

1 JOSEPH H. HUNT
 Assistant Attorney General
 2 ANTHONY J. COPPOLINO
 Deputy Director
 3 LISA ZEIDNER MARCUS
 Senior Counsel
 4 VINITA B. ANDRAPALLIYAL
 Trial Attorney
 5 UNITED STATES DEPARTMENT OF JUSTICE
 Civil Division, Federal Programs Branch
 6 P.O. Box 883
 Washington, DC 20044
 7 Tel: (202) 305-0845
 8 vinita.b.andrapalliyal@usdoj.gov

9 *Counsel for Defendants*

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

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

15 Plaintiffs,

16 v.

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

20 Defendants.

No. CV 18-523-JFW-JC

DEFENDANTS' REPLY IN
 SUPPORT OF MOTION FOR
 PARTIAL SUMMARY JUDGMENT

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

 I. Plaintiffs’ APA claim fails because there is an adequate, alternative
 remedy at law..... 2

 II. Defendants are entitled to summary judgment on Plaintiffs’ substantive
 due process claim..... 7

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

Alsaiddi v. U.S. Dep’t of State,
 292 F. Supp. 3d 320 (D.D.C. 2018)3

Asemanni v. U.S. Citizenship & Immigration Servs.,
 797 F.3d 1069 (D.C. Cir. 2015).....6

Astrue v. Capato ex rel. B.N.C.,
 566 U.S. 541 (2012)11

Bowen v. Massachusetts,
 487 U.S. 879 (1988)2, 3

Brittain v. Hansen,
 451 F.3d 982 (9th Cir. 2006)12

California v. Azar,
 911 F.3d 558 (9th Cir. 2018)5

Californians for Renewable Energy v. EPA,
 No. C 15-3292 SBA, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018)3

Colainni v. INS,
 490 F.3d 185 (2d Cir. 2007)11

Erotic Serv. Provider Legal Educ. & Research Project v. Gascon,
 880 F.3d 450 (9th Cir. 2018), *amended*, 881 F.3d 792 (9th Cir. 2018)10

Esparza v. Clinton,
 No. 6:12-CV-925-AA, 2012 WL 6738281 (D. Or. Dec. 21, 2012)3

Garza v. Tillerson,
 No. 1:17-cv-132, 2017 WL 8942394 (S.D. Tex. Dec. 14, 2017)
report & recommendation adopted, No. 1:17-cv-132, 2018 WL
 1934197 (S.D. Tex. Jan. 18, 2018).....4

1 *Gutierrez v. Tillerson*,
 2 No. 1:17-cv-111, 2017 WL 6044108 (S.D. Tex. Nov. 15, 2017),
 3 *report & recommendation adopted*, No. 1:17-cv-111, 2017 WL
 4 6054941 (S.D. Tex. Dec. 6, 2017) 3-4
 5 *Hinojosa v. Horn*,
 6 896 F.3d 305 (5th Cir. 2018)3
 7 *Kerry v. Din*,
 8 135 S. Ct. 2128 (2015)9
 9 *Kim v. United States*,
 10 121 F.3d 1269 (9th Cir. 1997)9
 11 *Latta v. Otter*,
 12 771 F.3d 456 (9th Cir. 2014)8
 13 *Marquez-Marquez v. Gonzales*,
 14 455 F.3d 548 (5th Cir. 2006)10
 15 *Miller v. Albright*,
 16 523 U.S. 420 (1998)7
 17 *Muttitt v. U.S. Cent. Command*,
 18 813 F. Supp. 2d 221 (D.D.C. 2011) 2-3
 19 *Ortega-Morales v. Lynch*,
 20 168 F. Supp. 3d 1228 (D. Ariz. 2016)3
 21 *Quick Korner Mkt. v. U.S. Dep’t of Agric., Food & Nutrition Serv.*,
 22 180 F. Supp. 3d 683 (S.D. Cal. 2016)2, 3
 23 *Richards v. Sec’y of State*,
 24 752 F.2d 1413 (9th Cir. 1985)2
 25 *Sackett v. EPA*,
 26 566 U.S. 120 (2012)6
 27 *Scales v. INS*,
 28 232 F.3d 1159 (9th Cir. 2000)6, 9

1 *Servin-Espinosa v. Ashcroft*,
 2 309 F.3d 1193 (9th Cir. 2002).....11
 3 *Sessions v. Morales-Santana*,
 4 137 S. Ct. 1678 (2017)9
 5 *Shanks v. Dressel*,
 6 540 F.3d 1082 (9th Cir. 2008).....12
 7 *Solis-Espinoza v. Gonzales*,
 8 401 F.3d 1090 (9th Cir. 2005).....9
 9 *United States v. Marguet-Pillado*,
 10 560 F.3d 1078 (9th Cir. 2009)..... 11, 12
 11 *Veterans for Common Sense v. Nicholson*,
 12 No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. Jan. 10, 2008).....4, 5
 13 *Washington v. Glucksberg*,
 14 521 U.S. 702 (1997)9
 15 **Statutes**
 16 5 U.S.C. § 704.....1, 2
 17 8 U.S.C. § 1103.....6
 18 8 U.S.C. § 1104.....6
 19 8 U.S.C. § 1401..... *passim*
 20 8 U.S.C. § 1401(g)..... *passim*
 21 8 U.S.C. § 1409..... *passim*
 22 8 U.S.C. § 1431(b).....11
 23 8 U.S.C. § 1433.....11
 24 8 U.S.C. § 1452.....1
 25 8 U.S.C. § 1452(a).....6
 26 8 U.S.C. § 1503(a)..... 1, 2, 4, 6
 27 22 U.S.C. § 2705.....4, 6
 28

1 **Regulations**

2 8 C.F.R. § 341.56

3 22 C.F.R. §§ 51.414

4 22 C.F.R. § 434

5 **Other Authorities**

6 Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction:*

7 *A Children's Rights Perspective*, 40 Harv. J. on Legis. 1 (2003).....10

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

INTRODUCTION

1
2 In their moving brief, Defendants explained that they are entitled to
3 summary judgment on Plaintiffs' claim under the Administrative Procedure Act
4 ("APA") as well as Plaintiffs' Declaratory Judgment Act ("DJA") claim alleging a
5 substantive due process violation. Plaintiffs' APA claim fails because alternative
6 remedies at law exist. *See* 5 U.S.C. § 704. Specifically, 8 U.S.C. § 1503(a) allows
7 Plaintiffs to seek *de novo* review of Plaintiff E.J.'s citizenship claim, and 8 U.S.C.
8 § 1452 allows Plaintiffs to seek a certificate of citizenship from U.S. Citizenship
9 and Immigration Services ("USCIS"). Plaintiffs' opposition brief argues that these
10 alternative remedies are inadequate, but it fails to explain why APA relief is
11 necessary to redress their injuries in light of section 1503(a), which provides for *de*
12 *novo* review of E.J.'s citizenship claim and a judicial declaration of citizenship, if
13 E.J. is successful. Moreover, Plaintiffs merely speculate about the potential pitfalls
14 of the certificate-of-citizenship administrative process, which allows for judicial
15 review.

16 Defendants are also entitled to summary judgment on Plaintiffs' substantive
17 due process claim, because Plaintiffs fail to establish that Defendants have
18 infringed Plaintiffs' fundamental rights; moreover, Defendants' interpretation of 8
19 U.S.C. §§ 1401(g) and 1409 survives rational-basis review. Plaintiffs argue that
20 Defendants' actions infringe on the rights of same-sex couples to marry and that
21 strict scrutiny should apply, but their arguments are unavailing: Defendants'
22 interpretation of sections 1401(g) and 1409 turn on principles of biology, not sex,
23 sexual orientation, or marriage. Plaintiffs' attempts to paint Defendants' policies as
24 irrational also fall short, as the Department of State's longstanding interpretation of
25 sections 1401(g) and 1409 is reasonable.

26
27
28

1 **ARGUMENT**

2 **I. Plaintiffs' APA claim fails because there is an adequate, alternative**
3 **remedy at law.**

4 Plaintiffs' APA claim fails because, as Defendants explained in their moving
5 brief, Plaintiffs have multiple adequate, alternative remedies at law. Plaintiffs'
6 arguments to the contrary are unpersuasive.

7 First, 8 U.S.C. § 1503(a)'s specific procedures, through which Plaintiffs
8 have brought a separate claim in this suit, provide an adequate remedy so as to
9 preclude APA review. *See* 5 U.S.C. § 704; *Bowen v. Massachusetts*, 487 U.S. 879,
10 903 (1988) (Section 704 "does not provide additional judicial remedies in
11 situations where the Congress has provided special and adequate review
12 procedures.") (internal citation omitted).

13 Under section 1503(a), "[i]f any person who is within the United States
14 claims a right or privilege as a national of the United States and is denied such
15 right or privilege" by the Department "upon the ground that he is not a national of
16 the United States," he "may institute an action" against the Department "for a
17 judgment declaring him to be a national of the United States." *Id.* Section 1503's
18 "review procedure is 'special' in the sense that it specifically encompasses the type
19 of action that Plaintiffs seek to bring here." *Quick Korner Mkt. v. U.S. Dep't of*
20 *Agric., Food & Nutrition Serv.*, 180 F. Supp. 3d 683, 695 (S.D. Cal. 2016) (quoting
21 *Bowen*, 487 U.S. at 903). And the *de novo* judicial review the statute authorizes,
22 *see Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985), supports the
23 conclusion that section 1503(a) provides an adequate remedy at law for the
24 purposes of APA review. *Quick Korner Mkt.*, 180 F. Supp. 3d at 694–95 ("Where a
25 statute affords an opportunity for *de novo* district-court review of the agency
26 action, APA review is precluded since Congress did not intend to permit a litigant
27 challenging an administrative denial . . . to utilize simultaneously both the statute's
28 review provision and the APA." (quoting *Muttitt v. U.S. Cent. Command*, 813 F.

1 Supp. 2d 221, 226–27 (D.D.C. 2011)).

2 Plaintiffs argue that while they seek “a declaration under [s]ection 1503 that
3 [E.J.] is a U.S. citizen at birth, they seek broader relief in addition to such a
4 declaration” that is not specifically authorized under section 1503(a). Pls.’ Opp’n
5 Br. at 5. Specifically, Plaintiffs also seek “a declaration that the State Department’s
6 . . . interpretation of [s]ection 301 is unlawful and unconstitutional and an
7 injunction precluding the State Department from continuing to interpret [s]ection
8 301 in that manner.” *Id.* at 5–6. But section 1503(a)’s remedies are adequate even
9 though “the APA provides for relief that Plaintiffs cannot obtain” under that
10 statute. *Quick Korner Mkt.*, 180 F. Supp. 3d at 695; *see also Californians for*
11 *Renewable Energy v. EPA*, No. C 15-3292 SBA, 2018 WL 1586211, at *11 (N.D.
12 Cal. Mar. 30, 2018) (“[T]he relief need not be identical to the APA” to be
13 considered adequate, so long as it offers more than ‘doubtful and limited relief.’”
14 (quoting *Bowen*, 487 U.S. at 901)). Indeed, courts that have examined this issue
15 have concluded that section 1503 does provide an adequate remedy even when a
16 claimant seeks prospective, injunctive relief.¹ *See Hinojosa v. Horn*, 896 F.3d 305,
17 312 (5th Cir. 2018) (Section “1503 expresses a clear congressional intent to
18 provide a specific procedure to review the Plaintiffs’ claims”, precluding Plaintiffs’
19 claims seeking declaratory and injunctive relief under the APA); *Gutierrez v.*

20
21 ¹ Plaintiffs also mischaracterize *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228
22 (D. Ariz. 2016), and *Esparza v. Clinton*, No. 6:12-CV-925-AA, 2012 WL 6738281
23 (D. Or. Dec. 21, 2012), in stating that those cases did not involve claims for
24 injunctive relief. *See* Pls.’ Opp. Br. at 6 n.9. In *Ortega-Morales*, the plaintiff *did*
25 seek injunctive relief. 168 F. Supp. 3d at 1232 (seeking an order to “compel
26 Defendants . . . to grant their applications”). And in *Esparza*, the district court
27 notes that the plaintiff is “challenging the Department of State’s denial of her
28 passport” under the APA without specifying the relief she was seeking under that
statute. 2012 WL 6738281, at *1.

Plaintiffs further mischaracterize the district court’s statements in *Alsaiddi v.*
26 *U.S. Dep’t of State*, 292 F. Supp. 3d 320 (D.D.C. 2018). The court in that case
27 noted that it was not deciding whether section 1503 was an adequate alternative
28 remedy in the context of an APA claim seeking injunctive relief, *id.* at 328–29, and
did not “expressly le[ave] open the possibility that [s]ection 1503 would not
provide an adequate remedy when a plaintiff requests ‘injunctive or any other form
of relief.’” Pls.’ Opp. Br. at 6 n.9 (quoting *Alsaiddi*, 292 F. Supp. 3d at 327–28).

1 *Tillerson*, 1:17-CV-111, 2017 WL 6044108, at *7 (S.D. Tex. Nov. 15, 2017),
2 *report and recommendation adopted*, No. 1:17-CV-111, 2017 WL 6054941 (S.D.
3 Tex. Dec. 6, 2017); *see also Garza v. Tillerson*, 1:17-CV-132, 2017 WL 8942394,
4 at *1 (S.D. Tex. Dec. 14, 2017), *report and recommendation adopted*, No. 1:17-
5 CV-132, 2018 WL 1934197 (S.D. Tex. Jan. 18, 2018).

6 Further, Plaintiffs do not meaningfully explain why APA review is
7 necessary in light of the declaratory relief available under section 1503. They
8 argue, without support, that “it remains to be seen whether the State Department
9 . . . would issue E.J. a CRBA and U.S. passport if he were to provide them with a
10 court order declaring him to be a U.S. citizen.” Pls.’ Opp’n Br. at 6. The
11 Department is of course bound by applicable judicial decisions and has been bound
12 by judicial declarations of citizenship in section 1503 cases brought in federal
13 district courts throughout the country. If the Court entered a declaration declaring
14 E.J. to be a citizen in accordance with the procedures set forth in 8 U.S.C.
15 §1503(a), under 22 U.S.C. § 2705, that judicial declaration has similar legal effect
16 to a CRBA issued by the Department or a certificate of citizenship issued by
17 USCIS. Such documentation would thus be evidence of U.S. citizenship for the
18 purposes of any future agency adjudications where proof of U.S. citizenship is
19 required—for example, a U.S. passport application. *See* 22 C.F.R. §§ 51.41, 43; 8
20 FAM 303.1-2.²

21 Plaintiffs rely heavily on an unpublished district court case, *Veterans for*
22 *Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. Jan.
23 10, 2008), in support of their argument that section 1503 does not provide an
24 adequate remedy here. But that case materially differs from the facts at bar. In
25 *Veterans for Common Sense*, the plaintiffs had brought a class action and asserted

26 ² Conversely, the Department is not bound by a court decision that does *not* apply
27 to it. To the extent the Department did not adhere to a particular circuit’s
28 interpretation of section 1401 or 1409 in adjudicating Plaintiffs’ CRBA and U.S.
passport applications, those adjudications were done abroad; Plaintiffs have not
explained, nor could they, why the Department should have applied Ninth Circuit
law (or any particular circuit’s law) to them at a time they were residing in Canada.

1 constitutional claims under the APA, and the alternative remedy at issue, available
2 through the Court of Appeals for Veterans Claims, was inadequate because that
3 court did not have jurisdiction to consider “many of Plaintiffs’ challenges . . .
4 aimed directly at the processes that the regional offices and the [Board of Veterans
5 Appeals] use to reach decisions of individual claims.” *Veterans for Common Sense*,
6 2008 WL 114919, at *7. Rather, the administrative appeals court “only has
7 jurisdiction to affirm, reverse, or remand decisions of the [Board] on individual
8 claims for benefits.” *Id.* at *7. Here, by contrast, Plaintiffs do not bring a class
9 action, nor do they bring procedural challenges that cannot be heard otherwise.
10 Also, Defendants do not seek to dismiss Plaintiffs’ constitutional claim on the basis
11 of section 1503’s remedies. Finally, section 1503 allows the Court to apply, after
12 *de novo* review, its interpretation of sections 1401 and 1409. Therefore, *Veterans*
13 *for Common Sense* does not provide a basis to conclude that section 1503 is an
14 inadequate remedy for Plaintiffs’ APA claim.

15 Plaintiffs argue that the broad relief they seek (i.e., to rectify “the statutory
16 construction/administrative policy” that led to the adjudications at issue) is not
17 available under section 1503. *See* Pls.’ Opp’n Br. at 7. Yet they claim that they do
18 not seek relief that goes beyond their own injuries, *See id.* at 8. To the extent that
19 Plaintiffs still seek to challenge the Department’s denials of E.J.’s CRBA and
20 passport applications, section 1503 is designed to address those concerns and can
21 provide the documentation of citizenship originally sought through E.J.’s CRBA
22 application; thus, section 1503 can provide complete relief to E.J. To the extent
23 Plaintiffs seek relief beyond redressing E.J.’s specific injuries, they provide no
24 meaningful reason for why such relief is legally necessary and properly available
25 now that they have a more than adequate remedy in the United States.

26 Thus, Plaintiffs’ sought-after relief provides no basis for APA review and,
27 indeed, is wholly inappropriate. *See California v. Azar*, 911 F.3d 558, 584 (9th Cir.
28 2018) (“The scope of the remedy must be no broader and no narrower than

1 necessary to redress the injury shown by the plaintiff states. The plaintiff states
2 argue that complete relief to them would require enjoining the [interim final rules]
3 in all of their applications nationwide. That is not necessarily the case.”).

4 Another alternative remedy exists in this case, in the form of a certificate of
5 citizenship from USCIS. Plaintiffs make much of the fact that this administrative
6 benefit is not a “judicial remedy” for the purposes of APA review. *See* Pls.’ Opp’n
7 Br. at 3–5. But the certificate-of-citizenship process provides for judicial review if
8 the certificate is denied.³ *See* 8 C.F.R. § 341.5; 8 U.S.C. § 1503(a). Plaintiffs
9 question the probability that the certificate would be granted. But as Defendants
10 explained, when an applicant living in the Ninth Circuit seeks certification of
11 citizenship, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d
12 1159, 1165 (9th Cir. 2000), Defs.’ Combined Stmt. of Facts 64–67, and thus it is
13 not “speculative” whether USCIS follows Ninth Circuit law in the Ninth
14 Circuit. Finally, Plaintiffs cast doubt on the value of a certificate of citizenship.
15 But certificates of citizenship may establish that the bearer acquired citizenship at
16 birth, *see* 8 U.S.C. § 1452(a), and are in all respects equivalent to a CRBA and a
17 judicial declaration of citizenship, *see* 22 U.S.C. § 2705.⁴

18 ³ Defendants acknowledge that *Sackett v. EPA*, 566 U.S. 120, 127 (2012), states
19 that “[t]he remedy for denial of action that might be sought from one agency does
20 not *ordinarily* provide an ‘adequate remedy’ for action already taken by another
21 agency.” (emphasis added). However, this case is not ordinary. USCIS, as part of
22 the Department of Homeland Security (“DHS”), is charged with making
23 citizenship determinations in the United States. *See* 8 U.S.C. § 1103. By contrast,
24 citizenship determinations sought by individuals living abroad fall within the
25 purview of the Department of State. *See* 8 U.S.C. § 1104; *see also Scales v. INS*,
232 F.3d 1159, 1165 (9th Cir. 2000) (“Because Petitioner is not a ‘person not in
the United States,’ the State Department is not the agency entrusted with the
determination of Petitioner’s citizenship.”). Plaintiffs’ claim against the
Department has thus been overtaken by events. Since Plaintiffs are in the United
States, review of Consulate Toronto’s decision is unnecessary in light of other
available remedies.

26 ⁴ Plaintiffs argue that “[c]itizenship at birth is a right, in contrast to naturalization,”
27 Pl.s’ Opp Br. at 4–5 n.8. They cite *Asemani v. U.S. Citizenship & Immigration*
28 *Servs.*, 797 F.3d 1069, 1077–78 (D.C. Cir. 2015), in support of their contention
that a certificate of citizenship is somehow inferior to a CRBA or a U.S. passport.
As an initial matter, *Asemani* does *not* stand for the proposition that the acquisition
of U.S. citizenship at birth for a foreign-born individual is a right, either statutory

1 **II. Defendants are entitled to summary judgment on Plaintiffs’ substantive**
 2 **due process claim.**

3 Defendants are also entitled to summary judgment on Plaintiffs’ substantive
 4 due process claim. Plaintiffs fail to establish a fundamental right at issue, and in
 5 resolving this constitutional claim the Court should find that Defendants’ actions
 6 pass rational-basis review.

7 Plaintiffs continue to claim that Defendants’ actions have “infringed the
 8 fundamental right to marry by denying same-sex couples and their children ‘equal
 9 dignity’ and the full constellation of rights and benefits linked to marriage.” Pls.’
 10 Opp’n Br. at 13. But as Defendants have explained, Plaintiffs incorrectly
 11 characterize the rights at issue. The Department’s understanding of the INA to
 12 require a biological connection between the foreign-born child seeking to acquire
 13 U.S. citizenship at birth and a U.S. citizen parent indisputably applies to both
 14 opposite-sex and same-sex couples, married and unmarried.⁵ See 8 FAM 301.4-

15 _____
 16 or otherwise. *Asemani* merely observes that the court is “aware of no case
 17 suggesting that an alien has the sort of fundamental right associated with obtaining
 18 naturalized citizenship status that would qualify for a constitutional entitlement to
 19 [the] fee waiver” at issue, and makes no mention of a particular right to the
 20 acquisition of citizenship at birth as a foreign-born child. Rather, as Defendants
 explained in their moving brief, “[p]ersons not born in the United States acquire
 citizenship by birth only as provided by Acts of Congress.” *Miller v. Albright*, 523
 U.S. 420, 424 (1998) (op. of Stevens, J.). Further, U.S. passports do not distinguish
 between individuals who are citizens at birth and those who are naturalized.

21 ⁵ Indeed, Plaintiffs actually challenge Defendants’ denial of E.J.’s CRBA and U.S.
 22 passport applications because Defendants applied 8 U.S.C. § 1409 instead of 8
 23 U.S.C. § 1401(g) to the applications. See, e.g., Am. Compl. ¶¶ 3–6. They do not
 24 challenge the Department’s interpretation of section 1401(g). See generally
 25 Compl., First Am. Compl. Irrespective of whether the Department decided E.J.’s
 26 applications under section 1401(g) or section 1409, it would have denied them.
 27 That is because, regardless of whether a child is considered to be born in wedlock
 28 for the purposes of section 1401(g), “[a]t least one biological parent must have
 been a U.S. citizen when the child was born” for the child to acquire U.S.
 citizenship despite being born outside of the country. 8 FAM 301.4-1(B)(1); see
 also 8 U.S.C. § 1401(g). The FAM notes that while “[c]hildren born in wedlock
 are generally presumed to be the issue of that marriage,” that presumption is
 overcome when, as here, “an actual biological relationship to a U.S. citizen parent”
 is lacking. 8 FAM 301.4-1(D)(1)(d). Plaintiffs’ focus on the application of section
 1409 thus obscures the statutory interpretation issue on which this case turns.

1 1(D)(1)(c), (D)(1)(d)(5). Indeed, that the Department’s relevant statutory
2 interpretation turns on biology, not sex or sexual orientation, is evident from the
3 Department’s approval of applications for a CRBA and passport for A.J.,
4 Andrew’s biological child.

5 The Department similarly interprets section 1409 as applicable to both
6 opposite-sex and same-sex couples in cases where a foreign-born child’s biological
7 parents are not married to each other. 8 FAM 304. Andrew is like a member of any
8 other couple, married or unmarried who, whether because of infertility, age or
9 personal choice, seeks to have and raise a child together with his or her partner or
10 spouse but without contributing his (or her) own genetic material, and so turns to a
11 third individual to be a biological parent.⁶

12 Plaintiffs later recast Defendants’ actions as infringing on the rights of *male*
13 same-sex men to marry and have children in wedlock. *See* Pls.’ Opp’n Br. at 15.
14 But in doing so, Plaintiffs concede, as they must, that the Department’s
15 interpretation does not treat same-sex couples differently from opposite-sex
16 couples. *See* 8 FAM 304.3-1(b) (recognizing a child’s acquisition of citizenship at
17 birth under 8 U.S.C. § 1401(g) where two women married to each other are U.S.
18 citizens, and one is the legal, gestational mother of the child and the other is the
19 genetic mother). Plaintiffs’ narrowed contention, however, is still meritless. It is
20 premised on the misapprehension that “[t]he INA makes the ability to transmit
21 U.S. citizenship to the child of a marriage part of the constellation of benefits
22 linked to marriage.” Pls.’ Opp’n Br. at 15. The INA does no such thing, especially
23 in the context of foreign-born children, where any right to transmit or acquire U.S.
24 citizenship, on the basis of a marriage or otherwise, is contingent at best. *See* 8
25

26 ⁶ *See Latta v. Otter*, 771 F.3d 456, 493 (9th Cir. 2014) (Berzon, J., concurring)
27 (“[B]oth same-sex and opposite-sex couples can and do produce children
28 biologically related only to one member of the couple, via assisted reproductive
technology or otherwise. And both same-sex and opposite-sex couples adopt
children, belying the notion that the two groups necessarily differ as to their
biological connection to the children they rear.”).

1 U.S.C. § 1401(g) (imposing conditions for foreign-born children to acquire U.S.
2 citizenship at birth, such as requiring U.S. citizen parents to have years of physical
3 presence in the United States); *see also Sessions v. Morales-Santana*, 137 S. Ct.
4 1678, 1687 (2017) (describing section 1401’s and section 1409’s physical-presence
5 requirements).⁷ Finally, as Defendants have explained, same-sex male couples
6 *could* have a child who acquires U.S. citizenship under section 1401(g). Defs.’
7 Combined Stmt. of Facts ¶¶ 59–60 (explaining that in certain instances, same-sex
8 male couples can have a foreign-born child who can acquire citizenship at birth
9 under section 1401(g)).

10 Plaintiffs argue that “the right of a *married* U.S. citizen to transmit
11 citizenship to his foreign-born [non-biological] child is settled law in the Ninth
12 Circuit and therefore is one of the incidents of marriage to which same-sex and
13 opposite-sex couples are equally entitled.” Pls.’ Opp’n Br. at 14 (citing *Scales* and
14 *Solis-Espinoza*). But the Ninth Circuit’s statutory interpretation of sections 1401
15 and 1409 does not create a fundamental right “so deeply rooted in our history and
16 traditions, or so fundamental to our concept of constitutionally ordered liberty,”
17 that it amounts to a fundamental right for the purposes of substantive due process
18 analysis.⁸ *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997). Because Plaintiffs
19 fail to identify a fundamental liberty or property interest at issue, strict scrutiny
20 does not apply; instead, rational-basis review governs. *Kim v. United States*, 121
21 F.3d 1269, 1273 (9th Cir. 1997).

22 _____
23 ⁷ Further, the case law does not “establish[] a free-floating and categorical liberty
24 interest in marriage . . . sufficient to trigger constitutional protection whenever a
regulation in any way touches upon an aspect of the marital relationship.” *Kerry v.*
Din, 135 S. Ct. 2128, 2135 (2015) (op. of Scalia, J.).

25 ⁸ Neither *Scales* nor *Solis-Espinoza* involved same-sex couples, and neither case
26 examined a U.S. citizen’s right to transmit citizenship to foreign-born children;
27 both cases were brought by foreign-born individuals asserting U.S. citizenship in
28 deportation proceedings. *Scales*, 232 F.3d at 1161–62; *Solis-Espinoza v. Gonzales*,
401 F.3d 1090, 1092 (9th Cir. 2005). And again, the Ninth Circuit decided both
cases as a matter of statutory interpretation. *Scales*, 232 F.3d at 1166; *Solis-*
Espinoza, 401 F.3d at 1094.

1 Plaintiffs attack the Department’s interpretation as “vastly over- and under-
2 inclusive.”⁹ Pls.’ Opp’n Br. at 16. But the Department understands Congress to
3 have included a biological requirement in both sections 1401 and 1409, which
4 applies regardless of sex, sexual orientation, or marriage status. The result of that
5 interpretation is not over- or under-inclusive, inasmuch as it is what the
6 Department believes Congress intended.

7 Plaintiffs also dispute the existence and validity of the Department’s fraud
8 concerns. But as Defendants noted, the Department is concerned about fraud in the
9 application for documentation of U.S. citizenship. Defs.’ Combined Stmt. of Facts
10 156; *see also id.* 71, 72. Plaintiffs speculate about other policies that the
11 Department could adopt to mitigate the Department’s fraud concerns, but that is
12 not the test under rational-basis review; Defendants must simply present a
13 “conceivable rational basis” for their policy. *Erotic Serv. Provider Legal Educ. &*
14 *Research Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018), *amended*, 881 F.3d
15 792 (9th Cir. 2018).

16 Plaintiffs also resist the parallels between their situation and a U.S. citizen’s
17 decision to adopt a foreign-born infant, for whom the INA specifies other
18 citizenship procedures, because “the adoption context presents different legal and
19 policy considerations given the need to account for the presence of multiple
20 different relationships.” Pls.’ Opp’n Br. at 20. But so too here, where assisted
21 reproductive technology has created complex relationships between intended
22 parents, surrogate mothers, and sperm and egg donors. *See, e.g.,* Helen M. Alvaré,
23 *The Case for Regulating Collaborative Reproduction: A Children’s Rights*
24 *Perspective*, 40 Harv. J. on Legis. 1, 2 (2003). Plaintiffs also attempt to distinguish
25 *Marquez-Marquez v. Gonzales*, 455 F.3d 548, 549 (5th Cir. 2006), *Colainni v. INS*,

26
27 ⁹ Plaintiffs make much of Defendants’ purportedly *post-hoc* justifications, but
28 “[r]ational basis review is highly deferential to the government, allowing any
conceivable rational basis to suffice. *Erotic Serv. Provider Legal Educ. &*
Research Project v. Gascon, 880 F.3d 450, 457 (9th Cir. 2018), *amended*, 881 F.3d
792 (9th Cir. 2018).

1 490 F.3d 185 (2d Cir. 2007), and *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541
2 (2012), on the facts. But they do not grapple with the relevant substance of these
3 cases: that children born abroad and adopted by U.S. citizen legal parents may only
4 acquire citizenship through derivation or naturalization after birth, *see* 8 U.S.C.
5 §§ 1431(b), 1433, even if they were adopted as infants. That the INA has separate
6 citizenship and naturalization procedures for the non-biological children of U.S.
7 citizen parents lends support to Defendants’ interpretation of section 1401(g).

8 Plaintiffs further claim that “‘the standard of rationality required’ that
9 applies whenever government action ‘violates a statutory command’ . . . is
10 ‘substantially less forgiving’ than whenever government action does not violate a
11 statutory command,” and that Defendants’ interpretation violates a statutory
12 command. Pls.’ Opp’n Br. at 21 (citing *Servin-Espinosa v. Ashcroft*, 309 F.3d
13 1193, 1198 (9th Cir. 2002)). This statement exaggerates the holding in *Servin-*
14 *Espinoza*; that case only examined “what standard of rationality is required under
15 equal protection,” not under substantive due process, and only purported to ascribe
16 a lower standard in such situations to the equal-protection standard of review. *Id.*

17 Further, the Department’s interpretation does *not* violate a statutory
18 command; it amounts to a reasonable reading of sections 1401 and 1409 that
19 differs in some respects from the Ninth Circuit’s views on the statutes. “*Born*
20 of . . . parents” (emphasis added) has an inherently biological connotation, and can
21 reasonably be read and understood to serve a similar function and purpose to the
22 “blood relationship” language of section 1409(a)—i.e., ensuring a biological
23 connection between a child and his or her parents. Moreover, “parents” as
24 understood by the legislature could only have meant “mother” and “father,” the
25 genetic contribution of both sexes being necessary to conceive a child, a person
26 who is subsequently “born of . . . parents.” *See United States v. Marguet-Pillado*,
27 560 F.3d 1078, 1083 (9th Cir. 2009) (“There can be little doubt that the ‘born of”
28

1 concept generally refers to a blood relationship.”¹⁰ Section 1401(g)’s language
2 can be seen as an indicator that in this context, Congress saw no need to be express
3 about a circumstance—a biological link between parents and child—that was
4 entirely unremarkable and therefore could be assumed. “[S]ubstantive due process
5 secures individuals from ‘arbitrary’ government action that rises to the level of
6 ‘egregious conduct,’ not from reasonable, though possibly erroneous, legal
7 interpretation.” *Brittain v. Hansen*, 451 F.3d 982, 996 (9th Cir. 2006); *see also*
8 *Shanks v. Dressel*, 540 F.3d 1082, 1089 (9th Cir. 2008).

9 CONCLUSION

10 For the foregoing reasons, the Court should grant Defendants’ motion for
11 partial summary judgment.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27 ¹⁰ Further, in describing the *Scales* and *Solis-Espinoza* decisions, the court in
28 *Marguet-Pillado* explained the “erosion of a biological nexus” in those cases as
“itself a reflection of the tradition that a man is considered to be the natural father
of a child born during wedlock.” 560 F.3d at 1083. In this case it is undisputed that
Elad, not Andrew, is E.J.’s biological father.

1 Dated: January 22, 2019

Respectfully submitted,

2 Attorneys for Defendants

3 JOSEPH H. HUNT
4 Assistant Attorney General

5 ANTHONY J. COPPOLINO
6 Deputy Director

7 By: s/ Vinita B. Andrapalliyal
8 VINITA B. ANDRAPALLIYAL
9 Trial Attorney
10 United States Department of Justice
11 Civil Division
12 Federal Programs Branch
13 P.O. Box 883, Ben Franklin Station
14 Washington, DC 20044
15 Tel: (202) 305-0845
16 Fax: (202) 616-8470
17 Email: vinita.b.andrapalliyal@usdoj.gov

18 LISA ZEIDNER MARCUS
19 Senior Counsel

20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Case No. CV 18-523-JFW-JC

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

On January 22, 2019, I served this REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT on each person or entity named below by uploading an electronic version of this document to the Court's ECF system:

ALEXA LAWSON-REMER
lawsonr@sullcrom.com
SULLIVAN & CROMWELL
1888 Century Park East, Los Angeles, CA 90067-1725
Telephone: (310) 712-6600 / Facsimile: (310) 712-8800

THEODORE EDELMAN
edelmant@sullcrom.com
JESSICA KLEIN
kleinj@sullcrom.com
SULLIVAN & CROMWELL
125 Broad Street, New York, New York 10004-2498
Telephone (212) 558-4000 / Facsimile: (212) 558-3588

IMMIGRATION EQUALITY
AARON C. MORRIS
amorris@immigrationequality.org
40 Exchange Place, Suite 1300, New York, New York, 10005-2744
Telephone: (212) 714-2904

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

Executed on January 22, 2019, at Washington, DC.

By: s/Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL
Trial Attorney
United States Department of Justice
Civil Division

1 JOSEPH H. HUNT
Assistant Attorney General
2 ANTHONY J. COPPOLINO
Deputy Director
3 LISA ZEIDNER MARCUS
Senior Counsel
4 Tel: (202-514-3336
lisa.marcus@usdoj.gov
5 VINITA B. ANDRAPALLIYAL
Trial Attorney
6 Tel: (202) 305-0845
vinita.b.andrapalliyal@usdoj.gov
7 UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
8 P.O. Box 883
Washington, DC 20044

9 *Counsel for Defendants*

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

13 ANDREW MASON DVASH-
14 BANKS, et al.,
15 Plaintiffs,
16 v.
17 MICHAEL R. POMPEO, in his
official capacity as U.S. Secretary of
18 State, et al.,
19 Defendants.

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

**COMBINED STATEMENT OF
FACTS, IN CONNECTION WITH
DEFENDANTS’ MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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

Honorable John F. Walter

20
21 Pursuant to Local Rule 56-1, and this Court’s Standing Order (ECF No. 27) and Case
22 Management Order (ECF No. 52), Defendants Secretary of State Michael R. Pompeo
23 and the U.S. Department of State (collectively, “Defendants”) respectfully submit the
24 following Combined Statement of Fact in connection with their Motion for Partial
25 Summary Judgment.
26
27
28

I. Statement of Uncontroverted Facts

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1. Andrew Mason Dvash-Banks is a dual United States / Canadian citizen.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 14:25–15:12 <p><u>NOT DISPUTED</u></p>
<p>2. Elad Austin Dvash-Banks is an Israeli citizen.</p>	<ul style="list-style-type: none"> • AR 019 <p><u>NOT DISPUTED</u></p>
<p>3. Andrew and Elad married each other in August 2010, in Toronto, Ontario. (Prior to their marriage, Andrew went by the name Andrew Mason Banks, and Elad went by the name Elad Dvash.)</p>	<ul style="list-style-type: none"> • AR 019 (marriage certificate) • AR 09 (prior names) • Dvash-Banks Depo. 29:05–08 <p><u>NOT DISPUTED</u></p>
<p>4. Andrew and Elad used Assisted Reproductive Technology (“ART”) to have E.J.; they used an anonymous egg donor to conceive E.J. and a gestational carrier to carry and give birth to E.J.</p>	<ul style="list-style-type: none"> • Plaintiffs’ Response to Defendants’ Requests for Admission Nos. 1. • Plaintiffs’ Response to Defendants’ Requests for Admission Nos. 3. <p><u>NOT DISPUTED</u></p>
<p>5. E.J. D-B, was born September 16, 2016, in Toronto, Ontario.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 29:09–14 • AR 017 <p><u>NOT DISPUTED</u></p>
<p>6. A.J. is E.J.’s biological half-brother; they share the same anonymous egg donor.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 84:14-16 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs do not dispute that A.J. and E.J. “share the same anonymous egg donor.” Plaintiffs object to the phrase</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>“biological half-brother” as mischaracterizing the testimony of Andrew Dvash-Banks to the extent that it suggests that both children were not born essentially at the same time and are not the offspring of the same marriage.</p> <p>The evidence cited by Defendants in support of SOF No. 6 is set forth below:</p> <p>“Q And you used the same egg donor for both of your sons? A We only used one egg donor. Correct.” Dvash-Banks Dep. 84:14-84:16.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement No. 6 mischaracterizes the record:</p> <p>“Q And did you at the time of implantation know whether your genetic material were -- was used to create either of those two embryos? A Did I know prior to implantation? Q Yes. A I believed at the time I did. Q And what was your understanding at the time?</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>A From the information that was provided to me from the fertility clinic, I understood that one of the embryos had my genetic material.</p> <p>Q And what was your understanding with respect to the other embryo?</p> <p>A It did not have my genetic material.</p> <p>Q Did it have your husband's genetic material?</p> <p>A Yes.”</p> <p>Dvash-Banks Dep. 84:22-85:13.</p>
<p>7. A.J. and E.J. were carried by the same surrogate; she carried them in tandem, and they were born on the same day.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 82:01–83:03 <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs do not dispute that “A.J. and E.J. were carried by the same surrogate” or that “they were born on the same day.” Plaintiffs object to the characterization that “she carried them in tandem” as mischaracterizing the testimony of Andrew Dvash-Banks to the extent that it suggests that both children were not carried during the same pregnancy by the same gestational surrogate and born essentially at the same time.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>The evidence cited by Defendants in support of Statement No. 7 is set forth below:</p> <p>BY MS. ZEIDNER MARCUS:</p> <p>Q Sure. Let me rephrase.</p> <p>Can you describe with broad strokes what occurred with respect to the surrogate from the time you spoke to the surrogacy agency until the children were born.</p> <p>A Can I describe with -- with -- what occurred with regard to the surrogate?</p> <p>Q Yes.</p> <p>A We -- from when we met the surrogate and then she selected us -- or I guess I should say, like, we selected each other. Probably better way of phrasing it. And then we “dated each other,” in quotes, for a few months just to get to know each other and be comfortable with each other. And then -- oh, and then up until the birth you’re -- you want to know --</p> <p>Q Yes.</p> <p>A -- like, the time line?</p> <p>Q Yes.</p> <p>A And then she went for medical testing at the fertility clinic and -- and then we did our</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>embryo implantation. And then lots of tests along the way during the pregnancy, some scares along the pregnancy, but luckily everything was fine with my twins. And then she gave birth to my twin boys in September. I hope that was, like, not too broad of a stroke.</p> <p>Dvash-Banks Dep. 82:01-83:3.</p>
<p>8. DNA testing later revealed that E.J. was not biologically related to Andrew; the test returned a 0% probability of paternity result.</p>	<ul style="list-style-type: none"> • Plaintiffs’ Resp. to Defendants’ Requests for Admission No. 14. • AR 062, 063 <p><u>NOT DISPUTED</u></p>
<p>9. After E.J. was born, Andrew and Elad initiated a court proceeding in Superior Court of Justice, Toronto, Ontario; that proceeding bears the Court File Number FS-16-21123. The two Respondents in the proceeding were: (a) the surrogate who gave birth to E.J., and (b) the Deputy Registrar General for the Province of Ontario, Ministry of the Attorney General, Legal Services Branch.</p>	<ul style="list-style-type: none"> • AR 022 <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>10.The Superior Court judge presiding over proceeding FS-16-21123 issued an order on September 28, 2018.</p>	<ul style="list-style-type: none"> • AR 022 <p><u>NOT DISPUTED</u></p>
<p>11.The order “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.”</p>	<ul style="list-style-type: none"> • AR 022 <p><u>NOT DISPUTED</u></p>
<p>12.The order did not state that it had retroactive effect.</p>	<ul style="list-style-type: none"> • AR 022 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object to the mischaracterization of the evidence and further object to Statement No. 12 to the extent that it mischaracterizes the parental relationship at issue. Plaintiffs also object to Statement No. 12 as a conclusion of law to the extent that Defendants seek to assert through this Statement a characterization of the legal effect of the Canadian court order. The text of the court order cited by Defendants in support of Statement No. 12 is set forth below:</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ol style="list-style-type: none"> 1. 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. 2. It is declared that the Respondent, [the gestational surrogate], is not the mother of the child. 3. The Deputy Registrar General for the Province of Ontario is directed to register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child.
<p>13.The order directed the Deputy Registrar General for the Province of Ontario “to register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child.”</p>	<ul style="list-style-type: none"> • AR 022 <p><u>NOT DISPUTED</u></p>
<p>14.Andrew, Elad, A.J., and E.J. appeared in person for the appointment at the</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 120:07–121:10 <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>Consulate Toronto on January 24, 2017.</p>	
<p>15.In advance of the appointment, he made the appointment online.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 36:15–20; 38:06–20 <p><u>NOT DISPUTED</u></p>
<p>16.During the appointment, Andrew and Elad submitted a total of four applications: two for E.J. and two for A.J.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 117:02–11 <p><u>NOT DISPUTED</u></p>
<p>17.The two applications for E.J. consisted of a CRBA application and a U.S. passport application, along with supporting materials.</p>	<ul style="list-style-type: none"> • AR 009-072 (applications and supporting materials; within this range, the CRBA application appears at AR 009-014, and the U.S. passport application appears at 068–071) <p><u>NOT DISPUTED</u></p>
<p>18.Consular Officer Terri Nathine Frances “Frankie” Day was the officer who conducted the adjudication of E.J.’s and A.J.’s applications.</p>	<ul style="list-style-type: none"> • Defendants’ Resp. to Plaintiffs’ Interrogatory Nos. 1, 2 • Day Depo 94:22–95:10 • AR 002-008 <p><u>NOT DISPUTED</u></p>
<p>19.Ms. Day interviewed the Dvash-Banks family on January 24, 2017.</p>	<ul style="list-style-type: none"> • Defendants’ Resp. to Plaintiffs’ Interrogatory Nos. 1, 2 • Day Depo 94:22–95:10 • AR 002-008 <p><u>NOT DISPUTED</u></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>20. Ms. Day made the ultimate decision to deny E.J.’s applications.</p>	<ul style="list-style-type: none"> Defendants’ Resp. to Plaintiffs’ Interrogatory Nos. 1, 2 Day Depo Day Depo 94:22–96:25 AR 001 <p><u>NOT DISPUTED</u></p>
<p>21. Consular Officer Margaret “Maggie” Ramsay assisted Ms. Day on the day of the interview, including by providing Ms. Day with relevant Foreign Affairs Manual references, and by speaking with the Dvash-Banks family toward the end of the interview.</p>	<ul style="list-style-type: none"> Defendants’ Resp. to Plaintiffs’ Interrogatory No. 1, 2 Ramsay Depo 147:14-22 Day Depo 95:11-25 AR 073 <p><u>NOT DISPUTED</u></p>
<p>22. Consular Officer Larilyn Reffett, who served as the American Citizen Services Chief at Consulate Toronto was Ms. Day’s supervisor. Ms. Reffett supervised Ms. Day during the underlying adjudication, and Ms. Day consulted with Ms. Reffett about the case.</p>	<ul style="list-style-type: none"> Defendants’ Resp. to Plaintiffs’ Interrogatory Nos. 1, 2 Reffett Depo 203:10-206:09 Day Depo 95:11-25 <p><u>NOT DISPUTED</u></p>
<p>23. The ultimate decisions on E.J.’s and A.J.’s applications were made by Ms. Day on her own.</p>	<ul style="list-style-type: none"> Day Depo 95:11-25 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object to Statement No. 23. Plaintiffs do not dispute that the “ultimate</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>decisions on E.J.’s and A.J.’s applications were made by Ms. Day”; Plaintiffs object to the characterization that she did so “on her own” as mischaracterizing the evidence to the extent that it suggests that Ms. Day acted unilaterally and without referring to the Foreign Affairs Manual and consulting with a colleague and her supervisor at the U.S. Consulate in Toronto, Canada.</p> <p>The evidence cited by Defendants in support of Statement No. 23 is set forth below:</p> <p>Q. Was anyone else involved in that adjudication? And we’ll start with E.J.</p> <p>A. Can I just say for both of them --</p> <p>Q. Sure.</p> <p>A. -- because they were -- they were treated as -- I mean, all the information that’s true for one -- in the initial interview phase, as far as I knew, it would have been true for the other. So no one was -- I mean, I consulted with my manager about the case, and she brought in Maggie Ramsay as well. But during the -- and during the interview, at a certain point, Maggie Ramsay did speak to the family. So in that</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>way, people were involved, but the ultimate decision was mine.</p> <p>Day Depo 95:11-25.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement No. 23 mischaracterizes the record:</p> <p>Q. You specifically remember looking at a FAM provision during the time that you were interviewing the Dvash-Banks family’s adults?</p> <p>A. Yes.</p> <p>Day Dep. 217:21-217:24</p>
<p>24.The application materials Andrew submitted to Consulate Toronto (prior to his interview by the consular officer) as part of E.J.’s applications identified that he and Elad had used Assisted Reproductive Technology (“ART”) to have E.J.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 172:08-15 • AR 024–056 <p><u>NOT DISPUTED</u></p>
<p>25.7 FAM 1140 Appendix D pertains to “Establishing a Biological Relationship in an ART Case.” It states: “In most cases involving assisted reproductive technology there is no shortage of documentation, and</p>	<ul style="list-style-type: none"> • AR 079 <p><u>NOT DISPUTED</u></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>consular officers are free, as in any case, to ask for appropriate supporting documentation that fits the circumstances of the case.”</p>	
<p>26.As the adjudicating officer for the Dvash-Banks family’s applications, Ms. Day viewed it to be her role and responsibility to each child’s eligibility for U.S. citizenship at birth for children born abroad.</p>	<ul style="list-style-type: none"> Day Depo 230:21–231:11 <p><u>NOT DISPUTED</u></p>
<p>27.Ms. Day consulted the Foreign Affairs Manual during her interview of the Dvash-Banks family.</p>	<ul style="list-style-type: none"> Day Depo 217:09-24; 220:03-06; 235:17–23. AR 073 <p><u>NOT DISPUTED</u></p>
<p>28.During the interview, Ms. Day concluded that it was unclear which (if either) of the children, E.J. and A.J., had a biological relationship to the U.S. citizen father (Andrew).</p>	<ul style="list-style-type: none"> Day Depo. 245:02–16 <p><u>NOT DISPUTED</u></p>
<p>29.Ms. Day told Andrew and Elad that they had options for how to proceed.</p>	<ul style="list-style-type: none"> Day Depo. 253:04–25 <p><u>NOT DISPUTED</u></p>
<p>30.She explained that they did not have to get a DNA test for E.J. and A.J. if they did not want to do so, but that she would not be able to approve E.J.’s or</p>	<ul style="list-style-type: none"> Day Depo. 253:04–25 <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>A.J.’s applications without information from such a test.</p>	
<p>31.She suggested to the Dvash-Banks family other ways that they could potentially have E.J. and A.J. documented as U.S. citizens.</p>	<ul style="list-style-type: none"> • Day Depo. 108:06–21 • Dvash-Banks00000031 (letter from Vice Consul Frankie Day to Andrew Dvash-Banks, dated Jan. 24, 2017) <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object to the mischaracterization of the evidence. Defendants assert that Dvash-Banks00000031, which Defendants cite in support of Statement No. 31, contains no support for Statement No. 31. Plaintiffs further object to Statement No. 31 to the extent that the words “documented as U.S. citizens” mischaracterizes recognition as a U.S. citizen through naturalization or other means as being the equivalent of acquisition of U.S. citizenship at birth.</p>
<p>32.She explained that the Dvash-Banks family had 90 days to provide to the Consulate any additional information or evidence supporting the applications.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 152:10-13 • Dvash-Banks00000031 (letter from Vice Consul Frankie Day to Andrew Dvash-Banks, dated Jan. 24, 2017) <p><u>NOT DISPUTED</u></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 33.Andrew and Elad chose to pursue 2 DNA testing, and the results were 3 submitted directly to the Consulate 4 Toronto. 5</p>	<p>• AR 62–66 <u>NOT DISPUTED</u></p>
<p>6 34.The DNA results showed a 0% 7 probability of paternity with respect to 8 the question whether Andrew was a 9 biological parent of E.J.</p>	<p>• AR 62, 63 <u>NOT DISPUTED</u></p>
<p>10 35.On March 2, 2017, Ms. Day issued a 11 letter denying E.J.’s applications for a 12 CRBA and a U.S. passport.</p>	<p>• AR 001 <u>NOT DISPUTED</u></p>
<p>13 36.The letter explained “that after careful 14 review of the evidence” Andrew 15 submitted with E.J.’s application, it 16 had been determined that E.J.’s claim 17 to U.S. citizenship had not been 18 satisfactorily established, as Andrew 19 is “not his biological father.”</p>	<p>• AR 001 <u>NOT DISPUTED</u></p>
<p>20 37.Under Department of State policy, 21 applicants for CRBAs and U.S. 22 passports have the burden of proving 23 that they are citizens of the United 24 States, among other requirements.</p>	<p>• AR 096–097 (7 FAM App’x A ¶ a (citing 22 C.F.R. § 51.23 and 22 C.F.R. § 51.40)) <u>NOT DISPUTED</u></p>
<p>25 38.Ms. Day testified that she does not 26 remember whether she adjudicated 27 28</p>	<p>• Day Depo. 116:12–19; 231:04– 233:18 <u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
E.J.’s applications as “in wedlock” or “out of wedlock.”	
<p>39.Regardless of whether E.J. was considered born “in wedlock” or “out of wedlock” for purposes of adjudicating his U.S. citizenship claim, it was—in Ms. Day’s view as the adjudicating officer—necessary for E.J. to have a biological connection to the U.S. citizen father (Andrew) in order for E.J. to acquire U.S. citizenship at birth.</p>	<ul style="list-style-type: none"> • Day Depo 232:01–11 <p><u>NOT DISPUTED</u></p>
<p>40.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.”</p>	<ul style="list-style-type: none"> • Day Depo. 232:01–233:10 <p><u>NOT DISPUTED</u></p>
<p>41.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).</p>	<ul style="list-style-type: none"> • Day Depo. 232:23–233:12; 277:12–278:02. <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>42. Ms. Reffett testified that a biological relationship is always required, regardless of whether the child’s legal parents are married to each other.</p>	<ul style="list-style-type: none">• Reffett Depo. 153:06-15; 156:10–19; 122:17–123:17; 124:09–22 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object to the mischaracterization of the evidence and further object to Statement No. 42 to the extent that it mischaracterizes the testimony by not indicating that the testimony referred to the FAM and to the Quick Reference Citizenship Chart Ms. Reffett created listing requirements from the FAM. Two passages of testimony cited by Defendants as evidence in support of Statement No. 6 are set forth below:</p> <p>Q. And you understand the Immigration and Nationality Act to require that even if the child’s legal parents are married to each other?</p> <p>A. That is not my understanding that that is the guidance from the Department of State. The Department of State, as referenced on our website, as in all of the information that is publicly available, requires that there be a</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>biological relationship between the U.S. citizen parent and a child who is not born in the United States.</p> <p>Q. Regardless of whether the parents are married?</p> <p>A. Correct.</p> <p>Reffett Tr. 124:09-124:22.</p> <p style="padding-left: 40px;">Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement No. 42 mischaracterizes the record:</p> <p>Q. When you described the row entitled “One Amcit in Wedlock” in the Quick Reference Citizenship Chart Bates-stamped Defendants 684, you testified that you understand the words “in wedlock” to require a biological tie to both married parents; correct?</p> <p>A. This is the guidance that is given to us by the Department. It is not my interpretation. It is the guidance as it is put forward for officers who are adjudicating.</p> <p>Reffett Tr. 153:06-153:15.</p>
<p>43.Ms. Ramsay testified that she believes—based on Ms. Day’s case</p>	<ul style="list-style-type: none"> • Ramsay Depo. 131:22–133:23 <p><u>NOT DISPUTED</u></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>notes—that Ms. Day initially considered E.J. to be born “in wedlock.”</p>	
<p>44.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.</p>	<ul style="list-style-type: none"> • Ramsay Depo. 131:22–133:23 <p><u>NOT DISPUTED</u></p>
<p>45.Ms. Day understood Department of State implementation of the Immigration and Nationality Act to require a biological connection between an American citizen parent and the applicant child that a biological connection between the American citizen father (Andrew) and E.J. would have been required under either INA 301(g) or INA 309(a).</p>	<ul style="list-style-type: none"> • Day Depo. 232:23–233:10 <p><u>NOT DISPUTED</u></p>
<p>46.Ms. Day’s understanding of the biological relationship requirement was based on the Foreign Affairs Manual (“FAM”).</p>	<ul style="list-style-type: none"> • Day Depo. 233:06–12 <p><u>NOT DISPUTED</u></p>
<p>47.In Ms. Day’s view the FAM was not completely separated from the Immigration and Nationality Act of 1952—the FAM included quotations</p>	<ul style="list-style-type: none"> • Day Depo. 233:19–234:20; 237:09–15 <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>from the INA; the FAM described INA provisions in addition to quoting them; and FAM provisions incorporated the INA.</p>	
<p>48.7 FAM 1131.4-1(d) (AR 083-084) provides that “Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen ‘parent’ is biologically related to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include, but are not limited to: ... The child was born through surrogacy or other forms of assisted reproductive technology.”</p>	<ul style="list-style-type: none"> • AR 083–084 <p><u>NOT DISPUTED</u></p>
<p>49.According to Department of State guidance in effect at the time of the adjudication at 7 FAM 1120 Appendix D ¶ f: When a child is born abroad to a surrogate, and the child’s genetic</p>	<ul style="list-style-type: none"> • AR 078 <p><u>NOT DISPUTED</u></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 parents are a U.S. citizen father and an 2 anonymous egg donor, the child “is 3 considered for citizenship purposes to 4 be a person born out of wedlock of a 5 U.S. citizen father, with a citizenship 6 claim adjudicated under INA 309(a). 7 This is the case regardless of whether 8 the man is married and regardless of 9 whether his spouse is the legal parent 10 of the child at the time of birth.” 11</p>	
<p>12 50.The Department of State’s Foreign 13 Affairs Manual defines the term “in 14 wedlock” as follows: “To say a child 15 was born ‘in wedlock’ means that 16 child’s biological parents were 17 married to each other at the time of the 18 birth of the child.”</p>	<p>• AR 091 (7 FAM 1140 App’x E ¶ c). <u>NOT DISPUTED</u></p>
<p>19 51.The Department of State’s definition 20 of “in wedlock” does not consider 21 whether a child’s legal parents were 22 married to each other at the time of the 23 child’s birth.</p>	<p>• AR 091 (7 FAM 1140 App’x E ¶ c). <u>NOT DISPUTED</u></p>
<p>24 52.Andrew asserts that the Department of 25 State rejected E.J.’s citizenship status 26 because the Department views E.J. as 27 a child born out of wedlock; he 28</p>	<p>• Dvash-Banks Depo. 161:01–162:17 <u>DISPUTED</u> <u>OBJECTION</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>believes this has something to do with his marriage.</p>	<p>Plaintiffs object to the mischaracterization of the evidence. The evidence cited by Defendants in support of Statement No. 23 is set forth below:</p> <p>Q And do you know what legal claims you are pursuing in connection with this litigation?</p> <p>A I'm aware of -- I mean, I'm not a lawyer; right? But I'm aware of my claims, yeah.</p> <p>Q From your perspective, generally speaking, what are your claims against the Department of State?</p> <p>A From my perspective, my claim against the Department of State is that my son EJ was refused United States citizenship by the U.S. state department. And my claim is that -- that we were wrong and treated unfairly, and that's an unfair --</p> <p>how do I say this? And -- and that he was refused American citizenship because he's considered a child born out of wedlock. And his twin brother born four minutes before him was granted American citizenship.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>I know our claim is, like, many, many pages long. I hope I did an okay job in summarizing it.</p> <p>Q It's not a test.</p> <p>A Okay.</p> <p>Q Do you have -- do you know whether you have a claim against the Department of State relating to a fundamental right that you have -- that you believe that you have?</p> <p>MS. LAWSON-REMER: Objection. Calls for a legal opinion, but he can answer if he knows.</p> <p>THE WITNESS: That I have a --</p> <p>BY MS. ZEIDNER MARCUS:</p> <p>Q Do you know whether you have any claims relating to any fundamental rights of yours?</p> <p>A The claim, I believe, also addresses the discrimination aspects that we -- that we experienced and that is part of the decision to reject my son's citizenship, if that answers your question.</p> <p>Q Do you know whether you have any claims relating to your marriage?</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>A I believe the claim is related to our marriage in the sense that the state department has rejected my son’s citizenship because they view him as a child born out of wedlock.</p> <p>Dvash-Banks Dep. 161:01-162:17.</p>
<p>53.Andrew testified that the Department’s decision to deny E.J.’s application did not harm Andrew’s ability to be married to Elad.</p>	<ul style="list-style-type: none"> • Dvash-Banks Depo. 162:12–163:04. <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object to the mischaracterization of the evidence. The evidence cited by Defendants in support of Statement No. 53 is set forth below:</p> <p>Q Do you know whether you have any claims relating to your marriage?</p> <p>A I believe the claim is related to our marriage in the sense that the state department has rejected my son’s citizenship because they view him as a child born out of wedlock.</p> <p>Q Do you think that that harms your marriage?</p> <p>A Harms my marriage in what way?</p> <p>MS. LAWSON-REMER: Objection.</p> <p>Vague.</p> <p>Ambiguous.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>BY MS. ZEIDNER MARCUS:</p> <p>Q Does it harm your ability to be married to your husband?</p> <p>A It doesn't change the status of my marriage to my husband. It harms us in many other ways. But the marriage -- my marriage to my husband is solid.</p> <p>Dvash-Banks Depo. 162:12-163:04.</p>
<p>54.Ms. Day testified that she considers the term “parents” to be a “very broad term”; in adjudicating E.J.’s applications, she did not consider it her role to determine whether Andrew and Elad were the “parents” of E.J.</p>	<ul style="list-style-type: none"> • Day Depo. 224:18–228:06 • Day Depo. 228:07–229:16 <p><u>NOT DISPUTED</u></p>
<p>55.Ms. Day considered Andrew and Elad to be E.J.’s parents.</p>	<ul style="list-style-type: none"> • Day Depo. 229:02-16 <p><u>NOT DISPUTED</u></p>
<p>56.Andrew is E.J.’s legal parent under the law of Ontario, Canada.</p>	<ul style="list-style-type: none"> • Defs’ Resp. to Pls.’ Request for Admission 18. <p><u>NOT DISPUTED</u></p>
<p>57.In testifying about the range of CRBA and U.S. passport adjudications she handled during her time in the American Citizenship Services unit at Consulate Toronto, Ms. Day testified that the use of Assisted Reproductive Technology did not exclusively arise</p>	<ul style="list-style-type: none"> • Day Depo. 79:25–80:17; 243:05–14 <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object that the evidence is disputed to the extent that Statement No. 57 asserts or suggests that Ms. Day initiated with opposite sex couples discussion of</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>in connection with applications in which the legal parents of the applicant child were in a same-sex marriage; it also arose in connection with applications in which the legal parents of the applicant child were in an opposite-sex marriage.</p>	<p>whether they used assisted reproductive technology.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs' objection that Statement No. 57 is disputed:</p> <p>Q. And when you talk about whether you had a question as to the biological tie, was that a subjective determination that you made during the course of the interview, for example?</p> <p>A. I would say no, because the -- from my understanding, the biological connection is required to transmit the citizenship. So if -- you know, someone -- so that's not really -- you can't really argue that point to say, well, maybe -- you know, kind of make a judgment call. I think it's very clear what this -- what the guidelines are. So I would say that if the parent indicated to me that -- which is normally, like I said, how that would go about. If the parent indicated to me that they had used assisted reproductive technology, then we would go down that line of questioning, if I thought that -- if I saw that this was something that had, you know, had happened.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	Day. 80:18-81:11.
<p>58.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.</p>	<ul style="list-style-type: none"> • Peek Dep. 202:17–23; 333:4–17 • Defs.’ Response to Pls.’ First Set of Requests for Admission 10 (denying that “under the State Department’s] current interpretation and application of” 8 U.S.C §§ 1401 and 1409, “Defendants would never conclude that two men who are married to each other may have a child in wedlock for purposes of” 8 U.S.C. § 1401.”). <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object to the mischaracterization of the evidence to the extent that Statement No. 58 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 the mischaracterization of the evidence in Statement No. 58. Plaintiffs also object to Statement No. 58 as misleading to the extent that it suggests that both members of</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>a same-sex male couple could be biologically related to a child.</p> <p>The testimony cited by Defendants in support of Statement No. 58 is set forth below:</p> <p>Q Are there circumstances in which the State Department treats children born into a same-sex marriage to be children born in wedlock?</p> <p>A Yes.</p> <p>Q And what are those circumstances?</p> <p>A If both parents had a biological relationship to the child.</p> <p>Peek [30(b)(6)] Dep. 202:17-202:23.</p> <p>Q Sure. In what circumstances does a child born to a same-sex female couple acquire U.S. citizenship under INA section 301(g)?</p> <p>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 an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother,</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>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).” Peek [30(b)(6)] Dep. 333:4-333:17.</p> <p>Plaintiffs further object that the reference to Defendants’ Response to Request for Admission No. 9 is similarly misleading and reprint the full RFA and Response below.</p> <p>“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.</p> <p>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.</p> <p>Response: Subject to and without waiving the above-stated objection, Defendants deny and note that, under Department of State policy, cases are adjudicated under Section 301 when a child’s biological parents are</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>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.”</p>
<p>59.Where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic mother, the Department adjudicates the child’s citizenship claim under INA 301(c).</p>	<ul style="list-style-type: none"> • Peek Dep. 202:17–23. • 8 FAM 304.3-1(b) <p><u>NOT DISPUTED</u> on the understanding that SOF No. 59 is limited to current State Department policy.</p>
<p>60.The Department also recognizes that a child of transgender and cisgender males can have a child born in wedlock, assuming that both parents have a biological relationship to the child.</p>	<ul style="list-style-type: none"> • Peek Dep. 178:20–179:18. <p><u>NOT DISPUTED</u></p>
<p>61.Ms. Day generally tried to ask all CRBA applicants about their use of Assisted Reproductive Technology, regardless of whether the parents were in a same-sex or opposite-sex marriage.</p>	<ul style="list-style-type: none"> • Day Depo. 243:15–244:10 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object that the evidence is disputed.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement No. 61 is disputed: Q. And when you talk about whether you had a question as to the biological tie, was that a subjective determination that you</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>made during the course of the interview, for example?</p> <p>A. I would say no, because the -- from my understanding, the biological connection is required to transmit the citizenship. So if -- you know, someone -- so that's not really -- you can't really argue that point to say, well, maybe -- you know, kind of make a judgment call. I think it's very clear what this -- what the guidelines are. So I would say that if the parent indicated to me that -- which is normally, like I said, how that would go about. If the parent indicated to me that they had used assisted reproductive technology, then we would go down that line of questioning, if I thought that -- if I saw that this was something that had, you know, had happened.</p> <p>Day. 80:18-81:11.</p>
<p>62.Ms. Day did not ask for DNA evidence in connection with every CRBA application, but the applications for which she did ask for DNA evidence included both families where the parents were in a same-sex marriage and families where the</p>	<ul style="list-style-type: none"> • Day Depo 245:22–246:03 <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
parents were in an opposite-sex marriage.	
63. Ms. Day did not ask every same-sex couple applying for a CRBA application for a child to present DNA evidence.	<ul style="list-style-type: none">• Day Depo 246:04-247:23 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object to the mischaracterization of the evidence to the extent that Statement No. 63 suggests that there was more than one same-sex family from which Ms. Day did not ask for DNA evidence or that she had not been presented with medical evidence previously in that case. Evidence cited by Defendants in support of Statement No. 63 is set forth below:</p> <p>Q. Were there, if you recall, same-sex couples for which you did not ask for DNA evidence?</p> <p>A. Yes.</p> <p>Q. Do you have maybe one particular example in mind or more than one?</p> <p>A. I can think of one particular example which was a same-sex couple. There were two women, and one was an AMCIT, and one was a Canadian citizen. And medical documents showed that --</p> <p>Q. Let me pause you for a second.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>A. Sorry.</p> <p>Q. By “medical documents showed,” before you explain what they showed, what medical documents are you talking about?</p> <p>A. The couple presented medical documents during the course of their interview to me regarding the conception of their child.</p> <p>Q. Do you recall whether there was medical documentation included in their applications?</p> <p>A. I do not recall.</p> <p>Q. Do you specifically recall that they provided you during the interview phase?</p> <p>A. I do not recall.</p> <p>Q. So when you said they presented during the interview, what did you mean by that?</p> <p>A. I mean that we -- it was brought -- we brought -- I brought it up during the interview, or it was -- we spoke about it during the interview.</p> <p>Q. Okay. You don't remember how it came up?</p> <p>A. No, I don't remember.</p> <p>Q. And -- but in this situation, you did not ask for DNA evidence?</p> <p>A. Correct.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>Q. Why did you not ask for DNA evidence in that situation?</p> <p>A. Because the medical documents that I was -- that they gave to me showed that the egg that made the baby was from the AMCIT mother and was gestated in the Canadian citizen mother.</p> <p>Q. And in that situation, did you consider that sufficient evidence to show biological connection between the AMCIT parent and the child applicant?</p> <p>A. Yes.</p> <p>Day Depo 246:04-247:23</p>
<p>64.The Dvash-Banks family may pursue another avenue for documenting E.J.’s citizenship.</p>	<ul style="list-style-type: none">• Defs.’ Resp. to Pls.’ First Set of Requests for Admission 11 <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object that Statement No. 64 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.”</p> <p>Plaintiffs further object to Statement No. 64 to the extent that the words “documenting</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>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.</p> <p>The evidence cited by Defendants in support of Statement No. 64 is set forth below:</p> <p><u>Response:</u> Upon conducting a reasonable inquiry, Defendants lack knowledge to definitively answer on behalf of the U.S. Citizenship and Immigration Services (“USCIS”), which is a component of the Department of Homeland Security—an Executive agency separate from the Department of State. Defendants understand generally and admit that for those applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of <i>Scales v. I.N.S.</i>, 232 F.3d 1159, 1165 (9th Cir. 2000).</p> <p>Def.’ Response to Pls.’ First Set of Requests for Admission [No. 10 at page] 11.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>65. The Dvash-Banks family could apply for a certificate of citizenship from USCIS.</p>	<ul style="list-style-type: none">• Defs.’ Resp. to Pls.’ First Set of Requests for Admission 11• 8 U.S.C. § 1452 (“A person who . . . is a citizen of the United States by virtue of . . . paragraph . . . (g) of section 1401 of this title . . . may apply” to the Secretary of Homeland Security “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.”). <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object that Statement No. 65 is misleading to the extent that it suggests any assertion of fact concerning the hypothetical outcome of an application to USCIS.</p> <p>The discovery response cited by Defendants in support of Statement No. 65 is set forth below:</p> <p><u>Request for Admission 10:</u></p> <p>Admit that for purposes of issuing certificates of citizenship in the Ninth Circuit, CIS does not require a biological</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>connection between the child and the child’s U.S. citizen parent.</p> <p><u>Response</u>: Upon conducting a reasonable inquiry, Defendants lack knowledge to definitively answer on behalf of the U.S. Citizenship and Immigration Services (“USCIS”), which is a component of the Department of Homeland Security—an Executive agency separate from the Department of State. Defendants understand generally and admit that for those applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of <i>Scales v. I.N.S.</i>, 232 F.3d 1159, 1165 (9th Cir. 2000). Def.’ Response to Pls.’ First Set of Requests for Admission [No. 10 at page] 11.</p> <p>Cited below is additional testimony supporting Plaintiffs’ objection to Statement No. 67:</p> <p>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 family applied for a</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>Certificate of Citizenship for E.J., that USCIS would grant that application?</p> <p>A. It was certainly within the realm of possibility.</p> <p>Q. But did it have an expectation that it would be granted?</p> <p>A. I don't know that it would be accurate to say that we had an expectation.</p> <p>30(b)(6) Dep. 318:4-318:15.</p>
<p>66.USCIS adjudicates applications for certificates of citizenship domestically, and considers the jurisdiction where the applicant lives when adjudicating an application.</p>	<ul style="list-style-type: none"> • Defs.’ Resp. to Pls.’ First Set of Requests for Admission 11 <p><u>NOT DISPUTED</u></p>
<p>67.For applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of <i>Scales v. I.N.S.</i>, 232 F.3d 1159, 1165 (9th Cir. 2000).</p>	<ul style="list-style-type: none"> • Defs.’ Resp. to Pls.’ First Set of Requests for Admission 11 • Peek Depo. 335:10–14 <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object to Statement No. 67 on the basis that there is insufficient evidence to know how USCIS would evaluate an application it has not received.</p> <p>The discovery response cited by Defendants in support of Statement No. 67 is set forth below:</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p><u>Request for Admission 10:</u></p> <p>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.</p> <p><u>Response:</u> Upon conducting a reasonable inquiry, Defendants lack knowledge to definitively answer on behalf of the U.S. Citizenship and Immigration Services (“USCIS”), which is a component of the Department of Homeland Security—an Executive agency separate from the Department of State. Defendants understand generally and admit that for those applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of <i>Scales v. I.N.S.</i>, 232 F.3d 1159, 1165 (9th Cir. 2000).</p> <p>Def.’ Response to Pls.’ First Set of Requests for Admission [No. 10 at page] 11.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs’ objection to Statement No. 67:</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>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 family applied for a Certificate of Citizenship for E.J., that USCIS would grant that application?</p> <p>A. It was certainly within the realm of possibility.</p> <p>Q. But did it have an expectation that it would be granted?</p> <p>A. I don't know that it would be accurate to say that we had an expectation.</p> <p>30(b)(6) Dep. 318:4-318:15.</p>
<p>68.The FAM states: “Since 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad:</p> <p>(1) At least one biological parent must have been a U.S. citizen when the child was born. The only exception is for a posthumous child.</p> <p>(2) The U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born.”</p>	<ul style="list-style-type: none"> • AR 82 (7 FAM 1131.2) <p><u>NOT DISPUTED</u></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>69. The INA was enacted in 1952, a time when it was commonly understood, that outside the adoption context, ‘parent’ at birth referred to a biological parent.</p>	<ul style="list-style-type: none"> • Defs.’ Second Resp. to Pls.’ First Set of Interrogatories at 22 <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object that SOF No. 69 calls for a legal conclusion. Plaintiffs further object to SOF No. 69 on the basis of lack of foundation.</p>
<p>70.The Department’s interpretation has been set forth in the FAM for at least twenty years.</p>	<ul style="list-style-type: none"> • DEFS000686 (7 FAM 1131.2 (1998)) <p><u>DISPUTED</u> <u>OBJECTION</u></p> <p>Plaintiffs object that Statement No. 70 is vague to the extent that it does not identify the interpretation referenced. Plaintiffs further object that Statement No. 70 mischaracterizes the evidence because the State Department changed its interpretation of the INA Sections 301 and 309 with respect to gestational mothers who are not the genetic parent of the child.</p> <p>Cited below is testimony supporting Plaintiffs’ objection that Statement No. 70 is disputed:</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>Q. Has the policy about what is considered a blood relationship ever been reconsidered by the State Department?</p> <p>MS. ANDRAPALLIYAL:· Objection.· Exceeds the scope.</p> <p>A. As I mentioned, the context of a gestational parent was added to the scope of blood relationship, or biological relationship, by the department in 2014, I believe it was.</p> <p>Peek [30(b)(6)] Dep. 166:14-166:22.</p>
<p>71.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.</p>	<ul style="list-style-type: none"> • 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • <i>See also</i> Reffett Depo 167:18–168:19. <p><u>DISPUTED</u></p> <p><u>OBJECTION</u></p> <p>Plaintiffs object to Statement No. 71 as mischaracterizing the testimony. Plaintiffs further object on the basis that Statement No. 71 is inconsistent with the evidence provided by Defendants. Plaintiffs also object to Statement No. 71 on the basis of</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>lack of foundation to the extent that it relies on DEFS001382.</p> <p>The testimony cited by Defendants in support of Statement No. 71 is set forth below:</p> <p>Q. What are other circumstances that would give rise to doubt of putative parentage?</p> <p>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 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.</p> <p>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</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>assisted reproductive technology, that will raise other questions.</p> <p>Anything on a birth certificate that would seem to indicate an adoption would raise questions.</p> <p>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.</p> <ul style="list-style-type: none">• Reffett Dep 167:18–168:19. <p>Cited below is additional testimony supporting Plaintiffs’ objection that Statement No. 71 is contradicted by the evidence provided by Defendants:</p> <p>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?</p> <p>A No.</p> <p>30(b)(6) Dep. 311:3-311:7.</p> <p>THE REPORTER: “But should I understand you still to be saying that the State Department’s view that the</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	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.
72.It is common practice throughout the world for Department of State Embassies and Consulates to ask for DNA testing in surrogacy cases; DNA testing is a means of discouraging fraud and ensuring that U.S. citizenship transmission Requirements are met.	<ul style="list-style-type: none"> • DEFS001648–49 <p><u>DISPUTED</u> <u>OBJECTION</u></p> Plaintiffs object to Statement No. 72 as lacking foundation. Plaintiffs further object to Statement No. 72 on the basis of insufficiency of the evidence.

II. Plaintiffs’ Additional Facts

ANDREW AND ELAD MARRY AND MAKE PREPARATIONS TO BECOME PARENTS

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
73.Andrew and Elad decided to have children.	Dvash-Banks Dep. 67:25-68:4 <i>Undisputed.</i>
74.Andrew and Elad obtained eggs from an anonymous egg donor (the “Donor”).	Dvash-Banks Dep. 79:12-79:16. <i>Undisputed.</i>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 75. Andrew and Elad donated their 2 respective genetic material to 3 create embryos using the eggs 4 from the Donor. 5</p>	<p>Dvash-Banks Dep. 83:17-84:2; 85:3-85:13. Undisputed.</p>
<p>6 76. Andrew and Elad successfully 7 created embryos using eggs from 8 the Donor.</p>	<p>Dvash-Banks Dep. 83:17-84:10. Undisputed.</p>
<p>9 77. In December 2015, Andrew and 10 Elad contracted with a 11 gestational surrogate (the 12 “Gestational Surrogate”) for the 13 purpose of carrying one or two 14 embryos during a pregnancy (the 15 “Surrogacy Agreement”).</p>	<p>AR 023-056 (Surrogacy Agmt.)¹ Undisputed.</p>
<p>16 78. The Surrogacy Agreement states 17 that “Andrew and Elad 18 (collectively called the ‘Intended 19 Parents’) are a same-sex married 20 couple who require assisted 21 reproductive technology to have 22 a child.”</p>	<p>AR 023 (Surrogacy Agmt.) at Section 1.1. Undisputed.</p>
<p>23 79. The Gestational Surrogate 24 agreed to carry eggs “retrieved 25 from the third party anonymous</p>	<p>AR 023 (Surrogacy Agmt.) at Section 1.4. Undisputed.</p>

26
 27 ¹ All references to page numbers of the Administrative Record (“AR”) cite to the
 28 internal page numbering therein. For example, the twenty-fourth page of the
 Administrative Record is cited as “AR 024,” which appears on the bottom right corner of
 that page of the Administrative Record.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>donor and Sperm supplied by Andrew and/or Elad” that was “incubated externally” to create embryos.</p>	
<p>80.The Gestational Surrogate became pregnant with one embryo created using genetic material from Andrew and one embryo created using genetic material from Elad.</p>	<p>Dvash-Banks Dep. 85:3-85:13. <i>Undisputed.</i></p>
<p>81.Under the terms of the Surrogacy Agreement, Andrew and Elad “will be recognized as the Child’s parents immediately upon the Child’s Birth.”</p>	<p>AR 024 (Surrogacy Agmt.) at Section 1.8. <i>Disputed in part:</i></p> <p>Disputed to the extent the statement conveys or implies that the Surrogacy Agreement would be binding on anyone other than the contracting parties.</p> <ul style="list-style-type: none"> • AR 024 (Surrogacy Agmt.) (“NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and promises contained in this Agreement and with the intention of being fully bound by its terms, the Parties do hereby covenant and agree as follows.”) • AR 026 (Surrogacy Agmt. pt. II ¶ p) (“Parties’ means the parties to this Agreement, being ANDREW DVASH-BANKS, ELAD DVASH-BANKS, and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>AMANDA MARIE ANNE ADAMS, and ‘Party’ means any one of the Parties individually[.]’)</p> <p>Otherwise undisputed.</p>
<p>82.Under the terms of the Surrogacy Agreement, Andrew and Elad, “intend to assume full care of, and all parental responsibility for the Child”</p>	<p>AR 024 (Surrogacy Agmt.) at Section 1.9. <i>Undisputed.</i></p>
<p>83.Under the terms of the Surrogacy Agreement, “Immediately upon the Birth of the Child, the Gestational Carrier will give the Child into the permanent custody of the Intended Parents and as soon as reasonably possible thereafter the Intended Parents will make an application in the Ontario Superior Court of Justice seeking a declaration of parentage on their part, and a declaration of non-parentage on the part of the Gestational Carrier.”</p>	<p>AR 024 (Surrogacy Agmt.) at Section 1.10. <i>Undisputed.</i></p>
<p>84.Under the terms of the Surrogacy Agreement: “The Parties acknowledge that immediately</p>	<p>AR 038 (Surrogacy Agmt.) at Section 14.4(c). <i>Undisputed.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
upon Birth all medical decisions regarding the Child shall be made solely by the Intended Parents.”	
85. The Surrogacy Agreement states that: “For purposes of this Agreement, ‘immediately upon birth’ means as soon as the umbilical cord is cut.”	AR 038 (Surrogacy Agmt.) at Section 14.1. <i>Undisputed.</i>
86. Under the terms of the Surrogacy Agreement, “The Gestational Carrier hereby expressly waives all parental, custodial and social rights that she has or may acquire to the Child.”	AR 038 (Surrogacy Agmt.) at Section 14.4. <i>Undisputed.</i>
87. Under the terms of the Surrogacy Agreement, “All Parties to this Agreement wish to maintain confidentiality between themselves, one to another, and between themselves and the public.”	AR 024 (Surrogacy Agmt.) at Section 1.11. <i>Undisputed.</i>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>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</p>	
<p>88.Twins A.J. and E.J. (the “Twins”) were born four minutes apart.</p>	<p>Dvash-Banks Dep. 161:13-161:16. <i>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.</i></p>
<p>89.Andrew and Elad were married to each other on the day of the Twins’ birth.</p>	<p>Dvash-Banks Dep. 171:10-171:15; AR 015-16 (E.J. Statement of Live Birth). <i>Undisputed.</i></p>
<p>90.Andrew and Elad are listed as E.J.’s parents on E.J.’s Statement of Live Birth issued by Ontario, Canada.</p>	<p>AR 015-16 (E.J. Statement of Live Birth). <i>Undisputed.</i></p>
<p>91.Andrew and Elad are the only parents listed on E.J.’s Statement of Live Birth.</p>	<p>AR 015-16 (E.J. Statement of Live Birth). <i>Undisputed.</i></p>
<p>92.Andrew and Elad have been E.J.’s legal parents since his birth in 2016.</p>	<p>AR 015-16 (E.J. Statement of Live Birth); AR 021-22 (Canadian Order); AR 024 (Surrogacy Agmt.) at Sections 1.8-1.10. <i>This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p>Undisputed that Andrew and Elad are E.J.’s and A.J.’s parents.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>93. Andrew and Elad have raised the Twins since the day the Twins were born.</p>	<p>AR 037-38 (Surrogacy Agmt.), at Sections 14.1, 14.4. <i>Undisputed.</i></p>
<p>94. No other individual has acted as a parent to E.J. or A.J.</p>	<p>AR 021-22 (Canadian Order); AR 024 (Surrogacy Agmt.) at Sections 1.7-1.10; Dvash-Banks Dep. 29:21-30:14. <i>This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p>Undisputed that Andrew and Elad are E.J.’s and A.J.’s parents.</p> <p>Disputed that no other individual ever acted as a parent.</p> <ul style="list-style-type: none"> • By providing ova, the egg donor acted as a biological/ genetic mother for E.J. and A.J. <i>See Plaintiffs’ Response to Defendants’ Request for Admission No. 1 (admitting anonymous donor used to conceive E.G. and A.J.)</i> • By carrying and giving birth to E.J. and A.J., the Gestational Carrier acted as a gestational mother/parent and birth mother to the children. <i>See Plaintiffs’ Response to Defendants’ Request for Admission No. 3 (admitting gestational</i>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>surrogate was used to carry and give birth (E.J.)</p> <p>Further disputed to the extent the statement conveys or implies that no other individual ever had legal rights as a parent to E.J. or A.J. under Canadian law.</p> <ul style="list-style-type: none">• AR 021 (Canadian Order) (listing Amanda Marie Anne Adams as “Respondent”); <i>id.</i> at 021–22 (dated September 28, 2018, and not stating that it had retroactive effect).• AR 042 (Surrogacy Agmt.) at Section 23.2 (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”)• AR 024 (Surrogacy Agmt.) at Section 1.10 (Gestational Carrier implied to be a parent until making a post-birth declaration of non-parentage). <p><u>Objection</u> to reliance here on <i>Dvash-Banks Dep. 29:21-30:14: hearsay.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>95.No other individual has asserted any parental rights with respect to E.J. or A.J.</p>	<p>AR 021-22 (Canadian Order); Dvash-Banks Dep. 112:19-112:24.</p> <p><i>This statement comprises a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p>Defendants lack sufficient knowledge as to whether any individual has ever asserted any parental rights with respect to E.J. or A.J.</p> <p><i>Undisputed</i> 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. AR 037–39 (Surrogacy Agreement Part XIV), (regarding “Custody of Child and Parental Rights”); AR 037-39 (Part X), AR 033–34 (regarding “Condition Precedent”).</p> <p><u>Objection</u> to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay.</p>
<p>96.Under the law of Ontario, Canada, Andrew and Elad are the legal parents of the Twins.</p>	<p>AR 021-22 (Canadian Order); Dvash-Banks Dep. 112:19-112:24.</p> <p><i>This statement comprises a conclusion of law, not a statement of fact. The cited evidence</i></p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p><i>does not establish the point(s) made in the statement.</i></p> <p>Undisputed that Andrew and Elad are E.J.’s and A.J.’s parents.</p> <p><i>Objection to reliance here on Dvash-Banks Dep. 112:19-112:24: hearsay.</i></p>
<p>97.A.J. was conceived using sperm from Andrew.</p>	<p>AR 062 (Viaguard A-M Letter); Dvash-Banks Dep. 84:17-85:13.</p> <p><i>Undisputed.</i></p>
<p>98.E.J. was conceived using sperm from Elad.</p>	<p>AR 062 (Viaguard A-M Letter); Dvash-Banks Dep. 84:17-85:13.</p> <p><i>Undisputed.</i></p>
<p>99.From the time the Twins left the hospital where they were born, they have lived continuously with Andrew and Elad.</p>	<p>Dvash-Banks Dep. 29:21-30:14; 171:16-171:23.</p> <p><i>Undisputed.</i></p>
<p>E.J. and A.J. Apply For U.S. Passports and For CRBAs In Recognition That The Twins Are U.S. Citizens At Birth</p>	
<p>100. 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</p>	<p>Dvash-Banks Dep. 95:4-97:12; 165:4-166:12; AR 009-62 (Application for Consular Report of Birth Abroad (“CRBA”) on behalf of E.J. and supporting documents).</p> <p><i>Disputed in part:</i></p> <p>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</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>Andrew and Elad’s marriage certificate.</p>	<p>periods of residency, and Andrew and Elad’s marriage certificate.</p> <p>Defendants dispute the portion of the statement describing this documentation as “the requisite documentation.”</p> <ul style="list-style-type: none"> AR 005 (consular officer’s case notes indicating: “School transcripts needed to confirm Amcit father’s physical presence in the US.”) <p>Defendants also dispute the “requisite documentation” portion of the statement to the extent it conveys or implies that the Department of State requires specific documents be submitted with CRBA and/or U.S. passport applications. It is up to applicants to select the specific documents they will submit to the Department to support their claim for citizenship.</p> <ul style="list-style-type: none"> Reffett Depo. Tr. 92:06–93:06; 177:04–25 See also 22 CFR §§ 50.2, 50.5, 51.40, 51.41, and 51.43 (burden on applicant) <p><i>Objection to reliance here on Dvash-Banks Dep. . 95:4-97:12; 165:4-166:12: hearsay.</i></p>
<p>101. Ms. Day accepted E.J.’s Statement of Live Birth as sufficient proof that Andrew and Elad are E.J.’s legal parents.</p>	<p>Day Dep. 172:5-173:12; Ramsay Dep. 103:7-103:11; AR 015-16 (E.J. Statement of Live Birth).</p> <p><i>Undisputed.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>102. 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.</p>	<p>Day Dep. 173:19-174:5; AR 021-22 (Canadian Order).</p> <p><i>Undisputed.</i></p>
<p>103. Ms. Day’s role in adjudicating U.S. passport and CRBA applications was to determine whether, according to the State Department’s <i>Foreign Affairs Manual</i> (“FAM”), the applicant was entitled to be recognized as a U.S. citizen.</p>	<p>Day Dep. 29:17-30:3; 47:12-47:24; 59:2-59:16.</p> <p><i>Disputed in part:</i></p> <p>Defendants dispute this statement to the extent it <i>conveys or implies that the Foreign Affairs Manual provided the only basis for the adjudicative criteria.</i></p> <ul style="list-style-type: none"> • Day Depo 29:17–30:3 (“My role was to determine if the applicant had a claim to U.S. citizenship... my job was to determine if that was – according to the Foreign Affairs Manual and the guidelines that we had ... if they were entitled to that citizenship.”) • <i>Id.</i> 233:19–234:20 (explaining that she did not consider FAM completely separated from Immigration and Nationality Act of 1952) <p>Defendants further dispute this statement to the extent it conveys or implies that that any applicant born abroad is “entitled” (automatically or otherwise) to be recognized or</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>documented as a U.S. citizen at birth. See generally 22 C.F.R. §§ 50, 51.</p> <p>Otherwise undisputed.</p>
<p>104. 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.</p>	<p>Ramsay Dep. 131:25-132:5.</p> <p><i>Disputed.</i></p> <p>Cited evidence does not establish this point.</p> <ul style="list-style-type: none"> • Day Depo. 116:12–19; 231:04-233:18
<p>105. 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.</p>	<p>Ramsay Dep. 60:5-60:8.</p> <p><i>Undisputed.</i></p>
<p>106. During the Dvash-Banks family’s interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that if they wanted to proceed with the Twins’ applications, they would have to provide additional information demonstrating the biological relationship between each child</p>	<p>Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17.</p> <p><i>Undisputed.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>and that child’s U.S. citizen parent.</p>	
<p>107. 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.</p>	<p>Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17. <i>Undisputed.</i></p>
<p>108. By letter dated January 24, 2017 from Ms. Day to Andrew, the State Department informed the Dvash-Banks family that “in reference to your application for a U.S. passport and a [CRBA] for [A.J.] and [E.J.]... The U.S. Consulate General in Toronto has considered the evidence you submitted and concluded that the blood relationship between a U.S. citizen parent and children have not been established by a preponderance of the evidence as</p>	<p>Defs’ Exhibit 10 (Jan. 24 Letter from Day); 30(b)(6) Dep. 296:11-297:3; Reffett Dep. at 67:14-69:4. <i>Undisputed.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>required to support a claim to U.S. citizenship.”</p>	
<p>109. The State Department applied Section 309 in adjudicating E.J.’s applications for a U.S. passport and CRBA.</p>	<p>30(b)(6) Dep. 273:2-7.</p> <p><i>Disputed.</i></p> <p>Cited evidence does not establish the point(s) made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State “appl[ied] the criteria of Section 309 in connection with those adjudications,” <i>i.e.</i>, the adjudications of E.J.’s and A.J.’s applications. The 30(b)(6) witness was not the decision maker in the underlying adjudication.</p> <ul style="list-style-type: none"> • Day Depo. 116:12–19; 231:04-233:18
<p>110. The State Department applies Section 309 to CRBA applications submitted on behalf of children who the State Department considers to have been born “out of wedlock.”</p>	<p>30(b)(6) Dep. 186:8-14.</p> <p><i>Undisputed.</i></p>
<p>111. 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.</p>	<p>30(b)(6) Dep. 273:2-273:15.</p> <p><i>Undisputed.</i></p>
<p>112. The State Department determined that Section 309 was</p>	<p>30(b)(6) Dep. 273:2-15.</p> <p><i>Disputed in part.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>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.</p>	<p>Cited evidence does not establish the points made in this statement. Undisputed that the 30(b)(6) witness testified that the Department of State “appl[ied] the criteria of Section 309 in connection with those adjudications,” <i>i.e.</i>, the adjudications of E.J.’s and A.J.’s applications. The 30(b)(6) witness was not the decision maker in the underlying adjudication.</p> <ul style="list-style-type: none"> • Day Depo. 116:12–19; 231:04-233:18
<p>113. 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.”</p>	<p>30(b)(6) Dep. 186:8-14.</p> <p><i>Undisputed.</i></p>
<p>114. The State Department interprets Section 301 to require, among other things, proof of a biological relationship between a CRBA applicant and both of his legal parents.</p>	<p>30(b)(6) Dep. 178:10-178:19.</p> <p><i>Disputed in part.</i></p> <p>Cited evidence does not establish this point. Also, the question is not the relationship between a CRBA applicant and his/her legal parents at the time of the application, but at the time of his/her birth. Disputed as incomplete. The Department’s interpretation of Section 301 for Assisted Reproductive Technology (ART) cases is stated in:</p> <ul style="list-style-type: none"> • AR 077–78 (7 FAM 1110 Appendix D)

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ul style="list-style-type: none"> • AR 078–79 (7 FAM 1120 Appendix D)
<p>The State Department Refuses to Recognize E.J.’s U.S. Citizenship</p>	
<p>115. 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 other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship.”</p>	<p>AR 001 (Mar. 2 Letter from Day). <i>Undisputed.</i></p>
<p>116. 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.</p>	<p>Reffett Dep. 77:14-17; 118:6-118:22. <i>Undisputed.</i></p>
<p>117. Ms. Day’s March 2, 2017 letter terminated the application</p>	<p>Reffett Dep. 118:6-22. <i>Disputed in part:</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>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.</p>	<p>Defendants do not dispute the part of the statement that reads: “Ms. Day’s March 2, 2017 letter terminated the application process for E.J.’s requests for a CRBA and U.S. passport with a denial.”</p> <p>Disputed to the extent the statement reads: “and the State Department closed the files relating to E.J.’s applications.” Cited evidence does not establish this point.</p> <p>AR 002–008 (case notes)</p>
<p>118. 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).</p>	<p>Reffett Dep. 78:9-78:20.</p> <p><i>Undisputed.</i></p>
<p>119. The State Department acknowledges that E.J.’s lack of a biological relationship to Andrew was the sole reason identified for the denial of E.J.’s applications.</p>	<p>30(b)(6) Dep. 298:24-299:6.</p> <p><i>Undisputed.</i></p>
<p>120. Following the Toronto Consulate’s receipt of the DNA testing results for the Twins from an approved testing</p>	<p>Ramsay Dep. 154:16-154:23.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent that the statement conveys or implies that the Consulate</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 establishment, the Toronto 2 Consulate followed the FAM 3 guidance on applications 4 submitted on behalf of children 5 born by means of assisted 6 reproductive technology. 7 8 9</p>	<p>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).”)</p>
THE STATE DEPARTMENT’S POLICIES	
<p>11 121. At the time of E.J.’s birth, 12 Andrew and Elad were validly 13 married.</p>	<p>Ramsay Dep. 65:15-20; 108: 2-7; 108:20-109:3; 30(b)(6) Dep. 260: 13-16. <i>Undisputed.</i></p>
<p>14 122. Andrew is E.J.’s legal parent. 15 16</p>	<p>Ramsay Dep. 103:7-11; 104:19-105:12; 30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5. <i>Undisputed.</i></p>
<p>17 123. When a male same-sex 18 couple uses sperm from one 19 parent and an egg from a donor 20 to conceive a child during their 21 marriage, the State Department 22 does not consider the child to be 23 born “in wedlock.” 24</p>	<p>30(b)(6) Dep. 177:14-177:22; 180:2-9. <i>Disputed in part:</i> 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. <ul style="list-style-type: none"> • 30(b)(6) Dep. 178:20–179:18. Otherwise undisputed.</p>
<p>25 124. The State Department asserts 26 that its understanding of “in 27 wedlock” is based on the 28 language of Section 301.</p>	<p>30(b)(6) Dep. 178:10-19; 180:10-15. <i>Disputed.</i> Cited evidence does not establish this proposition. The State Department’s</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>understanding of “in wedlock” in interpreting the INA is reflected in AR 091 (7 FAM 1140 Appendix E) (currently numbered 8 FAM § 304.1-2). <i>See also:</i></p> <ul style="list-style-type: none"> • 30(b)(6) Dep. 180:16-181:10.
<p>125. Under the State Department’s policies, E.J. and A.J. were born “out of wedlock” within the meaning of Section 309.</p>	<p>30(b)(6) Dep. 188:6-15; 271:20-22; 274:25-275:6.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent that the statement conveys or implies that the Department of State applies “policies” as opposed to applying the Department of State’s interpretation of the Immigration and Nationality Act. Otherwise undisputed.</p> <ul style="list-style-type: none"> • Day Depo. 232:01–233:10 (showing that distinction between “in wedlock” and “out of wedlock” did not matter to the outcome of E.J.’s adjudication)
<p>126. Under the State Department’s policies, Andrew and Elad can never have a child “in wedlock” together.</p>	<p>30(b)(6) Dep. 274:25-275:6.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by the Department of State to have been established at birth.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ul style="list-style-type: none"> Day Depo. 232:01–233:10 (showing that distinction between “in wedlock” and “out of wedlock” did not matter to the outcome of E.J.’s adjudication) <p>A.J.’s CRBA</p>
<p>128. 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 adjudicating a CRBA application.</p>	<p>30(b)(6) Dep. 201:2-16.</p> <p><i>Disputed in part:</i></p> <p>Disputed to the extent the statement conveys or implies that they could never have a child abroad together whose citizenship would be considered by the Department of State to have been established at birth.</p> <ul style="list-style-type: none"> Day Depo. 232:01–233:10 (showing that distinction between “in wedlock” and “out of wedlock” did not matter to the outcome of E.J.’s adjudication)
<p>129. The Toronto Consulate follows guidance from the State Department in Washington, D.C. as to the requirements for issuance of a CRBA, and there are no Toronto-specific policies concerning the adjudication of CRBA applications.</p>	<p>Reffett Dep. 30:12-21; Ramsay Dep. 17:22-18:1; Day Dep. 24:2-24:12; 30(b)(6) Dep. 92:6-92:15.</p> <p><i>Undisputed.</i></p>
<p>130. The text of Section 301 contains no reference to a “blood” relationship.</p>	<p>30(b)(6) Dep. 183:9-13; 191:6-14.</p> <p><i>Undisputed.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>131. 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.</p>	<p>30(b)(6) Dep. 178:13-19; 180:10-15.</p> <p><i>Disputed in part:</i></p> <p>Defendants dispute that the Department’s interpretation of Section 301 is based only on the language itself.</p> <p>Otherwise undisputed.</p>
<p>132. The State Department changed its interpretation of Section 301 in 2014 to interpret “born . . . of parents” to include not only a genetic parent, but also a gestational mother who did not provide the genetic material (<i>i.e.</i>, egg) for the child.</p>	<p>Reffett Dep. 183:4-183:18; 30(b)(6) Dep. 166:14-22; Ramsay Dep. at 84:7-84:12.</p> <p><i>Disputed in part:</i></p> <p>In 2014, the Department issued policy guidance on a topic for which it had not previously published policy guidance; the issuance elaborated as to certain circumstances that were within the Department’s interpretation. The Department did not designate the witness to provide 30(b)(6) testimony on this topic during this time frame.</p> <ul style="list-style-type: none"> • AR 074–76 (ALDAC dated January 31, 2014) <p>Otherwise undisputed.</p>
<p>133. 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</p>	<p>30(b)(6) Dep. 172:21-173:12.</p> <p><i>Disputed in part.</i></p> <p>The cited evidence does not establish this point. Undisputed that prior to that change (described in row No. 126), the State Department generally applied Section 301 so as</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 provide genetic material for the 2 child. 3 4</p>	<p>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.</p>
<p>8 134. The State Department made 9 this change even though 10 Congress had not made any 11 corresponding amendment of the 12 INA because the State 13 Department simply “changed its 14 mind” as to its interpretation of 15 Section 301. 16 17 18 19 20 21 22 23 24</p>	<p>30(b)(6) Dep. 243:1-4, 15-20. <i>Disputed in part.</i> 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 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. • AR 074–76 (ALDAC dated January 31, 2014)</p>
<p>25 135. The State Department’s 26 determination to interpret 27 Section 301 as treating a child 28 born outside the U.S. whose U.S.</p>	<p>30(b)(6) Dep. 175:2-5; 219:25-220:8. <i>Disputed.</i> The cited evidence does not establish this point. In addition, the Department did not</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>citizen parent was the child’s gestational mother as a U.S. citizen at birth was a policy decision made by the State Department.</p>	<p>designate the witness to provide 30(b)(6) testimony on this topic during this time frame.</p>
<p>136. 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.</p>	<p>30(b)(6) Dep. 251:4-9.</p> <p><i>Statement contains a conclusion of law, not a statement of fact.</i></p> <p>Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301 by interpreting the statute in a different manner. See Scales v. I.N.S., 232 F.3d 1159, 1166 (9th Cir. 2000); Solis-Espinoza, 401 F.3d 1090, 1091 (9th Cir. 2005).</p>
<p>137. The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in <i>Solis-Espinoza v. Gonzales</i>, 401 F.3d 1090 (9th Cir. 2005), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.</p>	<p>30(b)(6) Dep. 249:6-20.</p> <p><i>Statement contains a conclusion of law, not a statement of fact.</i></p> <p>Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301.</p>
<p>138. The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit</p>	<p>30(b)(6) Dep. 251:4-9.</p> <p><i>Statement contains a conclusion of law, not a statement of fact.</i></p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>in <i>Scales v. INS</i>, 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.</p>	<p>Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301.</p>
<p>139. The State Department does not follow the ruling of the Court of Appeals for the Second Circuit in <i>Jaen v. Sessions</i>, 899 F.3d 182 (2d Cir. 2018), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.</p>	<p>30(b)(6) Dep. 251:4-9.</p> <p><i>Statement contains a conclusion of law, not a statement of fact.</i></p> <p>Otherwise undisputed that some courts including the Ninth Circuit have disagreed with the Department’s interpretation of Section 301.</p>
<p>140. 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</p>	<p>30(b)(6) Dep. 311:3-311:7; 317:2-8.</p> <p><i>Disputed.</i></p> <p>The cited evidence does not establish the point(s) made in the statement.</p> <ul style="list-style-type: none"> • 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • Reffett Depo 167:18–168:19.

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>1 applications for recognition of 2 U.S. citizenship.</p>	
<p>3 4 141. The FAM is not subject to 5 notice-and- comment rule 6 making.</p>	<p>30(b)(6) Dep. 244:13-18. <i>Undisputed.</i></p>
<p>7 142. The FAM is not approved by 8 Congress.</p>	<p>30(b)(6) Dep. 244:5-6. <i>Undisputed.</i></p>
<p>9 143. The State Department 10 acknowledges that the FAM 11 policies regarding recognition of 12 U.S. citizenship include 13 requirements not specifically set 14 out in the INA.</p>	<p>30(b)(6) Dep. 103:5-11; 104:8-11. <i>Disputed.</i> Disputed as incomplete. The statement refers to procedural requirements, not the legal elements for establishing U.S. citizenship. Additionally, portions of the FAM replicate provisions of the INA. <i>See, e.g.,</i> AR 088–89 (7 FAM 1120 App. E)</p>
<p>15 16 17 144. The FAM does not have the 18 force of law.</p>	<p>30(b)(6) Dep. 244:20-244:25. <i>Statement contains a conclusion of law, not a statement of fact.</i> Cited evidence does not establish the point made in the statement. Disputed as incomplete. The FAM is comprised of Department of State directives “establishing and prescribing the organizations, policies, or procedures that provide an official basis of Department of State operation.” 18 FAM 201.1-4;² <i>see</i> 18 FAM</p>

27
28 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>.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>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. <i>See, e.g.</i>, AR 082 (7 FAM 1131.2); AR 082 (7 FAM 1131.4); AR 088–89 (7 FAM 1120 App. E).</p>
<p>145. The State Department does not track how frequently CRBA applicants are asked to undergo DNA testing or how often CRBA applications submitted on behalf of children of same-sex couples are granted or denied.</p>	<p>30(b)(6) Dep. 315:10-13; 320:20-321:3. <i>Undisputed.</i></p>
<p>146. The State Department acknowledges that Andrew is E.J.’s legal parent.</p>	<p>30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5. <i>Undisputed.</i></p>
<p>147. The State Department considers Andrew to be E.J.’s legal parent at birth under Ontario law.</p>	<p>30(b)(6) Dep. 268:2-5. <i>Disputed in part:</i> Undisputed that the 30(b)(6) witness testified as stated in the cited portion of the transcript; disputed that the Department made a determination regarding E.J.’s legal parents at birth. The adjudicating officer did not reach this question; she considered Andrew to be E.J.’s</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>legal parent at the time of the January 24, 2017 applications, a sufficient condition for purposes of interviewing Andrew and Elad regarding the applications.</p> <p>E.J.’s applications were rejected on the ground of a lack of a biological connection, without needing to reach whether Andrew was E.J.’s legal parent at birth under Ontario law. See <i>supra</i>, Defendants’ Statement of Genuine Issues of Material Facts Nos. 96.</p> <p>The Department recognizes that under Ontario law, Andrew’s legal parentage of E.J. was established on September 28, 2017, the date the Ontario Court issued its parentage order, twelve days following E.J.’s birth. See, AR 021–22 (Canadian Order) ; <i>see also supra</i>, Defendants’ Statement of Genuine Issues of Material Facts Nos. 94.</p>
<p>148. The State Department acknowledges that Andrew and Elad are E.J.’s only legal parents.</p>	<p>30(b)(6) Dep. 261:16-261:18.</p> <p><i>Undisputed except to the extent</i> 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 <i>supra</i>, Defendants’ Statement of Genuine Issues of Material Facts Nos. 37, 39, 40.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>149. The State Department acknowledges that Andrew and Elad are identified as E.J.’s parents on E.J.’s Statement of Live Birth.</p>	<p>30(b)(6) Dep. 260:21-261:1. <i>Undisputed.</i></p>
<p>150. The State Department acknowledges that Andrew and Elad were validly married at the time of the Twins’ birth.</p>	<p>30(b)(6) Dep. 260:17-260:20. <i>Undisputed.</i></p>
<p>151. The State Department’s position is that it is within the realm of possibility that USCIS would grant a certificate of citizenship to E.J.</p>	<p>30(b)(6) Dep. 318:4-318:15. <i>Disputed in part:</i> The Department’s position is that USCIS would likely grant a certificate of citizenship to E.J., given that E.J. now lives in California, and USCIS applies Ninth Circuit law to applicants residing in California.</p>
<p>152. Under its current policy, the State Department would consider a child born by means of a form of assisted reproductive technology that involves use of the genetic material of a non-citizen during his or her marriage to satisfy the State Department’s biological requirement if the U.S. citizen is the gestational</p>	<p>30(b)(6) Dep. 174:11-175:5. <i>Undisputed except to the extent</i> the statement conveys or implies that the Department of State’s “policy” is independent from its interpretation of the Immigration and Nationality Act.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>parent, even if the US. citizen did not contribute genetic material to the child.</p>	
<p>153. Ms. Ramsay testified that a certificate of citizenship is different from a CRBA because a CRBA recognizes the recipient’s status as a U.S. citizen at birth whereas a Certificate of Citizenship may be issued at any time to an individual and may indicate that the individual has acquired citizenship at a later date.</p>	<p>Ramsay Dep. 169:5-169:15.</p> <p><i>Disputed in part:</i></p> <p>Undisputed that Ms. Ramsay testified as described in the statement. But the questions asked of Ms. Ramsay were incomplete insofar as they did not ask whether a Certificate of Citizenship may be issued to a person who has acquired citizenship at birth. <i>See</i> 8 U.S.C. § 1452 (“A person ... who is a citizen of the United States by virtue of paragraph (c), (d), (e), or (g) of section 1401 of this title, ... or under the provisions of section 1403 of this title, may apply ... for a certificate of citizenship.”).</p> <p>Disputed to the extent the statement conveys or implies that a CRBA is a superior form of evidence of an individual’s citizenship status. <i>See</i> 22 U.S.C. § 2705 (indicating that a CRBA and a Certificate of Citizenship may equally be used as proof a person’s citizenship status); <i>see also</i> 8 U.S.C. § 1452 (providing that USCIS may issue certificates of citizenship documenting both citizenship acquired at birth and later-acquired citizenship).</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<p>Further disputed to the extent the statement conveys or implies that qualifications for a certificate of citizenship are the same as for a certificate of naturalization, <i>compare</i> 8 U.S.C. § 1452 (certificates of citizenship), <i>with id.</i> § 1449 (certificate of naturalization). 1452.</p>
<p>154. Consular officer Margaret Ramsay testified that she does not generally ask opposite-sex couples who apply for a passport for a child born outside the United States whose genetic material was used to create the child.</p>	<p>Ramsay Dep. 77:1-77:6.</p> <p><i>Disputed in part:</i></p> <p>The statement is disputed as incomplete.</p> <p>Ms. Ramsay was not the adjudicating officer for E.J.’s applications, and what she may have asked or not asked other applicants is not at issue in this case. Ms. Day, the adjudicating officer, testified that she generally asked all couples about whether they used ART.</p> <ul style="list-style-type: none"> • Day Depo Day Depo 94:22–96:25 • Day Depo 95:11-25 • Day Depo. 243:15–244:10
<p>155. Consular Officer Margaret Ramsay testified that if a same-sex couple applied for a CRBA on behalf of their child, Ms. Ramsay would ask the couple about the biological connection between a parent and child.</p>	<p>Ramsay Dep. 77:7-77:15.</p> <p><i>Disputed in part:</i></p> <p>The statement is disputed as incomplete.</p> <p>Ms. Ramsay was not the adjudicating officer for E.J.’s applications, and what she may have asked or not asked other applicants is not at issue in this case. Ms. Day, the adjudicating officer, testified that she generally asked all couples who used ART about the biological connection.</p>

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
	<ul style="list-style-type: none"> • Day Depo Day Depo 94:22–96:25 • Day Depo 95:11-25 • Day Depo. 243:15–244:10

III. Additional Reply Brief Facts

<i>Uncontroverted Fact</i>	<i>Supporting Evidence</i>
<p>156. The Department is concerned about fraud in the application for documentation of U.S. citizenship.</p>	<ul style="list-style-type: none"> • Dep. of Paul Peek at 234:22–24; • <i>See also id.</i> at 236:3–12 (“Q: So do concerns about preventing fraud have any relevance to the way that the State Department interprets section 301 of the INA to require a biological relationship between the U.S. citizen parent and a child? A·The primary concern is to be compliant with the law. The secondary concern is to make sure that fraud is not taking place in how people are applying under the law.”). • <i>See also</i> Defendants’ uncontroverted fact Nos. 71, 72, <i>supra</i> at Combined Stmt. of Facts Nos. 71, 72.

1 JOSEPH H. HUNT
Assistant Attorney General

2 ANTHONY J. COPPOLINO
Deputy Director

3 LISA ZEIDNER MARCUS
Senior Counsel

4 Tel: (202-514-3336

5 lisa.marcus@usdoj.gov

VINITA B. ANDRAPALLIYAL

6 Trial Attorney

7 Tel: (202) 305-0845

vinita.b.andrapalliyal@usdoj.gov

8 UNITED STATES DEPARTMENT OF JUSTICE

Civil Division, Federal Programs Branch

9 P.O. Box 883

10 Washington, DC 20044

Counsel for Defendants

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

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

16 Plaintiffs,

17 v.

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

20 Defendants.

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

**Third Declaration of Lisa Zeidner
Marcus**

In Support of: Defendants' Motion for
Partial Summary Judgment

Hearing Date: Feb. 4, 2019

Hearing Time: 1:30 pm

Honorable John F. Walter

21
22 **THIRD DECLARATION OF LISA ZEIDNER MARCUS**

23 I, Lisa Zeidner Marcus, hereby declare:

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

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

3 2. This is my third declaration in support of Defendants' opposition to
4 Plaintiffs' motion for partial summary judgment. My first two declarations were
5 docketed at ECF No. 89-3 and ECF No. 90, respectively. I submit this declaration to
6 authenticate additional evidence submitted by Defendants with their reply brief and
7 "Combined Statement of Facts."

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

9 Ex. 17 2012 Information Memo to the Secretary on Assisted Reproductive
10 Technology (ART), Citizenship and Visa Law (DEFS001382).

11 Ex. 18 18 FAM 201.1 (Last updated September 19, 2018), available from
12 <https://fam.state.gov/>

13 Ex. 19 AJ's CRBA

14 Ex. 20 Additional excerpts of the deposition transcript of the Deposition of Larilyn
15 Reffett. excerpted by Defendants

16 Ex. 21 Additional excerpts of the deposition transcript of Department of State
17 30(b)(6) witness Paul Peek, excerpted by Defendants

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

19 Executed on January 22, 2019 at Pittsburgh, Pennsylvania.

20
21
22
23
24
25
26
27
28

/s/ Lisa Zeidner Marcus
Lisa Zeidner Marcus

Exhibit 17

(In Support of Defendants' Motion for Summary
Judgment)



United States Department of State

*Assistant Secretary of State
for Consular Affairs*

Washington, D.C. 20520

UNCLASSIFIED

February 13, 2012

INFORMATION MEMO FOR THE SECRETARY

FROM: CA – Janice L. Jacobs

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

- 2 -

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

UNCLASSIFIED

Approved: CA: JJacobs

(JP)

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

Cleared:

DP/NR

Exhibit 18

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

18 FAM 200 REGULATIONS AND RELATED PROGRAMS

18 FAM 201 DIRECTIVES MANAGEMENT

18 FAM 201.1 DIRECTIVES

*(CT:PPP-10; 09-19-2018)
(Office of Origin: A/GIS/DIR)*

18 FAM 201.1-1 POLICY AND OBJECTIVE

18 FAM 201.1-1(A) Policy

*(CT:PPP-2; 03-19-2018)
(State Only)*

- a. The Department of State articulates official guidance, including procedures and policies, on matters relating to Department management and personnel, known collectively as "directives," in the Foreign Affairs Manual and Handbook Series. Directives include Department administrative organization policies and procedures. These directives derive their authority from statutes, Executive orders, other legal authorities, and Presidential directives, such as OMB circulars, and Department policies.
- b. For the purposes of this subchapter, all references to the Foreign Affairs Manual include the Foreign Affairs Handbook series.
- c. The only authoritative text of the Foreign Affairs Manual or its Foreign Affairs handbook series is the text that the Office of Directives Management (A/GIS/DIR) posts and maintains on its Internet, Intranet, and ClassNet websites. Personnel who administer Department websites must not post copies of Foreign Affairs Manual or Foreign Affairs Handbook material on such websites; instead, they must provide a hyperlink to the authoritative text. See [18 FAM 201.1-6\(D\)\(2\)](#).

18 FAM 201.1-1(B) Objective

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Department's directives program provides agency managers with the means to convey written instructions to Department and other relevant personnel and to document Department directives. The program's purpose is to make necessary organization, policy, and procedural information available to program management and operating offices so that they can carry out their responsibilities in accordance with statutory and Executive mandates.
- b. The Department achieves its objective by:
 - (1) Providing a single, comprehensive, and authoritative source: The Foreign Affairs Manual (FAM) and the related Foreign Affairs Handbooks (FAH) for organizational structures, policies, and procedures that govern the operations of the Department, the Foreign Service, and, when applicable, other Foreign Affairs agencies;
 - (2) Organizing and structuring policy and procedural information and providing indices and references to facilitate effective use;
 - (3) Incorporating statutes, Executive orders, and directives originally issued elsewhere into the FAM;
 - (4) Issuing changes and additions to Department directives in a timely manner;
 - (5) Annually reviewing the FAM to ensure completeness and accuracy (see [18 FAM 201.1-3\(A\)](#), subparagraph (2)); and
 - (6) Supporting operational needs of offices by providing updated FAM material on its websites and in other formats, as requested.

18 FAM 201.1-1(C) Scope

(CT:PPP-2; 03-19-2018)
(State Only)

These directives apply to the Department of State and its operations worldwide.

18 FAM 201.1-1(D) Applicability

(CT:PPP-2; 03-19-2018)
(State Only)

These directives apply to all Department of State and other relevant personnel worldwide.

18 FAM 201.1-2 AUTHORITIES

(CT:PPP-2; 03-19-2018)
(State Only)

Authorities include:

- (1) Section 1 (a)(4) of the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a(1)(a)(4)). This statute, authorizes the Secretary to “promulgate such rules and regulations as may be necessary to carry out the functions of the Secretary of State and the Department of State.” Various other statutes and regulations authorize the Secretary to prescribe rules and regulations on particular topics. (For example, see Section 206 of the Foreign Service Act of 1980, as amended (22 U.S.C. 3926), which authorizes the Secretary to prescribe such regulations as the Secretary deems appropriate to carry out functions under the Foreign Service Act.) Relevant legal authorities are cited in the portions of the FAM to which they pertain;
- (2) The Federal Records Act of 1950 (44 U.S.C. Chapter 31);
- (3) The Government Paperwork Elimination Act (GPEA) (Public Law 105-277, Title XVII (44 U.S.C. 3504, note); and
- (4) The Electronic and Information Technology Accessibility Standards, which implement Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d).

18 FAM 201.1-3 RESPONSIBILITIES

18 FAM 201.1-3(A) Program Offices

(CT:PPP-7; 08-13-2018)
(State Only)

Program offices:

- (1) Draft and coordinate appropriate directives to be incorporated into the FAM that set forth Department organizational structures, policies, and procedures and identify and verify related legal authorities;
- (2) Ensure that the Department’s directives are current. Program offices review directives for which they have substantive and coordinating responsibility annually and make changes to maintain the completeness and accuracy of the FAM; and
- (3) Ensure that organizational, policy, or procedural changes issued by ALDACS or Department Notices (see [18 FAM 201.1-5\(B\)](#)) are incorporated into the FAM within 60 days of the announcement of such changes.

18 FAM 201.1-3(B) Operating Offices

(CT:PPP-2; 03-19-2018)
(State Only)

Operating offices should notify the proper program office, if known, or the Office of Directives Management of any discrepancies in the FAM.

18 FAM 201.1-3(C) Office of Directives Management

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Office of Directives Management (A/GIS/DIR):
 - (1) Analyzes, evaluates, organizes, and edits initial FAM directives and changes;
 - (2) Coordinates with and ensures that responsible program offices incorporate statutes, Executive orders, or other legally-required or Presidentially-directed materials into the FAM;
 - (3) In conjunction with the Office of the Legal Adviser, determines the validity of Department of State directives materials; and
 - (4) Periodically reports to management the status of the Directives Management Program.
- b. A/GIS/DIR must approve and ensure the appropriate clearance of all directives before publication or issuance. (This includes changes issued as covered under section [18 FAM 201.1-5\(B\)](#).)
- c. A/GIS/DIR coordinates the annual review of all FAM material (see [18 FAM 201.1-1\(B\)](#) paragraph b(5)) and reports on the review's status to the Standing Committee on Directives.
- d. A/GIS/DIR also maintains the official Department of State organization chart. This chart reflects the structure of the Department as given by the organizational and functional statements in 1 FAM (Organization and Functions).
- e. A/GIS/DIR provides up-to-date organizational information to the Federal Register annually, or as otherwise requested, for inclusion in the United States Government Manual (See 5 U.S.C. 552).

18 FAM 201.1-3(D) Office of Inspector General

(CT:PPP-2; 03-19-2018)
(State Only)

The Office of Inspector General (OIG) has statutory responsibilities under section 4(a) of the Inspector General Act of 1978, as amended (5 U.S.C. Appendix). Accordingly, OIG reviews proposed legislation, regulations, and policies relating

to programs and operations of the Department and other establishments for which OIG provides oversight. OIG provides written comments on such proposals when appropriate. OIG's review ensures its awareness of all changes relevant to its oversight responsibilities, and its comments typically focus on text that is related to:

- (1) OIG work or recommendations within the past 3 years; or
- (2) OIG oversight authorities and internal operations.

18 FAM 201.1-3(E) Other Foreign Affairs Agencies

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Department of State and other Foreign Affairs agencies, i.e., the Agency for International Development (USAID) and the Departments of Commerce and Agriculture, should strive to provide maximum uniformity in their administrative policies and procedures. Directives, therefore, should be joint efforts whenever the agencies have common operations. In the Department of State's Foreign Affairs Manual, these joint directives are issued using the term "uniform regulations." A/GIS/DIR determines the presentation style of these policies and procedures.
- b. A Joint Regulations Board, consisting of a representative from State (A/GIS/DIR), who is the chair, and one representative each from USAID and the Departments of Commerce and Agriculture, administers the uniform directives program. The Department of State provides leadership, but all agencies participating have equal voice in developing uniform directives.

18 FAM 201.1-3(F) Volume Coordinator

(CT:PPP-2; 03-19-2018)
(State Only)

Volume coordinators perform FAM oversight and liaison functions in cooperation with the Office of Directives Management (A/GIS/DIR). With the exception of Volumes 1 and 2 of the FAM, the volume coordinator for a specific volume or portion of a volume is designated by the Assistant Secretary (or equivalent), whose 1 FAM responsibilities include managerial responsibility for that particular volume or portion. Each volume coordinator also:

- (1) Oversees the assigned volume (and attendant handbooks); monitors status of pending items; and reviews issuance dates to ensure that the material contained in the FAM is current;
- (2) Coordinates FAM changes; participates in all formal submissions to A/GIS/DIR (sometimes drafting the formal submission memorandum); and may act as the conduit for all submissions and revisions between the substantive office and A/GIS/DIR;

- (3) Ensures proper clearances of all material before formal submission to A/GIS/DIR;
- (4) Coordinates clearances within the volume coordinator's bureau on related issues in other volumes;
- (5) Keeps management informed of the status of changes and alerts appropriate offices concerning portions of the FAM that warrant revision. Secures management's cooperation to ensure that reviews and revisions are carried out;
- (6) Coordinates with the designated A/GIS/DIR FAM analyst to ensure FAM revisions under the volume coordinator's responsibility are codified;
- (7) Identifies material for inclusion in the FAM and ensures such material is added; and
- (8) Mediates differences between offices on FAM issues.

18 FAM 201.1-3(G) Standing Committee on Directives

(CT:PPP-2; 03-19-2018)
(State Only)

The Standing Committee on Directives is chaired by the Assistant Secretary for Administration and is composed of designated representatives from other Department bureaus. It meets as necessary to provide guidance and direction on FAM issues and to resolve clearance issues between offices concerning FAM material.

18 FAM 201.1-4 DEFINITIONS

(CT:PPP-2; 03-19-2018)
(State Only)

Change Transmittal (CT): Formerly known as Transmittal Letter (TL), the official document that implements formal directive changes to the FAM or FAH. It provides effective dates and necessary instructions for incorporating changes into the FAM or FAH.

Directive: A written communication establishing and prescribing the organizations, policies, or procedures that provide an official basis of Department of State operation.

Foreign Affairs Handbook (FAH): An extension of the Foreign Affairs Manual. This supplemental series provides implementing guidelines and detailed procedures for directives contained in the FAM. The term "Handbook" denotes a Foreign Affairs Handbook. (See also [18 FAM 201.1-5 \(E\)\(1.\)](#))

Foreign Affairs Manual (FAM): The formal written document for recording, maintaining, and issuing Department directives. The term “manual” denotes the Foreign Affairs Manual or one of its volumes.

Operating offices: These offices are responsible for carrying out the Department’s mission. They perform their functions in accordance with directives contained in the FAM.

Program offices: Department organizations that develop, implement, and manage appropriate policies and procedures regarding specified functions. Program offices also perform oversight and periodic review of operating offices to ensure their compliance with Department directives.

Uniform regulations: The term used for joint directives agreed to by the Department and other Foreign Affairs agencies and incorporated into agency directives materials (see [18 FAM 201.1-3\(E\)](#)).

Valid (validity): The term used to describe those directives placed in force through proper issuance as prescribed in [18 FAM 201.1](#).

18 FAM 201.1-5 DIRECTIVES PROGRAM

(CT:PPP-10; 09-19-2018)
(State Only)

The directives program comprises the Foreign Affairs Manual, the Foreign Affairs Handbooks, acquisition regulations (see [18 FAM 201.1-5\(D\)](#)), Department Notices and *cables* (interim issuance only), and collateral regulations (see [18 FAM 201.1-5\(F\)](#)). DIR also manages delegations of authority (see [18 FAM 201.3](#)) and agency rulemaking (see [18 FAM 201.4](#)).

18 FAM 201.1-5(A) The Foreign Affairs Manual (FAM)

(CT:PPP-2; 03-19-2018)
(State Only)

a. The Foreign Affairs Manual is the official articulation of directives that apply to the activities of the Department of State and the Foreign Service (see [18 FAM 201.1-1\(B\)](#)). The Foreign Affairs Manual consists of multiple volumes, listed below, with brief summaries of content. Abbreviations used for numbering change transmittals follow in parentheses.

1 FAM—ORGANIZATION AND FUNCTIONS (CT:ORG-): This volume consists of the organizational structure of the Department of State, its functions, responsibilities, and authorities, and contains the official Department organization chart.

2 FAM—GENERAL (CT:GEN-): This volume contains an extensive range of unrelated materials; refer to 2 FAM Table of Contents for the list of subjects.

3 FAM—PERSONNEL (CT:PER-): This volume contains employment information, compensation, commissions, allowances and differentials, attendance and leave, benefits, performance evaluation, labor-management relations, conduct, grievance procedures, separation/retirement, locally employed staff (LE staff), etc.

4 FAM—FINANCIAL MANAGEMENT (CT:FIN-): This volume contains information on auditing, budgeting, accounting, disbursing, vouchers and claims, payroll operations, structure and classification codes, etc.

5 FAM—INFORMATION MANAGEMENT (CT:IM-): This volume contains information management-related issues, including correspondence and records management, audio-visual management, telecommunications, software engineering, system management, equipment and services acquisition, strategic planning, Freedom of Information, and program management.

6 FAM—GENERAL SERVICES (CT:GS-): This volume contains personal services and benefits information; commissary, mess, and recreational facilities; safety program; procurement of automated data processing equipment; space allocation; and publication, library, and language services.

7 FAM—CONSULAR AFFAIRS (CT:CON-): This volume contains responsibilities regarding the welfare of U.S. citizens abroad; judicial, financial, and medical assistance; shipping and seamen; acquisition and loss of U.S. citizenship; passport services; registration abroad, including reports of birth and absentee voting; and protection of foreign interests.

8 FAM—Reserved for Passports.

9 FAM—VISAS (CT:VISA-): This volume contains information on the issuance or refusal of visas to aliens.

10 FAM—PUBLIC, EDUCATIONAL, AND CULTURAL AFFAIRS (CT:PEC-): This volume contains information on public affairs; public diplomacy; education and cultural exchange programs; press relations; U.S. Government information dissemination to and within foreign countries; and educational and cultural conferences.

11 FAM—LEGAL AND POLITICAL AFFAIRS (CT:POL-): This volume contains political reporting, policies, and programs the Office of the Legal Adviser administers; intelligence, treaties and other international agreements; and international conferences. (Much of 11 FAM is CLASSIFIED.)

12 FAM—DIPLOMATIC SECURITY (CT:DS-): This volume governs security issues for personnel, facilities, and systems; protection; investigations; courier service; and counterterrorism.

13 FAM—TRAINING AND PROFESSIONAL DEVELOPMENT (CT:TPD-): This volume contains policies and procedures for the training of employees of the Department of State, and others, as appropriate.

14 FAM—LOGISTICS MANAGEMENT (CT:LM-): This volume contains logistics management, including procurement and the Diplomatic Pouch.

15 FAM—OVERSEAS BUILDINGS OPERATIONS (CT:OBO-): This volume consists of management information of the Department's facilities abroad including foreign aspects of the Department's safety program.

16 FAM—Medical and Health Program (CT:MED-): This volume provides information regarding medical clearances for personnel and acts as the Designated Agency Head for Safety Operations.

17 FAM—Reserved.

18 FAM—Programs, Practices, and Planning (CT:PPP-): Provides guidance strategic direction, policy priorities, and program management.

- b. A/GIS/DIR maintains the definitive master copy and inventory of the Foreign Affairs Manual. This office also maintains the historical record of prior FAM provisions no longer in effect.

18 FAM 201.1-5(B) Interim Directive

(CT:PPP-8; 08-14-2018)

a. POLICY

An office may issue an interim directive that has immediate effect.

- (1) Interim directive refers to a new policy or a change in policy that is announced in a cable (ALDAC) or Department Notice prior to being codified in the Foreign Affairs Manual (FAM) or associated Foreign Affairs Handbook (FAH). An interim directive is issued due to an urgent or compelling need or an emergency situation. An interim directive might result in conflicting guidance with the FAM/FAH. Due to the possible confusion that may be caused by having more than one version of a policy in existence, interim directives are valid and supersede the FAM/FAH for the time period identified within the ALDAC or Department Notice. If an interim directive expires, the effective policy will be the policy codified in the FAM/FAH.
- (2) Emergency situation includes addressing national security and public safety issues; litigation deadlines; Presidential Policy Directive Executive Orders and new legislation that have short deadlines; or other time sensitive situations.

b. PROCEDURES

- (1) Drafting:
 - (a) The first sentence of an interim directive ALDAC or Department Notice must include: "this is a policy change" and the expiration of the interim directive, not to exceed one year from date of issuance.

- (b) The reference line of an interim directive ALDAC or Department Notice must refer to the relevant FAM or FAH section.
 - (c) A point of contact (POC) must be named within the interim directive.
- (2) Clearance:
- (a) The drafting bureau's Assistant Secretary or designee must approve and certify the interim directive as a new or change in policy that must be codified into the FAM in a timely manner.
 - (b) The drafting office must secure all bureau clearances before the interim directive can be issued in an ALDAC or Department Notice.
 - (c) The drafting office must secure clearance from all stakeholders within the Department, within two business days, before the interim directive can be issued in an ALDAC or Department Notice. Except for the requirements identified in paragraphs (d) and (e) below, if no response is received within two business days, the document will advance to the next step. If a stakeholder indicates a Do Not Clear they must concurrently provide the justification and alternate content verbiage that will allow them to clear.
 - (d) The Volume Coordinator (VC) is a mandatory clearer for each interim directive.
 - (e) An attorney assigned to the Office of the Legal Adviser (L) must clear before the interim directive can be issued in an ALDAC or Department Notice.
 - (f) The Office of the Inspector General (OIG) will review, within two business days, the text before the interim directive can be issued in an ALDAC or Department Notice. OIG may provide comments on Department directives, ALDACs and Notices, but does not provide clearance. If no response is received within two business days, the document will advance to the next step.
 - (g) A clearance sheet must be maintained that indicates the bureau and name of the clearer.
 - (h) Upon request from L or OIG, A/GIS/DIR will provide a crosswalk of modifications regarding the interim guidance and current FAM/FAH text.
 - (i) For interim personnel directives that require a revision or modification of 3 FAM/FAH, see [3 FAH-1 H-1116.1](#) for clearance guidance.
- (3) Emergency Interim Directive:
- (a) In an emergency situation, an interim directive may be issued in accordance with [2 FAM 1216.2](#)

- (i) In an emergency, normal clearance may be dispensed with, but the action bureau assumes responsibility for departure from the prescribed process.
 - (ii) The action office must inform the units and stakeholders within the Department omitted from the clearance process of the action that has been taken at opening of business the next business day.
 - (b) An attorney assigned to the Office of the Legal Adviser (L) must clear all emergency interim directives before the interim directive can be issued in an ALDAC or Department Notice.
 - (c) Emergency interim directives issued after hours may be cleared by the drafting bureau with relevant bureau duty officers.
 - (d) The drafting bureau must notify the OIG of the emergency issuance of an interim directive at opening of business the next business day. Subsequently the OIG will conduct a review of the interim directive within five business days. OIG may provide comments on Department directives, ALDACs and Notices, but does not provide clearance. If no response is received within five business days, the document will advance to the next step.
- (4) Issuance:
- (a) Once approval and clearances are secured:
 - (i) The ALDAC draft is transmitted by the drafting bureau in the SMART system. The Operations Center (S/ES-O) will review each outgoing ALDAC electronically within SMART and authorize final issuance. The ALDACs that do not meet the standard requirements for issuance will be returned to the drafter for re-submission.
 - Detailed guidance, step-by-step instructions for entering ALDACs into SMART, and clearance guidance are available on the Executive Secretariat InfoLink page at under "Paper Guidance."
 - Additional resources on drafting and sending cables through SMART are available at the SMART apps page.
 - (ii) The Department Notice is transmitted by the drafting bureau to A/GIS for final issuance.
 - (b) Upon issuance of the interim directive, on the day of or opening of business the next business day, the drafting office must provide the following to A/GIS/DIR, at efam@state.gov, for publishing in the FAM/FAH:
 - (i) Approved ALDAC or Department Notice;
 - (ii) Clearance sheet;
 - (iii) Hyperlink URL to the specific interim directive:

- on the SMART Search site for ALDACs;
 - on the Department Intranet site for Department Notices.
- (c) A/GIS/DIR will notify the appropriate VC upon receipt of information regarding the interim directive.
- (5) FAM/FAH Publication:
- (a) Within two working days after the issuance of the ALDAC or Department Notice, A/GIS/DIR will publish the hyperlink in the appropriate FAM/FAH section linking directly to the interim directive.
 - (b) Within 60 days of issuance, the interim directive will be placed in the FAM Clearance application by the VC, in the standard FAM/FAH format, in order to secure clearance from all stakeholders within the Department.
 - (c) In the event required modifications or revisions are identified within the FAM clearance process:
 - (i) The final cleared policy will be published in the FAM and will supersede the issued interim directive and prior policy.
 - (ii) The office of origin will re-issue an ALDAC or Department Notice citing the previous issuance, identifying the modifications or revisions made along with the appropriate hyperlink, and notifying the Department that the final policy is available in the FAM/FAH on the A/GIS/DIR website.
 - (d) A/GIS/DIR will notify the office of origin VC 30 days prior to expiration of an interim directive.
 - (e) Altogether, bureaus should codify an interim directive it has announced within 90 days of the announcement.

c. RESOURCES

- (1) [5 FAH-1 H-232](#) guidance regarding drafting ALDACs;
- (2) [5 FAH-1 H-240](#) guidance regarding release of ALDACs; see also [5 FAH-1 H-211](#) and [5 FAH-1 H-212.1](#) guidance regarding archive messages that convey official Department policy;
- (3) [5 FAH-1 H-710](#) guidance regarding use of Department Notices;
- (4) [5 FAH-1 H-720](#) guidance regarding preparation and clearance of Department Notices;
- (5) [2 FAM 1210](#) provides general guidance on action and clearance procedures and processes;
- (6) Repository:
 - (i) ALDACs are retrievable in SMART Search.
 - (ii) Department Notices are retrievable in the Department Intranet.

- (iii) Consular policy ALDACs and Department Notices are also retrievable in the CAWeb Intranet.

18 FAM 201.1-5(C) Delegations of Authority

(CT:PPP-2; 03-19-2018)
(State Only)

Delegations of authority, when assigned numbers by A/GIS/DIR, become part of the Department's body of authorities, to be cited as appropriate in the FAM. As necessary, DIR may also include delegations of authority in the FAM. (See [18 FAM 201.3](#)).

18 FAM 201.1-5(D) Acquisition Regulations

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Federal Acquisition Regulations System codifies under Title 48 of the Code of Federal Regulations uniform policies and procedures for acquisition by all executive agencies.
- b. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR.
- c. The Department of State Acquisition Regulation (DOSAR) implements, supplements, and in some cases, deviates from the FAR. The FAR and DOSAR cover Department of State acquisitions both domestically and abroad. The Office of the Procurement Executive (A/OPE) is responsible for the DOSAR and represents the Department on the council that revises the FAR.

18 FAM 201.1-5(E) Handbooks and Guidelines

18 FAM 201.1-5(E)(1) Foreign Affairs Handbook Series

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Foreign Affairs Handbook (FAH) series is a supplemental series providing guidelines and procedures for implementing policies and directives contained in the FAM. Material published in a FAH has the same force and effect as material published in the FAM. Each handbook in the FAH series starts with the same FAM volume number to which it relates. For example, 5 FAH-1 refers to the Correspondence Handbook. The "5" prefix refers to Volume 5, Information Management. The "1" shows that this is the first handbook in that FAH series.

- b. A/GIS/DIR maintains a complete inventory and listing of all extant handbooks. DIR also maintains the historical record of prior FAH provisions no longer in effect.

18 FAM 201.1-5(E)(2) Other Guidebooks and Booklets

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Office of Directives Management does not always link the FAM to other Department guidebooks (also termed guidelines, internal procedures, etc.) relating to isolated operations. A/GIS/DIR must clear all proposed guidebooks or other similar materials prior to publication to determine whether they must be incorporated in a FAM volume or FAH handbook series. Guidebooks are not enforceable.
- b. Booklets contain general information for distribution to individual employees or the public (such as health conditions or social customs in certain areas of the world). Booklets are not enforceable.

18 FAM 201.1-5(F) Collateral Regulations

(CT:PPP-10; 09-19-2018)
(State Only)

Collateral regulations comprise an organized collection of the regulatory or directives publications of Federal agencies other than the Department of State that affect the work of the Department and the Foreign Service. They have legal effect without reissuance by the Department. Such material is not ordinarily written into the Foreign Affairs Manual. It is forwarded to posts in the form in which originally issued or as extracts under cover of explanatory *cables* or change transmittals. Maintain these materials as individual manuals or sets of issuances.

18 FAM 201.1-6 ISSUING DIRECTIVES

(CT:PPP-2; 03-19-2018)
(State Only)

Procedures for drafting, clearing, formatting, and issuing FAM material are given in 2 FAH-1, Foreign Affairs Manual Standards.

18 FAM 201.1-6(A) Drafting Directives

(CT:PPP-10; 09-19-2018)
(State Only)

- a. Originating offices should coordinate with the Office of Directives Management (A/GIS/DIR) before drafting a directive for publication in the FAM (or emergency issuance by Department Notice or *cable*).
- b. The originating office is responsible for the substance, proper format, and necessary clearances of each directive proposed for publication as a change to the Foreign Affairs Manual or a Foreign Affairs Handbook. A/GIS/DIR may return to the originating office for correction any directives submitted for publication that are not properly formatted or contain substantive errors, such as incorrect authority citations.
- c. While any office of the Department may propose the initiation of a new or revised directive, the office having primary program responsibility or interest in the subject matter involved prepares the material. When two or more offices share in preparing a single directive, this responsibility may be assumed under mutual agreement by either office, by the volume coordinator, or the Office of Directives Management.
- d. When drafting new or revised directives, drafting officers should collaborate with their counterparts in other foreign affairs agencies to obtain uniformity. A uniform regulation may not be revised without interagency consultation.
- e. The originating office also prepares a suggested summary to be included in the change transmittal. The summary contains the specific major changes in the directive.

18 FAM 201.1-6(B) Clearance and Submission Procedure

(CT:PPP-2; 03-19-2018)
(State Only)

Specifics procedures regarding the FAM clearance process are covered in 2 FAH-1, Chapter H-100.

18 FAM 201.1-6(B)(1) Policy

(CT:PPP-2; 03-19-2018)
(State Only)

- a. A/GIS/DIR is responsible for ensuring that materials have proper clearance before issuance, printing, or other dissemination.
- b. A/GIS/DIR may specify and require clearance points and may decline issuance without those clearances.

- c. FAM material needing clearances from within the Department must be submitted to the FAM Clearance website. Procedures for using the FAM Clearance website are contained in [2 FAH-1 H-116](#).

18 FAM 201.1-6(B)(2) Internal Clearances

(CT:PPP-2; 03-19-2018)
(State Only)

Originating/program offices are responsible for obtaining their own bureau's internal clearances; they work with the relevant volume coordinator as needed. Drafters should be in contact with A/GIS/DIR to obtain an informal review before getting the internal clearances.

18 FAM 201.1-6(B)(3) Department Review and Clearance Points

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The originating office is responsible for identifying which bureaus/offices should review, comment, and/or clear the material.
- b. Each clearance point indicates approval or disapproval in writing, including the use of email, through the FAM Clearance website (see [2 FAH-1 H-116](#)). In the case of disapproval, the clearance point gives its reasons.
- c. Required clearance points are:
- (1) L—mandatory for substantive issues;
 - (2) CGFS—for financial issues;
 - (3) HR—for personnel issues; and
 - (4) A/GIS/DIR—for all Department administrative issues, policies, and procedures.
- d. OIG is always a review point for new policies. OIG will comment as appropriate, but does **not** clear.

18 FAM 201.1-6(B)(4) Formal Submission

(CT:PPP-2; 03-19-2018)
(State Only)

- a. After all clearances are obtained, the originating office reconciles comments on proposed directives into the draft directive. It sends the request for publication and final draft in approved format (see [2 FAH-1 H-100](#)) to the volume coordinator. The volume coordinator reviews the submission and forwards the final draft to the Office of Directives Management for review and codification.

- b. If needed or requested by A/GIS/DIR, the originating office must explain in writing reasons for nonacceptance of substantive comment from other offices identified in the clearance process. L clearance is mandatory for substantive issues.

18 FAM 201.1-6(C) Review and Issuance

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Office of Directives Management determines and applies directives standards. It makes such editorial changes it deems necessary (without reclearance, unless substantive intent of the proposed material is affected), and it arranges for publication.
- b. A/GIS/DIR reviews and issues all directives, ensuring that:
 - (1) No conflicting and duplicating policies are published;
 - (2) Proper clearances and approvals have been obtained; and
 - (3) Directives are easy to understand.
- c. The A/GIS/DIR obtains or directs the originating office to obtain any additional clearances it deems necessary, especially if uniformity among agencies is involved. It also approves for publication new or revised directives after all offices concerned have reviewed and concurred.
- d. When the originating office or the Office of Directives Management cannot reconcile dissenting views, A/GIS/DIR must report the matter to the Standing Committee on Directives.
- e. On a uniform directive, agency dissenting views are resolved by the Joint Regulations Board or by referral by the Board to senior officials of the agencies concerned.

18 FAM 201.1-6(D) Issuance and Distribution

18 FAM 201.1-6(D)(1) General Policy

(CT:PPP-2; 03-19-2018)
(State Only)

- a. A/GIS/DIR is solely responsible for managing this program. Address all questions concerning this program, including validity of materials in either format, to A/GIS/DIR.
- b. A/GIS/DIR prepares its master copies for electronic use. Offices may purchase paper revisions from A/GIS/GPS and use them as backup copies and for reference as needed.

- c. A/GIS/DIR issues change transmittals (CTs) to make changes and replacements by subchapter. DIR maintains a master copy for validity and continuity purposes.
- d. Use the TAGS AINF and KFAM on all official communications concerning any FAM or FAH issuances.

18 FAM 201.1-6(D)(2) Intranet

(CT:PPP-2; 03-19-2018)
(State Only)

A/GIS/DIR posts all issued Department's directives on its websites. These electronic Web versions are the official versions of the Department's directives.

18 FAM 201.1-6(D)(3) Compact Disk Format

(CT:PPP-2; 03-19-2018)
(State Only)

Upon requests from posts where the Internet may not be available or reliable, A/GIS/DIR can supply the FAM in CD-ROM (Compact Disk-Read Only Memory) format.

18 FAM 201.1-6(E) Volume Maintenance

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The FAM is a vital part of the Department's day-to-day operations. Posts/offices relying on nonelectronic FAM materials must maintain them and keep them current. Responsibilities for FAM maintenance include:
 - (1) Providing means to access the FAM over the Department's Intranet or ClassNet, as well as the Internet, OSIS, and SIPRNET whenever possible, or making the most recent FAM CD-ROMs or paper copies readily available;
 - (2) Distributing new material promptly; and
 - (3) Ensuring that FAM materials remain at the post/office, and not in the possession of individual officers or staff.
- b. Posts and offices that rely primarily on CD-ROM or paper versions of the FAM should include FAM maintenance as part of the job descriptions of designated employees and should include a FAM/FAH review as part of check-in and check-out procedures.

18 FAM 201.1-7 DIRECTIVES RECORDS

(CT:PPP-2; 03-19-2018)
(State Only)

The Office of Directives Management maintains complete records showing clearances and approvals on all materials published in the FAMs and FAHs. These records are available to officers of the Department who seek information on the history of directives.

18 FAM 201.1-8 DIRECTIVES VALIDITY AND INTERPRETATION

18 FAM 201.1-8(A) Validity

(CT:PPP-2; 03-19-2018)
(State Only)

- a. The Office of Directives Management (A/GIS/DIR), in coordination with L, determines the validity of Department of State directives. As the managing office, DIR maintains an official copy of all valid directives. In the case of legal deficiency, L may request DIR to rescind the identified material and at the same time notify the program office of the determination and the need to revise the affected material.
- b. A/GIS/DIR will respond to questions of apparent discrepancy or divergence between the official electronic version and other DIR-issued versions. (For example, due to older processing requirements, FAM citations have differed slightly between the two formats, but both are equally valid as long as their substance is the same.)
- c. Direct requests concerning the validity of directives or other similar materials to A/GIS/DIR.

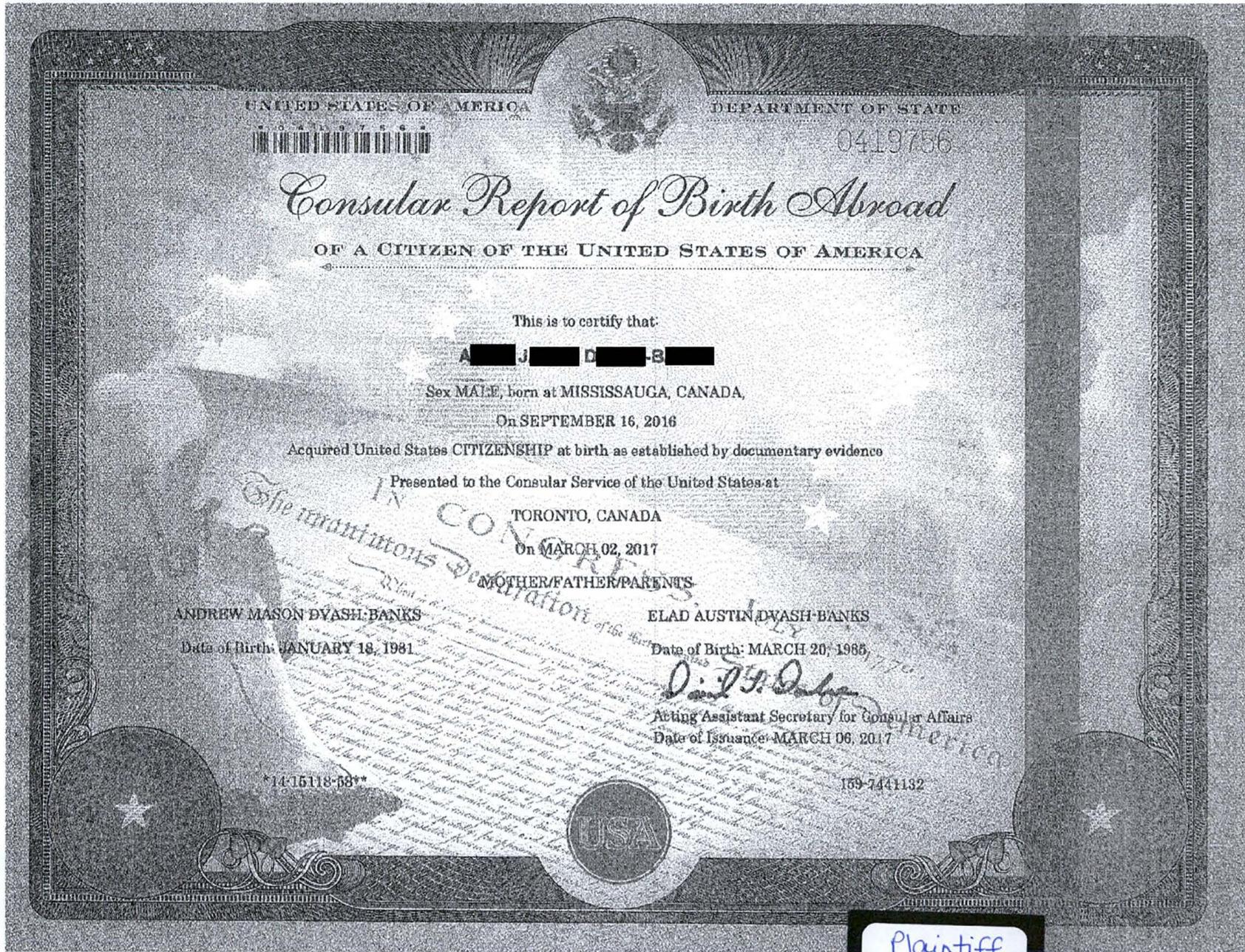
18 FAM 201.1-8(B) Interpretation

(CT:PPP-2; 03-19-2018)
(State Only)

The originating office is responsible for interpreting its directives, subject to L review. The Office of Directives Management will forward inquiries it receives to the originating office. Interpretation of uniform directives is made after interagency consultation.

Exhibit 19

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



Plaintiff
 Deposition Exhibit
 12 for ID
 12-20-18 dll

Attorneys' Eyes Only

Since 1790, U.S. law has provided for transmittal of U.S. citizenship to children born abroad to a U.S. citizen parent. The U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born. Since 1919, such births have been recorded on Form FS-240 Consular Report of Birth Abroad of a Citizen of the United States of America.

This document is a permanent record of the bearer's acquisition of U.S. citizenship. Under the provisions of Section 2705 of Title 22 of the United States Code, the Consular Report of Birth Abroad of a Citizen of the United States is proof of U.S. citizenship.

Exhibit 20

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

1 JOSEPH H. HUNT
 2 Assistant Attorney General
 3 ANTHONY J. COPPOLINO
 4 Deputy Director
 5 LISA ZEIDNER MARCUS
 6 Senior Counsel
 7 Tel: (202-514-3336
 8 lisa.marcus@usdoj.gov
 9 VINITA B. ANDRAPALLIYAL
 10 Trial Attorney
 11 Tel: (202) 305-0845
 12 vinita.b.andrapalliyal@usdoj.gov
 13 UNITED STATES DEPARTMENT OF JUSTICE
 14 Civil Division, Federal Programs Branch
 15 P.O. Box 883
 16 Washington, DC 20044

17 *Counsel for Defendants*

18 UNITED STATES DISTRICT COURT
 19 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 20 WESTERN DIVISION

21 ANDREW MASON DVASH-
22 BANKS, et al.,

23 Plaintiffs,

24 v.

25 THE HONORABLE MICHAEL R.
26 POMPEO, Secretary of State, et al.,

27 Defendants.

28 No. CV 18-523-JFW-JC

**Additional Excerpts from the
Deposition Testimony of Larilyn
Reffett, Supporting Defendants’
Motion for Partial Summary
Judgment**

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

29 Pursuant to this Court’s Case Management Order (Dkt. No. 52), Defendants
 30 hereby file the instant document for deponent Larilyn Reffett. This document contains
 31 “only those questions and answers, and any objections made at the time of the deposition
 32 to those questions, that Defendants are relying on to support their partial motion for
 33

1 summary judgment, with a citation to the appropriate page(s) and line number(s) in the
2 deposition transcript.”

3 ***

4
5 Reffett, Larilyn, (Pages 92:06 to 93:06)

6 92

7
8 Q. And in adjudicating applications
9 7 for a passport for a child born in September of
10 8 2016, is it your testimony that if that child was
11 9 born in Ontario, the consulate would require
12 10 submission of a Statement of Live Birth?

13 11 A. Generally speaking, we would
14 12 require a statement of some type issued by the
15 13 Registrar in Ontario.

16 14 Q. Okay. And are there written
17 15 materials stating what documentation needs to be
18 16 provided to the Toronto Consulate in support of a
19 17 U.S. passport application for a child?

20 18 A. That information is all on our
21 19 website. When you go to make your appointment for
22 20 the service, there is a checklist of information
23
24
25
26
27

1 21 that you would need to bring with you.

2 22 Q. And does that checklist require
3
4 23 that a Statement of Live Birth be brought to the
5 24 consulate?

6 25 A. I don't know how it references the

7
8 93

9 1 document. As I mentioned, it is the equivalent of
10 2 a birth certificate and there are many different
11 3 versions here in Ontario. If you bring one of the
12 4 versions that doesn't meet the requirements, we
13 5 will request that you get the more comprehensive
14 6 version.
15
16
17
18

19 Reffett, Larilyn, (Pages 177:04 to 177:25)

20 177

21 4 Q. For children born in Ontario who
22 5 are applying for a U.S. passport at the Toronto
23 6 Consulate, does the consulate require that children
24 7 provide a document entitled a Notice of Live Birth?

25 8 A. No, we require that you provide us
26
27
28

1 9 with a document that has been issued by the
2 10 Registrar here that is an official Ontario birth
3
4 11 document, and we do require for minor children that
5 12 that document does include the names of both of the
6 13 parents for the purposes of meeting the two-parent
7
8 14 signature consent requirement so we have to be able
9 15 to see that on the birth certificate those are the
10 16 parents listed in order to allow them to sign the
11
12 17 application.

13 18 That was kind of what I was referencing
14
15 19 in saying that there are a couple of different
16 20 versions, and there is one version that does not
17 21 list the parents. That one we cannot accept
18
19 22 because we have to be able to identify that the
20 23 people standing in front of us taking the oath are
21 24 allowed to sign that application and allowed to
22
23 25 authorize documentation for the child.

Exhibit 21

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

1 JOSEPH H. HUNT
 Assistant Attorney General
 2 ANTHONY J. COPPOLINO
 Deputy Director
 3 LISA ZEIDNER MARCUS
 Senior Counsel
 4 Tel: (202-514-3336
 lisa.marcus@usdoj.gov
 5 VINITA B. ANDRAPALLIYAL
 Trial Attorney
 6 Tel: (202) 305-0845
 vinita.b.andrapalliyal@usdoj.gov
 7 UNITED STATES DEPARTMENT OF JUSTICE
 Civil Division, Federal Programs Branch
 8 P.O. Box 883
 9 Washington, DC 20044
 10

11 *Counsel for Defendants*

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

15 ANDREW MASON DVASH-
 16 BANKS, et al.,
 Plaintiffs,
 17
 v.
 18
 19 MICHAEL R. POMPEO, in his
 official capacity as U.S. Secretary of
 20 State, et al.,
 Defendants.
 21

No. CV 18-523-JFW-JC

**Additional Excerpts from the
Deposition Testimony of Paul Peek,
Supporting Defendants’ Motion for
Partial Summary Judgment**

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

22
 23 Pursuant to this Court’s Case Management Order (Dkt. No. 52), Defendants
 24 hereby file the instant document for deponent Paul Peek. This document contains “only
 25 those questions and answers, and any objections made at the time of the deposition to
 26 those questions, that Defendants are relying on to support their partial motion for
 27
 28

1 summary judgment, with a citation to the appropriate page(s) and line number(s) in the
2 deposition transcript.”

3 ***

4 Peek, Paul, (Pages 180:16 to 181:10)

5 180

6 16 Q Okay. So -- and just to close that
7 17 circle, if you go back to Plaintiffs' Deposition
8 18 Exhibit 4, which probably is in front of you, 7 FAM
9 19 1140, appendix E on page 4 -- tell me if you're
10 20 there. I know this gets confusing --

11 21 A The whole thing is 7 FAM appendix E --
12 22 1140 appendix E. Right.

13 23 Q Okay. And page 4. We're in the in
14 24 wedlock and of wedlock.

15 25 A Right.

16 181

17 1 Q Okay. Part (a), "The term 'birth in
18 2 wedlock' has consistently -- has been consistently
19 3 interpreted to mean birth during the marriage of the
20 4 biological parents to each other," correct?

21 5 A Yes.

22 6 Q And is that -- I'm trying to close off
23 7 this circle here. Is that what you mean in your
24 8 last answer when you talk about the requirement that
25 9 the biological parents be married to each other?

26 10 A Yes.

1 Peek, Paul, (Pages 234:22 to 234:24)

2 234

3 22 A Yes, the department is concerned about
4 23 fraud in the application for documentation of U.S.
5 24 citizenship.

7 Peek, Paul, (Pages 236:3 to 236:12)

8 236

9 3 BY MR. EDELMAN:

10 4 Q So do concerns about preventing fraud
11 5 have any relevance to the way that the State
12 6 Department interprets section 301 of the INA to
13 7 require a biological relationship between the U.S.
14 8 citizen parent and a child?

15 9 A The primary concern is to be compliant
16 10 with the law. The secondary concern is to make sure
17 11 that fraud is not taking place in how people are
18 12 applying under the law

20

21

22

23

24

25

26

27

28