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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

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

Defendants.

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

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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

PRELIMINARY STATEMENT

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

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

3. At birth, both E.J. and A.J. qualified for United States citizenship pursuant to Section 301(g) of the Immigration and Nationality Act (“INA”) (codified at 8 U.S.C. § 1401(g)). That clause entitles a person born abroad to citizenship at birth if one of that person’s married parents is a United States citizen and the other is a foreign national, as long as the citizen parent satisfies certain statutorily prescribed periods of residency in the U.S. Andrew is a U.S. citizen who has lived

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

1 in the United States for over twenty-four years, and so clearly satisfies the residency
2 requirements of Section 301(g). Because Andrew and Elad were married to each
3 other when E.J. and A.J. were born, E.J. and A.J. have been U.S. citizens since birth
4 under Section 301(g).

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

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

23 6. The State Department’s failure to recognize and give effect to the
24 marriage between Andrew and Elad also denies E.J. the rights and privileges that
25 accompany U.S. citizenship, including the right to reside permanently in the U.S.,
26 the right to obtain a U.S. passport, and, when he is older, the right to run for political
27 office. Because the State Department does not recognize E.J.’s U.S. citizenship, he
28 cannot visit or live in the United States freely as other members of his family can.

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

11 8. The State Department's policy is not only wrong and harmful, it is also
12 contrary to the INA as well as the guarantee of due process enshrined in the Fifth
13 Amendment. To the extent that the State Department's policy was adopted before
14 the Supreme Court's recent precedents guaranteeing equality to same-sex married
15 couples and their families, its continued enforcement violates that precedent. The
16 Supreme Court has made clear that the Constitution requires that same-sex marriages
17 receive the same legal effects and respect as opposite-sex marriages. The State
18 Department's policy, or at least its application to E.J., violates that mandate by
19 restricting eligibility for citizenship under Section 301 of the INA solely to children
20 whose parents are in opposite-sex marriages. These violations create real and
21 significant hardships for the Dvash-Banks family and others like them.

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

1 State Department's unlawful policy to stand.

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

5 **THE PARTIES**

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

9 12. Plaintiff E.J. is two years old. He was born in Mississauga, Ontario,
10 Canada, and currently resides with his parents Andrew and Elad and twin brother
11 A.J. in Los Angeles—although, as explained below, E.J.'s permission to remain in
12 the U.S. recently has expired.

13 13. Andrew brings this action in his individual capacity and on behalf of
14 his son E.J.

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

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

24 **JURISDICTION AND VENUE**

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

26 17. This Court is authorized to issue a declaratory judgment pursuant to
27 28 U.S.C. §§ 2201 and 2202.

28 18. This Court is authorized to issue a judgment and injunctive relief

1 pursuant to 5 U.S.C. § 702.

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

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

5 **STATUTORY AND REGULATORY BACKGROUND**

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

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

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

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

27 24. For unwed fathers, Section 309(a) specifies, in part, that certain
28 provisions of Section 301—including Section 301(g)—“shall apply as of the date of

1 birth to a person born out of wedlock if—(1) a blood relationship between the person
2 and the father is established by clear and convincing evidence.” In addition, Section
3 309(a) requires that, for citizenship under Section 301 to be available to an unwed
4 father’s child, the father must have (2) acquired U.S. nationality by the time the
5 person seeking citizenship was born, (3) agreed in writing to provide financial
6 support to that person until the age of 18, and (4) while the person is under 18 years
7 old, (a) legitimated the person under the law of that person’s residence or domicile,
8 (b) acknowledged paternity in writing under oath, or (c) had paternity established by
9 a court of competent jurisdiction.

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

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

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

26 28. Congress has made clear that the legislative intent behind the INA
27 should be construed liberally because the INA was designed to make it easier—not
28 harder—for families of citizens and non-citizens to stay together. According to

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

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

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

12 30. As the Supreme Court has recognized, same-sex couples have long
 13 been subjected to illegal institutional discrimination and social stigmatization. The
 14 Supreme Court’s precedent makes clear that the Constitution compels equal
 15 protection and recognition of, and respect for, the rights of same-sex spouses,
 16 including their right to have autonomy over the most personal and intimate of
 17 choices—decisions about starting a family and sustaining a partnership in which to
 18 raise and nurture a child. Accordingly, the State Department must recognize the
 19 “equal dignity of same-sex marriages.” *United States v. Windsor*, 133 S. Ct. 2675,
 20 2693 (2013).

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

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

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

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

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

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

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

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

relevant portion of the appendix is appended to this Complaint at Exhibit A.)

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

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

FACTUAL ALLEGATIONS

A. The Dvash-Banks Family

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

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

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

42. Then, as now, Canadian law recognizes the validity and equality of

1 same-sex marriages. Although Andrew and Elad wanted to move to the United
2 States to start their family in California, where four of Andrew's five siblings live
3 with their families, at the time of their marriage in August 2010, the Defense of
4 Marriage Act had not yet been ruled unconstitutional by the Supreme Court. The
5 Defense of Marriage Act precluded the United States government from recognizing
6 the validity of Andrew and Elad's marriage, and therefore barred Elad from
7 obtaining permanent residence through his marriage to Andrew.

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

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

15 45. In February 2016, the surrogate became pregnant with one embryo
16 created using sperm from Andrew and one embryo created using sperm from Elad.
17 Andrew and Elad intended to be the sole parents of the resulting children.

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

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

1
2 **B. The Application of the State Department's Policy to the Dvash-**
3 **Banks Family**

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

8 49. After hours of waiting, Andrew and Elad finally spoke with a consular
9 official. Notwithstanding Andrew's U.S. citizenship, his status as Elad's husband,
10 and his status as a parent of both E.J. and A.J., the official informed Andrew and
11 Elad that further questions would be required. The official then began to inquire
12 into the highly personal details of how Andrew and Elad—a married couple—had
13 children together. The official asked how the spouses had come to create fertilized
14 embryos with their sperm, the identity of the egg donor, and which spouse had
15 provided sperm for which child. Andrew and Elad had planned to keep the genetic
16 identity of their children private so that both children would feel equally connected
17 to each of their parents. In the hope of ensuring that the U.S. government would
18 recognize their children's citizenship, however, they disclosed the genetic links they
19 had to E.J. and A.J.

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

26 51. Andrew and Elad left the consulate shocked, humiliated, and hurt.
27 They were also deeply offended by the ramifications of what they had heard. The
28 U.S. government did not recognize Andrew as the parent of his son E.J., regardless
of what E.J.'s birth certificate and applicable Canadian law said, and regardless of

1 the daily reality of Andrew and E.J.'s parent-child relationship.

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

11 53. The Letter denying E.J.'s application, addressed to Andrew, stated that
12 "after careful review of the evidence you submitted with your child's application, it
13 has been determined that his claim to U.S. citizenship has not been satisfactorily
14 established, as you are not his biological father." The Letter went on to reference
15 the "Immigration and Nationality Act (INA) of 1952," which according to the Letter
16 "requires among other things, a blood relationship between a child and the U.S.
17 citizen parent in order for the parent to transmit U.S. citizenship." The letter did not
18 include any further citation to more specific statutory provisions or authority.

19 54. The Letter provided Andrew and E.J. no mechanism to appeal the State
20 Department's denial, and merely suggested Andrew "contact the nearest office of
21 U.S. Citizenship and Immigration Services regarding [E.J.'s] citizenship status."

22 55. Andrew reached out to his representative, Congressman Ted Lieu, for
23 assistance, and Congressman Lieu's office contacted the State Department. In an
24 October 2, 2017 letter to Congressman Lieu, the State Department's Office of
25 American Citizen Services and Crisis Management also failed to cite any statute or
26 regulation to explain the reasons for the Dvash-Banks family's situation and the
27 denial of a Consular Report of Birth Abroad and U.S. passport for E.J. (A copy of
28 this letter is appended to this Complaint as Exhibit D.) The State Department's

1 Office of American Citizen Services and Crisis Management merely suggested that
2 Andrew and Elad find “an immigration lawyer who can help explain the avenues”
3 through which E.J. could “acquire citizenship through naturalization,” or that they
4 should “consider applying for a certificate of citizenship directly from USCIS.”

5 56. The State Department’s Office of American Citizen Services and Crisis
6 Management did not explain how, or why, USCIS would recognize that E.J. had
7 acquired citizenship at birth when the consulate had not. Furthermore, the USCIS
8 application for a certificate of citizenship requires the applicant to have “at least one
9 biological or adoptive U.S. citizen parent.” *Instructions for Application for*
10 *Certificate of Citizenship*, OMB No. 1615-0057. Because E.J. does not have at least
11 one biological or adoptive U.S. citizen parent, Andrew and Elad could not complete
12 an application for citizenship on E.J.’s behalf that would satisfy the requirements of
13 USCIS.

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

21 58. Andrew, Elad, E.J., and A.J. all live in Los Angeles, California
22 together. Both Andrew and Elad work in Los Angeles and they have no intention of
23 moving from Los Angeles. They must keep their home in Toronto as a contingency
24 because although Andrew and A.J. both have U.S. Citizenship and Elad has
25 permanent residency in the U.S., immigration officials would allow E.J. to enter the
26 United States only on a tourist visa. The stay authorized upon that entry expired on
27 December 23, 2017. All of Andrew and Elad’s professional, personal, and familial
28 commitments are in constant jeopardy of being undone if the Department of

1 Homeland Security deports E.J.

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

10 60. Andrew and Elad have also suffered indignity and emotional pain
 11 because the U.S. government recognizes neither their marriage nor their parental
 12 rights in determining whether their children were born in or out of wedlock.
 13 According to the U.S. government, Andrew and Elad could never have children in
 14 wedlock because they could not both be married to each other and be the biological
 15 parents of the same child. As a result, the U.S. government is undermining,
 16 disrespecting, and rendering unequal the intimate relationship between same-sex
 17 married couples and the children they have and raise together within family units
 18 founded on the sanctity of marriage. They also worry about the obvious inequity the
 19 State Department's decision causes between their twin sons, the impact on E.J. and
 20 A.J. of their different citizenship status and the awareness that the U.S. government
 21 considers them illegitimate notwithstanding their parents' valid marriage.

22 **C. The State Department Erroneously Deemed E.J. to Have Been**
 23 **Born "Out of Wedlock"**

24 61. As alleged herein, E.J. acquired U.S. citizenship at birth under
 25 Section 301(g) of the INA. Pursuant to Section 301(g), a U.S. citizen at birth
 26 includes:

27 a person born outside the geographical limits of the United States and
 28 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.

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

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

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

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

65. The State Department's policy and its application to E.J. are unconstitutional because they violate E.J.'s and Andrew's right to due process under the Fifth Amendment of the Constitution. As discussed above, the State Department refuses to apply Section 301(g) of the INA to E.J. based on its erroneous and

1 demeaning classification of him as a child born out of wedlock. Apparently on that
2 basis alone, it refuses to recognize E.J.’s citizenship.

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

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

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

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

25 70. Although the State Department’s policy may in theory apply to
26 marriages between spouses of opposite sexes, its overwhelming effect is to deprive
27 spouses in same-sex marriages—and their children—of fundamental rights and
28 equal dignity as citizens under the law. The fact that *some* opposite-sex married

1 couples *may* use assisted reproductive technology to conceive a child does not
 2 change the discriminatory nature or harmful effects of the government's policy on
 3 same-sex couples.

4 71. In addition to discriminating against E.J., the State Department's policy
 5 discriminates against Andrew by denying him the ability to transmit citizenship to a
 6 child conceived with his husband's sperm, born during their marriage, and raised as
 7 a child of that marriage.

8 **COUNT I — DECLARATORY JUDGMENT**
 9 **THE STATE DEPARTMENT'S POLICY VIOLATES THE DUE PROCESS**
 10 **GUARANTEE OF THE FIFTH AMENDMENT**

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

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

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

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

25 76. Defendants have violated and continue to violate the Fifth Amendment
 26 of the United States Constitution by enforcing a policy that excludes U.S. citizens in
 27 same-sex marriages from conferring citizenship pursuant to Section 301, while
 28 restricting access to citizenship under that provision to the children of opposite-sex
 married couples. Defendants' policy has deprived and continues to deprive Plaintiffs

1 of their rights to acquire and confer citizenship at birth pursuant to INA Section 301.
 2 As a result of Defendants' policy, Plaintiffs have suffered, and will suffer,
 3 irreparable harm to their protected interest in conferring, and having recognized,
 4 E.J.'s U.S. citizenship.

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

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

20 79. Plaintiffs have no adequate remedy at law.

21 **COUNT II — ADMINISTRATIVE PROCEDURE ACT**

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

24 81. Plaintiffs have suffered a "legal wrong because of agency action."
 25 5 U.S.C. § 702.

26 82. The Administrative Procedure Act bars any agency action that is
 27 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
 28 law." 5 U.S.C. § 706(2)(A).

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

5 84. Plaintiffs have suffered and continue to suffer legal wrongs because of
6 the U.S. Embassy's decision to deny the Consular Report of Birth Abroad
7 application submitted on behalf of E.J.

8 85. Plaintiffs have exhausted all administrative remedies available to them
9 as of right.

10 86. Plaintiffs have no other recourse to judicial review other than this
11 action.

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

15 88. Plaintiffs have no adequate remedy at law.

16 **COUNT III — DECLARATION THAT E.J. D.-B. IS A U.S. CITIZEN**

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

19 90. 8 U.S.C. § 1503(a) authorizes this Court to make a *de novo* judgment
20 as to the citizenship status of E.J.

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

24 92. Andrew and Elad were legally married to each other by a judge in
25 Canada on August 19, 2010. They have been married to each other continuously
26 since that date.

27 93. Their sons, A.J. and E.J., were born on September 16, 2016 in
28 Mississauga, Canada, during Andrew's and Elad's marriage.

1 94. Andrew and Elad are E.J.'s parents. They are identified as E.J.'s
2 parents on his birth certificate and recognized as his parents under Canadian law.

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

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

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

1 Dated: January 14, 2019

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