

United States Senate

WASHINGTON, DC 20510

June 6, 2019

The Honorable Mike Pompeo
Secretary of State
U.S. Department of State
Washington D.C. 20520

Mr. Secretary,

We write to urge you to reverse the State Department's discriminatory policy towards same-sex couples that have children abroad. Your Department's reinterpretation of immigration law to deny the constitutional right of citizenship to the children of same-sex couples who are born outside the United States is extraordinary and deeply disturbing. Even in the face of the mounting hardship the policy has created for loving families, your Department has gone to great lengths to continue to defend a policy in Federal Court that separates American families before they reach the U.S. border edge.

Since the landmark 2015 Obergefell v. Hodges decision, which extended the freedom to marry to all Americans, same-sex married couples abroad followed a process – consistent with the Immigration and Naturalization Act (INA) – to be granted a U.S. passport and U.S. citizenship for a child born abroad. After the Obergefell decision, the Department of Homeland Security made it clear that it would apply “all relevant laws to determine the validity of a same-sex marriage” as it does for opposite-sex marriages.

However, your Department's misapplication of the INA fails to apply immigration laws equally to same-sex married partners, particularly those who turn to Alternative Reproduction Therapy (ART) and gestational surrogacy to have children. As ART is often cost-prohibitive for many same-sex couples in the United States, some opt to have their children born in Canada or elsewhere where providers of ART provide the service on a not-for-profit basis. Section 301 of the INA makes no requirement that either parent of a U.S. married couple – regardless if they are same – or opposite-sex – must prove biological relation to their child. Your Department's guidance redefines Section 301(g) of the INA by saying that children are considered born “out of wedlock” if they are not biologically related to both parents. This appears to be a thinly veiled attack on LGBTQ Americans whose children are conceived through the use of egg donors and gestational surrogacy.

In the case of Andrew and Elad Dvash-Banks, your policy has threatened to separate two twin brothers born just four minutes apart. Andrew, a U.S. citizen, and Elad an Israeli citizen, married in 2013 in California and gave birth to twins, “E.J and A.J” through a gestational surrogate in Canada. Your Department bizarrely defined the birth of Elad and Andrew's twin sons as being “out of wedlock,” meaning that only A.J., the one twin biologically related to Andrew, would be granted citizenship at birth. U.S. District Judge, John F. Walter found your Department's reading of U.S. immigration law – which strips American newborns of their rights under the Constitution – as “strained.” Yet your Department continues to defend this policy in Federal Court.

The Dvash-Banks family, unfortunately, is not an isolated case. Additional same-sex couples have publicly come forward to share harrowing stories of their newborn son or daughter being denied a U.S. passport at U.S. consulates and embassies abroad even though they have met every statutory requirement under Section 301 of the INA. Stories after stories have recently been chronicled of same-sex couples being told by your Department that their marriages are, by definition, invalid, and that any children they may have abroad risk becoming stateless. Every new American parent should focus on celebrating the birth of a child, not be consumed with fear that all members of their family may not be welcomed back home to the United States.

Unfortunately, the State Department's defense of this discriminatory policy follows another regrettable action that targets, rather than champions the rights of LGBTQ persons. Last October, the State Department announced it would not grant visas to the same-sex partners of foreign diplomats serving at international organizations and at bilateral missions in the United States, leaving such diplomats with an awful choice: separate from their partners or get married and face possible termination or prosecution in their home countries, 69 of which criminalize homosexuality.

The United States can best advocate for LGBTQ rights around the world by living its values at home, especially during this month of Pride. That starts with reversing your misguided policy regarding children born abroad by ART and surrogacy, removing roadblocks for foreign diplomats serving in the United States, and changing the administration's muted response to persecution of LGBTQ persons in Chechnya, Brunei, and beyond.

The State Department's discriminatory misinterpretation of U.S. law will continue to harm American families. That is why we call upon you to immediately drop the Department's appeal of the Dvash-Banks family court case and make it clear that every U.S. married couple is entitled to the same rights under the U.S. Constitution, no matter whom they love.

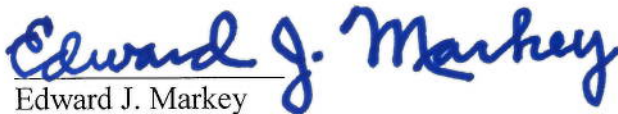
Sincerely,



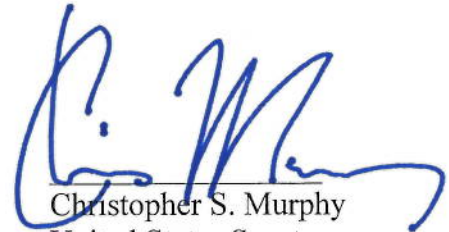
Jeffrey A. Merkley
United States Senator



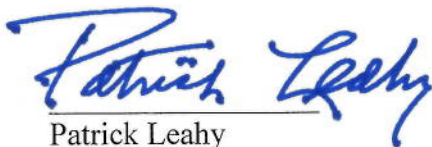
Kamala D. Harris
United States Senator



Edward J. Markey
United States Senator



Christopher S. Murphy
United States Senator



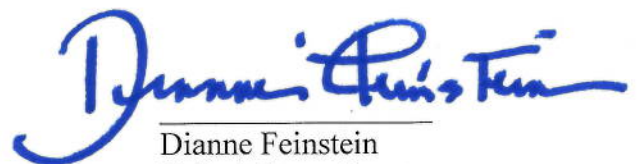
Patrick Leahy
United States Senator



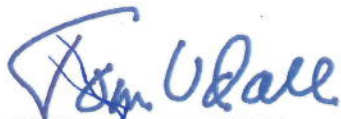
Bernard Sanders
United States Senator



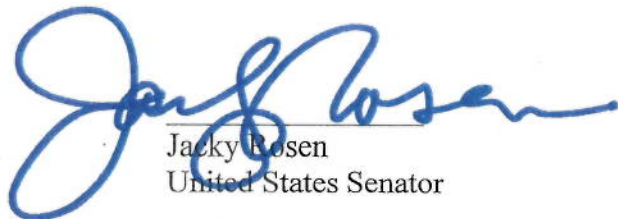
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United States Senator



Dianne Feinstein
United States Senator



Tom Udall
United States Senator



Jacky Rosen
United States Senator



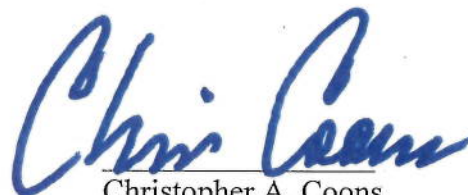
Richard J. Durbin
United States Senator



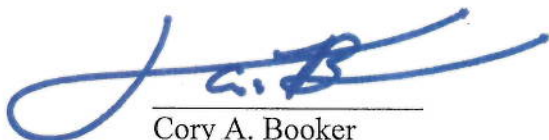
Amy Klobuchar
United States Senator



Tammy Duckworth
United States Senator



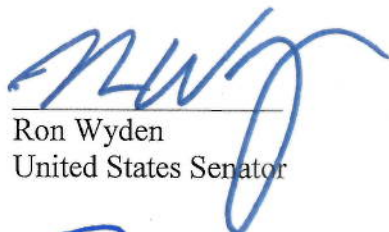
Christopher A. Coons
United States Senator



Cory A. Booker
United States Senator



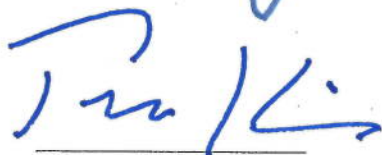
Margaret Wood Hassan
United States Senator



Ron Wyden
United States Senator



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United States Senator



Tim Kaine
United States Senator