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16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
18 **WESTERN DIVISION**  
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20 ANDREW MASON DVASH-  
BANKS, et al.,

21 Plaintiffs,

22 v.

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

25 Defendants.  
26

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

**PLAINTIFFS' STATEMENT OF  
GENUINE DISPUTES OF  
MATERIAL FACT IN OPPOSITION  
TO DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Hearing Date: Feb. 4, 2019  
Hearing Time: 1:30 pm  
Courtroom: 7A

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), Plaintiffs Andrew Dvash-Banks and E.J. D.-B. respectfully submit the following *Statement of Genuine Disputes of Material Facts* in opposition to Defendants' motion for partial summary judgment (ECF Nos. 89, 92). The chart below includes Plaintiffs' responses to each asserted uncontroverted fact that appeared in *Defendants' Statement of Uncontroverted Facts and Conclusions of Law* (ECF No. 89-2) and is followed consecutively by Plaintiffs' asserted uncontroverted facts. As the purpose of this document is to identify issues of fact that are disputed and those that are not, Plaintiffs do not respond, but contest, Defendants' conclusions of law and Defendants' assertions that Plaintiffs are not entitled to prevail on their claims.

### I. Statement of Genuinely Disputed Facts

<i>Defendants' Asserted Uncontroverted Fact ("SOF" or "Statement")</i>	<i>Supporting Evidence and Plaintiffs' Response</i>
1. Andrew Mason Dvash-Banks is a dual United States / Canadian citizen.	<ul style="list-style-type: none"> <li>Dvash-Banks Depo. 14:25–15:12</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
2. Elad Austin Dvash-Banks is an Israeli citizen.	<ul style="list-style-type: none"> <li>AR 019</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
3. Andrew and Elad married each other in August 2010, in Toronto, Ontario. (Prior to their marriage, Andrew went by the name Andrew Mason Banks, and Elad went by the name Elad Dvash.)	<ul style="list-style-type: none"> <li>AR 019 (marriage certificate)</li> <li>AR 09 (prior names)</li> <li>Dvash-Banks Depo. 29:05–08</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>

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<p>4. Andrew and Elad used Assisted Reproductive Technology (“ART”) to have E.J.; they used an anonymous egg donor to conceive E.J. and a gestational carrier to carry and give birth to E.J.</p>	<ul style="list-style-type: none"> <li>• Plaintiffs’ Response to Defendants’ Requests for Admission Nos. 1.</li> <li>• Plaintiffs’ Response to Defendants’ Requests for Admission Nos. 3.</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>5. E.J. D-B, was born September 16, 2016, in Toronto, Ontario.</p>	<ul style="list-style-type: none"> <li>• Dvash-Banks Depo. 29:09–14</li> <li>• AR 017</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>6. A.J. is E.J.’s biological half-brother; they share the same anonymous egg donor.</p>	<ul style="list-style-type: none"> <li>• Dvash-Banks Depo. 84:14-16</li> </ul> <p><b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b></p> <p>Plaintiffs do not dispute that A.J. and E.J. “share the same anonymous egg donor.” Plaintiffs object to the phrase “biological half-brother” as mischaracterizing the testimony of Andrew Dvash-Banks to the extent that it suggests that both children were not born essentially at the same time and are not the offspring of the same marriage.</p> <p>The evidence cited by Defendants in support of SOF No. 6 is set forth below:</p>

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“Q And you used the same egg donor for both of your sons?  
A We only used one egg donor. Correct.”  
Dvash-Banks Dep. 84:14-84:16.  
Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement No. 6 mischaracterizes the record:  
“Q And did you at the time of implantation know whether your genetic material were -- was used to create either of those two embryos?  
A Did I know prior to implantation?  
Q Yes.  
A I believed at the time I did.  
Q And what was your understanding at the time?  
A From the information that was provided to me from the fertility clinic, I understood that one of the embryos had my genetic material.  
Q And what was your understanding with respect to the other embryo?  
A It did not have my genetic

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	<p>material.</p> <p>Q Did it have your husband's genetic material?</p> <p>A Yes.</p> <p>Dvash-Banks Dep. 84:22-85:13.</p>
<p>7. A.J. and E.J. were carried by the same surrogate; she carried them in tandem, and they were born on the same day.</p>	<p>• Dvash-Banks Depo. 82:01–83:03</p> <p><b><u>DISPUTED</u></b></p> <p><b><u>OBJECTION</u></b></p> <p>Plaintiffs do not dispute that “A.J. and E.J. were carried by the same surrogate” or that “they were born on the same day.” Plaintiffs object to the characterization that “she carried them in tandem” as mischaracterizing the testimony of Andrew Dvash-Banks to the extent that it suggests that both children were not carried during the same pregnancy by the same gestational surrogate and born essentially at the same time.</p> <p>The evidence cited by Defendants in support of Statement No. 7 is set forth below:</p> <p>BY MS. ZEIDNER MARCUS:</p> <p>Q Sure. Let me rephrase.</p> <p>Can you describe with broad strokes what occurred with respect to the</p>

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surrogate from the time you spoke to the surrogacy agency until the children were born.

A Can I describe with -- with -- what occurred with regard to the surrogate?

Q Yes.

A We -- from when we met the surrogate and then she selected us -- or I guess I should say, like, we selected each other. Probably better way of phrasing it. And then we "dated each other," in quotes, for a few months just to get to know each other and be comfortable with each other. And then -- oh, and then up until the birth you're -- you want to know --

Q Yes.

A -- like, the time line?

Q Yes.

A And then she went for medical testing at the fertility clinic and -- and then we did our embryo implantation. And then lots of tests along the way during the pregnancy, some scares along the pregnancy, but luckily everything was fine with

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

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<p><b>10.</b>The Superior Court judge presiding over proceeding FS-16-21123 issued an order on September 28, 2018.</p>	<ul style="list-style-type: none"><li>• AR 022</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
<p><b>11.</b>The order “declared that the Applicants Elad Dvash-Banks and Andrew Dvash-Banks are the parents of the child, E.J. D-B, born September 16, 2016 (‘the child’), and that the Applicants are recognized for all purposes in law to be the parents of the child.”</p>	<ul style="list-style-type: none"><li>• AR 022</li></ul> <p><b><u>NOT DISPUTED</u></b></p>



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12. The order did not state that it had retroactive effect.

• AR 022

**DISPUTED**  
**OBJECTION**

Plaintiffs object to the mischaracterization of the evidence and further object to Statement No. 12 to the extent that it mischaracterizes the parental relationship at issue. Plaintiffs also object to Statement No. 12 as a conclusion of law to the extent that Defendants seek to assert through this Statement a characterization of the legal effect of the Canadian court order. The text of the court order cited by Defendants in support of Statement No. 12 is set forth below:

1. It is declared that the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, are the parents of the child, E[] J[] D[]-B[], born September 16, 2016 (“the child”), and that the Applicants are recognized for all purposes in law to be the parents of the child.
2. It is declared that the Respondent, [the gestational surrogate], is not the mother of the child.

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	<p>3. The Deputy Registrar General for the Province of Ontario is directed to register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child.</p>
<p><b>13.</b> The order directed the Deputy Registrar General for the Province of Ontario “to register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child.”</p>	<p>• AR 022</p> <p><b><u>NOT DISPUTED</u></b></p>
<p><b>14.</b> Andrew, Elad, A.J., and E.J. appeared in person for the appointment at the Consulate Toronto on January 24, 2017.</p>	<p>• Dvash-Banks Depo. 120:07–121:10</p> <p><b><u>NOT DISPUTED</u></b></p>

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

<p>1 2 3 4 5 6 7</p>	<p><b>20.</b>Ms. Day made the ultimate decision to deny E.J.’s applications.</p>	<ul style="list-style-type: none"> <li>• Defendants’ Resp. to Plaintiffs’ Interrogatory Nos. 1, 2</li> <li>• Day Depo Day Depo 94:22–96:25</li> <li>• AR 001</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>8 9 10 11 12 13 14 15 16</p>	<p><b>21.</b>Consular Officer Margaret “Maggie” Ramsay assisted Ms. Day on the day of the interview, including by providing Ms. Day with relevant Foreign Affairs Manual references, and by speaking with the Dvash-Banks family toward the end of the interview.</p>	<ul style="list-style-type: none"> <li>• Defendants’ Resp. to Plaintiffs’ Interrogatory No. 1, 2</li> <li>• Ramsay Depo 147:14-22</li> <li>• Day Depo 95:11-25</li> <li>• AR 073</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>17 18 19 20 21 22 23 24 25</p>	<p><b>22.</b>Consular Officer Larilyn Reffett, who served as the American Citizen Services Chief at Consulate Toronto was Ms. Day’s supervisor. Ms. Reffett supervised Ms. Day during the underlying adjudication, and Ms. Day consulted with Ms. Reffett about the case.</p>	<ul style="list-style-type: none"> <li>• Defendants’ Resp. to Plaintiffs’ Interrogatory Nos. 1, 2</li> <li>• Reffett Depo 203:10-206:09</li> <li>• Day Depo 95:11-25</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>26 27 28</p>	<p><b>23.</b>The ultimate decisions on E.J.’s and A.J.’s applications were made by Ms. Day on her own.</p>	<ul style="list-style-type: none"> <li>• Day Depo 95:11-25</li> </ul> <p><b><u>DISPUTED</u></b></p>

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**OBJECTION**

Plaintiffs object to Statement No. 23. Plaintiffs do not dispute that the “ultimate decisions on E.J.’s and A.J.’s applications were made by Ms. Day”; Plaintiffs object to the characterization that she did so “on her own” as mischaracterizing the evidence to the extent that it suggests that Ms. Day acted unilaterally and without referring to the Foreign Affairs Manual and consulting with a colleague and her supervisor at the U.S. Consulate in Toronto, Canada.

The evidence cited by Defendants in support of Statement No. 23 is set forth below:

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

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	<p>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.</p> <p>Day Depo 95:11-25.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs' objection that Statement No. 23 mischaracterizes the record:</p> <p>Q. You specifically remember looking at a FAM provision during the time that you were interviewing the Dvash-Banks family's adults?</p> <p>A. Yes.</p> <p>Day Dep. 217:21-217:24.</p>
<p>24. The application materials Andrew submitted to Consulate Toronto (prior to his interview by the consular officer) as part of E.J.'s applications identified that he and Elad had used Assisted</p>	<ul style="list-style-type: none"><li>• Dvash-Banks Depo. 172:08-15</li><li>• AR 024-056</li></ul> <p><b><u>NOT DISPUTED</u></b></p>

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Reproductive Technology ("ART") to have E.J.	
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<p>1     <b>25.7</b> FAM 1140 Appendix D pertains  2             to “Establishing a Biological  3             Relationship in an ART Case.” It  4             states: “In most cases involving  5             assisted reproductive technology  6             there is no shortage of  7             documentation, and consular  8             officers are free, as in any case, to  9             ask for appropriate supporting  10            documentation that fits the  11            circumstances of the case.”</p>	<ul style="list-style-type: none"> <li>• AR 079</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>12     <b>26.</b>As the adjudicating officer for the  13            Dvash-Banks family’s  14            applications, Ms. Day viewed it to  15            be her role and responsibility to  16            [assess] each child’s eligibility for  17            U.S. citizenship at birth for  18            children born abroad.</p>	<ul style="list-style-type: none"> <li>• Day Depo 230:21–231:11</li> </ul> <p><b><u>NOT DISPUTED</u></b><sup>1</sup></p>
<p>19     <b>27.</b>Ms. Day consulted the Foreign  20            Affairs Manual during her  21            interview of the Dvash-Banks  22            family.</p>	<ul style="list-style-type: none"> <li>• Day Depo 217:09-24; 220:03-06;  235:17–23.</li> <li>• AR 073</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>24     <b>28.</b>During the interview, Ms. Day  25            concluded that it was unclear  26            which (if either) of the children,</p>	<ul style="list-style-type: none"> <li>• Day Depo. 245:02–16</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>

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<sup>1</sup> For purposes of clarity, Plaintiffs have added in brackets what appears to be a word missing from Statement 26. Plaintiffs do not dispute this fact regardless.



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<p>E.J. and A.J., had a biological relationship to the U.S. citizen father (Andrew).</p>	
<p>29. Ms. Day told Andrew and Elad that they had options for how to proceed.</p>	<ul style="list-style-type: none"><li>• Day Depo. 253:04–25</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>30. She explained that they did not have to get a DNA test for E.J. and A.J. if they did not want to do so, but that she would not be able to approve E.J.’s or A.J.’s applications without information from such a test.</p>	<ul style="list-style-type: none"><li>• Day Depo. 253:04–25</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>31. She suggested to the Dvash-Banks family other ways that they could potentially have E.J. and A.J. documented as U.S. citizens.</p>	<ul style="list-style-type: none"><li>• Day Depo. 108:06–21</li><li>• Dvash-Banks00000031 (letter from Vice Consul Frankie Day to Andrew Dvash-Banks, dated Jan. 24, 2017)</li></ul> <p><b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b></p> <p>Plaintiffs object to the mischaracterization of the evidence. Defendants assert that Dvash-Banks00000031, which Defendants cite in support of Statement No. 31, contains no support for Statement No. 31. Plaintiffs further object to</p>

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<p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p>	<p><b>32.</b>She explained that the Dvash-Banks family had 90 days to provide to the Consulate any additional information or evidence supporting the applications.</p>	<ul style="list-style-type: none"> <li>• Dvash-Banks Depo. 152:10-13</li> <li>• Dvash-Banks00000031 (letter from Vice Consul Frankie Day to Andrew Dvash-Banks, dated Jan. 24, 2017)</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>15</p> <p>16</p> <p>17</p> <p>18</p>	<p><b>33.</b>Andrew and Elad chose to pursue DNA testing, and the results were submitted directly to the Consulate Toronto.</p>	<ul style="list-style-type: none"> <li>• AR 62–66</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	<p><b>34.</b>The DNA results showed a 0% probability of paternity with respect to the question whether Andrew was a biological parent of E.J.</p>	<ul style="list-style-type: none"> <li>• AR 62, 63</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>24</p> <p>25</p> <p>26</p>	<p><b>35.</b>On March 2, 2017, Ms. Day issued a letter denying E.J.’s applications for a CRBA and a U.S. passport.</p>	<ul style="list-style-type: none"> <li>• AR 001</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>27</p> <p>28</p>	<p><b>36.</b>The letter explained “that after careful review of the evidence”</p>	<ul style="list-style-type: none"> <li>• AR 001</li> </ul>

<p>1 Andrew submitted with E.J.’s                  2 application, it had been determined                  3 that E.J.’s claim to U.S. citizenship                  4 had not been satisfactorily                  5 established, as Andrew is “not his                  6 biological father.”</p>	<p><b><u>NOT DISPUTED</u></b></p>
<p>7 <b>37.</b>Under Department of State policy,                  8 applicants for CRBAs and U.S.                  9 passports have the burden of                  10 proving that they are citizens of the                  11 United States, among other                  12 requirements.</p>	<p>• AR 096–097 (7 FAM App’x A ¶                  a (citing 22 C.F.R. § 51.23 and 22                  C.F.R. § 51.40))</p> <p><b><u>NOT DISPUTED</u></b></p>
<p>13 <b>38.</b>Ms. Day testified that she does not                  14 remember whether she adjudicated                  15 E.J.’s applications as “in wedlock”                  16 or “out of wedlock.”</p>	<p>• Day Depo. [2]16:12–19<sup>2</sup>; 231:04-                  233:18</p> <p><b><u>NOT DISPUTED</u></b></p>
<p>17 <b>39.</b>Regardless of whether E.J. was                  18 considered born “in wedlock” or                  19 “out of wedlock” for purposes of                  20 adjudicating his U.S. citizenship                  21 claim, it was—in Ms. Day’s view                  22 as the adjudicating officer—                  23 necessary for E.J. to have a                  24 biological connection to the U.S.                  25 citizen father (Andrew) in order</p>	<p>• Day Depo 232:01–11</p> <p><b><u>NOT DISPUTED</u></b></p>

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 28 <sup>2</sup> Defendants’ SOF cites to this record support as page 116 lines 12 through 19. In fact the testimony appears at page 216 lines 12 through 19 and for clarity, Plaintiffs have noted this change in brackets.

<p>1</p> <p>2</p>	<p>for E.J. to acquire U.S. citizenship at birth.</p>	
<p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p>	<p>40. Ms. Day testified that it would not have made a difference to her final adjudication decision for E.J.’s applications whether she had considered the children to be born “in wedlock” or whether she had considered them to be born “out of wedlock.”</p>	<ul style="list-style-type: none"> <li>Day Depo. 232:01–233:10</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p>	<p>41. Ms. Day testified that it would not have mattered to the outcome of the adjudication if E.J.’s applications had been adjudicated pursuant to INA 301(g) rather than INA 309(a).</p>	<ul style="list-style-type: none"> <li>Day Depo. 232:23–233:12; 277:12–278:02.</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>42. Ms. Reffett testified that a biological relationship is always required, regardless of whether the child’s legal parents are married to each other.</p>	<ul style="list-style-type: none"> <li>Reffett Depo. 153:06-15; 156:10–19; 122:17–123:17; 124:09–22</li> </ul> <p><b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b></p> <p>Plaintiffs object to the mischaracterization of the evidence and further object to Statement No. 42 to the extent that it mischaracterizes the testimony by not indicating that the testimony referred to the FAM and to the Quick Reference Citizenship Chart</p>

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Ms. Reffett created listing requirements from the FAM. Two passages of testimony cited by Defendants as evidence in support of Statement No. 6 are set forth below:

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 Tr. 124:09-124:22.

Cited below is additional testimony from the witness supporting

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	<p>Plaintiffs’ objection that Statement No. 42 mischaracterizes the record: 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 Tr. 153:06-153:15.</p>
<p>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.”</p>	<ul style="list-style-type: none"><li>• Ramsay Depo. 131:22–133:23</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>44. Ms. Ramsay also testified that it would not have made a difference to the outcome of the adjudication if Ms. Day had adjudicated EJ’s</p>	<ul style="list-style-type: none"><li>• Ramsay Depo. 131:22–133:23</li></ul> <p><b><u>NOT DISPUTED</u></b></p>

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applications under INA 301 instead of INA 309[.][?] <sup>3</sup>	
<b>45.</b> 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).	<ul style="list-style-type: none"><li>• Day Depo. 232:23–233:10</li></ul> <p><b><u>NOT DISPUTED</u></b><sup>4</sup></p>

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<sup>3</sup> The question mark appeared as such in SOF No. 44; Defendants’ counsel confirmed to Plaintiffs’ counsel by e-mail dated January 9, 2019 that the question mark was included as a result of a typographical error, and requested that Plaintiffs’ counsel consider the sentence to end in a period.

<sup>4</sup> Plaintiffs do not dispute Statement No. 45 in any event but note that it appears that a word is missing from Statement No. 45 and that Defendants may have intended to assert that: 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 [such] 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).

1 2 3 4	<p>46. Ms. Day’s understanding of the biological relationship requirement was based on the Foreign Affairs Manual (“FAM”).</p>	<ul style="list-style-type: none"><li>• Day Depo. 233:06–12</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
5 6 7 8 9 10 11 12 13	<p>47. In Ms. Day’s view the FAM was not completely separated from the Immigration and Nationality Act of 1952—the FAM included quotations from the INA; the FAM described INA provisions in addition to quoting them; and FAM provisions incorporated the INA.</p>	<ul style="list-style-type: none"><li>• Day Depo. 233:19–234:20; 237:09–15</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>48.7 FAM 1131.4-1(d) (AR 083-084) provides that “Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen ‘parent’ is biologically related to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include, but are not limited to: ...</p>	<ul style="list-style-type: none"><li>• AR 083–084</li></ul> <p><b><u>NOT DISPUTED</u></b></p>



1	The child was born through	
2	surrogacy or other forms of	
3	assisted reproductive technology.”	
4	<b>49.</b> According to Department of State	• AR 078
5	guidance in effect at the time of	
6	the adjudication at 7 FAM 1120	<b><u>NOT DISPUTED</u></b>
7	Appendix D ¶ f: When a child is	
8	born abroad to a surrogate, and the	
9	child’s genetic parents are a U.S.	
10	citizen father and an anonymous	
11	egg donor, the child “is considered	
12	for citizenship purposes to be a	
13	person born out of wedlock of a	
14	U.S. citizen father, with a	
15	citizenship claim adjudicated	
16	under INA 309(a). This is the case	
17	regardless of whether the man is	
18	married and regardless of whether	
19	his spouse is the legal parent of the	
20	child at the time of birth.”	
21	<b>50.</b> The Department of State’s Foreign	• AR 091 (7 FAM 1140 App’x E ¶
22	Affairs Manual defines the term	c).
23	“in wedlock” as follows: “To say a	
24	child was born ‘in wedlock’ means	<b><u>NOT DISPUTED</u></b>
25	that child’s biological parents were	
26	married to each other at the time of	
27	the birth of the child.”	
28	<b>51.</b> The Department of State’s	• AR 091 (7 FAM 1140 App’x E ¶

1 2 3 4	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.	c).  <b><u>NOT DISPUTED</u></b>
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<b>52.</b> 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  <b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b> Plaintiffs object to the mischaracterization of the evidence. The evidence cited by Defendants in support of Statement No. 23 is set forth below: Q And do you know what legal claims you are pursuing in connection with this litigation? A I’m aware of -- I mean, I’m not a lawyer; right? But I’m aware of my claims, yeah. Q From your perspective, generally speaking, what are your claims against the Department of State? A From my perspective, my claim against the Department of State is that my son EJ was refused United States citizenship by the U.S. state department. And my claim is that --

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that we were wrong and treated unfairly, and that's an unfair -- how do I say this? And -- and that he was refused American citizenship because he's considered a child born out of wedlock. And his twin brother born four minutes before him was granted American citizenship. I know our claim is, like, many, many pages long. I hope I did an okay job in summarizing it.

Q It's not a test.

A Okay.

Q Do you have -- do you know whether you have a claim against the Department of State relating to a fundamental right that you have -- that you believe that you have?

MS. LAWSON-REMER: Objection. Calls for a legal opinion, but he can answer if he knows.

THE WITNESS: That I have a --

BY MS. ZEIDNER MARCUS:

Q Do you know whether you have any claims relating to any fundamental rights of yours?

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	<p>A The claim, I believe, also addresses the discrimination aspects that we -- that we experienced and that is part of the decision to reject my son's citizenship, if that answers your question.</p> <p>Q Do you know whether you have any claims relating to your marriage?</p> <p>A I believe the claim is related to our marriage in the sense that the state department has rejected my son's citizenship because they view him as a child born out of wedlock.</p> <p>Dvash-Banks Dep. 161:01-162:17.</p>
<p><b>53.</b>Andrew testified that the Department's decision to deny E.J.'s application did not harm Andrew's ability to be married to Elad.</p>	<ul style="list-style-type: none"><li>• Dvash-Banks Depo. 162:12–163:04.</li></ul> <p><b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b></p> <p>Plaintiffs object to the mischaracterization of the evidence. The evidence cited by Defendants in support of Statement No. 53 is set forth below:</p> <p>Q Do you know whether you have any claims relating to your marriage?</p>

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A I believe the claim is related to our marriage in the sense that the state department has rejected my son's citizenship because they view him as a child born out of wedlock.

Q Do you think that that harms your marriage?

A Harms my marriage in what way?

MS. LAWSON-REMER: Objection. Vague.

Ambiguous.

BY MS. ZEIDNER MARCUS:

Q Does it harm your ability to be married to your husband?

A It doesn't change the status of my marriage to my husband. It harms us in many other ways. But the marriage -- my marriage to my husband is solid.

Dvash-Banks Depo. 162:12-163:04.

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p>	<p><b>54.</b>Ms. Day testified that she considers the term “parents” to be a “very broad term”; in adjudicating E.J.’s applications, she did not consider it her role to determine whether Andrew and Elad were the “parents” of E.J.</p>	<ul style="list-style-type: none"> <li>• Day Depo. 224:18–228:06</li> <li>• Day Depo. 228:07–229:16</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>8</p> <p>9</p> <p>10</p>	<p><b>55.</b>Ms. Day considered Andrew and Elad to be E.J.’s parents.</p>	<ul style="list-style-type: none"> <li>• Day Depo. 229:02-16</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>11</p> <p>12</p> <p>13</p> <p>14</p>	<p><b>56.</b>Andrew is E.J.’s legal parent under the law of Ontario, Canada.</p>	<ul style="list-style-type: none"> <li>• Defs’ Resp. to Pls.’ Request for Admission 18.</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p><b>57.</b>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</p>	<ul style="list-style-type: none"> <li>• Day Depo. 79:25–80:17; 243:05–14</li> </ul> <p><b><u>DISPUTED</u></b></p> <p><b><u>OBJECTION</u></b></p> <p>Plaintiffs object that the evidence is disputed to the extent that Statement No. 57 asserts or suggests that Ms. Day initiated with opposite sex couples discussion of whether they used assisted reproductive technology.</p> <p>Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement</p>

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parents of the applicant child were  
in an opposite-sex marriage.

No. 57 is disputed:

Q. And when you talk about whether you had a question as to the biological tie, was that a subjective determination that you made during the course of the interview, for example?

A. I would say no, because the -- from my understanding, the biological connection is required to transmit the citizenship. So if -- you know, someone -- so that's not really -- you can't really argue that point to say, well, maybe -- you know, kind of make a judgment call. I think it's very clear what this -- what the guidelines are. So I would say that if the parent indicated to me that -- which is normally, like I said, how that would go about. If the parent indicated to me that they had used assisted reproductive technology, then we would go down that line of questioning, if I thought that -- if I saw that this was something that had, you know, had happened.

Day. 80:18-81:11.

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**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 [30(b)(6)] Dep. 202:17–23; 333:4–17<sup>5</sup>
- Defs.’ Response to Pls.’ First Set of Requests for Admission [No. 9 at page] 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.”).

**DISPUTED**

**OBJECTION**

Plaintiffs object to the mischaracterization of the evidence to the extent that Statement No. 58 purports to quote the INA. See 8 U.S.C. §1401 (the words “born” and “of” do not appear next to each other in Section 1401 of the INA). Plaintiffs further object to the mischaracterization of the evidence in Statement No. 58. Plaintiffs also

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<sup>5</sup> Defendant the United States Department of State’s designee under Federal Rule of Civil Procedure 30(b)(6) was Mr. Paul Peek. Plaintiffs refer to this as the “30(b)(6) Dep.” and Defendants refer to this as the “Peek Depo.” For purposes of clarity, Plaintiffs have added in brackets [30(b)(6)] next to each “Peek Depo.” citation.



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object to Statement No. 58 as misleading to the extent that it suggests that both members of a same-sex male couple could be biologically related to a child. The testimony cited by Defendants in support of Statement No. 58 is set forth below:

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 [30(b)(6)] Dep. 202:17-202:23.

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

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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 [30(b)(6)] Dep. 333:4-333:17.

Plaintiffs further object that the reference to Defendants’ Response to Request for Admission No. 9 is similarly misleading and reprint the full RFA and Response below.

“Request for Admission 9: Admit that under the State Department’s current interpretation and application of Section 301 and Section 309, Defendants would never conclude that two men who are married to each other may have a child in wedlock for purposes of

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	<p>Section 301.</p> <p>Specific Objection: Defendants object to this RFA as vague in that ‘have a child’ is not a term used in Section 301 of the INA.</p> <p>Response: Subject to and without waiving the above-stated objection, Defendants deny and note that, under Department of State policy, cases are adjudicated under Section 301 when a child’s biological parents are married to each other at the time of the birth of the child, 8 FAM 304.1-2, and each case is determined on its own set of facts.”</p>
<p><b>59.</b>Where two women married to each other are U.S. citizens, and one is the legal, gestational mother of the child and the other is the genetic mother, the Department adjudicates the child’s citizenship claim under INA 301(c).</p>	<ul style="list-style-type: none"> <li>• Peek [30(b)(6)] Dep. 202:17–23.</li> <li>• 8 FAM 304.3-1(b)</li> </ul> <p><b><u>NOT DISPUTED</u></b> on the understanding that SOF No. 59 is limited to current State Department policy.</p>
<p><b>60.</b>The Department also recognizes that a child of transgender and cisgender males can have a child born in wedlock, assuming that both parents have a biological relationship to the child.</p>	<ul style="list-style-type: none"> <li>• Peek [30(b)(6)] Dep. 178:20–179:18.</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>

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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

**DISPUTED**  
**OBJECTION**

Plaintiffs object that the evidence is disputed.

Cited below is additional testimony from the witness supporting Plaintiffs’ objection that Statement No. 61 is disputed:

Q. And when you talk about whether you had a question as to the biological tie, was that a subjective determination that you made during the course of the interview, for example?

A. I would say no, because the -- from my understanding, the biological connection is required to transmit the citizenship. So if -- you know, someone -- so that’s not really -- you can’t really argue that point to say, well, maybe -- you know, kind of make a judgment call. I think it’s very clear what this -- what the guidelines are. So I would say that if the parent indicated to me that -- which is normally, like I said, how

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	<p>that would go about. If the parent indicated to me that they had used assisted reproductive technology, then we would go down that line of questioning, if I thought that -- if I saw that this was something that had, you know, had happened. Day. 80:18-81:11.</p>
<p><b>62.</b>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.</p>	<ul style="list-style-type: none"><li>• Day Depo 245:22–246:03</li></ul> <p><b><u>NOT DISPUTED</u></b></p>
<p><b>63.</b>Ms. Day did not ask every same-sex couple applying for a CRBA application for a child to present DNA evidence.</p>	<ul style="list-style-type: none"><li>• Day Depo 246:04-247:23</li></ul> <p><b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b></p> <p>Plaintiffs object to the mischaracterization of the evidence to the extent that Statement No. 63 suggests that there was more than one same-sex family from which Ms. Day did not ask for DNA evidence or that she had not been presented with medical evidence</p>

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previously in that case. Evidence cited by Defendants in support of Statement No. 63 is set forth below:  
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

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

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	<p>consider that sufficient evidence to show biological connection between the AMCIT parent and the child applicant?</p> <p>A. Yes.</p> <p>Day Depo 246:04-247:23</p>
<p><b>64.</b>The Dvash-Banks family may pursue another avenue for documenting E.J.’s citizenship.</p>	<ul style="list-style-type: none"><li>• Defs.’ Resp. to Pls.’ First Set of Requests for Admission [No. 10 at page] 11<sup>6</sup></li></ul> <p><b><u>DISPUTED</u></b></p> <p><b><u>OBJECTION</u></b></p> <p>Plaintiffs object that Statement No. 64 is misleading to the extent that it suggests any assertion of fact concerning the hypothetical outcome of other efforts that have not been taken by the Dvash-Banks family for “documenting E.J.’s citizenship.”</p> <p>Plaintiffs further object to Statement No. 64 to the extent that the words “documenting E.J.’s citizenship” mischaracterize recognition as a U.S. citizen through naturalization or by other means as the equivalent of</p>

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<sup>6</sup> For purposes of clarity, Plaintiffs have added in brackets that Defendants’ reference to RFA 11 should be to RFA No. 10, which appears at page 11 of the cited document.



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acquisition of U.S. citizenship at birth.

The evidence cited by Defendants in support of Statement No. 64 is set forth below:

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). Def.’ Response to Pls.’ First Set of Requests for Admission [No. 10 at page] 11.

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65. The Dvash-Banks family could apply for a certificate of citizenship from USCIS.

- Defs.’ Resp. to Pls.’ First Set of Requests for Admission [No. 10 at page] 11<sup>7</sup>
- 8 U.S.C. § 1452 (“A person who . . . is a citizen of the United States by virtue of . . . paragraph . . . (g) of section 1401 of this title . . . may apply” to the Secretary of Homeland Security “for a certificate of citizenship” and “[u]pon proof to the satisfaction of” the Secretary, she may receive a citizenship certification if she is within in the United States at the time.”).

**DISPUTED**

**OBJECTION**

Plaintiffs object that Statement No. 65 is misleading to the extent that it suggests any assertion of fact concerning the hypothetical outcome of an application to USCIS. The discovery response cited by Defendants in support of Statement No. 65 is set forth below:  
Request for Admission 10:

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<sup>7</sup> For purposes of clarity, Plaintiffs have added in brackets that Defendants’ reference to RFA 11 should be to RFA No. 10, which appears at page 11 of the cited document.

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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). Def.’ Response to Pls.’ First Set of Requests for Admission [No. 10 at page] 11.

Cited below is additional testimony

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	<p>supporting Plaintiffs’ objection to Statement No. 67:</p> <p>Q. Yes. At the time that the State Department sent this letter, Exhibit 27, did the State Department have an expectation that if the Dvash-Banks family applied for a Certificate of Citizenship for E.J., that USCIS would grant that application?</p> <p>A. It was certainly within the realm of possibility.</p> <p>Q. But did it have an expectation that it would be granted?</p> <p>A. I don't know that it would be accurate to say that we had an expectation.</p> <p>30(b)(6) Dep. 318:4-318:15.</p>
<p><b>66.</b>USCIS adjudicates applications for certificates of citizenship domestically, and considers the jurisdiction where the applicant lives when adjudicating an application.</p>	<ul style="list-style-type: none"> <li>• Defs.’ Resp. to Pls.’ First Set of Requests for Admission 11</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
<p><b>67.</b>For applications for certificates of citizenship that USCIS receives from applicants living in the Ninth</p>	<ul style="list-style-type: none"> <li>• Defs.’ Resp. to Pls.’ First Set of Requests for Admission [No. 10 at page] 11<sup>8</sup></li> </ul>

<sup>8</sup> For purposes of clarity, Plaintiffs have added in brackets that Defendants’ reference to RFA 11 should be to RFA No. 10, which appears at page 11 of the cited document.

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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).

• Peek [30(b)(6)] Depo. 335:10–14

**DISPUTED**

**OBJECTION**

Plaintiffs object to Statement No. 67 on the basis that there is insufficient evidence to know how USCIS would evaluate an application it has not received.

The discovery response cited by Defendants in support of Statement No. 67 is set forth below:

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

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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). Def.’ Response to Pls.’ First Set of Requests for Admission [No. 10 at page] 11.

Cited below is additional testimony from the witness supporting Plaintiffs’ objection to Statement No. 67:

Q. Yes. At the time that the State Department sent this letter, Exhibit 27, did the State Department have an expectation that if the Dvash-Banks family applied for a Certificate of Citizenship for E.J., that USCIS would grant that application?

A. It was certainly within the realm of possibility.

Q. But did it have an expectation that it would be granted?

A. I don't know that it would be accurate to say that we had an

1		expectation.
2		30(b)(6) Dep. 318:4-318:15.
3	<p><b>68.</b>The FAM states: “Since 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad:</p> <p>(1) At least one biological parent must have been a U.S. citizen when the child was born. The only exception is for a posthumous child.</p> <p>(2) The U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born.”</p>	<ul style="list-style-type: none"> <li>• AR 82 (7 FAM 1131.2)</li> </ul> <p><b><u>NOT DISPUTED</u></b></p>
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16	<p><b>69.</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.</p>	<ul style="list-style-type: none"> <li>• Defs.’ Second Resp. to Pls.’ First Set of Interrogatories at 22</li> </ul> <p><b><u>DISPUTED</u></b></p> <p><b><u>OBJECTION</u></b></p> <p>Plaintiffs object that SOF No. 69 calls for a legal conclusion.</p> <p>Plaintiffs further object to SOF No. 69 on the basis of lack of foundation.</p>
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25	<p><b>70.</b>The Department’s interpretation has been set forth in the FAM for at least twenty years.</p>	<ul style="list-style-type: none"> <li>• DEFS000686 (7 FAM 1131.2 (1998))</li> </ul> <p><b><u>DISPUTED</u></b></p>
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**OBJECTION**

Plaintiffs object that Statement No. 70 is vague to the extent that it does not identify the interpretation referenced. Plaintiffs further object that Statement No. 70 mischaracterizes the evidence because the State Department changed its interpretation of the INA Sections 301 and 309 with respect to gestational mothers who are not the genetic parent of the child.

Cited below is testimony supporting Plaintiffs' objection that Statement No. 70 is disputed:

Q. Has the policy about what is considered a blood relationship ever been reconsidered by the State Department?

MS. ANDRAPALLIYAL:·

Objection.· Exceeds the scope.

A. As I mentioned, the context of a gestational parent was added to the scope of blood relationship, or biological relationship, by the department in 2014, I believe it was. Peek [30(b)(6)] Dep. 166:14-166:22.



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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.

**DISPUTED**

**OBJECTION**

Plaintiffs object to Statement No. 71 as mischaracterizing the testimony. Plaintiffs further object on the basis that Statement No. 71 is inconsistent with the evidence provided by Defendants. Plaintiffs also object to Statement No. 71 on the basis of lack of foundation to the extent that it relies on DEFS001382.

The testimony cited by Defendants in support of Statement No. 71 is set forth below:

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

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question whether parentage as related by blood was potentially something they should look into, I don't want to make a huge list of these because they are fraud concerns, but things like a birth certificate that was amended later to add potentially a parent or to change some biographical information; that would be something that would be considered a red flag for an adjudicating officer and that would cause a line of questioning that wouldn't be asked of other applicants.

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

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correct chain of questions to get the information that we need to make the determination.

- Reffett Dep 167:18–168:19.

Cited below is additional testimony supporting Plaintiffs’ objection that Statement No. 71 is contradicted by the evidence provided by

Defendants:

Q Sure. I’m just trying to understand whether any aspect of the State Department’s interest in sustaining its interpretation of section 301 is rooted in an effort to prevent fraud?

A No.

30(b)(6) Dep. 311:3-311:7.

THE REPORTER: “But should I understand you still to be saying that the State Department’s view that the requirements for establishing the blood relationship between a U.S. citizen parent and a child born outside the United States is not tied really in any way to concern about fraud?”

A Correct.

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	30(b)(6) Dep. 317:2-317:8.
<p><b>72.</b>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.</p>	<p>• DEFS001648–49</p> <p><b><u>DISPUTED</u></b> <b><u>OBJECTION</u></b></p> <p>Plaintiffs object to Statement No. 72 as lacking foundation. Plaintiffs further object to Statement No. 72 on the basis of insufficiency of the evidence.</p>

**II. Plaintiffs’ Additional Undisputed Facts in Support of Their Opposition to Defendants’ Motion for Summary Judgment**

<b>ANDREW AND ELAD MARRY AND MAKE PREPARATIONS TO BECOME PARENTS</b>	
UNDISPUTED FACT	SUPPORTING EVIDENCE
73.	Andrew and Elad decided to have children.
74.	Andrew and Elad obtained eggs from an anonymous egg donor (the “Donor”).
75.	Andrew and Elad donated their respective genetic material to create embryos using the eggs from the Donor.
76.	Andrew and Elad successfully created embryos using eggs from the Donor.

1	77.	In December 2015, Andrew and Elad contracted with a gestational surrogate (the “Gestational Surrogate”) for the purpose of carrying one or two embryos during a pregnancy (the “Surrogacy Agreement”).	AR 023-056 (Surrogacy Agmt.) <sup>9</sup>
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7	78.	The Surrogacy Agreement states that “Andrew and Elad (collectively called the ‘Intended Parents’) are a same-sex married couple who require assisted reproductive technology to have a child.”	AR 023 (Surrogacy Agmt.) at Section 1.1.
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12	79.	The Gestational Surrogate agreed to carry eggs “retrieved from the third party anonymous donor and Sperm supplied by Andrew and/or Elad” that was “incubated externally” to create embryos.	AR 023 (Surrogacy Agmt.) at Section 1.4.
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18	80.	The Gestational Surrogate became pregnant with one embryo created using genetic material from Andrew and one embryo created using genetic material from Elad.	Dvash-Banks Dep. 85:3-85:13.
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23	81.	Under the terms of the Surrogacy Agreement, Andrew and Elad “will be	AR 024 (Surrogacy Agmt.) at Section 1.8.
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<sup>9</sup> All references to page numbers of the Administrative Record (“AR”) cite to the internal page numbering therein. For example, the twenty-fourth page of the Administrative Record is cited as “AR 024,” which appears on the bottom right corner of that page of the Administrative Record.

1		recognized as the Child’s parents	
2		immediately upon the Child’s Birth.”	
3	82.	Under the terms of the Surrogacy	AR 024 (Surrogacy Agmt.) at
4		Agreement, Andrew and Elad, “intend to	Section 1.9.
5		assume full care of, and all parental	
6		responsibility for the Child . . . .”	
7	83.	Under the terms of the Surrogacy	AR 024 (Surrogacy Agmt.) at
8		Agreement, “Immediately upon the Birth	Section 1.10.
9		of the Child, the Gestational Carrier will	
10		give the Child into the permanent	
11		custody of the Intended Parents and as	
12		soon as reasonably possible thereafter	
13		the Intended Parents will make an	
14		application in the Ontario Superior Court	
15		of Justice seeking a declaration of	
16		parentage on their part, and a declaration	
17		of non-parentage on the part of the	
18		Gestational Carrier.”	
19	84.	Under the terms of the Surrogacy	AR 038 (Surrogacy Agmt.) at
20		Agreement: “The Parties acknowledge	Section 14.4(c).
21		that immediately upon Birth all medical	
22		decisions regarding the Child shall be	
23		made solely by the Intended Parents.”	
24	85.	The Surrogacy Agreement states that:	AR 038 (Surrogacy Agmt.) at
25		“For purposes of this Agreement,	Section 14.1.
26		‘immediately upon birth’ means as soon	
27		as the umbilical cord is cut.”	
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1	86.	Under the terms of the Surrogacy Agreement, “The Gestational Carrier hereby expressly waives all parental, custodial and social rights that she has or may acquire to the Child.”	AR 038 (Surrogacy Agmt.) at Section 14.4.
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6	87.	Under the terms of the Surrogacy Agreement, “All Parties to this Agreement wish to maintain confidentiality between themselves, one to another, and between themselves and the public.”	AR 024 (Surrogacy Agmt.) at Section 1.11.
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12	<b>THE TWINS ARE BORN AND ELAD AND ANDREW ARE NAMED AS</b>		
13	<b>THEIR PARENTS ON THEIR BIRTH CERTIFICATES AND ARE</b>		
14	<b>RECOGNIZED FOR ALL PURPOSES IN LAW TO BE THEIR</b>		
15	<b>PARENTS</b>		
16	<b>UNDISPUTED FACT</b>		<b>SUPPORTING EVIDENCE</b>
17	88.	Twins A.J. and E.J. (the “Twins”) were born four minutes apart.	Dvash-Banks Dep. 161:13-161:16.
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19	89.	Andrew and Elad were married to each other on the day of the Twins’ birth.	Dvash-Banks Dep. 171:10-171:15; AR 015-16 (E.J. Statement of Live Birth).
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22	90.	Andrew and Elad are listed as E.J.’s parents on E.J.’s Statement of Live Birth issued by Ontario, Canada.	AR 015-16 (E.J. Statement of Live Birth).
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25	91.	Andrew and Elad are the only parents listed on E.J.’s Statement of Live Birth.	AR 015-16 (E.J. Statement of Live Birth).
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27	92.	Andrew and Elad have been E.J.’s legal parents since his birth in 2016.	AR 015-16 (E.J. Statement of Live Birth); AR 021-22
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		(Canadian Order); AR 024 (Surrogacy Agmt.) at Sections 1.8-1.10.
93.	Andrew and Elad have raised the Twins since the day the Twins were born.	AR 037-38 (Surrogacy Agmt.), at Sections 14.1, 14.4.
94.	No other individual has acted as a parent to E.J. or A.J.	AR 021-22 (Canadian Order); AR 024 (Surrogacy Agmt.) at Sections 1.7-1.10; Dvash-Banks Dep. 29:21-30:14.
95.	No other individual has asserted any parental rights with respect to E.J. or A.J.	AR 021-22 (Canadian Order); Dvash-Banks Dep. 112:19-112:24.
96.	Under the law of Ontario, Canada, Andrew and Elad are the legal parents of the Twins.	AR 021-22 (Canadian Order); Dvash-Banks Dep. 112:19-112:24.
97.	A.J. was conceived using sperm from Andrew.	AR 062 (Viaguard A-M Letter); Dvash-Banks Dep. 84:17-85:13.
98.	E.J. was conceived using sperm from Elad.	AR 062 (Viaguard A-M Letter); Dvash-Banks Dep. 84:17-85:13.
99.	From the time the Twins left the hospital where they were born, they have lived continuously with Andrew and Elad.	Dvash-Banks Dep. 29:21-30:14; 171:16-171:23.
<b>E.J. AND A.J. APPLY FOR U.S. PASSPORTS AND FOR CRBAS IN RECOGNITION THAT THE TWINS ARE U.S. CITIZENS AT BIRTH</b>		
UNDISPUTED FACT		SUPPORTING EVIDENCE
100.	Andrew and Elad provided the Toronto Consulate with the requisite documentation for E.J.'s applications,	Dvash-Banks Dep. 95:4-97:12; 165:4-166:12; AR 009-62 (Application for Consular Report



1		including E.J.’s Statement of Live Birth, which identified Andrew and Elad as the parents, evidence of Andrew’s U.S. citizenship and periods of residency, and Andrew and Elad’s marriage certificate.	of Birth Abroad (“CRBA”) on behalf of E.J. and supporting documents).
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7	101.	Ms. Day accepted E.J.’s Statement of Live Birth as sufficient proof that Andrew and Elad are E.J.’s legal parents.	Day Dep. 172:5-173:12; Ramsay Dep. 103:7-103:11; AR 015-16 (E.J. Statement of Live Birth).
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11	102.	Ms. Day accepted the Ontario Court order naming Andrew and Elad as the parents of E.J. as sufficient proof that Andrew and Elad were E.J.’s legal parents.	Day Dep. 173:19-174:5; AR 021-22 (Canadian Order).
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16	103.	Ms. Day’s role in adjudicating U.S. passport and CRBA applications was to determine whether, according to the State Department’s <i>Foreign Affairs Manual</i> (“FAM”), the applicant was entitled to be recognized as a U.S. citizen.	Day Dep. 29:17-30:3; 47:12-47:24; 59:2-59:16.
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23	104.	Ms. Day ultimately applied Section 309 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1409 (“Section 309”), to the adjudication of the Twins’ applications.	Ramsay Dep. 131:25-132:5.
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1	105.	Ms. Ramsay suggested to Ms. Day that she could ask the Dvash-Banks family to provide additional biological evidence, such as DNA testing, in connection with the adjudication of the applications for E.J. and A.J.	Ramsay Dep. 60:5-60:8.
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7	106.	During the Dvash-Banks family’s interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that if they wanted to proceed with the Twins’ applications, they would have to provide additional information demonstrating the biological relationship between each child and that child’s U.S. citizen parent.	Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17.
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17	107.	During the Dvash-Banks family’s interview at the Toronto Consulate on January 24, 2017, Ms. Day told Andrew and Elad that a form of additional information demonstrating the biological relationship required by the Department of State (the “State Department”) is DNA evidence.	Ramsay Dep. 48:12-49:10, Reffett Dep. 68:22-69:4; 72:7-72:17.
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25	108.	By letter dated January 24, 2017 from Ms. Day to Andrew, the State Department informed the Dvash-Banks family that “in reference to your	Defs’ Exhibit 10 (Jan. 24 Letter from Day); 30(b)(6) Dep. 296:11-297:3; Reffett Dep. at 67:14-69:4.
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1	application for a U.S. passport and a	
2	[CRBA] for [A.J.] and [E.J.]... The	
3	U.S. Consulate General in Toronto has	
4	considered the evidence you submitted	
5	and concluded that the blood	
6	relationship between a U.S. citizen	
7	parent and children have not been	
8	established by a preponderance of the	
9	evidence as required to support a claim	
10	to U.S. citizenship.”	
11	109. The State Department applied Section	30(b)(6) Dep. 273:2-7.
12	309 in adjudicating E.J.’s applications	
13	for a U.S. passport and CRBA.	
14	110. The State Department applies Section	30(b)(6) Dep. 186:8-14.
15	309 to CRBA applications submitted	
16	on behalf of children who the State	
17	Department considers to have been	
18	born “out of wedlock.”	
19	111. The State Department interprets	30(b)(6) Dep. 273:2-273:15.
20	Section 309 to require, among other	
21	things, proof of a biological	
22	relationship between a CRBA applicant	
23	and that child’s U.S. citizen parent.	
24	112. The State Department determined that	30(b)(6) Dep. 273:2-15.
25	Section 309 was the correct statutory	
26	section to apply in adjudicating E.J.’s	
27	applications for a U.S. passport and	
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	CRBA because E.J.’s biological parents were not married to each other.	
113.	The State Department applies Section 301 of the INA, 8 U.S.C. § 1401 (“Section 301”), to CRBA applications submitted on behalf of children who the State Department considers to have been born “in wedlock.”	30(b)(6) Dep. 186:8-14.
114.	The State Department interprets Section 301 to require, among other things, proof of a biological relationship between a CRBA applicant and both of his legal parents.	30(b)(6) Dep. 178:10-178:19.

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<b>THE STATE DEPARTMENT REFUSES TO RECOGNIZE E.J.'S U.S. CITIZENSHIP</b>		
	UNDISPUTED FACT	SUPPORTING EVIDENCE
115	Ms. Day’s March 2, 2017 letter to Andrew stated, in part, “after careful review of the evidence you submitted with your child’s application, it has been determined that his claim to U.S. citizenship has not been satisfactorily established, as you are not his biological father. The Immigration and Nationality Act (INA) of 1952, as amended, requires, among other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship.”	AR 001 (Mar. 2 Letter from Day).
116	Ms. Day’s March 2, 2017 letter to Andrew denying E.J.’s applications for a U.S. passport and CRBA was the final determination of the applications by the State Department.	Reffett Dep. 77:14-17; 118:6-118:22.
117	Ms. Day’s March 2, 2017 letter terminated the application process for E.J.’s requests for a CRBA and U.S. passport with a denial and the State Department closed the files relating to E.J.’s applications.	Reffett Dep. 118:6-22.

1	118	The reason for the State Department’s denial of E.J.’s applications for a U.S. passport and CRBA was that he did not establish a biological relationship to his U.S. citizen parent (Andrew).	Reffett Dep. 78:9-78:20.
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6	119	The State Department acknowledges that E.J.’s lack of a biological relationship to Andrew was the sole reason identified for the denial of E.J.’s applications.	30(b)(6) Dep. 298:24-299:6.
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11	120	Following the Toronto Consulate’s receipt of the DNA testing results for the Twins from an approved testing establishment, the Toronto Consulate followed the FAM guidance on applications submitted on behalf of children born by means of assisted reproductive technology.	Ramsay Dep. 154:16-154:23.
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19	<b>THE STATE DEPARTMENT’S POLICIES</b>		
20	<b>UNDISPUTED FACT</b>		<b>SUPPORTING EVIDENCE</b>
21	121	At the time of E.J.’s birth, Andrew and Elad were validly married.	Ramsay Dep. 65:15-20; 108: 2-7; 108:20-109:3; 30(b)(6) Dep. 260: 13-16.
22			
23			
24	122	Andrew is E.J.’s legal parent.	Ramsay Dep. 103:7-11; 104:19-105:12; 30(b)(6) Dep. 88:12-16; 261:16-18; 268:2-5.
25			
26			
27	123	When a male same-sex couple uses sperm from one parent and an egg from	30(b)(6) Dep. 177:14-177:22; 180:2-9.
28			

1		a donor to conceive a child during their	
2		marriage, the State Department does not	
3		consider the child to be born “in	
4		wedlock.”	
5	124	The State Department asserts that its	30(b)(6) Dep. 178:10-19;
6		understanding of “in wedlock” is based	180:10-15.
7		on the language of Section 301.	
8	125	Under the State Department’s policies,	30(b)(6) Dep. 188:6-15; 271:20-
9		E.J. and A.J. were born “out of	22; 274:25-275:6.
10		wedlock” within the meaning of Section	
11		309.	
12	126	Under the State Department’s policies,	30(b)(6) Dep. 274:25-275:6.
13		Andrew and Elad can never have a child	
14		“in wedlock” together.	
15	127	Under the State Department’s policies,	30(b)(6) Dep. 201:2-16.
16		two legally married men who have	
17		always been men could never have a	
18		child “in wedlock” for purposes of	
19		adjudicating a CRBA application.	
20	128	The Toronto Consulate follows	Reffett Dep. 30:12-21; Ramsay
21		guidance from the State Department in	Dep. 17:22-18:1; Day Dep. 24:2-
22		Washington, D.C. as to the requirements	24:12; 30(b)(6) Dep. 92:6-92:15.
23		for issuance of a CRBA, and there are	
24		no Toronto-specific policies concerning	
25		the adjudication of CRBA applications.	
26	129	The text of Section 301 contains no	30(b)(6) Dep. 183:9-13; 191:6-
27		reference to a “blood” relationship.	14.
28			

1	130	The State Department’s interpretation of	30(b)(6) Dep. 178:13-19;
2		Section 301 is based on the State	180:10-15.
3		Department’s interpretation of the	
4		words “born . . . of parents” in Section	
5		301 as referring to a biological parent of	
6		the child.	
7	131	The State Department changed its	Reffett Dep. 183:4-183:18;
8		interpretation of Section 301 in 2014 to	30(b)(6) Dep. 166:14-22;
9		interpret “born . . . of parents” to	Ramsay Dep. at 84:7-84:12.
10		include not only a genetic parent, but	
11		also a gestational mother who did not	
12		provide the genetic material ( <i>i.e.</i> , egg)	
13		for the child.	
14	132	Prior to that change, the State	30(b)(6) Dep. 172:21-173:12.
15		Department interpreted Section 301 as	
16		excluding from the biological	
17		relationship that the State Department	
18		requires, a gestational mother who did	
19		not provide genetic material for the	
20		child.	
21	133	The State Department made this change	30(b)(6) Dep. 243:1-4, 15-20.
22		even though Congress had not made any	
23		corresponding amendment of the INA	
24		because the State Department simply	
25		“changed its mind” as to its	
26		interpretation of Section 301.	
27	134	The State Department’s determination	30(b)(6) Dep. 175:2-5; 219:25-
28		to interpret Section 301 as treating a	220:8.



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	child born outside the U.S. whose U.S. citizen parent was the child's gestational mother as a U.S. citizen at birth was a policy decision made by the State Department.	
135	The State Department does not follow the decisions of any federal circuit court of appeals holding that Section 301 does not include a biological relationship requirement and does not consider itself bound to do so.	30(b)(6) Dep. 251:4-9.
136	The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in <i>Solis-Espinoza v. Gonzales</i> , 401 F.3d 1090 (9th Cir. 2005), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.	30(b)(6) Dep. 249:6-20.
137	The State Department does not follow the ruling of the Court of Appeals for the Ninth Circuit in <i>Scales v. INS</i> , 232 F.3d 1159 (9th Cir. 2000), which held that Section 301 does not require a biological relationship between a U.S. citizen parent and his child.	30(b)(6) Dep. 251:4-9.

1	138	The State Department does not follow	30(b)(6) Dep. 251:4-9.
2		the ruling of the Court of Appeals for	
3		the Second	
4		Circuit in <i>Jaen v. Sessions</i> , 899 F.3d	
5		182 (2d Cir. 2018), which held that	
6		Section 301 does not require a	
7		biological relationship between a U.S.	
8		citizen parent and his child.	
9	139	The State Department's rationale for its	30(b)(6) Dep. 311:3-311:7;
10		interpretation of Section 301 is not	317:2-8.
11		rooted in a concern that interpreting	
12		Section 301 as not requiring a biological	
13		relationship between an applicant for a	
14		CRBA or U.S. passport who was born	
15		outside the United States and the child's	
16		United States citizen parent would	
17		create or increase the risk of fraud in	
18		connection with applications for	
19		recognition of U.S. citizenship.	
20	140	The FAM is not subject to notice-and-	30(b)(6) Dep. 244:13-18.
21		comment rule making.	
22	141	The FAM is not approved by Congress.	30(b)(6) Dep. 244:5-6.
23	142	The State Department acknowledges	30(b)(6) Dep. 103:5-11; 104:8-
24		that the FAM policies regarding	11.
25		recognition of U.S. citizenship include	
26		requirements not specifically set out in	
27		the INA.	
28			

1	143	The FAM does not have the force of	30(b)(6) Dep. 244:20-244:25.
2		law.	
3	144	The State Department does not track	30(b)(6) Dep. 315:10-13;
4		how frequently CRBA applicants are	320:20-321:3.
5		asked to undergo DNA testing or how	
6		often CRBA applications submitted on	
7		behalf of children of same-sex couples	
8		are granted or denied.	
9	145	The State Department acknowledges	30(b)(6) Dep. 88:12-16; 261:16-
10		that Andrew is E.J.'s legal parent.	18; 268:2-5.
11	146	The State Department considers Andrew	30(b)(6) Dep. 268:2-5.
12		to be E.J.'s legal parent at birth under	
13		Ontario law.	
14	147	The State Department acknowledges	30(b)(6) Dep. 261:16-261:18.
15		that Andrew and Elad are E.J.'s only	
16		legal parents.	
17	148	The State Department acknowledges	30(b)(6) Dep. 260:21-261:1.
18		that Andrew and Elad are identified as	
19		E.J.'s parents on E.J.'s Statement of	
20		Live Birth.	
21	149	The State Department acknowledges	30(b)(6) Dep. 260:17-260:20.
22		that Andrew and Elad were validly	
23		married at the time of the Twins' birth.	
24	150	The State Department's position is that	30(b)(6) Dep. 318:4-318:15.
25		it is within the realm of possibility that	
26		USCIS would grant a certificate of	
27		citizenship to E.J.	
28			

1	151	Under its current policy, the State	30(b)(6) Dep. 174:11-175:5.
2		Department would consider a child born	
3		by means of a form of assisted	
4		reproductive technology that involves	
5		use of the genetic material of a non-	
6		citizen during his or her marriage to	
7		satisfy the State Department's biological	
8		requirement if the U.S. citizen is the	
9		gestational parent, even if the US.	
10		citizen did not contribute genetic	
11		material to the child.	
12	152	Ms. Ramsay testified that a certificate of	Ramsay Dep. 169:5-169:15.
13		citizenship is different from a CRBA	
14		because a CRBA recognizes the	
15		recipient's status as a U.S. citizen at	
16		birth whereas a Certificate of	
17		Citizenship may be issued at any time to	
18		an individual and may indicate that the	
19		individual has acquired citizenship at a	
20		later date.	
21	153	Consular officer Margaret Ramsay	Ramsay Dep. 77:1-77:6.
22		testified that she does not generally ask	
23		opposite-sex couples who apply for a	
24		passport for a child born outside the	
25		United States whose genetic material	
26		was used to create the child.	
27	154	Consular Officer Margaret Ramsay	Ramsay Dep. 77:7-77:15.
28		testified that if a same-sex couple	

1 applied for a CRBA on behalf of their  
2 child, Ms. Ramsay would ask the couple  
3 about the biological connection between  
4 a parent and child.

5  
6 Dated: January 14, 2019

Respectfully submitted,

7  
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15 *Attorneys for Plaintiffs*

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

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

21 Plaintiffs,

22 v.

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

26 Defendants.  
27

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

**DECLARATION OF ALEXA  
LAWSON-REMER IN SUPPORT  
OF PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Judge: Hon. John F. Walter  
Hearing Date: February 4, 2019  
Courtroom: 7A

1 I, ALEXA LAWSON-REMER, declare as follows:

2 1. I am an attorney duly licensed by the State of California and am  
3 admitted to practice before this Court. I am an associate at Sullivan & Cromwell  
4 LLP and am one of the attorneys representing Plaintiffs *pro bono* in the above-  
5 captioned action (the “Action”). I submit this declaration in support of Plaintiffs’  
6 Opposition to Defendants’ Motion for Partial Summary Judgment, filed  
7 concurrently herewith. I have personal knowledge of the facts set forth in this  
8 declaration and, if called upon, could and would testify to those facts.

9 2. Attached to this declaration as Exhibit 11 is a true and correct  
10 copy of excerpts of the *Transcript of the Deposition of Paul Peek*, designated  
11 deponent of Defendant the United States Department of State under Federal Rule  
12 of Civil Procedure 30(b)(6), conducted on December 20, 2018, in Washington,  
13 D.C., as part of discovery in this Action.

14 3. Attached to this declaration as Exhibit 12 is a true and correct  
15 copy of excerpts of the *Transcript of the Deposition of Frances Terri Day*,  
16 conducted on December 20, 2018, in Charlotte, North Carolina, as part of  
17 discovery in this Action.

18 4. Attached to this declaration as Exhibit 13 is a true and correct  
19 copy of excerpts of the *Transcript of the Deposition of Andrew Dvash-Banks*,  
20 conducted on December 12, 2018, in Los Angeles, California, as part of discovery  
21 in this Action.

22 5. Attached to this declaration as Exhibit 14 is a true and correct  
23 copy of excerpts of the *Transcript of the Deposition of Margaret Ramsay*,  
24 conducted on December 7, 2018, at the United States Consulate in Toronto,  
25 Canada, as part of discovery in this Action.

26 6. Attached to this declaration as Exhibit 15 is a true and correct  
27 copy of excerpts of the *Transcript of the Deposition of Larilyn Reffett*, conducted  
28

1 on December 6, 2018, at the United States Consulate in Toronto, Canada, as part of  
2 discovery in this Action.

3 7. Attached to this declaration as Exhibit 16 is a true and correct  
4 copy of excerpts of the *Administrative Record*, filed by Defendants on January 4,  
5 2019 as ECF No. 80 and authenticated by Defendants therein. Specifically, the  
6 portions attached as Exhibit 16 are:

- 7 a. AR 001: March 2 Letter from Frances Terri Day to Andrew  
8 Dvash-Banks; and  
9 b. AR 009-62: Application for Consular Report of Birth Abroad  
10 on behalf of E.J. D.-B., and supporting documents, including:  
11 i. AR 015-16: Statement of Live Birth for E.J. D.-B.;  
12 ii. AR 021-22: Order dated September 28, 2016 from the  
13 Ontario Superior Court of Justice declaring Elad Dvash-  
14 Banks and Andrew Dvash-Banks to be the parents of E.J.  
15 D.-B.;  
16 iii. AR 023-56: Surrogacy Agreement dated December 21,  
17 2015; and  
18 iv. AR 062: Letter dated January 30, 2017 from Viaguard  
19 A-M regarding the paternity test between Andrew  
20 Dvash-Banks and E.J. D.-B.

21  
22 I declare under penalty of perjury under the laws of the State of  
23 California that the foregoing is true and correct to the best of my knowledge.

24 Executed this 14th day of January, 2019 in Los Angeles, California.

25  
26   
27 \_\_\_\_\_  
28 Alexa Lawson-Remer



# **EXHIBIT 11**

CONFIDENTIAL - PROTECTIVE ORDER

PAUL PEEK - 12/20/2018

CONFIDENTIAL - PROTECTIVE ORDER  
UNITED STATES DISTRICT COURT

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

v.

Case No.

2:18-cv-00523-JFW-JCx

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

---

Video Deposition of Paul Peek  
Washington, D.C.  
Thursday, December 20, 2018  
9:15 a.m.

Job No.: NY-203388  
Pages: 1 - 351  
Reported by: Donna L. Linton, RMR-CLR

1 Video deposition of Paul Peek, the 30(b)(6)  
2 witness herein, held at:

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Sullivan & Cromwell

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1700 New York Avenue, Northwest

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South Conference Room, Suite 800

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Washington, D.C. 20006

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(202) 956-7500

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Pursuant to Amended Notice of Rule 30(b)(6)

18

Deposition of Defendant United States Department of

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State and Federal Rules of Civil Procedure, before

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Donna L. Linton, Registered Merit Reporter,

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Certified LiveNote Reporter, and Notary Public in

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and for the District of Columbia.

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFFS:

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A P P E A R A N C E S

(continued)

ON BEHALF OF THE DEFENDANTS:

VINITA ANDRAPALLIYAL, ESQUIRE

EMILY NEWTON, ESQUIRE

United States Department of Justice

Civil Division - Federal Programs Branch

Post Office Box 883

Washington, D.C. 20044

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- and -

CHRISTINE L. McLEAN, ESQUIRE

United States Department of State

600 19th Street, Northwest

Washington, D.C. 20006

(202) 485-8000

mcleancl@state.gov

ALSO PRESENT:

Brian Mackey, Videographer

1 Department of Justice for Defendants.

2 MS. ANDRAPALLIYAL: Vinita Andrapalliyal,  
3 Department of Justice, for Defendants.

4 THE VIDEOGRAPHER: The court reporter  
5 today is Donna Linton.

6 Would the reporter please swear in the  
7 witness?

8 Whereupon,

9 PAUL PEEK,  
10 the witness herein, was called for examination by  
11 counsel on behalf of Plaintiffs, and having been  
12 sworn was examined and testified as follows:

13 MR. EDELMAN: Good morning. Just for the  
14 record, since we have one other individual today,  
15 could we just ask you to identify yourself for the  
16 record so the transcript will reflect your  
17 participation?

18 MS. McLEAN: Yes. I'm Christine McLean.  
19 I'm here with the Department of State.

20 MR. EDELMAN: Welcome.

21 EXAMINATION BY COUNSEL ON BEHALF OF PLAINTIFFS  
22 BY MR. EDELMAN:

23 Q Good morning Mr. Peek.

24 A Good morning.

25 Q Can we just, to identify you to the

1 Q Did you review the case file for E.J. --  
2 not A.J. now -- E.J. D [REDACTED]-B [REDACTED]?

3 A I did not review the application for A.J.  
4 D [REDACTED]-B [REDACTED].

5 Q I asked you about E.J.

6 A I did review the application for E.J.  
7 D [REDACTED]-B [REDACTED].

8 Q And were Andrew and Elad's names listed  
9 on the birth certificate for E.J. D [REDACTED]-B [REDACTED] --  
10 listed as his parents?

11 A Yes.

12 Q And does the State Department have any  
13 reason to doubt that Andrew or -- and Elad are E.J.  
14 D [REDACTED]-B [REDACTED]' parents?

15 A His legal parents, there is no reason to  
16 doubt.

17 Q When you say his legal parents, what do  
18 you mean?

19 A As opposed to biological parents.

20 Q Okay. We'll come to that in a little  
21 bit, but do you have any reason to believe, based on  
22 the facts of these cases, that A.J. D [REDACTED]'s parents  
23 are different from E.J. D [REDACTED]-B [REDACTED]' parents?

24 MS. ANDRAPALLIYAL: Objection. Exceeds  
25 the scope.

1 A Yes.

2 Q All right. Now I want to go back a  
3 little bit to talk about the process of applying for  
4 a CRBA.

5 A Uh-hum. Yes.

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

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

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

16 BY MR. EDELMAN:

17 Q Let's talk for a moment about the  
18 elements or criteria of the application.

19 A Uh-hum.

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

23 A Yes.

24 Q And who set those criteria?

25 A The Department of State.



1 Q Okay.

2 A So U.S. citizenship.

3 Q So --

4 A Excuse me.

5 Q I'm sorry. I didn't mean to talk over  
6 you. Let's just unpack a little bit to make sure  
7 that we understand your answer.

8 Does the -- do the training materials for  
9 that course cover the INA or do they cover the FAM's  
10 discussion of the INA?

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

13 A Both. They're very closely intertwined.

14 BY MR. EDELMAN:

15 Q What does that mean?

16 A I mean, the FAM guidance is based on the  
17 INA and the INA is referenced throughout the FAM  
18 guidance, so --

19 Q Okay.

20 A -- it's hard to talk about one -- it's  
21 hard to talk about the FAM without talking about the  
22 INA when you're talking about the citizenship  
23 sections.

24 Q Are there any differences between the  
25 language of the INA provisions relevant to

1 adjudications of passport applications and the  
2 language of the FAM provisions relevant to  
3 adjudications of passport applications?

4 A The FAM goes in -- yes.

5 Q What are those differences?

6 A The FAM goes into much greater detail.

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

10 A The FAM gives guidance to a universe of  
11 scenarios that are covered in the INA. Yeah.

12 Q I'm sorry. I'm not sure I understood.  
13 Are there scenarios covered in the INA?

14 A Yeah.

15 Q Maybe I don't understand what you mean by  
16 scenarios. So how are you using the term  
17 "scenarios" in your answer?

18 A An example would be two U.S. citizens in  
19 wedlock, two U.S. citizens out of wedlock, one U.S.  
20 citizen -- parents I'm referring to, biological  
21 parents -- in and out of wedlock would be different  
22 scenarios, for instance.

23 Q Okay. And is the wording of the FAM  
24 identical to the wording of the INA with respect to  
25 those situations?

1 A In places, yes.

2 Q When you say, "in places, yes," does that  
3 mean in places, no?

4 A The FAM goes into greater detail, so the  
5 FAM is kind of, again, how to interpret different  
6 situations in much greater detail than the INA goes  
7 into.

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

11 A Yes.

12 Q Now, does the State Department require  
13 consular officials adjudicating applications for a  
14 U.S. passport to be familiar with provisions of U.S.  
15 immigration law applicable to those adjudications?

16 A Yes.

17 Q And does the State Department do anything  
18 to train consular officials on those elements of  
19 U.S. immigration law?

20 MS. ANDRAPALLIYAL: Objection. Exceeds  
21 the scope.

22 A Yes.

23 BY MR. EDELMAN:

24 Q What does it do?

25 A The basic consular course -- that's the

1 BY MR. EDELMAN:

2 Q So what laws?

3 A The laws that govern the acquisition of  
4 citizenship at birth derived of a U.S. citizen  
5 parent when born abroad.

6 Q Okay. And has the State Department's  
7 interpretation of what those laws require by way of  
8 a blood relationship been constant throughout the  
9 State Department's application of those laws?

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

12 A Can you be more specific?

13 BY MR. EDELMAN:

14 Q Has the policy about what is considered a  
15 blood relationship ever been reconsidered by the  
16 State Department?

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

19 A As I mentioned, the context of a  
20 gestational parent was added to the scope of blood  
21 relationship, or biological relationship, by the  
22 department in 2014, I believe it was.

23 BY MR. EDELMAN:

24 Q So does that mean the State Department  
25 for a period of time did not consider a gestational

1 parents to each other"?

2 A Yes.

3 Q Do you see that?

4 A Yes.

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

9 A Yes.

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

12 A Yes.

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

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

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

20 A Section 301(g).

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

1 A It depends on the circumstances.

2 Q Can you elaborate, please?

3 A If both parents were -- if both parents  
4 were the biological parents or gestational parent --  
5 a combination of -- if they were both the biological  
6 parents, which can include the gestational parent,  
7 and were married to each other, then the birth would  
8 be considered in wedlock.

9 Q Okay. Now, has it always been the case,  
10 by the way, that the gestational parent was included  
11 in that definition?

12 A Not by policy, no.

13 Q Has it been that -- always the case that  
14 the gestational parent was included in that  
15 definition by any other means, policy or otherwise?

16 A As I said, I'm not certain of how any  
17 individual case may have been adjudicated prior to  
18 the implementation of the policy.

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

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

3 Q What do you mean by biological?

4 A If both parents had contributed genetic  
5 material.

6 Q Okay. What if the gestational surrogate  
7 was not -- was one of the married -- one of the  
8 spouses?

9 A I'm sorry. I don't understand your  
10 question.

11 Q So I want to distinguish two things. The  
12 situation where A and B are married and they go to C  
13 to act as the surrogate --

14 A Yes.

15 Q -- and a situation where A and B are  
16 married and the egg from A is implanted into B.

17 A If an egg from A was implanted into B,  
18 then both parents would be considered to be  
19 biologically related.

20 Q Okay. So in that circumstance, the State  
21 Department does not consider one to be a surrogate  
22 even though the egg moved from A to B?

23 A I believe that, medically, they would be  
24 considered to be a surrogate, but they are also a  
25 biological parent, which is more important to us for



1 adjudication of citizenship.

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

5 A Correct.

6 Q Now, let's take a case where a married  
7 couple use assisted reproduction technology to give  
8 birth to a child during the marriage using a  
9 gestational surrogate to carry the fetus. The child  
10 is born outside the United States and only one of  
11 the spouses is a U.S. citizen. Do you have that in  
12 mind?

13 A Yes.

14 Q Okay. In that circumstance, would the  
15 State Department recognize the child as a U.S.  
16 citizen from birth?

17 A It depends.

18 Q Okay. And what does it depend on?

19 A Whether there was a biological  
20 relationship between the child and the U.S. citizen  
21 parent.

22 Q Okay. And what is the basis for the  
23 State Department's position on that -- in that  
24 scenario?

25 A The department's interpretation of the



1 A To require which result?

2 Q The result that we just talked about,  
3 that in that circumstance that we've been talking  
4 about the State Department would consider the child  
5 to be a U.S. citizen at birth only if the U.S.  
6 citizen parent contributed genetic material to the  
7 child.

8 A If only one of the parents is  
9 biologically related to the child, we would be  
10 looking at INA 309 which states that a blood  
11 relationship is required.

12 Q Okay. And -- maybe we'll come to that in  
13 a minute, but let's just flesh out the issues.

14 Let's say you have two men married to  
15 each other. Okay?

16 A Yes.

17 Q And they use sperm from one of them and  
18 an egg from a donor to give birth to a child during  
19 their marriage. Is that child considered to be born  
20 in wedlock?

21 A If both parents did not contribute  
22 genetic material, no.

23 Q Okay. In my scenario --

24 A And if neither one of them was the  
25 gestational parent, I apologize.

1 Q Well -- okay. In my scenario we had one  
2 of the parents -- it was the sperm from one of the  
3 parents and a donor egg. Okay? In that  
4 circumstance would the child be considered to have  
5 been born in wedlock?

6 A The donor egg is from a third party.

7 Q Well, there's two men, so yes.

8 A The child would not be considered to be  
9 born in wedlock.

10 Q And what's the basis for the State  
11 Department's position?

12 A The Immigration and Nationality Act.

13 Q What in particular in the Immigration and  
14 Nationality Act requires that result?

15 A Well, we would be looking at 309 for out  
16 of wedlock, because 301(g) addresses a child born of  
17 parents, which the department has interpreted to  
18 mean both parents -- a blood relationship to both  
19 parents, a biological relationship to both parents.

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

1 A It depends.

2 Q What does it depend on?

3 A Whether the U.S. citizen parent also  
4 contributed genetic material or was the gestational  
5 parent.

6 Q Okay. So, again, I'm talking about two  
7 men, sperm from one of them; that person not a U.S.  
8 citizen. Question: Would the resulting child born  
9 outside the United States be considered a U.S.  
10 citizen at birth?

11 A Let me elaborate on why I'm saying "it  
12 depends" in my answer.

13 Q Please.

14 A Because one of the two men could be  
15 someone whose has transitioned and is now a man but  
16 is not always a man. So could theoretically have  
17 contributed genetic material or been the gestational  
18 parent.

19 Q Okay. Let's simplify it and use a  
20 situation where two men who were always men. Okay?

21 A Born male.

22 Q Pardon?

23 A Born male.

24 Q Okay. In that circumstance -- do you  
25 have the rest of the scenario in mind?

1 A Sure.

2 Q Okay. In that circumstance, would the  
3 State Department recognize the child as a U.S.  
4 citizen at birth?

5 A No.

6 Q Okay. Would the State Department  
7 consider the child to have been born in wedlock to  
8 the married couple?

9 A No.

10 Q What is the basis for the State  
11 Department's position?

12 A Again, the interpretation that  
13 section 301(g) of the INA, when it uses the language  
14 "born of parents," it is referring to a biological  
15 relationship to both parents.

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

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

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

25 A Right.

1 Q I don't understand. Surely, it must be  
2 somewhere if the State Department says that this is  
3 a requirement of section 301.

4 MS. ANDRAPALLIYAL: Objection.  
5 Argumentative.

6 BY MR. EDELMAN:

7 Q Is it not in the statute?

8 A I don't see it in the statute.

9 Q Okay. So -- again, so we're talking  
10 about the same thing, just show us where in 301 the  
11 words "blood relation" appear?

12 A The words "blood relationship" do not  
13 appear in 301.

14 Q So other than the FAM, what is the source  
15 of the State Department policy that requires a blood  
16 relationship, as we looked at for purposes of the  
17 definition of "in wedlock" as set out in Plaintiffs'  
18 Deposition Exhibit 4?

19 A I would have to look at the FAM to see  
20 what that -- the background is.

21 Q Well, is that something you were prepared  
22 to address in connection with your testimony here  
23 today?

24 A I've reviewed the FAM, yes.

25 Q And so other than the FAM, are there any



1 always been male?

2 Q Yes. Unless I specify otherwise, that's  
3 always the premise of the scenarios.

4 A Okay. I will go with that premise going  
5 forward. Can you repeat your question?

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

12 A Yes.

13 Q And the question is what provision of the  
14 INA would apply to that application?

15 A Section 309.

16 Q Okay. And what's the basis for the State  
17 Department's position?

18 A As I said before, 301 -- the language of  
19 301 has been interpreted to mean born of parents --  
20 has been interpreted to mean born of two biological  
21 parents.

22 Q Okay. Now, other than the FAM, what, if  
23 any, sources -- any sources -- require the State  
24 Department to take the position that it should apply  
25 section 309 and not 301(g) of the INA to an



1 requires a biological relationship?

2 A Correct.

3 Q Okay. Now, if they both require a  
4 biological relationship, then what's the difference  
5 between the two statutes -- the two sections?

6 A One section is specifying an  
7 out-of-wedlock birth. I mean, that's what the  
8 statute is addressing specifically is an  
9 out-of-wedlock birth. So -- and the other --  
10 one -- one specifies an out-of-wedlock birth.

11 Q All right. Look with me, if you will, at  
12 Plaintiffs' Deposition Exhibit 16.

13 A I'm sorry. Which one?

14 Q 16. It's section 309. It's the rescript  
15 of section 309.

16 A I have it.

17 Q So I'm in (a)(1). Do you see the  
18 reference to a blood relationship?

19 A Yes.

20 Q Okay. Now, we looked at Plaintiffs'  
21 Deposition Exhibit 15 previously, correct?

22 A I'm sorry?

23 Q We looked at Plaintiffs' Deposition  
24 Exhibit 15, which is the rescript of section 301,  
25 previously, right?



1 A Correct.

2 Q There is no similar reference there to a  
3 blood relationship, correct?

4 A The term "blood relationship" is not  
5 present in 301.

6 Q Okay. So would you agree with me that

7 Congress saw fit to include the term "blood

8 relationship" in 309?

9 A Yes.

10 Q And saw fit not to include it in

11 section 301(g) --

12 A Yes.

13 Q -- or 301, correct?

14 A Correct.

15 Q Okay. Now, what is the State  
16 Department's understanding of the fact that the  
17 words "blood relationship" appear in section 309 but  
18 not in section 301?

19 MS. ANDRAPALLIYAL: Objection. It calls  
20 for a legal conclusion.

21 MR. EDELMAN: It calls for the position  
22 of the State Department.

23 A I'm sorry. Can you restate the question?

24 BY MR. EDELMAN:

25 Q Yes. We've agreed, correct, that the

1 would be the appropriate...

2 Q All right. Now, if two individuals who  
3 were born men and are still men are married to each  
4 other, would you agree that they cannot both be  
5 biological parents of the same child?

6 A Correct.

7 Q Okay. So under the State Department's  
8 policy, am I correct in understanding that two men  
9 who are married to each other can never have a child  
10 whom the State Department would consider to be born  
11 in wedlock?

12 A Assuming they have both been men their  
13 entire lives, that's correct.

14 Q Okay. Even though they're legally  
15 married, correct?

16 A Correct.

17 Q And even though the child is born into  
18 their family during their marriage?

19 A Correct.

20 Q Okay. And that is because of the way  
21 that the State Department interprets the INA,  
22 correct?

23 A Correct.

24 Q Okay. Now, are there circumstances in  
25 which the State Department considers children of



1 Plaintiffs' Deposition Exhibit 18 indicates that the  
2 State Department changed the policy with respect to  
3 whether gestational mothers were considered to have  
4 a blood relationship for purposes of the INA, in  
5 particular, section 301 of the INA?

6 A Based on the fact that it says there's  
7 been a recent policy change, I would agree with that  
8 statement.

9 MR. EDELMAN: Okay. Now, let's mark as  
10 Plaintiffs' Deposition Exhibit 19 the document you  
11 were referring us to in the binder so we can talk  
12 about that. So if you would be so kind as to give  
13 that document to the reporter so the reporter can  
14 apply the appropriate exhibit sticker, we can go  
15 from there.

16 (Plaintiffs' Deposition Exhibit Number 19  
17 was marked for identification.)

18 MR. EDELMAN: Let me just use yours for a  
19 moment, please, sir, so I can identify it properly.

20 So the reporter has marked a three-page  
21 document bearing production numbers DEFS001382  
22 through 1384. I'm placing that document back before  
23 the witness.

24 BY MR. EDELMAN:

25 Q And ask you, Mr. Peek, please can you

1 MR. EDELMAN: Let's just do this for the  
2 record. We've just marked as Plaintiffs' Exhibit 20  
3 a multipage document bearing production numbers  
4 DEFS000650 through 52, which has an MRN number of  
5 14 STATE 10952 dated January 31, 2014.

6 A I'm sorry. If you don't mind, I'll note  
7 that on your Exhibit 18, that same 10952 number is  
8 at the top of yours, but as you can see, yours is an  
9 incomplete version.

10 Q Okay. Let's just do as much as we can,  
11 and this is question and answer, so that the record  
12 will be clear.

13 A I apologize.

14 Q You can keep that in front of you, but my  
15 question was really referring to Exhibit 15. Okay?

16 A Yes.

17 Q And to answer my question, we have to  
18 look -- we can look at Exhibit 20 for a minute to  
19 say we've agreed already the State Department  
20 changed the policy as it relates to gestational  
21 mothers, correct?

22 A Correct. And that --

23 Q Okay.

24 A -- means I misstated my earlier  
25 testimony.

1 Q Okay. Now, prior to or leading up to

2 that policy change, was there an amendment to

3 section 301?

4 A No.

5 Q Okay. So the State Department just  
6 changed its interpretation, correct?

7 MS. ANDRAPALLIYAL: Objection. Exceeds  
8 the scope.

9 A I would say it's incorrect to say that  
10 the department changed its interpretation of 301(g).

11 BY MR. EDELMAN:

12 Q Well, what would you say happened?

13 A We expanded the scope of what was  
14 allowable under 301(g).

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

17 A Correct.

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

20 A Yes.

21 Q Okay. All right. Now, would you agree  
22 with me that the FAM is an internal State Department  
23 document?

24 A Much of it is internal. There are  
25 sections of it that are available in the public

1 domain.

2 Q Is it subject to approval by any  
3 individual or entity outside the State Department?

4 A No.

5 Q Is it subject to congressional approval?

6 A No.

7 Q Are any provisions of the State  
8 Department subject to public notice and comment?

9 MS. ANDRAPALLIYAL: Objection. Exceeds  
10 the scope.

11 MR. EDELMAN: I'm sorry.

12 BY MR. EDELMAN:

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

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

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

19 BY MR. EDELMAN:

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

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

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



1 formalities.

2 (Plaintiffs' Deposition Exhibit Number 21  
3 was marked for identification.)

4 MR. EDELMAN: We have now marked as  
5 Plaintiffs' Deposition Exhibit 21 a two-page  
6 document bearing production numbers DEFS001431  
7 through 32. And I'm going to put that back in front  
8 of the witness.

9 BY MR. EDELMAN:

10 Q Mr. Peek, do you now have Plaintiffs'  
11 Deposition Exhibit 21 in front of you?

12 A Yes.

13 Q And could you please identify what that  
14 is for the record?

15 A It is a cable from the Secretary of  
16 State, via others, to a post answering a question  
17 about adjudication of a citizen -- a citizenship  
18 adjudication question.

19 Q Okay. Now, I had asked you about three  
20 federal court decisions, and you wanted to refer us  
21 to Exhibit 21 in responding to those, so please go  
22 ahead.

23 A Starting with paragraph 5 of this cable,  
24 "U.S. citizenship is transmitted from father to  
25 child only when a blood relationship is established.



1 That the INA requires a blood relationship is  
2 evidenced in the provisions that require both the  
3 establishment of biological paternity and a legal  
4 relationship for children born out of wedlock to  
5 U.S. citizen fathers, INA section 309."

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

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

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

21 Q Okay. What about the other two?

22 A Let me see if I have the documentation of  
23 the other two. I don't know -- I don't know that I  
24 have any documentation of the other two  
25 specifically.

1 yes?

2 A Could you ask your question again?

3 MR. EDELMAN: Please read it back.

4 THE REPORTER: Should I understand your

5 reference to paragraph 6 in Exhibit 21 as suggesting

6 that the State Department's view is, notwithstanding

7 the inconsistency, that it just doesn't believe it

8 has to follow those decisions?

9 A Yes.

10 BY MR. EDELMAN:

11 Q Okay. Now, let's go back to the

12 paragraph we were looking at on page 7 of

13 Defendant's Exhibit 10 -- I'm sorry. Plaintiffs'

14 Deposition Exhibit 10.

15 A I'm sorry. What page?

16 Q Page 7.

17 A Page 7, paragraph 7.

18 Q Right. Now, let's look -- right. Let's

19 look at lines 23 and 24.

20 A Uh-hum.

21 Q So we'll take them one at a time.

22 There's a decision there, Pavan versus Smith, which

23 is a United States Supreme Court decision from 2017.

24 Do you see the reference there?

25 A Yes.

1 A Yes.

2 Q Okay. And is it fair to say with a  
3 little more specificity that the only reason the  
4 State Department denied E.J.'s application was  
5 because he did not share a biological relationship  
6 with his U.S. citizen parent --

7 A Correct.

8 Q -- Andrew?

9 A Correct. I'm sorry.

10 Q Okay. All right. Now, let's just put  
11 some context around this to make sure we're on the  
12 same page.

13 Does the State Department agree that  
14 Andrew and Elad, the spouses, that they were validly  
15 married?

16 A Yes.

17 Q Okay. And does the State Department  
18 agree that Andrew and Elad were validly married at  
19 the time of E.J.'s birth?

20 A Yes.

21 Q Let's make sure we have commonality on  
22 some other things.

23 Does the State Department agree that  
24 Andrew and Elad are identified as E.J.'s parents on  
25 E.J.'s birth certificate?

1 A That's correct.

2 Q And does the State Department agree that  
3 no one other than Andrew and Elad has asserted  
4 parental rights with respect to E.J.?

5 A Correct.

6 Q So does the State Department agree -- I  
7 just want to make sure it's clear so we're talking  
8 about the same thing. Does the State Department  
9 agree that only Andrew and Elad are considered to be  
10 E.J.'s parents?

11 MS. ANDRAPALLIYAL: Objection. Exceeds  
12 the scope.

13 A I'm sorry. Could you restate your  
14 question? I'm sorry.

15 BY MR. EDELMAN:

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

18 A His legal parents, yes.

19 Q Okay. And should I understand your last  
20 answer as recognition that Andrew and Elad used a  
21 gestational surrogate to carry E.J. and his twin  
22 brother?

23 A Yes.

24 Q Okay. And are you aware that Andrew and  
25 Elad had a written contract, agreement, with the

1 A The legal parent, yes.

2 Q Okay. And does the State Department

3 consider Andrew to be E.J.'s parent at birth under

4 Ontario law?

5 A His legal parent at birth, yes.

6 Q Okay. And you referred earlier today to  
7 a court order, correct?

8 A Yes.

9 Q Okay. So let me show you a document and  
10 make sure we're talking about the same thing.

11 A Sure.

12 Q So in Exhibit 5, which you have open in  
13 front of you --

14 A Okay.

15 Q -- if you go to the page -- and we're  
16 looking now at the top stamped page numbers --  
17 ending dash 1768 and 1769. Tell me when you have  
18 that.

19 A I do. Can I just take one more question  
20 before we break?

21 Q Yes. Again, we'll accommodate whatever  
22 your schedule is. If you want to break right now,  
23 we can do that.

24 A You can ask your question; then I would  
25 like to take a break.

1 the scope.

2 A I don't know.

3 BY MR. EDELMAN:

4 Q Okay. Did you -- in your communications  
5 with Ms. Day or anyone else in preparation for  
6 today's deposition, did you discuss the  
7 circumstances of what transpired during the  
8 application and interview process for E.J.'s  
9 application for a CRBA?

10 A Yes.

11 Q And did that issue come up?

12 A Which issue?

13 Q Of where E.J. was at the time of the  
14 issuance of this order.

15 A I do not recall it.

16 Q Okay. So let's see if we can streamline  
17 some of this, given the hour. I just want to ask  
18 you a bunch of propositions and see if that is the  
19 State Department's position.

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

22 A Yes.

23 Q And is it the State Department's position  
24 that A.J., E.J.'s twin, was born out of wedlock?

25 MS. ANDRAPALLIYAL: Objection. Exceeds

1 A -- shouldn't have done that.

2 Q So now we're talking about the State

3 Department's adjudication of the applications for

4 E.J. for a U.S. passport and a CRBA. Okay? In

5 connection with those adjudications, did the State

6 Department apply the criteria of section 309?

7 A Yes.

8 Q And just for the record, why did the

9 State Department determine that those were the right

10 criteria to apply?

11 A The State Department determined that INA

12 309 was the correct statute to apply because both of

13 the parents did not have a biological connection --

14 Q Okay.

15 A -- to the child.

16 Q Now, just so there's no confusion on this

17 point down the line, is it the State Department's

18 position that the adjudication by the consular

19 officer of E.J.'s applications was correct?

20 A Yes.

21 Q Okay. And some other things just to make

22 sure, you know, where we're on the same page and

23 where we're not.

24 Does the State Department dispute that

25 Andrew, the father, is a U.S. citizen?



1 A No.

2 Q Okay. Is -- does the State Department  
3 agree that Andrew Dvash-Banks sufficiently  
4 demonstrated to the Toronto consulate that he met  
5 the residency requirements of section 301?

6 A I believe that he did, yes.

7 Q Okay. And if I were to ask you questions  
8 about the adjudication of A.J., would you say that  
9 you haven't reviewed them?

10 A Yes.

11 Q Okay. So is it the State Department's  
12 position that Andrew could not have a child born in  
13 wedlock under the INA if he and another man are  
14 listed as the parents on the child's birth  
15 certificate?

16 A If the context of your question is the  
17 same as it was earlier, that two men who have  
18 been --

19 Q Yes.

20 A -- male their entire lives --

21 Q Right.

22 A -- that is correct.

23 Q Correct. My bad. I should have made  
24 that clear. Yes. So putting aside the possibility  
25 of a transgender male -- man. So is it the State



1 Department's position, assuming there is nobody in  
2 the picture who is a transgender man, that Andrew  
3 Dvash-Banks could never have a child born in wedlock  
4 under the INA if he and another man are listed as  
5 the parents on a child's birth certificate?

6 A Correct.

7 Q Okay. So I want to focus you now on the  
8 State Department's position, if you will, of what  
9 transpired in the application and interview process.  
10 Okay?

11 A Okay.

12 Q And, first, what are the sources of your  
13 information on that subject?

14 A The application itself and the attached  
15 documents, a discussion that I had with Terri Day,  
16 and the transcripts of -- I'm sorry. I'm forgetting  
17 her name. The woman who was at the next window, her  
18 deposition. Marybeth, Mary --

19 Q Margaret?

20 A Margaret.

21 Q Ramsay.

22 A Yes. I'm sorry.

23 Q So some questions, then, about all this.  
24 Did Ms. Day ask the Dvash-Banks family how -- in  
25 particular, Andrew and Elad -- how they created the

1 (Discussion off the record.)

2 (Plaintiffs' Deposition Exhibit Number 25  
3 was marked for identification.)

4 THE VIDEOGRAPHER: We are back on the  
5 record. The time is 6:09 p.m.

6 BY MR. EDELMAN:

7 Q Okay. So we've placed before you a  
8 document that's been marked as Plaintiffs'  
9 Deposition Exhibit 25. It is a two-page document  
10 bearing the production numbers DVASH-BANKS, lots of  
11 zeros, 31 through 32. Have you seen this document  
12 before?

13 MS. ANDRAPALLIYAL: Do you have a copy  
14 for me?

15 MR. EDELMAN: Oh, I'm sorry. Yes. I beg  
16 your pardon (handing).

17 MS. ANDRAPALLIYAL: Thank you.

18 BY MR. EDELMAN:

19 Q So I believe I was asking you if you've  
20 seen this document before.

21 Are you looking for something specific?

22 A Yes. I'm looking through the documents  
23 that I reviewed because the document doesn't look  
24 familiar to me, and I just want to make sure that  
25 that's my faulty recollection rather than the fact

1 that I have not actually seen this before.

2 Q Okay. Do you know what this document is?

3 I want to just -- I want to be respectful of your  
4 time and not keep you going --

5 A Sure. Would you rather -- do you want me  
6 to focus on the document or --

7 Q I would rather you --

8 A -- focus on reviewing --

9 Q -- focus on the document.

10 A Okay.

11 Q Do you know what this document is?

12 A Give me just a moment to read it. Yes.

13 Q What is this document?

14 A It's a letter from the consulate in  
15 Toronto to the applicant -- to Andrew Dvash-Banks  
16 advising of the procedure for undergoing DNA testing  
17 should he wish to do so.

18 Q Okay. Now, it says in the third  
19 paragraph that -- three lines down or two lines down  
20 in the third paragraph, "The Immigration and  
21 Nationality Act (INA) of 1952, as amended, requires,  
22 among other things, proof of a blood relationship  
23 between the child and the U.S. citizen parent,"  
24 correct?

25 A That's what it says, yes.

1 Q And that is the position of the State

2 Department, correct?

3 A Correct.

4 Q But that does not purport to be a  
5 quotation from the INA, right?

6 A Correct.

7 Q Okay. Now, do consular officers ask all  
8 same-sex couples with children born outside the  
9 United States to get DNA testing?

10 A No.

11 Q So, again, is it just up to the  
12 discretion of the consular officer?

13 A Correct.

14 Q I believe -- let's do this. Do you have  
15 this?

16 MR. EDELMAN: Just so we're closing out  
17 the discussion of what happened with respect to the  
18 Dvash-Banks' application, I'm going to put before  
19 you Plaintiffs' Deposition Exhibit 1. Here is a  
20 copy for counsel.

21 (Plaintiffs' Exhibit Number 1 marked for  
22 identification was introduced.)

23 BY MR. EDELMAN:

24 Q Again, I don't think you need to hunt  
25 through your book because it's -- we'll just see

1 if -- have you seen this before? And if you don't  
2 immediately -- if it doesn't immediately trigger a  
3 recollection, we can just deal with it.

4 A Yes, I have seen this before.

5 Q Okay. And when did you see it for the  
6 first time?

7 A In preparation for this deposition.

8 Q Okay. Do you know what this is?

9 A Yes.

10 Q What is it?

11 A It is what we call a denial letter.

12 Q And denial of what?

13 A In this instance, it is the denial of  
14 consular report of birth abroad and passport  
15 application for the child.

16 Q Okay. And did the State Department, in  
17 fact, conclude that -- did, in fact, deny E.J.'s  
18 application for CRBA?

19 A Correct.

20 Q And did it do so on the basis that it  
21 concluded E.J. was not biologically related to his  
22 U.S. citizen parent?

23 A I'm sorry. Could you restate that?

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

1 evidence that E.J. was biologically related to the

2 U.S. citizen parent?

3 A Yes.

4 Q Okay. And that was the sole reason for

5 the denial, correct?

6 A Correct.

7 Q Okay. Now, did the State Department  
8 conclude that E.J. had been born out of wedlock?

9 A Yes.

10 Q Did the State Department ever believe  
11 that E.J. had been born in wedlock?

12 A I believe that Ms. Day made a case note  
13 to that effect at the beginning of the process, but  
14 I think she later -- later -- she left the case note  
15 in but later determined that was not the case.

16 Q All right. Let's just mark the case note  
17 so that we're not speaking in the abstract.

18 MR. EDELMAN: This will be Plaintiffs'  
19 Deposition Exhibit 26. Oh, I'm sorry. I beg your  
20 pardon. It's already marked as Plaintiffs'  
21 Exhibit 6, at least Jessica points out, so no reason  
22 to create more confusion and mark it twice.

23 (Plaintiffs' Exhibit Number 6 marked for  
24 identification was introduced.)

25 BY MR. EDELMAN:

1 A Could you repeat the question?

2 BY MR. EDELMAN:

3 Q Sure. I'm just trying to understand  
4 whether any aspect of the State Department's  
5 interest in sustaining its interpretation of  
6 section 301 is rooted in an effort to prevent fraud?

7 A No.

8 MR. EDELMAN: Okay. Let's do this. I  
9 don't think this is marked, so let's mark this as  
10 27.

11 (Plaintiffs' Deposition Exhibit Number 27  
12 was marked for identification.)

13 MR. EDELMAN: So we've placed before --  
14 did I give one to counsel? I may not have. I  
15 apologize. There we go.

16 MS. ANDRAPALLIYAL: Thank you.

17 MR. EDELMAN: We've placed before the  
18 witness a one-page document bearing production  
19 numbers DEFS000764, a letter dated October 2, 2017,  
20 from Carlos Hernandez of the United States  
21 Department of State to The Honorable Congressman  
22 Lieu, L-I-E-U.

23 BY MR. EDELMAN:

24 Q Have you seen this document before?

25 A Yes.



1 between the U.S. citizen and the child?

2 Q I thought you said earlier --

3 A I'm sorry. Go ahead.

4 Q No. Go ahead.

5 A I shouldn't be speaking in absolute.

6 Where -- it may happen in every case where the

7 officer is not sure that the blood relationship

8 between -- the biological relationship between the

9 U.S. citizen and the child had been established.

10 Q Does the State Department actually track

11 how frequently applicants are asked to undergo DNA

12 testing?

13 A No.

14 Q So on what basis did the State Department

15 conclude that it's common to ask them to do so?

16 A It would be -- I guess we're parsing out

17 the definition of common because, in the universe of

18 20 million passport applications annually, it is

19 certainly uncommon. In the much smaller subset of

20 people who are trying to establish U.S. citizenship

21 based on a birth abroad due to assisted reproductive

22 technology, it is much more common.

23 Q Okay. Would you agree with me that at

24 the time that Mr. Hernandez sent Plaintiffs'

25 Deposition Exhibit 27, he actually had no idea how



1 frequently the State Department asked applicants for  
2 a CRBA to undergo DNA testing?

3 A That's correct.

4 Q Okay. Now, if you look at the third  
5 paragraph beginning with the word "please," do you  
6 see it says, "Please be assured that recommending  
7 DNA testing is not a form of discrimination but a  
8 means of discouraging fraud"?

9 A That's what it says.

10 Q Right. And what is the relevance of  
11 fraud to the DNA testing request, given the  
12 conversation we were having just a few moments ago?

13 A If we could take every document at face  
14 value, we wouldn't need to look beyond them in any  
15 way, but sometimes documents are fraudulent or just  
16 incorrect and we can't always trust the veracity.

17 Q But should I understand you still to be  
18 saying that the State Department's view that the  
19 requirements for establishing the blood relationship  
20 between a U.S. citizen parent and a child born  
21 outside the United States is not tied really in any  
22 way to concern about fraud?

23 A Could you restate your question? I'm  
24 sorry.

25 MR. EDELMAN: Could you read it back,

1 please?

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

8 A Correct.

9 BY MR. EDELMAN:

10 Q Okay. Now, look, please, at the next  
11 paragraph -- the last part of that paragraph -- "He  
12 may also wish to consider applying for certificate  
13 of citizenship directly from USCIS."

14 Do you see that?

15 A Yes.

16 Q Do you know why Mr. Hernandez included  
17 that suggestion in Plaintiffs' Deposition  
18 Exhibit 27?

19 A Because the child may also have a claim  
20 under another section of INA, such as 320, that does  
21 not require a biological relationship.

22 Q At the time that the State Department  
23 sent Plaintiffs' Exhibit 27, did the State  
24 Department have an expectation that if the  
25 Dvash-Banks family submitted an application for a

1 Certificate of Citizenship to USCIS, that that  
2 application would be granted?

3 A Could you repeat the question?

4 Q Yes. At the time that the State  
5 Department sent this letter, Exhibit 27, did the  
6 State Department have an expectation that if the  
7 Dvash-Banks family applied for a Certificate of  
8 Citizenship for E.J., that USCIS would grant that  
9 application?

10 A It was certainly within the realm of  
11 possibility.

12 Q But did it have an expectation that it  
13 would be granted?

14 A I don't know that it would be accurate to  
15 say that we had an expectation.

16 Q If the State Department didn't have such  
17 an expectation, why did it make this suggestion?

18 A Because given the facts of the case,  
19 again, other sections of the INA, such as 320 and  
20 322, do not require a biological relationship, so if  
21 there is no biological relationship and someone is  
22 the parent of -- a U.S. citizen is the parent of a  
23 child, that's kind of a stock answer, is to check  
24 with USCIS, if a document could be issued by them by  
25 any means.

1 Q Does the State Department provide  
2 training regarding any -- specifically with  
3 reference to applications for U.S. passports or  
4 CRBAs by same-sex couples?

5 You know what? Let's come back to that  
6 if you don't know, because I want to just sort of  
7 see if we can --

8 A Okay.

9 Q -- finish up and get you home.

10 A I just wanted to make sure I was giving  
11 you an accurate answer so I was...

12 Q Okay. Now, is an application for a U.S.  
13 passport or CRBA more likely to be denied if the  
14 applicant's parents are a same-sex married couple  
15 than if they are an opposite-sex married couple?

16 A I don't know.

17 Q Does the State Department compile any  
18 statistics relating to that subject?

19 A Can you be more specific?

20 Q Does the State Department keep track of  
21 the rate at which CRBA applications on behalf of --  
22 or by same-sex couples are granted or denied?

23 A No.

24 Q Does it keep track of any comparison  
25 statistics as to the rate at which applications for

1 a CRBA by same-sex couples versus applications for a

2 CRBA by opposite-sex couples are granted or denied?

3 A No.

4 Q Other than this litigation, has the State  
5 Department received any allegations of  
6 discrimination against same-sex couples in the  
7 adjudication of applications for U.S. passports or  
8 CRBAs?

9 A I'm sorry. Could you repeat that?

10 Q Yes. Other than this litigation -- put  
11 aside this litigation -- has the State Department  
12 received any allegations that the State Department  
13 discriminates against same-sex couples in  
14 adjudicating applications for a U.S. passport or a  
15 CRBA?

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

18 A It's a very broad question, so I'll say  
19 yes.

20 BY MR. EDELMAN:

21 Q Do you know of any?

22 A I can't think of a specific instance,  
23 but, I mean, in 20 million applications there's --

24 Q Okay.

25 A -- you know, we get congressionals on a

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CERTIFICATE OF NOTARY PUBLIC

I, DONNA L. LINTON, RMR-CLR, and a Notary Public in and for the District of Columbia, before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in Shorthand at the time and place mentioned in the caption hereof and thereafter transcribed by me; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



\_\_\_\_\_  
DONNA L. LINTON, RMR-CLR  
Notary Public in and for  
DISTRICT OF COLUMBIA  
Dated: December 24th 2018

My Commission expires: June 30, 2019