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

Counsel for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS

Plaintiffs,

v.

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

Defendants.

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

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

PLEASE TAKE NOTICE that on February 4, 1:30 p.m., or as soon thereafter as the parties may be heard, Defendants United States of America will bring for hearing the above-captioned motion. The hearing will take place before the Honorable John F. Walter, in Courtroom 7A at the above-titled Court. This Motion is based on the Memorandum of Points and Authorities attached to this motion, all pleadings, papers and files in this action, and such oral argument as may be presented at the hearing on the motion. This motion is made following the counsels' conference pursuant to L.R. 7-3, which took place over two days, including December 21, 2018.

Defendants' motion is brought pursuant to the provisions of Federal Rules of Civil Procedure 56 upon the grounds that (1) adequate alternative remedies at law preclude Plaintiffs' claim under the Administrative Procedure Act ("APA"), and (2) Plaintiffs fail to establish a fundamental right and Defendants' actions pass rational-basis review for the purposes of Plaintiffs' substantive due process claim. Thus, as there exists herein no genuine triable issue of law or material fact in relation to the application of federal or state law, Defendant is entitled to partial summary judgment.

This Motion is made and will be based upon these moving papers, the Memorandum of Points and Authorities and Declaration with attached evidence filed herewith, and upon such other and further arguments, documents and grounds as may be advanced to the Court in the future.

Dated: January 7, 2019

Respectfully submitted,

Attorneys for Defendants

JOSEPH H. HUNT
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

By: *s/ Vinita B. Andrapalliyal*
VINITA B. ANDRAPALLIYAL

Trial Attorney
United States Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-0845
Fax: (202) 616-8470
Email: vinita.b.andrapalliyal@usdoj.gov

LISA ZEIDNER MARCUS
Senior Counsel

JOSEPH H. HUNT
Assistant Attorney General
ANTHONY J. COPPOLINO
Deputy Director
LISA ZEIDNER MARCUS
Senior Counsel
Tel: (202-514-3336
lisa.marcus@usdoj.gov
VINITA B. ANDRAPALLIYAL
Trial Attorney
Tel: (202) 305-0845
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P.O. Box 883
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ANDREW MASON DVASH-BANKS and E.J. DVASH-BANKS

Plaintiffs,

v.

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

Defendants.

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

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INTRODUCTION

The U.S. Department of State adjudicates citizenship claims for persons—including minor children—located abroad, pursuant to the statutory grant of authority in 8 U.S.C. § 1104, which "charge[s]" the Secretary of State "with the administration and the enforcement of the … immigration and nationality laws relating to … the determination of nationality of a person not in the United States." This case concerns applications for a Consular Report of Birth Abroad ("CRBA")[1] and for a U.S. passport submitted in January 2017 to the Department of State at the U.S. Consulate General Toronto ("Consulate Toronto" or "the Consulate")[2] on behalf of a minor child, E.J. D-B, who was, at the time of his application, located in Toronto, Canada.

E.J. D-B (hereinafter, "E.J.") was born in September 2016 in Toronto via a gestational surrogate. E.J.'s legal parents, Andrew and Elad Dvash-Banks, who were married to each other at the time of E.J.'s birth; Andrew holds United States and Canadian citizenship, and Elad is an Israeli citizen. In January 2017, Andrew and Elad appeared in person at Consulate Toronto to submit applications for CRBAs and U.S. passports for E.J. and his biological half-brother A.J. The application materials showed that each child had been born using assisted reproductive technology ("ART").

A consular officer at Consulate Toronto interviewed the Dvash-Banks family in connection with these applications, and inquired into whether the Dvash-Banks family could establish under the Immigration and Nationality Act of 1952 ("INA"), as interpreted by the Department of State ("the Department"), each child's eligibility for U.S. citizenship at birth for children born abroad. She

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[1] A Consular Report of Birth Abroad "is a formal document certifying the acquisition of U.S. citizenship at birth by a person born abroad to a U.S. citizen parent(s)." 8 FAM 101.1-2; *see also* 22 U.S.C. § 2705.

[2] The Department of State directs and instructs U.S. missions abroad, including Consulate Toronto, in the performance of its consular and diplomatic functions.

conveyed to the Dvash-Banks family that their applications did not contain sufficient evidence to allow her to conclude that E.J. and A.J. were entitled to a CRBA and a U.S. passport, and she advised the family that they could submit additional evidence to support their applications. Thereafter the family arranged for DNA testing for the children, and had the test results sent to the Consulate. Ultimately, based on the totality of the evidence presented, the consular officer denied the applications submitted on behalf of E.J., and granted the applications submitted on behalf of A.J.

Plaintiffs through this action challenge those denials. They assert that the denial of E.J.'s applications violated the Administrative Procedure Act ("APA") and Plaintiffs' substantive due process rights. The Dvash-Banks family currently lives in Los Angeles, and Plaintiffs' Complaint also pursues a claim under 8 U.S.C. § 1503(a), which provides a mechanism for the Court to conduct a *de novo* review of E.J.'s citizenship status.[3] Defendants move for summary judgment on the APA and Due Process claims.

There are no issues of material fact with respect to Plaintiffs' APA and due process claims, and Defendants are entitled to summary judgment on those claims. First, Plaintiffs' APA claim should be dismissed because the APA's general grant of judicial review precludes review of final agency action for which there is an "other adequate remedy in a court." 5 U.S.C. § 704. Congress has provided a specific, separate avenue for Plaintiffs to obtain judicial review of their claims that they have been denied "a right or privilege as a national of the United States": the provisions of 8 U.S.C. § 1503, under which Plaintiffs have filed a separate claim. Additionally, because the Dvash-Banks family is currently located in the United States, specifically in California, they may apply for a certificate of citizenship for E.J. from U.S. Citizenship & Immigration Services ("USCIS"), under 8 U.S.C.

[3] Section 1503(a) applies to "any person who is within the United States . . . ." 8 U.S.C. § 1503(a).

§ 1452. Congress has made clear that a certificate of citizenship provides proof of citizenship equivalent to that of a CRBA or U.S. passport. *See* 22 U.S.C. § 2705. Because §§ 1503 and 1452 each provide an "adequate remedy at law," APA review is unavailable to Plaintiffs. Second, Plaintiffs' claims under the Declaratory Judgment Act ("DJA") must fail because Plaintiffs cannot establish that Defendants' actions violate a fundamental right and because Defendants' actions easily pass rational-basis review, thus satisfying the constitutional tenet of substantive due process.

For these reasons, and as explained more fully below, the Court should grant Defendants' motion for partial summary judgment.

FACTUAL BACKGROUND

Andrew Dvash-Banks (*né* Andrew Banks) holds dual U.S. and Canadian citizenship. Stmt. ¶ 1.[4] In August 2010, he married Elad Dvash-Banks (*né* Elad Dvash), an Israeli citizen, in Toronto, Canada. *Id.* ¶ 3. Andrew and Elad used Assisted Reproductive Technology ("ART") to have two children named E.J. and A.J. *Id.* ¶¶ 4–7. They used an anonymous egg donor to conceive the children, and a gestational carrier to carry and give birth to them. *Id.* ¶¶ 4, 7. E.J. and A.J. are biological half-brothers; they share the same anonymous egg donor. *Id.* ¶ 6. E.J. and A.J. were carried by the same surrogate; she carried them in tandem, and they were born on the same day. *Id.* ¶ 7. They were born on September 16, 2016, in Toronto, Ontario. *See id.* ¶¶ 5, 7. DNA testing later revealed that E.J. was not biologically related to Andrew; the test returned a 0% probability of paternity result. *Id.* ¶ 8.

On September 28, 2016, Andrew and Elad petitioned the Superior Court of Justice in Toronto, Ontario, to declare them to be the parents of E.J. and A.J. *Id.*

[4] In accordance with the Court's Standing Order, this memorandum supports factual statements with citations to paragraphs in the Statement of Uncontroverted Facts and Conclusions of Law ("Stmt."). *See* ECF No. 27. That document, in turn, lists the relevant underlying evidence supporting particular facts. *Id.*

¶¶ 9–10. The court granted the Dvash-Banks' application, and directed the Deputy Registrar General for the Province of Ontario to register the birth of the children as to show Andrew and Elad as the parents of the children. *Id.* ¶¶ 10–11.

In late 2016, Andrew made an appointment at the Consulate Toronto to submit applications for CRBAs and U.S. Passports for E.J. and A.J. *Id.* ¶¶ 14–15. On the day of their appointment, January 24, 2017, Andrew, Elad, E.J., and A.J. appeared at the Consulate Toronto to submit the applications and be interviewed by a consular officer. *Id.* ¶ 14. Andrew and Elad submitted to the Consulate applications that showed that the children had been born using ART. *Id.* ¶ 24.

During the interview, the consular officer concluded that it was unclear which (if either) of the children, E.J. and A.J., had a biological relationship to the U.S. citizen father (Andrew). *Id.* ¶ 28. When the family answered "no," she provided them the option of submitting DNA evidence to prove such relationship, and a letter outlining relevant steps should they choose to pursue that option. *Id.* ¶¶ 29–32.

The Dvash-Banks family left the Consulate. Thereafter they chose to pursue the DNA option, and arranged to have DNA testing conducted and submitted in support of E.J.'s and A.J.'s applications. *Id.* ¶ 33. Ultimately, the adjudicating officer denied E.J.'s applications on the ground that the applicants had failed to establish a biological connection between E.J. and a U.S. citizen parent. *Id.* ¶¶ 35–36.

In January 2018, Andrew filed the instant suit on behalf of himself and E.J.,[5] challenging the decisions by Defendants to deny E.J.'s CRBA and U.S. passport applications. In their Complaint, Plaintiffs asserted that the denial of E.J.'s applications violated the Administrative Procedure Act. Plaintiffs also asserted claims under the Declaratory Judgment Act ("DJA") alleging violations of their

[5] In December 2018, Elad was appointed guardian *ad litem* for E.J. in the instant action.

substantive due process and equal protection rights. The Complaint also pursued a claim under 8 U.S.C. § 1503(a), which provides a mechanism for the Court to conduct a *de novo* review of E.J.'s citizenship status.

On January 4, 2019, Plaintiffs filed an application to submit an Amended Complaint, which removes Plaintiffs' DJA claim alleging an equal protection violation. *See* ECF No. 79. Defendants move for summary judgment on Plaintiffs' APA and substantive due process claims.

LEGAL BACKGROUND

I. Basic principles of U.S. citizenship and naturalization

In the United States, "'nationality may be predicated either on *jus soli* or on *jus sanguinis*,'" *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015) (quoting *Acheson v. Maenza*, 202 F.2d 453, 459 (D.C. Cir. 1953)), terms that translate to "right of birthplace" and "right of blood," respectively, *see id.* As originally adopted, the Constitution lacked any definition of citizenship. *Rogers v. Bellei*, 401 U.S. 815, 828 (1971). This changed with ratification of the Fourteenth Amendment in July 1868, *see id.*, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[6] U.S. Const. amend. XIV, § 1. The Fourteenth Amendment "relat[es] to the acquisition of citizenship by facts occurring within the limits of the United States." *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898). It does not cover "the acquisition of citizenship by being born abroad of American parents," and instead "left that subject to be regulated, as it had always been, by congress, in the exercise of the power conferred by the

[6] "This sentence of the fourteenth amendment is declaratory of existing rights [at the time of passage], and affirmative of existing law, as to each of the qualifications therein expressed,—'born in the United States,' 'naturalized in the United States,' and 'subject to the jurisdiction thereof'; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States." *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898).

constitution to establish a uniform rule of naturalization." *Id.*; *see also* U.S. Const. Art. I, § 8, Cl. 4.

While colloquially a foreign-born child's acquisition of citizenship through a U.S. citizen parent may be referred to as "birthright citizenship," *see, e.g.*, Compl. ¶ 1, ECF No. 1, "the [Supreme] Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Rogers*, 401 U.S. at 830; *see also Miller v. Albright*, 523 U.S. 420, 424 (1998) ("Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress.").

II. 8 U.S.C. §§ 1401 and 1409

Congress's present-day rules for acquiring U.S. citizenship at birth are found principally in 8 U.S.C. § 1401, titled "Nationals and citizens of United States at birth" and also known as Section 301 of the Immigration and Nationality Act. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017). Under section 1401, a person born outside of the United States

> of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . not less than five years, at least two of which were after attaining the age of fourteen

shall be a U.S. citizen. 8 U.S.C. § 1401(g);[7] *see also Tuan Anh Nguyen v. INS*, 533 U.S. 53, 59 (2001).

8 U.S.C. § 1409, or Section 309 of the INA, provides several situational categories by which a child born abroad may acquire U.S. citizenship at birth, in addition to those described in § 1401. The title of section 1409 indicates that it applies to "children born out of wedlock," but that term is not explicitly defined by

[7] Subsections (a), (b), (c), (d), (e), and (f) of 8 U.S.C. § 1401 describe other categories of persons who acquire citizenship at birth, including for example "a person born in the United States, and subject to the jurisdiction thereof," 8 U.S.C. § 1401(a). This brief primarily addresses 8 U.S.C. § 1401(g) because Plaintiffs' allegations implicate that section. *See, e.g.*, Compl. ¶ 3.

the INA. Section 1409(a) sets out the regime for acquisition of citizenship at birth in the case of a child born out of wedlock to a U.S. citizen father.[8]

III. The Secretary of State's authority to issue Consular Reports of Birth Abroad and U.S. passports

The Secretary of State is charged with "the administration and the enforcement of [the Immigration and Nationality Act] and all other immigration and nationality laws relating to ... the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a). Pursuant to this authority, the Department of State issues documentation of the birth of U.S. citizens born abroad. *See* 22 C.F.R. § 50.7; *see also* 22 U.S.C. § 2705. Congress also authorized the Secretary of State to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States ... under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."[9] 22 U.S.C. § 211a; *see also* E.O. 11295 (Aug. 5, 1966), available at https://www.archives.gov/federal-register/codification/executive-order/11295.html. CRBAs and passports serve to prove the citizenship status of their holders. 22 U.S.C. § 2705. But neither document actually confers citizenship.[10] *See id.*; 8 U.S.C. § 1504(a); *see also, e.g.*, *L. Xia v. Tillerson*, 865

[8] *See also Morales-Santana*, 137 S.Ct. 1678 (holding that the differing physical presence requirements in 8 U.S.C. § 1409 (a) and (c) for unwed fathers and mothers was unconstitutional and ordering that, until Congress enacted a "uniform prescription," the "now-five-year [physical presence] requirement" of the provision that has become 8 U.S.C. § 1401(g) "should apply, prospectively, to children born to unwed U. S.-citizen mothers").

[9] Although enacted as part of the Passport Act of 1926, the pertinent language regarding the Secretary's authority dates back to 1874. *See Haig v. Agee*, 453 U.S. 280, 290 (1981).

[10] The "sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General." 8 U.S.C. § 1421(a). "When Congress passed the Homeland Security Act of 2002, it transferred to DHS authority over all functions that the former Immigration and Naturalization Service . . . or its officers

F.3d 643, 651–52, 655–56 (D.C. Cir. 2017) (passports); *Hizam v. Kerry*, 747 F.3d 102, 107–08 (2d Cir. 2014) (CRBAs).

Department guidance regarding interpretation and administration of the Immigration and Nationality Act can be found in its Foreign Affairs Manual ("FAM"). The FAM states that "[s]ince 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad." 8 FAM 301.4-1(B).[11] First, "at least one biological parent must have been a U.S. citizen when the child was born." *Id.* Second, the "U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born." *Id.*

Against this backdrop, the Department interprets the phrase "born … of parents" in 8 U.S.C. § 1401 to include a biological connection between the child and the referenced parents. Thus, the Department applies 8 U.S.C. § 1401(g) to children whose biological parents are married to each other at the time of the child's birth. *See* 8 FAM 301.7-4(D) (interpreting section 1401(g) to apply to children born in wedlock to a U.S. citizen parent and an alien parent); the FAM defines "birth in wedlock" as "birth during the marriage of the biological parents to each other." 8 FAM 304.1-2(a). The FAM goes on to state: "If a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The same is true for a child born to a

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previously carried out." *Elgharib v. Napolitano*, 600 F.3d 597, 606–07 (6th Cir. 2010); 6 U.S.C. § 251. "Under 6 U.S.C. § 557, references in federal law to any agency or officer whose functions have been transferred to DHS shall be deemed to refer to the Secretary of DHS or other official or component to which the functions were transferred." *Durable Mfg. Co. v. U.S. Dep't of Labor*, 578 F.3d 497, 499 n. 1 (7th Cir. 1999). As a result, courts interpret the reference to the Attorney General in 8 U.S.C. § 1421 "as referring to the authority of the USCIS," the DHS component tasked administering that statute. *See Yith v. Nielsen*, 881 F.3d 1155, 1158 (9th Cir. 2018).

[11] Formerly within chapter 7 FAM 1130. The FAM's guidance on acquisition of citizenship was renumbered as of July 16, 2018.

married man and a person other than his spouse." 8 FAM 304.1-2(e). The FAM notes that

> [c]hildren born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen 'parent' is biologically related to the child, the consular officer is expected to investigate carefully.

8 FAM 301.4-1(D)(1)(d); *see also id.* § 301.4-1(D)(1)(a) ("It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired."); Defs' Stmt. of Facts ¶ 48. Circumstances in which such a doubt may arise include where "[t]he child was born through surrogacy or other forms of assisted reproductive technology." 8 FAM 301.4-1(D)(1)(d)(5); *see also* 8 FAM 304.3-2(f) ("A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born *out of wedlock* of a U.S. citizen and alien spouse, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.") (emphasis added); Defs.' Stmt. of Facts ¶ 48.

The FAM interprets 8 U.S.C. § 1409 to apply to children whose biological parents are not married to each other. 8 FAM 304.1-2. A child may acquire U.S. citizenship at birth through his or her U.S. citizen father if "a blood relationship between the person and the father is established by clear and convincing evidence," and certain other conditions are met. *See* 8 U.S.C. § 1409(a); 8 FAM 301.4-1(D)(1)(b)(1). The Department considers a man to have "a biological relationship with his child, or a 'blood relationship' as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child." 8 FAM 301.4-1(D)(1)(c). The FAM recognizes a "biological relationship" between a child

and mother may include either a genetic relationship or a legal, gestational relationship. *Id.*; *see also* Defs.' Stmt. of Facts ¶¶ 58–59.

IV. The Department of Homeland Security's role in adjudicating citizenship claims in the United States

While the Secretary of State is charged with citizenship and nationality determinations that are made abroad, the Secretary of Homeland Security is responsible for such determinations made in the United States. *See* 8 U.S.C. § 1103(a)(1). For example, USCIS, within the Department of Homeland Security, adjudicates certificate of citizenship applications. *See* 8 U.S.C. § 1452. Under section 1452, "[a] person who . . . is a citizen of the United States by virtue of . . . paragraph . . . (g) of section 1401 of this title . . . may apply" to the Secretary of Homeland Security[12] "for a certificate of citizenship" and "[u]pon proof to the satisfaction of" the Secretary, she may receive a citizenship certification if she is within in the United States at the time. A certificate of citizenship has the "same force and effect as proof of United States citizenship" as a CRBA or a U.S. passport. 22 U.S.C. § 2705.

Defendants acknowledge that the Ninth Circuit, in the course of reviewing the Department of Homeland Security's denial of citizenship claims arising in the context of immigration-court removal proceedings, has held, contrary to the Department of State's interpretation, that (1) "a blood relationship between a child and a U.S. citizen [is] not required to establish citizenship under 8 U.S.C. § 1401(g)" if the child was born in wedlock, *Solis-Espinoza*, 401 F.3d 1090, 1091 (9th Cir. 2005); and (2) a child is born in wedlock if his or her parents were

[12] *See supra* note 10 for an explanation for why Section 1452's reference to the Attorney General is a reference to the Secretary of Homeland Security.

married to each other at the time of the birth, *id.*; *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000).[13]

LEGAL STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

"A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment." *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009); *see also Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007) (a mere scintilla of evidence supporting the plaintiff's position is insufficient to withstand summary judgment.").

[13] U.S. embassies and consulates, in adjudicating applications for citizenship documentation from individuals located abroad, adhere to a uniform, worldwide policy consistent with applicable Supreme Court case law, but the variable case law of individual circuits in the United States does not control those adjudications taking place in foreign jurisdictions.

ARGUMENT

I. Plaintiffs' APA claim fails because there exists multiple, adequate remedies at law.

Plaintiffs bring a claim under Section 706(2)(A) of the APA, asserting that Defendants' denial of E.J.'s CRBA application—and more broadly an alleged exclusion of children born abroad in same-sex marriages from the category of children who qualify for citizenship at birth under 8 U.S.C. § 1401(g)—"lacks a rational basis, is arbitrary, and is contrary to law." *See* Compl. ¶¶ 92, 96. APA review, however, is not available for Plaintiffs. There exists an "adequate remedy at law," *see* 5 U.S.C. § 704, precluding Plaintiffs' APA claims. First, E.J. can challenge, and, indeed, has brought a separate claim challenging, the State Department's denials of the CRBA and passport applications filed on his behalf under 8 U.S.C. § 1503, which provides a path by which E.J. may assert a claim that he is a U.S. national. Second, Plaintiffs may apply for a certificate of citizenship from USCIS, which provides equivalent proof of U.S. citizenship.

The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). "[T]he Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a special and adequate review procedure." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation and internal quotation marks omitted); *see also Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."); *Coos Cnty. Bd. of County Com'rs v. Kempthorne*, 531 F.3d 792, 810 (9th Cir. 2008).

Here, Plaintiffs have already invoked the provisions Congress specifically made available by 8 U.S.C. § 1503 to an individual who is denied a "right or privilege as a national of the United States" by the federal government on "the

ground that [s]he is not a national of the United States." Courts have found that the Department's denial of a CRBA application or a U.S. passport application constitutes the denial of a "right or privilege" that allows the applicant to avail himself or herself of remedies under Section 1503. *See Hizam v. Kerry*, 747 F.3d 102, 108 (2d Cir. 2014). And where an applicant challenges the State Department's denial of a right or privilege of U.S. citizenship on the basis that the plaintiff is not a U.S. citizen, courts have consistently concluded that Section 1503(a) offers an adequate alternative remedy to APA review. *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1233–34 (D. Ariz. 2016) ("Because 8 U.S.C. § 1503(a) affords Plaintiffs a right of action, the APA does not apply."); *Esparza v. Clinton*, 6:12-CV-925-AA, 2012 WL 6738281, at *1 (D. Or. Dec. 21, 2012) (rejecting the argument that "because 8 U.S.C. § 1503 can only provide [the plaintiff] with a declaration of citizenship, her claim challenging the Department of State's denial of her passport application is appropriate under the APA," because Section 1503 provides an adequate remedy in the form of a declaration of U.S. citizenship); *Alsaidi v. U.S. Dep't of State*, 292 F. Supp. 3d 320, 326 (D.D.C. 2018) ("[C]ourts have repeatedly dismissed APA claims challenging the denial of a passport application or a passport revocation on grounds that the holder is not a U.S. national, reasoning that . . . a judicial declaration of citizenship and entitlement to a passport may be directly sought through 8 U.S.C. § 1503(a)." (quoting *Villarreal v. Horn*, 203 F.Supp.3d 765, 773 (S.D. Tex. 2016)).

Section 1503's remedies do not fall short because Plaintiffs seek injunctive and declaratory relief under the APA but can obtain only declaratory relief under section 1503(a). Plaintiffs seek (1) a declaration that the Department of State's alleged policy of "classifying the children of same-sex married couples as 'children born out of wedlock,' and its consequent refusal to recognize [E.J.'s] citizenship status on that basis," violates the INA and the Constitution; (2) a declaration that [E.J.] is a U.S. citizen at birth; and (3) a permanent injunction enjoining

Defendants from "continuing to discriminate against Plaintiffs by classifying 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." Compl. at 24, Prayer for Relief. Section 1503 accords an individual "judgment declaring him to be a national of the United States," 8 U.S.C. § 1503(a). This is, at its core, the relief the Plaintiffs seek here.

Section 706(2)(A) of the APA, meanwhile, only allows the courts to "hold unlawful and set aside agency action" that does not comport with the applicable laws and procedures. 5 U.S.C. § 706(2)(A). But all section 706(2)(A) of the APA can provide is an order vacating or remanding the Department's denials of E.J. D.-B.'s CRBA and passport applications. *See id.* Such a remedy is of limited utility to Plaintiffs, because they are not currently abroad and, thus, cannot apply for another CRBA from the Department unless they leave the country. 22 C.F.R. § 50.2 ("The Department shall determine claims to United States nationality *when made by persons abroad* on the basis of an application for . . . a Consular Report of Birth Abroad of a Citizen of the United States of America."); *see also* 22 C.F.R. § 50.5. The APA remedies also do not encompass Plaintiffs' second request for relief, a declaration that E.J. is a U.S. citizen; rather, Section 1503 provides Plaintiffs with a mechanism to obtain such a declaration.

Meanwhile, Plaintiffs' other, sweeping requests for judgment on the Department of State's policies as a whole and for a permanent, universal injunction are unavailable under the APA and, in any event, must be rejected as improper. First, the APA does not allow Plaintiffs to seek "*wholesale* improvement of [a] program by court decree." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *cf. Ctr. For Biological Diversity v. U.S. Dept. of Hous. & Urban Dev.*, 241 F.R.D. 495, 500, 501 (D. Ariz. 2006) (concluding that an APA challenge impermissibly sought broad programmatic relief where it went beyond a direct appeal of a single

agency decision and instead sought a declaration that "Defendants have violated and continue to violate" the law and injunctive relief compelling Defendants to change their practices). Second, it is a black-letter rule that injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see also Gill v. Whitford*, 138 S.Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."); *see also California v. Azar*, — F.3d —, 18-15144, 2018 WL 6566752, at *16 (9th Cir. Dec. 13, 2018); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018). Indeed, section 706(2)'s inability to provide Plaintiffs with *any* of their requested relief is an independent basis on which to dismiss this claim.

A further alternative remedy is plainly available to the Plaintiffs here. Andrew is free to apply for a certificate of citizenship on behalf of E.J. from USCIS, *see* 8 U.S.C. §1452, which is equivalent proof of U.S. citizenship, *see* 22 U.S.C. § 2705. *See also* Defs.' Stmt. of Facts ¶ 64. In the Ninth Circuit, where Plaintiffs currently reside, USCIS follows the Ninth Circuit's decision in *Scales*, 232 F.3d at 1166. Defs.' Stmt. of Facts ¶¶ 66–67.

USCIS's certificate-of-citizenship process provides an adequate, alternative remedy at law for Plaintiffs to procure proof of U.S. citizenship for E.J.[14] *Cf. Nickerson v. United States*, CV 07-211 JH/WDS, 2007 WL 9662632, at *6 (D.N.M. Oct. 31, 2007) (setting forth alternative remedies, including under 8 U.S.C. §§ 1452 and 1503, for an individual to obtain proof of citizenship). And a certificate of citizenship would be of greater practical value to Plaintiffs than a decision vacating the Department's denial of E.J.'s CRBA application or

[14] Indeed, Plaintiffs' pursuit of a certificate of citizenship from USCIS would also obviate the need for this Court to decide Plaintiffs' claim under 8 U.S.C. § 1503.

remanding the application, *see* 5 U.S.C. § 706(A), since Plaintiffs cannot apply for another CRBA from within the United States. *See* 22 C.F.R. §§ 50.2, 50.5.

For these reasons, summary judgment should be entered for the Defendants as a matter of law on Plaintiffs' APA claims in Count III.

II. Defendants are entitled to summary judgment on Plaintiffs' Substantive Due Process claim in Count I.

Summary judgment should also be entered for the Defendants on Plaintiffs' Substantive Due Process claim.[15]

Plaintiffs assert that Defendants are violating their substantive due process rights "by enforcing a policy that excludes U.S. citizens in same-sex marriages from conferring citizenship pursuant to [8 U.S.C. § 1401], while restricting access to citizenship under that provision to the children of opposite-sex married couples." Compl. ¶ 76; *see also id.* ¶¶ 75–77. But because Plaintiffs fail to identify a fundamental right upon which Defendants have infringed and because Defendants' policies pass rational-basis review, Plaintiffs' substantive due process claim must be rejected.

The Supreme Court has established that the Fifth Amendment guarantee of due process includes "a substantive component, which forbids the government from infringing certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). But the Court has "always been reluctant to expand the concept of substantive due process because guideposts

[15] As an initial matter, the DJA neither independently vests courts with jurisdiction nor "provide[s] a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *see also Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (The DJA "only creates a remedy and is not an independent basis for jurisdiction."). Thus, the Act's "'operation . . . is procedural only.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 138 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). Plaintiffs must identify some other source of law, then, that accords them the right to bring these claims in a federal court. They have not done so in their First Amended Complaint.

for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The Court has observed that the protections of substantive due process are limited to those rights that rank as "fundamental"—that is, both "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citation omitted). "The range of liberty interests that substantive due process protects is narrow and '[o]nly those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause.'" *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018), *cert. denied*, 18-585, 2018 WL 5792470 (U.S. Dec. 10, 2018) (quoting *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995)).

The Supreme Court has thus made clear that a plaintiff must provide "a 'careful description' of the asserted fundamental liberty interest" when raising such a claim. *Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003); *see also Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1222 (C.D. Cal. 2003), *aff'd*, 427 F.3d 1197 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006). "Where a fundamental right is not implicated . . . governmental action need only have a rational basis to be upheld against a substantive due process attack." *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997); *see also Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014) ("Absent a fundamental right, strict scrutiny is inapplicable.").

Here, in the case of a family that made the choice to live and have children outside the United States, Plaintiffs' asserted "rights to acquire and confer citizenship at birth pursuant to INA Section 301," Compl. ¶ 77, is too broad an assertion to comply with *Glucksberg*. *See also Hutchins v. Dist. of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999). Nor do Plaintiffs sufficiently describe a

fundamental interest in asserting a right to "the legal recognition that same-sex spouses may both be the parents of a child born during their marriage, even if only one spouse is the child's biological parent." Compl. ¶ 36. As an initial matter, "[a] fair reading of petitioner's complaint does not charge" Defendants with infringing upon this broad right. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Rather, Plaintiffs actually complain that Defendants do not recognize E.J. as a U.S citizen child born abroad "because of the lack of a genetic or gestational relationship between him and Andrew," Compl. ¶ 56, and the State Department acknowledges that Andrew is E.J.'s legal parent. *See* Defs.' Stmt. Facts ¶¶ 55, 56.

Rather, Andrew's asserted interest is more carefully described as an individual's right to successfully apply for a CRBA or a U.S. passport on behalf of a child who is born abroad and is not the individual's biological child. E.J.'s asserted interest, conversely, is more carefully described as an individual's right to successfully apply for a CRBA or a U.S. passport as a child born abroad who is not the biological child of a U.S. citizen. These asserted rights—which Plaintiffs do not even characterize as a liberty or property interest—cannot be considered fundamental under substantive due process jurisprudence because there are no such rights deeply rooted in this Nation's history, tradition, and practices. Indeed, the extension of citizenship to foreign-born children is not a constitutionally enshrined right for either the U.S. citizen or the child seeking to acquire citizenship; rather, it is a right granted by Congress. *Rogers*, 401 U.S. at 827; *see also Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring) ("Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned, and can only become a citizen by being naturalized, either by treaty, . . . or by authority of Congress.") (internal citation and quotation marks omitted); *see also Icaza v. Schultz*, 656 F. Supp. 819, 823 (D.D.C. 1987). Further, the Supreme Court has underscored the importance of a biological connection between the child seeking to acquire citizenship and the U.S. citizen seeking to confer citizenship.

See, e.g., *Miller v. Albright*, 523 U.S. at 438 ("There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective.") (plurality op.); *Nguyen*, 533 U.S. at 62 (acknowledging "the importance of assuring that a biological parent-child relationship exists" for the purposes of a U.S. citizen father conferring citizenship on a child born abroad). Therefore, Plaintiffs fail to establish a fundamental right at issue in this case.

Because Plaintiffs' asserted right is not fundamental, their claims are subject only to rational basis review. *Kim*, 121 F.3d at 1273. "Rational basis review is highly deferential to the government, allowing any conceivable rational basis to suffice." *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018), *amended,* 881 F.3d 792 (9th Cir. 2018) (citing *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000)). Defendants' longstanding interpretation of the relevant sections of the INA to require a biological relationship between the U.S. citizen and child for the child born abroad to receive a CRBA or a U.S. passport passes rational-basis review.

The question for resolution of Count I is separate from the question of whether this Court agrees with the Department's longstanding statutory interpretation.[16] *See Shanks v. Dressel*, 540 F.3d 1082, 1089 (9th Cir. 2008)

[16] As noted above, Defendants recognize that the Ninth Circuit—in cases where, unlike here, the challenged agency action took place within the circuit's geographic jurisdiction—has construed the instant statutory provisions differently from the Department of State, *see Solis-Espinoza*, 401 F.3d at 1091, and *Scales v. INS*, 232 F.3d at 1166.

To extent the court believes that Plaintiffs are entitled to relief on their due process claim, the court should defer ruling on Count I until it resolves Plaintiffs' statutory claim, which may provide sufficient relief without unnecessarily addressing a constitutional question. *See Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994); *see also United States v. Kenney*, 789 F.2d 783, 784 n.2 (9th Cir. 1986) ("Because we decide on statutory grounds, we need not reach the constitutional issue.").

(concluding that the executive decision purportedly taken, even if "legally erroneous . . . falls short of being constitutionally arbitrary."). Rather, the Court must determine whether the Department's interpretation violates the substantive due process component of the Fifth Amendment. It does not.

Unlike children born in the United States, children born abroad do not automatically become U.S. citizens at birth pursuant to the Fourteenth Amendment to the Constitution. Instead, whether children born outside the United State may acquire citizenship at birth upon application depends on a complex statutory scheme enacted by Congress. *See Miller*, 523 U.S. at 424. Those rules are designed to assure that children born abroad have a sufficient connection to the United States to warrant conferral of U.S. citizenship, with the attendant rights and responsibilities that come with citizenship and the attendant duties of protection assumed by the U.S. government. Such rules also work to prevent fraud by ensuring that not every putative "parent" who submits a U.S. passport application for a child located abroad will easily obtain a passport for that child.

Defendants' longstanding interpretation of the language "born of . . . parents" in Section 1401(g) to require a biological relationship between the child seeking to acquire U.S. citizenship and her married parents is rooted in its understanding that Congress has, since 1790, required that "at least one biological parent must have been a U.S. citizen when the child was born. The only exception is for a posthumous child." 8 FAM 301.4-1(B); The INA was enacted in 1952, a time when it was commonly understood, that outside the adoption context, 'parent' at birth referred to a biological parent. Defs' Stmt. of Facts ¶ 69. Indeed, the Supreme Court, in examining Section 1409, has observed that: "There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective." *Miller*, 523 U.S. at 436 (opinion of Stevens, J.); *see also Tuan*, 533 U.S. at 62; *Bellei*, 401 U.S. at 834 (referring to the "heritable blood of citizenship"). The Department's

uniform, worldwide interpretation and application of 8 U.S.C. §§ 1401 and 1409 is reasonable in light of the Supreme Court's recognition that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977).

The Department's interpretation is supported by other sections of the INA that treat non-biological children of U.S. citizens differently, as well as Section 1409, which specifies how the Department should treat children born out of wedlock. For example, Congress excluded "stepchild" from its definition of child for the purposes of citizenship and naturalization, *see Acevedo v. Lynch*, 798 F.3d 1167, 1171 (9th Cir. 2015); *see also* 8 U.S.C. § 1101(c). Further, children born abroad and then adopted by U.S. citizen legal parents may only acquire U.S. citizenship through derivation or naturalization at some point after birth, *see* 8 U.S.C. §§ 1431(b), 1433—not at birth—even if they were adopted as infants. *See Colaianni v. I.N.S.*, 490 F.3d 185, 187 (2d Cir. 2007); *Marquez-Marquez v. Gonzales*, 455 F.3d 548, 556–57 (5th Cir. 2006) (per curiam); *see also Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 552 (2012).

Finally, the Department has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of fraudulent citizenship claims, because it would be more difficult to identify child smuggling or illegal adoption without requiring a biological link between child applicant and the transmitting parent. *See* Defs' Stmt. of Facts ¶ 71.

Plaintiffs contend that there is no rational basis to limit the application of section 1401 to the children of heterosexual couples. *See* Compl. ¶¶ 8–9, 69, 78. But this allegation is misplaced because Defendants *do not* limit the application of section 1401 to the children of heterosexual couples. Defs.' Stmt. Facts ¶¶ 58–60; *Browning*, 292 F.3d 235, at 242. As discussed above, Plaintiffs themselves acknowledge that "the Department of State's policy may in theory apply to

marriages between spouses of opposite sexes," Compl. ¶ 70. The Department treats the children of *all* couples the same, regardless of their sexual orientation, for the purposes of Section 1409 if both biological parents are not married to each other, *see* 8 FAM 301.4.

The Department also treats the children of same-sex couples as "born of . . . parents" for the purposes of Section 1401 when both parents have a biological connection to the children. *See* Defs' Stmt. of Facts ¶¶ 58–60. For example, where one woman is a U.S. citizen and her same-sex spouse is an alien, the child can acquire U.S. citizenship at birth if the U.S.-citizen spouse is either "the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby)," so long as the law of the country where she resides also recognizes her as a legal parent.[17] 8 FAM 301.4-1(D)(1)(c). Where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic mother, the Department adjudicates the child's citizenship claim under INA 301(c).[18] 8 FAM 304.3-1(b); *see also* Defs' Stmt. of Facts ¶ 59. Rather, the Department's interpretation of Sections 1401 and 1409 affects all non-biological parents of children born abroad, regardless of sexual orientation.

Moreover, the FAM contains no language that treats same-sex couples differently from opposite-sex married couples in requiring a biological connection between the child seeking to acquire U.S. citizenship and the asserted U.S. citizen parent under 8 U.S.C. § 1401. *See, e.g.*, 8 FAM 301.4 (*passim*). In particular, as

[17] It is not enough for a U.S. citizen to serve as a surrogate—*i.e.*, a gestational mother lacking status as the legal parent of the child. A "surrogate's citizenship is irrelevant to the child's citizenship analysis," 8 FAM 304.3-2(a), and a child may not acquire citizenship through a surrogate, *see id.*

[18] Further, the Department also recognizes that a child of transgender and cisgender males can have a child born in wedlock, assuming that both parents have a biological relationship to the child. *See* Defs' Stmt. of Facts ¶ 60.

noted above, consular officers are expected to investigate carefully to establish a biological relationship when "[t]he child was born through surrogacy or other forms of assisted reproductive technology," irrespective of the sex or sexual orientation of the legal parents of the child. 8 FAM 301.4-1(D)(1)(d)(5).

For the foregoing reasons, summary judgment should be granted for Defendants on Count I.[19]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for partial summary judgment.

[19] If the Court concludes to the contrary, then, as noted above, it may only order relief that is limited to the parties and not a nationwide injunction, because "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702; *see also Gill*, 138 S.Ct. at 1933. "This rule applies with special force where," as here, "there is no class certification." *California*, 2018 WL 6566752, at *15.

Dated: January 7, 2019

Respectfully submitted,

Attorneys for Defendants

JOSEPH H. HUNT
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

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

LISA ZEIDNER MARCUS
Senior Counsel

CERTIFICATE OF SERVICE

Case No. CV 18-523-JFW-JC

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

On January 7, 2019, I served this MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on each person or entity named below by uploading an electronic version of this document to the Court's ECF system:

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

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

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

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

Executed on January 7, 2019, at Washington, DC.

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

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

Counsel for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al.,

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

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

Honorable John F. Walter

Pursuant to Local Rule 56-1, and this Court's Standing Order (ECF No. 27) and Case Management Order (ECF No. 52), Defendants Secretary of State Michael R. Pompeo and the U.S. Department of State (collectively, "Defendants") respectfully submit the following Statement of Uncontroverted Facts and Conclusions of Law in support of their Motion for Partial Summary Judgment.

I. Statement of Uncontroverted Facts

Uncontroverted Fact	*Supporting Evidence*
1. Andrew Mason Dvash-Banks is a dual United States / Canadian citizen.	• Dvash-Banks Depo. 14:25–15:12
2. Elad Austin Dvash-Banks is an Israeli citizen.	• AR 019
3. Andrew and Elad married each other in August 2010, in Toronto, Ontario. (Prior to their marriage, Andrew went by the name Andrew Mason Banks, and Elad went by the name Elad Dvash.)	• AR 019 (marriage certificate) • AR 09 (prior names) • Dvash-Banks Depo. 29:05–08
4. Andrew and Elad used Assisted Reproductive Technology ("ART") to have E.J.; they used an anonymous egg donor to conceive E.J.. and a gestational carrier to carry and give birth to E.J.	• Plaintiffs' Response to Defendants' Requests for Admission Nos. 1. • Plaintiffs' Response to Defendants' Requests for Admission Nos. 3.
5. E.J. D-B, was born September 16, 2016, in Toronto, Ontario.	• Dvash-Banks Depo. 29:09–14 • AR 017
6. A.J. is E.J.'s biological half-brother; they share the same anonymous egg donor.	• Dvash-Banks Depo. 84:14-16
7. A.J. and E.J. were carried by the same surrogate; she carried them in tandem, and they were born on the same day.	• Dvash-Banks Depo. 82:01–83:03
8. DNA testing later revealed that E.J. was not biologically related to Andrew; the test returned a 0% probability of paternity result.	• Plaintiffs' Resp. to Defendants' Requests for Admission No. 14. • AR 062, 063

Uncontroverted Fact	*Supporting Evidence*
9. After E.J. was born, Andrew and Elad initiated a court proceeding in Superior Court of Justice, Toronto, Ontario; that proceeding bears the Court File Number FS-16-21123. The two Respondents in the proceeding were: (a) the surrogate who gave birth to E.J., and (b) the Deputy Registrar General for the Province of Ontario, Ministry of the Attorney General, Legal Services Branch.	• AR 022
10. The Superior Court judge presiding over proceeding FS-16-21123 issued an order on September 28, 2018.	• AR 022
11. The order "declared that the Applicants Elad Dvash-Banks and Andrew Dvash-Banks are the parents of the child, E.J. D-B, born September 16, 2016 ('the child'), and that the Applicants are recognized for all purposes in law to be the parents of the child."	• AR 022
12. The order did not state that it had retroactive effect.	• AR 022
13. The order directed the Deputy Registrar General for the Province of Ontario "to register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child."	• AR 022

Uncontroverted Fact	*Supporting Evidence*
14. Andrew, Elad, A.J., and E.J. appeared in person for the appointment at the Consulate Toronto on January 24, 2017.	• Dvash-Banks Depo. 120:07–121:10
15. In advance of the appointment, he made the appointment online.	• Dvash-Banks Depo. 36:15–20; 38:06–20
16. During the appointment, Andrew and Elad submitted a total of four applications: two for E.J. and two for A.J.	• Dvash-Banks Depo. 117:02–11
17. The two applications for E.J. consisted of a CRBA application and a U.S. passport application, along with supporting materials.	• AR 009-072 (applications and supporting materials; within this range, the CRBA application appears at AR 009-014, and the U.S. passport application appears at 068–071)
18. Consular Officer Terri Nathine Frances "Frankie" Day was the officer who conducted the adjudication of E.J.'s and A.J.'s applications.	• Defendants' Resp. to Plaintiffs' Interrogatory Nos. 1, 2 • Day Depo 94:22–95:10 • AR 002-008
19. Ms. Day interviewed the Dvash-Banks family on January 24, 2017.	• Defendants' Resp. to Plaintiffs' Interrogatory Nos. 1, 2 • Day Depo 94:22–95:10 • AR 002-008

Uncontroverted Fact	*Supporting Evidence*
20. Ms. Day made the ultimate decision to deny E.J.'s applications.	• Defendants' Resp. to Plaintiffs' Interrogatory Nos. 1, 2 • Day Depo Day Depo 94:22–96:25 • AR 001
21. Consular Officer Margaret "Maggie" Ramsay assisted Ms. Day on the day of the interview, including by providing Ms. Day with relevant Foreign Affairs Manual references, and by speaking with the Dvash-Banks family toward the end of the interview.	• Defendants' Resp. to Plaintiffs' Interrogatory No. 1, 2 • Ramsay Depo 147:14-22 • Day Depo 95:11-25 • AR 073
22. Consular Officer Larilyn Reffett, who served as the American Citizen Services Chief at Consulate Toronto was Ms. Day's supervisor. Ms. Reffett supervised Ms. Day during the underlying adjudication, and Ms. Day consulted with Ms. Reffett about the case.	• Defendants' Resp. to Plaintiffs' Interrogatory Nos. 1, 2 • Reffett Depo 203:10-206:09 • Day Depo 95:11-25
23. The ultimate decisions on E.J.'s and A.J.'s applications were made by Ms. Day on her own.	• Day Depo 95:11-25
24. The application materials Andrew submitted to Consulate Toronto (prior to his interview by the consular officer) as part of E.J.'s applications identified that he and Elad had used Assisted Reproductive Technology ("ART") to have E.J.	• Dvash-Banks Depo. 172:08-15 • AR 024–056

Uncontroverted Fact	*Supporting Evidence*
25. 7 FAM 1140 Appendix D pertains to "Establishing a Biological Relationship in an ART Case." It states: "In most cases involving assisted reproductive technology there is no shortage of documentation, and consular officers are free, as in any case, to ask for appropriate supporting documentation that fits the circumstances of the case."	• AR 079
26. As the adjudicating officer for the Dvash-Banks family's applications, Ms. Day viewed it to be her role and responsibility to each child's eligibility for U.S. citizenship at birth for children born abroad.	• Day Depo 230:21–231:11
27. Ms. Day consulted the Foreign Affairs Manual during her interview of the Dvash-Banks family.	• Day Depo 217:09-24; 220:03-06; 235:17–23. • AR 073
28. During the interview, Ms. Day concluded that it was unclear which (if either) of the children, E.J. and A.J., had a biological relationship to the U.S. citizen father (Andrew).	• Day Depo. 245:02–16
29. Ms. Day told Andrew and Elad that they had options for how to proceed.	• Day Depo. 253:04–25

Uncontroverted Fact	*Supporting Evidence*
30. She explained that they did not have to get a DNA test for E.J. and A.J. if they did not want to do so, but that she would not be able to approve E.J.'s or A.J.'s applications without information from such a test.	• Day Depo. 253:04–25
31. She suggested to the Dvash-Banks family other ways that they could potentially have E.J. and A.J. documented as U.S. citizens.	• Day Depo. 108:06–21 • Dvash-Banks00000031 (letter from Vice Consul Frankie Day to Andrew Dvash-Banks, dated Jan. 24, 2017)
32. She explained that the Dvash-Banks family had 90 days to provide to the Consulate any additional information or evidence supporting the applications.	• Dvash-Banks Depo. 152:10-13 • Dvash-Banks00000031 (letter from Vice Consul Frankie Day to Andrew Dvash-Banks, dated Jan. 24, 2017)
33. Andrew and Elad chose to pursue DNA testing, and the results were submitted directly to the Consulate Toronto.	• AR 62–66
34. The DNA results showed a 0% probability of paternity with respect to the question whether Andrew was a biological parent of E.J.	• AR 62, 63
35. On March 2, 2017, Ms. Day issued a letter denying E.J.'s applications for a CRBA and a U.S. passport.	• AR 001

Uncontroverted Fact	*Supporting Evidence*
36. The letter explained "that after careful review of the evidence" Andrew submitted with E.J.'s application, it had been determined that E.J.'s claim to U.S. citizenship had not been satisfactorily established, as Andrew is "not his biological father."	• AR 001
37. Under Department of State policy, applicants for CRBAs and U.S. passports have the burden of proving that they are citizens of the United States, among other requirements.	• AR 096–097 (7 FAM App'x A ¶ a (citing 22 C.F.R. § 51.23 and 22 C.F.R. § 51.40))
38. Ms. Day testified that she does not remember whether she adjudicated E.J.'s applications as "in wedlock" or "out of wedlock."	• Day Depo. 116:12–19; 231:04-233:18
39. Regardless of whether E.J. was considered born "in wedlock" or "out of wedlock" for purposes of adjudicating his U.S. citizenship claim, it was—in Ms. Day's view as the adjudicating officer—necessary for E.J. to have a biological connection to the U.S. citizen father (Andrew) in order for E.J. to acquire U.S. citizenship at birth.	• Day Depo 232:01–11

Uncontroverted Fact	*Supporting Evidence*
40. Ms. Day testified that it would not have made a difference to her final adjudication decision for E.J.'s applications whether she had considered the children to be born "in wedlock" or whether she had considered them to be born "out of wedlock."	• Day Depo. 232:01–233:10
41. Ms. Day testified that it would not have mattered to the outcome of the adjudication if E.J.'s applications had been adjudicated pursuant to INA 301(g) rather than INA 309(a).	• Day Depo. 232:23–233:12; 277:12–278:02.
42. Ms. Reffett testified that a biological relationship is always required, regardless of whether the child's legal parents are married to each other.	• Reffett Depo. 153:06-15; 156:10–19; 122:17–123:17; 124:09–22
43. Ms. Ramsay testified that she believes—based on Ms. Day's case notes—that Ms. Day initially considered E.J. to be born "in wedlock."	• Ramsay Depo. 131:22–133:23
44. Ms. Ramsay also testified that it would not have made a difference to the outcome of the adjudication if Ms. Day had adjudicated EJ's applications under INA 301 instead of INA 309?	• Ramsay Depo. 131:22–133:23

Uncontroverted Fact	*Supporting Evidence*
45. Ms. Day understood Department of State implementation of the Immigration and Nationality Act to require a biological connection between an American citizen parent and the applicant child that a biological connection between the American citizen father (Andrew) and E.J. would have been required under either INA 301(g) or INA 309(a).	• Day Depo. 232:23–233:10
46. Ms. Day's understanding of the biological relationship requirement was based on the Foreign Affairs Manual ("FAM").	• Day Depo. 233:06–12
47. In Ms. Day's view the FAM was not completely separated from the Immigration and Nationality Act of 1952—-the FAM included quotations from the INA; the FAM described INA provisions in addition to quoting them; and FAM provisions incorporated the INA.	• Day Depo. 233:19–234:20; 237:09–15

Uncontroverted Fact	*Supporting Evidence*
48. 7 FAM 1131.4-1(d) (AR 083-084) provides that "Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen 'parent' is biologically related to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include, but are not limited to: … The child was born through surrogacy or other forms of assisted reproductive technology."	• AR 083–084
49. According to Department of State guidance in effect at the time of the adjudication at 7 FAM 1120 Appendix D ¶ f: When a child is born abroad to a surrogate, and the child's genetic parents are a U.S. citizen father and an anonymous egg donor, the child "is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth."	• AR 078

Uncontroverted Fact	*Supporting Evidence*
50. The Department of State's Foreign Affairs Manual defines the term "in wedlock" as follows: "To say a child was born 'in wedlock' means that child's biological parents were married to each other at the time of the birth of the child."	• AR 091 (7 FAM 1140 App'x E ¶ c).
51. The Department of State's definition of "in wedlock" does not consider whether a child's legal parents were married to each other at the time of the child's birth.	• AR 091 (7 FAM 1140 App'x E ¶ c).
52. Andrew asserts that the Department of State rejected E.J.'s citizenship status because the Department views E.J. as a child born out of wedlock; he believes this has something to do with his marriage.	• Dvash-Banks Depo. 161:01–162:17
53. Andrew testified that the Department's decision to deny E.J.'s application did not harm Andrew's ability to be married to Elad.	• Dvash-Banks Depo. 162:12–163:04.
54. Ms. Day testified that she considers the term "parents" to be a "very broad term"; in adjudicating E.J.'s applications, she did not consider it her role to determine whether Andrew and Elad were the "parents" of E.J.	• Day Depo. 224:18–228:06 • Day Depo. 228:07–229:16
55. Ms. Day considered Andrew and Elad to be E.J.'s parents.	• Day Depo. 229:02-16

Uncontroverted Fact	*Supporting Evidence*
56. Andrew is E.J.'s legal parent under the law of Ontario, Canada.	• Defs' Resp. to Pls.' Request for Admission 18.
57. In testifying about the range of CRBA and U.S. passport adjudications she handled during her time in the American Citizenship Services unit at Consulate Toronto, Ms. Day testified that the use of Assisted Reproductive Technology did not exclusively arise in connection with applications in which the legal parents of the applicant child were in a same-sex marriage; it also arose in connection with applications in which the legal parents of the applicant child were in an opposite-sex marriage.	• Day Depo. 79:25–80:17; 243:05–14
58. The Department treats the children of same-sex couples as "born of . . . parents" for the purposes of Section 1401 when both parents have a biological connection to the children.	• Peek Dep. 202:17–23; 333:4–17 • Defs.' Response to Pls.' First Set of Requests for Admission 10 (denying that "under the State Department's] current interpretation and application of" 8 U.S.C §§ 1401 and 1409, "Defendants would never conclude that two men who are married to each other may have a child in wedlock for purposes of" 8 U.S.C. § 1401.").

Uncontroverted Fact	*Supporting Evidence*
59. Where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic mother, the Department adjudicates the child's citizenship claim under INA 301(c).	• Peek Dep. 202:17–23. • 8 FAM 304.3-1(b)
60. The Department also recognizes that a child of transgender and cisgender males can have a child born in wedlock, assuming that both parents have a biological relationship to the child.	• Peek Dep. 178:20–179:18.
61. Ms. Day generally tried to ask all CRBA applicants about their use of Assisted Reproductive Technology, regardless of whether the parents were in a same-sex or opposite-sex marriage.	• Day Depo. 243:15–244:10
62. Ms. Day did not ask for DNA evidence in connection with every CRBA application, but the applications for which she did ask for DNA evidence included both families where the parents were in a same-sex marriage and families where the parents were in an opposite-sex marriage.	• Day Depo 245:22–246:03
63. Ms. Day did not ask every same-sex couple applying for a CRBA application for a child to present DNA evidence.	• Day Depo 246:04-247:23

Uncontroverted Fact	*Supporting Evidence*
64. The Dvash-Banks family may pursue another avenue for documenting E.J.'s citizenship.	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11
65. The Dvash-Banks family could apply for a certificate of citizenship from USCIS.	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11 • 8 U.S.C. § 1452 ("A person who . . . is a citizen of the United States by virtue of . . . paragraph . . . (g) of section 1401 of this title . . . may apply" to the Secretary of Homeland Security[1] "for a certificate of citizenship" and "[u]pon proof to the satisfaction of" the Secretary, she may receive a citizenship certification if she is within in the United States at the time.").
66. USCIS adjudicates applications for certificates of citizenship domestically, and considers the jurisdiction where the applicant lives when adjudicating an application.	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11
67. For applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000).	• Defs.' Resp. to Pls.' First Set of Requests for Admission 11 • Peek Depo. 335:10–14

Uncontroverted Fact	*Supporting Evidence*
68. The FAM states: "Since 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad: (1) At least one biological parent must have been a U.S. citizen when the child was born. The only exception is for a posthumous child. (2) The U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born."	• AR 82 (7 FAM 1131.2)
69. The INA was enacted in 1952, a time when it was commonly understood, that outside the adoption context, 'parent' at birth referred to a biological parent.	• Defs.' Second Resp. to Pls.' First Set of Interrogatories at 22
70. The Department's interpretation has been set forth in the FAM for at least twenty years.	• DEFS000686 (7 FAM 1131.2 (1998))
71. The Department has expressed concerns that adopting a contrary interpretation of Section 1401(g) would raise the frequency of fraudulent citizenship claims, because it would be difficult to identify child smuggling or illegal adoption without requiring a biological link between child applicant and the transmitting parent.	• 2012 Information Memo to the Secretary on Assisted Reproductive Technology (ART), Citizenship and Visa Law (DEFS001382). • *See also* Reffett Depo 167:18–168:19.

Uncontroverted Fact	*Supporting Evidence*
72. It is common practice throughout the world for Department of State Embassies and Consulates to ask for DNA testing in surrogacy cases; DNA testing is a means of discouraging fraud and ensuring that U.S. citizenship transmission Requirements are met.	• DEFS001648–49

II. Conclusions of Law

1. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."	• Fed. R. Civ. P. 56(c)
2. A fact is material when, under the governing substantive law, it could affect the outcome of the case.	• *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997)
3. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."	• *Anderson*, 477 U.S. at 248

4. The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial.	• *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)
5. "A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment."	• *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009); *see also Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007)
6. In the United States, "'nationality may be predicated either on *jus soli* or on *jus sanguinis*, terms that translate to "right of birthplace" and "right of blood," respectively.	• *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015) (quoting *Acheson v. Maenza*, 202 F.2d 453, 459 (D.C. Cir. 1953))
7. The Constitution does not cover "the acquisition of citizenship by being born abroad of American parents," and instead "left that subject to be regulated, as it had always been, by congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization."	• *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898)
8. "Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress."	• *Miller v. Albright*, 523 U.S. 420, 424 (1998)
9. A person born outside of the United States "of parents one of whom is an	• 8 U.S.C. § 1401(g); *see also Tuan Anh Nguyen v. INS*, 533 U.S. 53, 59 (2001)

alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . not less than five years, at least two of which were after attaining the age of fourteen" shall be a U.S. citizen.	
10. Subsections (a), (b), (c), (d), (e), and (f) of 8 U.S.C. § 1401 describe other categories of persons who acquire citizenship at birth, including for example "a person born in the United States, and subject to the jurisdiction thereof."	• 8 U.S.C. § 1401(a); *see generally* 8 U.S.C. § 1401
11. 8 U.S.C. § 1409, or Section 309 of the INA, provides several situational categories by which a child born abroad may acquire U.S. citizenship at birth, in addition to those described in § 1401.	• 8 U.S.C. § 1409
12. The title of section 1409 indicates that it applies to "children born out of wedlock."	• 8 U.S.C. § 1409
13. 8 U.S.C. § 1409(a) sets out the regime for acquisition of citizenship at birth in the case of a child born out of wedlock to a U.S. citizen father.	• 8 U.S.C. § 1409(a)

Whether E.J.'s applications were adjudicated under INA 301(g) and considered "in wedlock," or adjudicated under INA 309(a) and considered "not in wedlock," would not have affected the outcome of the underlying adjudication because either way the adjudicating officer would have required a showing of a biological connection between a U.S. citizen parent and the applicant child.	
14. Section 104(a) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1104(a), gives the Secretary of State the responsibility for the administration and enforcement of all nationality laws relating to "the determination of nationality of a person not in the United States."	• AR 081 • 8 U.S.C. § 1104(a)
15. Pursuant to this authority, the Department of State issues documentation of the birth of U.S. citizens born abroad.	• 22 C.F.R. § 50.7; *see also* 22 U.S.C. § 2705.
16. Congress also authorized the Secretary of State to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular	• 22 U.S.C. § 211a; *see also* E.O. 11295 (Aug. 5, 1966)

officers of the United States ... under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."	
17. The Department of State's decision whether to apply INA 301 or INA 309 in a given case does not reflect whether the Department recognizes the legal validity of the marriage of a child's legal parents.	• 7 FAM 1131.4-1(d) (AR 083-084) provides that "Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required." • 7 FAM 1120 App'x D ¶ f (AR 078) provides that "A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). *This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth*." (emphasis added)

18. While the Secretary of State is charged with citizenship and nationality determinations that are made abroad, the Secretary of Homeland Security is responsible for such determinations made in the United States.	• *See* 8 U.S.C. § 1103(a)(1)
19. "A person who . . . is a citizen of the United States by virtue of . . . paragraph . . . (g) of section 1401 of this title . . . may apply" to the Secretary of Homeland Security "for a certificate of citizenship" and "[u]pon proof to the satisfaction of" the Secretary, she may receive a citizenship certification if she is within in the United States at the time.	• 8 U.S.C. § 1452
20. A certificate of citizenship has the "same force and effect as proof of United States citizenship" as a CRBA or a U.S. passport.	• 22 U.S.C. § 2705
21. The Ninth Circuit, in the course of reviewing the Department of Homeland Security's denial of citizenship claims arising in the context of immigration-court removal proceedings, has held, contrary to the Department of State's interpretation,	• *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000); *Solis-Espinoza*, 401 F.3d 1090, 1091 (9th Cir. 2005)

that (1) "a blood relationship between a child and a U.S. citizen [is] not required to establish citizenship under 8 U.S.C. § 1401(g)" if the child was born in wedlock, and (2) a child is born in wedlock if his or her parents were married to each other at the time of the birth.	
22. APA review is not available for where there exists an "adequate remedy at law."	• 5 U.S.C. § 704; *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation and internal quotation marks omitted); *see also Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988); *Coos Cnty. Bd. of County Com'rs v. Kempthorne*, 531 F.3d 792, 810 (9th Cir. 2008)
23. 8 U.S.C. § 1503 provides a right of action to an individual who is denied a "right or privilege as a national of the United States" by the federal government on "the ground that [s]he is not a national of the United States."	• 8 U.S.C. § 1503
24. The Department of State's denial of a CRBA application or a U.S. passport application constitutes the denial of a "right or privilege" that allows the	• *Hizam v. Kerry*, 747 F.3d 102, 108 (2d Cir. 2014)

applicant to avail him or herself of remedies under Section 1503.	
25. Where an applicant challenges the State Department's denial of a right or privilege of U.S. citizenship on the basis that the plaintiff is not a U.S. citizen, Section 1503(a) offers an adequate alternative remedy to APA review.	• *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1233–34 (D. Ariz. 2016); *Esparza v. Clinton*, 6:12-CV-925-AA, 2012 WL 6738281, at *1 (D. Or. Dec. 21, 2012); *Alsaidi v. U.S. Dep't of State*, 292 F. Supp. 3d 320, 326 (D.D.C. 2018) (quoting *Villarreal v. Horn*, 203 F.Supp.3d 765, 773 (S.D. Tex. 2016))
26. Section 1503 accords an individual "judgment declaring him to be a national of the United States."	• 8 U.S.C. § 1503(a)
27. Section 706(2)(A) of the APA, only allows the courts to "hold unlawful and set aside agency action" that does not comport with the applicable laws and procedures.	• 5 U.S.C. § 706(2)(A)
28. Plaintiffs cannot apply for another CRBA from the Department unless they leave the country.	• 22 C.F.R. § 50.2; *see also* 22 C.F.R. § 50.5
29. The APA does not allow Plaintiffs to seek "*wholesale* improvement of [a] program by court decree."	• *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *cf. Ctr. For Biological Diversity v. U.S. Dept. of Hous. & Urban Dev.*, 241 F.R.D. 495, 500, 501 (D. Ariz. 2006)

30. Injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."	• *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see also Gill v. Whitford*, 138 S.Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."); *see also California v. Azar*, — F.3d —, 18-15144, 2018 WL 6566752, at *16 (9th Cir. Dec. 13, 2018); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018).
31. "This rule applies with special force where," as here, "there is no class certification."	• *California*, 2018 WL 6566752, at *15
32. USCIS's certificate-of-citizenship process provides an adequate, alternative remedy at law for Plaintiffs to procure proof of U.S. citizenship for E.J.	• *Nickerson v. United States*, CV 07-211 JH/WDS, 2007 WL 9662632, at *6 (D.N.M. Oct. 31, 2007) (examining alternative remedies for a claim brought under the FTCA)
33. The Declaratory Judgment Act neither independently vests courts with jurisdiction nor "provide[s] a cause of action."	• *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *see also Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (The DJA "only creates a remedy and is not an

	independent basis for jurisdiction.")
34. The Court's adjudication of Plaintiffs' statutory claim under 8 U.S.C. § 1503 may provide sufficient relief without unnecessarily addressing Plaintiffs' constitutional claim.	• *See Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994); *see also United States v. Kenney*, 789 F.2d 783, 784 n.2 (9th Cir. 1986)
35. The Supreme Court has established that the Fifth Amendment guarantee of due process includes "a substantive component, which forbids the government from infringing certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."	• *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)
36. The Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."	• *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)
37. The protections of substantive due process are limited to those rights that rank as "fundamental"—that is, both "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered	• *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citation omitted)

liberty, such that neither liberty nor justice would exist if they were sacrificed."	
38. "The range of liberty interests that substantive due process protects is narrow and '[o]nly those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause.'"	• *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018), *cert. denied*, 18-585, 2018 WL 5792470 (U.S. Dec. 10, 2018) (quoting *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995))
39. A plaintiff must provide "a 'careful description' of the asserted fundamental liberty interest" when raising such a claim.	• *Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003); *see also Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1222 (C.D. Cal. 2003), *aff'd*, 427 F.3d 1197 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006)
40. "Where a fundamental right is not implicated . . . governmental action need only have a rational basis to be upheld against a substantive due process attack."	• *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997); *see also Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014)
41. Plaintiffs' asserted "rights to acquire and confer citizenship at birth pursuant to INA Section 301," Compl. ¶ 77, is	• *See also Hutchins v. Dist. of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999)

too broad an assertion to comply with *Glucksberg*.	
42. The extension of citizenship to foreign-born children is not a constitutionally enshrined right for either the U.S. citizen or the child seeking to acquire citizenship; rather, it is a right granted by Congress.	• *Rogers*, 401 U.S. at 827; *see also Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring)
43. The Supreme Court has underscored the importance of a biological connection between the child seeking to acquire citizenship and the U.S. citizen seeking to confer citizenship.	• *See, e.g.*, *Miller v. Albright*, 523 U.S. at 438 ("There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective.") (plurality op.); *Nguyen*, 533 U.S. at 62
44. Because Plaintiffs' asserted right is not fundamental, their claims are subject only to rational basis review.	• *Kim*, 121 F.3d at 1273
45. "Rational basis review is highly deferential to the government, allowing any conceivable rational basis to suffice."	• *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018), *amended*, 881 F.3d 792 (9th Cir. 2018) (citing *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000))
46. The question for resolution of Count I is separate from the question of whether this Court agrees with the	• *Shanks v. Dressel*, 540 F.3d 1082, 1089 (9th Cir. 2008)

Department's longstanding statutory interpretation.	
47. Whether children born outside the United State may acquire citizenship at birth upon application depends on a complex statutory scheme enacted by Congress.	• *See Miller*, 523 U.S. at 424
48. The Supreme Court, in examining Section 1409, has observed that: "There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective."	• *Miller*, 523 U.S. at 436 (opinion of Stevens, J.); *see also Tuan*, 533 U.S. at 62; *Bellei*, 401 U.S. at 834 (referring to the "heritable blood of citizenship")
49. Congress excluded "stepchild" from its definition of child for the purposes of citizenship and naturalization.	• *See Acevedo v. Lynch*, 798 F.3d 1167, 1171 (9th Cir. 2015); *see also* 8 U.S.C. § 1101(c)
50. Further, children born abroad and then adopted by U.S. citizen legal parents may only acquire U.S. citizenship through derivation or naturalization at some point after birth, *see* 8 U.S.C. §§ 1431(b), 1433—not at birth—even if they were adopted as infants.	• *See Colaianni v. I.N.S.*, 490 F.3d 185, 187 (2d Cir. 2007); *Marquez-Marquez v. Gonzales*, 455 F.3d 548, 556–57 (5th Cir. 2006) (per curiam); *see also Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 552 (2012)

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

Counsel for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants.	Case No. CV 18-523-JFW(JCx) **Declaration of Lisa Zeidner Marcus** Hearing Date: Feb. 4, 2019 Hearing Time: 1:30 pm Honorable John F. Walter

DECLARATION OF LISA ZEIDNER MARCUS

I, Lisa Zeidner Marcus, hereby declare:

I serve as trial attorney for the U.S. Department of Justice, Civil Division, Federal Programs Branch, a position I have held since October 2007. My colleague Vinita Andrapalliyal and I serve as co-counsel representing Defendants in the above-captioned case. The statements set forth in this Declaration are based on my personal knowledge as well as information provided to me in my official capacity.

I submit this declaration in support of Defendants' motion for partial summary judgment, and specifically to authenticate deposition transcripts, written discovery responses, and the receipt of certain documents. My declaration also includes information regarding the Foreign Affairs Manual ("FAM"), and a chart showing present-day citations for the versions of FAM provisions in effect in the January to March 2017 time period, *i.e.*, the time during which the underlying adjudication being challenged in this litigation took place.

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

Ex. 1 Excerpts of Plaintiffs' Responses to Defendants' Requests for Admission, including all such responses Defendants cite in their Statement of Uncontroverted Facts.

Ex. 2 Excerpts of Defendants' Responses to Plaintiffs' Requests for Admission, including all such responses Defendants cite in their Statement of Uncontroverted Facts.

Ex. 3 Excerpts of Defendants' Responses to Plaintiffs' Interrogatories, including all such responses Defendants cite in their Statement of Uncontroverted Facts.

Ex. 4 Excerpts of the transcript of Day, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. 5 Excerpts of the transcript of Andrew Dvash-Banks, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. 6 Excerpts of the transcript of Margaret Ramsay, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. 7 Excerpts of the transcript of Larilyn Reffett, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

Ex. 8 Excerpts of the transcript of Paul Peek, including all such portions Defendants rely on in their Statement of Uncontroverted Facts.

In support of their motion for partial summary judgment, Defendants also rely on the Certified Administrative Record that I filed on the docket for this case, at ECF No. 80. The documents I filed at ECF No. 80 (including ECF Nos. 80-1, 80-2, 80-3, 80-4, 80-5, 80-6, 80-7, and 80-8) comprise a true and correct copy of the Certified Administrative Record that was provided to me by the Department of State, except that before filing the record I ran OCR'ing (optical character recognition) on it to make the

scanned pages text-searchable in accordance with the Local Rules of this Court, and I added Bates-stamping to identify the page numbers of the AR.

Many provisions of the Department of State's Foreign Affairs Manual ("FAM") were renumbered as of July 16, 2018. The following chart shows the current citations for the FAM provisions included in the Administrative Record:

FAM Provision in Administrative Record	*AR Page(s)*	*Current FAM Provision*
7 FAM 1130	AR 081–087	8 FAM 301
7 FAM 1100 Appendix A	AR 095–106	8 FAM
7 FAM 1110 Appendix D	AR 077–080	8 FAM 304.3-4
7 FAM 1100 Appendix E	AR 088–094	8 FAM 102.01

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

Executed on January 7, 2019 at Pittsburgh, Pennsylvania.

/s/ Lisa Zeidner Marcus
Lisa Zeidner Marcus

JOSEPH H. HUNT
Assistant Attorney General
ANTHONY J. COPPOLINO
Deputy Director
VINITA B. ANDRAPALLIYAL
Vinita.b.andrapalliyal@usdoj.gov
Trial Attorney
LISA ZEIDNER MARCUS
lisa.marcus@usdoj.gov
Senior Counsel

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 514-3336

Counsel for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS, et al., Plaintiffs, v. MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State, et al., Defendants,	**Case No. 2:18-cv-00523-JFW (JCx)** **Defendants' Responses to Plaintiffs' First Set of Requests for Admission** Dec. 31, 2018

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, and Local Rules 36-1 through 36-3, Defendants hereby respond to Plaintiffs' First Set of Requests for Admission ("RFAs"), which Plaintiffs served on November 29, 2018.

I. OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Defendants note that Plaintiffs did not serve their First Set of Requests for Admission until November 29, 2018, making Defendants' responses due on

Request for Admission 10:

Admit that for purposes of issuing certificates of citizenship in the Ninth Circuit, CIS does not require a biological connection between the child and the child's U.S. citizen parent.

Response:

Upon conducting a reasonable inquiry, Defendants lack knowledge to definitively answer on behalf of the U.S. Citizenship and Immigration Services ("USCIS"), which is a component of the Department of Homeland Security—an Executive agency separate from the Department of State. Defendants understand generally and admit that for those applications for certificates of citizenship that USCIS receives from applicants living in the Ninth Circuit at the time of their application, USCIS applies the Ninth Circuit caselaw of *Scales v. I.N.S.*, 232 F.3d 1159, 1165 (9th Cir. 2000).

Request for Admission 11:

Admit that *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), precludes the State Department from requiring a showing of a biological connection between the U.S. citizen parent and child applicant in deciding applications for Consular Reports of Birth Abroad and U.S. passports by or on behalf of residents of states located in the Ninth Circuit.

Specific Objection:

Defendants object to this RFA because it calls for a legal conclusion, and because it is overly broad, particularly insofar as it seeks a response regarding U.S. passport applications, which include U.S. passport applications for naturalized citizens as well as for individuals who acquired citizenship at birth because they were born in the United States.

Response:

Subject to and without waiving the above-stated objection, Defendants generally deny this statement. Defendants deny the statement with respect to deciding applications for Consular Reports of Birth Abroad ("CRBAs") by or on behalf of residents of states located in the Ninth Circuit because such residents are not eligible for a CRBA. A CRBA, also known as form FS-240, is a consular declaration of the fact of acquisition of U.S. citizenship at birth, and it is only available to individuals who are located abroad. See 8 FAM 101.1-1. With respect to deciding applications for U.S. passports, insofar as the wording of the RFA and the facts presented by this case refer to applications for first-time passports that are submitted to a U.S. Embassy or consulate abroad by individuals who also are applying for a CRBA, such individuals would, again, be located abroad and not in a state within the Ninth Circuit or of any particular state within the United States.

With respect to deciding applications for U.S. passports by or on behalf of residents of states located in the Ninth Circuit, Defendants are not able to either admit or deny the statement because as stated it is so broad that the applicability or non-applicability of *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), cannot be determined.

Request for Admission 12:

Admit that the only basis for the State Department's denial of Ethan's applications for a Consular Report of Birth Abroad and U.S. passport is that Ethan and Andrew are not biologically related.

Response:

Defendants admit that one basis for denying the applications was that there was insufficient evidence of a biological tie between the child applicant and

Response:

Based on the documents provided to Defendants in connection with Plaintiff E.J. D-B.'s CRBA and U.S. passport applications, and the CRBA and U.S. passport applications of A.J. D-B, Defendants admit this statement.

Request for Admission 17:

Admit that Andrew meets all residency requirements of Section 301(g).

Response:

Based on the documents provided to Defendants in connection with Plaintiff E.J. D-B.'s CRBA and U.S. passport applications, Defendants admit this statement.

Request for Admission 18:

Admit that Andrew and Ethan are California residents.

Response:

Based on the testimony provided by Plaintiff Andrew Dvash-Banks at his deposition, Defendants admit that Andrew and E.J. D-B are currently residents of California.

Request for Admission 19:

Admit that Andrew and Elad are married.

Specific Objection:

Defendants object to this RFA to the extent it calls for a legal conclusion.

Response:

Subject to and without waiving the above-stated objection, based on deposition testimony provided by Andrew Dvash-Banks, and the marriage certificate submitted to the Department of State with the application materials

JOSEPH H. HUNT
Assistant Attorney General
JOSHUA E. GARDNER
Assistant Director
VINITA B. ANDRAPALLIYAL
Vinita.b.andrapalliyal@usdoj.gov
Trial Attorney
LISA ZEIDNER MARCUS
lisa.marcus@usdoj.gov
Senior Counsel

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 514-3336

Counsel for Defendants

UNITED STATES DISTRICT COURT

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ANDREW MASON DVASH-BANKS, et al.,

Plaintiffs,

v.

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

Defendants,

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

Defendants' Second Set of Responses to Plaintiffs' First Set of Interrogatories

November 16, 2018

On October 5, 2018, Defendants served Plaintiffs with "Defendants' First Set of Responses to Plaintiffs' First Set of Interrogatories" ("Defendants' First Set of Responses"). Among other objections, Defendants' First Set of Responses objected to counting Plaintiffs' Interrogatories and their discrete subparts as consisting of only twenty requests. Defs.' 1st Set Resps. ¶ 13. Defendants noted: "When the Interrogatories and their discrete subparts are properly construed as

With respect to 14(A):[12]

The Department's rationale, governmental interests, and concerns are in faithfully executing the laws passed by Congress. The INA was enacted in 1952, a time when it was commonly understood, that outside the adoption context, a "parent" at birth referred to a biological parent. 8 FAM 301.4-1(D)(1)(a) provides, "[t]he laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim."

With respect to 14(B):[13]

Defendants lack knowledge with respect the rationale, governmental interests, and concerns of the Department of Homeland Security and its components.

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[12] Interrogatory 14(A) asks: "Identify and describe the State Department's… rationale, governmental interests or concerns Concerning any decision not to treat as a United States citizen a child born outside of the United States to a married couple (of which one spouse is a United States citizen) when the United States citizen is not the child's biological parent but is listed as a parent on the child's birth certificate."

[13] Interrogatory 14(B) asks: "Identify and describe… [US]CIS's or DHS's rationale, governmental interests or concerns Concerning any decision not to treat as a United States citizen a child born outside of the United States to a married couple (of which one spouse is a United States citizen) when the United States citizen is not the child's biological parent but is listed as a parent on the child's birth certificate."

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

Counsel for Defendants

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS Plaintiffs, v. THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State, Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Terri Nathine Frances Day, Supporting Defendants' Motion for Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order (Dkt. No. 52), Defendants hereby file the instant document for deponent Terri Nathine Frances Day. This document contains "only those questions and answers, and any objections made at the time of the deposition to those questions, that Defendants are relying on to support their

partial motion for summary judgment, with a citation to the appropriate page(s) and line number(s) in the deposition transcript."

***

Frances Day, Terri Nathine, (Pages 79:25 to 80:17)

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Q. Was it your usual practice to ask every

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same-sex couple whether they used assisted reproductive technology?

A. I would say that it was my policy to ask as many people as possible if they used assisted reproductive technology, whether they were same-sex or not, because there was an attempt to -- to -- for me personally to not single anyone out. So it kind of -- and I -- this was something that I -- I can't say that I did 100 percent of the time, just because there are a lot of -- there are a lot of steps to this whole process. But just asking, okay, as a point of -- you know, as a matter of course, like, did you -- did you at some point use ART when you were conceiving your child? Just as a normal kind of question to incorporate into my number of hundreds of questions that I probably asked parents.

Frances Day, Terri Nathine, (Pages 94:22 to 95:10)

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BY MS. GOLDSMITH:

Q. So you stated earlier that you were personally involved in the adjudication of A.J.'s and E.J.'s applications for U.S. passports and

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CRBAs; is that correct?

A. Yes.

Q. And what was your role?

A. I was the adjudicating officer. So I took in the -- I -- after the local staff took in the documents, I reviewed them and I certified copies. I gave an oath to the parents and had them sign the documents. I interviewed them, and then I was ultimately responsible for approving or denying those applications.

Frances Day, Terri Nathine, (Page 95:11 to 95:25)

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Q. Was anyone else involved in that adjudication? And we'll start with E.J.

A. Can I just say for both of them --

Q. Sure.

A. -- because they were -- they were treated as -- I mean, all the information that's true for one -- in the initial interview phase, as far as I knew, it would have been true for the

other. So no one was -- I mean, I consulted with my manager about the case, and she brought in Maggie Ramsay as well. But during the -- and during the interview, at a certain point, Maggie Ramsay did speak to the family. So in that way, people were involved, but the ultimate decision was mine.

Frances Day, Terri Nathine, (Page 96:1 to 96:25)

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Q. So let's talk first for a moment about Ms. Ramsay. You said that Ms. Ramsay was involved in the process; is that correct?

A. Specifically, we -- like I said, it's a collaborative effort. We talk to each other about cases. If we have questions, we talk to each other.

At a certain point during the interview, the parents of the kids, the boys, seemed -- were upset. I was also upset just because they were upset, and there was a lot -- they -- their voices were raised at me. And I believe that Maggie felt that at that time -- at that point we had been speaking for probably an hour or more. And at that point I was telling them, you know, what was needed. They were telling me what they wanted. We weren't really getting

anywhere. And so she came over to kind of reiterate my points that I had already said, "Okay, you're pending for this documentation. You need to get us this documentation." And so she did interact with them at that point.

Q. Did you consult with Ms. Ramsay at any point about this case, about these applications, before the Dvash-Banks family came in for their

Frances Day, Terri Nathine, (Pages 103:14 to 109:17)

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Q. So can you walk me through step by step what happened on the day that the Dvash-Banks family came in for their interview, so if you did anything to prepare for their coming in and then what happened next.

A. So I can't tell you everything specifically because I just don't recall, and I also can't tell you everything that -- when they came in because they deal with the local staff first.

From my understanding -- the way that things normally work is there is a stack of cases

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in manila folders between the two ACS officers. And we take one when we're finished with the one we've done before. So it's random how it comes up.

You take it off the stack, you open it, and you have the documents, whatever documents that they've presented to you.

Like I said before, you certify the documents. You check -- you look for where they need to sign and you prepare whatever -- you start thinking about what kind of questions you're going to have to ask, what information you may need, which they may be able to give you during the course of the interview or you may need to pend them for documentation.

If somebody didn't bring a birth certificate for their child, I'm looking through that and I'll make a note, okay, I need to ask them if they have a copy, or I'm going to prepare a pending document sheet and mark birth certificate before they even come up to the window, and -- and then I can give it to them or chuck it if we don't need it or I have it all -- I had it after all.

So then you call -- then I would call them up to the window. You, again, give them an oath. You determine that they are the person that

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they -- that is on the application and the kids -- you look -- you have to look at the kids. At the time the boys were infants. They're like little potatoes. You know, they don't look like anybody

in particular. So I'm looking at a photo. I'm looking at the baby. The baby is like two times the size by now.

So I don't remember if I would have asked them to sit -- if I would have asked -- because I know that there's one AMCIT parent. So sometimes I would ask the non-AMCIT parent and the kids to sit down, if they wanted to. Sometimes they prefer to stay at the window. I always gave them a choice, even the kids, because sometimes they like to be at the window and see what's going on. Obviously, these were babies, so they didn't care, but -- and then you start asking them questions.

I don't remember exactly what order I asked them questions in, when the idea of the assisted reproductive technology might have come up or exactly, you know, how it came up. But after -- during that interview, after it was clear to me that they had used assisted reproductive technology, I had to talk to them about the process

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of it, how were the kids conceived, what was the process of donating the sperm, et cetera.

It's a sensitive subject, not just because it's a medical situation, it's a sensitive subject for the families as well. So anytime, you

know, you're asking somebody about how their kid was conceived, you try to be mindful that it is a sensitive topic. And that was true for, you know, same-sex or opposite-sex couples.

And then -- and then when it became clear to me that it was a possibility that the two boys would have -- one would be biologically related to one of the dads and one would be biologically related to the other dad, it became clear that I would need -- and this was -- by the way, I'm going back to Larilyn and I'm asking, "Okay, this is the situation. What do we think about this?"

It became clear that I would need to ask for DNA to determine the biological link to the kids. And they were very upset. I remember them telling me that they didn't know and they didn't want to know, which I totally understand and I totally appreciate, but, unfortunately, for our purposes, it wasn't -- we weren't able to -- you

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know, that wasn't an answer that we could accept.

They were getting worked up. They were yelling, and I was -- I mean, I've been yelled at before, you know. I've been yelled at in my job before. I've been yelled at in ACS before. I don't -- you know, I'm -- in this particular case,

as a person, as an LGBT person, as a person who, like, understands, you know, how these things can feel when, you know, you have -- you have -- you're othered in a way. I was -- I did feel emotional, but I also understood that this was not coming at me. This was coming at the process, which I completely appreciated.

So, yeah, there was times -- there was a point where I did step away from the window. They were getting worked up, and I could feel that kind of coming back, and I had to step away from the window. And, you know, at this point we had been going for a long time. We had gotten to the point where I was saying, "Look, we have to have this. This is required for us to determine the biological link. We don't -- you know, because of the information that you've given me today, because of the things that we've talked about, we don't have a choice in this. If you don't want to do

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it" -- and I understood if they didn't want to -- if they were thinking they didn't want to do it. I -- you know, if you don't want to do it, I understand. You don't have to continue the application.

And I suggested other ways for them to have both boys, you know, documented as AMCITs, and

just giving them -- you know, and I -- when I -- if I have a denial, a lot of the times, I want to give the family other options because I know they want to get their -- they want their family to be together. So I say, "Okay, well, this might not work, but here's another option that you can consider," or, "Here's another option that you can consider," and -- you know, because I am in the habit of -- of -- you know, the vast majority of cases were approved. So I'm in the habit of approving people for their -- kids for their citizenship, and I like doing it. I want to do it. But I'm bound by U.S. -- the law. You know, so -- by the FAM regulation and by the INAs.

So at that point, you know, I had to explain to them, we had re-explained. They had told me what they thought. You know, there was yelling, and I -- I had to step away from the --

from the window, and I went back to my desk, and I sat down, and I cried a little bit.

And Maggie, seeing kind of how it was affecting me, went over and said, you know, "Look, you know, this is what it is. We can't really do anything about it. We have to -- you have to -- you know, this is kind of what's required. These are your choices."

And at that point, there was nothing really else she could explain to them. They were dissatisfied with the answer, and, you know, I don't blame them for that. But at that point, it was kind of out of -- it was kind of out of our hands, so we -- and as far as I know, they -- they left dissatisfied with the answer, and we, you know -- and that was it for the interviews for that day.

Frances Day, Terri Nathine, (Page 116:12 to 116:19)

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wouldn't be able to issue or deny without that -- that DNA test, they were not happy with that.

Q. And how did you know that they weren't happy at that point?

A. Well, they seemed upset. They were -- specifically, I think I spoke the most with Andrew, the AMCIT dad. He was raising his voice. He was -- I believe he began crying at one point.

Frances Day, Terri Nathine, (Page 217:9 to 217:24)

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Q. You don't remember if you looked at the Foreign Affairs Manual?

A. I don't recall this specifically. I do know that -- I do recall that -- actually, I will

say that I do recall looking at this -- the -- the FAM provision, specifically. Because I got -- because -- it was either Maggie or Larilyn, someone -- I don't remember who -- sent it to me. And I was looking at it as -- as I conducted the interview because you can kind of go step by step and say, "Okay. Does this apply to you?" or whatnot. So I -- I do remember having that up.

Q. You specifically remember looking at a FAM provision during the time that you were interviewing the Dvash-Banks family's adults?

A. Yes.

Frances Day, Terri Nathine, (Page 220:3 to 220:6)

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Q. And to be clear, you recall looking at a FAM -- you do recall looking at a specific FAM provision, but you don't remember which one?

A. Correct.

Frances Day, Terri Nathine, (Pages 224:18 to 228:6)

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Q. Ms. Goldsmith asked you a series of questions at different points during today's deposition where she used the word "parents." Do you recall that?

A. I do.

Q. And do you recall when -- whether, when Ms. Goldsmith used that word, you understood or not the specific manner in which she was using the

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word?

A. Sometimes.

Q. And other times?

A. And other times, not.

Q. And there were some times during your testimony in response to Ms. Goldsmith where you asked her to -- you told her you didn't understand some of the questions that she was asking. Do you remember, generally, saying that you don't understand?

A. Yes.

Q. Briefly, at a high level, can you summarize, to the extent you recall, the kinds of questions or the questions that she asked earlier that you did not understand?

A. Did you -- for example, did you determine that Person A or Person B was the parent of Person C? Does this document state that these people are the parents of this person? Things like that.

Q. Why did you not understand those questions?

A. Because as far as my recollection goes, and as far as my interaction with the family that we're discussing, it wasn't my determination -- I

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didn't -- I wasn't there to determine who were the parents of whom. My determination was, who has a -- does the AMCIT father have a biological link to the person -- the child that he is applying for? So that's something that I didn't feel comfortable kind of speculating about -- about.

Q. When you just said that's something that you didn't feel comfortable speculating about, what were your -- can you clarify for the record what you're describing with the word "that's"?

A. It seemed to be a question of, who are the parents? Who are the parents? And that is a very broad term.

Q. Hold -- let me slow you down.

A. Okay.

Q. What is a very broad term?

A. Parent.

Q. Why is it a broad term?

A. Because in the case -- in -- in my -- my view of the case, it's a very specific thing of biological -- a biological connection. It -- it doesn't really involve the word "parent."

Q. And more broadly speaking, with, generally, your work in American Citizen Services, did you use the term "parent" differently in

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different contexts? That is, were there certain contexts in which you were focused on whether there was a legal parent relationship with an individual? Let me rephrase.

You testified a few moments ago that you thought the word "parent" was broad. And then in explaining why you thought it was broad, you talked about the specific four applications about which Ms. Goldsmith has been asking you earlier. Do you understand the term "parent" to be broad only when used in relation to the Dvash-Banks family's applications?

A. No.

Q. Do you generally understand, from your work in ACS and/or NIV, the term "parent" to be broad?

A. I would say yes.

Q. And can you explain that at a more general level, not referring to a specific case, why you think that term is broad?

A. Because you can say, for example, somebody is -- the legal guardian of somebody is

not necessarily -- or the -- the legal guardian of somebody might not necessarily be -- might be called the parent.

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There could be all kinds of relationships to a child that would be called a parent in different circumstances. Not to say that one is more definitive than the other, but there might be a lot of different relationships to the child, and the person might be called a parent.

Frances Day, Terri Nathine, (Pages 228:7 to 229:16)

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Q. And coming back to the Dvash-Banks family's applications, did you understand it to be your role to determine whether Andrew and Elad Dvash-Banks were the parents of -- however that term is defined -- of E.J. and A.J.?

A. No.

Q. It was not your role?

A. No.

Q. Why do you say that?

A. Because my role is to -- to apply the circumstances of the FAM to the relationship between the AMCIT father and the applicant. But however they define "parent" is not for me to say.

Q. And by "they" here, you're talking about this family?
A. About the family. About the parent. About -- about Andrew and Elad.
Q. Did that -- so did that mean that you didn't -- that you deferred -- does that mean

229

that --
Let me ask you this: When Andrew and Elad Dvash-Banks were at your interview window January 2017, did they describe themselves as the parents to E.J. and A.J.?
A. Yes.
Q. And --
A. To the best of my recollection.
Q. And did you make any judgment that they were incorrectly referring to themselves as parents?
A. No.
Q. Did you accept -- for this particular situation, you accepted their representation that they were the parents of these children?
A. Yes.

Frances Day, Terri Nathine, (Pages 230:21 to 231:11)

230

Q. Am I correct that you testified about your role, and can you state for the record for clarity purposes what your role was as the adjudicating officer for these particular applications?

231

A. For this particular case, my role was to determine if the AMCIT father can transmit citizenship to one or both of the children.

Q. Okay. And was it your role to assess whether there was a biological relationship between the AMCIT father and one or both of the applicant children?

A. Yes.

Q. And you sound fairly clear about that. Are you clear about that?

A. Yes.

Frances Day, Terri Nathine, (Pages 231:4 to 233:18)

231

Q. Okay. And was it your role to assess whether there was a biological relationship between the AMCIT father and one or both of the applicant children?

A. Yes.

Q. And you sound fairly clear about that.

Are you clear about that?

A. Yes.

Q. But you also earlier said that you don't remember whether you considered -- you don't remember, sitting here today, whether you considered these children to have been born in wedlock or out of wedlock; is that also correct?

A. Correct.

Q. And -- okay. Would it have been your role to assess whether there is a biological relationship between the AMCIT father and the applicant child under either the framework of wedlock or the framework of out of wedlock?

MS. GOLDSMITH: Objection. Form.

THE WITNESS: Yes, that -- yes.

BY MS. MARCUS:

232

Q. Do you understand that it was -- it would have been necessary, and it was necessary, regardless of whether the children were born in wedlock or out of wedlock -- let me start over. I'm sorry.

Regardless of whether the children were born in wedlock or out of wedlock, was it necessary for the children to have a biological connection to the AMCIT father in order for the children to

acquire citizenship at birth?

A. Yes.

Q. So is it your testimony that it would not have made a difference to your final adjudication decision for these cases whether you had considered the children to be born in wedlock or whether you had considered them to be born out of wedlock?

A. Yes, that's correct.

Q. To be clear, it would not have made a difference?

A. Correct, it would not have made a difference.

Q. Would it have made a difference whether you had adjudicated these applications under INA 301 versus INA 309 for these cases?

233

A. No, it would not have made a difference.

Q. Why not?

A. Because the biological connection is still required.

Q. And your understanding that the biological connection is required, what is that understanding based on?

A. It's based on the FAM, what I read in

the FAM.

Q. Is it based on anything else?

A. No.

Q. Was that something that you needed to seek clarity from, from your supervisor?

A. No.

Q. Was it something that you needed to consult with Maggie Ramsay about?

A. No.

Frances Day, Terri Nathine, (Page 232:1 to 232:11)

232

Q. Do you understand that it was -- it would have been necessary, and it was necessary, regardless of whether the children were born in wedlock or out of wedlock -- let me start over. I'm sorry.

Regardless of whether the children were born in wedlock or out of wedlock, was it necessary for the children to have a biological connection to the AMCIT father in order for the children to acquire citizenship at birth?

A. Yes.

Frances Day, Terri Nathine, (Pages 232:23 to 233:12)

232

Q. Would it have made a difference whether you had adjudicated these applications under INA 301 versus INA 309 for these cases?

233

A. No, it would not have made a difference.

Q. Why not?

A. Because the biological connection is still required.

Q. And your understanding that the biological connection is required, what is that understanding based on?

A. It's based on the FAM, what I read in the FAM.

Q. Is it based on anything else?

A. No.

Frances Day, Terri Nathine, (Pages 233:19 to 234:20)

233

Q. Was that the -- would you describe the lack of a -- sorry. Let me start over.

When you're talking about the FAM -- when you've been talking today at various points about the FAM, do you understand the FAM to be something that is completely separated from the Immigration and Nationality Act of 1952?

234

A. No.
Q. You don't consider them completely separated?
A. I don't consider them completely separated.
Q. Does the FAM have quotations from the statute within it?
A. As far as my recollection goes, yes.
Q. Does it describe provisions as well in addition to quoting them?
A. As far as my recollection goes, yes.
Q. Would you say that the FAM -- let me start over. I'm sorry.
MS. MARCUS: Apologies to the court reporter and to everybody else.
BY MS. MARCUS:
Q. Would you say that there are FAM provisions that incorporate the Immigration and Nationality Act of 1952?
A. To the best of my recollection, yes.

Frances Day, Terri Nathine, (Page 235:17 to 235:23)

235

Q. Did you consult FAM provisions after the day of the interview during your work on the

19 Dvash-Banks family's -- family's applications?
20 A. I don't recall that.
21 Q. But you do recall consulting on the day
22 of the interview?
23 A. Yes.

Frances Day, Terri Nathine, (Page 237:9 to 237:15)

237

9 Q. But did you also -- do you recall also
10 seeing specific language of the INA within the FAM
11 provisions that you consulted?
12 A. Yes.
13 Q. And you looked at that specific
14 language?
15 A. Yes.

Frances Day, Terri Nathine, (Page 243:5 to 243:14)

243

5 Q. If I -- do you recall testify -- sorry.
6 Did the use of assisted reproductive
7 technology come up exclusively in situations in
8 which the legal parents of an applicant child were
9 in a same-sex marriage?
10 A. No.
11 Q. Did it also come up in situations in
12 which the child's applicant -- the applicant

child's parents were in an opposite-sex marriage?

A. Yes.

Frances Day, Terri Nathine, (Pages 243:15 to 244:10)

243

Q. Do you -- did you only ask same-sex couples about whether they had used assisted reproductive technology?

A. No.

Q. Did you also ask opposite-sex couples?

A. Yes.

Q. Do I correctly understand your testimony from earlier today that you generally tried to ask all applicants that question?

A. Yes.

Q. And by "all applicants" here, I'm

244

talking about applicants for CRBAs and first-time U.S. passports for minor children. So to be clear, in those situations, was it your general practice in every situation, in every case to ask whether assisted reproductive technology was used by the family?

A. Yes.

Q. And was that true throughout your tenure in ACS?

10 A. Yes.

Frances Day, Terri Nathine, (Page 245:2 to 245:16)

245

2 BY MS. MARCUS:
3 Q. Ms. Day, do you recall in sum and
4 substance -- I'm sorry.
5 Do you recall testifying in sum and
6 substance that it became clear that you would need
7 to ask for DNA to determine the biological link
8 between the AMCIT father and the children?
9 A. Yes. I recall saying that, yes.
10 Q. What did you mean by you would need to
11 ask for DNA to determine the biological link to the
12 AMCIT -- between the AMCIT father and the kids?
13 A. Because during the course of the
14 interview, to the best of my recollection, it was
15 determined that it was unclear which of the
16 children had a biological link to the AMCIT father.

Frances Day, Terri Nathine, (Pages 245:22 to 246:3)

245

22 Q. Did you in your time in American
23 Citizen Services only ask opposite-sex couples for
24 DNA evidence?
25 A. No.

246

Q. Did you also ask same-sex couples for DNA evidence?

A. Yes.

Frances Day, Terri Nathine, (Pages 246:4 to 247:23)

246

Q. Were there, if you recall, same-sex couples for which you did not ask for DNA evidence?

A. Yes.

Q. Do you have maybe one particular example in mind or more than one?

A. I can think of one particular example which was a same-sex couple. There were two women, and one was an AMCIT, and one was a Canadian citizen. And medical documents showed that --

Q. Let me pause you for a second.

A. Sorry.

Q. By "medical documents showed," before you explain what they showed, what medical documents are you talking about?

A. The couple presented medical documents during the course of their interview to me regarding the conception of their child.

Q. Do you recall whether there was medical documentation included in their applications?

A. I do not recall.
Q. Do you specifically recall that they provided you during the interview phase?

247

A. I do not recall.
Q. So when you said they presented during the interview, what did you mean by that?
A. I mean that we -- it was brought -- we brought -- I brought it up during the interview, or it was -- we spoke about it during the interview.
Q. Okay. You don't remember how it came up?
A. No, I don't remember.
Q. And -- but in this situation, you did not ask for DNA evidence?
A. Correct.
Q. Why did you not ask for DNA evidence in that situation?
A. Because the medical documents that I was -- that they gave to me showed that the egg that made the baby was from the AMCIT mother and was gestated in the Canadian citizen mother.
Q. And in that situation, did you consider that sufficient evidence to show biological connection between the AMCIT parent and the child applicant?

23 A. Yes.

Frances Day, Terri Nathine, (Page 253:4 to 253:25)

253

4 Q. Do you recall whether you explained
5 that option to Andrew and/or Elad?
6 A. I would not -- I don't recall. To the
7 best of my recollection, I -- I told them that they
8 had options, that they didn't have to get the DNA
9 test if they didn't want to, but that it would --
10 we wouldn't be able to approve the case without
11 that information.
12 Q. I think in the very beginning of your
13 answer just now, when you said, "I don't recall,"
14 then you described some recollection, did you
15 mean -- what did you mean when you first said, "I
16 don't recall"?
17 A. I don't recall specifically what I said
18 to them. I do remember -- I do recall
19 explaining -- especially when it came to the point
20 of when they wanted to cancel the application, I do
21 remember explaining to them that if they, you know,
22 didn't do anything, that the case would close.
23 Q. And that they had that option, to not
24 do anything?
25 A. Yes.

Frances Day, Terri Nathine, (Pages 277:12 to 278:2)

277

Q. And you also stated in response to one of Ms. Marcus's questions that, in your opinion, it would not have made a difference whether you had adjudicated E.J.'s application under Section 301 versus Section 309?

A. Based on my understanding, yes.

Q. What is the basis for your opinion that it would not have made a difference whether you had adjudicated E.J.'s application under Section 301 versus 309?

A. Because both require the biological link -- both require the biological connection.

Q. And is your understanding that the basis for that requirement is a provision in the

278

FAM?

A. Yes.

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

Counsel for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS Plaintiffs, v. THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State, Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Margaret "Maggie" Ramsay, Supporting Defendants' Motion for Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order (Dkt. No. 52), Defendants hereby file the instant document for deponent Margaret "Maggie" Ramsay. This document contains "only those questions and answers, and any objections made at the

time of the deposition to those questions, that Defendants are relying on to support their partial motion for summary judgment, with a citation to the appropriate page(s) and line number(s) in the deposition transcript."

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Ramsay, Margaret, (Page 131:22 to 133:23)

131

Q. Do you know whether Ms. Day considered Ethan Dvash-Banks to be born in wedlock, as that term is used in the FAM and the INA?

A. I think initially, as evidenced by

132

her case notes, she may have considered them in wedlock because she saw a marriage certificate, but I believe after reviewing the guidance and as evidenced by the final denial letter, ultimately applied 309 of the INA to the decision-making.

Q. Is it your understanding, and if you need to refer to the case notes to refresh your memory on this, then you can do so and then point me to that section, if you do so, but is it your understanding that on the day that they visited, the Dvash-Banks family visited the Consulate Toronto that Ms. Day on that day considered them to be a married couple, the adults in the family?

MS. GOLDSMITH: Objection, leading.

THE WITNESS: I think what may have happened is when she was reviewing all the documents and she saw a marriage certificate, she started typing her notes, as we often do, and then over the course of the interview discovered that we would have to treat the case as a 309 case instead.

BY MS. ZEIDNER MARCUS:

Q. Do you know whether she communicated to the Dvash-Banks family on that day whether there was a particular provision that she was going to be applying in the case?

133

A. I believe she may have told them about the provisions of INA 309.

Q. What is that belief based on?

A. I think I heard her talk to them about the requirements for it and the requirements for a biological relationship as well.

Q. Is there a requirement for a biological relationship under both 301 and 309, as you understand and apply the -- let me start over. The biological requirement that you were just describing, what is that biological requirement?

A. There must be, in order for a U.S. citizen parent to transmit citizenship to a child at birth, there must be a biological relationship between parent and child.

Q. Is that true for both INA 301 and INA 309, in your understanding?
A. Yes.
Q. So would it have made a difference to the outcome of this case if Ms. Day had adjudicated these applications under INA 301 instead of INA 309?
A. No.

Ramsay, Margaret, (Page 147:14 to 147:22)

147

Q. And did you also speak with the Dvash-Banks family personally?
A. Yes.
Q. How long did that conversation last?
A. Probably about five minutes.
Q. At what point did that conversation take place?
A. At the end of their interview.

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

Counsel for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS Plaintiffs, v. THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State, Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Larilyn Reffett, Supporting Defendants' Motion for Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

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

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

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Reffett, Larilyn, (Pages 122:17 to 123:17)

122

BY MS. KLEIN:

Q. Ms. Reffett, is it correct that before we very briefly went off the record, you testified that with the exception of a gestational parent, a U.S. citizen must have a biological tie to his child in order to transmit citizenship?

A. To transmit citizenship from birth, yes, that is correct.

Q. And that is your understanding of

123

the INA?

A. I mean, you would have to -- if you have a specific example that you wanted to present for a specific case, but yes, in general we establish the biological relationship between the U.S. citizen parent and the child in order to confirm that a parent has transmitted U.S. citizenship to their child.

Q. And is that the case even if the U.S. citizen parent is married to the child's

biological parent?

A. Yes.

Q. Does whether the U.S. citizen parent is married to the child's biological parent make any difference in your analysis of whether the U.S. citizen has conferred citizenship upon the child?

A.

Reffett, Larilyn, (Pages 124:09 to 124:22)

124

Q. And you understand the Immigration and Nationality Act to require that even if the child's legal parents are married to each other?

A. That is not my understanding that that is the guidance from the Department of State. The Department of State, as referenced on our website, as in all of the information that is publicly available, requires that there be a biological relationship between the U.S. citizen parent and a child who is not born in the United States.

Q. Regardless of whether the parents are married?

A. Correct.

Reffett, Larilyn, (Pages 153:06 to 153:15)

153

Q. When you described the row entitled "One Amcit in Wedlock" in the Quick Reference Citizenship Chart Bates-stamped Defendants 684, you testified that you understand the words "in wedlock" to require a biological tie to both married parents; correct?

A. This is the guidance that is given to us by the Department. It is not my interpretation. It is the guidance as it is put forward for officers who are adjudicating.

Reffett, Larilyn, (Pages 156:10 to 156:19)

156

Q. A blood relationship has always been required for a child born in wedlock to one U.S. citizen parent?

A. If the U.S. citizen parent is -- yes, the one U.S. citizen parent has to have the blood relationship in order to transmit the citizenship to the child. That is applicable before November 14th, 1986, as well as after November 14th, 1986, which is why it is not spelled out here, because that was consistent.

Reffett, Larilyn, (Pages 167:18 to 168:19)

167

Q. What are other circumstances that would give rise to doubt of putative parentage?

A. I mean, every case is going to be different and this is only putative parentage as related by blood. Other things that might cause someone to question whether parentage as related by blood was potentially something they should look into, I don't want to make a huge list of these

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because they are fraud concerns, but things like a birth certificate that was amended later to add potentially a parent or to change some biographical information; that would be something that would be considered a red flag for an adjudicating officer and that would cause a line of questioning that wouldn't be asked of other applicants.

You know, other things about whether there would be questions about whether a putative parent is related by blood, again, anything that would indicate the use of assisted reproductive technology, that will raise other questions.

Anything on a birth certificate that would seem to indicate an adoption would raise questions.

These all are indicators that we look at when we are looking at documents so that we are asking the correct chain of questions to get the information that we need to make the determination.

Reffett, Larilyn, (Pages 203:10 to 206:09)

203

Q. Do you recall that earlier today you testified regarding one or more conversations you had with Frankie Day?

A. Yes.

Q. And do you recall generally your testimony that you spoke with her on the day that the Dvash-Banks family presented applications at the Toronto Consulate for CRBAs and U.S. passports for Ethan and Aiden Dvash-Banks?

A. Yes.

Q. And you testified that you spoke to her, I believe, twice?

A. The day of the application, I believe twice was correct.

Q. And Ms. Klein asked you that -- asked whether Ms. Day had conveyed to you that the

204

Dvash-Banks family included a same-sex couple, and you answered that; do you recall?

A. Yes.

Q. And she then asked you what did Ms. Day tell you. Do you recall your testimony, that you said, quote:

"She told me that she, as I mentioned, she had a case involving artificial reproductive technology, that the case involved two fathers but that the evidence did not establish which person was the biological parent of the children."

Then Ms. Klein asked you what else did Ms. Day tell you during that conversation, and you answered, quote, "Nothing."

Thinking now about your answer to the question of what else did Ms. Day tell you during that conversation, is there anything that you have since recalled regarding what Ms. Day told you in addition to what you had previously testified about?

A. Yes, when she told me that she was requesting the DNA test, she did mention that she asked the applicants about the biological

205

relationship and the donation of genetic material used for the conception of the children and that I don't know which -- she wasn't specific in this

conversation with me. It was just as a preference -- this was the pre, sort of back story as to why she was asking about the DNA test. She said that when she asked about the biological relationship and the genetic material that was used in the conception, that one of the parents answered that both parents had donated sperm in this case. They did not know which was used and did not want to know. They did not want to know which in her mind was why they didn't, they hadn't sought that information prior to this.

She said that as she said I'm requesting DNA. I asked them about the genetic relationship. They told me they didn't know and didn't want to know but I am requesting DNA testing. How do I move forward with that.

Q. And you understood what she told you to be that she had asked them whether they knew which, if either, father was biologically related to which, if either, child?

A. My understanding was that she asked about the genetic circumstances of the

206

conception, who had donated sperm in this specific case to establish the biological relationship, and one of the parents said they had both donated sperm in this case and did not know which had been used.

Q. Would that --

A. It was not a lengthy conversation. It was just a very brief reference to -- basically as the precursor to the announcement that she was requesting DNA testing.

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

Counsel for Defendants

UNITED STATES DISTRICT COURT

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WESTERN DIVISION

ANDREW MASON DVASH-BANKS and ETHAN JACOB DVASH-BANKS Plaintiffs, v. THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State, Defendants.	No. CV 18-523-JFW-JC **Excerpts from the Deposition Testimony of Paul Peek, Supporting Defendants' Motion for Summary Judgment** Hearing Date: Feb. 4, 2019 Honorable John F. Walter

Pursuant to this Court's Case Management Order (Dkt. No. 52), Defendants hereby file the instant document for deponent Paul Peek. This document contains "only those questions and answers, and any objections made at the time of the deposition to

those questions, that Defendants are relying on to support their partial motion for summary judgment, with a citation to the appropriate page(s) and line number(s) in the deposition transcript."

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Peek, Paul, (Pages 178:20 to 179:18)

178

Q Okay. Now, if the child was born -- two men married to each other, child is born outside the United States, and the spouse whose sperm was used for the assisted reproduction technology is not a U.S. citizen, would the State Department recognize the child as a U.S. citizen at birth?

179

A It depends.
Q What does it depend on?
A Whether the U.S. citizen parent also contributed genetic material or was the gestational parent.
Q Okay. So, again, I'm talking about two men, sperm from one of them; that person not a U.S. citizen. Question: Would the resulting child born outside the United States be considered a U.S. citizen at birth?
A Let me elaborate on why I'm saying "it depends" in my answer.
Q Please.
A Because one of the two men could be someone whose has transitioned and is now a man but is not always a man. So could theoretically have contributed genetic material or been the gestational parent.

Peek, Paul, (Pages 202:17 to 202:23)

202

Q Are there circumstances in which the

State Department treats children born into a same-sex marriage to be children born in wedlock?
A Yes.
Q And what are those circumstances?
A If both parents had a biological relationship to the child.

Peek, Paul, (Pages 333:4 to 333:17)

333

Q Sure. In what circumstances does a child born to a same-sex female couple acquire U.S. citizenship under INA section 301(g)?
A I am looking at 8 FAM 304.3-1, which I think would also answer your previous question. To read it aloud, paragraph (b), "A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a citizen born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c)."

Peek, Paul, (Pages 335:10 to 335:14)

335

What is the State Department's understanding of USCIS' actions taken to follow the 9th Circuit's decision in Scales?
A That, in the jurisdiction of the 9th Circuit, they comply with the ruling.