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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”; collectively, “Plaintiffs”) respectfully submit the following memorandum of points and authorities (“Opposition”) in opposition to Defendants’¹ motion for partial summary judgment on Plaintiffs’ claim under 8 U.S.C. § 1503(a) (“Section 1503(a)”) (ECF No. 67-1 (“Motion” or “Mot.”)) in the above-captioned action (the “Action”).

I. PRELIMINARY STATEMENT

As set out in Plaintiffs’ Complaint and cross-motion for summary judgment (ECF No. 66-1 (“Plaintiffs’ Motion” or “Pl. Mot.”)), L. Z.-B. became a U.S. citizen at birth because his parents, Allison—a U.S. citizen—and Stefania, were married to each other when he was born abroad to his biological and gestational mother, Stefania.

Defendants argue that because there was no “blood relationship” between L. Z.-B. and Allison, L. Z.-B. is not a U.S. citizen at birth under Section 301(g) of the Immigration and Nationality Act of 1952, as amended, (“INA”), 8 U.S.C. § 1401 (“Section 301”). Defendants ground their argument on isolated words in Section 301, divorced from their context, and their

¹ Defendants are The United States Department of State (“State Department”) and the Honorable Michael R. Pompeo in his official capacity as Secretary of State.

misinterpretation of the Roman law concept of “*jus sanguinis*,” a term that appears nowhere in the INA. This position ignores the statute, its history and purpose, and uniform case law interpreting it.

There is no genuine dispute as to any fact bearing on the outcome of the pending cross-motions. Defendants agree that Allison and Stefania were married when L. Z.-B. was born, are—and have always been—his only legal parents, and have raised L. Z.-B. and his brother since they were born. (ECF No. 67-3, *Defendants’ Statement of Undisputed Material Facts* (“SOF”) ¶ 12; *Plaintiffs’ Supplemental Statement of Undisputed Material Facts* (“Pl. SOF”) ¶¶ 16-17.) Defendants further acknowledge that Allison is a U.S. citizen who satisfied the residency requirements of Section 301 when L. Z.-B. was born, and that the State Department denied L. Z.-B.’s application for a Consular Report of Birth Abroad (“CRBA”) solely because Allison is not L. Z.-B.’s biological parent. (SOF ¶ 9; Pl. SOF ¶¶ 45-46, 56.) The parties’ only dispute hinges on the legal question of whether the terms “born” and “of parents” in Section 301 implicitly require a CRBA applicant to demonstrate a biological relationship with a U.S. citizen parent. The Court should follow the unbroken string of federal court decisions that has rejected Defendants’ arguments and has held that Section 301 does not impose a biological relationship requirement, and deny the Motion for the reasons set forth below.

First, Defendants’ position is contrary to the position of every court to have considered this matter, including three panels of the Ninth Circuit Court of Appeals and one of the Second Circuit, along with four federal district courts.² Defendants acknowledge the importance of precedent for statutory interpretation, but argue that those decisions “were wrongly decided” and “non-binding.” (Mot. at 12.) Although not technically binding precedent, these thoughtful decisions are persuasive and entitled to great weight.

Second, Section 301 does not include any reference to a requirement of a “blood relationship” to the U.S. citizen parent in the case of a child born abroad to a married couple, one of whom is an alien and the other a U.S citizen. And it omits any such proviso even though Congress expressly required precisely such a relationship in INA Section 309, 8 U.S.C. § 1409, (“Section 309”), a companion provision regarding children born abroad to unmarried parents. This contrast further establishes that Congress did not intend a “blood relationship” requirement to apply under Section 301. Stated simply, Congress knew how to require a “blood

² See *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000); *Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020); *Sabra as next friend of Baby M. v. Pompeo*, 453 F. Supp. 3d 291 (D.D.C. 2020); *Dvash-Banks v. U.S. Dep’t of State*, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019); see also *E.J.D.-B. v. U.S. Dep’t of State*, 825 F. App’x 479 (9th Cir. 2020); *Mize v. Pompeo*, 2020 WL 5059253 (N.D. Ga. Aug. 27, 2020).

relationship” as a predicate for citizenship when it wished to; and it violates fundamental principles of statutory construction for a court or agency to insert those words as Defendants propose.

Third, at common law, a child is presumed to be the offspring of his or her gestational parent and the spouse of that parent. Defendants acknowledge that their interpretation of Section 301 ignores this presumption, but contend that the presumption is not relevant here solely because the State Department’s own internal *Foreign Affairs Manual* (“FAM”) declares so (Mot. at 14-15), even though every court that has addressed the issue has ruled to the contrary. *Jaen*, 899 F.3d at 188; *Mize*, 2020 WL 5059253, at *13; *Kiviti*, 467 F. Supp. 3d at 306-08; *Dvash-Banks*, 2019 WL 911799, at *7. Again, under fundamental principles of statutory construction, a statute should not be read to be in derogation of common law rules unless the legislature clearly intended such a result. There is no evidence of such intent in Section 301.

Fourth, the single most-cited authority in Defendants’ brief is the FAM, an internal document containing the State Department’s (evolving) view of how it should apply the INA. The FAM was not issued as a regulation, has never been subject to notice-and-comment rule-making, and was not the product of formal adjudication. (Pl. SOF ¶¶ 18-20, 22.) It does not even purport to be an interpretation of the statute and does not attempt to parse the statutory language. The FAM is not

a rule, and it is not a precedent. It is State Department *ipse dixit*. No court has granted Defendants' request to accord the FAM policy deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), or any other interpretive rule. There is no basis for this Court to do otherwise. Even if the FAM policy is intended to assist the State Department in avoiding fraud in citizenship applications, that objective does not permit Defendants to add statutory requirements that Congress did not impose. Moreover, the absence of a biological relationship requirement does not hamper the State Department's manifold tools for inquiring into possible fraud where, unlike here, there are concerns that it might exist.

Fifth, Defendants mischaracterize Plaintiffs' position as "promot[ing] public policy goals regardless of whether it is faithful to the text" of the INA (Mot. at 19). Defendants have gotten it backwards, as it is Defendants' interpretation of Section 301 that asks the Court to ignore the statute's text, context, and purpose. Defendants' assertion that the FAM's divergence from the INA's purpose of keeping families together should be tolerated because "Congress clearly did not intend to freely confer citizenship any time it would facilitate family unity" (*id.*) relies on Congress's discretion to exclude aliens, not citizens, from the United States, and on the INA's special requirements for children whose U.S. citizen parent is not married to their other parent. This cannot justify adopting an interpretation of Section 301 that conflicts with the INA's purpose over one that fosters it.

Defendants' contention that there are other avenues for the Zaccari-Blixt family to live together in the United States cannot excuse Defendants' imposition of extra-statutory requirements and demeans, if not disregards entirely, Allison and Stefania's marriage. The State Department's policy leads to absurd results, especially in cases involving same-sex couples, by creating artificial divisions and distress within families, impinging on the constitutionally protected parent-child relationship, and denying the "most precious right" of citizenship at birth. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963).

II. ARGUMENT

A. Defendants' Interpretation of Section 301 Has, For Good Reason, Been Uniformly Rejected by the Courts.

The parties agree that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." (Mot. at 11 (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)).) As Plaintiffs argued in their cross-motion for summary judgment, the statutory text, context, and purpose, as well as relevant precedents all support Plaintiffs' interpretation of Section 301. (*See* Pl. Mot. at 17-32.) Indeed, every court to consider Defendants' interpretation of Section 301 has concluded that it conflicts with the language, context, and purpose of the INA. As a result, although Defendants argued in their motion to dismiss the initial complaint in this Action (which was denied) that

“Congress could have had no other intention” than to “interpret the [INA] as requiring both a biological relationship and a legal relationship” under Section 301, (ECF No. 31-1 at 26), Defendants now concede that the text of Section 301 does not compel the State Department’s interpretation (Mot. at 10). On this Motion, Defendants argue instead that Section 301 “*can* be read to encompass parents’ use of [assisted reproductive technology] to create a child, but that is hardly a necessary reading or the most natural one.” (*Id.* (emphasis in original and citations omitted).)

Defendants grudgingly acknowledge that the courts have uniformly rejected that assertion, including in cases involving assisted reproductive technology (“ART”), but contend that those cases “were wrongly decided and, in any event, non-binding.” (*Id.* at 12); *see Jaen*, 899 F.3d at 190; *Solis-Espinoza*, 401 F.3d at 1094; *Scales*, 232 F.3d at 1164; *Mize*, 2020 WL 5059253, at *16; *Kiviti*, 467 F. Supp. 3d at 307-08; *Sabra*, 453 F. Supp. at 320; *Dvash-Banks*, 2019 WL 911799, at *7, *aff’d sub nom. E.J.D.-B.*, 825 F. App’x at 480. Significantly, although Defendants recently filed a petition for rehearing *en banc* in the *Dvash-Banks* action, they did not appeal the decision in *Mize* and withdrew their appeal in *Kiviti*. *See* Pet. for Reh’g En Banc, *E.J.D.-B. v. U.S. Dep’t of State*, Case No. 19-55517 (9th Cir. Dec. 23, 2020), ECF No. 59-1; *Mize v. Pompeo*, Case No. 19-cv-03331 (N.D. Ga.); Order, *Kiviti v. Pompeo*, Case No. 20-1882 (4th Cir. Oct. 26, 2020), ECF No. 14 (granting Defendants’ withdrawal of appeal). Although this unanimous precedent is not

dispositive here, those decisions address and reject each of Defendants' arguments regarding the construction of Section 301 and provide persuasive authority for the Court to do the same. *See Dolan*, 546 U.S. at 486 (statutory interpretation should "consult[] any precedents or authorities that inform the analysis"); *Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 165 (3d Cir. 2015) (same).

Defendants attempt to distinguish *Jaen* by distorting the Second Circuit's holding as interpreting only the term "parents," and ignoring the words "born" and "of," in Section 301. In fact, *Jaen* directly addressed the same statutory interpretation question at issue here. 899 F.3d at 187-89. The court specifically observed that "the textual distinction between the sections 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." *Id.* (internal quotation marks omitted). *Jaen's* holding that Section 301 "does not include a requirement that an individual be a biological parent in order to be a 'parent' for purposes of transmitting citizenship to their child at birth," *id.* at 185, necessarily means that Section 301 includes children, such as L. Z.-B., who were born of a non-biological U.S. citizen parent who satisfies the section's residency requirement. Defendants' contention that Section 301 nonetheless requires that such children have a biological relationship with a U.S. citizen "parent," would render

nonsensical both the statutory scheme and the holding in *Jaen*. See *Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017) (“[I]t is our role to make sense rather than nonsense out of the *corpus juris*.” (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (alteration in original))); *United States v. Dohou*, 948 F.3d 621, 624 (3d Cir. 2020) (interpreting a statute “to make[] sense in light of the broader statutory scheme”).³

B. Defendants Misconstrue the Meaning and Context of Section 301.

Instead of analyzing Section 301 as a whole and in the context of the statutory scheme of which it is a part (including its relationship to Section 309), Defendants have adopted a semantic approach, trying to construe the words “born” and “of” by reference to Defendants’ preferred dictionary definitions. (Mot. at 10.) The Court should reject Defendants’ approach and interpretation for at least three reasons.

³ Defendants try to muddy the Second Circuit’s clear interpretation of Section 301 by citing to *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2008), which predated *Jaen* and was issued by two of the three judges who sat on the *Jaen* appeal panel. *Colaianni* rejected the petitioner’s claim of citizenship because he did not have a U.S. citizen parent until seventeen months after his birth, when he moved to the United States and was adopted by U.S. citizens, neither of whom was his biological parent. 490 F.3d at 186-87. Because the petitioner did not meet Section 301’s requirements *at the time of his birth*, the Second Circuit did not need to address in *Colaianni* whether Section 301 requires a biological tie to a U.S. citizen parent at the time of birth. See *id.* at 187. The courts have rejected Defendants’ repeated attempts to use *Colaianni* to undermine or limit *Jaen*. See *Kiviti*, 467 F. Supp. 3d at 305; *Mize*, 2020 WL 5059253, at *14.

First, Defendants’ improper attempt to circumvent the plain meaning of Section 301 by considering the terms “born” and “of” in isolation (*id.*) conflicts with the canon of statutory construction that courts should construe statutes to give effect to all of their terms. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (citation omitted)); (*see also* Pl. Mot. at 24-26). Section 301’s relevant terms include “born” and “of parents,” and Section 301’s choice of the word “parents,” as opposed to, for example, “persons,” makes clear that the word “parents” in the statute connotes a legal relationship. *See, e.g., Jaen*, 899 F.3d at 190 (“[P]arentage for purposes of Section [301] is a legal construct that incorporates the common law’s enduring respect for the marital family.”). Moreover, as Plaintiffs demonstrate in their cross-motion, nothing in Section 301 or any other section of the INA suggests that Congress intended the term “parent” to exclude non-biological parents. (Pl. Mot. at 21-22.)

The inclusion in Section 301 of the terms “born” and “of” does not undermine this conclusion. As a threshold matter, the Third Circuit, as have other courts, has cautioned against over-reliance on dictionary definitions, particularly, when, as here, Defendants attempt to substitute those definitions for the meaning of terms in their statutory context or in ordinary usage. *See, e.g., Madar v. U.S. Citizenship & Immigr. Servs.*, 918 F.3d 120, 123 (3d Cir. 2019) (adopting the

“ordinary meaning” of the INA’s physical presence requirement because to do otherwise would cut against “basic interpretive principles”); *Alli v. Decker*, 650 F.3d 1007, 1012 (3d Cir. 2011) (holding that the district court’s “approach based on dictionary definitions” was “insufficient” because “[t]he Supreme Court has stated consistently that the text of the statute must be considered in the larger context or structure of the statute in which it is found” (alteration in original and citations omitted)); *United States v. Zheng*, 768 F.2d 518, 523 (3d Cir. 1985) (holding that the “dictionary definition relied on by the district court [was] of little value” because the term at issue was a “term whose contours are constructed by context”).

In any event, the terms “born” and “of” are susceptible to multiple meanings and do not import into Section 301 an implicit biological relationship requirement. (See Pl. Mot. at 24-26.) Indeed, both *Kiviti* and *Mize* have rejected the contention that a biological relationship requirement is “inherent in the phrase ‘born . . . of parents.’” *Kiviti*, 467 F. Supp. 3d at 308; see also *Mize*, 2020 WL 5059253, at *12-13. In *Kiviti*, the court was “unpersuad[ed]” by Defendants’ resort to dictionary definitions because, “even under the State Department’s approach, the term ‘born . . . of’ is susceptible to a range of interpretations,” and “[a] child could fairly be deemed to originate from parents other than through a genetic relationship, such as where two married parents both play a fundamental and instrumental role in the creation of the child,” e.g., through ART. 467 F. Supp. 3d at 307-08. Similarly,

in *Mize*, the court concluded that Defendants’ reliance on dictionary definitions was misplaced, observing that the *Oxford English Dictionary* (the dictionary Defendants rely on here) “points out[] [that] the meaning of the word ‘of’ has been ‘so weakened down’ over time that it now often ‘express[es] . . . the vaguest and most intangible of relations.’” 2020 WL 5059253, at *12 (noting that the defendants’ interpretation of Section 301 “may place more weight on” the word “of” “than it can bear”).

Second, Defendants seek to erase the significance of marriage to the statutory scheme—and in the process to elide the distinctions between Section 301 and Section 309—by arguing that Section 301 requires a biological relationship with a U.S. citizen parent because it “refers to a child ‘born . . . of parents’” rather than “a child ‘born of a marriage.’” (Mot. at 11.) In context, however, Section 301 had to refer to parents (as opposed to a marriage) because it is the applicant’s parents who must meet the INA’s requirements. The phrase “born . . . of parents one of whom is an alien, and the other a citizen . . .” would make no sense if the word “parents” were replaced with the word “marriage.” Similarly, Section 301’s “plural reference to ‘parents’” (*id.* at 10-11) does not suggest that “*each* parent must have a biological relationship to the child” (*id.* at 11), but that those parents must have been married to each other at the time of the child’s birth—a requirement indisputably met by Allison and Stefania here. *See Kiviti*, 467 F. Supp. 3d at 306-07 (“[T]he term ‘parents,’ on its own, does not impose a requirement that both putative parents have

a biological relationship with the child” given the “longstanding principle[]” that “status as a parent can derive from marriage rather than biology”).⁴

Third, Defendants make no effort to address Section 301’s statutory context, including the contrast between Section 301—which is applicable to children of married parents and contains no reference to a biological relationship—with Section 309—which expressly requires that children born out of wedlock demonstrate by clear and convincing evidence a “blood relationship” with a U.S.

⁴ Defendants erroneously contend that the State Department’s treatment of L. Z.-B. as a child born “out of wedlock” is “not a failure to recognize Allison and Stefania’s marriage” and “does not stigmatize Allison and Stefania’s marriage” because children born to different-sex couples through ART might also be considered “born out of wedlock.” (Mot. at 11 & n. 4.) Irrespective of the impact of the State Department’s interpretation of Section 301 on different-sex couples, that interpretation clearly relegates the children of nearly all married, same-sex spouses to the status of “out-of-wedlock” and “illegitimate,” and treats them essentially as legal strangers to their parents’ marriages. Defendants’ interpretation, thus, is fundamentally at odds with the INA’s purpose of keeping families together and, as two courts already have concluded, raises constitutional questions so serious as to require rejection of the proposed interpretation. *See Kiviti*, 467 F. Supp. 3d at 313; *Mize*, 2020 WL 5059253, at *11. Although Defendants dismiss the consequences of their interpretation of Section 301 for the children of same-sex marriages as unintended and essentially the litigators’ equivalent of “nothing personal” (Mot. at 11 & n.4), the Supreme Court has expressly admonished against ignoring the impact of such characterizations on those children. *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (stating that laws that require differential treatment of same-sex and different-sex couples “harm and humiliate the children of same-sex couples” (citation omitted)); *United States v. Windsor*, 570 U.S. 744, 772 (2013) (stating that “differentiation” between same-sex and different-sex couples “humiliates tens of thousands of children now being raised by same-sex couples” and “makes it even more difficult for the children to understand the integrity and closeness of their own family”).

citizen parent. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here 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.”). As Plaintiffs’ Motion demonstrated, this contrast confirms that the INA requires proof of a biological relationship only when there is no marriage to provide the familial and national connections necessary for transmission of U.S. citizenship at birth to children born outside the United States. (*See* Pl. Mot. at 27-29.)

Instead of engaging with the structure of the INA, Defendants rely on a misconception they characterize as “*jus sanguinis* citizenship,” which they appear to construe as the conferral of citizenship solely on the basis of descent. (Mot. at 11.) Defendants point to nothing other than the State Department’s internal FAM to support what they claim is “the traditional understanding of *jus sanguinis* citizenship,” and their assertion that it provides a guiding principle of U.S. citizenship law. (*See* Mot. at 11-12.) As two courts recently observed, the State Department has not identified any “place in the Constitution, the INA, or another federal statute where that principle has been explicitly adopted by the United States.” *Kiviti*, 467 F. Supp. 3d at 312; *see Mize*, 2020 WL 5059253, at *16. Defendants’ inability to support the FAM’s reference to *jus sanguinis* citizenship is not surprising: as the Supreme Court explained in *United States v. Wong Kim Ark*,

“[t]here is not, and never was, any such common-law principle.” 169 U.S. 649, 670 (1898) (citation omitted).

In any event, Defendants oversimplify and misconstrue the principle of *jus sanguinis*, which they premise on a literal translation of the Latin phrase “right of blood.” As Plaintiffs have demonstrated in their cross-motion, parentage as embodied in the concept of *jus sanguinis* was not—traditionally or otherwise—co-extensive with biological parenthood. (Pl. Mot. at 34-35); *see, e.g.*, Matthew Lister, *Citizenship, in the Immigration Context*, 70 Md. L. Rev. 175, 199-204 & n.146 (2010) (citing Section [301] and explaining that the United States has “a more limited version” of *jus sanguinis* under which children “inherit the citizenship of their parents”—as opposed to a “strong form,” “which equates citizenship with ethnic membership” and “flows with the blood”); *Mize*, 2020 WL 5059253, at *16 (stating that “there are different versions of *jus sanguinis* whose basic rules can vary in strength” and rejecting Defendants’ version of *jus sanguinis* “that literally depends on blood” (internal quotation marks and alteration omitted)). Thus, although “[d]erivative citizenship for nonmarital children of American fathers requires demonstration of a ‘blood relationship,’” 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, 2223-24 n. 353 (2014); *cf.*, Kerry Abrams & R. Kent Piacenti,

Immigration's Family Values, 100 Va. L. Rev. 629, 658 (2014) (“Marriage was the conduit by which a man could transfer citizenship to the children of his wife, whether or not they were his biological children.”).⁵ This understanding of the scope and role of *jus sanguinis* in U.S. citizenship determinations is consistent with the text and structure of the INA, which includes separate provisions for children born in and out of wedlock and imposes requirements, such as proof of sufficient U.S. residency, to transmit U.S. citizenship at birth, regardless of biological ties.⁶

C. Federal Courts Repeatedly Have Rejected Defendants’ Assertion That the Presumption of Parentage Is “Irrelevant” to Section 301.

Relying solely on the FAM itself, Defendants argue that the common law treatment of both spouses as the legal parents of a child—regardless of whether both share a biological tie to the child—“is irrelevant to whether a child is ‘born . . . of’ his parents for purposes of Section [301], even if it may sometimes remain relevant to determining a child’s legal ‘parents.’” (Mot. at 14.) Defendants’

⁵ Historically, legal parentage was essential to the acquisition of citizenship under the law of derivative citizenship, even when there was a biological connection between father and child. *See, e.g., Guyer v. Smith*, 22 Md. 239, 249 (1864) (stating that children “not born in lawful wedlock . . . under our law [are] nullius filii and . . . not within the provisions of [the citizenship act]”); Collins, *supra*, at 2196-99 (citing historical sources and explaining that “[i]n 1938, as in the 1920s, in the majority of states the only way a father could fully legitimate his child was to marry the mother. Accordingly, by requiring legitimation, the . . . Nationality Act [of 1940] . . . maintained marriage as the key to father-child citizenship transmission in most instances”).

⁶ Defendants’ citation to *Miller v. Albright*, 523 U.S. 420 (1998), and *Nguyen v. INS*, 533 U.S. 53 (2001), are inapposite, as those decisions involved non-marital children who were subject to Section 309, and do not construe Section 301. (*See* Pl. Mot. at 30-31.)

argument is inherently circular: Defendants argue that the FAM policy does not conflict with the presumption of paternity embedded in U.S. law and jurisprudence because the FAM declares that rule “irrelevant” to citizenship determinations. *See, e.g., Kiviti*, 467 F. Supp. 3d at 309 (“Where it is the FAM’s interpretations themselves that are at issue here, this is too thin a reed on which to support the State Department’s argument” regarding burden of proof of biological relationship supposedly required by Section 301). Defendants then extend this logical fallacy by asserting as fact the very issue before the Court, *i.e.*, whether, notwithstanding the near uniform and long-standing acceptance of the presumption of parentage, Section 301 requires proof of a biological relationship between a U.S. citizen parent and his or her child. (Mot. at 14.)

The lack of support for Defendants’ argument is conspicuous but not unexpected given that every court to have considered the argument has rejected it. The courts repeatedly have held that Section 301 was drafted against the backdrop of the common law presumption of parentage, which is “one of the most venerable, persistent, and continuously pervasive in the common law” because of its “effect as a conservator of generally recognized fundamental social values related to the institutions of marriage and family.” *See McMillian v. Heckler*, 759 F.2d 1147, 1153 (4th Cir. 1985); *see, e.g., Jaen*, 899 F.3d at 188 (given absence of any indication that Congress intended to depart from the “centuries-old, common law meaning” of

“parent,” the term, as used in Section 301, “incorporate[s] the longstanding presumption of parentage based on marriage”); *Scales*, 232 F.3d at 1164; *Mize*, 2020 WL 5059253, at *13; *Dvash-Banks*, 2019 WL 911799, at *7. (See also Pl. Mot. at 22-24.) In reaching this conclusion, the courts have rejected Defendants’ assertion that the words “born . . . of parents” in Section 301 reflect a congressional determination to override the presumption. See, e.g., *Kiviti*, 467 F. Supp. 3d at 307-08 (“the phrase ‘born . . . of parents’ must still be viewed against the backdrop of the common law presumption of parentage”).

Despite their protestations to the contrary, Defendants acknowledge that U.S. citizenship law requires proof of a biological relationship only in the absence of marriage: they concede that U.S. citizenship laws treated “marriage as a proxy for a blood relationship,” for when “biological relationships . . . did not exist, it was considered better to presume that they existed than to eliminate the requirement altogether.” (Mot. at 15 (quoting *Abrams & Piacenti*, *supra*, at 658).) This distinction between marital children and non-marital children is embedded in the text and structure of the INA—specifically, the different requirements in Section 301 and Section 309—because the interests in ensuring “the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States,” *Nguyen*, 533 U.S. at 65, are more readily satisfied in the marital context, but not as obviously so in cases involving non-marital children. (See

Pl. Mot. at 30-31.) As a result, courts construing Section 301 have agreed that the section must be viewed in light of Congress’s decision to treat marriage and non-marriage differently for purposes of transmitting U.S. citizenship at birth, and that the statute reflects Congress’s determination to require proof of a biological relationship only for non-marital children. *See, e.g., Jaen*, 899 F.3d at 189 (“[T]he father of a child born out of wedlock was required to establish his parentage through legitimation in order for citizenship to be transmitted” but, “[c]onsistent with the common law presumption, paternity is simply assumed in the case of married parents.”); *Scales* 232 F.3d at 1164.

D. There Is No Basis for Deference to the FAM.

1. *Skidmore* Deference Is Not Warranted.

Having conceded that Section 301 “*can* be read to encompass” children born into a marriage by means of ART (Mot. at 10 (emphasis in original)), Defendants argue that “a tiebreaking factor is the deference owed to th[eir] interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)” (*id.* at 15). No court, however, has accepted Defendants’ invitation to insulate from judicial review the State Department’s preferred interpretation of Section 301. To the contrary, every court to consider the issue has held that the FAM policy is not entitled to deference. *See, e.g., Kiviti*, 467 F. Supp. at 311 (The statutory text “establish[es] unambiguously that § [301](c) does not require a biological relationship between the

child and both parents to be applicable,” and, therefore, “*Skidmore* deference is not warranted.”); *Sabra*, 453 F. Supp. 3d at 320 (affording no deference “because the 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”); (*see also* Pl. Mot. at 33-36).⁷

Courts consistently have declined to defer to the FAM because the State Department’s interpretation of Section 301 lacks the requisite persuasiveness under *Skidmore*. *Skidmore* accords an agency interpretation only the “weight” of its “power to persuade,” 323 U.S. at 140, and, therefore, is not deference at all. *See also Kisor v. Wilke*, 139 S. Ct. 2400, 2443 (2019) (Roberts, C.J., concurring) (*Skidmore* “afford[s] respectful consideration to the expert agency’s views” while “remain[ing] open to competing expert and other evidence supplied in an adversarial setting.”); *id.* at 2428 (Gorsuch, J., concurring) (*Skidmore* created the “rule that an agency’s views about the law may persuade a court but can never control its judgment.”).

⁷ Even were the Court to find Section 301 to be ambiguous, there would be no basis to defer to Defendants’ interpretation because it raises serious constitutional concerns, and “constitutional avoidance trumps *Skidmore* deference.” *Mize*, 2020 WL 5059253, at *15; *cf.*, *Kiviti*, 467 F. Supp. 3d at 312-14; *see also Miller v. Johnson*, 515 U.S. 900, 923 (1995) (“[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.”); *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 226-27 (3d Cir. 2018) (declining to defer to agency interpretation under *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

In applying *Skidmore*, courts consider “the thoroughness evident in [the agency’s] consideration, the validity of [the agency’s] reasoning, [and] its consistency with earlier and later pronouncements.” *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 114 (3d Cir. 2003) (quoting *Skidmore*, 323 U.S. at 140). None of these considerations supports deference to the FAM here. *First*, the FAM lacks the thoroughness and validity *Skidmore* requires. The FAM is neither the product of formal adjudication nor notice-and-comment rulemaking, but rather an internal policy changeable (and changed) at the State Department’s discretion. (Pl. SOF ¶¶ 18-22; *see also id.* 34, 40-42.) As the Third Circuit has explained, an “internal agency manual is not subject to the kind of deliberateness or thoroughness that gives rise to significant deference.” *Ebbert*, 319 F.3d at 115. Decisions in addition to *Kiviti* and *Mize* have rejected the proposition that Defendants’ interpretation of Section 301 is worthy of deference because “the FAM does not even purport to interpret the statute, let alone to apply to the situation at hand regarding a citizenship claim made by an individual inside the territorial United States.” *Jaen*, 899 F.3d at 187 n. 4; *see Scales*, 232 F.3d at 1166 (declining to defer to the FAM under *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because “the statement in the FAM is not specifically an interpretation of § [301] and, importantly, it is not an interpretation ‘arrived at after, for example, a formal adjudication or notice-and-comment rulemaking’”); *see also Vorchheimer v. Philadelphian Owners Ass’n*, 903

F.3d 100, 111 (3d Cir. 2018) (finding that a joint agency guidance letter did not have the “power to persuade” because it “d[id] not purport to parse or define the statutory requirement” or “consider what [the requirement] means in common parlance or in other areas of law” and, thus, could not “overcome the plain meaning of the word” (citations omitted)).⁸

Second, the State Department’s policy lacks the requisite consistency. The State Department changes its interpretation whenever it decides to do so, even when not “occasioned by any corresponding amendments to the law or any other congressional action.” *Dvash-Banks*, 2019 WL 911799, at *5. In an about-face in 2014, the State Department changed its policy to permit a gestational mother who has no genetic relationship to the child to transmit citizenship to the child if she is the child’s legal parent, but not otherwise. *Id.* The State Department considered

⁸ The decisions Defendants cite in support of their request for *Skidmore* deference (Mot. at 15-16) are inapt because they involved agency interpretations that, unlike here, were consistent with Congress’s purpose. For example, in *Kasten v. Saint-Gobain Performance Plastics Corporation*, 563 U.S. 1, 7, 15-16 (2011), the Supreme Court afforded *Skidmore* deference to two federal agencies’ interpretation of the “filed any complaint” provision in the Fair Labor Standards Act. The Court explained that an alternative interpretation “would undermine the Act’s basic objectives” and would be inconsistent with analogous provisions in other federal statutes. *Id.* at 11, 15. In each of the other decisions Defendants cite, the courts similarly found that the agency’s interpretation furthered the relevant statute’s purpose. See *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008); *Hayes v. Harvey*, 903 F.3d 32, 45-46 (3d Cir. 2018) (finding that interpretation by Department of Housing and Urban Development (“HUD”) of enhanced voucher statute was entitled to *Skidmore* deference because it furthered Congress’s “inten[t] to grant enhanced voucher tenants a right to choose to stay in their housing developments,” HUD applied same interpretation “consistently” for “nearly two decades,” and HUD had “sought to codify its interpretation through notice-and-comment rulemaking” that was pending at time of Third Circuit’s decision).

other proposed revisions to its interpretation of Section 301, even though Congress has not changed Section 301 since 1986. *Id.*

Third, contrary to Defendants’ argument that the State Department’s interpretation “reflects . . . its appreciation of the need for ‘uniformity’” (Mot. at 16 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001))), deference to the FAM policy would create a disparity between the State Department’s interpretation and the decisions of all eight federal courts that uniformly have agreed that Section 301 does not include a biological requirement.

2. The State Department’s Interest in Preventing Fraud Does Not Justify Defendants’ Policy.

Defendants contend that the State Department’s general interest in rooting out fraud in citizenship applications and its “specialized experience” in adjudicating them support deferring to the FAM policy under *Skidmore*. (Mot. at 16.) Even if this focus motivates the FAM policy,⁹ Defendants’ argument both misconstrues the basis for, and scope of, any deference and overstates the asserted governmental interest.

Irrespective of whether the FAM policy was designed to address potential fraud concerns, that would not provide license to the State Department to

⁹ The Rule 30(b)(6) testimony of Defendants’ representative in *Dvash-Banks* on which the Motion relies is, at best, equivocal on whether and to what extent concern about fraud in citizenship applications underlies the FAM policy. (Pl. SOF ¶ 61.)

read into Section 301, or otherwise impose, legal requirements that the statute does not contain. *See Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 329 (2014) (affirming “the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate”); *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 495 (3d Cir. 2014) (noting that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms” (alteration in original)). The courts have consistently held that the INA does not require a child born outside the United States during and into the marriage of a U.S. citizen and non-citizen to demonstrate a biological tie to those parents as a condition to recognition of U.S. citizenship at birth. Defendants cannot substitute their own views for that clear authority even if they believe that doing so would assist their ability to address CRBA or passport applications.¹⁰

Moreover, Defendants’ assertion that a biological relationship “requirement is a powerful way to address concerns about fraud” (Mot. at 16)

¹⁰ Defendants’ reliance on *New Jersey Board of Public Utilities v. Federal Energy Regulatory Commission*, 744 F.3d 74 (3d Cir. 2014), is misplaced. That decision did not mention *Skidmore* deference, and the court deferred to the Federal Energy Regulatory Commission because that agency had statutory authority based on its “field of discretion and expertise” to “change any practice that, in its opinion, renders a rate charge, or classification unjust, unreasonable, or discriminatory.” *Id.* at 111 (citing 16 U.S.C. § 824e). Similarly, the Supreme Court’s recognition in *Fiallo v. Bell*, that Congress’s “power over aliens” is entitled to “special judicial deference” has no bearing here because L. Z.-B. is not an alien, and the basis for the State Department’s denial of L. Z.-B.’s CRBA application is not an act of Congress, but a State Department policy based upon its internal FAM. 430 U.S. 787, 792-93 (1977).

exaggerates the need for, and utility of, such a requirement. Here, for example, a biological relationship requirement would not assist the State Department in assessing the accuracy of Allison and Stefania's assertions that L. Z.-B. is their marital child, and that they are, and always have been, L. Z.-B.'s only parents, who have lived with him every day of his life as part of their family. DNA testing would establish merely what Allison and Stefania reported to the State Department: that L. Z.-B. shares a biological connection with Stefania and not Allison. That testing would say nothing about L. Z.-B.'s status as an actual child of their marriage, the extended efforts that they took to bring him into the world, or his close familial links to both his parents, one of whom is a U.S. citizen who met Section 301's residency requirements. In addition, as Defendants concede, in most cases, the State Department requires consular and embassy officials to "investigate carefully," and thus seek DNA testing, only in cases of "doubt" as to whether a child is biologically related to his or her parent. (*See* Mot. at 6.) That the State Department inquires into biological relationships in only a subset of cases is itself proof that Defendants have alternative means to prevent fraud in citizenship adjudications.¹¹

¹¹ Defendants' suggestion that the FAM policy is entitled to deference because it is allegedly "consistent and longstanding" (Mot. at 18) is both factually incorrect and legally irrelevant. As the courts have noted, Defendants have changed that policy at their whim, without any change in the language of the INA. *See Mize*, 2020 WL 5059253, at *3 (noting that the State Department, in 2014, "modified its handbook" but "[n]o amendment to the INA triggered this change"); *Kiviti*, 467 F. Supp. 3d at 302 (same); *Dvash-Banks*, 2019 WL 911799, at *5 (same). Further, as Judge Sullivan observed during oral argument on Defendants' motion to dismiss the initial complaint, "[y]ou can't just say that it's always been that way [T]hat

Defendants’ assertion that the absence of a biological relationship requirement would inhibit their ability to detect fraud because in that event “citizenship claims could be supported merely by documents purporting to show marriages and legal relationships between parents and child” (Mot. at 16) is further undermined by the fact that reliable DNA testing was not available when the INA was passed in 1952, nor when Defendants adopted their purportedly “longstanding interpretation” of Section 301. *See, e.g.,* Jill Adams, *Paternity testing: blood types and DNA*, NATURE EDUCATION 1(1):146 (2008) (“The process of DNA fingerprinting was developed by Alec Jeffreys in 1984, and it first became available for paternity testing in 1988.”). Moreover, the State Department routinely relies on documentary evidence of parentage. The FAM lists birth certificates, marriage licenses, and affidavits—as well as “entry/exit stamps in passports, airline/hotel receipts, travel orders, etc.”—as types of evidence that may be relevant to a showing of paternity, and lists DNA tests last. 8 FAM § 304.1-4.

Nor does this case concern challenges to the propriety of DNA testing or other inquiries in circumstances in which, unlike here, the State Department suspects fraud. The courts’ consistent construction of Section 301 does not limit the State Department’s ability to test the accuracy of any factual representation made in

can’t be the answer.” (May 15, 2019 Conf. Tr. at 34:14-19 (ECF No. 38)); *see also* *Kiviti*, 467 F. Supp. 3d at 311 (“highly dubious” that “general requirement of a biological relationship dates back to 1790”).

a CRBA application or preclude the government from relying on genetic testing when necessary to assess compliance with a requirement of the INA, such as when citizenship claims are premised on a biological relationship under Section 309. As the court made clear in *Sabra*, finding no biological relationship requirement in Section 301 does not preclude the State Department from “request[ing] additional evidence for proof of citizenship.” *Sabra*, 453 F. Supp. 3d at 322; *see, e.g.*, 22 C.F.R. § 51.45; 22 C.F.R. § 51.23(c).¹²

E. Defendants’ Interpretation of Section 301 Undermines the INA’s Object and Purpose.

Defendants misstate Plaintiffs’ position, erroneously asserting that Plaintiffs contend that “their interpretation promotes public policy goals regardless of whether it is faithful to the text of the statute.” (Mot. at 19.) To the contrary, Plaintiffs’ Motion argues that, in addition to the consistency of Plaintiffs’ reading of Section 301 with the statutory text and context—which is all that the Court need consider to resolve Plaintiffs’ Section 1503(a) claim—

¹² Defendants’ purported concern about relying on “the legal parentage laws of more than two hundred countries” also is unavailing. (Mot. at 17.) The State Department routinely looks to state and foreign laws to assess legal relationships. For example, the INA’s definition of “child” specifically requires reference to local parentage rules. 8 U.S.C. § 1101(c)(1) (providing that “child” “includes a child legitimated under the law of the child’s [or father’s] residence or domicile”). And officials may be required to assess whether a child is a citizen under Section 309 by reference to foreign family law. *Id.* § 1409(a)(4)(A); *see, e.g., Iracheta v. Holder*, 730 F.3d 419, 423-27 (5th Cir. 2013) (holding that, because petitioner was legitimated “under the laws of the Mexican state where he resided” by his U.S. citizen father, he was a citizen under Section 309); *In re Reyes*, 17 I. & N. Dec. 512, 515 (B.I.A. 1980) (collecting citizenship cases that turn on application of the family laws of many different countries), *overruled on other grounds by In re Cabrera*, 21 I. & N. Dec. 589 (B.I.A. 1996) (en banc)).

Plaintiffs' position *also* conforms to, and furthers, the purpose of Congress in enacting the INA. (Pl. Mot. at 30-32.) By contrast, the State Department's interpretation of Section 301 undermines a principal goal of statutory interpretation, which "is to actualize legislative intent." *Perri v. Novartis Pharms. Corp.*, 2019 WL 6880006, at *11 (D.N.J. Feb. 21, 2019).

Defendants also ignore that courts have held that construing Section 301 to include a blood relationship requirement would contravene both the statutory text and Congress's object and purpose in enacting the INA, namely to promote family unity. *See, e.g., Solis-Espinoza*, 401 F.3d at 1094 (holding that INA "was intended to keep families together" and "should be construed in favor of family units and the acceptance of responsibility by family members"); *Kiviti*, 467 F. Supp. 3d at 312 ("Inclusion of all children born of two married U.S. citizen parents is fully consistent with the 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.'" (quoting H.R. Rep. No. 85-1199, at 2020 (1957))); *Dvash-Banks*, 2019 WL 911799, at *8 (same); *see also Jaen*, 899 F.3d at 190 ("[P]arentage for purposes of Section [301] is a legal construct that incorporates the common law's enduring respect for the marital family.").

Defendants also contend that "Congress clearly did not intend to freely confer citizenship any time it would facilitate family unity." (Mot. at 19.) Of course

not. But that is not the issue. It is not the INA, but rather the State Department's unilateral policy of imposing on marital children a biological relationship requirement, that creates the disunity Congress sought to avoid. Defendants cannot rationalize the harmful effects of their departure from the statutory text, context, and objective by asserting that "no immigration rule can produce results that are uniformly 'logical' in each and every case." (*Id.* at 20.) And their position cannot justify adopting an interpretation of Section 301 that conflicts with the INA's purpose instead of an interpretation that promotes the statutory objective. *Vooy's v. Bentley*, 901 F.3d 172, 192 (3d Cir. 2018) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982))). Further, Defendants' contention relies on precedent dealing only with non-marital children (who may lack the family unity the INA seeks to promote), not children of a marriage, such as *L. Z.-B.* (Mot. at 20); *see also Nguyen*, 533 U.S. at 70. Indeed, it is only by analogizing Plaintiffs' situation to that of adoption, stepchildren, and non-citizens born out of wedlock—circumstances that are vastly different and comparisons that reflect a disregard for Allison and Stefania's marriage and Plaintiffs' family circumstances—that Defendants endeavor to defend the "differential treatment" resulting from the FAM policy. (Mot. at 20 & n.5.)

The State Department callously attempts to minimize these consequences by pointing to other “avenues through which children may legally reside in the U.S.” (Mot. at 19.) This assertion ignores the special status of the rights attendant to U.S. citizenship at birth.¹³ *See generally Mize*, 2020 WL 5059253, at *6-8 (denial of motion to dismiss claim for lack of subject matter jurisdiction based on naturalization of the plaintiff); *see Elk v. Wilkins*, 112 U.S. 94, 101 (1884) (“The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the constitution[.]”); *id.* at 109 (“To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form.”); *see also Miller*, 523 U.S. at 481 (Breyer, J., dissenting) (stating that “the statutes that automatically transfer American citizenship from parent to child ‘at birth’ differ significantly from those that confer citizenship on those who originally owed loyalty to a different nation”). And Defendants cannot excuse their failure to comply with the INA by contending that other means could rectify the breach. As the Supreme Court stated in *Stanley v. Illinois*, “[t]his Court has not . . . embraced the general proposition that a wrong may be done if it can be

¹³ Courts have identified meaningful differences between legal permanent residence—one alternative avenue suggested by Defendants—and U.S. citizenship at birth. *See, e.g., Dela Torre v. City of Salinas*, 2010 WL 3743762, at *2 (N.D. Cal. Sept. 17, 2010) (“[A]s an alien increases her ties to the United States, by becoming a lawful permanent resident and then applying for citizenship, her constitutional rights increase accordingly.”); *Nikoi v. Att’y Gen. of the U.S.*, 939 F.2d 1065, 1070 (D.C. Cir. 1991) (contrasting constitutional right to retain one’s citizenship, absent voluntary disavowal, with “privilege” of residing permanently in the United States).

undone.” 405 U.S. 645, 647 (1972) (availability of other means to regain custody of children did not excuse potential non-compliance of dependency proceeding with Fourteenth Amendment). Moreover, such alternative “avenues” do not diminish or alleviate the harms created by Defendants’ denial of L. Z.-B.’s right to be recognized as a U.S. citizen at birth.

III. CONCLUSION

For the foregoing reasons and those set out in Plaintiffs’ Motion, Plaintiffs request that the Court deny Defendants’ Motion in full, and grant to Plaintiffs such other and further relief as the Court deems just and proper.

Dated: January 4, 2021

Respectfully Submitted,

/s/ Theodore Edelman

Theodore Edelman (*pro hac vice*)
Jessica M. Klein (*pro hac vice*)
Lauren M. Goldsmith (*pro hac vice*)
Mark A. Makar
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: 212-558-4000

Elizabeth A. Cassady (*pro hac vice*)
SULLIVAN & CROMWELL LLP
1700 New York Avenue N.W.
Washington, D.C. 20006
Telephone: 202-956-6980

Aaron C. Morris (*pro hac vice*)
IMMIGRATION EQUALITY
40 Exchange Place, Suite 1300
New York, New York 10005
Telephone: 212-714-2904

Attorneys for Plaintiffs

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 *Response to Defendants’ Statement of Undisputed Material Facts* in the above-captioned action (“Action”):

1. Disputed in part. Plaintiffs dispute Statement No. 1 to the extent that it implies that the quoted language in the Foreign Affairs Manual (“FAM”) is historically or legally or factually accurate or that Defendants’ interpretations or applications of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 *et seq.*, (“INA”) at issue in the Action are legally supported or correct. Plaintiffs do not dispute that the FAM includes the quoted language.

2. Disputed. Statement No. 2 is overly broad, vague and ambiguous, and is not supported by the evidence Defendants have provided. The FAM provision cited states:

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

Plaintiffs further dispute Statement No. 2 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally or factually accurate.

3. Disputed in part. Plaintiffs dispute Statement No. 3 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct or that Statement No. 3 represents the consistent policy of the State Department before 2014.

4. Disputed in part. Statement No. 4 is not supported by the evidence Defendants have provided. The FAM provision cited states:

- 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.

Plaintiffs further dispute Statement No. 4 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct. Plaintiffs do not dispute (i) that the State Department applies section 309 of the INA, 8 U.S.C. § 1409, ("Section 309") to applications for Consular Reports of Birth Abroad ("CRBA") submitted on behalf of children whom the State Department considers to have been born "out of wedlock"; or (ii) that the State Department applied Section 309 to the application submitted on behalf of L. Z.-B. at issue in this Action. Plaintiffs further dispute that the State Department's application of Section 309 to L. Z.-B.'s CRBA application or to applications of other children born by means of assisted reproductive technology ("ART") to married same-sex couples for a CRBA or U.S. passport is consistent with the INA or the Constitution of the United States.

5. Disputed in part. Plaintiffs dispute Statement No. 5 to the extent that it implies that the quoted language is consistent with the language of section 301 of the INA, 8 U.S.C. § 1401, ("Section 301"). Plaintiffs further dispute Statement No. 5 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct. Plaintiffs do not dispute that the FAM includes the quoted language.

6. Disputed in part. Plaintiffs dispute Statement No. 6 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the

Action are legally supported or correct. Plaintiffs do not dispute that the FAM includes the quoted language.

7. Disputed in part. Plaintiffs dispute Statement No. 7 to the extent that it implies that the quoted language is consistent with the language of Section 301 or that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct. Plaintiffs do not dispute that the FAM includes the quoted language.

8. Disputed in part. Statement No. 8 is not supported by the evidence Defendants have provided. Plaintiffs further dispute Statement No. 8 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct. Plaintiffs do not dispute that the CRBA application form instructs the applicant's parent to indicate whether he or she was "married to the [applicant's] other biological parent when the child was born." Plaintiffs further dispute Statement No. 8 to the extent that it implies that the CRBA application form specifically asks the applicant's parent whether he or she has a biological relationship with the child. *See Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 314 (D. Md. 2020) ("The relevant form does not specifically ask a parent whether he or she has a biological relationship with the child and instead asks only whether the parent was 'married to the child's other biological parent when the child was born.'").

9. Not disputed.

10. Not disputed.

11. Not disputed.

12. Not disputed.

13. Not disputed.

14. Not disputed.

15. Disputed in part. Plaintiffs do not dispute that neither L. Z.-B.'s CRBA nor U.S. passport application was granted. Plaintiffs agree that L. Z.-B.'s CRBA application was denied, but assert that L. Z.-B.'s U.S. passport application was withdrawn.

16. Disputed in part. Plaintiffs do not dispute that the State Department's May 24, 2017 letter included the quoted language, but Plaintiffs dispute Statement No. 16 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct.

17. Disputed in part. Statement No. 17 is not supported by the evidence Defendants have cited. The letter dated May 24, 2017 that was sent to Allison states:

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

The requirements relevant to your circumstances are as follows:

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

Plaintiffs further dispute Statement No. 17 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct.

18. Not disputed.

19. Disputed in part. Plaintiffs dispute Statement No. 19 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct.

20. Disputed in part. Plaintiffs do not dispute that the State Department's November 7, 2017 letter includes the quoted language, but Plaintiffs dispute Statement No. 20 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct.

21. Disputed in part. Plaintiffs dispute Statement No. 21 to the extent that it implies that the quoted language is consistent with the language of Section 301 or that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct. Plaintiffs further dispute Statement No. 21 to the extent

that it implies that the State Department does not have means other than DNA testing to prevent fraud in citizenship adjudications. Plaintiffs do not dispute that the Joint Statement of U.S. Citizenship & Immigration Services (“USCIS”) and the Department of State includes the quoted language.

22. Disputed. Statement No. 22 mischaracterizes the record. During the deposition of Paul Peek, designee of Defendant The United States Department of State, conducted pursuant to Federal Rule of Civil Procedure 30(b)(6), on December 20, 2018, in Washington, D.C., in *Dvash-Banks v. Pompeo*, 2:18-cv-00523, Mr. Peek provided equivocal responses on the subject of fraud in relation to the State Department’s interpretation of Section 301. Excerpts of Mr. Peek’s testimony are attached as Exhibit F to *Defendants’ Motion for Partial Summary Judgment, Exhibit List* (ECF No. 67-4) and as Exhibit A to the *Declaration of Mark A. Makar in Support of Plaintiffs’ Motion for Partial Summary Judgment*, sworn to November 16, 2020 (“Makar Decl.”) Exhibit (“Ex.”) A (ECF No. 66-5). In the portion of Mr. Peek’s testimony excerpted by Defendants, Mr. Peek testified as follows:

Q. Yes. Now, I’m not asking you what’s the basis. I’m asking you what’s the rationale for the requirement that the State Department reads into section 301 that there must be a biological relationship between a U.S. citizen parent and a child?

A. Within the scope of INA 301 and 309, it is the language of the statutes.

Q. But what is the – is there a fundamental purpose for which the State Department believes this is a requirement?

A. I'm not sure I understand your question.

Q. Well, is it, for example, a concern about fraud?

A. Concern about fraud in what context?

Q. Fraud in either the process or pursuit of U.S. citizenship for children.

A. Yes, the department is concerned about fraud in the application for documentation of U.S. citizenship.

(ECF No. 67-4, at 234:5-24.) Mr. Peek further testified as follows:

Q. So do concerns about preventing fraud have any relevance to the way that the State Department interprets section 301 of the INA to require a biological relationship between the U.S. citizen parent and a child?

A. The primary concern is to be compliant with the law. The secondary concern is to make sure that fraud is not taking place in how people are applying under the law.

(ECF No. 67-4, at 236:4-12.) Mr. Peek further testified as follows:

Q. 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.

(Makar Decl. Ex. A, at 317:2-8.) Plaintiffs further dispute Statement No. 22 to the extent that it implies that Defendants' interpretations or applications of the INA at issue in the Action are legally supported or correct.

Dated: January 4, 2021

Respectfully Submitted,

/s/ Theodore Edelman

Theodore Edelman (*pro hac vice*)

Jessica M. Klein (*pro hac vice*)

Lauren M. Goldsmith (*pro hac vice*)

Mark A. Makar

SULLIVAN & CROMWELL LLP

125 Broad Street

New York, New York 10004

Telephone: 212-558-4000

Elizabeth A. Cassady (*pro hac vice*)

SULLIVAN & CROMWELL LLP

1700 New York Avenue N.W.

Washington, D.C. 20006

Telephone: 202-956-6980

Aaron C. Morris (*pro hac vice*)

IMMIGRATION EQUALITY

40 Exchange Place, Suite 1300

New York, New York 10005

Telephone: 212-714-2904

Attorneys for Plaintiffs

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 *Supplemental Statement of Undisputed Material Facts*:

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.)

2. 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.)

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

4. Allison and Stefania took steps through the use of Assisted Reproductive Technology (“ART”) to conceive their children. (*See* Stip. ¶¶ 14, 22.)

5. Allison and Stefania registered L. Z.-B.’s birth with the Lambeth Register Office in England, 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.)

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

7. 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.)

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

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

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

11. Allison and Stefania registered M. Z.-B.'s birth with the Lambeth Register Office in England, 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.)

12. Allison and Stefania are the parents identified on M. Z.-B.'s birth certificate. (Stip. ¶ 27.)

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

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

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

16. 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.)

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

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

18. The Foreign Affairs Manual (“FAM”) is an internal, publicly-available State Department document. (Stip. ¶ 35.)

19. 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*, sworn to November 16, 2020, (“Makar Decl.”) Exhibit (“Ex.”) A (ECF No. 66-5) (*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 *Dvash-Banks v. Pompeo*, 2:18-cv-00523 (“*Dvash-Banks*”)), at 244:13-18.)

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

21. The State Department acknowledges that the FAM policies regarding recognition of U.S. citizenship include requirements not specifically set out in the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 *et seq.*, (“INA”). (Makar Decl. Ex. A, at 103:5-11; 104:8-11.)

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

23. The State Department expects embassy and consular officials to follow State Department policies and FAM guidance issued by the State Department in adjudicating applications for Consular Reports of Birth Abroad (“CRBA”) submitted on behalf of children born through the use of ART. (Stip. ¶ 39.)

24. 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.)

25. 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.)

26. 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.)

27. 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.)

28. 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.)

29. 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.)

30. The State Department interprets section 309 of the INA, 8 U.S.C. § 1409, 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.)

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

32. 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.)

33. 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.)

34. 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.)

35. 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.)

36. 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.)

37. 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.)

38. 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.)

39. 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.)

40. 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.)

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

42. 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.)

43. 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.)

L. Z.-B.’S CRBA APPLICATION

44. During their visit to the United States embassy in London, England (“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.)

45. 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.)

46. 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.)

47. 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.)

48. 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.)

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

50. 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.)

51. 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.)

52. 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.)

53. 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.)

54. 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.)

55. 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.)

56. In adjudicating L. Z.-B.'s 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.)

57. 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.)

58. 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.)

59. 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.)

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

61. Paul Peek, The State Department's designee pursuant to Federal Rule of Civil Procedure 30(b)(6) in *Dvash-Banks*, equivocated as to whether a rationale for its interpretation of Section 301 is a concern that interpreting Section 301 as not requiring a biological relationship between an applicant for a CRBA who was born outside the United States and the child's U.S. citizen parent would create or increase the risk of fraud in connection with applications for recognition of U.S. citizenship. (Makar Decl. Ex. A, at 317:2-8; *Defendants' Motion for Partial Summary Judgment*,

Exhibit List, Exhibit F (Excerpts from the Deposition of Paul Peek) (ECF No. 67-4),
at 234:5-24; 236:4-12.)

Dated: January 4, 2021

Respectfully Submitted,

/s/ Theodore Edelman

Theodore Edelman (*pro hac vice*)

Jessica M. Klein (*pro hac vice*)

Lauren M. Goldsmith (*pro hac vice*)

Mark A. Makar

SULLIVAN & CROMWELL LLP

125 Broad Street

New York, New York 10004

Telephone: 212-558-4000

Elizabeth A. Cassady (*pro hac vice*)

SULLIVAN & CROMWELL LLP

1700 New York Avenue N.W.

Washington, D.C. 20006

Telephone: 202-956-6980

Aaron C. Morris (*pro hac vice*)

IMMIGRATION EQUALITY

40 Exchange Place, Suite 1300

New York, New York 10005

Telephone: 212-714-2904

Attorneys for Plaintiffs

SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: 212-558-4000

**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
-against-	:	
	:	Hon. Kevin McNulty
The UNITED STATES	:	Oral Argument Requested
DEPARTMENT OF STATE and	:	
MICHAEL R. POMPEO in his official	:	Motion Date: February 16, 2021
capacity as Secretary, U.S. Department	:	
of State,	:	
	:	
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 January 4, 2021, I caused a copy of *Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Partial Summary Judgment, Plaintiffs’ Response to Defendants’ Statement of Undisputed Material Facts, Plaintiffs’ Supplemental Statement of Undisputed Material Facts*, 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: January 4, 2021

/s/ Mark A. Makar