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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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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Plaintiffs Andrew Mason Dvash-Banks ("Andrew") and his son E.J. D.-B. ("E.J.") submit the following memorandum of points and authorities in opposition to Defendants'[1] motion for partial summary judgment (the "Motion") (ECF No.92-1) in the above-captioned action (the "Action").[2]

I. PRELIMINARY STATEMENT[3]

Defendants move for summary judgment on the First Amended Complaint's (the "Complaint" or "Compl.") claims under Section 706(2)(A) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and the Due Process Clause of the Fifth Amendment, U.S. CONST., amend. V. There is no genuine dispute as to any material fact that bears on the outcome of Defendants' Motion;[4] the parties' only relevant dispute and, therefore, the outcome of Defendants' Motion, hinges entirely on the merits of Defendants' legal arguments. The Court should deny Defendants' Motion for the reasons below.

First, Defendants are not entitled to summary judgment on the APA claim because Andrew and E.J. have no adequate alternative remedy in a court. By its own terms, Section 704 of the APA, 5 U.S.C. § 704 ("Section 704"), precludes judicial review only when a *court* can afford the plaintiff adequate redress. Because

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[1] Defendants are the United States Department of State ("State Department") and the Honorable Michael R. Pompeo in his capacity as Secretary of State.

[2] E.J. brings his claims in this Action by and through his guardian *ad litem* and other parent, Elad Dvash-Banks ("Elad").

[3] Citations in this memorandum to "SOGD" refer to *Plaintiffs' Rule 56.1 Statement of Genuine Disputes of Material Facts*, filed concurrently with this memorandum.

[4] Plaintiffs do not agree with all of the characterizations in Defendants' submissions in support of the Motion. For example, the record is replete with testimony that E.J. and his brother A.J. D.-B. are twins. (*See, e.g.*, SOGD ¶¶ 75-76, 88, 89.) Yet Defendants attempt to recast the relationships within the Dvash-Banks family by inventing strained terminology such as "biological half-brothers" who were "carried . . . in tandem." (Motion ("Mot.") at 3.) These linguistic contortions demean Plaintiffs and their family and seek to distract from the undisputed fact that E.J. was born during the marriage of Andrew and Elad, his legal parents (SOGD ¶¶ 56, 89), but they have no bearing on the adjudication of the Motion.

U.S. Citizen and Immigration Services ("USCIS") is not a court, Defendants' suggestion that Andrew and E.J. could apply for and potentially obtain a certificate of citizenship from that agency is legally irrelevant. Nor does Section 1503 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1503 ("Section 1503"), offer an adequate remedy because, in contrast to the remedies available under the APA, the only redress available under that provision is a *de novo* adjudication of E.J.'s citizenship status.

Second, Defendants are not entitled to summary judgment on the due process claim because the State Department's interpretation of Section 301 of the INA, 8 U.S.C. § 1401 ("Section 301"), denies couples in same-sex marriages the full constellation of rights and benefits available to spouses in opposite-sex marriages and cannot survive the exacting scrutiny the Constitution requires whenever a fundamental right has been abridged. Even were the Court to accept Defendants' overly-narrow characterization of the right at issue, Defendants' interpretation of Section 301 would not survive even rational basis review, for Defendants' interpretation of Section 301 not only harms a protected class—same-sex married couples—but is based solely on an interpretation of the INA that conflicts with statute's language and purpose and controlling Ninth Circuit law.[5]

Third, Defendants' argument that the Declaratory Judgment Act, 28 U.S.C. § 2201 ("DJA")—the statutory basis for some of the relief sought—does not create a cause of action is without merit. Courts in the Ninth Circuit have held

[5] The State Department's interpretation of the INA is inconsistent with the legislative history of the INA, which "clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 85-1199, at 7 (1957); *see also* *Nation* v. *Esperdy*, 239 F. Supp. 531, 538 (S.D.N.Y. 1965) ("'[T]hese provisions are designed to clarify or adjust existing provisions of law in the interest of reuniting broken families . . .'") (quoting 103 CONG. REC. 15, 498 (1957) (statement of Sen. John F. Kennedy)). The State Department's interpretation of Section 301(g) to require a biological relationship between a U.S. citizen parent and his or her child does exactly the opposite, especially in cases of same-sex marriages such as Andrew and Elad's.

that a plaintiff seeking declaratory relief under the DJA is not required to assert an additional, independent cause of action when the court has subject matter jurisdiction and there is Article III standing. Both of these requirements are satisfied here, and Defendants do not argue otherwise. Further, under settled Supreme Court law, Andrew and E.J. may assert claims for equitable relief directly under the Due Process Clause of the Fifth Amendment.[6]

II. ARGUMENT[7]

A. Defendants Are Not Entitled to Summary Judgment on the APA Claim Because Plaintiffs Have No Adequate Alternative Remedy in a Court.

Defendants contend that they are entitled to summary judgment on the APA claim because Plaintiffs have "multiple, adequate remedies at law." (Mot. at 12.) These supposed adequate remedies include seeking a declaration of citizenship from this Court under Section 1503 or, in the alternative, applying for a certificate of citizenship from USCIS. Defendants' argument, however, misstates the purpose and scope of APA review. (Mot. at 12-16.)

As a threshold matter, Defendants' Motion cannot be reconciled with the APA's "central purpose," which is to provide "a broad spectrum of judicial review of agency action." *Bowen* v. *Massachusetts*, 487 U.S. 879, 903-04 (1988) (explaining that the prerequisites to jurisdiction in Section 704 should be construed narrowly). "The APA's comprehensive provisions allow any person 'adversely

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[6] If the Court were to determine not only that it should deny Defendants' Motion, but that there is no genuine dispute of material fact relevant to the claims at issue in Defendants' Motion and that Andrew and E.J. should prevail, the Court may grant summary judgment for Plaintiffs *sua sponte*. *See* *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.").

[7] For purposes of the Motion and, in the interest of brevity, Andrew and E.J. incorporate by reference without restating in this memorandum, the Statement of Relevant Facts included as Section II in the *Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment* ("Plaintiffs' Motion") (ECF No. 83).

affected or aggrieved' by agency action to obtain judicial review thereof, so long as the decision challenged represents a 'final agency action for which there is no adequate remedy in a court.'" *Western Radio Servs. Co.* v. *U.S. Forest Serv.*, 578 F.3d 1116, 1122 (9th Cir. 2009) (quoting *Webster* v. *Doe*, 486 U.S. 592, 599 (1988) (alterations omitted)). As the Ninth Circuit has explained, the APA is "vast in scope" and its "comprehensive provisions provide the backup or default remedies for all interactions between individuals and all federal agencies . . . ." *Id.* at 1122-23 (internal quotation marks omitted).

Defendants' Motion incorrectly argues that they are entitled to summary judgment on the APA claim because E.J. could "apply for a certificate of citizenship from USCIS," another federal agency. (Mot. at 12.) Section 704 provides, in relevant part, that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy *in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). By its terms, Section 704 precludes judicial review only when a court can afford the plaintiff adequate redress. The Supreme Court has explained that the prospect of relief from a second agency is not an adequate remedy for the denial of action by a first agency. *See Sackett* v. *EPA*, 566 U.S. 120, 127 (2012) ("The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' [within the meaning of Section 704] for action already taken by another agency.").[8]

[8] Moreover, Defendants' suggestion that USCIS would approve an application for a certificate of citizenship submitted on E.J.'s behalf is based only on Defendants' assumption that USCIS would do what Defendants refuse to do—follow Ninth Circuit law rejecting the State Department's interpretation of Section 301 to include a biological relationship requirement—and is entirely speculative. (Mot. at 15.) Indeed, *Defendants' Statement of Uncontroverted Facts and Conclusions of Law* ("SOF") (ECF No. 89-2) asserts only that "the Dvash-Banks family could apply for a certificate of citizenship from USCIS" and makes no representations about the probable result of such an application. (SOF ¶¶ 64-65.) For these reasons, Plaintiffs do not address fully here whether a certificate of citizenship is, as Defendants argue, the legal equivalent of the Consular Report of Birth Abroad ("CRBA") for which Andrew and Elad applied on E.J.'s behalf. Notably, Defendants' proffered authority for this point states only that a certificate of citizenship or a certificate of naturalization are equivalent evidence of citizenship to a CRBA or U.S. passport. 22 U.S.C. § 2705. Yet these documents differ in their

Moreover, "[c]ourts that have construed this phrase [in Section 704] have been concerned with whether there is *a court* that has the authority and ability to provide complete relief." *Sheikh* v. *Gonzales*, 2005 WL 2277118, at *1 (N.D. Cal. Sept. 19, 2005) (emphasis in original; citing, *inter alia*, *Bowen*, 487 U.S. at 901; *Tucson Airport Auth.* v. *Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998)); *see also* *Matsuo* v. *United States*, 416 F. Supp. 2d 982, 995 (D. Haw. 2006) ("'In effect, § 704 withdraws the limited waiver of immunity under § 702 if an adequate *judicial* remedy is already available elsewhere.'" (quoting *Con. Ed. Co. of N.Y.* v. *U.S. Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001) (emphasis added))); *Sterling* v. *United States*, 749 F. Supp. 1202, 1207-08 (E.D.N.Y. 1990) ("The APA precludes judicial review of a final agency action under its provisions if there is another court available which provides an adequate remedy to redress the alleged grievance.").

Defendants' Motion also erroneously argues that Section 1503 is an "adequate remedy" within the meaning of Section 704 because a declaration of E.J.'s U.S. citizenship is, "at its core, the relief Plaintiffs seek here." (Mot. at 14.) Although, as Andrew and E.J. demonstrated in Plaintiffs' Motion, E.J. is entitled to a declaration under Section 1503 that he is a U.S. citizen at birth, they seek broader relief in addition to such a declaration. *See* 8 U.S.C. § 1503(a) (authorizing certain persons to "institute an action . . . for a judgment declaring him to be a national of the United States . . . ."); *see also* *Acosta* v. *United States*, 2014 WL 2216105, at *4 (W.D. Wash. May 29, 2014) ("[U]nder a § 1503(a) action, the district court only has jurisdiction to make a *de novo* adjudication of citizenship."). The relief Plaintiffs seek also includes a declaration that the State Department's discriminatory

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language concerning how citizenship was acquired. For example, a CRBA indicates that an individual is a U.S. citizen at birth, but a certificate of citizenship can be issued at any time in an individual's life to show that he or she acquired U.S. citizenship at a later date. (SOGD ¶ 152.) Citizenship at birth is a right, in contrast to naturalization, *Asemani* v. *USCIS*, 797 F.3d 1069, 1078 (D.C. Cir. 2015), and Defendants' Motion offers no prediction as to whether a hypothetical certificate of citizenship for E.J. would state that he acquired citizenship on the date of his birth.

interpretation of Section 301 is unlawful and unconstitutional and an injunction precluding the State Department from continuing to interpret Section 301 in that manner. A remedy is not "adequate" within the meaning of Section 704 if it provides "doubtful and limited relief." *See* *Bowen*, 487 U.S. at 901 . That consideration is particularly important here given the State Department's avowed position that it is not bound by the decisions of any court interpreting Section 301's requirements other than the Supreme Court. (Mot. at 11 n.13; SOGD ¶ 135.) Even if this Court were to declare E.J. to be a U.S. citizen at birth under Section 1503, it remains to be seen whether the State Department and its "embassies and consulates" around the world would issue E.J. a CRBA and U.S. passport if he were to provide them with a court order declaring him to be a U.S. citizen. (*See* Mot. at 11 n.13.) To grant summary judgment for Defendants on the APA claim therefore would potentially insulate the State Department's unlawful and unconstitutional policies from judicial review. Defendants have not identified any "clear and convincing evidence" that Congress intended to bar APA review under these circumstances. *See* *Hyatt* v. *Office of Mgmt. & Budget*, 908 F.3d 1165, 1170-71 (9th Cir. 2018) (stating that the presumption that Congress intends judicial review of agency action is overcome only by "a showing of 'clear and convincing evidence of a contrary legislative intent'" (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140-41 (1967)).[9]

[9] The decisions that Defendants cite for the proposition that Section 1503 is an adequate alternative to APA review (Mot. at 13) do not involve claims for either injunctive relief or an order invalidating an agency's interpretation of a federal statute and, therefore, are readily distinguishable. In *Ortega-Morales* v. *Lynch*, 168 F. Supp. 3d 1228 (D. Ariz. 2016), for example, the plaintiffs challenged only the immigration judge's factual finding that they did not present sufficient evidence that their father met the INA's residency requirements. *Id.* at 1240-41 ("Resolving this issue is a matter of routine fact-finding and application of clear statutes."). In each of the other decisions that Defendants cite, the plaintiff similarly contested only the agency's determination of nationality status, as opposed to its interpretation of the INA's requirements, and sought similarly limited relief in the form of a declaration of citizenship. *See* *Esparza* v. *Clinton*, 2012 WL 6738281 (D. Or. Dec. 21, 2012); *Alsaidi* v. *U.S. Dep't of State*, 292 F. Supp. 3d 320 (D.D.C. 2018). Moreover, in *Alsaidi*, the court expressly left open the possibility that Section 1503 would not provide an adequate remedy when a plaintiff requests "injunctive or any other form of relief." 292 F. Supp. 3d at 327-28.

Courts in the Ninth Circuit have held that APA review is available under circumstances analogous to those here. For example, in *Veterans for Common Sense* v. *Nicholson*, the plaintiffs filed a complaint for injunctive and declaratory relief that "broadly challenge[d] the benefits adjudications programs of the United States Department of Veterans Affairs ("VA")." 2008 WL 114919, *1 (N.D. Cal. Jan. 10, 2008). The defendants sought to dismiss the complaint's APA claim, arguing that "the system for adjudicating veterans' claims . . . provides the opportunity for an alternative adequate remedy." *Id.* at *7. In rejecting the defendants' argument, the court noted that "[t]he system established by Congress for adjudicating veterans' individual benefit claims does not provide an adequate alternative remedy," in part, because the United States Court of Appeals for Veteran Claims "only has jurisdiction to affirm, reverse, or remand decisions of the [Board of Veterans Appeals] on individual claims for benefits" and "would not have jurisdiction over or the power to provide a remedy for the systemic, constitutional challenges to the VA health system such as those currently alleged by Plaintiffs." *Id.* The court observed: "It is thus impossible for this Court to understand how the VA system can be considered an adequate alternative forum when that forum cannot entertain the type of claims raised by Plaintiffs in the present action." *Id.* Here, as in *Veterans for Common Sense*, Andrew and E.J. request declaratory and injunctive relief to redress both the State Department's erroneous adjudication of E.J.'s CRBA and U.S. passport applications and the statutory construction/administrative policy that led to it. Although Section 1503 authorizes the Court to determine that E.J. is a citizen at birth under Section 301—relief to which E.J. is entitled—it does not authorize the Court to adjudicate the legality of the agency's decision-making processes and, therefore, does not obviate the need for APA review.[10]

[10] This Court should not follow the Fifth Circuit's decision in *Hinojosa* v. *Horn*, 896 F.3d 305, 313-14 (5th Cir. 2018). There, 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

Defendants' Motion mischaracterizes the claims and exaggerates the scope of the relief sought in this Action, arguing that Andrew and E.J. improperly seek "sweeping . . . judgment on the Department of State's policies as a whole" and "*wholesale* improvement of [a] program by court decree." (Mot. at 14 (emphasis in original).) Andrew and E.J. seek redress for a specific, incorrect adjudication and seek to enjoin only the specific State Department policy that gave rise to that error and caused each of them actual, concrete harm. *See* *Cent. Sierra Envt'l Res. Ctr. v. Stanislaus Nat'l Forest*, 304 F. Supp. 3d 916, 947 (E.D. Cal. 2018) (finding "sufficiently narrow" the plaintiffs' challenge "to discrete final Forest Service actions" as opposed to "the sort of wide-ranging challenge that the Supreme Court has held to be inappropriate"); *Guam Contractors Ass'n v. Sessions*, 2018 WL 525697, at *4 (D. Guam Jan. 24, 2018) (finding the allegations and relief to be sufficiently narrow because "the employers here have identified the single piece of statutory language, the two specific regulations, and the limited family of supporting regulations they believe have given rise to the agency's alleged errors, and they have identified the employers who have felt the effects and will continue to feel them"). This is a far cry from the "broad programmatic relief" that the plaintiffs sought in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and therefore Defendants' reliance on that decision is misplaced. In *Lujan*, the plaintiffs challenged the Bureau of Land Management's entire "land withdrawal review program," alleging that "violation of the law is rampant within this program" without identifying any specific "'agency action' that causes it harm." *Id.* at 890-91. In other words, *Lujan* does not proscribe the specific, narrow type of relief Andrew and

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(*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 their U.S. citizenship, not the agency's interpretation of the INA or the policies that ostensibly led to that determination.

E.J. seek here. Indeed, *Center for Biological Diversity* v. *U.S. Department of Housing & Urban Development*, a decision on which Defendants rely, clarifies that a plaintiff may challenge "a specific 'final agency action' which has an actual or immediately threatened effect, even when such a challenge has the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency." 241 F.R.D. 495, 500 n.1 (D. Ariz. 2006) (quoting *Sierra Club* v. *Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (internal quotation marks omitted)).

Defendants further miss the mark in asserting that the available APA remedies would be "of limited utility" to Andrew and E.J. because they could obtain only an order remanding the matter to the State Department for further consideration of E.J.'s CRBA and U.S. passport applications. (Mot. at 14.) Defendants contend that such an order would be of limited practical value because Andrew and E.J. "are not currently abroad, and, thus, cannot apply for another CRBA from the Department unless they leave the country." (*Id.*) If the Court were to hold that the State Department's interpretation of Section 301 is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), the State Department effectively would be precluded from interpreting and applying Section 301 in a discriminatory manner, including with respect to E.J., who therefore would be treated as born "in wedlock" under Section 301, and Andrew, who would be recognized as E.J.'s "parent" under Section 301 and therefore treated with the equal dignity to which both he and his marriage are entitled. That is, even if the Court were to stop short of declaring E.J. to be a U.S. citizen at birth, but were to invalidate the State Department's interpretation of Section 301, vacate the State Department's determination, and remand to the State Department for further consideration, it would eliminate the only impediment to E.J.'s obtaining a CRBA and U.S. passport and Andrew's being recognized as E.J.'s "parent" under Section 301.[11]

[11] Ironically, Defendants contend that an order vacating the State Department's decision and remanding to the State Department would be of limited value because Andrew and E.J. "cannot apply for another CRBA . . . unless they leave the country."

Defendants' argument is no more persuasive to the extent that they suggest that the APA's remedies would be of limited value to Andrew and E.J. because the State Department would require a biological relationship between Andrew and E.J. under either Section 301 or Section 309 of the INA, 8 U.S.C. § 1409 ("Section 309") (SOF ¶¶ 40-42, 44-45), and, therefore, remand to the State Department to adjudicate E.J.'s application under Section 301 would not result in the approval of E.J.'s CRBA and U.S. passport applications. This contention misses the critical point. The Complaint's claims are predicated on the proposition—and Andrew and E.J. have demonstrated that—there is no biological relationship requirement under Section 301. Given that the State Department's misinterpretation of Section 301 was the sole basis for the State Department's application of Section 309 and denial of E.J.'s applications for a CRBA and U.S. passport, the State Department could not continue to impose on E.J. a biological relationship requirement if it were required to reconsider those applications under Section 301.

Accordingly, the Court should deny Defendants' Motion for summary judgment on the APA claim.

B. Defendants Are Not Entitled to Summary Judgment on the Due Process Claim Because the State Department's Interpretation of the INA Unconstitutionally Infringes the Fundamental Right to Marry.

a. There is Subject Matter Jurisdiction for the Due Process Claim.

Defendants incorrectly contend that the Court lacks subject matter jurisdiction to adjudicate the due process claim because the DJA "neither independently vests courts with jurisdiction nor provides a cause of action." (Mot. at 16 n.15 (internal quotation marks omitted).) The Court has jurisdiction to adjudicate the due process claim regardless of whether the DJA creates a cause of action; and, in any event, the DJA provides an additional appropriate vehicle for adjudicating and remedying Defendants' constitutional violation.

(Mot. at 14.) It is Defendants' refusal to recognize E.J.'s U.S. citizenship that impairs the Dvash-Banks family's ability to travel freely.

First, courts in the Ninth Circuit have held that a plaintiff seeking declaratory relief under the DJA is not required to assert an additional, independent cause of action when the court has subject matter jurisdiction and the plaintiff has standing. For example, in *County of Santa Clara* v. *Trump*, the government moved to dismiss the complaint's claim for declaratory relief, asserting that the plaintiff "failed to identify a right of action in [the relevant statute] or elsewhere that would allow it to pursue declaratory relief." 267 F. Supp. 3d 1201, 1215 (N.D. Cal. 2017). The court rejected this argument, observing that "the Declaratory Judgment Act would be meaningless" if "a plaintiff must have some other independent statutory right to bring a plausible claim for declaratory relief." *Id.* at 1215-16.

As the court in *County of Santa Clara* clarified, although the DJA does not create an independent cause of action, a plaintiff seeking relief under that statute need demonstrate only that the court has subject matter jurisdiction and that the plaintiff has standing. *Id.* at 1216 (citing *Fid. & Cas. Co.* v. *Reserve Ins. Co.*, 596 F.2d 914, 916 (9th Cir. 1979)); *see also City of Seattle* v. *Trump*, 2017 WL 4700144, at *7 (W.D. Wash. Oct. 19, 2017) ("The Declaratory Judgment Act, 28 U.S.C. § 2201, is available when there 'is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" (citing *Maryland Cas. Co.* v. *Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941))). There is no question that both of these requirements are met here, and Defendants do not suggest otherwise. The Court has subject matter jurisdiction because the due process claim arises under federal law. *See* 28 U.S.C. § 1331. Andrew and E.J. have Article III standing because each of them has suffered an injury as a result of the State Department's interpretation and application of Sections 301 and 309 to E.J.'s CRBA and U.S. passport applications that likely would be redressed by a favorable decision of the Court. *See Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016); *accord Daniel* v. *Nat'l Park Serv.*, 891 F.3d 762, 766 (9th Cir. 2018).

Second, Defendants erroneously argue that "Plaintiffs must identify some other source of law" other than the DJA "that accords them the right to bring these claims in federal court." (Mot. at 16 n.15.) Under settled Supreme Court precedent, Andrew and E.J. may bring a due process claim directly under the Due Process Clause of the Fifth Amendment because they seek only equitable relief for Defendants' constitutional violation. In *Bolling* v. *Sharpe*, the plaintiffs filed suit directly under the Fifth Amendment, seeking equitable relief based on the allegation that "segregation [in schools] deprive[d] them of due process of law under the Fifth Amendment." 347 U.S. 497, 498 (1954). The Supreme Court reversed the district court's dismissal of the complaint and remanded with an instruction to determine the appropriate equitable relief. *Id.* at 500. *See also Davis* v. *Passman*, 442 U.S. 228, 242-44 (1979) ("[T]his Court has . . . settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right."); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *accord Clinton* v. *Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) ("It is well established that federal courts have jurisdiction to provide equitable relief to protect rights safeguarded by the Constitution.").

b. The State Department's Interpretation of the INA Unconstitutionally Infringes the Fundamental Right of Same-Sex Couples to Marry.

In a transparent effort to avoid the exacting scrutiny that the Constitution requires whenever a fundamental right has been infringed, Defendants seek to circumscribe narrowly the right at issue as a challenge to "an individual's right to successfully apply for a CRBA or a U.S. passport" (Mot. at 18), as opposed to the fundamental right of same-sex couples to enjoy the rights and benefits to which all married couples and their children are entitled. Only through such a strained interpretation of the Complaint and evidence could Defendants argue that

"Plaintiffs fail to identify a fundamental right upon which Defendants have infringed." (Mot. at 16.) Defendants' argument mischaracterizes the allegations and the right at issue.

The Due Process Clause of the Fifth Amendment "'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997) (emphasis in original) (quoting *Reno* v. *Flores*, 507 U.S. 292, 302 (1993)); *accord* *United States* v. *Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012). Substantive due process has been "largely confined" to protecting the sort of fundamental liberty interests at issue here, "such as marriage, procreation, contraception, family relationships, child rearing, education and a person's bodily integrity, which are 'deeply rooted in this Nation's history and tradition.'" *Franceschi* v. *Yee*, 887 F.3d 927, 937 (9th Cir. 2018) (quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977)). The Supreme Court has recognized that government, "throughout our history [has] made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2601 (2015). Laws that deny same-sex couples "the constellation of benefits that the States have"—or, here, Congress has—"linked to marriage" infringe the fundamental right to marry by consigning those couples "to an instability many opposite-sex couples would deem intolerable in their own lives" and by "teaching that gays and lesbians are unequal in important respects." *Id.* at 2601-02.

Contrary to Defendants' assertion that the right implicated is not fundamental, the Complaint alleges, and the undisputed facts show, that the State Department has infringed the fundamental right to marry by denying same-sex couples and their children "equal dignity" and the full constellation of rights and benefits linked to marriage, including "the legal recognition that same-sex spouses may both be the parents of a child born during their marriage, even if only one spouse

is the child's biological parent." (Compl. ¶¶ 30, 34) (citing *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) and *Pavan* v. *Nathaniel Smith*, 137 S. Ct. 2075, 2077 (2017)); *see also Obergefell*, 135 S. Ct. at 2601-02; *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."). Further, as Andrew and E.J. argued in Plaintiffs' Motion, the right of a *married* U.S. citizen to transmit citizenship to his foreign-born child is settled law in the Ninth Circuit and therefore is one of the incidents of marriage to which same-sex and opposite-sex couples are equally entitled. *See Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090, 1093 (9th Cir. 2005); *Scales* v. *INS*, 232 F.3d 1159, 1164 (9th Cir. 2000); *see also Miller* v. *Albright*, 523 U.S. 420, 433 (1998) (explaining that, under the INA, if a *married* U.S. citizen and a foreign national conceive a child, "*citizenship will follow*" (emphasis in original)). Defendants do not dispute that Andrew and Elad, a same-sex couple, were married at the time of E.J.'s birth, or that they are E.J.'s legal parents. (SOF ¶¶ 3, 55-56.) Defendants' refusal to recognize E.J. as a legitimate child of their marriage thus infringes a fundamental right.[12]

When, as here, government action "abridges a fundamental right," that action "will be subject to strict scrutiny and is invalidated unless it is 'narrowly tailored to serve a compelling state interest.'" *United States* v. *Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (quoting *Reno*, 507 U.S. at 302); *see Glucksberg*, 521 U.S. at 721 (noting that the government bears the burden to prove that the infringement is narrowly tailored to serve a compelling governmental interest). The State Department's policy does not satisfy this standard. Defendants have not

[12] Section 301 includes the term "parent" without inclusion of any requirement that the "parent" have a biological relationship to the child. 8 U.S.C. § 1401; *see, e.g.*, *Scales*, 232 F.3d at 1159. Defendants narrowly misquote the text of Section 301 in their Motion as stating "born of . . . parents" when in fact the statute states "*born* outside the geographical limits of the United States and its outlying possessions *of* parents one of whom is an alien, and the other a citizen of the United States . . . ." 8 U.S.C. § 1401 (emphasis added).

identified a compelling interest or, indeed, any interest, that actually animated its exclusionary interpretation of the INA. To the contrary, Defendants' designated representative explained during his deposition in this Action that the sole basis for the State Department's policy is its interpretation of the text of the statute (*see* SOGD ¶¶ 130, 139), which Defendants concede does not expressly include a biological relationship requirement (SOGD ¶ 129). Indeed, he did not identify *any* governmental interest that interpretation furthers and explicitly and repeatedly denied that the policy was predicated on concerns about fraud in the citizenship process (SOGD ¶¶ 130, 139). Having failed to articulate a compelling interest to justify Defendants' infringement of a fundamental right, Defendants' interpretation of Section 301 runs afoul of the Due Process Clause of the Fifth Amendment and must be enjoined.

Defendants' assertion that that they "*do not* limit the application of [Section 301] to the children of heterosexual[s]" (Mot. at 21 (emphasis in original)) and that "the [Foreign Affairs Manual or "FAM"] contains no language that treats same-sex couples differently than opposite-sex married couples" (Mot. at 22) is beside the point. The INA makes the ability to transmit U.S. citizenship to the child of a marriage part of the constellation of benefits linked to marriage. The FAM section on which the State Department apparently relied 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—an impossibility in the case of male same-sex couples. *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, completely *forecloses* their children, like E.J., from being treated as the legitimate children of their parents' marriages, and therefore "harm[s] and humiliate[s]" their children. *See* *Obergefell*, 135 S. Ct. at 2590 (a "basis for protecting the right to marry is that it safeguards children and families"). In this

way, the State Department's interpretation of Section 301 deprives male same-sex married couples of the benefits of marriage and discriminates against and stigmatizes their children.

That the State Department's interpretation of Section 301 applies to the children of opposite-sex couples (or even one or more female same-sex couples) (Mot. at 21-23) cannot save it because it is vastly over- and under-inclusive and, therefore, is not "narrowly tailored." As described above, strict scrutiny requires that there be a close relationship between the government's compelling interest and the means chosen to advance it. Here, Defendants have failed to articulate any compelling justification for the State Department's interpretation of Section 301, which therefore necessarily fails the "narrowly tailored" prong of the strict scrutiny analysis. But even accepting for the sake of argument that (1) Defendants' hypothesized interests in ensuring "a sufficient connection to the United States" and in "prevent[ing] fraud" were the *actual* justifications for the State Department's interpretation (which Defendants deny); and (2) those hypothesized interests rise to the level of "compelling" (they do not), Defendants' interpretation of Section 301 is both over- and under-inclusive. Every child born of a male same-sex couple, like E.J., and nearly every child born of a female same-sex couple is deemed to be illegitimate and excluded from citizenship under Section 301, even though many of their children have a sufficient connection to the United States and their applications are not fraudulent, while at least some children born of an opposite-sex couple will be considered for citizenship under Section 301, even though they lack a sufficient connection to the United States and/or their applications are fraudulent.

There are means of achieving these hypothesized objectives that would be both more effective and far less burdensome to the right to marry of same-sex couples than is the State Department's interpretation of Section 301. Presumably, the interest in avoiding fraud relates to the effort to prevent U.S. citizens abroad from seeking to transmit U.S. citizenship to children who are, in fact, not their children.

Here, the State Department has refused to consider under Section 301 applications of children like E.J., whose membership in the Dvash-Banks family is clearly and unquestionably demonstrated by Andrew's and Elad's surrogacy agreement, an Order of the Superior Court of Justice, Ontario, and the undisputed facts of the Dvash-Banks family's living arrangement. (SOGD ¶¶ 77-78, 81-82, 93-94, 99; SOF ¶ 10.) The State Department could continue to police or deter fraud without impinging on the types of familial relationships the INA seeks to protect if it were to modify its definition of a biological relationship under Section 301, as it did with gestational mothers, to apply to a child born during the marriage of the child's U.S. citizen parent to the other, biological parent (*e.g.*, the petitioners in *Scales* and *Solis-Espinoza*). Likewise, the State Department could both achieve its fraud protection objectives and comply with the INA's language and purpose if it were to treat as born in wedlock and covered by Section 301 a child conceived through the use of assisted reproductive technology who provides documentation, such as a court order or a surrogacy agreement, evidencing that a U.S. citizen and his or her spouse were and are the child's intended and legal parents.

Even were the Court to accept Defendants' crabbed characterization of the right at issue, the State Department's interpretation of Section 301 would fail rational basis review. Defendants suggest two possible, *post hoc* justifications for the State Department's discriminatory interpretation of Section 301, neither of which is rationally related to a legitimate governmental interest. *See* *Golinski* v. *U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 981-82 (N.D. Cal. 2012) ("Under the rational basis review, a law must be rationally related to the furtherance of a legitimate governmental interest." (citing *Romer* v. *Evans*, 517 U.S. 620, 631 (1996))). *First*, Defendants assert that the State Department's interpretation of Section 301 "assure[s] that children born abroad have a sufficient connection to the United States to warrant conferral of U.S. citizenship . . . ." (Mot. at 20.) Defendants purport to rely on *Miller*, 523 U.S. 420, and *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53

(2001), for the supposed "importance of a biological connection between the child seeking to acquire citizenship and the U.S. citizen seeking to confer citizenship," but omit the fact that those decisions describe the importance of a biological relationship *when a child is born out of wedlock*.[13] (Mot. at 18.) Indeed, the Supreme Court has held that there is a legitimate government interest in ensuring a biological connection between a parent and his or her child only in cases involving children whose parents were not married. *See*, *e.g.*, *Miller*, 523 U.S. 420. Defendants also overlook three unanimous court of appeals decisions, including two in the Ninth Circuit, holding that the justification for a biological relationship requirement is not present when a child is born in wedlock. *See* *Jaen*, 899 F.3d at 185; *Solis-Espinoza*, 401 F.3d at 1094; *Scales*, 232 F.3d at 1164.

Second, Defendants hypothesize that their discriminatory interpretation of Section 301 may mitigate the "frequency of fraudulent citizenship claims[] because it would be more difficult to identify child smuggling or illegal adoption" (Mot. at 21), a position that their designated representative expressly disavowed as a justification for the State Department's interpretation of Section 301 (SOGD ¶ 139). Defendants nowhere even begin to explain how the situation at issue, in which a child was born during the marriage of his U.S. citizen parent to his other, biological parent, raises any concern of "child smuggling" or "illegal adoption." *See* *Gallinger* v. *Becerra*, 898 F.3d 1012, 1019 (9th Cir. 2018) ("To survive rational-

[13] These decisions not only are inapposite—they involve children whose U.S. citizen parents were not married at the time of their birth—but they make clear that Congress intended to confer citizenship on the foreign-born children of married U.S. citizens, like E.J. In *Miller*, for example, the Supreme Court stated: "Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen . . . . If the two parties engage in a second joint act—if they agree to marry one another—*citizenship will follow*." 523 U.S. at 433 (emphasis added). Even accepting that "the extension of citizenship to foreign-born children . . . is a right granted by Congress" (Mot. at 18), the decisions that Defendants cite demonstrate that Congress intended to recognize the U.S. citizenship of children such as E.J. *See* *Miller*, 533 U.S. 433; *see also* *Jaen* v. *Sessions*, 899 F.3d 182, 184 (2d Cir. 2018); *Solis-Espinoza*, 401 F.3d at 1091; *Scales*, 232 F.3d at 1162.

basis review, the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." (internal quotation marks omitted)). When, as here, a child's married parents provide evidence that they are the child's legal parents and that the child lives with them as a full-fledged member of their family, there can be no legitimate concern of fraud. Indeed, in *Colaianni* v. *INS*, 490 F.3d 185 (2d Cir. 2007), where the petitioner challenged a provision of the INA requiring the children of native-born U.S. citizens to apply for a certificate of citizenship to obtain U.S. citizenship, the court acknowledged that the government's interest in deterring immigration fraud was furthered by "the requirement of an affirmative act" that "arguably served to solidify the bond between the child, his parents, and the United States." *Id.* at 189. Here, E.J.'s parents engaged in more than one affirmative act demonstrating such a bond: They appeared in person at the Toronto Consulate to apply for a CRBA and U.S. passport on E.J.'s behalf and supplied evidence that they were married, that Andrew was a U.S. citizen satisfying the INA's residency requirements, and that they were recognized as E.J.'s parents "for all purposes in law." (SOF ¶¶ 11, 14; SOGD ¶¶ 96, 100.) Under such circumstances, where the child's parents have gone well beyond the type of affirmative conduct reflecting their familial connection to the child, there could be no legitimate concern of fraud, and the State Department's policy cannot be said to be rationally related to any legitimate governmental interest.

The legitimacy of this *post hoc* justification is further undercut by the State Department's 2014 unilateral policy change to consider sufficient under Section 301's purported biological relationship requirement, applications of children born to a gestational mother, who is the child's legal parent, even if she used a donor egg to conceive the child. (SOGD ¶¶ 131, 133-34.) Prior to 2014, the State Department had viewed such circumstances as insufficient to satisfy that requirement and adjudicated those applications under Section 309. (SOGD ¶ 132.) Although this situation, like the circumstances of E.J.'s birth, involves a form of

assisted reproductive technology and may involve use of the genetic material of a non-citizen during his or her marriage to a U.S. citizen (*see* SOGD ¶ 151), Defendants were not deterred by any concern that it would facilitate "child smuggling" or "illegal adoption." The Court should not save Defendants' discriminatory policy based on an after-the-fact rationalization that Defendants' designated representative conceded played no role in its adoption (SOGD ¶ 139) and is inapplicable to the present circumstances.

The Motion also attempts to justify the State Department's misreading of Section 301 by invoking a false parallel between children, like E.J., who had a married U.S. citizen parent at the time of their birth, and adopted children and stepchildren, who did not. E.J. was not adopted—Andrew and Elad are, and have been, E.J.'s legal parents since his birth in September 2016. The INA includes separate provisions covering, and requirements for, citizenship of adopted children, *see* 8 U.S.C. §§ 1101(b), (c)(1), and the adoption context presents different legal and policy considerations given the need to account for the presence of multiple different relationships. E.J. also is not a stepchild (the product of a prior relationship of Elad—Elad and Andrew decided to have a child together); Andrew, a U.S. citizen, is E.J.'s parent and was married to E.J.'s other, biological parent at the time of E.J.'s birth.

None of the decisions to which Defendants cite supports their argument. For example, in *Marquez-Marquez* v. *Gonzales*, 455 F.3d 548, 549 (5th Cir. 2006), the petitioner was born in Mexico to unmarried Mexican citizens and, at nine-years-old, was adopted by her mother's husband, a U.S. citizen. In holding that the petitioner did not acquire citizenship under Section 301, the Fifth Circuit explained that the petitioner did not have the requisite relationship with a U.S. citizen parent because "section 301(g) requires that the 'person' be 'born . . . of' a citizen parent." *Id.* at 557. The court expressly declined to consider whether *Scales* and *Solis-Espinoza* had been decided correctly, stating that "assuming *arguendo* that we adopt

that interpretation, Moreno's claim to citizenship under section 301(g) still fails." *Id.* at 559. *Colaianni*, similarly, is distinguishable. There, the petitioner was born in Canada, entered the United States at the age of 17 months as a lawful permanent resident, and adopted by two U.S. citizens. 490 F.3d at 186. The court emphasized that Section 301 "extends citizenship 'at birth'" and "pertains only to the acquisition of citizenship 'at birth.'" *Id.* at 187.[14] Lastly, in *Astrue* v. *Capato ex rel. B.N.C.*, 566 U.S. 541 (2012), a decision that involved an entirely different statutory scheme—the Social Security Act—the Court held that the statute's text called for resolution of the respondent's claim by reference to state intestacy law and has no bearing here. *Id.* at 559.

Even if Defendants could manufacture a legitimate government interest that their interpretation of Section 301 arguably furthers, this interest would be subordinate to Defendants' obligation to follow the law. The Ninth Circuit has explained that, although "the standard of rationality required" that applies whenever government action "violates a statutory command" has not been clearly articulated, it is "at least clear that the standard is substantially less forgiving" than whenever government action does not violate a statutory command. *See* *Servin-Espinoza* v. *Ashcroft*, 309 F.3d 1193, 1198 (9th Cir. 2002). Here, Defendants' interpretation of Section 301 conflicts with the INA's text and purpose and violates Ninth Circuit law. Defendants concede that the relevant provisions of the FAM, which are not the product of formal adjudication or notice-and-comment rulemaking and do not have the force of law, include requirements that are not set out in Section 301. (SOGD

[14] The court rejected the argument that "by using the preposition 'of,' rather than 'to,' Congress implied that biological parentage is not necessary for a[n adopted] person to claim citizenship under" Section 301. *Id.* In *Jaen*, however, the Second Circuit, consistent with *Scales* and *Solis-Espinoza*, expressly rejected this conclusion and implicitly overruled *Colaianni*. *See* *Jaen*, 899 F.3d at 190. In holding that Section 301 does not include a biological relationship requirement, the court also stated: although "this is a question of first impression in our Circuit, we are not alone in reaching the conclusion that a blood relationship is not required" and cited the Ninth Circuit's decision in *Scales*. *Id.*

¶¶ 140-43.) Defendants also acknowledge that the State Department's interpretation of Section 301 conflicts with decisions of the Ninth and Second Circuits expressly holding that Section 301 does not require a biological relationship between a U.S. citizen parent and his child. (SOGD ¶¶ 135-38.) *See* *Jaen*, 899 F.3d at 185; *Solis-Espinoza*, 401 F.3d at 1094; *Scales*, 232 F.3d at 1164. As a result, Defendants must provide "more justification than the slender (indeed, to be frank, somewhat far-fetched) reasons the government has advanced in this case." *See* *Servin-Espinoza*, 309 F.3d at 1198. Defendants' proffered justifications do not meet even this standard.[15]

By any measure, Defendants have failed to justify their disregard of the INA's language and purpose, multiple federal courts of appeals' interpretation of the INA's relevant provisions, and the consequent infringement on the fundamental right to marry. Accordingly, Defendants' Motion for summary judgment on the due process claim should be denied.

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[15] Defendants' Motion asserts that their interpretation of Section 301 is constitutional even if the Court disagrees with it unless it is "constitutionally arbitrary." (Mot. at 19-20.) In support of this proposition, Defendants refer to *Shanks* v. *Dressel*, 540 F.3d 1082 (9th Cir. 2008), a land-use action seeking the enforcement of zoning provisions intended to preserve historical neighborhoods, in which the court noted that when "executive action like a discrete permitting decision is at issue, only egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 1088 (internal quotation marks omitted). *Shanks* concerned a city's "discrete permitting decision," *id.* at 1088, and alleged failure to "discharge its mandatory duties," *id.* at 1086. In contrast, here, Andrew and E.J. seek redress for injuries resulting from the State Department's application of an unlawful and unconstitutional policy to E.J.'s CRBA and U.S. passport applications. Moreover, the State Department's refusal to comply with the decisions of two federal courts of appeals invalidating its interpretation of Section 301 rises to the level of "constitutionally arbitrary" because, for the reasons stated, that interpretation "'lack[s] any reasonable justification in the service of [a] legitimate governmental objective.'" *Schneider* v. *Cty. of Sacramento*, 2014 WL 1334004, at *5 (E.D. Cal. Apr. 3, 2014) (defining "constitutionally arbitrary") (quoting *Shanks*, 540 F.3d at 1088).

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny in its entirety Defendants' motion for partial summary judgment and grant to Plaintiffs such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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