpretation of Sections 301 and 309, as embodied in
4 the FAM, conflicts with the clear language and statutory purpose of the INA. This
5 interpretation, published without any public comment, is arbitrary, capricious, and
6 not in accordance with the INA.

7 93. Plaintiffs have suffered and continue to suffer legal wrongs because of
8 the U.S. Embassy’s decision to deny the Consular Report of Birth Abroad
9 application submitted on behalf of Ethan.

10 94. Plaintiffs have exhausted all administrative remedies available to them
11 as of right.

12 95. Plaintiffs have no other recourse to judicial review other than this
13 action.

14 96. Defendants’ exclusion of children born abroad in same-sex marriages
15 from the category of children who qualify for citizenship at birth as born to valid
16 marriages lacks a rational basis, is arbitrary, and is contrary to law.

17 97. Plaintiffs have no adequate remedy at law.

18 **COUNT IV – DECLARATION THAT ETHAN DVASH-BANKS IS A**
19 **U.S. CITIZEN**

20 98. Plaintiffs repeat, reallege, and incorporate by reference the allegations
21 contained in paragraphs 1 through 71 as if fully set forth herein.

22 99. 8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* judgment
23 as to the citizenship status of Ethan.

24 100. Andrew is a U.S. citizen, who was born in the U.S. and physically
25 present in the U.S. for a period of 24 years, starting from the time he was born in
26 California in 1981 until the time he moved to Israel in 2005.

27 101. Andrew and Elad were legally married to each other by a judge in
28 Canada on August 19, 2010. They have been married to each other continuously
since that date.

1 102. Their sons, Aiden and Ethan, were born on September 16, 2016 in
2 Mississauga, Canada, during Andrew's and Elad's marriage.

3 103. Andrew and Elad are Ethan's parents. They are identified as Ethan's
4 parents on his birth certificate and recognized as his parents under Canadian law.

5 104. Section 301(g) of the INA is applicable to Ethan's citizenship claim
6 because Ethan is the child of parents who were married to each other at the time of
7 his birth, and one of Ethan's married parents is a U.S. citizen. Section 309(a) of
8 the INA is inapplicable to Ethan's citizenship claim because he is the child of
9 married parents, and therefore is not a child born out of wedlock.

10 105. Ethan is a U.S. citizen at birth pursuant to Section 301(g) because he
11 was born: (1) outside the geographical limits of the United States and its outlying
12 possessions, (2) to parents one of whom is an alien, and the other a citizen of the
13 United States, (3) to a parent who, prior to the birth of such person, was physically
14 present in the United States or its outlying possessions for a period or periods
15 totaling not less than five years, at least two of which were after attaining the age
16 of fourteen years.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

- i. Declare unconstitutional, and a violation of the INA, the State Department’s policy of classifying the children of same-sex married couples as “children born out of wedlock,” and its consequent refusal to recognize Ethan’s citizenship status on that basis, both on its face and as applied to Plaintiffs, Andrew Mason Dvash-Banks, in his individual capacity, and on behalf of his son, Ethan Jacob Dvash-Banks;
- ii. Declare Ethan Jacob Dvash-Banks a U.S. citizen at birth;
- iii. Permanently enjoin Defendants from continuing to discriminate against Plaintiffs by classifying the children of same-sex married couples as “children born out of wedlock,” and denying the children of same-sex married couples the right to acquire citizenship at birth pursuant to Section 301(g) on that basis; and
- iv. Award Plaintiffs attorneys’ fees and costs as allowed by law, and such other relief as the Court deems just and proper, including an award of reasonable litigation costs incurred in this proceeding pursuant to 28 U.S.C. § 2412.

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1 Dated: New York, New York
2 January 22, 2018

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