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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  
DENYING DEFENDANTS'  
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 Denying Defendants’ Motion for Partial Summary Judgment*  
7 in connection with Defendants’ *Motion for Partial Summary Judgment* in the  
8 above-captioned action (ECF No. 89).

9  
10 Dated: January 24, 2019

Respectfully submitted,

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

## 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 Plaintiffs as the non-  
17 moving party. See [Kristensen v. Credit Payment Servs. Inc., 879 F.3d 1010, 1013](#)  
18 [\(9th Cir. 2018\)](#).

### 19 A. The Dvash-Banks Family

20 Andrew is a U.S. citizen. (Defendants’ Statement of Combined Facts,  
21 ECF No. 112-1 (“SOCF”) at ¶ 1.) In 2010, Andrew and Elad Dvash-Banks (“Elad”),  
22 an Israeli citizen, were married in Toronto, Canada. (*Id.* at ¶¶ 2-3.)

23 When Andrew and Elad, two men, decided to start a family, they did so  
24 using assisted reproductive technology (“ART”). (*Id.* at ¶¶ 4, 74-76.) As part of that  
25 process, Andrew and Elad provided their respective genetic material to create

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27 <sup>1</sup> When, as here, the parties’ only dispute relevant to the adjudication of the  
28 motion is a legal one and the parties had ample notice to provide any relevant  
evidence, the Court may grant summary judgment for the non-moving party *sua*  
*sponte*. See [Celotex Corp. v. Catrett, 477 U.S. 317, 326 \(1986\)](#).

1 embryos using eggs from an anonymous egg donor (the “Donor”), and subsequently  
2 contracted with a gestational surrogate (the “Gestational Surrogate”) to carry the  
3 embryos. (*Id.* at ¶¶ 75-77.) Thereafter, two embryos, one of which was created  
4 using genetic material from Elad and the Donor and the other of which was created  
5 using genetic material from Andrew and the Donor, were implanted into the  
6 Gestational Surrogate, who became pregnant with twins. (*Id.* at ¶ 80.) On  
7 September 16, 2016, E.J. and his brother, A.J. D.-B. (“A.J.”; together the “Twins”),  
8 were born four minutes apart in Ontario, Canada. (*Id.* at ¶¶ 5, 7, 88.) Andrew, Elad,  
9 and the Twins have lived together as a family since the Twins’ release from the  
10 hospital after their birth. (*Id.* at ¶ 99.) Andrew and Elad, the Twins’ legal parents  
11 (*id.* at ¶¶ 55-56, 92, 96, 146-48), have raised the Twins since the day they were born  
12 (*id.* at ¶ 93).

13 **B. The INA**

14 The INA specifies the eligibility requirements for U.S. citizenship at  
15 birth. These requirements differ for children of a marriage, who are subject to  
16 8 U.S.C. § 1401 (“Section 301”), and children “born out of wedlock,” who are  
17 subject to 8 U.S.C. § 1409 (“Section 309”).

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

26 In contrast to Section 301, which does not reference a “blood  
27 relationship” requirement, Section 309 imposes additional and different  
28 requirements, providing in relevant part that a child born abroad to an unwed U.S.

1 citizen father is a citizen at birth only if the child establishes “a blood relationship  
2 between the person and the father . . . by clear and convincing evidence” and meets  
3 certain other requirements. 8 U.S.C. § 1409(a)(1).

4           Nonetheless, the State Department’s internal *Foreign Affairs Manual*  
5 (“FAM”) purports to impose on applicants for a Consular Report of Birth Abroad  
6 (“CRBA”) a biological relationship test under Section 301. It does so by requiring  
7 that, to be considered born “in wedlock” (and thus to be covered by Section 301), a  
8 child born outside the United States must have a biological relationship with both of  
9 his or her married parents. (SOCF at ¶¶ 113-14.) *See* 8 FAM § 304.1-2. The basis  
10 for the State Department’s imposition of a biological requirement is its interpretation  
11 of the reference in Section 301(g) to “a person born . . . of parents one of whom is  
12 a . . . citizen of the United States.” (*See* SOCF at ¶ 131.)

13           The FAM represents the State Department’s unilateral declarations and  
14 is not the product of a formal adjudication or notice-and-comment rulemaking or  
15 congressional action. (*See id.* at ¶¶ 141-142.)<sup>2</sup> For example, in 2014, the State  
16 Department changed its interpretation of born “in wedlock” to include children born  
17 of a gestational mother, who is the child’s legal parent, even if she did not provide  
18 the egg from which the child was conceived. (*Id.* at ¶¶ 132-35.) This change was  
19 not occasioned by any corresponding amendment of the law or other congressional  
20 action. (*Id.* at ¶ 134.)

### 21       **C. The Application of the State Department’s Policy to the Twins**

22           On January 24, 2017, four months after the Twins were born, Andrew,  
23 Elad, and the Twins appeared at the U.S. Consulate in Toronto (the “Toronto  
24 Consulate”) in connection with applications for documents evidencing each Twin’s  
25 U.S. citizenship—a CRBA and a U.S. passport. (SOCF at ¶¶ 14, 16-17.) Andrew  
26 and Elad provided documentation for E.J., including, among other materials, his

27 \_\_\_\_\_  
28 <sup>2</sup> [See \*Scales v. INS\*, 232 F.3d 1159, 1166 \(9th Cir. 2000\); \*Jaen v. Sessions\*, 899 F.3d 182, 187 n.4 \(2d Cir. 2018\).](#)

1 Ontario Statement of Live Birth, which identified Andrew and Elad as E.J.’s parents,  
2 evidence of Andrew’s U.S. citizenship and residency history, and Andrew’s and  
3 Elad’s marriage certificate. (*Id.* at ¶¶ 17, 100.)<sup>3</sup> Vice Consul Frances Terri Day was  
4 assigned to adjudicate the Twins’ applications. (*See id.* at ¶ 18.) Ms. Day accepted  
5 E.J.’s Statement of Live Birth as sufficient proof that Andrew and Elad are E.J.’s  
6 parents. (*Id.* at ¶¶ 90-91, 101.) The State Department also accepted Andrew’s and  
7 Elad’s Ontario marriage license as proof of their marriage. (*Id.* at ¶ 121.)

8           During the interview, and after consulting with her colleagues, Ms. Day  
9 informed Andrew and Elad that, absent evidence of a biological relationship with  
10 Andrew, neither Twin would qualify for U.S. citizenship. (*Id.* at ¶¶ 30, 105-06.)  
11 Ms. Day further told Andrew and Elad that, if they opted to proceed with the Twins’  
12 applications, they would have to provide additional information demonstrating the  
13 biological relationship required by the State Department and suggested that they  
14 could provide DNA evidence for each child. (*Id.* at ¶¶ 30, 107.)

15           Thereafter, Andrew underwent DNA testing, the results of which  
16 reflected that A.J. was Andrew’s biological child, and E.J. was not. (*Id.* at ¶¶ 33-  
17 34.) By letter dated March 2, 2017, Ms. Day informed the Dvash-Banks family that  
18 the State Department had denied E.J.’s applications for a CRBA and U.S. passport.  
19 (*Id.* at ¶ 35.) Ms. Day’s letter reflected a final adjudication of E.J.’s applications.  
20 (*Id.* at ¶ 116.) The basis for the denial of E.J.’s applications for a CRBA and U.S.  
21 passport was the lack of evidence of a biological connection between Andrew and  
22 E.J. (*Id.* at ¶¶ 118-19.) To reach this determination, Ms. Day applied State  
23 Department policies memorialized in the FAM for adjudicating U.S. citizenship  
24 applications. (*Id.* at ¶ 103.)

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28 <sup>3</sup> The parties do not dispute that Andrew meets the INA’s residency requirements.

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## II. STANDARD

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

## III. DISCUSSION

### A. E.J.’s Claim Under the APA

Defendants move for summary judgment on the APA claim, seeking review of the State Department’s final adjudication of E.J.’s applications for a CRBA and U.S. passport. (Defendants’ Motion, ECF No. 92-1 (“Mot.”) at 2.) Defendants’ motion is denied and summary judgment is granted for Plaintiffs.

Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Regents of the Univ. of California v. U.S. Dep’t of Homeland Sec.*, [908 F.3d 476, 494 \(9th Cir. 2018\)](#) (quoting 5 U.S.C. § 702). There is a “‘strong presumption’ favoring judicial review of administrative action.” *Id.* When, as here, a plaintiff challenges an agency action under the APA, the “agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Id.* (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, [463 U.S. 29, 50 \(1983\)](#)); see also *SEC v. Chenery Corp.*, [332 U.S. 194, 196 \(1947\)](#) (“[A] reviewing court . . . must judge the propriety of [agency] solely by the grounds invoked by the agency.” (alterations in original)).

1 E.J. contends that he acquired U.S. citizenship at birth under Section  
2 301(g) when he was born to his married parents, Andrew and Elad, on September  
3 16, 2016. Plaintiffs’ APA claim challenges the denial of E.J.’s applications for a  
4 CRBA and U.S. passport. Section 301(g) provides, in relevant part, that the  
5 following individuals are nationals and citizens of the United States at birth: “a  
6 person born outside the geographical limits of the United States and its outlying  
7 possessions of parents one of whom is an alien, and the other a citizen of the United  
8 States . . . .” 8 U.S.C. § 1401(g).

9 The material facts are not in dispute. Specifically, there is no dispute  
10 that (i) Andrew is a U.S. citizen who satisfied Section 301’s residency requirements  
11 at the time of E.J.’s birth; (ii) E.J.’s legal parents, Andrew and Elad, were married at  
12 the time of E.J.’s birth; (iii) E.J. was born outside of the United States; (iv) Andrew  
13 and Elad are E.J.’s legal parents and have acted as his only parents since his birth;  
14 and (v) E.J. does not share a biological relationship with Andrew. (SOCF at ¶¶ 1, 5,  
15 8, 89, 92, 93-95, 121-22, 146-48, 150.) The basis for the denial of E.J.’s applications  
16 for a CRBA and U.S. passport was the State Department’s interpretation of Section  
17 301(g) to require a biological relationship between E.J. and his U.S. citizen parent,  
18 Andrew (SOCF at ¶¶ 118-19). The parties’ only disputes relating to the APA claim  
19 therefore are legal ones: (1) whether the State Department’s denial of E.J.’s  
20 applications for a CRBA and U.S. passport based on the lack of a biological  
21 relationship with his U.S. citizen parent is arbitrary, capricious, an abuse of  
22 discretion, or otherwise not in accordance with law under Section 706(2)(A) of the  
23 APA; and (2) whether the APA claim is barred under Section 704 of the APA, 5  
24 U.S.C. § 704 (“Section 704”), because there are adequate alternative remedies  
25 available to Plaintiffs.

26 The State Department’s interpretation of Section 301, which resulted in  
27 the denial of E.J.’s applications for a CRBA and U.S. passport, conflicts with the  
28 INA’s text and purpose and therefore fails even the APA’s deferential standard of

1 review. Nothing in Section 301 even suggests that in using the words “parent” or  
2 “born . . . of parents,” Congress intended to refer only to biological or genetic  
3 parents.<sup>4</sup> In contrast, Congress included a “blood relationship” requirement in  
4 Section 309, which is further evidence that Congress intended children born in and  
5 out of wedlock to be treated differently for purposes of acquiring U.S. citizenship.  
6 *See Scales, 232 F.3d at 1164-65; Jaen, 899 F.3d at 189; see also Russello v. United*  
7 *States, 464 U.S. 16, 23 (1983)* (“[W]here Congress includes particular language in  
8 one section of a statute but omits it in another section of the same Act, it is generally  
9 presumed that Congress acts intentionally and purposely . . . .” (internal quotation  
10 marks omitted)).<sup>5</sup> Further, the INA’s legislative history “clearly indicates that the  
11 Congress intended to provide for a liberal treatment of children and was concerned  
12 with the problem of keeping families of United States citizens and immigrants  
13 united.” H.R. Rep. No. 85-1199, at 7 (1957); *see Solis-Espinoza v. Gonzales, 401*  
14 *F.3d 1090, 1094 (9th Cir. 2005); accord Sook Young Hong v. Napolitano, 772 F.*  
15 *Supp. 2d 1270, 1278-79 (D. Haw. 2011)* (collecting cases). To interpret Section 301  
16 to impose a biological relationship requirement would be to do exactly the opposite  
17 of what Congress intended.

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20 <sup>4</sup> Except to clarify that the term “parent” includes a deceased parent, Title III of  
21 the INA, the Title that includes Sections 301(g) and 309, contains no definition of  
22 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>5</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, where 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 the extent that Defendants suggest that the denial of E.J.’s  
2 applications was legally required, the denial was based on an erroneous legal  
3 premise and cannot stand. See Regents of the Univ. of California, 908 F.3d at 505.  
4 In two decisions that are controlling here, the Ninth Circuit held that Section 301  
5 does not impose a biological relationship requirement. In *Scales v. INS*, 232 F.3d  
6 1159 (9th Cir. 2000), the Ninth Circuit held that “[a] straightforward reading” of  
7 Section 301 “indicates . . . that there is no requirement of a blood relationship.” *Id.*  
8 at 1164. The Ninth Circuit further explained that “[i]f Congress had wanted to  
9 ensure” that a person born to married parents only one of whom was a U.S. citizen  
10 “actually shares a blood relationship with an American citizen,” “it knew how to do  
11 so,” as it had done in Section 309. *Id.* (quoting Custis v. United States, 511 U.S.  
12 485, 492 (1994)). The Ninth Circuit reaffirmed *Scales* in *Solis-Espinoza v.*  
13 *Gonzales*, 401 F.3d 1090 (9th Cir. 2005), holding that the petitioner, whose father  
14 was married to a woman other than his biological mother when the petitioner was  
15 born, “was a legitimate child, not born out of wedlock, and . . . thus a United States  
16 citizen pursuant to [Section 301(g)]” *Id. at 1094*. But for the gender of E.J.’s  
17 parents, the circumstances undergirding *Scales* and *Solis-Espinoza* are virtually  
18 indistinguishable from those here. *Scales* and *Solis-Espinoza* therefore control and  
19 foreclose the imposition of a biological relationship requirement under Section  
20 301(g).<sup>6</sup>

21 Defendants do not appear to dispute that the State Department’s  
22 interpretation of Section 301 is incompatible with Ninth Circuit law and do not assert  
23 that their position is consistent with the INA’s purpose. (Defendants’ Reply, ECF  
24 No. 112 (“Reply”) at 2-6.) Instead, Defendants seek to insulate from judicial review  
25

26 <sup>6</sup> Defendants’ argument is no more persuasive to the extent that they suggest  
27 that the APA’s remedies would be fruitless because the State Department requires a  
28 biological relationship under both Section 301 and Section 309. This contention  
misses the point. A court order holding that the State Department’s interpretation  
violates Section 706(2)(A) effectively would preclude the State Department from  
imposing on E.J. a biological relationship requirement under Section 301.

1 the State Department’s interpretation of the INA and adjudication of E.J.’s  
2 applications, urging the Court to hold that Section 704 bars the APA claim because  
3 Plaintiffs have “multiple, adequate remedies at law.” (Mot. at 12.) These supposed  
4 adequate remedies include seeking a certificate of citizenship from U.S. Citizen and  
5 Immigration Services (“USCIS”) or, in the alternative, seeking a declaration of  
6 citizenship under Section 1503 of the INA, 8 U.S.C. § 1503 (“Section 1503”).  
7 Defendants’ argument (Mot. at 12-16) fails as a matter of law.<sup>7</sup>

8 By its own terms, Section 704 precludes judicial review only when a  
9 *court* can afford the plaintiff adequate redress. Section 704 provides, in relevant  
10 part, that “[a]gency action made reviewable by statute and final agency action for  
11 which there is no other adequate remedy in a court are subject to judicial review.” 5  
12 U.S.C. § 704. The prospect of relief from a second agency therefore is not an  
13 adequate remedy for the denial of action by a first agency. See [Sackett v. EPA, 566](#)  
14 [U.S. 120, 127 \(2012\)](#); see also [Sheikh v. Gonzales, 2005 WL 2277118, at \\*1 \(N.D.](#)  
15 [Cal. Sept. 19, 2005\)](#) (“Courts that have construed this phrase [in Section 704] have  
16 been concerned with whether there is *a court* that has the authority and ability to  
17 provide complete relief.” (emphasis in original)). Because USCIS is not a court,  
18 Defendants’ suggestion that Plaintiffs could apply for and obtain a certificate of  
19 citizenship from that agency (Mot. at 12) is legally irrelevant.

20 Nor does Section 1503 offer “special and adequate review  
21 procedure[s],” as Defendants contend, such that APA review is barred. (Mot. at 12-  
22 13 (quoting [Garcia v. Vilsack, 563 F.3d 519, 522 \(D.C. Cir. 2009\)](#))).<sup>8</sup> In contrast to

23 \_\_\_\_\_  
24 <sup>7</sup> Defendants’ argument that the Court should decline to exercise jurisdiction  
25 over the APA claim because Section 1503 provides an “adequate remedy” simply  
26 cannot be reconciled with the argument in their opposition to Plaintiffs’ motion for  
27 partial summary judgment that the Court should decline to exercise jurisdiction over  
28 the Section 1503 claim in deference to USCIS (ECF No. 101, at 3-5).

<sup>8</sup> Defendants rely on [Quick Korner Market v. U.S. Dep’t of Agriculture, Food & Nutrition Services, 180 F. Supp. 3d 683 \(S.D. Cal. 2016\)](#), for the proposition that where *de novo* review of agency action is available, “APA review is precluded,” (Reply at 2). [Quick Korner](#), however, involved the adequacy of the review procedures of the Food and Nutrition Act, which provides for, among other things,

1 APA remedies, the redress available under Section 1503 is limited to a declaration  
2 of E.J.’s citizenship status. *See* 8 U.S.C. § 1503(a); [Acosta v. United States, 2014](#)  
3 [WL 2216105, at \\*4 \(W.D. Wash. May 29, 2014\)](#) (under Section 1503, “the district  
4 court only has jurisdiction to make a de novo adjudication of citizenship”). This  
5 would not result in vacatur and remand of the Toronto Consulate’s prior adjudication  
6 of E.J.’s CRBA and U.S. passport applications, as would a favorable decision under  
7 the APA. Here, Plaintiffs seek not only a *de novo* adjudication of E.J.’s citizenship  
8 status, but injunctive relief. Taken together, the remedies sought in and procedural  
9 posture of this Action reflect that Plaintiffs do not have an alternative remedy of the  
10 type that is available under the APA. Defendants also have not identified any “clear  
11 and convincing evidence” that Congress intended to bar APA review under these  
12 circumstances. *See Hyatt v. Office of Mgmt. & Budget, 908 F.3d 1165, 1170-71 (9th*  
13 [Cir. 2018\)](#) (internal quotation marks omitted).<sup>9</sup> Because it is clear that Defendants’  
14 interpretation of Section 301 is legally erroneous, the State Department’s denial of  
15 E.J.’s applications for a CRBA and U.S. passport is set aside. Defendants’ motion  
16 is denied and Plaintiffs are entitled to summary judgment on the APA claim.

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20 remand to the agency, and therefore is inapposite. [180 F. Supp. 3d at 695](#).  
21 Moreover, in contrast to here, where Plaintiffs seek broader relief than is available  
22 under Section 1503, the review procedure available under the Food and Nutrition  
23 Act was “‘special’ in the sense that it specifically encompasse[d] the type of action”  
24 that the plaintiffs there sought to bring. *Id.*

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28 <sup>9</sup> Defendants also rely on *Hinojosa v. Horn, 896 F.3d 305, 313-14 (5th Cir. 2018)*. (Reply at 3.) The Court declines to follow that decision, in which, contrary to Congress’s intent that the APA be liberally construed to afford complainants fair review of administrative decisions, the court concluded that Sections 1503(b) and (c), which are inapplicable here, provide an exclusive remedy when the petitioner faces no serious obstacles (*e.g.*, a criminal indictment) to proceeding under those provisions of the statute. As the dissent there noted, the majority decision is inconsistent with Supreme Court precedent requiring that the APA’s “generous review provisions [be given] . . . a ‘hospitable’ interpretation.” *Id. at 317*. Moreover, in *Hinojosa*, the petitioners challenged only the agency’s determination that they had presented insufficient evidence of U.S. citizenship, not the agency’s interpretation of the INA or the policies that led to that determination.

1       **B. Plaintiffs’ Claim Under the Due Process Clause**

2               Defendants’ motion for summary judgment on the due process claim  
3 similarly is denied, and the Court grants summary judgment for Plaintiffs because  
4 the State Department’s interpretation of Section 301 to impose a biological  
5 relationship requirement unconstitutionally infringes the fundamental right of same-  
6 sex couples to marry.<sup>10</sup>

7               Defendants argue that the State Department’s interpretation of Section  
8 301 is subject to rational basis review because it does not implicate a fundamental  
9 right. (Mot. at 16, 17-19.) Defendants’ argument fails as a matter of law. The State  
10 Department’s interpretation of Section 301 denies same-sex couples and their  
11 children the panoply of rights and benefits of marriage, including the right of a  
12 married U.S. citizen parent to transmit citizenship to his or her legal child. In *Miller*  
13 *v. Albright*, [523 U.S. 420 \(1998\)](#), the Supreme Court explained that, under the INA,  
14 if a married U.S. citizen and a foreign national conceive a child, “*citizenship will*  
15 *follow.*” *Id.* at 433 (emphasis added). Similarly, in *Scales*, [232 F.3d 1159](#), and *Solis-*  
16 *Espinoza*, [401 F.3d 1090](#), the Ninth Circuit held that children born into a marriage  
17 are the legitimate offspring of that marriage and the U.S. citizenship of either spouse  
18 may be transmitted to such children regardless of any biological connection between  
19 parent and child. *Solis-Espinoza*, [401 F.3d at 1093](#) (citing *Scales*, [232 F.3d at 1164](#)).  
20 *Miller*, *Scales*, and *Solis-Espinoza* together stand for the proposition that, in enacting  
21 the INA, Congress intended to confer on married U.S. citizens a right to transmit  
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23 <sup>10</sup> As a threshold matter, Defendants’ contention that the Court lacks subject  
24 matter jurisdiction to adjudicate the due process claim (Mot. at 16 n.15) lacks merit.  
25 A plaintiff seeking declaratory relief under the Declaratory Judgment Act is not  
26 required to assert an additional, independent cause of action when, as here, the Court  
27 has subject matter jurisdiction under 28 U.S.C. § 1331, and the plaintiff has standing.  
28 *See, e.g., County of Santa Clara v. Trump*, [267 F. Supp. 3d 1201, 1216 \(N.D. Cal. 2017\)](#).  
Further, under settled Supreme Court precedent, Plaintiffs may bring a due  
process claim for equitable relief directly under the Due Process Clause of the Fifth  
Amendment. *See, e.g., Bolling v. Sharpe*, [347 U.S. 497, 500 \(1954\)](#); *see also Clinton*  
*v. Babbitt*, [180 F.3d 1081, 1087 \(9th Cir. 1999\)](#) (“[F]ederal courts have jurisdiction  
to provide equitable relief to protect rights safeguarded by the Constitution.”).

1 U.S. citizenship to their foreign-born children and therefore that such a right is an  
2 incident of marriage to which same-sex and opposite-sex couples are equally  
3 entitled. See [Pavan v. Smith, 137 S. Ct. 2075, 2076 \(2017\)](#) (“the Constitution entitles  
4 same-sex couples to civil marriage on the same terms and conditions as opposite-  
5 sex couples” (internal quotation marks omitted)); [Obergefell v. Hodges, 135 S. Ct.](#)  
6 [2584, 2601 \(2015\)](#) (same-sex couples may not be “denied the constellation of  
7 benefits that [government] ha[s] linked to marriage”).<sup>11</sup>

8 Because the State Department’s interpretation of Section 301 infringes  
9 a fundamental right, Defendants bear the burden of establishing that it is “narrowly  
10 tailored to serve a compelling state interest.” [United States v. Juvenile Male, 670](#)  
11 [F.3d 999, 1012 \(9th Cir. 2012\)](#) (quoting [Reno v. Flores, 507 U.S. 292, 302 \(1993\)](#));  
12 see [Washington v. Glucksberg, 521 U.S. 702, 721 \(1997\)](#) (noting that the  
13 government bears the burden to prove that the infringement is narrowly tailored to  
14 serve a compelling governmental interest). The State Department’s interpretation of  
15 Section 301 does not meet this standard. Defendants have not identified a  
16 compelling interest or, indeed, any interest, that actually animated its exclusionary  
17 interpretation of Section 301. To the contrary, the record demonstrates that the basis  
18 for the State Department’s interpretation of Section 301 is its misinterpretation of  
19 the text of Section 301. (SOCF at ¶ 138.) Defendants have asserted vague references  
20 to the benefits of the biological relationship requirement in combatting fraud in the  
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22 <sup>11</sup> Defendants’ assertion that that they “do not limit the application of [Section  
23 301] to the children of heterosexual[s]” (Mot. at 21 (emphasis in original)) and that  
24 “the FAM contains no language that treats same-sex couples differently from  
25 opposite-sex married couples” (Mot. at 22) is unavailing. The INA makes the ability  
26 to transmit U.S. citizenship to the child of a marriage part of the constellation of  
27 benefits linked to marriage. The FAM section on which the State Department relied  
28 to conclude that E.J. is not a U.S. citizen, however, defines legitimate children as  
only those born during the marriage of their biological parents to each other. See 8  
FAM § 304.1-2. By imposing on male same-sex couples a requirement that, because  
of their sex and sexual-orientation, they can never meet, the State Department denies  
such couples a recognized benefit of the right to marriage and “harm[s] and  
humiliate[s]” their children. See [Obergefell, 135 S. Ct. at 2590, 2600](#) (a “basis for  
protecting the right to marry is that it safeguards children and families”).

1 citizenship application process (Mot. at 20, 21); however, Defendants’ own designee  
2 testified at deposition that the State Department’s interpretation of Section 301 has  
3 no connection with such concerns (SOCF at ¶¶ 131, 140). Having failed to articulate  
4 a compelling interest to justify the State Department’s infringement of a fundamental  
5 right, Defendants’ interpretation of Section 301 runs afoul of the Due Process Clause  
6 of the Fifth Amendment, and Plaintiffs are entitled to summary judgment.<sup>12</sup>

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

23 As discussed in connection with the APA claim, Section 301 does not  
24 include a biological relationship requirement, and the State Department does not  
25 have a legitimate interest in preserving a statutory interpretation that conflicts with  
26

27 <sup>12</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 the text and purpose of the INA. *See Scales, 232 F.3d at 1164; Solis-Espinoza, 401*  
2 *F.3d at 1093*. Nor could Defendants have a legitimate interest in perpetuating an  
3 interpretation of the INA that conflicts with the INA’s purpose. As described above,  
4 in enacting the INA, Congress intended to promote family unity, a purpose that is  
5 frustrated by the State Department’s interpretation of Section 301. *Solis-Espinoza,*  
6 *401 F.3d at 1094; Sook Young Hong, 772 F. Supp. 2d at 1278-79*. The State  
7 Department’s interpretation cannot be reconciled with “the traditional ‘aversion to  
8 declaring children illegitimate,’ as well as an interest in promoting familial  
9 tranquility through deference to the marital family.” *Jaen, 899 F.3d at 190* (quoting  
10 *Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989)*). Defendants’ sweeping,  
11 unsupported assertions about Congress’s supposed intent to imply a biological  
12 relationship requirement under Section 301 (Mot. at 20-21) are inconsistent with the  
13 record and cannot save the State Department’s policy.<sup>13</sup>

14 Defendants’ interpretation of Section 301 also is not rationally related  
15 to a legitimate interest in detecting fraudulent citizenship applications, specifically  
16 “child smuggling” or “illegal adoption,” as Defendants have contended. (Mot. at  
17 21.) There could be no legitimate concern of such fraud when, as here, a child’s  
18 parents, one of whom is a U.S. citizen, provide evidence of the child’s parentage and  
19 living arrangements. *See Gallinger, 898 F.3d at 1019* (“To survive rational-basis  
20 review, the State may not rely on a classification whose relationship to an asserted  
21

<sup>13</sup> Nor is Defendants’ argument persuasive that the State Department’s  
22 “interpretation is supported by other sections of the INA that treat non-biological  
23 children of U.S. citizens differently” for purposes of acquiring U.S. citizenship at  
24 birth. (Mot. at 21.) Defendants draw a false parallel between children, like E.J.,  
25 who had a married U.S. citizen parent when they were born, and adopted children  
26 and stepchildren, who did not. (*Id.*) The INA addresses citizenship of adopted and  
27 stepchildren in other sections (8 U.S.C. §§ 1101(c), 1431(b), 1433(c)). The  
28 citizenship of such children implicates familial relationships that are irrelevant in the  
context of children born into a marriage. 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 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 goal is so attenuated as to render the distinction arbitrary or irrational.”). Any  
2 purported interest in fraud prevention and/or detection also is contradicted by the  
3 undisputed evidence that the State Department’s interpretation of Section 301 is not  
4 predicated on concerns about fraud (SOCF at ¶¶ 131, 140) and undermined by the  
5 State Department’s unilateral decision in 2014 to treat as born “in wedlock” children  
6 born of a gestational mother, who is the child’s legal parent, even if she and the child  
7 do not share a genetic relationship (*id.* at ¶¶ 132-35). Although the State Department  
8 may, in the abstract, have a legitimate interest in mitigating the risk of fraudulent  
9 citizenship applications, its interpretation of the INA bears no rational relationship  
10 to that interest and therefore Defendants’ motion is denied. Because there are no  
11 genuine disputes of material fact related to the due process claim, and Defendants’  
12 arguments fail as a matter of law, Plaintiffs are entitled to summary judgment on  
13 their claim for declaratory and injunctive relief under the Due Process Clause.

14 **IV. CONCLUSION**

15 For the reasons stated above, Defendants’ motion for partial summary  
16 judgment is **DENIED**. Summary judgment is **GRANTED** for Plaintiffs.

17 Dated: \_\_\_\_\_

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

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