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

JAMES DEREK MIZE, et al.,

Plaintiffs,

v.

MICHAEL R. POMPEO, et al.,

Defendants.

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

This case is about family: about S.M.-G., the infant daughter of two married U.S. citizens, her parents James Derek Mize and Jonathan D. Gregg, and whether the United States government can disregard their familial and legal ties by fiat.

Pursuant to Section 301(c) of the Immigration and Nationality Act ("INA"), "a person born outside of the United States . . . of parents both of whom are citizens of the United States and one of whom has had a residence in the United States . . . prior to the birth of such person," "shall be [a] national[] and citizen[] of the United States at birth." 8 U.S.C. § 1401(c). S.M.-G. is such a person. S.M.-G. was born in the United Kingdom in 2018 to her intended and only parents, Mize and Gregg, both of whom are U.S. citizens who resided here before her birth.

The State Department wrongfully refused to recognize S.M.-G.'s U.S. citizenship. It declined to issue her a passport pursuant to its own extra-textual requirement that a biological or "blood relationship" exist between a child and both of her married U.S.-citizen parents for citizenship to be conferred under Section 301(c)—a requirement contrary to the INA's plain language, overall structure, and purpose of promoting family unity. Requiring a biological relationship between a parent and a marital child for purposes of derivative citizenship is discriminatory and wrong. And as every court to consider the issue has found, it is also unlawful.

In addition, the Department of State's policy of interpreting Section 301 of the INA to require a biological relationship between a marital child and both of her U.S. citizen parents raises grave constitutional concerns, all which of counsel against the adoption of Defendants' proposed interpretation. By adopting their biological relationship requirement, Defendants disregarded the lawful marriage of Mize and Gregg, ignored the parent-child relationship between Mize and S.M.-G., and demeaned Plaintiffs' family. Defendants' reading of the statute would result in a deprivation of liberty and equality for all families headed by married same-sex couples, like Mize and Gregg, and should be rejected.

Plaintiffs move for summary judgment on their 8 U.S.C. § 1503(a) claim. The Court should declare S.M.-G. to be a citizen since birth, set aside Defendants' unlawful actions, and order Defendants to issue S.M.-G. a U.S. Passport.

II. FACTUAL AND STATUTORY BACKGROUND

A. The Immigration And Nationality Act And Defendants' Policy.

Persons born outside the United States acquire citizenship at birth only as provided by statute, namely the INA. *See Miller v. Albright*, 523 U.S. 420, 423-24 (1998). The INA sets out the circumstances under which persons born abroad are citizens at birth in two different provisions—Sections 301 and 309, which are codified at 8 U.S.C. §§ 1401 and 1409, respectively—and their application differs

depending on whether a child's parents are married or unmarried. *See Retuya v. Sec'y Dep't of Homeland Sec*., 412 F. App'x 185, 187 (11th Cir. 2010) (contrasting 8 U.S.C. § 1401 with 8 U.S.C. § 1409). Section 301 sets forth categories of persons who "shall be nationals and citizens of the United States at birth," 8 U.S.C. § 1401, and has long been recognized to apply to anyone whose parents were lawfully married when he or she was born. *See*, *e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (8 U.S.C. § 1401 is "[a]pplicable to married couples"). Section 301 makes no mention of a biological relationship.

By contrast, Section 309 applies only to children "born out of wedlock" and sets forth a number of additional and distinct requirements for citizenship at birth. *See* 8 U.S.C. § 1409. To establish the U.S. citizenship of a child born abroad to an unwed U.S.-citizen father, Section 309 requires (among other things) that "a blood relationship between the person and the father is established by clear and convincing evidence." 8 U.S.C. § 1409(a)(1).

Despite the absence of any "blood relationship" requirement in Section 301, the State Department imposes a biological relationship test for issuance of a U.S. passport. Specifically, the Department's internal Foreign Affairs Manual ("FAM") states that to be considered born "in wedlock"—and therefore eligible for U.S. citizenship under Section 301(c)—a child born abroad must have a biological

relationship with both of her married parents. *See* 8 FAM § 304.1-2(c).[1]

The State Department's extra-textual biological relationship requirement has changed over time, even while the statue has not. Prior to 2014, the State Department applied Section 309 to the children born abroad to a gestational but non-genetic mother—*i.e.*, a mother who had used an egg donor—even if she was the child's legal parent. Manning Decl., Ex. Q at 166:14-22. In 2014, the State Department changed course. It redefined the biological relationship requirement to deem gestational, non-genetic mothers to have a "biological" or "blood relationship" with the child—but *only* if the mother is also the child's legal parent. *See, e.g.*, 8 FAM § 301.4(D)(1)(c). This change was not occasioned by any congressional enactment or amendment to the INA. The State Department simply changed its mind. Manning Decl., Ex. Q at 243:15-20.

B. The Mize-Gregg Family.

Mize and Gregg are U.S. citizens who each resided in the United States prior to their daughter's birth. Mize was born in 1980 in Jackson, Mississippi. *See* Decl. of James Derek Mize ("Mize Decl.") at ¶ 3 & Ex. A. He grew up in the Jackson area, and moved to Ohio to attend college and later law school. *Id*. at ¶¶ 3, 5. In

[1] The Foreign Affairs Manual is available at fam.state.gov. For the Court's convenience, Plaintiffs have also included the cited FAM provisions as Exhibits N-P to the Declaration of Susan Baker Manning.

2009, Mize moved to New York City for work. *Id*. at ¶ 6.

Gregg is a U.S. citizen who was born in 1981 in London, England to his U.S.-citizen mother and his U.K.-citizen father. *See* Decl. of Jonathan D. Gregg ("Gregg Decl.") at ¶¶ 3, 4; Mize. Decl., Ex. B. Gregg grew up in London, with frequent trips to the United States to visit family. *Id*. at ¶ 3.

Mize and Gregg met in 2014 when Gregg was visiting New York City. Mize Decl. ¶ 6; Gregg Decl. ¶ 5. After several months of dating, Gregg transferred to his employer's New York offices, and he moved to the United States in November 2014. Mize Decl. ¶¶ 7, 9, 10 & Exs. C, D; Gregg Decl. ¶ 5, 6. Mize and 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. Mize Decl. ¶ 13; Gregg Decl. ¶ 9. Mize and Gregg married on May 30, 2015 in New York City. Mize Decl. ¶ 11 & Ex. E; Gregg Decl. ¶ 7.

When Mize and Gregg were ready to move forward with bringing children into their family, they decided to seek an anonymous egg donor and to accept the invitation of a U.K.-based close friend to be their gestational surrogate. Mize Decl. ¶ 14; Gregg Decl. ¶ 10. All parties agreed and intended that Mize and Gregg would be the only parents of any child born via surrogacy. Mize Decl. ¶ 15 & Exs. F, G;

Gregg Decl. ¶ 11. In October 2017, a donated egg fertilized with Gregg's genetic material was implanted in the gestational surrogate, who became pregnant with Mize and Gregg's daughter S.M.-G. Mize Decl. ¶¶ 18, 19; Gregg Decl. ¶¶ 12, 13. Both parents made several visits to the U.K. during the pregnancy, and both were present in the U.K for substantial portions of the last trimester. Mize Decl. ¶¶ 21, 22; Gregg Decl. ¶¶ 14, 15.

S.M.-G. was born in the summer of 2018, with both Mize and Gregg present in the delivery room. Mize Decl. ¶ 23 & Ex. I; Gregg Decl. ¶ 16. Gregg cut the umbilical cord while Mize held their daughter. Mize Decl. ¶ 23; Gregg Decl. ¶ 16. The couple named their newborn daughter together, including giving her a hyphenated last name to reflect their status as a family, and Mize and Gregg's status as her parents. *Id*.

All three family members stayed in the hospital for three days, with Mize and Gregg caring for S.M.-G. and getting to know their daughter. Mize Decl. ¶ 25; Gregg Decl. ¶ 17. When they left the hospital, Gregg and Mize drove the surrogate to her home, and then brought S.M.-G. home with them. *Id*.; *see also generally* Mize. Decl., Ex. J.

In August 2018, Gregg and Mize applied for a Parental Order under Section 54 of the United Kingdom's Human Fertilisation and Embryology Act 2008 to

reflect their status as S.M.-G.'s parents. Mize Decl. ¶ 27; Gregg Decl. ¶ 18. On March 21, 2019, the Central London Family Court issued a Parental Order declaring "that [S.M.-G.], who was born on . . . 2018 is to be treated in law as the child of the parties to a marriage, Jonathan Daniel Gregg and James Derek Mize." Mize Decl., Ex. K. On April 17, 2019, the General Registrar Office issued a birth certificate identifying Mize and Gregg as S.M.-G.'s parents. *Id*., Ex. I.

C. Defendants' Refusal To Recognize S.M.-G.'s U.S. Citizenship.

On March 26, 2019, Mize took S.M.-G. to a Social Security Administration office in Atlanta to apply for a Social Security number. Mize was very surprised and disappointed when the staff declined to issue the Social Security number, stated that additional evidence of S.M.-G.'s citizenship was required, and advised him to return to London to establish her citizenship. Mize Decl. ¶¶ 32, 33. Worried, Mize and Gregg arranged to travel to London. Mize Decl. ¶ 32; Gregg Decl. ¶ 23.

On April 24, 2019, the family appeared at the U.S. Embassy in London to apply for a Consular Report of Birth Abroad ("CRBA") and a U.S. passport, Mize Decl. ¶ 35; Gregg Decl. ¶ 24, either of which would be proof of S.M.-G.'s citizenship. *See* 22 U.S.C. § 2705. At the Embassy, the family waited until they were called to a window where they presented S.M.-G.'s CRBA application (including each parent's U.S. passport, and a copy of their marriage certificate) and

passport application to an embassy staff person. *Id*. ¶ 26. The staff person went into a back room for some time before returning to ask who S.M.-G.'s father was. Mize Decl. ¶ 36; Gregg Decl. ¶ 25. Mize and Gregg explained that they are both S.M.-G.'s fathers. *Id*. When the staff person pressed for information on which father's sperm had been used to conceive S.M.-G., Mize and Gregg described the assisted reproductive technology ("ART") process they used to create their family. *Id*. The clerk asked the family to wait. *Id*.

After approximately three hours of waiting, embassy staff called the family to another window and informed them that S.M.-G.'s CRBA application was denied. Mize Decl. ¶¶ 37, 38; Gregg Decl. ¶¶ 26, 27. 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. Mize Decl. ¶ 38 & Ex. L; Gregg Decl. ¶ 27.

As the letter makes clear, the U.S. Embassy evaluated the application under sections 309 (applicable only to children "born out of wedlock") and 301(g) (applicable to the children of a U.S. citizen and a noncitizen). Mize Decl., Ex. L. The State Department had determined that S.M.-G. was *not* Mize and Gregg's marital child, and not Mize's child at all. The State Department did not recognize

Mize and Gregg's marriage, and it deemed the parent-child relationship between Mize and S.M.-G. irrelevant merely because he is not biologically related to her. Based on these deeply painful and humiliating determinations, *see* Mize Decl. ¶ 40; Gregg Decl. ¶ 28, the State Department denied S.M.-G.'s CRBA application on the sole ground that "the biological U.S. citizen parent [Gregg] was not physically present in the United States for five years prior to the child's birth . . . as required under the provisions of § 301(g) of the [INA]." Mize Decl., Ex. L.

III. LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party shows "an absence of evidence to support the nonmoving party's case," summary judgment is warranted unless the non-movant presents competent evidence showing a genuine issue exists for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25 (1986); *see also Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1367–68 (N.D. Ga. 2019). "The essential question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Kemper v. Equity Ins. Co.*, 396 F. Supp. 3d 1299, 1302 (N.D. Ga. 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).

IV. ARGUMENT

Section 301 of the INA provides that "a person born outside of the United States . . . of parents both of whom are citizens of the United States and one of whom has had a residence in the United States . . . prior to the birth of such person," "shall be [a] national[] and citizen[] of the United States at birth." 8 U.S.C. § 1401(c). As a child born of her married parents, both of whom are U.S. citizens, S.M.-G. is a citizen at birth under the plain terms of this section.

The facts are undisputed: Mize and Gregg are U.S. citizens who are married to each other, and who both resided in the United States prior to S.M.-G.'s birth; S.M.-G. was born abroad during Mize and Gregg's marriage; and, S.M.-G. is the legal, marital child of Mize and Gregg, her intended and only parents. Mize Decl. ¶¶ 3-7, 14, 15, 18, 19, 23, 25, Exs. A-I, K; Gregg Decl. ¶¶ 3-7, 10-13, 16, 17. Based on these facts, pursuant to Section 301(c) of the INA, S.M.-G. is and has been a U.S. citizen since her birth.

Defendants nevertheless refuse to recognize S.M.-G. as a U.S. citizen because they erroneously graft onto Section 301 a requirement that the children of married U.S. citizens have a "biological" relationship with both of their married parents. This added requirement is contrary to the INA, and has been repeatedly rejected by the courts. Moreover, it categorically disrespects the marriages of

same-sex couples, and, by definition, excludes children born abroad to same-sex couples from birthright citizenship. This not only harms these families, but also raises serious due process and equal protection concerns. Nothing in Section 301, or any other provision of the INA, suggests that in using the phrase "born . . . of parents" Congress intended to refer only to parents who are both legal *and* biological parents.

The INA empowers this Court to issue a *de novo* declaration that S.M.-G. is a U.S. citizen. *See* 8 U.S.C. § 1503(a). Based on the text, structure, and purpose of the INA, and in order to avoid running afoul of constitutional liberty and equality principles, this Court should grant summary judgment on S.M.-G.'s Section 1503(a) claim, and declare S.M.-G. to be a U.S. citizen since birth pursuant to Section 301(c) of the INA, with all the rights and privileges of such citizenship.

A. The Text, Structure, And Purpose Of Section 301 Make Clear That S.M.-G. Is A U.S. Citizen, And Has Been Since Birth.

1. The plain language of Section 301(c) does not require a child to have a biological relationship with both of her married parents.

Defendants read into Section 301 a requirement—that a child and both her parents have a biological or "blood relationship"—that is simply not present in the statutory text. Section 301's plain language cannot support this invented prerequisite to citizenship-at-birth; the law says nothing about biology. If it had

wanted to do so, Congress knew how to require a genetic or "blood relationship" between a parent and child. The plain text of Section 309—the only other provision of the INA that deals with citizenship at birth—specifies that "a person born out of wedlock" is a U.S. citizen only if several requirements are met, including that "a blood relationship between the person and the [U.S.-citizen] father is established by clear and convincing evidence." 8 U.S.C. § 1409(a)(1). Section 301 contains no such requirement for the children of married U.S. citizens.

This difference is dispositive. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotations omitted). Here, "Congress clearly specified enhanced requirements for proof of parentage in the case of children born out of wedlock" and "the 'textual distinction' between the sections regarding children of married parents and children of unmarried parents is strongly suggestive of a clear Congressional intent to treat the two categories differently on this point." *Jaen v. Sessions*, 899 F.3d 182, 189 (2d Cir. 2018); *see also Scales v. INS*, 232 F.3d 1159, 1164-65 (9th Cir. 2000) (contrasting Sections 301 and 309 and holding that Section 301 does not require a blood relationship).

2. Defendants' reading of Section 301 is inconsistent with the design and structure of the INA.

Defendants' grafting of an extra-textual biological relationship requirement onto Section 301 should also be rejected in light of "its inconsistency with the design and structure of the statute as a whole." *Univ. of Tex. Sw. Med. Center v. Nassar*, 570 U.S. 338, 353 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). Section 309(a) incorporates the provisions of Section 301(c), (d), (e), and (g), as applicable, and then further requires that "a blood relationship between the person and the father [be] established by clear and convincing evidence." 8 U.S.C. § 1409(a). The explicit "blood relationship" requirement in Section 309(a) would be superfluous if paragraphs (c), (d), (e), and (g) of Section 301 already required a biological relationship. The Supreme Court has repeatedly "cautioned against reading a text in a way that makes part of it redundant." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (applying the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

Other provisions of the INA are consistent with Plaintiffs' reading. Sections 301 and 309 are part of Title III of the INA, which does not define "parent" beyond clarifying that it includes a deceased parent, much less define it to mean only

biological or genetic parents. *See* 8 U.S.C. § 1101(c)(2). For purposes of Titles I and II, the INA defines "parent" as "a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection." 8 U.S.C. § 1101(b)(2). Subdivision (1), in turn, defines "child" to mean "an unmarried person under twenty-one years of age" who is "a child born in wedlock," is a stepchild, or, if not born in wedlock, meets certain criteria, such as, for example, having been "legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile." 8 U.S.C. § 1101(b)(1)(A)-(C). Taken together, Titles I, II, and III reflect the INA's broad approach to the term "parent," and narrow the term's scope only in the case of non-marital children—a situation not applicable to S.M.-G. and others like her.

3. The INA reflects Congress's intent to keep families together.

The legislative history of the INA "clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 85-1199, at 7 (1957); *see also Nation v. Esperdy*, 239 F. Supp. 531, 538 (S.D.N.Y. 1965) ("'[T]hese provisions are designed to clarify or adjust existing provisions of law in the interest of reuniting broken families . . . .'" (quoting 103 Cong. Rec. 15,498 (1957) (statement of Sen. John F. Kennedy))).

In rejecting a biological relationship requirement in Section 301, the Ninth Circuit recognized that "[t]he [INA] was intended to keep families together [and] should be construed in favor of family units and the acceptance of responsibility by family members." *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005); *see also Sook Young Hong v. Napolitano*, 772 F. Supp. 2d 1270, 1278-79 (D. Haw. 2011) (collecting cases regarding the proposition that "maintenance of family unity and . . . the liberal treatment of children represent well-known goals of the INA"). The State Department's interpretation of Section 301(c) does exactly the opposite, especially for families headed by same-sex couples like Plaintiffs.

4. Section 301(c) must be understood against the backdrop of the common law spousal presumption of parentage, which does not hinge on biology.

In omitting any reference to a biological or blood relationship requirement from Section 301, Congress incorporated the general common law spousal presumption of parentage (sometimes referred to as a "marital presumption" "presumptive parentage," or a presumption of "legitimacy"). The long-standing presumption that every child born during the marriage of two people is the legal child of both spouses, regardless of "blood" ties, forms the essential backdrop against which statute's use of the term "parent" must be understood. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have

accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

"The presumption of legitimacy was a fundamental principle of the common law." *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (upholding presumption recognizing married father's parental status even where it was undisputed that he was not the child's biological parent). *See also Ray v. Bryant*, 411 F.2d 1204, 1205 (5th Cir. 1969) ("The presumption of legitimacy in favor of children born in wedlock is universally recognized.") This spousal presumption of parentage is rooted in the historic respect for marital family units, and is designed to protect both the peace and tranquility of the family, and the child's rights of support and inheritance from both married parents. *Michael H.*, 491 U.S. at 123-25; *Murphy v. Houma Well Serv.*, 413 F.2d 509, 512 (5th Cir. 1969) ("The presumption of legitimacy is without question reasonably related to the encouragement of family stability[.]"). It is incorporated into domestic relations laws across the country, *see, e.g.*, *McMillian by McMillian v. Heckler*, 759 F.2d 1147, 1153 (4th Cir. 1985) (noting that marital presumption is applied in "most, if not all" states); *Jaen*, 899 F.3d at 189 (noting states' incorporation of the presumption into their domestic relations laws), and in light of this "universal appli[cation] by the states," has been

recognized as an element of federal common law regarding the parentage of marital children. *McMillian*, 749 F.2d at 1153.

More specifically, the marital presumption sets forth that when a child is born into a marriage, both spouses are presumed to be that child's legal parents regardless of biology. *See Michael H.*, 491 U.S. at 124-26; *Murphy*, 413 F.2d at 512. This understanding is reflected in case law across the country applying the presumption even when it is undisputed that only one spouse is a biological parent, including when the spouses are of the same sex. *See, e.g.*, *L.C. v. M.G.*, 430 P.3d 400, 410, 412 (Haw. 2018) (non-birth mother married to birth mother presumed to be the child's legal parent; noting that presumption of parentage is "not restricted to persons that share a biological or genetic link with the child"); *McLaughlin v. Jones in & for Cty. of Pima*, 401 P.3d 492, 497 (Ariz. 2017) (same); *Boquet v. Boquet*, 269 So. 3d 895, 900 (La. Ct. App. 2019), *writ denied*, 274 So. 3d 1261 (La. 2019) (non-birth mother presumed to be parent of child born to same-sex spouse); *In re Christopher YY. v. Jessica ZZ*, 159 A.D.3d 18, 24 (N.Y. App. Div. 3d Dep't 2018) ("As the child was born to respondents, a married couple, they have established that the presumption of legitimacy applies, a conclusion unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor."); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C.

1987) (applying common law presumption of parentage to children conceived using donor sperm).

This established common law presumption of parentage is incorporated into the meaning of "parent" in Section 301. *See Jaen*, 899 F.3d at 189 (Section 301 "incorporates the common law deference to the marital family"). Nothing in the text or context of the INA suggests that Congress intended to overthrow this centuries-old understanding that marital children are the legal children of both spouses. "It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meanings of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (alterations and quotations omitted). When it enacted the INA, Congress did not suggest—much less dictate—any deviation from the common-law rule that parentage does not turn solely on biology.

5. Courts have repeatedly rejected Defendants' reading of Section 301.

Defendants' interpretation of the statute is directly contrary to the decisions of every court to consider whether Section 301 requires a biological relationship between a child and both married parents. In *Scales*, the Ninth Circuit held that a child born to a noncitizen mother married to a U.S. citizen man acquired derivative

citizenship from his legal father even when it was undisputed that the U.S. citizen was not the child's biological father. 232 F.3d at 1166.[2] The court stated directly that "[t]here is no requirement of a blood relationship between Petitioner and his citizen father, as there is for an illegitimate child." *Id*. "A straightforward reading" of the "born . . . of parents" language in Section 301, the court reasoned, "indicates . . . that there is no requirement of a blood relationship." *Id.* at 1164. The court contrasted Section 301 with Section 309, which does require a blood relationship between a non-marital child and a U.S. citizen father, but which "d[id] not apply to [Scales] . . . because he was born to parents who were married at the time of his birth." *Id*. Finally, the court in *Scales* explained that "[i]f Congress had wanted to ensure" that a person born of married parents only one of whom was a U.S. citizen "actually shares a blood relationship with an American citizen," "'it knew how to do so.'" *Id*. (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)). As such, the court refused to defer to the FAM, which so diverged from the statute that it could not be deemed "an interpretation of § 1401." *Id*. at 1165-66.

[2] In *Scales* and other cases in this section, the children's claims proceeded under Section 301(g) because only one of their married parents was a U.S. citizen. Here, S.M.-G.'s claim arises under Section 301(c) because both of her married parents are U.S. citizens. Both subsections use the "born . . . of parents" formulation, and decisions interpreting Section 301(g) apply equally to Section 301(c).

Five years later, the Ninth Circuit reaffirmed *Scales* in *Solis-Espinoza*, a case in which a child conceived during an extramarital affair between his noncitizen father and a noncitizen woman sought recognition of his birthright citizenship. *Solis-Espinoza*, 401 F.3d at 1091. Stressing the INA's purpose of maintaining family integrity, the court held that Solis-Espinoza derived U.S. citizenship under Section 301 from his father's wife, the U.S. citizen who raised him from birth and was "in every practical sense" the child's mother, notwithstanding the absence of a biological relationship between them. *Id*. at 1094. The court explained that the blood relationship requirement applied only to a non-marital child and not to someone like petitioner "who was not born 'out of wedlock.'" *Id*. at 1093.

> In every practical sense, [the wife of petitioner's biological father] was petitioner's mother and he was her son. There is no good reason to treat petitioner otherwise. Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.

Id. at 1094.

The Second Circuit reached the same conclusion in *Jaen*. The court held that parentage under Section 301 imported the common law marital presumption such that the husband of Jaen's mother at the time of his birth was his parent for purposes of Section 301 even though he was not biologically related to Jaen. 899

F.3d at 188. "[T]he INA incorporates the common law meaning of 'parent' into [Section 301(g)], such that a child born into a lawful marriage is the lawful child of those parents, regardless of the existence or nonexistence of any biological link." *Id*. at 185. The court contrasted Sections 301 and 309, noting that, "[t]here is no comparable additional requirement for the establishment of paternity in the section regarding citizenship via *married* parents. Consistent with the common law presumption, paternity is simply assumed in the case of married parents." *Id*. at 189. As in *Scales*, the *Jaen* court rejected the argument that the FAM was entitled to deference. *Id.* at 187 n.4. These directly-on-point decisions confirm that the term "parents" as used in Section 301 is not limited to biological parents.

In an analogous case involving a child born to a married male same-sex couple through ART, the court held that, "the word 'parents' as used in Section 301(g) is not limited to biological parents and that the presumption of legitimacy that applies when a child is born to married parents—as codified in the INA—cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent." *Dvash-Banks v*. *Pompeo*, No. 2:18-cv-00523, 2019 WL 911799, *7 (C.D. Cal. Feb. 21, 2019) (granting summary judgment, issuing a declaration of U.S. citizenship under 8 U.S.C. § 1503(a), and ordering Defendants to issue a passport), *appeal docketed*, No. 19-55517 (9th Cir. May 7, 2019).

6. Defendants' definitional argument is unavailing.

Finding no refuge in the ordinary rules of statutory construction or precedent, Defendants have previously resorted to a "textual" argument that defies the plain language of the statute through the use of cherry-picked dictionary definitions. *See* ECF Doc. 32-1 at 19-20. Defendants offer the following unsound syllogism: Because "born" is defined as "to be brought forth as offspring" and "of" refers to the origin of a person, to be "born of parents" must mean that the child "originates or derives" from the parents. As such, so the argument goes, Section 301's reference to children "born . . . of parents" necessarily means "biologically related" *to both parents* because a child cannot "originate or derive" from parents unless the child is biologically related to *both*. *See id*. This simply does not follow.

First, it is *not* the case that a child born using ART does not "originate" or "derive from" the parents who used that technology to bring her into the world, nor that a child cannot be "brought forth as offspring" unless two married individuals have contributed their genetic material to her. The *Oxford English Dictionary*—the same dictionary Defendants cite—also defines "born" as "to come into existence" (Def. I.2(a)), and it further states that "of" "[i]ndicat[es] the *agent or doer*" (Def. IV.A.), thus supporting an interpretation of "born of . . . parents" as meaning *coming into existence* because of the parents. *See* Born, *Oxford English Dictionary*,

https://www.oed.com/view/Entry/21674; Of, *Oxford English Dictionary*, https://www.oed.com/view/Entry/130549 (emphasis added).

Second, the definition of the preposition "of" does not support Defendants' argument. Defendants define "of" as indicating the "person from . . . whom something originates, comes, or is acquired or sought." ECF Doc. 32-1 at 20. That a child originates from—that is, comes into being through the actions of—their parents is the *sine qua non* of intentional parenthood, as is the case here. Other dictionaries' definitions support this conclusion. *See*, *e.g.*, Of, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/of (defining "of" as "used as a function word to indicate the cause, motive, or reason"); Of, *Lexico.com*, https://www.lexico.com/en/definition/of (defining "of" as "[i]ndicating an association between two entities, typically one of belonging").

7. Defendants' reliance on the Roman concept of *jus sanguinis* is misplaced.

Defendants have also rationalized their policy by relying on the Roman concept of *jus sanguinis*. *See* ECF Doc. 32-1 at 2 & 20-21. That argument also does not withstand scrutiny. The Latin phrase "*jus sanguinis*" literally refers to the "right of blood," *see* Black's Law Dictionary (11th ed. 2019). Only Section 309 refers to a required "blood relationship" while Section 301 does not. That is because, instead of adopting this Roman concept, the INA created a distinct

statutory framework for "derivative citizenship." *See* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 Geo. Immigr. L.J. 277, 289 (2014) ("Derivative citizenship is the means by which U.S. citizenship is conferred to foreign-born children when certain conditions are met."); *see also, e.g.*, *Morales-Santana*, 137 S. Ct. at 1688 (analyzing "claim to citizenship derived from the U.S. citizenship of [the] father"); 8 FAM § 301.9-2 (discussing "acquisition of derivative citizenship").

The historical context of how citizenship has been derived in the United States undermines Defendants' argument. A blood relationship has never been either necessary or sufficient to pass on derivative U.S. citizenship. Historically, derivative citizenship required a *legal* parental relationship, and unmarried men had no such relationship with their biological children. *See Guyer v. Smith*, 22 Md. 239, 249 (1864) (children "not born in lawful wedlock . . . under our law [are] *nullius filii*, and … not within the provisions of [the citizenship act]"); Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 657 (2014) (under "nineteenth century . . . citizenship laws," "children acquiring citizenship at birth had to be *legitimate*").

At the same time, by contrast, because the law treated a husband as the legal father of a child to whom his wife gave birth, a husband could confer derivative

citizenship on his child even if he was not the child's biological father. *See id.* at 658 ("The interaction of the marital presumption of paternity with nineteenth-century courts' interpretations of these early citizenship acts meant that, almost certainly, citizenship sometimes passed from U.S. citizen fathers to foreign-born marital children to whom they were not biologically related. . . . Thus it becomes clear that it was marriage rather than blood that was doing the work in the Acts of 1790, 1802, and 1855."). Put simply, historically speaking, "[m]arriage was the conduit by which a man could transfer citizenship to the children of his wife, whether or not they were his biological children." *Id.*

Thus, although "[d]erivative citizenship for non-marital children of American fathers requires demonstration of a 'blood relationship,'" such "statutory requirement . . . does not apply to marital children." Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2223-24 n.353 (2014).

Defendants further cite *Miller v. Albright*, 523 U.S. 420 (1998), and *Nguyen v. INS*, 533 U.S. 53 (2001), in support for their argument that Section 301 incorporates the concept of *jus sanguinis*. But *Miller* and *Nguyen* were cases involving actual non-marital children who therefore fell within the purview of Section 309 of the INA, not Section 301. *Miller* holds that when parental rights

have not been established, requiring blood relationship in Section 309 to ensure that there is reliable proof of that relationship is an important government objective. 523 U.S. at 436. But here, where Section 301 omits any reference to a "blood relationship," the State Department cannot substitute its policy preferences for those chosen by Congress. And no one disputes Mize and Gregg's parental rights. Not only does S.M.-G.'s birth certificate list Mize and Gregg as her only parents, so does other documentary evidence, including the Parental Order issued by the Central London Family Court, which declares Gregg and Mize to be S.M.-G.'s only parents. Mize Decl., Exs. I, K. Simply put, there are no indicia of fraud or lack of proof of the parent-child relationship; to the contrary, Plaintiffs' status as a family is well-documented. *See* Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss (Doc. 35-1) at 10-12. As Defendants admit, cases involving surrogacy usually have ample medical and legal documentation evidencing the relationship between a child and their parents, including legal documents that usually "detail the various 'parties' intentions with respect to future parental rights." *See* 8 FAM § 304.3-4(b)-(c).

Neither tortured dictionary definitions nor relics of Roman law undermine the fact that the text, structure, and purpose of Section 301 all lead to the same unequivocal conclusion: the derivative citizenship of a marital child like S.M.-G.

does not depend on a biological relationship with both married parents.

B. Section 301 Must Be Read To Reject Defendants' Biological Relationship Requirement As A Matter Of Constitutional Avoidance.

If, *arguendo*, the Court nonetheless considers the meaning of Section 301 ambiguous, the canon of constitutional avoidance weighs in favor of Plaintiffs' plausible interpretation. Defendants' addition of a biological relationship requirement is not only contrary to the statute, it also raises serious constitutional concerns about whether Defendants' policy violates the Fifth Amendment due process and equal protection rights of families headed by married same-sex couples, like the Plaintiffs. Accordingly, even if the Court were to view Section 301 as susceptible of more than one construction, the canon of constitutional avoidance strongly favors rejecting Defendants' biological relationship requirement and choosing the interpretation that does not raise those constitutional concerns.

1. The Court should employ the canon of constitutional avoidance to avoid addressing the serious constitutional questions raised by Defendants' interpretation.

"The elementary rule is that every reasonable construction [of a statute] must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). As such, the Eleventh Circuit has cautioned

that "[w]e avoid statutory interpretations that raise constitutional problems." *Burban v. City of Neptune Beach*, 920 F.3d 1274, 1282 (11th Cir. 2019). This well-established canon of constitutional avoidance is "an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). It "has no application in the absence of statutory ambiguity," *U.S. v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 494 (2001), but when "choosing between competing plausible interpretations," the canon rests "on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

"[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Id*.; *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (canon of constitutional avoidance merely calls for a determination that a certain interpretation "would *raise* serious constitutional problems" (emphasis added)). "[T]he canon of statutory interpretation . . . seeks to avoid constitutional difficulties." *Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 610 (11th Cir. 1992).

Thus, when "an otherwise acceptable construction of a statute would raise

serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (citations omitted); *see also Pine v. City of West Palm Beach*, 762 F.3d 1262, 1270–71 (11th Cir. 2014) (construing ordinance to "avoid serious constitutional concerns" where the interpretation was "not plainly contrary to legislative intent" as set forth in law's text and structure); *Cable Holdings of Ga., Inc*, 953 F.2d at 609–10 (adopting interpretation of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521–559 (1988), that serves "to avoid constitutional difficulties"). Plaintiffs' proposed reading of Section 301 is entirely plausible and more than consistent with the application of ordinary rules of statutory construction, *see* Part IV.A, *supra*, and should be adopted to avoid the constitutional concerns raised by Defendants' interpretation.

2. Defendants' interpretation of Section 301 raises serious constitutional problems.

In applying a biological relationship requirement to Section 301, Defendants have ignored Mize and Gregg's lawful marriage, deemed their daughter not to be their marital child, and treated Mize and S.M.-G. as legal strangers. In short, they have treated the Mize-Gregg family as if they were not a family at all. Adopting Defendants' interpretation of Section 301 would create serious constitutional

liberty and equality concerns for families headed by married same-sex couples, such as the Mize-Greggs. At minimum, it would raise serious constitutional questions about whether the biological relationship requirement violates (1) same-sex couples' fundamental right to marry and attendant, protected liberty interests in their marriage; (2) the fundamental rights of families headed by same-sex couples to be recognized as a family, including the rights to family privacy, integrity, and association; and, (3) the right to equal protection for same-sex couples and their children.

a. Defendants' biological relationship requirement would run afoul of the liberty and equality principles recognized in *Windsor*, *Obergefell*, and *Pavan*.

Defendants' biological relationship requirement has the effect of disregarding the marriages of same-sex couples who, by definition, cannot both be genetic parents, and of deeming their children not to be marital children. In so doing, this interpretation would violate the principles articulated by the Supreme Court in *United States v. Windsor*, 570 U.S. 744 (2013), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), which mandate the equal treatment of same-sex couples' marriages, as well as equal access to the full "constellation of benefits" attendant to marriage, *Obergefell*, 135 S. Ct. at 2601. In other words, the "precepts of liberty and equality

under the Constitution" prohibit the denial of legal benefits and protections to same-sex couples based on governmental refusal to treat their marriages in the same way that marriages of different-sex couples. *Obergefell*, 135 S. Ct. at 2604; *see also Windsor*, 570 U.S. at 772-74. The Supreme Court has "acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians." *Obergefell*, 135 S. Ct. at 2604.

Here, citizenship under Section 301 *without the added burdens imposed by Section 309* is not a mere "right granted by Congress," ECF Doc. 32-1 at 15, it is part of the "constellation of benefits that [Congress] ha[s] linked to marriage." *Obergefell*, 135 S. Ct. at 2601. Yet, adopting Defendants' biological relationship requirement would unconstitutionally "impose[] restrictions and disabilities" on same-sex couples' valid marriages, instructing them and their children "that their marriage is less worthy than the marriages of others." *Windsor*, 570 U.S. at 768, 775. By refusing to recognize the children of married same-sex couples as marital children for purposes of citizenship under Section 301, Defendants' policy treats same-sex couples' marriages as "second-class marriages for purposes of federal law." *Windsor*, 570 U.S. at 771. This "differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" *Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell*,

135 S. Ct at 2601).

"This raises a most serious question under the Constitution's Fifth Amendment." *Windsor*, 570 U.S. at 771. Because marriage's function in "safeguard[ing] children and families" is one reason that the Constitution protects the right to marry, *Obergefell*, 135 S. Ct. at 2600, any government conduct that deprives married same-sex couples and their children of those protections is unconstitutional. *Id.* at 2601-02.

Put simply, Defendants' interpretation of Section 301 would "burden the liberty of same-sex couples, and . . . abridge central precepts of equality." *Obergefell*, 135 S. Ct. at 2604. The Court therefore should adopt Plaintiffs' interpretation of Section 301 in order to avoid confronting these serious constitutional questions.

b. Defendants' interpretation would infringe upon Plaintiffs' fundamental rights to family formation, integrity, and privacy.

Defendants' biological relationship requirement would also infringe the fundamental rights of families headed by same-sex couples, like Plaintiffs, to form and be a family. "[C]hoices concerning . . . family relationships, procreation, and childrearing," are "among the most intimate that an individual can make." *Obergefell*, 135 S. Ct. at 2599. These rights are intertwined with the right to marry

to make "a unified whole: The right to 'marry, establish a home and bring up children.'" *Id.* at 2600 (quotes and alteration omitted). This collective set of fundamental rights is violated by laws, regulations, and policies that "humiliate[] . . . children . . . being raised by same-sex couples and . . . make[] it even more difficult for the children to understand the integrity and closeness of their own family." *Windsor*, 570 U.S. at 772. Defendants' biological relationship requirement would deny birth citizenship to children like S.M.-G. in violation of the fundamental right to form a family of married same-sex parents and their children.

In addition, requiring a biological relationship in order for a marital child to derive citizenship from one of her two parents would disregard legal parent-child relationships and would unravel "[t]he intangible fibers that connect parent and child." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Infringements of parent-child relationships are cognizable constitutional harms, *see Stanley v. Illinois*, 405 U.S. 645, 647-48 (1972), and the right to family integrity is equally shared by both parents and children. *See Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000).

Finally, the insertion of a biological relationship requirement into Section 301 would require invasive inquiries into intimate decisions about procreation and how married same-sex couples brought children into their families. This raises

concerns about the invasion of the fundamental right to decisional privacy. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977). These protections extend to the childbearing and childrearing decisions and deliberations of all families, including those headed by same-sex couples. *Windsor*, 570 U.S. at 772.

Defendants' proposed interpretation of Section 301 would substantially burden the fundamental rights of families formed by married same-sex couples to establish and be a family and would unnecessarily invade their privacy. By adopting Plaintiffs' plausible interpretation of Section 301, the Court can and should avoid adjudication of these serious constitutional questions.[3]

c. Defendants' interpretation would raise serious equal protection concerns.

Defendants' biological relationship requirement also raises serious constitutional concerns under the equal protection component of the Fifth Amendment. Interpreting Section 301 in this way would treat the marriages of same-sex couples as second class, discriminate against those couples on account of their sexual orientation and sex, and discriminate against their children based on

[3] For the reasons set forth in Part V of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, Defendants cannot meet their burden of justifying their interpretation of Section 301, which infringes the due process mandate of the Fifth Amendment. *See* Doc. 35-1, at 12-19.

the circumstances of their birth. "The Constitution grants [same-sex couples and their children] th[e] right" to "equal dignity in the eyes of the law." *Obergefell*, 135 S. Ct. at 2608. Defendants' interpretation of Section 301 raises serious concerns that right would be denied.

Under Defendants' interpretation, the marital and parental relationships of married same-sex couples will always be presumed invalid, and their applications for recognition of their child's citizenship will always be subject to additional scrutiny, obstacles, and review. By contrast, the marital and parental relationships of married different-sex couples are presumed valid.[4] Defendants' interpretation of Section 301 would thus "identify a subset of state-sanctioned marriages and make them unequal," *Windsor*, 570 U.S. at 772, depriving same-sex couples of equal protection. It would "deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages" and "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex

[4] While some different-sex couples who disclose that they have used ART to have children may also be wrongly treated as unmarried couples, and some gestational, non-genetic mothers might rightfully be recognized as a parent under Defendants' policy, these rare exceptions to the discriminatory rule would not permit Defendants' interpretation to pass constitutional muster. This kind of over- and under-inclusiveness is constitutionally fatal. *See Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

marriages made lawful by the unquestioned authority of the States." *Id*. at 770.

Specifically, the disparate treatment of married same-sex couples and their children under Defendants' interpretation of Section 301 would discriminate against those couples on the bases of sexual orientation and sex and against their children because of the circumstances of their birth, all in violation of the equal protection component of the Fifth Amendment. Each of these forms of discrimination would render Defendants' interpretation constitutionally suspect.

The level of scrutiny applicable to sexual orientation discrimination is an open question in this Circuit. *See Morrissey v. United States*, 871 F.3d 1260, 1270 (11th Cir. 2017). The Eleventh Circuit previously observed that other circuits had declined to apply heightened scrutiny, *see Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004), but that occurred before *Obergefell* and *Windsor*, which require that heightened scrutiny be applied to classifications based on sexual orientation. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (*Windsor* requires courts "to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection."); *see also Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012) (analyzing sexual orientation as a "quasi-suspect class"), *aff'd*, 570 U.S. 744 (2013).

Similarly, laws that treat different-sex and same-sex couples disparately "constitute gender discrimination both facially and when recognized, in their historical context, both as resting on sex stereotyping and as a vestige of the sex-based legal rules once imbedded in the institution of marriage." *Latta v. Otter*, 771 F.3d 456, 490 (9th Cir. 2014) (Berzon, J., concurring); *see also Waters v. Ricketts*, 48 F. Supp. 3d 1271, 1281 (D. Neb. 2015) (a law "that mandates that women may only marry men and men may only marry women facially classifies on the basis of gender"), *aff'd on other grounds*, 798 F.3d 682 (8th Cir. 2015); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (finding that Utah's marriage laws prohibiting "a man from marrying another man," but not "from marrying a woman," classify based on sex), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014). And "[l]aws granting or denying benefits 'on the basis of the sex of the qualifying parent,' . . . differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee." *Morales-Santana*, 137 S. Ct. at 1689.

Lastly, Defendants' interpretation would penalize children for the circumstances of their birth by denying them important rights and protections—a policy that is "illogical and unjust" and subject to heightened scrutiny. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972). It is "invidious to

discriminate against" the marital children of same-sex couples "when no action, conduct, or demeanor of theirs" is relevant to the conferral of citizenship by their citizen parents. *Levy v. Louisiana*, 391 U.S. 68, 72 (1968). And "imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175.

All of these constitutional equality concerns warrant against this Court's adoption of Defendants' biological relationship interpretation of Section 301.[5] The Court can avoid answering these constitutional questions by choosing Plaintiffs' plausible text-based interpretation, which applies even-handedly to all married couples and their children.

V. CONCLUSION

Because Defendants' policy and actions run counter to the text, structure, and purpose of the INA, and because their interpretation of Section 301 would raise serious constitutional questions, the Court should grant Plaintiffs' Motion for

[5] For the reasons set forth in Part VI of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, Defendants' interpretation of Section 301 is unlikely to survive any level of scrutiny and thus violate the equal protection mandate of the Fifth Amendment. *See* Doc. 35-1, at 19-25.

Partial Summary Judgment, declare S.M.-G. to be a U.S. citizen since birth, and order Defendants to issue her a U.S. passport.

Dated this 17th day of January, 2020.

Respectfully submitted,

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

JAMES DEREK MIZE, et al., *Plaintiffs,* v. MICHAEL R. POMPEO, et al., *Defendants.*	Civil Action No. 1:19-cv-3331-MLB

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the foregoing Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment was filed electronically using the Court's CM/ECF system, which provides electronic notice of the filing to all counsel of record. Parties may access this filing through the Court's electronic filing system.

I further certify that the foregoing was prepared in compliance with LR 5.1 because it is typed in Times New Roman (14 point) font, and its top margin is not less than one and one-half (1½) inches and left margin is not less than one (1) inch.

Dated this 17th day of January, 2020.

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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.	:	Civ. No. 1:19-CV-03331-MLB
MICHAEL R. POMPEO, in his official capacity as Secretary of State, and THE U.S. DEPARTMENT OF STATE,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Plaintiffs James Derek Mize and Jonathan Daniel Gregg, individually and on behalf of their minor child, S.M.-G. (collectively, Plaintiffs), challenge decisions by the U.S. Embassy in London—acting under the authority of the Department of State and the Secretary of State—to decline to issue a Consular Report of Birth Abroad (CRBA) and a U.S. passport to S.M.-G. Plaintiffs claim Defendants' actions violated the equal protection and due process guarantees of the Fifth Amendment of the Constitution. Plaintiffs also claim Defendants violated the Administrative Procedure Act (APA). Finally, Plaintiffs seek a declaration of citizenship for S.M.-G. pursuant to the Immigration and Naturalization Act (INA), 8 U.S.C. § 1503.

The Court should dismiss Plaintiffs' claims because they fail as a matter of law. Plaintiffs fail to plead any allegations of intentional discrimination for the purposes of their equal protection claim. Plaintiffs also fail to identify a fundamental right that has been infringed upon or establish that Defendants' actions fail rational basis review for the purposes of their due process claim. Plaintiffs' APA claim should be dismissed because the APA's general grant of judicial review precludes review of final agency action for which there is an "other adequate remedy in a court." 5 U.S.C. § 704. Congress has provided a specific, separate avenue for Plaintiffs to obtain judicial review of their claims that they have been denied "a right or privilege as a national of the United States," namely the provisions of 8 U.S.C. § 1503. Plaintiffs have raised a claim seeking relief pursuant to 8 U.S.C. § 1503, but cannot succeed on this claim because the Department's interpretation of the applicable statute is appropriate and entitled to deference. This interpretation compels the conclusion that S.M.-G. did not acquire U.S. citizenship automatically at birth.

For these reasons, as explained more fully below, the Court should dismiss the Complaint.

LEGAL BACKGROUND

I. Statutory Framework

There are two "universally accepted" ways to establish citizenship which reflect genuine links between the country and the individual—*jus soli* and *jus sanguinis*. *See Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1322 (11th Cir. 2018). *Jus soli* means "right of land or ground—conferral of nationality based on birth within the national territory." Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). *Jus sanguinis* literally means "right of blood—the conferral of nationality based on descent, irrespective of the place of birth." *Id.*

The Fourteenth Amendment provides that "[a]ll persons born … in the United States, and subject to the jurisdiction thereof, are citizens of the United States[.]" U.S. Const. amend. XIV, § 1. Since the Amendment's enactment, "the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*." *Miller v. Albright*, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting) (citing *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)). While a foreign-born child's acquisition of citizenship through a U.S. citizen parent may be referred to colloquially as "birthright citizenship," *see, e.g.*, Compl. at ¶¶ 33, 84, 99 (ECF No. 1), "the [Supreme] Court has specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent." *Rogers*, 401 U.S. at 830 (emphasis added); *see also Miller*, 523 U.S. at 424 (1998) ("Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress.").

The general rules for acquiring United States citizenship are set forth in 8 U.S.C. § 1401, where the INA sets out the "rules for determining who 'shall be nationals and citizens of the United States at birth' by establishing a range of residency and physical-presence requirements calibrated primarily to the parents' nationality and the child's place of birth." *Sessions v. Morales-Santana*, 132 S. Ct. 1678, 1686 (2017). Sections 1401(c) and 1401(g) provide requirements for U.S. citizenship relevant to the claims raised in this lawsuit. Section 1401(c) provides for the citizenship 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." Section 8 U.S.C. § 1401(g), provides for the citizenship of

> A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years[.]

Section 1409(a), addresses specifically "children born out of wedlock." Section 1409(a) states that "[t]he provisions of " § 1401(c) and (g)

> shall apply as of the date of birth to a person born out of wedlock if—
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—
>
> (A) the person is legitimated under the law of the person's residence or domicile,

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

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

For the purpose of determining citizenship, the Department applies § 1409 when there is no biological connection between *both* parents and the child for whom citizenship is sought, regardless of the parents' legal marital status, sex, or sexual orientation. 8 FAM 304.1-2. By incorporating the physical-presence requirements of § 1401 by reference, § 1409 allows a U.S. citizen father to transmit U.S. citizenship to a foreign-born child under the same terms as § 1401. Where, as here, the transmission of U.S. citizenship relies upon a biological connection to only one U.S. citizen parent, the Department applies the physical presence requirements of § 1401(g). Were both of the child's biological parents U.S. citizens, on the other hand, the Department would have applied § 1401(c).

II. Agency Interpretation

The Secretary of State is "charged with" administering the INA to determine the "nationality of a person not in the United States." 8 U.S.C. § 1104(a). When a child is born overseas, the child's parents may apply to one of the State Department's consulates for a CRBA that reflects the Department's determination that the child acquired citizenship at birth. 22 C.F.R. § 50.7. Consulates also issue U.S. passports. 22 U.S.C. § 211a. CRBAs and passports "have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." *Id.* § 2705.

To allow consular officers to apply the relevant statutory provisions in a consistent and evenhanded way, the State Department has interpreted the provisions in its Foreign Affairs

Manual (FAM).[1] *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015) (discussing the FAM as a reflection of State Department policy). The FAM explains the Department's understanding that, "[s]ince 1790," "[a]t least one biological parent" of a child born abroad "must have been a U.S. citizen when the child was born" in order for that parent to "transmit[] U.S. citizenship at birth" to the child. 8 FAM § 301.4-1(B); *see also id.* § 301.4-1(D)(1)(a) ("The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed."). Genetic relationships are the usual form of biological relationship between parents and children. 8 FAM § 301.4-1(D)(1)(c). The Department also recognizes gestation by a legal mother as a type of biological relationship, even without a genetic relationship. *Id.* The Department regards the citizenship of a surrogate who gestates a child as "irrelevant to the child's citizenship analysis." 8 FAM § 304.3-2.(a).

Although the law of the jurisdiction where a child is born may sometimes create a presumption that children born during the marriage of their legal parents are "the issue of that marriage," 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such "presumption is not determinative in citizenship cases, … because an actual biological relationship to a U.S. citizen parent is required." *Id.*; *see also id.* § 301.4-1(D)(1)(a) ("It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired.").

[1] The current public version of the FAM is available at https://fam.state.gov/.

The FAM requires consular officers "to investigate carefully" whenever a "doubt arises that [a] U.S. citizen" through whom a child claims citizenship—including a legal parent of the child—"is biologically related to the child." 8 FAM § 301.4-1(D)(1)(d). Such doubts may arise, for example, "when either of the alleged biological parents was married to another person during the relevant time period" or when "the child was conceived at a time when the alleged father had no physical access to the mother." *Id.* They also arise whenever a "child was born through surrogacy or other forms of assisted reproductive technology." *Id.*

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

A same-sex couple's use of surrogacy or other forms of assisted reproductive technology (ART) may more readily be apparent to consular officers than an opposite-sex couple's use of ART. To facilitate evenhanded application of the rules to all couples and not just those for whom a consular officer can readily ascertain that ART was used, the State Department's CRBA application form requires parents to indicate whether they were "married to the child's other biological parent when the child was born." Attach. A (CRBA application form).

FACTUAL BACKGROUND

The following allegations in the Complaint are accepted as true for the purposes of this motion to dismiss. Plaintiffs James Derek Mize and Daniel Gregg are United States citizens. Compl. (ECF No. 1) at ¶1. Mr. Mize was born and raised in the United States. Compl. at ¶10. Mr. Gregg was born in England to a mother who is a U.S. citizen and a father who is a citizen of the United Kingdom. Compl. at ¶11. Mr. Gregg was raised in the United Kingdom, though he has made frequent trips to the United States to visit. Compl. at ¶11. Plaintiffs Mize and Gregg met in 2014 in New York, where Mr. Mize was living at the time and Mr. Gregg was visiting. Compl. at ¶39. Mr. Gregg moved to the United States later that year and, in 2015, Mr. Mize and Mr. Gregg were married in New York. Compl. at ¶40.

Plaintiffs Mize and Gregg later had a child conceived via ART. Compl. at ¶41. In 2017, an embryo created using Mr. Gregg's sperm and an anonymous donor's egg was implanted successfully in a gestational surrogate in London. Compl. at ¶42. In the summer of 2018, Plaintiff S.M.-G. was born in the United Kingdom. Compl. at ¶45. 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 married parents, Mr. Mize and Mr. Gregg. Compl. at ¶48. The General Registrar Office issued a birth certificate shortly thereafter, identifying Mr. Mize and Mr. Gregg as the child's parents. Compl. at ¶49.

In the fall of 2018, Mr. Mize and Mr. Gregg returned to the United States with S.M.-G. Compl. at ¶47. The family currently resides in Decatur, Georgia. Compl. at ¶47. In the spring of 2019, Mr. Mize applied to the Social Security Administration (SSA) for a Social Security card for S.M.-G. and the application was denied. Compl. at ¶51. SSA staff notified Mr. Mize that additional evidence of S.M.-G.'s U.S. citizenship was required. Compl. at ¶51.

Mr. Mize and Mr. Gregg then appeared at the U.S. Embassy in London to apply for a CRBA and a U.S. passport for S.M.-G. Compl. at ¶52. Their applications on behalf of S.M.-G. were denied. Compl. at ¶54. The Department of State's denial letter stated that S.M.-G.'s application for a CRBA was denied because "[i]t has been determined that based upon the information provided . . . , the biological U.S. citizen parent was not physically present in the United States for five years prior to the child's birth, at least two years of which were after the parent reached the age of fourteen, as required under the provisions of section 301(g) of the [INA]." Compl. at Ex. A.

On July 23, 2019, Plaintiffs filed this lawsuit, raising four claims. Count I seeks declaration of citizenship for S.M.-G. under the INA, 8 U.S.C. § 1503. Compl. at ¶¶ 62-69. Count II alleges that the Department's evaluation of S.M.-G.'s CRBA and passport applications under § 1401(g) and § 1409, instead of § 1401(c), violates the Due Process Clause of the Fifth Amendment. Compl. at ¶¶70-81. Count III alleges that the Department has a policy of routinely deeming children born abroad to same-sex married couples to be "born out of wedlock," in violation of the equal protection guarantees of the Fifth Amendment. Compl. at ¶¶82-90. Lastly, Count IV seeks judicial review under the APA, 5 U.S.C. § 706, of the Department's denial of the CRBA and passport applications. Compl. at ¶¶91-101. Defendants now move to dismiss.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of

the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as . . . factual allegation[s]" are "disentitle[d] . . . to th[is] presumption of truth." *Id.* at 678, 681 (citation omitted). The court may consider a document attached to a pleading or referenced therein without converting the motion into one for summary judgment, if the attached document is central to the plaintiff's claim and undisputed as to its authenticity. *Day v. Taylor*, 400 F.3d 1271, 1276 (11th Cir. 2005).

ANALYSIS

I. Plaintiffs Fail To Allege A Plausible Equal Protection Claim.

With respect to Plaintiffs' equal protection claims, they have failed to plausibly allege that the State Department's interpretation of provisions of the INA constitutes intentional discrimination against a protected class.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Although this clause expressly applies only to the States, the Supreme Court has found that its protections are encompassed by the Due Process Clause of the Fifth Amendment, and are therefore applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The equal protection component of the Fifth Amendment's Due Process Clause "forbids the federal government from 'denying to any person the equal protection of the laws . . . .'" *United States v. Castillo*, 899 F.3d 1208, 1213 (11th Cir. 2018) (citing *United States v. Windsor*, 570 U.S. 744, 774 (2013)). To advance an equal protection claim, a plaintiff must assert facts that support the allegation that the government subjected him to disparate treatment

by virtue of purposeful or intentional discrimination. *See Smith v. State of Ga.*, 684 F.2d 729, 736 (11th Cir. 1982).

Here, Plaintiffs seek a declaration that Defendants have violated the Due Process Clause's guarantee of equal protection by "excluding [the children of same-sex married couples] from the marital protections of § 1401 that would allow them to confer citizenship status on a child born abroad and treating them differently from married different-sex couples." Compl. ¶ 87. But their equal protection claim rests on "naked assertions, devoid of further factual enhancement," *see Iqbal*, 556 U.S. at 678, and legal conclusions couched as factual allegation, neither of which the Court is not bound to accept as true, *see Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986). For example, Plaintiffs assert that the Department of State does not subject the children of opposite-sex married couples to the same "born out of wedlock" provisions, Compl. at ¶ 85, and denies the children of same-sex married couples access to citizenship at birth pursuant to § 1401 "because of the circumstances of their birth and because of their parents' sexual orientation, sex, and/or status as a same-sex married couple," *id.* ¶ 88.

These threadbare factual allegations are insufficient to state an equal protection violation. Plaintiffs fail to allege any set of facts to support a claim that the State Department's interpretation of the INA reflects invidious discrimination. Discriminatory intent "implies more than intent as volition or intent as awareness of consequences." *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Instead, it requires "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' the law's differential treatment of a particular class of persons." *Id.*; *see also Vacco v. Quill*, 521 U.S. 793, 803 (1997) (holding that "[t]he law has long used actors' intent or purpose to distinguish between two acts that may have the same result."). Accordingly, a discriminatory effect against

a group or class does not run afoul of the Constitution unless it is also an intended consequence of the government. *Feeney*, 442 U.S. at 279.

Plaintiffs do not even attempt to suggest that the State Department's interpretation of the INA as reflected in the FAM evidences purposeful discrimination. Indeed, it is beyond dispute that the Department's interpretation of the INA as reflected in the FAM is facially neutral, and does not even reference sexual orientation. To begin, the FAM explicitly recognizes that children born abroad to a married same-sex female couple can be "born in wedlock" for INA § 1401 purposes. For example, where one woman is a U.S. citizen and the other woman is an alien, the child can acquire U.S. citizenship at birth if the U.S.-citizen wife is either "the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby)," so long as the law of the country where she resides also recognizes her as a legal parent. 8 FAM 301.4-1(D)(1)(c). Where both women are U.S. citizens, and one is the legal, gestational mother and the other is the genetic mother of the child, the Department of State adjudicates the child's citizenship claim under § 1401(c). 8 FAM 304.3-1(b).

Moreover, the Department requires a child claiming acquisition of citizenship at birth to establish both a legal relationship and a biological connection with a U.S. citizen parent in all cases, *regardless* of the sex or sexual orientation of the U.S. citizen parent. As the FAM explains:

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

> relationship and legal relationship, where applicable, is on the person making such claim.

8 FAM 301.4-1(D)(1). While it is true that a child born during a marriage may generally be "presumed" to be the issue of that marriage, *see id.*; *see also* Compl. ¶ 20, the Department of State considers such presumption insufficient for determining citizenship regardless of the sex or sexual identity of the married couple. 8 FAM 301.4-1(D)(1). *All* applicants are required to prove claims to U.S. citizenship, including documentation concerning ART, where applicable. *See* 22 C.F.R. § 51.40; *see also* 8 FAM 304.3-4; *see also id.* ¶ a.

Plaintiffs highlight a reference to 8 U.S.C. § 1409 in the Embassy's letter dated April 24, 2019. Compl. at ¶ 54. That provision applies to "[c]hildren born out of wedlock." *See* 8 U.S.C. § 1409. Plaintiffs question why the Department considered § 1409 applicable to their situation rather than 8 U.S.C. § 1401, which makes no explicit reference to "wedlock," but generally covers children whose biological parents are married. *See* Compl. at ¶ 55. Plaintiffs then infer that the Department "failed to acknowledge the validity of Mr. Mize and Mr. Gregg's marriage." *Id.* at ¶ 4. But the Court should not accept as true this "legal conclusion couched as a factual allegation." *See Iqbal*, 556 U.S. at 678. Nor do Plaintiffs' well-pleaded factual allegations support such inference. *See id.* As explained below, Plaintiffs mistakenly conflate recognition of marriage with § 1401's applicability.

The FAM explains that persons in legally valid and recognized marriages (including marriages of opposite-sex couples) may still have a child considered "born out of wedlock" for § 1409 purposes. *See, e.g.*, 8 FAM 304.3-2. The Department applies this policy equally to same-sex marriages and opposite-sex marriages. *See id.*; *see also* 7 FAM Ex. 1454. Thus, the

term "out of wedlock" concerns the marital status of a child's biological parents, and its application is not a failure to recognize the validity of a same-sex marriage.

Equally fatal to Plaintiffs' equal protection claim is the inability to identify any similarly situated protected group that the Department treated differently. The Complaint describes Plaintiffs' experience applying for a CRBA and passport for S.M.-G., *see, e.g.*, Compl. ¶¶ 52–55, but it lacks any factual allegations that similarly situated persons were treated differently. For example, other than a naked allegation, *see id.* at ¶ 85, Plaintiffs do not allege that a similarly situated opposite-sex married couple who used ART to conceive a child has been treated differently by the Department.

Because the Complaint lacks well-pleaded factual allegations that Plaintiffs have been treated differently than other similarly situated persons, the Court need not reach the question of whether the Departments' actions in denying a CRBA and U.S. passport to S.M.-G. survive rational basis review, *see, e.g., Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008); or whether a lower standard of review applies, *see Fiallo v. Bell*, 430 U.S. 787, 794–95 (1977).

Because Plaintiffs fail as a matter of law to allege a plausible equal protection claim, this claim should be dismissed.

II. Plaintiffs Fail To Allege A Plausible Due Process Claim.

The Court should likewise dismiss Plaintiffs' due process claim. Plaintiffs assert that Defendants are violating their substantive due process rights by "excluding the children of same-sex spouses from the scope of [§ 1401]." Compl. at ¶ 78; *see also id.* at ¶ 79. Because Plaintiffs fail to identify a fundamental right that Defendants have infringed upon, their substantive due process claim must be evaluated under rational basis review. Defendants' actions easily survive such review.

The Supreme Court has established that the Fifth Amendment guarantee of due process includes "a substantive component, which forbids the government from infringing certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). But the Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The Court has observed that the protections of substantive due process are limited to those rights that rank as "fundamental"—that is, both "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citation omitted). The Supreme Court has also made clear that a plaintiff must provide "a 'careful description' of the asserted fundamental liberty interest" when raising such a claim. *Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003). Where the asserted interest is not a fundamental right, the Court must ask whether the challenged statute is "rationally related to legitimate government interests." *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) (internal citation and quotation omitted). "The rational basis standard is 'highly deferential' and [the Court] hold[s] legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances." *Id.* (citing *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001).

Here, in the case of a family that has made the choice to have children outside the United States, Plaintiffs' asserted right to transmission of citizenship via § 1401, Compl. at ¶ 78, is too broad to comply with *Glucksberg*. Under the Department's interpretation of § 1401, S.M.-G. could have acquired U.S. citizenship through Mr. Mize had they had a biological, rather than just

legal, relationship. 8 U.S.C. §§ 1401(g), 1409(a). Going forward, the family retains the option of pursuing S.M.-G.'s naturalization pursuant to the Child Citizenship Act of 2000, 8 U.S.C. § 1431, which provides for citizenship for children born abroad in certain other circumstances.

Thus, Plaintiffs' asserted interest is better described as an individual's right to successfully apply for a CRBA or a U.S. passport on behalf of a child who is born abroad and is not the citizenship-conferring individual's biological child. This asserted right—which Plaintiffs do not even characterize as a liberty or property interest—cannot be considered fundamental under substantive due process jurisprudence because there is no such right deeply rooted in this Nation's history, tradition, and practices. As a threshold matter, the extension of citizenship to foreign-born children is not a constitutionally enshrined right for either the U.S. citizen or the child seeking to acquire citizenship; rather, it is a right granted by Congress. *Rogers*, 401 U.S. at 827; *see also Miller*, 523 U.S. at 453 (Scalia, J., concurring). Further, the Supreme Court has underscored the importance of a biological connection between the child seeking to acquire citizenship and the U.S. citizen seeking to confer citizenship. *See, e.g., Miller*, 523 U.S. at 438; *Nguyen v. INS*, 533 U.S. 53, 62 (2001). Therefore, Plaintiffs fail to establish a fundamental right at issue in this case.

Because Plaintiffs' asserted right is not fundamental, their claim "is subject only to rational basis scrutiny." *Doe*, 410 F.3d at 1345. This claim can be disposed of on a motion to dismiss, because Plaintiffs' pleadings evidence the rational basis of the challenged determination. Simply put, the Complaint is bereft of allegations that Defendants' interpretation of § 1409 and § 1401 to require a biological relationship between the qualified U.S. citizen and child for the child to receive a CRBA or a U.S. passport despite being born abroad is irrational.

Plaintiffs contend that there is no rational basis to limit the application of § 1401 to the children of opposite-sex couples. *See* Compl. ¶¶ 80, 89, 97. But there is no such policy, and the claim fails at the pleading stage because Plaintiffs fail to even allege that Defendants limit the application of § 1401 to the children of such couples. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The FAM contains no language that treats same-sex couples differently from opposite-sex married couples in requiring a biological connection between the child seeking to acquire U.S. citizenship and the relevant U.S. citizen parent under 8 U.S.C. § 1401. *See, e.g.*, 8 FAM 301.4 (*passim*).

Therefore, Plaintiffs fail to sufficiently allege that the Department's requirements for citizenship bear no rational relationship to a legitimate state interest, and Plaintiffs' equal protection claim must be dismissed accordingly.

III. Plaintiffs Fail To State A Valid Administrative Procedure Act Claim.

Plaintiffs' APA claim is barred because Plaintiffs have an adequate remedy at law. Plaintiffs bring a claim under § 706(2) of the APA, asserting that Defendants' denial of S.M.-G.'s CRBA and passport applications—and more broadly an alleged exclusion of children born abroad in same-sex marriages from the category of children who qualify for citizenship at birth—"lacks a rational basis, is arbitrary, and is contrary to law." *See* Compl. ¶¶ 93-94. APA review, however, is not available for Plaintiffs. The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). Section 704 is interpreted by the Supreme Court as precluding APA review where Congress has otherwise provided a special and adequate review procedure. *Bowen v. Massachusetts*, 487 U.S. 879, 901 (1988).

Here, there exists an "adequate remedy at law," *see* 5 U.S.C. § 704, precluding Plaintiffs' APA claim—S.M.-G. can challenge the State Department's denials of the CRBA application filed on her behalf under 8 U.S.C. § 1503, which provides a path by which S.M.-G. may assert a claim that she is a U.S. national. Section 1503 provides for *de novo* review of the issue of whether an individual is a U.S. national. 8 U.S.C. § 1503(a). "The APA does not authorize judicial review 'that adds to the sweeping *de novo* review' that the INA provides." *Heslop v. Attorney General of U.S.*, 594 F. App'x 580, 584 (11th Cir. 2014) (citation omitted).

Plaintiffs appear to concede that by bringing a claim under 8 U.S.C. § 1503 in this lawsuit, such a claim provides an adequate remedy at law. Indeed, the Fifth Circuit has recently affirmed that § 1503 is an adequate alternative to APA review of an agency determination that an individual is not a U.S. citizen. *Hinojosa v. Horn*, 896 F.3d 305, 312 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019). As the court noted, § 1503 provides a "direct and guaranteed path to judicial review" under § 1503. *Id.* "Moreover, the provision comprises 'both agency obligations and a mechanism for judicial enforcement,'" *id.* (quoting *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1245 (D.C. Cir. 2017)), which suggests that the statute "strikes the balance between statutory duties and judicial enforcement that Congress desired," *Citizens for Responsibility*, 846 F.3d at 1245. The Fifth Circuit concluded that "[p]ermitting a cause of action under the APA would provide a duplicative remedy, authorizing an end-run around that process." *Hinojosa*, 896 F.3d at 312. The Fifth Circuit's reasoning is persuasive, and should be adopted here.

That Plaintiffs may seek injunctive and declaratory relief under the APA but can obtain declaratory relief only under § 1503(a) does not render § 1503's remedies inadequate here. Section 706(2)(A) of the APA allows the courts to "hold unlawful and set aside agency action"

that does not comport with the applicable laws and procedures. 5 U.S.C. § 706(2)(A). Section 1503, for its part, accords an individual "judgment declaring him to be a national of the United States," 8 U.S.C. § 1503(a).

There is no significant gap between the relief that § 1503 affords and that which is available to Plaintiffs under the APA. *Cf. Bowen*, 487 U.S. at 905. Indeed, all § 706(2)(A) of the APA can provide is an order vacating or remanding the Department's denials of S.M.-G.'s CRBA and passport applications. *See id.* These remedies do not encompass an affirmative declaration that S.M.-G. is a U.S. citizen, which is Plaintiffs' second request for relief, *see supra*. Section 1503 instead provides Plaintiffs with a mechanism to obtain a declaration that S.M.-G. was a citizen at birth. As the Supreme Court has recognized, "the power to make someone a citizen of the United States has not been conferred upon the federal courts . . . as one of their generally applicable equitable powers." *INS v. Pangilinan*, 486 U.S. 875, 883–84 (1988). "Rather, it has been given to them as a specific function to be performed in strict compliance with the terms of an authorizing statute which says that '[a] person may be naturalized ... in the manner and under the conditions prescribed in this subchapter, and not otherwise.'" *Id.* at 884 (quoting 8 U.S.C. § 1421(d)). Thus, even if the Court were to find that Defendants violated the APA by not granting a CRBA or a passport to S.M.-G., any declaratory or injunctive relief the Court might order under the APA could not grant or guarantee citizenship for S.M.-G. The Court lacks authority to convey citizenship to specific individuals outside of the procedures required by the INA. *See Pangilinan*, 486 U.S. at 884.

And Plaintiffs' other, sweeping requests for judgment on the Department of State's policies as a whole and for a permanent, universal injunction are unavailable under the APA and, in any event, must be rejected as improper. First, the APA does not allow Plaintiffs to seek

"*wholesale* improvement of [a] program by court decree." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Second, it is a black-letter rule that injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see also Gill v. Whitford*, 138 S.Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). Indeed, § 706(2)'s inability to provide Plaintiffs with *any* of their requested relief is an independent basis on which to dismiss this claim.

Therefore, Plaintiffs' APA claims should be dismissed due to § 1503's adequate alternative review procedures.

IV. Defendants Have Properly Interpreted § 1401 To Require A Biological Relationship And That Interpretation Compels The Conclusion That S.M.-G. Did Not Acquire Citizenship Automatically At Birth, Thereby Defeating Plaintiffs' §1503 Claim.

A. The Text And Context Of § 1401 Support The Department's Interpretation.

Even if Plaintiffs could pursue an APA claim, that claim fails as a matter of law because the Department's interpretation of the INA is reasonable. *See Iqbal*, 556 U.S. at 678. Section 1401 confers citizenship on individuals "born … of parents" who meet the statutory requirements. To be "born," of course, is "[t]o be brought forth as offspring, to come into the world." *Oxford English Dictionary*, https://oed.com (definition I.1 of "born, *adj.*"). And "of," in this context, "[i]ndicat[es] the thing, place, or person from which or whom something originates, comes, or is acquired or sought." *Id.* (definition III of "of, *prep.*"); *see also, e.g., American Heritage Dictionary* 1221 (5th ed. 2016) ("[d]erived or coming from"). For a child to be "born of parents," then, means that he originates or derives from those parents. That is true if the child is biologically related to the parents. It is not true if the child lacks such a relationship.

Section 1401's plural reference to "parents" further supports the inference that it requires a biological relationship. The statute does not refer to a child "born of a marriage" in which one parent is a U.S. citizen and the other is not. Rather, it refers to a child "born … of parents," bolstering the conclusion that *each* parent have a biological relationship to the child.

Other courts have interpreted the phrase "born of parents" in a manner consistent with the State Department's construction. The Second Circuit, for example, has interpreted the language of 8 U.S.C. § 1401(c)—conferring citizenship "at birth" on "a person born outside of the United States … of parents both of whom are citizens of the United States"—as requiring a biological relationship between the child and the parents.[2] *Colaianni v. INS*, 490 F.3d 185, 187 (2d Cir. 2007). And the Court of Appeals for Veterans Claims, in construing the phrase "illegitimate child" to mean a child "'born of parents not married to each other,'" explained that "'[b]orn of parents' indicates a biological connection between the parents and the child." *McDowell v. Shinseki*, 23 Vet. App. 207, 210-212 (2009), *aff'd*, 396 F. App'x 691 (Fed. Cir. 2010).

The Department's interpretation of § 1401's text is further supported by its context: the conferral of *jus sanguinis* citizenship. *See, e.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). *Jus sanguinis* literally means the "right of blood—the conferral of nationality based on descent, irrespective of the place of birth." Aleinikoff et al., Immigration and Citizenship: Process and Policy 15 (6th ed. 2008). Consistent with that historical

[2] The Second Circuit has also interpreted "born of parents" in the INA to include the common law meaning of "parents" and, thus, "the longstanding presumption of parentage based on marriage." *Jaen v. Sessions*, 899 F.3d 182, 188 (2d Cir. 2018).

understanding of the doctrine, the Supreme Court has repeatedly emphasized the importance of the government's interest in "assuring that a biological . . . relationship exists" between a child and a parent through whom the child claims citizenship. *Nguyen*, 533 U.S. at 62; *see also Miller*, 523 U.S. at 436.

That traditional understanding of *jus sanguinis* citizenship provides a strong reason to pause before concluding that Congress meant to confer citizenship at birth on children born abroad who lack any biological connection to a U.S. citizen by whom citizenship is intended to be transmitted. To be sure, if the text of § 1401 unambiguously extended citizenship without a biological relationship, then the text would govern. But § 1401's text favors a biological relationship requirement for the reasons discussed above. That implication is bolstered by the traditional understanding of *jus sanguinis* citizenship—the context in which Congress enacted § 1401. *See, e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) ("[T]he language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.").

B. The Department's Interpretation Warrants *Skidmore* Deference.

To the extent § 1401 remains ambiguous notwithstanding the textual and contextual factors favoring the State Department's interpretation, a tiebreaking factor is the deference owed to that interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* and its progeny recognize that agency interpretations lacking the force of law may nonetheless warrant deference "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218,

234 (2001) (citation omitted; quoting *Skidmore*, 323 U.S. at 139, 140). Such interpretations are entitled to some deference based upon its power to persuade. *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1155 (11th Cir. 2007). The proportional deference afforded the agency's interpretation depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Id.* (quoting *Skidmore*, 323 U.S. at 140). Other decisions reflect a similar approach. *See, e.g.*, *Kasten*, 563 U.S. at 15-16; *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401-402 (2008; *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 839 (9th Cir. 2012) (en banc).

The State Department's longstanding interpretation of § 1401, § 1409, and related provisions is exactly the sort of interpretation that warrants *Skidmore* deference. To begin, the interpretation reflects the Department's "'specialized experience'" and its appreciation of the need for "uniformity," *Mead*, 533 U.S. at 234. The Department has long been concerned about the phenomenon of individuals fraudulently claiming citizenship on behalf of a child born abroad who is not actually theirs. *See, e.g.*, 8 FAM § 301.4-1(E) (concerning suspected fraud or falsehood in citizenship claims).

Of course, citizenship fraud is not limited to the context of assisted reproduction, and a biological-relationship requirement is not a failsafe means of preventing it. But because biological relationships can easily and objectively be verified through DNA testing, such a requirement is a powerful way to address concerns about fraud. Without it, citizenship claims could be supported merely by documents purporting to show legal relationships between parents and child, and it can be extremely difficult (especially in certain countries) to verify that such documents are genuine and accurate. *See, e.g.*, Joint Statement of USCIS and the Department of

State, *U.S. Suspends Processing New Nepal Adoption Cases Based on Abandonment* (Aug. 6, 2010), https://go.usa.gov/xVpWZ (explaining that, in Nepal, "[c]ivil documents, such as … birth certificates[,] often include data that has been changed or fabricated"). If § 1401(c)'s "born … of parents" language were interpreted to require only legal, not biological, parentage, then the State Department could be required to undertake a complex investigation into the genuineness and accuracy of a child's birth certificate, rather than relying on far more straightforward evidence of biological parentage. Similar fraud concerns arise in many circumstances. *See, e.g.*, *Alzokari v. Pompeo*, 2019 WL 3805083 (E.D.N.Y. Aug. 13, 2019) (challenge to passport revocation resulting from fraud concerns regarding plaintiff 's parentage claim for a child he later admitted was his grandson), *appeal filed*, No. 19-3113 (2d Cir. Oct. 1, 2019).

The State Department's assessment of fraud concerns is a strong reason for the Court to defer to the Department's interpretation of the INA. *Cf. Fiallo v. Bell*, 430 U.S. 787, 799 n.8 (1977) (explaining that, in adopting a provision not at issue here, "Congress may well have given substantial weight" to the "difficulty" of parentage determinations "and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line"). The Department's interpretation reflects its "'specialized experience'" in adjudicating thousands of applications for citizenship documents, as well as its appreciation of the need for standards that can be applied "uniform[ly]" in countries around the world, including those where legal documents may be falsified or inaccurate. *Mead*, 533 U.S. at 234. And the interpretation accounts for the Department's predictive judgment that eliminating a biological-relationship requirement would increase citizenship fraud. *Cf. Mo.-Kan.-Tex. R. Co. v. United States*, 632 F.2d 392, 406 ("In making a predictive judgment, the expertise of the [agency] supplements, and may supplant, the projections placed in the record by the parties.").

Nor is fraud the only relevant concern. If a child could acquire citizenship through a legal parent regardless of whether he is biologically related to that parent, then the conferral of U.S. citizenship on children born overseas would depend on the legal parentage laws of more than two hundred countries, some of which recognize forms of parentage inconceivable to the Congress that enacted the INA. For example, the law of Ontario, Canada, currently affords automatic recognition to up to four intended parents designated in a surrogacy agreement, and allows courts to recognize more than four. Children's Law Reform Act, R.S.O. 1990, c. C.12, §§ 10, 11, *available at* https://www.ontario.ca/laws/statute/90c12.

In addition, the State Department's position is consistent and longstanding. As the Foreign Affairs Manual explains, a biological relationship with a U.S. citizen parent has been a prerequisite to citizenship for a child born abroad "[s]ince 1790." 8 FAM § 301.4-1(B). And to facilitate the evenhanded application of the requirement to people claiming citizenship under a wide range of circumstances, the State Department's application form for a CRBA—as noted above—asks parents to indicate whether they were "married to the child's other biological parent when the child was born." Attach. A. There is no basis to suggest that the interpretation at issue in this case reflects "'*post hoc* rationalizatio[n],'" as opposed to the kind of "careful consideration" that warrants *Skidmore* deference, *Kasten*, 563 U.S. at 15-16.

The State Department's position is also eminently reasonable as a construction of the INA, even assuming alternative constructions could also be regarded as reasonable. As discussed above, § 1401's use of the phrase "born of" supports the Department's interpretation of that provision to entail a biological-relationship requirement. That interpretation is further corroborated by the statutory context, including the historical understanding of *jus sanguinis* citizenship. And it serves important governmental objectives, including the prevention of

citizenship fraud. A contrary interpretation, even if plausible, is not so clearly correct as to foreclose the State Department's view.

C. S.M.-G. Did Not Acquire U.S. Citizenship Automatically At Birth.

As discussed above, the Department's interpretation of the applicable statute is reasonable and appropriate. The Court should apply this interpretation when considering Plaintiffs' claim pursuant to 8 U.S.C. § 1503. In doing so, the Court should conclude that Plaintiffs have failed to state a claim upon which S.M.-G. may be determined to be a U.S. citizen by operation of § 1401(c), or § 1401(g) for that matter. Section 1401(c) provides for automatic citizenship at birth for a foreign-born person if that person is "born . . . 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." 8 U.S.C. § 1401(c). Both Mr. Mize and Mr. Gregg must have a biological relationship, not just a legal relationship, with S.M.-G. in order for her to acquire U.S. citizenship at birth under § 1401(c). Accordingly, § 1401(c) does not operate to confer citizenship here. Furthermore, Plaintiffs do not dispute that Mr. Gregg, the U.S. citizen parent with whom S.M.-G. has a biological relationship, did not meet the five-year physical presence requirement of § 1401(g). Section 1401(g), therefore, also fails to confer U.S. citizenship to S.M.-G. Thus, Plaintiffs' claim pursuant to 8 U.S.C. § 1503 is unavailing.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint with prejudice.

Dated: November 4, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRCIT 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.	:	Civ. No. 1:19-CV-03331-MLB
MICHAEL R. POMPEO, in his official capacity as Secretary of State, and THE U.S. DEPARTMENT OF STATE,	:	
Defendants.	:	

CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in LR 5.1B for documents prepared by computer.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 18-523-JFW(JCx)** Date: February 21, 2019

Title: Andrew Mason Dvash-Banks, et al. *-v-* Michael R. Pompeo, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [filed 1/7/19; Docket No. 83]; and**

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [filed 1/7/19; Docket No. 89]

On January 7, 2019, Plaintiffs Andrew Mason Dvash-Banks ("Andrew") and E.J., by and through his guardian *ad litem* Elad Dvash-Banks, ("E.J.") (collectively, "Plaintiffs") filed a Motion for Partial Summary Judgment. On January 14, 2019, Defendants the United States Department of State (the "State Department") and Michael R. Pompeo ("Pompeo") (collectively, "Defendants") filed their Opposition. On January 22, 2019, Plaintiffs filed a Reply. On January 7, 2019, Defendants filed a Motion for Partial Summary Judgment. On January 14, 2019, Plaintiffs filed their Opposition. On January 22, 2019, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's February 11, 2019 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background[1]

[1] The facts in this case are largely undisputed. To the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those

A. Factual Background

Andrew is a citizen of the United States, who was born, raised, and attended college in California.[2] Andrew continuously resided in the United States from his birth in 1981 to October 2005. In 2007, Andrew enrolled in and attended a master's degree program in Israel. In 2008, Andrew met his now-husband, Elad Dvash-Banks ("Elad"), who is an Israeli citizen. In 2010, Andrew and Elad moved to Canada and they were married in Toronto on August 19, 2010.

When Andrew and Elad, who are both men, decided to start a family, they did so using assisted reproductive technology ("ART"). As part of the ART process, Andrew and Elad provided their respective genetic material to create embryos using eggs from an anonymous egg donor (the "Donor"). In December 2015, Andrew and Elad entered into a written contract with a gestational surrogate (the "Gestational Surrogate") to carry a maximum of two embryos to term. Two embryos, one of which was created using genetic material from Elad and the Donor and the other of which was created using genetic material from Andrew and the Donor, were then implanted into the Gestational Surrogate, who became pregnant with twins.

On September 16, 2016, E.J. and his brother, A.J. (collectively, the "Twins"), were born four minutes apart in Ontario, Canada. Andrew, Elad, and the Twins have lived together as a family since the Twins' birth. On September 28, 2016, Andrew and Elad petitioned the Superior Court of Justice in Toronto, Ontario, to declare them to be the legal parents of E.J. and A.J. The court granted the application, and directed the Deputy Registrar General for the Province of Ontario to register the birth of the children and to show Andrew and Elad as the legal parents of the children.

On January 24, 2017, four months after the Twins were born, Andrew, Elad, and the Twins appeared in person at the U.S. Consulate in Toronto (the "Toronto Consulate") in connection with applications for documents evidencing each Twin's U.S. citizenship – specifically, a Consular Report of Birth Abroad ("CRBA") and a U.S. passport.[3] The applications submitted to the Toronto Consulate disclosed that the children had been born using ART. Andrew and Elad provided the required documentation for E.J. and A.J., including their Ontario Statements of Live Birth, which identified Andrew and Elad as A.J.'s and E.J.'s parents; evidence of Andrew's U.S. citizenship and residency history; and Andrew's and Elad's marriage certificate.

Vice Consul Frances Terri Day ("Day") was assigned to adjudicate the applications. Day accepted Andrew's and Elad's Ontario marriage license as proof of their marriage and A.J.'s and E.J.'s Statements of Live Birth as timely filed Canadian birth certificates. Day also accepted the Statements of Live Birth, which identified Andrew and Elad as A.J.'s and E.J.'s parents, as proof of A.J.'s and E.J.'s parentage. During the interview, and after consulting with her colleagues, Day informed Andrew and Elad that, absent evidence of a biological relationship with Andrew, neither Twin would qualify for U.S. citizenship. Day told Andrew and Elad that, if they opted to proceed

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objections because the disputed evidence was not relied on by the Court.

[2] Andrew holds dual U.S. and Canadian citizenship.

[3] CRBAs and passports prove the citizenship status of their holders. 22 U.S.C. § 2705.

with the Twins' applications, they would have to provide additional evidence demonstrating the existence of a biological relationship required by the State Department. Day provided the family the option of submitting DNA evidence to prove such relationship, and a letter outlining relevant steps should they choose to pursue that option. Andrew and Elad arranged to have DNA testing conducted and submitted in support of E.J.'s and A.J.'s applications.

Following the interview, Andrew underwent DNA testing, the results of which established that A.J. was the biological child of Andrew, and E.J. was not. On March 2, 2017, the Toronto Consulate issued a CRBA for A.J. By letter to Andrew dated that same day, Day informed the Dvash-Banks family that the State Department had denied E.J.'s applications for a CRBA and a U.S. passport.[4] The basis for the denial of E.J.'s applications for a CRBA and a U.S. passport was the lack of evidence of a biological connection between Andrew and E.J. To arrive at this determination, Day applied State Department policies memorialized in the State Department's internal Foreign Affairs Manual ("FAM") for adjudicating U.S. citizenship applications for children born through the use of ART. Day's letter constituted a final adjudication of E.J.'s applications.

B. Procedural History

On January 22, 2018, Andrew filed this action on behalf of himself and E.J.[5], challenging Defendants' decisions to deny E.J.'s applications for a CRBA and a U.S. passport. On January 14, 2019, Plaintiffs filed a First Amended Complaint, alleging three claims: (1) a claim under the Declaratory Judgment Act alleging a violation of Plaintiffs' substantive due process rights; (2) a claim alleging a violation of the Administrative Procedure Act ("APA"); and (3) a claim under 8 U.S.C. § 1503 seeking an order that E.J. is a U.S. citizen.

In their Motion for Partial Summary Judgment, Plaintiffs move for summary judgment on their first claim alleging a violation of their substantive due process rights and their third claim for a declaration pursuant to 8 U.S.C. § 1503 that E.J. is a U.S. citizen. In their Motion for Partial Summary Judgment, Defendants move for summary judgment on Plaintiffs' first claim alleging a violation of Plaintiffs' substantive due process rights and Plaintiffs' second claim for violation of the APA.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)

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[4] In addition to issuing CRBA, the State Department also grants and issues U.S. passports. *See* 22 U.S.C. § 211a.

[5] On December 4, 2018, Elad was appointed guardian *ad litem* for E.J. in this action.

("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

A. The Immigration and Nationality Act and Its Enforcement by the State Department and the Department of Homeland Security

The Immigration and Nationality Act ("INA") specifies the eligibility requirements for U.S. citizenship at birth. For children born abroad, these requirements differ for children born to married parents, who are subject to 8 U.S.C. § 1401 ("Section 301"), and children "born out of wedlock," who are subject to 8 U.S.C. § 1409 ("Section 309"). Section 301(g) provides, in part, that a person born outside the United States

> of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . not less than five years, at least two of which were after attaining the age of fourteen

shall be a U.S. citizen. 8 U.S.C. § 1401(g); *see also Tuan Anh Nguyen v. INS*, 533 U.S. 53, 59 (2001).

Section 309 of the INA, which is entitled "Children born out of wedlock," provides several additional means by which a child born outside the United States may acquire U.S. citizenship at birth in addition to those described in Section 301. Specifically, Section 309(a) provides that a person born outside the United States and "out of wedlock" shall be a U.S. citizen if

(1) a blood relationship between the person and the father is established by clear and convincing evidence,
(2) the father had the nationality of the United States at the time of the person's birth,
(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
(4) while the person is under the age of 18 years –
    (A) the person is legitmated under the law of the person's residence or domicile,
    (B) the father acknowledges paternity of the person in writing under oath, or
    (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a). Although the word "wedlock" does not appear anywhere in Section 301, courts have consistently interpreted that section as applying to children born abroad to married parents, in part, because of the differences between Sections 301 and 309, including the fact that Section 309 is entitled "Children born out of wedlock." *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (referring to Section 301(g) as "[a]pplicable to married couples"). In comparing the two statutes, Section 301(g) does not contain the express language of Section 309(a) requiring a "blood relationship between the person and the father" in order for citizenship to be acquired at birth.

State Department guidance regarding interpretation and administration of the INA can be found in its FAM.[6] Despite Section 301's silence on the issue, the FAM purports to impose a biological relationship test under Section 301 on applicants for a CRBA. It does so by requiring that, to be considered born "in wedlock" (and, thus, to be covered by Section 301), a child born outside of the United States must have a biological relationship with both of his or her married parents. For example, the FAM 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." 8 FAM § 304.1-2. The basis for the State Department's imposition of a biological requirement is its strained interpretation of the language in Section 301(g) "a person . . . born . . . of parents one of whom is a . . . citizen of the United States."[7]

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[6] The State Department is responsible for U.S. citizenship determinations for individuals born abroad. 8 U.S.C. § 1104(a); 22 C.F.R. § 50.7; *see also* 22 U.S.C. § 2705. However, the Department of Homeland Security ("DHS") is responsible for citizenship determinations made in the United States. *See* 8 U.S.C. § 1103(a)(1). Specifically, the U.S. Citizenship and Immigration Services ("USCIS") within DHS adjudicates applications for certificates of citizenship. *See* 8 U.S.C. § 1452.

[7] The FAM states that "[s]ince 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad." 7 FAM 1131.2. First, "at least one biological parent must have been a U.S. citizen when the child was born." *Id*. Second, the "U.S. citizen parent(s) must have resided or been physically present in the [U.S.] for the time required by the law in effect when the child was born." Id. Therefore, Defendants interpret the phrase "born … of parents" in Section 301 to include a biological connection between the child and the referenced parents. The

The FAM represents the State Department's unilateral declarations and is not the product of a formal adjudication or notice-and-comment rulemaking or congressional action. *See Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000); *Jaen v. Sessions*, 899 F.3d 182, 187 n.4 (2d Cir. 2018). For example, in 2014, the State Department decided to change its interpretation of born "in wedlock" to include children born of a gestational mother who is the child's legal parent, even if she did not provide the egg from which the child was conceived. This change was not occasioned by any corresponding amendments to the law or any other congressional action. Similarly, State Department employees began drafting a memorandum exploring possible ways to further modify the State Department's definition of "in wedlock" to cover other children born through the use of ART, but ultimately the State Department did not make that change.

B. Defendants Are Entitled to Summary Judgment on Plaintiffs' APA Claim.

In their second claim, brought under Section 706(2)(A) of the APA, Plaintiffs allege that Defendants' denial of E.J.'s CRBA application – and more broadly an alleged exclusion of children born abroad in same-sex marriages from the category of children who qualify for citizenship at birth under 8 U.S.C. § 1401(g) – lacks a rational basis, is arbitrary, and is contrary to law. Defendants argue that APA review is not available for Plaintiffs because there is an adequate remedy at law, which precludes Plaintiffs' APA claim. Specifically, Defendants argue that E.J. can, and has, brought a separate claim under 8 U.S.C. § 1503 challenging the State Department's denials of the CRBA and passport applications, which provides a path by which E.J. may assert a claim that he is a U.S. citizen. In addition, Defendants argue that E.J. can also apply for a certificate of citizenship from USCIS, which provides equivalent proof of U.S. citizenship. Plaintiffs argue that asking E.J. to seek relief from a second agency, the USCIS, is not an adequate remedy under the APA. Plaintiffs also argue that the relief provided by Section 1503 is inadequate because it is limited to a declaration of E.J.'s citizenship status and does not provide all the remedies provided for under the APA, such as injunctive relief.

The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). "[T]he Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a special and adequate review procedure." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation and internal quotation marks omitted); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *Coos Cnty. Bd. of County Com'rs v. Kempthorne*, 531 F.3d 792, 810 (9th Cir. 2008).

In this case, Plaintiffs have brought a separate claim under Section 1503(a), which is the statute Congress specifically enacted to provide a remedy for an individual who is denied a "right or privilege as a national of the United States" by the federal government on "the ground that [s]he is not a national of the United States." *See* 8 U.S.C. § 1503(a). Where an applicant challenges the State Department's denial of a right or privilege of U.S. citizenship on the basis that the plaintiff

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State Department argues that the "born . . . of parents" language in Section 301 has an inherently biological connotation, and can reasonably be read and understood to serve a similar function and purpose to the "blood relationship" language of Section 309(a) of ensuring a biological connection between a child and his or her parents.

is not a U.S. citizen, courts have consistently concluded that Section 1503(a) offers an adequate alternative remedy to APA review. *See, e.g., Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1233–34 (D. Ariz. 2016) ("Because 8 U.S.C. § 1503(a) affords Plaintiffs a right of action, the APA does not apply"); *Esparza v. Clinton*, 2012 WL 6738281, at *1 (D. Or. Dec. 21, 2012) (dismissing the plaintiff's APA claim and holding "[t]hat 'right or privilege as a national of the United States,' a passport as sought by plaintiff here, is exactly the relief provided for by 8 U.S.C. § 1503"); *Alsaidi v. U.S. Dep't of State*, 292 F. Supp. 3d 320, 326 (D.D.C. 2018) (dismissing the plaintiff's APA claim and holding that "[t]o renew her passport, plaintiff will require proof of citizenship, and under 8 U.S.C. § 1503(a), she may accomplish this directly through de novo review in the federal district court where she resides (i.e., the Northern District of California). This constitutes an adequate alternative remedy to achieve plaintiff's desired relief").

In addition, although Plaintiffs argue that Section 1503's remedies are inadequate because Plaintiffs seek injunctive and declaratory relief under the APA and Plaintiffs are limited to declaratory relief and no injunctive relief under section 1503(a), the Court disagrees. First, the APA does not allow Plaintiffs to seek the type of "wholesale improvement of [a] program by court decree," that they do in asking the Court to declare the State Department's policy of classifying the children of same sex married couples as "children born out of wedlock" unconstitutional and a violation of the INA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Second, Plaintiffs seek to permanently enjoin Defendants from continuing to classify all children of same sex married couples as "children born out of wedlock" and denying those children the right to acquire citizenship at birth pursuant to Section 301(g) on that basis, but injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (*quoting Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see also Gill v. Whitford*, 138 S.Ct. 1916, 1933 (2018); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018). The injunction sought by Plaintiffs is well beyond that needed to provide Plaintiffs with complete relief, namely a declaration that E.J. is a U.S. citizen.

Accordingly, Defendants are entitled to summary judgment on Plaintiffs' second claim for violation of the APA.

C. Plaintiffs Are Entitled to Summary Judgment on Their Section 1503 Claim.

In their third claim, Plaintiffs seek a declaration pursuant to Section 1503 that E.J. is and was a U.S. citizen at birth. In their Motion for Partial Summary Judgment, Plaintiffs argue that, pursuant to Section 1503, E.J. is entitled to a declaration that he acquired U.S. citizenship at birth under Section 301(g) of the INA because the State Department's biological relationship requirement is inconsistent with the text and legislative intent of Section 301(g). Defendants argue that because Plaintiffs now live in the United States, Andrew can apply for a certificate of citizenship on behalf of E.J. from USCIS, and, thus, the Court should deny without prejudice Plaintiffs' Motion for Partial Summary Judgment with respect to the Section 1503 claim until Plaintiffs seek a certificate of citizenship for E.J. from USCIS.

Under Section 1503, any person who is within the United States who "claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency . . . may institute an action . . . for a judgment declaring him to be a national

of the United States." 8 U.S.C. § 1503(a). "A suit under section 1503(a) is not one for judicial review of the agency's action" but for "a de novo judicial determination of the status of the plaintiff as a United States national." *Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985); *Acosta v. United States*, 2014 WL 2216105, at *3 (W.D. Wash. May 29, 2014).

E.J. claims that he acquired U.S. citizenship at birth under Section 301(g) of the INA because he was born to his married parents, Andrew and Elad, on September 16, 2016, and Andrew is a U.S. citizen. Section 301(g) provides that the following individuals are nationals and citizens of the United States at birth:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years . . . .

In this case, the material facts are not in dispute. Specifically, there is no dispute that: (1) Andrew is a U.S. citizen who satisfied Section 301's residency requirements at the time of E.J.'s birth; (2) E.J.'s legal parents, Andrew and Elad, were married at the time of E.J.'s birth; (3) E.J. was born outside of the United States; (4) Andrew and Elad are E.J.'s legal parents and have acted as his only parents since his birth; (5) E.J. now resides in California; and (6) E.J. does not share a biological relationship with Andrew but does with Elad. In addition, it is undisputed that the denial of E.J.'s CRBA and U.S. passport applications constitutes the denial of "a right or privilege as a national of the United States." 8 U.S.C. § 1503. Thus, the only issue is whether Section 301 requires E.J., who was born during the marriage of his parents, to demonstrate a biological relationship with both of his married parents.

The Court concludes that, under controlling Ninth Circuit authority, Section 301 does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their married parents. For example, in *Scales v. INS*, the petitioner was born during the marriage of his Philippine citizen mother and U.S. citizen father, but was not the biological child of his U.S. citizen father. 232 F.3d at 1162. Following a conviction in Washington for possession with intent to deliver cocaine, the INS entered an order that the petitioner be deported as an alien convicted of an aggravated felony because the petitioner was a citizen of the Philippines. *Id.* at 1162. The petitioner appealed the deportation order to the Board of Immigration Appeals ("BIA"), arguing that he was a U.S. citizen because his mother had been married to his U.S. citizen father at the time he was born and, thus, he acquired U.S. citizenship at birth through his father, even though he was not his father's biological son. *Id.* The BIA dismissed the petitioner's appeal, holding that there must be a blood relationship between the child and the parent through whom citizenship is claimed to acquire U.S. citizenship at birth. *Id.* The petitioner then sought review of the BIA's decision in the Ninth Circuit. *Id.* The Ninth Circuit held that "[a] straightforward reading" of the "born of parents" language in Section 301 "indicates . . . that there is no requirement of a blood relationship." *Id*. at 1164. The Ninth Circuit also held that "[i]f Congress had wanted to ensure" that a person born to married parents only one of whom was a U.S. citizen "actually shares a blood relationship with an American citizen," "'it knew how to do so,'" as it had done in Section 309. *Id*. (*quoting Custis v. United States*, 511 U.S. 485, 492 (1994)). The Ninth Circuit expressly refused to defer to the FAM, concluding that it was so divergent from the statutory

language as to not even be appropriately considered "an interpretation of § 1401." *Id.* at 1165-66; *see also Jaen*, 899 F.3d at 187 n.4.

The Ninth Circuit followed *Scales* in *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). In *Solis-Espinoza*, the petitioner was born in Mexico and raised in the United States by his biological father, a Mexican citizen, and his father's wife, a U.S. citizen who was not the petitioner's biological mother. *Id.* The petitioner's father and the father's wife were married at the time of the petitioner's birth. *Id.* at 1091-92. The Board of Immigration Appeals held that the petitioner "'was born out of wedlock,' because his biological father was not married to his biological mother at the time of his birth." *Id.* at 1092. On appeal, the Ninth Circuit reversed, holding that the petitioner "was a legitimate child, not born out of wedlock, and . . . thus a United States citizen pursuant to 8 U.S.C. § 1401(g)." *Id.* at 1094. Thus, the Ninth Circuit held once again that Section 301 does not condition U.S. citizenship on the existence of a blood relationship with a U.S. citizen parent. *Id.* at 1093 (*citing Scales*, 232 F.3d at 1164).

Other than the gender of E.J.'s parents, the factual circumstances in *Scales* and *Solis-Espinoza* are indistinguishable from the facts in this case. Both *Scales* and *Solis-Espinoza* make clear that the word "parents" as used in Section 301(g) is not limited to biological parents and that the presumption of legitimacy that applies when a child is born to married parents – as codified in the INA – cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent. In fact, in *Solis-Espinoza*, it was undisputed that the petitioner did not share a biological relationship with his U.S. citizen parent – his father's wife – but the Ninth Circuit nonetheless rejected the applicability of a biological relationship test. *See Solis-Espinoza*, 401 F.3d at 1091-92; *see also Jaen*, 899 F.3d at 185 (holding that under the INA, "a child born into a lawful marriage is the lawful child of those parents, regardless of . . . any biological link"). Therefore, it is clear under *Scales* and *Solis-Espinoza* that, in the Ninth Circuit, a biological relationship is not required under Section 301(g).

In addition, the dramatic difference in the language of Section 301 and Section 309 makes it clear that a biological relationship is not required between a child and his U.S. citizen parent if that child his born during the marriage of his parents to each other. Nothing in Section 301 references a biological relationship requirement or suggests that in using the words "parent" or "born . . . of parents," Congress intended to refer only to biological or genetic parents. However, by including a "blood relationship" requirement in Section 309, Congress made it clear that it intended children born in and out of wedlock to be treated differently for purposes of acquiring U.S. citizenship. *See Scales*, 232 F.3d at 1165; *Jaen*, 899 F.3d at 189 ("Congress clearly specified enhanced requirements for proof of parentage in the case of children born out of wedlock" and "the 'textual distinction' between the sections regarding children of married parents and children of unmarried parents is strongly suggestive of a clear Congressional intent to treat the two categories differently on this point"); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation marks omitted).

Moreover, concluding that Section 301 does not impose a biological relationship requirement is consistent with the legislative history of the INA, which "clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the

problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 85-1199, at 7 (1957); *see also Nation v. Esperdy*, 239 F. Supp. 531, 538 (S.D.N.Y. 1965) ("'[T]hese provisions are designed to clarify or adjust existing provisions of law in the interest of reuniting broken families . . . .'") (quoting 103 Cong. Rec. 15,498 (1957) (statement of Sen. John F. Kennedy)). As the Ninth Circuit recognized in *Solis-Espinoza*, "[t]he [INA] was intended to keep families together [and] should be construed in favor of family units and the acceptance of responsibility by family members." *Solis-Espinoza*, 401 F.3d at 1094; *Sook Young Hong v. Napolitano*, 772 F. Supp. 2d 1270, 1278-79 (D. Haw. 2011) (collecting cases). In *Scales*, the Ninth Circuit also held that its interpretation of Section 301 was consistent with Congress's purpose in enacting the INA because the concerns necessitating a blood relationship requirement in Section 309 – that "'the unmarried male . . . need not participate in the decision to give birth rather than to choose an abortion; that he need not be present at the birth; and for at least 17 years thereafter he need not provide any parental support . . . in order to preserve his right to confer citizenship on the child pursuant to [Section 309]'" – are "not present if a child is born in wedlock." *Scales*, 232 F.3d at 1164 (*quoting Miller v. Albright*, 523 U.S. 420, 434 (1998)).

Accordingly, Plaintiffs are entitled to summary judgment on their third claim for a declaration pursuant to 8 U.S.C. § 1503 that E.J. acquired U.S. citizen at birth.

D. Plaintiffs' Declaratory Judgment Claim is Moot.

In their first claim, Plaintiffs seek a declaration that the State Department's interpretation of Section 301 violates the due process guarantee of the Fifth Amendment by infringing on the fundamental right of same sex couples to marry. However, the parties agree that if Plaintiffs prevail on their Section 1503 claim that it would be unnecessary for the Court to decide Plaintiffs' declaratory judgment claim. Defendants' Motion for Partial Summary Judgment (Docket No. 92-1), 19:24-26 ("To the extent the court believes that Plaintiffs are entitled to relief on their due process claim, the court should defer ruling on Count I until it resolves Plaintiffs' statutory claim, which may provide sufficient relief without unnecessarily addressing a constitutional question"); Plaintiffs' Motion for Partial Summary Judgment (Docket No. 83-1), 22:4-6 and 26-28 (arguing that "E.J. is entitled to judgment as a matter of law on his claim under Section 1503 and a declaration that he is a U.S. citizen at birth" and noting that "[t]his result is necessary to avoid the serious constitutional questions raised by Plaintiffs under the Fifth Amendment"); and Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment (Docket No. 101), 6:25-28 ("The parties agree that to the extent this Court can resolve Plaintiffs' section 1503 claim, this Court need not reach Plaintiffs' constitutional claim"). Therefore, because the Court has decided Plaintiffs' Section 1503 claim in favor of Plaintiffs, the Court need not and will not reach the constitutional issue raised in Plaintiffs' declaratory judgment claim. *United States v. Kenney*, 789 F.2d 783, n. 2 (9th Cir. 1986) ("Because we decide on statutory grounds, we need not reach the constitutional issue"); *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994) ("There is no reason, however, to explore the boundaries of the constitutional guarantee of procedural due process in the present context, and we do not do so"); *Baires v. I.N.S.*, 856 F.2d 89, 91 (9th Cir. 1988) ("[W]e need not reach the constitutional issue if we find that a statutory right was violated and that the violation caused prejudice to the alien"); *see also Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977) (holding that granting relief on a statutory basis foreclosed the Court from reaching a constitutional issue); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available").

Accordingly, Plaintiffs' first claim for declaratory judgment is **DISMISSED as moot**.

IV. Conclusion

For all the foregoing reasons, Plaintiffs' and Defendants' Motions for Partial Summary Judgment are **GRANTED in part and DENIED in part**. Defendants are granted summary judgment with respect to Plaintiffs' second claim and Plaintiffs are granted summary judgment with respect to Plaintiffs' third claim. Plaintiffs' first claim is **DISMISSED as moot**.

The parties are ordered to meet and confer and agree on a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before **February 28, 2019.** In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a Joint Statement setting forth their respective positions no later than **February 28, 2019.**

IT IS SO ORDERED.

No. 19-55517

IN THE

United States Court of Appeals for the Ninth Circuit

E.J. D.-B., a Minor, ELAD DVASH-BANKS as the guardian ad litem, and ANDREW MASON DVASH-BANKS,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 2:18-cv-00523
District Judge John F. Walter

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December 19, 2019

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STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* submit this brief without an accompanying motion for leave to file because all parties have consented to its filing. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae—sixty-five scholars of family law—respectfully submit this brief in support of Appellees. *Amici* have substantial knowledge of the past and current laws regulating family relationships, including the parent-child relationship. This brief demonstrates that citizenship law long has looked to and incorporated family law principles. Contrary to the government's representations, under those principles, derivative citizenship for marital children depended on legal rather than biological relationships. A full list of *amici* can be found in the Appendix.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From the moment he was born, E.J. has been—in the eyes of the law—the child of a married U.S. citizen, Andrew Dvash-Banks. Under the operative provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1401(g), that

makes E.J. an American citizen from birth. Yet the government refuses to recognize E.J. as a U.S. citizen. It claims that Section 1401(g) requires not only a legal parent-child relationship at birth, but also a biological one. The government cites no express requirement of a biological relationship in the statute itself; instead, it relies heavily on a supposed "historical understanding of *jus sanguinis* citizenship"—one that the government claims has always turned on a biological relationship. U.S. Br. 2.

The government's argument is wrong both as a matter of history and as a matter of statutory construction. Throughout this Nation's history, the rules governing derivative citizenship have looked to and incorporated relevant principles of family law in determining whether a person born abroad is the child of a U.S. citizen. Under those principles, a biological relationship historically has been neither sufficient nor necessary to transmit citizenship to children born abroad. Rather, historically, nonmarital children did not obtain citizenship even if their biological parents were citizens; marital children did not obtain citizenship if only their biological mother was a citizen; and—most importantly for this case—children of married parents *were* eligible to obtain citizenship even if they were not biologically connected to their citizen father. The government's suggestion that a "blood" relationship was necessary to establish derivative citizenship, U.S. Br. 15,

is simply wrong: For centuries, marriage, not biological relationships, animated derivative citizenship rules.

The government's argument is also unsupported by principles of statutory construction. Section 1401(g) does not require a biological relationship between parent and child. Congress knows how to require proof of a biological relationship in statutes governing citizenship when it wishes to do so: It included such a requirement in Section 1409, which governs the derivative citizenship of *non*marital children. In stark contrast, Section 1401(g), which governs the derivative citizenship of *marital* children, contains no such requirement.

Despite our long history of relying on *legal* parentage to determine whether a foreign-born marital child is eligible for derivative citizenship, the government suggests that a *biological* parentage requirement is necessary to prevent fraud. Fraud is a genuine and legitimate concern, but it is—and long has been—adequately addressed through other means. Accordingly, this Court should adhere to its holdings in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), that Section 1401(g) does not require the existence of a biological relationship, and affirm the district court's holding that E.J. acquired citizenship from his father, Andrew, at birth.[1]

[1] The government agrees that this Circuit's existing law requires this result. U.S. Br. 2.

ARGUMENT

I. GUIDED BY PRINCIPLES OF FAMILY LAW, HISTORICALLY THE CITIZENSHIP LAWS DEEMED A BIOLOGICAL RELATIONSHIP NEITHER SUFFICIENT NOR NECESSARY TO TRANSMIT DERIVATIVE CITIZENSHIP.

From the earliest years of this Nation's history, Congress has provided for some form of derivative citizenship. Early Congresses did so through a series of statutes that conferred citizenship on "children of citizens" who were born abroad. *See* Act of Mar. 26, 1790, § 1, 1 Stat. 103, 103–104; Act of Jan. 29, 1795, § 3, 1 Stat. 414, 415; Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155. In 1855, Congress revised the language to confer citizenship on "persons . . . whose *fathers* were . . . citizens." Act of Feb. 10, 1855, § 1, 10 Stat. 604, 604 (emphasis added). Congress did not provide an express definition of the terms in these statutes. And so, for centuries, the government has looked to principles of family law—including the rules governing the parentage of marital and nonmarital children and the differential status of husbands and wives in marriage—to determine which children are entitled to derivative citizenship under these statutes. Contrary to the government's claim, derivative citizenship law in this country historically has not been a rule "of blood." U.S. Br. 15. Rather, for centuries, family law—and thus citizenship law—has deemed a biological relationship neither sufficient nor necessary to establish a parent-child relationship. Instead, legal relationships based on family law principles governed.

A. Historically, A Biological Relationship Was Not Sufficient For A Child To Acquire Derivative Citizenship From A Parent.

For much of our history, two principles permeated local domestic relations law: the strong preference for marital families and the role of the father as head of the family. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690–91 (2017). These principles led the law not only to treat the children of married parents more favorably than the children of unmarried parents, but also to treat father-child relationships more favorably than mother-child relationships within marital families. These family law principles were reflected in the rules governing derivative citizenship, which conferred citizenship at birth on neither the biological children of unmarried parents nor the biological children of married American mothers where the child's father was a noncitizen.

1. At common law, a child born outside of marriage was considered "illegitimate" and had no legal relationship to his biological parents. Instead, the common law deemed nonmarital children *nullius filii*—literally, "sons of nobody." *See, e.g.*, 2 William Blackstone, Commentaries *247; *Nullius Filius*, Black's Law Dictionary (11th ed. 2019); Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 637 (2014). Eventually, even as family law continued to discriminate against nonmarital children, it recognized a legal relationship between a nonmarital child and his mother. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1691 (noting that "[a]t common law, the mother, and only

the mother, was 'bound to maintain [a nonmarital child] as its natural guardian'" (quoting 2 James Kent, Commentaries on American Law *215–216 (8th ed. 1854))). But the law refused to recognize a legal parent-child relationship between a father and his nonmarital child, even when their biological relationship was known and uncontested. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2272–73 (2017); Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 197–198 (1985).

Historically, these family law principles were reflected in citizenship rules. Early citizenship statutes did not differentiate between marital and nonmarital children; instead, they referred simply to "children" and "fathers." *See supra* 4. Accordingly, "administrators, government attorneys, and judges rel[ied] on [local] domestic relations law" in applying citizenship law. Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2184 (2014); *see also* Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 Duke L.J. 1727, 1737–39 (2017) (discussing how administrators relied on "the law of the father's domicile" when applying these statutes).

Consistent with that approach, courts and administrators determined that citizenship could not pass from fathers to their nonmarital children (that is, *nullius filii*), even where biological relationships were certain. Derivative citizenship

required a *legal* parental relationship, and unmarried men had no such relationship with their biological children. *See Guyer v. Smith*, 22 Md. 239, 249 (1864) (holding that children "not born in lawful wedlock . . . under our law [are] *nullius filii*, and clearly therefore not within the provisions of [the citizenship act]"); *see also* Abrams & Piacenti, *supra*, at 657 (under "nineteenth century . . . citizenship laws," "the children acquiring citizenship at birth had to be legitimate children").

As family law's treatment of nonmarital children evolved, so too did citizenship law's. For example, as family law began to recognize the relationship between nonmarital mothers and their biological children, federal officials administering the citizenship statutes did so as well. Thus, even before Congress amended the citizenship statute in 1934 to expressly include mothers, "in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children." *Morales-Santana*, 137 S. Ct. at 1691–92; *see also* Act of May 24, 1934, § 1, 48 Stat. 797, 797 (amending statute to include mothers).

Eventually, family law enabled a biological father to legally recognize (or "legitimize") his nonmarital child, and thereby become a legal parent, through a variety of mechanisms. Abrams & Piacenti, *supra*, at 638. Citizenship law followed suit, extending citizenship to nonmarital children of some citizen fathers where the fathers established legal relationships with their children under family law rules. It did so first through administrative practice, Collins, *Illegitimate*

Borders, *supra*, at 2174 (discussing the State Department's "legitimation exception" to the rule that nonmarital children were precluded from acquiring citizenship), and later through codification, *see, e.g.*, Nationality Act of 1940, § 205, 54 Stat. 1137, 1139–40 (conferring citizenship on children "born out of wedlock" in the event of "legitimation, or adjudication of a competent court" of "paternity").

2. Historically, the citizenship statutes' treatment of married women also reflected family law's gendered view of the marital family. And there, too, the law prevented the biological children of some U.S. citizens from obtaining citizenship at birth.

During the Nation's early history, family law embodied a deeply entrenched view that women were subordinate to men in the marital family. Indeed, the system of coverture ensured that a married woman had no legal identity separate from her husband. *See* 1 William Blackstone, Commentaries *442 ("By marriage the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . ."). As the Supreme Court has explained, "[i]n marriage, husband [wa]s dominant, wife subordinate." *Morales-Santana*, 137 S. Ct. at 1691. Although it has since been repudiated, that gendered view of marriage was considered an "ancient principle" of the American

legal system. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915); *see Morales-Santana*, 137 S. Ct. at 1691 n.9.

Following this view of the mother's subordinated legal standing within marriage, nineteenth century derivative citizenship statutes relied on the married father's citizenship to determine the citizenship of his family members: "Marriage automatically conferred citizenship on his wife, and the children of the marriage acquired citizenship at birth." Abrams & Piacenti, *supra*, at 657. Consistent with this view, citizenship law barred married mothers from transmitting citizenship to their biological children. *Morales-Santana*, 137 S. Ct. at 1691. Indeed, American women who married foreign citizens were expatriated, and the biological children of such women were categorically excluded from derivative citizenship until 1934. *Id.* at 1691 & nn.10–11; *see* Act of Mar. 2, 1907, § 3, 34 Stat. 1228, 1228–29; *see also* Collins, *Illegitimate Borders*, *supra*, at 2199. In this area, too, a biological relationship was not sufficient to establish parentage under the citizenship laws. Instead, citizenship determinations followed the gender-based principles embodied in family law.

B. Historically, A Biological Connection Was Not Necessary For A Child To Acquire Derivative Citizenship From A Married Father.

With regard to married fathers, by contrast, the law deemed a biological connection *unnecessary* to obtain derivative citizenship: Because the law treated a

husband as the legal father of a child to whom his wife gave birth, a husband could confer citizenship on his child even if he was not the child's biological father.

The marital presumption, or presumption of legitimacy, "was a fundamental principle of the common law." *Michael H. v. Gerald D.*, 491 U.S. 110, 124–125 (1989) (plurality op.). Under this presumption, "when a married woman gave birth to a child, the law recognized her husband as the child's father." NeJaime, *supra*, at 2266. As a historical matter, the presumption was very difficult—often, practically speaking, impossible—to rebut. *See* 1 William Blackstone, Commentaries *457 (providing that it was only "if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, [that] her issue during that period shall be bastards"). Thus, the presumption operated to "hide biological facts to maintain the husband's parental status and the child's legitimacy." NeJaime, *supra*, at 2271; *accord* Abrams & Piacenti, *supra*, at 638 ("The marital presumption of paternity . . . meant that a man's non-genetic child might nonetheless be his legal child.").

The fact that the marital presumption did not depend on a biological relationship was no accident; it "was based at least in part on policy concerns." Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 Iowa L. Rev. 1467, 1491 (2013). By assigning parentage to the husband, the presumption

ensured that families, rather than the state, bore the financial burdens of child-rearing. *See Michael H.*, 491 U.S. at 125 (plurality op.). It also served the goal of promoting social stability by protecting families from interference by outsiders making claims to parentage. *See Pearson v. Pearson*, 182 P.3d 353, 357 (Utah 2008) (explaining that the presumption of legitimacy "promotes family harmony between parents and children by protecting and preserving these crucial relationships"); *see also* J. Schouler, A Treatise on the Law of the Domestic Relations § 225, p. 304 (3d ed. 1882). Of course, by ensuring a source of support and protecting the integrity of the family, the presumption promoted the interests of children. *See Michelle W. v. Ronald W.*, 703 P.2d 88, 92–93 (Cal. 1985).

Citizenship determinations reflected the important principle that a child born to a married woman is the legal child of her husband, even in the absence of a biological relationship between the husband and the child. Accordingly, "[t]he interaction of the marital presumption of paternity with nineteenth-century courts' interpretations of these early citizenship acts meant that, almost certainly, citizenship sometimes passed from U.S. citizen fathers to foreign-born marital children to whom they were not biologically related." Abrams & Piacenti, *supra*, at 658. Again, marriage, not biological relationships, animated derivative citizenship rules. *Id.* Because marital fathers were *legal* fathers, they could confer citizenship on their children.

II. MODERN FAMILY LAW DOES NOT REQUIRE A BIOLOGICAL CONNECTION TO ESTABLISH A PARENT-CHILD RELATIONSHIP.

As the foregoing discussion illustrates, under family law principles, biology has never been the sole or dispositive consideration for determinations of parentage. Joslin, *Marriage, Biology, and Federal Benefits*, *supra*, at 1491–92. That remains true today. In fact, as medical and scientific advances have allowed more people to have children through assisted reproduction, most states have supplemented their existing parentage rules to expressly address these new means of family formation. These supplemental rules also allow for the recognition of legal parent-child relationships at birth even in the absence of biological connections.

1. The presumption of legitimacy continues to exist in all fifty states. Leslie Joan Harris, Lee E. Teitelbaum & June Carbone, Family Law 865 (5th ed. 2014). As a result, the law continues to recognize a husband as a legal parent even when there is clear evidence that he is not the child's biological parent. And the U.S. Supreme Court has approved this result. In *Michael H. v. Gerald D.*, the Court considered the legal parentage of a child born to a married woman but conceived as the result of an extramarital relationship. 491 U.S. at 113. Although it was undisputed that Gerald, the husband, was not the child's biological parent—a point confirmed by blood tests—California law recognized Gerald as the legal father by

virtue of the marital presumption. In its decision, the Supreme Court affirmed the state-law designation of Gerald as the legal father and upheld California's law that barred the biological father from even disputing Gerald's paternity under state law. *See id.* at 119–120, 124–126 (plurality op.).[2]

State reporters abound with other recent cases relying on the marital presumption to conclude that a husband is a child's legal father despite clear evidence that he is not the child's biological father. *See, e.g.*, *Pearson*, 182 P.3d at 359 (upholding application of the marital presumption against challenge by a biological father); *Merkel v. Doe*, 635 N.E.2d 70, 71 (Ohio Ct. Com. Pl. 1993) (barring a putative biological father from bringing a paternity action "because of the obvious trauma to families and marital instability that" it would cause); *John M. v. Paula T.*, 571 A.2d 1380, 1386, 1388 (Pa. 1990) (rejecting challenge to the marital presumption brought by the biological father).

2. Today, practically all states have supplemented the presumption of legitimacy by enacting additional rules that account for changes in how families are formed. Like the marital presumption, these additional rules allow for the

[2] Justice Stevens concurred in the judgment, concluding that a California statute that allowed people other than legal parents to seek visitation adequately protected any rights of the biological father. 491 U.S. at 133 (Stevens, J., concurring in the judgment).

recognition of a spouse as a legal parent even in the absence of a biological relationship.

Beginning in the second half of the twentieth century, increasing numbers of children have been conceived using assisted reproductive technologies. Initially, the law in many states adapted the marital presumption's recognition of non-biological fathers to these new methods of family formation. Thus, for example, courts relied on the marital presumption to deem a husband a legal father when his wife gave birth to a child conceived with donor sperm. *See* NeJaime, *supra*, at 2292–93; *see also In re Adoption of Anonymous*, 74 Misc. 2d 99, 105 (N.Y. Sur. Ct. 1973) ("It is determined that a child born of consensual [artificial insemination by donor] during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage. The father of such child is therefore the 'parent' . . . .").

Over time, states enacted additional family law rules that expressly apply to marital families formed through assisted reproduction. Under these rules, a husband is treated as the legal parent of a child born to his wife through assisted reproduction even if he is not, and knows he is not, biologically related to that child. *See, e.g.*, Minn. Stat. § 257.56 ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if

he were the biological father of a child thereby conceived."); Ark. Code Ann. § 9-10-201(b) ("A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband . . . ."); *see also* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177, 1179 (2010) ("[T]he existing rules provide that a husband is the legal parent of a child born to his wife through alternative insemination so long as he consented to the insemination." (footnotes omitted)).

In addition, and most relevant to this case, many states and foreign jurisdictions have enacted statutes governing the parentage of children conceived through surrogacy arrangements. For instance, many states and countries recognize the intended parents as the legal parents of the resulting child from the time of birth, regardless of whether they are biologically related to the child. This is true, for example, in Ontario, where E.J. was born. Consistent with the law of Ontario, the order entered by the Ontario court declares Andrew and Elad to be E.J.'s legal parents, and directs the appropriate authorities to "register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child." Excerpts of Record 76–77. The same would be true under California law, Cal. Fam. Code § 7962, and the laws of many other states, *see, e.g.*, Me. Rev. Stat. Ann. tit. 19-A, § 1933(1) ("The intended parent or

parents [of children conceived under a compliant surrogacy agreement] are by operation of law the parent or parents of the resulting child immediately upon the birth of the child, and the resulting child is considered the child of the intended parent or parents immediately upon the birth of the child.").

In sum, as a matter of family law—the body of law on which parentage determinations for purposes of derivative citizenship historically have relied—a biological relationship never has been required to establish the parentage of marital children. Today, there are multiple rules, contemplating various methods of family formation, under which a spouse is recognized as a legal parent absent a biological relationship to the child.

III. THE TEXT OF SECTION 1401(g) DOES NOT REQUIRE A BIOLOGICAL RELATIONSHIP.

Since 1940, U.S. law has conferred citizenship on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States." 8 U.S.C. § 1401(g); *see also* Nationality Act of 1940 § 201. Nothing in this provision requires a biological connection between a child and his U.S. citizen parent. Rather, this provision is properly interpreted to require a *legal* parent-child relationship under the applicable rules of family law—in this case, the rules of Ontario law, which deem Andrew the father of E.J. from birth.

Start with the text of the provision itself. Section 1401(g) makes citizenship hinge on whether, at birth, the person is the child "of parents one of whom is . . . a citizen." 8 U.S.C. § 1401(g). The term "parent" is not defined in the statute. But it is well-established that the "scope of a federal right" may "be determined by state, rather than federal law." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956); *see also Butner v. United States*, 440 U.S. 48, 55 (1979). "This is especially true where a statute deals with a familial relationship . . . ." *De Sylva*, 351 U.S. at 580. Accordingly, courts and federal agencies and officials regularly "draw on the ready-made body of state [family] law," *id.*, to determine whether a person qualifies as a "child" for purposes of a range of federal statutes, *see, e.g.*, Soc. Sec. Admin., Program Opportunity Manual System (POMS) (setting forth "information used by Social Security employees to process claims for Social Security benefits")[3]—even when the statute does not expressly direct consideration of state law, *De Sylva*, 351 U.S. at 580–581 (looking to state family law rules to interpret the word "child" for purposes of the Copyright Act). The same is true of "parent." *See, e.g.*, *King v. Smith*, 392 U.S. 309, 329 (1968) ("Congress must have meant [in the Aid to Families With Dependent Children statute] by the term 'parent' an individual who owed to the child a state-imposed legal duty of support."); *Prudential Ins. Co. of Am. v. Ellwein*, 435 F. Supp. 248, 251 (W.D.N.Y. 1977)

[3] *Available at* https://secure.ssa.gov/apps10/poms.nsf/Home?readform.

(holding that, at the relevant time, "the [Serviceman's Group Life Insurance statute] did not define the term 'parent' and presumably left such definition to local state law"). Thus, when Congress used the word "parents" in what is now Section 1401(g), it stands to reason that it sought to refer to the rules of parentage in family law, not to superimpose a strict requirement of a biological relationship that has never been a feature of this country's family (or citizenship) laws.

A comparison between Section 1401 and Section 1409 powerfully reinforces the conclusion that Section 1401 turns on the existence of a parent-child relationship as defined in family law and does not require proof of a biological relationship. Section 1409 states that "paragraph[ ] . . . (g) of section 1401 . . . shall apply . . . to a person born out of wedlock if . . . a *blood relationship* between the person and the father is established by clear and convincing evidence." 8 U.S.C. § 1409(a)(1) (emphasis added). There would be no need to separately require proof of a biological relationship for nonmarital children in Section 1409 if Section 1401(g) required proof of a biological relationship for *all* children. Indeed, such a reading would render the requirement of a "blood relationship" in Section 1409(a)(1) superfluous, and courts "generally presume that statutes do not contain surplusage." *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) (internal quotation marks and alterations omitted).

This reading of Sections 1401 and 1409 is also supported by the statutory history. The early citizenship statutes conferred citizenship on the "children of citizens" or "persons . . . whose fathers were . . . citizens." Act of Mar. 26, 1790, § 1; Act of Jan. 29, 1795, § 3; Act of Apr. 14, 1802, § 4; Act of Feb. 10, 1855, § 1. As detailed above, courts and government administrators interpreted those terms in light of the then-prevailing rules of family law, which made biology neither sufficient nor necessary to establish a parent-child relationship. *See supra* 4–11. When Congress enacted Section 1401 in 1940, it presumably sought to continue, rather than dramatically depart from, this established practice.

With no other textual evidence to stand on, the government tries to support its reading of Section 1401(g) by looking to the statute's use of the words "*born . . . of* parents." U.S. Br. 18–20 (emphasis added). That argument is flawed for several reasons. For one thing, the phrase "born of" does not appear in the statute. Rather, Section 1401(g) states that a child is a U.S. citizen if he or she is "a person *born* outside the geographical limits of the United States and its outlying possessions *of* parents one of whom is an alien, and the other a citizen of the United States." 8 U.S.C. § 1401(g) (emphases added). The past participle "born" plainly modifies the phrase "outside the geographical limits of the United States and its outlying possessions." It is doubtful whether it also modifies the words "of parents," which appear substantially later in the sentence, and as part of a differently structured

grammatical phrase. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 152 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a . . . modifier normally applies only to the nearest reasonable referent."). Moreover, the surrounding subsections of Section 1401 use the word "born" only when it immediately precedes a geographic designation. *See* 8 U.S.C. § 1401(a)–(f), (h). When Section 1401(f) refers simply to a child's parentage, it omits the word "born" entirely, *see id.* § 1401(f) (referring simply to "a person *of* unknown parentage")—suggesting that Congress did not intend the word "born" to modify those words in Section 1401(g), either.[4]

In any event, even if the statute did refer to children "born . . . of parents," that phrase is a term of art that does not require a biological relationship. *See Scales*, 232 F.3d at 1164. As noted, the law has long deemed a person a "child" of both of his marital parents at birth regardless of whether there is evidence of biological parentage. *See, e.g.*, *Cross v. Cross*, 3 Paige Ch. 139, 140 (N.Y. 1832) ("the *husband* must be taken to be the *father* of the *child*" (emphases added)).

[4] The language in Section 1409 also supports this point. In the one place where that provision uses the word "born" to modify two consecutive phrases, it includes the word "and" to clearly link the clauses. 8 U.S.C. § 1409(c) ("a person *born*, after December 23, 1952, outside the United States *and* out of wedlock" (emphases added)). There is no parallel "and" in Section 1401(g). *See* Scalia & Garner, *supra*, at 170 ("a material variation in terms suggests a variation in meaning").

The government also tries to support its argument by emphasizing (at 20–21) the literal translation of the term "*jus sanguinis*"—the historical name for the body of citizenship law governing the transmission of citizenship through the parent-child relationship. That argument fails as well. As the history recounted above makes abundantly clear, the citizenship laws have never deemed a "blood" relationship dispositive. Indeed, the misleading moniker "*jus sanguinis*" is no longer the primary term used to describe the law governing citizenship by birth. Instead, the modern statutes and judicial decisions governing citizenship by birth commonly refer to "citizenship by descent," "derivative citizenship," or "acquired citizenship," terms that lack any connotation of a biological relationship and instead rely on legal relationships.[5] *See, e.g.*, 8 U.S.C. § 1444(b)(2) ("derivative citizenship"); *Morales-Santana*, 137 S. Ct. at 1698 (discussing the transmission of citizenship "derivatively"); *Jaen v. Sessions*, 899 F.3d 182, 186 (2d Cir. 2018) (discussing "the transmission of citizenship from U.S. citizen parents to their children" by "derivative citizenship and acquired citizenship"); *Rabang v. INS*, 35 F.3d 1449, 1450 (9th Cir. 1994) ("citizenship by descent"); *see also* Br. for

[5] The word "descent" describes the "[t]ransmission of a title, status, dignity, [or] personal quality" either "to heirs *or* offspring," recognizing that "inheritance" does not always flow through biological connections. *Descent*, Oxford English Dictionary (3d ed. 2015) (emphasis added). And the terms "derivative" and "acquired" are entirely neutral as to the source of that which has been transmitted. *Derivative*, Oxford English Dictionary (2d ed. 1989); *Acquired*, Oxford English Dictionary (3d ed. 2011).

Appellee United States at 8 & n.6, *United States v. Llamas-Gonzales*, No. 10-50014 (9th Cir. Sept. 30, 2010) ("derivative" and "acquired" citizenship); U.S. Citizenship & Immigration Servs., A4—I am a U.S. Citizen: How do I get proof of my U.S. Citizenship?, at 1–2 (Oct. 2013) (same).

Likewise, the government's two-sentence discussion (at 21) of the history does not undermine the wealth of evidence presented by *amici* that family law rules, rather than biology, predominated in citizenship law. The government cites only three cases, all decided in the last 25 years, in which courts required a biological relationship for a parent to confer citizenship on a child. But all three involve the interpretation of Section 1409, which governs acquisition of citizenship by *nonmarital* children, not Section 1401, which governs the acquisition of citizenship by *marital* children. Those cases are thus inapposite to this case, which concerns the meaning and application of Section 1401. U.S. Br. 21 (citing *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), *Miller v. Albright*, 523 U.S. 420 (1998) (opinion of Stevens, J., joined by Rehnquist, C.J.), and *United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009)). That the government relies on cases involving children of unmarried parents only underscores the fact that for a child of married parents—like the child at issue here—a biological relationship is not the basis on which citizenship is conferred.

IV. A RULE BASED ON LEGAL PARENT-CHILD RELATIONSHIPS IS ADMINISTRABLE.

Despite the clear evidence that derivative citizenship for marital children has long turned on legal parentage, the government argues that this long-established practice is not administrable and would pose a serious risk of fraud. *See* U.S. Br. 31–32. These assertions do not hold up.

1. A rule based on legal parentage is both straightforward and administrable. As noted, the federal government and the states regularly apply such a rule in a wide variety of contexts, including citizenship. For instance, it is legal parents who are obligated to pay child support. *See, e.g.*, *Stacy M. v. Jason M.*, 858 N.W.2d 852, 858 (Neb. 2015) (declaring that "[t]he obligation of support is a duty of a legally determined parent" and rejecting a husband's request to be relieved of his child support obligations based on evidence that he is not the child's biological parent). The same is true for questions of custody and visitation. *See, e.g.*, *Cesar C. v. Alicia L.*, 800 N.W.2d 249, 256, 258 (Neb. 2011) (remanding case to trial court to adjudicate custody dispute between mother and nonbiological father who had established his legal parentage by signing an acknowledgment of paternity). Similarly, the federal government looks to state family law in determining eligibility for a variety of federal benefits. *See, e.g.*, *De Sylva*, 351 U.S. at 580–581 (Copyright Act); *see generally* Joslin, *Marriage, Biology, and Federal Benefits*, *supra*, at 1473 ("[I]n a vast array of federal benefits programs,

eligibility is not conditioned on a child's biological connection with his or her parent(s). Instead, Congress long has both implicitly and explicitly extended benefits to biologically unrelated children."). In fact, the Supreme Court recently rejected a party's argument in favor of a biology-based parentage rule for purposes of determining children's eligibility for federal Social Security benefits. *See Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 551 (2012) (observing that nothing in the statute "indicate[s] that Congress intended 'biological' parentage to be prerequisite to 'child' status under" the Social Security Act).

In the citizenship context specifically, the government already routinely assesses legal relationships by reference to state and foreign domestic relations law. When deciding whether a person is subject to Section 1401(g) or Section 1409, a threshold question is whether a child was born "out of wedlock." *See* 8 U.S.C. §§ 1401(g), 1409(a). That determination requires the government to consider whether the parents were validly married according to the relevant local domestic relations law. *See, e.g.*, *Hernandez v. Lynch*, No. 12-00639 JMS-BMK, 2015 WL 3935373, at *1 (D. Haw. June 25, 2015) ("The details of this case are confusing, although the ultimate issue is straightforward—whether Petitioner was born 'out of wedlock' under Philippine law."); *In re M-D-*, 3 I. & N. Dec. 485, 487–488 (B.I.A. 1949) (looking to Mexican family law to determine whether the child was entitled to citizenship under the then-applicable version of Section

1401); *cf. United States v. Gomez-Orozco*, 188 F.3d 422, 427 (7th Cir. 1999) (ruling in favor of the defendant because he "presented substantial evidence that his parents were married under [Texas] common law at the time he was born," and was therefore potentially a citizen incapable of committing the crime of illegal re-entry).

In addition, the INA's definition of "child" specifically requires reference to local parentage rules. 8 U.S.C. § 1101(c)(1) (providing that "child" "includes a child legitimated under the law of the child's [or father's] residence or domicile"). Accordingly, officials are regularly required to look to foreign and local family law in determining whether a child may acquire derivative citizenship under Section 1409. *Id.* § 1409(a)(4)(A); *see, e.g.*, *Iracheta v. Holder*, 730 F.3d 419, 423–427 (5th Cir. 2013) (holding that, because the petitioner was legitimated "under the laws of the Mexican state where he resided" by his U.S.-citizen father, he qualified for derivative citizenship under Section 1409); *In re Reyes*, 17 I. & N. Dec. 512, 515 (B.I.A. 1980) (collecting citizenship cases that turn on the application of the family laws of many different countries), *overruled on other grounds by In re Cabrera*, 21 I. & N. Dec. 589 (B.I.A. 1996) (en banc)).

2. The government's suggestion that a biological connection is necessary to eliminate parental citizenship fraud is likewise misguided. U.S. Br. 29. States and the federal government regularly administer benefits programs that look to state

parentage rules to determine eligibility. The government identifies no evidence—and *amici* are aware of none—that the government's fears of fraud have materialized in any of those contexts. *See* Abrams & Piacenti, *supra*, at 689 (suggesting people are less likely to commit parenthood fraud than marriage fraud "given that fraudulently sponsoring a child would be more likely to lead to a legally binding obligation to continue her support"). That is perhaps because there are many other mechanisms for policing fraud in this area: For instance, many of the same tools from the government's kit for evaluating marriage fraud would be equally effective in detecting fraud in the context of derivative citizenship. *See id.* (explaining that the government might conduct in-person interviews or review the parties' living arrangements, among other things, to assess whether the claimed relationship is genuine); *see, e.g.*, 8 C.F.R. § 216.4(a)(5) (listing examples of documentation that can demonstrate that a "marriage was not entered into for the purpose of" immigration fraud); *id.* § 216.4(b) (discussing interview requirement). And, of course, the burden to prove citizenship remains on the applicant, *see Hussein v. Barrett*, 820 F.3d 1083, 1087–88 (9th Cir. 2016), meaning that truly doubtful cases may be resolved against the applicant.

Finally, reading Section 1401(g) to recognize legal parentage does not foreclose the government from relying on genetic testing in appropriate cases. Where a claim is founded on an asserted genetic connection—for instance, under

Section 1409(a)(1)—the government may still use genetic testing to verify that claim. But where the legal parent-child relationship does not rest on proof of a genetic relationship, genetic testing is unnecessary, because the absence of a genetic relationship cannot rule out the citizenship claim.

That is the case here. There is no dispute that E.J. is the legal child of Andrew, his U.S.-citizen father, and was so at the moment of E.J.'s birth. Andrew is therefore E.J.'s "parent" for the purposes of Section 1401(g), and the District Court properly deemed E.J. a U.S. citizen from birth.

CONCLUSION

For the forgoing reasons, the Court should affirm the decision below.

December 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,354 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ *Mitchell P. Reich*
Mitchell P. Reich

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Mitchell P. Reich*
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