

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 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
No. 18-cv-00523
Hon. John F. Walter

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INTRODUCTION

This case involves Defendants'¹ refusal to recognize that E.J., the child of a U.S. citizen and his foreign spouse, acquired U.S. citizenship at birth pursuant to Section 301 of the Immigration and Nationality Act of 1952, as amended ("Section 301"), 8 U.S.C. § 1401. E.J. and his twin brother, A.J., (collectively, "the Twins") were born four minutes apart in Ontario, Canada, on September 16, 2016. (Supplemental Excerpts of Record ("SER") 036–37, SER091.) Their parents, Andrew, a U.S. citizen, and Elad Dvash-Banks ("Elad"), an Israeli citizen, conceived the Twins during their marriage through the use of assisted reproductive technology ("ART"). (Excerpts of Record ("ER") 73, 78.) A.J. was conceived using a donor egg and Andrew's sperm, and E.J. was conceived using an egg from the same donor and Elad's sperm. (SER031–32, SER083; *see also* ER117.) Andrew and Elad are the only parents the Twins have ever had, and Andrew, Elad, and the Twins have lived together as a family since the moment the children were born. (SER030.)

The State Department nonetheless denied E.J.'s applications for a Consular Report of Birth Abroad ("CRBA") and a U.S. passport, but granted A.J.'s

¹ As used in this brief, the term "Defendants" refers collectively to Appellants, the United States Department of State (the "State Department") and the Honorable Michael R. Pompeo, in his capacity as Secretary of State; and the term "Plaintiffs" refers collectively to Appellees, Andrew Dvash-Banks ("Andrew") and E.J. D.-B. ("E.J.").

parallel applications. (SER066, SER068.) In reaching that result, the State Department applied its unilateral policy, memorialized in its internal *Foreign Affairs Manual* (“FAM”), defining “birth in wedlock” to mean “birth during the marriage of the biological parents to each other,” and requiring children born abroad to prove a biological relationship with a U.S. citizen parent as a condition of eligibility for U.S. citizenship at birth. 8 FAM § 304.1-2.

Because Section 301 contains no such requirement, Plaintiffs sued, in part, under 8 U.S.C. § 1503 (“Section 1503”)² to compel recognition that E.J. had acquired U.S. citizenship at birth. (ER27.) The district court agreed and entered Judgment for E.J. on that claim. (ER1–3.) Defendants, relying on a tortured reading of Section 301, their policy, and certain arguments they did not raise below, argue here that the district court erred in holding that Plaintiffs were not required under Section 301(g) to show that E.J. is biologically related to his U.S. citizen parent. Defendants’ argument conflicts with the clear language of Section 301 and every decision of an Article III court that has addressed this question. *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005); *Scales v. INS*,

² Section 1503(a), which is set out in the Addendum to this Answering Brief, allows any person within the United States to file in the district where he “resides or claims a residence” an action “for a judgment declaring him to be a national of the United States” if he “claims a right or privilege as a national of the United States and is denied such right or privilege . . . upon the ground that he is not a national of the United States.” 8 U.S.C. § 1503(a).

232 F.3d 1159, 1166 (9th Cir. 2000); *see also Jaen v. Sessions*, 899 F.3d 182, 190 (2d Cir. 2018).

Defendants concede that two binding decisions of this Court “foreclose the State Department’s interpretation” of the INA, and require that the district court’s Judgment on Plaintiffs’ Section 1503 claim “be affirmed.” (Opening Brief (“Op. Br.”) at 35–36.) This Court’s analysis should end there. Defendants suggest that their appeal might be viable if this Court were to conduct an initial hearing *en banc* and reverse its prior decisions. (Op. Br. at 35–36, 38–39.) They offer no basis for such an extraordinary change (Op. Br. at 39), and none exists.

Moreover, Defendants’ proposed interpretation treats the children of married same-sex couples as “born out of wedlock,” and adjudicates their CRBA applications under the section of the INA that governs the citizenship of nonmarital children born abroad to a U.S. citizen and a non-citizen, 8 U.S.C. § 1409 (“Section 309”). (*See* SER023.) This treatment of married couples as unmarried raises serious constitutional questions under *United States v. Windsor*, which held that the federal government must respect the lawful marriages of same-sex couples and treat them as the federal government treats other married couples. 570 U.S. 744, 775 (2013). As the Supreme Court has explained, “differential treatment” of same-sex couples with respect to particular benefits of marriage, such as the application

of Section 301, may also “infringe[] *Obergefell*’s commitment to provide same-sex couples ‘the constellation of benefits that the States have linked to marriage.’”

Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

For the reasons discussed in this brief, Plaintiffs request that this Court summarily affirm the Judgment below.

STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(b) and Circuit Rule 28-2.2, Plaintiffs-Appellees agree with Defendants-Appellants’ statement of jurisdiction. (Op. Br. at 3.)

STATUTORY AND REGULATORY AUTHORITIES

The Addendum to this brief includes the relevant statutes and relevant sections of the FAM.

ISSUE PRESENTED

Whether the district court correctly held that under Section 301 of the INA and this Court’s decisions in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), E.J. acquired U.S. citizenship at birth, given that E.J. was born during the marriage of his parents, one of whom is a U.S. citizen who met Section 301’s residency requirements at the time of E.J.’s birth.

STATEMENT OF THE CASE

Andrew is a U.S. citizen. (ER73.) He was born and raised in California, and lived there from his birth in 1981 until at least October 2005. (ER65.) In 2008, Andrew met his now-husband, Elad; and in 2010, they married in Toronto. (SER023, SER030; *see also* ER49.) Andrew and Elad decided to start a family using ART. (ER78; SER031.) Andrew and Elad each contributed genetic material to create embryos using eggs from an anonymous egg donor. (SER031.) In December 2015, they contracted under Ontario law with a gestational surrogate, who carried the Twins in utero. (ER106, ER78.) E.J. was conceived using Elad's sperm, and A.J. was conceived using Andrew's sperm. (SER031–32, SER083; *see also* ER117.) The Twins were born in Ontario on September 16, 2016. (ER70; SER091.)

Under the surrogacy agreement executed between Andrew and Elad, and the gestational surrogate, Andrew and Elad would have “permanent custody” of the Twins, would be “recognized as [the Twins'] parents immediately upon [their] birth,” and would “assume full care of, and all parental responsibility for [the Twins].” (ER79.) The surrogacy agreement further provided that the surrogate “hereby expressly waives all parental, custodial and social rights that she has or may acquire” with respect to the Twins. (ER92–93.)

Andrew and Elad are the only parents listed on the Twins' birth certificates. (ER70; SER091.) They also are the Twins' legal parents under Ontario law.³ (ER76–77; *see also* SER014-15, SER034.) The State Department concedes that Andrew and Elad are the Twins' only legal parents and that the Twins were born during Andrew and Elad's marriage. (SER048, SER022–23, SER008.) Andrew, Elad, and the Twins have lived together as a family, originally in Canada and now in California, since the moment of the Twins' birth. (SER030.) Andrew and A.J. entered the United States as U.S. citizens, and E.J. entered the country on the basis of a now-expired tourist visa. (SER081–82.)

A. The INA

The INA governs, among other things, eligibility for U.S. citizenship at birth based on a child's relationship with a U.S. citizen parent, also known as derivative citizenship. The INA imposes certain different eligibility requirements for derivative citizenship based on whether at birth the child's parents were married or unmarried.

Section 301 applies directly to marital children and confers U.S. citizenship at birth on “a person born outside the geographical limits of the United States and its outlying possessions of parents” if at least one of his parents is a U.S.

³ On September 28, 2016, the Ontario Superior Court entered an order affirming that Andrew and Elad—and only Andrew and Elad—are E.J.'s legal parents. (ER76–77.)

citizen who meets specified residency requirements. 8 U.S.C. § 1401(g).

Although the term “wedlock” does not appear in Section 301, courts consistently have interpreted Section 301 to apply to marital children born abroad, in part, because of its contrast with Section 309, which is titled “Children born out of wedlock.” *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (referring to Section 301(g) as “[a]pplicable to married couples”). Section 301 does not mention a biological relationship requirement, and this Court has twice held that it does not include one. *Solis-Espinoza*, 401 F.3d at 1094; *Scales*, 232 F.3d at 1166; *see also Jaen*, 899 F.3d at 190.

Section 309 establishes certain prerequisites for the application of Section 301 to nonmarital children. The INA has always been interpreted as providing that a child born abroad with a U.S. citizen father not married to the child’s non-U.S. citizen mother must establish that he has a biological connection with his father as a condition to U.S. citizenship at birth. Congress made that requirement more explicit in 1986 by adding the language “blood relationship” to Section 309’s requirements concerning U.S. citizen fathers. Act of Nov. 14, 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655. Specifically, Section 309 currently (and at the time of the Twins’ birth) states, in relevant part, that a child born abroad to an unmarried U.S. citizen father is a citizen at birth only if the child establishes “a blood relationship between the [child] and the father . . . by clear and convincing

evidence” and is legitimated before age eighteen. 8 U.S.C. § 1409(a)(1), (4). In contrast, Congress made no corresponding change to Section 301, although it made other revisions to that provision at that time. *See* Pub. L. No. 99-653, § 12, 100 Stat. 3655. Because of these differences between Section 301 and Section 309, this Court explained in *Scales* that “[a] straightforward reading” of the “born of parents” language in Section 301 “indicates . . . that there is no requirement of a blood relationship.” *Scales*, 232 F.3d at 1164; *see also Jaen*, 899 F.3d at 189.

B. The FAM

Notwithstanding this clear statutory difference, the State Department has imposed a biological relationship requirement for recognition of citizenship at birth pursuant to Section 301. The FAM defines children born in wedlock as children who have a biological relationship with both of their married parents. *See* 8 FAM § 304.1-2 (“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.”). As the district court found, “[t]he FAM represents the State Department’s unilateral declarations and is not the product of a formal adjudication or notice-and-comment rulemaking or congressional action.” *Dvash-Banks v. Pompeo*, 2019 WL 911799, at *5 (C.D. Cal. Feb. 21, 2019) (citing *Scales*, 232 F.3d at 1166; *Jaen*, 899 F.3d at 187 n.4).

The State Department’s application of its unilateral interpretation has been inconsistent and internally contradictory. (SER008–09, SER011.) For example, before 2014, the State Department did not consider the “biological relationship” required in the FAM to exist if a child conceived with a donor egg was born during the marriage of his legal parents, one of whom is American, and carried by that parent. (See SER009.) In 2014, the State Department changed its view, declaring that it would henceforth consider a gestational mother who also is the legal parent to have a “biological relationship” to the child, even if the egg originated from a donor. (See SER009.) See also 8 FAM § 304.3-1(c). As the district court found, “[t]his change was not occasioned by any corresponding amendments to the law,” which has not been amended since 1986, “or any other congressional action.” *Dvash-Banks*, 2019 WL 911799, at *5.

C. The State Department’s Refusal to Recognize E.J.’s U.S. Citizenship

On January 24, 2017, the Dvash-Banks family appeared in person at the U.S. Consulate in Toronto (“Consulate”) to apply for documents evidencing the Twins’ U.S. citizenship: a CRBA and a U.S. passport for each child. (ER64–67.) Andrew and Elad submitted the requisite documentation, and the adjudicating officer accepted these documents as sufficient proof of Andrew and Elad’s marriage and of the Twins’ legal parentage. (SER034, SER045–48.) During her interview of the family, the officer asked Andrew and Elad whose egg and sperm

had been used to conceive each of the children and probed into the details of the Twins' conception (SER044–45, SER020, SER035), an inquiry that the State Department does not make of every applicant. *See* 8 FAM § 301.4-1(D)(1)(d). After consulting with two of her colleagues, the officer informed Andrew and Elad that neither E.J. nor A.J. would qualify for U.S. citizenship absent a biological relationship with Andrew, and provided them the option of submitting DNA evidence to establish that connection. (SER044, SER020–21, SER094–95.) The officer subsequently sent a letter to Andrew, explaining that “in reference to your application for a U.S. passport and a [CRBA] for [A.J.] and [E.J.] . . . [t]he U.S. Consulate General in Toronto has considered the evidence you submitted and concluded that the blood relationship between a U.S. citizen parent and children ha[s] not been established by a preponderance of the evidence as required to support a claim to U.S. citizenship.” (SER094–95.)

Andrew thereafter submitted DNA test results, which showed that A.J., but not E.J., was Andrew's biological child. (ER117.) On March 2, 2017, in reliance on the FAM policy, the Consulate issued a CRBA for A.J., confirming that A.J. “[a]quired United States CITIZENSHIP at birth.” (SER088.) On the same day, the adjudicating officer sent Andrew a letter denying E.J.'s applications for a CRBA and U.S. passport because “it has been determined that [E.J.'s] claim to U.S. citizenship ha[d] not been satisfactorily established, as you are not his

biological father.” (ER56.) The letter referenced the “Immigration and Nationality Act (INA) of 1952,” without specifying a particular provision, and stated 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.” (ER56.) That determination constituted final adjudication of E.J.’s applications. (SER065.)

The sole reason for the denial of E.J.’s applications for a U.S. passport and CRBA was the lack of a biological relationship between E.J. and Andrew, his U.S. citizen parent. (SER066.)

D. The Complaint

On January 22, 2018, Andrew and E.J. filed the Complaint below, alleging that Defendants had wrongfully denied E.J.’s applications for a U.S. passport and CRBA despite his qualifying for U.S. citizenship at birth under Section 301. (SER098.) The Complaint sought, in part, a declaration under Section 1503 that E.J. is a U.S. citizen at birth. (SER117–18.) The Complaint further alleged that the State Department’s application of Section 309 and denial of E.J.’s applications, was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (“APA”). (SER116–17.) The Complaint also alleged that the State Department’s interpretation of the INA and treatment of E.J. as “born out of wedlock” violated Andrew’s and E.J.’s rights under the Due Process and Equal

Protection Clauses of the Fifth Amendment⁴ by discriminating against same-sex spouses and their children based on the spouses' sex and sexual orientation and depriving same-sex spouses of the ability to transmit U.S. citizenship to their children at birth. (SER114–16.) On that basis, the Complaint sought an order declaring the State Department's interpretation of the statute to be unconstitutional. (SER119.)

E. The District Court Recognizes E.J.'s U.S. Citizenship

On January 7, 2019, after the close of discovery, Plaintiffs and Defendants filed cross-motions for partial summary judgment. (ER176–77.) Andrew and E.J. moved for summary judgment on the Section 1503 and due process claims; Defendants moved for partial summary judgment on the APA and due process claims. (ER176–77.)

On February 21, 2019, the district court granted Andrew and E.J.'s motion for summary judgment on the Section 1503 claim.⁵ The district court held that “under controlling Ninth Circuit authority, Section 301 does not require a person born during their parents' marriage to demonstrate a biological relationship

⁴ Plaintiffs filed an amended complaint on January 14, 2019, removing their claim under the Equal Protection Clause of the Fifth Amendment. (*See* ER23.)

⁵ The district court granted Defendants' motion for summary judgment on the APA claim, concluding that Section 1503 remedies were “adequate” under Section 704 of the APA. *Dvash-Banks*, 2019 WL 911799, at *6; 5 U.S.C. § 704. Because Plaintiffs prevailed on their Section 1503 claim, the district court concluded that the due process claim was moot and granted Defendants' motion for summary judgment on that claim. *Id.* at *8.

with both of their married parents.” *Dvash-Banks*, 2019 WL 911799, at *7 (relying on *Solis-Espinoza*, 401 F.3d 1090, and *Scales*, 232 F.3d 1159). The district court noted that this Court in *Scales* “expressly refused to defer to the FAM, concluding that it was so divergent from the statutory language as to not even be appropriately considered ‘an interpretation of § [301].’” *Id.* at *7 (quoting *Scales*, 232 F.3d at 1165–66). The district court further concluded that its holding was mandated by the relevant statutory language, observing that nothing in Section 301 references a biological relationship requirement or reflects a congressional intention to include one. *Id.* The court noted that “the dramatic difference in the language of Section 301 and Section 309 makes it clear that a biological relationship is not required between a child and his U.S. citizen parent if that child was born during the marriage of his parents to each other.” *Id.* The district court observed that its interpretation of Section 301 “is 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.’” *Id.* at *8.

On March 6, 2019, the district court entered its Judgment. (ER at 1.) The Judgment “declare[d] that [E.J.] is a national and citizen of the United States who acquired U.S. citizenship at birth by operation of Section 301(g) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g)” and “ordered [the State

Department] to issue to E.J. a United States passport as soon as is practicable but not later than 45 days from the date of entry of this Judgment.” (ER1–2.)

On May 6, 2019, Defendants filed their notice of appeal. (ER15–18.)

SUMMARY OF THE ARGUMENT

Defendants concede that their appeal is foreclosed by two prior decisions of this Court and that the district court properly applied those decisions, but argue that the Court should reconsider those rulings. (Op. Br. at 35–36.) As Defendants acknowledge, this could happen only if this Court were to take the extraordinary step of hearing this appeal initially *en banc*. (Op. Br. at 3, 35–36.) No subsequent change in law or other prerequisite for such a measure exists, and Defendants do not contend otherwise. (Op. Br. at 38–39.)

Even if this Court were to reconsider its holdings in *Scales* and *Solis-Espinoza*, the Court should affirm the Judgment.

1. Neither the language nor structure of Section 301 requires proof of a biological relationship when a child is born during the valid marriage of a U.S. citizen and a foreign spouse. Defendants’ contention that the words “born . . . of parents” in Section 301 import a biological relationship requirement into that section takes those words out of context, distorts the statutory meaning and is unsupported by any relevant precedent. To the contrary, this Court has twice rejected Defendants’ interpretation and has applied Section 301 to children born

during valid marriages even when it was clear that the children lacked biological relationships to a U.S. citizen parent.

2. Defendants' argument here, but not below, regarding the "traditional understanding of *jus sanguinis* citizenship" (Op. Br. at 21) misconstrues the nature of derivative citizenship, which is transmitted by parentage and has never turned solely on biological connections.

3. Defendants' position also is undermined by a comparison of Section 301 with Section 309, the latter of which expressly obligates nonmarital children born outside the United States to demonstrate a "blood relationship" with a U.S. citizen father by "clear and convincing evidence." Congress's amendment of Section 309, but not Section 301, to include this language at a time when it made other revisions to Section 301 manifests that it limited the requirement to Section 309. Further, Defendants' attempt to insert a parallel requirement into Section 301 assumes that Congress used different words in Sections 301 and 309 to impose the same obligation and would render elements of the INA redundant.

4. The FAM policy threatens to create artificial, pernicious distinctions among family members and to undermine the INA's objective of preserving family unity. The circumstances here illustrate the point: Under the FAM, A.J. receives all the rights and privileges of U.S. citizenship, including the

rights to travel freely to, and remain in, the United States with his parents, while his twin brother does not.

5. Defendants' interpretation of Section 301 also raises serious constitutional questions under Supreme Court precedents requiring the federal government to treat the valid marriages of same-sex couples the same way it treats other marriages. It is fundamental, however, that courts should endeavor to construe statutes, when possible, to avoid raising constitutional issues.

6. The State Department's policy lacks the persuasiveness necessary to satisfy their belated request for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which they did not seek below. The FAM policy conflicts with the plain language of Section 301 and this Court's decisions construing that provision, and is based on the State Department's changing view of what constitutes a biological relationship under the policy. Nor is the FAM policy necessary to further any governmental interest in avoiding fraud in citizenship applications. This case does not impinge on any effort by the State Department to investigate any factual assertion in any such application.

STANDARD OF REVIEW

This Court reviews *de novo* legal questions, including claims of citizenship. *Anderson v. Holder*, 673 F.3d 1089, 1096 (9th Cir. 2012); *Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985) (“[S]ection 1503(a) authorizes

a *de novo* judicial determination of the status of the plaintiff as a United States national.”). “Findings of fact are reviewed for clear error.” *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017).

““The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child’s birth.”” *Anderson*, 673 F.3d at 1097 (quoting *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990)).

ARGUMENT

I. DEFENDANTS CONCEDE THAT THIS COURT MUST AFFIRM.

Defendants concede that this Court is bound by its unanimous decisions in *Scales* and *Solis-Espinoza*, and that under those decisions, E.J. need not establish a biological relationship with his U.S. citizen parent to be recognized under Section 301 as a U.S. citizen at birth. (Op. Br. at 35–36.) Defendants further acknowledge that the district court properly applied those holdings in ruling that E.J. acquired U.S. citizenship at birth. (Op. Br. at 38.)

This appeal, therefore, is not one in which this Court must weigh the merits of dueling positions on the meaning of the text of Section 301. The law of the Ninth Circuit is already established and binding. Indeed, United States Citizenship & Immigration Services (“USCIS”), which adjudicates citizenship applications for individuals present in the United States, follows *Scales* and *Solis-*

Espinoza in its Los Angeles Field Office and throughout the Ninth Circuit. (*See* SER004.) The State Department’s appeal is therefore merely an expression of its displeasure with the governing law and settled precedent of this Circuit, which has been consistent for almost twenty years and was followed by the only other federal court of appeals to address the issue. *See Jaen*, 899 F.3d at 190.

Nor is this case appropriate for initial hearing *en banc*. *En banc* consideration “is not favored and ordinarily will not be ordered” unless it is necessary to “maintain uniformity of the Court’s decisions,” which Defendants concede is not the case here (*see* Op. Br. at 35–36), or “the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a). Initial review *en banc* is even more rare. *See John v. United States*, 247 F.3d 1032, 1033 (9th Cir. 2001) (Reinhardt, J., concurring) (*per curiam*) (“We ordinarily do this only when there is a direct conflict between two Ninth Circuit opinions and a panel would not be free to follow either.”) (citing *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (*en banc*)). Here, there is uniformity not only within this Circuit but among circuit courts. *See Jaen*, 899 F.3d at 190. Recognition of E.J.’s U.S. citizenship, although vitally important to his family, follows from a straightforward application of binding Ninth Circuit precedent, and, in turn, the

INA and therefore does not warrant the extraordinary procedural step of initial consideration *en banc*.⁶

II. THE DISTRICT COURT CORRECTLY APPLIED THIS COURT’S DECISIONS IN *SCALES V. INS* AND *SOLIS-ESPINOZA V. GONZALES*, WHICH RESOLVE THIS CASE.

As Defendants concede, this Court’s decisions in *Scales* and *Solis-Espinoza* are dispositive here, and the district court correctly applied those decisions to E.J.’s claim under Section 1503. (Op. Br. at 3, 17–18, 35–39.) This Court therefore should affirm.

Scales, which this Court decided in 2000, addressed the very question at issue here: whether Section 301 imposes on the child of a married U.S. citizen a requirement to demonstrate a biological relationship with that parent. 232 F.3d at 1161, 1166. This Court unanimously held that it does not. *Id.* at 1166. In *Scales*, the petitioner was born during the marriage of his Philippine citizen mother and U.S. citizen father, but he was not the biological child of his U.S. citizen father. *Id.* at 1162. This Court nonetheless held that “[a] straightforward reading” of Section 301 “indicates . . . that there is no requirement of a blood relationship.” *Id.* at 1164. This Court noted that, in contrast, Section 309, which applies to nonmarital

⁶ Plaintiffs respectfully request that, if Defendants file a petition under Federal Rule of Appellate Procedure 35(c) for initial hearing *en banc* and the Court deems it appropriate to consider that submission, Plaintiffs be afforded a reasonable opportunity to respond.

children, does require a blood relationship between a child and his U.S. citizen father, but determined that the provision “d[id] not apply to Petitioner . . . because he was born to parents who were married at the time of his birth.” *Id.*

Emphasizing the contrast between Section 301 and Section 309, this Court further explained that “[i]f Congress had wanted to ensure” that a marital child “actually shares a blood relationship with an American citizen,” “it knew how to do so.” *Id.* (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)). This Court was not asked to, and did not, consider the government’s entitlement to *Skidmore* deference and expressly declined to defer to the FAM under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concluding that the policy was neither “an interpretation of § 1401” nor the product of “a formal adjudication or notice-and-comment rulemaking.”⁷ *See id.* at 1166.

⁷ Defendants’ argument that Section 301 clearly requires a biological relationship (Op. Br. at 16) contradicts the government’s position in *Scales* and *Solis-Espinoza*, in which the government argued that the question was an open one. (See Declaration of Theodore Edelman In Support of Plaintiffs-Appellees’ Motion for Judicial Notice (“Edelman Dec.”) Ex. 1 at 15, Ex. 2 at 16. (“Neither INA § 301(g), which describes nationals and citizens of the United States at birth, nor INA § [1]101(c)(1), which defines ‘child’ for purposes of INA § 301, expressly state whether a child can claim derivative citizenship from a parent’s spouse who is not his natural [parent].”.) Given its position in *Scales* that “Congress has not directly addressed the precise question at issue” (Edelman Dec. Ex. 1 at 15 (quoting *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1985)), the government argued that the Court should defer to the FAM under *Chevron*. (*Id.*; see also Edelman Ex. 2 at 16.) The government did not seek *Skidmore* deference in either *Scales* or *Solis-Espinoza*. The Court may take judicial notice of these prior submissions. See, e.g., *Hornish v. King Cty.*, 899 F.3d 680, 702–03 (9th Cir.

In 2005, this Court reaffirmed *Scales in Solis-Espinoza*. 401 F.3d at 1091. In *Solis-Espinoza*, the petitioner was born in Mexico and raised in the United States. *Id.* at 1091–92. Before the Board of Immigration Appeals, the petitioner claimed that he had acquired derivative U.S. citizenship under Section 301 through his father’s wife. *Id.* She “was married to petitioner’s biological father at the time of petitioner’s birth, acknowledged petitioner from his infancy as a member of her family and raised him as his mother, though he did not in fact have a biological connection with that woman.” *Id.* This Court reversed the Board of Immigration Appeals, which had concluded that the petitioner “‘was born out of wedlock,’ because his biological father was not married to his biological mother at the time of his birth.” *Id.* at 1092. This Court explained that the petitioner “was not illegitimate or born out of wedlock” because, like the petitioner in *Scales*, he was the child of married parents at the time of his birth. *Id.* at 1091, 1093 (citing *Scales*, 232 F.3d at 1164). The Court further explained that “the [blood relationship] requirement applied *only* to an illegitimate child and that it did not apply to someone who was not born ‘out of wedlock.’” *Id.* at 1093.

On summary judgment in this action, the district court explicitly relied on *Scales* and *Solis-Espinoza* to hold that E.J. had acquired U.S. citizenship at birth

2018); *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131–32 (9th Cir. 2012); Wright & Miller, *Fed. Prac. & Proc. Evid.* § 5106.4 (2d ed. 2019).

under Section 301. *Dvash-Banks*, 2019 WL 911799, at *7–*8. As in both *Scales* and *Solis-Espinoza*, the district court analyzed E.J.’s claim of citizenship under Section 301 because E.J. “was born during the marriage of his parents.” *Id.* at *6. The district court then observed that, “under [this] controlling Ninth Circuit authority, Section 301 does not require a person born during their parents’ marriage to demonstrate a biological relationship with both of their married parents.” *Id.* at *7. Citing *Scales* and *Solis-Espinoza*, the district court observed that “[o]ther than the gender of E.J.’s parents, the factual circumstances in *Scales* and *Solis-Espinoza* are indistinguishable from the facts in this case.” *Id.* The court added that “[b]oth *Scales* and *Solis-Espinoza* make clear that the word ‘parents’ as used in Section 301(g) is not limited to biological parents and that the presumption of legitimacy that applies when a child is born to married parents—as codified in the INA—cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent.” *Id.*

As Defendants concede, *Scales* and *Solis-Espinoza* make clear that Section 301 “does not require a biological relationship between a child and the parent through whom he claims citizenship.” (Op. Br. at 1–2; *see also id.* at 3, 17–18, 35–39.) Because the district court faithfully applied these precedents, this Court should affirm. Indeed, as Defendants recognize, unless this case is heard *en*

banc in the first instance, “the district court’s judgment that E.J. is a U.S. citizen must be affirmed.” (Op. Br. at 15.)

III. EVEN IF THIS WERE A MATTER OF FIRST IMPRESSION, WHICH IT IS NOT, THE DISTRICT COURT CORRECTLY HELD THAT E.J. ACQUIRED U.S. CITIZENSHIP AT BIRTH.

As the district court concluded, Defendants’ interpretation of Section 301 conflicts not only with binding precedent, but also with Section 301’s text, the INA’s structure, and the INA’s object and policy. This Court should again reject that interpretation.

A. The Text and Structure of the INA Demonstrate That Section 301 Does Not Include a Biological Relationship Requirement.

1. The Text of Section 301 Does Not Require a Biological Relationship.

The district court correctly applied the traditional tools of statutory construction to hold that E.J. acquired U.S. citizenship at birth under Section 301.⁸

This Court previously set out the steps for interpreting a statute:

To interpret a statute, ‘we look first to the plain meaning of the text.’ When words in a statute are not defined, they ‘will be interpreted as taking their ordinary, contemporary, common meaning.’ Courts examine ‘not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.’

United States v. Kaplan, 836 F.3d 1199, 1208 (9th Cir. 2016) (internal citations

⁸ On appeal, Defendants do not contest (Op. Br. at 18), that Section 301 is the appropriate section under which to adjudicate E.J.’s claim of citizenship. Plaintiffs therefore address only the issue of whether Section 301 includes a biological relationship requirement.

omitted). Defendants’ position runs counter to these well-established principles and supplants the clear text of the statute with the State Department’s unilateral policy. (*See Op. Br.* at 18–20.)

As this Court has held twice, a “straightforward reading” of Section 301 compels the conclusion that “[t]here is no requirement of a blood relationship.” *Scales*, 232 F.3d at 1166; *see Solis-Espinoza*, 401 F.3d at 1094. Section 301 states that “a person born outside of 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” for the requisite time “shall be . . . [a] citizen[] of the United States at birth.” 8 U.S.C. § 1401. Considering the entire statutory provision, it is clear that the words “born” and “of parents” refer to the location and other circumstances of the child’s birth and do not impose a biological relationship requirement. *See Marquez-Marquez v. Gonzales*, 455 F.3d 548, 557 (5th Cir. 2006) (Under Section 301, the Court “analyze[s] the circumstances existing at the petitioner’s birth.”). There is no mention of biological relationships in Section 301, and “[i]t is not [this Court’s] practice to read words into statutory provisions.” *Pit River Tribe v. Bureau of Land Mgmt.*, 939 F.3d 962, 970 (9th Cir. 2019). Where, as here, “the statute’s language is plain, the sole function” of the Court “is to enforce it according to its terms.” *Lamie v. U.S. Trustee*, 540 U.S.

526, 534 (2004) (internal quotation marks omitted). Here, E.J. acquired U.S. citizenship under Section 301 because he was “born” in Canada “of parents” Andrew and Elad. Andrew and Elad did not later emerge on the scene.

In addition, Defendants’ interpretation of Section 301 would raise serious constitutional questions because of its substantial infringement of the fundamental rights of married same-sex couples. The State Department’s policies relegate children born of married same-sex parents to the INA’s “out of wedlock” provision and therefore improperly treat those children, including E.J., as nonmarital. The State Department’s policies have this effect because, under the FAM, a child is considered to be a marital child, *i.e.*, “born in wedlock,” only if both of the child’s biological parents were married to each other at the time of the child’s birth. 8 FAM § 304.1-2. Under this policy, same-sex married male couples could essentially never have a marital child who would qualify for derivative citizenship directly under Section 301, and married same-sex female couples could do so only rarely. (SER012.) By essentially relegating the children of same-sex married couples to the status of nonmarital children—which is the way in which E.J.’s twin brother A.J. could have his citizenship recognized under the FAM policy—Defendants’ approach improperly denies to validly married same-sex couples the respect accorded to opposite-sex married couples. *See Windsor*, 570 U.S. at 775. This disparate treatment of same-sex couples with respect to the

transmission of citizenship at birth also raises questions under the Supreme Court’s decisions requiring that same-sex couples be accorded the same constellation of benefits available to opposite-sex marriages. *See Pavan*, 137 S. Ct. at 2077; *Obergefell*, 135 S. Ct. at 2601. Here, the INA not only “is open to a construction that obviates deciding” whether it would violate the constitution, but it is the only reasonable construction of the statute. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

2. The Words “Born” and “Of” in Section 301 Do Not Impose a Biological Relationship Requirement.

Defendants rely on selective definitions in current dictionaries of the words “born” and “of” and decisions involving nonmarital children to contend that “[f]or a child to be ‘born of parents’ . . . means that he originates or derives from those parents.”⁹ (Op. Br. at 19.) Defendants then assert that this can occur only if the child is biologically related to the parents. (Op. Br. at 19.) Defendants’

⁹ Defendants reference to definitions of “born” and “of” from current dictionaries (Op. Br. at 19) does not elucidate the “plain meaning” of the statute because it cherry picks words from the statute, ignoring their plain meaning in context. A dictionary definition cannot substitute for the meaning of a term in its statutory context. *See Rachel H. v. Dep’t of Educ. Hawaii*, 868 F.3d 1085, 1089 (9th Cir. 2017) (dictionary definition of the word “location” did “not reveal what Congress intended by the term in [its] context”); *Diaz-Jimenez v. Sessions*, 902 F.3d 955, 960 (9th Cir. 2018) (The preposition “under” is “a chameleon; it has many dictionary definitions and must draw its meaning from its context.” (internal citations and quotation marks omitted)).

argument picks the words “born” and “of” out of context and distorts the statutory language. The word “born” is not contiguous with the word “of” in Section 301(g): the relevant phrase includes the words “born . . . of parents” In between “born” and “of,” the statute refers to the location of the child’s birth and, following “parents,” the statute describes the citizenship and residency of the parents. The language must be read together as part of a unitary provision. *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 320 (2014) (It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Viewed in this context, the statutory language addresses the circumstances of the child’s birth, including the location of the child and citizenship of his parents at the time of the child’s birth, and is not limited to children with biological connections to a U.S. parent. This is exactly what one would expect from a statute setting out the conditions for recognition of citizenship that passes from family relationships, as opposed to by birth in the United States.

Defendants cite to *United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009), to support their argument that the words “born” and “of parents” in Section 301 nonetheless refer to a biological relationship. (Op. Br. at 15, 19–20.) That decision, however, is not helpful to Defendants. *First*, that case involved a

nonmarital child, and, in that context, noted that “the ‘born of’ concept generally refers to a blood relationship,” 560 F.3d at 1083. *Second*, the Court “recognize[d]” and left undisturbed its holdings in *Scales* and *Solis-Espinoza* “that when a child is born during a marriage and at least one parent is a United States citizen, a blood relationship is not absolutely required.” *Id.* at 1083. The Court explained that the absence of a biological nexus requirement in the case of marriage reflects “the tradition that a man is considered to be the natural father of a child born during wedlock.” *Id.* The Court affirmed the denial of the appellant’s claim of citizenship in that case because he could not meet either test: the U.S. citizen through whom he claimed derivative citizenship was “not related to [him] by blood, and was not even married to [his] mother at the time of [the appellant’s] birth.” *Id.* at 1087.

Defendants erroneously contend that the Second Circuit also has “interpreted the phrase ‘born of parents’ in a manner consistent with the State Department’s construction.” (Op. Br. at 20.) In 2018, the Second Circuit considered the same statutory interpretation question at issue here and held that “a blood relationship is not required to establish parentage for purposes of acquired citizenship when the child is born into marriage.”¹⁰ *Jaen*, 899 F.3d at 190.

¹⁰ Defendants’ reliance on the Second Circuit’s *per curiam* decision in *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007), also is misplaced. There, the Second Circuit rejected the petitioner’s claim of derivative citizenship because he

3. The Word “Parents” in Section 301 Refers to a Legal, Not Biological, Relationship.

The State Department acknowledges Andrew as E.J.’s “legal parent at birth” under Ontario law (SER015), but Defendants contend here that Section 301 is limited to parents who have a biological relationship with their children. As this Court and the Second Circuit have recognized, the term “parents” in Section 301 is not limited to biological parentage.¹¹ In *Solis-Espinoza*, the Court held that the petitioner was a U.S. citizen at birth even though he was not biologically related to his father’s wife because he was born during that marriage and treated by the married couple for all purposes as their son. *See* 401 F.3d at 1094 (observing that

did not have a U.S. citizen parent until seventeen months after his birth, when he moved to the United States and was adopted by U.S. citizens. *Id.* at 186–87. Because the petitioner could not establish that Section 301’s requirements were met at the time of his birth, the Second Circuit did not need to address whether Section 301 requires a biological tie to a U.S. citizen parent. *Id.* The Second Circuit relied on the Fifth Circuit’s decision in *Marquez-Marquez*, in which the court held that the petitioner had failed to meet Section 301’s requirements at the time of his birth, which a “plain reading” of the statute required. 490 F.3d at 187 (relying on *Marquez-Marquez*, 455 F.3d at 556–57). There, the Fifth Circuit declined to decide whether to adopt the rule of *Scales* and *Solis-Espinoza*, concluding that the petitioner’s claim would have failed in any event because of “the explicit requirement that the circumstances described by section 301(g) be met *at birth.*” 455 F.3d at 559.

¹¹ Section 301 appears in Title III of the INA, which governs U.S. citizenship at birth. Title III does not define the term “parents” (other than to make clear that the term includes a deceased parent), let alone indicate that it excludes non-biological parents. *See* 8 U.S.C. § 1101(c)(2). By contrast, other Titles of the INA define the term “parent” to include biological and non-biological parents, as long as the child is not married and is under the age of 21. *See* 8 U.S.C. § 1101(b)(1)–(2).

“[i]n every practical sense, [petitioner’s father’s wife] was petitioner’s mother and he was her son”); *see also Scales*, 232 F.3d at 1164. In *Jaen*, the Second Circuit even more specifically concluded that the word “parents” in Section 301 includes non-biological parents. 899 F.3d at 187–88. The court explained that, given the absence of any indication that Congress intended to depart in Section 301 from the “centuries-old, common law meaning” of “parent,” the term as used in that section, “incorporated the longstanding presumption of parentage based on marriage.” *Jaen*, 899 F.3d at 188 (relying on *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989)); *see also Marguet-Pillado*, 560 F.3d at 1083 (noting “the tradition that a man is considered to be the natural father of a child born during wedlock”). Thus, in Section 301, Congress allowed a married U.S. citizen parent to confer derivative citizenship on his child, irrespective of whether that parent has a biological relationship to the child.

Defendants nonetheless contend that the meaning of the term “parents” in Section 301 “is emphatically irrelevant” (Op. Br. at 27) to the question of whether that section imposes a biological relationship condition because the words “born . . . of” create such a requirement. As addressed above, Defendants misconstrue the meaning of “born . . . of.” Moreover, they improperly attempt to read those words in isolation and to strip the term “parents” of any significance. This approach conflicts with the canon of statutory construction that courts should

construe statutes to give effect to all of their terms. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (citation omitted)). The relevant words include “born . . . of parents,” and Section 301’s use of the word “parents,” as opposed to, for example, “persons,” makes clear that the statute refers to the legal status of the parents. As the Second Circuit explained in *Jaen*, “parentage for purposes of Section [301] is a legal construct that incorporates the common law’s enduring respect for the marital family.”¹² 899 F.3d at 190.

4. Defendants Misconstrue the Term of Art *Jus Sanguinis* to Inject Into Section 301 a Biological Relationship Requirement That Does Not Exist.

Defendants urge this Court “to pause” before concluding that Section 301 does not include a biological relationship requirement because the section incorporates the “traditional understanding of *jus sanguinis*.” (Op. Br. at 21.)

¹² Defendants’ seek to minimize the significance of marriage to the statutory scheme by arguing that Section 301 requires a biological relationship with a U.S. citizen parent because it “refers to a child ‘born . . . of parents’” rather than “a child ‘born of a marriage.’” (Op. Br. at 20.) In context, however, Section 301 had to refer to parents (as opposed to a marriage) because it is the applicant’s parents who must meet the INA’s requirements. The phrase “born . . . of parents one of whom is an alien, and the other a citizen” would make no substantive—or grammatical—sense if the term “parents” were replaced with “marriage.” Similarly, Section 301’s “plural reference to ‘parents’” (Op. Br. at 20) does not suggest that “each parent would have a biological relationship to the child” (Op. Br. at 20) but that those parents must have been married at the time of the child’s birth.

Defendants maintain that the “traditional understanding” requires a blood-based or, to use the more modern term, a biological, parent-child relationship. But this distorted understanding of *jus sanguinis* is simply a hyper-literal translation of the Latin term. *Jus sanguinis* is a technical, legal term, which, borrowing from family law principles, considers parentage as a means of extending citizenship to children.¹³ Parentage as embodied in the concept of *jus sanguinis* was not—traditionally or otherwise—coextensive with biological parenthood. See Ferdinand Mackeldey, *Handbook of the Roman Law* 444 (Moses A. Dropsie trans., T. & J.W. Johnson & Co., 1883) (“By the Roman law illegitimate children were regarded as fatherless (*quasi sine patre filii*).”); Fritz Schulz, *Roman Registers of Births and Birth Certificates*, 32 *J. Roman Stud.* Parts I & II 81 (1942) (The Roman “register [of birth] was barred to illegitimate children.”). Thus, Defendants’ characterization

¹³ See *Jus Sanguinis*, *Black’s Law Dictionary* (11th ed. 2019) (defining *jus sanguinis* as “[t]he rule that a child’s citizenship is determined by the parents’ citizenship” and explaining that “the *jus sanguinis* principle confers political membership on the basis of *parentage* and *descent*. The children of present members of the polity, irrespective of place of birth, are automatically defined as citizens of their parents’ political community.” (internal citations and quotations omitted)); Matthew Lister, *Citizenship, in the Immigration Context*, 70 *Md. L. Rev.* 175, 199–204 & n.146 (2010) (citing Section 1401(g) and explaining that the United States has “a more limited version” of *jus sanguinis* where children “inherit the citizenship of their parents”—as opposed to a “strong form,” “which equates citizenship with ethnic membership” and “flows with the blood”); see also *Acheson v. Maenza*, 202 F.2d 453, 455 n.3 (D.C. Cir. 1953) (defining *jus sanguinis*, “nationality of the child depends on the nationality of the parents”).

of Section 301’s reference to parentage is based on a misconception of the scope of the concept of *jus sanguinis* as it has long been implemented in American law.¹⁴

Historically, legal parentage was essential to the acquisition of citizenship under the law of derivative citizenship, even when there was a biological connection between father and child. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2196–99 (2014) (citing historical sources and explaining that “[i]n 1938, as in the 1920s, in the majority of states the only way a father could fully legitimate his child was to marry the mother. Accordingly, by requiring legitimation, the [Nationality Act of 1940] maintained marriage as the key to father-child citizenship transmission in most instances”); see generally *Morales-Santana*, 137 S. Ct. at 1690–93; Cf. *Guyer v. Smith*, 22 Md. 239, 244, 249 (1864) (noting that Guyer’s children were not born “in lawful wedlock” and thus “they are illegitimate; under our law *nullius filii*, and clearly therefore” could not benefit under the 1802 immigration statute applying to children of citizens).

Indeed, were Defendants correct that *jus sanguinis* is limited to bloodlines, Section 301 would have required only that a child establish a biological

¹⁴ Defendants also overstate the relevance of this Roman Law principle. *Jus sanguinis*, as the Supreme Court has explained, is not the common law of England or the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 670 (1898) (“There is not, and never was, any such common law principle.” (internal quotation marks omitted)).

relationship with a U.S. citizen parent and the INA would not distinguish between marital and nonmarital children of U.S. citizens. Sections 301 and 309, however, impose other requirements that are not linked to biology. For example, with respect to the nonmarital children of American fathers, Section 309 includes requirements beyond proof of a “blood relationship,” such as an obligation to establish paternity “while the child is under the age of 18 years,” not at any time. 8 U.S.C. § 1409. Section 309 also imposes financial requirements that further restrict the conveyance of citizenship to nonmarital children, even if they can demonstrate a biological relationship to a U.S. citizen father. *See id.* Further, Section 301 imposes on a U.S. citizen parent a residency requirement of five years, at least two of which must be after age fourteen, in order to convey derivative citizenship. *See* 8 U.S.C. § 1401. These conditions evidence that Congress intended to create a law of derivative citizenship that cannot be reduced to shared DNA.

In support of their theory of *jus sanguinis*, Defendants selectively excerpt the Supreme Court’s decisions in *Miller v. Albright*, 523 U.S. 420 (1998), and *Tuan Ahn Nguyen v. INS*, 533 U.S. 53 (2001), to argue that “[t]he Supreme Court has repeatedly emphasized the importance of the government’s interest in ‘assuring that a biological . . . relationship exists’ between a child and parent through whom the child claims citizenship.” (Op. Br. at 21 (quoting *Tuan Anh*,

533 U.S. at 62.) They fail to mention that those decisions involved the application of Section 309 to children who were born to unmarried parents; nor do those decisions suggest that Section 309 (let alone Section 301) is focused on biology alone. Those decisions thus have no bearing on whether Section 301 includes a requirement of a biological connection. (*See* Op. Br. at 21.) *See Miller*, 523 U.S. at 432, 443–45.

B. The Contrast Between Sections 301 and 309 Confirms That Section 301 Does Not Require a Biological Relationship.

As this Court and the district court below concluded, a comparison of Sections 301 and 309 makes clear that Section 301 does not include a biological relationship requirement.

1. Section 309 Evinces That Section 301 Does Not Include a Biological Relationship Requirement.

The operative version of Section 309 requires that a nonmarital child establish “a blood relationship” with a U.S. citizen parent “by clear and convincing evidence,” whereas Section 301 contains no parallel language for marital children. This contrast confirms Congress’s intent not to require marital children to prove a biological tie to a U.S. citizen because, “[i]f Congress had wanted to ensure the same about a person born in wedlock, it knew how to do so.” *Scales*, 232 F.3d at 1164 (internal quotation marks omitted); *see Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotation marks omitted)); *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1186 (9th Cir. 2019).

Defendants argue that this Court should ignore this well-established principle of statutory interpretation and conclude instead that Sections 301 and 309 include the same biological relationship requirement. (Op. Br. at 23–24.) Defendants assert that such a requirement was “implicit[]” in both Sections before Congress amended Section 309 in 1986 to make “more explicit” the “blood relationship” requirement (Op. Br. at 24), while leaving unchanged the relevant language in Section 301 (Op. Br. at 23–24). Defendants’ argument here is circular. They claim, in effect, that Congress’s failure to amend the “born . . . of parents” language in Section 301 somehow demonstrates that that Section includes a blood relationship requirement. This argument depends entirely on the Court’s acceptance of the point to be proven: that the words “born . . . of parents” create a biological relationship requirement.

Compounding this logical flaw, Defendants erroneously suggest that Congress did not consider Section 301 when it amended Section 309. (*See* Op. Br. at 23–24.) But it did; and, in fact, amended Sections 301 and 309 in the same instrument. Pub. L. No. 99-653, §§ 12–13, 100 Stat. 3655 (shortening the

residency requirement in Section 301 from between five and ten years to between two and five years and requiring a “blood relationship” in Section 309). As Defendants acknowledge, the inference that Congress acted intentionally in imposing different requirements under two provisions of the same statute is strongest when Congress considered (or reconsidered) the two sections together. (See Op. Br. at 23–24.) Congress’s decision not to “alter the operative ‘born . . . of parents’ language of § 1401(g)” (Op. Br. at 23), when it concurrently amended Sections 301 and 309, strongly supports the view that Congress intended to require a “blood relationship” only where it said so, *i.e.*, in Section 309. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (The “negative implications raised by disparate provisions are strongest when the provisions were considered simultaneously when the language raising the implication was inserted.” (internal quotation marks omitted)).

Defendants’ contention that both Sections 301 and 309 contain a biological relationship requirement (Op. Br. at 24) also cannot be reconciled with a common sense interpretation of the text. Defendants do not explain why Congress would have seen a need to clarify the biological relationship requirement and specify the burden of proof for only nonmarital children under Section 309, if the same requirement applied to marital children under Section 301. Defendants’ argument is inconsistent with the “fundamental canon of statutory construction

that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Utility Air Reg. Grp.*, 573 U.S. at 320 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133); *see also Miller*, 523 U.S. at 456 (“We do not, however, read statutory provisions in isolation, as if other provisions in the same Act do not exist. . . .”). To the contrary, Congress’s effort to clarify the proof of paternity requirement only in Section 309 confirms that there is no parallel requirement in Section 301. Indeed, the absence from Section 301 of the language Congress added to Section 309 in 1986 created a conundrum for the State Department because it lacked any statutory direction as to how to apply the biological relationship requirement it reads into Section 301. Faced with this gap, the State Department unilaterally declared in the FAM that “[a]pplicants must meet different standards of proof of blood relationship depending on the circumstances of their birth,” 8 FAM § 301.4-1(D)(1)(b), and that “the general standard of a preponderance of the evidence” applies other than to children born out of wedlock to a U.S. citizen father, *id.* at § 301.4-1(D)(1)(b)(2).¹⁵

¹⁵ This anomaly is highlighted in this case, where the State Department adjudicated E.J.’s application under Section 309 (*see* SER023), but departed from the FAM directive and required that E.J. demonstrate a biological relationship to Andrew by “a preponderance of the evidence.” (SER094.)

2. Defendants’ Interpretation of the INA Ignores Differences in Statutory Language and Renders Terms of the INA Unnecessary.

Defendants’ interpretation of Section 301 as imposing a biological relationship condition would require the Court to accept that Congress used entirely different language in Section 301 (“born . . . of parents”) and Section 309 (“blood relationship”) to convey the same meaning. (*See* Op. Br. at 23–24.) This would violate the “well-established canon of statutory interpretation that the use of different words or terms within a statute,” as here, “demonstrates that Congress intended to convey a different meaning for those words, and . . . that the difference in usage is legally significant.” *Padash v. INS*, 358 F.3d 1161, 1169 n.7 (9th Cir. 2004) (internal quotation marks omitted) (quoting *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)).

Defendants’ interpretation also renders redundant the “blood relationship” requirement in Section 309. Section 301 sets forth the only standards for derivative citizenship for marital children, but nonmarital children also must fulfill Section 309’s requirements, which include “establish[ing] by clear and convincing evidence” proof of a “blood relationship.” 8 U.S.C. § 1409.

Defendants’ assertion that the words “born . . . of parents” in Section 301 also create a biological relationship requirement would make Section 309’s blood relationship requirement surplusage. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31

(2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (citation omitted)).

C. The State Department’s Policy Undermines the INA’s Object and Policy.

As this Court recognized in *Solis-Espinoza*, the INA “was intended to keep families together” and “should be construed in favor of family units and the acceptance of responsibility by family members.” 401 F.3d at 1094; *see Dvash-Banks*, 2019 WL 911799, at *8 (quoting H.R. Rep. No. 85-1199, at 7 (1957) and citing *Solis-Espinoza*, 401 F.3d at 1094); *see also Sook Young Hong v. Napolitano*, 772 F. Supp. 2d 1270, 1278–79 (D. Haw. 2011) (“[M]aintenance of family unity and . . . the liberal treatment of children represent well-known goals of the INA.”). The State Department’s policy undermines these goals, especially in the case of married same-sex parents. Aside from the deep distress it causes a family to have their sons treated differently, under the State Department’s policies, a child would not have any automatic right to remain in the United States with his parents if he could not establish a biological relationship to his U.S. citizen parent. Indeed, the State Department’s adjudication of the Twins’ applications has led to just such a result: Absent the district court’s Judgment requiring Defendants to issue a U.S. passport to E.J. (ER at 1), he would not have had permission to remain legally in

the United States with his brother, despite the nearly identical circumstances of his and A.J.'s birth, legal relationships to Andrew, and living arrangements.

Defendants dispute that their policy will have these effects because other laws “afford[] several alternative paths to citizenship” (Op. Br. at 33–35.) None of these supposed “alternative paths” would provide E.J. with the relief to which he is entitled—recognition that he, like his twin brother, acquired U.S. citizenship at birth, with all the rights and privileges that accompany that status. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (“Citizenship is a most precious right.”).

Defendants’ proposed alternative of applying for lawful permanent residence is insufficient because it would convey a status less than citizenship at birth and may be granted, after a long process, and only at the government’s discretion. Courts have recognized the meaningful differences between birthright citizenship and lawful permanent resident status. *See, e.g., Dela Torre v. City of Salinas*, 2010 WL 3743762, at *2 (N.D. Cal. Sept. 17, 2010) (“[A]s an alien increases her ties to the United States, by becoming a lawful permanent resident and then applying for citizenship, her constitutional rights increase accordingly.” (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)); *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1023 (N.D.

Cal. 2018) (Deferred Action for Childhood Arrivals program “paved no pathway to lawful permanent residency, much less citizenship”).

Defendants’ other proposed alternatives to derivative citizenship would impermissibly dictate the means by which same-sex couples procreate and form families. (Op. Br. at 33–35.) Adoption generally exists for the purpose of creating a new parent-child relationship, not duplicating one that already exists, and there can be delay and financial and cultural barriers associated with the process. Defendants’ suggestion that same-sex couples could use the genetic material of the U.S. citizen to procreate overlooks that that option may not always be possible, and even more fundamentally, that the couple, and not the government, must decide whether and how to procreate. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). These supposed alternatives do nothing to remedy the State Department’s wrongful and hurtful treatment of the children of married same-sex couples. The State Department may not excuse its undermining of the INA’s goals—keeping families together and providing for a liberal treatment of children—by contending that other statutes might eventually mitigate some of the resulting harms.

IV. THE FAM IS NOT ENTITLED TO ANY DEFERENCE UNDER *SKIDMORE*.

A. *Skidmore* Deference Is Not Warranted Here.

Defendants correctly recognize that the State Department’s interpretation of Section 301 in the FAM is not entitled to *Chevron* deference. (*See* Op. Br. at 37.) *See, e.g., Scales*, 232 F.3d at 1165–66; *Jaen*, 899 F.3d at 187 n.4. Instead, Defendants now assert (for the first time on this appeal) that they are entitled to “deference” under *Skidmore*, 323 U.S. at 140. (Op. Br. at 27–33.) This belated attempt to insulate the State Department’s policy from judicial review fares no better than Defendants’ initial effort under *Chevron*.

First, Defendants waived this argument by not raising it below. *See, e.g., Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 518 (9th Cir. 2018) (rejecting the appellants’ argument as “forfeited” because it did “not appear that this argument was presented” to the district court); *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (“We will not . . . review an issue not raised below unless necessary to prevent manifest injustice.” (internal quotation marks and citation omitted; ellipses in original)).

Second, even if not waived, the FAM’s policy lacks the persuasiveness necessary to meet *Skidmore*’s requirements. *Skidmore* entitles an agency interpretation only to the “weight” of its “power to persuade,” 323 U.S. at 140, and therefore is not truly deference at all. *See also Kisor v. Wilke*, 139 S. Ct.

2400, 2443 (2019) (Roberts, C.J., concurring) (*Skidmore* “afford[s] respectful consideration to the expert agency’s views” while “remain[ing] open to competing expert and other evidence supplied in an adversarial setting”); *id.* at 2429 (Gorsuch, J., concurring) (*Skidmore* created the “rule that an agency’s views about the law may *persuade* a court but can never *control* its judgment.”). In applying *Skidmore*, courts look to “the thoroughness evident in [an agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”¹⁶ *Sierra Club v. Trump*, 929 F.3d 670, 693 (9th Cir. 2019) (quoting *Skidmore*, 323 U.S. at 140).

¹⁶ The decisions Defendants cite in support of their request for *Skidmore* deference (Op. Br. at 28) are inapt because they involved agency interpretations that, unlike here, effectuated Congress’s purpose. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7, 15–16 (2011), for example, the Supreme Court afforded *Skidmore* deference to two federal agencies’ interpretation of the “filed any complaint” provision in the Fair Labor Standards Act. The Court explained that any alternative interpretation “would undermine the Act’s basic objectives” and would be inconsistent with analogous provisions in other federal statutes. *Id.* at 11, 15. In each of the other decisions Defendants cite, the courts similarly found that the agency’s interpretation furthered the relevant statute’s purpose. See *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 395 (2008); *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 837–39 (9th Cir. 2012). Defendants’ reliance on *Tablada v. Thomas*, 533 F.3d 800, 802, 807 (9th Cir. 2008), similarly is misplaced as that decision involved a Bureau of Prisons (“BOP”) “methodology” for calculating good time credits that did not “subvert the statutory design” and that was identical to a BOP rule that had been adopted through the APA’s notice-and-comment procedure and found entitled to *Chevron* deference.

The FAM’s conflict with the relevant statutory text and judicial construction of the INA manifests that it lacks the persuasiveness required under *Skidmore*. See *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004). Even beyond that, the FAM lacks the thoroughness and validity required by *Skidmore*. The relevant section is neither the product of formal adjudication nor notice-and-comment rulemaking, but merely an internal declaration changeable in the State Department’s discretion. See 8 FAM § 301.4; *Scales*, 232 F.3d at 1165–66.

The State Department’s policy also lacks the requisite consistency. As the district court found, the State Department changes its interpretation whenever it decides to do so, even when not “occasioned by any corresponding amendments to the law or any other congressional action.” *Dvash-Banks*, 2019 WL 911799, at *5. In an about-face in 2014, the State Department changed its policy to permit a gestational mother who had no genetic relationship to the child to transmit citizenship to the child if she is the child’s legal parent, but not otherwise.¹⁷ This is at odds with the State Department’s contention that the status of legal parenthood is “emphatically irrelevant” to the construction of Section 301. (Op. Br. at 27.)

¹⁷ More recently, the State Department considered further proposed revisions to its interpretation of Section 301, even though Congress has not changed Section 301 since 1986. *Dvash-Banks*, 2019 WL 911799, at *5.

B. The State Department’s Policy Is Not Necessary to Promote the State Department’s Interest in Identifying Fraud.

Defendants invoke the State Department’s general interest in rooting out fraud in citizenship applications to support their request for *Skidmore* deference, characterizing DNA testing as “a powerful way to address concerns about fraud.” (Op. Br. at 29.) This argument misses the point for at least two reasons. *First*, in most cases, the State Department does not seek DNA testing of a marital child and his U.S. citizen parent; as Defendants concede, it does so only in cases of “doubt.” (Op. Br. at 9.) *See* 8 FAM § 301.4-1(D)(1)(d). The State Department’s inquiry into biological relationships only in a subset of cases evinces that Defendants have alternative means to prevent fraud in citizenship adjudications. The absence of a biological relationship requirement in Section 301 does not impair the government’s ability to adjudicate citizenship applications, as demonstrated by the fact that USCIS follows *Scales* and *Solis-Espinoza* in the Ninth Circuit. (SER004.) Indeed, during discovery below, the State Department’s representative deponent disclaimed that the FAM policy had any connection to concerns about possible fraud. (SER016.)

Second, this appeal does not concern challenges to the propriety of DNA testing in cases in which the State Department suspects fraud. Plaintiffs do not seek to limit the State Department’s ability to test the accuracy of any factual representation made in a citizenship application. But no fraud is asserted or

suspected here: Andrew and Elad are validly married, are legal parents, and have not represented that E.J. was conceived with the sperm of a U.S. citizen. Instead, Andrew and Elad contend that they are validly married and one of E.J.'s legal parents is a U.S. citizen, and therefore that they were not required by Section 301 to prove such a biological connection. Because this case does not challenge the State Department's ability to investigate suspected fraud in appropriate cases, Defendants' suggestion that the State Department's policy is necessary to its efforts to prevent fraud in citizenship applications is at best overstated.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court affirm the Judgment.

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STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases that currently are pending in the Ninth Circuit.

Date: December 12, 2019

By: /s/ Theodore Edelman
Theodore Edelman

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

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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; and

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 U.S.C. § 1503(a)

§ 1503. Denial of rights and privileges as national

(a) Proceedings for declaration of United States nationality

If 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, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a

residence, and jurisdiction over such officials in such cases is conferred upon those courts.

8 U.S.C. § 1101(b)(1)
§ 1101. Definitions

(b) As used in subchapters I and II—

(1) The term “child” means an unmarried person under twenty-one years of age who is—

(A) a child born in wedlock;

(B) 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;

(C) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) 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;

(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in

such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years;

(F)(i) 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 section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen who is at least 25 years of age, at least 1 of whom personally saw and observed the child before or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same provisos as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title; or

(G)(i) a child, younger than 16 years of age at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 1151(b) of this title, who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States by a United States citizen and spouse jointly or by an unmarried United States citizen who is at least 25 years of age, *Provided*,

That—

(I) the Secretary of Homeland Security is satisfied that proper care will be furnished the child if admitted to the United States;

(II) the child's natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child's emigration and adoption;

(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;

(IV) the Secretary of Homeland Security is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated (and in carrying out both obligations under this subclause the Secretary of Homeland Security may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents); and

(V) in the case of a child who has not been adopted—

(aa) the competent authority of the foreign state has approved the child's emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents; and

(bb) the prospective adoptive parent or parents has or have complied with any pre-adoption requirements of the child's proposed residence; and

(ii) except that no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(iii) subject to the same provisos as in clauses (i) and (ii), a child who—

(I) is a natural sibling of a child described in clause (i), subparagraph (E)(i), or subparagraph (F)(i);

(II) was adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in clause (i), subparagraph (E)(i), or subparagraph (F)(i); and

(III) is otherwise described in clause (i), except that the child is younger than 18 years of age at the time a petition is filed on his or her behalf for classification as an immediate relative under section 1151(b) of this title.

8 U.S.C. § 1101(b)(2)
§ 1101. Definitions

(b) As used in subchapters I and II—

(2) The terms “parent”, “father”, or “mother” mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) and paragraph (1)(G)(i) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term “parent” does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

8 U.S.C. § 1101(c)(2)
§ 1101. Definitions

(c) As used in subchapter III—

(2) The terms “parent”, “father”, and “mother” include in the case of a posthumous child a deceased parent, father, and mother.

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 § 304.3-2(a)— Birth Abroad to a Surrogate of a Child Who is the Genetic Issue of a US Citizen Mother and/or US 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.

8 FAM § 301.4-1(D)—A Biological Relationship, or Blood Relationship, Is Required for a U.S. Citizen Parent of a Child Born Abroad to Transmit U.S. Citizenship to the Child

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.

b. Applicants must meet different standards of proof of blood relationship depending on the circumstances of their birth:

(1) Section 309(a) INA (8 U.S.C. 1409(a)), as amended on November 14, 1986, specifies that the blood relationship of a child born out of wedlock to a U.S. citizen father must be established by clear and convincing evidence. This standard generally means that the evidence must produce a firm belief in the truth of the facts asserted that is beyond a preponderance but does not reach the certainty required for proof beyond a reasonable doubt. There are no specific items of evidence that must be presented. DNA tests are not required, but may be submitted and can help resolve cases in which other available evidence is insufficient to establish the relationship. For the procedures for establishing legal relationship to or legitimation by a citizen father once blood relationship has been proven, see 8 FAM 301.4-3(D). (8 FAM 304.2 provides guidance regarding DNA tests.); and

(2) The Immigration and Nationality Act (INA) does not specify a standard of proof for persons claiming transmission of U.S. citizenship based upon birth (a) in wedlock to a U.S. citizen parent or (b) out of wedlock to a U.S. citizen mother. The Department's regulations also do not explicitly establish a standard of proof in these two circumstances. Where no other standard of proof is explicitly required by law, the Department applies the general standard of a preponderance of the evidence. This standard means that the evidence of the biological relationship is of greater weight than the evidence to the contrary. In such a case, the evidence is credible and best accords with reason and probability. Meeting the standard does not depend on the quantity of evidence presented.

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.