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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| ANDREW MASON DVASH-BANKS and E.J. D.-B.,<br><br>Plaintiffs,<br><br>v.<br><br>THE UNITED STATES DEPARTMENT OF STATE, and THE HONORABLE MICHAEL R. POMPEO, Secretary of State,<br><br>Defendants. | Case No. 2:18-CV-00523-JFW-JCx<br><br>**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**<br><br>Judge: Hon. John F. Walter<br>Hearing Date: February 4, 2019<br>Courtroom: 7A |

## PRELIMINARY STATEMENT

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

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

3. At birth, both E.J. and A.J. qualified for United States citizenship pursuant to Section 301(g) of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1401(g)). That clause entitles a person born abroad to citizenship at birth if one of that person's married parents is a United States citizen and the other is a foreign national, as long as the citizen parent satisfies certain statutorily prescribed periods of residency in the U.S. Andrew is a U.S. citizen who has lived

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

in the United States for over twenty-four years, and so clearly satisfies the residency requirements of Section 301(g). Because Andrew and Elad were married to each other when E.J. and A.J. were born, E.J. and A.J. have been U.S. citizens since birth under Section 301(g).

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

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

6. The State Department's failure to recognize and give effect to the marriage between Andrew and Elad also denies E.J. the rights and privileges that accompany U.S. citizenship, including the right to reside permanently in the U.S., the right to obtain a U.S. passport, and, when he is older, the right to run for political office. Because the State Department does not recognize E.J.'s U.S. citizenship, he cannot visit or live in the United States freely as other members of his family can.

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

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

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

State Department's unlawful policy to stand.

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

## THE PARTIES

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

12. Plaintiff E.J. is two years old. He was born in Mississauga, Ontario, Canada, and currently resides with his parents Andrew and Elad and twin brother A.J. in Los Angeles—although, as explained below, E.J.'s permission to remain in the U.S. recently has expired.

13. Andrew brings this action in his individual capacity and on behalf of his son E.J.

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

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

## JURISDICTION AND VENUE

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

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

18. This Court is authorized to issue a judgment and injunctive relief

pursuant to 5 U.S.C. § 702.

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

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

## STATUTORY AND REGULATORY BACKGROUND

### A. United States Citizenship at Birth

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

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

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

24. For unwed fathers, Section 309(a) specifies, in part, that certain provisions of Section 301—including Section 301(g)—"shall apply as of the date of

birth to a person born out of wedlock if—(1) a blood relationship between the person and the father is established by clear and convincing evidence." In addition, Section 309(a) requires that, for citizenship under Section 301 to be available to an unwed father's child, the father must have (2) acquired U.S. nationality by the time the person seeking citizenship was born, (3) agreed in writing to provide financial support to that person until the age of 18, and (4) while the person is under 18 years old, (a) legitimated the person under the law of that person's residence or domicile, (b) acknowledged paternity in writing under oath, or (c) had paternity established by a court of competent jurisdiction.

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

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

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

28. Congress has made clear that the legislative intent behind the INA should be construed liberally because the INA was designed to make it easier—not harder—for families of citizens and non-citizens to stay together. According to

Congress, "the legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States Citizens and Immigrants united." H.R. Rep. 85-1199, at 2020 (1957). Congress has also declared that "the statutory language makes it clear that the underlying intent [is] to preserve the family unit upon immigration to the United States." *Id.*

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

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

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

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

opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage.”).

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

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

34. In *Pavan* v. *Nathaniel Smith*, the Supreme Court held that married couples must receive the same “constellation of benefits . . . linked to marriage,” regardless of whether the marriage is between spouses of the same or opposite sexes. 137 S. Ct. 2075, 2077 (2017). Those benefits include 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.

### C. The State Department’s Restrictive Classification of Eligible Children

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

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

relevant portion of the appendix is appended to this Complaint at Exhibit A.)

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

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

## FACTUAL ALLEGATIONS

### A. The Dvash-Banks Family

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

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

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

42. Then, as now, Canadian law recognizes the validity and equality of

same-sex marriages. Although Andrew and Elad wanted to move to the United States to start their family in California, where four of Andrew's five siblings live with their families, at the time of their marriage in August 2010, the Defense of Marriage Act had not yet been ruled unconstitutional by the Supreme Court. The Defense of Marriage Act precluded the United States government from recognizing the validity of Andrew and Elad's marriage, and therefore barred Elad from obtaining permanent residence through his marriage to Andrew.

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

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

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

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

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

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

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

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

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

51. Andrew and Elad left the consulate shocked, humiliated, and hurt. They were also deeply offended by the ramifications of what they had heard. The U.S. government did not recognize Andrew as the parent of his son E.J., regardless of what E.J.'s birth certificate and applicable Canadian law said, and regardless of

the daily reality of Andrew and E.J.'s parent-child relationship.

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

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

54. The Letter provided Andrew and E.J. no mechanism to appeal the State Department's denial, and merely suggested Andrew "contact the nearest office of U.S. Citizenship and Immigration Services regarding [E.J.'s] citizenship status."

55. Andrew reached out to his representative, Congressman Ted Lieu, for assistance, and Congressman Lieu's office contacted the State Department. In an October 2, 2017 letter to Congressman Lieu, the State Department's Office of American Citizen Services and Crisis Management also failed to cite any statute or regulation to explain the reasons for the Dvash-Banks family's situation and the denial of a Consular Report of Birth Abroad and U.S. passport for E.J. (A copy of this letter is appended to this Complaint as Exhibit D.) The State Department's

Office of American Citizen Services and Crisis Management merely suggested that Andrew and Elad find "an immigration lawyer who can help explain the avenues" through which E.J. could "acquire citizenship through naturalization," or that they should "consider applying for a certificate of citizenship directly from USCIS."

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

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

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

Homeland Security deports E.J.

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

60. Andrew and Elad have also suffered indignity and emotional pain because the U.S. government recognizes neither their marriage nor their parental rights in determining whether their children were born in or out of wedlock. According to the U.S. government, Andrew and Elad could never have children in wedlock because they could not both be married to each other and be the biological parents of the same child. As a result, the U.S. government is undermining, disrespecting, and rendering unequal the intimate relationship between same-sex married couples and the children they have and raise together within family units founded on the sanctity of marriage. They also worry about the obvious inequity the State Department's decision causes between their twin sons, the impact on E.J. and A.J. of their different citizenship status and the awareness that the U.S. government considers them illegitimate notwithstanding their parents' valid marriage.

### C. The State Department Erroneously Deemed E.J. to Have Been Born "Out of Wedlock"

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

> a person born outside the geographical limits of the United States and its outlying possessions 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 or its outlying

possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

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

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

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

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

65. The State Department's policy and its application to E.J. are unconstitutional because they violate E.J.'s and Andrew's right to due process under the Fifth Amendment of the Constitution. As discussed above, the State Department refuses to apply Section 301(g) of the INA to E.J. based on its erroneous and

demeaning classification of him as a child born out of wedlock. Apparently on that basis alone, it refuses to recognize E.J.'s citizenship.

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

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

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

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

70. Although the State Department's policy may in theory apply to marriages between spouses of opposite sexes, its overwhelming effect is to deprive spouses in same-sex marriages—and their children—of fundamental rights and equal dignity as citizens under the law. The fact that *some* opposite-sex married

couples *may* use assisted reproductive technology to conceive a child does not change the discriminatory nature or harmful effects of the government's policy on same-sex couples.

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

**COUNT I — DECLARATORY JUDGMENT**
**THE STATE DEPARTMENT'S POLICY VIOLATES THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT**

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

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

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

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

76. Defendants have violated and continue to violate the Fifth Amendment of the United States Constitution by enforcing a policy that excludes U.S. citizens in same-sex marriages from conferring citizenship pursuant to Section 301, while restricting access to citizenship under that provision to the children of opposite-sex married couples. Defendants' policy has deprived and continues to deprive Plaintiffs

of their rights to acquire and confer citizenship at birth pursuant to INA Section 301. As a result of Defendants' policy, Plaintiffs have suffered, and will suffer, irreparable harm to their protected interest in conferring, and having recognized, E.J.'s U.S. citizenship.

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

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

79. Plaintiffs have no adequate remedy at law.

**COUNT II — ADMINISTRATIVE PROCEDURE ACT**

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

81. Plaintiffs have suffered a "legal wrong because of agency action." 5 U.S.C. § 702.

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

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

84. Plaintiffs have suffered and continue to suffer legal wrongs because of the U.S. Embassy's decision to deny the Consular Report of Birth Abroad application submitted on behalf of E.J.

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

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

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

88. Plaintiffs have no adequate remedy at law.

**COUNT III — DECLARATION THAT E.J. D.-B. IS A U.S. CITIZEN**

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

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

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

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

93. Their sons, A.J. and E.J., were born on September 16, 2016 in Mississauga, Canada, during Andrew's and Elad's marriage.

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

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

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

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

i. Declare unconstitutional, and a violation of the INA, the State Department's policy of classifying the children of same-sex married couples as "children born out of wedlock," and its consequent refusal to recognize E.J.'s citizenship status on that basis, both on its face and as applied to Plaintiffs, Andrew Mason Dvash-Banks, in his individual capacity, and on behalf of his son, E.J. D.-B.;

ii. Declare E.J. D.-B. a U.S. citizen at birth;

iii. Permanently enjoin Defendants from continuing to classify the children of same-sex married couples as "children born out of wedlock," and denying the children of same-sex married couples the right to acquire citizenship at birth pursuant to Section 301(g) on that basis; and

iv. Award Plaintiffs attorneys' fees and costs as allowed by law, and such other relief as the Court deems just and proper, including an award of reasonable litigation costs incurred in this proceeding pursuant to 28 U.S.C. § 2412.

Dated: January 14, 2019

/s/ Alexa M. Lawson-Remer

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Attorneys for Plaintiffs

# Exhibit A

***Appendix*** A and the CA Internet page on DNA and Parentage Testing. See 7 FAM 1160 ***Appendix E*** for further guidance on adjudication.

**NOTE**:

CA/FPPs CAWeb Intranet Relationship Fraud feature.

CA/FPPs Intranet Fraud Digest includes other information about relationship fraud. For example: Relationship Fraud in Yemen; Marriage Fraud Dangerous and Pervasive.

# 7 FAM *1140 APPENDIX E* IN WEDLOCK AND OF WEDLOCK

*(CT:CON-521; 07-08-2014)*

a. The term Birth in Wedlock has been consistently interpreted to mean birth during the marriage of the biological parents to each other.

b. This includes a child conceived before the marriage but born during the marriage.

c. To say a child was born "in wedlock" means that the childs biological parents were married to each other at the time of the birth of the child.

d. In the case of a marriage terminated by dissolution, death, or annulment, the term of wedlock still includes a biological child conceived during the marriage and born within 300 days after termination of the marriage.

***e***. 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 married man and a person other than his spouse.

# 7 FAM 1150 *APPENDIX E* VOID AND VOIDABLE MARRIAGES

*(CT:CON-576; 05-05-2015)*

a. A marriage that does not conform to the laws of the country or state in which it was performed generally is voidable and may be declared void by an appropriate authority, usually a court in the jurisdiction where the marriage occurred.

b. Prior to such a declaration, the marriage usually is considered valid for all purposes. Even after a marriage is voided, the children's status usually is not affected. In the United States, for example, every state considers children of a void marriage to be legitimate.

# Exhibit B

Ontario
Office of the Registrar General
Bureau du registraire général

Certified A True Photostatic Print of a Record
Photocopie certifiée conforme d'un document

on file at the Office of the Registrar General Ontario, Canada
se trouvant dans les dossiers du Bureau du registraire général (Ontario) Canada

2010 029232
PAGE 1

Numéro d'enregistrement :
Certificate number: Numéro du certificat : P 1338811
Date issued: Date de délivrance : Oct 05 2010
File number: Numéro de dossier : 01076584-01-3

Ontario Ministry of Government Services Office of the Registrar General

# Marriage Licence

This form is a permanent legal document and can only be used to register a marriage that takes place in Ontario. Please PRINT clearly in blue or black ink.

Licence number: E 0689966

**Part 1 To be completed by the office issuing this licence**

1. Date this licence was issued (d/m/y): 19 Aug 2010
2. Municipality where licence was issued: City of Toronto
3. Name of licence issuer or deputy issuer: Catherine Masters
4. Signature of licence issuer or deputy issuer
5. Proposed place of marriage (town/city): Toronto
6. Proposed date of marriage (d/m/y) must be within 3 months of date of issue: 19 Aug 2010

**Part 2 Marriage Affidavit (Form 4)**

Information about the applicant

7. Last legal name before this marriage: Banks
8. First and middle names: Andrew Mason
9. Marital status: [X] never married [ ] widowed [ ] divorced
10. If divorced in Canada, please provide the court file number: — Court file number: — City divorce granted in:
11. Religious denomination: Jewish
12. Age: 29
13. Date of birth (d/m/y): [redacted]
13. Province where applicant was born (if outside Canada, state the country): USA
14. Father's name (last, first): Banks, James Howard
15. Mother's name (last name before marriage, first name): Mason, Ann
16. Province where the applicant's father was born (if outside Canada, state the country): Ontario
17. Province where the applicant's mother was born (if outside Canada, state the country): Ontario

Information about the joint applicant

24. Last legal name before this marriage: Dvash
25. First and middle names: Elad
26. Marital status: [X] never married [ ] widowed [ ] divorced
27. If divorced in Canada, please provide the court file number: — Court file number: — City divorce granted in:
28. Religious denomination: Jewish
29. Age: 25
29. Date of birth (d/m/y): [redacted]
30. Province where joint applicant was born (if outside Canada, state the country): Israel
31. Father's name (last, first): Dvash, Mordehay
32. Mother's name (last name before marriage, first name): Abadi, Tova
33. Province where the joint applicant's father was born (if outside Canada, state the country): Israel
34. Province where the joint applicant's mother was born (if outside Canada, state the country): Israel

18. Name in full of applicant: Andrew Mason Banks and Name in full of joint applicant: Elad Dvash

make oath and say/affirm as follows: That I believe there is no affinity, consanguinity, prior marriage or other lawful cause or legal impediment to bar or hinder the solemnization of the marriage, and that the contents set forth herein are to the best of my/our knowledge, information and belief, true in every particular.

Sworn/affirmed before me at City of Toronto in the Province of Ontario this 19th day of August 2010

Signature of issuer/deputy issuer — (signature of applicant) — (signature of joint applicant)

19. Present address of applicant (street number and name): [redacted] Apartment: [redacted]
20. City or town: Toronto
21. Province: ON
22. Postal code: M4S 2H4
23. Telephone number: [redacted]

35. Present address of joint applicant (street number and name): [redacted] Apartment: [redacted]
36. City or town: Givatayim, Israel
37. Province:
38. Postal code: 53482
39. Telephone number: [redacted]

**Part 3 Statement of marriage - to be completed following the marriage ceremony (Form 7)**

40. Place of marriage (name the city or town and the county, regional municipality or district): TORONTO ONTARIO
41. Date of marriage (d/m/y): 19 AUGUST 2010
42. Signature of applicant: X
43. Signature of joint applicant: X
44. Signature of witness: X
45. Signature of witness: X

By signing below, I certify that the marriage of the parties named in this marriage licence was performed on the date and at the place indicated above.

46. Signature of person who performed marriage: X
47. Date (d/m/y): 19 AUGUST 2010

Please print clearly in blue or black ink.

48. Name of person who performed marriage (last, first, middle): BONKALO, ANNEMARIE ERIKA
49. Your status: [ ] Clergy [X] Judge [ ] Justice of the peace [ ] Other
50. Address of person who performed marriage: ONE QUEEN ST. EAST STE 2300, BOX 91, TORONTO ON M5C 2W5
51. Telephone number: 416 327-5824
52. Your registration number: J 2492
53. Your denomination (clergy only):

For use of the Registrar General only:
I am satisfied to the correctness of this statement and register this marriage
Signature — Date (d/m/y): AUG 25 2010

Personal information contained in this form is collected under the authority of the Marriage Act, R.S.O. 1990, c.M.3 and will be used to determine whether to issue the marriage licence, to register the marriage, provide certified copies, extracts, certificates, search notices, photocopies and for statistical, research, medical, law enforcement, adoption and adoption disclosure purposes. Questions about this collection should be directed to the Deputy Registrar General at PO Box 4600, 189 Red River Road, Thunder Bay ON P7B 6L8. Telephone: 1 800 461-2156 or 416 325-8305

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Judith M Hartman

Judith M. Hartman
Deputy Registrar General
Registraire générale adjointe de l'état civil

11105(10/00)

---CERTIFIED COPY---
NOT VALID WITHOUT ALL PAGES



REGISTRAR GENERAL • REGISTRAIRE GÉNÉRAL • ONTARIO

# Exhibit C

U.S. DEPARTMENT OF STATE
U.S. CONSULATE GENERAL, TORONTO
360 University Avenue, Toronto, ON M5G 1S4 Canada
Email: torontopassport@state.gov
Website: toronto.usconsulate.gov

March 2, 2017

Mr. Andrew Mason Dvash-Banks
[redacted]
Toronto, Ontario
M6B 4C6

Dear Mr. Dvash-Banks

I am writing in reference to your recent application for a Consular Report of Birth Abroad and passpor for E[redacted] J[redacted] D[redacted]-B[redacted], who was born on September 16,[redacted] in Toronto, Canada.

I regret to inform you that after careful review of the evidence you submitted with your child's application, it has been determined that his claim to U.S. citizenship has not been satisfactorily established, as you are not his biological father.

The Immigration and Nationality Act (INA) of 1952, as amended, requires, among other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmi U.S. citizenship.

In view of the above, it does not appear that E[redacted] J[redacted] D[redacted] B[redacted] acquired U.S. citizenship through you. Therefore, your child is not entitled to U.S. Consular Report of Birth Abroad and passport, therefo the applications are denied.

We suggest that you contact the nearest office of U.S. Citizenship and Immigration Services regarding your citizenship status. All documents submitted as part of the application are enclosed. By law, application fees are non-refundable.

Sincerely,

Terri N. Day,
Vice Consul

# Exhibit D

**United States Department of State**

***Washington, D.C. 20520***

October 2, 2017

The Honorable Congressman Lieu
C/O Ashley Fumiko Dominguez
5055 Wilshire Blvd., Suite 310
Los Angeles, CA 90036

Dear Ms. Dominguez:

Thank you for the letter from Congressman Lieu of September 22nd regarding his constituent Mr. Dvash-Banks, concerning citizenship of his son.

We take the concerns voiced in Mr. Dvash-Banks' letter very seriously. According to 22 CRF 51.40, applicants for U.S. passports and Consular Reports of the Birth Abroad of a Citizen of the United States have the burden of proving by a preponderance of the evidence that they are citizens of the United States. To establish the evidence of transmission as required by U.S. citizenship law, it is common for our Embassies and Consulates to ask persons who engage in surrogacy overseas - regardless of sexual orientation - to go through DNA testing to establish the blood relationship between parent and child required for transmission of U.S. citizenship in support of a Consular Report of Birth Abroad application. This practice is not limited to the U.S. Consulate Toronto.

Please be assured that recommending DNA testing is not a form of discrimination but a means of discouraging fraud and ensuring that U.S. citizenship transmission requirements are met. I apologize if this was not sufficiently explained to Mr. Dvash-Banks during his initial interview and subsequent meetings. We truly regret any difficulties he experienced and wish Mr. Dvash-Banks and his family all the best.

Also, we may suggest that, in addition to finding an immigration lawyer who can help explain the avenues through which his son can acquire citizenship through naturalization, he may also wish to consider applying for a certificate of citizenship directly from USCIS.

If you have any additional questions, please contact Carlos Hernandez in the Office of American Citizens Services and Crisis Management.

Sincerely,

Carlos Hernandez
Country Officer
Office of American Citizens Services and Crisis Management