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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
19 official capacity as U.S. Secretary of
State, et al.,
20 Defendants.

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

**Defendants' Notice of Errata Re:
Defendants' Statement of Genuine
Disputes of Material Fact, and
Corrected Statement Attached as
Exhibit**

Honorable John F. Walter

21
22 Defendants hereby advise the Court that the as-filed version of Defendants'
23 Statement of Genuine Disputes of Material Fact contained errors as a result of
24 inadvertently filing an earlier, non-final version of the Statement. The Statement was
25 edited on a file-sharing system (OneDrive), and when printed to PDF for filing, it
26 had not synced with certain edits that had been made to the document, resulting in a
27 PDF of an earlier version of the document.
28

1 Attached to this notice is a corrected Statement of Genuine Disputes of
 2 Material Facts, which corrects the following errors:

<u>Row/Fact No.</u>	<u>Correction to Right-Hand Column</u>
45	Delete stray words in first sentence.
57	Add bullet of supporting evidence
79	Replace period with colon at end of first line.
85	Add “in part” after “Distputed”; add to explanation; delete stray citations.
101	Add “Relevant portions of” before “Dvash-Banks Depo”; replace underscore with relevant page span; add bullet of supporting evidence.
103	Edited second sentence.
104	Updated explanation.
105	Add sentence to explanation; add bullet of supporting evidence; add exhibit numbers; make “Plaintiff’s” plural; fix apostrophe in “childrens’.”
111	Add sentence to explanation.
113	Add bullet of supporting evidence.
115	Replace “Depo citations” with specific citation.
116	Add clause to end of last sentence; delete stray words.
126	Delete stray word “to” after “Distputed”
128	Move sentence from last bullet point to end of second paragraph.
131	Delete “Further,” in second sentence.
142	Add missing words and citation to record.
143	Updated explanation; add FAM citations.
146	Delete stray words; missing explanation.

1	161	Left-hand column correction = delete stray words and edit fact
2		description.
3	39, 114, 138,	Add exhibit numbers.
4	162–65, 168–	
5	71	
6	168–70	Typo; should cite Defs.’ Resp. to Request for Admission No.
7		10, not No. 11.
8	172	Add parenthetical.
9	133, 134, 150	Added hyperlinks to cited cases.
10	Throughout	Formatting for consistency.

11
12 Other than the changes listed above, no other changes were made to
13 Defendants’ Statement.

14 Date: January 15, 2019

Respectfully submitted,

15
16 JOSEPH H. HUNT
Assistant Attorney General

17
18 ANTHONY J. COPPOLINO
Deputy Director

19
20 /s/ Lisa Zeidner Marcus
VINITA B. ANDRAPALLIYAL
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CERTIFICATE OF SERVICE

Case No. CV 18-523-JFW-JC

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.

On January 16, 2019, I served this NOTICE OF ERRATA 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 16, 2019 January 15, 2019 at Pittsburgh, PA.

By: s/Lisa Zeidner Marcus
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13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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15 ANDREW MASON DVASH-
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)

**Defendants' Statement of Genuine
Disputes of Material Fact
("Def.' 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

23 Pursuant to Local Rule 56-1, and this Court's Standing Order (ECF No. 27) and Case
24 Management Order (ECF No. 52), Defendants Secretary of State Michael R. Pompeo
25 and the U.S. Department of State (collectively, "Defendants") respectfully submit the
26 following Statement of Genuine Disputes of Material Fact, in response to Plaintiffs'
27 Statement of Uncontroverted Facts and Conclusions of Law (ECF No. 83-24).
28

I. Statement of Uncontroverted Facts

A. “Andrew Dvash-Banks is a United States citizen.”

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
1. Andrew Dvash-Banks (“Andrew”) is a United States citizen.	Dvash-Banks Dep. 171:3-171:6. <i>Undisputed.</i>
2. Andrew was born in California in 1981.	Dvash-Banks Dep. 13:24-14:2. <i>Undisputed.</i>
3. During his childhood, Andrew lived primarily in Beverly Hills, California.	Dvash-Banks Dep. 14:9-14:14. <i>Undisputed.</i>
4. Andrew attended high school in California.	Dvash-Banks Dep. 15:20-15:22. <i>Undisputed.</i>
5. Andrew attended college in California.	Dvash-Banks Dep. 15:23-15:25. <i>Undisputed.</i>
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. <i>Undisputed.</i>
7. In 2007, Andrew enrolled in a master’s degree program in Israel.	Dvash-Banks Dep. 18:1-18:4; 19:20-20:2. <i>Undisputed.</i>
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. <i>Undisputed.</i>

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

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>gestational surrogate (the “Gestational Surrogate”) for the purpose of carrying one or two embryos during a pregnancy (the “Surrogacy Agreement”).</p>	
<p>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.”</p>	<p>Surrogacy Agmt. at Section 1.1, AR 023. <i>Undisputed.</i></p>
<p>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.</p>	<p>Surrogacy Agmt. at Section 1.4, AR 023. <i>Undisputed.</i></p>
<p>20.The Gestational Surrogate became pregnant with one embryo created using genetic material from Andrew and one embryo created using genetic material from Elad.</p>	<p>Dvash-Banks Dep. 85:3-85:13. <i>Undisputed.</i></p>

1 <i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
2 21. Under the terms of the Surrogacy 3 Agreement, Andrew and Elad 4 “will be recognized as the 5 Child’s parents immediately 6 upon the Child’s Birth.” 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Surrogacy Agmt. at Section 1.8, AR 024. <i>Disputed in part:</i> Disputed to the extent the statement conveys or implies that the Surrogacy Agreement would be binding on anyone other than the contracting parties. <ul style="list-style-type: none"> • 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.”) • <i>Id.</i> 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 22. Under the terms of the Surrogacy 23 Agreement, Andrew and Elad, 24 “intend to assume full care of, 25 and all parental responsibility for 26 the Child. . . .” 27 28	Surrogacy Agmt. at Section 1.9, AR 024. <i>Undisputed.</i>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>23. Under the terms of the Surrogacy Agreement, “Immediately upon 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.”</p>	<p>Surrogacy Agmt. at Section 1.10, AR 024. <i>Undisputed.</i></p>
<p>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.”</p>	<p>Surrogacy Agmt. at Section 14.4(c), AR 038. <i>Undisputed.</i></p>
<p>25. The Surrogacy Agreement states that: “For purposes of this Agreement, ‘immediately upon</p>	<p>Surrogacy Agmt. at Section 14.1, AR 038. <i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 birth’ means as soon as the 2 umbilical cord is cut.”</p>	
<p>3 4 26.Under the terms of the Surrogacy 5 Agreement, “The Gestational 6 Carrier hereby expressly waives 7 all parental, custodial and social 8 rights that she has or may 9 acquire to the Child.”</p>	<p>Surrogacy Agmt. at Section 14.4, AR 038. <i>Undisputed.</i></p>
<p>10 27.Under the terms of the Surrogacy 11 Agreement, “All Parties to this 12 Agreement wish to maintain 13 confidentiality between 14 themselves, one to another, and 15 between themselves and the 16 public.”</p>	<p>Surrogacy Agmt. at Section 1.11 at AR 024. <i>Undisputed.</i></p>
<p>17 28.Under the terms of the Surrogacy 18 Agreement, the Surrogacy 19 Agreement is governed by the 20 laws of the Province of Ontario, 21 Canada.</p>	<p>Surrogacy Agmt. at Section 35.1 at AR 051. <i>Undisputed.</i></p>
<p>22 23 C. “The twins are born and Elad and Andrew are named as their parents on 24 their birth certificates and are recognized for all purposes in law to be their 25 parents.”</p>	
<p>26 29.Twins A.J. and E.J. (the 27 “Twins”) were born on 28</p>	<p>E.J. Statement of Live Birth; A.J. Statement of Live Birth. <i>Undisputed except to the extent the term</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
September 16, 2016 in Ontario, Canada.	<i>“twins” is intended to imply that E.J. is biologically related to Andrew, or that A.J. and E.J. share the same biological parents.</i>
30. The Twins were born four minutes apart.	Dvash-Banks Dep. 161:13-161:16. <i>Undisputed.</i>
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. <i>Undisputed.</i>
32. Andrew was the person who cut E.J.’s umbilical cord.	Dvash-Banks Dep. 143:23-144:15. <i>Undisputed.</i>
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. <i>Undisputed.</i>
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. <i>Undisputed.</i>
35. Andrew and Elad are the only parents listed on E.J.’s Statement of Live Birth.	E.J. Statement of Live Birth. <i>Undisputed.</i>
36. Andrew and Elad are the only parents listed on A.J.’s Statement of Live Birth.	A.J. Statement of Live Birth. <i>Undisputed.</i>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 37. Andrew and Elad have been 2 E.J.'s and A.J.'s legal parents 3 since the Twins' birth in 2016. 4</p>	<p>E.J. Statement of Live Birth; A.J. Statement of Live Birth; Surrogacy Agmt., at Sections 1.8-1.10, AR 024; Canadian Order. <i>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.</i> Undisputed that Andrew and Elad are E.J.'s and A.J.'s parents.</p>
<p>11 38. Andrew and Elad have raised the 12 Twins since the day the Twins 13 were born.</p>	<p>Surrogacy Agmt., at Sections 14.1, 14.4, AR 037- 38. <i>Undisputed.</i></p>
<p>14 39. No other individual has acted as 15 a parent to E.J. or A.J. 16 17 18 19 20 21 22 23 24 25 26 27</p>	<p>Canadian Order; Surrogacy Agmt. at Sections 1.7- 1.10, AR 024; Dvash-Banks Dep. 29:21-30:14. <i>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.</i> Undisputed that Andrew and Elad are E.J.'s. and A.J.'s parents. Disputed that no other individual ever acted as a parent. <ul style="list-style-type: none"> • By providing ova, the egg donor acted as a biological/ genetic mother for E.J. and A.J. See Ex. H: Plaintiffs' Response to Defendants' Request for Admission No. 1 </p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>(admitting anonymous donor used to conceive E.G. and A.J.)</p> <ul style="list-style-type: none">• 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. <i>See</i> Ex. H: Plaintiffs’ Response to Defendants’ Request for Admission No. 3 (admitting gestational surrogate was used to carry and give birth E.J.) <p>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.</p> <ul style="list-style-type: none">• Canadian Order, AR 021 (listing Amanda Marie Anne Adams as “Respondent”); <i>id.</i> 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

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>until making a post-birth declaration of non-parentage).</p> <p><u>Objection</u> to reliance here on Dvash-Banks Dep. 29:21-30:14: hearsay.</p>
<p>40.No other individual has asserted any parental rights with respect to E.J. or A.J.</p>	<p>Canadian Order; Dvash- Banks Dep. 112:19-112:24.</p> <p><i>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.</i></p> <p>Defendants lack sufficient knowledge as to whether any individual has ever asserted any parental rights with respect to E.J. or A.J.</p> <p>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”); <i>id.</i> Part X, AR 033–34 (regarding “Condition Precedent”).</p> <p><u>Objection</u> to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay.</p>
<p>41.On September 28, 2016, the Ontario Superior Court of Justice</p>	<p>Canadian Order.</p> <p><i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 entered an Order (the “Canadian 2 Order”) stating that: “It is 3 declared that the Applicants, 4 Elad Dvash-Banks and Andrew 5 Dvash-Banks, are the parents of 6 the child, [E.J.], born September 7 16, 2016 (“the child”), and that 8 the Applicants are recognized for 9 all purposes in law to be the 10 parents of the child.”</p>	
<p>12 42.The Canadian Order declared 13 that [the Gestational Surrogate] 14 is not the mother of the child.</p>	<p>Canadian Order. <i>Undisputed.</i></p>
<p>15 43.The Canadian Order directed the 16 Deputy Registrar General for the 17 Province of Ontario “to register 18 the birth of the child [E.J.] so as 19 to show the Applicants, Elad 20 Dvash-Banks and Andrew 21 Dvash-Banks, as the parents of 22 the child.”</p>	<p>Canadian Order. <i>Undisputed.</i></p>
<p>23 44.The Canadian court issued a 24 parallel order for A.J.</p>	<p>Dvash-Banks Dep. 112:19-112:24. <i>Undisputed.</i></p>
<p>25 45.Under the law of Ontario, 26 Canada, Andrew and Elad are 27 the legal parents of the Twins.</p>	<p>Canadian Order; Dvash- Banks Dep. 112:19- 112:24. <i>This statement comprises a conclusion of law,</i></p>

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

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 since the Twins’ release from the 2 hospital following their birth.</p>	
<p>3 4 52.Andrew and Elad and the Twins 5 now reside in California.</p>	<p>Dvash-Banks Dep. 29:21-29:23; 34:13-34:14. <i>Undisputed.</i></p>
<p>6 7 D. “E.J. and A.J. apply for U.S. passports and for CRBAs in Recognition that 8 the twins are U.S. citizens at birth”</p>	
<p>9 53.Andrew and Elad submitted to 10 the United States Consulate in 11 Toronto, Canada (“Toronto 12 Consulate”) applications for a 13 Consular Report of Birth Abroad 14 (“CRBA”) and U.S. passport for 15 each of the Twins.</p>	<p>Dvash-Banks Dep. 117:3-117:11. <i>Undisputed.</i></p>
<p>16 54.A CRBA demonstrates that the 17 recipient is a U.S. citizen at 18 birth.</p>	<p>Reffett Dep. 34:21-34:24. <i>Undisputed.</i></p>
<p>19 55.On January 24, 2017, Andrew 20 and Elad appeared in person at 21 the Toronto Consulate in 22 connection with the applications 23 for a CRBA and U.S. passport 24 for each of the Twins.</p>	<p>Dvash-Banks Dep. 125:12-126:12; Day Dep. 121:19-122:1. <i>Undisputed.</i></p>
<p>25 56.Andrew and Elad provided the 26 Toronto Consulate with the 27 requisite documentation for 28 E.J.’s applications, including</p>	<p>Dvash-Banks Dep. 95:4-97:12; 165:4-166:12; Admin. Record 09-62. <i>Disputed in part:</i> It is undisputed that Andrew and Elad provided</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>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.</p>	<p>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.</p> <p>Defendants dispute the portion of the statement describing this documentation as “the requisite documentation.”</p> <ul style="list-style-type: none">• AR 005 (consular officer’s case notes indicating: “School transcripts needed to confirm Amcit father’s physical presence in the US.”) <p>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.</p> <ul style="list-style-type: none">• Reffett Depo. Tr. 92:06–93:06; 177:04–25• <i>See also</i> 22 CFR §§ 50.2, 50.5, 51.40, 51.41, and 51.43 (burden on applicant) <p><u>Objection</u> to reliance here on Dvash-Banks Dep. . 95:4-97:12; 165:4-166:12: hearsay.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 57.On January 24, 2017, Frances</p> <p>2 Terri Day, Vice Consul, Toronto</p> <p>3 Consulate, interviewed the</p> <p>4 Dvash-Banks family and</p> <p>5 adjudicated E.J.’s and A.J.’s</p> <p>6 respective applications for a</p> <p>7 CRBA and U.S. passport.</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p>	<p>Day Dep. 94:23-95:25.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent the use of the term</p> <p>“adjudicated” conveys or implies that the</p> <p>adjudication of the applications were completed on</p> <p>January 24, 2017.</p> <ul style="list-style-type: none"> • ACS Activity Log, AR 002–008 (showing adjudication began but was not completed on January 24, 2017). <p>Undisputed that on January 24, 2017, Terri</p> <p>Nathine Francis Day, Vice Consul, Toronto</p> <p>Consulate, interviewed the Dvash-Banks family in</p> <p>connection with E.J.’s and A.J.’s respective</p> <p>applications for a CRBA and U.S. passport, and</p> <p>that she started to adjudicate those applications that</p> <p>day.</p>
<p>18 58.Ms. Day had authority to make</p> <p>19 the final decision as to whether</p> <p>20 to grant or deny the applications</p> <p>21 for E.J. and A.J.</p>	<p>Day Dep. 48:6-48:10.</p> <p><i>Undisputed.</i></p>
<p>22 59.Ms. Day accepted Andrew and</p> <p>23 Elad’s marriage license from the</p> <p>24 Ontario government as sufficient</p> <p>25 proof of their marriage.</p>	<p>Day Dep. 142:19-142:25;155:24-156:6; 161:24-</p> <p>162:6;Marriage Lic.</p> <p><i>Undisputed.</i></p>
<p>26 60.Ms. Day accepted E.J.’s</p> <p>27 Statement of Live Birth as a</p> <p>28</p>	<p>Day Dep.172:5-172:24; E.J. Statement of Live</p> <p>Birth.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 timely-filed Canadian birth 2 certificate. 3 4 5 6 7</p>	<p><i>Disputed in part:</i> Disputed to the extent this statement conveys or implies that a “Statement of Live Birth” is the equivalent of “a ... birth certificate.” <ul style="list-style-type: none">• Reffett Depo. Tr. 92:06–93:06; 177:04–25Otherwise undisputed.</p>
<p>8 61.Ms. Day accepted E.J.’s 9 Statement of Live Birth as 10 sufficient proof that Andrew and 11 Elad are E.J.’s legal parents.</p>	<p>Day Dep. 172:5-173:12;Ramsay Dep. 103:7- 103:11;E.J. Statement of Live Birth. <i>Undisputed.</i></p>
<p>12 62.Ms. Day accepted the Ontario 13 Court order naming Andrew and 14 Elad as the parents of E.J. as 15 sufficient proof that Andrew and 16 Elad were E.J.’s legal parents.</p>	<p>Day Dep. 173:19-174:5; Canadian Order. <i>Undisputed.</i></p>
<p>17 63.During their interview at the 18 Toronto Consulate on January 19 24, 2017, Frances Terri Day 20 asked Andrew and Elad how 21 they had conceived the Twins 22 and whose egg and sperm had 23 been used to conceive each of 24 the Twins. 25 26 27 28</p>	<p>Ramsay Dep. 45:6-45:11;46:20-46:23; Dvash- Banks Dep. 129:15-129:21; Day Dep. 110:22- 112:11. <i>Disputed.</i> Evidence does not establish that Ms. Day asked Andrew and Elad these questions. <ul style="list-style-type: none">• Day Depo. 120:14–121:3This information was volunteered by Andrew and Elad, at least to the extent their application materials reflected that they had used Assisted Reproductive Technology.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ul style="list-style-type: none"> • AR 021–56 <p><u>Objection</u> to reliance here on Dvash-Banks Dep. 129:15-129:21: hearsay.</p>
<p>64. Andrew had not planned to disclose to others the biological relationships among Elad and Andrew and the Twins.</p>	<p>Surrogacy Agmt. at Section 1.1, AR 024.</p> <p><i>Disputed in part:</i></p> <p>Cited evidence does not establish this point. Disputed to the extent that the statement 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.</p>
<p>65. Ms. Day’s role in adjudicating U.S. passport and CRBA applications was to determine whether, according to the State Department’s <i>Foreign Affairs Manual</i> (“FAM”), the applicant was entitled to be recognized as a U.S. citizen.</p>	<p>Day Dep. 29:17-30:3; 47:12-47:24; 59:2-59:16.</p> <p><i>Disputed in part:</i></p> <p>Defendants dispute this statement to the extent it conveys or implies that the Foreign Affairs Manual provided the only basis for the adjudicative criteria.</p> <ul style="list-style-type: none"> • 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.”)

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ul style="list-style-type: none"> • <i>Id.</i> 233:19–234:20 (explaining that she did not consider FAM completely separated from Immigration and Nationality Act of 1952) <p>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. <i>See generally</i> (22 C.F.R. §§ 50, 51.</p> <p>Otherwise undisputed.</p>
<p>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.</p>	<p>Ramsay Dep. 163:5-164:14; Reffett Dep. 67:19-68:5.</p> <p><i>Undisputed.</i></p>
<p>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.</p>	<p>Reffett Dep. 79:8-79:16; Ramsay Dep. 40:10-40:24; AR 073.</p> <p><i>Disputed in part:</i></p> <p>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.</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>Disputed that Ms. Ramsay provided Ms. Day with “relevant sections” (in the plural) of the FAM.</p> <ul style="list-style-type: none"> • 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.”). • AR 081–106 (FAM sections)
<p>68.Ms. Day referred to the FAM during the time that she was interviewing the Dvash-Banks family.</p>	<p>Day Dep. 217:21-217:24. <i>Undisputed.</i></p>
<p>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.</p>	<p>AR 003; Ramsay Dep. 131:25-132:5. <i>Undisputed.</i></p>
<p>70.Ms. Day ultimately applied Section 309 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1409 (“Section 309”),</p>	<p>Ramsay Dep. 131:25-132:5. <i>Disputed.</i></p> <p>Cited evidence does not establish this point.</p> <ul style="list-style-type: none"> • Day Depo. 116:12–19; 231:04-233:18

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>2 to the adjudication of the Twins’ 3 applications.</p>	
<p>4 71.Ms. Ramsay suggested to Ms. 5 Day that she could ask the 6 Dvash-Banks family to provide 7 additional biological evidence, 8 such as DNA testing, in 9 connection with the adjudication 10 of the applications for E.J. and 11 A.J.</p>	<p>Ramsay Dep. 60:5-60:8. <i>Undisputed.</i></p>
<p>12 72.During the Dvash-Banks 13 family’s interview at the Toronto 14 Consulate on January 24, 2017, 15 Ms. Day told Andrew and Elad 16 that if they wanted to proceed 17 with the Twins’ applications, 18 they would have to provide 19 additional information 20 demonstrating the biological 21 relationship between each child 22 and that child’s U.S. citizen 23 parent.</p>	<p>Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22- 69:4; 72:7-72:17. <i>Undisputed.</i></p>
<p>24 73.During the Dvash-Banks 25 family’s interview at the Toronto 26 Consulate on January 24, 2017, 27 Ms. Day told Andrew and Elad</p>	<p>Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22- 69:4;72:7-72:17. <i>Undisputed.</i></p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 that a form of additional 2 information demonstrating the 3 biological relationship required 4 by the Department of State (the 5 “State Department”) is DNA 6 evidence. 7</p>	
<p>8 74.Ms. Day provided Andrew and 9 Elad with information 10 concerning certain DNA testing 11 establishments from which the 12 Toronto Consulate accepts DNA 13 testing results.</p>	<p>Jan. 24 Letter from Day. <i>Undisputed.</i></p>
<p>14 75.By letter dated January 24, 2017 15 from Ms. Day to Andrew, the 16 State Department informed the 17 Dvash-Banks family that “in 18 reference to your application for 19 a U.S. passport and a [CRBA] 20 for [A.J.] and [E.J.]... The U.S. 21 Consulate General in Toronto 22 has considered the evidence you 23 submitted and concluded that the 24 blood relationship between a 25 U.S. citizen parent and children 26 have not been established by a 27 preponderance of the evidence as 28</p>	<p>Jan. 24 Letter from Day; 30(b)(6) Dep. 296:11- 297:3; Reffett Dep. At 67:14-69:4. <i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>required to support a claim to U.S. citizenship.”</p>	
<p>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.”</p>	<p>Ramsay Dep. 48:24-49:10. <i>Undisputed.</i></p>
<p>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.</p>	<p>Reffett Dep. 67:14-68:11; Day Dep. 37:4-37:23. <i>Disputed in part:</i> 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. <ul style="list-style-type: none"> • Day Depo 37:4–28 Otherwise undisputed.</p>
<p>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.”</p>	<p>Day Dep. 119:22-120:12. <i>Undisputed.</i></p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>79.E.J.’s and A.J.’s applications for a CRBA and U.S. passport were adjudicated by Ms. Day under Section 309.</p>	<p>30(b)(6) Dep. 273:2-15; Ramsay Dep. 131:22-132:5;132:22-133:6; 164:9-164:14.</p> <p><i>Disputed in part:</i></p> <p>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>i.e.</i>, 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. The testimony of Ms. Ramsay does not establish this point. <i>See also:</i></p> <ul style="list-style-type: none">• Day Depo. 116:12–19; 231:04-233:18
<p>80.The State Department applied Section 309 in adjudicating E.J.’s applications for a U.S. passport and CRBA.</p>	<p>30(b)(6) Dep. 273:2-7.</p> <p><i>Disputed.</i></p> <p>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>i.e.</i>, 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.</p> <p>Cited evidence does not establish this point.</p> <ul style="list-style-type: none">• Day Depo. 116:12–19; 231:04-233:18

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 81.The State Department applies 2 Section 309 to CRBA 3 applications submitted on behalf 4 of children who the State 5 Department considers to have 6 been born “out of wedlock.” 7</p>	<p>30(b)(6) Dep. 186:8-14. <i>Undisputed.</i></p>
<p>8 82.The State Department interprets 9 Section 309 to require, among 10 other things, proof of a 11 biological relationship between a 12 CRBA applicant and that child’s 13 U.S. citizen parent.</p>	<p>30(b)(6) Dep. 273:2-273:15. <i>Undisputed.</i></p>
<p>14 83.The State Department 15 determined that Section 309 was 16 the correct statutory section to 17 apply in adjudicating E.J.’s 18 applications for a U.S. passport 19 and CRBA because E.J.’s 20 biological parents were not 21 married to each other. 22 23 24</p>	<p>30(b)(6) Dep. 273:2-15. <i>Disputed in part.</i> 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>i.e.</i>, 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. <ul style="list-style-type: none"> • Day Depo. 116:12–19; 231:04-233:18 </p>
<p>25 84.The State Department applies 26 Section 301 of the INA, 8 U.S.C. 27 § 1401, (“Section 301”) to 28</p>	<p>30(b)(6) Dep. 186:8-14. <i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>CRBA applications submitted on behalf of children who the State Department considers to have been born “in wedlock.”</p>	
<p>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.</p>	<p>30(b)(6) Dep. 178:10-178:19.</p> <p><i>Disputed in part.</i></p> <p>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 birth. Disputed as incomplete. The Department’s interpretation of Section 301 for Assisted Reproductive Technology (ART) cases is stated in:</p> <ul style="list-style-type: none"> • 7 FAM 1110 Appendix D, AR 077–78 • 7 FAM 1120 Appendix D, AR 078–79
<p>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.</p>	<p>Day Dep. 232:23-233:10; 277:18-278:2.</p> <p><i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 87.After the January 24, 2017</p> <p>2 interview, the Dvash-Banks</p> <p>3 proceeded to have DNA testing</p> <p>4 conducted by an establishment</p> <p>5 approved by the Toronto</p> <p>6 Consulate.</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p>	<p>Viaguard A-M Letter.</p> <p><i>Disputed in part.</i></p> <p>Disputed to the extent the statement conveys or implies that the Toronto Consulate approved a particular establishment. The cited evidence does not establish that point.</p> <p>The Consulate would only accept DNA “processed by a lab that is accredited by the American Association of Blood Banks (AABB),” <i>see</i> AR 098, but that does not mean that the Consulate “approved” particular DNA testing facilities, <i>see id.</i></p>
<p>14 88.The Toronto Consulate received</p> <p>15 DNA results for E.J. and A.J.</p>	<p>Ramsay Dep. 54:4-54:5; Viaguard A-M Letter.</p> <p><i>Undisputed.</i></p>
<p>E. “The State Department recognizes A.J. as a U.S. citizen at birth and refuses to recognize E.J.’s U.S. citizenship”</p>	
<p>19 89.Ms. Day approved A.J.’s</p> <p>20 applications for a CRBA and</p> <p>21 U.S. passport.</p>	<p>Reffett Dep. 87:15-22; Day Dep. 166:16-166:24;</p> <p>A.J. CRBA.</p> <p><i>Undisputed.</i></p>
<p>22 90.The State Department issued a</p> <p>23 CRBA to A.J., dated March 2,</p> <p>24 2017.</p>	<p>A.J. CRBA.</p> <p><i>Undisputed.</i></p>
<p>25 91.By letter dated March 2, 2017,</p> <p>26 on the letterhead of the Toronto</p> <p>27 Consulate, Ms. Day informed</p> <p>28 Andrew that E.J.’s “applications</p>	<p>Mar. 2 Letter from Day; Reffett Dep. 65:6-65:9.</p> <p><i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 [for a CRBA and U.S. passport] 2 are denied.”</p>	
<p>4 92.Ms. Day’s March 2, 2017 letter 5 to Andrew stated, in part, “after 6 careful review of the evidence 7 you submitted with your child’s 8 application, it has been 9 determined that his claim to U.S. 10 citizenship has not been 11 satisfactorily established, as you 12 are not his biological father. The 13 Immigration and Nationality Act 14 (INA) of 1952, as amended, 15 requires, among other things, a 16 blood relationship between a 17 child and the U.S. citizen parent 18 in order for the parent to transmit 19 U.S. citizenship.”</p>	<p>Mar. 2 Letter from Day. <i>Undisputed.</i></p>
<p>20 93.Ms. Day’s March 2, 2017 letter 21 to Andrew denying E.J.’s 22 applications for a U.S. passport 23 and CRBA was the final 24 determination of the applications 25 by the State Department.</p>	<p>Reffett Dep. 77:14-17; 118:6-118:22. <i>Undisputed.</i></p>
<p>26 94.Ms. Day’s March 2, 2017 letter 27 terminated the application</p>	<p>Reffett Dep. 118:6-22. <i>Disputed in part:</i></p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 process for E.J.’s requests for a 2 CRBA and U.S. passport with a 3 denial and the State Department 4 closed the files relating to E.J.’s 5 applications. 6 7 8 9 10 11</p>	<p>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.”</p> <p>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.</p> <ul style="list-style-type: none"> • AR 002–008 (case notes)
<p>12 95.The reason for the State 13 Department’s denial of E.J.’s 14 applications for a U.S. Passport 15 and CRBA was that he did not 16 establish a biological 17 relationship to his U.S. citizen 18 parent (Andrew).</p>	<p>Reffett Dep. 78:9-78:20. <i>Undisputed.</i></p>
<p>19 96.The State Department 20 acknowledges that E.J.’s lack of 21 a biological relationship to 22 Andrew was the sole reason 23 identified for the denial of E.J.’s 24 applications.</p>	<p>30(b)(6) Dep. 298:24-299:6. <i>Undisputed.</i></p>
<p>25 97.Following the Toronto 26 Consulate’s receipt of the DNA 27 testing results for the Twins from 28</p>	<p>Ramsay Dep. 154:16-154:23. <i>Disputed in part:</i> Disputed to the extent that the statement</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>an approved testing establishment, the Toronto Consulate followed the FAM guidance on applications submitted on behalf of children born by means of assisted reproductive technology.</p>	<p>conveys or implies that the Consulate specifically approved this or any other testing establishment. Cited evidence does not establish this proposition.</p> <ul style="list-style-type: none"> AR 098 (FAM provision setting requirement that Department may only accept DNA “processed by a lab that is accredited by the American Association of Blood Banks (AABB).”)
<p>98.Ms. Day granted A.J.’s applications for a U.S. Passport and CRBA.</p>	<p>Reffett Dep. 87:15-22 <i>Undisputed.</i></p>
<p>99.As a result of the State Department’s denial of E.J.’s application, the Dvash-Banks family has suffered greatly.</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>This statement comprises a conclusion of law, not a statement of fact. Disputed.</i> 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.</p>
<p>100.Andrew and Elad feel the indignity of the U.S. Government’s refusal to recognize their marriage and the legitimacy of their children.</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>Disputed in part:</i> Defendants lack sufficient knowledge as to what Andrew and Elad may feel. Otherwise disputed that the U.S. government has refused to recognize their marriage or the legitimacy of their children.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 2 101. The Dvash-Banks family’s 3 travel is significantly restricted 4 or impaired because E.J. entered 5 the United States on a tourist 6 visa, which has expired, and 7 although E.J. now has an 8 Advance Parole document, it 9 does not guarantee re-entry into 10 the United States.</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>Disputed.</i></p> <ul style="list-style-type: none"> • Relevant portions of Dvash-Banks Depo at 38:22–67:24 (party admission / testimony that Dvash-Banks family has travelled into and out of the U.S. on at least five occasions, and that they did so with minimal trouble, restriction, or impairment). • Ex. I: Defs.’ Resp. to Pls.’ First Set of Requests for Admission 10 (Plaintiffs could apply for, and as residents of the Ninth Circuit may be granted, a Certificate of Citizenship from U.S. Citizenship and Immigration Services)
<p>16 102. When the Dvash-Banks family 17 has traveled, it always is with the 18 fear that E.J., who does not have 19 a U.S. passport, may not be 20 permitted to re-enter the United 21 States.</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>Disputed in part:</i></p> <p>Defendants lack sufficient knowledge as to what Andrew and Elad may subjectively feel but dispute that the Department of State’s actions were unlawful.</p> <ul style="list-style-type: none"> • Dvash-Banks Depo at 61:2–63:1 (E.J. entered and exited U.S. on a Canadian passport)
<p>25 103. The Dvash-Banks has spent 26 substantial time consulting with 27 lawyers, their accountant, and</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>Disputed in part:</i></p> <p>Undisputed that the family has spent time</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 others about a range of issues, 2 from E.J.’s immigration status to 3 obtaining medical benefits and a 4 Tax ID number for E.J., who 5 does not have a Social Security 6 number. 7</p>	<p>consulting. Disputed to the extent the statement conveys or implies that Defendants actions were unlawful, or that Defendants caused the Dvash- Banks family to spend their time as stated.</p>
<p>8 104. The Dvash-Banks family has 9 endured, and continues to 10 endure, the pain and stigma of 11 the State Department’s refusal to 12 recognize Andrew’s marriage to 13 Elad and status as E.J.’s parent, 14 and its treatment of E.J. as 15 illegitimate.</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>This statement comprises a conclusion of law, not a statement of fact, and is disputed.</i> The Department has not refused to recognize Andrew and Elad’s marriage, or their current status as legal parents of E.J. The Department does not consider E.J. illegitimate; no evidence to the contrary.</p>
<p>16 105. They also live with the invasion 17 of their privacy resulting from 18 their need to commence this 19 litigation in federal court seeking 20 recognition of E.J.’s U.S. 21 citizenship at birth, which could 22 have been provided privately at 23 the Toronto Consulate. 24 25 26 27 28</p>	<p>Pls. Disc. Responses at Interrogatory No. 5. <i>Disputed.</i> Allegation that Defendants invaded Plaintiffs’ privacy not established by cited evidence. The Dvash-Banks family voluntarily publicized details about their lives and information (including images) of their children. • Ex. R: Sept. 2017 (pre-litigation) news story, featuring video, showing that Andrew and Elad sought/allowed publicity, including photos of their children inside their home.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ul style="list-style-type: none"> • Ex. S: “Meet the Dvash-Banks Family” on the Immigration Equality web site, https://www.immigrationequality.org/dvashbanks • Ex. T: 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.	
<p>106. At the time of E.J.’s birth, Andrew and Elad were validly married.</p>	<p>Ramsay Dep. 65:15-20; 108:2-7; 108:20-109:3; 30(b)(6)Dep. 260: 13-16. <i>Undisputed.</i></p>
<p>107. Andrew is E.J.’s legal parent.</p>	<p>Ramsay Dep. 103:7-11;104: 19-105:12; 30(b)(6) Dep.88:12-16; 261:16-18; 268:2-5. <i>Undisputed.</i></p>
<p>108. Under the State Department’s existing policies and procedures, a child is born “in wedlock” only if the two biological parents are married to each other.</p>	<p>30(b)(6) Dep. 171:1-4. <i>Disputed in part:</i> Disputed to the extent that the statement conveys or implies that the Department of State is applying “policies and procedures” as opposed to applying the Department of State’s interpretation of the Immigration and Nationality Act. Otherwise undisputed.</p>
<p>109. The State Department applies this definition of “in wedlock” when a married couple uses</p>	<p>30(b)(6) Dep. 173:19-174:2. <i>Disputed.</i> Cited evidence does not establish this point.</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>assisted reproduction technology.</p>	<ul style="list-style-type: none"> • 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.)”; <i>id.</i> ¶ 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 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).”)
<p>110. When a male same-sex couple uses sperm from one parent and</p>	<p>30(b)(6) Dep. 177:14-177:22;180:2-9. <i>Disputed in part:</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 an egg from a donor to conceive 2 a child during their marriage, the 3 State Department does not 4 consider the child born “in 5 wedlock.” 6 7 8</p>	<p>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.</p> <ul style="list-style-type: none"> • 30(b)(6) Dep. 178:20–179:18. <p>Otherwise undisputed.</p>
<p>9 111. The State Department asserts 10 that its understanding of “in 11 wedlock” is based on the 12 language of Section 301. 13 14 15 16 17</p>	<p>30(b)(6) Dep. 178:10-19;180:10-15.</p> <p><i>Disputed.</i></p> <p>Cited evidence does not establish this proposition. The State Department’s understanding of “in wedlock” in interpreting the INA is reflected in 7 FAM 1140 Appendix E, AR 091 (currently numbered 8 FAM § 304.1-2). <i>See also:</i></p> <ul style="list-style-type: none"> • 30(b)(6) Dep. 180:16-181:10.
<p>18 112. The State Department’s 19 understanding of “in wedlock” in 20 interpreting the INA is reflected 21 in 8 FAM § 304.1-2 (previously 22 numbered 7 FAM 1140 23 Appendix E).</p>	<p>30(b)(6) Dep. 180:16-181:10.</p> <p><i>Undisputed.</i></p>
<p>24 113. Under the State Department’s 25 policies, E.J. and A.J. were born 26 “out of wedlock” within the 27 meaning of Section 309. 28</p>	<p>30(b)(6) Dep. 188:6-15;271:20-22; 274:25-275:6.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent that the statement conveys or implies that the Department of State</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>applies “policies” as opposed to applying the Department of State’s interpretation of the Immigration and Nationality Act. Otherwise undisputed.</p> <ul style="list-style-type: none"> • 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)
<p>114. Under the State Department’s policies, Andrew and Elad can never have a child “in wedlock” together because they are two men.</p>	<p>30(b)(6) Dep. 274:25-275:6.</p> <p><i>Disputed in part:</i></p> <p>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.</p> <ul style="list-style-type: none"> • 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) • Ex. H: A.J.’s CRBA
<p>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</p>	<p>30(b)(6) Dep. 201:2-16.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>adjudicating a CRBA application.</p>	<p>the Department of State to have been established at birth.</p> <ul style="list-style-type: none"> 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)
<p>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.</p>	<p>30(b)(6) Dep. 211:23-213:25.</p> <p>Disputed.</p> <p>The cited evidence does not establish the statement. The Department considered E.J. and A.J. legitimate; there is no evidence to the contrary.</p>
<p>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</p>	<p>Reffett Dep. 121:22-122:7;124:9-125:3; 157:3-4; 30(b)(6) Dep. 158:25-159:13.</p> <p>Undisputed.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>parent at the time of the child’s birth.</p>	
<p>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.</p>	<p>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. <i>Undisputed.</i></p>
<p>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.</p>	<p>30(b)(6) Dep. 93:3-93:8. <i>Undisputed.</i></p>
<p>120. The Toronto Consulate follows State Department policies and FAM guidance issued by the State Department in Washington, D.C. regarding the adjudication</p>	<p>Reffett Dep. 60:18-61:6; 30(b)(6) Dep. 92:20-93:8. <i>Undisputed.</i></p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>of CRBA and passport applications.</p>	
<p>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.</p>	<p>Ramsay Dep. 154:16-154:23. <i>Undisputed.</i></p>
<p>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.</p>	<p>30(b)(6) Dep. 158:25-159:13. <i>This statement describes as “fact” a legal position taken by the Department of State; otherwise undisputed.</i></p>
<p>123. The text of Section 301 does not contain the phrase “in wedlock.”</p>	<p>30(b)(6) Dep. 182:21-25; 183:7-183:8. <i>Undisputed.</i></p>
<p>124. The text of Section 301 contains no reference to a “blood” relationship.</p>	<p>30(b)(6) Dep. 183:9-13; 191:6-14. <i>Undisputed.</i></p>
<p>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</p>	<p>30(b)(6) Dep. 178:13-19; 180:10-15. <i>Disputed in part:</i> Defendants dispute that the Department’s interpretation of Section 301 is based only on the language itself.</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
referring to a biological parent of the child.	Otherwise undisputed.
<p>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>i.e.</i>, egg) for the child.</p>	<p>Reffett Dep. 183:4-183:18;30(b)(6) Dep. 166:14-22; Ramsay Dep. at 84:7-84:12.</p> <p><i>Disputed in part:</i></p> <p>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.</p> <ul style="list-style-type: none"> • ALDAC dated January 31, 2014, AR 074–76 <p>Otherwise undisputed.</p>
<p>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.</p>	<p>30(b)(6) Dep. 172:21-173:12.</p> <p><i>Disputed in part.</i></p> <p>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.</p> <p>In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>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.</p>	<p>30(b)(6) Dep. 243:1-4, 15-20.</p> <p><i>Disputed in part.</i></p> <p>Undisputed that Congress had not amended the law.</p> <p>Otherwise 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.</p> <p>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.</p> <ul style="list-style-type: none"> • ALDAC dated January 31, 2014, AR 074–76
<p>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.</p>	<p>30(b)(6) Dep. 175:2-5;</p> <p><i>Disputed.</i></p> <p>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.</p>
<p>130. The State Department’s determination to interpret</p>	<p>30(b)(6) Dep. 175:2-5; 219:25-220:8.</p> <p><i>Disputed.</i></p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>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.</p>	<p>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.</p>
<p>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.</p>	<p>30(b)(6) Dep. 225:1-16; 229:1-8. <i>Disputed.</i> The cited evidence does not establish this point. 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.</p>
<p>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 “studying whether we can interpret the INA to allow U.S. citizen parents to transmit U.S.</p>	<p>30(b)(6) Dep. 222:11-24. <i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 citizenship to their children born 2 abroad through [assisted 3 reproductive technology] in a 4 broader range of circumstances,” 5 and was “considering how this 6 would impact children born 7 through [assisted reproductive 8 technology] overseas to same- 9 sex couples.” 10</p>	
<p>11 133. The State Department’s 12 interpretation of the INA as 13 requiring a biological 14 relationship between a married 15 U.S. citizen parent and a child 16 born outside the United States 17 for purposes of recognizing U.S. 18 citizenship at birth is 19 inconsistent with the rulings of 20 various federal circuit courts of 21 appeals. 22 23 24</p>	<p>30(b)(6) Dep. 245:9-19; 250:3-250:15. <i>Disputed.</i> <i>Statement contains a conclusion of law, not a statement of fact.</i> 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.</p>
<p>25 134. The State Department does not 26 follow the decisions of any 27 federal circuit court of appeals 28</p>	<p>30(b)(6) Dep. 251:4-9. <i>Statement contains a conclusion of law, not a statement of fact.</i></p>

1 <i>Uncontroverted Fact</i>	1 <i>Supporting Evidence</i>
2 holding that Section 301 does 3 not include a biological 4 relationship requirement and 5 does not consider itself bound to 6 do so. 7 8	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. <i>See</i> Scales v. I.N.S., 232 F.3d 1159, 1166 (9th Cir. 2000) ; Solis-Espinoza, 401 F.3d 1090, 1091 (9th Cir. 2005) .
9 135. The State Department does not 10 follow the ruling of the Court of 11 Appeals for the Ninth Circuit in 12 <i>Solis-Espinoza v. Gonzales</i> , 401 13 F.3d 1090 (9th Cir. 2005), which 14 held that Section 301 does not 15 require a biological relationship 16 between a U.S. citizen parent 17 and his child.	30(b)(6) Dep. 249:6-20. <i>Statement contains a conclusion of law, not a statement of fact.</i> Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301.
18 136. The State Department does not 19 follow the ruling of the Court of 20 Appeals for the Ninth Circuit in 21 <i>Scales v. INS</i> , 232 F.3d 1159 22 (9th Cir. 2000), which held that 23 Section 301 does not require a 24 biological relationship between a 25 U.S. citizen parent and his child.	30(b)(6) Dep. 251:4-9. <i>Statement contains a conclusion of law, not a statement of fact.</i> Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301.
26 137. The State Department does not 27 follow the ruling of the Court of 28	30(b)(6) Dep. 251:4-9. <i>Statement contains a conclusion of law, not a</i>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 Appeals for the Second Circuit 2 in <i>Jaen v. Sessions</i>, 899 F.3d 182 3 (2d Cir. 2018), which held that 4 Section 301 does not require a 5 biological relationship between a 6 U.S. citizen parent and his child.</p>	<p><i>statement of fact.</i></p> <p>Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301.</p>
<p>8 138. The State Department’s 9 rationale for its interpretation of 10 Section 301 is not rooted in a 11 concern that interpreting Section 12 301 as not requiring a biological 13 relationship between an 14 applicant for a CRBA or U.S. 15 passport who was born outside 16 the United States and the child’s 17 United States citizen parent 18 would create or increase the risk 19 of fraud in connection with 20 applications for recognition of 21 U.S. citizenship.</p>	<p>30(b)(6) Dep. 317:2-8.</p> <p><i>Disputed.</i></p> <p>The cited evidence does not establish the point(s) made in the statement.</p> <ul style="list-style-type: none"> • Ex. Q: 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • Reffett Depo 167:18–168:19.
<p>22 139. The State Department’s 23 interpretation of Section 301 as 24 requiring a genetic or gestational 25 relationship between a U.S. 26 citizen parent and a child is 27 memorialized in 8 FAM § 304.1-</p>	<p>30(b)(6) Dep. 171:18-172:20.</p> <p><i>Undisputed.</i></p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
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. <i>Undisputed.</i>
141. The FAM is not approved by Congress.	30(b)(6) Dep. 244:5-6. <i>Undisputed.</i>
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. <i>Disputed.</i> Disputed as incomplete. The statement refers to procedural requirements, not the legal elements for establishing U.S. citizenship. Additionally, portions of the FAM replicate provisions of the INA. <i>See, e.g.,</i> 7 FAM 1120 App. E, AR 088–89.
143. The FAM does not have the force of law.	30(b)(6) Dep. 244:20-244:25. <i>Statement contains a conclusion of law, not a statement of fact.</i> Cited evidence does not establish the point made in the statement. Disputed as incomplete. The FAM is comprised of Department of State directives “establishing and prescribing the organizations, policies, or procedures that provide an official basis of Department of State operation.” 18 FAM 201.1-4 ; ¹ <i>see</i> 18 FAM 201.1-1(A)(a) .

¹ 18 FAM 201.1 and its subsections are available on the Department of State’s website at <https://fam.state.gov/FAM/18FAM/18FAM020101.html>.

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>“These directives derive their authority from statutes, Executive orders, other legal authorities, and Presidential directives, such as OMB circulars, and Department policies.” 18 FAM 201.1-1(A)(a). The FAM includes the Department’s interpretation of the Immigration and Nationality Act. <i>See, e.g.</i>, 7 FAM 1131.2, AR 082; 7 FAM 1131.4, AR 082; 7 FAM 1120 App. E, AR 088–89.</p>
<p>144. The State Department does not track how frequently CRBA applicants are asked to undergo DNA testing or how often CRBA applications submitted on behalf of children of same-sex couples are granted or denied.</p>	<p>30(b)(6) Dep. 315:10-13; 320:20-321:3. <i>Undisputed.</i></p>
<p>145. The State Department acknowledges that Andrew is E.J.’s legal parent.</p>	<p>30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5. <i>Undisputed.</i></p>
<p>146. The State Department considers Andrew to be E.J.’s legal parent at birth under Ontario law.</p>	<p>30(b)(6) Dep. 268:2-5. <i>Disputed in part:</i> Undisputed that the 30(b)(6) witness testified as stated in the cited portion of the transcript; disputed that the Department made a determination regarding E.J.’s legal parents at birth. The adjudicating officer did not reach this question; she considered Andrew to be E.J.’s legal parent at the</p>

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>time of the January 24, 2017 applications, a sufficient condition for purposes of interviewing Andrew and Elad regarding the applications.</p> <p>E.J.’s applications were rejected on the ground of a lack of a biological connection, without needing to reach whether Andrew was E.J.’s legal parent at birth under Ontario law. <i>See supra</i>, Defendants’ Statement of Genuine Issues of Material Facts Nos. 96.</p> <p>The Department recognizes that under Ontario law, Andrew’s legal parentage of E.J. was established on September 28, 2017, the date the Ontario Court issued its parentage order, twelve days following E.J.’s birth. <i>See Canadian Order, AR 021–22; see also supra</i>, Defendants’ Statement of Genuine Issues of Material Facts Nos. 39.</p>
<p>147. The State Department acknowledges that Andrew and Elad are E.J.’s only legal parents.</p>	<p>30(b)(6) Dep. 261:16-261:18.</p> <p><i>Undisputed</i> 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. <i>See supra</i>, Defendants’ Statement of Genuine Issues of Material Facts Nos. 37, 39, 40.</p>
<p>148. The State Department acknowledges that Andrew and Elad are identified as E.J.’s</p>	<p>30(b)(6) Dep. 260:21-261:1.</p> <p><i>Undisputed.</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 parents on E.J.’s Statement of 2 Live Birth.</p>	
<p>4 149. The State Department 5 acknowledges that Andrew and 6 Elad were validly married at the 7 time of the Twins’ birth.</p>	<p>30(b)(6) Dep. 260:17-260:20. <i>Undisputed.</i></p>

DEFENDANTS’ ADDITIONAL, RELEVANT, UNCONTROVERTED FACTS.

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>12 150. California recognized the 13 validity of same-sex marriages 14 from June 16, 2008, until the 15 passage of Proposition 8 on 16 November 5, 2008, and then 17 again following the U.S. 18 Supreme Court’s June 26, 2013 19 decision in <i>Hollingsworth v.</i> 20 <i>Perry</i>.</p>	<p>The Court can take judicial notice of this fact based on the background information described in <i>Hollingsworth v. Perry</i>, 570 U.S. 693, 701–04 (2013) (describing <i>In re Marriage Cases</i>, 183 P.3d 384 (Cal. 2008) and Proposition 8), and the outcome of <i>Hollingsworth</i>, 570 U.S. at 715.</p>
<p>21 151. The FAM incorporates the 22 INA.</p>	<ul style="list-style-type: none"> • <i>See e.g.</i>, 7 FAM 1131.1-1(b), AR 081; 7 FAM 1131.4-1(b), AR 083; 7 FAM 1131.4-1(a), 089.
<p>24 152. Under the terms of the 25 Surrogacy Agreement, Andrew 26 and Elad “acknowledge[d] and 27 agree[d] that the procedure</p>	<ul style="list-style-type: none"> • Surrogacy Agmt. at Section 35.3, AR 051–52.

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 contemplated by this Agreement 2 are novel and new and that the 3 law applicable to such 4 procedures and relationships is 5 developing and unsettled.” 6</p>	
<p>7 153.The Surrogacy Agreement 8 recognized that “the possibility 9 exists that this Agreement may 10 be declared void as against 11 public policy, in whole or in 12 part, and may be held 13 unenforceable, in whole or in 14 part, by an Ontario Court... .”</p>	<ul style="list-style-type: none"> • Surrogacy Agmt. at Section 35.3, AR 051–52.
<p>15 154.The documentation submitted 16 with E.J.’s application materials 17 on January 24, 2017 was 18 insufficient to show that Andrew 19 met the residency requirements 20 necessary to demonstrate that 21 E.J. met the elements for 22 recognition of citizenship at 23 birth. 24</p>	<ul style="list-style-type: none"> • AR 005 (consular officer’s case notes indicating: “School transcripts needed to confirm Amcit father’s physical presence in the US.”)
<p>25 155.Ms. Day testified that it would 26 not have made a difference to 27 her final adjudication decision 28</p>	<ul style="list-style-type: none"> • Day Depo. 232:01–233:10

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 for E.J.’s applications whether 2 she had considered the children 3 to be born “in wedlock” or 4 whether she had considered them 5 to be born “out of wedlock.” 6</p>	
<p>7 156.Ms. Day testified that it would 8 not have mattered to the outcome 9 of the adjudication if E.J.’s 10 applications had been 11 adjudicated pursuant to INA 12 301(g) rather than INA 309(a).</p>	<ul style="list-style-type: none"> • Day Depo. 232:23–233:12; 277:12–278:02.
<p>13 157.Ms. Ramsay also testified that 14 it would not have made a 15 difference to the outcome of the 16 adjudication if Ms. Day had 17 adjudicated EJ’s applications 18 under INA 301 instead of INA 19 309</p>	<ul style="list-style-type: none"> • Ramsay Depo. 131:22–133:23
<p>20 158. The Surrogacy Agreement 21 was a contract between 22 contacting parties consisting of 23 Andrew, Elad, and the 24 gestational surrogate. 25 26 27 28</p>	<ul style="list-style-type: none"> • 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’); <i>id.</i> Pt. II ¶ p, AR 026 (defining “Parties”).

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>159. The Surrogacy Agreement did not purport to override the local law as to legal parentage.</p>	<ul style="list-style-type: none"> • Surrogacy Agmt. at Section XXXV (“Governing Law”), AR 051–52.
<p>160. The Surrogacy Agreement acknowledged that it was subject to Ontario Law.</p>	<ul style="list-style-type: none"> • Surrogacy Agmt. at Section XXXV (“Governing Law”), AR 051–52.
<p>161. The Surrogacy Agreement acknowledged that the law applicable to surrogacy “procedures and relationships is developing and unsettled.”</p>	<ul style="list-style-type: none"> • Surrogacy Agmt. at Section 35.3, AR 051–52.
<p>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.”</p>	<ul style="list-style-type: none"> • Ex. J: Dvash-Banks000000031
<p>163. The letter explained, “Should you wish to undergo DNA testing, which could conclusively establish whether both children are the biological</p>	<ul style="list-style-type: none"> • Ex. J: Dvash-Banks000000031

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 children of a U.S. citizen parent, 2 please review the enclosed flyer 3 explaining DNA testing and the 4 procedures under which the 5 samples must be collected and 6 the test conducted, including 7 chain of custody procedures, in 8 order for the results to be 9 considered in connection with a 10 citizenship claim. 11</p>	
<p>12 164. The letter also stated that 13 “DNA testing must be conducted 14 at a lab accredited by the 15 American Association of Blood 16 Banks in the United States,” and 17 it “[e]nclosed ... a list of 18 laboratories in the United States 19 accredited by the AABB.”</p>	<ul style="list-style-type: none"> • Ex. J: Dvash-Banks000000031
<p>20 165. The Department treats the 21 children of same-sex couples as 22 “born of . . . parents” for the 23 purposes of Section 1401 when 24 both parents have a biological 25 connection to the children. 26</p>	<ul style="list-style-type: none"> • 30(b)(6) Dep. 202:17–23; 333:4–17 • Ex. I: 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 that two men who are married to

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	each other may have a child in wedlock for purposes of’ 8 U.S.C. § 1401.’”).
<p>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).</p>	<ul style="list-style-type: none"> • 30(b)(6) Dep. 202:17–23 • January 31, 2014 ALDAC, AR 074–75 • 7 FAM 1110 Appx. D, AR 077-78.
<p>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.</p>	<ul style="list-style-type: none"> • 30(b)(6) Dep. 178:20–179:18
<p>168. The Dvash-Banks family may pursue another avenue for documenting E.J.’s citizenship.</p>	<ul style="list-style-type: none"> • Ex. I: Defs.’ Resp. to Pls.’ First Set of Requests for Admission 10 • 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 “for a certificate of citizenship” and “[u]pon proof to the satisfaction of” the Secretary, she may

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	receive a citizenship certification if she is within in the United States at the time.”).
<p>169. USCIS adjudicates applications for certificates of citizenship domestically, and considers the jurisdiction where the applicant lives when adjudicating an application.</p>	<ul style="list-style-type: none"> • Ex. I: Defs.’ Resp. to Pls.’ First Set of Requests for Admission 10
<p>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 <i>Scales v. I.N.S.</i>, 232 F.3d 1159, 1165 (9th Cir. 2000).</p>	<ul style="list-style-type: none"> • Ex. I: Defs.’ Resp. to Pls.’ First Set of Requests for Admission 10 • 30(b)(6) Depo. 335:10–14
<p>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.</p>	<ul style="list-style-type: none"> • Ex. J: Defs.’ Second Resp. to Pls.’ First Set of Interrogatories at 22
<p>172. The Department has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of</p>	<ul style="list-style-type: none"> • Ex. Q: 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382) (“Because we regularly

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<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
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.	encounter people seeking to document children who are not theirs, we use DNA testing to verify parentage.”). <ul style="list-style-type: none">• <i>See also</i> Reffett Depo 167:18–168:19.