

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JAMES DEREK MIZE and :
JONATHAN DANIEL GREGG, :
individually and on behalf of their :
minor child, S.M.-G., :

Plaintiffs, :

v. :

Civ. No. 1:19-CV-03331-MLB

MICHAEL R. POMPEO, in his :
official capacity as Secretary of :
State, and THE U.S. :
DEPARTMENT OF STATE, :

Defendants. :

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

In this lawsuit, Plaintiffs James Derek Mize and Jonathan Daniel Gregg, individually and on behalf of their minor child, S.M.-G. (collectively, Plaintiffs), challenge decisions by the U.S. Embassy in London—acting under the authority of the Department of State and the Secretary of State—to decline to issue a Consular Report of Birth Abroad (CRBA) and a U.S. passport to S.M.-G. Plaintiffs claim Defendants’ actions violated the equal protection and due process guarantees of the Fifth Amendment of the Constitution. Plaintiffs also claim Defendants violated the Administrative Procedure Act (APA). Finally, Plaintiffs seek a declaration of citizenship for S.M.-G. pursuant to the Immigration and Naturalization Act (INA), 8 U.S.C. § 1503(a).

Plaintiffs now move for partial summary judgment on their claim under 8 U.S.C. § 1503(a), arguing that S.M.-G. acquired citizenship at birth pursuant to 8 U.S.C. § 1401(c). Defendants oppose Plaintiffs’ motion and hereby cross-move for partial summary judgment on the claim. The Court should enter judgment in favor of Defendants here because the Department’s interpretation of 8 U.S.C. § 1401 to require a biological relationship between a child born abroad and her U.S. citizenship-conferring parent(s) is reasonable and entitled to deference. The Court should thus apply this interpretation when considering Plaintiffs’ claim

pursuant to 8 U.S.C. § 1503(a). In doing so, the Court should conclude that S.M.-G. did not acquire U.S. citizenship automatically at birth.

To acquire citizenship under § 1401(c) via Mr. Mize and Mr. Gregg, S.M.-G. would need to have a biological as well as a legal relationship with both parents. This has been the Department's consistent, longstanding interpretation of the operative statutory language. This requirement is not met here. Accordingly, § 1401(c) does not operate to confer citizenship upon S.M.-G. Thus, Plaintiffs' claim pursuant to 8 U.S.C. § 1503(a) must fail. The Court should deny Plaintiffs' motion for partial summary judgment on the claim and enter judgment in favor of Defendants accordingly.

LEGAL BACKGROUND

I. Statutory Framework

There are two “universally accepted” ways to establish citizenship which reflect genuine links between the country and the individual—*jus soli* and *jus sanguinis*. See *Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1322 (11th Cir. 2018). *Jus soli* means “right of land or ground—conferral of nationality based on birth within the national territory.” Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). *Jus sanguinis*

literally means “right of blood—the conferral of nationality based on descent, irrespective of the place of birth.” *Id.*

The Fourteenth Amendment provides that “[a]ll persons born ... in the United States, and subject to the jurisdiction thereof, are citizens of the United States[.]” U.S. Const. amend. XIV, § 1. Since the Amendment’s enactment, “the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*.” *Miller v. Albright*, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting) (citing *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)). While a foreign-born child’s acquisition of citizenship through a U.S. citizen parent may be referred to colloquially as “birthright citizenship,” *see, e.g.*, Compl. at ¶¶ 33, 84, 99 (ECF No. 1), “the [Supreme] Court has specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent.” *Rogers*, 401 U.S. at 830 (emphasis added); *see also Miller*, 523 U.S. at 424 (1998) (“Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress.”).

The general rules for children born abroad to acquire United States citizenship at birth are set forth in 8 U.S.C. § 1401, which “establish[es] a range of residency and physical-presence requirements calibrated primarily to the parents’

nationality and the child’s place of birth.” *Sessions v. Morales-Santana*, 132 S. Ct. 1678, 1686 (2017). Sections 1401(c), 1401(g), and 1409(a) provide requirements for U.S. citizenship relevant to the claims raised in this lawsuit. Section 1401(c) provides for the citizenship of “a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person.” Section § 1401(g) provides for the citizenship of

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

Section 1409(a), addresses specifically “children born out of wedlock.”

Section 1409(a) states that “[t]he provisions of ” § 1401(c) and (g) (as well as other provisions of § 1401 that are not relevant here)

shall apply as of the date of birth to a person born out of wedlock if—

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,

- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
 - (A) the person is legitimated under the law of the person's residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or
 - (C) the paternity of the person is established by adjudication of a competent court.

As discussed further below, the Department applies § 1409 when the child's biological parents are not married to each other at the time of the child's birth.

II. Agency Interpretation

The Secretary of State is “charged with” administering the INA to determine the “nationality of a person not in the United States.” 8 U.S.C. § 1104(a). When a child is born overseas, the child's parents may apply to one of the State Department's consulates for a CRBA that reflects the Department's determination that the child acquired citizenship at birth. 22 C.F.R. § 50.7. The Secretary of State is also authorized to issue U.S. passports. 22 U.S.C. § 211a. If applying for a passport domestically, applicants may appear before a designated passport agent in the United States for adjudication. 22 C.F.R. §§ 51.21, 51.28. CRBAs and

passports “have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction.” *Id.* § 2705.

To allow passport adjudicators and consular officers to apply the relevant statutory provisions in a consistent and evenhanded way, the State Department has interpreted the provisions in its Foreign Affairs Manual (FAM).¹ *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015) (discussing the FAM as a reflection of State Department policy). The FAM explains the Department’s understanding that, “[s]ince 1790,” “[a]t least one biological parent” of a child born abroad “must have been a U.S. citizen when the child was born” in order for that parent to “transmit[] U.S. citizenship at birth” to the child. 8 FAM § 301.4-1(B); *see also id.* § 301.4-1(D)(1)(a) (“The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed.”). Genetic relationships are the usual form of biological relationship between parents and children. 8 FAM § 301.4-1(D)(1)(c). The Department also recognizes gestation by a legal mother as a type of biological relationship, even without a genetic relationship. *Id.* The Department regards the citizenship of a surrogate

¹ The current public version of the FAM is available at <https://fam.state.gov/>.

who gestates a child as “irrelevant to the child’s citizenship analysis.” 8 FAM § 304.3-2(a).

For the purpose of determining citizenship, the Department applies § 1409 when there is no biological connection between *both* parents and the child for whom citizenship is sought, regardless of the parents’ legal marital status, sex, or sexual orientation. 8 FAM 304.1-2. By incorporating the physical-presence requirements of § 1401 by reference, § 1409 allows a U.S. citizen father to transmit U.S. citizenship to a foreign-born child under the same terms as § 1401. Where, as here, the transmission of U.S. citizenship relies upon a biological connection to only one U.S. citizen parent, the Department applies the physical presence requirements of § 1401(g). Were both of the child’s biological parents U.S. citizens, on the other hand, the Department would have applied § 1401(c).

Although the law of the jurisdiction where a child is born may sometimes create a presumption that children born during the marriage of their legal parents are “the issue of that marriage,” 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such “presumption is not determinative in citizenship cases, ... because an actual biological relationship to a U.S. citizen parent is required.” *Id.*; *see also id.* § 301.4-1(D)(1)(a) (“It is not enough that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born.

Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired.”).

The FAM requires agents “to investigate carefully” whenever a “doubt arises that [a] U.S. citizen” through whom a child claims citizenship—including a legal parent of the child—“is biologically related to the child.” 8 FAM § 301.4-1(D)(1)(d). Such doubts may arise, for example, “when either of the alleged biological parents was married to another person during the relevant time period” or when “the child was conceived at a time when the alleged father had no physical access to the mother.” *Id.* They also arise whenever a “child was born through surrogacy or other forms of assisted reproductive technology.” *Id.*

These rules apply to opposite-sex couples exactly as they do to same-sex couples. Thus, “[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor,” can acquire citizenship only under § 1409(c)—not under § 1401—“regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.” 8 FAM § 304.3-2(c). Likewise, “[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor,” can acquire citizenship only if the father satisfies the requirements of § 1409(a) and

§ 1401(g), “regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.” 8 FAM § 304.3-2(f). A same-sex couple’s use of surrogacy or other forms of assisted reproductive technology (ART) may more readily be apparent to agents than an opposite-sex couple’s use of ART. But the State Department applies the rules to all couples evenhandedly—not just those for whom a passport adjudicator or consular officer can readily ascertain that ART was used. For example, the State Department’s CRBA application form requires parents to indicate whether they were married to the child’s other biological parent when the child was born. CRBA Application, Defs. Ex. A at 4.

FACTUAL BACKGROUND

Plaintiffs James Derek Mize and Jonathan Daniel Gregg are United States citizens. J. Mize Passport, Pls. Ex A (ECF No. 45-1); J. Gregg Passport, Pls. Ex. B (ECF No. 45-2). Mr. Mize was born and raised in the United States. Pls. Ex. A. Mr. Gregg was born in England to a mother who is a U.S. citizen and a father who is a citizen of the United Kingdom. Decl. of J. Gregg (Gregg Decl.) at ¶ 3, 4 (ECF No. 46). Mr. Gregg was raised in the United Kingdom, though he has made frequent trips to the United States to visit. *Id.* at ¶ 3. Plaintiffs Mize and Gregg met in 2014 in New York, where Mr. Mize was living at the time and Mr. Gregg

was visiting. *Id.* at ¶ 5; Decl. of J. Mize (Mize Decl.) at ¶ 6 (ECF No. 45). Mr. Gregg moved to the United States later that year and, in 2015, Mr. Mize and Mr. Gregg were married in New York. Gregg Decl. at ¶ 5, 6; Mize Decl. at ¶ 6; Mize-Gregg Marriage Certificate, Pls. Ex. E (ECF No. 45-5).

Plaintiffs Mize and Gregg later had a child conceived via ART. Surrogacy Consent Form, Pls. Ex. H (ECF No. 45-8); S.M.-G. Birth Certificate, Pls. Ex. I (ECF No. 45-9). In 2017, an embryo created using Mr. Gregg's sperm and an anonymous donor's egg was implanted successfully in a gestational surrogate in London. Mize Decl. at ¶ 18, 19; Gregg Decl. at ¶ 12, 13. In the summer of 2018, Plaintiff S.M.-G. was born in the United Kingdom. Pls. Ex. I. The Central London Family Court issued a Parental Order declaring that S.M.-G. is to be treated in law as the child of the married parents, Mr. Mize and Mr. Gregg. Central London Family Court Parental Or., Pls. Ex. K (ECF No. 45-11). The General Registrar Office issued a birth certificate shortly thereafter, identifying Mr. Mize and Mr. Gregg as the child's legal parents. Pls. Ex. I.

In the fall of 2018, Mr. Mize and Mr. Gregg returned to the United States with S.M.-G. Compl. at ¶47. The family currently resides in Decatur, Georgia. Compl. at ¶47. In the spring of 2019, Mr. Mize applied to the Social Security Administration (SSA) for a Social Security card for S.M.-G. and the application

was denied. Mize Decl. at ¶¶ 32, 33. SSA staff notified Mr. Mize that additional evidence of S.M.-G.'s U.S. citizenship was required. *Id.*

Mr. Mize and Mr. Gregg then appeared at the U.S. Embassy in London to apply for a CRBA and a U.S. passport for S.M.-G. Mize Decl. at ¶ 35; Gregg Decl. at ¶ 24. Their applications on behalf of S.M.-G. were denied. Ltr. from Dep't of State (Apr. 24, 2019), Ex. L (ECF No. 45-12). The Department of State's denial letter stated that S.M.-G.'s application for a CRBA was denied because "[i]t has been determined that based upon the information provided . . . , the biological U.S. citizen parent was not physically present in the United States for five years prior to the child's birth, at least two years of which were after the parent reached the age of fourteen, as required under the provisions of section 301(g) of the [INA]." *Id.*

On July 23, 2019, Plaintiffs filed this lawsuit, raising four claims. Count I seeks a declaration of citizenship for S.M.-G. under the INA, 8 U.S.C. § 1503. Compl. at ¶¶ 62-69. Count II alleges that the Department's evaluation of S.M.-G.'s CRBA and passport applications under § 1401(g) and § 1409, instead of § 1401(c), violates the Due Process Clause of the Fifth Amendment. Compl. at ¶¶ 70-81. Count III alleges that the Department has a policy of routinely deeming children born abroad to same-sex married couples to be "born out of wedlock," in

violation of the equal protection guarantees of the Fifth Amendment. Compl. at ¶¶82-90. Lastly, Count IV seeks judicial review under the APA, 5 U.S.C. § 706, of the Department's denial of the CRBA and passport applications. Compl. at ¶¶91-101.

On November 4, 2019, Defendants filed a motion to dismiss the Complaint in its entirety for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Defs. Mot. to Dismiss (ECF No. 32). The motion to dismiss has been fully briefed and is currently pending before the Court. *See id.*, Pls. Opp. to Mot. to Dismiss (ECF No. 35); Defs. Reply in Supp. of Mot. to Dismiss (ECF No. 42).

On January 17, 2020, Plaintiffs filed a motion for partial summary judgment on Count I of the Complaint, seeking a declaration of citizenship for S.M.-G. pursuant to 8 U.S.C. § 1503. Defendants come now in response to Plaintiffs' motion for partial summary judgment and cross-move for summary judgment on the claim.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material

when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

A party’s reliance upon the allegations or denials in the pleadings is insufficient to withstand a motion for summary judgment. *Walker v. Darby*, 911 F.2d 1573, 1576-77 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 242). Rather, the party must set forth specific facts showing there is a genuine issue for trial. *Id.* “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice” *Id.* at 1577. Conclusory, vague, and general allegations about violations of law based on a party’s subjective beliefs are likewise insufficient. *Fullman v. Graddick*, 739 F.2d. 553, 557 (11th Cir. 1984). Absent such a showing of specific facts, judgment shall be entered against the non-moving party. Fed. R. Civ. P. 56(e).

ARGUMENT

I. The State Department Appropriately Interprets § 1401 To Require A Biological Relationship Between A Child And Her Legal Parents.

A. Section § 1409(a)'s Explicit Requirement Of A Biological Relationship Does Not Undermine § 1401's Implicit Requirement.

Plaintiffs assert that Congress necessarily intended to exclude a biological relationship requirement from § 1401 because the current version of § 1409(a) expressly creates such a requirement. Pls. Mot. for Partial Summ. J. at 11-12. The explicit biological-relationship requirement of § 1409(a) does not provide a sound basis to construe § 1401 as lacking such a requirement. Thus, Plaintiffs' inference is unwarranted.

As an initial matter, when Congress passed the INA in 1952, § 1409(a)'s predecessor did not contain language explicitly requiring a biological relationship. At that point, § 301(a)(3) and § 301(a)(7) of the statute—the predecessors to § 1401(c) and (g), respectively—both applied to children “born . . . of parents” where either both parents were U.S. citizens (§ 301(a)(3)) or one parent was a U.S. citizen and the other an alien (§ 301(a)(7)). INA § 301(a)(3), (7), 66 Stat. 163, 235-36. And § 309(a)—the predecessor to § 1409(a)—provided that § 301(a)(3) and (7) “shall apply as of the date of birth to a child born out of wedlock . . . , if the

paternity of such child is established while such child is under the age of twenty-one years by legitimation.” *Id.* § 309(a), 66 Stat. at 238.

Thus, when the INA was enacted, the juxtaposition between the original versions of § 1401(c) and (g) on the one hand and § 1409(a) on the other did not suggest that Congress envisioned a biological connection as more (or less) necessary for children born outside of a marriage than for those born within a marriage. To the contrary, § 301(a)(3) and (7)’s conferral of citizenship on a child “born . . . of parents” remains the same requirement as in § 1401 today—and, for the reasons Defendants have explained, requires a biological relationship between the child and the parents. But when a child is born outside a marriage, the child’s parentage necessarily has to be “established” through some process. *See, e.g., Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995). In that context, § 309(a) served to determine who the child’s “parents” were for the purpose of applying § 301(a)(3) or (7) to the child.

Congress amended § 309(a) in 1986, adding the explicit “blood relationship” language and requiring that the relationship be “established by clear and convincing evidence.” INA Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. By this amendment, Congress elaborated on the framework for establishing biological paternity and heightened the relevant evidentiary burden.

But that amendment does nothing to suggest that § 1401 excludes a biological-relationship requirement. That is true for two reasons. First, Congress did not alter the operative “born . . . of parents” language of § 1401 when amending § 1409(a), nor has it done so since. The Supreme Court has recognized that “‘negative implications raised by disparate provisions are strongest’ when the provisions were ‘considered simultaneously when the language raising the implication was inserted.’” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009); *see also Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (describing this as a “familiar rule”). Thus, to the extent § 1409(a) sheds light on the meaning of § 1401, the version of § 1409(a) that is most relevant is the one contemporaneously adopted in 1952—and that provision, like § 1401, states a biological-relationship requirement implicitly rather than explicitly.

Second, Congress’s addition of the “blood relationship” language to § 1409(a) did not create a biological-relationship requirement where none existed before. It simply made that requirement more explicit in the circumstances addressed by that provision and required the relationship to be “established by clear and convincing evidence.” The original § 309(a) already required a “blood (biological) relationship between the alleged father and the child at birth.” *United States v. Marguet-Pillado*, 560 F.3d 1078, 1082 (9th Cir. 2009); *see also Miller v.*

Albright, 523 U.S. 420, 435 (1998) (opinion of Stevens, J.). Thus, even if the contrast between modern-day § 1401 and modern-day § 1409(a) could shed light on what Congress meant when it enacted § 1401’s operative language in the original INA, modern-day § 1409(a) does not imply—any more than the original § 309(a) did—that children born within a marriage may claim citizenship through parents to whom they are not biologically related. Section 1409(a) simply serves, as the original § 309(a) did, to identify the child’s male “parent” for the purpose of applying “[t]he provisions of [§ 1401]” to that child, 8 U.S.C. § 1409(a).

There is accordingly no basis to infer that Congress intended to include a biological-relationship requirement only in §1409(a). The Department has long interpreted § 1401 to require a biological relationship, and Congress was presumably aware of that interpretation when it amended § 1401 and § 1409 in 1986. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (“Congress is presumed to be aware of administrative . . . interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.”). If Congress wished to eliminate § 1401’s existing biological-relationship requirement and abrogate the Department’s practice, it would have done so not through implied repeal by negative inference but by an express amendment. In other words, Congress would have taken the opportunity—while amending an unrelated part of § 1401—to

clarify that legal parentage was sufficient to convey citizenship under that provision. “It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

Finally, Plaintiffs are likewise incorrect to argue that the Department’s interpretation is “inconsistent with the design and structure of the INA.” Pls. Mot. for Partial Summ. J. at 13-14. Plaintiffs challenge the Department’s interpretation as “superfluous” and “redundant.” *Id.* However, as discussed above, § 1409(a) requires unmarried fathers not only to prove a biological relationship with their children, but to do so by clear and convincing evidence. Section 1401’s biological-relationship requirement, by contrast, can be satisfied by a preponderance of the evidence. 8 FAM § 301.4-1(D)(1)(b)(2). Thus, although both provisions require a biological relationship, there is a meaningful distinction between the two.

The statutory text thus supports the Department’s view that a child can acquire citizenship under § 1401 only if she is biologically related to her parents.

B. The Common Law Presumption Of Parentage Does Not Invalidate The Statutory Biological-Relationship Requirement.

Plaintiffs maintain that the general common law spousal presumption of parentage is incorporated in § 1401. Pls. Mot. for Partial Summ. J. at 15-18. Plaintiffs assert that “[n]othing in the text or context of the INA suggests that Congress intended to overthrow this centuries-old understanding that marital children are the legal children of both spouses” and that parentage “does not turn solely on biology.” *Id.* at 18. Plaintiffs’ acknowledgement of common law presumptions of parentage does not undermine the biological foundation of *jus sanguinis* citizenship.

Although the law of the jurisdiction where a child is born may sometimes create a presumption that children born during the marriage of their legal parents are “the issue of that marriage,” 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such “presumption is not determinative in citizenship cases, ... because an actual biological relationship to a U.S. citizen parent is required.” *Id.*; *see also id.* § 301.4-1(D)(1)(a) (“It is not enough that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child’s own claim is based, U.S. citizenship is not acquired.”). Thus, the common law presumption of legitimacy may affect the determination of a child’s

legal “parents” for purposes of §1401, but the presumption has no bearing on whether a child was “born . . . of” his legal parents, as required by the provision.

Stated differently, the common law presumption is irrelevant to whether a child is “born . . . of” his parents for purposes of § 1401, even if it may sometimes remain relevant to determining a child’s legal “parents.” That is because the presumption is not a rule of evidence concerning the determination of a child’s actual biological father. It is instead the opposite: “a substantive rule of law” providing that it is “*irrelevant* . . . whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband.” *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion). In effect, the presumption supplies a legal fiction that paternity exists, irrespective of a biological relationship. But in enacting § 1401, Congress made a specific choice about the relevance of an actual biological relationship. The determination whether a child is “born . . . of” his parents turns on exactly the biological facts that the presumption treats as irrelevant. *All* applicants are required to prove claims to U.S. citizenship, including documentation concerning ART, where applicable. *See* 22 C.F.R. § 51.40; *see also* 8 FAM 304.3-4; *see also id.* ¶ a.

Nor does the presumption undercut the Department’s view that biology was historically central to *jus sanguinis* citizenship. Insofar as the historical citizenship

laws allowed children to acquire citizenship from their mothers' husbands without any consideration of biological paternity, they treated "marriage as a proxy for a blood relationship." Abrams & Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 658 (2014). That is no basis to conclude, as Plaintiffs suggest, that biological relationships are unimportant to *jus sanguinis* citizenship. To the contrary, it highlights the importance of biological relationships: When they did not exist, it was considered better to presume that they existed than to eliminate the requirement that they exist.

C. The Court Should Defer To The Department's Interpretation.

To the extent § 1401 remains ambiguous notwithstanding the textual and contextual factors favoring the State Department's interpretation, a tiebreaking factor is the deference owed to that interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* and its progeny recognize that agency interpretations lacking the force of law may nonetheless warrant deference "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted; quoting *Skidmore*, 323 U.S. at 139, 140). Such interpretations are entitled to some deference based upon their power to

persuade. *Martin v. Social Security Admin, Comm’r*, 903 F.3d 1154, 1159 (11th Cir. 2018). The deference afforded the agency’s interpretation depends upon the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade” *Skidmore*, 323 U.S. at 140. Other decisions reflect a similar approach. *See, e.g., Kasten v. Saint-Gobain Performance Plastics, Corp.*, 563 U.S. 1, 15-16 (2011); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401-02 (2008) (“The agency’s interpretive position . . . provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under *Skidmore*.”)

The State Department’s longstanding interpretation of § 1401, § 1409, and related provisions is exactly the sort of interpretation that warrants *Skidmore* deference. To begin, the interpretation reflects the Department’s “specialized experience” and its appreciation of the need for “uniformity,” *Mead*, 533 U.S. at 234. The Department has long been concerned about the phenomenon of individuals fraudulently claiming citizenship on behalf of a child born abroad who is not actually theirs. Memo. From Asst. Sec’y of State for Consular Affairs (Feb. 13, 2012), Defs. Ex. B; Excerpts from P. Peek Dep., Defs. Ex. C; *see, e.g.,*

8 FAM § 301.4-1(E) (concerning suspected fraud or falsehood in citizenship claims).

Of course, citizenship fraud is not limited to the context of assisted reproduction, and a biological-relationship requirement is not a failsafe means of preventing it. But because biological relationships can easily and objectively be verified through DNA testing, such a requirement is a powerful way to address concerns about fraud. Without it, citizenship claims could be supported merely by documents purporting to show legal relationships between parents and child, and it can be extremely difficult (especially in certain countries) to verify that such documents are genuine and accurate. *See, e.g.*, Joint Statement of USCIS and the Dep't of State, *U.S. Suspends Processing New Nepal Adoption Cases Based on Abandonment* (Aug. 6, 2010), Ex. D (explaining that, in Nepal, “[c]ivil documents, such as ... birth certificates[,] often include data that has been changed or fabricated”).

A case pending in the District Court for the District of Columbia—*Sabra v. Pompeo*, No. 19-cv-2090 (D.D.C.)—illustrates the problem. It concerns a child born in Gaza whose alleged biological parents are both U.S. citizens. The plaintiff, the child’s putative father, asserts that the child acquired citizenship under 8 U.S.C. § 1401(c). Based on a number of factors—including the advanced age of the

child's putative mother, her claim to have received no prenatal care, the child's alleged birth in a private home unattended by medical professionals, and the embassy's inability to directly view and assess the child—the U.S. embassy requested additional evidence to establish the child's biological parentage, such as prenatal or post-natal medical records, photographs taken during the putative pregnancy, or DNA testing. The putative parents refused to provide such evidence. They provided only a birth certificate issued by the Hamas-controlled Interior Ministry in Gaza, which identified them as the child's legal parents. If § 1401(c)'s "born ... of parents" language were interpreted to require only legal, not biological, parentage, then the State Department would be required to undertake a complex investigation into the genuineness and accuracy of the birth certificate, rather than relying on far more straightforward evidence of biological parentage. Similar fraud concerns arise in many circumstances. *See, e.g., Alzokari v. Pompeo*, 2019 WL 3805083 (E.D.N.Y. Aug. 13, 2019) (challenge to passport revocation resulting from fraud concerns regarding plaintiff's parentage claim for a child he later admitted was his grandson), *appeal filed*, No. 19-3133 (2d Cir. Oct. 1, 2019).

The State Department's assessment of fraud concerns is a strong reason for the Court to defer to the Department's interpretation of the INA. *Cf. Fiallo v. Bell*, 430 U.S. 787, 799 n.8 (1977) (explaining that, in adopting a provision not at issue

here, “Congress may well have given substantial weight” to the “difficulty” of parentage determinations “and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line”). The Department’s interpretation reflects its “specialized experience” in adjudicating thousands of applications for citizenship documents, as well as its appreciation of the need for standards that can be applied “uniform[ly]” in countries around the world, including those where legal documents may be falsified or inaccurate. *Mead*, 533 U.S. at 234. And the interpretation accounts for the Department’s predictive judgment that eliminating a biological-relationship requirement would increase citizenship fraud. *Cf. Mo.-Kan.-Tex. R. Co. v. United States*, 632 F.2d 392, 406 (5th Cir. 1980) (“In making a predictive judgment, the expertise of the [agency] supplements, and may supplant, the projections placed in the record by the parties.”).

Nor is fraud the only relevant concern. If a child could acquire citizenship through a legal parent regardless of whether he is biologically related to that parent, then the conferral of U.S. citizenship on children born overseas would depend on the legal parentage laws of more than two hundred countries, some of which recognize forms of parentage inconsistent with Congress’s intent or this country’s traditions of *jus sanguinis* citizenship. For example, the law of Ontario,

Canada, currently affords automatic recognition to up to four intended parents designated in a surrogacy agreement, and allows courts to recognize more than four. Children’s Law Reform Act, R.S.O. 1990, c. C.12, §§ 10, 11, *available at* <https://www.ontario.ca/laws/statute/90c12>.

In addition, the State Department’s position is consistent and longstanding. As the Foreign Affairs Manual explains, a biological relationship with a U.S. citizen parent has been a prerequisite to citizenship for a child born abroad “[s]ince 1790.” 8 FAM § 301.4-1(B). And to facilitate the evenhanded application of the requirement to people claiming citizenship under a wide range of circumstances, the State Department’s application form for a CRBA—as noted above—asks parents to indicate whether they were married to the child’s other biological parent when the child was born. There is no basis to suggest that the interpretation at issue in this case reflects “*post hoc* rationalizatio[n],” as opposed to the kind of “careful consideration” that warrants *Skidmore* deference, *Kasten*, 563 U.S. at 15-16.

The State Department’s position is also eminently reasonable as a construction of the INA, even assuming alternative constructions could also be regarded as reasonable. As discussed above, § 1401’s use of the phrase “born of” supports the Department’s interpretation of that provision to entail a biological-

relationship requirement. That interpretation is further corroborated by the statutory context, including the historical understanding of *jus sanguinis* citizenship. And it serves important governmental objectives, including the prevention of citizenship fraud. A contrary interpretation, even if plausible, is not so clearly correct as to foreclose the State Department's view.

D. Other Courts' Decisions Do Not Preclude Judgment In Defendants' Favor.

Plaintiffs cite decisions from other courts in an effort to demonstrate that the Department's interpretation has been or should be rejected. Pls. Mot. for Partial Summ. J. at 18-21. Of course, this Court is not bound by the decision of any other court relied upon by Plaintiffs. And, for the reasons set forth herein, a closer examination of the law favors Defendants' position.

Plaintiffs discuss in particular cases from the Second and Ninth Circuits. Pls. Mot. for Partial Summ. J. at 18-21. Plaintiffs turn to the Second Circuit's decision in *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), to demonstrate the term "parents," as used in § 1401, "is not limited to biological parents." Pls. Mot. for Partial Summ. J. at 21. In *Jaen*, the Second Circuit held that the husband of a child's biological mother was the child's "parent" at the time of his birth for purposes of § 1401(g). *Jaen*, 899 F.3d at 184-88. But *Jaen* ignored the statute's "born . . . of" language; the Court wrongly believed that the "sole question" was

whether the husband was the child's "parent," *id.* at 185. Thus, contrary to Plaintiffs' contention, *Jaen* is not a "directly-on-point" decision rejecting the Department interpretation of § 1401 at issue in this case.

Moreover, Plaintiffs disregard the Second Circuit's analysis of the operative language in *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007), which supports the Department's interpretation. The petitioner in that case claimed citizenship under a predecessor to 8 U.S.C. § 1401(c). *Colaianni*, 490 F.3d at 187. One reason the petitioner's claim failed was that § 1401(c) "pertains only to the acquisition of citizenship 'at birth,'" and the petitioner had been adopted by his U.S. citizen parents only after his birth. 490 F.3d at 187; *see id.* at 186. But the Second Circuit did not base its ruling solely on that ground. The court also rejected the petitioner's argument that by following the word "born" with "the preposition 'of,' rather than 'to,' Congress implied that biological parentage is not necessary for a person to claim citizenship under" § 1401(c). 490 F.3d at 187. It found that argument "contradicted by the plain language of the statute, which refers to persons 'born . . . of parents both of whom are citizens of the United States'" as well as "pertain[ing] only to the acquisition of citizenship 'at birth.'" *Id.* (emphasis in original).

With respect to the Ninth Circuit, Plaintiffs cite *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005).

Pls. Mot. for Partial Summ. J. at 18-21. Both cases held that § 1401 does not include a biological-relationship requirement. *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1091. In a recent case, *Dvash-Banks v. Dep't of State*, No. 2:18-cv-00523, 2019 WL 911799, *7 (C.D. Cal. Feb. 21, 2019), the district court of the Central District of California, reached a similar conclusion, applying *Scales* and *Solis-Espinoza* to issue a declaration of U.S. citizenship pursuant to 8 U.S.C. § 1503(a). Defendants in *Dvash-Banks* have appealed the district court's decision, and argue that *Scales* and *Solis-Espinoza* were wrongly decided for reasons similar to those submitted for this Court's consideration here. *Dvash-Banks v. Dep't of State*, No. 19-55517 (9th Cir.). The *Dvash-Banks* appeal is currently pending, with the matter having been fully briefed. Simply put, the legal questions at hand remain unresolved and the way is open for this Court to adopt what Defendants submit is the correct view—that § 1401, properly construed, encompasses a biological relationship requirement.

E. The Department's Interpretation Does Not Raise Constitutional Concerns.

Plaintiffs argue that, if there is any ambiguity as to whether a biological relationship is required by the statute, the canon of constitutional avoidance disfavors the Department's interpretation. Pls. Mot. for Partial Summ. J. at 27-38. That is incorrect. Plaintiffs assert that adopting the Defendants' interpretation

would raise three constitutional questions: whether the biological-relationship requirement “violates (1) same-sex couples’ fundamental right to marry and attendant, protected liberty interest in their marriage; (2) the fundamental rights of families headed by same-sex couples to be recognized as a family, including the rights to family privacy, integrity, and association; and, (3) the right to equal protection for same-sex couples and their children.” *Id.* at 30. Plaintiffs argue that the implication of these Fifth Amendment questions counsels against construing the statute as the Department has for decades. *Id.* at 27. Yet, the Department’s interpretation raises no constitutional concerns.

1. Defendants’ Interpretation Does Not Present A Due Process Concern.

Plaintiffs are simply wrong to state that the Department “ignores,” “disregards,” or “refus[es] to recognize” the lawful marriages of same-sex couples, including Plaintiffs, *Pls. Mot. for Partial Summ. J.* at 29-31. Defendants have not treated Mr. Mize and Mr. Gregg as “legal strangers” or the Mize-Gregg family “as if they were not family at all,” *id.* at 29. Rather, Defendants applied a facially neutral policy, which implements the statutory requirement that the citizenship-conferring parent have a biological relationship with the child—regardless of the sexual orientation of the child’s legal parents. Plaintiffs do not allege that the Department refused to accept the documents reflecting the couple’s legal marriage

as sufficient proof thereof—nor have they made such a showing on their motion. Furthermore, Defendants did not, nor do they now, dispute that S.M.-G. is the “marital child” of Mr. Mize and Mr. Gregg. Rather, the pertinent question is whether S.M.-G. is “born . . . of” her parents. The mere existence of a biological-relationship requirement or that the circumstances here do not meet the requirement do not compel the conclusion that Plaintiffs have been denied due process.

Contrary to Plaintiffs’ assertion, Pls. Mot. for Partial Summ. J. at 21-22, Defendants are not, therefore, in violation of the Supreme Court’s decisions in *United States v. Windsor*, 570 U.S. 744 (2013), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), requiring the equal treatment of same-sex marriages, including equal access to the full “constellation of benefits” attendant to marriage, *Obergefell*, 135 S. Ct. at 2601.

Plaintiffs allege that the Department’s interpretation infringes upon the fundamental right of same-sex couples “to form and be a family” by denying birth citizenship to children like S.M.-G. Pls. Mot. for Partial Summ. J. at 32-33. Conspicuously absent from Plaintiffs’ conclusory analysis is any explanation as to *how* a biological-relationship requirement constrains the ability to create families for same-sex couples. Plaintiffs have not pointed to anything in the Department’s

interpretation of § 1401 to require a biological relationship that impedes Plaintiffs’ ability—or any other couples’ ability—to enter into a lawful marriage, have that marriage recognized under the law, or establish families. To the extent that couples using ART to create families may be required to provide evidence of a qualifying biological relationship to meet the requirement of the statute, *see* Pls. Mot. for Partial Summ. J. at 33-34, such evidence may be required of *all* couples seeking citizenship for their children pursuant to § 1401.

Plaintiffs’ analysis also fails to set forth the basis for their conclusion that there is a fundamental right to citizenship at birth for children lacking a biological relationship to a qualifying U.S. citizen parent, regardless of whether that parent is in a same- or opposite-sex couple. The extension of citizenship to foreign-born children is not a constitutionally enshrined right for either the U.S. citizen or the child seeking to acquire citizenship; rather, it is a right granted by Congress. *Rogers*, 401 U.S. at 827; *see also Miller*, 523 U.S. at 453 (Scalia, J., concurring) (“Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned, and can only become a citizen by being naturalized, either by treaty, . . . or by authority of Congress.”) (internal citation and quotation marks omitted). Further, the Supreme Court has underscored the importance of a biological connection between the child seeking to acquire

citizenship and the U.S. citizen seeking to confer citizenship. *See, e.g., Miller*, 523 U.S. at 438 (“There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective.”) (plurality op.); *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (acknowledging “the importance of assuring that a biological parent-child relationship exists” for the purposes of a U.S. citizen father conferring citizenship on a child born abroad).

Plaintiffs are thus wrong to suggest that the transmission of citizenship to a non-biological child is among “the constellation of benefits . . . linked to marriage,” *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)). Nor is the asserted right to transmit citizenship to a non-biological child “deeply rooted in this Nation’s history and tradition,” as would be necessary for the Due Process Clause to protect it, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). No married couple—whether same- or opposite-sex—has a right to transmit citizenship under § 1401 to a child who is not biologically related to both parents.

Lastly, Plaintiffs fail to establish how the Department’s interpretation disregards legal parent-child relationships. *See* Pls. Mot. for Partial Summ. J. at 32-33. As discussed above, the status of the parent-child legal relationship is

recognized and important to other determinations made by the Department, but is simply irrelevant to § 1401's requirement that a child be "born . . . of" her parents. The question of citizenship here turns on the biological relationship, not the legal one.

There is, therefore, no cognizable Fifth Amendment due process concern with the Department's interpretation.

2. Defendants' Interpretation Does Not Present An Equal Protection Concern.

Plaintiffs are also wrong to suggest that the Department's interpretation would "treat the marriages of same-sex couples as second class, discriminate against those couples on account of their sexual orientation and sex, and discriminate against their children." Pls. Mot. for Summ. J. at 34-35. The Department's interpretation of § 1401 treats the children of married same-sex couples exactly as it treats the children of married opposite-sex couples. When children are biologically related to both parents, they are "born . . . of" their parents and eligible to acquire citizenship under § 1401(c) or (g), if the other statutory requirements are satisfied. When children are not biologically related to both parents, they are not "born . . . of" their parents and thus cannot acquire citizenship under § 1401(c) or (g). Instead, they may acquire citizenship through a

U.S. citizen father under § 1409(a) or through a U.S. citizen mother under § 1409(c).

Additionally, the Department's relevant policies require *all* parents to indicate on the CRBA application form whether they were married to the child's other biological parent when the child was born. Defs. Ex. A at 4. Plaintiffs fail to point to any policy or allegations of fact to establish that the Department applies its policies in a manner that treats same-sex and opposite-sex couples differently.

A facially neutral policy does not raise equal protection concerns simply because it may have a disproportionate effect on one group. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Many children of opposite-sex couples lack a biological relationship with both parents,² and some children of same-sex couples have a biological relationship with both parents.³ It is not legally relevant that the children of opposite-sex couples more often have a biological relationship with both parents than the

² Infertility affects more than one in ten couples (Office of Population Affairs, xpM2r), and clinics in the United States perform nearly 300,000 ART cycles each year (CDC, Dep't of Health & Human Servs., *ART Success Rates* (Nov. 15, 2019), <https://go.usa.gov/xpM2Y>).

³ Two women who are married to each other may both have a biological relationship with their child if one spouse contributes the egg and the other gestates the fetus. *See* 8 FAM § 301.4-1(D)(1)(c); *id.* § 304.3-1(b).

children of same-sex couples. Plaintiffs have not suggested—nor could they—that the Department adopted or reaffirmed the challenged policy “at least in part ‘because of,’” rather than “merely ‘in spite of,’” any disproportionate effect on the children of same-sex couples, *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Even if there were binding authority in this Circuit requiring heightened scrutiny for classifications based upon sexual orientation, which there is not, Defendants’ policy is not subject to any heightened scrutiny because the policy does not present any classification resulting in discrimination against a protected class. Furthermore, because Plaintiffs have failed to establish that they have been treated differently than other similarly situated persons, the Court need not even reach the question of whether the Department’s interpretation survives rational basis review, *see, e.g., Engquist v. Or. Dep’t of Agr.*, 553 U.S. 591, 602 (2008); or whether a lower standard of review applies, *see Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977).

This notwithstanding, as established above, the Department’s interpretation is “rationally related to legitimate government interests,” *Heller v. Doe*, 509 U.S. 312, 318-19 (1993), like the prevention of fraud. The rational basis standard entitles Defendants interpretation to a “strong presumption of validity,” and the

interpretation must be sustained if “there is any reasonably conceivable state of facts that could provide a rational basis.” *Id.* at 319-20 (internal citations omitted). The burden is on Plaintiffs to show there is no conceivable basis for Defendants’ position. *Id.* at 320. Plaintiffs have failed to do so here.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs’ motion for partial summary judgment and enter judgment in favor of Defendants on Count I of the Complaint.

Dated: February 14, 2020

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JAMES DEREK MIZE and :
JONATHAN DANIEL GREGG, :
individually and on behalf of their :
minor child, S.M.-G., :

Plaintiffs, :

v. :

Civ. No. 1:19-CV-03331-MLB

MICHAEL R. POMPEO, in his :
official capacity as Secretary of :
State, and THE U.S. :
DEPARTMENT OF STATE, :

Defendants. :

CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in LR 5.1B for documents prepared by computer.

/s/ Alexis J. Echols
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EXHIBITS

DEFENDANTS' EXHIBIT A

U.S. Department of State

INSTRUCTIONS**APPLICATION FOR CONSULAR REPORT OF BIRTH ABROAD
OF A CITIZEN OF THE UNITED STATES OF AMERICA**

A Consular Report of Birth Abroad may be issued for any U.S. citizen child under the age of 18 who was born abroad and who acquired U.S. citizenship at birth. Only the child's parent(s), legal guardian, person acting in loco parentis or the child may apply on the child's behalf. The application generally must be signed before a U.S. consular officer, a consular agent, or, in the case of children born in U.S. military hospitals, a designated military official. A Consular Report of Birth Abroad is proof of U.S. citizenship; however, **it is not a travel document** and does not take the place of a passport for travel purposes.

IMPORTANT: You **MUST** provide the required evidence listed below before we can process the application. Please follow the instructions below.

STEP 1: Read the instructions before completing and submitting this application. The instructions contain important information about completing the application and list what documents can be submitted as evidence to support the application.

STEP 2: Complete the application.

STEP 3: Make an appointment with the U.S. embassy or consulate online or contact the U.S. consular agency or designated U.S. military official.

STEP 4: Assemble the required documentary evidence. Take the application and supporting documents with you to your appointment at the U.S. embassy, consulate, consular agency, or with a military acceptance agent. **NOTE:** Do not sign the application until you are before a designated U.S. consular official or military acceptance agent.

STEP 5: Once the citizenship claim has been approved, the Consular Report of Birth Abroad will be printed in the United States and sent to the address you designate in the United States or the address you designate abroad in countries where the mailing of U.S. citizenship documents is permitted unless you indicate that you will pick it up at the U.S. embassy, consulate or consular agency.

ABOUT YOUR DOCUMENTS

- You must submit **ORIGINAL** documents or **copies certified by the custodian of the record**. Generally, we will return your documents after we have seen them.
- **We cannot accept photocopies or notarized copies of documents.**

DOCUMENTS WE NEED TO SEE

When applying for a Consular Report of Birth Abroad for a child who has never been documented as a U.S. citizen, the documentary evidence listed below should be presented. In certain instances, additional evidence may be required. Unless otherwise provided, all documentation submitted must be originals or certified copies of the originals bearing the seal of the issuing vital records office, court, or other authority.

1. Child's birth certificate.
2. Evidence of the parent(s)' U.S. citizenship and identity. This may consist of a U.S. passport, U.S. passport card, Consular Report of Birth Abroad, Naturalization Certificate, Certificate of Citizenship or timely filed U.S. birth certificate. For other forms of acceptable U.S. citizenship evidence, contact the U.S. consul. A passport or government issued Photo ID must be presented as proof of identity.
3. Evidence of the U.S. citizen parent(s)' physical presence or residence in the United States prior to the birth of the child. Such evidence may include, but is not limited to affidavits, school, employment, tax, bank, and medical records, utility bills, rent receipts, or other official public documents. Evidence of time spent abroad working for the U.S. government, U.S. Armed Forces or qualifying international organization, or as a dependent child of a person working abroad for such entities prior to the birth of the child is also acceptable in some cases.
4. Parents' marriage certificate, if applicable.
5. Evidence of the termination of any previous marriages of the parents (divorce decree, annulment decree, or death certificate).
6. If a person other than a parent or the child is applying for the Consular Report of Birth Abroad, the person must present a certified copy of legal guardianship or notarized affidavit from the parent(s) authorizing the person to make the application.

HOW TO COMPLETE THIS APPLICATION

Most of the items on the form are self-explanatory with the exception of the items discussed below. The numbers match the numbered items on the form.

1. Name of Child in Full: Enter the name of the child as it is recorded on the local birth certificate. If a different name is shown on the birth certificate, an explanatory affidavit from the parent or legal guardian must be presented regarding the correct name. When a child's name has been legally changed by adoption or certain other legal action amending the child's name from birth, the new name may be recorded on the application if supported by documentary evidence.
2. Sex: Check (X) box to indicate whether male or female.
3. Date of Birth: Write the month before the date and year. (Example: 10/2/2009).
(month)(day)(year)
4. Place of Birth: Enter the name of the city and country.

Mother/Father/Parent. NOTE: If the U.S. citizen parent transmitting citizenship to the child is not present, he or she may complete State Department Form DS 5507 Affidavit of Parentage Physical Presence and Support and submit separately. The parent completing this application should provide as much information on the parent completing the Form DS 5507 as he or she has.)

INFORMATION ABOUT MOTHER/FATHER/PARENT

- 5 and 11. Full Name: Enter Mother/Father/Parent's name as it appears on the passport and/or government issued identity document.
- 6 and 12. All Previous Legal Names: Enter all legal names ever used by father, including name at birth.
- 7 and 13. Sex: Check (X) box to indicate whether male or female.
- 8 and 14. Date of Birth: Write the month before the day and year. (Example: 10/2/2009).
(month)(day)(year)
- 9 and 15. Place of Birth: Enter the name of the city, state/province (if applicable) and country.
- 10 and 16. Current Physical Address (Do not list a P.O. Box) (You may list an A.P.O. Address): Enter the address in the foreign country where the application is completed.
17. Enter Mailing Address
- 18 and 19. Citizenship: Please place an "X" in the "yes" box or the "no" box to indicate whether you were a U.S. Citizen or Non-Citizen National when the child was born.
20. Enter yes or no if you and U.S. citizen parent of child were/was married to the child's other biological parent when the child was born.
21. List Date and Place of marriage and check current status of that marriage, adding date of death or divorce if applicable.
- 22 and 23. Marriage(s): Please list any other marriages as follows: Date of marriage; end date, if any; and manner ended, if applicable. If you have never been married, enter "none."
- 24 and 25. Time spent in the United States: List all dates you have been present in the United States.
- 26 and 27. Time spent abroad in U.S. Armed Forces, in other U.S. Government employment, with qualifying international organization, or as a dependent child of a person so employed: Official documentation of relevant periods of service from the appropriate governmental department or international organization must be presented. For names of qualifying organizations, consult the U.S. embassy or consulate.
28. Do not sign until you are appearing before the person administering the oath/affirmation.
29. Do not sign until you are appearing before the person administering the oath/affirmation.
30. The U.S. embassy or consulate official approving the issuance of the Consular Report of Birth Abroad will enter the serial number of the Consular Report of Birth Abroad and the date and place of issuance before signing this section.



**APPLICATION FOR CONSULAR REPORT OF BIRTH ABROAD
OF A CITIZEN OF THE UNITED STATES OF AMERICA**

Registration Number

A. THIS SECTION TO BE COMPLETED BY THE CHILD'S PARENT(S) OR GUARDIAN(S) OR THE CHILD (USE SECTION D CONTINUATION SHEET)

INFORMATION ABOUT THE CHILD

1. Name of Child in Full

(Last/Surname) (First) (Middle)

2. Sex

3. Date of Birth

4. Place of Birth

M F

___ / ___ / ___
(month) (day) (year)

(City) (Country)

NOTE: (If the U.S. citizen parent transmitting citizenship to the child is not present, he or she may complete State Department Form DS 5507 Affidavit of Parentage Physical Presence and Support and submit it separately. The parent completing this application should provide as much information on the parent completing the Form DS 5507 as he or she has.)

INFORMATION ON MOTHER/FATHER/PARENT

INFORMATION ON MOTHER/FATHER/PARENT

5. Full Name

(Last/Surname) (First) (Middle)

6. All Previous Legal Names Used

(Last/Surname) (First) (Middle)

(Last/Surname) (First) (Middle)

7. Sex

8. Date of Birth

M F

___ / ___ / ___
(month) (day) (year)

9. Place of Birth

(City) (State/Province) (Country)

10. Current Physical Address (Do not list P.O. Box)
(A.P.O. Address Permitted)

(Address Line 1)

(City, State/Province, Country, Postal Code)

(Phone Number(s))

(Email Address)

Use this address if Consular Report of Birth will be mailed? Yes No

11. Full Name

(Last/Surname) (First) (Middle)

12. All Previous Legal Names Used

(Last/Surname) (First) (Middle)

(Last/Surname) (First) (Middle)

13. Sex

14. Date of Birth

M F

___ / ___ / ___
(month) (day) (year)

15. Place of Birth

(City) (State/Province) (Country)

16. Current Physical Address (Do not list P.O. Box)
(A.P.O. Address Permitted)

(Address Line 1)

(City, State/Province, Country, Postal Code)

(Phone Number(s))

(Email Address)

Use this address if Consular Report of Birth will be mailed? Yes No

17. Mailing Address (if different from Current Physical Address) (Do not list a P.O. Box.)
(You may list an A.P.O. address)

(Address Line 1) (City, State/Province, Country and Postal Code)

(Continued)

INFORMATION ON MOTHER/FATHER/PARENT

26. Precise Periods Abroad in U.S. Armed Forces, in other U.S. Government Employment, with Qualifying International Organization, or as a dependent child of a person so employed (Specify) (if additional space is needed please use the Section D Continuation Sheet)

Branch/Agency/Org.	Date	Date
	(month-day-year)	(month-day-year)
	From	To

(Continued)

INFORMATION ON MOTHER/FATHER/PARENT

27. Precise Periods Abroad in U.S. Armed Forces, in other U.S. Government Employment, with Qualifying International Organization, or as a dependent child of a person so employed (Specify) (if additional space is needed please use the Section D Continuation Sheet)

Branch/Agency/Org.	Date	Date
	(month-day-year)	(month-day-year)
	From	To

B. THIS SECTION TO BE COMPLETED BEFORE/BY CONSULAR OFFICER, NOTARY PUBLIC, OR OTHER PERSON QUALIFIED TO ADMINISTER OATH

NOTE: If a U.S. citizen parent transmitting citizenship to the child born out of wedlock is not present, he or she may complete State Department Form DS 5507 Affidavit of Parentage Physical Presence and Support and submit separately. Only the U.S. citizen father of a child born abroad out of wedlock must complete the acknowledgement of paternity and agreement to provide financial support.

28. I _____ do solemnly swear (or affirm)(check all that apply)
 (Name)

I am a U.S. citizen or non-citizen national. I am the father of _____,
 (Name of Child)

who was born on _____ in _____. My child was born out of wedlock, and I am the
 (Date of Birth) (Place of Birth)

the father through whom he/she is claiming U.S. citizenship. I agree to provide financial support for this child until he/she reaches the age of eighteen

 (Signature of Affiant)

SUBSCRIBED AND SWORN TO (AFFIRMED) before me this _____ day of _____, _____

 (Signature and Title of Administering Officer)

(SEAL)

(Continued)

THIS SECTION TO BE COMPLETED BEFORE/BY CONSULAR OFFICER, NOTARY PUBLIC, OR OTHER PERSON QUALIFIED TO ADMINISTER OATHS

29. Affirmation: I SOLEMNLY SWEAR (OR AFFIRM) THAT THE STATEMENTS MADE ON THIS APPLICATION ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Name of Person(s) Providing Information	Relationship to the Child <i>(Parent, Legal Guardian, Other (Specify))</i>	Signature of Person(s) Providing Information
_____	_____	_____
_____	_____	_____
Type Name and Title of Official	Signature of Official	City
_____	_____	_____
		Date ____ / ____ / ____ <i>(month) (day) (year)</i>

Subscribed to: *(SEAL)*

30. Approval of Consular Report of Birth

_____		_____
<i>(Printed Name of Consular Officer)</i>		<i>(Signature of Consular Officer)</i>
_____	____ / ____ / ____ <i>(month) (day) (year)</i> <i>(Date of Approval)</i>	_____
<i>(Approving Post)</i>		<i>(Registration Number)</i>

D.

CONTINUATION SHEET (USE THIS SPACE FOR ADDITIONAL INFORMATION)

PRIVACY ACT STATEMENT

AUTHORITY: The information solicited on this form is requested pursuant to provisions in Titles 8 and 22 of the United States Code (U.S.C.), whether or not codified, including specifically 22 U.S.C. 2705 and predecessor statutes, and by regulations issued pursuant to E.O. 11295 (August 5, 1966), including Part 50, Title 22 Code of Federal Regulations (CFR).

PURPOSE: The primary purpose for soliciting the information is to establish citizenship, identity, and entitlement to issuance of a Consular Report of Birth and to properly administer and enforce the laws pertaining thereto. The information may also be used in connection with issuing other evidence of citizenship, and in furtherance of the Secretary's responsibility for the protection of U.S. nationals abroad.

ROUTINE USES: The information solicited on this form may be made available as a routine use to other government agencies, to assist the U.S. Department of State in adjudicating passport applications and requests for related services, and for law enforcement and administrative purposes. It may also be disclosed pursuant to court order. The information may be made available to foreign government agencies to fulfill passport control and immigration duties. The information may also be provided to foreign government agencies, international organizations and, in limited cases, private persons and organizations to investigate, prosecute, or otherwise address possible violations of law or to further the Secretary's responsibility for the protection of U.S. nationals abroad. The information may be made available to private U.S. citizen 'wardens' designated by the U.S. embassies and consulates. More information on the Routine Uses for the form can be found in the System of Records Notice, Public Notice 6209 for May 2, 2008. The title of this notice is Overseas Citizens Services Records.

DISCLOSURE: Providing the information requested on this form is voluntary. Failure to provide the information requested on this form may result in the denial of a Consular Report of Birth, related document or service to the individual seeking such report, document or service.

PAPERWORK REDUCTION ACT (PRA) STATEMENT

Public reporting burden for this collection of information is estimated to average 20 minutes per response, including time required for searching existing data sources, gathering the necessary documentation, providing the information and/or documents required, and reviewing the final collection. You do not have to supply this information unless this collection displays a currently valid OMB control number. If you have comments on the accuracy of this burden estimate and/or recommendations for reducing it, please send them to: CA/OCS/L, SA-29, 4th Floor, U.S. Department of State, Washington, DC 20037-3202.

**DEFENDANTS’
EXHIBIT B**



United States Department of State

*Assistant Secretary of State
for Consular Affairs*

Washington, D.C. 20520

UNCLASSIFIED

February 13, 2012

INFORMATION MEMO FOR THE SECRETARY

FROM: CA – Janice L. Jacobs

SUBJECT: Assisted Reproductive Technology (ART), Citizenship and Visa Law

The Immigration and Nationality Act grants authority to the Secretary of State to adjudicate citizenship questions abroad. The Department is receiving an increasing number of citizenship and immigration claims for children born abroad who were conceived through assisted reproductive technology (ART). Adjudicating these claims often is challenging.

Sections 301 and 309 of the Immigration and Nationality Act (INA) provide that a child born abroad acquires U.S. citizenship at birth if the child is “born of” at least one U.S. citizen parent who meets other statutory requirements. The statutory language predates the advent of ART. Under the longstanding interpretation, the term “born of” requires a genetic link (i.e., a DNA link (egg or sperm)) between the U.S. citizen parent transmitting citizenship and the child. For example, under this interpretation, a U.S. citizen mother and U.S. citizen father who use a foreign surrogate cannot transmit citizenship to their child, unless the child was conceived with the egg or sperm of one of the U.S. citizen parents. Similarly, a U.S. citizen mother who gives birth abroad cannot transmit citizenship to her child if she uses donor eggs to conceive (assuming the person providing the sperm is not a U.S. citizen, in which case the sperm donor may be able to transmit citizenship). Although children who are not genetically related to a U.S. citizen parent cannot acquire U.S. citizenship at birth, they are in some circumstances eligible for immigrant visas, which could place them on the path to U.S. citizenship.

CA and L, in consultation with DHS, have been studying whether we can interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through ART in a broader range of circumstances, and in other circumstances, amend visa requirements for such children. Related to this, we are considering how this would impact children born through ART overseas to same-sex couples. Because we regularly encounter people seeking to document

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- 2 -

children who are not theirs, we use DNA testing to verify parentage. We are carefully reviewing any policy changes we recommend for the serious potential fraud implications. We are not the only country evaluating current law and its interpretation in light of modern ART developments and follow developments in the policies of other countries; our law is unique and we must ensure any changes in our policy are consistent with current law. We know of no current Congressional interest in this issue, but believe that significant changes to current policy might well attract Congressional interest. We do not anticipate that we would seek any legislative changes at this time. Our policy and any changes to it is of interest to the LGBT community, to single parents, as well as to many heterosexual couples who have had difficulties conceiving by traditional methods.

UNCLASSIFIED

Approved: CA: JJacobs

(m)

Drafted: CA/OCS/PRI- Lisa Vogel, ext. 6-9087 and cell: (703) 307-5207

Cleared:

DP/NR

**DEFENDANTS'
EXHIBIT C**

CONFIDENTIAL - PROTECTIVE ORDER
PAUL PEEK - 12/20/2018

1 CONFIDENTIAL - PROTECTIVE ORDER
 UNITED STATES DISTRICT COURT
 2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 3
 4 ANDREW MASON DVASH-
 5 BANKS and E.J.D.-B,
 6 Plaintiffs,
 7 v. Case No.
 8 2:18-cv-00523-JFW-JCx
 9 THE UNITED STATES
 10 DEPARTMENT OF STATE,
 11 and THE HONORABLE
 12 MICHAEL R. POMPEO,
 13 Secretary of State,
 14 Defendants.
 15 _____
 16
 17
 18 Video Deposition of Paul Peek
 19 Washington, D.C.
 20 Thursday, December 20, 2018
 21 9:15 a.m.
 22
 23 Job No.: NY-203388
 24 Pages: 1 - 351
 25 Reported by: Donna L. Linton, RMR-CLR

Epiq Court Reporting Solutions - New York
1-800-325-3376 www.deposition.com

CONFIDENTIAL - PROTECTIVE ORDER
PAUL PEEK - 12/20/2018

Page 2

1 Video deposition of Paul Peek, the 30(b)(6)
 2 witness herein, held at:
 3
 4
 5
 6
 7 Sullivan & Cromwell
 8 1700 New York Avenue, Northwest
 9 South Conference Room, Suite 800
 10 Washington, D.C. 20006
 11 (202) 956-7500
 12
 13
 14
 15
 16
 17 Pursuant to Amended Notice of Rule 30(b)(6)
 18 Deposition of Defendant United States Department of
 19 State and Federal Rules of Civil Procedure, before
 20 Donna L. Linton, Registered Merit Reporter,
 21 Certified LiveNote Reporter, and Notary Public in
 22 and for the District of Columbia.
 23
 24
 25

Epiq Court Reporting Solutions - New York
1-800-325-3376 www.deposition.com

1 MS. ANDRAPALLIYAL: Objection. Asked and
2 answered.
3 A Could you repeat the question?
4 BY MR. EDELMAN:
5 Q Yes. Now, I'm not asking you what's the
6 basis. I'm asking you what's the rationale for the
7 requirement that the State Department reads into
8 section 301 that there must be a biological
9 relationship between a U.S. citizen parent and a
10 child?
11 A Within the scope of INA 301 and 309, it
12 is the language of the statutes.
13 Q But what is the -- is there a fundamental
14 purpose for which the State Department believes this
15 is a requirement?
16 A I'm not sure I understand your question.
17 Q Well, is it, for example, a concern about
18 fraud?
19 A Concern about fraud in what context?
20 Q Fraud in either the process or pursuit of
21 U.S. citizenship for children.
22 A Yes, the department is concerned about
23 fraud in the application for documentation of U.S.
24 citizenship.
25 Q Isn't that the principal reason why the

1 MR. EDELMAN: Okay. I'll just do it
2 again.
3 BY MR. EDELMAN:
4 Q So do concerns about preventing fraud
5 have any relevance to the way that the State
6 Department interprets section 301 of the INA to
7 require a biological relationship between the U.S.
8 citizen parent and a child?
9 A The primary concern is to be compliant
10 with the law. The secondary concern is to make sure
11 that fraud is not taking place in how people are
12 applying under the law.
13 Q And when the State Department changed the
14 policy with respect to gestational mothers, was
15 there any discussion about the impact on the effort
16 to prevent fraud of that change?
17 MS. ANDRAPALLIYAL: Objection. Exceeds
18 the scope.
19 A Let me look at the cable that went out
20 announcing the policy.
21 Could you ask the question again? I'm
22 sorry.
23 BY MR. EDELMAN:
24 Q I'll ask it this way based upon your
25 answers to my prior questions.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JAMES DEREK MIZE and :
JONATHAN DANIEL GREGG, :
individually and on behalf of their :
minor child, S.M.-G., :

Plaintiffs, :

v. :

Civ. No. 1:19-CV-03331-MLB

MICHAEL R. POMPEO, in his :
official capacity as Secretary of :
State, and THE U.S. :
DEPARTMENT OF STATE, :

Defendants. :

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ STATEMENT OF
UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AND
COUNTER-STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF DEFENDANTS’
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1 and the Court’s Standing Order Regarding Civil Litigation (ECF No. 5), Defendants, by and through undersigned counsel, hereby respectfully submit the following response to Plaintiffs’ Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment (ECF No. 44-2) and counter-statement of facts in support of Defendants’ Cross-Motion for Partial Summary Judgment.

No.	Undisputed Fact	Supporting Evidence
The Mize-Gregg Family		
1.	Plaintiff James Derek Mize (“Mize”) is a U.S. citizen.	Mize Decl. ¶¶ 3-4; Ex. A <u>Defendants’ Response:</u> <i>Undisputed.</i>
2.	Plaintiff Jonathan D. Gregg is a U.S. citizen.	Mize Decl. ¶ 8, Ex. B; Gregg Decl. ¶¶ 3-4 <u>Defendants’ Response:</u> <i>Undisputed.</i>
3.	Mize resided in the United States prior to S.M.-G.’s birth.	Mize Decl. ¶¶ 3, 5-7; Ex. C <u>Defendants’ Response:</u> <i>Undisputed.</i>
4.	Gregg resided in the United States prior to S.M.-G.’s birth.	Mize Decl. ¶ 7, Exs. C & D; Gregg Decl. ¶ 5 <u>Defendants’ Response:</u> <i>Undisputed.</i>
5.	Mize and Gregg are a married couple who were wed in New York City on May 30, 2015.	Mize Decl. ¶ 11, Ex. E; Gregg Decl. ¶ 7 <u>Defendants’ Response:</u> <i>Undisputed.</i>

S.M.-G.'s Conception and Birth		
6.	When Mize and Gregg were ready to move forward with expanding their family, they decided to use assisted reproductive technology (ART).	Mize Decl. ¶ 14; Gregg Decl. ¶ 10 <u>Defendants' Response:</u> <i>Undisputed.</i>
7.	Mize and Gregg sought an anonymous egg donor and accepted the offer of a U.K.-based close friend to be their gestational surrogate.	Mize Decl. ¶ 14, Exs. F & G; Gregg Decl. ¶ 10 <u>Defendants' Response:</u> <i>Undisputed.</i>
8.	Prior to S.M.-G.'s conception, Mize, Gregg, the gestational surrogate, and the gestational surrogate's husband all agreed that Mize and Gregg would be the intended and only parents of any child born through the ART process.	Mize Decl. ¶¶ 15-16, Ex. G; Gregg Decl. ¶ 11 <u>Defendants' Response:</u> <i>Undisputed.</i>
9.	In October 2017, an anonymously donated egg fertilized with Gregg's genetic material was implanted in the gestational surrogate who became pregnant with S.M.-G.	Mize Decl. ¶ 19, Ex. F, G & H; Gregg Decl. ¶ 13 <u>Defendants' Response:</u> <i>Undisputed.</i>
10.	Plaintiff S.M.-G. was born in 2018 in the United Kingdom, with both Mize and Gregg present in the delivery room.	Mize Decl. ¶ 23, Ex. I; Gregg Decl. ¶ 16 <u>Defendants' Response:</u> <i>Undisputed.</i>

11.	Gregg and Mize named S.M.-G., including giving her a hyphenated last name to reflect their status as a family, and that she is both Mize's and Gregg's daughter.	Mize Decl. ¶ 23; Gregg Decl. ¶ 16 <u>Defendants' Response:</u> <i>Undisputed.</i>
12.	S.M.-G. was born during Mize and Gregg's marriage.	Mize Decl. ¶¶ 11 & 22, Exs. E & I; Gregg Decl. ¶¶ 7 & 16 <u>Defendants' Response:</u> <i>Undisputed.</i>
S.M.-G.'s Parentage		
13.	On March 21, 2019, the Central London Family Court issued a Parental Order declaring "that [S.M.-G.], who was born on [] 2018 is to be treated in law as the child of the parties to a marriage, Jonathan Daniel Gregg and James Derek Mize."	Mize Decl. ¶¶ 29 & 30, Exs. E, I & K; Gregg Decl. ¶ 20 <u>Defendants' Response:</u> <i>Undisputed.</i>
14.	On April 17, 2019, the General Registrar Office issued a birth certificate identifying Mize and Gregg as S.M.-G.'s parents.	Mize Decl. ¶ 31, Ex. I; Gregg Decl. ¶ 21 <u>Defendants' Response:</u> <i>Undisputed.</i>

15.	Mize is S.M.-G.'s legal parent.	<p>Mize Decl. ¶¶ 29 & 31, Exs. I & K; Gregg Decl. ¶¶ 20 & 21</p> <p><u>Defendants' Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement. The statement is, therefore, disputed in part.</i></p> <p><i>Defendants do not dispute that Mize is S.M.-G.'s legal parent.</i></p>
16.	Gregg is S.M.-G.'s legal parent.	<p>Mize Decl. ¶¶ 29 & 31, Exs. I & K; Gregg Decl. ¶¶ 20 & 21</p> <p><u>Defendants' Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement. The statement is, therefore, disputed in part.</i></p> <p><i>Defendants do not dispute that Gregg is S.M.-G.'s legal parent.</i></p>
17.	Gregg is S.M.-G.'s biological (i.e., genetic) parent.	<p>Mize Decl. ¶ 19, Ex. H; Gregg Decl. ¶ 13</p> <p><u>Defendants' Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement. The statement is, therefore, disputed in part.</i></p> <p><i>Defendants do not dispute that Gregg is S.M.-G.'s biological parent.</i></p>

18.	Mize and Gregg have acted as S.M.-G.'s parents at all times since her birth.	Mize Decl. ¶ 25, Ex. J; Gregg Decl. ¶ 17 <u>Defendants' Response:</u> <i>Undisputed.</i>
19.	No person other than Mize and Gregg has ever acted as S.M.G.'s parent.	Mize Decl. ¶ 25; Gregg Decl. ¶ 17 <u>Defendants' Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement and therefore the statement is disputed in part.</i> <i>Defendants do not dispute that Mize and Gregg are S.M.-G.'s legal parents. Defendants also do not dispute that Gregg is S.M.-G.'s biological parent.</i> <i>Defendants dispute that no other individual ever acted as a parent. By providing ova, the anonymous egg donor acted as the genetic mother/parent of S.M.-G. See Undisputed Fact No. 7. By carrying and giving birth to S.M.-G., the gestational surrogate acted as gestational mother/parent to S.M.-G. See Undisputed Fact Nos. 7, 9.</i> <i>Defendants further dispute the statement to the extent the statement conveys or implies that no other individual ever had legal rights as a parent of S.M.-G. See Gestational Surrogate Consent Form re: S.M.-G., Pls. Ex. G at 1 (stating that the gestational surrogate and her partner, if married or in a civil partnership, are the child's conditional legal parents).</i>

<p>20.</p>	<p>Mize and Gregg are, and at all times have been, S.M.-G.'s intended and only parents.</p>	<p>Mize Decl. ¶¶ 15-16, 23 & 25, Ex. G; Gregg Decl. ¶¶ 11 & 17</p> <p><u>Defendants' Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement and therefore the statement is disputed in part.</i></p> <p><i>Defendants do not dispute that Mize and Gregg are S.M.-G.'s parents.</i></p> <p><i>Defendants dispute that no other individual ever acted as a parent. By providing ova, the anonymous egg donor acted as the genetic mother/parent of S.M.-G. See Undisputed Fact No. 7. By carrying and giving birth to S.M.-G., the gestational surrogate acted as gestational mother/parent to S.M.-G. See Undisputed Fact Nos. 7, 9.</i></p> <p><i>Defendants further dispute the statement to the extent the statement conveys or implies that no other individual ever had legal rights as a parent of S.M.-G. See Gestational Surrogate Consent Form re: S.M.-G., Pls. Ex. G at 1 (stating that the gestational surrogate and her partner, if married or in a civil partnership, are the child's conditional legal parents).</i></p>
------------	---	---

The Mize-Greggs' Efforts to Establish S.M.-G.'s U.S. Citizenship		
21.	On March 26, 2019, Mize took S.M.-G. to a local Social Security Administration office in Atlanta, Georgia to apply for a Social Security number.	Mize Decl. ¶ 32; Gregg Decl. ¶ 22 <u>Defendants' Response:</u> <i>Undisputed.</i>
22.	Employees at the Social Security office declined to issue the Social Security number and stated that additional evidence of S.M.-G.'s U.S. citizenship was required.	Mize Decl. ¶ 33; Gregg Decl. ¶ 22 <u>Defendants' Response:</u> <i>Undisputed.</i>
23.	On April 24, 2019, Plaintiffs appeared at the U.S. Embassy in London and applied for a Consular Record of Birth Abroad (CRBA) and a U.S. passport for S.M.-G.	Mize Decl. ¶ 35; Gregg Decl. ¶ 24 <u>Defendants' Response:</u> <i>Undisputed.</i>
24.	Mize and Gregg submitted a CRBA application, passport application, a copy of their marriage certificate, and Mize and Gregg's own passports.	Mize Decl. ¶ 35; Gregg Decl. ¶ 24 <u>Defendants' Response:</u> <i>Undisputed.</i>
25.	When Embassy staff asked which of Mize and Gregg was S.M.-G.'s father, Mize and Gregg told the staff person that they are both S.M.-G.'s fathers.	Mize Decl. ¶ 36; Gregg Decl. ¶ 25 <u>Defendants' Response:</u> <i>Undisputed.</i>
26.	When Embassy staff pressed for information on whose sperm had been used to conceive S.M.-G., Mize and Gregg described the assisted reproductive technology (ART) process they had used to create S.M.-G.	Mize Decl. ¶ 36; Gregg Decl. ¶ 25 <u>Defendants' Response:</u> <i>Undisputed.</i>

27.	After approximately three hours of waiting, embassy staff informed Mize and Gregg that S.M.-G.'s CRBA and passport applications were denied.	Mize Decl. ¶ 38; Gregg Decl. ¶ 27 <u>Defendants' Response:</u> <i>Undisputed.</i>
28.	The head of the Passport and Citizenship Unit told Mize and Gregg that embassy staff, in consultation with other State Department personnel "up the chain," had determined that S.M.-G. did not qualify for citizenship at birth.	Mize Decl. ¶ 37; Gregg Decl. ¶ 27 <u>Defendants' Response:</u> <i>Undisputed.</i>
29.	The State Department evaluated S.M.-G.'s passport application under the requirements of INA Sections 309 (applicable to persons "born out of wedlock") and 301(g) (applicable to persons "born . . . of parents one of whom is an alien, and the other a citizen of the United States").	Mize Decl., Ex. L <u>Defendants' Response:</u> <i>Undisputed.</i>
30.	The State Department determined that S.M.-G. was not "born . . . of" her married legal parents, Mize and Gregg, because S.M.-G. does not have a biological relationship to both Mize and Gregg.	Mize Decl., Ex. L See also generally 8 FAM § 304.1-2(c) (FAM definition of "born 'in wedlock'"), 8 FAM § 301.4-1(D)(1)(c) ("A man has a biological relationship with his child, or a 'blood relationship' as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child.") <u>Defendants' Response:</u> <i>Undisputed.</i>

31.	The State Department evaluated S.M.-G.'s passport application under the requirements of INA sections 309 and 301(g) because S.M.-G. does not have a biological relationship to both Mize and Gregg.	<p>Mize Decl., Ex. L See also generally 8 FAM § 304.1-2(c) (FAM definition of “born ‘in wedlock’”), 8 FAM § 301.4-1(D)(1)(c) (“A man has a biological relationship with his child, or a ‘blood relationship’ as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child.”).</p> <p><u>Defendants’ Response:</u> <i>Undisputed.</i></p>
32.	The State Department determined that Mize is not S.M.-G’s parent for purposes of INA Section 301 because they are not biologically related.	<p>Mize Decl., Ex. L See also generally 8 FAM § 304.1-2(c) (FAM definition of “born ‘in wedlock’”), 8 FAM § 301.4-1(D)(1)(c) (“A man has a biological relationship with his child, or a ‘blood relationship’ as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child.”).</p> <p><u>Defendants’ Response:</u> <i>The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p><i>Defendants do not dispute that the State Department determined that S.M.-G. was not “born . . . of” both Mize and Gregg and, therefore, lacked a biological relationship to both Mize and Gregg.</i></p>

33.	The State Department determined that S.M.-G. could not obtain derivative citizenship through Mize because they are not biologically related.	<p>Mize Decl. ¶ 38, Ex. L; Gregg Decl. ¶ 27 See also generally 8 FAM § 304.1-2(c) (FAM definition of “born ‘in wedlock’”), 8 FAM § 301.4-1(D)(1)(c) (“A man has a biological relationship with his child, or a ‘blood relationship’ as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child.”).</p> <p><u>Defendants’ Response:</u> <i>The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p><i>Defendants do not dispute that the State Department determined that S.M.-G. lacked a biological relationship to Mize.</i></p>
34.	The State Department denied S.M.-G.’s passport application on the sole ground that “the biological U.S. citizen parent [i.e., Gregg] was not physically present in the United States for five years prior to the child’s birth ... as required under the provisions of § 301(g) of the [INA].”	<p>Mize Decl., Ex. L</p> <p><u>Defendants’ Response:</u> <i>The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p><i>Defendants do not dispute that the State Department determined that “based on the information provided on [Plaintiffs’] DS-2029, the biological U.S. citizen parent was not physically present in the United States for five years prior to the child’s birth . . . as required under the provisions of section 301(g) of the [INA],” Pls.’ Ex. L. Defendants also do not dispute that S.M.-G.’s passport application was denied on that basis. See id.</i></p>

35.	The State Department denied S.M.G's passport application based solely on its determination that she is not a U.S. citizen.	<p>Mize Decl., Ex. L</p> <p><u>Defendants' Response:</u> <i>The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p><i>Defendants do not dispute that the State Department denied S.M.-G.'s passport application on the basis that S.M.-G. appeared to have no claim to U.S. citizenship. See Pls. Ex. L.</i></p>
36.	The State Department refused to recognize S.M.-G. as a U.S. citizen because it imposes a requirement that the children of married U.S. citizens have a "biological" relationship with both of their parents before their citizenship can be evaluated under Section 301(c) (8 U.S.C. §1401(c)).	<p>Mize Decl., Ex. L See also generally 8 FAM § 304.1-2(c) (FAM definition of "born 'in wedlock'"), 8 FAM § 301.4-1(D)(1)(c) ("A man has a biological relationship with his child, or a 'blood relationship' as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child.").</p> <p><u>Defendants' Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement, and therefore the statement is disputed in part.</i></p> <p><i>Defendants do not dispute that the State Department denied S.M.-G.'s passport application on the basis that S.M.-G. appeared to have no claim to U.S. citizenship. See Pls. Ex. L. Defendants also do not dispute that S.M.-G. lacks biological relationships with both Mize and Gregg.</i></p>

The Foreign Affairs Manual		
37.	The Foreign Affairs Manual reflects State Department policy.	Manning Decl., Ex. M <u>Defendants' Response:</u> <i>Undisputed.</i>
38.	The FAM is not the product of notice-and-comment rulemaking or congressional action.	Manning Decl., Ex. Q at 244:13- 18; Manning Decl., Ex. T (Fact 140) <u>Defendants' Response:</u> <i>Undisputed.</i>
39.	The FAM includes requirements not specifically set out in the INA.	Manning Decl., Ex. Q at 44:13-18; Manning Decl., Ex. T (Fact 142) <u>Defendants' Response:</u> <i>Defendants dispute this statement as incomplete. The FAM specifies how the INA's requirements are applied. Additionally, portions of the FAM replicate requirements set forth in the INA.</i>
40.	The FAM is not approved by Congress.	Manning Decl., Ex. Q at 244:4-6; Manning Decl., Ex. T (Fact 141) <u>Defendants' Response:</u> <i>Undisputed.</i>
41.	The FAM includes requirements not specifically set out in the INA.	Manning Decl., Ex. Q at 103:5-11 & 104:8-11 <u>Defendants' Response:</u> <i>Defendants dispute this statement as incomplete. The FAM specifies how the INA's requirements are applied. Additionally, portions of the FAM replicate requirements set forth in the INA.</i>

<p>42.</p>	<p>The State Department’s Foreign Affairs Manual homepage states:</p> <p>“The Foreign Affairs Manual (FAM) and associated Handbooks (FAHs) are a single, comprehensive, and authoritative source for the Department's organization structures, policies, and procedures that govern the operations of the State Department, the Foreign Service and, when applicable, other federal agencies. The FAM (generally policy) and the FAHs (generally procedures) together convey codified information to Department staff and contractors so they can carry out their responsibilities in accordance with statutory, executive and Department mandates.”</p>	<p>Manning Decl., Ex. M</p> <p><u>Defendants’ Response:</u></p> <p><i>Defendant does not dispute that, as of the date of this filing, www.fam.state.gov, includes the language quoted in this statement.</i></p>
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State Department Policies		
43.	It is State Department policy that a child is deemed to be born in wedlock only if he or she has a “biological” relationship to both married parents.	<p>8 FAM § 304.1-2(c); Manning Decl., Ex. Q, at 170:21-25 – 171:1-4</p> <p><u>Defendants’ Response:</u> <i>Defendants dispute this statement in part. Defendants dispute the statement to the extent it conveys or implies that the Department of State is applying a “policy,” as opposed to applying the Department of State’s interpretation of the INA. Defendants do not dispute that a child is deemed to have been born in wedlock only if his or her biological parents were married at the time of the child’s birth.</i></p>
44.	The FAM states: “To 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.”	<p>8 FAM § 304.1-2(c)</p> <p><u>Defendants’ Response:</u> <i>Undisputed.</i></p>

45.	With one exception created in 2014, the State Department considers a parent to have a “biological” relationship with their child only if they are the child’s genetic parent.	<p>Manning Decl., Ex. Q, at 173:19- 25-174:1-5 (“Q What do you mean by biological? A If both parents had contributed genetic material.”); <i>see also</i> 8 FAM § 301.4-1(D)(1)(c).</p> <p><u>Defendants’ Response:</u> <i>Defendants dispute the statement in part. Defendants dispute the statement’s characterization of the 2014 modification to 8 FAM § 301.4-1(D)(1)(c) as an “exception.”</i></p> <p><i>Defendants do not dispute that, in 2014, the Department of State issued policy guidance on a topic which had not been addressed previously, clarifying the guidance as to certain circumstances that were within the Department’s interpretation. Defendants also do not dispute that, under the 2014 guidance, they consider gestation to be a form of biological relationship between mother and child.</i></p>
46.	It is State Department policy that a man has a “biological” relationship with his child only if he is the child’s genetic parent.	<p>8 FAM § 301.4-1(D)(1)(c)</p> <p><u>Defendants’ Response:</u> <i>Undisputed.</i></p>
47.	It is State Department policy that a man is a child’s parent for purposes of Sections 301 and 309 of the INA (8 U.S.C. §§ 1401 & 1409) only if he is the child’s genetic parent.	<p>8 FAM § 301.4-1(D)(1)(c)</p> <p><u>Defendants’ Response:</u> <i>The cited evidence does not establish the point(s) made in the statement. The statement is, therefore, disputed.</i></p>

<p>48.</p>	<p>The FAM states: “A man has a biological relationship with his child, or a ‘blood relationship’ as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child. A woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby). (See 8 FAM 304.3.)”</p>	<p>8 FAM § 301.4-1(D)(1)(c) <u>Defendants’ Response:</u> Undisputed.</p>
<p>49.</p>	<p>Under State Department policy, Mize and Gregg can never have a child “in wedlock” together because they are two men.</p>	<p>8 FAM § 301.4-1(D)(1)(c); 8 FAM § 304.1-2(c); Manning Decl., Ex. Q at 274:25-275:6 <u>Defendants’ Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the Statement, and therefore the statement is disputed.</i></p>

50.	It is State Department policy that a U.S. citizen parent must have a biological relationship with a child in order to transmit U.S. citizenship at birth to the child, even if the parent is the legal parent of the child and was married to the child's other legal parent at the time of the child's birth.	<p>8 FAM § 301.4-1(D)(1); Manning Decl., Ex. Q at 158:25-159:13; Manning Decl., Ex. R at 121:22- 122:7, 124:9-125:3 & 157:3-4</p> <p><u>Defendants' Response:</u> <i>The statement is incomplete and, therefore, Defendants dispute the statement in part.</i></p> <p><i>Defendants do not dispute that the Department of State interprets 8 U.S.C. § 1401 to require that a U.S. citizen parent have a biological relationship with a child born abroad in order to transmit U.S. citizenship at birth under the statute, even if the U.S. citizen parent is the legal parent of the child and married to the child's other legal parent at the time of the child's birth.</i></p>
51.	The State Department's reading of Section 301 as requiring a biological relationship is based on the State Department's interpretation of the words "born ... of parents" in Section 301 as referring to a biological parent of the child.	<p>Manning Decl., Ex. W at 178:13- 19; & 180:10-15</p> <p><u>Defendants' Response:</u> <i>Undisputed.</i></p>

52.	<p>It is State Department policy to define a non-genetic gestational mother who is also the legal parent of a child as a “biological” parent of the child for purposes of derivative citizenship under Section 301 of the INA (8 U.S.C. § 1401).</p>	<p>8 FAM § 301.4(D)(1)(c); 8 FAM § 304.3-1(a)</p> <p><u>Defendants’ Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement. The statement is, therefore, disputed in part.</i></p> <p><i>Defendants do not dispute that 8 FAM § 301.4(D)(1)(c) provides that “[a] woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby). (See 8 FAM 304.3)”</i></p> <p><i>Defendants also do not dispute that 8 FAM § 304.3-1(a) provides that “[a] child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and nationality Act (INA) 301(c).”</i></p>
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<p>53.</p>	<p>It is State Department policy to define certain non-genetic mothers as “biological” parents for purposes of derivative citizenship under Section 301 of the INA (8 U.S.C. § 1401) only where the non-genetic mother is a legal parent of the child.</p>	<p>8 FAM § 301.4(D)(1)(c); 8 FAM § 304.3-1(a)</p> <p><u>Defendants’ Response:</u> <i>This statement constitutes a conclusion of law, not a statement of fact. The cited evidence does not establish the point(s) made in the statement. The statement is, therefore, disputed in part.</i></p> <p><i>Defendants do not dispute that 8 FAM § 301.4(D)(1)(c) provides that “[a] woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby). (See 8 FAM 304.3)”</i></p> <p><i>Defendants also do not dispute that 8 FAM § 304.3-1(a) provides that “[a] child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and nationality Act (INA) 301(c).”</i></p>
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54.	<p>The State Department changed its interpretation of Section 301 in 2014 to interpret “born . . . of parents” to include not only a genetic parent, but also a gestational mother who did not provide the genetic material (i.e., egg) for the child.</p>	<p>Manning Decl., Ex. Q, (166:14-2); Manning Decl., Ex. R at 183:4- 183:18; id., Ex. S at (84:7-84:12</p> <p><u>Defendants’ Response:</u> <i>The evidence cited does not establish the point(s) made in the statement. The testimony cited is deposition testimony pursuant to Fed. R. Civ. P. 30(b)(6) in Dvash-Banks v. U.S. Dep’t of State, No. 18-523 (C.D. Ca.). The defendants in that case did not designate the witness to provide testimony on the subject of the statement pursuant to Fed. R. Civ. P. 30(b)(6) at the time. Defendants, therefore, dispute this statement in part.</i></p> <p><i>Defendants do not dispute that, in 2014, the Department of State issued policy guidance on a topic which had not be addressed previously, clarifying the guidance as to certain circumstances that were within the Department’s interpretation. Defendants also do not dispute that, under the 2014 guidance, they consider gestation to be a form of biological relationship between mother and child.</i></p>
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<p>55.</p>	<p>Prior to that change, the State Department interpreted Section 301 as excluding from the biological relationship that the State Department requires, a gestational mother who did not provide genetic material for the child.</p>	<p>Manning Decl., Ex. Q at 172:21- 173:12; Manning Decl., Ex. T (Fact 128)</p> <p><u>Defendants' Response:</u> <i>The evidence cited does not establish the point(s) made in the statement. Defendants, therefore, dispute this statement in part.</i></p> <p><i>Defendants do not dispute that prior to the Department of State's 2014 clarification of its policy guidance regarding section 301, the Department of State generally applied the statute so as not to treat as a biological mother a gestational mother who did not have a genetic relationship with the child.</i></p>
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56.	The State Department made this change even though Congress had not made any corresponding amendment of the INA because the State Department simply “changed its mind” as to its interpretation of Section 301.	<p>Manning Decl., Ex. Q at 243:1-4, 15-20</p> <p><u>Defendants’ Response:</u> <i>The cited evidence does not establish the point(s) made by the statement. The testimony cited is deposition testimony pursuant to Fed. R. Civ. P. 30(b)(6) in Dvash-Banks v. U.S. Dep’t of State, No. 18-523 (C.D. Ca.). The defendants in that case did not designate the witness to provide testimony on the subject of the statement pursuant to Fed. R. Civ. P. 30(b)(6) at the time. Further, Defendants dispute that the Department of State “simply ‘changed its mind.’” As new sets of facts and circumstances relating to the use of ART became more common, the Department of Statement reviewed and modified its relevant policy guidance. Defendants, therefore, dispute the statement in part.</i></p> <p><i>Defendants do not dispute that the 2014 clarification did not result from an amendment of the INA.</i></p>
57.	The FAM states: “In most cases involving assisted reproductive technology there is no shortage of documentation, and consular officers are free, as in any case, to ask for appropriate supporting documentation that fits the circumstances of the case.”	<p>8 FAM § 304.3-4(a)</p> <p><u>Defendants’ Response:</u> <i>Undisputed.</i></p>

<p>58.</p>	<p>The FAM states: “Examples of appropriate supporting documentation would be: certified hospital records or physicians’ records where the procedure occurred and a sworn statement from the physician who performed the procedure; medical records documenting pre-natal care of the surrogate or the gestational mother; medical records documenting underlying medical conditions that caused parent to seek assisted reproductive technology (i.e., infertility or injury); insurance documents or other types of receipts documenting the payments made for the various different procedures. DNA testing may be recommended depending on the other medical evidence and circumstances of the case.”</p>	<p>8 FAM § 304.3-4(a)</p> <p><u>Defendants’ Response:</u></p> <p><i>The cited evidence does not establish the point(s) made by the statement. Defendants, therefore, dispute the statement in part.</i></p> <p><i>Defendants do not dispute that the statement accurately quotes 8 FAM § 304-3.4(b).</i></p>
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59.	The FAM states: “In cases involving surrogacy, in addition to the medical records discussed above, the intended parents are likely to have signed contracts or other legal instruments with any of the following: fertility clinic, physician, laboratories, the surrogate mother, and/or egg/sperm donor. These legal documents should detail the various parties’ intentions with respect to future parental rights and also about fees and payments to the various parties.”	8 FAM § 304.3-4(c) <u>Defendants’ Response:</u> <u>Undisputed.</u>
60.	It is State Department policy that a biological relationship between an anonymous sperm or egg donor who is a U.S. citizen and a child is insufficient to transmit U.S. citizenship to the child.	8 FAM § 304.3-3 <u>Defendants’ Response:</u> <u>Undisputed.</u>
61.	The FAM states: “U.S. citizenship cannot be transmitted by an anonymous sperm or egg donor, even if a clinic, sperm bank, or intended parent(s) purport to certify that the sperm or egg was donated by a U.S. citizen.”	8 FAM § 304.3-3 <u>Defendants’ Response:</u> <u>Undisputed.</u>

62.	The FAM identifies birth certificates, surrogacy contracts, entry/exit stamps in passports, airline/hotel receipts, sworn statements, and photographs, mementos, among other documents, as typical evidence the State Department looks to establish parentage.	8 FAM §§ 304.1-4, 304.3-4 <u>Defendants' Response:</u> <u>Undisputed.</u>
63.	The State Department's rationale for its interpretation of Section 301 is not rooted in a concern that interpreting Section 301 as not requiring a biological relationship between an applicant for a CRBA or U.S. passport who was born outside the United States and the child's United States citizen parent would create or increase the risk of fraud in connection with applications for recognition of U.S. citizenship.	Manning Decl., Ex. Q at 317:2-8 ("THE REPORTER[Q:]: "But should I understand you still to be saying that the State Department's view that the requirements for establishing the blood relationship between a U.S. citizen parent and a child born outside the United States is not tied really in any way to concern about fraud? A: Correct.""). <u>Defendants' Response:</u> <i>The cited evidence does not establish the point(s) made in the statement. See Memo. From Asst. Sec'y of State (February 13, 2012) Defs. Ex. B; Excerpt from Dep. of P. Peek, Defs. Ex. C. Defendants, therefore, dispute the statement.</i>

Dated: February 14, 2020

Respectfully submitted,

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