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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA
 13 WESTERN DIVISION

14 ANDREW MASON DVASH-
 BANKS, et al.,
 15
 Plaintiffs,
 16
 v.
 17
 MICHAEL R. POMPEO, in his
 18 official capacity as U.S. Secretary of
 State, et al.,
 19
 Defendants,
 20

) Case No. **2:18-cv-00523-JFW (JCx)**
)
) **DEFENDANTS' NOTICE OF**
) **ERRATA RE: DEFENDANTS'**
) **STATEMENT OF PROPOSED**
) **DECISION GRANTING**
) **DEFENDANTS' MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **AND CORRECTED DOCUMENT AS**
) **ATTACHED EXHIBIT**
)
) Honorable John F. Walter

1 Defendants hereby advise the Court that Defendants' Notice of Lodging of
2 Defendants' Proposed Statement of Decision Granting Defendants' Motion for
3 Partial Summary Judgment, ECF No. 119, contained the following error:

- 4 1) The attachment to the notice of lodging was a duplicate notice of lodging,
5 instead of the proposed statement of decision.

6 Accordingly, Defendants refer the Court to the attached exhibit, which is the
7 proposed statement of decision granting Defendants' motion for partial summary
8 judgment. Ex. A.

9
10 Date: January 24, 2019

Respectfully submitted,

11
12 JOSEPH H. HUNT
13 Assistant Attorney General

14 ANTHONY J. COPPOLINO
15 Deputy Director

16 /s/ Vinita B. Andrapalliyal
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1
2 **CERTIFICATE OF SERVICE**

3 Case No. CV 18-523-JFW-JC

4 I hereby certify that I am over the age of 18 and not a party to the above-
5 titled action. I am employed as a Trial Attorney at the United States Department of
6 Justice, Civil Division, Federal Programs Branch. My business address is 20
7 Massachusetts Ave., N.W., Washington, DC 20530.

8 On January 24, 2019, I served this DEFENDANTS' NOTICE OF ERRATA
9 RE: DEFENDANTS' STATEMENT OF PROPOSED DECISION GRANTING
10 DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND
11 CORRECTED DOCUMENT AS ATTACHED EXHIBIT on each person or entity
12 named below by uploading an electronic version of this document to the Court's
13 ECF system:

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I declare under penalty of perjury under the laws of the United States of
America that the following is true and correct.

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Executed on January 24, 2019, at Washington, DC.

By: s/Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL
Trial Attorney
United States Department of Justice
Civil Division

EXHIBIT A

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10
11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 ANDREW MASON DVASH-
15 BANKS and E.J. DVASH-BANKS

16 Plaintiffs,

17 v.

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

21 Defendants.

Case No. CV 18-523-JFW(JCx)

**PROPOSED STATEMENT OF
DECISION GRANTING
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Hearing Date: Feb. 4, 2019
1:30 pm

Honorable John F. Walter

1 On January 7, 2019, Defendants Secretary of State Michael R. Pompeo, and
2 the U.S. Department of State (collectively, “Defendants”) filed a Motion for Partial
3 Summary Judgment, seeking summary judgment on Counts I and II of the First
4 Amended Complaint. On January 14, Plaintiffs Andrew Dvash-Banks and E.J.
5 Dvash-Banks (collectively, “Plaintiffs”) filed their Opposition. On January 22,
6 Defendants filed a Reply. After considering the moving, opposing, and reply
7 papers, and the arguments therein, the Court rules as follows:

8 **FACTUAL BACKGROUND**

9 Andrew Dvash-Banks holds dual U.S. and Canadian citizenship. Defs.’
10 Combined Stmt. of Facts (“DCSOF”) ¶ 1. In August 2010, he married Elad Dvash-
11 Banks, an Israeli citizen, in Toronto, Canada. *Id.* ¶ 3. Andrew and Elad used
12 Assisted Reproductive Technology (“ART”) to have two children named E.J. and
13 A.J. *Id.* ¶¶ 4–7. They used an anonymous egg donor to conceive the children, and a
14 gestational carrier to carry and give birth to them. *Id.* ¶¶ 4, 7. E.J. and A.J. are
15 biological half-brothers; they share the same anonymous egg donor. *Id.* ¶ 6. E.J.
16 and A.J. were born on September 16, 2016, in Toronto, Ontario. *See id.* ¶¶ 5, 7.
17 DNA testing later revealed that E.J. was not biologically related to Andrew; the
18 test showed a 0% probability of paternity for Andrew. *Id.* ¶ 8.

19 On September 28, 2016, Andrew and Elad petitioned the Superior Court of
20 Justice in Toronto, Ontario, to declare them to be the parents of E.J. and A.J. *Id.*
21 ¶¶ 9–10. The court granted the Dvash-Banks’ application, and directed the Deputy
22 Registrar General for the Province of Ontario to register the birth of the children as
23 to show Andrew and Elad as the parents of the children. *Id.* ¶¶ 10–11.

24 On January 24, 2017, Andrew and Elad, together with E.J. and A.J.,
25 appeared in person at the U.S. Consulate General Toronto (“the Consulate”) to
26 apply for CRBAs and U.S. Passports for E.J. and A.J. *Id.* ¶¶ 14–15. The
27 applications they submitted to the Consulate showed that the children had been
28 born using ART. *Id.* ¶ 24. The Dvash-Banks family was interviewed by a consular

1 officer in connection with these applications. She concluded that it was unclear
2 which (if either) of the children, E.J. or A.J., had a biological relationship to a U.S.
3 citizen parent (Andrew). *Id.* ¶ 28. The consular officer provided the family the
4 option of submitting DNA evidence to prove such relationship, and a letter
5 outlining relevant steps should they choose to pursue that option. *Id.* ¶¶ 29–32. The
6 Dvash-Banks family arranged to have DNA testing conducted and submitted in
7 support of E.J.’s and A.J.’s applications. *Id.* ¶ 33. Ultimately, on March 2, 2017,
8 the consular officer denied E.J.’s applications for a CRBA and a U.S. Passport
9 because the applicants had failed to establish a biological connection between E.J.
10 and a U.S. citizen parent. *Id.* ¶¶ 35–36. She granted A.J.’s applications. *See Ex. 19.*

11 In January 2018, Andrew Dvash-Banks filed the instant suit on behalf of
12 himself and E.J.,¹ challenging the decisions by Defendants to deny E.J.’s CRBA
13 and U.S. passport applications. On January 14, 2019, Plaintiffs filed a First
14 Amended Complaint.² In their First Amended Complaint, Plaintiffs assert that the
15 Plaintiffs assert that the denial of E.J.’s applications violated the Administrative
16 Procedure Act. Plaintiffs also assert a claim under the Declaratory Judgment Act
17 (“DJA”) alleging violations of their substantive due process rights. The First
18 Amended Complaint also pursues a claim under 8 U.S.C. § 1503(a), which
19 provides a mechanism for the Court to conduct a *de novo* review of E.J.’s
20 citizenship status. Defendants move for summary judgment on Plaintiffs’ APA and
21 substantive due process claims.

22 LEGAL BACKGROUND

23 I. 8 U.S.C. §§ 1401 and 1409

24 Congress’s present-day rules for acquiring U.S. citizenship at birth are found
25 principally in 8 U.S.C. § 1401, titled “Nationals and citizens of United States at

26 ¹ In December 2018, Elad was appointed guardian *ad litem* for E.J. in this action.

27 ² The First Amended Complaint removed a claim that had been included in the
28 original Complaint, but left unchanged the allegations relating to the APA and
substantive due process claims.

1 birth” and also known as Section 301 of the Immigration and Nationality Act
2 (“INA”). *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017). Under
3 section 1401, a person born outside of the United States

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

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

10 8 U.S.C. § 1409, or Section 309 of the INA, provides several situational
11 categories by which a child born abroad may acquire U.S. citizenship at birth, in
12 addition to those described in § 1401. The title of section 1409 indicates that it
13 applies to “children born out of wedlock,” but that term is not expressly defined by
14 the INA. Section 1409(a) sets out the regime for acquisition of citizenship at birth
15 in the case of a child born out of wedlock to a U.S. citizen father.³

16 **II. The Secretary of State’s authority to issue Consular Reports of Birth** 17 **Abroad and U.S. Passports to Foreign-Born Children**

18 Defendants issue documentation of the birth of U.S. citizens born abroad. 8
19 U.S.C. § 1104(a); 22 C.F.R. § 50.7; *see also* 22 U.S.C. § 2705. Defendants also
20 grant and issues U.S. passports. *See* 22 U.S.C. § 211a. CRBAs and passports prove
21 the citizenship status of their holders. 22 U.S.C. § 2705.

22 Department of State guidance regarding interpretation and administration of
23 the INA can be found in its Foreign Affairs Manual (“FAM”). The FAM states that
24 “[s]ince 1790, there have been two prerequisites for transmitting U.S. citizenship at
25 birth to children born abroad.” 7 FAM 1131.2 (AR 82).⁴ First, “at least one

25 ³ *See also Morales-Santana*, 137 S.Ct. 1678 (holding that the differing physical
26 presence requirements in 8 U.S.C. § 1409 (a) and (c) for unwed fathers and
27 mothers was unconstitutional and ordering that, until Congress enacted a “uniform
28 prescription,” the “now-five-year [physical presence] requirement” of the provision
that has become 8 U.S.C. § 1401(g) “should apply, prospectively, to children born
to unwed U.S.-citizen mothers”).

⁴ Relevant provisions of the FAM appear in the Certified Administrative Record.

1 biological parent must have been a U.S. citizen when the child was born.” *Id.*
2 Second, the “U.S. citizen parent(s) must have resided or been physically present in
3 the [U.S.] for the time required by the law in effect when the child was born.” *Id.*

4 Defendants therefore interpret the phrase “born ... of parents” in 8 U.S.C.
5 § 1401 to include a biological connection between the child and the referenced
6 parents. *See* DCSOF 131; *see also id.* at 58. The FAM defines “birth in wedlock”
7 as “birth during the marriage of the biological parents to each other.” 7 FAM 1140
8 App. E ¶ c (AR 91); *see also id.* ¶ e; 7 FAM 1131.4-1 ¶¶ a, d (AR 82–84); *see also*
9 *id.* 7 FAM 1120 App. D ¶ f (AR 78) (“A child born abroad to a surrogate, whose
10 genetic parents are a U.S. citizen father and anonymous egg donor, is considered
11 for citizenship purposes to be a person born *out of wedlock* of a U.S. citizen and
12 alien spouse, with a citizenship claim adjudicated under INA 309(a). This is the
13 case regardless of whether the man is married and regardless of whether his spouse
14 is the legal parent of the child at the time of birth.”) (emphasis added).

15 The FAM interprets 8 U.S.C. § 1409 to apply to children whose biological
16 parents are not married to each other. 7 FAM 1140 App. E (AR 91). A child may
17 acquire U.S. citizenship at birth through his or her U.S. citizen father if “a blood
18 relationship between the person and the father is established by clear and
19 convincing evidence,” and certain other conditions are met. *See* 8 U.S.C. §
20 1409(a); 7 FAM 1131.4-1 ¶ b(1) (AR 83). Defendants consider a man to have “a
21 biological relationship with his child, or a ‘blood relationship’ as required in . . .
22 INA section 309(a), when he has a genetic parental relationship to the child.”⁵ 7
23 FAM 1131.4-1 ¶ c (AR 83).

24

As such, the Court generally cites herein to the version of each FAM provision
25 appearing in the Administrative Record, *i.e.*, the versions in effect at the time of
26 the underlying adjudication. The Court notes, however, that the FAM’s guidance
27 on acquisition of citizenship has since been reorganized and renumbered. An
28 appendix matching the cited provisions to their present-day versions appears at the
end of this opinion.

⁵ The FAM recognizes a “biological relationship” between a child and mother may include either a genetic relationship or a legal, gestational relationship. *Id.*

1 **III. The Department of Homeland Security’s role in adjudicating**
2 **citizenship claims in the United States**

3 The Department of Homeland Security (“DHS”), meanwhile, is responsible
4 for citizenship determinations made in the United States. *See* 8 U.S.C.
5 § 1103(a)(1). U.S. Citizenship and Immigration Services (“USCIS”), within DHS,
6 adjudicates certificate of citizenship applications. *See* 8 U.S.C. § 1452. Under
7 section 1452, “[a] person who . . . is a citizen of the United States by virtue of . . .
8 paragraph . . . (g) of section 1401 of this title . . . may apply” to the Secretary of
9 Homeland Security for a certificate of citizenship and “[u]pon proof to the
10 satisfaction of” the Secretary, she may receive the certificate if she is within the
11 United States at the time.

12 The Ninth Circuit, in reviewing the DHS’s denial of citizenship claims
13 arising in immigration-court proceedings, has held, contrary to the Department of
14 State’s interpretation, that “a blood relationship between a child and a U.S. citizen
15 [is] not required to establish citizenship under 8 U.S.C. § 1401(g)” if the child was
16 born in wedlock, *Solis-Espinoza*, 401 F.3d 1090, 1091 (9th Cir. 2005); and that a
17 child is born in wedlock if his or her parents were married to each other at the time
18 of the birth, *id.*; *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000).⁶

19 **LEGAL STANDARDS**

20 Summary judgment is proper “if the pleadings, depositions, answers to
21 interrogatories, and admissions on file, together with affidavits, if any, show that
22 there is no genuine issue as to any material fact and that the moving party is
23 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is material
24 when, under the governing substantive law, it could affect the outcome of the case.
25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*,
26 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if

27 ⁶ U.S. embassies and consulates, in adjudicating applications for citizenship
28 documentation from individuals located abroad, adhere to a uniform, worldwide
policy consistent with applicable Supreme Court case law, but the variable case
law of federal circuit courts does not control those foreign adjudications.

1 “the evidence is such that a reasonable jury could return a verdict for the
2 nonmoving party.” *Anderson*, 477 U.S. at 248.

3 ANALYSIS

4 I. Plaintiffs’ APA Claims (Count II)

5 Plaintiffs bring a claim under Section 706(2)(A) of the APA, asserting that
6 Defendants’ denial of E.J.’s CRBA application—and more broadly an alleged
7 exclusion of children born abroad in same-sex marriages from the category of
8 children who qualify for citizenship at birth under 8 U.S.C. § 1401(g)—“lacks a
9 rational basis, is arbitrary, and is contrary to law.” *See* Compl. ¶¶ 92, 96. APA
10 review, however, is not available for Plaintiffs. There exists an “adequate remedy
11 at law,” *see* 5 U.S.C. § 704, precluding Plaintiffs’ APA claims. First, E.J. can
12 challenge, and, indeed, has brought a separate claim challenging, the Department
13 of State’s denials of the CRBA and passport applications filed on his behalf under
14 8 U.S.C. § 1503, which provides a path by which E.J. may assert a claim that he is
15 a U.S. national. Second, E.J. may apply for a certificate of citizenship from USCIS,
16 which provides equivalent proof of U.S. citizenship.

17 The APA limits judicial review to “final agency action for which there is no
18 other adequate remedy in a court.” 5 U.S.C. § 704; *U.S. Army Corps of Eng’rs v.*
19 *Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). “[T]he Supreme Court interpreted
20 § 704 as precluding APA review where Congress has otherwise provided a special
21 and adequate review procedure.” *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir.
22 2009) (citation and internal quotation marks omitted); *accord Bowen v.*
23 *Massachusetts*, 487 U.S. 879, 903 (1988); *Coos Cnty. Bd. of County Com’rs v.*
24 *Kempthorne*, 531 F.3d 792, 810 (9th Cir. 2008).

25 Here, Plaintiffs have separately invoked the statute Congress specifically
26 provided for an individual who is denied a “right or privilege as a national of the
27 United States” by the federal government on “the ground that [s]he is not a
28 national of the United States.” 8 U.S.C. § 1503(a). Where an applicant challenges

1 the Department of State’s denial of a right or privilege of U.S. citizenship on the
2 basis that the plaintiff is not a U.S. citizen, courts have consistently concluded that
3 Section 1503(a) offers an adequate alternative remedy to APA review. *See, e.g.,*
4 *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1233–34 (D. Ariz. 2016);
5 *Esparza v. Clinton*, 6:12-CV-925-AA, 2012 WL 6738281, at *1 (D. Or. Dec. 21,
6 2012); *Alsaïdi v. U.S. Dep’t of State*, 292 F. Supp. 3d 320, 326 (D.D.C. 2018).

7 Section 1503’s remedies do not fall short because Plaintiffs seek injunctive
8 and declaratory relief under the APA but can obtain only declaratory relief under
9 section 1503(a). Plaintiffs seek (1) a declaration that the Department’s alleged
10 policy of “classifying the children of same-sex married couples as ‘children born
11 out of wedlock,’ and its . . . refusal to recognize [E.J.’s] citizenship status on that
12 basis,” violates the INA and the Constitution; (2) a declaration that E.J. is a U.S.
13 citizen at birth; and (3) a permanent injunction enjoining Defendants from
14 “classifying the children of same-sex married couples as ‘children born out of
15 wedlock,’ and denying [them] the right to acquire citizenship at birth pursuant to
16 Section 301(g) on that basis.” Compl. at 24, Prayer for Relief.

17 Section 706(2)(A) of the APA, meanwhile, only allows the courts to “hold
18 unlawful and set aside agency action” that does not comport with the applicable
19 laws and procedures. 5 U.S.C. § 706(2)(A). All section 706(2)(A) can provide is an
20 order vacating or remanding the Department’s denials of E.J. D.-B.’s CRBA and
21 passport applications. *See id.* Such a remedy is of limited utility to Plaintiffs,
22 because they are not currently abroad and, thus, cannot apply for another CRBA
23 from the Department unless they leave the country. 22 C.F.R. § 50.2; *see also* 22
24 C.F.R. § 50.5. Meanwhile, the APA’s remedies also do not encompass Plaintiffs’
25 second request for relief: a declaration that E.J. is a U.S. citizen. Rather, Section
26 1503 provides Plaintiffs with a mechanism to obtain such a declaration.

27 Further, Plaintiffs’ other requests for judgment on the Department of State’s
28 policies as a whole and for a permanent, universal injunction are unavailable under

1 the APA and, in any event, must be rejected as improper. First, the APA does not
2 allow Plaintiffs to seek “*wholesale* improvement of [a] program by court decree.”
3 *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990); *cf. Ctr. For Biological*
4 *Diversity v. U.S. Dept. of Hous. & Urban Dev.*, 241 F.R.D. 495, 500, 501 (D. Ariz.
5 2006) (An APA challenge impermissibly sought broad programmatic relief where
6 it sought a declaration that “Defendants have violated and continue to violate” the
7 law and injunctive relief compelling Defendants to change their practices.).
8 Second, injunctions “should be no more burdensome to the defendant than
9 necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health*
10 *Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682,
11 702 (1979)); *see also Gill v. Whitford*, 138 S.Ct. 1916, 1933 (2018); *California v.*
12 *Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *City & Cnty. of San Francisco v. Trump*,
13 897 F.3d 1225, 1244 (9th Cir. 2018). Indeed section 706(2) cannot provide
14 Plaintiffs with *any* of their requested relief.

15 A further alternative remedy is available to Plaintiffs. Andrew may apply for
16 a certificate of citizenship on behalf of E.J. from USCIS, *see* 8 U.S.C. §1452,
17 which is equivalent proof of U.S. citizenship, *see* 22 U.S.C. § 2705. *See also*
18 DCSOF ¶ 64. In the Ninth Circuit, where Plaintiffs currently reside, USCIS
19 follows the Ninth Circuit’s decision in *Scales*, 232 F.3d at 1166. DCSOF ¶¶ 66–67.

20 USCIS’s certificate-of-citizenship process provides an adequate, alternative
21 remedy at law for Plaintiffs to procure proof of U.S. citizenship for E.J. *Cf.*
22 *Nickerson v. United States*, CV 07-211 JH/WDS, 2007 WL 9662632, at *6
23 (D.N.M. Oct. 31, 2007) (setting forth alternative remedies, including under 8
24 U.S.C. §§ 1452 and 1503, for an individual to obtain proof of citizenship).

25 Therefore, summary judgment is granted for Defendants on Count II.

26 **II. Plaintiffs’ Substantive Due Process Claims (Count I)**

27 Plaintiffs assert that Defendants have violated their substantive due process
28 rights “by enforcing a policy that excludes U.S. citizens in same-sex marriages

1 from conferring citizenship pursuant to [8 U.S.C. § 1401], while restricting access
2 to citizenship under that provision to the children of opposite-sex married
3 couples.” Compl. ¶ 76; *see also id.* ¶¶ 75–77.

4 Substantive due process protections are limited to rights that are
5 “fundamental”—both “objectively, deeply rooted in this Nation’s history and
6 tradition” and “implicit in the concept of ordered liberty, such that neither liberty
7 nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521
8 U.S. 702, 720–21 (1997) (citation omitted); *see also Franceschi v. Yee*, 887 F.3d
9 927, 937 (9th Cir. 2018), *cert. denied*, 18-585, 2018 WL 5792470 (U.S. Dec. 10,
10 2018). A plaintiff must provide “a ‘careful description’ of the asserted fundamental
11 liberty interest” when raising such a claim. *Chavez v. Martinez*, 538 U.S. 760, 775–
12 76 (2003). “Where a fundamental right is not implicated . . . governmental action
13 need only have a rational basis to be upheld against a substantive due process
14 attack.” *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997).

15 Plaintiffs’ asserted “rights to acquire and confer citizenship at birth pursuant
16 to INA Section 301,” Compl. ¶ 77, is too broad to comply with *Glucksberg*. Nor do
17 Plaintiffs sufficiently describe a fundamental interest in asserting a right to “the
18 legal recognition that same-sex spouses may both be the parents of a child born
19 during their marriage, even if only one spouse is the child’s biological parent.”
20 Compl. ¶ 36. Defendants’ understanding of the INA to require a biological
21 connection between the foreign-born child seeking to acquire U.S. citizenship at
22 birth and a U.S. citizen parent applies to both opposite-sex and same-sex couples,
23 married and unmarried. *See* 7 FAM 1131.4-1 ¶¶ c, d(5). This is evident from
24 Defendants’ approval of applications for a CRBA and passport for A.J., Andrew’s
25 biological child. Defendants similarly interprets section 1409 as applicable to both
26 opposite-sex and same-sex couples where a foreign-born child’s biological parents
27 are not married to each other.⁷ 7 FAM 1100 App. D (AR 77–80); *id.* App. E (AR

28 ⁷ *See Latta v. Otter*, 771 F.3d 456, 493 (9th Cir. 2014) (Berzon, J., concurring)

1 88–94).

2 Rather, Andrew’s asserted interest is more carefully described as an
3 individual’s right to successfully apply for a CRBA or a U.S. passport on behalf of
4 a child who is born abroad and is not the individual’s biological child.⁸ And E.J.’s
5 asserted interest is properly described as an individual’s right to successfully apply
6 for a CRBA or a U.S. passport as a child born abroad who is the non-biological
7 child of a U.S. citizen. These asserted rights cannot be considered fundamental
8 because there are no such rights deeply rooted in this Nation’s history, tradition,
9 and practices. Indeed, the extension of citizenship to foreign-born children is not a
10 constitutionally enshrined right for either the U.S. citizen or the child seeking to
11 acquire citizenship; rather, it is a right granted by Congress.⁹ *Rogers*, 401 U.S. at
12 827; *see also Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring);
13 *Icaza v. Schultz*, 656 F. Supp. 819, 823 (D.D.C. 1987).

14 Therefore, Plaintiffs’ claims are subject only to rational-basis review. *Kim*,
15 121 F.3d at 1273. Defendants’ longstanding interpretation of the INA to require a
16 biological relationship between the U.S. citizen and child for the child born abroad
17 to receive a CRBA or a U.S. passport passes that review.¹⁰

18 Plaintiffs attack the Department’s interpretation as “vastly over- and under-
19 _____
20 (“[B]oth same-sex and opposite-sex couples can and do produce children
21 biologically related only to one member of the couple, via assisted reproductive
22 technology or otherwise. And both same-sex and opposite-sex couples adopt
23 children, belying the notion that the two groups necessarily differ as to their
24 biological connection to the children they rear.”).

22 ⁸ Children born outside of the United States are not covered by the Fourteenth
23 Amendment’s provision for citizenship at birth.

24 ⁹ Further, the Supreme Court has underscored the importance of a biological
25 connection between the child seeking to acquire citizenship and the U.S. citizen
26 seeking to confer citizenship. *See, e.g., Miller v. Albright*, 523 U.S. at 438
(plurality op.); *Nguyen*, 533 U.S. at 62.

26 ¹⁰ The question for resolution of Count I is separate from the question of whether
27 this Court agrees with the Department’s longstanding statutory interpretation. *See*
28 *Shanks v. Dressel*, 540 F.3d 1082, 1089 (9th Cir. 2008). Rather, the Court must
determine whether the Department’s interpretation violates the Fifth Amendment’s
substantive due process component.

1 inclusive.” Pls.’ Opp’n Br. at 16. But the Department understands Congress to
2 have included a biological requirement in both sections 1401 and 1409, which
3 applies regardless of sex, sexual orientation, or marriage status. The result is not
4 over- or under-inclusive, inasmuch as it is what the Department believes Congress
5 intended. And while the Department’s interpretation differs from the Ninth
6 Circuit’s views on the statutes, it amounts to a reasonable reading. “Born ...
7 of parents” can reasonably be read and understood to serve a similar function and
8 purpose to the “blood relationship” language of section 1409(a): to ensure a
9 biological connection between a child and his or her parents. Moreover, “parents”
10 could only have meant “mother” and “father,” as the genetic contribution of both
11 sexes is necessary to conceive a child who is subsequently “born. . . of parents.”
12 *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009) (“There can
13 be little doubt that the ‘born of’ concept generally refers to a blood relationship.”).

14 That the INA has separate citizenship and naturalization procedures for the
15 non-biological children of U.S. citizen parents lends support to Defendants’
16 interpretation. *See Marquez-Marquez v. Gonzales*, 455 F.3d 548, 549 (5th Cir.
17 2006); *Colainni v. INS*, 490 F.3d 185 (2d Cir. 2007); *Astrue v. Capato ex rel.*
18 *B.N.C.*, 566 U.S. 541 (2012); *see also* 8 U.S.C. §§ 1431(b), 1433. Plaintiffs argue
19 that “the adoption context presents different legal and policy considerations given
20 the need to account for the presence of multiple different relationships.” Pls.’
21 Opp’n Br. at 20. But so too here, where ART creates complex relationships
22 between intended parents, surrogate mothers, and sperm and egg donors.

23 The foregoing analysis notwithstanding, this Court recognizes that the Ninth
24 Circuit has decided, in *Scales*, that “a straightforward reading of § 1401
25 indicates . . . that there is no requirement of a blood relationship,” *Scales*, 232 F.3d
26 at 1164 (emphasis added); *see also Solis-Espinoza*, 401 F.3d at 1094. Neither of
27 those cases, however, involved a child born through the use of ART, or addressed
28 the constitutional claim raised here.

1 The Department is also concerned about fraud in the application for
2 documentation of U.S. citizenship. DCSOF 156; *see also id.* 71, 72. Plaintiffs
3 speculate about other policies that the Department could adopt to mitigate those
4 concerns, but that is not the test under rational-basis review; Defendants must
5 simply present a “conceivable rational basis” for their policy. *Erotic Serv. Provider*
6 *Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018),
7 *amended*, 881 F.3d 792 (9th Cir. 2018).

8 **CONCLUSION**

9 For all the foregoing reasons, Defendants’ Motion for Partial Summary
10 Judgment is GRANTED.

11 IT IS SO ORDERED.

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13 Dated _____

14 **JOHN F. WALTER**
UNITED STATES DISTRICT JUDGE

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1 Presented, and respectfully submitted on January 24, 2019, by:

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[Proposed] Appendix A

The following chart shows the current numbering of the Foreign Affairs Manual (“FAM”) provisions cited in this decision. Current versions of the FAM may be found online, on the Department of State’s website, <https://fam.state.gov>:

<u>Cited Provision</u>		<u>Current Version</u>
7 FAM 1100 App. D	(AR 77–80)	8 FAM 304.3
7 FAM 1120 App. D	(AR 78)	8 FAM 304.3-2
7 FAM 1131.2	(AR 82)	8 FAM 301.4-1(B)
7 FAM 1131.4-1	(AR 82–84)	8 FAM 301.4-1(D)(1)
7 FAM 1100 App. E	(AR 88–94)	8 FAM 304.1
7 FAM 1140 App. E	(AR 91)	8 FAM 304.1-2

1
2 **CERTIFICATE OF SERVICE**

3 Case No. CV 18-523-JFW-JC

4 I hereby certify that I am over the age of 18 and not a party to the above-
5 titled action. I am employed as a Trial Attorney at the United States Department of
6 Justice, Civil Division, Federal Programs Branch. My business address is 20
7 Massachusetts Ave., N.W., Washington, DC 20530.

8 On January 24, 2019, I served this PROPOSED STATEMENT OF
9 DECISION GRANTING DEFENDANTS' MOTION FOR PARTIAL
10 SUMMARY JUDGMENT on each person or entity named below by uploading an
11 electronic version of this document to the Court's ECF system:

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35 I declare under penalty of perjury under the laws of the United States of
36 America that the following is true and correct.

37 Executed on January 24, 2019, at Washington, DC.

By: s/Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL
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