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17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**  
19 **WESTERN DIVISION (LOS ANGELES)**  
20

21 ANDREW MASON DVASH- )  
BANKS and E.J. D.-B., )  
22 )  
Plaintiffs, )  
23 )  
v. )  
24 )  
THE UNITED STATES )  
25 DEPARTMENT OF STATE, and )  
THE HONORABLE MICHAEL )  
26 R. POMPEO, Secretary of State, )  
27 )  
Defendants. )  
28 )

Case No. 2:18-cv-00523-JFW-(JCx)

**PLAINTIFFS' NOTICE OF  
LODGING OF [PROPOSED]  
STATEMENT OF DECISION  
GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Judge: Hon. John F. Walter  
Hearing Date: February 4, 2019  
Hearing Time: 1:30 p.m.  
Courtroom: 7A

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:  
2 PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil  
3 Procedure 56, Local Rule 56-1, and Section 4(e) of this Court’s Scheduling and  
4 Case Management Order (ECF No. 52), Plaintiffs Andrew Mason Dvash-Banks  
5 and E.J. D.-B. (together, “Plaintiffs”) hereby lodge the attached [*Proposed*]  
6 *Statement of Decision Granting Plaintiffs’ Motion for Partial Summary Judgment*  
7 in connection with Plaintiffs’ *Motion for Partial Summary Judgment* (ECF No. 83)  
8 in the above-captioned action.

9  
10 Dated: January 24, 2019

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION (LOS ANGELES)**

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

Plaintiffs,

v.

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

Defendants.

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

**[PROPOSED] STATEMENT OF  
DECISION GRANTING  
PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

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

1 Plaintiffs Andrew Mason Dvash-Banks (“Andrew”) and his son E.J.  
2 D.-B. (“E.J.”; together, “Plaintiffs”) filed the First Amended Complaint (“FAC”) in  
3 the above-captioned action (“Action”), alleging that Defendants the United States  
4 Department of State (the “State Department”) and the Honorable Michael R.  
5 Pompeo in his official capacity as Secretary of State (collectively, “Defendants”)  
6 wrongly denied recognition that E.J. is a United States citizen at birth. Plaintiffs  
7 assert claims under Section 1503 of the Immigration and Nationality Act (“INA”),  
8 8 U.S.C. § 1503 (“Section 1503”), Section 706(2)(A) of the Administrative  
9 Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), and the Due Process Clause of the  
10 Fifth Amendment. E.J. moves for summary judgment under Federal Rule of Civil  
11 Procedure 56 on the Section 1503 claim and Plaintiffs move for summary  
12 judgment on the due process claim. For the following reasons, Plaintiffs’ motion  
13 for summary judgment is **GRANTED**.

#### 14 I. BACKGROUND

15 The facts below are drawn from the parties’ Rule 56-1 Statements and  
16 other submissions on this motion and are construed in favor of Defendants as the  
17 non-moving party. *See Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010,  
18 1013 (9th Cir. 2018).

##### 19 A. The Dvash-Banks Family

20 Andrew is a U.S. citizen who was born and raised in California, where  
21 he also attended high school and college. (Statement of Combined Facts, ECF  
22 No. 110-1 (“SOCF”) at ¶¶ 1-5.) Andrew resided in the United States for a  
23 continuous period from his birth in 1981 through October 2005. (*Id.* at ¶ 6.) In  
24 2007, Andrew enrolled in a master’s degree program in Israel, where, in 2008, he  
25 met his now-husband, Elad Dvash-Banks (“Elad”), who is an Israeli citizen. (*Id.* at  
26 ¶¶ 7-9.) In 2010, Andrew and Elad moved to Canada (*id.* at ¶ 10) and were  
27 married in Toronto on August 19, 2010 (*id.* at ¶ 11).

1           When Andrew and Elad, two men, decided to start a family, they did  
2 so using assisted reproductive technology (“ART”). (*Id.* at ¶¶ 13-18.) As part of  
3 that process, Andrew and Elad provided their respective genetic material to create  
4 embryos using eggs from an anonymous egg donor (the “Donor”). (*Id.* at ¶¶ 14-  
5 16.) In December 2015, Andrew and Elad contracted with a gestational surrogate  
6 (the “Gestational Surrogate”) to carry a maximum of two embryos to term. (*Id.* at  
7 ¶ 17.) Thereafter, two embryos, one of which was created using genetic material  
8 from Elad and the Donor and the other of which was created using genetic material  
9 from Andrew and the Donor, were implanted into the Gestational Surrogate, who  
10 became pregnant with twins. (*Id.* at ¶¶ 15, 19-20.) On September 16, 2016, E.J.  
11 and his brother, A.J. D.-B. (“A.J.”; together the “Twins”), were born four minutes  
12 apart in Ontario, Canada. (*Id.* at ¶¶ 29-30.) Andrew, Elad, and the Twins have  
13 lived together as a family since the Twins’ release from the hospital after their  
14 birth. (*Id.* at ¶ 51.) Andrew and Elad, the Twins’ legal parents (*id.* at ¶¶ 37, 108,  
15 145), have raised the Twins since the day they were born (*id.* at ¶ 38).

16           **B.     The INA**

17           The INA specifies the eligibility requirements for U.S. citizenship at  
18 birth. These requirements differ for children of a marriage, who are subject to  
19 8 U.S.C. § 1401 (“Section 301”), and children “born out of wedlock,” who are  
20 subject to 8 U.S.C. § 1409 (“Section 309”).

21           Section 301(g) provides, in relevant part, that a child born abroad is a  
22 U.S. citizen at birth if one of his or her married parents is a U.S. citizen and meets  
23 certain residency requirements. Although the word “wedlock” does not appear  
24 anywhere in Section 301, courts have consistently interpreted that Section to apply  
25 to children born abroad to married parents, in part, because of the provision’s  
26 contrast with Section 309, which is titled “Children born out of wedlock.” *See,*  
27 *e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (referring to  
28 Section 301(g) as “[a]pplicable to married couples”).

1 In contrast to Section 301, which does not reference a “blood  
2 relationship” requirement, Section 309 imposes additional and different  
3 requirements, providing in relevant part that a child born abroad to an unwed U.S.  
4 citizen father is a U.S. citizen at birth only if the child establishes “a blood  
5 relationship between the person and the father . . . by clear and convincing  
6 evidence” and meets certain other requirements. 8 U.S.C. § 1409(a)(1).

7 Despite Section 301’s silence on the subject, and its contrast to  
8 Section 309, the State Department’s internal *Foreign Affairs Manual* (“FAM”)  
9 purports to impose on applicants for a Consular Report of Birth Abroad (“CRBA”)  
10 a biological relationship test under Section 301. It does so by requiring that, to be  
11 considered born “in wedlock” (and thus to be covered by Section 301), a child born  
12 outside of the United States must have a biological relationship with both of his or  
13 her married parents. (SOCF at ¶ 109.) *See* 8 FAM § 304.1-2 (“To say a child was  
14 born ‘in wedlock’ means that the child’s biological parents were married to each  
15 other at the time of the birth of the child.”). The basis for the State Department’s  
16 imposition of a biological requirement is its interpretation of the reference in  
17 Section 301(g) to “a person . . . born . . . of parents one of whom is a . . . citizen of  
18 the United States.” (*See* SOCF at ¶ 126.)

19 The FAM represents the State Department’s unilateral declarations  
20 and is not the product of a formal adjudication or notice-and-comment rulemaking  
21 or congressional action. (*See id.* at ¶¶ 140-141.) *See Scales v. INS*, 232 F.3d 1159,  
22 1166 (9th Cir. 2000); *Jaen v. Sessions*, 899 F.3d 182, 187 n.4 (2d Cir. 2018). For  
23 example, in 2014, the State Department decided to change its interpretation of born  
24 “in wedlock” to include children born of a gestational mother, who is the child’s  
25 legal parent, even if she did not provide the egg from which the child was  
26 conceived. (SOCF at ¶¶ 127-130.) This change was not occasioned by any  
27 corresponding amendment of the law or any other congressional action. (*Id.*)  
28 Similarly, State Department employees began to draft a memorandum exploring

1 possible ways to modify further the State Department’s definition of “in wedlock”  
2 to cover other children born through the use of ART, but ultimately the State  
3 Department did not make that change. (*Id.* at ¶¶ 131-32.)

4 **C. The Application of the State Department’s Policy to the Dvash-**  
5 **Banks Family**

6 On January 24, 2017, four months after the Twins were born, Andrew,  
7 Elad, and the Twins appeared in person at the U.S. Consulate in Toronto (the  
8 “Toronto Consulate”) in connection with applications for documents evidencing  
9 each Twin’s U.S. citizenship—a CRBA and a U.S. passport. (SOCF at ¶¶ 53-55.)  
10 Andrew and Elad provided documentation for E.J., including, among other  
11 materials, his Ontario Statement of Live Birth, which identified Andrew and Elad  
12 as E.J.’s parents, evidence of Andrew’s U.S. citizenship and residency history, and  
13 Andrew’s and Elad’s marriage certificate. (*Id.* at ¶ 56.) Vice Consul Frances Terri  
14 Day was assigned to adjudicate the applications. (*See id.* at ¶ 57.) Ms. Day  
15 accepted Andrew’s and Elad’s Ontario marriage license as sufficient proof of their  
16 marriage and E.J.’s Statement of Live Birth as a timely filed Canadian birth  
17 certificate. (*Id.* at ¶¶ 59-60.) Ms. Day also accepted the latter document—which  
18 identified Andrew and Elad as E.J.’s parents—as sufficient proof of E.J.’s  
19 parentage. (*Id.* at ¶ 61.)

20 During the interview, and after consulting with her colleagues,  
21 Ms. Day informed Andrew and Elad that, absent evidence of a biological  
22 relationship with Andrew, neither Twin would qualify for U.S. citizenship. (*Id.* at  
23 ¶¶ 66-68, 71-72.) Ms. Day told Andrew and Elad that, if they opted to proceed  
24 with the Twins’ applications, they would have to provide additional information  
25 demonstrating the biological relationship required by the State Department and  
26 suggested that they could provide DNA evidence for each child. (*Id.* at ¶¶ 72-73.)

27 Thereafter, Andrew underwent DNA testing, the results of which  
28 reflected that A.J. was the biological child of Andrew, and E.J. was not. (*Id.* at

1 ¶ 89.) By letter to Andrew dated March 2, 2017, Ms. Day informed the Dvash-  
2 Banks family that the State Department had denied E.J.’s applications for a CRBA  
3 and U.S. passport. (*Id.* at ¶ 92.) Ms. Day’s letter reflected a final adjudication of  
4 E.J.’s applications. (*Id.* at ¶ 94.) On the same day, the Toronto Consulate issued a  
5 CRBA for A.J. (*Id.* at ¶ 91.) The basis for the denial of E.J.’s applications for a  
6 CRBA and U.S. passport was the lack of evidence of a biological connection  
7 between Andrew and E.J. (*Id.* at ¶ 97.) To reach this determination, Ms. Day  
8 applied State Department policies memorialized in the FAM for adjudicating U.S.  
9 citizenship applications for children born through the use of ART. (*Id.* at ¶ 98.)

## 10 II. STANDARD

11 On a motion for summary judgment, the moving party “must  
12 demonstrate that ‘there is no genuine dispute as to any material fact’ and that the  
13 party ‘is entitled to judgment as a matter of law.’” *Fuller v. Idaho Dep’t of Corr.*,  
14 865 F.3d 1154, 1168 (9th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). For purposes  
15 of summary judgment, “[a] material fact is one that ‘might affect the outcome of  
16 the suit under the governing law,’ and a genuine dispute is one for which ‘a  
17 reasonable jury could return a verdict for the nonmoving party.’” *Id.* (quoting  
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw  
19 all reasonable inferences “in the light most favorable to the nonmoving party.” *Id.*  
20 at 1168-69 (internal quotation marks omitted).

## 21 III. DISCUSSION

### 22 A. E.J.’s Claim Under Section 1503

23 E.J. moves for summary judgment on his claim under Section 1503,  
24 seeking a declaration of the Court that he is a U.S. citizen at birth. (Plaintiffs’  
25 Motion, ECF No. 83-1 (“Mot.”) at 13-22.) E.J.’s motion is granted.

26 Under Section 1503, any person who is within the United States who  
27 “claims a right or privilege as a national of the United States and is denied such  
28 right or privilege by any department or independent agency . . . may institute an

1 action . . . for a judgment declaring him to be a national of the United States.”  
2 8 U.S.C. § 1503(a). “A suit under section 1503(a) is not one for judicial review of  
3 the agency’s action” but for “a *de novo* judicial determination of the status of the  
4 plaintiff as a United States national.” *Richards v. Sec’y of State*, 752 F.2d 1413,  
5 1417 (9th Cir. 1985); *accord Acosta v. United States*, 2014 WL 2216105, at \*3  
6 (W.D. Wash. May 29, 2014).

7 E.J. claims that he acquired U.S. citizenship at birth under Section  
8 301(g) of the INA when he was born to his married parents, Andrew and Elad, on  
9 September 16, 2016. Section 301(g) provides that the following individuals are  
10 nationals and citizens of the United States at birth:

11 a person born outside the geographical limits of the  
12 United States and its outlying possessions of parents one  
13 of whom is an alien, and the other a citizen of the United  
14 States who, prior to the birth of such person, was  
15 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 . . . .

16 E.J. is entitled to summary judgment on the Section 1503 claim. The  
17 material facts are not in dispute. Specifically, there is no dispute that (i) Andrew is  
18 a U.S. citizen who satisfied Section 301’s residency requirements at the time of  
19 E.J.’s birth; (ii) E.J.’s legal parents, Andrew and Elad, were married at the time of  
20 E.J.’s birth; (iii) E.J. was born outside of the United States; (iv) Andrew and Elad  
21 are E.J.’s legal parents and have acted as his only parents since his birth; (v) E.J.  
22 resides in California; and (vi) E.J. does not share a biological relationship with  
23 Andrew. (SOCF at ¶¶ 1-2, 6, 29, 31, 37-40, 46, 52, 108, 145.) The denial of E.J.’s  
24 CRBA and U.S. passport applications unquestionably constitutes the denial of “a  
25 right or privilege as a national of the United States.” 8 U.S.C. § 1503. The parties’  
26 only material dispute relating to E.J.’s Section 1503 claim is a legal one: whether  
27 the INA requires persons like E.J., who were born during their parents’ marriage,  
28 to demonstrate a biological relationship with both of their married parents.

1 Under controlling Ninth Circuit law, Section 301 does not impose  
2 such a requirement. In *Scales v. INS*, the petitioner was born during the marriage  
3 of his Philippine citizen mother and U.S. citizen father, but was not the biological  
4 child of his U.S. citizen father. 232 F.3d at 1162. The Ninth Circuit nevertheless  
5 held—and in so doing conclusively refuted the sole basis for Defendants’ position  
6 with respect to E.J.’s Section 1503 claim—that “[a] straightforward reading” of the  
7 “born of parents” language in Section 301 “indicates . . . that there is no  
8 requirement of a blood relationship.” *Id.* at 1164.<sup>1</sup> The Ninth Circuit further  
9 explained that “[i]f Congress had wanted to ensure” that a person born to married  
10 parents only one of whom was a U.S. citizen “actually shares a blood relationship  
11 with an American citizen,” “it knew how to do so,” as it had done in Section 309.  
12 *Id.* (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)). The court  
13 expressly refused to defer to the FAM, concluding that it was so divergent from the  
14 statutory language as to not even be appropriately considered “an interpretation of  
15 § 1401.” *Scales*, 232 F.3d at 1165-66; *see Jaen*, 899 F.3d at 187 n.4.

16 The Ninth Circuit reaffirmed *Scales* in *Solis-Espinoza v. Gonzales*,  
17 401 F.3d 1090 (9th Cir. 2005). There, the petitioner was born in Mexico and  
18 raised in the United States by his biological father, a Mexican citizen, and his  
19 father’s wife, a U.S. citizen who was not the petitioner’s biological mother. The  
20 petitioner’s father and the father’s wife were married at the time of the petitioner’s  
21 birth. *Id.* at 1091-92. The Board of Immigration Appeals determined that the  
22 petitioner “‘was born out of wedlock,’ because his biological father was not  
23 married to his biological mother at the time of his birth.” *Id.* at 1092. On appeal,  
24 the Ninth Circuit reversed, holding that the petitioner “was a legitimate child, not  
25

26 <sup>1</sup> *See also Scales*, 232 F.3d at 1166 (“Section 1401 requires only that  
27 Petitioner be ‘born . . . of parents,’ one of whom is a U.S. citizen, in order to  
28 acquire citizenship. The record is uncontroverted that Petitioner was born to Topaz [non-U.S. citizen genetic mother] and Scales [U.S. citizen husband of genetic mother at time of birth] during their marriage. There is no requirement of a blood relationship between Petitioner and his citizen father, as there is for an illegitimate child.”).

1 born out of wedlock, and . . . thus a United States citizen pursuant to 8 U.S.C.  
2 § 1401(g).” *Id.* at 1094. The court thus reaffirmed that Section 301 does not  
3 condition U.S. citizenship on the existence of a blood relationship with a U.S.  
4 citizen parent. *Id.* at 1093 (citing *Scales*, 232 F.3d at 1164).

5 But for the gender of E.J.’s parents, the circumstances undergirding  
6 *Scales* and *Solis-Espinoza* are virtually indistinguishable from those here. Those  
7 decisions make clear that (1) the word “parents” as used in Section 301(g) is not  
8 limited to biological parents; and (2) the presumption of legitimacy that applies  
9 when a child is born to married parents—codified in the INA—cannot be rebutted  
10 by evidence that the child does not have a biological tie to a U.S. citizen parent.  
11 Indeed, in *Solis-Espinoza*, it was undisputed that the petitioner did not share a  
12 biological relationship with his U.S. citizen parent—his father’s wife—but the  
13 court nonetheless rejected the imposition of a biological relationship test. *See*  
14 *Solis-Espinoza*, 401 F.3d at 1091-92; *see also Jaen*, 899 F.3d at 185 (under the  
15 INA, “a child born into a lawful marriage is the lawful child of those parents,  
16 regardless of . . . any biological link”). *Scales* and *Solis-Espinoza* therefore  
17 foreclose the imposition of a biological relationship requirement under Section  
18 301(g), including as applied to E.J.<sup>2</sup>

19  
20 <sup>2</sup> Defendants do not dispute that Section 1503 provides for a *de novo*  
21 adjudication of the Court of E.J.’s citizenship status and even appear to concede  
22 that if the Court were to adjudicate the merits of E.J.’s 1503 claim, the Court  
23 would be bound by Ninth Circuit law (Defendants’ Opposition, ECF No. 101  
24 (“Opp.”) at 1) and thus presumably would grant the claim pursuant to *Scales*.  
25 Defendants urge the Court to defer, however, and to require Plaintiffs instead to  
26 apply for a certificate of citizenship for E.J. from U.S. Citizen and Immigration  
27 Services (“USCIS”). Defendants contend that USCIS would be bound by *Scales*  
28 and *Solis-Espinoza* to grant such an application, if made. (*See* Opp. at 5.) E.J.’s  
ability to seek a certificate of citizenship from USCIS does not limit the  
jurisdiction of the Court to resolve E.J.’s claim under Section 1503. *See McCarthy*  
*v. Madigan*, 503 U.S. 140, 146 (1992), *superseded by statute on other grounds*  
 (“federal courts are vested with a virtually unflagging obligation to exercise the  
jurisdiction given them”); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs*, 558  
U.S. 67, 71 (2009). Indeed, “Congress allocated responsibility” to the courts to  
take “an independent and comprehensive role in determining citizenship,” *Ortega-*  
*Morales v. Lynch*, 168 F. Supp. 3d 1228, 1240 (D. Ariz. 2016), and that grant of  
jurisdiction is not discretionary.

1 In addition, the plain language of Section 301 and its contrast with  
2 Section 309 make clear that there is no such requirement. Nothing in Section 301  
3 references a biological relationship requirement or suggests that in using the words  
4 “parent” or “born . . . of parents,” Congress intended to refer only to biological or  
5 genetic parents.<sup>3</sup> To the contrary, Congress included a “blood relationship”  
6 requirement in Section 309, but not in Section 301(g), which is further evidence  
7 that Congress intended children born in and out of wedlock to be treated differently  
8 for purposes of acquiring U.S. citizenship and that there be no biological  
9 relationship requirement for the children of married U.S. citizens. *See Scales*, 232  
10 F.3d at 1165; *Jaen*, 899 F.3d at 189 (“Congress clearly specified enhanced  
11 requirements for proof of parentage in the case of children born out of wedlock”  
12 and “the ‘textual distinction’ between the sections regarding children of married  
13 parents and children of unmarried parents is strongly suggestive of a clear  
14 Congressional intent to treat the two categories differently on this point.”); *see also*  
15 *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes  
16 particular language in one section of a statute but omits it in another section of the  
17 same Act, it is generally presumed that Congress acts intentionally and purposely  
18 in the disparate inclusion or exclusion.” (internal quotation marks omitted)).<sup>4</sup>

19 \_\_\_\_\_  
20 <sup>3</sup> Except to clarify that the term “parent” includes a deceased parent, Title III  
21 of the INA, the Title that includes Sections 301(g) and 309, contains no definition  
22 of the term, let alone a definition limiting it to biological and/or gestational parents.  
23 *See* 8 U.S.C. § 1101(c)(2).

24 <sup>4</sup> Moreover, as the Second Circuit determined in *Jaen*, absent evidence of a  
25 contrary congressional intent, statutory language should be viewed against the  
26 background of the common law. *Jaen*, 899 F.3d at 188-89. The common law  
27 meaning of “parent” rests on the presumption that, when a child is born into a  
28 marriage, the married individuals are the child’s parents irrespective of their  
biological relationship to the child. *See Michael H. v. Gerald D.*, 491 U.S. 110,  
124 (1989) (describing the “presumption of legitimacy” as “a fundamental  
principle of the common law”). The common law presumption that every child  
born in wedlock is the legitimate offspring of the child’s married parents applies  
even when only one spouse is the child’s biological parent, and even when the  
child’s parents are of the same sex. *See, e.g., Elisa B. v. Superior Court*, 37 Cal.  
4th 108, 122 (2005) (holding that the presumption of parenthood was not rebutted  
by proof that the plaintiff was not the biological parent of her same-sex partner’s  
children).

1 To hold that Section 301 does not impose a biological relationship  
2 requirement on the children of married U.S. citizens also is consistent with the  
3 legislative history of the INA, which “clearly indicates that the Congress intended  
4 to provide for a liberal treatment of children and was concerned with the problem  
5 of keeping families of United States citizens and immigrants united.” H.R. Rep.  
6 No. 85-1199, at 7 (1957); *see also Nation v. Esperdy*, 239 F. Supp. 531, 538  
7 (S.D.N.Y. 1965) (“[T]hese provisions are designed to clarify or adjust existing  
8 provisions of law in the interest of reuniting broken families . . . .”) (quoting 103  
9 CONG. REC. 15,498 (1957) (statement of Sen. John F. Kennedy)). The Ninth  
10 Circuit recognized this purpose in *Solis-Espinoza*, explaining that “[t]he [INA] was  
11 intended to keep families together [and] should be construed in favor of family  
12 units and the acceptance of responsibility by family members.” *Solis-Espinoza*,  
13 401 F.3d at 1094; *accord Sook Young Hong v. Napolitano*, 772 F. Supp. 2d 1270,  
14 1278-79 (D. Haw. 2011) (collecting cases). In *Scales*, the Ninth Circuit also  
15 explained that its interpretation of Section 301 was consistent with Congress’s  
16 purpose in enacting the INA because the concerns animating the blood relationship  
17 requirement in Section 309—that “the unmarried male . . . need not participate in  
18 the decision to give birth rather than to choose an abortion; that he need not be  
19 present at the birth; and for at least 17 years thereafter he need not provide any  
20 parental support . . . in order to preserve his right to confer citizenship on the child  
21 pursuant to [Section 309]”—are “not present if a child is born in wedlock.”  
22 *Scales*, 232 F.3d at 1164 (quoting *Miller v. Albright*, 523 U.S. 420, 434 (1998)).  
23 To interpret Section 301(g) to require proof of a biological relationship with a U.S.  
24 citizen would be to do exactly the opposite of what Congress intended.

25 Accordingly, E.J. is entitled to a declaration that he acquired U.S.  
26 citizenship at birth and summary judgment on the Section 1503 claim.

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1           **B. Plaintiffs’ Claim Under the Due Process Clause of the Fifth**  
2           **Amendment**

3           The Court grants summary judgment on Plaintiffs’ claim under the  
4 Due Process Clause of the Fifth Amendment because, contrary to Defendants’  
5 argument on this motion, the State Department’s interpretation of Section 301 to  
6 require a biological relationship between the U.S. citizen parent and the child  
7 unconstitutionally infringes the fundamental right of same-sex couples to marry.

8           Defendants argue that the State Department’s interpretation of Section  
9 301 is subject to rational basis review because it does not implicate any  
10 fundamental right. (Opp. at 6-9.) Defendants’ argument fails as a matter of law.  
11 The State Department’s imposition of a biological relationship requirement under  
12 Section 301 denies same-sex couples and their children the panoply of rights and  
13 benefits of marriage, including the right of a married U.S. citizen parent to transmit  
14 citizenship to his or her legal child. In *Miller v. Albright*, 523 U.S. 420 (1998), the  
15 Supreme Court explained that, under the INA, if a *married* U.S. citizen and a  
16 foreign national conceive a child, “*citizenship will follow.*” *Id.* at 433 (emphasis  
17 added). Similarly, in *Scales*, 232 F.3d 1159, and *Solis-Espinoza*, 401 F.3d 1090,  
18 the Ninth Circuit held that children born into a marriage are the legitimate  
19 offspring of that marriage and the U.S. citizenship of either spouse may be  
20 transmitted to such children regardless of any biological connection between  
21 parent and child. *Solis-Espinoza*, 401 F.3d at 1093 (citing *Scales*, 232 F.3d at  
22 1164). *Miller*, *Scales*, and *Solis-Espinoza* together stand for the proposition that, in  
23 enacting the INA, Congress intended to confer on married U.S. citizens a right to  
24 transmit U.S. citizenship to their foreign-born children and therefore that such a  
25 right is an incident of marriage to which same-sex and opposite-sex couples are  
26 equally entitled. *See Pavan v. Smith*, 137 S. Ct. 2075, 2076 (2017) (“the  
27 Constitution entitles same-sex couples to civil marriage on the same terms and  
28 conditions as opposite-sex couples” (internal quotation marks omitted));

1 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (same-sex couples may not be  
2 “denied the constellation of benefits that [government] ha[s] linked to marriage”).

3 Defendants’ effort to characterize narrowly the right at issue and their  
4 related argument that there is not “a fundamental right to unconditionally transmit  
5 U.S. citizenship to a foreign-born child” because persons born in the United States  
6 can “acquire citizenship by birth only as provided by Acts of Congress” (Opp. at 8)  
7 is without merit. It conflates the unrelated issues of, on the one hand, whether U.S.  
8 citizenship is a fundamental right and, on the other, whether, as a result of  
9 Congress’s enacting the INA, transmission of U.S. citizenship to children of a valid  
10 marriage is part of the protected “constellation of benefits . . . linked to marriage.”  
11 *Pavan*, 137 S. Ct. at 2077. Nor does it matter that a right or benefit of marriage is  
12 conferred by statute (rather than being inherent to marriage). Indeed, in *Pavan* the  
13 privileges at issue attached to marriage by state statute. *Id.*

14 Because the State Department’s interpretation of Section 301 infringes  
15 a fundamental right, Defendants bear the burden of establishing that it is “narrowly  
16 tailored to serve a compelling state interest.” *United States v. Juvenile Male*, 670  
17 F.3d 999, 1012 (9th Cir. 2012) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993));  
18 *see Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (noting that the  
19 government bears the burden to prove that the infringement is narrowly tailored to  
20 serve a compelling governmental interest). The State Department’s interpretation  
21 of Section 301 does not meet this standard. Defendants have not identified a  
22 compelling interest or, indeed, any interest, that actually animated its exclusionary  
23 interpretation of Section 301. To the contrary, the record demonstrates that the  
24 sole basis for the State Department’s interpretation of Section 301 is its  
25 interpretation of the text of Section 301 (SOCF at ¶ 138), which does not include a  
26 biological relationship requirement. On this motion, Defendants have asserted  
27 vague references to the benefits of the biological relationship requirement in  
28 combatting fraud in the citizenship application process (Opp. at 10); however,

1 Defendants’ own designee testified at deposition that the State Department’s  
2 interpretation of Section 301 has no connection with such concerns. (SOCF at  
3 ¶ 138.) Having failed to articulate a compelling interest to justify the State  
4 Department’s infringement of a fundamental right, Defendants’ interpretation of  
5 Section 301 runs afoul of the Due Process Clause of the Fifth Amendment, and  
6 Plaintiffs are entitled to summary judgment.<sup>5</sup>

7 Defendants’ interpretation of Section 301 fails even rational basis  
8 review, under which Plaintiffs would bear the burden of demonstrating that the  
9 State Department’s policy is not rationally related to the furtherance of a legitimate  
10 governmental interest. *Glucksberg*, 521 U.S. at 722; *accord Gallinger v. Becerra*,  
11 898 F.3d 1012, 1017 (9th Cir. 2018). On this motion, Defendants have sought to  
12 defend the State Department’s interpretation based on “the Department’s  
13 longstanding interpretation of the language ‘[born . . . of parents]’ in Section  
14 1401(g).” (Opp. at 9.) Plaintiffs are correct, however, that the preservation of a  
15 “longstanding interpretation” is not an independent legitimate governmental  
16 objective. *See Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1142 (D. Or. 2014)  
17 (“The mere fact that prior law, history, tradition, the dictionary, and the Bible have  
18 defined a term does not give that definition a rational basis, it merely states what  
19 has been.”); *accord Golinski v. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998  
20 (N.D. Cal. 2012). Defendants’ argument is tautological: the State Department’s  
21 interpretation of Section 301 is rationally related to the State Department’s interest  
22 in preserving its interpretation of Section 301. *See Perry v. Schwarzenegger*, 704  
23 F. Supp. 2d 921, 998 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d  
24 1052 (9th Cir. 2012).

25  
26  
27 <sup>5</sup> Because Defendants have failed to articulate any compelling justification for  
28 the State Department’s interpretation of Section 301 they necessarily fail to satisfy  
the “narrowly tailored” prong of the strict scrutiny analysis.

1 As discussed in connection with the Section 1503 claim, Section 301  
2 does not include a biological relationship requirement, and the State Department  
3 does not have a legitimate interest in preserving a statutory interpretation that  
4 conflicts with the text and purpose of the INA. The “advent of assisted  
5 reproductive technology” (Opp. at 10) does not undermine the rationale of those  
6 decisions: the fundamental fact is that children such as E.J., who are born through  
7 the use of ART to married parents, are as much the children of their parents’  
8 marriage as biological children born to married parents. Nor could Defendants  
9 have a legitimate interest in perpetuating an interpretation of the INA that conflicts  
10 with the INA’s purpose. As described above, in enacting the INA, Congress  
11 intended to promote family unity, a purpose that is frustrated by the State  
12 Department’s interpretation of Section 301. *Solis-Espinoza*, 401 F.3d at 1094;  
13 *Sook Young Hong*, 772 F. Supp. 2d at 1278-79. The State Department’s  
14 interpretation cannot be reconciled with “the traditional ‘aversion to declaring  
15 children illegitimate,’ as well as an interest in promoting familial tranquility  
16 through deference to the marital family.” *Jaen*, 899 F.3d at 190 (quoting *Michael*  
17 *H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989)). Defendants’ sweeping,  
18 unsupported assertions about Congress’s supposed intent to imply a biological  
19 relationship requirement under Section 301 (Opp. at 11-13) are inconsistent with  
20 the record and cannot save the State Department’s policy under even rational basis  
21 review.<sup>6</sup>

22 \_\_\_\_\_  
23 <sup>6</sup> Nor is Defendants’ argument persuasive that the “text and structure of the  
24 INA” suggest that Congress intended to treat all biological and non-biological  
25 children differently for purposes of acquiring U.S. citizenship at birth. (Opp. at 9.)  
26 Defendants draw a false parallel between children, like E.J., who had a married  
27 U.S. citizen parent when they were born, and adopted children and stepchildren,  
28 who did not. (Opp. at 9.) The INA addresses citizenship of adopted and  
stepchildren in other sections (8 U.S.C. §§ 1101(c), 1431(b), 1433(c)), and for  
good reason: they implicate sets of familial relationships that are not involved in  
the context of children born into a marriage, by ART or otherwise. Only Sections  
301 and 309 are relevant to the adjudication of this motion. As courts have  
observed, “the ‘textual distinction’ between [Sections 301 and 309] 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

1 Nor is the State Department’s interpretation of Section 301 rationally  
2 related to a legitimate interest in detecting fraudulent citizenship applications,  
3 specifically “child smuggling” or “illegal adoption,” as Defendants have  
4 contended. (Opp. at 10.) There could be no legitimate concern of such fraud  
5 when, as here, a child’s parents, one of whom is a U.S. citizen, provide evidence of  
6 the child’s parentage and living arrangements. See Gallinger, 898 F.3d at 1019  
7 (“To survive rational-basis review, the State may not rely on a classification whose  
8 relationship to an asserted goal is so attenuated as to render the distinction arbitrary  
9 or irrational.” (internal quotation marks omitted)). Any purported interest in fraud  
10 prevention and/or detection also is contradicted by the undisputed testimony of the  
11 State Department’s representative that the State Department’s interpretation of  
12 Section 301 is not predicated on concerns about fraud (SOCF at ¶ 138) and  
13 undermined by the State Department’s unilateral decision in 2014 to treat as born  
14 “in wedlock” children born of a gestational mother, who is the child’s legal parent,  
15 even if she and the child do not share a genetic relationship (*id.* at ¶¶ 127-130).  
16 Although the State Department may, in the abstract, have a legitimate interest in  
17 mitigating the risk of fraudulent citizenship applications, the State Department’s  
18 interpretation of the INA bears no rational relationship to that interest and therefore  
19 Plaintiffs are entitled to summary judgment on their claim for declaratory and  
20 injunctive relief under the Due Process Clause.

#### 21 IV. CONCLUSION

22 For the reasons above, Plaintiffs’ motion for partial summary  
23 judgment is **GRANTED**.

24 Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable John F. Walter  
United States District Judge

25  
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27  
28 this point.” *Jaen*, 899 F.3d at 189; see *Scales*, 232 F.3d at 1164; *Russello v. United States*, 464 U.S. 16, 23 (1983).

1 Respectfully submitted,

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