

1 Alexa M. Lawson-Remer (SBN 268855)
lawsonr@sullcrom.com
2 SULLIVAN & CROMWELL LLP
1888 Century Park East, Suite 2100
3 Los Angeles, California 90067-1725
Telephone: (310) 712-6600
4 Facsimile: (310) 712-8800

5 Theodore Edelman (*pro hac vice*)
edlemant@sullcrom.com
6 Jessica Klein (*pro hac vice*)
kleinj@sullcrom.com
7 Lauren M. Goldsmith (SBN 293269)
goldsmithl@sullcrom.com
8 SULLIVAN & CROMWELL LLP
125 Broad Street
9 New York, New York 10004-2498
Telephone: (212) 558-4000
10 Facsimile: (212) 558-3588

11 Aaron C. Morris (*pro hac vice*)
amorris@immigrationequality.org
12 IMMIGRATION EQUALITY
40 Exchange Place, Suite 1300
13 New York, New York 10005-2744
Telephone: (212) 714-2904
14

15 *Attorneys for Plaintiffs*

16
17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **WESTERN DIVISION (LOS ANGELES)**
20

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

22 Plaintiffs,
23

24 v.

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

28 Defendants.

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

**EXCERPTS FROM THE
DEPOSITION OF PAUL PEEK IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Judge: Hon. John F. Walter
Hearing Date: February 4, 2019
Courtroom: 16

1 Pursuant to Part 4(b) of the Court's Scheduling and Case Management
2 Order (DKT 52), entered on August 21, 2018, attached hereto are excerpts from
3 the deposition of Paul Peek submitted in support of Plaintiffs' Motion for Partial
4 Summary Judgment.

5 Dated: January 7, 2019

Respectfully submitted,

6
7 By: /s/ Alexa M. Lawson-Remer
8 Alexa M. Lawson-Remer (SBN 268855)
9 lawsonr@sullcrom.com
10 SULLIVAN & CROMWELL LLP
11 1888 Century Park East, Suite 2100
12 Los Angeles, California 90067-1725
13 Telephone: (310) 712-6600
14 Facsimile: (310) 712-8800

15 Theodore Edelman (*pro hac vice*)
16 edlemant@sullcrom.com
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18 kleinj@sullcrom.com
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20 goldsmithl@sullcrom.com
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24 Telephone: (212) 558-4000
25 Facsimile: (212) 558-3588

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Attorneys for Plaintiffs

Page 88

12. Q And does the State Department have any
13. reason to doubt that Andrew or -- and Elad are E.J.
14. Dvash-Banks' parents?
15. A His legal parents, there is no reason to
16. doubt.

Pages 92-93

6. Q In 2017, January of 2017, did the Toronto
7. consulate have its own protocol or process for
8. applications for a CRBA, or was there a general
9. process that applied for all posts?

10. MS. ANDRAPALLIYAL: Objection. Form.
11. Objection. Exceeds the scope.

12. A The requirements for the issuance of a
13. CRBA are uniform worldwide, but the process may be
14. different just depending on staffing, layout of a
15. consulate, those sorts of things.

20. Q Was there a -- in January of 2017 was
21. there a uniform set of criteria for issuance of a
22. CRBA?

23. A Yes.

24. Q And who set those criteria?

25. A The Department of State.

1. Q In Washington, D.C.?

2. A Yes.

3. Q Okay. Would it be fair to say that at
4. that time the Toronto consulate -- the State
5. Department expected the Toronto consulate to follow
6. the criteria set by the State Department in
7. Washington?

8. A Yes.

Page 103

5. Q What are those differences?

6. A The FAM goes into much greater detail.

7. Q By that -- when you say it goes into
8. greater detail, do you mean that the FAM includes
9. elements that the INA does not?

10. A The FAM gives guidance to a universe of

Paul Peek

12/20/2018

11. scenarios that are covered in the INA. Yeah.

Page 104

8. Q So, again, the question is, when you say,
9. "goes into greater detail," does the FAM include
10. elements that the INA does not?
11. A Yes.

Pages 158-159

25. Q So let's just ask, to be clear, does the
13. State Department require a biological relationship
14. between a married U.S. citizen parent and a child
15. born outside the United States in order to establish
16. citizenship at birth of the child?
17. A Yes.
18. Q And what is the source of that
19. requirement?
20. A I'm sorry. What is the what?
21. Q What's the source? What's the basis for
22. that requirement?
23. A The Immigration and Nationality Act.
24. Q And what in particular?
25. A Section 301(g).

Page 166

14. Q Has the policy about what is considered a
15. blood relationship ever been reconsidered by the
16. State Department?
17. MS. ANDRAPALLIYAL: Objection. Exceeds
18. the scope.
19. A As I mentioned, the context of a
20. gestational parent was added to the scope of blood
21. relationship, or biological relationship, by the
22. department in 2014, I believe it was.

Page 171

1. Q What is that definition?
2. A If both biological parents -- if the two
3. biological parents are married, then the case would
4. be considered to be in wedlock.

Pages 171-173

18. Q Okay. 7 FAM 1140 appendix E, In wedlock
19. and out of wedlock.

20. Do you see that?

21. A In wedlock and of wedlock.

22. Q Of wedlock, I beg your pardon. Sorry.

23. Now, is -- do you see (a), "The term
24. 'birth in wedlock' has been consistently interpreted
25. to mean birth during the marriage of the biological

1. parents to each other"?

2. A Yes.

3. Q Do you see that?

4. A Yes.

5. Q And (c), "To say a child was born 'in
6. wedlock' means that the child's biological parents
7. were married to each other at the time of the birth
8. of the child." Do you see that?

9. A Yes.

10. Q Is that the definition you had in mind
11. when you were asking to consult any documentation?

12. A Yes.

13. Q Okay. What's the basis for the State
14. Department's definition of "in wedlock" as embodied
15. in the material we just looked at?

16. A Their interpretation of the Immigration
17. and Nationality Act.

18. Q What in particular in the Immigration and
19. Nationality Act?

20. A Section 301(g).

21. Q Okay. Now, if a married couple used
22. assisted reproduction technology to give birth to a
23. child during their marriage, does the State
24. Department consider that child to have been born in
25. wedlock?

1. A It depends on the circumstances.

2. Q Can you elaborate, please?

3. A If both parents were -- if both parents
4. were the biological parents or gestational parent --
5. a combination of -- if they were both the biological

Paul Peek

12/20/2018

6. parents, which can include the gestational parent,
7. and were married to each other, then the birth would
8. be considered in wedlock.
9. Q Okay. Now, has it always been the case,
10. by the way, that the gestational parent was included
11. in that definition?
12. A Not by policy, no.

Pages 173-174

19. Q Now -- so the policy -- am I
20. understanding you correct that if a married couple
21. used assisted reproduction technology to give birth
22. to a child during their marriage using a gestational
23. surrogate to carry the fetus, the State Department
24. now would consider that child to have been born in
25. wedlock?

1. A If both of those parents were biological
2. parents of that child, yes.

Page 175

2. Q And that determination that they're a
3. biological parent is just a policy determination by
4. the State Department, correct?
5. A Correct.

Page 177

12. Q Okay. And - maybe we'll come to that in
13. a minute, but let's just flesh out the issues.
14. Let's say you have two men married to
15. each other. Okay?
16. A Yes.
17. Q And they use sperm from one of them and
18. an egg from a donor to give birth to a child during
19. their marriage. Is that child considered to be born
20. in wedlock?
21. A If both parents did not contribute
22. genetic material, no.

Page 178

Paul Peek

12/20/2018

10. Q And what's the basis for the State
11. Department's position?
12. A The Immigration and Nationality Act.
13. Q What in particular in the Immigration and
14. Nationality Act requires that result?
15. A Well, we would be looking at 309 for out
16. of wedlock, because 301(g) addresses a child born of
17. parents, which the department has interpreted to
18. mean both parents -- a blood relationship to both
19. parents, a biological relationship to both parents.

Pages 180-181

2. Q Okay. In that circumstance, would the
3. State Department recognize the child as a U.S.
4. citizen at birth?
5. A No.
6. Q Okay. Would the State Department
7. consider the child to have been born in wedlock to
8. the married couple?
9. A No.
10. Q What is the basis for the State
11. Department's position?
12. A Again, the interpretation that
13. section 301(g) of the INA, when it uses the language
14. "born of parents," it is referring to a biological
15. relationship to both parents.
16. Q Okay. So -- and just to close that
17. circle, if you go back to Plaintiffs' Deposition
18. Exhibit 4, which probably is in front of you, 7 FAM
19. 1140, appendix E on page 4 -- tell me if you're
20. there. I know this gets confusing --
21. A The whole thing is 7 FAM appendix E --
22. 1140 appendix E. Right.
23. Q Okay. And page 4. We're in the in
24. wedlock and of wedlock.
25. A Right.
1. Q Okay. Part (a), "The term 'birth in
2. wedlock' has consistently -- has been consistently
3. interpreted to mean birth during the marriage of the
4. biological parents to each other," correct?

Paul Peek

12/20/2018

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

Page 182

21. Q Okay. So just for the record, so we're
22. all singing from the same sheet, just point us,
23. please, to where in section 301 the words "in
24. wedlock" appear.
25. A I do not see it.

Page 183

7. Q Is it not in the statute?
8. A I don't see it in the statute.
9. Q Okay. So -- again, so we're talking
10. about the same thing, just show us where in 301 the
11. words "bloodrelation" appear?
12. A The words "blood relationship" do not
13. appear in 301.

Page 186

8. Q I don't think I asked that question but
9. let's ask that. Okay? And what is it you wanted to
10. tell us about that?
11. A That the fact that 309 specifies out of
12. wedlock implies that 301 is within wedlock, meaning
13. the fact that the law in this other area calls out
14. an out-of-wedlock birth.

Page 188

6. Q Yes. Application for a CRBA. Two men
7. married to each other. They apply on behalf of a
8. child born outside the U.S. during their marriage.
9. The child was born using the sperm from one of them
10. and the egg from a donor. Okay. That's the
11. scenario. Do you have that in mind?
12. A Yes.
13. Q And the question is what provision of the

Paul Peek

12/20/2018

14. INA would apply to that application?

15. A Section 309.

Page 191

6. Q Okay. So would you agree with me that

7. Congress saw fit to include the term "blood

8. relationship" in 309?

9. A Yes.

10. Q And saw fit not to include it in

11. section 301(g) --

12. A Yes.

13. Q -- or 301, correct?

14. A Correct.

Page 201

2. Q All right. Now, if two individuals who

3. were born men and are still men are married to each

4. other, would you agree that they cannot both be

5. biological parents of the same child?

6. A Correct.

7. Q Okay. So under the State Department's

8. policy, am I correct in understanding that two men

9. who are married to each other can never have a child

10. whom the State Department would consider to be born

11. in wedlock?

12. A Assuming they have both been men their

13. entire lives, that's correct.

14. Q Okay. Even though they're legally

15. married, correct?

16. A Correct.

Pages 211-213

23. Q I'm not going to fence with you. Isn't

24. it true that notwithstanding your efforts to

25. advocate to the contrary, the State Department's

1. position is that when two nontransgender men who are

2. married to each other have a child using assisted

3. reproduction technology and that child is born

4. outside the United States, the government of the

5. United States tells those men their child is not

Paul Peek

12/20/2018

6. legitimate unless some action happens down the line
7. to change the status of that child to legitimate?

8. MS. ANDRAPALLIYAL: Okay.

9. Mischaracterizes testimony.

10. BY MR. EDELMAN:

11. Q Yes or no?

12. A No.

13. Q It's not true?

14. A I do not agree with that statement.

15. Q And why do you disagree with that
16. statement?

17. A Again, I refer you to section 4(c). The
18. law of the applicant's country of birth may deem
19. them legitimate and the United States would honor
20. that.

21. Q Okay. I'll amend my question to say
22. absent the possibility that some law would recognize
23. the child as legitimate, the State Department
24. doesn't recognize the child as legitimate, yes or
25. no?

1. A Absent the law of where the country --
2. absent the laws of the country of the birth -- the
3. State Department would follow the laws of the
4. country of birth --

5. Q We're going to do this --

6. A -- for legitimation.

7. Q -- all day until we get an answer to this
8. question.

9. MR. EDELMAN: Please read back the
10. question.

11. MS. ANDRAPALLIYAL: Objection.
12. Argumentative.

13. THE REPORTER: "I'll amend my question to
14. say absent the possibility that some law would
15. recognize the child as legitimate, the State
16. Department doesn't recognize the child as
17. legitimate, yes or no?"

18. THE WITNESS: Could you read it again one
19. more time? I'm sorry.

20. THE REPORTER: "I'll amend my question to

Paul Peek

12/20/2018

21. say absent the possibility that some law would
22. recognize the child as legitimate, the State
23. Department doesn't recognize the child as
24. legitimate, yes or no?"
25. A Yes.

Pages 219-220

25. Q Okay. So would you agree with me that
1. Plaintiffs' Deposition Exhibit 18 indicates that the
2. State Department changed the policy with respect to
3. whether gestational mothers were considered to have
4. a blood relationship for purposes of the INA, in
5. particular, section 301 of the INA?
6. A Based on the fact that it says there's
7. been a recent policy change, I would agree with that
8. statement.

Page 222

11. refers to the Bureau of Consular Affairs and the
12. department's legal department -- in consultation
13. with DHS -- the Department of Homeland Security --
14. have been studying whether we can interpret the INA
15. to allow U.S. citizen parents to transmit U.S.
16. citizenship to their children born abroad through
17. ART in a broader range of circumstances, and in
18. other circumstances, amend visa requirements for
19. such children. Related to this, we are considering
20. how this would impact children born through ART
21. overseas to same-sex couples. Because we regularly
22. encounter people seeking to document children who
23. are not theirs, we use DNA testing to verify
24. parentage.

Page 225

1. A The consideration would have included the
2. impact of a change on various scenarios affecting
3. same-sex couples.
4. Q What scenarios in particular?
5. MS. ANDRAPALLIYAL: Objection. Exceeds
6. the scope.

Paul Peek

12/20/2018

7. A The universe of scenarios that could have
8. taken place.

9. BY MR. EDELMAN:

10. Q Okay. And one of them would be to read
11. section 301 -- by "read" I mean the State
12. Department -- for the State Department to read 301
13. as including the children born through assisted
14. reproductive technology to same-sex couples as
15. citizens at birth under section 301, correct?

16. A Correct.

Page 229

1. A Can you be more specific? Can I get a
2. time period?

3. Q Well, in the time period we're talking
4. about in Exhibit 19, which is, say, 2012 through
5. 2014.

6. A I just want to make sure I'm accurate in
7. my answer. Aside from the gestational mother's
8. policy, no.

Page 243

1. Q Okay. Now, prior to or leading up to
2. that policy change, was there an amendment to
3. section 301?

4. A No.

15. Q Well, something previously wasn't
16. allowable and then it was, correct?

17. A Correct.

18. Q Okay. So the State Department changed
19. its mind, right?

20. A Yes.

Page 244

5. Q Is it subject to congressional approval?

6. A No.

13. Q The provisions of the FAM -- are any
14. provisions of the FAM subject to public notice and

Paul Peek

12/20/2018

15. comment?

16. MS. ANDRAPALLIYAL: Objection. Exceeds
17. the scope. Calls for a legal conclusion.

18. A No. I can't think of one.

20. Q Okay. Would you agree with me that the
21. FAM does not have the force of law?

22. MS. ANDRAPALLIYAL: Objection. Calls for
23. a legal conclusion. Exceeds the scope.

24. A The FAM is guidance. I do not believe it
25. has the force of the law.

Page 245

9. Q Now, would you agree that the State
10. Department's requirement that there be a biological
11. relationship between a married U.S. citizen parent
12. and a child born outside the United States for
13. purposes of recognizing U.S. citizenship at birth --
14. would you agree that that requirement is
15. inconsistent with rulings by various federal
16. appellate courts?

17. MS. ANDRAPALLIYAL: Objection. Exceeds
18. the scope.

19. A I believe that it is, yes.

Page 249

6. "Mr." -- redacted on my copy -- "also
7. points to the U.S. Court of Appeals for the 9th
8. Circuit recent opinion in Solis versus Espinoza
9. versus" -- I'm sorry -- "Solis-Espinoza v. Gonzalez
10. and argues that this case should be persuasive in
11. the department's adjudication of the children's
12. claim. As a court of limited geographic
13. jurisdiction, decisions of the 9th Circuit are not
14. binding upon the department's adjudication in
15. New Jersey or Mexico."

16. Q Okay. So my question to you was would
17. you agree that the State Department's interpretation
18. is inconsistent with those decisions?

19. A It sounds like it's inconsistent with
20. this decision, yes.

Page 250

1. Q Okay. Well, let's make sure this is as
2. clear as we can make it, in fairness to you.
3. So the question I asked, in its
4. completeness, is would you agree that the State
5. Department's requirement that it -- through its
6. interpretation of section 301 of the INA, that there
7. be a biological relationship between a married U.S.
8. citizen parent and his child born outside the U.S.
9. in order to recognize that the child acquired U.S.
10. citizenship at birth, that that interpretation is
11. inconsistent with the decisions that we looked at in
12. Plaintiffs' Deposition Exhibit 10?
13. MS. ANDRAPALLIYAL: Objection. Calls for
14. a legal conclusion.
15. A I believe that is the case.

Page 251

4. THE REPORTER: Should I understand your
5. reference to paragraph 6 in Exhibit 21 as suggesting
6. that the State Department's view is, notwithstanding
7. the inconsistency, that it just doesn't believe it
8. has to follow those decisions?
9. A Yes.

Pages 260-261

10. Q Okay. All right. Now, let's just put
11. some context around this to make sure we're on the
12. same page.
13. Does the State Department agree that
14. Andrew and Elad, the spouses, that they were validly
15. married?
16. A Yes.
17. Q Okay. And does the State Department
18. agree that Andrew and Elad were validly married at
19. the time of E.J.'s birth?
20. A Yes.
21. Q Let's make sure we have commonality on
22. some other things.
23. Does the State Department agree that

Paul Peek

12/20/2018

24. Andrew and Elad are identified as E.J.'s parents on
25. E.J.'s birth certificate?

1. A That's correct.

Page 261

16. Q Does the State Department agree that only
17. Andrew and Elad are considered to be E.J.'s parents?
18. A His legal parents, yes.

Page 268

2. Q Okay. And does the State Department
3. consider Andrew to be E.J.'s parent at birth under
4. Ontario law?
5. A His legal parent at birth, yes.

Page 271

20. So is it the State Department's position
21. that E.J. was born out of wedlock?
22. A Yes.

Page 273

2. Q So now we're talking about the State
3. Department's adjudication of the applications for
4. E.J. for a U.S. passport and a CRBA. Okay? In
5. connection with those adjudications, did the State
6. Department apply the criteria of section 309?
7. A Yes.
8. Q And just for the record, why did the
9. State Department determine that those were the right
10. criteria to apply?
11. A The State Department determined that INA
12. 309 was the correct statute to apply because both of
13. the parents did not have a biological connection --
14. Q Okay.
15. A -- to the child.

Pages 274-275

25. of a transgender male -- man. So is it the State
1. Department's position, assuming there is nobody in

Paul Peek

12/20/2018

2. the picture who is a transgender man, that Andrew
3. Dvash-Banks could never have a child born in wedlock
4. under the INA if he and another man are listed as
5. the parents on a child's birth certificate?
6. A Correct.

Pages 296-297

11. Q Do you know what this document is?
12. A Give me just a moment to read it. Yes.
13. Q What is this document?
14. A It's a letter from the consulate in either
child.
15. Toronto to the applicant -- to Andrew Dvash-Banks
16. advising of the procedure for undergoing DNA testing
17. should he wish to do so.
18. Q Okay. Now, it says in the third
19. paragraph that -- three lines down or two lines down
20. in the third paragraph, "The Immigration and
21. Nationality Act (INA) of 1952, as amended, requires,
22. among other things, proof of a blood relationship
23. between the child and the U.S. citizen parent,"
24. correct?
25. A That's what it says, yes.

1. Q And that is the position of the State
2. Department, correct?
3. A Correct.

Pages 298-299

24. Q Did the State Department deny the
25. application because it concluded that there was no

1. evidence that E.J. was biologically related to the
2. U.S. citizenparent?
3. A Yes.
4. Q Okay. And that was the sole reason for
5. the denial, correct?
6. A Correct.

Page 315

10. Q Does the State Department actually track

Paul Peek

12/20/2018

11. how frequently applicants are asked to undergo DNA
12. testing?
13. A No.

Page 317

2. THE REPORTER: "But should I understand
3. you still to be saying that the State Department's
4. view that the requirements for establishing the
5. blood relationship between a U.S. citizen parent and
6. a child born outside the United States is not tied
7. really in any way to concern about fraud?"
8. A Correct.

Pages 320-321

20. Q Does the State Department keep track of
21. the rate at which CRBA applications on behalf of --
22. or by same-sex couples are granted or denied?
23. A No.
24. Q Does it keep track of any comparison
25. statistics as to the rate at which applications for

1. a CRBA by same-sex couples versus applications for a
2. CRBA by opposite-sex couples are granted or denied?
3. A No.