No. 19-55517

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR APPELLANTS

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INTRODUCTION

Children may acquire United States citizenship at birth in two ways. First, the Fourteenth Amendment generally confers citizenship on children born within the United States. Second, Congress since 1790 has enacted various statutes providing for children born outside the United States to acquire citizenship through a U.S. citizen parent. These two mechanisms for acquiring citizenship track the two longstanding doctrines of citizenship at birth: *jus soli*, or right of land; and *jus sanguinis*, or right of blood.

This case concerns a provision, 8 U.S.C. § 1401(g), that confers *jus sanguinis* citizenship at birth on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States" meeting certain requirements. The State Department has long interpreted that provision, and related provisions, to require a biological relationship between a child and the "parents" to whom the statute refers. That interpretation reflects the Department's understanding that a child is not "born … of parents" meeting the statutory requirements unless the child is biologically related to those parents. It is consistent with the traditional meaning of *jus sanguinis* citizenship and serves important objectives, including the prevention of fraud. This Court, however, has taken a different view of the statute in two decisions—*Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005)—which held that § 1401(g)

does not require a biological relationship between a child and the parent through whom he claims citizenship.

This case concerns a child, E.J. Dvash-Banks, who was conceived using an egg from an anonymous donor and the sperm of one of his fathers, Elad Dvash-Banks, who is not a U.S. citizen. There is no dispute that Elad and his husband, Andrew Dvash-Banks—who is a U.S. citizen—were lawfully married at the time of E.J.'s birth (and remain married today). Nor is there any dispute that a Canadian court recognized Elad and Andrew as E.J.'s legal parents. But because Elad is not a U.S. citizen, and because E.J. has no biological relationship with Andrew, the U.S. consulate in Ontario, Canada determined that E.J. did not acquire citizenship at birth. After the Dvash-Banks family resettled in California, Andrew and E.J. brought this suit, seeking (among other things) a judicial declaration of E.J.'s citizenship. The district court, applying *Scales* and *Solis-Espinoza*, held that E.J. is a citizen.

That determination was required by *Scales* and *Solis-Espinoza*. The government respectfully submits, however, that those cases were wrongly decided. The text of § 1401(g), conferring citizenship on a child "born … of parents" meeting the statutory requirements, suggests that a child must be biologically related to those parents in order for the provision to apply. That interpretation is consistent with the historical understanding of *jus sanguinis* citizenship and serves important anti-fraud purposes. Neither this Court in *Scales* and *Solis-Espinoza* nor the district court here identified a sufficient

basis to read the statute in a manner that departs from its text and context and undermines an important governmental objective. This case therefore might be appropriate for initial hearing en banc. Otherwise, the district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered a final judgment on March 6, 2019, declaring E.J. to be a citizen and ordering the State Department to issue him a passport. ER1-2. The district court retained jurisdiction to adjudicate any application for attorney's fees and costs, ER2, which does not prevent its judgment from being final for purposes of appeal, *see, e.g.*, *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983).

Defendants timely noticed this appeal on May 6, 2019. ER15-18; *see* Fed. R. App. P. 4(a)(1)(B), 26(a)(1)(C). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Is a child "born … of" a parent, within the meaning of 8 U.S.C. § 1401(g), if the child and parent are not biologically related?

PERTINENT STATUTES AND OTHER PROVISIONS

Pertinent provisions of the Immigration and Nationality Act and the State Department's Foreign Affairs Manual are reproduced in the addendum to this brief.

STATEMENT

A. History Of *Jus Sanguinis* Citizenship

Domestic law concerning the acquisition of U.S. citizenship at birth reflects the two "traditional ways of transmitting and acquiring citizenship at birth"—that is, "*jus soli* and *jus sanguinis*." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1081-1082 (9th Cir. 2009). *Jus soli* means "right of land or ground—conferral of nationality based on birth within the national territory." Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). *Jus sanguinis* literally means "right of blood—the conferral of nationality based on descent, irrespective of the place of birth." *Id.*

"[A]t common law in England and the United States[,] the rule with respect to nationality was that of the jus soli." *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927). Reflecting that doctrine, the Fourteenth Amendment provides that "[a]ll persons born … in the United States, and subject to the jurisdiction thereof, are citizens of the United States[.]" U.S. Const. amend. XIV, § 1; *see Marguet-Pillado*, 560 F.3d at 1081-1082 & n.2. Since the Amendment's enactment, "the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*." *Miller v. Albright*, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting) (citing *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)).

Congress has, however, enacted numerous statutes that confer *jus sanguinis* citizenship in certain circumstances. It first did so in 1790, providing that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the

United States, shall be considered as natural born citizens," with the caveat "[t]hat the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, § 1, 1 Stat. 103, 104. Similar provisions were enacted in 1795, 1802, and 1855, and codified in 1878. Act of Jan. 29, 1795, § 3, 1 Stat. 414, 415; Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155; Act of Feb. 10, 1855, § 1, 10 Stat. 604, 604; Revised Statutes of 1878, § 1993. In 1934, Congress broadened the law to allow mothers as well as fathers to transmit citizenship at birth. Act of May 24, 1934, § 1, 48 Stat. 797, 797.

In 1940, Congress first adopted the relevant language of the present statute, conferring citizenship at birth—with provisos not relevant here—on "[a] person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions … , the other being an alien." Nationality Act of 1940, § 201(g), 54 Stat. 1137, 1139. In 1952, Congress enacted the same provision, without some of the accompanying caveats, in the Immigration and Nationality Act (INA), § 301(a)(7), (b), 66 Stat. 163, 236 (1952).

Both the Nationality Act of 1940 and the INA also stated that those same provisions—§ 201(g) of the Nationality Act and § 301(a)(7) of the INA—would apply in certain circumstances to children born "out of wedlock." The Nationality Act stated that § 201(g) "appl[ies], as of the date of birth, to a child born out of wedlock, provided

the paternity is established during minority, by legitimation, or adjudication of a competent court." Nationality Act of 1940, § 205, 54 Stat. at 1139. The INA likewise stated that § 301(a)(7) "shall apply as of the date of birth to a child born out of wedlock … , if the paternity of such child is established while such child is under the age of twenty-one years by legitimation." INA § 309(a), 66 Stat. at 238.

B. The Modern Statutory And Administrative Framework

1. *Statutory provisions.* The INA provisions discussed above, with amendments not relevant here, were in force at the time of E.J.'s birth (and remain so today). The current version of the INA's original § 301(a)(7), now codified at 8 U.S.C. § 1401(g), confers U.S. citizenship on

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

The current version of the INA's original § 309(a), now codified at 8 U.S.C § 1409(a), states that "[t]he provisions of" § 1401(g)

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

> (4) while the person is under the age of 18 years—
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

Section 1409(c) states that, "[n]otwithstanding … subsection (a)," a person born "outside the United States and out of wedlock" since 1952 "shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."[1]

2. *Agency interpretation.* The Secretary of State is "charged with" administering the INA to determine the "nationality of a person not in the United States." 8 U.S.C. § 1104(a). When a child is born overseas, the child's parents may apply to one of the State Department's consulates for a document—known as a Consular Report of Birth Abroad of a Citizen of the United States of America (CRBA)—that reflects the Department's determination that the child acquired citizenship at birth. 22 C.F.R. § 50.7. Consulates also issue U.S. passports. 22 U.S.C. § 211a. CRBAs and passports

[1] The Supreme Court has held unconstitutional the distinction between § 1409(a)'s residency requirement for fathers and the shorter physical-presence requirement § 1409(c) provides for mothers. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017). That holding is irrelevant here; the operative parts of § 1409 remain in force.

"have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." *Id.* § 2705.

To allow consular officers to apply the relevant statutory provisions in a consistent and evenhanded way, the State Department has interpreted the provisions in its Foreign Affairs Manual (FAM).[2] *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015) (discussing the FAM as a reflection of State Department policy). The FAM explains the Department's understanding that, "[s]ince 1790," "[a]t least one biological parent" of a child born abroad "must have been a U.S. citizen when the child was born" in order for that parent to "transmit[] U.S. citizenship at birth" to the child. 8 FAM § 301.4-1(B); *see also id.* § 301.4-1(D)(1)(a) ("The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed.").[3] Genetic relationships are the usual form of biological relationship between parents and children. 8 FAM § 301.4-1(D)(1)(c). The Department also recognizes gestation by a legal mother as a type of biological relationship, even without a genetic relationship. *Id.*; *see* ER129-131 (2014 cable setting forth this view). The Department regards the citizenship of a

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

[3] For clarity, this brief refers to the current numbering of the relevant FAM provisions, which are reprinted in the Addendum. The versions of those provisions in effect at the time of the events at issue in this case, which are substantively identical but numbered differently, are included in the Excerpts of Record (ER132-161).

surrogate who gestates a child as "irrelevant to the child's citizenship analysis." 8 FAM § 304.3-2.(a).

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

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

These rules apply to opposite-sex couples exactly as they do to same-sex couples. Thus, "[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen

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

Of course, a same-sex couple's use of surrogacy or other forms of assisted reproductive technology (ART) may more readily be apparent to consular officers than an opposite-sex couple's use of ART. To facilitate evenhanded application of the rules to all couples, the State Department's application form for a Consular Report of Birth Abroad requires parents to indicate whether they were "married to the child's other biological parent when the child was born." ER65.

3. *The Child Citizenship Act.* Aside from the citizenship-at-birth provisions discussed above, Congress enacted the Child Citizenship Act in 2000 to provide citizenship in certain other circumstances for children born overseas. Pub. L. No. 106-395, tit. I, 114 Stat. 1631, 1631-1633 (codified at 8 U.S.C. §§ 1431, 1433). Under the Act, "[a] child born outside of the United States automatically becomes a citizen of the United States when … (1) [a]t least one parent of the child is a citizen of the United States, whether by birth or naturalization[;] (2) [t]he child is under the age of eighteen

years"; and "(3) [t]he child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." 8 U.S.C. § 1431(a). That provision includes adopted children in its scope. *Id.* § 1431(b). The Act also provides for children born and residing outside the United States to acquire citizenship upon application by a U.S. citizen parent (or, in case of the parent's death, a citizen grandparent or guardian), so long as the parent or the parent's parent was "physically present in the United States" for at least five years. *Id.* § 1432(a). That provision, too, applies to adopted children. *Id.* § 1432(c).

B. Facts Of This Case

Plaintiff Andrew Mason Dvash-Banks is a U.S. citizen who has resided in the United States for most of his life. ER5. In 2008, while studying in Israel, Andrew met and began a relationship with Elad Dvash-Banks, a male Israeli citizen. *Id.*[4] Elad and Andrew moved to Canada in 2010 and married there in August 2010. *Id.*

Several years later, with the goal of having children together, Elad and Andrew entered into a contract with a gestational surrogate. ER5; *see* ER78-111 (contract). The contract provided that Elad and Andrew would "be recognized," "immediately upon … [b]irth," "as the … parents" of any child born through the surrogacy arrangement. ER79. Elad and Andrew provided sperm that was combined with eggs from an anonymous donor to create embryos, and two of those embryos—one created with

[4] For clarity, this brief uses Elad and Andrew's current full names and generally refers to them by their first names.

Andrew's sperm, another with Elad's—were successfully transferred to the surrogate. ER5. In September 2016, the surrogate gave birth to two boys, E.J. and A.J. *Id.* Later that month, consistent with the surrogacy contract, a Canadian court declared Elad and Andrew to be the parents of both children. *Id.*; *see* ER76-77 (court order). Birth registrations documenting that relationship were issued several weeks later. ER5; *see* ER70-71 (E.J.'s birth registration).

In January 2017, Elad and Andrew visited the U.S. Consulate in Toronto to apply for Consular Reports of Birth Abroad and U.S. passports for the children. ER5. The consular official who reviewed the applications accepted Elad and Andrew's marriage license as proof of a valid marriage and accepted A.J.'s and E.J.'s birth registrations as proof that Elad and Andrew were their legal parents. *Id.* After consulting with her colleagues, however, the officer informed Elad and Andrew that the children would qualify for U.S. citizenship at birth only if they were biologically related to Andrew, the U.S. citizen parent. *Id.* Elad and Andrew then submitted DNA test results showing that A.J. is Andrew's biological child and E.J. is not. ER6.

Because A.J. is biologically related to Andrew, the consulate determined that A.J. is a citizen. ER6. The consulate denied E.J.'s applications, however, on the ground that Andrew is "not his biological father." ER56. The denial letter explained that the INA "requires, among other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship." *Id.*

C. This Litigation

In January 2018, Andrew brought this suit, on behalf of himself and E.J., against the State Department and the Secretary of State in his official capacity. Dkt. No. 1. The original complaint sought a declaratory judgment that the Department's biological-relationship policy violates the Due Process Clause of the Fifth Amendment, the equal protection component of the Fifth Amendment, and the Administrative Procedure Act (APA), and sought a declaration under 8 U.S.C. § 1503(a) that E.J. is a citizen of the United States. Dkt. No. 1. Plaintiffs later amended their complaint to remove the equal protection claim. ER23-53 (amended complaint and attachments).

In February 2019, the district court partly granted and partly denied the parties' cross-motions for summary judgment. ER4-14. The district court first concluded that the government is entitled to summary judgment on plaintiffs' APA claim. ER9-10. The court explained that "[t]he APA limits judicial review to 'final agency action for which there is no other adequate remedy in a court.'" ER9 (quoting 5 U.S.C. § 704). Here, the court held, there is an adequate alternative remedy: plaintiffs' claim under 8 U.S.C. § 1503(a), which provides (with exceptions not relevant here) that "[i]f any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency … upon the ground that he is not a national of the United States, such person may institute an action under [the Declaratory Judgment Act] against the head of such department or independent agency for a judgment declaring him to be a national of the

United States." The court rejected plaintiffs' argument that § 1503(a) is inadequate to afford the broader injunctive and declaratory relief they seek, on the ground that any such injunction would be "well beyond that needed to provide Plaintiffs with complete relief, namely a declaration that E.J. is a U.S. citizen." ER10.

The court next ruled in plaintiffs' favor on their § 1503(a) claim, holding that E.J. is a U.S. citizen. ER10-13. The court reasoned that, "under controlling Ninth Circuit authority, [8 U.S.C. § 1401(g)] does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their married parents." ER11 (citing *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005)). That conclusion is bolstered, the court held, by the fact that § 1401(g) does not explicitly require a biological relationship whereas § 1409(a) does. ER12. The court regarded its holding as "consistent with the legislative history of the INA, which 'clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.'" ER12-13. The court then held that its resolution of the § 1503(a) claim made it unnecessary to resolve plaintiffs' constitutional due process claim. ER13-14.

The district court entered judgment in plaintiffs' favor on the § 1503(a) claim, declaring that E.J. "is a national and citizen of the United States who acquired U.S. citizenship at birth by operation of" § 1401(g) and ordering that the State Department

issue E.J. a passport. ER1-2. The court entered judgment for the government on the APA claim and dismissed the due process claim as moot. ER2.

The government timely filed this appeal. ER15-18. Plaintiffs have not cross-appealed the district court's decision rejecting their APA and due process claims.

SUMMARY OF ARGUMENT

This Court has previously held that a child born overseas may acquire citizenship at birth under 8 U.S.C. § 1401(g) even if he is not biologically related to his U.S. citizen mother or father. *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). Unless this case is heard initially en banc, the district court's judgment that E.J. is a U.S. citizen must be affirmed, but the government respectfully submits that initial en banc consideration may be warranted because this Court's precedents are incorrect for the reasons discussed below.

Section 1401(g)'s text supports the Department's interpretation that a child born overseas cannot acquire citizenship at birth under that provision unless he is biologically related to a U.S. citizen parent. The statute confers citizenship on individuals "born … of parents" who meet the statutory requirements, and "[t]here can be little doubt that the 'born of' concept generally refers to a blood relationship." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009).

That textual interpretation is bolstered by § 1401(g)'s context: the conferral of *jus sanguinis* citizenship. *Jus sanguinis* literally means the "right of blood." Consistent

with that historical meaning, the Supreme Court has repeatedly emphasized the importance of the government's interest in "assuring that a biological … relationship exists" between a child and a parent through whom the child claims citizenship. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62 (2001).

A related provision, 8 U.S.C. § 1409(a), explicitly requires a biological relationship for a child to claim citizenship through his father when the child's parents were unmarried at the time of his birth. But that is no reason to construe § 1401(g) as lacking a biological-relationship requirement. Section 1409(a) simply reflects the fact that, when a child is born outside a marriage, the identity of the child's father must be "established"—rather than presumed—for the purpose of applying § 1401(g) to the child.

The district court based its conclusion partly on the view that § 1401(g) incorporates the common-law "presumption of legitimacy that applies when a child is born to married parents." ER12. That is incorrect. Presumptions of legitimacy are legal fictions that render biological parentage irrelevant for certain purposes. But in this context, Congress has made clear that a child's legal parent—whose identity is properly determined not by federal common law but by the law of the relevant state or foreign jurisdiction—must also be his biological parent for § 1401(g) to apply.

To the extent § 1401(g) remains ambiguous, the Court should defer to the State Department's interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That interpretation is reasonable, consistent, and longstanding, and it reflects the Department's extensive experience adjudicating citizenship applications. A biological-

relationship requirement is a powerful tool in the government's efforts to prevent fraud. Without such a requirement, citizenship claims could be supported merely by documents purporting to show legal relationships between parents and children, and it can be quite difficult (especially in certain countries) to verify that such documents are genuine and accurate.

The district court opined that the Department's interpretation of § 1401(g) is not "consistent with the legislative history of the INA" because it undermines Congress's goal "'of keeping families of United States citizens and immigrants united.'" ER12-13. But the law affords alternative paths to citizenship for children in E.J.'s circumstances. For example, E.J. could become a lawful permanent resident of the United States by virtue of his relationship to Andrew, and Elad could become a U.S. citizen by virtue of his marriage to Andrew; at that point, E.J. could acquire U.S. citizenship through Elad.

STANDARD OF REVIEW

This Court reviews de novo a district court's determination, under 8 U.S.C. § 1503(a), whether a person is a citizen of the United States. *Anderson v. Holder*, 673 F.3d 1089, 1096 (9th Cir. 2012).

ARGUMENT

This Court's previous decisions in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), support the district court's determination that E.J. is a citizen. *Scales* held that § 1401(g) imposes "no requirement

of a blood relationship," 232 F.3d at 1164, and *Solis-Espinoza* reaffirmed that holding, 401 F.3d at 1094.

U.S. consulates adjudicate applications for citizenship documents under a uniform global standard, rather than one that reflects the law of individual courts of appeals. The consular officer in Ontario, Canada therefore acted properly in applying the State Department's longstanding interpretation of § 1401(g) to determine that E.J. is not a citizen. But the propriety of that decision is not at issue in this case because 8 U.S.C. § 1503(a), the statute under which E.J. and his father Andrew brought this action, provides not "for judicial review of the agency's action" but for "a *de novo* judicial determination of the status of the plaintiff as a United States national." *Richards v. Secretary of State*, 752 F.2d 1413, 1417 (9th Cir. 1985). Under that standard, the government does not dispute—and did not dispute below—that *Scales* and *Solis-Espinoza* require the conclusion that E.J. acquired citizenship under § 1401(g) from his U.S. citizen legal father. But those decisions are incorrect for the reasons given below, and the Court may therefore wish to hear this case initially en banc.

I. THE STATE DEPARTMENT APPROPRIATELY INTERPRETS § 1401(g) TO REQUIRE A BIOLOGICAL RELATIONSHIP

A. The Text And Context Of § 1401(g) Favor That Interpretation

1. Section 1401(g) confers citizenship on individuals "born … of parents" who meet the statutory requirements. As this Court held in a closely related context,

"[t]here can be little doubt that the 'born of' concept generally refers to a blood relationship." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009). Indeed, while the *Marguet-Pillado* panel distinguished this Court's decisions in *Scales* and *Solis-Espinoza* interpreting § 1401(g) not to require a biological relationship, it commented on the "erosion of a biological nexus" between parenthood and the acquisition of citizenship reflected in those decisions. *Id.*[5]

This Court's understanding of "the 'born of' concept," *Marguet-Pillado*, 560 F.3d at 1083, is well supported by the plain meaning of those words. To be "born," of course, is "[t]o be brought forth as offspring, to come into the world." *Oxford English Dictionary*, https://oed.com (definition I.1 of "born, *adj.*"). And "of," in this context, "[i]ndicat[es] the thing, place, or person from which or whom something originates, comes, or is acquired or sought." *Id.* (definition III of "of, *prep.*"); *see also, e.g.*, *American Heritage Dictionary* 1221 (5th ed. 2016) ("[d]erived or coming from"). For a child to be "born of parents," then, means that he originates or derives from those parents. That is true if the child is biologically related to the parents. It is not true if the child lacks such a relationship.

[5] The question in *Marguet-Pillado* was whether a child could acquire citizenship from a U.S. citizen who was not his biological father and who married his noncitizen mother only after his birth. *See* 560 F.3d at 1080-1084. The Court distinguished *Scales* and *Solis-Espinoza* on the ground that, in those cases, the child's legal parents were married at the time of the birth. *Id.* at 1083.

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

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

2. The Department's interpretation of § 1401(g)'s text is further supported by its context: the conferral of *jus sanguinis* citizenship. *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

Jus sanguinis literally means the "right of blood—the conferral of nationality based on descent, irrespective of the place of birth." Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). Consistent with that historical understanding of the doctrine, the Supreme Court has repeatedly emphasized the importance of the government's interest in "assuring that a biological … relationship exists" between a child and a parent through whom the child claims citizenship. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62 (2001); *see also Miller v. Albright*, 523 U.S. 420, 436 (1998) (opinion of Stevens, J., joined by Rehnquist, C.J.) ("There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective."); *id.* at 484 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.) (agreeing with the importance of that objective). As this Court observed in *Marguet-Pillado*, the requirement of a biological relationship between a child and the parent whose citizenship he seeks to claim is ingrained in "our traditions." 560 F.3d at 1082.

That traditional understanding of *jus sanguinis* citizenship provides a strong reason to pause before concluding that Congress meant in 1952 to confer citizenship at birth on children who lack any biological connection to a U.S. citizen. *Cf. Marguet-Pillado*, 560 F.3d at 1082 ("It would be a bit surprising to discover that … Congress … was content to have United States citizenship acquired at birth by a person born out of wedlock, who was not born on United States soil and who, at the time, did not have a natural parent who was a United States citizen."). To be sure, if the text of § 1401(g)

unambiguously extended citizenship without a biological relationship, then the text would govern. But § 1401(g)'s text favors a biological-relationship requirement for the reasons discussed above. That implication is bolstered by the traditional understanding of *jus sanguinis* citizenship—the context in which Congress enacted § 1401(g). *See, e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) ("[T]he language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.").

B. Section 1409(a)'s Explicit Biological-Relationship Requirement Does Not Imply § 1401(g) Lacks Such A Requirement

The district court's opinion in this case—following this Court's opinion in *Scales*, discussed in greater detail below—treats § 1409(a)'s explicit biological-relationship requirement as a reason not to construe § 1401(g) as containing such a requirement. *See* ER12; *Scales*, 232 F.3d at 1164-1165. That inference is unwarranted.

As an initial matter, when Congress passed the INA in 1952, § 1409(a)'s predecessor did not contain language explicitly requiring a biological relationship. At that point, § 301(a)(7) of the statute—the predecessor to § 1401(g)—conferred citizenship on "a person born outside the geographical limits of the United States … of parents one of whom is an alien, and the other a citizen of the United States" meeting certain residency requirements. INA § 301(a)(7), (b), 66 Stat. at 236. And § 309(a)—the predecessor to § 1409(a)—provided that § 301(a)(7) "shall apply as of the date of birth to

a child born out of wedlock … , if the paternity of such child is established while such child is under the age of twenty-one years by legitimation." *Id.* § 309(a), 66 Stat. at 238.

Thus, when the INA was enacted, the juxtaposition between the original versions of § 1401(g) and § 1409(a) did not suggest that Congress envisioned a biological connection as more (or less) necessary for children born outside of a marriage than for those born within a marriage. To the contrary, § 301(a)(7)'s conferral of citizenship on a child "born … of parents" required a biological connection between the child and the parents, just as § 1401(g) entails that requirement today. But when a child is born outside a marriage, the child's parentage necessarily has to be "established" through some process. *See, e.g.*, *Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995) ("Clearly, an illegitimate child cannot claim citizenship via *jus sanguinis* until her parentage is established."). In that context, § 309(a) served to determine who the child's "parents" were for the purpose of applying § 301(a)(7) to the child.

Congress amended § 309(a) in 1986, adding the explicit "blood relationship" language and requiring that the relationship be "established by clear and convincing evidence." INA Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. But that amendment does no more to suggest that § 1401(g) lacks a biological-relationship requirement. That is true for two reasons. *First*, Congress did not alter the operative "born … of parents" language of § 1401(g) when amending § 1409(a), nor has it done so since. The Supreme Court has recognized that "'negative implications

raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009); *see also Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (describing this as a "familiar rule"). Thus, to the extent § 1409(a) sheds light on the meaning of § 1401(g), the version of § 1409(a) that is most relevant is the one contemporaneously adopted in 1952—and that provision, like § 1401(g), states a biological-relationship requirement implicitly rather than explicitly. Relatedly, Congress's amendment of § 1409(a) cannot be construed as an implied amendment of § 1401(g), because Congress "is presumed to have acted intentionally" when it "amends one statutory provision but not another." *Gross*, 557 U.S. at 174.

Second, Congress's addition of the "blood relationship" language to § 1409(a) did not create a biological-relationship requirement where none existed before. It simply made that requirement more explicit in the circumstances addressed by that provision and required the relationship to be "established by clear and convincing evidence." This Court recognized in *Marguet-Pillado* that the original § 309(a) already required a "blood (biological) relationship between the alleged father and the child at birth." 560 F.3d at 1082; *see also Miller*, 523 U.S. at 435 (opinion of Stevens, J.) (original § 309(a)'s requirement for "paternity" to be "established … by legitimation" was a "means of proving a biological relationship"). Thus, even if the contrast between modern-day § 1401(g) and modern-day § 1409(a) could shed light on what Congress meant when it enacted § 1401(g)'s operative language in the original INA, modern-day § 1409(a) does

not imply—any more than the original § 309(a) did—that children born within a marriage may claim citizenship through parents to whom they are not biologically related. Section 1409(a) simply serves, as the original § 309(a) did, to identify the "parents"—specifically the father—of a child born outside of a marriage, for the purpose of applying "[t]he provisions of [§ 1401(g)]" to that child, 8 U.S.C. § 1409(a).

C. The Common-Law Presumption Of Legitimacy Is Irrelevant To § 1401(g)

The district court based its ruling partly on the view that "the presumption of legitimacy that applies when a child is born to married parents" is "codified in the INA" and "cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent." ER12. But that reasoning—and the Second Circuit's analysis in *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), on which the district court relied (ER12)—ignores Congress's decision to base citizenship under § 1401(g) not just on who a child's legal "parents" are but on whether the child was "born of" those parents. A presumption of legitimacy addresses the former question but not the latter.

In *Jaen*, the Second Circuit considered whether Levy Alberto Jaen acquired U.S. citizenship, under a predecessor to § 1401(g), by virtue of his mother's marriage to a U.S. citizen at the time of his overseas birth. 899 F.3d at 184. The court ignored the statute's "born of" language. Instead, it believed "the sole question" was whether the husband of Mr. Jaen's mother was his "parent" at the time of birth, even though he was undisputedly not Mr. Jaen's biological father. *Id.* at 185. In answering that question,

the court reasoned that "'where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Id.* at 187-188 (quoting *Neder v. United States*, 527 U.S. 1, 21 (1999)). The court accordingly concluded that the INA's reference to "parents" should be read to "incorporate[] the common law meaning of" that term and thus "the longstanding presumption of parentage based on marriage." *Id.* at 188. Applying that presumption, the court held that the man who was married to Mr. Jaen's mother at the time of his birth should be treated as Mr. Jaen's "parent" for purposes of § 1401(g).

Elad and Andrew are the parents named on E.J.'s birth registration, and they remain his parents today. But as discussed above, the INA does not confer citizenship on every child with a legal parent who meets the other statutory requirements. Rather, § 1401(g) confers citizenship only on children "*born* … *of* parents" who meet the statutory requirements.

The traditional presumption of legitimacy has no bearing on that question, because—as the Supreme Court explained in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)—the presumption is not a rule of evidence concerning the determination of a child's biological father. Rather, it is "a substantive rule of law" providing that, "except in limited circumstances, [it is] *irrelevant* … whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband." *Id.* at 119 (plurality opinion); *see also, e.g.*, NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260,

2273 (2017) ("[T]he marital presumption both facilitated parental recognition that departed from biological facts and cut off claims to parental recognition based on biological facts."). Whether or not that common-law rule is relevant to determining who a child's legal "parents" are for purposes of applying § 1401(g), it is emphatically irrelevant to determining whether the child was "born … of" his legal parents, since that determination turns on precisely those biological facts that the presumption renders irrelevant.[6]

D. The State Department's Interpretation Warrants *Skidmore* Deference

To the extent § 1401(g) remains ambiguous notwithstanding the textual and contextual factors favoring the State Department's interpretation, a tiebreaking factor is the deference owed to that interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* and its progeny recognize that agency interpretations lacking the force of law

[6] In any event, it is unclear whether the common-law presumption of legitimacy would be relevant even to the issue of parentage. Where the application of a federal statute "involves a legal relationship that is created by state or foreign law, the court must begin its analysis by looking to that law." *Minasyan v. Gonzales*, 401 F.3d 1069, 1076 (9th Cir. 2005). That "is especially true where a statute deals with a familial relationship," like parentage, because "there is no federal law of domestic relations, which is primarily a matter of state concern." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). That is why, in *Scales* and *Solis-Espinoza* (discussed in greater detail below), this Court looked to presumptions created by state law rather than common law. *See Scales*, 232 F.3d at 1163-1164 (examining "the Washington state-law presumption that Scales is [the petitioner's] father because he was born in wedlock"); *Solis-Espinoza*, 401 F.3d at 1093-1094 (examining a California statute providing "that a child, such as Solis-Espinoza, who was acknowledged by the father and accepted into the family by the father's wife, was legitimate").

may nonetheless warrant deference "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted; quoting *Skidmore*, 323 U.S. at 139, 140). Such interpretations are "entitled to a measure of deference proportional to [their] power to persuade." *Tablada v. Thomas*, 533 F.3d 800, 806 (9th Cir. 2008).

Courts consider numerous factors in determining the persuasiveness of an agency's interpretation. For example, in *Tablada*—where the Court deferred to the Bureau of Prisons's interpretation of a statute governing good-conduct credits—it focused on whether the interpretation was reasonable, consistent, and longstanding. *Id.* at 806-808. Answering those questions in the affirmative, the Court determined that the agency's interpretation was "reasonable and persuasive" even if "reasonable alternative interpretation[s]" were also available, and deferred to it. *Id.* at 808. Other decisions reflect a similar approach.[7]

[7] *See, e.g.*, *Kasten*, 563 U.S. at 15-16 (affording *Skidmore* deference because agencies' views were "reasonable" and "consistent with the" statute and "[t]he length of time the agencies ha[d] held them suggest[ed] that they reflect[ed] careful consideration, not '*post hoc* rationalizatio[n]'"); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401-402 (2008) ("The agency's interpretive position … provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under *Skidmore*."); *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 839 (9th Cir. 2012) (en banc) (affording deference where "considerations favoring" one interpretation "versus the other [were] in near equipoise" and "the agency ha[d] expressed a preference for" one interpretation "for at least twenty years").

The State Department's longstanding interpretation of § 1401(g) and related provisions is exactly the sort of interpretation that warrants *Skidmore* deference.

1. To begin, the interpretation reflects the Department's "'specialized experience'" and its appreciation of the need for "uniformity," *Mead*, 533 U.S. at 234. The Department has long been concerned about the phenomenon of individuals fraudulently claiming citizenship on behalf of a child who is not actually theirs. In 2012, for example, the Department considered whether it could "interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through [assisted reproductive technology] in a broader range of circumstances," but it was concerned that any such change would have "serious potential fraud implications" because U.S. consulates "regularly encounter people seeking to document children who are not theirs." ER20-21 (memorandum from the Assistant Secretary of State for Consular Affairs to the Secretary of State); *see also, e.g.*, 8 FAM § 301.4-1(E) (concerning suspected fraud or falsehood in citizenship claims).

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

Statement of USCIS and the Department of State, *U.S. Suspends Processing New Nepal Adoption Cases Based on Abandonment* (Aug. 6, 2010), https://go.usa.gov/xVpWZ (explaining that, in Nepal, "[c]ivil documents, such as … birth certificates[,] often include data that has been changed or fabricated").

A case pending in the District Court for the District of Columbia—*Sabra v. Pompeo*, No. 19-cv-2090 (D.D.C.)—illustrates the problem. It concerns a child born in Gaza whose alleged biological parents are both U.S. citizens. The plaintiff, the child's putative father, asserts that the child acquired citizenship under 8 U.S.C. § 1401(c), which (as relevant) confers citizenship on "a person born outside of the United States … of parents both of whom are citizens of the United States." The State Department understands § 1401(c)'s "born … of parents" language, like § 1401(g)'s, to require a biological relationship between a child and the parents through whom she claims citizenship. Based on a number of factors—including the advanced age of the child's putative mother, her claim to have received no prenatal care, and the child's alleged birth in a private home unattended by medical professionals—the U.S. embassy requested additional evidence to establish the child's biological parentage, such as prenatal or postnatal medical records, photographs taken during the putative pregnancy, or DNA testing. The putative parents have to date refused to provide such evidence; they have instead provided a birth certificate issued by the Hamas-controlled Interior Ministry in Gaza, which identifies them as the child's legal parents. If § 1401(c)'s "born … of parents" language were interpreted to require only legal, not biological, parentage, then

the State Department would be required to undertake a complex investigation into the genuineness and accuracy of the birth certificate, rather than relying on far more straightforward evidence of biological parentage. Similar fraud concerns arise in many circumstances. *See, e.g.*, *Alzokari v. Pompeo*, 2019 WL 3805083 (E.D.N.Y. Aug. 13, 2019) (challenge to passport revocation resulting from fraud concerns regarding plaintiff's parentage claim for a child he later admitted was his grandson), *appeal filed*, No. 19-3113 (2d Cir. Oct. 1, 2019).

The State Department's assessment of fraud concerns is a strong reason for the Court to defer to the Department's interpretation of the INA. *Cf. Fiallo v. Bell*, 430 U.S. 787, 799 n.8 (1977) (explaining that, in adopting a provision not at issue here, "Congress may well have given substantial weight" to the "difficulty" of parentage determinations "and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line"). The Department's interpretation reflects its "'specialized experience'" in adjudicating thousands of applications for citizenship documents, as well as its appreciation of the need for standards that can be applied "uniform[ly]" in countries around the world, including those where legal documents may be falsified or inaccurate. *Mead*, 533 U.S. at 234. And the interpretation accounts for the Department's predictive judgment that eliminating a biological-relationship requirement would increase citizenship fraud. *Cf. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 602 (9th Cir. 2018) (APA standard for review of agency action "'is particularly deferential in matters implicating predictive judgments'").

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

2. In addition, the State Department's position is consistent and longstanding. As the Foreign Affairs Manual explains, a biological relationship with a U.S. citizen parent has been a prerequisite to citizenship for a child born abroad "[s]ince 1790." 8 FAM § 301.4-1(B). And to facilitate the evenhanded application of the requirement to people claiming citizenship under a wide range of circumstances, the State Department's application form for a Consular Report of Birth Abroad—as noted above—asks parents to indicate whether they were "married to the child's other biological parent when the child was born." ER65. There is no basis to suggest that the interpretation at issue in this case reflects "'*post hoc* rationalizatio[n],'" as opposed to the kind of "careful consideration" that warrants *Skidmore* deference, *Kasten*, 563 U.S. at 15-16.

3. The State Department's position is also eminently reasonable as a construction of the INA, even assuming alternative constructions could also be regarded

as reasonable. As discussed above, § 1401(g)'s use of the phrase "born of" supports the Department's interpretation of that provision to entail a biological-relationship requirement. That interpretation is further corroborated by the statutory context, including the historical understanding of *jus sanguinis* citizenship, and is not undermined by § 1409(a)'s explicit biological-relationship requirement or by the common-law presumption of legitimacy. And it serves important governmental objectives, including the prevention of citizenship fraud. Plaintiffs' contrary interpretation, even if plausible, is not so clearly correct as to foreclose the State Department's view.

E. Alternative Paths To Citizenship Exist For Children In E.J.'s Situation

Finally, the district court opined that the State Department's interpretation of § 1401(g) is not "consistent with the legislative history of the INA"—and, in particular, that it undermines Congress's goal "'of keeping families of United States citizens and immigrants united.'" ER12-13. That is incorrect. The law affords several alternative paths to citizenship for children who, like E.J., (1) are born overseas with one U.S. citizen parent to whom they are not biologically related and one noncitizen parent to whom they are biologically related and (2) now reside in the United States.

First, a child in that position can become a lawful permanent resident (LPR) of the United States by virtue of his relationship to the U.S. citizen parent, who qualifies—through marriage to the child's biological parent—as the child's stepparent for purposes

of 8 U.S.C. § 1101(b)(1)(C).[8] The noncitizen parent also qualifies to become an LPR, *id.* § 1151(b)(2)(A)(i), and may then qualify to become a U.S. citizen after residing in the United States for three years, *id.* § 1430(a). Once the noncitizen parent naturalizes, the child can automatically acquire citizenship through that parent by satisfying the requirements of the Child Citizenship Act. *Id.* § 1431(a) ("A child born outside of the United States automatically becomes a citizen of the United States when … [a]t least one parent of the child is a citizen of the United States, … [t]he child is under the age of eighteen years[, and] … [t]he child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.").[9] This mechanism alleviates any risk of statelessness or family separation arising from the Department's policy.

Second, couples who conceive a child using assisted reproductive technology may sometimes be able to establish the legal parentage of a member of the couple who did not biologically contribute to the child by having that person adopt the child together

[8] That provision defines a "'child'" to include "a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." Stepchildren qualify as immediate relatives entitled to immigrate without numerical limitation. 8 U.S.C. § 1151(b)(2)(A)(i).

[9] Alternatively, instead of becoming an LPR by virtue of his relationship to the citizen parent, the child can become an LPR through his relationship to the noncitizen parent after that parent naturalizes. *See* 8 U.S.C. § 1101(b)(1) (defining "child" to include "a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person").

with the biological parent. *See, e.g.*, Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev. 933, 934 (2000). In that situation, the child can acquire citizenship through a U.S. citizen parent under the Child Citizenship Act, in much the manner described above. *See* 8 U.S.C. § 1431(b) (providing that § 1431(a) "shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under [8 U.S.C. § 1101(b)(1)]"); *id.* § 1101(b)(1)(F)(i) (defining "child" to include "a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under [8 U.S.C. § 1151(b)], … who has been adopted abroad by a United States citizen and spouse jointly, … at least 1 of whom personally saw and observed the child before or during the adoption proceedings").

Finally, couples may in some circumstances have a choice about which parent contributes biologically to a child conceived through assisted reproductive technology, and they can make that choice in a way that ensures the child will be eligible for U.S. citizenship if born overseas.

II. THIS COURT'S PRECEDENTS FORECLOSE THE STATE DEPARTMENT'S INTERPRETATION

Although the State Department's interpretation of § 1401(g) is faithful to the statutory text and context, and advances important governmental objectives, the Department recognizes that its interpretation is foreclosed by this Court's decisions in

Scales and *Solis-Espinoza*. This case might therefore be a candidate for initial hearing en banc. Otherwise, the district court's judgment must be affirmed.

A. In *Scales*, the Court considered the citizenship claim of Stanley Russell Scales, Jr., who had been born in the Philippines. Mr. Scales's mother was at the time of his birth married to a U.S. citizen, but her husband was not Mr. Scales's biological father. 232 F.3d at 1162. After being convicted of a drug offense, Mr. Scales claimed as a defense to deportation that he had acquired U.S. citizenship through his mother's husband. *Id.* The Board of Immigration Appeals disagreed, reasoning—on the basis of the State Department's longstanding statutory interpretation, reflected in the FAM—that "in order 'to acquire United States citizenship at birth there must be a blood relationship between the child and the parent through whom citizenship is claimed.'" *Id.*

This Court granted Mr. Scales's petition for review. The Court reasoned that § 1401(g) "does not address whether being 'born of parents' requires … a blood relationship between the person claiming citizenship and the citizen parent." 232 F.3d at 1164. It nonetheless held—without confronting the contrary arguments discussed in this brief—that "[a] straightforward reading of" the statute "indicates … that there is no requirement of a blood relationship." *Id.* The Court based that conclusion largely on the fact that 8 U.S.C. § 1409(a), unlike § 1401(g), "does expressly require a blood relationship between a person claiming citizenship and a citizen father, if the person is born out of wedlock." *Id.* "If Congress had wanted to ensure the same about a person born in wedlock," the Court opined, "'it knew how to do so.'" *Id.*

The Court declined to defer to the State Department's contrary interpretation on the ground that, because Mr. Scales was located within the United States, "[d]etermination of [his] citizenship is not a duty of the State Department … but of the Attorney General." 232 F.3d at 1165; *cf.* 8 U.S.C. § 1104(a) (authorizing the Secretary of State to determine the "nationality of a person not in the United States"). The Court further held that the FAM does not warrant *Chevron* deference because it does not have the force of law. 232 F.3d at 1166. It did not consider whether *Skidmore* deference was appropriate.

The Court reached a similar holding in *Solis-Espinoza*. The petitioner there, Eduardo Solis-Espinoza, was born in Mexico. 401 F.3d at 1091. His biological father was at the time of his birth married to a U.S. citizen, but she was not Mr. Solis-Espinoza's biological mother. *Id.* at 1091-1092. After being convicted of a drug offense, Mr. Solis-Espinoza asserted as a defense to removal that he had acquired U.S. citizenship through his father's wife. *Id.* at 1092. The Board of Immigration Appeals rejected that claim on the ground that, because Mr. Solis-Espinoza's "biological father was not married to his biological mother at the time of his birth," he "'was born out of wedlock'" and was therefore subject to § 1409 rather than § 1401(g). *Id.*

As in *Scales*, this Court granted Mr. Solis-Espinoza's petition for review. The Court explained that because Mr. Solis-Espinoza's father was married at the time of his birth, and because his father's wife accepted him into the family, Mr. Solis-Espinoza was

deemed "'for all purposes legitimate' from the time of his birth" by operation of California law. 401 F.3d at 1093-1094. For that reason, the Court held, Mr. Solis-Espinoza "was not 'born out of wedlock'"—and thus, under *Scales*, "the blood relationship requirement of § 1409 [did] not apply to him and he [was] entitled to be recognized as a citizen under § 1401." *Id.* at 1094.

B. The State Department has the authority to determine the "nationality of a person not in the United States." 8 U.S.C. § 1104(a). The Department's overseas consulates apply a uniform worldwide standard in rendering those determinations. They adhere to precedents of the U.S. Supreme Court but are not bound by precedents of individual courts of appeals. For that reason, the Department's consulate in Toronto acted properly by adjudicating E.J.'s application for a passport and Consular Report of Birth Abroad in a manner consistent with the Department's longstanding policy though inconsistent with *Scales* and *Solis-Espinoza*. An action under 8 U.S.C. § 1503(a), however, "is not one for judicial review of the agency's action." *Richards v. Secretary of State*, 752 F.2d 1413, 1417 (9th Cir. 1985). Rather, the statute "authorizes a *de novo* judicial determination of the status of the plaintiff as a United States national." *Id.*

Under that standard, the government does not dispute—and did not dispute below—that *Scales* and *Solis-Espinoza* require the conclusion that E.J. acquired citizenship under § 1401(g) from his U.S. citizen legal father. Panels of this Court are bound by its prior precedents, unless "the reasoning or theory of … prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," *Miller v.*

Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). *Scales* and *Solis-Espinoza* did not engage with many of the arguments addressed in this brief, and the government respectfully submits that they were wrongly decided, but they are not "clearly irreconcilable" with intervening en banc or Supreme Court authority. They therefore compel affirmance of the district court's judgment absent en banc consideration.

CONCLUSION

Unless this case is heard initially en banc, this Court's precedents compel affirmance of the judgment below.

Respectfully submitted,

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October 11, 2019

STATEMENT OF RELATED CASES

Appellants know of no related case pending in this Court.

/s/ Daniel Winik
Daniel Winik

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-55517

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ADDENDUM

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8 U.S.C. § 1401(g)

§ 1401. Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

…

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date[.]

8 U.S.C. § 1409

§ 1409. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

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

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

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 FAM 301.4-1(B)—Prerequisites for Transmitting U.S. Citizenship

Since 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad:

(1) At least one biological parent must have been a U.S. citizen when the child was born. The only exception is for a posthumous child; and

(2) The U.S. citizen parent(s) must have resided or been physically present in the United States for the time required by the law in effect when the child was born.

8 FAM 301.4-1(D)(1)—Establishing Blood Relationship

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

…

c. A man has a biological relationship with his child, or a "blood relationship" as required in the current text of INA section 309(a), when he has a genetic parental relationship to the child. A woman may have a biological relationship with her child

through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby). (See 8 FAM 304.3.)

d. Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual biological relationship to a U.S. citizen parent is required. If doubt arises that the U.S. citizen "parent" is biologically related to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include, but are not limited to:

(1) Conception or birth of a child when either of the alleged biological parents was married to another person during the relevant time period;

(2) Naming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents;

(3) Evidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother;

(4) If the child was conceived or born when the mother was married to someone other than the man claiming paternity, a statement from the man to whom the mother was married disavowing paternity, a divorce or custody decree mentioning certain of her children but omitting or specifically excluding the child in question, or credible statements from neighbors or friends having knowledge of the circumstances leading up to the birth may be required as evidence bearing on actual natural paternity; and

(5) The child was born through surrogacy or other forms of assisted reproductive technology. (8 FAM 304.3 provides guidance about acquisition of U.S. citizenship by birth abroad and assisted reproductive technology.)

e. In such cases, it is within the consular officer's discretion to request additional evidence pursuant to 22 CFR 51.45.

8 FAM 304.1-2—In Wedlock and Of Wedlock

a. The term birth in wedlock has been consistently interpreted to mean birth during the marriage of the biological parents to each other.

b. This includes a child conceived before the marriage but born during the marriage.

c. To say a child was born "in wedlock" means that the child[']s biological parents were married to each other at the time of the birth of the child.

d. In the case of a marriage terminated by dissolution, death, or annulment, the term of wedlock still includes a biological child conceived during the marriage and born within 300 days after termination of the marriage.

e. If a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The same is true for a child born to a married man and a person other than his spouse.

8 FAM 304.3-1—Birth Abroad To A U.S. Citizen Gestational Mother Who Is Also The Legal Mother At The Time She Gives Birth

a. A child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and nationality Act (INA) 301(c).

b. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c).

c. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien father, with a citizenship claim adjudicated under INA 301(g).

d. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, and who is not married to the genetic mother or father of the child at the time of the child's birth, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c).

8 FAM 304.3-2—Birth Abroad To A Surrogate Of A Child Who Is The Genetic Issue Of A U.S. Citizen Mother And/Or U.S. Citizen Father

a. For purposes of this section, the term "surrogate" refers to a woman who gives birth to a child, who is not the legal parent of the child at the time of the child's birth in the location of the birth. In such a case, the surrogate's citizenship is irrelevant to the child's citizenship analysis.

b. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizen parents, with a citizenship claim adjudicated under INA 301(c).

c. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor, is considered for citizenship purposes to be a person born out of wedlock to a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c). This is the case regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.

d. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien spouse, with a citizenship claim adjudicated under INA 301(g).

e. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and his non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen father and alien spouse, with a citizenship claim adjudicated under INA 301(g).

f. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.

g. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and the surrogate (mother) who is not married to the U.S. citizen father is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). Note that in such a case, despite the genetic and gestational connection, the surrogate mother is not the legal parent of the child at the time of birth, usually pursuant to a surrogacy agreement.

8 FAM 304.3-3—Anonymous Sperm/Egg Donors Cannot Transmit U.S. Citizenship to a Child

U.S. citizenship cannot be transmitted by an anonymous sperm or egg donor, even if a clinic, sperm bank, or intended parent(s) purport to certify that the sperm or egg was donated by a U.S. citizen. The applicant (or his or her parent, applying on behalf of a minor applicant) bears the burden of demonstrating the donor transmitting parent's U.S. citizenship and fulfillment of each other statutory requirement, and the

evidence in support must be verified by the consular officer. This will require cooperation from the donor(s) to establish the possible claim to U.S. citizenship.