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24 *Attorneys for Plaintiffs*

25  
26 **UNITED STATES DISTRICT COURT**  
27 **CENTRAL DISTRICT OF CALIFORNIA**  
28 **WESTERN DIVISION (LOS ANGELES)**

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

21 Plaintiffs,

22 v.

23 THE UNITED STATES  
24 DEPARTMENT OF STATE,  
25 and THE HONORABLE  
26 MICHAEL R. POMPEO,  
27 Secretary of State,

28 Defendants.

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

**EX PARTE NOTICE OF MOTION  
AND UNOPPOSED MOTION  
UNDER FRCP 15(a) FOR LEAVE  
TO REMOVE PLAINTIFFS'  
EQUAL PROTECTION CLAIM  
VIA AMENDMENT OF THE  
COMPLAINT**

Judge: Hon. John F. Walter

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** of Plaintiffs’ unopposed motion under Federal Rule of Civil Procedure 15 for leave to file a First Amended Complaint for the purpose of removing without prejudice their Equal Protection claim (Count II of the operative Complaint). A copy of the proposed First Amended Complaint, along with a redline version identifying the proposed changes from the initial Complaint, are attached for the Court’s review. (See Exhibits A and B, respectively, to the Declaration of Alexa M. Lawson-Remer (hereinafter “Lawson-Remer Declaration”). The proposed First Amended Complaint retains the remaining three causes of action as alleged against Defendants in the initial Complaint (specifically, Plaintiffs’ claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702; 8 U.S.C. § 1503 (“Section 1503”); and the Due Process clause of the Fifth Amendment). The parties met and conferred on December 21, 2018 and January 2 and January 3, 2019 and are available for a hearing if the Court so requires; but otherwise intend to submit the matter to the Court on the papers.

This motion will be based on this Notice of Motion and Motion, the annexed Memorandum of Points and Authorities, the Lawson-Remer Declaration and exhibits thereto, Plaintiff’s First Amended Complaint, the [Proposed] Order filed herewith, and on any additional material presented during the hearing on this motion (if any).

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on December 21, 2018 and January 2 and January 3, 2019. During this conference, Defendants’ counsel stated that they do not oppose a motion that allows Plaintiffs to amend the Complaint to remove Plaintiffs’ equal protection claim.

Dated: January 4, 2019

Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

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*Attorneys for Plaintiffs*

**CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3**

Plaintiffs’ counsel certifies that, prior to filing the instant motion, the parties, through counsel, met and conferred on December 21, 2018 and January 2 and January 3, 2019 regarding the contents of the instant motion and the concurrently-filed Joint Stipulation to Modify Scheduling Order Under Rule 16(b), and exchanged drafts of each.

Dated: January 4, 2019

Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiffs Andrew Mason Dvash-Banks (“Andrew”) and his son E.J.D.-B. (“E.J.”; together, “Plaintiffs”), respectfully submit this memorandum of points and authorities in support of their unopposed motion for an order granting Plaintiffs leave to file a First Amended Complaint for the purpose of removing without prejudice their Equal Protection claim (Count II of the operative Complaint) in the above-captioned action (the “Action”).

**I. INTRODUCTION**

This Action challenges the State Department’s determination not to recognize E.J. as a U.S. citizen at birth. E.J. and his twin brother, A.J.D.-B. (“A.J.”) were born in Canada to Andrew, a U.S. citizen, and his husband, Elad Dvash-Banks (“Elad”), an Israeli citizen, while they were married. The State Department recognizes A.J.’s U.S. citizenship but denies that E.J. is a U.S. citizen.

On January 22, 2018, Andrew and E.J. filed the Complaint in this Action, alleging that under the Immigration and Nationality Act (“INA”), “[a]t birth, both [E.J.] and [A.J.] qualified for United States citizenship pursuant to Section 301(g).” The Complaint alleges four causes of action: (1) violation of due process under the Fifth Amendment (Count I); (2) violation of equal protection under the Fifth Amendment (Count II); (3) violation of Section 706(2)(A) of the Administrative Procedure Act (the “APA”) (Count III); and (4) declaratory judgment pursuant to Section 1503 of the INA that E.J. is a U.S. citizen at birth (Count IV).

Defendants answered the Complaint on July 16, 2018, and the parties submitted their Joint Rule 26(f) Report on August 20, 2018. Thereafter, the Court issued a Scheduling and Case Management Order (“Scheduling Order”) on August 21, 2018, setting out the deadlines in the case. The deadline for amending the pleadings was set at sixty days from the date of the Scheduling Order, or October 20, 2018. The current deadline for moving for summary judgment (as stipulated to

1 by the parties on December 21, 2018 and ordered by the Court on December 26,  
2 2018) is January 7, 2019; the parties each intend to cross-move for summary  
3 judgment on multiple claims.

4 In connection with those contemplated motions, the parties met and  
5 conferred multiple times and, among other things, explored ways to try to  
6 streamline the Action by reducing issues and claims for the Court's consideration  
7 and adjudication. As part of that effort, the parties agreed, subject to the Court's  
8 approval, to eliminate the need for the Court to address Plaintiffs' equal protection  
9 claim. Accordingly, Plaintiffs now seek an order permitting them to amend the  
10 Complaint to remove their equal protection claim (Count II of the operative  
11 Complaint) under Federal Rules of Civil Procedure 15(a) in advance of the January  
12 7, 2019 deadline for filing motions for summary judgment.<sup>1</sup> Plaintiffs are seeking  
13 this order *ex parte* in an effort to obtain the order before the deadline for filing  
14 summary judgment motions. Counsel for Defendants was informed that the instant  
15 motion would be made *ex parte* and consented to the filing.<sup>2</sup>

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21 <sup>1</sup> The requested relief would have the effect of a dismissal without prejudice of  
22 Plaintiffs' equal protection claim. Inasmuch as amendment of the pleadings  
23 pursuant to Rule 15, rather than dismissal under Rule 41, is the proper procedure  
24 for removing individual claims, Plaintiffs seek to accomplish that result by means  
25 of this motion. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683,  
26 687-88 (9th Cir. 2005) ("Rule 41, or at least Rule 41(a), governs dismissals of  
27 entire actions, not of individual claims . . . . [W]ithdrawals of individual claims  
28 against a given defendant are governed by Fed.R.Civ.P. 15, which addresses  
amendments to pleadings.").

26 <sup>2</sup> Defendants in this Action are represented by Lisa Zeidner Marcus and Vinita B.  
27 Andrapalliyal of the United States Department of Justice, mailing address P.O.  
28 Box 883, Washington DC 20044. Their e-mail addresses are  
lisa.marcus@usdoj.gov and Vinita.B.Andrapalliyal@usdoj.gov, respectively.  
Defense counsel's contact telephone number is (202) 305-0845.

## II. ARGUMENT

### A. Legal Standard

Under Fed. R. Civ. P. 15(a), parties are permitted to amend their pleadings with “the opposing party’s written consent” or with leave of court.<sup>3</sup> “[L]eave [to amend] shall be freely given when justice so requires.” *Lisker v. City of Los Angeles*, 2011 WL 3420665, at \*1 (C.D. Cal. Aug. 4, 2011) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992)). In deciding whether to grant leave to amend, “courts are cautioned to apply the policy of free amendment of pleadings with extreme liberality.” *Id.* (quoting *SAES Getters S.P.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002)). Generally, “amendment of pleadings is to be permitted unless the opposing party makes a showing of undue delay, bad faith, undue prejudice, or futility of amendment on the part of the moving party.” *Id.* (quoting *Aeronex*, 219 F. Supp. 2d at 1086-87).

### B. Defendants have consented to Plaintiffs’ amendment of the Complaint, thus amendment is appropriate.

Defendants consented in writing to Plaintiffs’ proposed amendment of the Complaint. (*See* Joint Stipulation to Modify Scheduling Order Under Rule 16(b) at p. 2, filed concurrently with the instant motion). Even if Defendants had

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<sup>3</sup> Fed. R. Civ. P. 15(a) governs the amendment of pleadings. However, “once the court files a pretrial scheduling order establishing a timetable for amending the pleadings, Rule 16 [also] applies.” *Lisker v. City of Los Angeles*, 2011 WL 3420665, at \*1 (C.D. Cal. Aug. 4, 2011). Fed. R. Civ. P. 16(b) allows for modification of a scheduling order upon a showing of “good cause.” Rule 16(b)’s “‘good cause’ standard primarily considers the diligence of the party seeking the amendment . . . Relief may be granted if the court finds that the movant has not unduly delayed the action and that the opponent will not be prejudiced by the modification.” *Lisker*, 2011 WL 3420665, at \*1. Once the “party seeking the amendment demonstrates good cause under Rule 16, then th[at] party must demonstrate that amendment is proper under Rule 15.” *Id.* The parties jointly stipulated, subject to the Court’s approval, to modifying the deadline for amending the pleadings in the Court’s Scheduling Order (Dkt. No. 52) on January 4, 2019 and have filed that stipulation concurrently with this motion.

1 not so consented, amendment is appropriate under Rule 15(a) for the following  
2 reasons. *First*, Plaintiffs diligently notified Defendants of their intention to remove  
3 their equal protection claim before the January 7, 2019 deadline for filing summary  
4 judgment motions in an effort to assist the parties and the Court in streamlining  
5 this action. *Second*, allowing Plaintiffs to amend the Complaint would not unduly  
6 delay the action. To the contrary, it would narrow the issues for the Court to  
7 resolve and thus conserve the Court’s and the parties’ resources. *Third*,  
8 Defendants would not be prejudiced by Plaintiffs’ proposed amendment, which  
9 would reduce the scope of the action and the number of claims for the parties and  
10 the Court to address. Because Plaintiffs are seeking to remove a cause of action  
11 from the Complaint, there is no risk that Defendants would have to “undertake[] . .  
12 . an entirely new course of defense.” *Lisker*, 2011 WL 3420665, at \*2 (Defendants  
13 “fail[ed] to articulate how the *absence* of certain claims w[ould] undermine their  
14 already existing defenses against the remaining claims”). Moreover, because  
15 Plaintiffs could achieve the same result by removing the equal protection cause of  
16 action at the pretrial conference, there is “little point in precluding Plaintiff[s] from  
17 dropping claims [they] no longer wish[] to pursue.” *Id.* (“Defendants cannot force  
18 Plaintiff to pursue at trial every cause of action pleaded in the complaint. This is  
19 made explicit in the Central District’s pretrial procedures . . . . Plaintiff could wait  
20 until the pretrial conference and announce that he has abandoned the [] claims in  
21 question”). *Fourth*, because Plaintiffs are seeking to remove rather than add a  
22 cause of action, there is no concern that amendment would be futile. *Fifth*, there  
23 has been no suggestion—nor could any be made—that Plaintiffs’ request to amend  
24 is not made in good faith.

### 25 III. CONCLUSION

26 For the foregoing reasons, Plaintiffs Andrew and E.J. respectfully  
27 request that the Court grant this motion and thereby grant them leave to file an  
28 amended complaint deleting without prejudice their equal protection cause of

1 action.

2 Dated: January 4, 2019

Respectfully submitted,

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By: /s/ Alexa M. Lawson-Remer

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24 *Attorneys for Plaintiffs*

25 **UNITED STATES DISTRICT COURT**  
26 **CENTRAL DISTRICT OF CALIFORNIA**  
27 **WESTERN DIVISION (LOS ANGELES)**

28 ANDREW MASON DVASH-  
BANKS and E.J. D.-B.,  
  
Plaintiffs,  
  
v.  
  
THE UNITED STATES  
DEPARTMENT OF STATE,  
and THE HONORABLE  
MICHAEL R. POMPEO,  
Secretary of State,  
  
Defendants.

Case No. 2:18-cv-00523-JFW-JCx  
  
**DECLARATION OF ALEXA M.  
LAWSON-REMER IN SUPPORT  
OF UNOPPOSED MOTION UNDER  
FRCP 15(a) FOR LEAVE TO  
REMOVE PLAINTIFFS' EQUAL  
PROTECTION CLAIM VIA  
AMENDMENT OF THE  
COMPLAINT**

Judge: Hon. John F. Walter

1 I, ALEXA M. LAWSON-REMER, hereby declare as follows:

2 1. I am a member of the State Bar of California and admitted to practice  
3 before this Court. I am Special Counsel at Sullivan & Cromwell LLP, and am one  
4 of the lawyers representing Plaintiffs Andrew Dvash-Banks and E.J.D.B. *pro bono*  
5 in the above-entitled action. I provide this declaration in support of Plaintiffs’  
6 Unopposed Motion Under FRCP 15(a) for Leave to Remove Plaintiffs’ Equal  
7 Protection Claim Via Amendment of the Complaint (the “Motion”).

8 2. Attached hereto as Exhibit A is Plaintiffs’ proposed First Amended  
9 Complaint, removing the equal protection claim (Count II) of the initial Complaint.

10 3. Attached hereto as Exhibit B is a redline comparing the First  
11 Amended Complaint to the initial Complaint.

12 4. On January 4, 2019, I notified Defendants’ counsel, Lisa Marcus and  
13 Vinita Andrapalliyal, of Plaintiffs’ intent to file the Motion *ex parte*. Defendants’  
14 counsel consented to the filing.

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

17 Executed this 4th day of January 2019 in Los Angeles, California.

18  
19 /s/ Alexa M. Lawson-Remer  
Alexa M. Lawson-Remer

# EXHIBIT A

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23 Attorneys for Plaintiffs

24 **UNITED STATES DISTRICT COURT**  
25 **CENTRAL DISTRICT OF CALIFORNIA**

26 \_\_\_\_\_ )  
27 ANDREW MASON DVASH-BANKS and )  
28 ETHAN JACOB DVASH-BANKS, )

Plaintiffs, )

v. )

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

Defendants. )  
\_\_\_\_\_)

**FIRST AMENDED  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

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

## PRELIMINARY STATEMENT

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

13 2. Both Ethan and Aiden were conceived and born during Andrew’s  
14 marriage to Elad. Andrew and Elad conceived the twins using their own sperm  
15 and eggs from the same anonymous donor. They used Elad’s sperm to conceive  
16 Ethan and Andrew’s sperm to conceive Aiden. A surrogate carried the twins to  
17 term together in her womb and gave birth to them moments apart on September 16,  
18 2016, in Canada. Andrew and Elad are the only parents Ethan and Aiden have,  
19 and the only people Canadian law<sup>1</sup> recognizes as Ethan and Aiden’s parents.  
20 Accordingly, Andrew and Elad have been the twins’ legal parents from the day  
21 they came into this world together.

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

26  
27 <sup>1</sup> To the extent necessary to introduce or address issues of non-U.S. law in  
28 connection with this action, this hereby constitutes Plaintiffs’ notice pursuant to  
Federal Rule Civil Procedure 44.1 of reliance on foreign law.

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

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

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

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

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

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

15 8. The State Department's policy is not only wrong and harmful, it is  
16 also contrary to the INA as well as the guarantee of due process enshrined in the  
17 Fifth Amendment. To the extent that the State Department's policy was adopted  
18 before the Supreme Court's recent precedents guaranteeing equality to same-sex  
19 married couples and their families, its continued enforcement violates that  
20 precedent. The Supreme Court has made clear that the Constitution requires that  
21 same-sex marriages receive the same legal effects and respect as opposite-sex  
22 marriages. The State Department's policy, or at least its application to Ethan,  
23 violates that mandate by restricting eligibility for citizenship under Section 301 of  
24 the INA solely to children whose parents are in opposite-sex marriages. These  
25 violations create real and significant hardships for the Dvash-Banks family and  
26 others like them.

27 9. The State Department's policy is arbitrary and capricious and serves  
28 no rational, legitimate, or substantial governmental interest. The State

1 Department's policy drives families apart by treating the children of the same  
2 married parents differently depending upon which father's sperm was used during  
3 fertilization. The threat that this policy poses to family unity confirms that it is  
4 contrary to the legislative intent of the INA, which enshrines the preservation of  
5 the family unit as a paramount consideration. Neither the INA nor the U.S.  
6 Constitution permits the State Department's unlawful policy to stand.

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

### 10 THE PARTIES

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

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

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

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

26 15. Defendant The Honorable Michael R. Pompeo is the Secretary of  
27 State, whose office is located at the Department of State, 2201 C St. NW,  
28 Washington, D.C. 20520, and is being sued in his official capacity.

## JURISDICTION AND VENUE

1           16. This Court has subject matter jurisdiction pursuant to 28 U.S.C.  
2 § 1331.

3           17. This Court is authorized to issue a declaratory judgment pursuant to  
4 28 U.S.C. §§ 2201 and 2202.

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

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

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

## STATUTORY AND REGULATORY BACKGROUND

### A. United States Citizenship at Birth

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

21           22. The provisions governing eligibility for U.S. citizenship at birth by  
22 individuals born outside the United States are set forth in Sections 301 through 309  
23 of the INA. Section 301 is titled “Nationals and citizens of United States at birth.”  
24 Under Section 301(g), a baby born abroad is a U.S. citizen at birth when (1) one of  
25 the child’s parents is a married United States citizen and (2) the U.S. citizen parent  
26 lived in the U.S. for at least five years, at least two of which were after the parent’s  
27 fourteenth birthday.

28           23. Section 309 is titled “Children born out of wedlock,” and its

1 provisions explicitly apply only to a person “born out of wedlock.” The  
2 requirements for citizenship at birth under that provision differ substantially from  
3 those in Section 301, which has long been regarded as applicable to anyone whose  
4 parents were lawfully married when the child was born.

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

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

21 26. Since its enactment in 1952, the INA has neither included nor been  
22 amended to include definitions of the terms “parent” and “person,” as used in  
23 Section 301, or the terms “mother,” “father,” and “out of wedlock,” as used in  
24 Section 309.

25 27. Before and after the enactment of the INA, the majority of U.S. states  
26 have followed the common law in presuming that every child born in wedlock is  
27 the legitimate offspring of the child’s married parents. In general, including in  
28 California, that presumption applies even when only one spouse is the child’s

1 biological parent. The structure of the INA effectively codifies the common law  
2 presumption of parentage for married couples by making Section 301 applicable to  
3 any person except for children who are born “out of wedlock.”

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

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

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

18 30. As the Supreme Court has recognized, same-sex couples have long  
19 been subjected to illegal institutional discrimination and social stigmatization. The  
20 Supreme Court’s precedent makes clear that the Constitution compels equal  
21 protection and recognition of, and respect for, the rights of same-sex spouses,  
22 including their right to have autonomy over the most personal and intimate of  
23 choices—decisions about starting a family and sustaining a partnership in which to  
24 raise and nurture a child. Accordingly, the State Department must recognize the  
25 “equal dignity of same-sex marriages.” *United States v. Windsor*, 133 S. Ct. 2675,  
26 2693 (2013).

27 31. After *Windsor* overturned the statute excluding same-sex marriages  
28 from federal recognition, the federal government announced that it would

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

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

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

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

25 **C. The State Department’s Restrictive Classification of Eligible**  
26 **Children**

27 35. The INA does not define or limit the class of persons born in wedlock  
28 who are eligible for citizenship at birth pursuant to Section 301. Nevertheless, the  
State Department is restricting the class to exclude *all* children of same-sex

1 married couples.

2 36. The State Department has imposed that policy by inserting a  
3 definition of terms into an Appendix to the Foreign Affairs Manual (“FAM”),  
4 available at <https://fam.state.gov/>. Specifically, 1140 Appendix E of the FAM,  
5 titled “‘IN WEDLOCK’ AND ‘OUT OF WEDLOCK,’” includes subsection (c),  
6 which states that “[t]o say a child was born ‘in wedlock’ means that the child’s  
7 biological parents were married to each other at the time of the birth of the child.”  
8 (A copy of the relevant portion of the appendix is appended to this Complaint at  
9 Exhibit A.)

10 37. 1140 Appendix E of the FAM has never been submitted to notice and  
11 comment rulemaking. However, it forms the basis for the State Department’s  
12 conclusion that the children were born out of wedlock.

13 38. That definition has the effect of limiting birthright citizenship to  
14 children who are biologically related to a U.S. citizen parent, which the United  
15 States Court of Appeals for the Ninth Circuit has rejected in two separate  
16 decisions. *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005) (citing  
17 *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000)).

## 18 FACTUAL ALLEGATIONS

### 19 A. The Dvash-Banks Family

20 39. Andrew is a U.S. citizen who was born, raised, and has lived as an  
21 adult in the United States. He was born in 1981 in Santa Monica, California,  
22 where he lived continuously with his family from birth through the time of his high  
23 school graduation in 1999. Andrew’s parents were both born and raised in  
24 Toronto, Canada, and as a result, Andrew is also a citizen of Canada.

25 40. After graduating from high school, Andrew attended the University of  
26 California at Santa Barbara, graduating with a bachelor’s degree in June 2003.  
27 Andrew then moved to New York City, where he lived for three years while  
28 working for a translation company. In 2005, Andrew moved to Israel; and in July

1 2007, he enrolled in a master’s program at Tel Aviv University. In March of 2008,  
2 Andrew met Elad Dvash at a holiday party at Tel Aviv University.

3 41. Elad is an Israeli citizen, born in Ramat Gan, Israel, on March 20,  
4 1985. Elad had lived in Israel for his entire life when he met and began dating  
5 Andrew. Thereafter, the two moved to Toronto, Canada, where they were married  
6 by a judge on August 19, 2010. (A copy of Elad and Andrew’s marriage certificate  
7 is appended to this Complaint at Exhibit B.)

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

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

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

23 45. In February 2016, the surrogate became pregnant with one embryo  
24 created using sperm from Andrew and one embryo created using sperm from Elad.  
25 Andrew and Elad intended to be the sole parents of the resulting children.

26 46. On September 16, 2016, Andrew and Elad’s children—Ethan and  
27 Aiden—were born in Mississauga, a city in Ontario, Canada. Andrew and Elad,  
28 *and only* Andrew and Elad, are listed as the parents on both of their sons’ birth

1 certificates, and recognized as their sons' parents under Canadian law.

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

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

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

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

28 50. When Andrew and Elad explained that Ethan was conceived using  
Elad's sperm, the consular official required that the children undergo a DNA test to

1 determine whether either child was genetically linked to Andrew. She stated that  
2 without the biological link, neither child would qualify for U.S. citizenship at birth.  
3 The official did not identify any statutory, regulatory, or other authority supporting  
4 this demand.

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

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

20 53. The Letter denying Ethan's application, addressed to Andrew, stated  
21 that "after careful review of the evidence you submitted with your child's  
22 application, it has been determined that his claim to U.S. citizenship has not been  
23 satisfactorily established, as you are not his biological father." The Letter went on  
24 to reference the "Immigration and Nationality Act (INA) of 1952," which  
25 according to the Letter "requires among other things, a blood relationship between  
26 a child and the U.S. citizen parent in order for the parent to transmit U.S.  
27 citizenship." The letter did not include any further citation to more specific  
28 statutory provisions or authority.

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

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

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

26           57. The denial of Ethan’s Consular Report of Birth Abroad meant that  
27 Ethan was denied a U.S. passport as well. This has caused difficulties and  
28 humiliation for the Dvash-Banks family. After the Supreme Court’s decision in

1 *Windsor* reversed the Defense of Marriage Act, ensuring that Andrew and Elad's  
2 marriage would be recognized and respected in the U.S., Andrew and Elad decided  
3 to fulfill their long-held hope of moving to California so that they could live near  
4 Andrew's family, and moved to Los Angeles on June 24, 2017.

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

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

22 60. Andrew and Elad have also suffered indignity and emotional pain  
23 because the U.S. government recognizes neither their marriage nor their parental  
24 rights in determining whether their children were born in or out of wedlock.  
25 According to the U.S. government, Andrew and Elad could never have children in  
26 wedlock because they could not both be married to each other and be the biological  
27 parents of the same child. As a result, the U.S. government is undermining,  
28 disrespecting, and rendering unequal the intimate relationship between same-sex

1 married couples and the children they have and raise together within family units  
2 founded on the sanctity of marriage. They also worry about the obvious inequity  
3 the State Department’s decision causes between their twin sons, the impact on  
4 Ethan and Aiden of their different citizenship status and the awareness that the  
5 U.S. government considers them illegitimate notwithstanding their parents’ valid  
6 marriage.

7 **C. The State Department Erroneously Deemed Ethan to Have Been**  
8 **Born “Out of Wedlock”**

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

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

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

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

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

64. The decision to marry—like the decision to have children—is one of  
the most deeply personal choices one can make. For the liberty guaranteed by the

1 Constitution to be meaningful and effective, individuals must be able to make these  
2 fundamental and personal life choices freely, with dignity and without unwarranted  
3 consequences for the individual and his family. Accordingly, the Constitution’s  
4 guarantees of due process and equal protection apply with full force to an  
5 individual’s fundamental right to marry the spouse of his or her own choosing,  
6 including a spouse of the same sex. The Constitution requires not only recognition  
7 and protection of the right to enter into same-sex marriages, but also affords same-  
8 sex marriages the full constellation of legal rights and benefits—including dignity  
9 and respect—that have traditionally flowed from opposite-sex marriages.

10 65. The State Department’s policy and its application to Ethan are  
11 unconstitutional because they violate Ethan’s and Andrew’s right to due process  
12 under the Fifth Amendment of the Constitution. As discussed above, the State  
13 Department refuses to apply Section 301(g) of the INA to Ethan based on its  
14 erroneous and demeaning classification of him as a child born out of wedlock.  
15 Apparently on that basis alone, it refuses to recognize Ethan’s citizenship.

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

20 67. Nothing in the INA or the Constitution permits the State Department’s  
21 limitation of birthright citizenship under Section 301 to the children of U.S.  
22 citizens in opposite-sex marriages. The State Department’s requirement is  
23 unfounded and ensures unconstitutionally unequal treatment of the children of  
24 same-sex married couples.

25 68. The government has provided no rationale for this discriminatory  
26 policy. Furthermore, there is no legitimate governmental purpose that could justify  
27 limiting birthright citizenship in this way. To the contrary, such an approach  
28 undermines the congressionally established, legitimate, and important government

1 purposes that underlie the INA itself. For example, the State Department’s  
2 approach ultimately makes it harder, not easier, for families like the Dvash-  
3 Bankses to stay together. This undermines the INA’s statutory intent of  
4 “provid[ing] for a liberal treatment of children and . . . keeping families of United  
5 States Citizens and Immigrants united.” H.R. Rep. 85-1199, at 2020 (1957).

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

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

17 71. In addition to discriminating against Ethan, the State Department’s  
18 policy discriminates against Andrew by denying him the ability to transmit  
19 citizenship to a child conceived with his husband’s sperm, born during their  
20 marriage, and raised as a child of that marriage.

21 **COUNT I – DECLARATORY JUDGMENT**  
22 **THE STATE DEPARTMENT’S POLICY VIOLATES THE DUE PROCESS**  
23 **GUARANTEE OF THE FIFTH AMENDMENT**

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

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

28 74. The Due Process Clause of the Fifth Amendment prohibits the federal  
government from depriving any person of life, liberty, or property without due

1 process of law, as well as from depriving any person of equal protection under the  
2 law.

3 75. Section 301 of the INA entitles U.S. citizens to confer citizenship at  
4 birth on their children born abroad in wedlock. The INA does not require U.S.  
5 citizens to be in opposite-sex marriages to confer citizenship under Section 301.  
6 Nor does the INA require a child's biological parents to be married to each other  
7 for the child to be considered born in wedlock, and therefore eligible for  
8 citizenship under Section 301. The INA merely requires that the child is *not* born  
9 out of wedlock.

10 76. Defendants have violated and continue to violate the Fifth  
11 Amendment of the United States Constitution by enforcing a policy that excludes  
12 U.S. citizens in same-sex marriages from conferring citizenship pursuant to  
13 Section 301, while restricting access to citizenship under that provision to the  
14 children of opposite-sex married couples. Defendants' policy has deprived and  
15 continues to deprive Plaintiffs of their rights to acquire and confer citizenship at  
16 birth pursuant to INA Section 301. As a result of Defendants' policy, Plaintiffs  
17 have suffered, and will suffer, irreparable harm to their protected interest in  
18 conferring, and having recognized, Ethan's U.S. citizenship.

19 77. There is no rational, legitimate, or substantial government interest  
20 served by denying the children of same-sex married couples access to citizenship  
21 at birth pursuant to Section 301 of the INA based on the sex and/or sexual  
22 orientation of the child's citizen-parent. Nor is there any rational, legitimate, or  
23 substantial government interest served by denying U.S. citizens in same-sex  
24 marriages the right to confer citizenship on children born abroad during their  
25 marriage based on the citizen's sex and/or sexual orientation or exercise of the  
26 protected right to enter into a same-sex marriage. Defendants have offered no  
27 justification for precluding Andrew from conferring on Ethan citizenship pursuant  
28 to Section 301.

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

7 79. Plaintiffs have no adequate remedy at law.

8 **COUNT II – ADMINISTRATIVE PROCEDURE ACT**

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

11 81. Plaintiffs have suffered a “legal wrong because of agency action.”  
12 5 U.S.C. § 702.

13 82. The Administrative Procedure Act bars any agency action that is  
14 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
15 law.” 5 U.S.C. § 706(2)(A).

16 83. Defendants’ interpretation of Sections 301 and 309, as embodied in  
17 the FAM, conflicts with the clear language and statutory purpose of the INA. This  
18 interpretation, published without any public comment, is arbitrary, capricious, and  
19 not in accordance with the INA.

20 84. Plaintiffs have suffered and continue to suffer legal wrongs because of  
21 the U.S. Embassy’s decision to deny the Consular Report of Birth Abroad  
22 application submitted on behalf of Ethan.

23 85. Plaintiffs have exhausted all administrative remedies available to them  
24 as of right.

25 86. Plaintiffs have no other recourse to judicial review other than this  
26 action.

27 87. Defendants’ exclusion of children born abroad in same-sex marriages  
28 from the category of children who qualify for citizenship at birth as born to valid

1 marriages lacks a rational basis, is arbitrary, and is contrary to law.

2 88. Plaintiffs have no adequate remedy at law.

3 **COUNT III – DECLARATION THAT ETHAN DVASH-BANKS IS A**  
4 **U.S. CITIZEN**

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

7 90. 8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* judgment  
8 as to the citizenship status of Ethan.

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

12 92. Andrew and Elad were legally married to each other by a judge in  
13 Canada on August 19, 2010. They have been married to each other continuously  
14 since that date.

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

17 94. Andrew and Elad are Ethan's parents. They are identified as Ethan's  
18 parents on his birth certificate and recognized as his parents under Canadian law.

19 95. Section 301(g) of the INA is applicable to Ethan's citizenship claim  
20 because Ethan is the child of parents who were married to each other at the time of  
21 his birth, and one of Ethan's married parents is a U.S. citizen. Section 309(a) of  
22 the INA is inapplicable to Ethan's citizenship claim because he is the child of  
23 married parents, and therefore is not a child born out of wedlock.

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

1 of fourteen years.

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**PRAYER FOR RELIEF**

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WHEREFORE, Plaintiffs respectfully pray that this Court:

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

1 Dated: New York, New York  
2 January 4, 2019

SULLIVAN & CROMWELL LLP

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21 -and-

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28 Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

**FIRST AMENDED  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

~~Docket~~ Case No. ~~2:18-CV-~~  
cv-00523-JFW-JCx

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**PRELIMINARY STATEMENT**

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

2. Both Ethan and Aiden were conceived and born during Andrew’s marriage to Elad. Andrew and Elad conceived the twins using their own sperm and eggs from the same anonymous donor. They used Elad’s sperm to conceive Ethan and Andrew’s sperm to conceive Aiden. A surrogate carried the twins to term together in her womb and gave birth to them moments apart on September 16, 2016, in Canada. Andrew and Elad are the only parents Ethan and Aiden have, and the only people Canadian law<sup>1</sup> recognizes as Ethan and Aiden’s parents. Accordingly, Andrew and Elad have been the twins’ legal parents from the day they came into this world together.

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

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

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

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

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

27 6. The State Department’s failure to recognize and give effect to the  
28 marriage between Andrew and Elad also denies Ethan the rights and privileges that

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

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

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

1 ~~father or brother, and discriminates against him based on the sex and sexual~~  
2 ~~orientation of his parents.~~

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

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

#### 14 **THE PARTIES**

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

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

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

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

1 children of U.S. citizens.

2 15. Defendant The Honorable ~~Rex Tillerson~~[Michael R. Pompeo](#) is the  
3 Secretary of State, whose office is located at the Department of State, 2201 C St.  
4 NW, Washington, D.C. 20520, and is being sued in his official capacity.

## 5 JURISDICTION AND VENUE

6 16. This Court has subject matter jurisdiction pursuant to 28 U.S.C.  
7 § 1331.

8 17. This Court is authorized to issue a declaratory judgment pursuant to  
9 28 U.S.C. §§ 2201 and 2202.

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

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

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

## 15 STATUTORY AND REGULATORY BACKGROUND

### 16 A. United States Citizenship at Birth

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

26 22. The provisions governing eligibility for U.S. citizenship at birth by  
27 individuals born outside the United States are set forth in Sections 301 through 309  
28 of the INA. Section 301 is titled “Nationals and citizens of United States at birth.”

1 Under Section 301(g), a baby born abroad is a U.S. citizen at birth when (1) one of  
2 the child's parents is a married United States citizen and (2) the U.S. citizen parent  
3 lived in the U.S. for at least five years, at least two of which were after the parent's  
4 fourteenth birthday.

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

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

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

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

1 Section 309.

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

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

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

## 22 **B. The Constitutional Rights of Same-Sex Couples**

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

1 raise and nurture a child. Accordingly, the State Department must recognize the  
2 “equal dignity of same-sex marriages.” *United States v. Windsor*, 133 S. Ct. 2675,  
3 2693 (2013).

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

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

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

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

1 marriage, even if only one spouse is the child’s biological parent.

2 **C. The State Department’s Restrictive Classification of Eligible**  
3 **Children**

4 35. The INA does not define or limit the class of persons born in wedlock  
5 who are eligible for citizenship at birth pursuant to Section 301. Nevertheless, the  
6 State Department is restricting the class to exclude *all* children of same-sex  
7 married couples.

8 36. The State Department has imposed that policy by inserting a  
9 definition of terms into an Appendix to the Foreign Affairs Manual (“FAM”),  
10 available at <https://fam.state.gov/>. Specifically, 1140 Appendix E of the FAM,  
11 titled “‘IN WEDLOCK’ AND ‘OUT OF WEDLOCK,’” includes subsection (c),  
12 which states that “[t]o say a child was born ‘in wedlock’ means that the child’s  
13 biological parents were married to each other at the time of the birth of the child.”  
14 (A copy of the relevant portion of the appendix is appended to this Complaint at  
15 Exhibit A.)

16 37. 1140 Appendix E of the FAM has never been submitted to notice and  
17 comment rulemaking. However, it forms the basis for the State Department’s  
18 conclusion that the children were born out of wedlock.

19 38. That definition has the effect of limiting birthright citizenship to  
20 children who are biologically related to a U.S. citizen parent, which the United  
21 States Court of Appeals for the Ninth Circuit has rejected in two separate  
22 decisions. *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005) (citing  
23 *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000)).

24 **FACTUAL ALLEGATIONS**

25 **A. The Dvash-Banks Family**

26 39. Andrew is a U.S. citizen who was born, raised, and has lived as an  
27 adult in the United States. He was born in 1981 in Santa Monica, California,  
28 where he lived continuously with his family from birth through the time of his high  
school graduation in 1999. Andrew’s parents were both born and raised in

1 Toronto, Canada, and as a result, Andrew is also a citizen of Canada.

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

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

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

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

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

28 45. In February 2016, the surrogate became pregnant with one embryo

1 created using sperm from Andrew and one embryo created using sperm from Elad.  
2 Andrew and Elad intended to be the sole parents of the resulting children.

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

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

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

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

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

1 equally connected to each of their parents. In the hope of ensuring that the U.S.  
2 government would recognize their children's citizenship, however, they disclosed  
3 the genetic links they had to Ethan and Aiden.

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

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

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

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

1 to reference the “Immigration and Nationality Act (INA) of 1952,” which  
2 according to the Letter “requires among other things, a blood relationship between  
3 a child and the U.S. citizen parent in order for the parent to transmit U.S.  
4 citizenship.” The letter did not include any further citation to more specific  
5 statutory provisions or authority.

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

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

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

1 Elad could not complete an application for citizenship on Ethan's behalf that  
2 would satisfy the requirements of USCIS.

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

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

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

27 60. Andrew and Elad have also suffered indignity and emotional pain  
28 because the U.S. government recognizes neither their marriage nor their parental

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

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

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

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

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

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

1 and as a matter of the Constitution’s ~~guarantees~~guarantee of due process ~~and equal~~  
2 ~~protection~~.

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

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

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

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

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

1 unfounded and ensures unconstitutionally unequal treatment of the children of  
2 same-sex married couples.

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

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

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

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

1 ~~conceived with her husband's sperm, born during their marriage and raised as a~~  
2 ~~child of that marriage, even if she did not conceive or carry the child. Therefore, in~~  
3 ~~denying Andrew this right, the State Department's policy also discriminates~~  
4 ~~against him based on his sex and/or that of his spouse, Elad.~~

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

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

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

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

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

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

1 have suffered, and will suffer, irreparable harm to their protected interest in  
2 conferring, and having recognized, Ethan’s U.S. citizenship.

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

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

19 79. Plaintiffs have no adequate remedy at law.

20 **COUNT II—DECLARATORY JUDGMENT**  
21 **THE STATE DEPARTMENT’S POLICY VIOLATES THE**  
22 **CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION UNDER**  
23 **THE LAW**

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

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

28 ~~82.—Under the State Department’s interpretation of Sections 301 and 309,~~  
~~no child could be considered born in wedlock to spouses in same-sex marriages,~~  
~~even if the child’s parents are married to each other and are the sole individuals~~

1 ~~identified on the child's birth certificate as his or her parents.~~

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

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

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

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

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

23 ~~88.—Plaintiffs have no adequate remedy at law.~~

24 **~~COUNT III~~COUNT II – ADMINISTRATIVE PROCEDURE ACT**

25 ~~89.80.~~ Plaintiffs repeat, reallege, and incorporate by reference the allegations  
26 contained in paragraphs 1 through 71 as if fully set forth herein.

27 ~~90.81.~~ Plaintiffs have suffered a “legal wrong because of agency action.”  
28 5 U.S.C. § 702.

1 ~~91.82.~~The Administrative Procedure Act bars any agency action that is  
2 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
3 law.” 5 U.S.C. § 706(2)(A).

4 ~~92.83.~~Defendants’ interpretation of Sections 301 and 309, as embodied in  
5 the FAM, conflicts with the clear language and statutory purpose of the INA. This  
6 interpretation, published without any public comment, is arbitrary, capricious, and  
7 not in accordance with the INA.

8 ~~93.84.~~Plaintiffs have suffered and continue to suffer legal wrongs because of  
9 the U.S. Embassy’s decision to deny the Consular Report of Birth Abroad  
10 application submitted on behalf of Ethan.

11 ~~94.85.~~Plaintiffs have exhausted all administrative remedies available to them  
12 as of right.

13 ~~95.86.~~Plaintiffs have no other recourse to judicial review other than this  
14 action.

15 ~~96.87.~~Defendants’ exclusion of children born abroad in same-sex marriages  
16 from the category of children who qualify for citizenship at birth as born to valid  
17 marriages lacks a rational basis, is arbitrary, and is contrary to law.

18 ~~97.88.~~Plaintiffs have no adequate remedy at law.

19 ~~COUNT IV~~COUNT III – DECLARATION THAT ETHAN DVASH-BANKS  
20 IS A U.S. CITIZEN

21 ~~98.89.~~Plaintiffs repeat, reallege, and incorporate by reference the allegations  
22 contained in paragraphs 1 through 71 as if fully set forth herein.

23 ~~99.90.~~8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* judgment  
24 as to the citizenship status of Ethan.

25 ~~100.91.~~\_\_\_\_ Andrew is a U.S. citizen, who was born in the U.S. and  
26 physically present in the U.S. for a period of 24 years, starting from the time he  
27 was born in California in 1981 until the time he moved to Israel in 2005.

28 ~~101.92.~~\_\_\_\_ Andrew and Elad were legally married to each other by a judge  
in Canada on August 19, 2010. They have been married to each other

1 continuously since that date.

2 ~~102.93.~~ Their sons, Aiden and Ethan, were born on September 16,  
3 2016 in Mississauga, Canada, during Andrew's and Elad's marriage.

4 ~~103.94.~~ Andrew and Elad are Ethan's parents. They are identified as  
5 Ethan's parents on his birth certificate and recognized as his parents under  
6 Canadian law.

7 ~~104.95.~~ Section 301(g) of the INA is applicable to Ethan's citizenship  
8 claim because Ethan is the child of parents who were married to each other at the  
9 time of his birth, and one of Ethan's married parents is a U.S. citizen.  
10 Section 309(a) of the INA is inapplicable to Ethan's citizenship claim because he is  
11 the child of married parents, and therefore is not a child born out of wedlock.

12 ~~105.96.~~ Ethan is a U.S. citizen at birth pursuant to Section 301(g)  
13 because he was born: (1) outside the geographical limits of the United States and  
14 its outlying possessions, (2) to parents one of whom is an alien, and the other a  
15 citizen of the United States, (3) to a parent who, prior to the birth of such person,  
16 was physically present in the United States or its outlying possessions for a period  
17 or periods totaling not less than five years, at least two of which were after  
18 attaining the age of fourteen years.

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that this Court:

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

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1 Dated: New York, New York  
2 January ~~22, 2018~~ 4, 2019

3 SULLIVAN & CROMWELL LLP

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26 -and-

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25  
26 **UNITED STATES DISTRICT COURT**  
27 **CENTRAL DISTRICT OF CALIFORNIA**  
28 **WESTERN DIVISION (LOS ANGELES)**

19 ANDREW MASON DVASH-  
20 BANKS and E.J. D.-B.,  
21 Plaintiffs,

22 v.

23 THE UNITED STATES  
24 DEPARTMENT OF STATE,  
25 and THE HONORABLE  
26 MICHAEL R. POMPEO,  
27 Secretary of State,  
28 Defendants.

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

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS LEAVE TO REMOVE  
THEIR EQUAL PROTECTION  
CLAIM VIA AMENDMENT OF  
THE COMPLAINT**

---

Judge: Hon. John F. Walter

1 Presently before the Court is Plaintiffs' Unopposed Motion Under FRCP  
2 15(a) for Leave to Remove Plaintiffs' Equal Protection Claim Via Amendment of  
3 the Complaint (the "Motion").

4 Good cause appearing, the Court GRANTS Plaintiffs leave to file the First  
5 Amended Complaint, attached as Exhibit A to the Declaration of Alexa M.  
6 Lawson-Remer in support of their Motion. Defendants are not required to respond  
7 to the First Amended Complaint in light of their prior answer to the Complaint and  
8 the parties' forthcoming motions for partial summary judgment. No other case  
9 deadlines are added or altered.

10  
11 **IT IS SO ORDERED.**

12  
13 Dated: \_\_\_\_\_

14 The Honorable John F. Walter  
15 (U.S.D.J.)

16  
17  
18 Respectfully submitted,

19 By: /s/ Alexa M. Lawson-Remer

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