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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION (LOS ANGELES)

ANDREW MASON DVASH-BANKS AND E.J. D.-B.,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: Hon. John F. Walter
Hearing Date: Feb. 4, 2019
Courtroom: 7A

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Plaintiffs Andrew and his son E.J. (together, "Plaintiffs") submit the following reply in further support of their motion for partial summary judgment.[1]

I. PRELIMINARY STATEMENT

Defendants' *Response and Opposition to Plaintiffs' Motion for Partial Summary Judgment* (the "Opposition" or "Opp." (ECF No. 101)) does not provide any basis to deny Plaintiffs' Motion: It neither identifies any factual disputes that bear on the resolution of, nor raises any valid legal challenge to the claims at issue on, the Motion. And Defendants all but concede that the Court should grant E.J.'s Section 1503 claim under settled Ninth Circuit law.

Defendants agree that Andrew and Elad were married when E.J. and A.J. were born in September 2016, that Elad is E.J.'s biological parent, that Andrew is A.J.'s biological parent, and that A.J. and E.J. were carried during the same pregnancy. (SOCF ¶¶ 20, 31, 47-48.) Defendants also concur that E.J.'s applications for a CRBA and U.S. passport were denied solely because he is not biologically related to Andrew, his U.S. citizen parent. (Opp. at 3.)

The Opposition does not oppose the Section 1503 claim so much as it asks the Court to decline to exercise jurisdiction, a position that cannot be reconciled with the statute's text. Conspicuously absent from the Opposition is any authority for the assertion that Section 1503 grants discretionary jurisdiction or deferential review that permits the Court to close the courthouse doors and require Plaintiffs to seek relief from another agency, U.S. Citizen and Immigration Services ("USCIS").

Defendants' argument emanates from a larger effort to insulate from judicial review the State Department's interpretation of the INA and adjudication

[1] All capitalized terms used in this memorandum have the same definitions as set forth in Plaintiffs' *Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment* (the "Motion" or "Mot.") (ECF No. 83-1). References to "SOCF" are to *Plaintiffs' Statement of Consolidated Facts*, filed concurrently with this reply.

of E.J.'s applications. In addition to the lack of legal support for their position, the Opposition simply cannot be taken seriously when read together with Defendants' motion for partial summary judgment. ("Defendants' MSJ" or "Defs' MSJ") (ECF No. 89.) There, Defendants urge that Plaintiffs' APA claim should be dismissed because Section 1503 provides an adequate alternative remedy for the adjudication of E.J.'s citizenship. (*See* Defs' MSJ at 12-13.) Taken together, Defendants' arguments create a whipsaw effect that seeks to deprive the Dvash-Banks family of their day in court.

Defendants' effort to avoid this Court's review is equally evident in the context of Plaintiffs' due process claim. To evade the exacting scrutiny the Constitution requires here, the Opposition contends that Plaintiffs have not identified any fundamental right that has been infringed and proceeds on the assumption that the Court will accept their overly narrow characterization of the rights at issue and apply only rational basis review. Defendants do not even attempt to save their interpretation of Section 301 under the rubric of strict scrutiny, which they cannot because, as Plaintiffs demonstrated in their Motion, Defendants have not asserted *any* compelling governmental interest that actually animated their interpretation of the INA. (Mot. at 24-25.) Defendants' argument regarding rational basis review fares no better, as it is premised on the misguided proposition that there is a legitimate governmental interest in preserving a policy that conflicts with the underlying statute, and on nebulous, hypothetical "concerns" about citizenship fraud that the State Department expressly disclaimed at deposition. (SOCF ¶ 138.)

II. ARGUMENT

A. Jurisdiction Under Section 1503 Is Not Discretionary and E.J. Is Entitled To Summary Judgment on the Section 1503 Claim.

Defendants do not, strictly speaking, oppose E.J.'s claim for a declaration of U.S. citizenship under Section 1503. (Opp. at 1.) Defendants even

appear to concede that, if the Court adjudicates the claim, it should apply Ninth Circuit law (Opp. at 1) and therefore declare E.J. to be a U.S. citizen at birth.[2] Defendants encourage the Court instead to decline to adjudicate E.J.'s Section 1503 claim and punt to USCIS to adjudicate a different, hypothesized application for a certificate of citizenship, even though, as Defendants' MSJ concedes, Congress provided an avenue for a judicial determination of E.J.'s citizenship status. *See* 8 U.S.C. § 1503; 8 U.S.C. § 1401. (Defs' MSJ at 12-13.) Defendants' position cannot be reconciled with Section 1503's mandate to conduct *de novo* review of claims asserted under that provision.

As the Ninth Circuit explained in *Richards* v. *Secretary of State*, 752 F.2d 1413 (9th Cir. 1985), Section 1503(a) "authorizes, with certain exceptions inapplicable here, any person within the United States who has been denied a right or privilege on the ground that he is not a national of the United States to institute a declaratory judgment action to determine whether he is a national of the United States." *Id.* at 1417. The action may be brought, in the district where the claimant resides, against the head of the department or agency who denied the right, "and jurisdiction over such officials in such cases is conferred upon those courts." 8 U.S.C. § 1503(a). Under Section 1503, "Congress allocated responsibility" to the courts to take "an independent and comprehensive role in determining citizenship." *Ortega-Morales* v. *Lynch*, 168 F. Supp. 3d 1228, 1240 (D. Ariz. 2016); *Ali* v. *Pompeo*, 2018 WL 2058152, at *8 (E.D.N.Y. May 2, 2018); *Reyes* v. *Neelly*, 264 F.2d 673, 674 (5th Cir. 1959) (Section 1503 provides plaintiffs with an "opportunity for an independent suit with a trial and decision de novo . . . ."); *Delmore* v. *Brownell*, 236 F.2d 598, 599 n.1 (3d Cir. 1956) (Plaintiffs who come

[2] Defendants are hamstrung to argue the contrary, for it would require them to argue that the Court should limit the application of *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), to opposite-sex couples and therefore legalize differential treatment of same-sex and opposite-sex couples, which would be problematic for any current or future efforts that they make to defend the constitutionality of their interpretation of the INA.

before federal courts under Section 1503 are entitled to "a trial de novo . . . free of any burden of overcoming a prior adverse administrative finding."). The statute explicitly grants jurisdiction to this Court and provides E.J. the right to a *de novo* determination of his citizenship. *See* Richards, 752 F.2d at 1417. (Opp. at 3.)

In a desperate attempt to insulate the State Department's actions from scrutiny, Defendants advance two arguments, neither of which is relevant. *First*, Defendants contend that "the Court need not pass judgment on" the State Department's denial of E.J.'s applications because Section 1503 requires a *de novo* determination. (Opp. at 4.) Plaintiffs agree that the Court's task under Section 1503 is to analyze independently whether E.J. acquired U.S. citizenship at birth and do not seek judicial review of Defendants' adjudications of E.J.'s applications through their Section 1503 claim (Mot. at 14), although they do so through other claims, including their claim under Section 706(2)(A) of the APA, 5 U.S.C. § 706(2)(A). In any event, Plaintiffs' Motion clearly seeks a declaration of this Court that E.J. is a U.S. citizen at birth. (Mot. at 13-22.)

Second, Defendants ask the Court to "take note that Plaintiffs have another path to the relief they seek . . . that renders judicial intervention unnecessary." (Opp. at 4.) Defendants argue that E.J. could apply for a certificate of citizenship from USCIS, and they predict that USCIS would do what the State Department has refused to do: follow Ninth Circuit law and recognize E.J.'s U.S. citizenship, which "should obviate the need for this Court to decide Plaintiffs' 1503 claim." (Opp. at 5.) Even assuming that USCIS would issue a certificate of citizenship if such an application were submitted on E.J.'s behalf, Defendants' argument is undermined by Section 1503's mandate not to defer to any governmental agency, but instead to make an independent determination. *See, e.g.*, *Ortega-Morales*, 168 F. Supp. 3d at 1240. There is no language in Section 1503 to support Defendants' argument that the Court's jurisdiction under Section 1503 is either secondary to that of USCIS or discretionary, and it is counter to the

fundamental principle that generally "federal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given them." *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992), *superseded by statute on other grounds*; *see Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 71 (2009).

Defendants' vague insinuation that E.J.'s Section 1503 claim is effectively moot because he now lives in the United States is equally meritless. E.J. seeks through his Section 1503 claim a declaration of this Court that he is a U.S. citizen at birth. That determination is based entirely on whether he and his parents satisfy the elements of Section 301(g) of the INA, 8 U.S.C. § 1401(g).[3] Defendants' assertion that in conducting a *de novo* adjudication of E.J.'s Section 1503 claim, the Court should apply "the statute USCIS administers" obscures that the statute that USCIS administers is, in this context, Section 301.[4] A court order under Section 1503 recognizing E.J.'s U.S. citizenship would give E.J. the very relief he requests under that provision.

To evade judicial scrutiny, Defendants seek to create a classic whipsaw: arguing in Defendants' MSJ that Plaintiffs' APA claim should be denied because the Section 1503 claim provides an adequate remedy (Defs' MSJ at 12-13), while contending here that the Court should dismiss the Section 1503 claim or at least "hold this case in abeyance" (Opp. at 5 n.1) pending USCIS's adjudication

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[3] Defendants cite no support for the proposition that the State Department is no longer the relevant agency or that this Court should abstain simply because E.J. initiated this Action while living in the United States (a prerequisite for relief under Section 1503(a)). Defendants' only support for the argument that Plaintiffs' relocation to the United States "'ha[s] forestalled any occasion for meaningful relief' from this Court" (Opp. at 4) is *Cantrell* v. *City of Long Beach*, 241 F.3d 674 (9th Cir. 2001), a decision that is irrelevant, and even if it were relevant, would be unhelpful to Defendants. In *Cantrell*, the court analyzed whether the claims of birdwatchers seeking to preserve historic buildings that supported a bird habitat were moot because the historic buildings already had been demolished. The court concluded that even though the destruction could not be undone, "the demolition of the [historic buildings] was insufficient to render the case moot." *Id.* at 679.

[4] Although 8 U.S.C. § 1452 is the implementing statute for USCIS's decisions, it provides that any such decisions should be adjudicated by reference to other relevant statutes; here, "paragraph . . . (g) or section 1401 of this title[.]"

of E.J.'s hypothetical application for a certificate of citizenship.[5] This transparent attempt to force Plaintiffs to dance from pillar to post is legally unfounded and characteristic of Defendants' callous disregard for the human and familial interests at issue in this Action.[6]

B. The State Department's Interpretation and Application of the INA Infringes the Fundamental Right of Same-Sex Couples to Marry and, In Any Event, Cannot Survive Even Rational Basis Review.

Defendants' Opposition argues erroneously that the Court should analyze Plaintiffs' due process claim under the rational basis, rather than strict scrutiny, standard because the State Department's interpretation of Section 301 does not infringe the fundamental right of same-sex couples to marry.[7] *First*,

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[5] This is not the only way in which Defendants' arguments cannot be reconciled. For example, Defendants' suggestion that *Scales* should not be read to dictate the result that E.J. is a citizen (Opp. at 13 n.12) is inconsistent with their argument that USCIS would apply *Scales* and therefore would issue documentation evidencing E.J.'s U.S. citizenship at birth.

[6] Even in opposing the APA claim, Defendants argue that Plaintiffs should be compelled to try their luck at USCIS (Defs. MSJ at 12, 15-16). The Supreme Court has rejected the idea that a plaintiff can be bounced from agency to agency to reach a court only after the second agency has made a final decision. In *Sackett*, 566 U.S. 120 (2012), the Supreme Court made clear that, "the remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' [under APA Section 704] for action already taken by another agency." *Id. at* 127.

[7] Defendants erroneously contend that "Plaintiffs make no arguments that Defendants' actions have infringed upon any of E.J.'s fundamental rights." (Opp. at 6 n.2). To the contrary, the Motion is replete with references to the harm and humiliation that E.J. has endured because of the State Department's failure to accord to his parents' marriage the same rights and benefits as opposite-sex marriages and the treatment of E.J. as born "out of wedlock" (*i.e.*, illegitimate). (*See, e.g.*, Mot. at 3 ("Instead of recognizing that E.J. acquired U.S. citizenship when he was born during the marriage of his U.S. citizen parent . . . the State Department classified E.J. as a child born 'out of wedlock' and therefore denied him the rights and benefits of U.S. citizenship." (internal citations omitted)); Mot. at 23-24 ("[T]he State Department's counter-textual interpretation of the INA relegates the children of two married men inevitably to the stigma of illegitimacy simply because of their parents' sex and sexual orientation."); *see, e.g.*, *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2590 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."); *Latta* v. *Otter*, 771 F.3d 456, 474 (9th Cir. 2014) (to label "families as second-class" because the parents "are of the same sex is cruel as well as unconstitutional."); *Gill* v. *Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (recognizing that the denial of the right of same-sex couples to marry "prevent[s] children of same-sex

Defendants argue that the State Department's "legal interpretation distinguishes between biological and non-biological parent-child relationships, *not* between same-sex and opposite-sex couples," citing the State Department's exception for a gestational mother who is the legal but not biological parent of her child. (Opp. at 6-7 (emphasis in original).) Even accepting *arguendo* that the State Department's interpretation of Section 301 is not facially discriminatory, it is nonetheless discriminatory in its application because it creates a standard that no male same-sex couple could ever meet. Defendants do not dispute—and the Opposition expressly asserts (Opp. at 10)—that two married men, neither of whom is transgender, can never have a child together. (SOCF ¶ 115.) Under Defendants' interpretation, every child born of such a couple is treated as born "out of wedlock," *i.e.*, illegitimate, and foreclosed from acquiring U.S. citizenship under Section 301.

Second, Defendants incorrectly argue that "an individual's purported right to transmit U.S. citizenship at birth to a foreign-born child who has no biological relationship to the individual has not been recognized as a right and benefit of marriage." (Opp. at 7.) To the contrary, in *Miller* v. *Albright*, 523 U.S. 420 (1998), the Supreme Court explained that, under the INA, if a *married* U.S. citizen and a foreign national conceive a child, "*citizenship will follow*." *Id.* at 433 (emphasis added).[8] Similarly, in *Scales*, 232 F.3d 1159, and *Solis-Espinoza*, 401

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couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure" (internal quotation marks omitted)); *Campaign for S. Equality* v. *Bryant*, 64 F. Supp. 3d 906, 913 (S.D. Miss. 2014) ("The court concludes that Mississippi's same-sex marriage ban deprives same-sex couples and their children of equal dignity under the law" in violation of the Constitution.)).

[8] Defendants attempt to distinguish *Miller* on the ground that the decision concerned the acquisition, not transmission, of U.S. citizenship. (Opp. at 8.) This is mere semantics. The Supreme Court in *Miller* made clear that when a citizen and a foreign national marry and produce a child, "citizenship will follow." 523 U.S. at 433. Under this rule, Andrew's right to transmit U.S. citizenship and E.J.'s right to acquire U.S. citizenship *both* follow directly from Andrew's fundamental right to marry and cannot be infringed unless the infringement is narrowly tailored to further a compelling governmental objective, a standard that Defendants cannot meet.

F.3d 1090, the Ninth Circuit held that Section 301 does not condition eligibility for U.S. citizenship on the existence of a biological relationship between a U.S. citizen parent and the child, explaining in the latter decision that "the requirement [of a biological relationship] applied only to an illegitimate child" and "did not apply to someone who was not born 'out of wedlock.'" *Solis-Espinoza*, 401 F.3d at 1093 (citing *Scales*, 232 F.3d at 1164). *Miller*, *Scales*, and *Solis-Espinoza* together stand for the proposition that, in enacting the INA, Congress intended to confer on married U.S. citizens a right to transmit U.S. citizenship to their foreign-born children and therefore that such a right is an incident of marriage to which same-sex and opposite-sex married couples are equally entitled. *See Pavan* v. *Smith*, 137 S. Ct. 2075, 2076 (2017) ("the Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples" (internal quotation marks omitted)); *Obergefell*, 135 S. Ct. at 2601 (2015) (same-sex couples may not be "denied the constellation of benefits that [government] ha[s] linked to marriage").[9]

Because the State Department's interpretation of Section 301 infringes a fundamental right, Defendants bear the burden of establishing that it is narrowly tailored to further a compelling governmental interest. *See Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997); *United States* v. *Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012). As the Motion demonstrated, Defendants have failed to articulate any governmental interest, let alone a compelling one, that animated the

[9] Defendants' related argument that there is not "a fundamental right to unconditionally transmit U.S. citizenship to a foreign-born child" because persons born in the United States can "acquire citizenship by birth only as provided by Acts of Congress" (Opp. at 8) also is without merit. It conflates the unrelated issues of, on the one hand, whether U.S. citizenship is a fundamental right and, on the other, whether, as a result of Congress's enacting the INA, transmission of U.S. citizenship to children of a valid marriage is part of the protected "constellation of benefits . . . linked to marriage." *Pavan*, 137 S. Ct. at 2077. Nor does it matter that a right or benefit of marriage is conferred by statute (rather than being inherent to marriage). Indeed, in *Pavan* the privileges at issue attached to marriage by state statute. *Id*.

State Department's interpretation of Section 301. (*See* Mot. at 24-25.) Nor do Defendants argue that the State Department's interpretation of Section 301 is narrowly tailored to further any such compelling governmental interest. (*See* Opp. at 6-13.) Defendants simply assume that the Court will accept their overly narrow characterization of the right at issue and scrutinize the State Department's interpretation of Section 301 under rational basis review.

Defendants' interpretation of Section 301 fails even rational basis review, under which a law must be rationally related to the furtherance of a legitimate governmental interest. *Glucksberg*, 521 U.S. at 722; *accord* *Gallinger v. Becerra*, 898 F.3d 1012, 1017 (9th Cir. 2018). Defendants seek to defend the State Department's interpretation based on "the Department's longstanding interpretation of the language 'born of [sic] . . . parents' in Section 1401(g)." (Opp. at 9.) But the preservation of a "longstanding interpretation" is not an independent legitimate governmental objective. *See* *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1142 (D. Or. 2014) ("Simply stating what has always been done does not address the reasons for it. The mere fact that prior law, history, tradition, the dictionary, and the Bible have defined a term does not give that definition a rational basis, it merely states what has been."); *Golinski v. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012) ("[T]he argument that the definition of marriage should remain the same for the definition's sake is a circular argument, not a rational justification."). Defendants' argument is tautological: the State Department's interpretation of Section 301 is rationally related to the State Department's interest in preserving its interpretation of Section 301. *See* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) ("Proponents' asserted state interests in tradition are nothing more than tautologies and do not amount to rational bases for Proposition 8."), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

Defendants essentially suggest that the State Department has a legitimate interest in the preservation of a statutory interpretation that conflicts with the text and purpose of the INA. As a textual matter, the Motion demonstrated that Section 301 does not include a biological relationship requirement (Mot. at 14-16), as the Ninth and Second Circuits have held.[10] The "advent of assisted reproductive technology" (Opp. at 10) does not undermine the rationale of those decisions, at least one of which (*Jaen* v. *Sessions*, 899 F.3d 182 (2d Cir. 2018)) was decided well after ART became a common method of reproduction.[11] As the Motion also showed, in enacting the INA, Congress intended to promote family unity, a purpose that is frustrated by the State Department's interpretation of Section 301. (Mot. at 20-21.) Defendants' Opposition also fails to explain how the State Department's position can be reconciled with "the traditional 'aversion to declaring children illegitimate,' as well as an interest in promoting familial tranquility through deference to the marital

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[10] Defendants' interpretation of Section 301 as requiring a biological relationship between the U.S. citizen parent and the child renders redundant the requirement of a "blood relationship" in Section 309, 8 U.S.C. § 1409. *See Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

[11] Defendants quote out-of-context *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 68 (2001), and Justice Stevens' opinion in *Miller*, 523 U.S. at 433, for the proposition that "Congress—at least in the context of the law on acquisition of U.S. citizenship at birth—saw no need to be express" about the conclusion that "'born of' connoted a biological connection to both . . . mother and father" (Opp. at 12). Defendants omit that *Nguyen* and *Miller* involved children *born out of wedlock*. Those decisions do not suggest either that Congress intended to *imply* a biological relationship requirement under Section 301 or that the concerns animating the "blood relationship" requirement under Section 309 are relevant considerations when, as here, both of E.J.'s legal parents are married to each other and present and involved in E.J's life.

Defendants' reliance on *United States* v. *Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009) similarly is misplaced. Although the court stated there that "the 'born of' concept generally refers to a blood relationship," *id.* at 1083, it also "recognize[d] that we have held that when a child is born during a marriage and at least one parent is a United States citizen, a blood relationship is not absolutely required," *id.*

family." *Jaen*, 899 F.3d at 190 (quoting *Michael H.* v. *Gerald D.*, 491 U.S. 110, 124-25 (1989)). Defendants make only sweeping assertions about Congress's supposed intent and understanding without citing any evidence in the congressional record or elsewhere to support their counter-textual interpretation. (*See* Opp. at 11-12.) It strains credulity to suggest that the State Department could have a legitimate interest in furthering an interpretation of the INA that conflicts with Congress's purpose in enacting it.

The Opposition also draws a false parallel between children, like E.J., who had a married U.S. citizen parent when they were born, and adopted children and stepchildren, who did not. (Opp. at 9-10.) Defendants' citation to the INA's provisions governing adopted children and stepchildren is merely an attempt to deflect the Court's attention from the text of Sections 301 and 309, the provisions of the INA that actually are relevant to this Action. (*See* Opp. at 9 (citing 8 U.S.C. §§ 1101(c), 1431(b), 1433(c).)) As courts have observed, "the 'textual distinction' between [Sections 301 and 309] regarding children of married parents and children of unmarried parents is strongly suggestive of a clear Congressional intent to treat the two categories differently on this point." *Jaen*, 899 F.3d at 189; *Scales*, 232 F.3d at 1164; *see also Russello* v. *United States*, 464 U.S. 16, 23 (1983).

In a single, conclusory sentence, Defendants' Opposition hypothesizes that the State Department's interpretation of Section 301 addresses vague "concerns" about "fraudulent citizenship claims" (Opp. at 10). As the Motion demonstrated, the State Department has disavowed any such interest (Mot. at 8), and Defendants make no attempt to explain how the State Department's interpretation rationally relates to its purported interest particularly when, as here, a child's parents, one of whom is a U.S. citizen, provide evidence of the child's parentage and living arrangements. *See Gallinger*, 898 F.3d at 1019 ("To survive rational-basis review, the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or

irrational." (internal quotation marks omitted)). Thus, the State Department's interpretation of the INA fails even under a rational basis analysis.[12]

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant their motion for partial summary judgment and declare that E.J. is a U.S. citizen at birth under Section 301(g), declare that Defendants' interpretation and application of Section 301(g) to require proof of a biological relationship with a U.S. citizen is unconstitutional and unlawful, enjoin Defendants from continuing to interpret Section 301(g) in that manner, and grant attorneys' fees and costs and any such other and further relief as the Court deems to be just and proper.

Dated: January 22, 2019

Respectfully submitted,

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[12] Defendants urge the Court to decline to issue a "permanent, universal injunction" because relief should be "limited to what is sufficient to redress their injuries." (Opp. at 14.) Here, the First Amended Complaint seeks injunctive relief commensurate with Andrew's and E.J.'s injuries and necessary to afford complete relief. *See also* *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) (stating that "the scope of injunctive relief is dictated by the extent of the violation established"); *Bresgal* v. *Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (stating that "there is no bar against class-wide, and nationwide relief in federal district or circuit court when it is appropriate"). Moreover, an injunction precluding the State Department from imposing an unconstitutional requirement under Section 301 is consistent with "[o]ur country['s] strong . . . interest in the uniform application of immigration law and policy." *See* *Regents of Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018); *accord* *Washington* v. *Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (upholding a nationwide injunction because "a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy").

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PLAINTIFFS' COMBINED STATEMENT OF FACTS

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Hearing Date: Feb. 4, 2019
Courtroom: 7A

Pursuant to Local Rule 56-1 and this Court's Standing Order (ECF No. 27) and Case Management Order (ECF No. 52), Plaintiffs Andrew Dvash-Banks and E.J. D.-B. respectfully submit the following *Combined Statement of Facts* in support of Plaintiffs' *Reply in Further Support of Their Motion for Partial Summary Judgment*.

Any indication that Plaintiffs do not dispute, in whole or in part, statements included in "Defendants' Additional, Relevant, Uncontroverted Facts," (Statement Nos. 150-172), is limited to the statement or portion of the statement indicated and does not suggest agreement with any implications that Defendants may contend, in their legal memoranda or elsewhere, result from that statement.

I. Plaintiffs' Asserted Uncontroverted Facts

A. ANDREW DVASH-BANKS IS A UNITED STATES CITIZEN	
Uncontroverted Fact	*Supporting Evidence and Objections*
1. Andrew Dvash-Banks ("Andrew") is a United States citizen.[1]	Dvash-Banks Dep. 171:3-171:6. ***Undisputed.***
2. Andrew was born in California in 1981.	Dvash-Banks Dep. 13:24-14:2. ***Undisputed.***

[1] Plaintiffs have numbered the specific Statements of Fact in this document to track the same numbers used in *Plaintiffs' Statement of Undisputed Facts* (ECF 83-24). *Defendants' Statement of Genuine Disputes* (ECF 101-1) altered this numbering for Statements of Fact Nos. 89-130. Defendants did so by deleting Plaintiffs' Statement of Fact No. 89, as a result of which the subsequent numbering in Defendants' *Statement of Genuine Disputes* is one number lower than the numbering in *Plaintiffs' Statement of Undisputed Facts* for Statements of Fact Nos. 89-130. *Defendants' Statement of Genuine Disputes* also repeats Plaintiffs' Statement of Fact No. 130 twice, assigning that fact both numbers 130 and 131. Because of the repetition, all Statements of Fact beginning with number 131 in *Defendants' Statement of Genuine Disputes* resume the correct numbering that properly tracks Plaintiffs' original filing. Because Defendants did not include Plaintiffs' Statement of Fact No. 89 in *Defendants' Statement of Genuine Disputes*, Defendants did not assert any dispute with respect to Statement of Fact No. 89.

Uncontroverted Fact	*Supporting Evidence and Objections*
3. During his childhood, Andrew lived primarily in Beverly Hills, California.	Dvash-Banks Dep. 14:9-14:14. ***Undisputed.***
4. Andrew attended high school in California.	Dvash-Banks Dep. 15:20-15:22. ***Undisputed.***
5. Andrew attended college in California.	Dvash-Banks Dep. 15:23-15:25. ***Undisputed.***
6. Andrew resided in the United States continuously from 1981 through at least October 2005, as well as during other periods.	Dvash-Banks Dep. 169:13-169:19. ***Undisputed.***
7. In 2007, Andrew enrolled in a master's degree program in Israel.	Dvash-Banks Dep. 18:1-18:4; 19:20-20:2. ***Undisputed.***
8. In 2008, while enrolled in graduate school in Israel, Andrew met his now-husband, Elad Dvash-Banks ("Elad").	Dvash-Banks Dep. 19:6-20:2. ***Undisputed.***
9. Elad is an Israeli citizen.	CRBA App. ***Undisputed.***
B. ANDREW AND ELAD MARRY AND MAKE PREPARATIONS TO BECOME PARENTS	
10. Andrew and Elad moved to Toronto in 2010.	Dvash-Banks Dep. 22:23-22:25. ***Undisputed.***
11. Andrew and Elad were married on August 19, 2010 in Toronto, Canada.	Marriage Lic.; Dvash-Banks Dep. 29:5-29:8. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
12. At the time of the marriage of Andrew and Elad, two men, Ontario recognized the validity of same-sex marriages.	Dvash-Banks Dep. 22:10-22:11. ***Undisputed.***
13. Andrew and Elad decided to have children.	Dvash-Banks Dep. 67:25-68:4 ***Undisputed.***
14. Andrew and Elad obtained eggs from an anonymous egg donor (the "Donor").	Dvash-Banks Dep. 79:12-79:16. ***Undisputed.***
15. Andrew and Elad donated their respective genetic material to create embryos using the eggs from the Donor.	Dvash-Banks Dep. 83:17-84:2; 85:3-85:13. ***Undisputed.***
16. Andrew and Elad successfully created embryos using eggs from the Donor.	Dvash-Banks Dep. 83:17-84:10. ***Undisputed.***
17. In December 2015, Andrew and Elad contracted with a gestational surrogate (the "Gestational Surrogate") for the purpose of carrying one or two embryos during a pregnancy (the "Surrogacy Agreement").	Surrogacy Agmt. ***Undisputed.***
18. The Surrogacy Agreement states that "Andrew and Elad (collectively called the	Surrogacy Agmt. at Section 1.1, AR 023. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
'Intended Parents') are a same-sex married couple who require assisted reproductive technology to have a child."	
19. The Gestational Surrogate agreed to carry eggs "retrieved from the third party anonymous donor and Sperm supplied by Andrew and/or Elad" that was "incubated externally" to create embryos.	Surrogacy Agmt. at Section 1.4, AR 023. ***Undisputed.***
20. The Gestational Surrogate became pregnant with one embryo created using genetic material from Andrew and one embryo created using genetic material from Elad.	Dvash-Banks Dep. 85:3-85:13. ***Undisputed.***
21. Under the terms of the Surrogacy Agreement, Andrew and Elad "will be recognized as the Child's parents immediately upon the Child's Birth."	Surrogacy Agmt. at Section 1.8, AR 024. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that the Surrogacy Agreement would be binding on anyone other than the contracting parties. • Surrogacy Agmt. at 12, AR 024 ("NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and promises contained in

Uncontroverted Fact	*Supporting Evidence and Objections*
	this Agreement and with the intention of being fully bound by its terms, the Parties do hereby covenant and agree as follows.") • *Id.* pt. II ¶ p, AR 026 ("'Parties' means the parties to this Agreement, being ANDREW DVASH-BANKS, ELAD DVASH-BANKS, and AMANDA MARIE ANNE ADAMS, and 'Party' means any one of the Parties individually[.]") Otherwise undisputed. Plaintiffs' Reply: Defendants' response does not dispute the proffered fact.
22. Under the terms of the Surrogacy Agreement, Andrew and Elad, "intend to assume full care of, and all parental responsibility for the Child. . . ."	Surrogacy Agmt. at Section 1.9, AR 024. ***Undisputed.***
23. Under the terms of the Surrogacy Agreement, "Immediately upon the Birth of the Child, the Gestational Carrier will give the Child into the permanent custody of the Intended Parents and as soon as	Surrogacy Agmt. at Section 1.10, AR 024. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
reasonably possible thereafter the Intended Parents will make an application in the Ontario Superior Court of Justice seeking a declaration of parentage on their part, and a declaration of non-parentage on the part of the Gestational Carrier."	
24. Under the terms of the Surrogacy Agreement: "The Parties acknowledge that immediately upon Birth all medical decisions regarding the Child shall be made solely by the Intended Parents."	Surrogacy Agmt. at Section 14.4(c), AR 038. ***Undisputed.***
25. The Surrogacy Agreement states that: "For purposes of this Agreement, 'immediately upon birth' means as soon as the umbilical cord is cut."	Surrogacy Agmt. at Section 14.1, AR 038. ***Undisputed***.
26. Under the terms of the Surrogacy Agreement, "The Gestational Carrier hereby expressly waives all parental, custodial and social rights that	Surrogacy Agmt. at Section 14.4, AR 038. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
she has or may acquire to the Child."	
27. Under the terms of the Surrogacy Agreement, "All Parties to this Agreement wish to maintain confidentialities between themselves, one to another, and between themselves and the public."	Surrogacy Agmt. at Section 1.11 at AR 024. ***Undisputed.***
28. Under the terms of the Surrogacy Agreement, the Surrogacy Agreement is governed by the laws of the Province of Ontario, Canada.	Surrogacy Agmt. at Section 35.1 at AR 051. ***Undisputed.***
C. THE TWINS ARE BORN AND ELAD AND ANDREW ARE NAMED AS THEIR PARENTS ON THEIR BIRTH CERTIFICATES AND ARE RECOGNIZED FOR ALL PURPOSES IN LAW TO BE THEIR PARENTS	
29. Twins A.J. and E.J. (the "Twins") were born on September 16, 2016 in Ontario, Canada.	E.J. Statement of Live Birth; A.J. Statement of Live Birth. ***Undisputed except to the extent the term "twins" is intended to imply that E.J. is biologically related to Andrew, or that A.J. and E.J. share the same biological parents.*** Plaintiffs' Reply: Defendants' response

Uncontroverted Fact	*Supporting Evidence and Objections*
	does not dispute the proffered fact.
30. The Twins were born four minutes apart.	Dvash-Banks Dep. 161:13-161:16. ***Undisputed.***
31. Andrew and Elad were married to each other on the day of the Twins' birth.	Dvash-Banks Dep. 171:10- 171:15; E.J. Statement of Live Birth. ***Undisputed.***
32. Andrew was the person who cut E.J.'s umbilical cord.	Dvash-Banks Dep. 143:23-144:15. ***Undisputed.***
33. Andrew and Elad are listed as E.J.'s parents on E.J.'s Statement of Live Birth issued by Ontario, Canada.	E.J. Statement of Live Birth. ***Undisputed.***
34. Andrew and Elad are listed as A.J.'s parents on A.J.'s Statement of Live Birth issued by Ontario, Canada.	E.J. Statement of Live Birth. ***Undisputed.***
35. Andrew and Elad are the only parents listed on E.J.'s Statement of Live Birth.	E.J. Statement of Live Birth. ***Undisputed.***
36. Andrew and Elad are the only parents listed on A.J.'s Statement of Live Birth.	A.J. Statement of Live Birth. ***Undisputed.***
37. Andrew and Elad have been E.J.'s and A.J.'s legal parents since the Twins' birth in 2016.	E.J. Statement of Live Birth; A.J. Statement of Live Birth; Surrogacy Agmt., at Sections 1.8-1.10, AR 024; Canadian Order. ***This statement comprises a conclusion of law, not a statement of fact. The cited***

Uncontroverted Fact	*Supporting Evidence and Objections*
	evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part. Undisputed that Andrew and Elad are E.J's and A.J.'s parents. Plaintiffs' Reply: Plaintiffs dispute that Statement of Fact No. 37 comprises a conclusion of law. The Surrogacy Agreement provisions cited as evidence by Plaintiffs in support of Statement of Fact No. 37 are set forth below: "The Intended Parents will be recognized as the Child's parents immediately upon the Child's Birth. The Intended Parents intend to assume full care of, and all parental responsibility for the Child, and the Gestational Carrier intends to allow the Intended Parents to assume this care and responsibility without reserving any care or responsibility to herself. 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

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

Uncontroverted Fact	*Supporting Evidence and Objections*
	Admission No. 1 (admitting anonymous donor used to conceive E.G. and A.J.) • By carrying and giving birth to E.J. and A.J., the Gestational Carrier acted as a gestational mother/parent and birth mother to the children. *See* Ex. H: Plaintiffs' Response to Defendants' Request for Admission No. 3 (admitting gestational surrogate was used to carry and give birth [to] E.J.) Further disputed to the extent the statement conveys or implies that no other individual ever had legal rights as a parent to E.J. or A.J. under Canadian law. • Canadian Order, AR 021 (listing Amanda Marie Anne Adams as "Respondent"); *id.* at 021–22 (dated September 28, 2018, and not stating that it had retroactive effect). • Surrogacy Agmt. at Section 23.2, AR 042 (containing post-birth condition precedent that would need to occur before "the Gestational Carrier will sign all necessary documents to obtain a legal declaration that she is not the genetic or intended mother of the child")

Uncontroverted Fact	*Supporting Evidence and Objections*
	• Surrogacy Agmt. at Section 1.10, AR 024 (Gestational Carrier implied to be a parent until making a post-birth declaration of non-parentage). ***Objection*** to reliance here on Dvash-Banks Dep. 29:21-30:14: hearsay. Plaintiffs' Reply: Plaintiffs dispute that Statement of Fact No. 39 comprises a conclusion of law and further dispute that the evidence proffered by Defendants supports Defendants' objection. Plaintiffs also dispute the hearsay objection as outlined in Plaintiffs' Responses to Defendants' Evidentiary Objections ("Response to Evidentiary Objections") filed concurrently with this document.
40. No other individual has asserted any parental rights with respect to E.J. or A.J.	Canadian Order; Dvash-Banks Dep. 112:19-112:24. ***This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.*** Defendants lack sufficient knowledge as to whether any individual has ever asserted any parental rights with respect to

Uncontroverted Fact	*Supporting Evidence and Objections*
	E.J. or A.J. Undisputed that the Gestational Carrier agreed to not to "assert" any parental rights she may have had with respect to babies she carried and gave birth to under the Surrogacy Agreement, assuming the "condition precedent" and any other relevant terms of the agreement were met. Surrogacy Agreement Part XIV, AR 037–39 (regarding "Custody of Child and Parental Rights"); id. Part X, AR 033–34 (regarding "Condition Precedent"). ***Objection*** to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay. Plaintiffs' Reply: Plaintiffs dispute that Statement of Fact No. 40 comprises a conclusion of law and further dispute that the evidence proffered by Defendants supports Defendants' objection. Plaintiffs also dispute the hearsay objection as outlined in the Responses to Evidentiary Objections filed concurrently herewith. Plaintiffs further dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion. The evidence set forth below

Uncontroverted Fact	*Supporting Evidence and Objections*
	further supports Statement of Fact No. 40: "The Gestational Carrier believes that it would be in the best interests of the Child for the Child to be in the custody of the Intended Parents immediately upon Birth, and the Gestational Carrier hereby expresses her intention to waive all parental rights which she may have to any Child." Surrogacy Agmt. at 1.7, at AR 024.
41. On September 28, 2016, the Ontario Superior Court of Justice entered an Order (the "Canadian Order") stating that: "It is declared that the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, are the parents of the child, [E.J.], born September 16, 2016 ("the child"), and that the Applicants are recognized for all purposes in law to be the parents of the child."	Canadian Order. ***Undisputed.***
42. The Canadian Order declared that [the Gestational Surrogate] is not the mother of the child.	Canadian Order. ***Undisputed.***
43. The Canadian Order directed the Deputy Registrar General	Canadian Order. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
for the Province of Ontario "to register the birth of the child [E.J.] so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child."	
44. The Canadian court issued a parallel order for A.J.	Dvash-Banks Dep. 112:19-112:24. ***Undisputed.***
45. Under the law of Ontario, Canada, Andrew and Elad are the legal parents of the Twins.	Canadian Order; Dvash- Banks Dep. 112:19-112:24. ***This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement.*** Undisputed that Andrew and Elad are E.J's and A.J.'s parents**.** ***Objection*** to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay. Plaintiffs' Reply: Plaintiffs dispute that Statement of Fact No. 45 comprises a conclusion of law and further dispute that the evidence proffered by Defendants in Defendants' response supports Defendants' objection. Plaintiffs also dispute the hearsay objection as outlined in Plaintiffs' Responses to Defendants' Evidentiary

Uncontroverted Fact	*Supporting Evidence and Objections*
	Objections filed concurrently with this document. Evidence cited by Plaintiffs in support of Statement of Fact No. 45 is set forth below: It is declared that the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, are the parents of the child, **E**[] **J**[] **D**[]-**B**[], born September 16, 2016 ("the child"), and that the Applicants are recognized for all purposes in law to be the parents of the child. Canadian Court Order at 1.
46. E.J. was not conceived using Andrew's sperm.	Pls. Disc. Responses at Request For Admission ("RFA") No. 14. ***Undisputed.***
47. A.J. was conceived using sperm from Andrew.	Viaguard A-M Letter; Dvash-Banks Dep. 84:17-85:13. ***Undisputed.***
48. E.J. was conceived using sperm from Elad.	Viaguard A-M Letter; Dvash-Banks Dep. 84:17-85:13. ***Undisputed.***
49. There is no evidence that Andrew supplied genetic material to the conception or birth of E.J.	Viaguard A-M Letter; Pls. Disc. Responses at RFA No. 14. ***Undisputed.***
50. From the time the Twins left the hospital where they were	Dvash-Banks Dep. 29:21-30:14; 171:16-171:23.

Uncontroverted Fact	*Supporting Evidence and Objections*
born, they have lived continuously with Andrew and Elad.	***Undisputed.***
51. Andrew, Elad and the Twins have lived together as a family since the Twins' release from the hospital following their birth.	Dvash-Banks Dep. 29:21-30:14; 171:16-171:23. ***Undisputed.***
52. Andrew and Elad and the Twins now reside in California.	Dvash-Banks Dep. 29:21-29:23; 34:13-34:14. ***Undisputed.***
D. E.J. AND A.J. APPLY FOR U.S. PASSPORTS AND FOR CRBAS IN RECOGNITION THAT THE TWINS ARE U.S. CITIZENS AT BIRTH	
53. Andrew and Elad submitted to the United States Consulate in Toronto, Canada ("Toronto Consulate") applications for a Consular Report of Birth Abroad ("CRBA") and U.S. passport for each of the Twins.	Dvash-Banks Dep. 117:3-117:11. ***Undisputed.***
54. A CRBA demonstrates that the recipient is a U.S. citizen at birth.	Reffett Dep. 34:21-34:24. ***Undisputed***.
55. On January 24, 2017, Andrew and Elad appeared in person at the Toronto Consulate in	Dvash-Banks Dep. 125:12-126:12; Day Dep. 121:19-122:1. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
connection with the applications for a CRBA and U.S. passport for each of the Twins.	
56. Andrew and Elad provided the Toronto Consulate with the requisite documentation for E.J.'s applications, including 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.	Dvash-Banks Dep. 95:4-97:12; 165:4-166:12; Admin. Record 09-62. ***Disputed in part:*** It is undisputed that Andrew and Elad provided Consulate Toronto with documentation including E.J.'s Statement of Live Birth, evidence of Andrew's U.S. citizenship and periods of residency, and Andrew and Elad's marriage certificate. Defendants dispute the portion of the statement describing this documentation as "the requisite documentation." • AR 005 (consular officer's case notes indicating: "School transcripts needed to confirm Amcit father's physical presence in the US.") Defendants also dispute the "requisite documentation" portion of the statement to the extent it conveys or implies that the Department of State requires specific documents be submitted with CRBA and/or U.S. passport applications. It is up to applicants to select the specific documents

Uncontroverted Fact	*Supporting Evidence and Objections*
	they will submit to the Department to support their claim for citizenship. • Reffett Depo. Tr. 92:06–93:06; 177:04–25 • *See also* 22 CFR §§ 50.2, 50.5, 51.40, 51.41, and 51.43 (burden on applicant) ***Objection*** to reliance here on Dvash-Banks Dep[.] 95:4-97:12; 165:4-166:12: hearsay. Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion. Plaintiffs further dispute Defendants' hearsay objection as outlined in the Responses to Evidentiary Objections filed concurrently herewith.
57. On January 24, 2017, Frances Terri Day, Vice Consul, Toronto Consulate, interviewed the Dvash-Banks family and adjudicated E.J.'s and A.J.'s respective applications for a CRBA and U.S. passport.	Day Dep. 94:23-95:25. ***Disputed in part:*** Disputed to the extent the use of the term "adjudicated" conveys or implies that the adjudication of the applications were completed on January 24, 2017. • ACS Activity Log, AR 002–008 (showing adjudication began but was not completed on January 24, 2017). Undisputed that on January 24, 2017, Terri Nathine Francis Day, Vice Consul,

Uncontroverted Fact	*Supporting Evidence and Objections*
	Toronto Consulate, interviewed the Dvash-Banks family in connection with E.J.'s and A.J.'s respective applications for a CRBA and U.S. passport, and that she started to adjudicate those applications that day. Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
58. Ms. Day had authority to make the final decision as to whether to grant or deny the applications for E.J. and A.J.	Day Dep. 48:6-48:10. ***Undisputed.***
59. Ms. Day accepted Andrew and Elad's marriage license from the Ontario government as sufficient proof of their marriage.	Day Dep. 142:19-142:25;155:24-156:6; 161:24-162:6; Marriage Lic. ***Undisputed.***
60. Ms. Day accepted E.J.'s Statement of Live Birth as a timely-filed Canadian birth certificate.	Day Dep.172:5-172:24; E.J. Statement of Live Birth. ***Disputed in part:*** Disputed to the extent this statement conveys or implies that a "Statement of Live Birth" is the equivalent of "a … birth certificate."

Uncontroverted Fact	*Supporting Evidence and Objections*
	• Reffett Depo. Tr. 92:06–93:06; 177:04–25 Otherwise undisputed. Plaintiffs' Reply: Defendants' response does not dispute the proffered fact. The testimony cited by Plaintiffs in support of Statement of Fact No. 60 is set forth below: "Q. And can you turn, please, to the document that is Bates-stamped 00070270-1764. And I'll represent for the record that the title of the document is 'Statement of Live Birth.' A. 1764. Yes. Q. What is this document? A. It seems to be a Statement of Live Birth for [E.J. D.-B.]. Q. And have you seen this document before? A. Yes, I have. Q. And is this document E.J.'s Canadian birth certificate? A. It would seem to be, yes. A copy of that. Q. And in your review of this document during the process of adjudicating E.J.'s application, did you consider this document

Uncontroverted Fact	*Supporting Evidence and Objections*
	to be a true and accurate copy of E.J.'s timely filed Canadian birth certificate? A. Yes." Day Dep. 172:5-172:24.
61. Ms. Day accepted E.J.'s Statement of Live Birth as sufficient proof that Andrew and Elad are E.J.'s legal parents.	Day Dep. 172:5-173:12; Ramsay Dep. 103:7-103:11; E.J. Statement of Live Birth. ***Undisputed.***
62. Ms. Day accepted the Ontario Court order naming Andrew and Elad as the parents of E.J. as sufficient proof that Andrew and Elad were E.J.'s legal parents.	Day Dep. 173:19-174:5; Canadian Order. ***Undisputed.***
63. During their interview at the Toronto Consulate on January 24, 2017, Frances Terri Day asked Andrew and Elad how they had conceived the Twins and whose egg and sperm had been used to conceive each of the Twins.	Ramsay Dep. 45:6-45:11; 46:20-46:23; Dvash-Banks Dep. 129:15-129:21; Day Dep. 110:22-112:11. ***Disputed.*** Evidence does not establish that Ms. Day asked Andrew and Elad these questions. • Day Depo. 120:14–121:3 This information was volunteered by Andrew and Elad, at least to the extent their application materials reflected that they had used Assisted Reproductive Technology.

Uncontroverted Fact	*Supporting Evidence and Objections*
	• AR 021–56 ***Objection*** to reliance here on Dvash-Banks Dep. 129:15-129:21: hearsay. Plaintiffs' Reply: Plaintiffs dispute the hearsay objection as outlined in the Responses to Evidentiary Objections filed concurrently herewith. Defendants' response to Statement of Fact No. 63 is also inconsistent with the evidence. The testimony in support of Statement of Fact No. 63 that Defendants do not dispute is set forth below: "Q. And did you hear any questions during the interview that were related in some way to the fact that they were both men? A. Yes, in terms of asking about how the children were conceived and how the children came to be born in Canada." Ramsay Dep. 45:6-45:11. "Q. Do you remember anything else? A. I think that Frankie asked the question about who contributed genetic material to conceive the children." Ramsay Dep. 46:20-46:23.

Uncontroverted Fact	*Supporting Evidence and Objections*
64. Andrew had not planned to disclose to others the biological relationships among Elad and Andrew and the Twins.	Surrogacy Agmt. at Section 1.1, AR 024. ***Disputed in part:*** Cited evidence does not establish this point. Disputed to the extent that the statement 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. ***Plaintiffs' Reply:*** Defendants cite to no evidence in support of their contention.
65. Ms. Day's role in adjudicating U.S. passport and CRBA applications was to determine whether, according to the State Department's *Foreign Affairs Manual* ("FAM"), the applicant was entitled to be recognized as a U.S. citizen.	Day Dep. 29:17-30:3; 47:12-47:24; 59:2-59:16. ***Disputed in part:*** Defendants dispute this statement to the extent it conveys or implies that the Foreign Affairs Manual provided the only basis for the adjudicative criteria. • Day Depo 29:17–30:3 ("My role was to determine if the applicant had a claim to U.S. citizenship… my job was to determine if that was – according to the Foreign Affairs Manual and the

Uncontroverted Fact	*Supporting Evidence and Objections*
	guidelines that we had … if they were entitled to that citizenship.") • *Id.* 233:19–234:20 (explaining that she did not consider FAM completely separated from Immigration and Nationality Act of 1952) Defendants further dispute this statement to the extent it conveys or implies that that any applicant born abroad is "entitled" (automatically or otherwise) to be recognized or documented as a U.S. citizen at birth. See generally (22 C.F.R. §§ 50, 51. Otherwise undisputed. Plaintiffs' Reply: Defendants' response mischaracterizes the evidence and is not supported by the cited evidence.
66. During the Dvash-Banks' interview at the Toronto Consulate on January 24, 2017, Ms. Day consulted with another Consular Officer, Margaret Ramsay, and with Larilyn Reffett concerning the applications for E.J. and A.J.	Ramsay Dep. 163:5-164:14; Reffett Dep. 67:19-68:5. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
67. Ms. Ramsay provided Ms. Day with the relevant sections of the FAM so that Ms. Day would have the opportunity to consult them in adjudicating E.J.'s and A.J.'s applications.	Reffett Dep. 79:8-79:16; Ramsay Dep. 40:10-40:24; AR 073. ***Disputed in part:*** It is undisputed that Ms. Ramsay provided Ms. Day with a relevant section of the FAM so that Ms. Day would have the opportunity to consult it in adjudicating E.J.'s and A.J.'s applications. Disputed that Ms. Ramsay provided Ms. Day with "relevant sections" (in the plural) of the FAM. • AR 073 (email in which Ms. Ramsay sends Ms. Day a link to 7 FAM 1100 Appendix D) • AR Certification page (indicating that all of the FAM sections included in Administrative Record "were relevant to and were in effect at the time of the adjudication at issue…, and thus would have been considered directly or indirectly by the adjudicator."). • AR 081–106 (FAM sections) Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.

Uncontroverted Fact	*Supporting Evidence and Objections*
68. Ms. Day referred to the FAM during the time that she was interviewing the Dvash-Banks family.	Day Dep. 217:21-217:24. ***Undisputed.***
69. Ms. Day's typed notes reflect that she may originally have considered the Twins to have been born in wedlock because of the marriage certificate included in the applications.	AR 003; Ramsay Dep. 131:25-132:5. ***Undisputed.***
70. Ms. Day ultimately applied Section 309 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1409 ("Section 309"), to the adjudication of the Twins' applications.	Ramsay Dep. 131:25-132:5. ***Disputed.*** Cited evidence does not establish this point. Day Depo. 116:12–19; 231:04-233:18 ***Plaintiffs' Reply:*** Defendants' response is inconsistent with the cited testimony of Ms. Ramsay, and the testimony Defendants cite from Ms. Day is not to the contrary. See also 30(b)(6) Dep. 273:2-273:7. "A. I think initially, as evidenced by her case notes, she may have considered them in wedlock because she saw a marriage certificate, but I believe after reviewing the guidance and as evidenced by the final denial letter, ultimately applied 309 of the INA to the decision-making."

Uncontroverted Fact	*Supporting Evidence and Objections*
	Ramsay Dep. 131:25-132:5. "Q So now we're talking about the State Department's adjudication of the applications for E.J. for a U.S. passport and a CRBA. Okay? In connection with those adjudications, did the State Department apply the criteria of section 309? A Yes." 30(b)(6) Dep. 273:2-273:7.
71. Ms. Ramsay suggested to Ms. Day that she could ask the Dvash-Banks family to provide additional biological evidence, such as DNA testing, in connection with the adjudication of the applications for E.J. and A.J.	Ramsay Dep. 60:5-60:8. ***Undisputed.***
72. During the Dvash-Banks family's interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that if they wanted to proceed with the Twins' applications, they would have to provide additional information	Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
demonstrating the biological relationship between each child and that child's U.S. citizen parent.	
73. During the Dvash-Banks family's interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that a form of additional information demonstrating the biological relationship required by the Department of State (the "State Department") is DNA evidence.	Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17. ***Undisputed.***
74. Ms. Day provided Andrew and Elad with information concerning certain DNA testing establishments from which the Toronto Consulate accepts DNA testing results.	Jan. 24 Letter from Day. ***Undisputed.***
75. By letter dated January 24, 2017 from Ms. Day to Andrew, the State Department informed the Dvash-Banks family that "in reference to your application for a U.S. passport	Jan. 24 Letter from Day; 30(b)(6) Dep. 296:11-297:3; Reffett Dep. At 67:14-69:4. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
and a [CRBA] for [A.J.] and [E.J.]… The U.S. Consulate General in Toronto has considered the evidence you submitted and concluded that the blood relationship between a U.S. citizen parent and children have not been established by a preponderance of the evidence as required to support a claim to U.S. citizenship."	
76. On January 24, 2017, following the completion of the interview of the Dvash- Banks family at the Toronto Consulate, Ms. Day designated the status of each of the Twins' applications as "pending."	Ramsay Dep. 48:24-49:10. ***Undisputed.***
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	Reffett Dep. 67:14-68:11; Day Dep. 37:4-37:23. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that in all (or even any) cases that are put in "pending status" the Department of State has "requested" certain additional information be submitted.

Uncontroverted Fact	*Supporting Evidence and Objections*
information requested by the State Department.	• Day Depo 37:4–28 Otherwise undisputed. Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
78. During the Dvash-Banks family's interview at the Toronto Consulate on January 24, 2017, Andrew told Ms. Day that "these are our children. These are our sons. I'm the dad, and . . . Elad is the dad . . . we're the parents of these boys."	Day Dep. 119:22-120:12. ***Undisputed.***
79. E.J.'s and A.J.'s applications for a CRBA and U.S. passport were adjudicated by Ms. Day under Section 309.	30(b)(6) Dep. 273:2-15; Ramsay Dep. 131:22-132:5; 132:22-133:6; 164:9-164:14. ***Disputed in part:*** Cited evidence does not establish the points made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State "appl[ied] the criteria of Section 309 in connection with those adjudications," *i.e.*, the adjudications of E.J.'s and A.J.'s applications. The 30(b)(6) witness was not the decision maker in the

Uncontroverted Fact	*Supporting Evidence and Objections*
	underlying adjudication. The testimony of Ms. Ramsay does not establish this point. *See also*: • Day Depo. 116:12–19; 231:04-233:18 Plaintiffs' Reply: Defendants' response is inconsistent with the cited testimony of Ms. Ramsay, and the testimony Defendants cite from Ms. Day is not to the contrary. See also 30(b)(6) Dep. 273:2-273:7. "Q So now we're talking about the State Department's adjudication of the applications for E.J. for a U.S. passport and a CRBA. Okay? In connection with those adjudications, did the State Department apply the criteria of section 309? A Yes." 30(b)(6) Dep. 273:2-273:7.
80. The State Department applied Section 309 in adjudicating E.J.'s applications for a U.S. passport and CRBA.	30(b)(6) Dep. 273:2-273:7. ***Disputed.*** Cited evidence does not establish the point(s) made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State "appl[ied] the criteria of Section 309 in connection with those adjudications," *i.e.*, the adjudications of E.J.'s and A.J.'s applications. The 30(b)(6)

Uncontroverted Fact	*Supporting Evidence and Objections*
	witness was not the decision maker in the underlying adjudication. Cited evidence does not establish this point. • Day Depo. 116:12–19; 231:04-233:18 Plaintiffs' Reply: The testimony of Ms. Day Defendants cite does not conflict with Statement of Fact No. 80 or with testimony of the State Department's appointed 30(b)(6) representative. Statement of Fact No. 80 is also supported by the testimony set forth below: "A. I think initially, as evidenced by her case notes, she may have considered them in wedlock because she saw a marriage certificate, but I believe after reviewing the guidance and as evidenced by the final denial letter, ultimately applied 309 of the INA to the decision-making." Ramsay Dep. 131:25-132:5.
81. The State Department applies Section 309 to CRBA applications submitted on behalf of children who the State Department considers to	30(b)(6) Dep. 186:8-186:14. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
have been born "out of wedlock."	
82. The State Department interprets Section 309 to require, among other things, proof of a biological relationship between a CRBA applicant and that child's U.S. citizen parent.	30(b)(6) Dep. 273:2-273:15. ***Undisputed.***
83. The State Department determined that Section 309 was the correct statutory section to apply in adjudicating E.J.'s applications for a U.S. passport and CRBA because E.J.'s biological parents were not married to each other.	30(b)(6) Dep. 273:2-273:15. ***Disputed in part.*** Cited evidence does not establish the points made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State "appl[ied] the criteria of Section 309 in connection with those adjudications," *i.e.*, the adjudications of E.J.'s and A.J.'s applications. The 30(b)(6) witness was not the decision maker in the underlying adjudication. • Day Depo. 116:12–19; 231:04-233:18 Plaintiffs' Reply: The testimony of Ms. Day Defendants cite does not conflict with Statement of Fact No. 83 or with testimony of the State Department's appointed 30(b)(6) representative. Statement of Fact

Uncontroverted Fact	*Supporting Evidence and Objections*
	No. 83 is also supported by the testimony set forth below: "A. I think initially, as evidenced by her case notes, she may have considered them in wedlock because she saw a marriage certificate, but I believe after reviewing the guidance and as evidenced by the final denial letter, ultimately applied 309 of the INA to the decision-making." Ramsay Dep. 131:25-132:5.
84. The State Department applies Section 301 of the INA, 8 U.S.C. § 1401 ("Section 301"), to CRBA applications submitted on behalf of children who the State Department considers to have been born "in wedlock."	30(b)(6) Dep. 186:8-186:14. ***Undisputed***.
85. The State Department interprets Section 301 to require, among other things, proof of a biological relationship between a CRBA applicant and both of his legal parents.	30(b)(6) Dep. 178:10-178:19. ***Disputed in part.*** 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

Uncontroverted Fact	*Supporting Evidence and Objections*
	Reproductive Technology (ART) cases is stated in: • 7 FAM 1110 Appendix D, AR 077–78 • 7 FAM 1120 Appendix D, AR 078–79 Plaintiffs' Reply: Defendants' response is inconsistent with the testimony cited by Plaintiffs in support of Statement of Fact No. 85, and in any event, the balance of the response does not raise a genuine issue of fact material to the resolution of Plaintiffs' motion.
86. When she was adjudicating E.J.'s applications for a CRBA and U.S. passport, Ms. Day understood, based on her review of relevant provisions of the FAM, that the State Department interprets both Section 301 and Section 309 to require a biological relationship between a U.S. citizen parent and his child.	Day Dep. 232:23-233:10; 277:18-278:2. ***Undisputed.***
87. After the January 24, 2017 interview, the Dvash-Banks proceeded to have DNA testing conducted by an establishment	Viaguard A-M Letter. ***Disputed in part.*** Disputed to the extent the statement conveys or implies that the Toronto

Uncontroverted Fact	*Supporting Evidence and Objections*
approved by the Toronto Consulate.	Consulate approved a particular establishment. The cited evidence does not establish that point. The Consulate would only accept DNA "processed by a lab that is accredited by the American Association of Blood Banks (AABB)," *see* AR 098, but that does not mean that the Consulate "approved" particular DNA testing facilities, *see id.* Plaintiffs' Reply: Plaintiffs dispute that Defendants' response raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
88. The Toronto Consulate received DNA results for E.J. and A.J.	Ramsay Dep. 54:4-54:5; Viaguard A-M Letter. ***Undisputed.***
89. The DNA results received by the Toronto Consulate reflected that one of the Twins was the biological child of Andrew and one was not.	Ramsay Dep. 54:1-54:9.

Uncontroverted Fact	*Supporting Evidence and Objections*
E. THE STATE DEPARTMENT RECOGNIZES A.J. AS A U.S. CITIZEN AT BIRTH AND REFUSES TO RECOGNIZE E.J.'S U.S. CITIZENSHIP	
90. Ms. Day approved A.J.'s applications for a CRBA and U.S. passport.	Reffett Dep. 87:15-22; Day Dep. 166:16-166:24; A.J. CRBA. ***Undisputed.***
91. The State Department issued a CRBA to A.J., dated March 2, 2017.	A.J. CRBA. ***Undisputed.***
92. By letter dated March 2, 2017, on the letterhead of the Toronto Consulate, Ms. Day informed Andrew that E.J.'s "applications [for a CRBA and U.S. passport] are denied."	Mar. 2 Letter from Day; Reffett Dep. 65:6-65:9. ***Undisputed.***
93. Ms. Day's March 2, 2017 letter to Andrew stated, in part, "after careful review of the evidence you submitted with your child's application, it has been determined that his claim to U.S. citizenship has not been satisfactorily established, as you are not his biological father. The Immigration and Nationality Act (INA) of 1952, as amended, requires, among	Mar. 2 Letter from Day. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship."	
94. Ms. Day's March 2, 2017 letter to Andrew denying E.J.'s applications for a U.S. passport and CRBA was the final determination of the applications by the State Department.	Reffett Dep. 77:14-77:17; 118:6-118:22. ***Undisputed.***
95. Ms. Day's March 2, 2017 letter terminated the application process for E.J.'s requests for a CRBA and U.S. passport with a denial and the State Department closed the files relating to E.J.'s applications.	Reffett Dep. 118:6-118:22. ***Disputed in part:*** Defendants do not dispute the part of the statement that reads: "Ms. Day's March 2, 2017 letter terminated the application process for E.J.'s requests for a CRBA and U.S. passport with a denial." Disputed to the extent the statement reads: "and the State Department closed the files relating to E.J.'s applications." Cited evidence does not establish this point. • AR 002–008 (case notes) Plaintiffs' Reply: Defendants' Response is

Uncontroverted Fact	*Supporting Evidence and Objections*
	inconsistent with the cited testimony. That testimony reads as follows: "Q. Does Ms. Day's letter dated March 2nd, 2017, reflect a final adjudication of [E.J.]'s applications for a U.S. passport and Consular Report of Birth Abroad? A. As far as the applications that were submitted here in Toronto, that letter absolutely is a final determination. In the second-to-last paragraph: '[...] therefore the applications are denied.' That is the termination of that case from that point forward. Q. So how would you describe the status of that case for the Toronto Consulate today? A. The case was denied and it is closed." Reffett Dep. 118:6-118:22.
96. The reason for the State Department's denial of E.J.'s applications for a U.S. passport and CRBA was that he did not establish a biological relationship to his U.S. citizen parent (Andrew).	Reffett Dep. 78:9-78:20. ***Undisputed.***
97. The State Department acknowledges that E.J.'s lack	30(b)(6) Dep. 298:24-299:6. ***Undisputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
of a biological relationship to Andrew was the sole reason identified for the denial of E.J.'s applications.	
98. Following the Toronto Consulate's receipt of the DNA testing results for the Twins from an approved testing establishment, the Toronto Consulate followed the FAM guidance on applications submitted on behalf of children born by means of assisted reproductive technology.	Ramsay Dep. 154:16-154:23. ***Disputed in part:*** Disputed to the extent that the statement conveys or implies that the Consulate specifically approved this or any other testing establishment. Cited evidence does not establish this proposition. • AR 098 (FAM provision setting requirement that Department may only accept DNA "processed by a lab that is accredited by the American Association of Blood Banks (AABB).") Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
99. Ms. Day granted A.J.'s applications for a U.S. passport and CRBA.	Reffett Dep. 87:15-22 ***Undisputed.***
100. As a result of the State Department's denial of E.J.'s	Pls. Disc. Responses at Interrogatory No. 5. ***This statement comprises a conclusion of law, not a statement of fact. Disputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
application, the Dvash-Banks family has suffered greatly.	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. Plaintiffs' Reply: Plaintiffs dispute that Statement of Fact No. 100 comprises a conclusion of law. Plaintiffs further assert that Defendants' response cites no contrary evidence and the evidence cited by Plaintiffs describes the several types of harm Plaintiffs and the Dvash-Banks family have suffered**.**
101. Andrew and Elad feel the indignity of the U.S. Government's refusal to recognize their marriage and the legitimacy of their children.	Pls. Disc. Responses at Interrogatory No. 5. ***Disputed in part:*** Defendants lack sufficient knowledge as to what Andrew and Elad may feel. Otherwise disputed that the U.S. government has refused to recognize their marriage or the legitimacy of their children. Plaintiffs' Reply: Plaintiffs assert that Defendants' response cites no contrary evidence.
102. The Dvash-Banks family's travel is significantly restricted	Pls. Disc. Responses at Interrogatory No. 5. ***Disputed.***

Uncontroverted Fact	*Supporting Evidence and Objections*
or impaired because E.J. entered the United States on a tourist visa, which has expired, and although E.J. now has an Advance Parole document, it does not guarantee re-entry into the United States.	• 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) Plaintiffs' Reply: Plaintiffs assert that Defendants' response cites no contrary evidence.
103. When the Dvash-Banks family has traveled, it always is with the fear that E.J., who does not have a U.S. passport, may not be permitted to re-enter the United States.	Pls. Disc. Responses at Interrogatory No. 5. ***Disputed in part:*** Defendants lack sufficient knowledge as to what Andrew and Elad may subjectively feel but dispute that the Department of State's actions were unlawful. • Dvash-Banks Depo at 61:2–63:1 (E.J. entered and exited U.S. on a Canadian passport)

Uncontroverted Fact	*Supporting Evidence and Objections*
	Plaintiffs' Reply: Plaintiffs assert that Defendants' response cites no contrary evidence.
104. The Dvash-Banks has spent substantial time consulting with lawyers, their accountant, and others about a range of issues, from E.J.'s immigration status to obtaining medical benefits and a Tax ID number for E.J., who does not have a Social Security number.	Pls. Disc. Responses at Interrogatory No. 5. ***Disputed in part:*** Undisputed that the family has spent time consulting. 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. Plaintiffs' Reply: Plaintiffs assert that Defendants' response cites no contrary evidence.
105. The Dvash-Banks family has endured, and continues to endure, the pain and stigma of the State Department's refusal to recognize Andrew's marriage to Elad and status as E.J.'s parent, and its treatment of E.J. as illegitimate.	Pls. Disc. Responses at Interrogatory No. 5. ***This statement comprises a conclusion of law, not a statement of fact, and is disputed.*** 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. Plaintiffs' Reply: Plaintiffs dispute that

Uncontroverted Fact	*Supporting Evidence and Objections*
	Statement of Fact No. 105 comprises a conclusion of law. Plaintiffs further assert that Defendants' response cites no contrary evidence and is inconsistent with the deposition testimony cited in support of Statement of Fact No. 117. *See, e.g.*, 30(b)(6) Dep. 213:20-213:25: "THE REPORTER: "I'll amend my question to say absent the possibility that some law would recognize the child as legitimate, the State Department doesn't recognize the child as legitimate, yes or no?" A Yes." 30(b)(6) Dep. 213:20-213:25.
106. They also live with the invasion of their privacy resulting from their need to commence this litigation in federal court seeking recognition of E.J.'s U.S. citizenship at birth, which could have been provided privately at the Toronto Consulate.	Pls. Disc. Responses at Interrogatory No. 5. ***Disputed.*** Allegation that Defendants invaded 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

Uncontroverted Fact	*Supporting Evidence and Objections*
	publicity, including photos of their children inside their home. • 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). Plaintiffs' Reply: Defendants' response and the evidence cited by Defendants does not dispute the proffered fact.
F. THE STATE DEPARTMENT'S POLICIES	
107. At the time of E.J.'s birth, Andrew and Elad were validly married.	Ramsay Dep. 65:15-20; 108:2-7; 108:20-109:3; 30(b)(6) Dep. 260:13-16. ***Undisputed.***
108. Andrew is E.J.'s legal parent.	Ramsay Dep. 103:7-11; 104:19-105:12; 30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5. ***Undisputed.***
109. Under the State Department's existing policies and procedures, a child is born "in wedlock" only if the two	30(b)(6) Dep. 171:1-4. ***Disputed in part:*** Disputed to the extent that the statement conveys or implies that the Department of State is applying "policies

Uncontroverted Fact	*Supporting Evidence and Objections*
biological parents are married to each other.	and procedures" as opposed to applying the Department of State's interpretation of the Immigration and Nationality Act. Otherwise undisputed. Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion. *See also* Defendants' response to Statement of Fact No. 112.
110. The State Department applies this definition of "in wedlock" when a married couple uses assisted reproduction technology.	30(b)(6) Dep. 173:19-174:2. ***Disputed.*** Cited evidence does not establish this point. • 7 FAM 1100 Appendix D ("Acquisition of U.S. Citizenship at Birth - Assisted Reproductive Technology"), AR 077–80 • 7 FAM 1110 Appendix D ¶ b ("A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock

Uncontroverted Fact	*Supporting Evidence and Objections*
	of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c).”); id. ¶ c (“A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal 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).”) Plaintiffs’ Reply: Defendants’ response is inconsistent with the cited evidence. Defendants’ position is also contradicted by the testimony set forth below. “Q. Are you aware of any changes to the biological relationship to a U.S. citizen parent requirement that have changed during your tenure at the Toronto Consulate? A. I don’t know the exact dates of changes as they have come and gone. I do -- we have touched on this issue earlier, but we

Uncontroverted Fact	*Supporting Evidence and Objections*
	have talked about the fact that the biological relationship does now include a gestational mother role, for example. Being a gestational mother does in fact meet the biological -- does in fact qualify as a biological relationship. That has been a change, but when it happened, I honestly don't know. It is not something I keep track of." Reffett Dep. 183:4-183:18.
111. When a male same-sex couple uses sperm from one parent and an egg from a donor to conceive a child during their marriage, the State Department does not consider the child born "in wedlock."	30(b)(6) Dep. 177:14-177:22; 180:2-180:9. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that a transgendered male in a same-sex relationship could have a child born "in wedlock" even with the use of an egg donor. • 30(b)(6) Dep. 178:20–179:18. Otherwise undisputed. Plaintiffs' Reply: Defendants' response is inconsistent with the cited evidence.
112. The State Department asserts that its understanding of "in wedlock" is based on the language of Section 301.	30(b)(6) Dep. 178:10-19; 180:10-15. ***Disputed.*** Cited evidence does not establish this proposition. The State Department's understanding of "in wedlock" in

Uncontroverted Fact	*Supporting Evidence and Objections*
	interpreting the INA is reflected in 7 FAM 1140 Appendix E, AR 091 (currently numbered 8 FAM § 304.1-2). *See also*: • 30(b)(6) Dep. 180:16-181:10. Plaintiffs' Reply: Statement of Fact No. 112 is consistent with the cited evidence, which is set forth below. *See also* Defendants' response to Statement of Fact No. 109. "Q And what's the basis for the State Department's position? A The Immigration and Nationality Act. Q What in particular in the Immigration and Nationality Act requires that result? A Well, we would be looking at 309 for out of wedlock, because 301(g) addresses a child born of parents, which the department has interpreted to mean both parents -- a blood relationship to both parents, a biological relationship to both parents." 30(b)(6) Dep. 178:10-19. "Q What is the basis for the State Department's position? A Again, the interpretation that section 301(g) of the INA, when it uses the

Uncontroverted Fact	*Supporting Evidence and Objections*
	language 'born of parents,' it is referring to a biological relationship to both parents." 30(b)(6) Dep. 180:10-15.
113. The State Department's understanding of "in wedlock" in interpreting the INA is reflected in 8 FAM § 304.1-2 (previously numbered 7 FAM 1140 Appendix E).	30(b)(6) Dep. 180:16-181:10. Undisputed.
114. Under the State Department's policies, E.J. and A.J. were born "out of wedlock" within the meaning of Section 309.	30(b)(6) Dep. 188:6-15; 271:20-22; 274:25-275:6. Disputed in part: Disputed to the extent that the statement conveys or implies that the Department of State applies "policies" as opposed to applying the Department of State's interpretation of the Immigration and Nationality Act. Otherwise undisputed. • 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) Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the

Uncontroverted Fact	*Supporting Evidence and Objections*
	resolution of Plaintiffs' motion. *See also* Defendants' response to Statement of Fact No. 112.
115. Under the State Department's policies, Andrew and Elad can never have a child "in wedlock" together because they are two men.	30(b)(6) Dep. 274:25-275:6. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by the Department of State to have been established at birth. • Day Depo. 232:01–233:10 (showing that distinction between "in wedlock" and "out of wedlock" did not matter to the outcome of E.J.'s adjudication) • Ex. H: A.J.'s CRBA Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
116. Under the State Department's policies, two legally married men who have always been men could never have a child "in wedlock" for purposes of	30(b)(6) Dep. 201:2-16. ***Disputed in part:*** Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by the

Uncontroverted Fact	*Supporting Evidence and Objections*
adjudicating a CRBA application.	Department of State to have been established at birth. • Day Depo. 232:01–233:10 (showing that distinction between "in wedlock" and "out of wedlock" did not matter to the outcome of E.J.'s adjudication) Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
117. Absent the possibility that the law of the country of birth or domicile of a child born to a married male same-sex couple using assisted reproductive technology provides for the child's legitimation, the State Department does not consider the child as legitimate.	30(b)(6) Dep. 211:23-213:25. ***Disputed.*** The cited evidence does not establish the statement. The Department considered E.J. and A.J. legitimate; there is no evidence to the contrary. Plaintiffs' Reply: Defendants' response is inconsistent with the cited testimony.
118. 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.	Reffett Dep. 121:22-122:7; 124:9-125:3; 157:3-4; 30(b)(6) Dep. 158:25-159:13. ***Undisputed.***

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

Uncontroverted Fact	*Supporting Evidence and Objections*
policies and FAM guidance issued by the State Department in Washington, D.C. regarding the adjudication of CRBA and passport applications.	***Undisputed.***
122. The Toronto Consulate understood the FAM guidance to require a biological relationship between the applicant for a CRBA and/or U.S. passport and the child's U.S. citizen parent.	Ramsay Dep. 154:16-154:23. ***Undisputed.***
123. The State Department interprets Section 301 to require a biological connection between a married U.S. citizen and his child born outside of the United States in order to transmit U.S. citizenship at birth to the child.	30(b)(6) Dep. 158:25-159:13. ***This statement describes as "fact" a legal position taken by the Department of State; otherwise undisputed.*** Plaintiffs' Reply: Defendants' response does not dispute the proffered fact.
124. The text of Section 301 does not contain the phrase "in wedlock."	30(b)(6) Dep. 182:21-25; 183:7-183:8. ***Undisputed***.
125. The text of Section 301 contains no reference to a "blood" relationship.	30(b)(6) Dep. 183:9-13; 191:6-14. ***Undisputed***.

Uncontroverted Fact	*Supporting Evidence and Objections*
126. 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 referring to a biological parent of the child.	30(b)(6) Dep. 178:13-19; 180:10-15. ***Disputed in part:*** Defendants dispute that the Department's interpretation of Section 301 is based only on the language itself. Otherwise undisputed. Plaintiffs' Reply: Defendants cite no contrary evidence.
127. The State Department changed its interpretation of Section 301 in 2014 to interpret "born . . . of parents" to include not only a genetic parent, but also a gestational mother who did not provide the genetic material (*i.e.*, egg) for the child.	Reffett Dep. 183:4-183:18; 30(b)(6) Dep. 166:14-166:22; Ramsay Dep. at 84:7-84:12. ***Disputed in part:*** In 2014, the Department issued policy guidance on a topic for which it had not previously published policy guidance; the issuance elaborated as to certain circumstances that were within the Department's interpretation. The Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame. • ALDAC dated January 31, 2014, AR 074–76 Otherwise undisputed. Plaintiffs' Reply: Defendants' response is

Uncontroverted Fact	*Supporting Evidence and Objections*
	inconsistent with the cited testimony.
128. Prior to that change, the State Department interpreted Section 301 as excluding from the biological relationship that the State Department requires, a gestational mother who did not provide genetic material for the child.	30(b)(6) Dep. 172:21-173:12. ***Disputed in part.*** The cited evidence does not establish this point. Undisputed that prior to that change (described in row No. 126), the State Department generally applied Section 301 so as to exclude from the biological relationship a gestational mother who did not provide genetic material for the child. In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame. Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
129. The State Department made this change even though Congress had not made any corresponding amendment of the INA because the State Department simply "changed its mind" as to its interpretation of Section 301.	30(b)(6) Dep. 243:1-4, 15-20. ***Disputed in part.*** Undisputed that Congress had not amended the law. Otherwise disputed. The cited evidence does not establish this point. In addition, the Department did not designate the witness to provide 30(b)(6) testimony on

Uncontroverted Fact	*Supporting Evidence and Objections*
	this topic during this time frame. Disputed that the Department "simply 'changed its mind.'" As new sets of facts and circumstances relating to the use of Assisted Reproductive Technology became more common, the Department reviewed and elaborated upon its relevant policy guidance. • ALDAC dated January 31, 2014, AR 074–76 Plaintiffs' Reply: Defendants' response is inconsistent with the cited testimony. Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
130. The State Department's determination to interpret Section 301 as treating a child born outside the U.S. whose U.S. citizen parent was the child's gestational mother as a U.S. citizen at birth was a policy decision made by the State Department.	30(b)(6) Dep. 175:2-5; 219:25-220:8. ***Disputed.*** The cited evidence does not establish this point. In addition, the Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame. Plaintiffs' Reply: Defendants' response is

Uncontroverted Fact	*Supporting Evidence and Objections*
	inconsistent with the cited testimony.
131. The State Department considered changing its interpretation of Section 301 to deem children born through assisted reproductive technology to same-sex couples as U.S. citizens at birth, but did not do so.	30(b)(6) Dep. 225:1-16; 229:1-8. ***Disputed.*** The cited evidence does not establish this point. 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. Plaintiffs' Reply: Plaintiffs dispute that Defendants' proffered evidence raises a genuine issue of fact material to the resolution of Plaintiffs' motion.
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.	30(b)(6) Dep. 222:11-24. ***Undisputed***.

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

Uncontroverted Fact	*Supporting Evidence and Objections*
	inconsistent with the cited testimony.
134. The State Department does not follow the decisions of any federal circuit court of appeals holding that Section 301 does not include a biological relationship requirement and does not consider itself bound to do so.	30(b)(6) Dep. 251:4-9. ***Statement contains a conclusion of law, not a statement of fact.*** Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301 by interpreting the statute in a different manner. *See* Scales v. I.N.S., 232 F.3d 1159, 1166 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005 Solis-Espinoza, 401 F.3d 1090, 1091 (9th Cir. 2005). Plaintiffs' Reply: Defendants' response does not dispute the proffered fact. Plaintiffs further dispute that Statement of Fact No. 134 comprises a conclusion of law.
135. The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), which held that Section 301 does not require a biological relationship between	30(b)(6) Dep. 249:6-20. ***Statement contains a conclusion of law, not a statement of fact.*** Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301.

Uncontroverted Fact	*Supporting Evidence and Objections*
a U.S. citizen parent and his child.	Plaintiffs' Reply: Defendants' response does not dispute the proffered fact. Plaintiffs further dispute that Statement of Fact No. 135 comprises a conclusion of law.
136. The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.	30(b)(6) Dep. 251:4-9. ***Statement contains a conclusion of law, not a statement of fact.*** Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301. Plaintiffs' Reply: Defendants' response does not dispute the proffered fact. Plaintiffs further dispute that Statement of Fact No. 136 comprises a conclusion of law.
137. The State Department does not follow the ruling of the Court of Appeals for the Second Circuit in *Jaen* v. *Sessions*, 899 F.3d 182 (2d Cir. 2018), which held that Section 301 does not require a biological relationship between	30(b)(6) Dep. 251:4-9. ***Statement contains a conclusion of law, not a statement of fact.*** Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department's interpretation of Section 301. Plaintiffs' Reply: Defendants' response

Uncontroverted Fact	*Supporting Evidence and Objections*
a U.S. citizen parent and his child.	does not dispute the proffered fact. Plaintiffs further dispute that Statement of Fact No. 137 comprises a conclusion of law.
138. The State Department's rationale for its interpretation of Section 301 is not rooted in a concern that interpreting Section 301 as not requiring a biological relationship between an applicant for a CRBA or U.S. passport who was born outside the United States and the child's United States citizen parent would create or increase the risk of fraud in connection with applications for recognition of U.S. citizenship.	30(b)(6) Dep. 317:2-8. ***Disputed.*** The cited evidence does not establish the point(s) made in the statement. • Ex. Q: 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • Reffett Depo 167:18–168:19. Plaintiffs' Reply: Defendants' response mischaracterizes the evidence. Evidence cited by Plaintiffs in support of Statement of Fact No. 138 is set forth below: "THE REPORTER[Q:]: "But should I understand you still to be saying that the State Department's view that the requirements for establishing the blood relationship between a U.S. citizen parent and a child born outside the United States is not tied really in any way to concern about fraud?"

Uncontroverted Fact	*Supporting Evidence and Objections*
	A Correct." 30(b)(6) Dep. 317:2-8.
139. The State Department's interpretation of Section 301 as requiring a genetic or gestational relationship between a U.S. citizen parent and a child is memorialized in 8 FAM § 304.1-2 (previously numbered 7 FAM 1140 Appendix E).	30(b)(6) Dep. 171:18-172:20. ***Undisputed***.
140. The FAM is not subject to notice-and- comment rule making.	30(b)(6) Dep. 244:13-18. ***Undisputed.***
141. The FAM is not approved by Congress.	30(b)(6) Dep. 244:5-6. ***Undisputed.***
142. The State Department acknowledges that the FAM policies regarding recognition of U.S. citizenship include requirements not specifically set out in the INA.	30(b)(6) Dep. 103:5-11; 104:8-11. ***Disputed.*** Disputed as incomplete. The statement refers to procedural requirements, not the legal elements for establishing U.S. citizenship. Additionally, portions of the FAM replicate provisions of the INA. *See, e.g.*, 7 FAM 1120 App. E, AR 088–89. Plaintiffs' Reply: Defendants' response

Uncontroverted Fact	*Supporting Evidence and Objections*
	mischaracterizes the evidence.
143. The FAM does not have the force of law.	30(b)(6) Dep. 244:20-244:25. ***Statement contains a conclusion of law, not a statement of fact.*** Cited evidence does not establish 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;[2] *see* 18 FAM 201.1-1(A)(a). "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. *See, e.g.*, 7 FAM 1131.2, AR 082; 7 FAM 1131.4, AR 082; 7 FAM 1120 App. E, AR 088–89. Plaintiffs' Reply: Defendants' response does not dispute the proffered fact.

[2] 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.

Uncontroverted Fact	*Supporting Evidence and Objections*
	Evidence cited by Plaintiffs in support of Statement of Fact No. 143 is set forth below: "Q Okay. Would you agree with me that the FAM does not have the force of law? MS. ANDRAPALLIYAL: Objection. Calls for a legal conclusion. Exceeds the scope. A The FAM is guidance. I do not believe it has the force of the law." 30(b)(6) Dep. 244:20-244:25.
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.	30(b)(6) Dep. 315:10-13; 320:20-321:3. ***Undisputed.***
145. The State Department acknowledges that Andrew is E.J.'s legal parent.	30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5. ***Undisputed.***
146. The State Department considers Andrew to be E.J.'s legal parent at birth under Ontario law.	30(b)(6) Dep. 268:2-5. ***Disputed in part:*** Undisputed that the 30(b)(6) witness testified as stated in the cited portion of the transcript; disputed that the Department

Uncontroverted Fact	*Supporting Evidence and Objections*
	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 time of the January 24, 2017 applications, a sufficient condition for purposes of interviewing Andrew and Elad regarding the applications. 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. See supra, Defendants' Statement of Genuine Issues of Material Facts Nos. 96. 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. See Canadian Order, AR 021–22; see also supra, Defendants' Statement of Genuine Issues of Material Facts Nos. 39. Plaintiffs' Reply: Defendants' response does not dispute the proffered fact or cite

Uncontroverted Fact	*Supporting Evidence and Objections*
	any evidence in support of the portion of Statement No. 146 which Defendants dispute. Evidence cited by Plaintiffs in support of Statement of Fact No. 146 is set forth below: "Q Okay. And does the State Department consider Andrew to be E.J.'s parent at birth under Ontario law? A His legal parent at birth, yes." 30(b)(6) Dep. 268:2-5.
147. The State Department acknowledges that Andrew and Elad are E.J.'s only legal parents.	30(b)(6) Dep. 261:16-261:18. ***Undisputed*** except to the extent that the statement conveys or implies that Andrew and Elad have always been the only persons who Ontario law recognized as legal parents of the child. See supra, Defendants' Statement of Genuine Issues of Material Facts Nos. 37, 39, 40. Plaintiffs' Reply: Defendants cite to no evidence in support of their contention.
148. The State Department acknowledges that Andrew and Elad are identified as E.J.'s parents on E.J.'s Statement of Live Birth.	30(b)(6) Dep. 260:21-261:1. ***Undisputed.***

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

II. Defendants' Asserted Uncontroverted Facts.

Uncontroverted Fact	*Supporting Evidence and Objections*
150. California recognized the validity of same-sex marriages from June 16, 2008, until the passage of Proposition 8 on November 5, 2008, and then again following the U.S. Supreme Court's June 26, 2013 decision in *Hollingsworth v. Perry*.	The Court can take judicial notice of this fact based on the background information described in *Hollingsworth v. Perry*, 570 U.S. 693, 701–04 (2013) (describing *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) and Proposition 8), and the outcome of *Hollingsworth*, 570 U.S. at 715. **DISPUTED** **OBJECTION** Defendants have not complied with the requirements for judicial notice under Fed. R. Evid. 201 and, therefore, it is unclear what Defendants are asking the court to take judicial notice of.
151. The FAM incorporates the INA.	• *See e.g.*, 7 FAM 1131.1-1(b), AR 081; 7 FAM 1131.4-1(b), AR 083; 7 FAM 1131.4-1(a), 089. **DISPUTED**

Uncontroverted Fact	*Supporting Evidence and Objections*
	OBJECTION Plaintiffs object to Statement of Fact No. 151 as mischaracterizing the evidence and Plaintiffs further object that Statement of Fact No. 151 is contradicted by evidence that the FAM is the State Department's implementing guidance for its interpretations of the INA and includes requirements not specifically set out in the INA. Cited below is additional testimony from the witness supporting Plaintiffs' objection to Statement of Fact No. 151: "Q What are those differences? A The FAM goes into much greater detail. Q By that -- when you say it goes into greater detail, do you mean that the FAM includes elements that the INA does not? A The FAM gives guidance to a universe of scenarios that are covered in the INA.· Yeah. 30(b)(6) Dep. 103:5-11. Q So, again, the question is, when you say, "goes into greater detail," does the FAM include elements that the INA does not? A Yes." 30(b)(6) Dep. 104:8-11.

Uncontroverted Fact	*Supporting Evidence and Objections*
152. Under the terms of the Surrogacy Agreement, Andrew and Elad "acknowledge[d] and agree[d] that the procedure contemplated by this Agreement are novel and new and that the law applicable to such procedures and relationships is developing and unsettled."	• Surrogacy Agmt. at Section 35.3, AR 051–52. **NOT DISPUTED**
153. The Surrogacy Agreement recognized that "the possibility exists that this Agreement may be declared void as against public policy, in whole or in part, and may be held unenforceable, in whole or in part, by an Ontario Court… ."	• Surrogacy Agmt. at Section 35.3, AR 051–52. **DISPUTED** **OBJECTION.** Plaintiffs do not dispute that the Surrogacy Agreement included the provision quoted but object that Statement of Fact No. 153 mischaracterizes the evidence to the extent that the quoted portion is a fragment of the following sentence, which reads in whole: "Although the possibility exists that this Agreement may be declared void as against public policy, in whole or in part, and may be held unenforceable, in whole or in part, by an Ontario Court, all Parties nonetheless agree that they are entering into this

Uncontroverted Fact	*Supporting Evidence and Objections*
	Agreement with the intention of being fully bound by its terms. It is the intention of all Parties to comply with the provisions of the *Assisted Human Reproduction Act*, S.C. 2004, c.2, to the extent such Act has been proclaimed into force." Surrogacy Agmt. at Section 35.3, AR 051-052.
154. The documentation submitted with E.J.'s application materials on January 24, 2017 was insufficient to show that Andrew met the residency requirements necessary to demonstrate that E.J. met the elements for recognition of citizenship at birth.	• AR 005 (consular officer's case notes indicating: "School transcripts needed to confirm Amcit father's physical presence in the US.") **DISPUTED OBJECTION.** Plaintiffs object that Statement of Fact No. 154 mischaracterizes the evidence to the extent that it does not reflect that Andrew's school transcripts ultimately were included in the Administrative Record. AR 059-61. Cited below is testimony supporting Plaintiffs' objection to Statement of Fact No. 154: "Q Okay. Is -- does the State Department agree that Andrew Dvash-Banks sufficiently demonstrated to the Toronto

Uncontroverted Fact	*Supporting Evidence and Objections*
	consulate that he met the residency requirements of section 301? A I believe that he did, yes." 30(b)(6) Dep. 274:2-274:6.
155. Ms. Day testified that it would not have made a difference to her final adjudication decision for E.J.'s applications whether she had considered the children to be born "in wedlock" or whether she had considered them to be born "out of wedlock."	• Day Depo. 232:01–233:10 **NOT DISPUTED**
156. Ms. Day testified that it would not have mattered to the outcome of the adjudication if E.J.'s applications had been adjudicated pursuant to INA 301(g) rather than INA 309(a).	• Day Depo. 232:23–233:12; 277:12–278:02. **NOT DISPUTED**
157. Ms. Ramsay also testified that it would not have made a difference to the outcome of the adjudication if Ms. Day had adjudicated EJ's applications under INA 301 instead of INA 309	• Ramsay Depo. 131:22–133:23 **NOT DISPUTED**

Uncontroverted Fact	*Supporting Evidence and Objections*
158. The Surrogacy Agreement was a contract between contacting parties consisting of Andrew, Elad, and the gestational surrogate.	• Surrogacy Agreement at 1 (AR 023) (THIS IS AN AGREEMENT made on this 21st day of December, 2015, among ANDREW DVASH-BANKS (herein called 'Andrew') –and- ELAD DVASH-BANKS (herein called 'Elad') -and- AMANDA MARIE ANNE ADAMS (herein called the 'Gestational Carrier'); *id.* Pt. II ¶ p, AR 026 (defining "Parties"). **NOT DISPUTED**[3]
159. The Surrogacy Agreement did not purport to override the local law as to legal parentage.	• Surrogacy Agmt. at Section XXXV ("Governing Law"), AR 051–52. **DISPUTED** **OBJECTION** Plaintiffs object that Statement of Fact No. 159 is not a statement of fact but a legal argument. The relevant portion of the Surrogacy Agreement cited by Defendants in support of Statement of Fact No. 159 is set forth below: "This Agreement will be governed by, subject to and construed in accordance with

[3] Plaintiffs do not dispute Statement of Fact No. 158 in any event, but submit that Defendants' appear to have inadvertently described the parties as "contacting" instead of "contracting."

Uncontroverted Fact	*Supporting Evidence and Objections*
	the laws of the Province of Ontario. The Parties to this Agreement acknowledge and agree that it is their express intention and desire to comply with the laws of the Province of Ontario and the Federal Laws of Canada." Surrogacy Agmt., Section 35.1-35.2 at AR 51.
160. The Surrogacy Agreement acknowledged that it was subject to Ontario Law.	• Surrogacy Agmt. at Section XXXV ("Governing Law"), AR 051–52. **NOT DISPUTED**
161. The Surrogacy Agreement acknowledged that the law applicable to surrogacy "procedures and relationships is developing and unsettled."	• Surrogacy Agmt. at Section 35.3, AR 051–52. **DISPUTED** **OBJECTION.** Plaintiffs object that Statement of Fact No. 161 mischaracterizes the evidence to the extent that it suggests that the quoted provision refers to any law other than the law of Ontario, Canada.
162. On January 24, 2017, Consulate Toronto provided Andrew with a letter, the "purpose" of which was "to	• Ex. J: Dvash-Banks000000031 **NOT DISPUTED**

Uncontroverted Fact	*Supporting Evidence and Objections*
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."	
163. The letter explained, "Should you wish to undergo DNA testing, which could conclusively establish whether both children are the biological children of a U.S. citizen parent, please review the enclosed flyer explaining DNA testing and the procedures under which the samples must be collected and the test conducted, including chain of custody procedures, in order for the results to be considered in connection with a citizenship claim.	• Ex. J: Dvash-Banks000000031 **NOT DISPUTED**
164. The letter also stated that "DNA testing must be conducted at a lab accredited by the American Association	• Ex. J: Dvash-Banks000000031 **NOT DISPUTED**

Uncontroverted Fact	*Supporting Evidence and Objections*
of Blood Banks in the United States," and it "[e]nclosed … a list of laboratories in the United States accredited by the AABB."	
165. The Department treats the children of same-sex couples as "born of . . . parents" for the purposes of Section 1401 when both parents have a biological connection to the children.	• 30(b)(6) Dep. 202:17–23; 333:4–17 • Ex. I: Defs.' Response to Pls.' First Set of Requests for Admission [9 at page 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 each other may have a child in wedlock for purposes of" 8 U.S.C. § 1401."). **DISPUTED** **OBJECTION** Plaintiffs object to the mischaracterization of the evidence to the extent that Statement of Fact No. 165 purports to quote the INA. See 8 U.S.C. §1401 (the words "born" and "of" do not appear next to each other in Section 1401 of the INA). Plaintiffs further object to Statement of Fact No. 165 as misleading to the extent that it suggests that

Uncontroverted Fact	*Supporting Evidence and Objections*
	both members of a same-sex male couple could be biologically related to a child. The testimony cited by Defendants in support of Statement of Fact No. 165 is set forth below: "Q Are there circumstances in which the State Department treats children born into a same-sex marriage to be children born in wedlock? A Yes. Q And what are those circumstances? A If both parents had a biological relationship to the child." 30(b)(6) Dep. 202:17-202:23. "Q Sure. In what circumstances does a child born to a same-sex female couple acquire U.S. citizenship under INA section 301(g)? A I am looking at 8 FAM 304.3-1, which I think would also answer your previous question. To read it aloud, paragraph (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

Uncontroverted Fact	*Supporting Evidence and Objections*
	an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a citizen born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c)." 30(b)(6) Dep. 333:4-333:17. Plaintiffs further object that the reference to Defendants' Response to Request for Admission No. 9 is similarly misleading and reprint in full Plaintiffs' Request for Admission No. 9 and Defendants' response below. "Request for Admission 9: Admit that under the State Department's current interpretation and application of Section 301 and Section 309, Defendants would never conclude that two men who are married to each other may have a child in wedlock for purposes of Section 301. Specific Objection: Defendants object to this RFA as vague in that 'have a child' is not a term used in Section 301 of the INA. Response: Subject to and without waiving the above-stated objection, Defendants

Uncontroverted Fact	*Supporting Evidence and Objections*
	deny and note that, under Department of State policy, cases are adjudicated under Section 301 when a child's biological parents are married to each other at the time of the birth of the child, 8 FAM 304.1-2, and each case is determined on its own set of facts."
166. Where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic mother, the Department adjudicates the child's citizenship claim under INA 301(c).	• 30(b)(6) Dep. 202:17–23 • January 31, 2014 ALDAC, AR 074–75 • 7 FAM 1110 Appx. D, AR 077-78. **NOT DISPUTED** on the understanding that SOF No. 166 is limited to current State Department policy.
167. The Department also recognizes that a child of transgender and cisgender males can have a child born in wedlock, assuming that both parents have a biological relationship to the child.	• 30(b)(6) Dep. 178:20–179:18 **NOT DISPUTED**
168. The Dvash-Banks family may pursue another avenue for documenting E.J.'s citizenship.	• 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

Uncontroverted Fact	*Supporting Evidence and Objections*
	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 receive a citizenship certification if she is within in the United States at the time.").
	DISPUTED
	OBJECTION
	Plaintiffs object to Statement of Fact No. 168 to the extent that it constitutes a legal argument or conclusion. Plaintiffs further object that Statement of Fact No. 168 is misleading to the extent that it suggests any assertion of fact concerning the hypothetical outcome of other efforts that have not been taken by the Dvash-Banks family for "documenting E.J.'s citizenship."
	Plaintiffs also object to Statement of Fact No. 168 to the extent that the words "documenting E.J.'s citizenship" mischaracterize recognition as a U.S. citizen through naturalization or by other means as the equivalent of acquisition of U.S. citizenship at birth.

Uncontroverted Fact	*Supporting Evidence and Objections*
	Plaintiffs' Request for Admission No. 10 and Defendants' response to that request is set forth below: "Request for Admission 10: Admit that for purposes of issuing certificates of citizenship in the Ninth Circuit, CIS does not require a biological connection between the child and the child's U.S. citizen parent. Response: Upon conducting a reasonable inquiry, Defendants lack knowledge to definitively answer on behalf of the U.S. Citizenship and Immigration Services ("USCIS"), which is a component of the Department of Homeland Security—an Executive agency separate from the Department of State. Defendants understand generally and admit that for those applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit case law of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000). Def.' Response to Pls.' First Set of Requests for Admission No. 10."
169. USCIS adjudicates applications for certificates of	• Ex. I: Defs.' Resp. to Pls.' First Set of Requests for Admission 10

Uncontroverted Fact	*Supporting Evidence and Objections*
citizenship domestically, and considers the jurisdiction where the applicant lives when adjudicating an application.	**NOT DISPUTED**
170. For applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000).	• Ex. I: Defs.' Resp. to Pls.' First Set of Requests for Admission 10 • 30(b)(6) Depo. 335:10–14 **DISPUTED** **OBJECTION** Plaintiffs object to Statement of Fact No. 170 on the basis that there is insufficient evidence to know how USCIS would evaluate an application it has not received. Plaintiffs' Request for Admission No. 10 and Defendants' response to that request is set forth in response to Statement of Fact No. 168. Cited below is additional testimony from the witness supporting Plaintiffs' objection to Statement of Fact No. 170: Q. Yes. At the time that the State Department sent this letter, Exhibit 27, did the State Department have an expectation that if the Dvash-Banks

Uncontroverted Fact	*Supporting Evidence and Objections*
	family applied for a Certificate of Citizenship for E.J., that USCIS would grant that application? A. It was certainly within the realm of possibility. Q. But did it have an expectation that it would be granted? A. I don't know that it would be accurate to say that we had an expectation. 30(b)(6) Dep. 318:4-318:15.
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.	• Ex. J: Defs.' Second Resp. to Pls.' First Set of Interrogatories at 22 **DISPUTED** **OBJECTION** Plaintiffs object that Statement of Fact No. 171 calls for a legal conclusion. Plaintiffs further object to Statement No.171 on the basis of lack of foundation.
172. The Department has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of fraudulent citizenship claims, because it would be difficult to identify	• Ex. Q: 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382) ("Because we regularly encounter people seeking to document children who are not theirs, we use DNA testing to verify parentage.").

Uncontroverted Fact	*Supporting Evidence and Objections*
child smuggling or illegal adoption without requiring a biological link between child applicant and the transmitting parent.	• *See also* Reffett Depo 167:18–168:19. **DISPUTED** **OBJECTION** Plaintiffs object to Statement of Fact No. 172 as mischaracterizing the testimony. Plaintiffs further object on the basis that Statement of Fact No. 172 is inconsistent with the evidence provided by Defendants. Plaintiffs also object to Statement of Fact No. 172 on the basis of hearsay and lack of foundation to the extent that it relies on DEFS001382. The testimony cited by Defendants in support of Statement of Fact No. 172 is set forth below: "Q. What are other circumstances that would give rise to doubt of putative parentage? A. I mean, every case is going to be different and this is only putative parentage as related by blood. Other things that might cause someone to question whether parentage as related by blood was potentially something they should look into, I don't want to make a huge list of these because they are fraud concerns, but

Uncontroverted Fact	*Supporting Evidence and Objections*
	things like a birth certificate that was amended later to add potentially a parent or to change some biographical information; that would be something that would be considered a red flag for an adjudicating officer and that would cause a line of questioning that wouldn't be asked of other applicants. You know, other things about whether there would be questions about whether a putative parent is related by blood, again, anything that would indicate the use of assisted reproductive technology, that will raise other questions. Anything on a birth certificate that would seem to indicate an adoption would raise questions. These all are indicators that we look at when we are looking at documents so that we are asking the correct chain of questions to get the information that we need to make the determination." Reffett Dep 167:18–168:19. Cited below is additional testimony supporting Plaintiffs' objection that

Uncontroverted Fact	*Supporting Evidence and Objections*
	Statement of Fact No. 172 is contradicted by the evidence provided by Defendants: "Q Sure. I'm just trying to understand whether any aspect of the State Department's interest in sustaining its interpretation of section 301 is rooted in an effort to prevent fraud? A No. 30(b)(6) Dep. 311:3-311:7. THE REPORTER: "But should I understand you still to be saying that the State Department's view that the requirements for establishing the blood relationship between a U.S. citizen parent and a child born outside the United States is not tied really in any way to concern about fraud?" A Correct." 30(b)(6) Dep. 317:2-317:8.

Dated: January 22, 2019

Respectfully submitted,

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION (LOS ANGELES)

ANDREW MASON DVASH-BANKS AND E.J. D.-B.,

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF ALEXA LAWSON-REMER IN SUPPORT OF PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: Hon. John F. Walter
Hearing Date: February 4, 2019
Courtroom: 7A

I, ALEXA LAWSON-REMER, declare as follows:

1. I am an attorney duly licensed by the State of California and am admitted to practice before this Court. I am Special Counsel at Sullivan & Cromwell LLP, and am one of the attorneys representing Plaintiffs *pro bono* in the above-captioned action ("Action"). I submit this declaration in support of *Plaintiffs' Reply in Further Support of Their Motion for Partial Summary Judgment* ("Partial MSJ"), filed concurrently herewith. I have personal knowledge of the facts set forth in this declaration and, if called upon, could and would testify to those facts.

2. Attached to this declaration as Exhibit U is a true and correct copy of excerpts of the *Transcript of the Deposition of Paul Peek*, the designee under Federal Rule of Civil Procedure 30(b)(6) of Defendant the United States Department of State, conducted on December 20, 2018, in Washington, D.C. as part of discovery in this Action. These excerpts are being offered to rebut certain facts asserted by Defendants in their Opposition to Plaintiffs' Partial MSJ.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 22nd day of January, 2019 in Los Angeles, California.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' MEMORANDUM OF EVIDENTIARY OBJECTIONS IN RESPONSE TO DEFENDANTS' STATEMENT OF GENUINE DISPUTES OF MATERIAL FACT

Judge: Hon. John F. Walter
Hearing Date: February 4, 2019
Courtroom: 7A

Plaintiffs submit the following memorandum of points and authorities in support of their evidentiary objections to Defendants' *Statement of Genuine Disputes of Material Fact* (ECF No. 101-1).[1]

PLAINTIFFS' GENERAL OBJECTIONS

Lacks Foundation. Plaintiffs object to the evidence proffered by Defendants to the extent that the evidence lacks proper foundation. Evidence lacking proper foundation is not admissible. Federal Rule of Evidence ("Fed. R. Evid.") 602; *see also*, *e.g.*, *Beyene* v. *Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988) ("We have repeatedly held that documents which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment." (internal quotation marks and citation omitted)); *Lincoln Nat'l Life Ins. Co.* v. *McClendon*, 230 F. Supp. 3d 1180, 1184 (C.D. Cal. 2017) ("A document which lacks a proper foundation to authenticate it cannot be used to support a motion for summary judgment."). As demonstrated below, certain of Defendants' proffered evidence lacks proper foundation and is, therefore, inadmissible for purposes of their motion for partial summary judgment.

Mischaracterizes Evidence. Plaintiffs object to Defendants' statements of fact to the extent that they mischaracterize testimony or other evidence. Factual statements that mischaracterize evidence are not admissible under Fed. R. Evid. 403 as they are misleading and result in "confus[ion] [of] the issues." *Id.* Courts do not rely on asserted facts that mischaracterize the supporting evidence. *See*, *e.g.*, *Negrete* v. *Allianz Life Ins. Co. of N. Am.*, 926 F. Supp. 2d 1143, 1155 n. 8 (C.D. Cal. 2013) ("To the extent that plaintiffs have mischaracterized various exhibits [], the Court disregards plaintiffs' contentions of fact to the contrary."); *Conroy* v. *Hewlett-Packard Co.*, 2016 WL 1276552, at *3

[1] All capitalized terms used in this memorandum have the same definitions as set forth in Plaintiffs' *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment*. (ECF No. 83-1.)

(D. Or. Mar. 31, 2016) ("To the extent the statements made in the parties' briefing differ from the facts established in the submitted depositions, declarations, and exhibits, the court will ignore the statements made in the briefing."); *Bakhit* v. *Polar Air Cargo*, 2011 WL 3443629, at *5 (N.D. Cal. Aug. 5, 2011) (rejecting the moving party's "attempts to characterize defendant's acts as unlawful practices such as discrimination and retaliation [where] the [testimony] show[ed] that defendant was focused on plaintiff's, and other pilots', performance"). Therefore, Defendants' proffered statements that mischaracterize evidence are inadmissible.

Legal Conclusions. Plaintiffs object to Defendants' statements of fact to the extent that they are legal conclusions rather than facts. Fed. R. Evid. 403 makes clear that legal conclusions are not admissible because they are misleading and result in "confus[ion] [of] the issues." *Id.* Courts do not rely on asserted facts that are legal conclusions. *See*, *e.g.*, *Fed. Ins. Co.* v. *Burlington N. & Santa Fe Ry. Co.*, 270 F. Supp. 2d 1183, 1187 (C.D. Cal. July 7, 2003) (declining to adopt "Fact 8" from the moving party's statement of uncontroverted facts, where it was "not a fact, but a legal conclusion"); *Crane* v. *AHC of Glendale, LLC*, 2016 WL 5363748, at *5 (D. Ariz. Sept. 26, 2016) (court disregarded "counsel's assertions of legal conclusions as fact . . . recogniz[ing] that Plaintiff disagree[d] with those legal conclusions" and "made its own legal conclusions").

Hearsay. Plaintiffs object to the evidence proffered by Defendants to the extent that it is inadmissible hearsay. Hearsay is not admissible unless it falls within an exclusion or exception. Fed. R. Evid. 801-807; *see also* *Boyd* v. *City of Oakland*, 458 F. Supp. 2d 1015, 1025-38 (N.D. Cal. 2006) (finding multiple statements at summary judgment stage to be inadmissible hearsay where there was no basis for a hearsay exception); *Beyene*, 854 F.2d at 1182-83 (excluding various exhibits offered by moving party in support of motion for summary judgment as inadmissible hearsay). Therefore, Defendants' proffered evidence that is hearsay

and does not come within one of the hearsay exceptions or exclusions should be excluded.

PLAINTIFFS' SPECIFIC EVIDENTIARY OBJECTIONS

Statement of Facts No. 150: Defendants assert that "California recognized the validity of same-sex marriages from June 16, 2008, until the passage of Proposition 8 on November 5, 2008, and then again following the U.S. Supreme Court's June 26, 2013 decision in *Hollingsworth v. Perry*," citing for this proposition *Hollingsworth* v. *Perry*, 570 U.S. 693, 701-04 (2013) (describing *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) and Proposition 8), and the ruling in *Hollingsworth*, 570 U.S. at 715. Defendants have not filed a request for judicial notice under Federal Rule of Evidence 201 and have not complied with that rule's requirement to supply the Court "with the necessary information." Fed. R. Evid. 201(c)(2). As a result, it is unclear what information Defendants seek the Court to take judicial notice of, whether that information constitutes "an adjudicative fact" under Fed. R. Evid. 201(a), and whether it is "subject to reasonable dispute" under Fed. R. Evid. 201(b).

Statement of Fact No. 151: Defendants assert that "[t]he FAM incorporates the INA," citing for this proposition sections of the FAM (7 FAM 1131.1-1(b), AR 081; 7 FAM 1131.4-1(b), AR 083; 7 FAM 1131.4-1(a), [AR] 089). Plaintiffs object to Defendants' Statement of Fact No. 151 as mischaracterizing the evidence to the extent that Statement of Fact No. 151 purports to suggest that the FAM merely incorporates sections of the INA without interpreting them (which interpretation lacks the force of law and may differ from that of the federal courts or other institutions) and does not supplement or depart from provisions of the INA. Plaintiffs further object that Defendants' Statement of Fact No. 151 is contradicted by evidence that the FAM is the State Department's guidance for implementing its interpretation of the INA and includes requirements not specifically set out in the INA. *See* 30(b)(6) Dep. 104:8-11 (The State

Department's designated representative testified that "the FAM include[s] elements that the INA does not").

Statement of Fact No. 153: Defendants assert that "[t]he Surrogacy Agreement recognized that 'the possibility exists that this Agreement may be declared void as against public policy, in whole or in part, and may be held unenforceable, in whole or in part, by an Ontario Court . . . .'" Defendants cite for this proposition the Surrogacy Agreement, Section 35.3 (AR 051-52). Plaintiffs do not dispute that the Surrogacy Agreement included the language quoted but object that Defendants' Statement of Fact No. 153 mischaracterizes the evidence to the extent that the quoted portion is a fragment of the following sentence, which states in in its entirety: "Although the possibility exists that this Agreement may be declared void as against public policy, in whole or in part, and may be held unenforceable, in whole or in part, by an Ontario Court, all Parties nonetheless agree that they are entering into this Agreement with the intention of being fully bound by its terms. It is the intention of all Parties to comply with the provisions of the *Assisted Human Reproduction Act*, S.C. 2004, c.2, to the extent such Act has been proclaimed into force." This language, as well as the Surrogacy Agreement's text providing that it is governed by Ontario law (Surrogacy Agmt. Section 35.1, at AR 051), taken together, more accurately reflect the evidence.

Statement of Fact No. 154: Defendants assert that "[t]he documentation submitted with E.J.'s application materials on January 24, 2017 was insufficient to show that Andrew met the residency requirements necessary to demonstrate that E.J. met the elements for recognition of citizenship at birth," citing as support for this proposition AR 005, which is the consular officer's case notes from her January 24, 2017 interview with the Dvash-Banks family at the United States Consulate in Toronto, Canada. Plaintiffs object that Defendants' Statement of Fact No. 154 mischaracterizes the evidence to the extent that it does not reflect that Andrew's school transcripts ultimately were included in the

Administrative Record (*see* AR 056-61). Indeed, as Defendants concede, Andrew ultimately met the residency requirements of Section 301(g) (30(b)(6) Dep. 274:2-274:6), and the basis for the denial of E.J.'s applications for a U.S. Passport and CRBA was not related to Andrew's residency, but instead to whether he had a biological relationship to E.J. (Opp., ECF No. 101, at 3).

Statement of Fact No. 159: Defendants assert that the "Surrogacy Agreement did not purport to override the local law as to legal parentage," citing as support for this proposition the Surrogacy Agreement, Section XXXV (AR 051-52). Plaintiffs object that Defendants' Statement of Fact No. 159 is not a statement of fact but a legal argument, because whether or not the Surrogacy Agreement can be interpreted as purporting to override local law is a legal question.

Statement of Fact No. 161: Defendants assert that the "Surrogacy Agreement acknowledged that the law applicable to surrogacy 'procedures and relationships is developing and unsettled,'" citing as support for this proposition the Surrogacy Agreement, Section 35.3 (AR 051-52). Plaintiffs object to the mischaracterization of the evidence to the extent that Defendants are suggesting that the quoted provision of the Surrogacy Agreement refers to any law other than the law of Ontario, Canada. (*See* Surrogacy Agmt. Section 35.1, at AR 051).

Statement of Fact No. 165: Defendants assert that the "Department treats the children of same-sex couples as 'born of . . . parents' for the purposes of Section 1401 when both parents have a biological connection to the children." Plaintiffs object to the mischaracterization of the evidence to the extent that Defendants' Statement of Fact No. 165 purports to quote the INA. *See* 8 U.S.C. §1401 (the words "born" and "of" do not appear next to each other). Plaintiffs further object to the mischaracterization of the evidence in Defendants' Statement of Fact No. 165 because, although Defendants deny in their Response to Plaintiffs First Set of Requests for Admission No. 9 that they "would never conclude that two men who are married to each other may have a child in wedlock for purposes

of" Section 301 of the INA, they can identify *no* situation in which the State Department would treat the children of a married same-sex male couple such as Andrew and Elad (*i.e.*, a same-sex male couple in which neither spouse is a transgender male) as "born . . . of parents" for the purposes of Section 1401. Plaintiffs also object to Defendants' Statement of Fact No. 165 as misleading to the extent that it suggests that both members of a same-sex male married couple could be biologically related to a child.

Statement of Fact No. 168: Defendants assert that the "Dvash-Banks family may pursue another avenue for documenting E.J.'s citizenship." Plaintiffs object that Defendants' Statement of Fact No. 168 is a legal argument or conclusion because the question of whether Plaintiffs may obtain relief through another agency is a legal one. Plaintiffs further object that Defendants' Statement of Fact No. 168 is misleading to the extent that it suggests any assertion of fact concerning the hypothetical outcome of other efforts that have not been taken by the Dvash-Banks family for "documenting E.J.'s citizenship." Plaintiffs also object to Defendants' Statement of Fact No. 168 to the extent that the words "documenting E.J.'s citizenship" mischaracterize recognition of U.S. citizen through naturalization or by other means as the equivalent of acquisition of U.S. citizenship at birth.

Statement of Fact No. 170: Defendants assert that, "[f]or applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000)." Plaintiffs object to Defendants' Statement of Fact No. 170 on the grounds that Defendants have conceded that they lack information to predict how the USCIS would adjudicate an application on E.J.'s behalf. *See* 30(b)(6) Tr. 318:4-318:15 ("I don't know that it would be accurate to say that [the State Department] had an expectation" that USCIS would "grant [an] application [by the Dvash-Banks

family for a certificate of citizenship for E.J.]). Accordingly, there is insufficient evidence to know how USCIS would evaluate an application it has not received and therefore lack of foundation for Statement of Fact No. 170.

Statement of Fact No. 171: Defendants assert that 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." Plaintiffs object that Defendants' Statement of Fact No. 171 calls for a legal conclusion that, when the INA was enacted, the word "parent" (outside of the adoption context) referred to a biological parent. Plaintiffs further object to Defendants' Statement of Fact No. 171 on the grounds of lack of foundation because Defendants have provided no support (other than their own conclusory statement) for the assertion that, in 1952, it was commonly understood that "parent" referred to a biological parent.

Statement of Fact No. 172: Defendants assert that the "Department has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of fraudulent citizenship claims because it would be difficult to identify child smuggling or illegal adoption without requiring a biological link between child applicant and the transmitting parent." Plaintiffs object to Defendants' Statement of Fact No. 172 as mischaracterizing the testimony, in that Ms. Reffett testified only about circumstances that would give rise to doubt of putative parentage, not that the frequency of fraudulent citizenship claims would increase if the State Department were to adopt a different interpretation of Section 301(g) of the INA. In the testimony Defendants cite, Ms. Reffett expressed reluctance to catalogue the criteria the State Department considers for fear that knowledge of that information could create a risk of fraud. To the extent Defendants characterize this testimony as stating that the blood relationship requirement was imposed by the State Department to avoid fraud, it is a distortion of her testimony. *See* Reffett Tr. 167:18-168:19. Plaintiffs further object on the grounds that Defendants' Statement of Fact No. 172 is inconsistent

with the evidence provided by Defendants, which established that the State Department's imposition of a requirement to establish a blood relationship between a U.S. citizen parent and a child born outside the United States is not tied to a concern about fraud. When asked whether the "State Department's interest in sustaining its interpretation of section 301 is rooted in an effort to prevent fraud," the State Department's 30(b)(6) deponent responded "no." 30(b)(6) Tr. 317:2-317:8. Plaintiffs also object to Defendants' Statement of Fact No. 172 on the grounds of lack of foundation to the extent that it relies on DEFS001382. Defendants have not established that the author of that document had personal knowledge about the matters described therein, as required under Fed. R. Evid. 602. Plaintiffs further object to Defendants' Statement of Fact No. 172 on the grounds of hearsay to the extent it relies on DEFS001382. Specifically, Defendants cite to an out-of-court statement in DEFS001382 ("Because we regularly encounter people seeking to document children who are not theirs, we use DNA testing to verify parentage.") to prove the truth of the matter asserted and for which there is no applicable hearsay exclusion or exception. Fed. R. Evid. 801-807. Defendants' attempt to rely on such a hearsay statement is all the more inappropriate and unreliable because Defendants have not proffered a witness during discovery to testify about such matters.[2]

Dated: January 22, 2019

Respectfully submitted,

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[2] The truth of this assertion is, at a minimum, called into question by Plaintiffs' SOF No. 144, which is undisputed: "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."

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION (LOS ANGELES)

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' RESPONSES TO DEFENDANTS' EVIDENTIARY OBJECTIONS

Judge: Hon. John F. Walter
Hearing Date: February 4, 2019
Courtroom: 7A

Plaintiffs hereby submit the following memorandum of points and authorities in response to the objections raised by Defendants in their *Memorandum in Support of Evidentiary Objections Stated in Defendants' Statement of Genuine Disputes of Material Fact* (the "Evidentiary Objections") (ECF No. 101-2) and their *Statement of Genuine Disputes of Material Fact* ("Statement of Genuine Disputes") (ECF No. 101-1).[1] Plaintiffs specifically respond to evidentiary objections Defendants raised in connection with Statement of Fact Nos. 39, 40, 45 and 63 and further address Defendants' improper attempts in their Statement of Genuine Disputes to disavow the testimony of their 30(b)(6) witness in connection with Statement of Fact Nos. 79, 80, 83, and 138.

RESPONSE TO EVIDENTIARY OBJECTIONS

Defendants' Evidentiary Objections raise hearsay objections to three sources of evidence Plaintiffs cited in support of four assertions of fact in Plaintiffs' *Statement of Uncontroverted Facts* (ECF No. 83-24), all of which are excerpts of Andrew's sworn deposition testimony taken in the Action, on December 12, 2018, in Los Angeles, California. Defendants' hearsay objections are meritless. *First*, as a threshold matter, Andrew's deposition testimony is not hearsay for purposes of summary judgment because, as the Ninth Circuit has made clear, "[d]eposition testimony, irrespective of its contents, is ordinarily hearsay when submitted at trial or a motion hearing involving live witness testimony but not in a summary judgment motion." *Orr* v. *Bank of Am., NT & SA*, 285 F.3d 764, 779 n.27 (9th Cir. 2002); *see also Harvey* v. *City of San Diego*, 2011 WL 843975, at *6 n.4 (S.D. Cal. Mar. 8, 2011) (overruling hearsay objection at summary judgment stage because "testimony is not hearsay when submitted in conjunction with [a] summary judgment motion"); *United Alloys* v. *Baker*, 2010 WL

[1] All capitalized terms used in this memorandum have the same definitions as set forth in Plaintiffs' *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment*. (ECF No. 83-1.)

11515472, at *4 (C.D. Cal. Mar. 26, 2010) ("Though deposition testimony is hearsay at a trial or motion hearing involving live witness testimony, it is not hearsay for purposes of a summary judgment motion.").[2] Because Plaintiffs cited Andrew's deposition transcript to support assertions of fact in their *Rule 56-1 Statement of Uncontroverted Facts*, the deposition transcript is not inadmissible hearsay (even though it contains Andrew's out-of-court statements offered to prove the truth of the matters asserted therein).[3]

Second, as described below, there are applicable exclusions and/or exceptions for all instances of supposed hearsay that Defendants contend are contained within the challenged portions of Andrew's deposition transcript. *See Baker*, 2010 WL 11515472, at *4 ("Though deposition testimony is . . . not hearsay for purposes of a summary judgment motion . . . the *contents* of the deposition testimony may be excluded as inadmissible hearsay.").

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[2] Indeed, Federal Rule of Evidence 802 makes clear that the rule against hearsay does not apply where other rules adopted by the Supreme Court or by Act of Congress (such as the Federal Rules of Civil Procedure) provide an exception. Fed. R. Evid. 802; *see also* Advisory Committee's Note to Fed. R. Evid. 802. Federal Rule of Civil Procedure 56(c) provides such an exception: it instructs parties "asserting that a fact cannot be . . . genuinely disputed [to] support th[at] assertion" by "citing to particular parts of materials in the record, including depositions[.]" Fed. R. Civ. P. 56(c); *see also Orr*, 285 F.3d at 779 n.27 (describing Federal Rules of Civil Procedure 56(c) and (e) as "allowing the use of deposition testimony in a summary judgment motion"); Advisory Committee's Note to Fed. R. Evid. 802 (identifying Federal Rule of Civil Procedure 56 as an exception to the rule against hearsay).

[3] Rule 56(c) provides that a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence," but Defendants do not even attempt to address whether any information in Andrew's deposition transcript could be presented as admissible evidence. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents."); *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56."). Defendants have not suggested (and there is nothing to indicate otherwise) that Andrew could not appear at trial to testify regarding the statements to which Defendants have objected.

Notably absent from Defendants' Evidentiary Objections is any articulation of why the challenged statements constitute hearsay. Plaintiffs have attempted briefly to address below any concerns suggested by Defendants' assertions of hearsay objections to this testimony:

Statement of Fact No. 39. In support for the fact that "[n]o other individual has acted as a parent to E.J. or A.J.," Plaintiffs cite, in part, to Andrew's testimony that, since Andrew, Elad, E.J., and A.J. became a family, the four of them have not lived with anyone else as a family, except for a period when they lived with Andrew's mother. There is no hearsay contained within the cited portion of Andrew's deposition transcript and thus no hearsay exception or exclusion is required. Andrew merely describes his living situation in the excerpt; he does not quote from or paraphrase any other source. This statement was made by Andrew on personal knowledge and is therefore admissible. In any event, Plaintiffs amply support Statement of Fact No. 39 by citing (in addition to Andrew's testimony) the Canadian Order and Surrogacy Agreement, neither of which Defendants have objected to on any evidentiary grounds.

Statement of Fact Nos. 40 and 45. As support for the facts that "[n]o other individual has asserted any parental rights with respect to E.J. or A.J." and that, "[u]nder the law of Ontario, Canada, Andrew and Elad are the legal parents of the Twins," Plaintiffs cite, in part, to Andrew's testimony that the Canadian Order "affirm[ed] Elad and myself's parentage to our twin boys." This statement is arguably hearsay to the extent that Andrew was paraphrasing the Canadian Order; however, Defendants do not contend that the Canadian Order—which Plaintiffs also independently cite in support of Statement of Fact Nos. 40 and 45—is inadmissible hearsay and thus Andrew's statement paraphrasing it should be admissible. Moreover, Federal Rule of Evidence 803(23)[4] provides an applicable

[4] Federal Rule of Evidence 803(23) provides that the following is not excluded by the rule against hearsay: "A judgment that is admitted to prove a

exception to the rule against hearsay because the Canadian Order is a judgment to which Plaintiffs refer to prove a matter of family history (*i.e.*, that Andrew and Elad are E.J.'s legal parents). The matter of E.J.'s legal parentage was essential to the judgment, and it "c[an] be proved by evidence of reputation" under Federal Rule of Evidence 803(19), which permits reputation evidence by family members (among others) concerning a "person's birth, . . . adoption . . . or similar facts of personal or family history."[5] Fed. R. Evid. 803(19), (23). *See* Advisory Committee Note to Fed. R. Evid. 803 (citing cases in which immigration board decisions were held admissible to prove the alienage of laborers, as a matter of pedigree, and in a proceeding for declaration of citizenship, as illustrative of the principle underlying 803(23)). Thus, Andrew's statement, to the extent that it paraphrases the Canadian Order, is not inadmissible hearsay.

Statement of Fact No. 63. As support for the fact that "[d]uring their interview at the Toronto Consulate on January 24, 2017, Frances Terri Day asked Andrew and Elad how they had conceived the Twins and whose egg and sperm had been used to conceive each of the Twins," Plaintiffs cite, in part, to Andrew's testimony that "[Ms. Day] asked [him], are your children both genetically connected to you?" Andrew's testimony regarding Ms. Day's question is not hearsay because her question was not an assertion under Federal Rule of Evidence 801(a). *See*, *e.g.*, *United States* v. *Torres*, 794 F.3d 1053 (9th Cir. 2015) (questions "may constitute non-hearsay" where the declarant does not "intend[] the question to communicate an implied assertion and the proponent [does not] offer[] it for this

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matter of personal, family, or general history, or boundaries, if the matter: (A) was essential to the judgment; and (B) could be proved by evidence of reputation."

[5] Federal Rule of Evidence 803(19) excepts the following from the rule against hearsay: "A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history."

intended message."). Here, Plaintiffs merely offer this testimony to show that Ms. Day asked Andrew whether E.J. and A.J. were genetically related to him and not in support of any implied assertion. Even if Ms. Day's question were an assertion, it would still not be hearsay under Federal Rule of Evidence 801(d)(2)[6] because it is a statement (1) offered by Plaintiffs against an opposing party (Defendants); (2) made by Ms. Day, who was an employee of the State Department at the time that the statement was made; (3) pertaining to a matter within the scope of her employment as Vice Consul at the Toronto Consulate. In any event, Defendants do not challenge the other evidence Plaintiffs cited in support of Statement of Fact No. 63, which includes the testimony of Margaret Ramsay that Andrew was asked "about how the children were conceived," (*see Plaintiffs' Statement of Uncontroverted Facts*, ECF No. 83-24, citing Ramsay Tr. 45:6-11), and Ms. Day's testimony that, during CRBA interviews, if she had any questions about how children were conceived, she "would ask [about] that . . . [and] who's biologically related to whom." (*See Plaintiffs' Statement of Uncontroverted Facts*, ECF No. 83-24, citing Day Tr. 110:22-112:11). The testimony of Ms. Ramsay and Ms. Day is sufficient support for Statement of Fact No. 63.

RESPONSE TO OBJECTIONS IN DEFENDANTS' STATEMENT OF GENUINE DISPUTES THAT CONTRADICT TESTIMONY OF DEFENDANTS' RULE 30(b)(6) REPRESENTATIVE

Defendants attempt in multiple instances in their Statement of Genuine Disputes to disavow the testimony of the State Department's designated 30(b)(6) representative. Defendants sought in essentially every way possible to avoid that testimony, at first stonewalling to such an extent that it took an order of Magistrate Judge Chooljian for Defendants to secure it. (*See* Orders on Plaintiffs'

[6] Federal Rule of Evidence 801(d)(2) provides that the following is not hearsay: "[A] statement [that was] offered against an opposing party and . . . (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed."

Motion to Compel, ECF No. 65, at p. 3.). Once it became clear that Defendants had no alternative, but to comply, they worked extensively with their designee to educate him on the matters and theories at issue. Indeed, he testified that he spent approximately twenty hours preparing for the deposition (*see* 30(b)(6) Dep. 329:16-19) and arrived at the deposition with a thick binder of materials to which he referred frequently (*see*, *e.g.*, 30(b)(6) Dep. 20:6-14). He was also subject during the deposition to extensive re-direct examination from Defendants' trial counsel. (*See*, *e.g.*, 30(b)(6) Dep. 329:3-8; 345:18-19 (spanning re-direct examination).) Now that the evidence is in, Defendants seek to pretend that the deposition never occurred, in some cases ignoring highly pertinent testimony provided by their designee under this Court's order, and in other respects outright contradicting the designee's testimony. This is improper.

Under Ninth Circuit case law, an entity generally "cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative" unless that entity provides "good reason or explanation" for the qualification or retraction of the testimony. *See* *Snapp v. United Transportation Union*, 889 F.3d 1088, 1103 (9th Cir. 2018); *see also* *Amusement Art, LLC v. Life is Beautiful, LLC*, 2016 WL 6998566, at *9 (C.D. Cal. Nov. 29, 2016) ("[A] party can[not] withdraw their representative's prior testimony with impunity. As with any other litigant, the 30(b)(6) witness faces the same uphill battle of explaining to a trier of fact any retraction or qualification of a prior admission."). Defendants have not provided any "reason or explanation" for presenting theories of the facts that differ from those outlined by their 30(b)(6) representative. As a result, Defendants may not characterize the facts, or proffer assertions—in the guise of proposed statements of fact or otherwise—in ways that are inconsistent with the testimony of that representative:

Statement of Fact Nos. 79, 80, and 83. As support for the facts that (i) "E.J.'s and A.J.'s applications for a CRBA and U.S. passport were adjudicated

by Ms. Day under Section 309;" (ii) the "State Department applied Section 309 in adjudicating E.J.'s applications for a U.S. passport and CRBA;" and (iii) the "State Department determined that Section 309 was the correct statutory section to apply in adjudicating E.J.'s applications for a U.S. passport and CRBA because E.J.'s biological parents were not married to each other," Plaintiffs cite, in part, to the Rule 30(b)(6) representative's testimony confirming that the State Department applied the criteria of Section 309 in connection with E.J.'s CRBA and U.S. passport applications. *See* 30(b)(6) Dep. 273:2-15. Defendants concede that the Rule 30(b)(6) representative's testimony was consistent with Plaintiff's proffered statements of fact; however, they then dispute Plaintiffs' assertions of fact by disavowing that testimony, stating that the "30(b)(6) witness was not the decision maker in the underlying adjudication." Having provided no reason or explanation for this disavowal, the Court should disregard it.

Statement of Fact No. 138. As support for the fact that the "State Department's rationale for its interpretation of Section 301 is not rooted in a concern that interpreting Section 301 as not requiring a biological relationship between an applicant for a CRBA or U.S. passport who was born outside the United States and the child's United States citizen parent would create or increase the risk of fraud in connection with applications for recognition of U.S. citizenship," (SOF No. 138), Plaintiffs cite, in part, to the 30(b)(6) representative's testimony confirming that the State Department's requirement of a blood relationship between a U.S. citizen parent and a child born outside the United States is not tied in any way to a concern about fraud. *See* 30(b)(6) Dep. 317:2-8. In fact, during the deposition, Plaintiffs asked Defendants' designee about this matter, and the designee unequivocally responded multiple times that the State Department's policy was in no way linked to a concern about possible fraud in the citizenship process. (*See*, *e.g.*, 30(b)(6) Dep. 234:25-235:7; 311:3-7; 317:2-8.) Nonetheless, Defendants act as if this testimony had never existed. In disputing

Plaintiffs' assertion of fact, Defendants assert that the "cited evidence does not establish the point(s) made in the statement," pointing instead to a 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382) and testimony from Ms. Reffett that Plaintiffs assert is not supportive of the point for which it is cited. Nowhere do Defendants even acknowledge the sworn deposition testimony of their Rule 30(b)(6) designee (*see* Statement of Genuine Disputes, Defendants' response to SOF No. 138), let alone provide any explanation as to why that testimony does not support Plaintiffs' assertion of fact—nor could they do so credibly. Accordingly, the Court should reject Defendants' argument disputing Plaintiffs' assertion of fact.

CONCLUSION

For the foregoing reasons, Defendants' objections to Plaintiffs' evidence should be overruled, and Defendants' arguments as to why Statement of Fact Nos. 79, 80, 83, and 138 are disputed should be rejected.

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Respectfully submitted,

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