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**UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW JERSEY**

ALLISON DAWN BLIXT and  
L. Z.-B.,

Plaintiffs,

v.

The UNITED STATES  
DEPARTMENT OF STATE and  
MICHAEL R. POMPEO in his  
official capacity as Secretary, U.S.  
Department of State,

Defendants.

Civ. No. 2:20-cv-02102-KM-JBC

Hon. Kevin McNulty

**NOTICE OF MOTION AND  
MOTION FOR LEAVE TO  
AMEND THE COMPLAINT  
PURSUANT TO FEDERAL  
RULE OF CIVIL  
PROCEDURE 15(a)(2)**

Motion Date: May 18, 2020

PLEASE TAKE NOTICE that, on April 13, 2020, Sullivan & Cromwell LLP, counsel for Plaintiffs, Allison Dawn Blixt and L. Z.-B., by and through his court-appointed guardian *ad litem*, Stefania Zaccari, (together, “Plaintiffs”), will move before the Honorable Kevin McNulty, United States District Judge, District of New Jersey, at the Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, New Jersey, pursuant to Federal Rule of Civil Procedure 15(a)(2) and the Court’s Local Rule 15.1, for an Order granting leave to amend the Complaint (the “Motion”), and granting such other relief as the Court deems just and proper. Defendants, the United States Department of State and the Honorable Michael R. Pompeo, in his official capacity as Secretary of State, do not oppose this Motion.

PLEASE TAKE FURTHER NOTICE that, in support of the Motion, Plaintiffs will rely upon the accompanying *Memorandum of Points and Authorities in Support of Motion for Leave to Amend the Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2)* (Exhibit (“Ex.”) A).

PLEASE TAKE FURTHER NOTICE that the [*Proposed*] *First Amended Complaint* (Ex. B) and a redline of the proposed amended complaint identifying the proposed changes, from which L. Z.-B.’s and his minor brother’s full names have been redacted to preserve the privacy of their identities, (Ex. C) are submitted herewith for the Court’s consideration.

PLEASE TAKE FURTHER NOTICE that a proposed form of order is also submitted herewith for the Court's consideration (Ex. D).

Dated: April 13, 2020

Respectfully submitted,

By: /s/ Mark A. Makar

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I, Mark A. Makar, of full age, certify as follows:

1. On April 13, 2020, I served the foregoing Notice of Motion and Motion for Leave to Amend the Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2) on all counsel of record in the above-captioned action via the Court's ECF system.

Dated: April 13, 2020

Respectfully submitted,  
By: /s/ Mark A. Makar  
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# **Exhibit A**



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Pursuant to Federal Rule of Civil Procedure 15(a)(2) and the Court’s Local Rule 15.1, Plaintiffs, Allison Dawn Blixt and L. Z.-B., by and through his court-appointed guardian *ad litem*, Stefania Zaccari, (together, “Plaintiffs”), respectfully submit this memorandum in support of their Motion for Leave to Amend the Complaint (“Motion”) in the above-captioned action (“Action”). Defendants, the United States Department of State (“State Department”) and the Honorable Secretary of State Michael R. Pompeo, in his official capacity, (together, “Defendants”; jointly with Plaintiffs, the “Parties”), do not oppose this Motion.

## STATEMENT OF FACTS RELEVANT TO THIS MOTION

### A. BACKGROUND

L. Z.-B. was born in London, England during the marriage of a same-sex couple—Allison Dawn Blixt, a United States citizen, and Stefania Zaccari, an Italian citizen—by means of assisted reproductive technology. (ECF No. 1 ¶¶ 1–2.) L. Z.-B. was conceived using sperm from an anonymous donor and Stefania’s egg. (ECF No. 1 ¶ 2.) Stefania conceived and carried L. Z.-B. to term. (ECF No. 1 ¶ 2.) Allison and Stefania are the only individuals listed on L. Z.-B.’s birth certificate as his parents. (ECF No. 1 ¶ 2.) On May 23, 2017, Plaintiffs appeared in person at the United States Embassy in London (“Embassy”) to apply for a Consular Report of Birth Abroad (“CRBA”) for L. Z.-B.—a document evidencing his U.S. citizenship. (ECF No. 1 ¶ 56.) By letter dated May 24, 2017, the State Department informed

Plaintiffs that it had denied L. Z.-B.'s application because, although Allison is a U.S. citizen, his biological mother is not a U.S. citizen. (*See* ECF No. 1 ¶ 57; *see also* ECF No. 1-4.) In reaching its determination, the State Department relied on its internal policy interpreting Section 301 of the Immigration and Nationality Act of 1952, as amended (“INA”), 8 U.S.C. § 1401 (“Section 301”), to require that both of a child’s biological parents be married to each other at the time of the child’s birth. (ECF No. 1 ¶¶ 37–40.) Based on this policy, the State Department adjudicated L. Z.-B.’s application under Section 309 of the INA (“Section 309”), 8 U.S.C. § 1409, which applies only to children “born out of wedlock.” Section 309 requires a biological or gestational relationship between the child and the child’s U.S. citizen parent. (ECF No. 1 ¶¶ 21, 57.) The sole basis for the denial of L. Z.-B.’s application was the lack of a biological or gestational relationship between L. Z.-B. and Allison, his U.S. citizen parent. (ECF No. 1 ¶ 57.)

On September 5, 2017, Allison and L. Z.-B. submitted, through their counsel, a letter to the Embassy requesting reconsideration of its denial of L. Z.-B.’s application on the ground that the State Department had applied the wrong statutory provision of the INA—Section 309—based on an unconstitutional rationale that denies married same-sex couples full legal recognition of their marriages. (ECF No. 1 ¶ 60.) By letter dated November 7, 2017, the Embassy responded without any

explanation that it “affirm[ed] that [L. Z.-B.] did not acquire U.S. citizenship at birth.” (ECF No. 1 ¶ 61.)

On January 22, 2018, Plaintiffs filed their Complaint against Defendants in the United States District Court for the District of Columbia (“D.D.C.”), pursuant to 28 U.S.C. § 1391(e). (*See generally* ECF No. 1.) Plaintiffs filed the Action in the D.D.C. because they resided outside the United States at the time of the Action’s commencement. The Complaint asserts claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), and the Due Process and Equal Protection Clauses of the Fifth Amendment. (*See* ECF No. 1 ¶¶ 73–98.) Specifically, the Complaint seeks, among other things, (1) a declaration that L. Z.-B. is “a U.S. citizen at birth”; (2) a declaration that Defendants unconstitutionally and in violation of the INA classify children of same-sex-married couples to be “born out of wedlock” and thus ineligible for citizenship at birth under Section 301; and (3) an injunction enjoining Defendants from continuing “to discriminate against Plaintiffs by classifying the children of married same-sex couples as ‘children born out of wedlock,’ and denying the children of married same-sex couples the right to acquire citizenship at birth pursuant to Section 301(g) on that basis.” (ECF No. 1, at 24.)

Because Plaintiffs resided in London, England at the time the Complaint was filed, the Complaint does not assert a claim under 8 U.S.C. § 1503(a)

(“Section 1503(a)”), which provides a cause of action for an individual “who is within the United States” and to whom the federal government denies a “right or privilege . . . upon the ground that he is not a national of the United States.” 8 U.S.C. § 1503(a). In particular, such a person may institute an action under 28 U.S.C. § 2201 “for a judgment declaring him to be a national of the United States.” *Id.* A claim under Section 1503(a) “shall be filed in the district court of the United States for the district in which such person resides . . . .” *Id.*

In late 2019, Plaintiffs relocated from London, England to Essex County, New Jersey. (Declaration of Allison Dawn Blixt, ECF No. 48-2 ¶ 3.) Plaintiffs promptly notified the court in the D.D.C. and Defendants of this development and, thereafter, the Parties agreed to ask the court in the D.D.C. to transfer the Action to this District, where Plaintiffs now reside, in material part so that Plaintiffs could seek to assert a claim in this Court under Section 1503(a). (*See* ECF Nos. 45, 46, 47.) On February 13, 2020, the Parties filed in the D.D.C. a *Joint Motion For Transfer Pursuant to 28 U.S.C. § 1404(a)* (“Transfer Motion”), arguing, in relevant part, that “[b]ecause Plaintiffs would be forced to litigate their Section 1503(a) claim in a parallel action in D.N.J. absent transfer, the requested transfer is in the interest of justice and would ‘prevent[] the unnecessary expenditure of judicial and party resources that would otherwise occur if the claims were heard in multiple judicial districts.’” (ECF No. 48-1, at 4–5 (quoting *Edley v. Saul*, 2019 WL

3238635, at \*6 (D.D.C. July 18, 2019)).) On February 14, 2020, the court in the D.D.C. granted the Transfer Motion and ordered the transfer of the Action to this Court. (Minute Order, dated February 14, 2020.)

Plaintiffs now seek leave to amend the Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). Plaintiffs' *[Proposed] First Amended Complaint*, attached as Exhibit B to the notice of this Motion, removes the APA claim and adds a Section 1503(a) claim, which turns on the same facts and seeks substantially the same relief as the APA claim. Plaintiffs' proposed amendment also would modify or supplement allegations to reflect certain developments in the Action or Plaintiffs' situation since the filing of the Complaint ("Conforming Modifications").

## **B. STATUS OF THE ACTION**

Defendants filed in the D.D.C. a *Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Failure to State a Claim Upon Which Relief Can Be Granted* ("Motion to Dismiss") on September 3, 2018. (ECF No. 31.) On May 15, 2019, following a court conference on that date, the court denied Defendants' Motion to Dismiss, ordered Defendants to produce the administrative record relating to the State Department's adjudication of L. Z.-B.'s CRBA application ("Administrative Record"), and referred the Action to Magistrate Judge Robin M. Meriweather for discovery and mediation. (Minute Order, dated May 15, 2019; Minute Order Referring Case to Magistrate Judge Robin M. Meriweather for

Mediation and Discovery, dated May 15, 2019.) On May 29, 2019, the Parties exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1). (See ECF No. 40, at 2.) On June 28, 2019, Defendants filed their *Notice of Filing of Certified Index of the Administrative Record*, (ECF No. 43), and produced to Plaintiffs the Administrative Record, which consists of 57 pages. On May 31, 2019 and August 26, 2019, the Parties filed joint submissions outlining their respective positions, and seeking the Court’s guidance, regarding whether and to what extent further discovery should be permitted in the Action. (ECF Nos. 40, 44.) This issue remained unresolved as of February 14, 2020, the date on which the court in the D.D.C. transferred the Action to this Court. Other than the Parties’ respective initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) and Defendants’ filing of the Administrative Record, to date, there has been no discovery taken in the Action.

## ARGUMENT

### A. LEAVE TO AMEND THE COMPLAINT SHOULD BE GRANTED.

Federal Rule of Civil Procedure 15(a)(2) provides that “[t]he court should freely give leave when justice so requires.”<sup>1</sup> Fed. R. Civ. P. 15(a)(2); *Foman*

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<sup>1</sup> Plaintiffs’ Motion is governed by Federal Rule of Civil Procedure 15—not Federal Rule of Civil Procedure 16—because the court in the D.D.C. did not enter a scheduling order in the Action. See *Banda v. Corniel*, 2017 WL 5885662, at \*1 (D.N.J. Nov. 28, 2017) (“In this case, there was no Scheduling Order issued. Therefore, Rule 15 governs the instant motion.”).

v. *Davis*, 371 U.S. 178, 182 (1962). Under Third Circuit law, a “district court may deny leave to amend only if a plaintiff’s delay in seeking amendment is undue, motivated by bad faith, or prejudicial to the opposing party.” *Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984). Courts also deny leave to amend if the amendment would be futile. *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000).

As discussed below, Plaintiffs have not delayed in seeking to amend the Complaint, and the requested amendment is not sought in bad faith, would not prejudice Defendants, and would not be futile. Here, Plaintiffs seek leave to amend the Complaint to assert a claim under Section 1503(a) *in lieu* of a claim under the APA. Plaintiffs could not have filed the Action initially in this Court and could not have asserted a Section 1503(a) claim when they filed the Complaint because Plaintiffs did not then reside in the United States. When the Zaccari-Blixt family relocated from London, England to Essex County, New Jersey, Plaintiffs promptly sought to transfer the Action to this Court in order to assert a claim under Section 1503(a). *See Berrada v. Cohen*, 2017 WL 1496930, at \*3 (D.N.J. Apr. 24, 2017) (“[O]nce it became clear [to the plaintiff] that New Jersey law would apply (late in the action and upon transfer)[,]” the movant could substitute claims under New Jersey law for claims originally brought under Florida law); *State Coll. Area Sch. Dist. v. Rhodes & Sinon, LLP*, 2011 WL 13140664, at \*2 (M.D. Pa. July 27, 2011) (permitting amendment because “to refuse to allow amendment when

[movant] was unable to bring the new claims at an earlier date would not promote judicial efficiency or fairness”). Indeed, the express principal purpose of the Parties’ Transfer Motion was to enable Plaintiffs to assert such a claim. (ECF No. 48-1, at 4.) Plaintiffs also seek here to incorporate certain Conforming Modifications reflecting factual developments subsequent to the filing of the Complaint. The proposed amendment would not assert entirely new legal theories or claims and, Plaintiffs submit, the amended allegations would assist the Parties in litigating the Action. *See Glen Ridge SurgiCenter, LLC v. Horizon Blue Cross & Blue Shield of New Jersey*, 2011 WL 5881924, at \*6 (D.N.J. Sept. 16, 2011) (finding no prejudice where “only very limited discovery has occurred” and “the proposed amendment does not involve a change of legal theories”); *Kounelis v. Sherrer*, 396 F. Supp. 2d 525, 531 (D.N.J. 2005) (“Defendants would not be prejudiced by the amendments proposed by Plaintiff as no new claims are asserted against Defendants.”).

**B. THERE IS NO EVIDENCE OF UNDUE DELAY OR BAD FAITH.**

To find undue delay or bad faith, courts must assess the movant’s “motives for not amending” sooner. *Adams*, 739 F.2d at 868. Mere passage of time does not justify denial; instead, the delay must also place “an unwarranted burden on the court” or “an unfair burden on the opposing party.” *Id.*

Here, Plaintiffs have neither delayed in seeking to amend the Complaint nor acted in bad faith. Plaintiffs could not have brought a claim under

Section 1503(a) when they filed the Complaint in the D.D.C. because a plaintiff must “reside” in the United States to assert a claim under Section 1503(a). When Plaintiff Allison Dawn Blixt accepted an employment opportunity in the United States and the Zaccari-Blixt family relocated from London, England to Essex County, New Jersey in late 2019, Plaintiffs promptly informed both Defendants and the court in the D.D.C. of those developments, (*see* ECF Nos. 45, 46, 47); and the Parties thereafter moved to transfer the Action to enable Plaintiffs to seek to file an amended complaint (ECF No. 48-1, at 4; ECF No. 47 at 2 (“The Parties have been discussing a proposed transfer of the Action to the District of New Jersey . . . , following which Plaintiffs could seek to amend the Complaint, among other things, to assert [a claim] directly under 8 U.S.C. § 1503(a) . . . .”). Plaintiffs have filed this Motion at essentially the first possible opportunity, promptly after the transfer of the Action to this Court. Accordingly, there can be no finding of undue delay or bad faith here.

**C. DEFENDANTS WOULD NOT BE PREJUDICED BY PLAINTIFFS’ PROPOSED AMENDMENT.**

To demonstrate the required prejudice to deny a motion for leave to amend, the non-moving party must show “that its ability to present its case would be seriously impaired were amendment allowed.” *Dole v. Arco Chem. Co.*, 921 F.2d 484, 488 (3d Cir. 1990). A defendant does not suffer prejudice when it has “been aware of Plaintiff’s position . . . since the start of th[e] litigation.” *Garcia v. Correctional Med. Serv., Inc.*, 2016 WL 7377103, at \*3 (D.N.J. Dec. 20, 2016). Nor

does a defendant suffer prejudice when the “proposed amended complaint is based upon facts and circumstances which do not differ significantly from those underlying the [movant’s] original allegations” and “[t]he evidence required to meet these new allegations is substantially similar to that which was originally required.” *Dole*, 921 F.2d at 488.

Here, Defendants would not suffer any prejudice if Plaintiffs’ Motion is granted because Plaintiffs do not seek materially to alter the Complaint. Plaintiffs seek to replace their claim under the APA with a claim under Section 1503(a). Plaintiffs’ proposed Section 1503(a) claim turns on the same facts and seeks substantially similar relief as does their APA claim. Moreover, Defendants have long been aware of the potential applicability here of Section 1503(a), arguing in their Motion to Dismiss that “Plaintiffs can and should utilize the provisions Congress specifically made available by 8 U.S.C. § 1503 to an individual who is denied a ‘right or privilege as a national of the United States’ by the federal government on ‘the ground that [s]he is not a national of the United States.’” (ECF No. 31-1, at 21.) Similarly, Defendants would not be prejudiced by Plaintiffs’ proposed assertion of the Conforming Modifications, as these amendments merely reflect factual developments subsequent to the filing of the Complaint, all of which are well known to Defendants.

Further, the requested amendment is being sought at a relatively early stage of the Action, before any discovery has occurred (other than Defendants' filing of the Administrative Record and the Parties' exchange of initial disclosures) and before Defendants have invested substantial resources in discovery or trial preparation. *See, e.g., Rosenzweig v. Transworld Sys., Inc.*, 2016 WL 5106995, at \*2 (D.N.J. Sept. 20, 2016) (“[T]here is no prejudice” because “[l]ittle to no discovery has occurred and discovery is currently stayed.”); *Conover v. Rash Curtis & Assocs.*, 2016 WL 3708656, at \*3 (D.N.J. July 12, 2016) (“Given the early stage of discovery, Plaintiff’s addition of . . . allegations would not cause ‘substantial prejudice’ to Defendant.”); *Valdes v. New Jersey*, 2005 WL 3447618, at \*2 (D.N.J. Dec. 15, 2005) (“[L]eave to amend will not cause any prejudice to Defendants as no discovery has taken place.”). Because Plaintiffs’ proposed amendment would not “seriously impair[]” Defendants’ defense, Plaintiffs should be granted leave to file the *[Proposed] First Amended Complaint*. *Dole*, 921 F.2d at 488.

**D. PLAINTIFFS’ PROPOSED AMENDMENT WOULD NOT BE FUTILE.**

“In its assessment of whether an amendment would be futile, a court applies the same standard of legal sufficiency as under Fed. R. Civ. P. 12(b)(6).” *Florian Greenhouse, Inc. v. Cardinal IG Corp.*, 11 F. Supp. 2d 521, 525 (D.N.J. 1998) (citing *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 190 (3d Cir. 1998); *Jablonski v. Pan Am. World Airways*, 863 F.2d 289, 292 (3d Cir. 1988)).

“Given the liberal standard for the amendment of pleadings, courts place a heavy burden on opponents who wish to declare a proposed amendment futile.” *Dejoo Sales, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 2017 WL 4404565, at \*3 (D.N.J. Oct. 4, 2017) (internal quotation marks omitted).

Here, Plaintiffs’ proposed amendment would not be futile. Plaintiffs’ APA claim already has survived a motion to dismiss in the D.D.C. (*See Minute Order*, dated May 15, 2019.) The *[Proposed] First Amended Complaint* would replace Plaintiffs’ claim under the APA, which the court in the D.D.C. already held was sufficient to state a claim, with a substantively similar claim under Section 1503(a). Similarly, the Conforming Modifications merely update the Complaint with subsequent factual developments that do not bear on the viability of the Action.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion in full and grant to Plaintiffs such other and further relief as the Court deems just and proper.

Dated: April 13, 2020

Respectfully submitted,

By: /s/ Mark A. Makar

Mark A. Makar (N.J. Bar No. 244882017)

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# **Exhibit B**

**UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW JERSEY**

-----	X	
ALLISON DAWN BLIXT and L. Z.-B.,	:	
	:	
Plaintiffs,	:	[PROPOSED] FIRST AMENDED
	:	COMPLAINT
	:	
v.	:	Docket No. 2:20-CV-02102-KM-
	:	JBC
THE UNITED STATES DEPARTMENT OF STATE,	:	
and THE HONORABLE MICHAEL R. POMPEO,	:	Hon. Kevin McNulty
Secretary of State,	:	
	:	
Defendants.	:	
	:	
-----	X	

**PRELIMINARY STATEMENT**

1. This action challenges a United States Department of State (“State Department”) policy that hurts families and undermines the familial relationships of same-sex parents. The agency’s policy unconstitutionally disregards the dignity and sanctity of same-sex marriages by refusing to recognize the birthright citizenship of the children of married same-sex couples. Plaintiffs are members of a family who have suffered and continue to suffer harm because of the State Department’s policy. The family includes: Allison Dawn Blixt (“Allison”), a United States citizen who was born and raised in this country; Allison’s wife, Stefania Zaccari (“Stefania”), an Italian citizen; and their two young sons, L. Z.-B. and M. Z.-B.

2. Both L. Z.-B. and M. Z.-B. were conceived and born in London, England during Allison’s marriage to Stefania. Allison and Stefania conceived their children using their own eggs and sperm from an unknown donor. Stefania conceived and carried L. Z.-B. to term. Allison conceived and carried M. Z.-B. to term. Allison and Stefania are the only parents listed on L.

Z.-B.'s and M. Z.-B.'s birth certificates, and are the only people English law<sup>1</sup> recognizes as L. Z.-B. and M. Z.-B.'s parents. Accordingly, Allison and Stefania have been their children's legal parents from the day they came into this world.

3. At birth, both L. Z.-B. and M. Z.-B. qualified for United States citizenship pursuant to Section 301(g) of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1401(g)). That clause entitles a person born abroad to citizenship at birth if one of that person's married parents is a United States citizen and the other is a foreign national, as long as the citizen parent satisfies certain statutorily prescribed periods of residency in the United States. Allison is a U.S. citizen who lived in the United States for over twenty years, and so clearly satisfies the residency requirements of Section 301(g). Because Allison and Stefania were married to each other when L. Z.-B. and M. Z.-B. were born, L. Z.-B. and M. Z.-B. have been U.S. citizens since birth under Section 301(g).

4. The State Department, through the United States Embassy in London, however, failed to apply Section 301(g) to L. Z.-B. and M. Z.-B. Instead, it applied Section 309 of the INA (codified at 8 U.S.C. § 1409), a provision of the statute which applies only to children born "out of wedlock." Because the State Department wrongly considered them to have been born "out of wedlock," it concluded that they could qualify for citizenship at birth only as the children of unwed parents, and therefore could acquire such citizenship only pursuant to Section 309 and only if Allison gave birth to them both.

5. Focusing improperly on the biological relationship between each child and the parent who conceived and carried him, the State Department then recognized M. Z.-B.'s

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

citizenship and denied L. Z.-B.'s. The State Department's application of Section 309 instead of Section 301 is an unlawful, unconstitutional refusal to recognize the validity of Allison and Stefania's marriage and, therefore, that a child born to them during that marriage is the offspring of that marriage. The fact that the State Department's policy has led children identified by their birth certificates as boys with the same parents to have different nationalities listed on their passports crystallizes both the indignity and absurdity of the policy's effect.

6. The State Department's failure to recognize and give effect to the marriage between Allison and Stefania also denies L. Z.-B. the rights and privileges that accompany U.S. citizenship, including the right to reside permanently in the United States as a U.S. citizen, the right to obtain a U.S. passport, and, when he is older, the right to run for political office. Because the State Department does not recognize L. Z.-B.'s U.S. citizenship, he cannot visit or live in the United States freely on the same terms as other members of his family.

7. The State Department's decision to withhold from L. Z.-B. the same rights granted to his brother means that he will experience the indignity and stigma of unequal treatment imposed and endorsed by the U.S. government. No governmental purpose could justify imposing these indignities on a child of a valid marriage or restricting a family's freedom to live together as a family.

8. The State Department's policy is not only wrong and harmful, it is also contrary to the INA as well as the guarantees of due process and equal protection enshrined in the Fifth Amendment. To the extent that the State Department's policy was adopted before the Supreme Court's recent precedents guaranteeing equality to married same-sex couples and their families, its continued enforcement violates the law. The Supreme Court has made clear that the Constitution requires that same-sex marriages receive the same legal effects and respect as

opposite-sex marriages. The State Department's policy, or at least its application to L. Z.-B., violates that mandate by restricting eligibility for citizenship under Section 301 of the INA solely to children whose parents are in opposite-sex marriages. These violations create real and significant hardships for the Zaccari-Blixt family and others like them. Soon, L. Z.-B. will be old enough to realize that the U.S. government views him as a non-citizen with no enforceable connection to his mother or brother, and discriminates against him based on the sex and sexual orientation of his parents.

9. The State Department's policy serves no rational, legitimate, or substantial government interest. The State Department's policy drives apart families by treating the children of the same married parents differently depending upon which mother bore the child. The threat that this policy poses to family unity confirms that it is contrary to the legislative intent of the INA, which enshrines the preservation of the family unit as a paramount consideration. Neither the INA nor the U.S. Constitution permits the State Department's unlawful policy to stand.

#### **THE PARTIES**

10. Plaintiff Allison is a 41-year-old citizen of the United States. She was born in Illinois, raised in North Carolina, and resided as an adult in New York. She currently resides in Essex County, New Jersey.

11. Plaintiff L. Z.-B. is 5 years old. He was born in London, England, where he resided with his parents Allison and Stefania and his younger brother, M. Z.-B., until late 2019. L. Z.-B. currently resides in Essex County, New Jersey, along with Allison, Stefania, and M. Z.-B. L. Z.-B. was granted lawful permanent residence in the United States as of November 22, 2019.

12. Allison brings the above-captioned action ("Action") in her individual capacity and on behalf of her minor son L. Z.-B.

13. Allison and L. Z.-B. commenced this Action on January 22, 2018 with the filing of the Complaint in the United States District Court for the District of Columbia (“D.D.C.”). On February 13, 2019, that court appointed L. Z.-B.’s other parent, Stefania, to be L. Z.-B.’s guardian *ad litem* in the Action. L. Z.-B. brings this Action by and through Stefania in her capacity as his guardian *ad litem*.

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

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

#### **JURISDICTION AND VENUE**

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

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

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

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

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

## PROCEDURAL BACKGROUND

21. On January 22, 2018, Allison and L. Z.-B. filed the Complaint against Defendants in the D.D.C. Allison and L. Z.-B. filed the Action in the D.D.C. because they resided outside the United States at the time of the Action's commencement. The Complaint asserted claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fifth Amendment.

22. Defendants filed in the D.D.C. a *Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Failure to State a Claim Upon Which Relief Can Be Granted* ("Motion to Dismiss") on September 3, 2018. On May 15, 2019, following a court conference on that date, the court denied in full Defendants' Motion to Dismiss.

23. In late 2019, Plaintiffs relocated from London, England to Essex County, New Jersey. Because of this development, on February 13, 2020, Plaintiffs and Defendants filed in the D.D.C. a *Joint Motion For Transfer Pursuant to 28 U.S.C. § 1404(a)* ("Transfer Motion") primarily to enable Plaintiffs to seek to file the first amended complaint. On February 14, 2020, the court in the D.D.C. granted the Transfer Motion and ordered the transfer of the Action to this Court.

## STATUTORY AND REGULATORY BACKGROUND

### A. United States Citizenship at Birth

24. There are two pathways to become a United States citizen at birth: one pursuant to the Constitution and another by statute, the INA. The "Citizenship Clause" of the Fourteenth Amendment of the Constitution provides, in part, that anyone born in the United States is a citizen at birth. Under the INA, persons born outside the United States may be considered citizens at birth under certain statutorily prescribed circumstances. If a person born outside the United States does

not acquire citizenship at birth, that person can acquire citizenship only through naturalization, and therefore can never be eligible for the presidency as are birthright citizens.

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

26. Section 309 is titled “Children born out of wedlock,” and its provisions explicitly apply only to a person “born out of wedlock.” The requirements for citizenship at birth under that provision differ substantially from those in Section 301, which has long been regarded as applicable to anyone whose parents were lawfully married when the child was born. For unwed mothers, subsection 309(c) specifies, in part, that:

a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth . . . .

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

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

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

**B. The History of Sex-Based Discrimination as to Citizenship Rights**

30. The first citizenship law of the United States denied women any individual right to citizenship, let alone any right to transmit citizenship independently to their children. A woman who married would lose whatever citizenship she held prior to marriage, automatically and necessarily becoming a citizen of her husband's country, as would any children she conceived and carried while married.

31. Because women had no independent right to transmit citizenship to their children, unmarried women could not transmit citizenship to children they conceived and carried. Because unmarried women had no husbands, these children had no parent from whom they could derive citizenship, and therefore had no nationality or citizenship status at all. In light of the hardships suffered by such children, Congress amended the immigration laws to provide citizenship for the children of unwed U.S. citizens.

32. When Congress enacted the INA in 1952, it used the sex-neutral word "parent" in the provision governing the acquisition of U.S. citizenship at birth by children born abroad in wedlock, ensuring equal treatment of married men and married women and of the children born during their marriage. By contrast, Congress imposed different requirements on children born out of wedlock based on whether their U.S. citizen parent was an unwed mother or unwed father.

33. The Supreme Court has approved of applying different requirements to the children of unwed mothers and fathers for purposes of acquiring U.S. citizenship under Section 309. According to the Court, pregnancy—by nature and duration—ensures a child and mother have the requisite connection for the mother to transmit citizenship to her child at birth, while an unwed father—by nature of not being married to the child’s mother—may be asked to do more to ensure he is sufficiently connected to a child he may never even meet or have anything to do with beyond his role in the child’s conception.

34. The Supreme Court has rejected the application of different requirements, however, for eligibility for U.S. citizenship at birth of children of unwed fathers and mothers when those requirements have no relationship to—and therefore cannot be justified on the basis of—the biological differences between the sexes associated with pregnancy and childbirth. Thus, for example, federal law cannot require an unwed father to live in the United States for a longer period of time than an unwed mother before conferring citizenship on his child.

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

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

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

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

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

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

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

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

**D. The State Department’s Restrictive Classification of Eligible Children**

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

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

44. 1140 Appendix E of the FAM has never been submitted to notice and comment rulemaking. However, it forms the basis for the State Department’s conclusion that the children were born out of wedlock.

45. The State Department's policy of limiting birthright citizenship to children who are biologically related to a U.S. citizen parent has been rejected by the United States Courts of Appeals for the Second and Ninth Circuits in three separate decisions. *See Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000). A district judge in the United States District Court for the Central District of California also recently rejected the State Department's policy in a closely analogous case. *See Dvash-Banks v. Pompeo*, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019), *appeal filed*, No. 19-55517 (9th Cir. Oct. 11, 2019).

## **FACTUAL ALLEGATIONS**

### **A. The Zaccari-Blixt Family**

46. Allison is a U.S. citizen who was born, raised, and has lived as an adult in the United States. Born in 1978 in Park Ridge, Illinois, Allison moved at age six with her family to Clemmons, North Carolina, where she lived until graduating from high school and moving to Poughkeepsie, New York to attend Vassar College. Allison lived in the United States continuously from the time she was born in 1978 until 2008.

47. After graduating from college, Allison spent a year and a half coaching college field hockey at Hartwick College in Oneonta, New York, before returning to North Carolina to attend law school. In 2005, Allison received her law degree from the University of North Carolina, and moved to New York City, where she began working as an associate at a law firm.

48. Stefania is an Italian citizen, born in 1974 in Ferentino, Italy. Allison and Stefania met in 2006 when Stefania was visiting New York City on vacation. At that time, Stefania lived and worked in Rome, Italy, where she returned after her trip to New York ended. Allison and Stefania's relationship continued despite the distance.

49. At the end of 2007, Stefania returned to New York, this time after a year of being in a long-distance relationship with Allison. Stefania stayed with Allison in New York for as long as she was legally permitted: 90 days. During that time, the couple decided to take the next step in their relationship and live together.

50. Stefania was not eligible then to immigrate to the United States, nor could she hope to become eligible if the two married: at the time, the Defense of Marriage Act, 1 U.S.C. § 7, barred the federal government from providing immigration benefits on the basis of same-sex marriages.

51. As a citizen of Italy, a member state of the European Union, Stefania could live and work freely in England. As an employee of a law firm with a London office, Allison obtained a transfer of her position to the firm's London office, allowing her to live and work there. In 2008, Stefania and Allison moved to London so that they could finally be together.

52. In 2009, Allison and Stefania entered into a civil partnership in England. On January 3, 2015, they retroactively converted their civil partnership to a valid marriage following the recognition of marriage for same-sex couples in England. (A copy of Allison and Stefania's marriage certificate is appended to this Complaint at Exhibit B.)<sup>2</sup>

53. In the ensuing years, Allison and Stefania decided to start a family and have children. Given that Allison and Stefania are both women, they conceived children through the use of assisted reproductive technology.

54. In 2014, Stefania became pregnant using sperm from an unknown donor, and on [REDACTED] 2015, gave birth to a baby boy. Stefania Zaccari and Allison Blixt gave their son a

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<sup>2</sup> References to L. Z.-B.'s full name, as well as other personal identifying information, have been redacted from Exhibits B through E to preserve L. Z.-B.'s privacy and the privacy of his family.

name that would reflect their status as a married couple and family: L. Z.-B. (A copy of L. Z.-B.'s birth certificate is appended to this Complaint at Exhibit C.)

55. Allison and Stefania are L. Z.-B.'s parents in all relevant respects. They are L. Z.-B.'s legal birth parents, and his birth certificate lists only Allison and Stefania as parents. No one else has ever claimed to be or been declared to be his parent. Allison and Stefania made the decision together to bring L. Z.-B. into this world and into their family, and have raised L. Z.-B. together since the day he was born. Under the law of England—the jurisdiction in which L. Z.-B.'s parents resided at the time of L. Z.-B.'s birth, and the only jurisdiction relevant here—Allison is L. Z.-B.'s legal parent.

56. After L. Z.-B. was born, Allison and Stefania decided to have another child together. In 2016, Allison became pregnant, using sperm from the same donor (whose identity is unknown) the couple had selected when conceiving L. Z.-B. On [REDACTED] 2017, Allison gave birth to a baby boy. As they did for L. Z.-B., the parents gave their second child a name that would clearly indicate that his parents are Allison Blixt and Stefania Zaccari: M. Z.-B. Allison and Stefania are M. Z.-B.'s legal parents. They—and they alone—are identified as M. Z.-B.'s parents on his birth certificate and have acted in all respects as his exclusive parents.

57. L. Z.-B. and M. Z.-B. are part of the same family, with the same parents. In terms of their relationship to Allison, the only distinction between them is that Allison's wife conceived and carried L. Z.-B. instead of Allison. That distinction should make no difference to L. Z.-B.'s eligibility for U.S. citizenship at birth as a child demonstrably *not* born out of wedlock. But to the State Department, this is all the difference in the world.

**B. The Application of the State Department's Policy to the Zaccari-Blixt Family**

58. After L. Z.-B. was born in [REDACTED] 2015, Allison and Stefania appeared in person at the U.S. Embassy in London to apply for a Consular Report of Birth Abroad and a U.S. passport for L. Z.-B.

59. Notwithstanding Allison's citizenship, marriage, and status as L. Z.-B.'s legal parent, an Embassy official inquired into the details of L. Z.-B.'s birth, asking how Allison and Stefania had conceived L. Z.-B., whose genetic material had been used to conceive him, and in whose womb he had been carried. These invasive questions were as shocking as they were demeaning to Allison and her family. The Embassy official did not explain how these questions were relevant, if at all, to the question of whether L. Z.-B. had been born in or out of wedlock.

60. After answering the official's questions, Allison was informed that it would be futile to apply for a Consular Report of Birth Abroad for L. Z.-B. unless Allison could prove she had carried him or provided the egg used to conceive him. Accordingly, Allison and Stefania left the Embassy without submitting an application, heartbroken to learn that the U.S. government would not recognize or give effect to their marriage or Allison's parentage.

61. After M. Z.-B. was born, Allison and Stefania returned to the Embassy on May 23, 2017 to submit applications for Consular Reports of Birth Abroad on behalf of L. Z.-B. and M. Z.-B. Again, Stefania and Allison were asked a series of invasive and legally irrelevant questions about how their children were conceived and born. Again, they were told that L. Z.-B. would not be recognized as a citizen because of the lack of a genetic or gestational relationship between him and Allison. Stefania and Allison nonetheless submitted the applications on behalf of both L. Z.-B. and M. Z.-B.

62. In May 2017, Allison and Stefania received notice from the U.S. Embassy in London that M. Z.-B.'s application for a Consular Report of Birth Abroad for a U.S. passport had been granted, but that L. Z.-B.'s application had been denied. According to a letter from the Embassy, dated May 24, 2017 (the "Letter"), L. Z.-B.'s application had been denied on the ground that Section 309(c) of the INA required proof of L. Z.-B.'s genetic parental or gestational relationship to Allison regardless of his birth certificate and Allison and Stefania's marriage. (A copy of the Letter is appended to this Complaint at Exhibit D.) Specifically, the Letter read, in part:

It has been determined that there is not a biological relationship be [sic] between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship, as required under the provisions of section 309(c) of the Immigration and Nationality Act. Therefore, your application is denied.

(*Id.* at 1.)

63. The Letter did not explain why the State Department or the Embassy considered Section 309(c) applicable to L. Z.-B., whose parents were lawfully married to each other at the time of his birth. The Letter did not refer to Section 301(g) or provide any legal authority supporting the refusal to recognize Allison's status as L. Z.-B.'s mother or L. Z.-B.'s status as a child born in wedlock. The Letter also failed to identify any means through which its denial of L. Z.-B.'s application could be challenged, appealed, or reviewed. (*Id.*)

64. Because L. Z.-B. was not granted a Consular Report of Birth Abroad, he was not granted a U.S. passport, and therefore he is treated differently from, and does not have the same rights as, a U.S. citizen, let alone a U.S. citizen at birth. Among other things, the denial of L. Z.-B.'s application for a Consular Report of Birth Abroad, and the State Department's consequent refusal to recognize L. Z.-B. as a U.S. citizen, has restricted L. Z.-B.'s ability to vote in U.S. elections in the future, his eligibility for federal employment, and his ability to run for and

hold elected office. The State Department's policy also has deprived Allison of her right to transmit citizenship to L. Z.-B., which is among the most important rights and benefits available to a married U.S. citizen. In light of L. Z.-B.'s young age and dependence on his parents, these restrictions inflict concrete harms on L. Z.-B. and his family, as well as governmentally imposed diminutions of their fundamental protections and dignity, that are overwhelming and ongoing.

65. In light of the discriminatory and concrete harms caused by the Embassy's decision, Plaintiffs' counsel, on behalf of Allison and L. Z.-B., submitted a letter to the Embassy on September 5, 2017 requesting reconsideration of its denial of L. Z.-B.'s application for a Consular Report of Birth Abroad. Counsel sought reconsideration on the ground that the State Department had applied the incorrect statutory provision based on an unconstitutional rationale that denies legal recognition to same-sex marriages.

66. In a letter dated November 7, 2017, the Embassy responded, summarily stating that it had "affirm[ed] that [L. Z.-B.] did not acquire U.S. citizenship at birth," and therefore could not issue him a Consular Report of Birth Abroad. (A copy of that letter is appended to this Complaint at Exhibit E.) The Embassy did not offer any explanation or reason for its affirmance.

**C. The State Department Erroneously Deemed L. Z.-B. to Have Been Born "Out of Wedlock"**

67. As alleged herein, L. Z.-B. acquired U.S. citizenship at birth under Section 301(g) of the INA. Pursuant to Section 301(g), a U.S. citizen at birth includes:

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

68. Because L. Z.-B. is not a child born out of wedlock, his citizenship status is governed by Section 301(g). L. Z.-B. clearly satisfies the criteria for U.S. citizenship at birth under Section 301(g). That is so because his mother, Allison, lived in the U.S. for most of her life and clearly satisfies the statutory residence requirements of physical presence in the United States for no less than five years, including at least two after turning fourteen years old.

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

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

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

71. The State Department's policy and its application to L. Z.-B. is unconstitutional because they violate L. Z.-B.'s and Allison's rights to due process and equal protection under the Fifth Amendment of the Constitution. As discussed above, the State Department refuses to apply

Section 301(g) of the INA to L. Z.-B. based on its erroneous and demeaning classification of him as a child born out of wedlock. Apparently on that basis alone, it refuses to recognize L. Z.-B.'s citizenship.

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

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

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

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

76. Although the State Department's policy may in theory apply to marriages between spouses of opposite sexes, its overwhelming effect is to deprive married same-sex spouses—and their children—of fundamental rights and equal dignity as citizens under the law. The fact that *some* married opposite-sex couples *may* use assisted reproductive technology to conceive a child does not change the discriminatory nature or harmful effects of the government's policy on same-sex couples, for whom such means are the only way to procreate.

77. In addition to discriminating against L. Z.-B., the State Department's policy discriminates against Allison by denying her the ability to transmit citizenship to a child her wife conceived and carried during Allison's marriage. This right is presumptively available to similarly situated parents who are men—*i.e.*, male U.S. citizens married to alien national women. Therefore, in denying Allison this right, the State Department's policy also discriminates against her based on her sex.

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

78. Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through 77 as if fully set forth herein.

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

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

81. Section 301 of the INA entitles U.S. citizens to confer citizenship at birth on their children born abroad in wedlock. The INA does not require U.S. citizens to be in opposite-sex

marriages to confer citizenship under Section 301. Nor does the INA require a child's biological parents to be married to each other for the child to be considered born in wedlock, and therefore eligible for citizenship under Section 301. The INA merely requires that the child is *not* born out of wedlock.

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

83. There is no rational, legitimate, or substantial governmental interest served by denying the children of married same-sex couples access to citizenship at birth pursuant to Section 301 of the INA based on the sex and/or sexual orientation of the child's citizen-parent. Nor is there any rational, legitimate, or substantial government interest served by denying married same-sex U.S. citizens the right to confer citizenship on children born abroad during their marriage based on the citizen's sex and/or sexual orientation or exercise of the protected right to enter into a same-sex marriage. Defendants have offered no justification, either in their Letter, or in response to counsel's September 5, 2017 inquiry, for precluding Allison from conferring on L. Z.-B. citizenship pursuant to Section 301.

84. As a result of Defendants' arbitrary, discriminatory, and unlawful implementation and enforcement of its policy prohibiting married same-sex U.S. citizens from conferring U.S.

citizenship on their children born in wedlock outside the United States, Plaintiffs have suffered injuries and will suffer further irreparable harm to their constitutional rights under the Fifth Amendment if the State Department's policy is not declared unconstitutional and enjoined.

85. Plaintiffs have no adequate remedy at law.

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

86. Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through 77 as if fully set forth herein.

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

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

89. The State Department has offered no rationale, in either its initial Letter or in response to counsel's September 5, 2017, inquiry, to explain why it bars same-sex parents from relying upon Section 301.

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

91. Defendants' Letter, denying the application for a Consular Report of Birth Abroad by deeming L. Z.-B. to be a child born out of wedlock, discriminates against L. Z.-B. and Allison

based on sex and sexual orientation, without lawful justification, in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment.

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

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

94. Plaintiffs have no adequate remedy at law.

### **COUNT III – DECLARATION THAT L. Z.-B. IS A U.S. CITIZEN**

95. Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through 77 as if fully set forth herein.

96. 8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* determination of the citizenship status of L. Z.-B.

97. Allison is a U.S. citizen, who was born in the United States and was physically present in the United States for a period of more than twenty-nine years, starting from the time she was born in Illinois in 1978 until the time she moved to London, England in 2008.

98. In 2009, Allison and Stefania entered into a civil partnership in England. On January 3, 2015, they retroactively converted their civil partnership to a valid marriage following the legalization of same-sex marriage in England.

99. L. Z.-B. was born in London, England on [REDACTED] 2015, during Allison's marriage to Stefania.

100. Allison and Stefania are L. Z.-B.'s parents. They are recognized as L. Z.-B.'s parents on his birth certificate and recognized as his parents under English law.

101. Section 301(g) of the INA is applicable to L. Z.-B.'s citizenship claim because L. Z.-B. is the child of parents who were married to each other at the time of his birth, and one of L. Z.-B.'s parents is a U.S. citizen. Section 309(a) of the INA is inapplicable to L. Z.-B.'s citizenship claim because he is the child of married parents and was born during their marriage to each other, and therefore is not a child born out of wedlock.

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

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that this Court:

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

Dated: New York, New York  
April 13, 2020

IMMIGRATION EQUALITY

/s/ Aaron C. Morris  
Aaron C. Morris  
(*amorris@immigrationequality.org*)  
40 Exchange Place  
Suite 1300  
New York, New York 10005-2744  
(212) 714-2904

SULLIVAN & CROMWELL LLP

/s/ Mark A. Makar  
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(202) 956-7500

*Attorneys for Plaintiffs*

**Exhibit A**

[Appendix A](#) and the CA Internet page on DNA and Parentage Testing. See [7 FAM 1160 Appendix E](#) for further guidance on adjudication.

**NOTE:**

CA/FPPs CAWeb Intranet Relationship Fraud feature.

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

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

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

- a. The term Birth in Wedlock has been consistently interpreted to mean birth during the marriage of the biological parents to each other.
- b. This includes a child conceived before the marriage but born during the marriage.
- c. To say a child was born "in wedlock" means that the child's biological parents were married to each other at the time of the birth of the child.
- d. In the case of a marriage terminated by dissolution, death, or annulment, the term of wedlock still includes a biological child conceived during the marriage and born within 300 days after termination of the marriage.
- e. If a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The same is true for a child born to a married man and a person other than his spouse.

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

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

- a. A marriage that does not conform to the laws of the country or state in which it was performed generally is voidable and may be declared void by an appropriate authority, usually a court in the jurisdiction where the marriage occurred.
- b. Prior to such a declaration, the marriage usually is considered valid for all purposes. Even after a marriage is voided, the children's status usually is not affected. In the United States, for example, every state considers children of a void marriage to be legitimate.

**Exhibit B**





CPF080745

**CERTIFIED COPY OF AN ENTRY OF CIVIL PARTNERSHIP  
Pursuant to the Civil Partnership Act 2004**

<b>CIVIL PARTNERSHIP</b>		
Civil partnership registered in the Registration Authority of <b>The City of Westminster</b>		Entry No. <b>501864311</b>
1. Date and place of civil partnership registration	<b>Ninth July 2009 The Old Marylebone Town Hall Westminster Council House Marylebone Road London</b>	
2. Name and surname	<b>Stefania ZACCARI</b>	<b>Allison Dawn BLIXT</b>
3. Date of birth	<b>1974</b>	<b>1978</b>
4. Sex	<b>Female</b>	<b>Female</b>
5. Condition	<b>Single</b>	<b>Single</b>
6. Occupation		<b>Lawyer</b>
7. Residence at time of civil partnership registration	<b>Flat H, 17 Park Road, London, NW1 6XN</b>	<b>Flat H, 17 Park Road, London, NW1 6XN</b>
8. Father's name, surname and occupation	<b>Pietro ZACCARI [deceased] Assembler Worker [retired]</b>	<b>Charles Allen BLIXT Lawyer [retired]</b>
9. Mother's name, surname and occupation	<b>Severina POLLETTA Seamstress [retired]</b>	<b>Leslie Joan BLIXT Social Worker [retired]</b>
10. Civil partner's signature	<b>Stefania Zaccari</b>	<b>Allison Blixt</b>
11. Name and surname of witnesses	<b>Lindsey DAWSON</b>	
	<b>Chad SNELGAR</b>	
12. Civil partnership registrar's signature	<b>K E Merritt</b>	

Certified to be a true copy of an entry in the Civil Partnership Register.

on behalf of The City of Westminster Registration Authority.

Date 9th July 2009

CAUTION: THERE ARE OFFENCES RELATING TO FALSIFYING OR ALTERING A CERTIFICATE AND USING OR POSSESSING A FALSE CERTIFICATE ©CROWN COPYRIGHT

**WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY**

**Exhibit C**

BBF 077729

**CERTIFIED COPY**  
Pursuant to the Births and



**OF AN ENTRY**  
Deaths Registration Act 1953

<b>BIRTH</b>		Entry No. 20
Registration district Lambeth		Administrative area
Sub-district Lambeth		London Borough of Lambeth
<b>CHILD</b>		
1. Date and place of birth [REDACTED] 2015 St Thomas' Hospital Lambeth		
2. Name and surname L [REDACTED] A [REDACTED] Z [REDACTED] -B [REDACTED]		3. Sex Male
<b>PARENT</b>		
4. Name and surname Allison Dawn BLIXT		
5. Place of birth United States of America	6. Occupation Learning and Development Manager	
<b>MOTHER</b>		
7. Name and surname Stefania ZACCARI		
8.(a) Place of birth Italy	8. (b) Occupation Market Researcher	
9.(a) Maiden surname ZACCARI	9. (b) Surname at marriage if different from maiden surname _____	
10. Usual address (if different from place of child's birth) [REDACTED]		
11. Name and surname (if not the mother or parent) _____		12. Qualification Mother
13. Usual address (if different from that in 10 above) _____		
14. I certify that the particulars entered above are true to the best of my knowledge and belief Stefania Zaccari		Signature of informant
15. Date of registration Twenty-seventh February 2015	16. Signature of registrar  C Spence Deputy Registrar	
17. Name given after registration, and surname _____		

Certified to be a true copy of an entry in a register in my custody.

\_\_\_\_\_

{ Deputy  
\*Superintendent Registrar  
\*Registrar  
\*Strike out whichever does not apply

Date 27<sup>th</sup> February 2015

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**Exhibit D**



*Embassy of the United States of America*

Passport & Citizenship Unit  
24 Grosvenor Square  
London  
W1K 6AH

May 24, 2017

Dear Ms. Allison Dawn Blixt,

This letter is in reference to the Consular Report of Birth Abroad application submitted at the U.S. Embassy, London, on May 23, 2017, regarding the possible claim to United States citizenship of L [REDACTED] A [REDACTED] Z [REDACTED]-B [REDACTED], born on [REDACTED] 2015, in London, United Kingdom.

In order for your child to have acquired United States citizenship at birth, the U.S. citizen parent(s) would have had to have fulfilled the relevant requirements of the Immigration and Nationality Act (INA) as made applicable to your circumstances. Please see our website for further information: <https://uk.usembassy.gov/u-s-citizen-services/birth/transition-requirements/>.

The requirements relevant to your circumstances are as follows:

- At least one of the parents was a U.S. citizen at time of child's birth;
- The biological relationship be established between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship;
- The U.S. citizen parent was able to show evidence that they met the physical presence requirements of Section 309(c) of the INA;

In view of the above, it does not appear that your child has a claim to U.S. citizenship. It has been determined that there is not a biological relationship be established between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship, as required under the provisions of section 309(c) of the Immigration and Nationality Act. Therefore, your application is denied.

If you require additional information, you may contact the U.S. Citizenship and Immigration Services (USCIS) regarding your child's citizenship status. Their website is [www.uscis.gov](http://www.uscis.gov).

Any original supporting documents submitted as part of the application are enclosed. By law, the application fees are non-refundable.

Sincerely,

**Exhibit E**



*Embassy of the United States of America*

November 7, 2017

Theodore Edelman  
Sullivan & Cromwell LLP  
125 Broad Street  
New York, NY 10004-2498

Dear Mr. Edelman:

Thank you for your letter to Ambassador Johnson dated September 5, 2017, on behalf of your clients, L [REDACTED] A [REDACTED] Z [REDACTED]-E [REDACTED] and his parents, Allison Blixt and Stefania Zaccari. The Ambassador has asked me to respond to your inquiry.

The Department of State has given careful attention to your request for reconsideration and reversal of the Embassy's May 24, 2017, denial of the application for a Consular Report of Birth of a U.S. Citizen Abroad (CRBA). The Department affirms that L [REDACTED] did not acquire U.S. citizenship at birth, and therefore we are unable to issue him a CRBA.

Please be advised that L [REDACTED] may be able to pursue other paths to citizenship. Information is available on the website of United States Citizenship and Immigration Services at [www.uscis.gov/us-citizenship/citizenship-through-naturalization](http://www.uscis.gov/us-citizenship/citizenship-through-naturalization). Other avenues are set forth in Section 1503 of Title 8 of the U.S. Code.

Sincerely,

A handwritten signature in blue ink, appearing to read 'R. Packowitz'.

Ronald S. Packowitz  
Chief, American Citizen Services  
U.S. Embassy, London

# **Exhibit C**



parents listed on [L. Z.-B.'s](#) and [M. Z.-B.'s](#) birth certificates, and are the only people English law<sup>1</sup> recognizes as [L. Z.-B.](#) and [M. Z.-B.](#)'s parents. Accordingly, Allison and Stefania have been ~~the boys~~[their children's](#) legal parents from the day they came into this world~~together~~.

3. At birth, both [L. Z.-B.](#) and [M. Z.-B.](#) qualified for United States citizenship pursuant to Section 301(g) of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1401(g)). That clause entitles a person born abroad to citizenship at birth if one of that person's married parents is a United States citizen and the other is a foreign national, as long as the citizen parent satisfies certain statutorily prescribed periods of residency in the [U.S. United States](#). Allison is a U.S. citizen who lived in the United States for over twenty years, and so clearly satisfies the residency requirements of Section 301(g). Because Allison and Stefania were married to each other when [L. Z.-B.](#) and [M. Z.-B.](#) were born, [L. Z.-B.](#) and [M. Z.-B.](#) have been U.S. citizens since birth under Section 301(g).

4. The State Department, through the United States Embassy in London, however, failed to apply Section 301(g) to [L. Z.-B.](#) and [M. Z.-B.](#) Instead, it applied Section 309 of the INA (codified at 8 U.S.C. § 1409), a provision of the statute which applies only to children born "out of wedlock." Because the State Department~~therefore~~ wrongly considered them to have been born "out of wedlock," it concluded that they could qualify for citizenship at birth only as the children of unwed parents, and therefore could acquire such citizenship only pursuant to Section 309 and only if Allison gave birth to them both.

---

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

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

6. The State Department's failure to recognize and give effect to the marriage between Allison and Stefania also denies ~~I~~ L. Z.-B. the rights and privileges that accompany U.S. citizenship, including the right to reside permanently in the United States as a U.S. citizen, the right to obtain a U.S. passport, and, when he is older, the right to run for political office. Because the State Department does not recognize ~~I~~ L. Z.-B.'s U.S. citizenship, he cannot visit or live in the United States freely on the same terms as other members of his family ~~can~~.

7. ~~Allison and M~~ ~~may reside in the U.S. permanently because they are U.S. citizens. Stefania may reside in the U.S. permanently by obtaining a family-based immigrant visa based on her marriage to Allison. The State Department's policy, however, renders I~~ ~~the only member of his family without the freedom to live in the U.S. permanently.~~ The State Department's decision to withhold from ~~I~~ L. Z.-B. the same rights granted to his brother means that he will experience the indignity and stigma of unequal treatment imposed and endorsed by the U.S. government. No governmental purpose could justify imposing these indignities on a child of a valid marriage or restricting a family's freedom to live together as a family ~~together~~.

8. The State Department's policy is not only wrong and harmful, it is also contrary to the INA as well as the guarantees of due process and equal protection enshrined in the Fifth Amendment. To the extent that the State Department's policy was adopted before the Supreme Court's recent precedents guaranteeing equality to married same-sex ~~married~~ couples and their families, its continued enforcement violates ~~that precedent~~ the law. The Supreme Court has made clear that the Constitution requires that same-sex marriages receive the same legal effects and respect as opposite-sex marriages. The State Department's policy, or at least its application to ~~H~~ L. Z.-B., violates that mandate by restricting eligibility for citizenship under Section 301 of the INA solely to children whose parents are in opposite-sex marriages. These violations create real and significant hardships for the Zaccari-Blixt family and others like them. Soon, ~~H~~ L. Z.-B. will be old enough to realize that the U.S. government views him as ~~an~~ an alien non-citizen with no enforceable connection to his mother or brother, and discriminates against him based on the sex and sexual orientation of his parents.

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

#### THE PARTIES

10. Plaintiff Allison is a ~~39~~ 41-year-old citizen of the United States. She was born in Illinois, raised in North Carolina, and resided as an adult in New York, ~~where she is registered to vote as a U.S. citizen living abroad.~~ She currently resides in Essex County, New Jersey.

11. Plaintiff ~~L~~ L. Z.-B. is ~~2~~ 25 years old. He was born in London, England, where he ~~resides~~ resided with his parents Allison and Stefania and his younger brother, ~~M~~ M. Z.-B., until late 2019. L. Z.-B. currently resides in Essex County, New Jersey, along with Allison, Stefania, and M. Z.-B. L. Z.-B. was granted lawful permanent residence in the United States as of November 22, 2019.

12. Allison brings ~~this~~ the above-captioned action (“Action”) in her individual capacity and on behalf of her minor son ~~L~~ L. Z.-B.

13. Allison and L. Z.-B. commenced this Action on January 22, 2018 with the filing of the Complaint in the United States District Court for the District of Columbia (“D.D.C.”). On February 13, 2019, that court appointed L. Z.-B.’s other parent, Stefania, to be L. Z.-B.’s guardian ad litem in the Action. L. Z.-B. brings this Action by and through Stefania in her capacity as his guardian ad litem.

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

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

#### JURISDICTION AND VENUE

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

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

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

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

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

### **PROCEDURAL BACKGROUND**

21. On January 22, 2018, Allison and L. Z.-B. filed the Complaint against Defendants in the D.D.C. Allison and L. Z.-B. filed the Action in the D.D.C. because they resided outside the United States at the time of the Action’s commencement. The Complaint asserted claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fifth Amendment.

22. Defendants filed in the D.D.C. a *Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Failure to State a Claim Upon Which Relief Can Be Granted* (“Motion to Dismiss”) on September 3, 2018. On May 15, 2019, following a court conference on that date, the court denied in full Defendants’ Motion to Dismiss.

23. In late 2019, Plaintiffs relocated from London, England to Essex County, New Jersey. Because of this development, on February 13, 2020, Plaintiffs and Defendants filed in the D.D.C. a *Joint Motion For Transfer Pursuant to 28 U.S.C. § 1404(a)* (“Transfer Motion”) primarily to enable Plaintiffs to seek to file the first amended complaint. On February 14, 2020, the court in the D.D.C. granted the Transfer Motion and ordered the transfer of the Action to this Court.

## STATUTORY AND REGULATORY BACKGROUND

### A. United States Citizenship at Birth

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

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

26. ~~21.~~ Section 309 is titled “Children born out of wedlock,” and its provisions explicitly apply only to a person “born out of wedlock.” The requirements for citizenship at birth under that provision differ substantially from those in Section 301, which has long been regarded as applicable to anyone whose parents were lawfully married when the child was born. For unwed mothers, subsection 309(c) specifies, in part, that:

a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth . . . .

27. ~~22.~~ As a result of the different requirements for the children of wed and unwed U.S. citizens, it is possible for a person to qualify for citizenship at birth under Section 301 even if the

person does not qualify under Section 309. Thus, the determination of whether a child is born in or out of wedlock can be dispositive of the ultimate question of whether or not a child acquired U.S. citizenship at birth.

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

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

#### **B. The History of Sex-Based Discrimination as to Citizenship Rights**

30. ~~25.~~ The first citizenship law of the United States denied women any individual right to citizenship, let alone any right to transmit citizenship independently to their children. A woman who married would lose whatever citizenship she held prior to marriage, automatically and necessarily becoming a citizen of her husband’s country, as would any children she conceived and carried while married.

31. ~~26.~~ Because women had no independent right to transmit citizenship to their children, unmarried women could not transmit citizenship to children they conceived and carried. Because unmarried women had no husbands, these children had no parent from whom they could derive citizenship, and therefore had no nationality or citizenship status at all. In light of the

hardships suffered by such children, Congress amended the immigration laws to provide citizenship for the children of unwed U.S. citizens.

32. ~~27.~~ When Congress enacted the INA in 1952, it used the sex-neutral word “parent” in the provision governing the acquisition of U.S. citizenship at birth by children born abroad in wedlock, ensuring equal treatment of married men and married women and of the children born during their marriage. By contrast, Congress imposed different requirements on children born out of wedlock based on whether their U.S. citizen parent was an unwed mother or unwed father.

33. ~~28.~~ The Supreme Court has approved of applying different requirements to the children of unwed mothers and fathers for purposes of acquiring U.S. citizenship under Section 309. According to the Court, pregnancy—by nature and duration—ensures a child and mother have the requisite connection for the mother to transmit citizenship to her child at birth, while an unwed father—by nature of not being married to the child’s mother—may be asked to do more to ensure he is sufficiently connected to a child he may never even meet or have anything to do with beyond his role in the child’s conception.

34. ~~29.~~ The Supreme Court has rejected the application of different requirements, however, for eligibility for U.S. citizenship at birth of children of unwed fathers and mothers when those requirements have no relationship to—and therefore cannot be justified on the basis of—the biological differences between the sexes associated with pregnancy and childbirth. Thus, for example, federal law cannot require an unwed father to live in the United States for a longer period of time than an unwed mother before conferring citizenship on his child.

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

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

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

### C. The Constitutional Rights of Same-Sex Couples

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

38. ~~33.~~After *Windsor* ~~overturned~~invalidated the statute excluding same-sex marriages from federal recognition, the federal government announced that it would recognize same-sex marriages for immigration purposes. *See* Statement from Homeland Security Secretary Janet Napolitano on July 1, 2013, available at <https://www.uscis.gov/family/same-sex-marriages> (“As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as [the United States Citizenship and

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

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

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

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

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

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

43. ~~38.~~ The State Department has imposed that policy by inserting a definition of terms into an Appendix to the Foreign Affairs Manual (“FAM”), available at <https://fam.state.gov/>. Specifically, 1140 Appendix E of the FAM, titled “‘IN WEDLOCK’ AND ‘OUT OF WEDLOCK,’” includes subsection (c), which states that “[t]o say a child was born ‘in wedlock’

means that the child's biological parents were married to each other at the time of the birth of the child." (A copy of the relevant portion of the appendix is appended to this Complaint at Exhibit A.)

44. ~~39.~~ 1140 Appendix E of the FAM has never been submitted to notice and comment rulemaking. However, it forms the basis for the State Department's conclusion that the children were born out of wedlock.

45. ~~40. That definition has the effect~~ The State Department's policy of limiting birthright citizenship to children who are biologically related to a U.S. citizen parent, ~~which has been rejected by~~ the United States ~~Court~~ Courts of Appeals for the Second and Ninth Circuit has rejected Circuits in ~~two~~ three separate decisions. See Jaen v. Sessions, 899 F.3d 182 (2d Cir. 2018); Solis-Espinoza v. Gonzales, 401 F.3d 1090 (9th Cir. 2005) ~~(citing~~ Scalles v. INS, 232 F.3d 1159, 1166 (9th Cir. 2000). A district judge in the United States District Court for the Central District of California also recently rejected the State Department's policy in a closely analogous case. See Dvash-Banks v. Pompeo, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019), appeal filed, No. 19-55517 (9th Cir. Oct. 11, 2019).

## FACTUAL ALLEGATIONS

### A. The Zaccari-Blixt Family

46. ~~41.~~ Allison is a U.S. citizen who was born, raised, and has lived as an adult in the United States. Born in 1978 in Park Ridge, Illinois, Allison moved at age six with her family to Clemmons, North Carolina, where she lived until graduating from high school and moving to Poughkeepsie, New York to attend Vassar College. Allison lived in the United States continuously from the time she was born in 1978 until 2008.

47. ~~42.~~After graduating from college, Allison spent a year and a half coaching college field hockey at Hartwick College in Oneonta, New York, before returning to North Carolina to attend law school. In 2005, Allison received her law degree from the University of North Carolina, and moved to New York City, where she began working as an associate at a law firm.

48. ~~43.~~Stefania is an Italian citizen, born in 1974 in Ferentino, Italy. Allison and Stefania met in 2006 when Stefania was visiting New York City on vacation. At that time, Stefania lived and worked in Rome, Italy, where she returned after her trip to New York ended. Allison and Stefania's relationship continued despite the distance.

49. ~~44.~~At the end of 2007, Stefania returned to New York, this time after a year of being in a long-distance relationship with Allison. Stefania stayed with Allison in New York for as long as she was legally permitted: 90 days. During that time, the couple decided to take the next step in their relationship and live together.

50. ~~45.~~Stefania was not eligible then to immigrate to the ~~U.S.~~United States, nor could she hope to become eligible if the two married: at the time, the Defense of Marriage Act, 1 U.S.C. § 7, barred the federal government from providing immigration benefits on the basis of same-sex marriages.

51. ~~46.~~As a citizen of Italy, a member state of the European Union, Stefania could live and work freely in England. As an employee of a law firm with a London office, Allison obtained a transfer of her position to the firm's London office, allowing her to live and work there. In 2008, Stefania and Allison moved to London so that they could finally be together.

52. ~~47.~~In 2009, Allison and Stefania entered into a civil partnership in England. On January 3, 2015, they retroactively converted their civil partnership to a valid marriage following

the ~~legalization~~recognition of marriage for same-sex ~~marriage~~couples in England. (A copy of Allison's and Stefania's marriage certificate is appended to this Complaint at Exhibit B.)<sup>2</sup>

53. ~~48.~~In the ensuing years, Allison and Stefania decided to start a family and have children. Given that Allison and Stefania are both women, they conceived children through the use of assisted reproductive technology.

54. ~~49.~~In 2014, Stefania became pregnant using sperm from an unknown donor, and on [REDACTED] 2015, gave birth to a baby boy. Stefania Zaccari and Allison Blixt gave their son a name that would reflect their status as a married couple and family: ~~H [REDACTED] A [REDACTED] Z [REDACTED]~~ H [REDACTED] L. Z.-B. (A copy of H [REDACTED] L. Z.-B.'s birth certificate is appended to this Complaint at Exhibit C.)

55. ~~50.~~Allison and Stefania are H [REDACTED] L. Z.-B.'s parents in all relevant respects. They are H [REDACTED] L. Z.-B.'s legal birth parents, and his birth certificate lists only Allison and Stefania as parents. No one else has ever claimed to be or been declared to be his parent. Allison and Stefania made the decision together to bring H [REDACTED] L. Z.-B. into this world and into their family~~together,~~ and have raised H [REDACTED] L. Z.-B. together since the day he was born. Under the law of ~~every residence Allison or H [REDACTED] has ever had—New York, North Carolina, Illinois, and~~England—the jurisdiction in which L. Z.-B.'s parents resided at the time of L. Z.-B.'s birth, and the only jurisdiction relevant here—Allison is H [REDACTED] L. Z.-B.'s legal parent.

56. ~~51.~~After H [REDACTED] L. Z.-B. was born, Allison and Stefania decided to have another child together. In 2016, Allison became pregnant, using sperm from the same donor (whose identity is unknown) the couple had selected when conceiving H [REDACTED] L. Z.-B. On [REDACTED]

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<sup>2</sup> References to L. Z.-B.'s full name, as well as other personal identifying information, have been redacted from Exhibits B through E to preserve L. Z.-B.'s privacy and the privacy of his family.

2017, Allison gave birth to a baby boy. As they did for ~~H~~ L. Z.-B., the parents gave their second child a name that would clearly indicate that his parents are Allison Blixt and Stefania Zaccari: ~~M~~ M. Z.-B. Allison and Stefania are ~~M~~ M. Z.-B.'s legal parents. They—and they alone—are identified as ~~M~~ M. Z.-B.'s parents on his birth certificate and have acted in all respects as his exclusive parents.

57. ~~52.~~ ~~H~~ L. Z.-B. and ~~M~~ M. Z.-B. are part of the same family, with the same parents. In terms of their relationship to Allison, the only distinction between them is that Allison's wife conceived and carried ~~H~~ L. Z.-B. instead of Allison. That distinction should make no difference to ~~H~~ L. Z.-B.'s eligibility for U.S. citizenship at birth as a child demonstrably *not* born out of wedlock. But to the State Department, this is all the difference in the world.

**B. The Application of the State Department's Policy to the Zaccari-Blixt Family**

58. ~~53.~~ After ~~H~~ L. Z.-B. was born in ~~██████████~~ 2015, Allison and Stefania appeared in person at the U.S. Embassy in London to apply for a Consular Report of Birth Abroad and a U.S. passport for ~~H~~ L. Z.-B.

59. ~~54.~~ Notwithstanding Allison's citizenship, marriage, and status as ~~H~~ L. Z.-B.'s legal parent, an Embassy official inquired into the details of ~~H~~ L. Z.-B.'s birth, asking how Allison and Stefania had conceived ~~H~~ L. Z.-B., whose genetic material had been used to conceive him, and in whose womb he had been carried. These invasive questions were as shocking as they were demeaning to Allison and her family. The Embassy official did not explain how these questions were relevant, if at all, to the question of whether ~~H~~ L. Z.-B. had been born in or out of wedlock.

60. ~~55.~~ After answering the official's questions, Allison was informed that it would be futile to apply for a Consular Report of Birth Abroad for ~~H~~ L. Z.-B. unless Allison could prove

she had carried him or provided the egg used to conceive him. Accordingly, Allison and Stefania left the Embassy without submitting an application, heartbroken to learn that the U.S. government would not recognize or give effect to their marriage or Allison's parentage.

61. ~~56.~~ After ~~M~~ M. Z.-B. was born, Allison and Stefania returned to the Embassy on May 23, 2017 to submit applications for Consular Reports of Birth Abroad ~~and U.S. passports~~ on behalf of ~~H~~ L. Z.-B. and ~~M~~ M. Z.-B. Again, Stefania and Allison were asked a series of invasive and legally irrelevant questions about how their children were conceived and born. Again, they were told that ~~H~~ L. Z.-B. would not be recognized as a citizen because of the lack of a genetic or gestational relationship between him and Allison. Stefania and Allison nonetheless submitted the applications on behalf of both ~~H~~ L. Z.-B. and ~~M~~ M. Z.-B.

62. ~~57.~~ In May 2017, Allison and Stefania received notice from the U.S. Embassy in London that ~~M~~ M. Z.-B.'s application for a Consular Report of Birth Abroad for a U.S. passport had been granted, but that ~~H~~ L. Z.-B.'s application had been denied. According to a letter from the Embassy, dated May 24, 2017 (the "Letter"), ~~H~~ L. Z.-B.'s application had been denied on the ground that Section 309(c) of the INA required proof of ~~H~~ L. Z.-B.'s genetic parental or gestational relationship to Allison regardless of his birth certificate and Allison and Stefania's marriage. (A copy of the Letter is appended to this Complaint at Exhibit D.) Specifically, the Letter read, in part:

It has been determined that there is not a biological relationship be [sic] between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship, as required under the provisions of section 309(c) of the Immigration and Nationality Act. Therefore, your application is denied.

(*Id.* at 1.)

63. ~~58.~~ The Letter did not explain why the State Department or the Embassy considered Section 309(c) applicable to ~~H~~ L. Z.-B., whose parents were lawfully married to each other at

the time of his birth. The Letter did not refer to Section 301(g) or provide any legal authority supporting the refusal to recognize Allison's status as H [REDACTED] L. Z.-B.'s mother or H [REDACTED] L. Z.-B.'s status as a child born in wedlock. The Letter also failed to identify any means through which its denial of H [REDACTED] L. Z.-B.'s application could be challenged, appealed, or reviewed. (*Id.*)

64. ~~59.~~ Because H [REDACTED] L. Z.-B. was not granted a Consular Report of Birth Abroad, he was not granted a U.S. passport, and therefore ~~faces significant restrictions on his liberty, including his freedom~~ he is treated differently from, and does not have the same rights as, a U.S. citizen, let alone a U.S. citizen at birth. Among other things, the denial of L. Z.-B.'s application for a Consular Report of Birth Abroad, and the State Department's consequent refusal to recognize L. Z.-B. as a U.S. citizen, has restricted L. Z.-B.'s ability to enter, travel through, or remain vote in U.S. elections in the United States future, his eligibility for federal employment, and his ability to run for and hold elected office. The State Department's policy also has deprived Allison of her right to transmit citizenship to L. Z.-B., which is among the most important rights and benefits available to a married U.S. citizen. In light of H [REDACTED] L. Z.-B.'s young age and dependence on his parents, these restrictions ~~impose~~ inflict concrete harms on H [REDACTED] L. Z.-B. and his family, as well as governmentally imposed diminutions of their fundamental protections and dignity, that are overwhelming and ongoing. ~~For example, every time the Zaccari-Blixt family travels from London to visit Allison's family in North Carolina, the family must travel through the long line for non-citizens, and explain that L [REDACTED] is not considered a citizen because he was conceived by Allison's wife instead of by Allison herself and is therefore viewed by the government as illegitimate. Not only does this make traveling home more burdensome, it also exposes Allison, Stefania, and their young children to the pain and stigma of knowing that these burdens result from the State Department's refusal to recognize Allison's marriage to Stefania and parentage of L [REDACTED].~~

65. ~~60.~~ In light of ~~these~~ the discriminatory and ~~other hardships~~ concrete harms caused by the Embassy's decision, Plaintiffs' counsel, on behalf of Allison and ~~H~~ L. Z.-B., submitted a letter to the Embassy on September 5, 2017 requesting reconsideration of its denial of ~~H~~ L. Z.-B.'s application for a Consular Report of Birth Abroad. Counsel sought reconsideration on the ground that the State Department had applied the incorrect statutory provision based on an unconstitutional rationale that denies legal recognition to same-sex marriages.

66. ~~61.~~ In a letter dated November 7, 2017, the Embassy responded, summarily stating that it had "affirm[ed] that ~~H~~ [L. Z.-B.] did not acquire U.S. citizenship at birth," and therefore could not issue him a Consular Report of Birth Abroad. (A copy of that letter is appended to this Complaint at Exhibit E.) The Embassy did not offer any explanation or reason for its affirmance.

**C. The State Department Erroneously Deemed ~~H~~ L. Z.-B. to Have Been Born "Out of Wedlock"**

67. ~~62.~~ As alleged herein, ~~H~~ L. Z.-B. acquired U.S. citizenship at birth under Section 301(g) of the INA. Pursuant to Section 301(g), a U.S. citizen at birth includes:

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

68. ~~63.~~ Because ~~H~~ L. Z.-B. is not a child born out of wedlock, his citizenship status is governed by Section 301(g). ~~H~~ L. Z.-B. clearly satisfies the criteria for U.S. citizenship at birth under Section 301(g). That is so because his mother, Allison, lived in the U.S. for most of her life and clearly satisfies the statutory residence requirements of physical presence in the ~~U.S.~~ United States for no less than five years, including at least two after turning fourteen years old.

69. ~~64.~~The only way that ~~H~~ L. Z.-B. would not be a citizen at birth under the INA is if ~~H~~ he were a child born out of wedlock, as the State Department has deemed him. That determination was erroneous both as a matter of statutory interpretation and as a matter of the Constitution’s guarantees of due process and equal protection.

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

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

71. ~~66.~~The State Department’s policy and its application to ~~H~~ L. Z.-B. is unconstitutional because they violate ~~H~~ L. Z.-B.’s and Allison’s rights to due process and equal protection under the Fifth Amendment of the Constitution. As discussed above, the State Department refuses to apply Section 301(g) of the INA to ~~H~~ L. Z.-B. based on its erroneous and demeaning classification of him as a child born out of wedlock. Apparently on that basis alone, it refuses to recognize ~~H~~ L. Z.-B.’s citizenship.

72. ~~67.~~Under the State Department’s policy, citizenship through Section 301 is presumptively available to any person the State Department deems born “in wedlock”—a class the

agency has construed to consist almost exclusively of children conceived and carried by women who are married to men.

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

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

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

76. ~~71.~~ Although the State Department’s policy may in theory apply to marriages between spouses of opposite sexes, its overwhelming effect is to deprive ~~spouses in~~ married same-sex ~~marriages~~ spouses—and their children—of fundamental rights and equal dignity as citizens under the law. The fact that *some* married opposite-sex ~~married~~ couples *may* use assisted reproductive technology to conceive a child does not change the discriminatory nature or harmful

effects of the government's policy on same-sex couples, for whom such means are the only way to procreate.

77. ~~72.~~In addition to discriminating against ~~H~~ L. Z.-B., the State Department's policy discriminates against Allison by denying her the ability to transmit citizenship to a child her wife conceived and carried during Allison's marriage. This right is presumptively available to similarly situated parents who are men—*i.e.*, male U.S. citizens married to alien national women. Therefore, in denying Allison this right, the State Department's policy also discriminates against her based on her sex.

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

78. ~~73.~~Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through ~~72~~77 as if fully set forth herein.

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

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

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

82. ~~77.~~ Defendants have violated and continue to violate the Fifth Amendment of the United States Constitution by enforcing a policy that excludes U.S. citizens in same-sex marriages from conferring citizenship pursuant to Section 301, while restricting access to citizenship under that provision to the children of married opposite-sex~~married~~ couples. Defendants' policy has deprived and continues to deprive Plaintiffs of their rights to acquire and confer citizenship at birth pursuant to INA Section 301. As a result of Defendants' policy, Plaintiffs have suffered, and will suffer, irreparable harm to their protected interest in conferring, and having recognized, ~~H~~ L. Z.-B.'s U.S. citizenship.

83. ~~78.~~ There is no rational, legitimate, or substantial governmental interest served by denying the children of married same-sex~~married~~ couples access to citizenship at birth pursuant to Section 301 of the INA based on the sex and/or sexual orientation of the child's citizen-parent. Nor is there any rational, legitimate, or substantial government interest served by denying married same-sex U.S. citizens~~in same-sex marriages~~ the right to confer citizenship on children born abroad during their marriage based on the citizen's sex and/or sexual orientation or exercise of the protected right to enter into a same-sex marriage. Defendants have offered no justification, either in their Letter, or in response to counsel's September 5, 2017 inquiry, for precluding Allison from conferring on ~~H~~ L. Z.-B. citizenship pursuant to Section 301.

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

85. ~~80.~~ Plaintiffs have no adequate remedy at law.

**COUNT II – DECLARATORY JUDGMENT  
THE STATE DEPARTMENT’S POLICY VIOLATES THE CONSTITUTIONAL  
GUARANTEE OF EQUAL PROTECTION UNDER THE LAW.**

86. ~~81.~~ Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through ~~72~~77 as if fully set forth herein.

87. ~~82.~~ The Due Process Clause of the Fifth Amendment prohibits the federal government from denying persons the equal protection of its laws.

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

89. ~~84.~~ The State Department has offered no rationale, in either its initial Letter or in response to counsel’s September 5, 2017, inquiry, to explain why it bars same-sex parents from relying upon Section 301.

90. ~~85.~~ The State Department’s interpretation has a disparate impact on married same-sex ~~married~~ couples, because under that policy they can essentially *never* confer upon a child of such a couple U.S. citizenship pursuant to Section 301.

91. ~~86.~~ Defendants’ Letter, denying the application for a Consular Report of Birth Abroad by deeming ~~H~~ L. Z.-B. to be a child born out of wedlock, discriminates against ~~H~~ L. Z.-B. and Allison based on sex and sexual orientation, without lawful justification, in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment.

92. ~~87.~~ Defendants’ above-described discrimination against people who have an intimate relationship with a partner of the same sex—a discrete and insular group with a long

history of discrimination and degradation including by those acting under the color of law—does not advance any rational, legitimate, or substantial governmental interest.

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

94. ~~89.~~ Plaintiffs have no adequate remedy at law.

**COUNT III – ~~ADMINISTRATIVE PROCEDURE ACT~~ DECLARATION THAT L. Z.-B. IS A U.S. CITIZEN**

95. ~~90.~~ Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through ~~72~~77 as if fully set forth herein.

96. ~~91.~~ Plaintiffs have suffered a “legal wrong because of agency action.” 5 U.S.C. § ~~702.~~

~~92.~~ The Administrative Procedure Act bars any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

~~93.~~ Defendants’ interpretation of Sections 301 and 309, as embodied in the FAM, conflicts with the clear language and statutory purpose of the INA. This interpretation, published without any public comment, is arbitrary, capricious, and not in accordance with the INA.

~~94.~~ Plaintiffs have suffered and continue to suffer legal wrongs because of the U.S. Embassy’s decision to deny the Consular Report of Birth Abroad application submitted on behalf of ~~L. Z.-B.~~

~~95.~~ Plaintiffs have exhausted all administrative remedies available to them as of right.

~~96. — Plaintiffs have no other recourse to judicial review other than this action.~~

~~97. — Defendants' exclusion of children born abroad in same-sex marriages from the category of children who qualify for citizenship at birth as born to valid marriages lacks a rational basis, is arbitrary, and is contrary to~~ 8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* determination of the citizenship status of L. Z.-B.

97. Allison is a U.S. citizen, who was born in the United States and was physically present in the United States for a period of more than twenty-nine years, starting from the time she was born in Illinois in 1978 until the time she moved to London, England in 2008.

98. In 2009, Allison and Stefania entered into a civil partnership in England. On January 3, 2015, they retroactively converted their civil partnership to a valid marriage following the legalization of same-sex marriage in England.

99. L. Z.-B. was born in London, England on [REDACTED] 2015, during Allison's marriage to Stefania.

100. Allison and Stefania are L. Z.-B.'s parents. They are recognized as L. Z.-B.'s parents on his birth certificate and recognized as his parents under English law.

101. ~~98. Plaintiffs have no adequate remedy at law.~~ Section 301(g) of the INA is applicable to L. Z.-B.'s citizenship claim because L. Z.-B. is the child of parents who were married to each other at the time of his birth, and one of L. Z.-B.'s parents is a U.S. citizen. Section 309(a) of the INA is inapplicable to L. Z.-B.'s citizenship claim because he is the child of married parents and was born during their marriage to each other, and therefore is not a child born out of wedlock.

102. L. Z.-B. is a U.S. citizen at birth pursuant to Section 301(g) because he was born: (1) outside the geographical limits of the United States and its outlying possessions, (2) to parents one of whom is an alien, and the other a citizen of the United States, (3) to a parent who, prior to

the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after that parent attained the age of fourteen years.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that this Court:

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

Dated: ~~Washington, D.C.~~  
~~\_\_\_\_\_~~ New York, New York  
April 13, ~~2018~~2020

IMMIGRATION EQUALITY

/s/ Aaron C. Morris  
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~~/s/ Mark A. Makar~~  
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~~-and-~~

~~IMMIGRATION EQUALITY~~

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*Attorneys for Plaintiffs*

## **Exhibit A**

[Appendix A](#) and the CA Internet page on DNA and Parentage Testing. See [7 FAM 1160 Appendix E](#) for further guidance on adjudication.

**NOTE:**

CA/FPPs CAWeb Intranet Relationship Fraud feature.

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

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

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

- a. The term Birth in Wedlock has been consistently interpreted to mean birth during the marriage of the biological parents to each other.
- b. This includes a child conceived before the marriage but born during the marriage.
- c. To say a child was born "in wedlock" means that the child's biological parents were married to each other at the time of the birth of the child.
- d. In the case of a marriage terminated by dissolution, death, or annulment, the term of wedlock still includes a biological child conceived during the marriage and born within 300 days after termination of the marriage.
- e. If a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The same is true for a child born to a married man and a person other than his spouse.

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

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

- a. A marriage that does not conform to the laws of the country or state in which it was performed generally is voidable and may be declared void by an appropriate authority, usually a court in the jurisdiction where the marriage occurred.
- b. Prior to such a declaration, the marriage usually is considered valid for all purposes. Even after a marriage is voided, the children's status usually is not affected. In the United States, for example, every state considers children of a void marriage to be legitimate.

## **Exhibit B**





**CERTIFIED COPY OF AN ENTRY OF CIVIL PARTNERSHIP  
 Pursuant to the Civil Partnership Act 2004**

<b>CIVIL PARTNERSHIP</b>		
Civil partnership registered in the Registration Authority of <b>The City of Westminster</b>		Entry No. <b>501864311</b>
1. Date and place of civil partnership registration	<b>Ninth July 2009 The Old Marylebone Town Hall Westminster Council House Marylebone Road London</b>	
2. Name and surname	<b>Stefania ZACCARI</b>	<b>Allison Dawn BLIXT</b>
3. Date of birth	██████████ <b>1974</b>	██████████ <b>1978</b>
4. Sex	<b>Female</b>	<b>Female</b>
5. Condition	<b>Single</b>	<b>Single</b>
6. Occupation	-----	<b>Lawyer</b>
7. Residence at time of civil partnership registration	<b>Flat H, 17 Park Road, London, NW1 6XN</b>	<b>Flat H, 17 Park Road, London, NW1 6XN</b>
8. Father's name, surname and occupation	<b>Pietro ZACCARI [deceased] Assembler Worker [retired]</b>	<b>Charles Allen BLIXT Lawyer [retired]</b>
9. Mother's name, surname and occupation	<b>Severina POLLETTA Seamstress [retired]</b>	<b>Leslie Joan BLIXT Social Worker [retired]</b>
10. Civil partner's signature	<b>Stefania Zaccari</b>	<b>Allison Blixt</b>
11. Name and surname of witnesses	<b>Lindsey DAWSON</b>	
	<b>Chad SNELGAR</b>	
12. Civil partnership registrar's signature	<b>K E Merritt</b>	

Certified to be a true copy of an entry in the Civil Partnership Register.

on behalf of The City of Westminster Registration Authority.

Date 9th July 2009

CAUTION: THERE ARE OFFENCES RELATING TO FALSIFYING OR ALTERING A CERTIFICATE AND USING OR POSSESSING A FALSE CERTIFICATE ©CROWN COPYRIGHT

**WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY**

## Exhibit C

BBF 0177729

**CERTIFIED COPY OF AN ENTRY**  
**Pursuant to the Births and Deaths Registration Act 1953**



<b>BIRTH</b>		Entry No. 20
Registration district Lambeth		Administrative area
Sub-district Lambeth		London Borough of Lambeth
1. <b>Date and place of birth</b> [REDACTED] 2015 St Thomas' Hospital Lambeth		
2. <b>Name and surname</b> L [REDACTED] A [REDACTED] Z [REDACTED] -B [REDACTED]		3. <b>Sex</b> Male
4. <b>Name and surname</b> Allison Dawn BLIXT		
5. <b>Place of birth</b> United States of America	6. <b>Occupation</b> Learning and Development Manager	
7. <b>Name and surname</b> Stefania ZACCARI		
8.(a) <b>Place of birth</b> Italy	8. (b) <b>Occupation</b> Market Researcher	
9.(a) <b>Maiden surname</b> ZACCARI	9. (b) <b>Surname at marriage if different from maiden surname</b> _____	
10. <b>Usual address (if different from place of child's birth)</b> [REDACTED]		
11. <b>Name and surname (if not the mother or parent)</b> _____	<b>INFORMANT</b>	12. <b>Qualification</b> Mother
13. <b>Usual address (if different from that in 10 above)</b> _____		
14. <b>I certify that the particulars entered above are true to the best of my knowledge and belief</b> Stefania Zaccari		<b>Signature of informant</b>
15. <b>Date of registration</b> Twenty-seventh February 2015	16. <b>Signature of registrar</b>  C Spence Deputy Registrar	
17. <b>Name given after registration, and surname</b> _____		

Certified to be a true copy of an entry in a register in my custody.

\_\_\_\_\_

{ Deputy ~~Superintendent~~ Registrar  
 \*Registrar  
 \*Strike out whichever does not apply

Date 27<sup>th</sup> February 2015

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**WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY.**





*Embassy of the United States of America*

Passport & Citizenship Unit  
24 Grosvenor Square  
London  
W1K 6AH

May 24, 2017

Dear Ms. Allison Dawn Blixt,

This letter is in reference to the Consular Report of Birth Abroad application submitted at the U.S. Embassy, London, on May 23, 2017, regarding the possible claim to United States citizenship of L [REDACTED] A [REDACTED] Z [REDACTED]-B [REDACTED], born on [REDACTED] 2015, in London, United Kingdom.

In order for your child to have acquired United States citizenship at birth, the U.S. citizen parent(s) would have had to have fulfilled the relevant requirements of the Immigration and Nationality Act (INA) as made applicable to your circumstances. Please see our website for further information: <https://uk.usembassy.gov/u-s-citizen-services/birth/transition-requirements/>.

The requirements relevant to your circumstances are as follows:

- At least one of the parents was a U.S. citizen at time of child's birth;
- The biological relationship be established between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship;
- The U.S. citizen parent was able to show evidence that they met the physical presence requirements of Section 309(c) of the INA;

In view of the above, it does not appear that your child has a claim to U.S. citizenship. It has been determined that there is not a biological relationship be established between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship, as required under the provisions of section 309(c) of the Immigration and Nationality Act. Therefore, your application is denied.

If you require additional information, you may contact the U.S. Citizenship and Immigration Services (USCIS) regarding your child's citizenship status. Their website is [www.uscis.gov](http://www.uscis.gov).

Any original supporting documents submitted as part of the application are enclosed. By law, the application fees are non-refundable.

Sincerely,

## **Exhibit E**



# **Exhibit D**

Mark A. Makar (N.J. Bar No. 244882017)  
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Jessica M. Klein (*pro hac vice*)  
Lauren M. Goldsmith (*pro hac vice*)  
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Telephone: 212-714-2904

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW JERSEY**

ALLISON DAWN BLIXT and  
L. Z.-B.,  
  
Plaintiffs,  
  
v.  
  
The UNITED STATES  
DEPARTMENT OF STATE and  
MICHAEL R. POMPEO in his  
official capacity as Secretary, U.S.  
Department of State,  
  
Defendants.

Civ. No. 2:20-cv-02102-KM-JBC

Hon. Kevin McNulty

**[PROPOSED] ORDER  
GRANTING MOTION FOR  
LEAVE TO AMEND THE  
COMPLAINT PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 15(a)(2)**

Motion Date: May 18, 2020

This matter comes before the Court on Plaintiffs' Motion for Leave to Amend the Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2) and Local Rule 15.1. The Court having considered the matter, and for good cause shown, it is hereby **ORDERED** that Plaintiffs' Motion for Leave to Amend the Complaint is **GRANTED** in its entirety.

**SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Kevin McNulty  
United States District Judge

Mark A. Makar (N.J. Bar No. 244882017)  
SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, New York 10004  
Telephone: 212-558-4000

*Attorney for Plaintiffs*

**UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW JERSEY**

<hr/>	:	
ALLISON DAWN BLIXT and	:	
L. Z.-B.,	:	
	:	
	:	
Plaintiffs,	:	Civ. No. 2:20-cv-02102-KM-JBC
v.	:	
	:	
	:	Hon. Kevin McNulty
The UNITED STATES	:	
DEPARTMENT OF STATE and	:	
MICHAEL R. POMPEO in his	:	
official capacity as Secretary, U.S.	:	
Department of State,	:	
	:	
	:	
Defendants.	:	
<hr/>		

I hereby certify that on April 13, 2020, I served a copy of the following submissions via ECF upon the counsel of record in the above-captioned action:

- Notice of Motion and Motion for Leave to Amend the Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2);
- Memorandum of Points and Authorities in Support of Motion for Leave to Amend the Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2);
- [Proposed] First Amended Complaint;
- Redline of [Proposed] First Amended Complaint; and
- [Proposed] Order Granting Motion for Leave to Amend the Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2).

Dated: April 13, 2020

Respectfully submitted,

By: /s/ Mark A. Makar

Mark A. Makar (N.J. Bar No. 244882017)

SULLIVAN & CROMWELL LLP

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New York, New York 10004

Telephone: 212-558-4000

*Attorney for Plaintiffs*