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 Oral Argument Requested Motion Date: February 16, 2021

NOTICE OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL CIVIL RULE 56.1

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PLEASE TAKE NOTICE that, on February 16, 2021, or as soon thereafter as the matter may be heard, Sullivan & Cromwell LLP and Immigration Equality, 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, for the District of New Jersey, at the Martin Luther King Building & United States Courthouse, 50 Walnut Street, Newark, New Jersey, pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1, for an Order granting *Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1* ("Motion"), and granting such other relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that Plaintiffs will rely on the following submissions filed herewith, in support of the Motion: *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule Civil Procedure 56 and Local Civil Rule 56.1* (Exhibit ("Ex.") A), *Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1* (Ex. B), *Declaration of Mark A. Makar in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1* and exhibits thereto (Ex. C), and

Declaration of Allison Dawn Blixt in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1 (Ex. D).

PLEASE TAKE FURTHER NOTICE that a proposed form of order also is filed with the Motion for the Court's consideration.

PLEASE TAKE FURTHER NOTICE that Plaintiffs respectfully request oral argument.

Dated: November 18, 2020

Respectfully Submitted,

/s/ *Theodore Edelman*

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UNITED STATES DISTRICT COURT FOR
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL CIVIL RULE 56.1

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Plaintiffs Allison Dawn Blixt ("Allison") and her son L. Z.-B., by and through his court-appointed guardian *ad litem*, Stefania Zaccari, ("Stefania"; together, "Plaintiffs") respectfully submit the following memorandum of points and authorities in support of their motion for partial summary judgment ("Motion") in the above-captioned action (the "Action").

I. PRELIMINARY STATEMENT

This Action challenges Defendants'[1] improper refusal to recognize L. Z.-B. as a United States citizen at birth. L. Z.-B. met the eligibility requirements of Section 301(g) of the Immigration and Nationality Act of 1952, as amended, ("INA"), 8 U.S.C. § 1401(g) ("Section 301(g)"), for U.S. citizenship at birth when he was born in England during the marriage of his parents, Allison, a U.S. citizen, and her wife, Stefania, an Italian citizen. (*See* SOF ¶¶ 2, 10, 25–29.)[2]

L. Z.-B. was born to Allison and Stefania in early 2015 in London. (SOF ¶ 25.) Stefania became pregnant with L. Z.-B. through assisted reproductive

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[1] In this memorandum, the term "Defendants" refers to The United States Department of State (the "State Department") and The Honorable Michael R. Pompeo, in his official capacity as Secretary of State; and the term "Parties" refers jointly to Defendants and Plaintiffs.

[2] Citations in this memorandum to "SOF" refer to *Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, filed concurrently with this memorandum.

technology ("ART"), using sperm that Allison and Stefania had obtained from a sperm bank in Europe, and carried L. Z.-B. to term. (SOF ¶¶ 19, 24.)

In late 2016, Allison became pregnant using sperm from the same donor as had been used to conceive L. Z.-B., and she gave birth to another son, M. Z.-B., in 2017. (SOF ¶¶ 30–33.) Both children were born during Allison and Stefania's marriage. (SOF ¶¶ 29, 37.) Allison and Stefania are the only individuals named as parents on L. Z.-B.'s and M. Z.-B.'s birth certificates and have raised them and lived together with them as a family since the children were born. (SOF ¶¶ 27–28, 35–36, 38–44.)

Although L. Z.-B. and M. Z.-B. share the same parents, are part of the same family, and have identical living arrangements, the State Department denied the application of L. Z.-B. for a Consular Report of Birth Abroad ("CRBA"), but granted a parallel application of M. Z.-B. (SOF ¶¶ 38–44, 100, 104.) The sole basis for the State Department's position was that Allison, the U.S. citizen parent of both L. Z.-B. and M. Z.-B., shares a biological connection with M. Z.-B., but not with L. Z.-B. (*See* SOF ¶ 103). The State Department took this position even though the Ninth Circuit had expressly rejected this rationale in 2000 and 2005; and Defendants have adhered to this position even as the Second Circuit in 2018, and various courts since then, have uniformly rejected Defendants' interpretation of the INA, including

as applied to children born through ART during the marriage of a same-sex couple.[3]

In failing to recognize L. Z.-B.'s citizenship, the State Department disregarded the INA's plain text, structure, objective, and judicial construction, all of which demonstrate that Section 301(g)—the INA provision governing acquisition of U.S. citizenship by children born abroad in wedlock—contains no requirement of a biological relationship between the child and his or her U.S. citizen parent. The State Department instead relied on its contrary policy, unilaterally adopted without notice or opportunity for public comment and not embodied in any regulation. That policy, which is memorialized only in the State Department's internal *Foreign Affairs Manual* ("FAM"), requires children born abroad during their parents' marriage to have a biological relationship with a U.S. citizen parent as a condition of eligibility for U.S. citizenship at birth. 8 FAM § 301.4-1(D)(1). As a result, the State Department erroneously does not recognize L. Z.-B. as a U.S. citizen, even though he has satisfied all the requirements of Section 301(g).[4]

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[3] *See Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000); *Jaen* v. *Sessions*, 899 F.3d 182 (2d Cir. 2018); *Dvash-Banks* v. *Pompeo*, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019), *affirmed*, No. 19-55517 (9th Cir. Oct. 9. 2020); *Kiviti* v. *Pompeo*, 2020 WL 3268221 (D. Md. June 17, 2020), *appeal dismissed*, No. 20-1882 (4th Cir. Oct. 26, 2020); *Mize* v. *Pompeo*, 2020 WL 5059253 (N.D. Ga. Aug. 27, 2020).

[4] The FAM policy would, among other things, declare nearly every child of a same-sex couple to be born out of wedlock and therefore illegitimate. Nothing in the statutory language, legislative history, or underlying policy of the INA supports that outcome.

The State Department not only imposes a biological relationship requirement on marital children that conflicts with the text, purpose, and uniform judicial construction of Section 301, it also refuses even to recognize L. Z.-B. as a marital child, characterizing him instead as illegitimate and therefore subject to 8 U.S.C. § 1409 ("Section 309"), the INA provision applicable to children born "out of wedlock." *See* 8 FAM § 304.1-2. In sharp contrast to Section 301, Section 309 expressly requires that a child born out of wedlock demonstrate a "blood relationship" with a U.S. citizen parent. 8 U.S.C. § 1409(a)(1), (c). This dichotomy demonstrates that when Congress intended to impose a biological relationship requirement, it knew exactly how to do so.[5]

In applying Section 309 to L. Z.-B.'s applications, the State Department effectively (and unconstitutionally) declined to recognize and honor the validity of Allison and Stefania's marriage and the legitimacy of the children born during that marriage. The State Department's refusal to recognize L. Z.-B.'s U.S. citizenship creates artificial distinctions between L. Z.-B. and his brother and unfairly burdens and stigmatizes the marriages of same-sex couples and deprives them of the full constellation of rights and benefits of marriage enjoyed by married, different-sex spouses. The resulting distinction violates the Due Process and Equal Protection

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[5] Sections 301 and 309 and provisions of the FAM relevant to this Motion are set out in full in Appendix A to this memorandum.

Clauses of the Fifth Amendment. *Pavan* v. *Smith*, 137 S. Ct. 2075, 2077 (2017); *see also Obergefell* v. *Hodges*, 576 U.S. 644, 668–73 (2015).

In the face of this deprivation of rights, Plaintiffs pursued this Action under 8 U.S.C. § 1503(a) ("Section 1503(a)")[6] and the Fifth Amendment to the United States Constitution. Pursuant to a Court-endorsed agreement, the Parties have proceeded with litigation of the Section 1503(a) claim and deferred adjudication of the constitutional claims. Because L. Z.-B. meets all of the criteria in Section 301(g) for U.S. citizenship at birth, the Court should grant summary judgment to L. Z.-B. on the Section 1503(a) claim, and declare him to be a U.S. citizen at birth.

II. STATEMENT OF MATERIAL FACTS

A. The INA

The INA sets out the eligibility requirements for U.S. citizenship at birth of children born abroad to U.S. citizens. These requirements differ for children of a marriage and children "born out of wedlock." Section 301(g) governs the citizenship status of children born abroad to married parents and confers U.S.

[6] Section 1503(a), which also is set out in Appendix A to this memorandum, allows any person within the United States to file in the United States district court for the district in which he "resides or claims a residence" an action "for a judgment declaring him to be a national of the United States" if he "claims a right or privilege as a national of the United States and is denied such right or privilege . . . upon the ground that he is not a national of the United States."

citizenship at birth on a "person born outside the geographical limits of the United States and its outlying possessions of parents," at least one of whom is a U.S. citizen who met the specified United States residency requirements at the time of the child's birth. 8 U.S.C. § 1401(g). Although the term "wedlock" is not mentioned in Section 301, courts consistently have interpreted Section 301 to apply to children born during a marriage (*i.e.*, in wedlock), in part, because of the contrast between this section and Section 309, which is titled "Children born out of wedlock." *See, e.g.*, *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (referring to Section 301(g) as "[a]pplicable to married couples").

Section 301 makes no mention of a biological (or "blood") relationship requirement, and courts repeatedly have held that it does not include one. *See, e.g.*, *Jaen*, 899 F.3d at 190 (holding that a "blood relationship is not required to establish parentage for purposes of acquired citizenship when the child is born into a marriage") (citation omitted); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005); *Dvash-Banks*, 2019 WL 911799, at *7, *aff'd sub nom. E.J.D.-B.* v. *U.S. Dep't of State*, 825 F. App'x 479 (9th Cir. 2020). Courts have consistently interpreted Section 309, which sets out certain preconditions to the applicability of Section 301 to children born "out of wedlock," to require that a child born abroad to an unmarried U.S. citizen parent must establish a biological connection with that parent as a prerequisite to U.S. citizenship at birth. Congress made that requirement

more explicit in 1986, when it added the words "blood relationship" to Section 309. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657 (1986). Thus, in contrast to Section 301, since 1986, and today, Section 309 states that a child born abroad to an unmarried U.S. citizen parent can be a U.S. citizen at birth under Section 301 only if the child establishes "by clear and convincing evidence" "a blood relationship between the [child]" and the U.S. citizen parent (and meets certain other requirements). 8 U.S.C. § 1409(a)(1).

When it amended Section 309 in 1986 to include the reference to a blood relationship, Congress made no corresponding amendment to Section 301, although at that time Congress did make other changes to Section 301(g), shortening the U.S. residency requirement. *See* § 12, 100 Stat. at 3657. Courts consistently have cited the differences between Section 301 and Section 309 as one reason for ruling that Section 301 does not include a biological relationship requirement. *See, e.g.*, *Jaen*, 899 F.3d at 188-89; *Scales*, 232 F.3d at 1164; *Dvash-Banks*, 2019 WL 911799, at *7.

B. The Foreign Affairs Manual

Even though Section 301 contains no reference to a "blood relationship" requirement—in direct contrast to Section 309—the State Department's internal FAM requires one. 8 FAM § 301.4-1(D)(1)(a) ("Absent a blood relationship between the child and the parent on whose citizenship the child's

own claim is based, U.S. citizenship is not acquired."). The FAM improperly excludes marital children like L. Z.-B. from being recognized as U.S. citizens at birth under Section 301(g) in a second way, classifying them as children born "out of wedlock" and therefore subject to the requirements of Section 309 if they do not have a biological relationship with both married parents. 8 FAM § 304.1-2(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.").[7] The State Department acknowledges that the FAM—which is not the product of a formal adjudication or notice-and-comment rulemaking or congressional action—imposes requirements not specifically set out in the INA. *See, e.g.*, *Kiviti*, 2020 WL 3268221, at *4 ("Although the FAM reflects State Department policy, it has been neither approved by Congress nor subjected to notice-and-comment rulemaking."); (SOF ¶ 48–50.) The State Department purports to justify the FAM's biological relationship requirement solely on the basis of its interpretation of the reference in Section 301(g) to "a person born . . . of parents one of whom is . . . a citizen of the United States." (*See* SOF ¶ 57.)

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[7] The U.S. Embassy in London applied Section 309 to L. Z.-B.'s application, but the State Department has conceded that it would "have denied L. Z.-B.'s applications even if considered under 8 U.S.C. § [301](g)." (ECF No. 31-1 at 10.) Because this Motion is brought under Section 1503(a), which calls for the Court to make a *de novo* determination of citizenship, the remedy pursuant to Section 1503(a) does not require the Embassy to re-adjudicate L. Z.-B.'s 2017 application under Section 301(g).

The State Department's interpretation of this supposed requirement of a biological relationship has been inconsistent and internally contradictory. For example, in a 2014 policy change, the State Department reversed its position that the "biological" relationship it reads into Section 301 did not include a gestational mother (a woman who carries, but did not provide the egg used to conceive, the child). (SOF ¶¶ 64–65, 70.) As a result of that change, the State Department now considers there to be a blood relationship if a child conceived with a donor egg was born during the marriage of his legal parents, one of whom is a U.S. citizen, and was carried by that parent—but only if the gestational mother also is the child's *legal* parent. In other words, the State Department announced that a parent who provided neither egg nor sperm could still confer U.S. citizenship in limited circumstances. This reversal was not occasioned by any congressional amendment of the INA: the State Department simply "changed its mind." (SOF ¶¶ 71–72.) In connection with this change, the State Department considered, but decided against, reading Section 301 to apply to children born through ART to same-sex couples. (SOF ¶¶ 61–63.)

C. The Zaccari-Blixt Family

Allison, a U.S. citizen, was born, raised, and lived continuously in the United States from her birth in 1978 until 2008. (SOF ¶¶ 1–2, 8.) She was born in Park Ridge, Illinois, moved with her family to Clemmons, North Carolina when she was six, and lived there until she moved to Poughkeepsie, New York to attend Vassar

College. (SOF ¶¶ 1, 3–4.) Allison remained in New York State after graduating and worked as a field hockey coach at Hartwick College. (SOF ¶ 5.) From 2002 to 2005, Allison attended law school at the University of North Carolina before returning to New York to work at a law firm. (SOF ¶¶ 6–7.)

Allison met Stefania in 2006 when Stefania was visiting New York City on vacation from Rome, Italy. (SOF ¶ 11.) Stefania, an Italian citizen, was born in Ferentino, Italy in 1974. (SOF ¶¶ 9–10.) In late 2007, Stefania returned to New York and stayed with Allison for several months, but then had to return to Italy because she did not have authorization to stay longer in the United States. (SOF ¶ 12.) In 2008, Allison and Stefania both relocated to London, England so that they could live together permanently. (SOF ¶ 13.) In 2009, Allison and Stefania entered into a civil partnership in England, which was converted retroactively to a marriage on January 3, 2015, following the recognition of marriage for same-sex couples in England. (SOF ¶¶ 14–17.)

In or around 2012, Allison and Stefania decided to have children and took steps to do so through the use of ART. (SOF ¶ 18.) They obtained sperm from a sperm bank in Denmark—Cryos International. (SOF ¶ 19–20.) The identity of the donor whose sperm Cryos provided is unknown to Allison and Stefania. (SOF ¶ 19.) In 2014, Stefania became pregnant using her own egg and the donor sperm (SOF ¶ 19); and in 2015, L. Z.-B. was born in London, England (*see* SOF ¶ 25). In

2016, Allison and Stefania took steps to have a second child, and Allison became pregnant using her egg and the sperm of the same donor whose sperm had been used to conceive L. Z.-B. (SOF ¶ 30.) Their second child, M. Z.-B., was born in London, England in early 2017. (SOF ¶ 33.)

Allison and Stefania are and always have been L. Z.-B. and M. Z.-B.'s legal parents. (SOF ¶¶ 39–42.) They are the only parents listed on the children's birth certificates. (SOF ¶¶ 26–28, 34–36.) Allison and Stefania both were present in the hospital room when each child was born, and Allison and Stefania have been their parents for all purposes since their births. (SOF ¶ 38.) No other person has been recognized as either child's parent or has asserted parental rights regarding them; and the four have lived together as a family since the children's births—first in London and, since late-2019, in New Jersey. (*See* SOF ¶¶ 39–40, 42, 44, 110–11.)

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

In 2015, Allison and Stefania appeared in person at the U.S. Embassy in London (the "Embassy") to apply for a CRBA and a U.S. passport for L. Z.-B. (SOF ¶¶ 76–77.) An Embassy official inquired into the details of L. Z.-B.'s birth, including whose genetic material had been used to conceive him and who had carried him. (SOF ¶¶ 78–80.) After answering the official's invasive questions, and hearing from the official about the State Department's policy, Allison and Stefania were

informed that L. Z.-B.'s applications would be denied because he did not have a biological relationship with Allison. (SOF ¶ 81.) Based on what they were told, they believed that it would be futile to pursue the applications, and they left the Embassy dejected and with the understanding that they had abandoned their applications. (SOF ¶¶ 82–83.) By letter dated March 11, 2015, on Embassy letterhead, the State Department informed Allison and Stefania that L. Z.-B. "does not . . . ha[ve] a claim to U.S. citizenship." (SOF ¶ 84.)

After M. Z.-B. was born, Allison and Stefania returned to the Embassy on May 23, 2017 to submit CRBA applications for both L. Z.-B. and M. Z.-B. (SOF ¶ 85.) Allison and Stefania provided the Embassy with the requisite documentation for both children, including their birth certificates, which identified Allison and Stefania as each child's parents, proof of Allison's U.S. citizenship and residency history in the United States, and proof of Allison and Stefania's marriage (SOF ¶¶ 86–93)—everything that Section 301(g) of the INA requires for the applicant to be a U.S. citizen at birth.

Although M. Z.-B.'s CRBA application was granted, during the interview, the Embassy notified Allison and Stefania that L. Z.-B.'s CRBA application would be denied. (SOF ¶¶ 99–104.) In reaching this conclusion, the Embassy treated L. Z.-B. as a child born "out of wedlock," not the legitimate son of Allison and Stefania's marriage, and on that basis adjudicated his application under

Section 309.[8] (*See* SOF ¶¶ 98–99, 101–02.) A letter from the Embassy dated May 24, 2017 stated that L. Z.-B.'s application had been denied solely on the ground "that there is not a biological relationship . . . 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 [INA]." (SOF ¶¶ 100–03.)

On September 5, 2017, Allison and L. Z.-B., through their counsel, submitted a letter to the Embassy, requesting reconsideration of the Embassy's decision to deny L. Z.-B.'s CRBA application. (SOF ¶ 105.) The Embassy responded, in a letter dated November 7, 2017, that the "Department affirms that [L. Z.-B.] did not acquire U.S. citizenship at birth, and therefore we are unable to issue him a CRBA." (SOF ¶ 106–07.)

E. Procedural History

On January 22, 2018, Plaintiffs filed their original 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* ECF No. 1.) The original

[8] Because the FAM recognizes only children whose two biological parents are married to each other as born in wedlock, the State Department would consider M. Z.-B. to have acquired U.S. citizenship at birth only if he satisfied Section 309. M. Z.-B. met that section's blood relationship requirement because Allison is his biological mother. (SOF ¶¶ 30–33.) Because no explanation was given of the basis for recognizing M. Z.-B.'s citizenship, it is not possible to determine precisely how the Embassy personnel reached their conclusion, nor is it necessary to ascertain that information for the resolution of this Motion.

complaint asserted 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.) Because Plaintiffs resided in London, England when the complaint was filed, the complaint did not assert a claim under Section 1503(a), which provides a cause of action for an individual "who is within the United States" and must "be filed in the district court of the United States for the district in which such person resides or claims a residence . . . ." *Id*. On September 3, 2018, Defendants moved to dismiss the complaint; and the court denied that motion in full from the bench on May 15, 2019. (ECF No. 31; ECF No. 38, Conf. Tr. at 41:16–21; Minute Order dated May 15, 2019.)

On February 13, 2020, after Plaintiffs relocated from London, England to Essex County, New Jersey, the Parties jointly moved to transfer the Action from Washington D.C. to this Court, principally to permit the filing of a Section 1503(a) claim. The court in D.D.C. granted that motion on February 14, 2020. (Minute Order, dated February 1, 2020; *see also* ECF No. 48-1.) Following transfer, this Court granted a motion by Plaintiffs to amend the complaint primarily to replace the APA claim with a claim under Section 1503(a); and Plaintiffs filed the First Amended Complaint ("Complaint") on July 14, 2020. The Complaint turns on substantially the same facts and seeks substantially the same relief as the original complaint, including (i) a declaration that L. Z.-B. is a U.S. citizen at birth; (ii) a

declaration that the State Department's policy of classifying the children of same-sex married couples as "children born out of wedlock," and its refusal on that basis to recognize L. Z.-B.'s citizenship, conflicts with the INA and is unconstitutional; (iii) a permanent injunction prohibiting Defendants from continuing to discriminate against Plaintiffs by classifying the children of same-sex married couples as "children born out of wedlock" and denying recognition of those children's citizenship at birth pursuant to Section 301(g) on that basis; and (iv) an award of attorneys' fees and costs as allowed by law, and of such other relief as the Court deems just and proper. (ECF No. 56.)

In a September 17, 2020 scheduling order, the Court adopted the Parties' proposal to bifurcate the proceedings to adjudicate first Plaintiffs' claim under Section 1503(a), principally on the basis of a stipulation of agreed facts, and to defer adjudication of the constitutional claims. (ECF No. 64.) The Parties filed their stipulation of agreed facts on September 21, 2020. (ECF No. 65.)

III. ARGUMENT

A. L. Z.-B. Is Entitled to a Declaration Under Section 1503(a) that He Acquired Citizenship At Birth Under Section 301(g) of the INA.

There are no genuine disputes of material fact concerning Plaintiffs' Section 1503(a) claim.[9] The Parties agree that (i) L. Z.-B. was born outside of the United States; (ii) Allison is a U.S. citizen who satisfied Section 301(g)'s residency requirement at the time of L. Z.-B.'s birth; (iii) Allison and Stefania were married at the time of L. Z.-B.'s birth; (iv) Allison and Stefania are, and always have been, L. Z.-B.'s legal, and only, parents since his birth; (v) L. Z.-B. resides in New Jersey; and (vi) L. Z.-B. does not share a biological relationship with Allison. (SOF ¶¶ 23, 25, 29, 38–40, 42–44, 110–11; *see also* SOF ¶¶ 87–93.)

The Parties' only dispute concerning the Section 1503(a) claim is a legal one: whether Section 301(g) implicitly mandates—as a prerequisite to recognition of U.S. citizenship at birth—that persons like L. Z.-B., born during their

[9] On a motion for summary judgment, the moving party must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Razak* v. *Uber Techs., Inc.*, 951 F.3d 137, 144 (3d Cir. 2020) (quoting Fed. R. Civ. P. 56(a)). For purposes of summary judgment, a "factual dispute is 'material' if it 'might affect the outcome of the suit under the governing law'" and "'genuine' if the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must "view the facts and evidence presented on the motion in the light most favorable to the nonmoving party." *Id.* at 144.

parents' marriage, demonstrate a biological relationship with both married parents. The State Department's imposition of such a requirement under Section 301(g) disregards the text, context, and objective of the statute; and every Article III court to consider the State Department's interpretation has rejected it. Because there are no material facts in dispute and the State Department's legal interpretation is unfounded, L. Z.-B. is entitled to summary judgment on his claim under Section 1503(a), which provides a claim for a "*de novo*" judicial determination of the "plaintiff's status as a United States citizen." *Delmore* v. *Brownell*, 135 F. Supp. 470, 473 (D.N.J. 1955).

1. The State Department's Interpretation Conflicts with the Text and Context of Section 301.

a. The Plain Text of Section 301 Does Not Require a Biological Relationship.

The Third Circuit has explained that "[t]he role of the courts in interpreting a statute is to give effect to Congress's intent." *Rosenberg* v. *XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001). To interpret a statute, "the starting point is the language of the statute itself." *United States* v. *Gollapudi*, 130 F.3d 66, 70 (3d Cir. 1997). "Where the statutory language is plain and unambiguous," courts "rarely need to inquire into the meaning of the statute beyond examining its wording." *B & G Const. Co.* v. *Dir., Off. of Workers' Comp. Programs*, 662 F.3d 233, 248 (3d Cir. 2011). "To determine whether the language of the Act is

ambiguous, '[courts] must examine the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id*. (quoting *Rosenberg*, 274 F.3d at 141). In that inquiry, courts must "strive to give effect to every word which Congress used and to avoid any interpretation which renders an element of the statute superfluous." *Id*.

The text of Section 301(g) is plain and unambiguous, and indisputably does not expressly impose a biological relationship requirement: "person[s] born outside the geographical limits of the United States and its outlying possessions of parents," one of whom is a U.S. citizen who satisfies certain residency requirements "shall be nationals and citizens of the United States at birth." 8 U.S.C. § 1401(g). The State Department purports to derive its position solely from the inclusion in Section 301(g) of the words "born . . . of parents," which it interprets to require implicitly that a child's biological parents must be married to each other in order to transmit U.S. citizenship at birth. That reading conflicts with the INA's text, structure, and objective of keeping families together, and with the judicial decisions construing Section 301.

(i) **The courts have uniformly rejected Defendants' interpretation.**

Two federal circuit courts and multiple federal district courts have ruled that the text of Section 301 is clear and that it does not include a biological relationship requirement. The Ninth Circuit has done so three times. In *Scales*, the

petitioner was born during the marriage of his Philippine citizen mother and U.S. citizen father. 232 F.3d at 1161–62. Although the petitioner's U.S. citizen father was not his biological father, he acted as the petitioner's father from the time of the petitioner's birth. *Id.* at 1162. The Ninth Circuit held that "[a] straightforward reading" of Section 301 "indicates . . . that there is no requirement of a blood relationship." *Id.* at 1164. The Ninth Circuit reaffirmed *Scales* in *Solis-Espinoza*, similarly holding that the petitioner, who claimed to have acquired U.S. citizenship through his father's U.S. citizen wife, who was not his biological mother, "was not illegitimate or born out of wedlock" because he was the child of married parents at the time of his birth, and "thus [he was] a United States citizen pursuant to [Section 301(g)]." 401 F.3d at 1091, 1093–94. The Court further explained that "the [blood relationship] requirement applied only to an illegitimate child and that it did not apply to someone who was not born 'out of wedlock.'" *Id*. at 1093. Recently, the Ninth Circuit applied these precedents to affirm a district court's holding that Section 301(g) does not require a child born through ART during the marriage of his same-sex parents to demonstrate a biological relationship with those parents. *See E.J.D.-B.*, 825 F. App'x at 480, *aff'g sub nom. Dvash-Banks*, 2019 WL 911799.

The Second Circuit similarly held in 2018 that Section 301 does not include a biological relationship requirement. In *Jaen* v. *Sessions*, the plaintiff was born in Panama to a Panamanian mother who was at the time married to a U.S.

citizen. 899 F.3d at 184. Although the plaintiff's biological father was not a U.S. citizen, the Second Circuit held that the plaintiff was a U.S. citizen under Section 301 because his mother had been married to a U.S. citizen at the time of the child's birth. *Id.* at 184, 190. As in *Scales* and *Solis-Espinoza*, the Second Circuit held that "a blood relationship is not required to establish parentage for purposes of acquired citizenship [under Section 301] when the child is born into marriage." *Id.*

Federal district courts in Maryland and Washington, D.C. also ruled this year that Section 301 unambiguously does not require a biological relationship. *Kiviti*, 2020 WL 3268221, at *11 ("[T]he statute is clear and unambiguous that the phrase 'born . . . of parents' in 8 U.S.C. § [301](c) does not require a biological relationship with both parents.") (second alteration in original); *Sabra* v. *Pompeo*, 2020 WL 1643676, at *20 (D.D.C. Apr. 2, 2020) ("[T]he plain language of 8 U.S.C. § [301] does not require proof of a 'biological relationship' between the child born abroad to married U.S. citizen parents"); *cf. Mize*, 2020 WL 5059253, at *16 (holding, despite statutory ambiguity, that Section 301 does not require a biological relationship with both parents because the contrary reading "would raise serious constitutional questions").

Because "the meaning of the statute's terms is plain," the "inquiry is at end," and L. Z.-B. is entitled to summary judgment on his Section 1503(a) claim given that he was born in England during the marriage of Allison and Stefania.

Bostock v. *Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("[P]eople are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration").

(ii) **The word "parents" does not impose a biological requirement.**

As compelled by the text and judicial construction of Section 301, the State Department conceded in related litigation that the term "parent" in that section includes legal parents. *See Mize*, 2020 WL 5059253, at *11–12 & n.8 (noting "Defendants' position that, in Section 301, the word 'parents' refers to *legal* parents") (citations omitted). And every court to consider the meaning of the term "parents" in Section 301 has agreed.

The plain text of Section 301(g) confirms that the term "parents" does not create a biological relationship requirement. Section 301(g) appears in Title III of the INA, which governs U.S. citizenship at birth. Title III's definition of "parent," which appears in 8 U.S.C. § 1101(c)(2), states merely that the term "parent" "include[s] in the case of a posthumous child a deceased parent . . . ." The term "parent" is defined broadly in Titles I and II of the INA as "'a parent, father, or mother' whose relationship to a child 'exists by reason' of one of numerous circumstances, including several non-biological relationships such as those of stepparents and adoptive parents." *Kiviti*, 2020 WL 3268221, at *8 (citing 8 U.S.C. § 1101)). Thus, the INA's definition of "parent" is not limited to one who shares a

biological or genetic relationship to a child and includes non-biological, legal parents. *See Dvash-Banks*, 2019 WL 911799, at *7 ("[T]he word 'parents' as used in Section 301(g) is not limited to biological parents.").

The established common law meaning of the term "parent" is consistent with this interpretation of Section 301(g). *See Neder* v. *United States*, 527 U.S. 1, 21 (1999) ("It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meanings of these terms.") (alterations and internal quotation marks omitted). Under the common law, when a child is born during a marriage (as L. Z.-B. was here), the child is not illegitimate, and the married individuals are the child's parents regardless of whether they have a biological relationship with the child. *See Michael H.* v. *Gerald D.*, 491 U.S. 110, 124 (1989) (describing the "presumption of legitimacy" as "a fundamental principle of the common law").[10] Congress drafted the INA, including its separate provisions for children born in and

[10] Nearly every state in the United States has recognized or incorporated the common law presumption. *See, e.g.*, *Jaen*, 899 F.3d at 189 ("New York state—like many states—incorporates the common law presumption of parentage into its domestic relations law."); *In re K*, 222 A.2d 552, 553 (N.J. Co. Prob. Div. 1966) ("A child born or conceived [during] the marriage is by common law presumed to be the legitimate offspring of the husband and wife."); 41 Am. Jur. 2d *Illegitimate Children* § 8 (2020) ("[I]t is clear that such a presumption [of legitimacy for children born in wedlock] exists independently of statute in practically all jurisdictions.").

out of wedlock, against the backdrop of the common law presumption that a child born during a marriage is the child of the marriage, regardless of biological ties. *See Kiviti*, 2020 WL 3268221, at *9 (State Department's interpretation of Section 301 to require a biological relationship "unpersuasive" in light of common law presumption of parentage); *McMillian* v. *Heckler*, 759 F.2d 1147, 1149, 1153 (4th Cir. 1985) (stating, in connection with the common law presumption, that "[i]t would be anomalous if federal statutory law concerned with or dependent in any way upon determinations of the parentage of children born in wedlock did not include as an interstitial common law element a presumption so universally applied by the states").

Considering the statute in this context, courts have agreed unanimously that the term "parent" in Section 301 does not impose a biological relationship requirement for transmission of U.S. citizenship to children born abroad to married U.S. citizens. *See, e.g.*, *Jaen*, 899 F.3d at 188 (given absence of any indication that Congress intended to depart from "centuries-old, common law meaning" of "parent," the term, as used in Section 301, "incorporate[s] the longstanding presumption of parentage based on marriage"); *Kiviti*, 2020 WL 3268221, at *9 ("[T]he phrase 'born . . . of parents' must still be viewed against the backdrop of the common law presumption of parentage, which effectively considered a child to be born of parents consisting of a biological parent and that parent's spouse at the time of the birth, without requiring proof that the spouse had a genetic relationship with

the child.") (second alteration in original); *Solis-Espinoza*, 401 F.3d at 1094 (observing that "[i]n every practical sense, [petitioner's father's wife] was petitioner's mother and he was her son"); *Scales*, 232 F.3d at 1164; *Mize*, 2020 WL 5059253, at *13; *Dvash-Banks,* 2019 WL 911799, at *7.

(iii) The words "born . . . of" do not impose a biological relationship.

Defendants nonetheless contend that the words "born . . . of" impliedly impose a biological relationship requirement that plainly is not there. *First*, the words "born" and "of" do not appear contiguously in Section 301(g), but are separate components of a broader sub-section. The statutory language between "born" and "of" refers to the location of the child's birth, and the text following "parents" describes the citizenship and residency of the parents. The words "born" and "of," thus must be read as part of a cohesive provision that accounts for each of its terms, which address the circumstances at the time of the child's birth, including the location of the child and the citizenship of his parents. This is exactly what one would expect from a statute setting out the conditions for recognition of U.S. citizenship at birth that passes through parental relationships, and not birth in the United States. There is thus no basis to isolate "born" and "of" from the balance of the provision and read them as jointly implying a biological relationship requirement. *Utility Air Reg. Grp.* v. *EPA*, 573 U.S. 302, 320 (2014) (It is a "'fundamental canon of statutory construction that the words of a statute must be

read in their context and with a view to their place in the overall statutory scheme.'") (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).[11]

The State Department's interpretation not only divorces the term "born" from its context in Section 301(g), but it ascribes inordinate significance to the polysemous preposition "of." Courts analyzing Section 301 use "born of" and "born to" interchangeably, reflecting that Congress's choice of the word "of" rather than "to" in Section 301(g) was not intended to require a biological relationship. For example, in *Scales*, the court stated that petitioner "was *born to* parents who were married at the time of his birth." 232 F.3d at 1164 (emphasis added); *see also Kiviti*, 2020 WL 3268221, at *3 (Section 301 "applies where a child is *born to* a married couple[.]") (emphasis added); *see also Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 56 (2001) ("Title 8 U.S.C. § [309] governs the acquisition of United States citizenship by persons *born to* one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions.") (emphasis added). Moreover, as courts have recognized, the word

[11] Although these considerations are sufficient for resolution of this Motion, to sustain the contrary interpretation of Section 301(g), Defendants would, among other things, have to explain how the structure of subsection (g) supports their interpretation given that the words are part of a differently structured grammatical phrase. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 152 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a . . . modifier normally applies only to the nearest reasonable referent.")

"of" has been "so weakened down" that it now often "express[es] . . . the vaguest and most intangible of relations." *Mize*, 2020 WL 5059253, at *12 (alterations in original) (quoting 7 Oxford English Dictionary 66 (1st ed. 1933)). "In the face of this dilution, reading a narrow biological requirement into the word may place more weight on it than it can bear." *Id*.

Thus, the State Department's construction of "born . . . of" has no basis in the text of Section 301, and the assertion that the statute would use the meagre formulation "born . . . of" to impose a biological relationship requirement—a significant limitation on eligibility for U.S. citizenship at birth—defies established principles of statutory construction. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). This Court should reject Defendants' attempt to "contravene congressional intent by implying statutory language that Congress omitted." *Rea* v. *Federated Inv'rs*, 627 F.3d 937, 941 (3d Cir. 2010). Under the plain language of Section 301(g), L. Z.-B. acquired citizenship at birth because he was "born" in England "of parents" one of whom is an alien, Stefania, and the other a U.S. citizen, Allison, who prior to L. Z.-B.'s birth met the statute's residency requirement.

b. The State Department's Interpretation Ignores the Differences Between Section 301 and Section 309 and Renders Terms in the INA Redundant.

A straightforward comparison of Section 301, which covers children born in wedlock, and Section 309, which establishes additional requirements for children born out of wedlock, also shows that Section 301 does not include a biological relationship requirement. In 1986, Congress amended Sections 301 and 309 in the same instrument: Congress revised Section 309 to make explicit the need for children born out of wedlock to establish a "blood relationship" by "clear and convincing evidence." Congress made no similar change to Section 301; it merely shortened the length of the residency requirement in Section 301(g) from between five and ten years to between two and five years. §§ 12–13, 100 Stat. at 3657. That Congress simultaneously considered and amended Sections 301 and 309 in 1986 and added the "blood relationship" language to one section and not the other strongly supports the inference that Congress did not intend to include a parallel requirement in the other section, *i.e.*, in Section 301: "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (alterations and internal quotation marks omitted). As the Second and Ninth Circuits have recognized, Congress's omission in Section 301 of a "blood relationship"

requirement should be presumed purposeful, and no such requirement should be read into a statutory section that does not use the term. *Scales*, 232 F.3d at 1164 ("If Congress had wanted to ensure the same about a person born in wedlock, 'it knew how to do so.'") (citations omitted); *Jaen*, 899 F.3d at 189 ("'[T]he textual distinction' between [Sections 301 and 309] regarding children of married parents and children of unmarried parents is strongly suggestive of a clear Congressional intent to treat the two categories differently on this point.") (citation omitted). Indeed, the inference that Congress acted deliberately in using different language in two provisions of a statute is strongest, when, as here, it considered those two sections of the statute together. *See Kiviti*, 2020 WL 3268221, at *10 (Congress's insertion of "the 'blood relationship' requirement only in § [309] strengthens the view that there is no biological requirement in § [301]"); *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (The "negative implications raised by disparate provisions are strongest where the provisions were considered simultaneously when the language raising the implication was inserted.") (internal quotation marks omitted).[12]

[12] Defendants' interpretation of Section 301(g) would require the Court to accept that Congress used entirely different language there ("born . . . of parents") and in Section 309 ("blood relationship") to convey the same meaning. *Race Tires Am., Inc*. v. *Hoosier Racing Tire Corp*., 674 F.3d 158, 165 (3d Cir. 2012) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words."); *NLRB* v. *Food Fair Stores, Inc*., 307 F.2d 3, 10 (3d Cir.1962)

Defendants' interpretation also impermissibly renders redundant the "blood relationship" requirement in Section 309. *See Lawrence* v. *City of Philadelphia*, 527 F.3d 299, 322 (3d Cir. 2008) ("[W]hen examining the statutory text and structure, we must be careful to avoid a construction that renders any part of the statute superfluous."). Section 301 sets forth the only standards for acquired citizenship for marital children, but non-marital children must first fulfill Section 309's requirements, which include "establish[ing] by clear and convincing evidence" proof of a "blood relationship." 8 U.S.C. § 1409(a)(1). The State Department's position that Section 301 also contains a biological relationship requirement would make Section 309's blood relationship requirement surplusage. *See Kiviti*, 2020 WL 3268221, at *10 (interpreting Section 301 "to include a biological relationship requirement would mean that § [309], which by reference directs the application of § [301] under certain circumstances, contains two biological relationship requirements, an interpretation that runs afoul of" statutory interpretation principles); *Ottaviance* v. *AVS Props., LLC*, 2019 WL 3183642, at *6 (D.N.J. July 15, 2019) ("It is a cardinal principle of statutory construction that the statute ought, upon the whole to be so construed that, if it can be prevented, no

(applying "the rule of statutory construction which holds that different words appearing in the same statute are presumed to have different meanings").

clause, sentence or word shall be superfluous, void, or insignificant.") (quoting *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001)).

c. The Plain Meaning of Section 301 Furthers Congress's Object and Purpose.

The State Department's interpretation of the INA ignores that Congress enacted separate, contrasting provisions for children born in and out of wedlock, and that the differences between the two sections reflect different legislative focuses. As Justice Stevens explained in *Miller* v. *Albright*, 523 U.S. 420, 438 (1998), among the interests served by Section 309 are "the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States." *See also Tuan Anh Nguyen*, 533 U.S. at 64–65 ("The second important governmental interest furthered in a substantial manner by § [309](a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."). These interests are amply met without requiring a "blood relationship" when, as here, the child is born into a marriage of a U.S. citizen and is part of a family. It is precisely because of the absence of a marriage when children are born "out of wedlock" that Section 309, but not Section 301, requires a biological

relationship between the child and U.S. citizen parent in order to foster these interests. *See Scales*, 232 F.3d at 1164 (the "concerns" that animate the requirement of a blood relationship in Section 309, such as fostering "parental support, either moral or financial," "presumably are not present if a child is born in wedlock.") (citing *Miller*, 523 U.S. at 434).

The INA's reliance on marriage to satisfy these interests is consistent with, if not a direct result of, the statute's objective of fostering family unity. Courts consistently have recognized that the INA "was intended to keep families together" and "should be construed in favor of family units and the acceptance of responsibility by family members." *Solis-Espinoza*, 401 F.3d at 1094; *see Kiviti*, 2020 WL 3268221, at *12 (noting "intent of the INA to 'provide for a liberal treatment of children' and to address 'the problem of keeping families of United States citizens and immigrants united'") (citations omitted); *Dvash-Banks*, 2019 WL 911799, at *8 (quoting H.R. Rep. No. 85-1199, at 7 (1957) and citing *Solis-Espinoza*, 401 F.3d at 1094); *see also Sook Young Hong* v. *Napolitano*, 772 F. Supp. 2d 1270, 1278–79 (D. Haw. 2011) ("[M]aintenance of family unity and . . . the liberal treatment of children represent well-known goals of the INA.").

The State Department's interpretation of the INA creates artificial distinctions among married parents and their children that could engender concrete familial harms, such as burdens on the ability to travel or on entitlements to other

legal rights and privileges—the antithesis of the INA's purpose of protecting families and its reliance on the presumption that children born during a marriage are the legitimate children of their parents. Here, the State Department's interpretation has led to the absurd result that siblings—L. Z.-B. and M. Z.-B.—born into their parents' marriage and raised together in the same home—are classified as illegitimate and are treated differently for purposes of the acquisition of U.S. citizenship. In addition to depriving L. Z.-B. of the "most precious right" of citizenship, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159 (1963), to which he is so clearly entitled, the State Department's policies also cause L. Z.-B. and similarly situated children to endure harmful stigma that challenge and threaten to erode family unity. Further, when the State Department classifies the children of married same-sex couples as born "out of wedlock" and treats them differently from the children of married different-sex couples by denying them citizenship, the State Department effectively disregards the validity of the marriages of same-sex couples and withholds the full constellation of rights and benefits available to married, different-sex couples. *See Pavan*, 137 S. Ct. at 2077. These distinctions also convey the demeaning message to L. Z.-B. and his parents (and similarly situated families) that the marriage of a same-sex couple is inferior to the marriage of a different-sex couple. *See Obergefell*, 576 U.S. at 668 ("Without the recognition, stability, and

predictability marriage offers, . . . children suffer the stigma of knowing their families are somehow lesser.").

B. The State Department's Policy Is Unreasonable and Not Entitled to Deference.

Defendants in this and related litigation have offered various extra-statutory arguments in support of their policy requiring a marital child to have a biological relationship with his U.S. citizen parent in order to acquire U.S. citizenship at birth. These include (1) the policy is longstanding; (2) it adheres to the principle of *jus sanguinis* supposedly "underl[ying] the American approach to recognizing citizenship of children born abroad to U.S. citizens"; and (3) the State Department's position is entitled to deference. *See* Memorandum in Support of Defendants' Motion to Dismiss, ECF No. 31-1, at 26. None of these arguments excuses the policy's conflict with the text and meaning of Section 301.

First, Defendants' assertion that the State Department's policy is longstanding is incorrect. The State Department's unilateral interpretation has been inconsistent and internally contradictory. (SOF ¶¶ 50, 61–64, 70–73.) Before 2014, the State Department did not consider the "biological relationship" required in the FAM to exist if a child conceived with a donor egg was born during the marriage of his legal parents, one of whom is American, and carried by that parent. (SOF ¶ 70.) In 2014, the State Department "changed its mind," declaring that it would consider a gestational mother who also is the legal parent to have a "biological relationship"

to the child, even if the egg originated from a donor. (*See* SOF ¶¶ 64–65, 71–73.) *See also* 8 FAM § 304.3-1(c).[13] The State Department's "change was not occasioned by any corresponding amendments to the law, or any other congressional action." *Dvash-Banks*, 2019 WL 911799, at *5.[14] *See Kiviti*, 2020 WL 3268221, at *10 (noting the "State Department's recent change in policy, untethered to any change in the statute, to include within this term gestational mothers with no genetic relationship to the children they bear"). (SOF ¶¶ 71–73.) Even if the policy undergirding the FAM's biological relationship requirement were longstanding and internally consistent, however, it is irrelevant to interpreting Section 301, because "[t]he FAM does not even purport to interpret the statute." *Jaen*, 899 F.3d at 187 n.4; *see also Scales*, 232 F.3d at 1166 ("the FAM is not specifically an interpretation of § [301]").

Second, Defendants' justification for their policy rests on a distorted understanding of *jus sanguinis*—a misnomer, translated literally from the Latin as "right of blood." The discussion of the text and structure of the INA above demonstrates that, instead of adopting the Roman bloodlines concept, the statute

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[13] Curiously, under the new policy, the supposedly-necessary *biological* relationship would exist only if the gestational mother also were the child's *legal* parent. *Compare* 8 FAM 304.3-1(c) *with* 8 FAM 304.3-2(f).

[14] More recently, the State Department considered further proposed revisions to its interpretation of Section 301, even though Congress has not changed Section 301 since 1986. *Dvash-Banks*, 2019 WL 911799, at *5.

established a distinct statutory framework for the acquisition of citizenship. Under that framework "[d]erivative citizenship for nonmarital children of American fathers requires demonstration of a 'blood relationship,'" but that "statutory requirement . . . does not apply to marital children." Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race and Nation*, 123 Yale L.J. 2134, 2223 n.353 (2014). Indeed, were the INA focused on bloodlines, Section 301 would have required only that a child establish a biological relationship with a U.S. citizen parent, and the INA would not distinguish between marital and non-marital children of U.S. citizens. Sections 301 and 309, however, impose other requirements that are not linked to biology, such as residency and financial support requirements. These conditions show that Congress intended to create a law of citizenship that cannot be reduced to shared DNA.

Courts confronted with the Defendants' *jus sanguinis* argument have rejected it as an oversimplification or misconception lacking statutory or constitutional support. *See Kiviti*, 2020 WL 3268221, at *12; *Mize*, 2020 WL 5059253, at *16. This Court should similarly reject Defendants' attempt to replace Section 301(g)'s plain and unambiguous text with their unfounded interpretation of American citizenship law.

Third, the State Department's policy is not entitled to deference because it conflicts with the clear and unambiguous text of Section 301. Congress "has

spoken to the precise question at issue" here, and Defendants must "give effect to the unambiguously expressed intent of Congress." *Kaufman* v. *Nielsen*, 896 F.3d 475, 482 (D.C. Cir. 2018) (quoting *Chevron*, 469 U.S. at 842-43). For those reasons, among others, no court has held that the State Department's interpretation of Section 301 warrants deference, under either the *Chevron* or *Skidmore* standards. *See Jaen*, 899 F.3d at 187 n.4 (no *Chevron* deference); *Scales*, 232 F.3d at 1166 (no *Chevron* deference); *Kiviti*, 2020 WL 3268221, at *12 (no *Skidmore* deference); *Sabra*, 453 F. Supp. 3d at 320 (no *Skidmore* deference); *Mize*, 2020 WL 5059253, at *15 (constitutional avoidance trump[ed any] *Skidmore* deference" to which the State Department might be entitled). Nothing here compels a different conclusion.

C. Section 301 Must be Construed to Exclude a Biological Relationship Requirement to Avoid Raising Significant Constitutional Issues.

The text, structure, and purpose of the INA all unequivocally mandate that a marital child, like L. Z.-B., need not demonstrate a biological relationship to his married parents to acquire U.S. citizenship at birth. Even if Section 301(g) could be considered ambiguous on this point, however, the doctrine of constitutional avoidance compels this reading of Section 301(g). "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v.

Rodriguez, 138 S. Ct. 830, 836 (2018). No actual finding of unconstitutionality is required. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.").

The State Department's interpretation of Section 301(g) "raise[s] a multitude of constitutional problems," *id.*, because of its substantial infringement of the fundamental rights of married same-sex couples. Under the policy, the children of married same-sex parents are relegated to the INA's "out of wedlock" provision and treated as illegitimate. Applying the State Department's requirement that both of a child's biological parents must be married to each other at the time of his birth in order for him to be deemed "born 'in wedlock,'" 8 FAM § 304.1-2(c), necessarily limits to rare circumstances the ability of married female same-sex couples to transmit U.S. citizenship to their children under Section 301(g) (and completely precludes male same-sex couples from doing so). By treating children born during the marriage of their parents as illegitimate—as the State Department did here—the State Department unconstitutionally denies married same-sex couples the rights and benefits and respect accorded to married, different-sex couples. *See United States* v. *Windsor*, 570 U.S. 744, 775 (2013). The Supreme Court has made clear that the Constitution cannot tolerate such disparate treatment and the harms that are inflicted

on their children as a result. *See Pavan*, 137 S. Ct. at 2077; *Obergefell*, 576 U.S. at 667–69.

Relying on these established principles, the courts in *Kiviti* and *Mize* recently held that the doctrine of constitutional avoidance compels rejection of the State Department's interpretation of Section 301. In *Kiviti*, which involved the child of a male same-sex couple whom the State Department refused to recognize as a U.S. citizen at birth, the court held that "[i]f the canon [of constitutional avoidance] were applied," it would favor the plaintiffs' interpretation, "which avoids a likely conflict with constitutional principles by more easily permitting equal treatment of same-sex male couples, particularly by allowing them to have a child in wedlock." 2020 WL 3268221, at *14. The court further held that "the ability to confer citizenship on children falls within the 'constellation of benefits that the State has linked to marriage'" and that the State Department's imposition of a biological relationship requirement "raises 'serious . . . doubts' whether it infringes on that fundamental right" because, under that interpretation, a "male same-sex married couple can never have a child deemed to be born in wedlock." *Id*. at *13 (citation omitted). Similarly, in *Mize*, the court found that reading a biological relationship requirement into Section 301 "would result in a statute that (1) provides a benefit, (2) conditioned on marriage, (3) that is unavailable to certain married same-sex couples. As in *Pavan* . . . , this would 'den[y] married same-sex couples access to

the constellation of benefits that the State has linked to marriage.' And, as in *Pavan* . . . , that would likely render the statute unconstitutional." 2020 WL 5059253, at *11 (second alteration in original) (citing *Pavan*, 137 S. Ct. at 2078). Here, even if Section 301(g) were "susceptible of multiple interpretations," the Court should adopt Plaintiffs' construction, to avoid the "serious constitutional doubts" raised by Defendants' interpretation. *Jennings*, 138 S. Ct. at 836.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant in full their motion for partial summary judgment and declare under Section 1503(a) that L. Z.-B. is a U.S. citizen at birth under Section 301(g), and grant attorneys' fees and costs and such other and further relief as the Court deems just and proper.

Dated: November 18, 2020

Respectfully Submitted,

/s/ *Theodore Edelman*

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APPENDIX A

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8 U.S.C. § 1401(g)
§ 1401. Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:
…
(g) 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: *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

8 U.S.C. § 1409
§ 1409. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—

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

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, 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, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1503(a)
§ 1503. Denial of rights and privileges as national

(a) Proceedings for declaration of United States nationality

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a

residence, and jurisdiction over such officials in such cases is conferred upon those courts.

8 FAM § 304.1-2—In Wedlock and Of Wedlock

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.

8 FAM § 304.3-1—Birth Abroad to a U.S. Citizen Gestational Mother Who Is Also the Legal Mother at the Time She Gives Birth (Birth Mother, But Not Genetic Mother)

a. A child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and nationality Act (INA) 301(c).

b. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c).

c. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien father, with a citizenship claim adjudicated under INA 301(g).

d. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, and who is not married to the genetic mother or father of the child at the time of the child's birth, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c).

8 FAM § 304.3-2— Birth Abroad to a Surrogate of a Child Who is the Genetic Issue of a US Citizen Mother and/or US Citizen Father

a. For purposes of this section, the term "surrogate" refers to a woman who gives birth to a child, who is not the legal parent of the child at the time of the child's birth in the location of the birth. In such a case, the surrogate's citizenship is irrelevant to the child's citizenship analysis.

b. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizen parents, with a citizenship claim adjudicated under INA 301(c).

c. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor, is considered for citizenship purposes to be a person born out of wedlock to a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c). This is the case regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.

d. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien spouse, with a citizenship claim adjudicated under INA 301(g).

e. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and his non-U.S. citizen spouse, is considered for citizenship

purposes to be a person born in wedlock of a U.S. citizen father and alien spouse, with a citizenship claim adjudicated under INA 301(g).

f. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.

g. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and the surrogate (mother) who is not married to the U.S. citizen father is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). Note that in such a case, despite the genetic and gestational connection, the surrogate mother is not the legal parent of the child at the time of birth, usually pursuant to a surrogacy agreement.

8 FAM § 301.4-1(D)—A Biological Relationship, or Blood Relationship, Is Required for a U.S. Citizen Parent of a Child Born Abroad to Transmit U.S. Citizenship to the Child
8 FAM 301.4-1(D)(1)—Establishing Blood Relationship

a. The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.

b. Applicants must meet different standards of proof of blood relationship depending on the circumstances of their birth:

(1) Section 309(a) INA (8 U.S.C. 1409(a)), as amended on November 14, 1986, specifies that the blood relationship of a child born out of wedlock to a U.S. citizen father must be established by clear and convincing evidence. This standard generally means that the evidence must produce a firm belief in the truth of the

facts asserted that is beyond a preponderance but does not reach the certainty required for proof beyond a reasonable doubt. There are no specific items of evidence that must be presented. DNA tests are not required, but may be submitted and can help resolve cases in which other available evidence is insufficient to establish the relationship. For the procedures for establishing legal relationship to or legitimation by a citizen father once blood relationship has been proven, see 8 FAM 301.4-3(D). (8 FAM 304.2 provides guidance regarding DNA tests.); and

(2) The Immigration and Nationality Act (INA) does not specify a standard of proof for persons claiming transmission of U.S. citizenship based upon birth (a) in wedlock to a U.S. citizen parent or (b) out of wedlock to a U.S. citizen mother. The Department's regulations also do not explicitly establish a standard of proof in these two circumstances. Where no other standard of proof is explicitly required by law, the Department applies the general standard of a preponderance of the evidence. This standard means that the evidence of the biological relationship is of greater weight than the evidence to the contrary. In such a case, the evidence is credible and best accords with reason and probability. Meeting the standard does not depend on the quantity of evidence presented.

c. A man has a biological relationship with his child, or a "blood relationship" as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child. A woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby). (See 8 FAM 304.3.)

d. Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen "parent" is biologically related to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include, but are not limited to:

(1) Conception or birth of a child when either of the alleged biological parents was married to another person during the relevant time period;

(2) Naming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents;

(3) Evidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother;

(4) If the child was conceived or born when the mother was married to someone other than the man claiming paternity, a statement from the man to whom the mother was married disavowing paternity, a divorce or custody decree mentioning certain of her children but omitting or specifically excluding the child in question, or credible statements from neighbors or friends having knowledge of the circumstances leading up to the birth may be required as evidence bearing on actual natural paternity; and

(5) The child was born through surrogacy or other forms of assisted reproductive technology. (8 FAM 304.3 provides guidance about acquisition of U.S. citizenship by birth abroad and assisted reproductive technology.)

e. In such cases, it is within the consular officer's discretion to request additional evidence pursuant to 22 CFR 51.45.

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 Oral Argument Requested Motion Date: February 16, 2021

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL CIVIL RULE 56.1

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Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1, Plaintiffs Allison Dawn Blixt ("Allison") and L. Z.-B., by and through his court-appointed guardian *ad litem*, Stefania Zaccari, ("Stefania"; together, "Plaintiffs"), respectfully submit the following *Statement of Undisputed Material Facts In Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*:

THE ZACCARI-BLIXT FAMILY

1. Allison was born in Park Ridge, Illinois in 1978. (ECF No. 65, *Stipulation of Agreed Facts Relating To Claim Pursuant to 8 U.S.C. § 1503(a)* ("Stip.") ¶ 1; *Declaration of Allison Dawn Blixt in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, sworn to November 16, 2020, ("Blixt Decl.") ¶ 2.)

2. Allison is a United States citizen. (Stip. ¶ 2.)

3. Allison moved from Peoria, Illinois at the age of six with her family to Clemmons, North Carolina, where she lived until graduating high school in 1996. (Blixt Decl. ¶ 2.)

4. Allison attended Vassar College in Poughkeepsie, New York, from 1996 until 2000. (Stip. ¶ 3; Blixt Decl. ¶¶ 2-3.)

5. From 1996 to 2001, Allison resided in New York State. (Stip. ¶¶ 3-4.) After graduating from Vassar College in 2000, Allison worked as a field hockey

coach at Hartwick College, in Oneonta, New York, until December 2001. (Blixt Decl. ¶ 3.)

6. From 2002 to 2005, Allison lived in North Carolina, where she attended law school at the University of North Carolina. (Stip. ¶ 5.)

7. After receiving her law degree in 2005, Allison moved to New York City to work as an associate at a law firm. (Stip. ¶ 6.)

8. Allison lived in the United States continuously from the time of her birth in 1978 to 2008, as well as during other periods. (Stip. ¶ 7.)

9. Stefania was born in Ferentino, Italy, in 1974. (Stip. ¶ 8.)

10. Stefania is an Italian citizen. (Stip. ¶ 9.)

11. Allison met Stefania in 2006 when Stefania was visiting New York City on vacation. Allison and Stefania commenced a romantic relationship, which continued even after Stefania returned to her home in Rome, Italy in 2006. (Blixt Decl. ¶ 4.)

12. In late 2007, after more than a year of being in a long-distance relationship with Allison, Stefania returned to New York and stayed with Allison for several months. Stefania thereafter returned to Italy because she did not have authorization to stay longer in the United States. (Blixt Decl. ¶ 5.)

13. In 2008, Allison and Stefania both relocated to London, England so that they could live together. In 2008, Allison and Stefania shared a home following their relocation to London, England. (Blixt Decl. ¶ 6.)

14. Allison and Stefania entered into a civil partnership in London, England, on July 9, 2009. (Stip. ¶ 10; Blixt Decl. ¶ 6.)

15. On January 3, 2015, following recognition by the U.K. government of marriage for same-sex couples in England, Allison and Stefania's civil partnership was converted retroactively to a marriage. (Stip. ¶ 11; Blixt Decl. ¶ 6.)

16. Allison and Stefania's marriage certificate states that their marriage was "converted from a civil partnership on Third January 2015" and "is to be treated as having subsisted since the date . . . on which the civil partnership was formed." (Stip. ¶ 12.)

17. Allison and Stefania have been married since July 9, 2009. (Stip. ¶ 13.)

18. In or around 2012, Allison and Stefania decided to have children and took steps through the use of Assisted Reproductive Technology ("ART") to conceive their children. (Blixt Decl. ¶ 7.)

19. In 2014, through use of ART, Stefania became pregnant with L. Z.-B. using her own egg and sperm from an unknown donor obtained from a sperm bank in Denmark—Cryos International ("Cryos"). (Stip. ¶ 14; Blixt Decl. ¶ 7.)

20. Allison contracted with Cryos to deliver the donor's sperm to the London Women's Clinic and subsequently arranged to have the sperm transferred to Guy's Hospital. (Blixt Decl. ¶ 7.)

21. Allison used the London Women's Clinic and Guy's Hospital, in part, because she understood that both of those clinics were licensed by the Human Fertilisation & Embryology Authority ("HFEA"). (Blixt Decl. ¶ 7.)

22. L. Z.-B.'s conception was the result of ART treatment at Guy's Hospital. (Blixt Decl. ¶ 7.)

23. Allison's genetic material was not used to conceive L. Z.-B. (Stip. ¶ 15.)

24. Stefania carried L. Z.-B. to term. (Stip. ¶ 16.)

25. In early 2015, L. Z.-B. was born in London, England. (Stip. ¶ 17.)

26. Allison and Stefania registered L. Z.-B.'s birth with the Lambeth Register Office, which issued L. Z.-B. a birth certificate on February 27, 2015, pursuant to the U.K. Births and Deaths Registration Act of 1953. (Stip. ¶ 18; Blixt Decl. ¶ 8.)

27. Allison and Stefania are the parents identified on L. Z.-B.'s birth certificate. (Stip. ¶ 19; Blixt Decl. ¶ 8.)

28. L. Z.-B.'s birth certificate does not identify any parent of L. Z.-B. other than Allison and Stefania. (Stip. ¶ 20.)

29. Allison and Stefania were married to each other when L. Z.-B. was born. (Stip. ¶ 21.)

30. In 2016, through the use of ART, Allison became pregnant with her and Stefania's second child, M. Z.-B., using Allison's own egg and sperm from the same unknown donor whose sperm had been used to conceive L. Z.-B. (Stip. ¶ 22.)

31. Stefania's genetic material was not used to conceive M. Z.-B. (Stip. ¶ 23.)

32. Allison carried M. Z.-B. to term. (Stip. ¶ 24.)

33. M. Z.-B. was born in early 2017 in London, England. (Stip. ¶ 25.)

34. Allison and Stefania registered M. Z.-B.'s birth with the Lambeth Register Office, which issued M. Z.-B. a birth certificate on April 5, 2017, pursuant to the U.K. Births and Deaths Registration Act of 1953. (Stip. ¶ 26; Blixt Decl. ¶ 14.)

35. Allison and Stefania are the parents identified on M. Z.-B.'s birth certificate. (Stip. ¶ 27; Blixt Decl. ¶ 14.)

36. M. Z.-B.'s birth certificate does not identify any parent of M. Z.-B. other than Allison and Stefania. (Stip. ¶ 28.)

37. Allison and Stefania were married to each other when M. Z.-B. was born. (Stip. ¶ 29.)

38. Both Allison and Stefania were present in the hospital rooms when each of L. Z.-B. and M. Z.-B. was born, and Allison and Stefania have been their parents for all purposes from the time of their births onward. (Blixt Decl. ¶ 17.)

39. Allison and Stefania are L. Z.-B. and M. Z.-B.'s only legal parents. (Stip. ¶ 30.)

40. Allison and Stefania are the only individuals who have ever asserted any parental rights over L. Z.-B. or M. Z.-B. No other individual has asserted any parental rights with respect to L. Z.-B. or M. Z.-B. (Blixt Decl. ¶ 18.)

41. The sperm donor who contributed the genetic material to Cryos used to conceive L. Z.-B. and M. Z.-B. has never had any contact with L. Z.-B. or M. Z.-B. (Blixt Decl. ¶ 19.)

42. Allison and Stefania have been L. Z.-B. and M. Z.-B.'s legal parents from the time of L. Z.-B.'s and M. Z.-B.'s respective births. (Stip. ¶ 31.)

43. Allison and Stefania have raised L. Z.-B. and M. Z.-B. since L. Z.-B. and M. Z.-B. were born. (Stip. ¶ 32.)

44. Allison, Stefania, L. Z.-B., and M. Z.-B. have lived together as a family since L. Z.-B.'s and M. Z.-B.'s respective births. (Blixt Decl. ¶ 20.)

THE STATE DEPARTMENT'S INTERPRETATION OF THE IMMIGRATION AND NATIONALITY ACT IS MEMORIALIZED IN THE FOREIGN AFFAIRS MANUAL

45. A Consular Report of Birth Abroad ("CRBA") confirms that the person to whom the document was issued is a U.S. citizen at birth. (Stip. ¶ 33.)

46. In adjudicating an application for issuance of a CRBA, State Department personnel, including embassy and consular officials, rely on the State

Department's *Foreign Affairs Manual* ("FAM"), which, among other things, memorializes the interpretation of the Immigration and Nationality Act ("INA") by the United States Department of State ("State Department"). (Stip. ¶ 34.)

47. The FAM is an internal, publicly-available State Department document. (Stip. ¶ 35.)

48. The FAM is not subject to notice-and-comment rule-making. (Stip. ¶ 36; *Declaration of Mark A. Makar in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, sworn to November 16, 2020, ("Makar Decl.") Exhibit ("Ex.") A (*Transcript of the Deposition of Paul Peek*, designee of Defendant The United States Department of State pursuant to Federal Rule of Civil Procedure 30(b)(6), conducted on December 20, 2018), at 244:13-18).)

49. The FAM is not subject to congressional approval. (Stip. ¶ 37; Makar Decl. Ex. A, at 244:5-6.)

50. The State Department acknowledges that the FAM policies regarding recognition of U.S. citizenship include requirements not specifically set out in the INA. (Makar Decl. Ex. A, at 103:5-11; 104:8-11.)

51. The FAM does not have the force of law. (Stip. ¶ 38; Makar Decl. Ex. A, at 244:20-25.)

52. The State Department expects embassy and consular officials to follow State Department policies and FAM guidance issued by the State Department in adjudicating CRBA applications submitted on behalf of children born through the use of ART. (Stip. ¶ 39.)

53. The State Department applies Section 301 of the INA, 8 U.S.C. § 1401, ("Section 301") to CRBA applications submitted on behalf of children whom the State Department considers to have been born "in wedlock." (Makar Decl. Ex. A, at 186:8-14.)

54. In the FAM, the State Department defines birth "in wedlock" for purposes of Section 301 as only "birth during the marriage of [a child's] biological parents to each other." 8 FAM § 304.1-2(a). (Stip. ¶ 40; Makar Decl. Ex. A, at 171:1-4.)

55. The State Department applies the FAM definition of "in wedlock" to determine whether a child born to a married couple through ART would be considered under the State Department's policies to have been born "in wedlock." (Makar Decl. Ex. A, at 173:19-174:2.)

56. The State Department interprets Section 301 to require, among other things, proof of a biological relationship between a CRBA applicant and both of his legal parents. (Makar Decl. Ex. A, at 178:10-19.)

57. The State Department's interpretation of Section 301 is based on the State Department's interpretation of the words "born . . . of parents" in Section 301 as referring to a biological parent of the child. (Makar Decl. Ex. A, at 178:13-19; 180:10-15.)

58. The State Department's policy is that Section 301 requires that a U.S. citizen parent have a biological relationship with a child born outside of the United States in order to transmit U.S. citizenship at birth to the child, even if the parent is the legal parent of the child and was married to the child's other legal parent at the time of the child's birth. (Makar Decl. Ex. A, at 158:25-159:25.)

59. The State Department applies Section 309 of the INA, 8 U.S.C. § 1409, ("Section 309") to CRBA applications submitted on behalf of children whom the State Department considers to have been born "out of wedlock." (Makar Decl. Ex. A, at 186:8-14.)

60. The State Department interprets Section 309 to require, among other things, proof of a biological relationship between a CRBA applicant and that applicant's U.S. citizen parent. (Makar Decl. Ex. A, at 273:2-15.)

61. In 2012, the State Department considered changing its policy in regard to children born abroad through ART. (Stip. ¶ 41.)

62. On February 13, 2012, Assistant Secretary for Consular Affairs Janice L. Jacobs authored a memorandum entitled "Assisted Reproductive Technology (ART), Citizenship and Visa Law" ("2012 Memorandum"). (Stip. ¶ 42.)

63. The 2012 Memorandum stated that the State Department's Bureau of Consular Affairs was "studying whether we can interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through [ART] in a broader range of circumstances," and was "considering how this would impact children born through [ART] overseas to same-sex couples." (Stip. ¶ 43; Makar Decl. Ex. A, at 222:11-24.)

64. In 2014, the State Department issued new policy guidance under which Defendants consider gestation to be a form of biological relationship between mother and child. (Stip. ¶ 44.)

65. After the 2014 policy change, a gestational and legal mother may be deemed to have a biological relationship with a child even in situations in which the gestational mother did not contribute genetic material to the child. (Stip. ¶ 45.)

66. The State Department's interpretation of Section 301 as requiring a genetic or gestational relationship between a U.S. citizen parent and a child is memorialized in 8 FAM §§ 304.1-2, 304.3. (Stip. ¶ 46.)

67. The 2014 policy change with respect to gestational mothers is set forth in 8 FAM § 304.3-1(a) and 8 FAM § 304.3-1(b). (Stip. ¶ 47.)

68. Under 8 FAM 304.3-1(a): "A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c)." (Stip. ¶ 48.)

69. Under 8 FAM § 304.3-1(b): "A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c)." (Stip. ¶ 49.)

70. Prior to 2014, the State Department did not treat a gestational and legal mother as a biological mother if she did not have a genetic relationship with the child. (Stip. ¶ 50.)

71. The 2014 change did not result from an amendment of the INA. (Stip. ¶ 51.)

72. The State Department made this change even though Congress had not made any corresponding amendment to the INA because the State Department

"changed its mind" as to its interpretation of Section 301. (Makar Decl. Ex. A, at 175:2-5, 219:25-220:8, 243:1-4, 243:15-20.)

73. The State Department's determination to interpret Section 301 as treating a child born outside the United States whose U.S. citizen parent was the legal and gestational mother as a U.S. citizen resulted from a policy change by the State Department. (Makar Decl. Ex. A, at 219:25-220:8.)

74. The State Department's interpretation of the INA as requiring a biological relationship between a married U.S. citizen parent and a child born outside the United States for purposes of recognizing U.S. citizenship at birth is inconsistent with several federal circuit courts of appeals rulings. (Makar Decl. Ex. A, at 245:9-19; 250:3-15.)

75. The State Department takes the position that it is not bound to comport its policies regarding, or interpretation of, Section 301 with the decisions of federal circuit courts of appeals. (Makar Decl. Ex. A, at 251:4-9.)

L. Z.-B.'S CRBA AND U.S. PASSPORT APPLICATIONS

76. In 2015, after receiving L. Z.-B.'s birth certificate, Allison, Stefania, and L. Z.-B. made an appointment with the U.S. Embassy in London ("Embassy") to apply for a CRBA and U.S. passport for L. Z.-B. (Stip. ¶ 52; Blixt Decl. ¶ 9.)

77. On March 11, 2015, Allison, Stefania, and L. Z.-B. appeared in person at the Embassy to submit applications for a CRBA and U.S. passport on L. Z.-B.'s behalf. (Stip. ¶ 52; Blixt Decl. ¶ 10.)

78. During Allison and Stefania's visit to the Embassy in 2015, an Embassy official inquired into the details of L. Z.-B.'s birth, including whose genetic material had been used to conceive him and who had carried him in utero. (Blixt Decl. ¶ 10.)

79. During Allison and Stefania's visit to the Embassy in 2015, the Embassy official asked whether the sperm that was used to conceive L. Z.-B. could have come from a U.S. citizen donor. (Blixt Decl. ¶ 10.)

80. During Allison and Stefania's visit to the Embassy in 2015, Allison and Stefania described for the Embassy official the details of L. Z.-B.'s conception, including that L. Z.-B. had been conceived using Stefania's egg and sperm that they obtained from a sperm bank in Denmark. (Blixt Decl. ¶¶ 7, 11.)

81. After answering the Embassy official's invasive, personal questions during that interview, and hearing from the official about the State Department's policy of requiring a biological or gestational relationship, Allison and Stefania were informed that L. Z.-B.'s applications would be denied because he did not have a biological relationship with Allison. (Blixt Decl. ¶ 12.)

82. During their visit to the Embassy in 2015, Allison and Stefania withdrew L. Z.-B.'s U.S. passport application and were refunded the passport application fee. (Stip. ¶ 53.)

83. Based on what Allison and Stefania were told during their visit to the Embassy in 2015, they believed that it would be futile to pursue the CRBA and U.S. passport applications, and they left the Embassy dejected and with the understanding that they had abandoned those applications. (Blixt Decl. ¶ 13.)

84. By letter dated March 11, 2015, on Embassy letterhead, the State Department informed Allison and Stefania that L. Z.-B. "does not . . . ha[ve] a claim to U.S. citizenship." (Stip. ¶ 54.)

85. Allison and Stefania returned to the Embassy on May 23, 2017, to submit CRBA applications for both L. Z.-B. and M. Z.-B. (Stip. ¶ 55; Blixt Decl. ¶ 15.)

86. During their visit to the Embassy on May 23, 2017, Allison and Stefania provided the Embassy with the requisite documentation for L. Z.-B.'s and M. Z.-B.'s applications, including L. Z.-B.'s and M. Z.-B.'s birth certificates, which identified Allison and Stefania as L. Z.-B. and M. Z.-B.'s parents, evidence of Allison's U.S. citizenship and periods of residency, and Allison and Stefania's marriage certificate. (Stip. ¶ 56.)

87. The documentation Allison submitted to the State Department in May 2017 in connection with L. Z.-B.'s and M. Z.-B.'s CRBA applications was sufficient to demonstrate that Allison is a U.S. citizen and that she had been physically present in the United States for at least five years, at least two of which were after the age of fourteen, and which were prior to L. Z.-B.'s and M. Z.-B.'s respective births. (Stip. ¶ 57.)

88. In May 2017, in the course of adjudicating L. Z.-B.'s and M. Z.-B.'s CRBA applications, the State Department accepted Allison's documentation as sufficient proof of her U.S. citizenship and determined that she had been physically present in the United States for at least five years, at least two of which were after the age of fourteen, and which were prior to L. Z.-B.'s birth. (Stip. ¶ 58.)

89. The documentation Allison and Stefania submitted to the State Department in May 2017 in connection with L. Z.-B.'s and M. Z.-B.'s CRBA applications was sufficient to demonstrate that Allison and Stefania were married at the time of L. Z.-B.'s and M. Z.-B.'s respective births. (Stip. ¶ 59.)

90. In May 2017, in the course of adjudicating L. Z.-B.'s and M. Z.-B.'s CRBA applications, the State Department accepted Allison and Stefania's marriage certificate as sufficient proof that they were married at the time of L. Z.-B.'s and M. Z.-B.'s respective births. (Stip. ¶ 60.)

91. In May 2017, Allison presented the Embassy with an English birth certificate identifying Allison and Stefania, and only Allison and Stefania, as M. Z.-B. and L. Z.-B.'s parents. (Stip. ¶ 61.)

92. The documentation Allison and Stefania submitted to the Embassy in May 2017 in connection with L. Z.-B.'s and M. Z.-B.'s CRBA applications was sufficient to demonstrate that Allison and Stefania are L. Z.-B. and M. Z.-B.'s legal parents under U.K. law. (Stip. ¶ 62.)

93. In May 2017, in the course of adjudicating L. Z.-B.'s and M. Z.-B.'s CRBA applications, the State Department accepted L. Z.-B.'s and M. Z.-B.'s birth certificates as sufficient proof that Allison and Stefania are L. Z.-B. and M. Z.-B.'s legal parents. (Stip. ¶ 63.)

94. On May 23, 2017, an Embassy official interviewed the Zaccari-Blixt family and adjudicated L. Z.-B.'s and M. Z.-B.'s CRBA applications. (Stip. ¶ 64.)

95. Embassy officials had the authority to make the final decision as to whether to grant or deny the CRBA applications for L. Z.-B. and M. Z.-B. (Stip. ¶ 65.)

96. In adjudicating L. Z.-B.'s and M. Z.-B.'s CRBA applications in May 2017, the Embassy followed the State Department's guidance contained in the FAM. (Stip. ¶ 66.)

97. In adjudicating L. Z.-B.'s and M. Z.-B.'s CRBA applications in May 2017, Embassy officials relied on, among other adjudicatory tools and references distributed to the Embassy by the State Department, the FAM guidance on applications submitted on behalf of children born by means of ART. (Stip. ¶ 67.)

98. In adjudicating L. Z.-B.'s 2017 CRBA application in May 2017, the State Department determined that L. Z.-B. could not acquire citizenship under Section 301 because his biological parents were not married to each other at the time of his birth. (Stip. ¶ 68.)

99. An Embassy official informed Allison and Stefania during their visit to the Embassy in 2017 that L. Z.-B.'s application would be denied because L. Z.-B. was neither genetically related to, nor was he carried by, his U.S. citizen parent, Allison. (Blixt Decl. ¶ 16.)

100. By letter dated May 24, 2017, on Embassy letterhead, Embassy official John S. Morgan informed Allison that L. Z.-B.'s CRBA application had been denied. (Stip. ¶ 71.)

101. The May 24, 2017 letter confirmed that the State Department had determined that L. Z.-B. could not acquire citizenship under Section 301 because his biological parents were not married to each other at the time of his birth. (Stip. ¶ 72.)

102. The May 24, 2017 letter stated, in relevant part: "It has been determined that there is not a biological relationship be [sic] 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." (Stip. ¶ 73.)

103. The sole reason for the State Department's denial of L. Z.-B.'s CRBA application in 2017 was that he did not establish a biological or gestational relationship to his U.S. citizen parent, Allison. (Stip. ¶ 74.)

104. The Embassy granted M. Z.-B.'s CRBA application and mailed to Allison M. Z.-B.'s CRBA on June 14, 2017. (Stip. ¶ 69.)

105. On September 5, 2017, Allison and L. Z.-B. submitted a letter to the Embassy, by and through their counsel, requesting reconsideration of the Embassy's decision to deny L. Z.-B.'s CRBA application. (Stip. ¶ 75.)

106. The Embassy responded, in a letter dated November 7, 2017, that the State Department had "affirm[ed] that [L. Z.-B.] did not acquire U.S. citizenship at birth, and therefore [the Embassy was] unable to issue him a CRBA." (Stip. ¶ 76.)

107. The November 7, 2017 letter contained no further explanation or analysis. (Stip. ¶ 77.)

108. There were no further steps that Allison and L. Z.-B. were required to take, or could have taken, to seek further review from the State Department of L. Z.-B.'s 2017 CRBA application. (Stip. ¶ 78.)

RELEVANT PROCEDURAL HISTORY OF THE ACTION

109. On January 22, 2018, Plaintiffs filed in the United States District Court for the District of Columbia the Complaint against the State Department and the Secretary of State alleging violations of the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. § 702. (Stip. ¶ 79.)

110. In late 2019, when L. Z.-B. was almost five-years-old, Allison, Stefania, L. Z.-B., and M. Z.-B. relocated from London, England, to the United States. (Stip. ¶ 80.)

111. Allison, Stefania, L. Z.-B., and M. Z.-B. now reside in Essex County, New Jersey. (Stip. ¶ 81.)

Dated: November 18, 2020

Respectfully Submitted,

/s/ *Theodore Edelman*

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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

DECLARATION OF MARK A. MAKAR IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL CIVIL RULE 56.1

I, Mark A. Makar, declare as follows:

1. I am an attorney duly licensed by the State of New Jersey and am admitted to practice before this Court. I am an associate at Sullivan & Cromwell LLP and am one of the attorneys representing Plaintiffs *pro bono* in the above-captioned action ("Action"). I submit this declaration in support of *Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, filed concurrently herewith. I am familiar with the facts set forth in this declaration based on personal knowledge and a review of files

in the possession of my firm. If called upon, I could and would testify to the facts set forth herein.

2. Attached to this declaration as Exhibit A is a true and correct copy of excerpts of the *Transcript of the Deposition of Paul Peek*, designee of Defendant The United States Department of State pursuant to Federal Rule of Civil Procedure 30(b)(6), conducted on December 20, 2018, in Washington, D.C., as part of discovery in the civil action filed in the United States District Court for the Central District of California captioned *Dvash-Banks* v. *Pompeo*, No. 2:18-cv-00523.

3. As indicated in the parties' *Joint Proposed Discovery Plan* submitted in the Action on September 4, 2020, the parties have agreed to include in the record in this Action "the portions of the deposition testimony of the State Department's chosen representative pursuant to Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)") in *Dvash-Banks* v. *Pompeo*, 18-cv-00523 (C.D. Cal.) ("*Dvash-Banks*"), Paul Peek, that were filed publicly on the docket in *Dvash-Banks* or *Kiviti* v. *Pompeo*, 8:19-cv-02665-TDC (D. Md.), and *Mize-Gregg* v. *Pompeo*, 1:19-cv-03331-MLB (N.D. Ga.)." (*Id.* at 7.) A true and correct copy of the *Joint Proposed Discovery Plan* is attached to this declaration as Exhibit B.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on the 16th day of November, 2020, in New York, New York.

Mark Makar

Mark A. Makar

EXHIBIT A

CONFIDENTIAL - PROTECTIVE ORDER

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

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

Defendants.

Video Deposition of Paul Peek

Washington, D.C.

Thursday, December 20, 2018

9:15 a.m.

Job No.: NY-203388

Pages: 1 - 351

Reported by: Donna L. Linton, RMR-CLR

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

Sullivan & Cromwell
1700 New York Avenue, Northwest
South Conference Room, Suite 800
Washington, D.C. 20006
(202) 956-7500

Pursuant to Amended Notice of Rule 30(b)(6) Deposition of Defendant United States Department of State and Federal Rules of Civil Procedure, before Donna L. Linton, Registered Merit Reporter, Certified LiveNote Reporter, and Notary Public in and for the District of Columbia.

A P P E A R A N C E S

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- continued -

A P P E A R A N C E S

(continued)

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ALSO PRESENT:

Brian Mackey, Videographer

Department of Justice for Defendants.

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

THE VIDEOGRAPHER: The court reporter today is Donna Linton.

Would the reporter please swear in the witness?

Whereupon,

PAUL PEEK,

the witness herein, was called for examination by counsel on behalf of Plaintiffs, and having been sworn was examined and testified as follows:

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

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

MR. EDELMAN: Welcome.

EXAMINATION BY COUNSEL ON BEHALF OF PLAINTIFFS

BY MR. EDELMAN:

Q Good morning Mr. Peek.

A Good morning.

Q Can we just, to identify you to the

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

A I did not review the application for A.J. D[redacted]-B[redacted].

Q I asked you about E.J.

A I did review the application for E.J. D[redacted]-B[redacted].

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

A Yes.

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

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

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

A As opposed to biological parents.

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

A Yes.

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

A Uh-hum. Yes.

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

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

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

BY MR. EDELMAN:

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

A Uh-hum.

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

A Yes.

Q And who set those criteria?

A The Department of State.

Q In Washington, D.C.?
A Yes.
Q Okay. Would it be fair to say that at that time the Toronto consulate -- the State Department expected the Toronto consulate to follow the criteria set by the State Department in Washington?
A Yes.
Q And would it be fair to say that at that time the State Department expected that the Toronto consulate would not depart from the criteria for issuance of a CRBA set by the State Department in Washington, D.C.?
A That is fair to say.
Q Okay. Are you familiar with the term "desk officer" as it applies to the State Department?
A Yes.
Q What do you understand that term to mean?
A It's a term used throughout the department for bureaus that are divided. Regionally, a desk officer is generally someone who is answering questions that -- or handling issues related to a specific region, like the Africa desk or the Somalia desk or what have you.

Q Okay.
A So U.S. citizenship.
Q So --
A Excuse me.
Q I'm sorry. I didn't mean to talk over you. Let's just unpack a little bit to make sure that we understand your answer.
Does the -- do the training materials for that course cover the INA or do they cover the FAM's discussion of the INA?
MS. ANDRAPALLIYAL: Objection. Form. Exceeds the scope.
A Both. They're very closely intertwined.
BY MR. EDELMAN:
Q What does that mean?
A I mean, the FAM guidance is based on the INA and the INA is referenced throughout the FAM guidance, so --
Q Okay.
A -- it's hard to talk about one -- it's hard to talk about the FAM without talking about the INA when you're talking about the citizenship sections.
Q Are there any differences between the language of the INA provisions relevant to

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

A The FAM goes in -- yes.

Q What are those differences?

A The FAM goes into much greater detail.

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

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

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

A Yeah.

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

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

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

A In places, yes.
Q When you say, "in places, yes," does that mean in places, no?
A The FAM goes into greater detail, so the FAM is kind of, again, how to interpret different situations in much greater detail than the INA goes into.
Q So, again, the question is, when you say, "goes into greater detail," does the FAM include elements that the INA does not?
A Yes.
Q Now, does the State Department require consular officials adjudicating applications for a U.S. passport to be familiar with provisions of U.S. immigration law applicable to those adjudications?
A Yes.
Q And does the State Department do anything to train consular officials on those elements of U.S. immigration law?
MS. ANDRAPALLIYAL: Objection. Exceeds the scope.
A Yes.
BY MR. EDELMAN:
Q What does it do?
A The basic consular course -- that's the

sections 301(g) and 309. And you had indicated that the State Department has consulted not only with USCIS but others. And we didn't have an opportunity to ask you what others you were referring to in your answer.

A For instance, if there was a court case about something that was effected by 301(g) of the INA, they might consult with the Department of Justice about that.

Q Okay. So this isn't abstract or hypothetical, were there communications -- let's just ask the fact yes or no: Were there communications between the State Department and the Department of Justice with respect to court cases or court decisions relating to the application of INA section 301(g) or 309?

MS. ANDRAPALLIYAL: Objection. Exceeds the scope of the deposition.

A I don't know.

BY MR. EDELMAN:

Q Okay. So my question really is were you referring to specific communications that you had in mind when you gave your answer before lunch?

A No.

Q So let's just ask, to be clear, does the

State Department require a biological relationship between a married U.S. citizen parent and a child born outside the United States in order to establish citizenship at birth of the child?

A Yes.

Q And what is the source of that requirement?

A I'm sorry. What is the what?

Q What's the source? What's the basis for that requirement?

A The Immigration and Nationality Act.

Q And what in particular?

A Section 301(g).

(Defendants' Exhibit Number 1 marked for identification was introduced.)

BY MR. EDELMAN:

Q Okay. So just to put some texture around it, I'm just going to show you Defendants' Deposition Exhibit 1. This has already been marked, so I'm just going to hand you a copy and one to counsel and ask you if you know what this document is.

A It looks like an excerpt of 7 FAM 1130, Acquisition of U.S. Citizenship by Birth Abroad to U.S. Citizen Parent.

BY MR. EDELMAN:

Q So what laws?

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

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

A Can you be more specific?

BY MR. EDELMAN:

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

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

BY MR. EDELMAN:

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

purposes of adjudicating CRBAs?
A Yes.
Q What is that definition?
A I will find it and read it for you.
Q I just want you to answer the question.
MS. ANDRAPALLIYAL: Can we go off the record?
MR. EDELMAN: No. I would like an answer to the question.
MS. ANDRAPALLIYAL: This is not a memory test. He's allowed to consult --
MR. EDELMAN: If the witness says he doesn't know, then we'll show him something to refresh his recollection.
BY MR. EDELMAN:
Q Could you answer my question, please?
A Could you -- what was your question again? I'm sorry.
MR. EDELMAN: Could you read it back, please?
THE REPORTER: "Does the State Department have a definition of the term "in wedlock" for purposes of adjudicating CRBAs?"
A Yes.
BY MR. EDELMAN:

Q What is that definition?
A If both biological parents -- if the two biological parents are married, then the case would be considered to be in wedlock.
(Plaintiffs' Exhibit Number 4 marked for identification was introduced.)
BY MR. EDELMAN:
Q Okay. Now, let's put in front of you Plaintiffs' Deposition Exhibit 4. This has been previously marked. A copy for counsel.
Let me ask you if this is the document for which -- that you had in mind?
A Yes.
Q Now, turn, please, to page 4. So it's page 4 of 7. There's little page numbers at the bottom.
A Uh-hum. Yes.
Q Okay. 7 FAM 1140 appendix E, In wedlock and out of wedlock.
Do you see that?
A In wedlock and of wedlock.
Q Of wedlock, I beg your pardon. Sorry.
Now, is -- do you see (a), "The term 'birth in wedlock' has been consistently interpreted to mean birth during the marriage of the biological

parents to each other"?
A Yes.
Q Do you see that?
A Yes.
Q And (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." Do you see that?
A Yes.
Q Is that the definition you had in mind when you were asking to consult any documentation?
A Yes.
Q Okay. What's the basis for the State Department's definition of "in wedlock" as embodied in the material we just looked at?
A Their interpretation of the Immigration and Nationality Act.
Q What in particular in the Immigration and Nationality Act?
A Section 301(g).
Q Okay. Now, if a married couple used assisted reproduction technology to give birth to a child during their marriage, does the State Department consider that child to have been born in wedlock?

A It depends on the circumstances.
Q Can you elaborate, please?
A If both parents were -- if both parents were the biological parents or gestational parent -- a combination of -- if they were both the biological parents, which can include the gestational parent, and were married to each other, then the birth would be considered in wedlock.
Q Okay. Now, has it always been the case, by the way, that the gestational parent was included in that definition?
A Not by policy, no.
Q Has it been that -- always the case that the gestational parent was included in that definition by any other means, policy or otherwise?
A As I said, I'm not certain of how any individual case may have been adjudicated prior to the implementation of the policy.
Q Now -- so the policy -- am I understanding you correct that if a married couple used assisted reproduction technology to give birth to a child during their marriage using a gestational surrogate to carry the fetus, the State Department now would consider that child to have been born in wedlock?

A If both of those parents were biological parents of that child, yes.
Q What do you mean by biological?
A If both parents had contributed genetic material.
Q Okay. What if the gestational surrogate was not -- was one of the married -- one of the spouses?
A I'm sorry. I don't understand your question.
Q So I want to distinguish two things. The situation where A and B are married and they go to C to act as the surrogate --
A Yes.
Q -- and a situation where A and B are married and the egg from A is implanted into B.
A If an egg from A was implanted into B, then both parents would be considered to be biologically related.
Q Okay. So in that circumstance, the State Department does not consider one to be a surrogate even though the egg moved from A to B?
A I believe that, medically, they would be considered to be a surrogate, but they are also a biological parent, which is more important to us for

adjudication of citizenship.

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

A Correct.

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

A Yes.

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

A It depends.

Q Okay. And what does it depend on?

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

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

A The department's interpretation of the

A To require which result?

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

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

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

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

A Yes.

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

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

Q Okay. In my scenario --

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

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

A The donor egg is from a third party.

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

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

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

A The Immigration and Nationality Act.

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

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

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

A It depends.
Q What does it depend on?
A Whether the U.S. citizen parent also contributed genetic material or was the gestational parent.
Q Okay. So, again, I'm talking about two men, sperm from one of them; that person not a U.S. citizen. Question: Would the resulting child born outside the United States be considered a U.S. citizen at birth?
A Let me elaborate on why I'm saying "it depends" in my answer.
Q Please.
A Because one of the two men could be someone whose has transitioned and is now a man but is not always a man. So could theoretically have contributed genetic material or been the gestational parent.
Q Okay. Let's simplify it and use a situation where two men who were always men. Okay?
A Born male.
Q Pardon?
A Born male.
Q Okay. In that circumstance -- do you have the rest of the scenario in mind?

A Sure.
Q Okay. In that circumstance, would the State Department recognize the child as a U.S. citizen at birth?
A No.
Q Okay. Would the State Department consider the child to have been born in wedlock to the married couple?
A No.
Q What is the basis for the State Department's position?
A Again, the interpretation that section 301(g) of the INA, when it uses the language "born of parents," it is referring to a biological relationship to both parents.
Q Okay. So -- and just to close that circle, if you go back to Plaintiffs' Deposition Exhibit 4, which probably is in front of you, 7 FAM 1140, appendix E on page 4 -- tell me if you're there. I know this gets confusing --
A The whole thing is 7 FAM appendix E -- 1140 appendix E. Right.
Q Okay. And page 4. We're in the in wedlock and of wedlock.
A Right.

Q Okay. Part (a), "The term 'birth in wedlock' has consistently -- has been consistently interpreted to mean birth during the marriage of the biological parents to each other," correct?

A Yes.

Q And is that -- I'm trying to close off this circle here. Is that what you mean in your last answer when you talk about the requirement that the biological parents be married to each other?

A Yes.

MR. EDELMAN: Okay. Now, let's mark as -- yeah. I'm going to mark -- I knew this would happen. I have now lost track of what number. Are we up to 15? Okay. So we're going to mark the first document as 15 and the second document as 16. And I'll hand copies to counsel in a moment. 15, 16.

THE WITNESS: I'm sorry. Since we're between questions, can I just take a short break to get some water?

MR. EDELMAN: Yeah, by all means. We have got to go off the record first.

THE VIDEOGRAPHER: We're going off the record. The time is 2:16 p.m.

(Discussion off the record.)

(Plaintiffs' Deposition Exhibit Numbers 15 and 16 were marked for identification.)

THE VIDEOGRAPHER: We're back on the record. The time is 2:17 p.m.

BY MR. EDELMAN:

Q Okay. So Mr. Peek, we've placed before you two documents. One is Plaintiffs' Deposition Exhibit 15, which is a rescript of section 301 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. section 1401, and Plaintiffs' Deposition Exhibit 16, which is a rescript of section 309 of the INA, 8 U.S.C. 1409.

Let me direct your attention first to section 301, so that's Plaintiffs' Deposition Exhibit 15.

A Uh-hum. Yes.

Q And take as long as you want or as short as you need to orientate yourself, and then I'm going to ask you a question.

A Go ahead.

Q Okay. So just for the record, so we're all singing from the same sheet, just point us, please, to where in section 301 the words "in wedlock" appear.

A I do not see it.

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

MS. ANDRAPALLIYAL: Objection. Argumentative.

BY MR. EDELMAN:

Q Is it not in the statute?

A I don't see it in the statute.

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

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

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

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

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

A I've reviewed the FAM, yes.

Q And so other than the FAM, are there any

A Affecting INA -- the interpretation of INA 301(g)?

Q Yes.

A Correct. Can I go back to one other point? I believe you asked what is the statuary authority that leads the department to interpret 301(g) as requiring wedlock?

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

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

Q Okay. I'll tell you what. Let's do it this way. In the State Department's view, what provision of the INA would apply to an application for a CRBA by a married couple for a child born during their marriage by means of assisted reproduction technology using a surrogate to carry a fetus?

A It depends on if -- whether one or both of the parents contributed genetic material to that child.

Q Okay. Tell us in each case. You say it

always been male?

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

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

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

A Yes.

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

A Section 309.

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

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

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

A Correct.
Q There is no similar reference there to a blood relationship, correct?
A The term "blood relationship" is not present in 301.
Q Okay. So would you agree with me that Congress saw fit to include the term "blood relationship" in 309?
A Yes.
Q And saw fit not to include it in section 301(g) --
A Yes.
Q -- or 301, correct?
A Correct.
Q Okay. Now, what is the State Department's understanding of the fact that the words "blood relationship" appear in section 309 but not in section 301?
MS. ANDRAPALLIYAL: Objection. It calls for a legal conclusion.
MR. EDELMAN: It calls for the position of the State Department.
A I'm sorry. Can you restate the question?
BY MR. EDELMAN:
Q Yes. We've agreed, correct, that the

would be the appropriate...

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

A Correct.

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

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

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

A Correct.

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

A Correct.

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

A Correct.

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

BY MR. EDELMAN:

Q Okay. Are you familiar with the legitimation laws of any country of the world?

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

A Off the top of my head?

BY MR. EDELMAN:

Q Are you familiar with the legitimation laws of any country? It's a yes or no question.

A Am I familiar with -- go ahead and repeat it.

Q Are you familiar with the legitimation laws of any country?

A Yes.

Q What laws are you familiar with?

A The United States.

Q And what do those laws provide?

A It depends if the child -- I -- I guess I don't know off the top of my head. I wouldn't be able to --

Q Okay.

A -- spout off the law.

Q I'm not going to fence with you. Isn't it true that notwithstanding your efforts to advocate to the contrary, the State Department's

position is that when two nontransgender men who are married to each other have a child using assisted reproduction technology and that child is born outside the United States, the government of the United States tells those men their child is not legitimate unless some action happens down the line to change the status of that child to legitimate?

MS. ANDRAPALLIYAL: Okay.

Mischaracterizes testimony.

BY MR. EDELMAN:

Q Yes or no?

A No.

Q It's not true?

A I do not agree with that statement.

Q And why do you disagree with that statement?

A Again, I refer you to section 4(c). The law of the applicant's country of birth may deem them legitimate and the United States would honor that.

Q Okay. I'll amend my question to say absent the possibility that some law would recognize the child as legitimate, the State Department doesn't recognize the child as legitimate, yes or no?

A Absent the law of where the country -- absent the laws of the country of the birth -- the State Department would follow the laws of the country of birth --

Q We're going to do this --

A -- for legitimation.

Q -- all day until we get an answer to this question.

MR. EDELMAN: Please read back the question.

MS. ANDRAPALLIYAL: Objection. Argumentative.

THE REPORTER: "I'll amend my question to say absent the possibility that some law would recognize the child as legitimate, the State Department doesn't recognize the child as legitimate, yes or no?"

THE WITNESS: Could you read it again one more time? I'm sorry.

THE REPORTER: "I'll amend my question to say absent the possibility that some law would recognize the child as legitimate, the State Department doesn't recognize the child as legitimate, yes or no?"

A Yes.

A It looks like a cable, an incomplete cable but -- yeah.

Q Meaning a cable disseminated within the State Department?

A Correct.

Q Okay. Focusing on the first sentence of text of Plaintiffs' Deposition Exhibit 18, read along with me, please, and make sure I do this properly, "There has been a recent policy change related to children born abroad through assisted reproductive technology (ART)."

Did I read that correctly?

A Yes.

Q "The previous policy required that a mother have a genetic connection to a child in order to qualify as a parent for the purpose of obtaining immigration benefits." Did I read that correctly?

A Yes.

Q "Under the new policy, birth mothers (gestational mothers) who are also the legal parent of the child will be treated the same as genetic mothers for the purposes of immigration benefits."

Do you see that?

A Correct. Yes.

Q Okay. So would you agree with me that

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

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

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

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

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

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

BY MR. EDELMAN:

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

I could get your question I was answering at the time I started looking for this.

Q The question, I believe, though I don't represent to you that it was said exactly this way, was how does the State Department know that USCIS interprets section 301 of the INA to require a blood relationship between the child and a U.S. citizen parent?

A I'm just going to start reading the third paragraph on the first page: CA and L -- which refers to the Bureau of Consular Affairs and the department's legal department -- in consultation with DHS -- the Department of Homeland Security -- have been studying whether we can interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through ART in a broader range of circumstances, and in other circumstances, amend visa requirements for such children. Related to this, we are considering how this would impact children born through ART overseas to same-sex couples. Because we regularly encounter people seeking to document children who are not theirs, we use DNA testing to verify parentage.

Q Okay. Now, just explain, if you will,

you see that?

A Yes.

Q Now, what consideration occurred with respect to this issue?

A Consideration of the various scenarios and how the broadening of the definition to include gestational parents would affect same-sex couples.

Q But in particular what was the consideration or was there a proposal to make a change?

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

MR. EDELMAN: The witness opened the door, Counsel.

A Could you repeat your question?

BY MR. EDELMAN:

Q Yes. What specific consideration was the State Department giving to assist you?

A What specific consideration was the State Department --

Q It says, "We are considering how this would impact children born through ART overseas to same-sex couples."

So I'm asking you to describe the consideration that was given.

A The consideration would have included the impact of a change on various scenarios affecting same-sex couples.

Q What scenarios in particular?

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

A The universe of scenarios that could have taken place.

BY MR. EDELMAN:

Q Okay. And one of them would be to read section 301 -- by "read" I mean the State Department -- for the State Department to read 301 as including the children born through assisted reproductive technology to same-sex couples as citizens at birth under section 301, correct?

A Correct.

Q Okay. And what happened with respect to that consideration?

MS. ANDRAPALLIYAL: Objection. Exceeds the scope of the deposition.

A I'm sorry. Can you repeat the question?

BY MR. EDELMAN:

Q Yes. What happened with respect to that consideration?

A What happened -- can you be more

how it interprets the biological relationship requirement of its policy as it relates to children born through assisted reproductive technology overseas to same-sex couples?

A The department did.

Q Did?

A Well -- I'm sorry. Could you repeat your question?

MR. EDELMAN: Why don't we read it back?

THE REPORTER: "So am I correct in my understanding that the State Department did not change its policy with respect to how it interprets the biological relationship requirement of its policy as it relates to children born through assisted reproductive technology overseas to same-sex couples?"

THE WITNESS: I'm sorry -- could you read that one more time? I'm sorry.

BY MR. EDELMAN:

Q Here. Let me see if I can make this easier. So aside from the gestational parent issue, okay, did the State Department change its interpretation of when a biological relationship between a child and a U.S. citizen parent is required for purposes of citizenship at birth?

A Can you be more specific? Can I get a time period?

Q Well, in the time period we're talking about in Exhibit 19, which is, say, 2012 through 2014.

A I just want to make sure I'm accurate in my answer. Aside from the gestational mother's policy, no.

Q Okay. Now, flip the page, please, so that -- we're still in Exhibit 19. About six lines up from the end --

A I'm sorry. Give me a moment to find what I did with Exhibit 19.

Q Nobody told you that there's a lot of document management work in these depositions.

A I'm just not sure where I put the piece of paper.

Q It should have a sticker on it.

A Yeah, I'm looking for that.

Q It looks like this (indicating).

A I just don't know what I did with 19.

I have it. I'm sorry.

Q So turn the page.

A Uh-hum.

Q Okay. Now --

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

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

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

A I apologize.

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

A Yes.

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

A Correct. And that --

Q Okay.

A -- means I misstated my earlier testimony.

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

A No.

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

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

BY MR. EDELMAN:

Q Well, what would you say happened?

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

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

A Correct.

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

A Yes.

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

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

domain.

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

A No.

Q Is it subject to congressional approval?

A No.

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

MR. EDELMAN: I'm sorry.

BY MR. EDELMAN:

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

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

A No. I can't think of one.

BY MR. EDELMAN:

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

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

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

BY MR. EDELMAN:

Q Okay. All right. Now, you, I believe, testified earlier -- and I'm asking you is it correct -- that the principal consideration that the State Department brings to bear in interpreting the INA is a desire to be compliant with law; is that correct?

A Correct.

Q Now, would you agree that the State Department's requirement that there be a biological relationship between a married U.S. citizen parent and a child born outside the United States for purposes of recognizing U.S. citizenship at birth -- would you agree that that requirement is inconsistent with rulings by various federal appellate courts?

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

A I believe that it is, yes.

BY MR. EDELMAN:

Q Okay. So help us understand how --

A Can I clarify?

Q Yes. Of course.

A I'm not sure if it's appellate courts. I can look at my documents and see if I have an

formalities.

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

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

BY MR. EDELMAN:

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

A Yes.

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

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

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

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

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

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

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

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

Q Okay. What about the other two?

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

Q Okay. Well, let's make sure this is as clear as we can make it, in fairness to you.

So the question I asked, in its completeness, is would you agree that the State Department's requirement that it -- through its interpretation of section 301 of the INA, that there be a biological relationship between a married U.S. citizen parent and his child born outside the U.S. in order to recognize that the child acquired U.S. citizenship at birth, that that interpretation is inconsistent with the decisions that we looked at in Plaintiffs' Deposition Exhibit 10?

MS. ANDRAPALLIYAL: Objection. Calls for a legal conclusion.

A I believe that is the case.

BY MR. EDELMAN:

Q Okay. Now, should I understand your reference to paragraph 6 in Exhibit 21 as suggesting that the State Department's view is, notwithstanding the inconsistency, it just doesn't believe it has to follow those decisions?

A Again, the department has a worldwide scope and are consistent regardless of geographic location in our application of the INA.

Q So wouldn't the answer to my question be

yes?

A Could you ask your question again?

MR. EDELMAN: Please read it back.

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

A Yes.

BY MR. EDELMAN:

Q Okay. Now, let's go back to the paragraph we were looking at on page 7 of Defendant's Exhibit 10 -- I'm sorry. Plaintiffs' Deposition Exhibit 10.

A I'm sorry. What page?

Q Page 7.

A Page 7, paragraph 7.

Q Right. Now, let's look -- right. Let's look at lines 23 and 24.

A Uh-hum.

Q So we'll take them one at a time. There's a decision there, Pavan versus Smith, which is a United States Supreme Court decision from 2017. Do you see the reference there?

A Yes.

A Yes.

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

A Correct.

Q -- Andrew?

A Correct. I'm sorry.

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

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

A Yes.

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

A Yes.

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

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

A That's correct.

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

A Correct.

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

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

BY MR. EDELMAN:

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

A His legal parents, yes.

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

A Yes.

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

A The legal parent, yes.
Q Okay. And does the State Department consider Andrew to be E.J.'s parent at birth under Ontario law?
A His legal parent at birth, yes.
Q Okay. And you referred earlier today to a court order, correct?
A Yes.
Q Okay. So let me show you a document and make sure we're talking about the same thing.
A Sure.
Q So in Exhibit 5, which you have open in front of you --
A Okay.
Q -- if you go to the page -- and we're looking now at the top stamped page numbers -- ending dash 1768 and 1769. Tell me when you have that.
A I do. Can I just take one more question before we break?
Q Yes. Again, we'll accommodate whatever your schedule is. If you want to break right now, we can do that.
A You can ask your question; then I would like to take a break.

the scope.

A I don't know.

BY MR. EDELMAN:

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

A Yes.

Q And did that issue come up?

A Which issue?

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

A I do not recall it.

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

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

A Yes.

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

MS. ANDRAPALLIYAL: Objection. Exceeds

A -- shouldn't have done that.

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

A Yes.

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

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

Q Okay.

A -- to the child.

Q Now, just so there's no confusion on this point down the line, is it the State Department's position that the adjudication by the consular officer of E.J.'s applications was correct?

A Yes.

Q Okay. And some other things just to make sure, you know, where we're on the same page and where we're not.

Does the State Department dispute that Andrew, the father, is a U.S. citizen?

A No.
Q Okay. Is -- does the State Department agree that Andrew Dvash-Banks sufficiently demonstrated to the Toronto consulate that he met the residency requirements of section 301?
A I believe that he did, yes.
Q Okay. And if I were to ask you questions about the adjudication of A.J., would you say that you haven't reviewed them?
A Yes.
Q Okay. So is it the State Department's position that Andrew could not have a child born in wedlock under the INA if he and another man are listed as the parents on the child's birth certificate?
A If the context of your question is the same as it was earlier, that two men who have been --
Q Yes.
A -- male their entire lives --
Q Right.
A -- that is correct.
Q Correct. My bad. I should have made that clear. Yes. So putting aside the possibility of a transgender male -- man. So is it the State

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

A Correct.

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

A Okay.

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

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

Q Margaret?

A Margaret.

Q Ramsay.

A Yes. I'm sorry.

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

that I have not actually seen this before.

Q Okay. Do you know what this document is? I want to just -- I want to be respectful of your time and not keep you going --

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

Q I would rather you --

A -- focus on reviewing --

Q -- focus on the document.

A Okay.

Q Do you know what this document is?

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

Q What is this document?

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

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

A That's what it says, yes.

Q And that is the position of the State Department, correct?
A Correct.
Q But that does not purport to be a quotation from the INA, right?
A Correct.
Q Okay. Now, do consular officers ask all same-sex couples with children born outside the United States to get DNA testing?
A No.
Q So, again, is it just up to the discretion of the consular officer?
A Correct.
Q I believe -- let's do this. Do you have this?
MR. EDELMAN: Just so we're closing out the discussion of what happened with respect to the Dvash-Banks' application, I'm going to put before you Plaintiffs' Deposition Exhibit 1. Here is a copy for counsel.
(Plaintiffs' Exhibit Number 1 marked for identification was introduced.)
BY MR. EDELMAN:
Q Again, I don't think you need to hunt through your book because it's -- we'll just see

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

A Yes, I have seen this before.

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

A In preparation for this deposition.

Q Okay. Do you know what this is?

A Yes.

Q What is it?

A It is what we call a denial letter.

Q And denial of what?

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

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

A Correct.

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

A I'm sorry. Could you restate that?

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

evidence that E.J. was biologically related to the U.S. citizen parent?

A Yes.

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

A Correct.

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

A Yes.

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

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

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

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

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

BY MR. EDELMAN:

between the U.S. citizen and the child?

Q I thought you said earlier --

A I'm sorry. Go ahead.

Q No. Go ahead.

A I shouldn't be speaking in absolute. Where -- it may happen in every case where the officer is not sure that the blood relationship between -- the biological relationship between the U.S. citizen and the child had been established.

Q Does the State Department actually track how frequently applicants are asked to undergo DNA testing?

A No.

Q So on what basis did the State Department conclude that it's common to ask them to do so?

A It would be -- I guess we're parsing out the definition of common because, in the universe of 20 million passport applications annually, it is certainly uncommon. In the much smaller subset of people who are trying to establish U.S. citizenship based on a birth abroad due to assisted reproductive technology, it is much more common.

Q Okay. Would you agree with me that at the time that Mr. Hernandez sent Plaintiffs' Deposition Exhibit 27, he actually had no idea how

please?

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

A Correct.

BY MR. EDELMAN:

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

Do you see that?

A Yes.

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

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

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

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

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

A Okay.

Q -- finish up and get you home.

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

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

A I don't know.

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

A Can you be more specific?

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

A No.

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

a CRBA by same-sex couples versus applications for a CRBA by opposite-sex couples are granted or denied?

A No.

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

A I'm sorry. Could you repeat that?

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

MS. ANDRAPALLIYAL: Objection. Exceeds the scope.

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

BY MR. EDELMAN:

Q Do you know of any?

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

Q Okay.

A -- you know, we get congressionals on a

CERTIFICATE OF NOTARY PUBLIC

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

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

My Commission expires: June 30, 2019

EXHIBIT B

`UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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,	:	Hon. James B. Clark, III
	:	**JOINT PROPOSED DISCOVERY PLAN**
Defendants.	:	

1. Set forth a factual description of the case. Include the causes of action and affirmative defenses asserted.

***Plaintiffs' Statement of the Facts and Legal Issues*:**

The above-captioned action ("Action") challenges the application to minor Plaintiff L. Z.-B. of the policy of The United States Department of State ("State Department") relating to recognition of U.S. citizenship at birth of children born abroad during the marriage of their same-sex, legal parents. Specifically, the Action challenges the State Department's interpretation of Section 301(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1401(g) ("Section 301(g)"). Section 301(g) entitles a person born outside of the United States to citizenship at birth if one of that person's married parents is a United States citizen and the other married parent is a foreign national, as long as the U.S. citizen satisfies certain residency requirements. Under the State Department's internal interpretation of Section 301(g), however, a child's "biological parents [must have been] married to each other at the time of the birth" in order for the child to acquire U.S. citizenship at birth. *See* 8 Foreign Affairs Manual ("FAM") § 304.1-2. The State Department's requirement that the U.S. citizen parent be a "biological parent," as opposed to a legal parent, at the time of birth, writes into Section 301 a requirement that cannot be found in the statute. The State Department's policy further errs by treating L. Z.-B., whose parents were married to each other at the time of his birth, as a child born "out of wedlock," and consequently applying a section of the INA governing children born "out of wedlock," 8 U.S.C. § 1409 ("Section 309"), to an application by L. Z.-B for a Consular Report of Birth Abroad ("CRBA") —a document evidencing United States citizenship at birth.

L. Z.-B. and his brother, M. Z.-B., were born in London, England, during the marriage of their parents—Allison Dawn Blixt ("Allison"), a U.S. citizen, and Stefania

Zaccari ("Stefania"), an Italian citizen—using assisted reproductive technology. Allison and Stefania entered into a civil partnership in England in 2009, which was retroactively converted into a marriage on January 3, 2015.

L. Z.-B. was conceived during Allison and Stefania's marriage, using sperm from an unknown donor and Stefania's egg, and was born in 2015. Allison and Stefania are the only parents identified on L. Z.-B.'s birth certificate. Soon after L. Z.-B. was born, on March 11, 2015, Allison and Stefania appeared in person at the U.S. Embassy in London ("Embassy") to apply for a CRBA and a U.S. passport. During their visit to the Embassy, an Embassy official inquired into the details of L. Z.-B.'s conception, including whose genetic material had been used to conceive him and who had carried him in utero. Allison and Stefania were informed during their visit to the Embassy that applying for a CRBA or U.S. passport for L. Z.-B. would be futile unless they could prove that Allison had carried him in utero or had provided the egg used to conceive him. As a result, Allison and Stefania determined not to proceed with the applications and received a refund for the U.S. passport application. By letter dated the same date as the Embassy visit, the State Department informed Allison and Stefania that L. Z.-B. "does not . . . hav[e] a claim to U.S. citizenship."

L. Z.-B.'s brother, M. Z.-B., also was conceived during Allison and Stefania's marriage, using sperm from the same unknown donor whose sperm was used to conceive L. Z.-B., and Allison's egg, and was born in 2017. Allison and Stefania are the only parents identified on M. Z.-B.'s birth certificate. Soon after M. Z.-B. was born, on May 23, 2017, Plaintiffs again appeared at the U.S. Embassy in London, this time to apply for a CRBA for both L. Z.-B. and M. Z.-B. The State Department granted M. Z.-B.'s application, but denied L. Z.-B.'s nearly identical application, because his biological mother—Stefania—is not a U.S. citizen. In reaching that determination, the State Department relied on its FAM policy interpreting Section 301 to require that both of a child's "biological parents" must be married to each other at the time of the child's birth. Based on this policy, the State Department adjudicated L. Z.-B.'s application under Section 309, even though L. Z.-B. was born during Allison and Stefania's marriage. According to a May 24, 2017 letter from the U.S. Embassy in London, the basis for the denial of L. Z.-B.'s application was that "[i]t has been determined that there is not a biological relationship be [*sic*] 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."

Plaintiffs contend that the State Department's interpretation of Section 301(g) and application of Section 309 to L. Z.-B.'s claim of U.S. citizenship at birth conflict with the text and purpose of the INA, relevant case law, bedrock principles of common law, and the mandate under the Fifth Amendment of the United States Constitution to treat the marriages of same-sex couples the same as those of opposite-sex couples. Section 301(g) contains no biological requirement, and courts have consistently rejected efforts to read such a requirement into that provision. *See, e.g.*, *Jaen* v. *Sessions*, 899 F.3d 182, 190 (2d Cir. 2018) (holding that "a blood relationship is not required to establish parentage for purposes of acquired citizenship when the child is born into marriage"); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005) (holding that a "blood relationship

between a child and U.S. citizen was not required to establish citizenship under [Section 301(g)], if the child in question was not born out of wedlock"); *Scales* v. *INS*, 232 F.3d 1159, 1161 (9th Cir. 2000) (holding that, because petitioner was born in wedlock, he acquired citizenship from his U.S. citizen father although there likely was no biological link between them); *Mize-Gregg* v. *Pompeo*, 2020 WL 5059253, at *17 (N.D. Ga. Aug. 27, 2020) (holding that Section 301 "does not require children to share a biological relationship with both citizen parents" to acquire United States citizenship at birth); *Kiviti* v. *Pompeo*, 2020 WL 3268221, at *8 (D. Md. June 17, 2020), *appeal filed*, No. 20-01882 (4th Cir. Aug. 13, 2020) (holding that "the term 'born . . . of parents'" in Section 301(g) "does not limit the provision's application to those children who have biological relationships with both of their married parents"); *Dvash-Banks* v. *Pompeo*, 2019 WL 911799, at *7 (C.D. Cal. Feb. 21, 2019), *appeal filed*, No. 19-55517 (9th Cir. Oct. 11, 2019) ("Section 301 does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their married parents."). In denying Defendants' motion to dismiss the original complaint in this Action, The Honorable Emmet G. Sullivan of the United States District Court for the District of Columbia ("D.D.C.") relied on certain of these decisions to reject Defendants' effort to read a biological relationship requirement into Section 301. *See Sabra* v. *Pompeo*, 2020 WL 1643676, at *20–*21 (D.D.C. Apr. 2, 2020). In contrast, Section 309, which applies only to children "born out of wedlock," requires that the U.S. citizen parent be biologically related to a child born out of wedlock in order for that child to be recognized as a U.S. citizen at birth.

By letter to the U.S. Embassy in London, dated September 5, 2017, Plaintiffs requested reconsideration of the State Department's denial of L. Z.-B.'s application ("Reconsideration Request"). The State Department denied the Reconsideration Request by letter dated November 7, 2017. The State Department's letter stated, in relevant part, that "[t]he Department affirms that [L. Z.-B.] did not acquire U.S. citizenship at birth," and that "[o]ther avenues [for redress] are set forth in Section 1503 of Title 8 of the U.S. Code."

***Defendants' Statement of the Facts and Legal Issues*:**

This case involves questions of law regarding the acquisition of citizenship at birth by children born abroad who are not biologically related to their citizenship-conferring U.S. parent. Congress's present-day rules for acquiring U.S. citizenship at birth are found principally in 8 U.S.C. § 1401, titled "Nationals and citizens of United States at birth" and also known as Section 301 of the Immigration and Nationality Act, and 8 U.S.C. § 1409, titled "Children born out of wedlock."

Under section 1401, a person born outside of the United States "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 . . . not less than five years, at least two of which were after attaining the age of fourteen" shall be a U.S. citizen. 8 U.S.C. § 1401(g). Department of State guidance regarding interpretation and administration of the Immigration and Nationality Act can be found in its Foreign Affairs Manual ("FAM"). The FAM states that "[s]ince 1790, there have been two prerequisites

for transmitting U.S. citizenship at birth to children born abroad." 8 FAM 301.4-1(B). First, "at least one biological parent must have been a U.S. citizen when the child was born." *Id.* Second, the "U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born." *Id.*

The Department interprets the phrase "born … of parents" in 8 U.S.C. § 1401 to include a biological connection between the child and the referenced parents. Thus, the Department reads 8 U.S.C. § 1401(g) as applying to children whose biological parents are married to each other at the time of the child's birth.[1] *See* 8 FAM 301.7-4(D) (interpreting section 1401(g) to apply to children born in wedlock to a U.S. citizen parent and an alien parent).

Meanwhile, 8 U.S.C. § 1409, or Section 309 of the INA, provides several additional, situational categories by which a child may acquire U.S. citizenship at birth. The title of section 1409 indicates that it applies to "children born out of wedlock," but that term is not explicitly defined by the INA. Section 1409(c) provides an avenue for at-birth citizenship in the case of a U.S. citizen mother in an out of wedlock birth (provided the U.S. citizen mother meets the physical presence requirements contained within the statute).

The FAM interprets 8 U.S.C. § 1409 to apply to children whose *biological* parents are not married to each other. 8 FAM 102.01. A child may acquire U.S. citizenship at birth from his legal mother, pursuant to section 1409, if the child has a biological relationship with her. *See* 8 U.S.C. § 1409(c). The FAM recognizes a "biological relationship" between a child and another may include either a genetic parental relationship or a legal, gestational relationship. 8 FAM 301.4-1(D)(1)(c).

Plaintiff Allison Blixt is a U.S. citizen. She is married to Stefania Zaccari, an Italian citizen. Zaccari, using the sperm of an anonymous donor, conceived L. Z.-B. and carried him to term, during Allison's marriage to Stefania. L.Z.-B. was born in a borough in London, England. Allison is listed on L. Z.-B.'s birth certificate as "parent." Allison does not have a biological relationship to L. Z.-B.

Allison and Stefania went to the U.S. Embassy in London to apply for a Consular Report of Birth Aboard ("CRBA") and a U.S. passport for L. Z.-B. Their applications on behalf of L. Z.-B. were denied. The Department of State's denial letter stated that L.Z.B.'s CRBA application was denied under Section 309(c) of the INA, 8 U.S.C. § 1409(c), because "[i]t has been determined that there is not a biological relationship . . . between the U.S. citizen mother and child." Specifically, Plaintiffs were informed that in

[1] The FAM defines "in wedlock" as "birth during the marriage of the biological parents to each other." 8 FAM 304.1-2(a).

addition to a legal relationship, either a genetic parental or gestational relationship needed to exist between Allison and L. Z.-B. for the applications to be approved.

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

* * *

The Parties' Statement of the Procedural History of the Action

On January 22, 2018, Plaintiffs filed the Complaint in this Action against Defendants in the D.D.C., pursuant to 28 U.S.C. § 1391(e). The Complaint named as defendants The State Department and the Secretary of State, in his official capacity. Plaintiffs filed the Action in the D.D.C. because they resided outside the United States (in London, England) when they initiated the Action. 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. The Complaint sought, among other things, (1) a declaration that Defendants unconstitutionally and in violation of the INA classify children of married same-sex couples to be "born out of wedlock" and therefore ineligible for citizenship at birth under Section 301; (2) an injunction enjoining Defendants from continuing this allegedly infirm approach; and (3) an order "declar[ing] [L. Z.-B.] a U.S. citizen at birth." The Complaint did 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," because Plaintiffs resided abroad at the time the Complaint was filed.[2]

Defendants moved to dismiss the Complaint, and the court denied that motion from the bench after oral argument on May 15, 2019, and referred the Action to Magistrate Judge Robin M. Merriweather to address any mediation and discovery issues. On June 14, 2019, Defendants filed their Answer.

In late 2019, Plaintiffs relocated from London, England to Essex County, New Jersey. Plaintiffs 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 the United States District Court for the District of New Jersey, where Plaintiffs now reside. The Parties sought to transfer the Action, in material part, so that Plaintiffs could seek to assert a claim in this Court under Section 1503(a), which requires that a claim "be filed in the district court of the United States for the district in which such person resides

[2] By Order dated February 13, 2019, the court in the D.D.C. appointed Stefania as L. Z.-B.'s guardian *ad litem* for purposes of the Action.

. . . . " On February 14, 2020, the court in the D.D.C. ordered the transfer of the Action to this Court.

On April 13, 2020, Plaintiffs filed their unopposed motion for leave to file the First Amended Complaint. This Court granted that motion on July 13, 2020. On the following day, Plaintiffs filed and served on Defendants the First Amended Complaint. (ECF No. 56.) The First Amended Complaint asserts claims under the Fifth Amendment of the U.S. Constitution and Section 1503(a) and seeks, *inter alia*, a declaration of L. Z.-B.'s U.S. citizenship at birth. The First Amended Complaint also updates certain allegations to reflect developments since the commencement of the Action, and no longer asserts a claim under the APA. On July 28, 2020, Defendants filed their Answer to the First Amended Complaint. (ECF No. 59.)

2. Have settlement discussions taken place? Yes ___x_____ No_____

If so, when?

Between approximately March and August 2018, the Parties explored without success ways to resolve the case amicably and informally. Further, during the May 15, 2019 status hearing, the court in the D.D.C. instructed the Parties to consider whether there was a reasonable prospect of resolving the Action by means of a negotiated resolution. On May 28, 2019, the Parties met and conferred telephonically regarding the possibility of settlement, but agreed at that time that resolution was not feasible.

(a) What was the plaintiff's last demand?

(1) Monetary demand: None.
(2) Non-monetary demand: A CRBA reflecting that L. Z.-B. is a U.S. citizen at birth.

(b) What was defendant's last offer?

(1) Monetary offer: None.
(2) Non-monetary offer: None.

3. The parties have exchanged the information required by Fed. R. Civ. P. 26(a)(1). If not, state the reason therefor.

The Parties exchanged initial disclosures on May 29, 2019.

The Parties will exchange any amended initial disclosures by September 28, 2020.

4. Describe any discovery conducted other than the above disclosures.

No discovery materials have been provided beyond the production of documents from the State Department's official administrative record concerning L. Z.-B.'s applications ("Administrative Record"). On September 3, 2020, the Parties agreed, subject to the Court's approval, to a stipulation of agreed facts on the Section 1503(a)

claim. The Parties are prepared to file that stipulation at such time as the Court directs. The Parties propose bifurcating the litigation to proceed to summary judgment on the Section 1503(a) claim on the basis of the Parties' stipulation of agreed facts, to be submitted to the Court, the Administrative Record, any declarations submitted in support of the Parties' cross-motions, and the portions of the deposition testimony of the State Department's chosen representative pursuant to Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)") in *Dvash-Banks* v. *Pompeo*, 18-cv-00523 (C.D. Cal.) ("*Dvash-Banks*"), Paul Peek, that were filed publicly on the docket in *Dvash-Banks* or *Kiviti* v. *Pompeo*, 8:19-cv-02665-TDC (D. Md.), and *Mize-Gregg* v. *Pompeo*, 1:19-cv-03331-MLB (N.D. Ga.).

5. Generally, dispositive Motions cannot be filed until the completion of discovery. Describe any Motions any party may seek to make prior to the completion of discovery. Include any jursidictional Motions and Motions to Amend.

As discussed in Item 6.b., below, the Parties propose bifurcation of discovery and motion practice in the Action to allow for adjudication first of cross-motions for summary judgment concerning the Section 1503(a) claim and deferral of discovery or motions concerning the constitutional claims until after adjudication of summary judgment motions concerning the Section 1503(a) claim. As set out in Item 6.a., below, the Parties propose a means to limit the need for discovery concerning the Section 1503(a) claim by entering into a stipulation of agreed facts relevant to the Section 1503(a) claim, as well as by stipulating to the admissibility of the portions of the discovery record in *Dvash-Banks* described in Item 4, above. Under this proposal, the Parties would be in a position to file expeditously cross-motions for summary judgment on the Section 1503(a) claim before conducting any discovery on the constitutional claims.

The Parties are not currently aware of any other motions that would have to be made before proceeding to summary judgment on the Section 1503(a) claim.

6. The parties proposed the following:

(a) Discovery is needed on the following subjects:

As discussed below, the Parties propose bifurcating this litigation and proceeding first to summary judgment on Plaintiffs' Section 1503(a) claim without conducting additional discovery. The Parties propose deferring the issue of what, if any, discovery is warranted in connection with Plaintiffs' constitutional claims until Plaintiffs' Section 1503(a) claim is adjudicated, as there may be no need for the Court to address the merits of those claims, depending on the Court's decision on the Parties' cross-motions for summary judgment on the Section 1503(a) claim.

In the event that this Court does not bifurcate the proceedings as the Parties propose, above, the Parties disagree on whether and to what extent discovery is warranted, as explained below:

***Plaintiffs' Statement*:**

On August 6, 2019, Plaintiffs served their First Set of Requests for Production of Documents (the "Requests"). Defendants declined to provide substantive responses to the Requests on the grounds that (1) the Requests were "premature" because "the court has not set a scheduling conference, nor have the parties engaged in a conference under Rule 26(f)"; and (2) "the court has yet to resolve the parties' dispute regarding whether this case will be decided on the basis of the administrative record or whether the court will allow extra-record discovery." (Defendants' letter to Plaintiffs, dated September 5, 2019.) On May 13, 2020, Plaintiffs sent to Defendants a proposed electronically stored information ("ESI") protocol and draft condentiality order, to which Defendants have not provided any substantive response, because Defendants contend that they are premature and may not be necessary. On July 14, 2020, Plaintiffs renewed their request that the Parties enter into a confidentiality order governing the Action, and further requested that Defendants supplement the Administrative Record with documents and information related to L. Z.-B.'s March 2015 application for a CRBA. On July 22, 2020, Defendants agreed to supplement the Administrative Record, but affirmed their position that a confidentiality order would be premature at this time. Defendants produced an updated Administrative Record that includes 30 additional pages on August 31, 2020.

Except to the extent obviated by the Parties' stipulation of agreed facts and any discovery in *Dvash-Banks* deemed admissible in the Action, as described in Item 7.b., below, Plaintiffs anticipate that discovery on the Section 1503(a) claim would include, but would not be limited to:

(1) documents and communications from January 1, 2015 to the present concerning the adjudication of L. Z.-B.'s and M. Z.-B.'s CRBA inquiries and applications;

(2) documents and communications concerning the terms, construction, and amendment of Section 301(g) or Section 309 or of any FAM provision relating to the State Department's interpretation of Section 301(g) or Section 309;

(3) documents and communications between the State Department and United States Citizen and Immigration Services concerning the terms, construction, and amendment of their respective interpretations and/or policies regarding Section 301;

(4) documents and communications from January 1, 2015 to the present concerning the State Department's protocols, procedures, practices, or policies concerning adjudication of CRBA applications, the State Department's interpretations of Section 301(g) and Section 309, and the State Department's application of those interpretations to children born abroad whose parents are married same-sex couples;

(5) the deposition of the consular officer at the U.S. Embassy in London, who interviewed the Zaccari-Blixt family on March 11, 2015;

(6) the deposition of John S. Morgan, the consular officer at the U.S. Embassy in London, who interviewed the Zaccari-Blixt family on May 23, 2017 and adjudicated L. Z.-B.'s CRBA application;

(7) the deposition of Ronald S. Packowitz, Chief of American Citizen Services ("ACS") at the U.S. Embassy in London, who signed the letter denying the Reconsideration Request;

(8) the deposition of Sandra Labarge, a consular officer identified in L. Z.-B.'s 2015 ACS case log;

(9) the deposition of Samantha Edge, a consular officer identified in L. Z.-B.'s 2015 ACS case log;

(10) the deposition of Andrew Birch, a consular officer identified in L. Z.-B.'s 2017 ACS case log;

(11) the deposition of William Ross, a consular officer identified in L. Z.-B.'s 2017 ACS case log;

(12) documents and communications concerning training of, or guidance or instructions given to, United States embassy or consular personnel concerning the circumstances in which they should inquire about any blood or gestational relationships between either member of a married couple and their children in connection with applications for CRBAs on behalf of children born outside of the United States; and

(13) a Rule 30(b)(6) deposition of the State Department concerning, among other things, the adjudication of L. Z.-B.'s CRBA application, the State Department's protocols, procedures, practices, and policies concerning the adjudication of CRBA applications, the State Department's interpretations of Section 301(g), and Section 309, and the State Department's application of those interpretations to children born abroad whose parents are married same-sex couples.

Plaintiffs anticipate that discovery on their constitutional law claims will include, but not be limited to, the discovery described above, and:

(1) documents and communications concerning the State Department's protocols, procedures, practices, or policies for applying Section 301(g) and Section 309 to persons born abroad whose parents are married same-sex couples, and documents and communications concerning any amendments, changes, or alterations to State Department governmental forms, as they relate to those protocols, procedures, practices, or policies;

(2) documents and communications concerning the adjudication of CRBA applications submitted on behalf of children who were conceived using assisted reproductive technology;

(3) documents and communications concerning the State Department's recognition of U.S. citizenship at birth of children born abroad to married same-sex couples, at least one of whom is a U.S. citizen;

(4) documents and communications concerning the State Department's treatment of same-sex couples and recognition or non-recognition of their marriages;

(5) documents or communications concerning the State Department's treatment of applications for a CRBA or U.S. passport for children born abroad to opposite-sex married couples;

(6) documents and communications concerning any effects on, or harms to, the children of married same-sex couples associated with the State Department's interpretation of Section 301(g) to require a genetic or gestational relationship between the applicant and a U.S. citizen parent;

(7) documents sufficient to show the number of married same-sex and opposite-sex couples, respectively, who have applied for CRBAs on behalf of children born outside the United States and the results of those applications and reasons for those determinations;

(8) documents sufficient to show the number of married same-sex and opposite-sex couples, respectively, who have applied for CRBAs on behalf of children born outside the United States and who have not been required to demonstrate a genetic or gestational relationship between the child and U.S. citizen parent;

(9) documents and communications sufficient to identify any circumstance in which a "doubt arises that a U.S. citizen 'parent' is biologically related to the child" under 8 FAM 301.4-1(D)(1)(d)(5);

(10) documents and communications concerning the history of, and rationales and purposes for, the State Department's decision to interpret Section 301(g) to treat as a "biological parent" a non-genetic gestational carrier who also is a legal parent; and

(11) documents concerning the history of, and rationales and purposes for, the State Department's interpretations of Section 301(g) and Section 309 as applied to the children born outside the United States to married same-sex couples, including the FAM policy at issue in the Action.

Plaintiffs also intend to seek depositions on these subjects, including a Rule 30(b)(6) deposition of Defendants.

Plaintiffs disagree with Defendants' characterization, below, of discovery in *Dvash-Banks*. There, the court allowed the parties a four-and-a-half month period in which to conduct discovery. Between August 14, 2018, the date on which Plaintiffs served their first set of requests for documents, and November 19, 2018, the date on which Plaintiffs moved to compel discovery, the defendants had produced only seven

pages of documents. Moreover, the defendants had refused to designate a witness for a deposition under Rule 30(b)(6), despite having been served with a deposition notice on September 7, 2018. Following the adjudication of the plaintiffs' motion to compel, the defendants were ordered to produce additional documents, to designate and produce a Rule 30(b)(6) witness for deposition, and to produce an individual witness for deposition. The plaintiffs took three depositions, and the defendants produced additional documents, in December 2018, immediately before the parties cross-moved for partial summary judgment in January 2019.

Moreover, contrary to Defendants' assertion in footnote 6 that the "parties' summary judgment motions [in *Dvash-Banks*] in large part relied on the administrative record" and the "discovery exchanged did not meaningfully bear on the *Dvash-Banks* court's adjudication of plaintiffs' claims," the parties' cross-motions for summary judgment cited extensively from the factual record developed in discovery, including depositions of the consular officers who were involved in the adjudication at issue in that case and of the defendants' Rule 30(b)(6) deponent. The court's decision on the parties' cross-motions also referenced the factual record developed in discovery. *See, e.g.*, *Dvash-Banks*, 2019 WL 911799, at *5.

Further, Defendants incorrectly argue, below, that Plaintiffs are not entitled to discovery on their constitutional claims, other than the Administrative Record, because their claims "would be subject to record review pursuant to the APA even in the absence of an APA claim." Federal Rule of Civil Procedure 26 expressly contemplates discovery in civil actions, and none of the decisions Defendants reference creates an exception to Rule 26 for constitutional claims, particularly where no APA claim is asserted. Unlike here, where Plaintiffs' constitutional claims challenge the State Department's unlawful and unconstitutional policy, irrespective of any specific adjudication, the decisions Defendants cite involved the adjudication of constitutional claims that fundamentally overlapped with a claim challenging a decision made by an administrative agency, *see, e.g.*, *Bellion Spirits, LLC* v. *United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018) (claim was "an appeal of an agency action in every respect"), or where the Administrative Record included all relevant information "underlying the determination to adopt" the challenged policy and was not limited "to the applications of one or more individual petitioners," *Almaklani* v. *Trump*, 444 F. Supp. 3d 425, 432-34 (E.D.N.Y. 2020). Moreover, Plaintiffs' constitutional claims challenge not whether "the agency followed the appropriate procedures and reached an appropriate decision" in adjudicating L. Z.-B.'s CRBA application, but whether the State Department has adopted an unlawful and unconstitutional policy of excluding the children of married same-sex couples from consideration under Section 301 and treating those children as born "out of wedlock." *Deron Sch. of N.J., Inc.* v. *U.S. Dep't of Agric.*, 2012 WL 13187163, at *3-*4 (D.N.J. July 16, 2012) (denying the government's motion to exclude from trial evidence outside of the administrative record because it "may be related to both the APA claims and the Rehabilitation Act claim").

Plaintiffs also may use expert testimony in support of their claims and defenses. Plaintiffs will disclose their experts at an appropriate time or in accordance with an order

of the Court setting the time to do so.

***Defendants' Statement*:**

No discovery is needed in this case because all claims present core issues of law as to which there is no genuine issue of facts. This action concerns the validity of the U.S. State Department's legal interpretation of 8 U.S.C. §§ 1401 and 1409, as manifested in the denials of Plaintiffs' CRBA and U.S. passport applications and in the Department's publicly-available Foreign Affairs Manual, whose guidance embodies the Department's interpretation of the relevant statutes. Plaintiffs' declaratory judgment claims alleging constitutional violations are necessarily brought through the Administrative Procedure Act's waiver of sovereign immunity, 5 U.S.C. § 702, and would be subject to record review pursuant to the APA even in the absence of an APA claim. *See Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 n.9 (6th Cir. 2017) (stating that a constitutional claim "is properly reviewed on the administrative record"), *cert. denied*, 138 S. Ct. 2648 (2018); *Almaklani v. Trump*, 444 F. Supp. 3d 425 (E.D.N.Y. 2020) ("[T]o allow broad ranging discovery under Rule 26, beyond the administrative record in every case where a plaintiff alleges a constitutional claim, would be inappropriate and render meaningless the APA's restriction of judicial review to the administrative record."); *Bellion Spirits, LLC* v. *United States*, 335 F. Supp. 3d 32. 43 (D.D.C. 2018) (concluding that discovery on the plaintiff's constitutional claims was inappropriate where "the gravamen" of those claims was "a decision made by an administrative agency"); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) (recognizing limit to record review was appropriate even on non-APA constitutional claims).

Plaintiffs argue that they do not necessarily challenge the application denials but rather challenge Defendants' "policy." *See also* Am. Compl., Prayer for Relief (i) (asking this Court to "[d]eclare unconstitutional, and a violation of the INA, the State Department's *policy* of classifying the children of same-sex married couples as 'children born out of wedlock,' and its consequent refusal to recognize [L. Z.-B's] citizenship status on that basis, both *on its face* and *as applied to Plaintiffs* . . . .") (emphasis added). But Plaintiffs' sought-after relief does not give Plaintiffs license to go beyond the APA's record-review principles. The (publicly available) FAM presents the Department's so-called policy on its face and the remaining content of the administrative record will reflect how that policy was applied to Plaintiffs. *Cf. L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, No. CIV.A. 10-05698 SRC, 2011 WL 1253994, at *7 (D.N.J. Mar. 29, 2011), *aff'd sub nom. L.Y. v. Bayonne Bd. of Educ.*, 542 F. App'x 139 (3d Cir. 2013) (plaintiff "could have referred to the underlying administrative record to support her as-applied [constitutional] claim" instead of seeking discovery).

Plaintiffs' claim under 8 U.S.C. § 1503, which allows an individual to seek a judgment declaring the individual to be a U.S. citizen, is the only claim for which discovery could potentially be available under the law, if necessary. But this dispute centers on a question of law—the U.S. State Department's statutory interpretation—and the Parties have stipulated to any the material facts regarding L.Z.-B. and the applications made on his behalf. There are no disputed material facts preventing the Court from deciding whether L. Z.-B. should be accorded judgment declaring her to be "a national of

the United States." 8 U.S.C. § 1503. *See* Defs.' Answer, ECF No. 59 (denying no properly pleaded factual allegations). Defendants' position comports with applicable law and ensures that Plaintiffs' claims will be adjudicated in a timely fashion, without wasting time and resources on improper and disproportionate discovery. Defendants request the opportunity to brief this issue further if this Court wishes to consider any further argument in connection with this issue.[3]

(b) Should discovery be conducted in phases? If so, explain.

The Parties respectfully submit that it would promote the efficient resolution of the Action for the Parties to address, and the Court to adjudicate, Plaintiffs' Section 1503(a) claim and to defer further litigation on the balance of Plaintiffs' claims until resolution of the Section 1503(a) claim. Plaintiffs contend that the intepretation of Section 301 to include a requirement that a child establish a biological relationship to both parents would raise significant issues under the Due Process and Equal Protection Clauses of the Fifth Amendment, but also recognize that there likely would be no need for the Court to address the merits of those constitutional issues if the Court were to grant summary judgment on the Section 1503(a) claim. Other courts have taken a similar approach in resolving substantially similar claims. *See Mize-Gregg*, 2020 WL 5059253, at *17; *Kiviti*, 2020 WL 3268221, at *14; *Dvash-Banks*, 2019 WL 911799, at *8. Accordingly, the Parties propose bifurcating the proceedings to litigate first the Section 1503(a) claim, without conducting additional discovery, and deferring any determinations concerning the scope, or the conduct of, any discovery on the balance of Plaintiffs' claims until resolution of the Section 1503(a) claim.

- Given that the Parties stipulated to the material facts, including but not limited to, certain facts regarding Allison and Stefania, their marriage, L. Z.-B.'s birth and situation, the adjudication and denial of his application for a CRBA, and the FAM, if the Court were to bifurcate the proceedings, the Parties propose to proceed expeditiously to file summary judgment cross-motions on the Section 1503(a) claim.
    - The Parties believe that this approach (coupled with their agreement providing for the admissibility in the Action of the portions of the discovery record in *Dvash-Banks* described in Item 4, above) could obviate the immediate need for the discovery discussed in Item 7.a., above. The Parties respectfully submit that, if the Court were to order the Parties to proceed in this manner, the Parties could cross-move expeditously for summary judgment on the Section 1503(a)

[3] The transferor district court indicated that it was open to hearing more about whether and to what extent discovery was needed. May 15, 2019 Status Conf. Tr. 45:21–22 ("I can't sit here and tell you whether there's a need for discovery on all claims, I can't do that."); *see also id.* 47:19–23; 48:20–23; 49:1–4; 52:25–53:1. Indeed, the court expressed skepticism about whether discovery was warranted. *See id.* 37:1 (I "query whether discovery is allowed in all circumstances."); *see also id.* 15:18–20.

claim without prejudice to the right to bring a subsequent motion for summary judgment on that claim and any other claims following the conduct of discovery, if Defendants were to prevail on the Section 1503(a) claim, or if the Court were to determine that it could not resolve the merits of the Section 1503(a) claim on the first motions because of the existence of a genuine dispute as to any material fact.

- Under this bifurcated approach, the Parties would file a joint status report with the Court following the resolution of the Section 1503(a) claim, to determine any appropriate remaining steps in the Action.

Although the Parties agree that bifurcation of the proceedings and expeditious motion practice on the Section 1503(a) claim would assist in the efficient conduct of the Action, the Parties disagree on an appropriate briefing schedule for summary-judgment motions on the Section 1503(a) claim:

Plaintiffs' Statement:

Plaintiffs respectfully submit that the following proposed schedule, which approach the Parties followed in connection with the summary judgment motions in *Dvash-Banks*, would best enable the Parties to provide the Court with considered briefing and argumentation on the Section 1503(a) claim:

EVENT	DATE
Deadline to serve amended initial disclosures	September 28, 2020
Deadline to submit a stipulation of agreed facts	September 28, 2020
Deadline to file motions for summary judgment on Section 1503(a) claim	November 18, 2020
Deadline for oppositions to motions for summary judgment on Section 1503(a) claim	January 4, 2021
Deadline for replies in support of motions of summary judgment on Section 1503(a) claim	February 4, 2021
Conference regarding further proceedings	At the Court's direction

Defendants' Statement:

Defendants propose the combined summary-judgment briefing schedule below in the interest of preserving the resources of the parties and the court. Instead of six dueling briefs, the briefing could proceed more efficiently and in sequence. Plaintiff would first move for summary judgment, and Defendants would respond and cross-move for

summary judgment, as appropriate.

Amended initial disclosures	September 28, 2020
Stipulation of agreed facts	September 28, 2020
Plaintiffs' motion for summary judgment on Section 1503(a) claim	October 26, 2020
Defendants' opposition and cross-motion for summary judgment	November 24, 2020
Plaintiffs' reply in support of motion and opposition to Defendants' motion	December 15, 2020
Defendants' reply in support of motion	January 5, 2021
Conference regarding further proceedings	At the Court's direction

If this Court does not bifurcate the proceedings, the Parties propose different approaches for how to proceed, as explained below.

***Plaintiffs' Statement*:**

Absent bifurcation, Plaintiffs are prepared to proceed expeditiously to conduct discovery on all claims, and propose the following schedule:[4]

EVENT	DATE
Deadline to serve amended initial disclosures	September 28, 2020
Deadline to file stipulation of agreed facts on Section 1503(a) claim	September 28, 2020
Deadline to complete fact discovery	March 18, 2021
Deadline to complete expert discovery	April 29, 2021
Deadline to file motions for summary judgment	May 28, 2021
Deadline for oppositions to summary judgment motions	June 30, 2021
Deadline for replies in support of summary judgment motions	July 30, 2021

[4] Plaintiffs disagree with Defendants' characterization of the record in the district court in the D.D.C., below. Contrary to Defendants' assertion that "the court expressed skepticism about whether discovery was warranted," Judge Sullivan's comments at the May 15, 2019 status hearing suggested that he had contemplated at least some discovery. (*See, e.g.*, May 15, 2020 Transcript ("Tr.") at 44:1-3 ("So, I expect that discovery, fact and expert, will be commenced and concluded within 180 days."; Tr. at 47:1-2 ("And maybe I should ask that magistrate judge to preside over discovery here."); Tr. at 49:1-4 ("Maybe it would be appropriate to hold off putting in place a briefing schedule until I get the best thoughts from the magistrate judge and counsel about discovery, and discovery on what issues.")).

Final Pretrial Conference	At the Court's direction
Trial	At the Court's direction

***Defendants' Statement*:**

As explained *supra*, Defendants believe that the entire case can proceed immediately to summary judgment, since Plaintiffs' nonstatutory claims should be reviewed on the basis of the administrative record and because no genuine disputes of material fact preclude the adjudication of Plaintiffs' Section 1503(a) claim. However, Defendants agree that adjudicating the Section 1503(a) claim first, without additional discovery, could obviate the need to determine Plaintiffs' constitutional claim.

If this Court determines that bifurcation of the claims is inappropriate, Defendants request that this Court determine that further discovery is unwarranted and set a briefing schedule for summary judgment on all claims.

If this Court determines that bifurcation is inappropriate *and* that discovery is warranted nonwithstanding Defendants' contrary arguments, discovery should be largely limited[5] to what Defendants produced in a case with nearly identical issues of law, *Dvash-Banks v. Pompeo*, 18-cv-523-JFW (C.D. Cal.).[6] However, in light of the potential complications arising from conducting discovery during the COVID-19 pandemic, as described *infra*, Defendants would not object to the schedule Plaintiffs proposed above.

(c) Number of Interrogatories by each party to each other party:

In the event that this Court does not bifurcate the proceedings as the Parties propose, above, the Parties propose the following:

[5] To the extent the Parties are ordered to proceed with discovery, Defendants otherwise object to the subjects identified by Plaintiffs above as they are overbroad, immaterial to the question of law before the Court, and unduly burdensome. Defendants reserve the right to raise specific objections if Plaintiffs propound discovery.

[6] The parties in that case engaged in four months of extensive extra-record discovery, but although Plaintiffs pursued a due process claim, they ultimately amended their complaint to withdraw their claim of an equal-protection violation after discovery, *see* First. Am. Compl., ECF No. 94, *Dvash-Banks*, 18-cv-523-JFW (C.D. Cal.), and the parties' summary judgment motions in large part relied on the administrative record. Moreover, the discovery exchanged did not meaningfully bear on the *Dvash-Banks* court's adjudication of plaintiffs' claims. Instead, the district court's decision focused on a question of law: whether the statutory requirements at issue contemplate a biological connection for a child born abroad to a U.S. citizen parent, as the Department of State has inferred from the applicable statutes for decades. *See Dvash-Banks v. Pompeo*, 2019 WL 911799 at *7, 18-cv-523-JFW (C.D. Cal.).

***Plaintiffs' Statement*:**

Plaintiffs propose a limit of no more than 30 interrogatories per side, without leave of the Court.

***Defendants' Statement*:**

Discovery is unwarranted, as explained *supra*. If this Court orders discovery to proceed, discovery should be largely limited to what Defendants produced in a case with nearly identical issues of law, *Dvash-Banks v. Pompeo*, 18-cv-523-JFW (C.D. Cal.). Defendants therefore propose a limit of no more than 10 interrogatories per side without leave of the Court, to address the facts specific to this case.

(d) Number of Depositions to be taken by each party:

In the event that this Court does not bifurcate the proceedings as the Parties propose, above, the Parties propose the following:

***Plaintiffs' Statement*:**

Plaintiffs propose that each side may take fact depositions with a cumulative time of 70 hours, with that time allotted among as many witnesses as necessary. The foregoing would not supplant the application of Rule 30(d)(1).

***Defendants' Statement*:**

Discovery is unwarranted, as explained *supra*. If this Court orders discovery to proceed, discovery should be largely limited to what Defendants produced in a case with nearly identical issues of law, *Dvash-Banks v. Pompeo*, 18-cv-523-JFW (C.D. Cal.). Defendants therefore propose a limit of no more than 35 hours of fact depositions per side without leave of this Court, to address the facts specific to this case.

(e) Plaintiff's expert report due on

Plaintiffs respectfully refer the Court to their response to Item 6.b., above. Under that proposal, any expert reports on constitutional claims would be due by April 29, 2021.

(f) Defendants' expert report due on

Defendants contend that discovery is unwarranted, as explained *supra*. If this Court orders discovery to proceed, Defendants request that the expert report be due by February 28, 2021.

(g) Motion to Amend or to Add Parties to be filed by

September 28, 2020.

(h) Dispositive motions to be served within __ days of completion of discovery.

Plaintiffs' Statement:

Assuming that the proceedings are bifurcated, Plaintiffs propose to file dispositive motions by November 18, 2020. Plaintiffs respectfully refer the Court to their response to Item 6.b., above.

***Defendants' Statement*:**

Assuming that the proceedings are bifurcated, Defendants propose that Plaintiffs file their dispositive motion by October 26, 2020, and that Defendants file a response and cross-motion by November 24, 2020. Defendants respectfully refer the Court to their response to Item 6.b., above.

(i) Factual discovery to be completed by

Assuming that the proceedings are bifurcated, the Parties propose to submit their stipulation of facts by September 28, 2020, and to file any additional materials, such as any declarations and relevant portions of the *Dvash-Banks* discovery record, in conjunction with their cross-motions for summary judgment. The Parties respectfully refer the Court to Item 6.b., above.

(j) Expert discovery to be completed by

Plaintiffs' Statement:

Assuming that the proceedings are bifurcated, Plaintiffs propose that there would be no need for expert discovery on the Section 1503(a) claim, but contemplate that they may submit one or more expert declarations in support of their motion for summary judgment on that claim. Plaintiffs respectfully refer to the Court to their response to Item 6.b., above.

Defendants' Statement:

Assuming that the proceedings are bifurcated, Defendants believe that expert discovery would be unnecessary for adjudicating the Section 1503(a) claim. In the event that Plaintiffs submit an expert declaration, Defendants reserve the right to strike the declaration and/or submit a rebuttal declaration. Defendants respectfully refer the Court to their response to Item 6.b., above.

(k) Set forth any special discovery mechanism or procedure requested, including data preservation orders or protective orders:

In the event that this Court does not bifurcate the proceedings as the Parties propose, above, the Parties propose the following:

***Plaintiffs' Statement*:**

Plaintiffs anticipate that disclosure and discovery in this Action will include ESI and information or records maintained in non-electronic form. Plaintiffs currently are not aware of any issues surrounding production and preservation of ESI. On May 13, 2020, Plaintiffs sent to Defendants a proposed ESI protocol and draft confidentiality order. On June 25, 2020, Defendants informed Plaintiffs of their position that it would be premature to enter into any such agreements and affirmed their original position that no discovery is necessary in this Action.

***Defendants' Statement*:**

Discovery is unwarranted, as explained *supra*. If this Court orders discovery to proceed, Defendants anticipate requesting a protective order in this case to protect certain sensitive information pertaining to L.Z.-B. and the Department of State's consular processing.

(l) A pretrial conference may take place on

The date will depend on whether the proceedings are bifurcated in accordance with Plaintiffs' proposal. The Parties respectfully refer the Court to their response to Item 6.b., above.

(m) Trial by jury or non-jury Trial?

***Plaintiffs' Statement*:**

Plaintiffs do not request a jury trial. Plaintiffs currently estimate a bench trial would span approximately four full days, but respectfully request leave to reconsider this issue following the close of fact and expert discovery.

***Defendants' Statement*:**

Defendants do not request a jury trial.

(n) Trial date:

***Plaintiffs' Statement*:**

The date will depend on whether the proceedings are bifurcated in accordance with the Parties' proposal. Plaintiffs respectfully refer the Court to their response to Item 6.b., above.

***Defendants' Statement*:**

Defendants believe that this case can be disposed of on summary judgment, but respectfully request leave to reconsider this issue as the case progresses.

7. Do you anticipate any discovery problem(s)? Yes __x_____ No _____

In the event that this Court does not bifurcate the proceedings as the Parties propose, above, the Parties propose the following:

***Plaintiffs' Statement*:**

Plaintiffs recognize that the COVID-19 pandemic may present logistical difficulties, which may be exacerbated for discovery involving documents and witnesses located outside the U.S. Plaintiffs are amenable to conducting any discovery expeditiously by remote means, including conducting depositions by means of videoconferencing technology, such as Zoom, that offer videotaping features. Plaintiffs intend to videotape all depositions they conduct. Plaintiffs understand that one or more of the individuals they may seek to depose may be located outside the United States. Plaintiffs propose conducting videotaped depositions of those individuals by videoconferencing technology, which would obviate the need for travel by counsel, the witness, or transcription and videotaping personnel. As those individuals are, or were, employees of the State Department, Plaintiffs request the Defendants' cooperation in producing those individuals, and facilitating the arrangements for the depositions.

***Defendants' Statement*:**

The ongoing COVID-19 pandemic has significantly impacted Defendants' ability to expeditiously participate in discovery, including responding to requests for the production of large volumes of documents; adequately preparing witnesses for depositions, especially witnesses, such as consular officials, located abroad; and conducting depositions.

In particular, electronic document production involves personnel from at least three separate bureaus at State Department headquarters in Washington and potentially also individuals at multiple sections (*e.g.*, consular and information technology) at overseas posts. Different bureaus, sections, offices and individuals are operating on different schedules during the pandemic—which can add to coordination challenges—and across the board, telework is encouraged wherever possible and work units have in-office capacity limitations owing to social distancing requirements. For example, electronic discovery staff in the Department's Office of the Legal Adviser are on office premises two to three days a week while working from home on other days.

Although work-from-home capabilities are substantial and growing, processes are invariably slower, owing for example to limited bandwidth for file transfers, greater network traffic and absence of dual-monitor configurations. Certain document processing functions such as those using Nuix e-discovery software can only be performed using specific desktop computers in the office, and others such as document retrieval from modern as well as legacy information technology systems, either benefit significantly from or require physical presence in the office, and/or extensive additional time to manage from home. The Department's eRecords system for electronic mail searches from 2017 onward, for example, affords only limited remote access

capabilities. Additionally, in the limited periods that employees are in the office—in particular staff with technology expertise who would have critical roles in document retrieval and production—they must prioritize ensuring system availability and integrity to meet day-to-day mission requirements of the organization, which in the current environment are ever more demanding.

8. **Do you anticipate any special discovery needs (i.e., videotape/telephone depositions, problems with out-of-state witnesses or documents, etc.)? Yes _X___ No ____. If so, explain.**

Yes. The Parties respectfully refer the Court to their response to Item 7, above.

9. **State whether this case is appropriate for voluntary arbitration (pursuant to Local Civil Rule 201.1 or otherwise) or mediation (pursuant to Local Civil Rule 301.1 or otherwise), appointment of a special master or other special procedure. If not, explain why and state whether any such procedure may be appropriate at a later time (i.e., after exchange of pretrial disclosures, after completion of depositions, after disposition or dispositive motions, etc.).**

The Parties do not believe that the Action is appropriate for voluntary arbitration. As described, in Item 2, above, during the May 15, 2019 court conference, the court in the D.D.C. referred mediation and discovery matters to Magistrate Judge Robin M. Merriweather and instructed the Parties to consider whether there was a reasonable prospect of resolving the Action by means of a negotiated resolution. On May 28, 2019, the Parties met and conferred telephonically regarding the possibility of settlement, but agreed at that time that resolution was not feasible. The Parties continue to believe that re-engaging now in settlement discussions or arbitration proceedings would not aid in the resolution of this Action. However, the Parties remain willing to engage in further discussions in the event that circumstances change.

10. **Is this case appropriate for bifurcation? Yes __x___ No _____.**

Yes. The Parties respectfully refer the Court to their response to Item 6.b., above.

11. We [do _____ do not _____x_____] consent to the trial being conducted by a Magistrate Judge.

No. The Parties do not consent to the trial being conducted by a Magistrate Judge.

Dated: September 4, 2020
New York, New York

Respectfully submitted,

/s/ *Theodore Edelman*

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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

DECLARATION OF ALLISON DAWN BLIXT IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL CIVIL RULE 56.1

1. I respectfully submit this declaration in the above-captioned action ("Action") to supplement certain facts set out in the *Stipulation of Agreed Facts Relating to Claim Pursuant to 8 U.S.C. § 1503(a)* ("Stipulation") filed in this Action on or about September 21, 2020. In the interest of brevity, I do not repeat facts included in that Stipulation.

2. I was born in Park Ridge, Illinois in 1978. When I was six years old, I moved with my family from Peoria, Illinois to Clemmons, North Carolina, where I lived until graduating high school in 1996. In 1996, I moved to Poughkeepsie, New York to attend Vassar College.

3. After graduating from Vassar College in 2000, I remained in New York State and worked as a field hockey coach at Hartwick College, in Oneonta, New York, until December 2001.

4. I met my wife, Stefania, in 2006 during a visit she made to New York City on vacation from her home in Rome, Italy. Shortly thereafter, Stefania and I commenced a romantic relationship, which continued even after her return to Italy in 2006.

5. In late 2007, after over a year of being in a long-distance relationship, Stefania returned to New York and stayed with me for several months, but then returned to Italy because she did not have authorization to stay longer in the United States.

6. In 2008, Stefania and I both relocated to London, England so that we could live together. In 2008, we shared a home following our relocation to London, England and, on July 9, 2009, entered into a civil partnership in London. On January 3, 2015, following recognition by the U.K. government of marriage for same-sex couples in England, our civil partnership was converted retroactively to a marriage.

7. In or around 2012, Stefania and I decided to have children, and we took steps through the use of assisted reproductive technology ("ART") to conceive. As set out in the Stipulation, our sons, L. Z.-B. and M. Z.-B., were born in 2015 and

2017, respectively, as a result of those efforts. Stefania and I sought and obtained the sperm used to conceive our sons from a sperm bank in Denmark—Cryos International ("Cryos"). I contracted with Cryos to deliver the donor's sperm to the London Women's Clinic and subsequently arranged to have the sperm transferred to Guy's Hospital ("Guy's"). I used the London Women's Clinic and Guy's, in part, because I understood that both clinics were licensed by the Human Fertilisation & Embryology Authority ("HFEA"). L. Z.-B.'s conception was the result of ART treatment at Guy's. The identity of the sperm donor is unknown to us.

8. As stated in the Stipulation, after L. Z.-B.'s birth, Stefania and I registered L. Z.-B.'s birth with the Lambeth Register Office, which issued L. Z.-B. a birth certificate that identified Stefania and me as his parents.

9. After receiving L. Z.-B.'s birth certificate, Stefania and I made an appointment with the U.S. Embassy in London ("Embassy") to apply for a Consular Report of Birth Abroad ("CRBA") and a U.S. passport for L. Z.-B.—documentation evidencing L. Z.-B.'s U.S. citizenship at birth.

10. On March 11, 2015, Stefania, L. Z.-B. and I appeared in person at the Embassy to submit applications for a CRBA and a U.S. passport. During our visit, an Embassy official inquired into the details of L. Z.-B.'s birth, including whose genetic material had been used to conceive him and who carried him in utero. The

Embassy official also asked whether the sperm that was used to conceive L. Z.-B. could have come from a U.S. citizen donor.

11. Stefania and I described for the Embassy official the details of L. Z.-B.'s conception, including that he had been conceived using Stefania's egg and the sperm of a donor who was unknown to us.

12. After answering the official's invasive, personal questions during that interview, and hearing from the official about the State Department's policy of requiring a biological or gestational relationship, Stefania and I were informed that L. Z.-B.'s applications would be denied because he did not have a biological relationship with me.

13. Based on what we were told, we believed that it would be futile to pursue the CRBA and U.S. passport applications, and we left the Embassy dejected and with the understanding that we had abandoned our applications.

14. As stated in the Stipulation, after M. Z.-B.'s birth, Stefania and I registered M. Z.-B.'s birth with the Lambeth Register Office, which issued M. Z.-B. a birth certificate that identified Stefania and me as his parents.

15. After receiving M. Z.-B.'s birth certificate, Stefania and I made an appointment with the Embassy to apply for CRBAs for both M. Z.-B. and L. Z.-B.

16. On May 23, 2017, Stefania and I returned to the Embassy with L. Z.-B. and M. Z.-B. During our interview, an Embassy official informed us that L. Z.-B.'s

application would be denied because L. Z.-B. was neither genetically related to, nor was he carried by, me, his U. S. citizen parent.

17. Both Stefania and I were present in the hospital room when L. Z.-B. and M. Z.-B. were born, and Stefania and I have been their parents for all purposes from the time of their births onward.

18. Stefania and I are the only individuals who have ever asserted any parental rights over L. Z.-B. or M. Z.-B. No other individual has ever acted as a parent to L. Z.-B. or M. Z.-B.

19. The sperm donor who contributed the genetic material to Cryos used to conceive L. Z.-B. and M. Z.-B. has never had any contact with L. Z.-B. or M. Z.-B.

20. Stefania, L. Z.-B., M. Z.-B. and I have lived together as a family since L. Z.-B.'s and M. Z.-B.'s respective births.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on the 16th day of November, 2020, in Essex County, New Jersey.

Allison Dawn Blixt

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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL CIVIL RULE 56.1

This action ("Action") challenges the denial by The Department of State of an application on behalf of minor plaintiff L. Z.-B. for a Consular Report of Birth Abroad recognizing him as a United States citizen at birth. On July 14, 2020, Plaintiffs, Allison Dawn Blixt and L. Z.-B., by and through his court-appointed guardian *ad litem*, Stefania Zaccari, (together, "Plaintiffs") filed their First Amended Complaint, asserting claims under 8 U.S.C. § 1503(a) ("Section 1503(a)") and the Equal Protection and Due Process Clauses of the Fifth Amendment of the United States Constitution ("Constitutional Claims"). By Order of The Honorable James B. Clark, III, U.S.M.J., dated September 14, 2020, the Court bifurcated proceedings in the Action, directing the parties to proceed with cross-motions for summary

judgment on Plaintiffs' Section 1503(a) claim and deferring litigation on the Constitutional Claims pending the adjudication of the Section 1503(a) claim. Pursuant to that Order, Plaintiffs timely moved for summary judgment on their Section 1503(a) claim pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1.

The Court, having considered all relevant submissions, documents, and evidence, and having considered the arguments of counsel, and good cause appearing therefore, finds that the undisputed facts and relevant law establish that Plaintiffs are entitled to summary judgment on their Section 1503(a) claim.

IT IS THEREFORE ORDERED AND DECLARED THAT:

1. Plaintiffs' Motion for Partial Summary Judgment is **GRANTED**, and judgment on the Section 1503(a) claim is hereby entered for Plaintiffs.

2. L. Z.-B. is a U.S. citizen at birth, who acquired U.S. citizenship on the date of his birth pursuant to Section 301(g) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1401(g).

3. The Department of State is ordered to issue a United States passport to L. Z.-B. as soon as is practicable but not later than 45 days from the date of entry of this Order.

4. Plaintiffs are hereby awarded attorneys' fees and costs as allowed by law, pursuant to 28 U.S.C. § 2412, including an award of reasonable litigation fees and costs incurred in this Action.

5. The parties are directed to meet and confer, and to submit no later than 30 days from the date of this Order a status report to the Court, regarding their proposals for any further proceedings in the Action.

SO ORDERED.

Dated: _____

_____
The Honorable Kevin McNulty
United States District Judge

SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

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,	:	Oral Argument Requested Motion Date: February 16, 2021
Defendants.	:	

CERTIFICATE OF SERVICE

I, **Mark A. Makar**, hereby certify that I am an associate at Sullivan & Cromwell LLP and am one of the attorneys representing Plaintiffs *pro bono* in the above-captioned action ("Action"), and that on November 18, 2020, I caused a copy of *Notice of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, *Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1*, *Declaration of Mark A. Makar* with accompanying exhibits, *Declaration of Allison*

Dawn Blixt, and this *Certificate of Service* to be electronically filed and served on all counsel of record in the Action via the Court's Electronic Case Filing System.

Dated: November 18, 2020 */s/ Mark A. Makar*