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

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

Plaintiffs,

v.

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

Defendants.

Civil Action No. 1:19-cv-3331-MLB

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Redacted)

I. PRELIMINARY STATEMENT

1. Plaintiff S.M.-G. is the infant daughter of two married U.S. citizens, Plaintiffs James Derek Mize and Jonathan Daniel Gregg. In almost all cases, the U.S. government will recognize a child born to two married U.S. citizens as a citizen at birth. But not S.M.-G. Because she is the child of two men, the U.S. Department of State evaluated S.M.-G.'s citizenship under the standards only applicable to children "born out of wedlock" and refused to recognize S.M.-G.'s U.S. citizenship. The State

Department's policy of treating children born to married same-sex couples and one of their legal parents as strangers is wrong and hurts families. It is also unlawful. The State Department's unjust policy and practices should be enjoined because they violate the Immigration and Nationalization Act (INA), unconstitutionally disregard the dignity and equality of the marriages of same-sex couples, and unlawfully discriminate against children simply because their parents are a same-sex couple.

2. Mr. Gregg and Mr. Mize are S.M.-G.'s parents. They brought her into the world via gestational surrogacy using Mr. Gregg's sperm and an anonymously donated egg, and she was born in the summer of 2018, during Mr. Gregg and Mr. Mize's marriage, in England. The medical staff immediately handed S.M.-G. to one of her fathers, Mr. Mize, and the other, Mr. Gregg, cut the umbilical cord. S.M.-G.'s United Kingdom birth certificate correctly identifies Mr. Mize and Mr. Gregg—and only Mr. Mize and Mr. Gregg—as her parents.

3. S.M.-G. qualified as a U.S. citizen at birth pursuant to Section 301(c) of the INA, codified at 8 U.S.C. § 1401(c). Under that provision, a person born outside the United States to two married U.S. citizens, at least one of whom has resided in the United States at any time, is a national and citizen of the United States at birth. Mr. Mize was born and raised in the United States. Mr. Gregg was born in London to a married U.S. citizen, and—like his daughter—has been a citizen since

birth. Mr. Gregg also resided in the United States prior to S.M.-G.'s birth. Because S.M.-G. is the child of two married U.S. citizens who have resided in the United States, she was a United States citizen at birth.

4. The State Department, however, has wrongly refused to recognize S.M.-G.'s U.S. citizenship. State Department officials at the U.S. Embassy in London refused to consider S.M.-G.'s citizenship under Section 301(c). Instead, the State Department erroneously applied two sets of more stringent requirements: (i) Section 309 of the INA, codified at 8 U.S.C. § 1409, which applies to the children of unmarried parents, and (ii) Section 301(g), which applies only if one of the parents is a noncitizen. In doing so, State Department officials failed to acknowledge the validity of Mr. Mize and Mr. Gregg's marriage, deemed S.M.-G. to have been "born out of wedlock," and treated Mr. Mize as if he were not S.M.-G.'s father.

5. This was not an aberration or the unsanctioned conduct of a single embassy employee. To the contrary, it is State Department policy to disregard the relationship between a child and his or her non-biological parent—a policy that leads the State Department to *routinely* refuse to recognize the lawful marriages of same-sex couples, and classify their children as non-marital children. A similarly-situated different-sex couple and their baby would not have been treated the same way.

6. Pursuant to agency policy, the State Department applied the requirements of Sections 309 and 301(g) that govern when an unwed father has a child with a noncitizen. It then determined that S.M.-G. is not a U.S. citizen because her U.S.-citizen biological parent, Mr. Gregg, had not lived in the United States long enough prior to S.M.-G.'s birth to meet Section 301(g)'s five-year residency requirement. This was wrong, discriminatory, and a violation of Plaintiffs' statutory and constitutional rights.

7. The State Department's unlawful policy also put the Mize-Gregg family at real risk. The State Department has denied S.M.-G. the rights and privileges of U.S. citizenship, including most urgently the right to reside permanently in the United States with her U.S.-citizen parents.

8. The State Department's policy also stigmatize and demean the Mize-Gregg family by refusing to recognize and give effect to Mr. Mize and Mr. Gregg's marriage, denying the reality of the father-daughter relationship between an infant and both of her fathers, labeling S.M.-G. a non-marital child, and singling the family out for government-sponsored discrimination. State Department policy unlawfully denies that the Mize-Gregg family is a family at all.

9. Plaintiffs seek a declaration that S.M.-G. has been a U.S. citizen since birth, an order instructing the State Department to issue her a passport immediately,

and declaratory and injunctive relief prohibiting the State Department from discriminating against same-sex couples and their children in violation of the INA and the United States Constitution.

II. THE PARTIES

10. Plaintiff James Derek Mize is a 38-year-old U.S. citizen who was born and raised in the Jackson, Mississippi area.

11. Plaintiff Jonathan Daniel Gregg is a 38-year-old U.S. citizen who was born in London, England. Mr. Gregg's mother is a U.S. citizen who was born and raised in New York City, and whose family has been in this country for generations. In the late 1960s, Mr. Gregg's mother moved to the United Kingdom, where she met Mr. Gregg's father, a U.K. citizen. Mr. Gregg's parents married in 1978, and Mr. Gregg was born in 1981. Mr. Gregg and his sister were raised in London, with frequent trips to the United States to visit family. As the child of a U.S. citizen and long-time resident who was born during his parents' marriage, Mr. Gregg has been a U.S. citizen since birth.

12. Plaintiff S.M.-G.[1] is the daughter of Mr. Gregg and Mr. Mize. S.M.-G. was born in 2018 in Huntingdon, a small town in Cambridgeshire, England.

[1] Pursuant to Federal Rule of Civil Procedure 5.2(h), S.M.-G. waives the privacy protections concerning her full name afforded by Federal Rule of Civil Procedure 5.2(a).

13. Defendant Michael R. Pompeo is named in his official capacity as Secretary of State. Defendant Pompeo is the head of the U.S. Department of State and responsible for setting and overseeing implementation of the policies and procedures employed by the agency and all its various subdivisions. Under Section 104(a) of the INA, the Secretary of State is "charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to . . . the determination of nationality of a person not in the United States." 8 U.S.C. § 1101(a). Defendant Pompeo's address is Department of State, 2201 C Street NW, Washington, DC 20520.

14. Defendant the U.S. Department of State is an agency of the U.S. government that is responsible for, among other things, operating U.S. overseas diplomatic missions and embassies. In particular, the State Department sets the policies by which U.S. embassy employees determine whether to issue a Consular Report of Birth Abroad ("CRBA") or a passport, and whether to recognize a child of one or more U.S. citizens as a U.S. citizen. The State Department's address is 2201 C Street NW, Washington, DC 20520.

III. JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over this Complaint pursuant to 28 U.S.C. § 1331 (federal question), 8 U.S.C. § 1503(a) (*de novo* proceedings for

declaration of United States nationality), and 28 U.S.C. §§ 2201-2202 (declaratory judgment). This Court also has jurisdiction to review final agency action pursuant to 5 U.S.C. § 702 (Administrative Procedures Act).

16. Venue is proper in the Northern District of Georgia under 28 U.S.C. § 1391(e)(1)(C) and 8 U.S.C. § 1503(a) because Plaintiffs reside in this District.

IV. THE STATUTORY SCHEME: BIRTHRIGHT CITIZENSHIP UNDER THE INA

17. Citizenship in the United States can be acquired through birth or naturalization. Pursuant to the "Citizenship Clause" of the Fourteenth Amendment, citizenship is acquired at birth by being born in the United States. Persons born outside the United States acquire citizenship at birth only as provided by the INA. Persons who do not acquire citizenship at birth may acquire citizenship only through naturalization.

18. Section 301 of the INA sets out the categories of persons who "shall be nationals and citizens of the United States at birth." Section 301 has long been recognized as applicable to any person whose parents were lawfully married when he or she was born.

19. As relevant here, under Section 301(c), a baby born abroad to married parents is a U.S. citizen at birth when both parents are U.S. citizens and one of them has resided in the U.S. at any point prior to the baby's birth. *See* 8 U.S.C. § 1401(c)

(providing for the citizenship at birth of "a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person").

20. Section 301 does not require a biological relationship between the child and both of his or her married parents. The INA does not expressly define "parents" or "born . . . of parents" as those terms are used in Section 301. Rather, it incorporates the fundamental common law principle that a child born to married parents is presumed to be a marital child. *See Jaen v. Sessions,* 899 F.3d 182, 186 (2d Cir. 2018) (under Section 301, "a child born into a lawful marriage is the lawful child of those parents, regardless of the existence or nonexistence of any biological link"); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093 (9th Cir. 2005) (the INA does "not require a blood relationship for citizenship, other than the requirement under [8 U.S.C.] § 1409 applicable only to children born out of wedlock"); *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) ("A straightforward reading of [8 U.S.C.] § 1401 indicates, however, that there is no requirement of a blood relationship."); *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799, * 7 (C.D. Cal. Feb. 21, 2019) ("Section 301 does not require a person born during their parents' marriage to

demonstrate a biological relationship with both of their married parents"), appeal docketed May 7, 2019, No. 19-55577 (9th Cir.).

21. In contrast to Section 301, Section 309 sets forth very different requirements for a child "born out of wedlock" to be a citizen at birth. The child of an unwed father is a U.S. citizen at birth only if he or she can satisfy the several requirements of Section 309(a) and, as applicable, the additional requirements of Section 301(c), (d), (e) or (g). The first requirement of Section 309(a) is that "a blood relationship between the person and the father is established by clear and convincing evidence." 8 U.S.C. § 1401(a)(1).

22. For a baby born abroad to an unwed U.S. citizen parent and a non-citizen parent, Section 309 also requires the child to meet the requirement of Section 301(g) that the citizen parent was physically present in the U.S. for at least five years prior to the baby's birth (at least two of which must be after the parent reached the age of fourteen).

V. THE STATE DEPARTMENT'S SYSTEMATIC MISCLASSIFICATION OF CHILDREN BORN TO MARRIED SAME-SEX COUPLES AS "BORN OUT OF WEDLOCK"

23. Chapter 8 of the State Department's Foreign Affairs Manual ("FAM") is entitled "Passports and Consular Reports of Birth Abroad," and sets out State Department policy concerning the citizenship at birth of a person born outside the

United States, and the circumstances under which it will issue a CRBA indicating that a person born abroad is a U.S. citizen.

24. The State Department describes the FAM and the associated Foreign Affairs Handbooks ("FAHs") as

> a single, comprehensive, and authoritative source for the Department's organization structures, policies, and procedures that govern the operations of the State Department, the Foreign Service and, when applicable, other federal agencies. The FAM (generally policy) and the FAHs (generally procedures) together convey codified information to Department staff and contractors so they can carry out their responsibilities in accordance with statutory, executive and Department mandates.

See fam.state.gov (last visited July 22, 2019).

25. The FAM sets out State Department policies and procedures, but is not the product of notice-and-comment rulemaking, congressional action, or formal adjudication.

26. According to the State Department, "If the U.S. embassy or consulate determines that the child acquired U.S. citizenship at birth, a consular officer will approve the CRBA application and the Department of State will issue a CRBA . . . in the child's name. According to U.S. law, a CRBA is proof of U.S. citizenship[.]" U.S. State Dep't., *Birth of U.S. Citizens Abroad*,

https://travel.state.gov/content/travel/en/international-travel/while-abroad/birth-abroad.html (last visited July 22, 2019).

27. Section 301 of the INA—unlike Section 309—does not require a biological or "blood relationship" between a child and both of his or her parents. Contrary to the plain language of the statute, however, the State Department has adopted a policy of requiring a "biological" relationship between both married parents and their child in order for the child's eligibility for citizenship to be evaluated under Section 301. In particular, the FAM defines being born "in wedlock" to mean that "the child's biological parents were married to each other at the time of the birth of the child." 8 FAM § 304.1-2.

28. In keeping with this definition, it is State Department policy to evaluate whether a child is a U.S. citizen under Section 301 only if the child has a "biological" relationship with both married parents, and under Section 309 if the child does not have a "biological" relationship with both married parents. The State Department deems a man to have a "biological" relationship with his child only if he is the child's genetic father. 8 FAM § 301.4-1(D)(1)(c).

29. While it is the State Department's stated policy that "[c]hildren born in wedlock are generally presumed to be the issue of that marriage," 8 FAM § 301.4-1(D)(1)(d), in practice, only the children of different-sex couples benefit from that

presumption due to the State Department's discriminatory policy and practices. The reality is that the State Department does not apply this established presumption to the children of married same-sex couples.

30. The State Department does not generally require specific evidence documenting a biological relationship between parents and their children. Rather, State Department policy expressly leaves it up to the subjective judgment of consular officials to determine whether and when "doubt arises that the U.S. citizen 'parent' is biologically related to the child." 8 FAM § 301.4-1(D)(1)(d).

31. On information and belief, State Department officials are highly unlikely to ask different-sex parents who are identified as legal parents (e.g., on a child's birth certificate) if their child is, in fact, biologically related to both legal parents. In contrast, same-sex parents will always trigger an investigation, and consular officials routinely ask same-sex parents for specific evidence of a biological tie and/or about the use of assisted reproductive technology.

32. On information and belief, the children of married different-sex parents are not routinely classified as non-marital children and subjected to the citizenship requirements of Section 309, even when those children are not, in fact, biologically related to both parents.

33. The State Department's policy of requiring a "biological" relationship between a child and both of his or her married parents misclassifies children born to married same-sex couples as "born out of wedlock." This policy categorically excludes the children of same-sex couples from the marital presumption embodied in Section 301. The State Department thus disregards the parents' valid marriages, ignores the legal and parental rights of non-biological parents, demeans the relationship between the child and his or her non-biological parent, and destabilizes families. It also disenfranchises U.S. citizen children of birthright citizenship.

VI. CONSTITUTIONAL RIGHTS OF SAME-SEX COUPLES AND THEIR CHILDREN

34. As the Supreme Court has recognized, excluding same-sex couples and their children from the rights and protections associated with marriage is unconstitutional. The Court's precedents have made clear that constitutional guarantees of liberty and equality protect same-sex couples as they make choices central to individual dignity and autonomy, including the choice of an intimate life partner, the choice to marry, and the choice to bring children into their family.

35. In *United States v. Windsor*, 570 U.S. 744 (2013), the Supreme Court recognized that withholding spousal protections from married same-sex couples violated their equal protection and due process rights as guaranteed by the Fifth Amendment. The Constitution mandates that the federal government respect the

equal dignity of the marriages of same-sex couples and extend to them equal treatment and recognition across the full range of federal programs and protections. In addition to infringing the constitutional rights of adults, denying federal marital protections to the families formed by same-sex couples humiliates their children, "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 570 U.S. at 772.

36. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court struck down state laws barring same-sex couples from marrying and having their marriages equally recognized because such laws violated their equal protection and due process rights as guaranteed by the Fourteenth Amendment. Embodied within these rights are protections for choices central to self-definition about marriage, intimacy, association, and family integrity. *Obergefell*, 135 S. Ct. at 2599-2601. Excluding same-sex couples from marriage and the attendant protections not only harms the couples, but also hurts and humiliates their children, denying them "the recognition, stability, and predictability marriage offers," and subjecting children to "the stigma of knowing their families are somehow lesser." *Id*. at 2600.

37. In *Pavan v. Smith*, 137 S. Ct. 2075 (2017), the Court reiterated that married same-sex couples must receive the same "constellation of benefits . . . linked

to marriage," as married different-sex couples. Those benefits include the right to be recognized as the parents of a child born during their marriage on the same terms as married different-sex couples, regardless of whether only one of the parents has a biological connection to the child.

38. Same-sex spouses and their children are also equally protected in their rights to family privacy, integrity, and association. Decisions about whether and how to bring children into a family, choices about how to raise them, and the right to secure parent-child relationships are fundamental and constitutionally protected.

VII. THE MIZE-GREGG FAMILY

39. Mr. Mize and Mr. Gregg met in 2014 in New York City, where Mr. Mize was living at the time and Mr. Gregg was visiting. After several months of dating, Mr. Gregg made arrangements to transfer from London to his employer's New York offices, and moved to the United States in November 2014.

40. Mr. Mize and Mr. Gregg discussed their mutual desire to have children early in their relationship, and when they got engaged they did so with the hope and understanding that children would be part of their future together. Mr. Mize and Mr. Gregg married on May 30, 2015 in New York City.

41. When Mr. Mize and Mr. Gregg decided to move forward with creating their family, they determined to try assisted reproductive technology ("ART") to

bring their baby into the world. The couple decided to use eggs provided by an anonymous donor and to accept the offer of a close friend from London who volunteered to be their gestational surrogate. All parties agreed that Mr. Mize and Mr. Gregg would be the intended and only parents of any child born via gestational surrogacy.

42. Indifferent to which parent would or would not have a biological relationship to their child, the couple had eggs fertilized with each of their sperm, and decided to take turns with the implantation of embryos created with their respective genetic material. In the spring of 2017, an embryo created with Mr. Mize's genetic material was implanted in the gestational surrogate, but she did not become pregnant. In October 2017, the couple tried again and an embryo created with Mr. Gregg's genetic material was implanted in the gestational surrogate. This time the surrogate became pregnant with Mr. Mize and Mr. Gregg's daughter S.M.-G. The couple were thrilled.

43. When the surrogate was approximately two months pregnant, Mr. Mize began making regular extended trips to the U.K. to be with and care for the gestational surrogate. Mr. Mize was present in the U.K. for the entire third trimester of the pregnancy.

44. Due to work commitments, Mr. Gregg was primarily in the United States during the pregnancy, but was able to make several short trips to the U.K. during that time. To ensure that he would be present for S.M.-G.'s birth, Mr. Gregg was present in the U.K. for the last five weeks of the pregnancy.

45. S.M.-G. was born in the summer of 2018, with both Mr. Mize and Mr. Gregg present in the delivery room. Mr. Gregg cut the umbilical cord while Mr. Mize held their daughter. The couple named their newborn, including giving her a hyphenated last name to reflect their status as a family, and her status as the child of both Mr. Mize and Mr. Gregg. All three family members and the gestational surrogate stayed in the hospital for three days and two nights, with Mr. Mize and Mr. Gregg caring for S.M.-G. and getting to know their daughter. When they left the hospital, Mr. Gregg and Mr. Mize drove the gestational surrogate to her home, and then brought S.M.-G. home to their own residence.

46. In August 2018, Mr. Gregg and Mr. Mize applied for a Parental Order under Section 54 of the U.K.'s Human Fertilisation and Embryology Act of 2008 to reflect their status as S.M.-G.'s parents. Under U.K. law, such an application cannot

be filed until six weeks after the birth of the child. Mr. Gregg and Mr. Mize filed the application six weeks and one day after S.M.-G.'s birth.[2]

47. In September 2018, Mr. Gregg and Mr. Mize returned to the United States with S.M.-G. The family currently lives in Decatur, Georgia.

48. On March 21, 2019 the Central London Family Court issued a Parental Order declaring that S.M.-G. "is to be treated in law as the child of the parties to a marriage, Jonathan Daniel Gregg and James Derek Mize."

49. On April 17, 2019, the General Registrar Office issued a birth certificate identifying Mr. Mize and Mr. Gregg as S.M.-G.'s only parents.

50. S.M.-G. is the marital child of Mr. Gregg and Mr. Mize.

51. On or about March 26, 2019, Mr. Mize took S.M.-G. to a local Social Security Administration office to apply for a Social Security card. Mr. Mize was very surprised and disappointed when the staff declined to issue S.M.-G. a Social Security number, stated that additional evidence of S.M.-G.'s citizenship was required, and advised Mr. Mize to return to the U.S. Embassy in London to establish S.M.-G.'s citizenship.

[2] Plaintiffs reserve the right to rely on U.K. law as it pertains to S.M.-G.'s parentage. To the extent such notice is necessary, this statement constitutes the notice contemplated by Federal Rule of Civil Procedure 44.1.

52. Worried, Mr. Mize and Mr. Gregg immediately arranged to travel to London with S.M.-G. On April 24, 2019, the family appeared at the U.S. Embassy in London to apply for a CRBA and passport. At the U.S. Embassy, the family waited until they were called to a window where they presented S.M.-G.'s CRBA application (including both men's U.S. passports, and a copy of their marriage certificate) and passport application to an embassy staff person. The staff person went into a back room for some time before returning to ask who was S.M.-G.'s father. Mr. Mize and Mr. Gregg explained that they were each S.M.-G.'s father. When the staff person pressed for information on which father's sperm had been used, Mr. Mize and Mr. Gregg described the ART process they used to create their family. The clerk asked the family to wait.

53. Over the next several hours, Mr. Mize and Mr. Gregg waited with their daughter and watched while numerous different-sex couples were called to a window, had their applications promptly processed, and received a CRBA and/or passport confirming their child's U.S. citizenship. Perceiving that his family was being treated differently than other families, Mr. Mize spent part of his time in the waiting room investigating the law of citizenship, and learned that a federal court had recently ruled that the citizenship of a child born via surrogacy to a married same-sex couple, only one of whom was a U.S. citizen, was entitled to citizenship

at birth. *See Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019), appeal docketed May 7, 2019, No. 19-55517 (9th Cir.).

54. After approximately three hours of waiting, embassy staff called the family to another window and informed them that S.M.-G.'s CRBA and passport applications were denied. Mr. Mize and Mr. Gregg asked to speak to a supervisor. The head of the Passport and Citizenship Unit confirmed that embassy staff, in consultation with other State Department personnel "up the chain," had determined that S.M.-G. did not qualify for citizenship at birth, and provided a letter confirming denial of S.M.-G.'s CRBA application. *See* Exhibit A. As the letter makes clear, the U.S. Embassy evaluated the application under the "born out of wedlock" requirements of Sections 309 and 301(g), wrongly deemed Mr. Mize not to be S.M.-G.'s parent because they are not biologically related, and denied the CRBA application on the ground that "the biological U.S. citizen parent [i.e., Mr. Gregg] was not physically present in the United States for five years prior to the child's birth."

55. Deeply distressed, Mr. Mize pointed out the *Dvash-Banks* case and its conclusion that the citizenship of a child born to a married same-sex couple was properly evaluated under the INA provisions applicable to children of a married couple. State Department staff stated they were aware of the case, but asserted that

the case was "in process" and that "until the rules change" the State Department's decision regarding S.M.-G.'s citizenship would stand.

56. The State Department's denial of S.M.-G.'s CRBA and passport applications was erroneous, violated Plaintiffs' due process and equal protection rights, and was based on an arbitrary, capricious, and legally incorrect reading of the INA.

57. Mr. Mize and Mr. Gregg are S.M.-G.'s parents in all relevant respects. Mr. Mize and Mr. Gregg are S.M.-G.'s legal parents, and the parents listed on her birth certificate. They made the decision to have children together, decided together how they would create their family, and make no distinction in their family life based on which parent has a biological connection to S.M.-G. Mr. Mize and Mr. Gregg are raising their daughter together. Both are equally S.M.-G.'s fathers.

58. No other person is S.M.-G.'s parent. No other person has ever acted as a parent to S.M.-G., or made a claim to be her parent. The anonymous egg donor is not S.M.-G.'s parent, has not claimed to be S.M.-G.'s parent, and has never acted as S.M.-G.'s parent. The gestational surrogate and her husband are not S.M.-G.'s parents, have never claimed to be S.M.-G.'s parents, and have never acted as S.M.-G.'s parents. Mr. Mize and Mr. Gregg are S.M.-G.'s only parents, and have been from the moment of her birth.

59. The State Department's refusal to recognize S.M.-G.'s birth citizenship significantly harms her and her parents. Defendants have denied S.M.-G. the rights and privileges of U.S. citizenship, including the right to permanently reside in the United States, the right to a passport, the protection of the United States government, and the right to run for political office.

60. Moreover, the State Department has subjected the entire Mize-Gregg family to the indignity and stigma of unequal treatment by the government and to the infringement of their liberty interests in their familial status and their spousal and parent-child relationships. Defendants' refusal to recognize S.M.-G.'s U.S. citizenship under Section 301 repeats the discrimination struck down in *Windsor* and *Obergefell*, and relegates S.M.-G. and other children like her "through no fault of their own to a more difficult and uncertain family life." *Obergefell*, 135 S. Ct. at 2600.

61. The State Department's policy and practice of excluding the children of married same-sex parents from the right of birth citizenship set forth in Section 301 is contrary to the INA, is arbitrary and capricious, and violates the statutory and constitutional rights of children and parents.

COUNT I

DECLARATION OF CITIZENSHIP UNDER THE INA
(By Plaintiff S.M.-G.)

62. Plaintiffs repeat, re-allege, and incorporate by reference the allegations of all preceding paragraphs of this Complaint.

63. 8 U.S.C. § 1503(a) empowers this Court to make a *de novo* judgment as to S.M.-G.'s citizenship.

64. Pursuant to Section 301(c) of the INA, S.M.-G. is a national and citizen of the United States, and has been since birth, because she is the child of parents who were married to each other at the time of her birth, both of whom are citizens of the United States, and both of whom had a residence in the United States prior to S.M.-G.'s birth.

65. The INA does not require that a child's married legal parents also both be the child's biological parents for the child to be deemed born in wedlock for purposes of Section 301.

66. In contrast, Section 309 of the INA pertains to "Children born out of wedlock," and does require "a blood relationship" between a child and his or her U.S. citizen father to confer citizenship on a child born abroad.

67. Section 309 of the INA is inapplicable to S.M.-G.'s citizenship claim because she was born to married parents, and is not a child "born out of wedlock."

68. Section 301(g) of the INA is inapplicable to S.M.-G.'s citizenship claim because, in addition to being the child of married parents, she is not "a person born . . . of parents one of whom is an alien, and the other a citizen of the United States."

69. S.M.-G. therefore seeks a declaration pursuant to 8 U.S.C. § 1503(a) that she is a national and citizen of the United States who acquired citizenship at birth by operation of Section 301(c) of the INA, 8 U.S.C. § 1401(c).

COUNT II

VIOLATION OF DUE PROCESS
(By All Plaintiffs)

70. Plaintiffs repeat, re-allege, and incorporate by reference the allegations of all preceding paragraphs of this Complaint.

71. The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving persons of their liberty without due process of law.

72. Plaintiffs have a protected liberty interest in their family privacy, integrity, and association, including the fundamental right to security in their parent-child bonds.

73. Plaintiffs Mize and Gregg's rights of procreation and child rearing are intertwined with their fundamental right to marry.

74. Mr. Mize and Mr. Gregg have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions about how to bring children into their family and concerning the care, custody, and control of their child, S.M.-G.

75. In evaluating S.M.-G.'s citizenship under Sections 309 and 301(g), not Section 301(c), Defendants unlawfully refused to recognize and give effect to Mr. Mize and Mr. Gregg's lawful marriage, as well as unlawfully interfered with Mr. Mize and Mr. Gregg's decisional privacy as it pertains to their right to form a family and parent children.

76. Defendants' refusal to recognize and give effect to Mr. Mize and Mr. Gregg's marriage violates their Due Process rights under the Fifth Amendment.

77. The right to marry is a "central part of the liberty protected by the Due Process Clause," as are the "constellation of benefits" linked to that right, *Obergefell*, 135 S. Ct. at 2600, 2601, including the ability to confer citizenship status on a child born abroad.

78. Defendants' policy and practice of routinely refusing to recognize and give effect to the marriages of same-sex couples, and thereby excluding the children of those same-sex spouses from the scope of Section 301, violates the Fifth Amendment.

79. Defendants have wrongfully deprived Mr. Mize and Mr. Gregg of their right to confer citizenship at birth, and deprived S.M.-G. of her right to obtain U.S. citizenship at birth under Section 301. In doing so, Defendants have unconstitutionally infringed on Plaintiffs' protected liberty interests.

80. There is no rational, legitimate, or substantial government interest served by denying the children of married same-sex couples citizenship at birth. Nor is there any rational, legitimate, or substantial government interest served by denying U.S. citizens married to same-sex spouses the right to confer citizenship on children born abroad during their marriage. There is no justification—let alone a compelling one—for denying S.M.-G. U.S. citizenship.

81. As a result of Defendants' discriminatory and unlawful policy and practices, Plaintiffs have suffered injuries to their constitutional rights under the Fifth Amendment, and will suffer further irreparable harm if the State Department's policy and practices are not declared unconstitutional and enjoined.

COUNT III

VIOLATION OF EQUAL PROTECTION
(By All Plaintiffs)

82. Plaintiffs repeat, re-allege, and incorporate by reference the allegations of all preceding paragraphs of this Complaint.

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

84. Under Defendants' policy, children born abroad to same-sex couples are routinely deemed to be "born out of wedlock," even if the child's parents are married to each other and are the sole individuals identified as parents on the child's birth certificate. Defendants' policy and practices discriminatorily refuse to recognize the birthright citizenship of such children under Section 301, and inappropriately subject them to the inapplicable requirements for U.S. citizenship found in Section 309.

85. The same is not true for the children of different-sex couples. On information and belief, the children of married different-sex parents are not routinely classified as non-marital children and subjected to the citizenship requirements of Section 309, even when those children are not, in fact, biologically related to both parents.

86. Defendants' policy and practices are discriminatory and violate Plaintiffs' Fifth Amendment Equal Protection rights by refusing to recognize the legal status of Plaintiffs' family, deeming S.M.-G. to be a non-marital child, penalizing S.M.-G. and her parents based on the circumstances of her birth, and by subjecting each member of the Mize-Gregg family to disparate and disfavored

treatment not experienced by similarly situated different-sex couples and their children.

87. Defendants discriminated against Plaintiffs Mize and Gregg on the bases of sexual orientation and sex by excluding them from the marital protections of Section 301 that would allow them to confer citizenship status on a child born abroad and treating them differently from married different-sex couples. Defendants discriminated against Defendants Mize and Gregg by subjecting them to different and unfavorable treatment based on their exercising their fundamental right to marry.

88. Defendants' denial of citizenship at birth under Section 301 to children like S.M.-G. born to same-sex spouses discriminates against them because of the circumstances of their birth and because of their parents' sexual orientation, sex, and/or status as a same-sex married couple.

89. There is no rational, legitimate, substantial, or compelling government interest served by declaring S.M.-G. and other children of married same-sex couples to be non-marital children, and denying those children access to citizenship at birth pursuant to Section 301 of the INA.

90. As a result of Defendants' unconstitutional policy and practices, Plaintiffs have suffered injuries to their constitutional rights under the Fifth

Amendment, and will suffer further irreparable harm if Defendant's policy and practices are not declared unconstitutional and enjoined.

COUNT IV

ADMINISTRATIVE PROCEDURES ACT
(By All Plaintiffs)

91. Plaintiffs repeat, re-allege, and incorporate by reference the allegations of all preceding paragraphs of this Complaint.

92. Plaintiffs have suffered and continued to suffer a "legal wrong because of agency action," 5 U.S.C. § 702, as a result of the U.S. Embassy's erroneous finding that S.M.-G. is not a U.S. citizen and its related decision to deny the CRBA and passport applications submitted on S.M.-G.'s behalf.

93. Under the Administrative Procedures Act, "final agency action for which there is no other adequate remedy in court [is] subject to judicial review." 5 U.S.C. § 704. The reviewing court "shall…hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2).

94. The Administrative Procedures Act also provides that a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 8 U.S.C.

§ 706(1). Relief under § 706(1) is available where "an agency failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

95. Plaintiffs have exhausted all required administrative remedies, and have no adequate remedy at law.

96. Defendants' interpretation of Sections 301 and 309, as embodied in the Foreign Affairs Manual, conflicts with the clear language and intent of the INA. The relevant provisions of the FAM ignore contrary, directly applicable rulings by the Second and Ninth Circuits. Defendants' interpretation of Sections 301 and 309, published without any notice or public comment, is arbitrary, capricious, and not in accordance with the INA.

97. Defendants' exclusion of S.M.-G. and other children born abroad to married same-sex couples from the category of children who qualify for citizenship at birth is arbitrary, lacks a rational basis, and is contrary to law. Similarly, Defendants' determination that S.M.-G. and other children of married same-sex couples are "born out of wedlock" is arbitrary, lacks a rational basis, and is contrary to law.

98. Congress has not delegated to Defendants, and Defendants therefore lack, any authority to deny citizenship to S.M.-G.

99. The State Department has acted by unconstitutional regulatory fiat to routinely refuse to recognize the birthright citizenship of the children of married same-sex couples. This policy illegally excludes those families based on protected personal characteristics. The State Department has thus stigmatized and denigrated children of same-sex parents and their parents, including Plaintiffs.

100. No provision of law purports to authorize such authority by the State Department to impinge on Plaintiffs' personal freedoms, nor could any law do so constitutionally.

101. Plaintiffs have suffered a legal wrong and have been adversely affected and aggrieved by the State Department's arbitrary and capricious conduct which is contrary to law and in excess of its authority delegated by Congress. Defendants' agency action must therefore be set aside and permanently enjoined.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a judgment declaring that S.M.-G. is a national and citizen of the United States who acquired citizenship at birth by operation of Section 301(c) of the Immigration and Nationality Act, 8 U.S.C. § 1401(c);

B. Order Defendants to immediately issue S.M.-G. a U.S. passport;

C. Issue a judgment declaring the State Department's policy and practice of classifying the children of married same-sex couples as "born out of wedlock," and the State Department's consequent refusal to recognize S.M.-G.'s citizenship status on that basis, unconstitutional and a violation of the INA, both on its face and as applied to Plaintiffs;

D. Permanently enjoin Defendants from continuing to classify the children of married same-sex couples as children "born out of wedlock," and denying the children of married same-sex couples the right to acquire citizenship at birth pursuant to Section 301 on that basis;

E. Award Plaintiffs their costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412, or other statutes; and

F. Grant such other and further relief as the Court deems equitable and just.

Dated: July 29, 2019

Respectfully submitted,

By: /s/ Tara Borelli

Tara Borelli
Attorney Bar No. 265084
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
Southern Regional Office
730 Peachtree Street NE, Suite 640
Atlanta, Georgia 30308
Telephone: (404) 897-1880
tborelli@lambdalegal.org

Karen Loewy*
Omar Gonzalez-Pagan*
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005
Telephone: (212) 809-8585
Facsimile: (212) 809-0055
kloewy@lambdalegal.org
ogonzalez-pagan@lambdalegal.org

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

Attorneys for Plaintiffs

Susan Baker Manning*
Eleanor Pelta*
MORGAN LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-3000
susan.manning@morganlewis.com
eleanor.pelta@morganlewis.com

John A. Polito*
Christie P. Bahna*
Charis A.M. Redmond*
MORGAN LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, California 94105
Telephone: (415) 442-1000
john.polito@morganlewis.com
christie.bahana@morganlewis.com
charis.redmond@morganlewis.com

Jacquelynne M. Hamilton*
MORGAN LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 963-5000
jacquelynne.hamilton@morganlewis.com

* Motions for admission *pro hac vice* forthcoming