

No. 19-55517

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

E.J. D.-B., a Minor, Elad Dvash-Banks as the guardian *ad litem*, and
ANDREW DVASH-BANKS,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 18-cv-00523
Hon. John F. Walter

**PLAINTIFFS-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD
VOL. I**

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ANDREW MASON DVASH-
BANKS and E. J. DVASH-BANKS,

Plaintiffs,

v.

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

Defendants.

No. CV 18-523-JFW-JC

DEFENDANTS' RESPONSE AND
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT

Hearing Date: Feb. 4, 2019

Honorable John F. Walter

relationship, and a letter outlining relevant steps should they choose to pursue that option. *Id.* ¶¶ 29–32.

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

ARGUMENT

I. Plaintiffs’ claim under 8 U.S.C. § 1503(a) incorrectly seeks to put the Department of State’s actions and policies at issue and, in any event, need not be decided by this Court.

Plaintiffs’ summary judgment motion challenges at length the Department of State’s (“the Department”) statutory interpretation and associated actions with respect to its Consular Report of Birth Abroad (“CRBA”) for Plaintiff E.J. But the reasonableness of Department’s actions should not be the focus of any analysis in which the Court may engage under section 1503. As Plaintiffs themselves note, section 1503(a) “authorizes a *de novo* judicial determination of the status of the plaintiff as a United States national.” Mem. Of P. & A. in Supp. of Pl.’s Mot. for Partial Summ. J. (“Pls.’ Br.”) at 14, ECF No. 83-1 (quoting *Richards v. Sec’y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985)). Therefore, “[a] suit under section 1503(a) is *not* one for judicial review of the agency’s action.” *Richards*, 752 F.2d at 1417 (emphasis added). That is because, while the Department made the citizenship determination in the first instance, “the courts make the real decisions all over again, *see* 8 U.S.C. § 1503(a). This allocation charges the courts with an independent and comprehensive role in determining citizenship.” *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1240 (D. Ariz. 2016). Thus, here, where the Department applied its longstanding statutory interpretations of 8 U.S.C. §§ 1401

and 1409 in adjudicating E.J.’s CRBA and passport adjudications abroad—where Ninth Circuit law does not apply—the Court need not pass judgment on the Department’s actions in evaluating Plaintiffs’ section 1503 claim. Instead, if the claim is reached, 8 U.S.C. § 1503(a) requires the Court to make a *de novo* determination about whether E.J. satisfies the applicable prerequisites to have acquired U.S. citizenship at birth as a foreign-born child. *See Simeonov v. Ashcroft*, 371 F.3d 532, 538 (9th Cir. 2004) (“As a general rule courts . . . are not required to make findings on issues the decision of which is unnecessary to the results they reach.” (citation omitted)).

Before doing so, however, the Court should take note that Plaintiffs have another path to the relief they seek through this claim that renders judicial intervention unnecessary. As explained in Defendants’ memorandum in support of their motion for partial summary judgment, now that Plaintiffs have relocated to within in the Ninth Circuit, Andrew is free to apply for a certificate of citizenship on behalf of E.J. from USCIS, *see* 8 U.S.C. § 1452. USCIS, as part of the Department of Homeland Security (“DHS”), is charged with making citizenship determinations in the United States, *see* 8 U.S.C. § 1103, distinct from citizenship determinations sought by individuals living abroad, the purview of the Department of State, *see* 8 U.S.C. § 1104; *see also Scales v. INS.*, 232 F.3d 1159, 1165 (9th Cir. 2000) (“Because Petitioner is not a ‘person not in the United States,’ the State Department is not the agency entrusted with the determination of Petitioner’s citizenship.”). Under *de novo* review, the court needs to apply the statute applicable to the current situation, which, here, is the statute that USCIS administers. Here, Plaintiffs’ changed circumstances “have forestalled any occasion for meaningful relief” from this Court, *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (citation omitted), since they may seek the same relief from USCIS.

If Plaintiffs seek a certificate of citizenship from USCIS, USCIS will apply Ninth Circuit case law to their case since Plaintiffs reside within the Ninth Circuit. In the Ninth Circuit, USCIS follows *Scales*, 232 F.3d at 1166; Defs.’ Opp. Stmt. of Facts ¶¶ 169–70, which construed the instant statutory provisions differently from the Department of State when reviewing DHS’s actions in the context of removal proceedings that occurred in the Ninth Circuit. *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005), and *Scales*, 232 F.3d at 1166. Because a certificate of citizenship is proof of U.S. citizenship (here, at-birth citizenship) equivalent to both a CRBA *and* a court order recognizing U.S. citizenship, *see* 22 U.S.C. § 2705, the availability of USCIS’s certificate-of-citizenship process to Plaintiffs should obviate the need for this Court to decide Plaintiffs’ 1503 claim, at least until Plaintiffs avail themselves of this alternative administrative procedure.¹ *Cf. Nat’l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (“If we do not decide it now, we may never need to. Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort. Article III courts should not make decisions unless they have to.”). Defendants believe that *Scales* and *Solis-Espinoza* were wrongly decided as explained further below, but there is no need at this stage for the Court to apply those cases to the facts here, given the availability of adequate alternative relief.

II. Plaintiffs are not entitled to summary judgment on their substantive due process claim because Defendants’ actions pass rational-basis review.

¹ For example, the Court could hold this case in abeyance so that Plaintiffs could apply for a certificate of citizenship from USCIS and only render a decision if USCIS denied the application.

Dated: January 14, 2019

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
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WESTERN DIVISION (LOS ANGELES)**

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

Plaintiffs,

v.

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

Defendants.

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

**EXCERPTS FROM THE
DEPOSITION OF PAUL PEEK,
DEFENDANTS' 30(b)(6)
DESIGNEE, IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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

Pursuant to Part 4(b) of the Court's Scheduling and Case Management Order (DKT 52), entered on August 21, 2018, attached hereto are excerpts from the deposition of Paul Peek, Defendants' 30(b)(6) designee, submitted in support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment.

Dated: January 14, 2019

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Page 88

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

Page 92

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.

Pages 102-103

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.

Page 104

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

Page 166

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

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

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

Pages 172-173

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.

Pages 174-175

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.

Page 177

12. Q Okay. And - maybe we'll come to that in
13. a minute, but let's just flesh out the issues.
14. Let's say you have two men married to
15. each other. Okay?

16. A Yes.

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

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

Page 178

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.

Page 180

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.

Page 183

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.

Page 186

8. Q I don't think I asked that question but
9. let's ask that. Okay? And what is it you wanted to
10. tell us about that?

11. A That the fact that 309 specifies out of
12. wedlock implies that 301 is within wedlock, meaning
13. the fact that the law in this other area calls out
14. an out-of-wedlock birth.

Page 188

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

12. A Yes.

13. Q And the question is what provision of the

14. INA would apply to that application?

15. A Section 309.

Page 191

6. Q Okay. So would you agree with me that
7. Congress saw fit to include the term "blood
8. relationship" in 309?

9. A Yes.

10. Q And saw fit not to include it in
11. section 301(g) --

12. A Yes.

13. Q -- or 301, correct?

14. A Correct.

Page 201

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

6. A Correct.

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

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

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

16. A Correct.

Pages 219-220

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

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

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

8. statement.

Page 243

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

4. A No.

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

17. A Correct.

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

20. A Yes.

Page 244

5. Q Is it subject to congressional approval?

6. A No.

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

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

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

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

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

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

Page 249

6. "Mr." -- redacted on my copy -- "also
7. points to the U.S. Court of Appeals for the 9th
8. Circuit recent opinion in Solis versus Espinoza
9. versus" -- I'm sorry -- "Solis-Espinoza v. Gonzalez
10. and argues that this case should be persuasive in
11. the department's adjudication of the children's

12. claim. As a court of limited geographic
13. jurisdiction, decisions of the 9th Circuit are not
14. binding upon the department's adjudication in
15. New Jersey or Mexico."

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

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

Page 251

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

9. A Yes.

Pages 260-261

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

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

16. A Yes.

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

20. A Yes.

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

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

1. A That's correct.

Page 261

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

18. A His legal parents, yes.

Page 268

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

5. A His legal parent at birth, yes.

Page 271

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

22. A Yes.

Page 273

2. Q So now we're talking about the State
3. Department's adjudication of the applications for
4. E.J. for a U.S. passport and a CRBA. Okay? In
5. connection with those adjudications, did the State
6. Department apply the criteria of section 309?

7. A Yes.

8. Q And just for the record, why did the
9. State Department determine that those were the right
10. criteria to apply?

11. A The State Department determined that INA
12. 309 was the correct statute to apply because both of
13. the parents did not have a biological connection --

14. Q Okay.

15. A -- to the child.

Pages 274-275

25. of a transgender male -- man. So is it the State

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

6. A Correct.

Pages 296-297

11. Q Do you know what this document is?

12. A Give me just a moment to read it. Yes.
13. Q What is this document?
14. A It's a letter from the consulate in either
child.

15. Toronto to the applicant -- to Andrew Dvash-Banks
16. advising of the procedure for undergoing DNA testing
17. should he wish to do so.

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

25. A That's what it says, yes.

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

3. A Correct.

Pages 298-299

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

1. evidence that E.J. was biologically related to the
2. U.S. citizenparent?

3. A Yes.

4. Q Okay. And that was the sole reason for
5. the denial, correct?

6. A Correct.

Page 311

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.

Page 315

10. Q Does the State Department actually track
11. how frequently applicants are asked to undergo DNA

12. testing?
13. A No.

Page 317

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

Page 318

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.

Pages 320-321

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

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

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

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

22 Plaintiffs,

23 v.

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

27 Defendants.
28

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

**EXCERPTS FROM THE
DEPOSITION OF MARGARET
RAMSAY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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

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

5 Dated: January 7, 2019

Respectfully submitted,

6
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Margaret Ramsay

12/7/2018

Pages 17-18

22 Q. And are the Toronto Consulate's
23 policies for adjudicating applications for
24 passports and Consular Reports of Birth Abroad the
25 same as the State Department's policies?

1 A. Yes.

Page 40

10 Q. Are you aware of E [REDACTED]
11 D [REDACTED]-E [REDACTED]'s application for a passport and a
12 Consular Report of Birth Abroad?

13 A. Yes.

14 Q. Who was the officer assigned to
15 his case, if you know?

16 A. It was Frankie Day.

17 Q. And were you involved in any way
18 in the process of reviewing E [REDACTED]'s applications?

19 A. Yes.

20 Q. Can you describe in what ways you
21 were involved in that process?

22 A. I assisted my colleague Frankie by
23 sending her relevant guidance from the Foreign
24 Affairs Manual.

Page 45

6 Q. And did you hear any questions
7 during the interview that were related in some way
8 to the fact that they were both men?

9 A. Yes, in terms of asking about how
10 the children were conceived and how the children
11 came to be born in Canada.

Page 46

20 Q. Do you remember anything else?

21 A. I think that Frankie asked the
22 question about who contributed genetic material to
23 conceive the children.

Pages 48-49

12 Q. Did you talk to Ms. Day while the
13 Dvash-Banks family was still at the consulate?

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14 A. Yes.

15 Q. And was that a separate
16 conversation from the one we were just discussing?

17 A. Yes, I believe so.

18 Q. And can you describe that
19 conversation?

20 A. I believe she told me that it
21 wasn't clear who the biological parents were and I
22 discussed with her that the DNA testing was an
23 option in these types of cases.

24 Q. So just to make sure that I'm
25 understanding, while the Dvash-Banks family was at

1 the consulate for their interview, you had a second
2 conversation with Ms. Day about how she should
3 proceed?

4 A. I offered some guidance to her as
5 to, you know, how the case could proceed, but
6 ultimately she made the decision herself.

7 Q. And what decision was that?

8 A. She made the decision to place the
9 case in a pending status, pending additional
10 information.

Page 54

1 Q. And did you ever discuss the
2 Dvash-Banks applications again with Ms. Day before
3 the final adjudication?

4 A. I think I discussed it with her
5 when the results of the DNA testing came back.

6 Q. And what did she say?

7 A. She told me that one child was the
8 biological child of the U.S. citizen and one was
9 not.

Page 60

5 Q. What, if any, was your role in Ms.
6 Day's decision to seek additional medical evidence
7 such as DNA testing?

8 A. I suggested it to her.

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Page 65

15 Q. And is it your understanding that
16 under the State Department's policies and
17 procedures, Andrew and Elad Dvash-Banks are
18 considered to be a married couple?

19 MS. ZEIDNER MARCUS: Objection to form.

20 THE WITNESS: That is my understanding.

Page 84

7 Q. And are you aware that the State
8 Department changed its policy to treat gestational
9 mothers who are the legal parent of a child the
10 same as genetic mothers for purposes of citizenship
11 and immigration benefits?

12 A. Yes.

Page 103

7 Q. Looking at this document, who are
8 E█████ D█████-B█████'s legal parents under State
9 Department policy and procedure?

10 A. It would be the people listed on
11 the child's birth certificate, so Andrew and Elad.

Pages 104-105

19 Q. Is this document entitled
20 "Statement of Live Birth"?

21 A. Yes.

22 Q. And according to this document,
23 who are E█████ D█████-B█████'s parents?

24 A. Andrew Mason Dvash-Banks and Elad
25 Dvash-Banks.

1 Q. And when you adjudicate CRBA
2 applications using a Statement of Live Birth in
3 Ontario, do you look at those fields to determine
4 who the child's parents are?

5 A. Yes.

6 Q. Under the State Department's
7 policies and procedures, as you understand them, is
8 this document sufficient proof of E█████'s
9 parentage?

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10 MS. ZEIDNER MARCUS: Objection to form.
11 THE WITNESS: It shows who the legal
12 parents are.

Page 108

2 Q. And under the State Department's
3 policies and procedures, is this document
4 sufficient proof of Andrew's and Elad's marriage?
5 MS. ZEIDNER MARCUS: Objection,
6 foundation, form.
7 THE WITNESS: Yes.

Pages 108-109

20 Q. In your practice adjudicating
21 applications, would an Ontario marriage licence
22 such as this one sufficiently demonstrate a valid
23 marriage?
24 A. Yes.
25 Q. And is it your understanding based

1 on this document that Andrew and Elad Dvash-Banks
2 are validly married?
3 A. Yes.

Pages 131-132

22 Q. Do you know whether Ms. Day
23 considered E█████ D█████-B█████ to be born in wedlock,
24 as that term is used in the FAM and the INA?
25 A. I think initially, as evidenced by

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

Pages 132-133

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

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

3 Q. What is that belief based on?

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

Page 154

16 Q. Why did you think that in this
17 case the FAM guidance was clear?

18 A. Because the FAM guidance on
19 assisted reproductive technology cases is clear
20 with regards to a biological relationship
21 requirement, and once we had that information after
22 the DNA testing, it was relatively straightforward
23 to make the decision.

Pages 163-164

5 Q. Did Ms. Ramsay -- excuse me, Ms.
6 Ramsay, did Ms. Day ever discuss with you whether
7 to apply Section 301 or 309 of the INA in
8 adjudicating E■■■■'s applications?

9 A. I believe we discussed it as
10 appropriately looking at the case through the lens
11 of 309 due to the fact pattern of the case in terms
12 of artificial reproductive technology being used.

13 Q. And when did that discussion
14 occur?

15 A. The morning of the interview.

16 Q. And was this the first
17 conversation you had with Ms. Day concerning the
18 Dvash-Banks applications?

19 A. No, no.

20 Q. This was the second conversation
21 you had with her that day concerning the
22 Dvash-Banks family's applications?

23 A. I think after she had interviewed
24 them, I discussed with her the different FAM
25 guidance and how the case would be, because they

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1 had used a surrogate, and how we would apply 309 to
2 the case.

3 Q. So it is now your testimony that
4 you discussed with Ms. Day on the day that the
5 Dvash-Bankses appeared for their interview which
6 section of the INA applied to their application?

7 A. I believe that was part of our
8 discussion, yes.

9 Q. And did you advise Ms. Day on
10 which section of the INA to apply?

11 A. I think so, yes.

12 Q. And what did you advise her?

13 A. I told her that these types of
14 cases are considered under INA 309.

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MOTION FOR PARTIAL
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Judge: Hon. John F. Walter
Hearing Date: February 4, 2019
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Order (DKT 52), entered on August 21, 2018, attached hereto are excerpts from the deposition of Andrew Mason Dvash-Banks submitted in support of Plaintiffs' Motion for Partial Summary Judgment.

Dated: January 7, 2019

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Pages 13-14

24 Q And where were you born?
25 A I was born in Santa Monica, California.

1 Q What year were you born?
2 A 1981.

Page 14

9 Q You lived with your parents when you were
10 a child?
11 A Yes.
12 Q And in what locations did you guys live?
13 A We lived in a few different locations.
14 Primarily in Beverly Hills, California.

Page 15

20 Q Where did you obtain your high school
21 degree?
22 A At Beverly Hills High School.
23 Q Where did you obtain your bachelor's
24 degree?
25 A UC Santa Barbara.

Page 18

1 Q Okay. And how long did your -- what year
2 did you enroll in graduate -- in your graduate
3 studies?
4 A 2007.

Pages 19-20

6 Q When did you meet this man?
7 A I met him in March of 2008.
8 Q What is his name?
9 A Elad Dvash-Banks.
10 Q And you're now married to Mr. Elad
11 Dvash-Banks; is that correct?
12 A Yes.
13 Q Congratulations.
14 A Thank you.
15 Q In March 2008, where did you meet?
16 A At a Purim party. Purim is a Jewish

17 Halloween.

18 Q I won't ask about your costume.

19 A Please don't.

20 Q Where -- in what country or --

21 A In Tel Aviv. At the University of Tel

22 Aviv.

23 Q Were you -- this is during the time that

24 you were a student --

25 A Correct.

1 Q -- working on your master's?

2 A Correct.

Pages 21-22

8 Q When I asked you why you moved to Toronto,

9 I recalled that -- what you said then. Do you

10 recall what your testimony was as to why you moved

11 to Toronto?

12 A Yeah. Yes.

13 Q Do you recall that you said because you

14 couldn't sponsor Elad as an immigrant to the United

15 States at that time?

16 MS. LAWSON-REMER: Objection to the extent

17 it mischaracterizes the testimony.

18 BY MS. ZEIDNER MARCUS:

19 Q Do you recall saying that? You can answer

20 the question.

21 A I recall saying that, yeah.

22 Q Is that an accurate reason why you moved

23 to Toronto?

24 A Yes.

25 Q And I was trying to understand if you

1 had -- I was trying to understand how Canada

2 compared to the United States in 2010 such that you

3 made this choice.

4 MS. LAWSON-REMER: Is there a question?

5 BY MS. ZEIDNER MARCUS:

6 Q Can you explain that further?

7 MS. LAWSON-REMER: Objection. Vague.

8 BY MS. ZEIDNER MARCUS:

9 Q You can answer.

10 A In 2010, Canada had gay -- legalized gay

11 marriage. And in 2010, the United States did not.

Page 22

23 Q In what month and year did you move to

24 Toronto?

25 A August of 2010.

Page 29

5 Q When did you get married?

6 A In August of 2010.

7 Q Where did you get married?

8 A In Toronto, Canada.

Pages 29-30

21 And you -- do you currently live with your

22 husband and your children?

23 A I do, yes.

24 Q Do you live with anybody else?

25 A No.

1 Q Since the four of you have become a family

2 unit, have you lived with anybody else?

3 A Since the four of us have become a family

4 unit, have we lived with anyone else? And by "live"

5 you mean -- I just want to make sure I'm going to

6 answer the question correctly -- like, under the

7 same roof for any period of time?

8 Q For a month or longer.

9 A For a month or longer. Yes, we have.

10 Q Was it one of your parents?

11 A Yes.

12 Q Other than that, was there anybody else

13 that you've lived with as a family?

14 A No.

Page 34

13 Q And currently you live in Los Angeles?

14 A I do, yes.

Pages 67-68

25 Q At some point prior to the birth of your

1 children, you and your husband, did you and your

2 husband decide to have children?

3 A At some point prior to the birth of my

4 children? Yeah.

Page 79

12 Q And I will represent for the record that

13 the complaint refers to use of an anonymous egg

14 donor. Was your -- do you understand that you used

15 anonymous egg donor?

16 A Yes.

Pages 83-84

17 Q And the -- could you describe in broad

18 strokes how you used the fertility clinic in the

19 process of having your children?

20 A Yes. We used the fertility -- in broad

21 strokes --

22 Q Yes.

23 A -- we used the fertility clinic to collect

24 our semen or sperm, to test it, to test us

25 medically, and to create embryos and to test those

1 embryos and to implant the embryos in our surrogate.

2 Totally broad strokes there.

3 Q Sure.

4 Were the embryos created after you

5 selected the surrogate and you selected each other?

6 A No.

7 Q At what point in time were the embryos

8 created, approximately?

9 A In July -- the end of July 2015, beginning

10 August 2015.

Pages 84-85

17 Q And the -- could you describe in broad

18 strokes how you used the fertility clinic in the

19 process of having your children?

20 A Yes. We used the fertility -- in broad

21 strokes --

22 Q Yes.

23 A -- we used the fertility clinic to collect

24 our semen or sperm, to test it, to test us

25 medically, and to create embryos and to test those

1 embryos and to implant the embryos in our surrogate.

2 Totally broad strokes there.

3 Q And what was your understanding at the

4 time?

5 A From the information that was provided to

6 me from the fertility clinic, I understood that one

7 of the embryos had my genetic material.

8 Q And what was your understanding with

9 respect to the other embryo?

10 A It did not have my genetic material.

11 Q Did it have your husband's genetic

12 material?

13 A Yes.

Pages 95-97

4 Q And I would like to identify for the

5 record, if you can, the page spans that are -- that

6 were submitted with the materials in -- with the

7 initial application to be distinguished from

8 anything that appears in Plaintiff's Exhibit 5 that

9 is not either the application that we just

10 identified or the initial application materials.

11 So my question for you is: Can you

12 quickly go through and identify the page spans for

13 the materials that you submitted with the initial

14 application, please.

15 MS. LAWSON-REMER: To the extent he knows

16 or remembers?

17 MS. ZEIDNER MARCUS: Correct.

18 MS. LAWSON-REMER: Okay.

19 THE WITNESS: Yeah. Are you asking me to,

20 like --

21 BY MS. LAWSON-REMER:

22 Q Yes.

23 A -- say --

24 Q Please state for the record.

25 A Like, the -- the four-digit number at the

1 top; right?

2 Q Yes, please.

3 A From, like, the beginning of the

4 application to where the end of the supporting

5 documentation is?

6 Q I'm now -- we --

7 A Basically, I just -- I don't want to have

8 to say every single number is what I'm asking you.

9 Q No, no. Right, right. Yes. Exactly. I

10 want the span, so --

11 A Okay. You want the span. Got it. Okay.

12 Q I'm looking for supporting materials.

13 We've covered the application itself.

14 A Yeah, yeah, yeah.

15 Q The supporting materials --

16 A Got it.

17 Q -- where do they start, where do they end?

18 A So supporting materials look like they

19 begin on 1764.

20 Q Okay.

21 MS. LAWSON-REMER: And just -- I'll just

22 make sure that I instruct you to look at every page

23 as you do this.

24 THE WITNESS: As I do this? Okay. I'll

25 look at every page as I do this.

1 So I believe -- this is just to the best

2 of my knowledge -- the supporting documentation

3 finishes on page 1808.

4 BY MS. ZEIDNER MARCUS:

5 Q Okay. And just to be clear, the materials

6 between 1764 and 1808 are materials that you

7 submitted with the initial application?

8 MS. LAWSON-REMER: Inclusive of 1808?

9 MS. ZEIDNER MARCUS: Yes.

10 MS. LAWSON-REMER: Okay.

11 THE WITNESS: Yes. To the best of my

12 knowledge, yes.

Page 112

19 Q Do you have any under- -- do you know the
20 result of this court order?

21 A Yes.

22 Q What was the result?

23 A The result was affirming Elad and myself's
24 parentage to our twin boys.

Page 117

3 Q Did you make one or more applications
4 during that visit?

5 A Yes.

6 Q How many total applications did you make
7 during that visit?

8 A Four.

9 Q And of those four, you made two for each
10 of your children?

11 A Yes.

Pages 125-126

7 Q Yes. I will say at another time after
8 this deposition, I'll share a story I'm recalling
9 now of a first adventure I had taking my two
10 children out and about with all those things that
11 you were just talking about.

12 And what was the next thing to happen
13 during the appointment?

14 A You mean after that prolonged period of
15 waiting?

16 Q Yes.

17 A We were called up to the window.

18 Q And was it a different window from the
19 first window that you were called up to?

20 A Yes.

21 Q And there was an individual on the other
22 side of the window?

23 A Yes.

24 Q Do you know the position that that
25 individual held?

1 A Do I know now? I know -- I know now what
2 that person's position was at the time.

3 Q Okay. And what was that person's
4 position?

5 A From my understanding, the person's
6 position was vice counsel.

7 Q And generally speaking, you understood it
8 -- this person to be a consular officer of the
9 Department of State?

10 A That's what I understood.

11 Q And were you interviewed by that person?

12 A Yes.

Page 129

15 Q What other questions do you remember?

16 A There were several. Obviously one really
17 sticks out to me just because it was a really
18 emotionally charged question. When she asked are
19 your children genetically connected -- she asked me,
20 Andrew, are your children both genetically connected
21 to you?

Pages 143-144

23 Q And can you describe how you would display
24 those emotions to the consular officer, please.

25 A It's not every day that you walk into your

1 home country's consulate to be told that you're
2 essentially not the parent of your child even though
3 you've produced a birth certificate showing that,
4 even though you've cut his umbilical cord, even
5 though you have, you know, fed him and stayed up all
6 night for -- what was that? Like, four months at
7 that point for him even though that you spent seven
8 months -- unfortunately, it was seven months. I
9 wish it was longer -- but seven months in utero --
10 at every single appointment to have a representative
11 of your country tell you that you're not his parent
12 or question that parentage.

13 So I guess to answer your question, like,
14 my emotions and my husband's emotions were derived

15 from that.

Page 161

5 Q From your perspective, generally speaking,
6 what are your claims against the Department of
7 State?

8 A From my perspective, my claim against the
9 Department of State is that my son EJ was refused
10 United States citizenship by the U.S. state
11 department. And my claim is that -- that we were
12 wrong and treated unfairly, and that's an unfair --
13 how do I say this? And -- and that he was refused
14 American citizenship because he's considered a child
15 born out of wedlock. And his twin brother born four
16 minutes before him was granted American citizenship.

Pages 165-166

4 Q Okay. Can you look at Plaintiff's Exhibit
5 5, please. I will represent to you that this was --
6 this packet that's Plaintiff's Exhibit 5 was
7 attached to defendant's initial disclosures in this
8 action and was identified by defendants as the
9 passport file for EJ. Okay?

10 If you could just turn to the page that
11 ends with the number 1767.

12 A All right. I'm here.

13 Q Okay. Do you recognize this to be a true
14 and correct copy of your marriage license?

15 A It appears to be, yes.

16 Q All right. Do you have any reason to
17 doubt its authenticity?

18 A I do not, no.

19 Q Does it look any different from the last
20 time you saw it?

21 A No. I don't think so.

22 Q Okay. And it's a copy of the document
23 that you submitted in connection with EJ's
24 applications for CRBA and passport; is that correct?

25 A Yes, that's correct.

1 Q Okay. If we could back up a little bit.

2 In the same packet, Plaintiff's Exhibit 5, go to
3 1764.

4 A Okay. I'm here.

5 Q And do you recognize this to be a true and
6 correct copy of the statement of live birth for EJ?

7 A It appears to be, yes.

8 Q And does it list you as one of his
9 fathers?

10 A It does, yes.

11 Q And who does it list as the other father?

12 A My husband.

Page 169

13 Q And then about halfway down the page,
14 starting on line 17 of page 17 of Plaintiff's
15 Exhibit 9, there are -- there's a statement that
16 says "Andrew resided in the United States from
17 January 18, 1981, day of his birth, to
18 October 2008." Is that statement true and correct?
19 A It is, yes.

Page 171

3 Q Okay. Are you a U.S. citizen?

4 A Yes.

5 Q Were you a U.S. citizen at birth?

6 A Yes.

7 Q Is it correct that you and Elad

8 Dvash-Banks were married on the day E [REDACTED] and A [REDACTED]

9 -- excuse me. I'll strike that.

10 Is it correct that you and Elad were
11 married on the day EJ and AJ were born?

12 A We were married on the day EJ and AJ were
13 born.

14 Q And what day was that?

15 A They were born on September 16th, 2016.

16 Q Okay. Does EJ live with you?

17 A Yes.

18 Q And -- and Elad?

19 A Yes.

20 Q Has he lived with you from the time he

21 left the hospital when he was born into -- to the

22 present?

23 A Yes.

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**EXCERPTS FROM THE
DEPOSITION OF TERRI
NATHINE FRANCES DAY IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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

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

5 Dated: January 7, 2019

Respectfully submitted,

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2 Q. Is it your understanding that the
3 policies that the Toronto consulate follows with
4 respect to how to adjudicate passport and CRBA
5 applications are the same policies that the State
6 Department follows?

7 A. According to my understanding, yes,
8 they are the same policies, as far as what I've
9 seen in the Foreign Affairs Manual, which is the
10 only thing I can attest to, really. And the
11 guidelines that have been given to me by Consular
12 Affairs, yes, they are the same.

Pages 29-30

17 Q. And what was your role in adjudicating
18 those applications?

19 A. My role was to determine if the
20 applicant had a claim to U.S. citizenship either
21 through their parent or their place of birth or
22 whatever reason they were -- you know, whatever
23 reason they were claiming was their purpose for
24 getting it -- acquiring U.S. citizenship. So that
25 was my -- my job was to determine if that was --

1 according to Foreign Affairs Manual and the
2 guidelines that we had, if that was -- if they were
3 entitled to that citizenship.

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4 Q. And can you explain what you mean by
5 "pending"?

6 A. "Pending," meaning in process, not
7 determined yet.

8 Q. And was it common to put applications
9 into this pending status?

10 A. Could you be a bit more specific? What
11 do you mean by "common"?

12 Q. Sure. In your experience, adjudicating
13 applications for U.S. passports and CRBA, was it
14 your typical practice to put an application into
15 pending status?

16 A. If the application called for it, yes,
17 without a doubt I would have put it in a pending
18 status, which -- so pending -- pending
19 documentation could include a birth certificate, a
20 photo, a signature that needed to be done. It
21 could mean a whole list of things. So it was
22 definitely something that was -- that happened
23 fairly frequently.

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12 Q. And I think before you referred to
13 there's a checklist you go through. Is that a
14 metaphorical checklist or is that a physical
15 checklist?

16 A. That is a metaphorical checklist. We
17 know based on the FAM what documents are required,
18 what things we need to know about the parent and
19 about the parents' relationship with the child. We
20 know that, but you're not going to go through the
21 FAM, you know, line by line. You're going to know
22 what it's asking you, and then you're going to --
23 you're going to say, "Okay, have I seen this?"
24 Yes. "Have I seen this?" No. Et cetera.

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6 Q. So in that window from January 2017 to
7 March 2017 when you were working at the Toronto
8 consulate, did you have authority to make a final
9 decision whether to approve or deny applications?

10 A. Yes.

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2 Q. Did you ever consult any other

3 documents or guidance of any kind during the course
4 of your adjudication of U.S. passport and CRBA
5 applications?

6 A. I would say no.

7 Q. Did you ever consult the FAM?

8 A. Yes.

9 Q. Was there anything else that you ever
10 consulted?

11 A. I can't -- I can't say with 100 percent
12 certainty. I don't remember specifically, but in
13 my experience, the FAM is the -- is the guideline
14 that is followed. If there are changes and they
15 are communicated to us through our managers, be it
16 in NIV, IV or ACS.

Pages 94-95

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

1 CRBAs; is that correct?

2 A. Yes.

3 Q. And what was your role?

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

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

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

14 Q. Sure.

15 A. -- because they were -- they were
16 treated as -- I mean, all the information that's
17 true for one -- in the initial interview phase, as

18 far as I knew, it would have been true for the
19 other. So no one was -- I mean, I consulted with
20 my manager about the case, and she brought in
21 Maggie Ramsay as well. But during the -- and
22 during the interview, at a certain point, Maggie
23 Ramsay did speak to the family. So in that way,
24 people were involved, but the ultimate decision was
25 mine.

Pages 110-112

22 Q. And then when you first met the
23 Dvash-Banks family, did you meet them in the
24 waitingroom?

25 A. No. So I would call the family up to

1 my window. I -- we have an intercom. I would say,
2 "Dvash-Banks family to window C."

3 Q. And then I think you testified earlier
4 that at that point, you would have sworn the
5 parents; is that correct?

6 A. Uh-huh.

7 Q. And then what would happen next? What
8 happened next?

9 A. What would happen next is we would
10 begin the interview. They would sign documents,
11 specifically. We would get all the clerical stuff
12 out of the way, and they would sign documents. We
13 would -- I would -- I would confirm their identity
14 to the photos. I would look at the kids. All of
15 that -- those things that you have to do at the
16 very beginning are all clerical things.

17 And then I would determine -- now, the
18 section of the law that they would fall under is
19 already -- you know, we already know the situation.
20 So I'm coming into it with that mind-set. If
21 during the course of the interview I find something
22 out different, then, obviously, I would change.

23 But for the most part, you know, I would ask them
24 questions along the lines of, okay, you know, your
25 marriage certificate, when did you get married, et

1 cetera, and then talking about the kids, how they
2 were conceived. If I have any questions about
3 that, I would ask that at that time. And then
4 we -- and then that's when we would get into, okay,
5 how they were conceived, who -- you know, who's
6 biologically related to whom, and then -- and on
7 through.

8 Q. And to the best of your recollection,
9 is this what happened on the day that you
10 interviewed the Dvash-Banks family?

11 A. I would say yes.

Pages 119-120

22 Q: Do you remember anything that
23 Andrew and Elad said to you that made you feel like
24 they thought they were being attacked?)

25 THE WITNESS: I do remember them --

1 especially Andrew saying, you know, these are our
2 children. These are our sons. I'm the dad, and
3 this is -- you know, and Elad, I think is his name,
4 Elad is the dad. You know, we're the parents of
5 these boys. You know, they're -- those kinds of
6 things, which made me kind of feel like -- I mean,
7 they were feeling that they were, you know, being
8 attacked. And it was directed at me, you know, no
9 doubt, not -- not necessarily at the FAM. They
10 probably don't -- have never heard of it until now.
11 But, you know -- so, yeah, that was -- those were
12 the kinds of things that they were saying.

Pages 121-122

19 Q. Still discussing the day of the

20 interview, January 4th, 2017, your interaction
21 with -- January 24th -- excuse me - your
22 interaction with the Dvash-Banks family on the day
23 of the interview, and we were talking before the
24 break about your conversation with the Dvash-Banks
25 family; is that correct?

1 A. Yes.

Page 142

19 Q. Did you consider Ontario law to
20 determine whether Andrew and Elad were a married
21 couple?

22 A. In that I had a copy of their marriage
23 certificate from the Ontario government, I -- I
24 looked at that document as a -- as proof of their
25 marriage.

Pages 155-156

24 Q. And is this document Andrew and Elad's
25 Canadian marriage license?

1 A. It would seem to be a marriage license
2 from Ontario, yes. It has their names on it.

3 Q. And did you consider this document to
4 be sufficient proof that Andrew and Elad were
5 married at the time of E.J.'s birth?

6 A. Yes.

Pages 161-162

24 Q. And the marriage license document that
25 is Bates-stamped 00070270-1767 and is marked as

1 Day Exhibit 4, does that refresh your recollection?

2 A. It -- it does. It is a marriage
3 license that has Andrew and Elad's name on it. So
4 if I saw this, I would -- at this point in time I
5 see this, and I would make the determination that
6 they are married, which is -- yeah.

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16 Q. So does this CRBA that the consulate
17 issued to A.J. reflect that he acquired U.S.
18 citizenship at birth?

19 A. Yes.

20 Q. Is this document, A.J.'s CRBA,
21 consistent, generally, with the form of a CRBA that
22 was in effect in March 2017, to the best of your
23 recollection?

24 A. As far as I recall, yes.

Pages 172-173

5 Q. And can you turn, please, to the
6 document that is Bates-stamped 00070270-1764. And
7 I'll represent for the record that the title of the
8 document is "Statement of Live Birth."

9 A. 1764. Yes

10 Q. What is this document?

11 A. It seems to be a Statement of Live
12 Birth for E█████ J█████ D█████-B█████.

13 Q. And have you seen this document before?

14 A. Yes, I have.

15 Q. And is this document E.J.'s Canadian
16 birth certificate?

17 A. It would seem to be, yes. A copy of
18 that.

19 Q. And in your review of this document
20 during the process of adjudicating E.J.'s
21 application, did you consider this document to be a
22 true and accurate copy of E.J.'s timely filed
23 Canadian birth certificate?

24 A. Yes.

25 Q. Did you consider this document to be

1 adequate proof that Andrew and Elad Dvash-Banks
2 were E.J.'s parents?

3 MS. MARCUS: Objection. Vague as to
4 the term "parents."
5 BY MS. GOLDSMITH:
6 Q. You can answer.
7 A. I need clarification on the term
8 "parents."
9 Q. Did you consider this document to be
10 adequate proof that Andrew and Elad Dvash-Banks are
11 E.J.'s legal parents?
12 A. I would say yes.

Pages 173-174

19 Q. What is this document?
20 A. It is an Ontario -- it seems to be a
21 copy of an Ontario court document that names Elad
22 and Andrew Dvash-Banks as the parents of E█████
23 J█████ D█████-B█████.
24 Q. And have you seen this document before?
25 A. I have, yes.

1 Q. Did you consider this document to be
2 adequate proof that Andrew and Elad were E.J.'s
3 parents at the time of E.J.'s birth? And, again,
4 I'm referring to legal parents.
5 A. I would say yes.

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

Pages 232-233

23 Q. Would it have made a difference whether
24 you had adjudicated these applications under INA
25 301 versus INA 309 for these cases?

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

3 Q. Why not?

4 A. Because the biological connection is
5 still required.

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

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

Pages 277-278

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

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

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

1 FAM?

2 A. Yes.

EXHIBIT E

In the Matter Of:

Andrew Mason Dvash-Banks, et al v.
The United States Department of State, et al

LARILYN REFFETT

December 06, 2018

neelsons

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Toronto, ON M5K 1A2
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LARILYN REFFETT on December 06, 2018

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANDREW MASON DVASH-BANKS and)
E [REDACTED] J [REDACTED] D [REDACTED]-B [REDACTED],) COMPLAINT FOR
Plaintiffs,) DECLARATION AND
) INJUNCTIVE RELIEF
v.)
THE UNITED STATES DEPARTMENT) Docket No. Case
OF STATE, and THE HONORABLE) 2:18-cv-00523-JFW-JCx
MICHAEL R. POMPEO, Secretary) JFW
of State,)
Defendants.)

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--- This is the Transcript of the Audio-Recorded
Deposition of LARILYN REFFETT, taken at the U.S.
Consulate, 360 University Avenue, Toronto, Ontario,
MSG 1S4, on the 6th day of December, 2018.

Reported By: Deana Santedicola, CSR (Ont.), RPR,
CRR

LARICYN REPORT on December 06, 2018

Page 2

1 A P P E A R A N C E S:

2 FOR THE PLAINTIFFS, ANDREW MASON DVASH-BANKS

3 and E [REDACTED] J [REDACTED] D [REDACTED]-B [REDACTED]:

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13 FOR THE DEFENDANTS, THE UNITED STATES DEPARTMENT

14 OF STATE, AND THE HONOURABLE MICHAEL R. POMPEO,

15 SECRETARY OF STATE:

16 UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION

17 FEDERAL PROGRAMS BRANCH

18 PER: Lisa Zeidner Marcus, Esq.

19 1100 L Street NW, 11th Floor,

20 Washington, DC, 20530

21 Email: lisa.marcus@usdoj.gov

22

23 Also Present: Jeremy Weinberg, U.S. Department of

24 State, Office of the Legal Advisor

25

LARILYN REFFETT on December 06, 2018 Page 3

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I N D E X

WITNESS: LARILYN REFFETT

PAGE

EXAMINATION BY MS. KLEIN..... 6

REDIRECT EXAMINATION BY MS. ZEIDNER

MARCUS..... 201

1 Goldsmith of Sullivan & Cromwell. I'm also
2 representing Andrew and E [REDACTED] D [REDACTED]-B [REDACTED].

3 MS. ZEIDNER MARCUS: I am Lisa Zeidner
4 Marcus, trial attorney, U.S. Department of Justice.
5 I represent the Defendants in this matter, the U.S.
6 Department of State and the Secretary of State who
7 was sued in his official capacity.

8 MR. WEINBERG: Jeremy Weinberg,
9 Department of State, Office of the Legal Advisor,
10 also representing the U.S. government in this
11 matter, Department of State.

12 AUDIO-RECORDER: Would the reporter
13 please swear or affirm the witness.

14 LARILYN REFFETT; AFFIRMED.

15 EXAMINATION BY MS. KLEIN:

16 Q. Good morning, Ms. Reffett.

17 A. Good morning.

18 Q. As you heard, I am Jessica Klein
19 and I am representing the Plaintiffs in this
20 matter. Have you ever been deposed before?

21 A. No.

22 Q. And have you ever testified in
23 Court?

24 A. No.

25 Q. Have you ever given testimony

1 Q. Did your training that you have
2 received in your career include training you in the
3 policies of the Toronto Consulate in adjudicating
4 applications for U.S. passports?

5 A. There is nothing Toronto-specific
6 in training.

7 Q. So is it correct then that the
8 policies of the United States State Department are
9 one and the same with the policies of the Toronto
10 Consulate in the adjudication of applications for
11 U.S. passports?

12 A. The adjudications here in Toronto
13 are done solely based on the guidance and the
14 references that we are provided by the Department
15 of State.

16 Q. Is there any Toronto
17 Consulate-specific guidance concerning
18 adjudications of U.S. passports?

19 A. No.

20 Q. What about Canada-specific?

21 A. No.

22 Q. So is it correct then that the
23 training you have received on the adjudication of
24 passport applications has been training that, to
25 your understanding, would apply in any consular

1 for Consular Reports of Birth Abroad?

2 A. Yes, when I mentioned the
3 adjudication piece, we don't separate. Those
4 appointments are all at the same time. You just
5 take whatever comes as it comes in.

6 Q. So am I correct that in addition
7 to adjudications randomly selected for your review,
8 you sometimes adjudicate applications for Consular
9 Reports of Birth Abroad?

10 A. I do.

11 Q. And do you make determinations of
12 who is a U.S. citizen?

13 A. Yes, that is part and parcel of
14 the adjudication.

15 Q. Is a determination of who is a
16 U.S. citizen part and parcel of adjudicating a
17 Consular Report of Birth Abroad?

18 A. That is the purpose of the
19 Consular Report of Birth Abroad, is to determine
20 whether someone is a U.S. citizen.

21 Q. And is the purpose of a Consular
22 Report of Birth Abroad to determine whether someone
23 is a U.S. citizen from birth?

24 A. Correct.

25 Q. And is the determination of U.S.

1 I mean, it is just a chart that just kind of has
2 the relevant scenario and then the FAM section that
3 you would consult for that.

4 Q. Okay. Is it accurate to say that
5 in adjudicating U.S. passport applications, the
6 Toronto Consulate applies the Foreign Affairs
7 Manual?

8 A. Well, we comply with the
9 instructions in the Foreign Affairs Manual, yes.

10 Q. All right. Is there any way in
11 which you are aware that the Toronto Consulate does
12 not comply with the Foreign Affairs Manual in the
13 adjudication of U.S. passport applications?

14 A. No.

15 Q. And is that also the case for the
16 application of Consular Reports for Birth Abroad?

17 A. Correct.

18 Q. So the Toronto Consulate applies
19 the Foreign Affairs Manual in adjudicating Consular
20 Reports for Birth Abroad?

21 A. We consult the Foreign Affairs
22 Manual and follow all of the relevant guidance that
23 we are required to follow.

24 Q. Is there any way in which you are
25 aware that the Toronto Consulate does not follow

1 the Foreign Affairs Manual in adjudicating
2 applications for Consular Reports of Birth Abroad?

3 A. No.

4 Q. And am I correct that the same is
5 true for U.S. passport applications?

6 A. Correct.

7 Q. Is there a practice in the Toronto
8 Consulate of an officer placing her initials on
9 each page of a passport application that she
10 adjudicates?

11 A. Not on each page that you
12 adjudicate, but we are required when we have
13 certified true copies, we are required as the
14 officer to put our initials to verify that we saw
15 the original document and that it matches the copy.

16 Q. So am I correct that if an officer
17 places her initials on a page of a U.S. passport
18 application file, that means to you that she has
19 consulted the original document and compared it to
20 the copy for accuracy between the two?

21 MS. ZEIDNER MARCUS: I would like to
22 consult with my colleague about a potential
23 privilege and briefly go off the record.

24 AUDIO-RECORDER: We are going off the
25 record at 11:39 a.m.

1 looks like it.

2 Q. And whose name is listed as the
3 person sending or writing this letter?

4 A. The letter was signed by Terri
5 Day.

6 Q. And is it your understanding that
7 E [REDACTED] D [REDACTED]-B [REDACTED]'s applications for U.S. passport
8 and Consular Report of Birth Abroad were denied?

9 A. Yes.

10 Q. Who adjudicated those
11 applications?

12 A. It is my understanding that Terri
13 Day adjudicated those two cases.

14 Q. And did Ms. Day have authority to
15 make the ultimate determination of whether to deny
16 those applications?

17 A. Yes, she did.

18 Q. And was she employed at the
19 Toronto Consulate on March 2nd, 2017?

20 A. Yes.

21 Q. Okay. And what reason or reasons
22 does this document cite as the basis for those
23 denials?

24 MS. ZEIDNER MARCUS: Objection, form,
25 foundation.

1 a U.S. passport and Consular Report of Birth
2 Abroad?

3 A. Making the determination? What do
4 you mean by that? The case was adjudicated by
5 Frankie Day -- Terri Day in this case.

6 Q. Am I correct that it is your
7 understanding that Ms. Day interviewed E [REDACTED] and
8 the Dvash-Bankses concerning these applications?

9 A. My understanding is that Terri Day
10 did in fact interview the Dvash-Banks family, and
11 based on her interview and based on the follow-up
12 information that she requested, she denied these
13 applications.

14 Q. And from the period of when the
15 applications were initiated through March 2nd,
16 2017, when this letter was dated, were you
17 personally involved at all in these applications or
18 their adjudication?

19 A. The day of the interview, Frankie
20 asked me about -- she told me that she was going to
21 request DNA testing. She asked me how she went
22 about doing that. I explained to her that she just
23 needs to ask a local staff to draft the letter.
24 There is standard language that explains how to
25 obtain a DNA test that is -- that meets the

1 requirements of the Department of State.

2 She asked for that letter and then
3 presented it to the family, so I was aware at that
4 point that she was requesting the DNA evidence. At
5 that point, a case will go into pending status.
6 Cases generally are allowed to remain in that
7 status for up to 90 days without any further
8 action. At the 90-day mark, we will review again
9 to see whether or not we have received the
10 information we have requested and try and proceed
11 with the case.

12 Q. Ms. Day spoke to you on the date
13 when the Dvash-Banks family came in about
14 requesting DNA testing; is that correct?

15 A. Yes, she asked me to verify how
16 the procedure works, what documentation needs to
17 happen, because we aren't in charge of the DNA
18 program as the adjudicating officers, so she wanted
19 to verify that she was getting the right letter,
20 giving them the right information about how to
21 proceed with that testing.

22 Q. Did Ms. Day share with you the
23 facts surrounding these applications for E [REDACTED]?

24 A. She told me that she had a case
25 that involved artificial reproductive technology.

1 She said that it was not clear from the
2 documentation who was biologically related to who
3 in the case and she was requesting the DNA in order
4 to establish that.

5 Q. Did you ever meet any members of
6 the Dvash-Banks family?

7 A. No.

8 Q. Did you ever see any members of
9 the Dvash-Banks family?

10 A. I might have seen them through the
11 interview windows. I generally walk up and down my
12 section to check on how things are going and, you
13 know, what is moving and what is not moving.

14 If they need additional assistance, for
15 example, if there are too many cases and we need
16 more interviews, I might be sort of checking on
17 that, but nothing that would have stood out to me
18 or that I realized, I mean, that I had seen this
19 particular family, no.

20 Q. Did Ms. Day inform you that the
21 Dvash-Banks family includes a same-sex couple?

22 A. She did.

23 Q. What did Ms. Day tell you?

24 A. She told me that she, as I
25 mentioned, she had a case involving artificial

1 Oftentimes in those situations, the
2 officers will make sure that all of the other
3 officers know that this is pending because if, for
4 example, the documentation came in while, for
5 example, Frankie was on leave, we would need to be
6 sure that we understood what we were waiting for.

7 Q. I would like to focus on your
8 conversations with Ms. Day about these applications
9 for the next several questions.

10 When Ms. Day first spoke with you about
11 E [REDACTED]'s applications, had she already decided to
12 give them pending status?

13 A. When she came to me, she explained
14 to me that the documentation did not establish the
15 biological relationship, so she was going to
16 request the DNA testing and she asked me about the
17 proper procedure for doing that.

18 Q. And did she ask you only what the
19 procedure was or also whether to seek DNA testing?

20 A. I don't recall the specific
21 details of the conversation, but what the result
22 was, and what -- I mean, what I recall was that I
23 explained to her how to do this and this is -- you
24 know, she told me I don't have in front of me in
25 this interview or this application the information

1 Q. And are you referring to being
2 notified of an inquiry that was made with
3 congressional staff?

4 A. Generally speaking, if
5 congressional staff have received an inquiry from a
6 member of the public about a case or a consular
7 service that is taking place at your post, that
8 staff will email you and ask you either for comment
9 or will just give you the just FYI this is what we
10 have received.

11 I know we did have correspondence from
12 a congressional office, but I don't remember the
13 date of it.

14 Q. Is it your understanding that when
15 Ms. Day signed this letter on March 2nd, 2017, the
16 adjudication was final?

17 A. Yes, that is my understanding.

18 Q. And sitting here today, do you
19 remember any involvement you had in the
20 adjudication or processing of E [REDACTED]'s applications
21 for a passport or Consular Report of Birth Abroad
22 other than the three brief conversations with Ms.
23 Day that you described?

24 A. No.

25 Q. Okay. Have you read E [REDACTED]'s

1 application materials?

2 A. No.

3 Q. So you don't have any view as to
4 the authenticity or completeness of the application
5 that was filed?

6 A. I have not seen the application.
7 I have only heard what Frankie told me about the
8 facts that she was presented.

9 Q. So sitting here today, what is
10 your understanding of why Frankie Terri Day denied
11 E [REDACTED]'s applications for a U.S. passport and
12 Consular Report of Birth Abroad?

13 A. My understanding is that the
14 applicants did not establish the biological
15 relationship between the American citizen parent
16 and the child, which is required by the Immigration
17 and Nationality Act.

18 Q. And are you aware of any other
19 reason why E [REDACTED]'s applications were denied?

20 A. No.

21 Q. And as you read the document
22 marked DVASH-BANKS30, Plaintiffs Deposition Exhibit
23 1, do you read it to state that there was no other
24 reason for the denial of the applications?

25 A. That is correct. I read it to

1 state that the denial was based on the
2 non-establishment of the blood relationship
3 required by the Immigration and Nationality Act.

4 Q. Do you know if anyone was involved
5 in the adjudication of those applications other
6 than Ms. Day?

7 A. In the adjudication, no.

8 Q. Do you know if anyone was involved
9 in processing the applications other than Ms. Day?

10 A. I do know that the same way that I
11 provided guidance on how to request a DNA test,
12 that my colleague Margaret Ramsay also provided the
13 relevant FAM citations, the Foreign Affairs Manual,
14 so that Frankie could consult if she wanted to, if
15 she needed to, the appropriate sections of the
16 Foreign Affairs Manual.

17 Q. Do you know of anyone else who was
18 involved?

19 A. No. Well, I mean, if you are
20 talking about the adjudication, I mean, there would
21 have been the receipt of the DNA, which that gets
22 received by the Fraud Prevention Officer, but it is
23 kind of a moving the mail.

24 Q. And do you know in what month and
25 year E [REDACTED]'s applications were submitted to the

1 citizen was the parent, that application was
2 approved.

3 Q. And were you personally involved
4 in the adjudication of that application?

5 A. No.

6 Q. Did Ms. Day ever speak with you
7 concerning the adjudication of that application?

8 A. Not separately. The two
9 applications were part of the same set of
10 circumstances, so when she informed me that she was
11 requesting DNA for one, she informed me she was
12 requesting DNA for the other as well. When the DNA
13 results came back and she informed me of the
14 results, she told me the results for each child.

15 Q. Is it your understanding that Ms.
16 Day was the person who granted A [REDACTED]'s application
17 for a U.S. passport?

18 A. It is my understanding that she
19 approved that application.

20 Q. And is the same true for A [REDACTED]'s
21 application for a Consular Report of Birth Abroad?

22 A. Yes.

23 Q. Under what circumstances does the
24 consulate ask for DNA evidence in support of an
25 application for a U.S. passport?

1 adjudicating that case would then have reference
2 material. They would be able to reference the
3 previous application so that they could see what
4 happened and where that case was -- how it
5 terminated.

6 Q. Does Ms. Day's letter dated March
7 2nd, 2017, reflect a final adjudication of E [REDACTED]'s
8 applications for a U.S. passport and Consular
9 Report of Birth Abroad?

10 A. As far as the applications that
11 were submitted here in Toronto, that letter
12 absolutely is a final determination. In the
13 second-to-last paragraph:

14 "[...] therefore the
15 applications are denied."

16 That is the termination of that case
17 from that point forward.

18 Q. So how would you describe the
19 status of that case for the Toronto Consulate
20 today?

21 A. The case was denied and it is
22 closed.

23 Q. And does your office prepare
24 additional paperwork concerning the adjudication of
25 a U.S. passport application beyond this letter?

1 earlier, and it is case-specific. Medical
2 documentation is one way that we can try and get to
3 a point where we understand the biological
4 relationships, but also in the interview that will
5 be a question that will be asked.

6 Based on the answers and based on the
7 conversation that the officer has with the
8 applicant, that will determine whether -- what
9 steps need to be taken next and what that entails,
10 if it entails DNA or something else.

11 Q. Is there any example or scenario
12 you are aware of in which two married men have
13 applied for a U.S. passport for their child born
14 abroad and not been asked to evidence the genetic
15 relationships of the child?

16 A. The biological relationship has to
17 be established, as we noted in the letter that you
18 have provided as Exhibit 1, the Immigration and
19 Nationality Act requires a blood relationship. We
20 have to establish that blood relationship in every
21 case.

22 Q. What is your understanding of in
23 what cases the Immigration and Nationality Act
24 requires a blood relationship between a child born
25 outside of the United States and a U.S. citizen?

1 A. If the U.S. citizen is
2 transmitting citizenship, there must be a
3 biological relationship between the child and the
4 parent, unless in the case of a female parent, if
5 you are the gestational parent, that also meets the
6 requirements. There must be a biological or
7 gestational relationship.

8 MS. ZEIDNER MARCUS: Can we go off the
9 record for a moment for me to confer with my
10 colleague, please.

11 AUDIO-RECORDER: We are going off the
12 record at 2:25 p.m.

13 -- RECESSED AT 2:25 P.M.

14 -- RESUMED AT 2:27 P.M.

15 AUDIO-RECORDER: We are now back on the
16 record at 2:27 p.m.

17 BY MS. KLEIN:

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

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

25 Q. And that is your understanding of

1 allow that U.S. citizen to confer citizenship upon
2 his child?

3 A. It is not the Toronto Consulate.
4 This would be the Immigration and Nationality Act.
5 It will require that the biological relationship is
6 established. Without the biological relationship,
7 the American citizen parent cannot transmit
8 citizenship.

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

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

20 Q. Regardless of whether the parents
21 are married?

22 A. Correct.

23 Q. And it is your understanding that
24 that is what the INA requires?

25 A. That is the Department's guidance

1 as to the Immigration and Nationality Act. We must
2 establish a biological relationship between the
3 U.S. citizen parent and the child.

4 Q. Are you aware of any difference
5 between the relevant provisions of the INA and of
6 the guidance from the State Department concerning
7 this issue?

8 A. No.

9 Q. And I believe you testified
10 earlier today that in adjudicating most passport
11 applications, the Toronto Consulate does not review
12 any legal or policy materials; is that correct?

13 A. In many cases, it is not required.
14 Most of the cases that we see here fall within a
15 very limited range of, you know, circumstances, the
16 things that we see on a very regular basis, and
17 doesn't require us to reference the Foreign Affairs
18 Manual every time that we see that type of case.

19 Q. And does the Toronto Consulate
20 ever reference the INA in adjudicating applications
21 for U.S. passports?

22 A. As I previously stated, the INA is
23 one source of information. If we have questions
24 about the case that is in front of us or the
25 parameters, we could consult with the INA. Every

1 The reason that that requirement is
2 specifically listed is to remind people who may not
3 remember that one random date so that when they
4 need to look at it and say, wait, what was the date
5 that the law changed, it is right there for them.
6 They can see very quickly what the differences are
7 between those two requirements.

8 The blood relationship did not change
9 on that date. It has always existed.

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

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

20 Q. And is there an exception for a
21 woman who is a gestational parent without a
22 biological relationship to the child?

23 A. Well, when I say a "biological,"
24 because we have been talking about fathers and, you
25 know, this particular, the row that you have

1 highlighted "Amcit Father out of Wedlock," we
2 weren't discussing mothers.

3 For mothers, the relationship has to be
4 either biological or gestational.

5 Q. And is the allowance for a
6 gestational mother who is not biologically related
7 to her child, as you understand it, in the INA?

8 A. I have not referenced the section
9 of the INA that would spell that out in some time.
10 I have seen the guidance from the Department. That
11 isn't one that I have had to pull up recently to
12 consult. I can't say with any confidence that I,
13 again, can recite that section of the INA.

14 Q. Is it the case that since you have
15 worked in the Toronto Consulate, there has been
16 allowance of a gestational mother U.S. citizen to
17 confer citizenship on a child who she is not
18 biologically related to?

19 A. I don't know about the word
20 "allowance." Whether somebody has transmitted and
21 had approved an application to transmit citizenship
22 as a gestational mother, I can't say for certain.
23 I suspect yes. This wouldn't be something that was
24 out of the unusual.

25 But again, I don't keep statistics on

1 about something that you are specifically looking
2 at that might have changed, because there have been
3 substantial changes.

4 Q. Are you aware of any changes to
5 the biological relationship to a U.S. citizen
6 parent requirement that have changed during your
7 tenure at the Toronto Consulate?

8 A. I don't know the exact dates of
9 changes as they have come and gone. I do -- we
10 have touched on this issue earlier, but we have
11 talked about the fact that the biological
12 relationship does now include a gestational mother
13 role, for example.

14 Being a gestational mother does in fact
15 meet the biological -- does in fact qualify as a
16 biological relationship. That has been a change,
17 but when it happened, I honestly don't know. It is
18 not something I keep track of.

19 Q. And other than the treatment of
20 gestational mothers who are not genetically related
21 to their children, are you aware of any other
22 changes that have been made at the State Department
23 in the requirements of a biological tie between a
24 U.S. citizen and his child?

25 A. I am not specific -- I don't know

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REPORTER'S CERTIFICATE

I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under oath
by me;

That the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 12th day of December, 2018



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PER: DEANA SANTEDICOLA, RPR, CRR, CSR
CERTIFIED REAL-TIME REPORTER

EXHIBIT F

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANDREW MASON DVASH-
BANKS and E [REDACTED] J [REDACTED]
D [REDACTED]-B [REDACTED],

Plaintiffs,

v.

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

Defendants.

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

**PLAINTIFFS' RESPONSES TO
DEFENDANTS' FIRST SET OF
DISCOVERY REQUESTS**

All of these documents were previously submitted to the State Department in support of E█████'s Consular Report of Birth Abroad ("CRBA") and/or U.S. passport applications. Plaintiffs do not intend this answer as a complete recitation of all the support for the allegation about which Interrogatory No. 4 inquires, and Plaintiffs reserve the right to modify or supplement their responses and objections to Interrogatory No. 4.

Interrogatory No. 5:

Identify any and all "difficulties and humiliation" that the Dvash-Banks family has endured due to the denial of a Consular Report of Birth Abroad and a U.S. passport for E█████, as alleged in paragraph 57 of your Complaint.

Response to Interrogatory No. 5:

Plaintiffs incorporate their Objections by reference and further object to Interrogatory No. 5 on the grounds that the Complaint speaks for itself and refer Defendants to the Complaint.

Subject to, and without waiver of, any of the Objections, Plaintiffs respond as follows:

The Dvash-Banks family has endured a multitude of harm, difficulties and humiliation as a result of the State Department's improper denial of the CRBA and U.S. passport applications for E█████. That harm includes damage to Plaintiffs' family life and unity, dignity, as well as the other forms of denigration and distress that result from Defendants' unwarranted denial of recognition of E█████'s U.S. citizenship at birth and branding of E█████ as an illegitimate child born "out of wedlock" to Andrew and Elad. Some, but by no means all, of the harm, difficulties and humiliation include the following: Andrew and Elad have suffered dignitary and stigmatic harm as a result of being treated differently based on their sexual orientation, including the State Department's refusal to recognize their marriage or that they are entitled to the same marital rights and benefits as opposite sex

2 born “out of wedlock.” The stigma to E [REDACTED], still a young child, of being
3 characterized as illegitimate, differentiated from his twin brother A [REDACTED], and
4 treated as though he is not his father Andrew’s son, is expected to continue for as
5 long as Defendants fail to recognize his U.S. citizenship and the effects of
6 Defendants’ arbitrary and unjustified conduct may well extend in perpetuity. The
7 practical consequences for E [REDACTED] range from how he is treated when he travels,
8 including the passport he holds, to whether he will one day during his childhood
9 develop the anxiety of knowing that he could be forced to leave the country at any
10 time. Plaintiffs have been and continue to be plagued by the fear of having their
11 family ripped apart.

12 Plaintiffs have been hampered in their ability to travel. Plaintiffs were
13 forced to cancel a trip to Israel to visit Elad’s family because E [REDACTED] was limited to
14 only a travel visa, which had expired, and there was a serious risk that he would be
15 prevented from reentering the United States upon his return. Even though E [REDACTED]
16 now has an Advance Parole document that allows travel outside the United States,
17 the risk that E [REDACTED] may not be granted reentry continues, as mere possession of
18 Advance Parole does not guarantee admission into the United States. Specifically,
19 individuals who have been unlawfully present in the U.S. and subsequently depart
20 and seek reentry through a grant of parole may be inadmissible. *See*
21 [https://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-](https://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-authorization-and-advance-parole-card-adjustment-status-applicants-questions-and-answers)
22 [authorization-and-advance-parole-card-adjustment-status-applicants-questions-](https://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-authorization-and-advance-parole-card-adjustment-status-applicants-questions-and-answers)
23 [and-answers](https://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-authorization-and-advance-parole-card-adjustment-status-applicants-questions-and-answers). When the Dvash-Banks family returned home from a recent trip to
24 Mexico, Andrew and E [REDACTED] were diverted to a room for secondary inspection,
25 while Elad and A [REDACTED] were able to pass through ordinary immigration and
26 customs.

27 Plaintiffs have also been harmed financially. For example, when Plaintiffs
28 were filing their 2017 taxes, they wished to claim a dependent exemption for

2 have a social security number, Andrew and Elad had to pay an accountant to obtain
3 an individual taxpayer identification number (“ITIN”) for E■■■■. This unnecessary
4 complication delayed payment of Plaintiffs’ tax refund, which they received only
5 recently. Plaintiffs also have had to expend substantial sums of money on E■■■■’s
6 green card application, which would be entirely unnecessary had his CRBA
7 application not been denied.

8 Plaintiffs have also had to spend countless hours dealing with the
9 ramifications of the denial of E■■■■’s CRBA and U.S. passport applications. For
10 instance, Plaintiffs have spent time on E■■■■’s green card application (and
11 associated Advance Parole document application). Plaintiffs have also spent long
12 hours attending to this Action, which has caused them to divert time and attention
13 from other pursuits. Andrew and Elad have faced additional difficulties including
14 explaining to their health care provider why A■■■■ has a social security number
15 while E■■■■ does not, as well as the tax return issues described above.

16 Plaintiffs have had to deal with publicity they never wanted. Before this
17 lawsuit, Andrew and Elad had no intention of disclosing to their children, let alone
18 to the general public, which child was biologically related to which parent, let
19 alone the private details of E■■■■ and A■■■■’s conception.

20 Plaintiffs reserve the right to modify or supplement their responses and
21 objections to Interrogatory No. 5.

22 **Interrogatory No. 6:**

23 Identify who you consider to be “similarly situated persons” as alleged in
24 paragraph 71 of your complaint and implied throughout your complaint.

25 **Response to Interrogatory No. 6:**

26 Plaintiffs incorporate their Objections by reference and further object to
27 Interrogatory No. 6 on the grounds that it is premature. Plaintiffs are still
28 developing their legal arguments, a process that has been substantially inhibited by

2 further state that Andrew is listed as a parent of E█████ on E█████’s Statement of
3 Live Birth. Plaintiffs further refer Defendants to the Declaration of Parentage of
4 E█████, which declared Andrew and Elad to be E█████’s parents “for all purposes in
5 law.”

6 **Request for Admission No. 13:**

7 Admit that your (Andrew’s) status as a legal parent of E█████ D█████-B█████
8 was not established until September 28, 2016.

9 **Response to Request for Admission No. 13:**

10 Plaintiffs incorporate their Objections by reference and further object on the
11 grounds that Request for Admission No. 13 calls for a legal conclusion.

12 Subject to, and without waiver of, any of the Objections, Plaintiffs deny that
13 Andrew’s status as a legal parent of E█████ was not established until September 28,
14 2016, twelve days after E█████’s birth.

15 **Request for Admission No. 14:**

16 Admit that you (Andrew) are not biologically related to E█████

17 **Response to Request for Admission No. 14:**

18 Plaintiffs incorporate their Objections by reference.

19 Subject to, and without waiver of, any of the Objections, Plaintiffs admit that
20 the DNA testing described in Plaintiffs’ Response to Request for Admission No. 6
21 did not find a biological connection between Andrew and E█████.

22 **Request for Admission No. 15:**

23 Admit that you (Andrew) and/or your husband (Elad) arranged for DNA
24 testing to be conducted in September 2016, after E█████ and A█████ were born, to
25 establish the parentage of E█████ and A█████.

26 **Response to Request for Admission No. 15:**

27 Plaintiffs incorporate their Objections by reference and further object to
28 Request for Admission No. 15 on the grounds that the phrase “establish the

2 and argumentative in that it assumes any DNA test was performed to “establish
3 parentage or non-parentage for E [REDACTED].” By responding to Request for Production
4 No. 11, Plaintiffs do not admit that the tests were performed to “establish the
5 parentage” of E [REDACTED]. Plaintiffs further object to Request for Production No. 11 to
6 the extent that it seeks the production of documents protected by the attorney-client
7 privilege and/or the work product doctrine. Plaintiffs construe the request as
8 seeking applications for and/or results of each DNA and/or paternity test
9 performed to establish whether E [REDACTED] was biologically related to either Andrew or
10 Elad, other than the documentation submitted with E [REDACTED]’s CRBA and U.S.
11 passport applications in January 2017.

12 In view of the foregoing objections and the other Objections, Plaintiffs will
13 not produce documents in response to Request for Production No. 11. Subject to,
14 and without waiver of, the Objections, Plaintiffs refer Defendants to Plaintiffs’
15 Response to Request for Admission No. 14, and state that they are available to
16 meet and confer with Defendants to discuss Plaintiffs’ objections to Request for
17 Production No. 11.

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20 Dated: November 19, 2018

Respectfully submitted,

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

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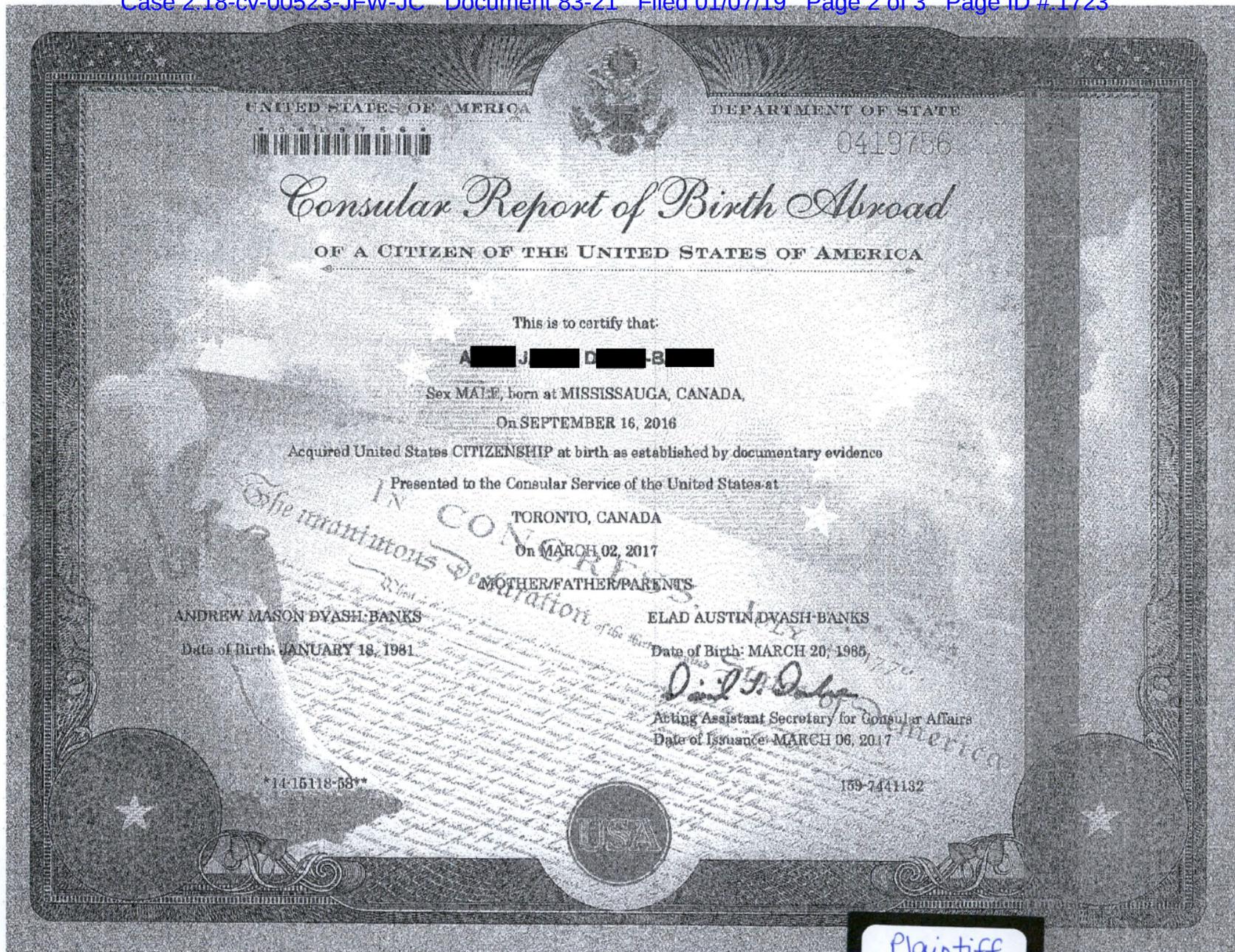
I, Andrew Mason Dvash-Banks, declare as follows:

I am a named Plaintiff in this matter and I am authorized to make this verification on Plaintiffs' behalf. I have read the foregoing Plaintiffs' Responses to Defendants' First Set of Interrogatories and know their contents. On behalf of myself and E████ J████ D████-B████, I certify or declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, the same are true and correct.

Executed on November 19, 2018 at Los Angeles, California.



EXHIBIT H



UNITED STATES OF AMERICA

DEPARTMENT OF STATE



0419756

Consular Report of Birth Abroad

OF A CITIZEN OF THE UNITED STATES OF AMERICA

This is to certify that:

A [REDACTED] J [REDACTED] D [REDACTED] - B [REDACTED]

Sex **MALE**, born at **MISSISSAUGA, CANADA**,

On **SEPTEMBER 16, 2016**

Acquired United States **CITIZENSHIP** at birth as established by documentary evidence

Presented to the Consular Service of the United States at

TORONTO, CANADA

On **MARCH 02, 2017**

MOTHER/FATHER/PARENTS

ANDREW MASON DVASH-BANKS

Date of Birth: **JANUARY 18, 1981**

ELAD AUSTIN DVASH-BANKS

Date of Birth: **MARCH 20, 1986**

David J. Dalrymple
Acting Assistant Secretary for Consular Affairs

Date of Issuance: **MARCH 06, 2017**

14-16118-58

159-2441132



Attorneys' Eyes Only

Plaintiff
Deposition Exhibit
12 for ID
12-20-18 dll

DVASH-BANKS00000017

Since 1790, U.S. law has provided for transmittal of U.S. citizenship to children born abroad to a U.S. citizen parent. 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. Since 1919, such births have been recorded on Form FS-240 Consular Report of Birth Abroad of a Citizen of the United States of America.

This document is a permanent record of the bearer's acquisition of U.S. citizenship. Under the provisions of Section 2705 of Title 22 of the United States Code, the Consular Report of Birth Abroad of a Citizen of the United States is proof of U.S. citizenship.

EXHIBIT I



Ontario
Office of the Registrar General
Bureau du registraire général

Certified A True
Photostatic
Print of a Record

Photocopie certifiée
conforme d'un document

on file at the
Office of the Registrar General
Ontario, Canada

déposée aux dossiers du
Bureau du registraire général
(Ontario) Canada

Registration Number:
Numéro d'enregistrement:

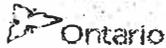
Certificate number:
Numéro de certificat: **P3319404**

Date issued:
Date de délivrance:

File number:
Numéro de dossier:

2016 113722
PAGE 1 of 1

Nov 09 2016
01596220-02-4



ServiceOntario

Office of the
Registrar General
108 Red River Road
P.O. Box 4000
Thunder Bay ON P7B 6L8

Statement of Live Birth
Form 2

Vital Statistics Act

This is a permanent legal record.
Please read all instructions before completing this form.
Type or print clearly in blue or black ink and complete all items.

Section A - Child's Information (see instruction #1)

Last Name D [redacted]		Sex of Child Male
First Name A [redacted]		Middle Name(s) [redacted]
Date of Birth (yyyy/mm/dd) 2016/09/18	Name of hospital (if not hospital give exact location where birth occurred) Credit Valley Hospital	
Place of Birth (City/Town/Village/Township) Mississauga		Regional municipality, county or district PEEL

Section B - Father's Information - (see instruction #2)

Current Legal Last Name Dvash-Banks	Legal Last Name at Birth Banks	First and Middle Name(s) Andrew Mason	Any Other Legal Last Name(s)
Place of Birth (City/Town/Village/Township) Santa Monica			
Place of Birth (Province/Country) California, USA	Date of Birth (yyyy/mm/dd) 1981	Age 35	
Marital Status of Parent in Section B <input type="checkbox"/> Single <input checked="" type="checkbox"/> Married <input type="checkbox"/> Common Law <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed			

Section C - Mother's Information - (see instruction #3)

Current Legal Last Name Dvash-Banks	Legal Last Name at Birth Dvach	First and Middle Name(s) Etay	Any Other Legal Last Name(s)
Place of Birth (City/Town/Village/Township) Ramat Gan			
Place of Birth (Province/Country) Israel	Date of Birth (yyyy/mm/dd) 1985	Age 31	

Section D - Birth Information

Residence at Birth (City/Town/Village/Township - Complete street address (City, town, village, township - if rural give Post Office or Rural Route address)) 1601 [redacted] Toronto	Postal Code M5B4C6			
Mailing Address of Parent in Section B if different from above - Complete street address (if rural give Post Office or Rural Route address)	Postal Code			
Duration of pregnancy (in weeks) 32	Total number of children ever born to this parent (including this one) 2 Of this total, Number born live 2	Weight of child at birth (Grams) 2820	Kind of Birth <input type="checkbox"/> Single <input checked="" type="checkbox"/> Twin <input type="checkbox"/> Triplet <input type="checkbox"/> Other	If multiple birth, state whether this child was born on 1st, 2nd, 3rd, etc. 1st
Name of Attendant at Birth Dr. Myckan Perry	<input checked="" type="checkbox"/> Physicist <input type="checkbox"/> Midwife <input type="checkbox"/> Other, specify			

Section E - Certification of Informant (Please read instruction #4 before signing)

If you are choosing a last name that is not one of the parent's last names or combination of those names, but is in accordance with the child's cultural, ethnic, or religious heritage, check one of the following boxes:

Cultural Heritage Religious Heritage Ethnic Heritage

I (We) certify the statements made on this form are true and correct. I am (We are) aware that it is an offence to wilfully make a false statement on this form.

I (We) have agreed that the child's last name will be as shown in Section A.

Yes No

Signature of Informant
[Signature]
Date (yyyy/mm/dd)
2016/10/08

Signature of Registrar
[Signature]
Date (yyyy/mm/dd)
2016/10/08

Signature of Informant (see instruction #10)
[Signature]
Date (yyyy/mm/dd)
2016/10/08

Section F - Office Use Only

I authorize this statement, and register this birth by signing this statement.

Signature of Registrar
[Signature]
Date (yyyy/mm/dd)
2016/11/03

Office Use Only

UPDATED GEO CODE

Alexandra Schmidt
Alexandra Schmidt
Deputy Registrar General
Registraire générale adjointe
de l'état civil

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



11109(03/10)

Attorneys' Eyes Only

DVASH-BANKS00000034

Alexandra Schmidt

Alexandra Schmidt
Deputy Registrar General
Registraire générale adjointe

—CERTIFIED COPY—
NOT VALID WITHOUT ALL PAGES

1/7/19
8212

EXHIBIT J



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

January 24, 2017

Mr. Andrew Dvash-Banks
135 Marlee Ave #1601
Toronto, Ontario

Dear Mr. Dvash-Banks,

I am writing in reference to your application for a U.S. passport and a Consular Report of Birth Abroad for A [redacted] and E [redacted] D [redacted] B [redacted] born on September 16, 2016, in Mississauga, Canada

The U.S. Consulate General in Toronto has considered the evidence you submitted and concluded that the blood relationship between a U.S. citizen parent and children have not been established by a preponderance of the evidence as required to support a claim to U.S. citizenship. The purpose of this letter is to provide you with information concerning DNA testing as an option to establish the requisite blood relationship between the child and the citizenship-transmitting U.S. citizen parent.

As noted above, in order to establish that both above mentioned children acquired U.S. citizenship by birth abroad to a U.S. citizen parent (and thus is eligible to apply for a CRBA and U.S. passport), the Immigration and Nationality Act (INA) of 1952, as amended, requires, among other things, proof of a blood relationship between the child and the U.S. citizen parent. Volume 22 of the Code of Federal Regulations, Section 51.40 provides that the burden of proof is upon the applicant to establish a claim to U.S. citizenship.

Should you wish to undergo DNA testing, which could conclusively establish whether both children are the biological children of a U.S. citizen parent, please review the enclosed flyer explaining DNA testing and the procedures under which the samples must be collected and the test conducted, including chain of custody procedures, in order for the results to be considered in connection with a citizenship claim. DNA testing must be conducted at a lab accredited by the American Association of Blood Banks in the United States. The laboratory conducting the tests must send the test results and an interpretation of the data to the U.S. Consulate General directly. All expenses are to be borne by the applicant, including shipping costs, and must be paid in advance.

If you choose to have DNA testing conducted in the United States, the sample collection, chain of custody procedures, and the conduct of the test must be in accordance with the joint AMA-ABA Guidelines and the guidelines set forth by the American Association of Blood Banks (AABB), as well as the guidelines of the Department of State. For DNA sample collection overseas, upon your request, the AABB accredited laboratory will provide sample collection kits, packing materials and instructions directly to the U.S. Consulate General in Toronto. DNA sample collection overseas must be done by an authorized lab technician in the presence of a designated U.S. citizen at the U.S. Consulate General Toronto, where the application is pending. The Consulate General will ship the samples directly to the AABB accredited

Plaintiffs'
Deposition Exhibit
25 for ID
12-20-18 dll

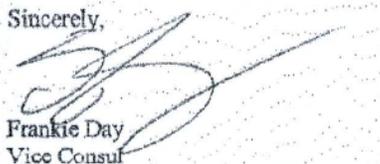
Attorneys' Eyes Only

DVASH-BANKS00000031

laboratory that you selected. Enclosed is a list of laboratories in the United States accredited by the AABB.

We appreciate you may not have considered DNA testing, but under the circumstances, it appears this may be the most expeditious way to establish children's claim to U.S. citizenship. You are, of course, free to submit any additional evidence you believe pertinent. Should you have any questions, please do not hesitate to contact us at TorontoPassport@state.gov.

Sincerely,



Frankie Day
Vice Consul

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2 Alexa M. Lawson-Remer (268855)
3 (lawsonr@sullcrom.com)
4 1888 Century Park East, Suite 2100
5 Los Angeles, CA 90067-1725
6 Telephone: (310) 712-6600
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8 Theodore Edelman (*pro hoc vice application forthcoming*)
9 (edelmant@sullcrom.com)
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11 (kleinj@sullcrom.com)
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20 IMMIGRATION EQUALITY
21 Aaron C. Morris (*pro hoc vice application forthcoming*)
22 (amorris@immigrationequality.org)
23 40 Exchange Place
24 Suite 1300
25 New York, New York 10005-2744
26 Telephone: (212) 714-2904

27 Attorneys for Plaintiffs

28
29
30 **UNITED STATES DISTRICT COURT**
31 **CENTRAL DISTRICT OF CALIFORNIA**

32 _____)
33)
34 ANDREW MASON DVASH-BANKS and)
35 E [REDACTED] J [REDACTED] D [REDACTED]-B [REDACTED],)

36 Plaintiffs,)

37 v.)

38 THE UNITED STATES DEPARTMENT OF)
39 STATE, and THE HONORABLE REX W.)
40 TILLERSON, Secretary of State,)

41 Defendants.)
42 _____)

43 **COMPLAINT FOR**
44 **DECLARATORY AND**
45 **INJUNCTIVE RELIEF**

46 Docket No. 18-CV-_____

PRELIMINARY STATEMENT

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

2. Both E████ and A████ were conceived and born during Andrew’s marriage to Elad. Andrew and Elad conceived the twins using their own sperm and eggs from the same anonymous donor. They used Elad’s sperm to conceive E████ and Andrew’s sperm to conceive A████. A surrogate carried the twins to term together in her womb and gave birth to them moments apart on September 16, 2016, in Canada. Andrew and Elad are the only parents E████ and A████ have, and the only people Canadian law¹ recognizes as E████ and A████’s parents. Accordingly, Andrew and Elad have been the twins’ legal parents from the day they came into this world together.

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

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

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

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

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

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

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

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

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

1 orientation of his parents.

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

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

13 THE PARTIES

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

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

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

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

1 15. Defendant The Honorable Rex Tillerson is the Secretary of State,
2 whose office is located at the Department of State, 2201 C St. NW, Washington,
3 D.C. 20520, and is being sued in his official capacity.

4 **JURISDICTION AND VENUE**

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

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

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

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

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

14 **STATUTORY AND REGULATORY BACKGROUND**

15 **A. United States Citizenship at Birth**

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

25 22. The provisions governing eligibility for U.S. citizenship at birth by
26 individuals born outside the United States are set forth in Sections 301 through 309
27 of the INA. Section 301 is titled “Nationals and citizens of United States at birth.”
28 Under Section 301(g), a baby born abroad is a U.S. citizen at birth when (1) one of

1 the child's parents is a married United States citizen and (2) the U.S. citizen parent
2 lived in the U.S. for at least five years, at least two of which were after the parent's
3 fourteenth birthday.

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

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

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

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

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

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

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

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

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

1 “equal dignity of same-sex marriages.” *United States v. Windsor*, 133 S. Ct. 2675,
2 2693 (2013).

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

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

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

A. The Dvash-Banks Family

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

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

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

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

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

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

27 45. In February 2016, the surrogate became pregnant with one embryo
28 created using sperm from Andrew and one embryo created using sperm from Elad.

1 Andrew and Elad intended to be the sole parents of the resulting children.

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

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

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

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

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

1 government would recognize their children's citizenship, however, they disclosed
2 the genetic links they had to E████ and A████.

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

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

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

24 53. The Letter denying E████'s application, addressed to Andrew, stated
25 that "after careful review of the evidence you submitted with your child's
26 application, it has been determined that his claim to U.S. citizenship has not been
27 satisfactorily established, as you are not his biological father." The Letter went on
28 to reference the "Immigration and Nationality Act (INA) of 1952," which

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

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

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

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

1 would satisfy the requirements of USCIS.

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

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

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

26 60. Andrew and Elad have also suffered indignity and emotional pain
27 because the U.S. government recognizes neither their marriage nor their parental
28 rights in determining whether their children were born in or out of wedlock.

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

11 **C. The State Department Erroneously Deemed E████ to Have Been**
12 **Born "Out of Wedlock"**

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

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

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

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

1 protection.

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

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

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

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

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

1 same-sex married couples.

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

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

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

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

1 child of that marriage, even if she did not conceive or carry the child. Therefore, in
2 denying Andrew this right, the State Department's policy also discriminates
3 against him based on his sex and/or that of his spouse, Elad.

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

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

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

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

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

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

1 conferring, and having recognized, E■■■■'s U.S. citizenship.

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

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

18 79. Plaintiffs have no adequate remedy at law.

19 **COUNT II – DECLARATORY JUDGMENT**
20 **THE STATE DEPARTMENT'S POLICY VIOLATES THE**
21 **CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION UNDER**
22 **THE LAW**

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

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

27 82. Under the State Department's interpretation of Sections 301 and 309,
28 no child could be considered born in wedlock to spouses in same-sex marriages,
even if the child's parents are married to each other and are the sole individuals
identified on the child's birth certificate as his or her parents.

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

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

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

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

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

22 88. Plaintiffs have no adequate remedy at law.

23 **COUNT III – ADMINISTRATIVE PROCEDURE ACT**

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

26 90. Plaintiffs have suffered a "legal wrong because of agency action."
27 5 U.S.C. § 702.

28 91. The Administrative Procedure Act bars any agency action that is

1 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
2 law.” 5 U.S.C. § 706(2)(A).

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

7 93. Plaintiffs have suffered and continue to suffer legal wrongs because of
8 the U.S. Embassy’s decision to deny the Consular Report of Birth Abroad
9 application submitted on behalf of E█████.

10 94. Plaintiffs have exhausted all administrative remedies available to them
11 as of right.

12 95. Plaintiffs have no other recourse to judicial review other than this
13 action.

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

17 97. Plaintiffs have no adequate remedy at law.

18 **COUNT IV – DECLARATION THAT E█████ D█████-B█████ IS A**
19 **U.S. CITIZEN**

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

22 99. 8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* judgment
23 as to the citizenship status of E█████.

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

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

1 102. Their sons, A■■■■ and E■■■■, were born on September 16, 2016 in
2 Mississauga, Canada, during Andrew’s and Elad’s marriage.

3 103. Andrew and Elad are E■■■■’s parents. They are identified as E■■■■’s
4 parents on his birth certificate and recognized as his parents under Canadian law.

5 104. Section 301(g) of the INA is applicable to E■■■■’s citizenship claim
6 because E■■■■ is the child of parents who were married to each other at the time of
7 his birth, and one of E■■■■’s married parents is a U.S. citizen. Section 309(a) of
8 the INA is inapplicable to E■■■■’s citizenship claim because he is the child of
9 married parents, and therefore is not a child born out of wedlock.

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

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WHEREFORE, Plaintiffs respectfully pray that this Court:

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

1 Dated: New York, New York
2 January 22, 2018

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