

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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ALLISON DAWN BLIXT and LUCAS ALEXANDER )  
 ZACCARI-BLIXT, )  
 )  
 Plaintiffs; )  
 )  
 v. )  
 )  
 THE UNITED STATES DEPARTMENT OF STATE )  
 et al., )  
 )  
 Defendants. )

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**Civ. Action No. 18-124 (EGS)**

**Defendants' Reply in Further Support of Motion to Dismiss**

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## INTRODUCTION

As Defendants demonstrated in their moving brief, Plaintiffs' Complaint fails to state a claim upon which relief can be granted. First, the Complaint, which challenges the Department of State's ("the Department") denials a Consular Report of Birth Abroad ("CRBA") and a U.S. Passport for plaintiff Lucas Zaccari-Blixt, a foreign-born child, lacks any allegations of intentional discrimination for the purposes of Plaintiffs' equal protection claim. Moreover, Plaintiffs fail to identify a fundamental right that has been infringed upon or establish that Defendants' actions fail rational basis review for the purposes of their due process claim.

In their opposition briefing, Plaintiffs attempt to circumvent the deficiencies in their Complaint by introducing arguments that are untethered to the factual allegations in their Complaint. *See* Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss the Compl. ("Pls.' Opp.") 3, ECF No. 32. Specifically, they now argue that (1) the Department's interpretation of 8 U.S.C. § 1401(g) (also known as section 301(g) of the Immigration and Nationality Act ("INA")) to include a biological relationship requirement between the CRBA applicant and a U.S. citizen parent is unlawful and (2) the Department's policy of investigating further if it doubts whether a CRBA applicant has a biological relationship to a U.S. citizen parent amounts to disparate treatment and infringes upon their fundamental rights. These new arguments, however, cannot support Plaintiffs' constitutional arguments even if they were related to the alleged facts in this case, because they do not establish the elements of an equal protection or due process claim.

Second, Plaintiffs' claim under the Administrative Procedure Act ("APA") should be dismissed because 8 U.S.C. § 1503 provides an "adequate remedy at law." 5 U.S.C. § 704. But even if APA review was available, Plaintiffs fail to state a claim that Defendants' interpretation of the INA was unlawful. Rather, Plaintiffs ask the Court to ignore the foundational principle of "jus sanguinis" ("right of blood") that has long been recognized as underlying the conditional statutory grant of citizenship at birth to children born abroad to U.S. citizen parent or parents

(who also must meet any other statutory requirements).<sup>1</sup> Plaintiffs argue that the Court should read 8 U.S.C. § 1401 (section 301 of the INA) as unambiguously indicating Congressional intent that a child need not be biologically related to a parent in order to be “born of” that parent. Additionally, Plaintiffs urge the Court to treat a long-recognized, rebuttable *presumption*—that a child born to married parents is the “issue” of that marriage—as *conclusive*. Plaintiffs seek to preclude the government from further inquiring into the relationship between a U.S. citizen spouse and a child born by the other alien spouse. Defendants’ long-held, consistent, and reasonable interpretation of the INA deserves deference, and Plaintiffs therefore fail to state a plausible claim of wrongdoing.

### ARGUMENT

As a threshold issue, Plaintiffs fail to identify a proper cause of action for any of their claims. They bring this lawsuit under the APA and the Declaratory Judgment Act (“DJA”)—neither of which authorize their claims—instead of the proper statute under which the Court can determine citizenship: 8 U.S.C. § 1503. Contrary to Plaintiffs’ arguments, the DJA does not provide Plaintiff with a cause of action where one does not otherwise exist.<sup>2</sup> Further, the APA is

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<sup>1</sup> See, e.g., *Tuaua v. United States*, 788 F.3d 300, 308 n.8 (D.C. Cir. 2015) (“‘In the United States, nationality may be predicated either on *jus soli* . . . or on *jus sanguinis*. . . .’ (the latter is conferred statutorily).”) (emphasis added) (quoting *Acheson v. Maenza*, 202 F.2d 453, 459 (D.C. Cir. 1953)).

<sup>2</sup> Plaintiffs acknowledge that the DJA is not an independent source of jurisdiction, but reason that the statute must be read to provide an independent cause of action. Pls.’ Opp. at 32. This conclusion does not follow. Instead, the DJA neither independently vests courts with jurisdiction nor “provide[s] a cause of action.” *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); see also *Metz v. BAE Sys. Tech. Solutions & Servs. Inc.*, 774 F.3d 18, 25 n.8 (D.C. Cir. 2014). Thus—as Defendants explained in their opening brief and as Plaintiffs fail to dispute—the Act’s “‘operation . . . is procedural only.’” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 138 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). Plaintiffs must identify some other source of law, then, that accords them the right to bring these claims in a federal court. They have not done so in their Complaint.

unavailable when, as here, Congress has provided an adequate remedy at law under another statute.

Alternatively, even if Plaintiffs have properly identified a cause of action, they fail to state a claim upon which relief may be granted. The allegations in their Complaint are insufficient to plausibly support their claims that Defendants' interpretation of the INA amounts to an equal protection, substantive due process, or APA violation. Further, Plaintiffs lack standing to seek relief on the basis of their claim that Defendants incorrectly adjudicated plaintiff Lucas Zaccari-Blixt's CRBA and U.S. passport applications under section 1409 instead of section 1401. Because plaintiff and U.S. citizen Allison Blixt lacks a biological connection to Lucas, both applications would have been denied under section 1401, as well.

**1. Plaintiffs fail to state an Equal Protection claim.**

In arguing that the Complaint states an Equal Protection claim, Plaintiffs' opposition brief devotes a single paragraph to the "disparate treatment" prong of such a claim.<sup>3</sup> Pls.' Opp. 39–40. Plaintiffs' argument, like the Complaint itself, "rests on 'naked assertions,'" and "'inferences ... unsupported by the facts set out in the complaint.'" *See* Mem. in Supp of Defs.' Mot. to Dismiss ("Defs.' Br") 12, ECF No. 31-1 (citations omitted); *see also id.* 12–16. Plaintiffs point to the Complaint's assertion that although opposite-sex married couples "*may* use assisted reproductive technology to conceive a child," Compl. ¶ 71 (emphasis in original), the "only way" same-sex couples can "procreate" is to "use assisted reproductive technology."<sup>4</sup> Pls.' Opp. 40 (quoting Compl. ¶ 71). Plaintiffs urge the Court to draw from this allegation an inference that the

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<sup>3</sup> To advance an Equal Protection claim, a plaintiff must assert facts that support the allegation that the government (a) subjected her to disparate treatment, (b) by virtue of purposeful or intentional discrimination. *See* Defs.' Br. 12.

<sup>4</sup> This fairly broad "allegation" seems itself to rest on assumptions and inferences. Although the Court must at this stage "accept as true" Plaintiffs' factual allegations, it need not accept inferences unsupported by facts alleged in the Complaint. *See* Defs.' Br. 8.

Department of State’s interpretation of the INA<sup>5</sup> “overwhelmingly and disproportionately harms children born of same-sex marriages.” Pls.’ Opp. 40. Far from demonstrating that Plaintiffs’ Complaint identifies a “similarly situated” individual or group that has been treated differently, Plaintiffs concede that the Department applies its interpretation of the INA to both opposite-sex couples and same-sex couples.<sup>6</sup> *Id.* 39–40; *see also* Compl. ¶ 71.

Plaintiffs fare no better on their argument that the Complaint sufficiently alleges that the Department’s denial of Lucas’s CRBA application under section 1409 “was motivated by a discriminatory purpose.” Pls.’ Opp. 40. Plaintiffs emphasize that “under the State Department’s interpretation of the INA, a child born of same-sex couples could *never* be considered born ‘in wedlock.’” Pls.’ Opp. 40 (emphasis added). But this is untrue, as Defendants explained in their moving brief. The Department’s Foreign Affairs Manual (“FAM”) explicitly recognizes that children born abroad to a married, same-sex female couple may be “born in wedlock” for the purposes of section 1401. *See* Defs.’ Br. 12–13. That is because the FAM recognizes a biological relationship between a child and his or her genetic parents and his or her legal, gestational mother. *See* 8 FAM 301.4-1(D)(1)(c); 8 FAM 304.3-1(b).

Finally, Plaintiffs argue that the Complaint alleges that “animus towards same-sex spouses was a ‘motivating factor.’” Pls.’ Opp. 41 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977)). But the Complaint does no such thing. Contrary to Plaintiffs’ contention, the Complaint contains no allegations of “a long history of . . . sexual-orientation-based discrimination in the immigration context” from which to conclude that

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<sup>5</sup> The Department requires a person born abroad who claims acquisition of U.S. citizenship at birth to establish both a legal relationship and a biological connection to a U.S. citizen parent or parents. *See* Defs.’ Mem. 14.

<sup>6</sup> At most, Plaintiffs appear to argue that the Department’s interpretation causes “disparate impact.” But disparate impact theories cannot support an Equal Protection claim, at least not without allegations of disparate treatment. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (“[W]ithout proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.”); *see also Rothe Dev., Inc. v. U.S. Dep’t of Def.*, 836 F.3d 57, 72 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 354 (2017).

Defendants harbor an animus towards same-sex couples. Pls.’ Opp. 41. Nor do Plaintiffs allege that Defendants have applied their interpretation of 1401 or 1409 so inconsistently as “to infer discriminatory purpose from its application in this case.” *Vill. of Arlington*, 429 U.S. at 270. Even assuming that Plaintiffs have sufficiently alleged that Defendants’ interpretation of the relevant statutes has resulted in a disparate impact on the children of same-sex couples, “a discriminatory ‘ultimate effect’ is without independent constitutional significance.” *Id.*

Plaintiffs attempt to amend their complaint to challenge the Department’s policy directing consular officials to investigate “[i]f doubt arises that the U.S. citizen ‘parent’ is biologically related to the child.” 8 FAM 301.4-1(D)(1)(d), and claims that this policy amounts to disparate treatment. *See* Pls.’ Opp. 39–40. This attempt is, of course, improper, because the Complaint contains no such allegations. “‘It is axiomatic’ . . . ‘that a party may not amend his complaint through an opposition brief.’” *Sai v. Transp. Sec. Admin.*, 326 F.R.D. 31, 33 (D.D.C. 2018) (quoting *Singh v. Dist. of Columbia*, 55 F. Supp. 3d 55, 70 (D.D.C. 2014)). In any event, this new allegation is insufficient to support an equal protection challenge because Plaintiffs do not argue that Defendants have applied this policy inconsistently such that the Court may “infer discriminatory purpose from its application in this case.” *Vill. of Arlington*, 429 U.S. at 270.

## **2. Plaintiffs fail to state a claim of a substantive due process violation.**

Plaintiffs’ substantive due process challenge also fails to state a claim upon which relief may be granted. That is because Plaintiffs fail to (1) properly describe the liberty or property interest at stake or properly identify any fundamental interest, and (2) establish that Defendants’ interpretation would fail any standard of review in light of what the Supreme Court recognizes as the Governments’ important interests in establishing a biological relationship between a child born abroad and his or her U.S. citizen parent for purposes of determining acquisition of U.S. citizenship.

Plaintiffs argue that their Complaint alleges a violation of a fundamental right to “the legal recognition that same-sex spouses may both be the parents of a child born during their marriage, even if only one spouse is the child’s biological parent.” Pls.’ Opp. 34.

Assuming the Complaint pleads a violation of such a right,<sup>7</sup> Plaintiffs fail to offer the “careful description” of their purported right that the Supreme Court requires. *See Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003). Instead the asserted right—an individual’s right to successfully apply for a CRBA or a U.S. passport on behalf of a child who is born abroad and is not the individual’s biological child—properly describes the purported right at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *See Hutchins v. Dist. of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999). In a footnote, Plaintiffs summarily dismiss Defendants’ more careful description but fail to explain why it is incorrect. *See Pls.’ Opp. 34 n.16*. At least in the context of naturalization policy, the Supreme Court “has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent.” *Rogers v. Bellei*, 401 U.S. 815, 830 (1971); *see also United States v. Wong Kim Ark*, 169 U.S. 649, 665 (1898) (“The right of citizenship never descends in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute.”). Because no right exists with respect to derivative citizenship, its attendant conditions cannot be deemed to impair a fundamental right— much less substantially so. To deem otherwise would create a constitutional right where there is none.

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<sup>7</sup> Indeed, “[a] fair reading of petitioner’s complaint does not charge” Defendants with infringing upon the broad right that Plaintiffs assert in their opposition briefing. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Rather, Plaintiffs actually complain that Defendants do not recognize Lucas as a U.S citizen child born abroad “because of the lack of a genetic or gestational relationship between him and Allison,” Compl. ¶ 56; they do not, and cannot, claim that Defendants fail to recognize that Allison is Lucas’s legal parent.

Even accepting, *arguendo*, that Plaintiffs’ description of the right at issue is correct, the Court should nonetheless reject Plaintiffs’ due process claim for at least two reasons. First, the Department of State’s policies identify a circumstance in which same-sex spouses may both be considered the parents of a child born during their marriage and the Department would apply 8 U.S.C. § 1401.<sup>8</sup> *See* 8 FAM 304.3-1(b) (explicitly noting that where both women are U.S. citizens and married to each other, and one is the gestational and legal mother and the other is the genetic mother of a child, the Department of State adjudicates the child’s citizenship claim under INA § 301(c)). The issue in this case arises under 8 U.S.C. § 1409 not because a same-sex marriage is at issue, but because Lucas was born to biological parents who are not married to each other.<sup>9</sup>

Second, Plaintiffs fail to establish that the right identified by their opposition brief “is deeply rooted in this Nation’s history, tradition, and practices.” *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703 (D.C. Cir. 2007). Rather, since at least 1790 a child born abroad must be biologically related to a U.S. citizen parent in order to acquire U.S. citizenship at birth, *see* 8 FAM 301.4-1(B), and that requirement has been affirmed multiple times by the Supreme Court. *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001); *Miller v. Albright*, 523 U.S. 420, 436 (1998) (opinion of Stevens, J.).

Plaintiffs contend that “given that same-sex spouses can have children only with the use of assisted reproduction, they will always be subject to the biological relationship inquiry that the State Department otherwise applies only in cases of ‘doubt.’” Pls.’ Opp. 36. But this is an entirely different, procedural challenge than the substantive claim they bring in their Complaint;

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<sup>8</sup> Indeed, Plaintiffs acknowledge that Defendants’ interpretation of 8 U.S.C. §§ 1401 and 1409 “may in theory apply to marriages between spouses of opposite sexes,” *id.* ¶ 71, undermining their contention that the denials of the CRBA and passport applications were based on sexual orientation.

<sup>9</sup> Moreover, as the FAM makes clear, whether Lucas was considered born “in wedlock” is ultimately immaterial for the purposes of determining whether Lucas has acquired U.S. citizenship at birth despite being born abroad. Lucas could have acquired citizenship at birth as his brother Massi did, *see* Compl. ¶ 5, had Lucas possessed a biological connection to Allison.

the Complaint challenges Defendants' purported policy excluding U.S. citizens in same-sex marriages from conferring U.S. citizenship under section 1401 to their children born abroad, not the procedures by which Defendants ascertain a biological relationship between the U.S. citizen parent(s) and the child born abroad. *See* Compl. ¶ 77. Plaintiffs may not amend their complaint through briefing. *Sai*, 326 F.R.D. at 33. In any event, Plaintiffs fail to establish how Defendants' policy of investigating whenever a "doubt arises that the U.S. citizen 'parent' is biologically related to the child," 8 FAM 301.4-1(D)(1)(d), violates a fundamental right protected by substantive due process or creates a risk of erroneous deprivation of Plaintiffs' private interests. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiffs' claim is also in tension with what the Supreme Court has recognized as the important governmental interest in ensuring a biological relationship between a U.S. citizen parent and a child born abroad who may have a statutory claim to U.S. citizenship at birth. *See Tuan*, 533 U.S. at 62; *Miller*, 523 U.S. at 436 (opinion of Stevens, J.). Plaintiffs claim that this interest is negated when the U.S. citizen legal parent is married to one of the biological parents because as long as one legal parent is also a biological parent of the child, it does not matter whether the U.S. citizen legal parent is a biological parent of the child. But as explained *supra*, the opposite is true. Moreover, Plaintiffs fail to take into account the various conditions Congress has placed on the acquisition of citizenship regardless of the U.S. citizen's marital status, particularly where families are of dual nationality, like the Blixt family. The Supreme Court has recognized on several occasions that "Congress has an appropriate concern with problems attendant on dual nationality." *Bellei*, 401 U.S. at 831; see *Kawakita v. United States*, 343 U.S. 717, 733 (1952) ("One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting.").

**3. Plaintiffs fail to state a claim under the Administrative Procedure Act.**

**A. Plaintiffs are not entitled to seek judicial review under the Administrative Procedure Act of Defendants' decisions because 8 U.S.C. § 1503 provides an adequate remedy at law.**

The APA only permits judicial review of final agency actions if there is no other adequate remedy in a court. 5 U.S.C. § 704. Plaintiffs' APA claim must be dismissed because there is an "adequate remedy" which precludes APA review. A separate statute, 8 U.S.C. § 1503, provides the mechanism by which Lucas can assert his claim that he is a U.S. national, and Plaintiffs should avail themselves of that statute instead of seeking review under the APA. Plaintiffs' arguments to the contrary should be rejected.

First, Plaintiffs argue that their requested relief is broader than the relief available under section 1503. Pls.' Opp. 27. But as Defendants explained in their moving brief, under D.C. Circuit law, "the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (quoting *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1272 (D.C. Cir. 2005)). Plaintiffs cite to non-circuit cases for support on this point, but neither case examines the adequacy of section 1503's remedies for the purposes of the APA. Rather, those cases merely note that under section 1503, a district court does not have jurisdiction to consider requests for relief and claims that are quite different from those brought by Plaintiffs: namely, to compel the State Department to return a CRBA, *Hizam v. Kerry*, 747 F.3d 102, 108 (2d Cir. 2014), and adjudicate the legality of regulations governing passport post-revocation procedures, *Acosta v. United States*, No. C14-420 RSM, 2014 WL 2216105, at \*4 (W.D. Wash. May 29, 2014). Plaintiffs fail to establish that a "yawning gap" exists between the relief available under section 1503 and the other relief that Plaintiffs seek. *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1246 (D.C. Cir. 2017). As Defendants explained in their moving brief, Plaintiffs' requested relief overlaps with the relief available under section 1503 insofar as Plaintiffs seek a declaration of U.S. nationality,

and the other relief they seek is unavailable under the APA. *See* Defs.’ Br. 24–25. Plaintiffs offer no effective response on this point.

Second, Plaintiffs argue that section 1503 is not an “exclusive” remedy. Pls.’ Opp. 28–29. In so arguing, Plaintiffs conflate two separate tests: one that establishes whether the APA’s waiver of sovereign immunity applies, in which courts determine whether another statute provides the exclusive remedy, *see Sagar v. Lew*, 211 F. Supp. 3d 262, 268 (D.D.C. 2016); and one that examines whether the APA provides a cause of action under the circumstances, which merely looks at whether the alternative remedy at issue is adequate. *See Garcia*, 563 F.3d at 522. Defendants do not argue that the APA’s waiver of sovereign immunity is inapplicable to Plaintiffs’ claim. Rather, Defendants contend that because section 1503 provides an adequate alternative remedy for Plaintiffs’ challenge to the Department’s denial of Lucas’s CRBA and U.S. passport applications, Plaintiffs fail to state a claim under the APA. *See* Defs.’ Br. 20–25. Plaintiff heavily relies on *Chacoty v. Tillerson*, but as Defendants explained in their moving brief, while that case concluded that section 1503 did not forbid relief under the APA so as to preclude the APA’s waiver of sovereign immunity, it specifically did not decide whether section 1503 furnished an adequate remedy at law so as to merit dismissal for failure to state a claim because the defendants had not raised that argument. 285 F. Supp. 3d 239 at 304.

Third, Plaintiffs contend that because no court in this circuit has determined whether section 1503 provides an adequate remedy at law “under the circumstances of this case,” the Court should not conclude that an adequate remedy exists here. *See* Pls.’ Br. 29. As an initial matter, Plaintiffs do not dispute that courts in this circuit have routinely found that section 1503 generally provides an adequate remedy at law so as to preclude APA relief. *See Alsaïdi v. U.S. Dep’t of State*, 292 F. Supp. 3d 320, 326 (D.D.C. 2018). And the courts around the country that have examined this issue in depth have concluded that section 1503 does provide an adequate remedy even when a claimant seeks prospective, injunctive relief, *see Gutierrez v. Tillerson*, 1:17-CV-111, 2017 WL 6044108, at \*7 (S.D. Tex. Nov. 15, 2017), *report and recommendation adopted*, 1:17-CV-111, 2017 WL 6054941 (S.D. Tex. Dec. 6, 2017), and when they are outside

the country, *see Hinojosa v. Horn*, 896 F. 3d 305, (5th Cir. 2018). Thus, the Court would not be creating new law by adopting the reasoning of other courts and by giving full effect to Congress’s specific procedures for adjudicating claims of U.S. nationality.

Plaintiffs summarily dismiss the Fifth Circuit’s decision in *Hinojosa* in a footnote, but it cannot escape the persuasiveness of that decision so easily. As Defendants explained in their moving brief, the *Hinojosa* court comprehensively analyzed the paths to judicial review under section 1503 and rejected the argument that section 1503(b) and (c) offer a “treacherous” path to relief. *See* Defs.’ Br. 22–24; *see also Hinojosa*, 896 F.3d at 312–13. Plaintiffs argue that sections 1503(b) and (c) “set out a highly burdensome procedural framework,” Pls.’ Opp. 30–31, but as *Hinojosa* explains, 1503(b) and (c)’s procedures allow for direct judicial review if the State Department or the Department of Homeland Security deny relief at any step of the way and its procedures therefore “express[] a clear congressional intent to provide a specific procedure to review the Plaintiffs’ claims.” *Hinojosa*, 896 F.3d at 312.<sup>10</sup> The other purported obstacles to review that Plaintiffs identify are speculative and would not deprive Lucas of direct judicial review, in any event. A remedy may be adequate even if it is “imperfect.” *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990).

Plaintiffs also cite to *Rusk v. Cort*, 369 U.S. 367 (1962), *abrogated in part by Califano v. Sanders*, 430 U.S. 99 (1977), for the proposition that the APA confers subject-matter jurisdiction and that section 1503 is not an exclusive remedy. *See* Pls.’ Opp. 28. But as the Fifth Circuit notes in *Hinojosa*, the holdings in *Rusk* have been called into doubt by *Califano v. Sanders*, which clarified that contrary to *Rusk*, the APA is not a jurisdiction-conferring statute, 430 U.S. at 105,

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<sup>10</sup> Plaintiffs claim that it is uncertain whether Lucas would receive a certificate of identity under section 1503(b)’s procedures, but section 1503(b) merely requires an applicant who has ever previously been physically present in the United States—as Lucas has, Pls.’ Opp. at 30—to establish “to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis.” 8 U.S.C. § 1503(b). Further, if an individual were denied a certificate of identity, as the *Hinojosa* court explains, such individual could then seek judicial review under the APA for that denial. *Hinojosa*, 896 F.3d at 312.

and the Supreme Court’s substantial development of the APA’s adequacy requirement since *Rusk* was decided. *Hinojosa*, 896 F.3d at 313. Further, *Rusk* turned on the specific circumstances of the claimant in that case, who had been criminally indicted for draft evasion. “[T]he Court concluded that Congress could not have ‘intended that a native of this country living abroad must travel thousands of miles, *be arrested, and go to jail* in order to attack an administrative finding that he is not a citizen of the United States.’” *Hinojosa*, 896 F.3d at 313 (quoting *Rusk*, 369 U.S. at 375). Here, as Defendants noted in their moving brief, there are no circumstances alleged in Plaintiffs’ Complaint that suggest that Plaintiffs would face any particular hardships in gaining entry into the United States under sections 1503(b) and (c)’s procedures.<sup>11</sup> Plaintiffs’ lack of desire to travel to the United States does not render section 1503 a legally inadequate means to seek a judicial ruling about whether Lucas is a U.S. national. Because 8 U.S.C. § 1503 provides an adequate remedy at law, Plaintiffs’ APA claim should be dismissed.

**B. Department of State policy—as articulated in the Foreign Affairs Manual and applied in the underlying adjudication here—reasonably interprets the Immigration and Nationality Act.**

For more than a century, the Department of State has understood the term “born of parents,” as used in 8 U.S.C. § 1401 and its predecessors, to incorporate the notion of a biological relationship between a child born abroad and the child’s parents. Likewise, the Department has consistently interpreted 8 U.S.C. § 1409 as applying to children born abroad out of wedlock, *i.e.*, whose biological parents were not married to each other. As the Department’s FAM makes clear, persons in legally valid and recognized marriages may still have a child considered “born out of wedlock” under § 1409 for purposes of adjudicating a citizenship claim. *See, e.g.*, 8 FAM 304.3-2. This is true for both same-sex marriages and opposite-sex marriages,

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<sup>11</sup> That Plaintiffs are not currently standing at the U.S. border, as the plaintiffs were in *Hinojosa*, is of no consequence. 896 F.3d at 313. Under section 1503(b), Lucas is free to apply for a certificate of identity from a nearby consulate and follow the rest of section 1503(b) and (c)’s procedures, and Plaintiffs present no allegations in their Complaint that suggest special hardships in, or compelling reasons to avoid, entering the United States. *See De La Garza Gutierrez v. Pompeo*, — Fed. App’x. —, 17-40305, 2018 WL 3454835, at \*4 (5th Cir. July 17, 2018).

as Plaintiffs concede. *See* Compl. ¶ 71. Nonetheless, Plaintiffs fault Defendants for applying the Department’s longstanding and consistent interpretation of the INA to the underlying adjudication here.

Plaintiffs argue that 8 U.S.C. § 1401 “does not require a biological relationship between the petitioner and his or her U.S. citizen parent, and instead codifies the common law presumption of legitimacy.” Pls.’ Op. 2; *see also id.* 18–19 (discussing presumption). Plaintiffs assert that such a “presumption” existed at common law, that this “presumption” was incorporated into 8 U.S.C. § 1401, and they urge the Court to find the presumption conclusive, instead of rebuttable. While there is a strong presumption that a child born during wedlock is legitimate, this presumption is not conclusive. *Smith v. Robbins*, 91 Mich. App. 284, 287 (1979) (“A child born during marriage is accorded a strong but not irrebuttable presumption of legitimacy.” (citing *People v. Case*, 171 Mich. 282, 284, 137 N.W. 55 (Mich. 1912))); *State v. Coliton*, 73 N.D. 582, 591–92 (1945) (“[A] child, born to a married woman, but not begotten by her husband, is a child ‘born out of wedlock,’ within the purview of our Uniform Illegitimacy Act.”); *see also Jones v. State*, 11 Ga. App. 760 (1912).

The Supreme Court has recognized that that the presumption of citizenship for a child born to married parents can be overcome where evidence shows a lack of a biological relationship between the child and the U.S. citizen parent. In *United States ex rel. Lee Kum Hoy v. Shaughnessy*, three foreign-born children of a U.S. citizen and his Chinese citizen wife claimed U.S. citizenship at birth based on the citizenship of their father. 355 U.S. 169, 169–70 (1957).<sup>12</sup> They challenged the Immigration and Nationality Service’s use of blood testing to

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<sup>12</sup> For factual and procedural background, *see United States ex rel. Lee Kum Hoy v. Shaughnessy*, 115 F. Supp. 302, 310 (S.D.N.Y. 1953) (granting writ of habeas corpus conditional on further hearing); 123 F. Supp. 674, 678 (S.D.N.Y. 1954) (granting writ conditional on further hearing); 16 F.R.D. 558, 559 (S.D.N.Y. 1954) (denying motion for discovery); 133 F. Supp. 850, 854 (S.D.N.Y. 1955) (granting writ), *rev’d*, 237 F.2d 307, 307 (2d Cir. 1956), *cert. granted*, 352 U.S. 966, *vacated sub nom. United States ex rel. Lee Kum Hoy v. Murff*, 355 U.S. 169, 170 (1957) (per curiam); *see also* Gabriel J. Chin, Cindy Hwang Chiang & Shirley S. Park, *The Lost Brown v. Board of Education of Immigration Law*, 91 N.C.L. Rev. 1657, 1672–82 (2013).

assess whether a biological relationship existed between them and their father. The Supreme Court ruled that “accurate” blood testing would be “relevant evidence,” and remanded the case for further testing. *United States ex rel. Lee Kum Hoy v. Murff*, 355 U.S. 169, 169–70 (1957). Similarly, in considering the asserted “derivative citizenship” of the petitioners in *Wong Kay Suey*, the D.C. Circuit viewed “the evidence of the result of blood tests... and of the [biological] relationships of the parties” as “important[.]” *Wong Kay Suey v. Rogers*, 266 F.2d 931, 931 (D.C. Cir. 1959).

Plaintiffs principally rely on three recent cases from the Ninth Circuit and Second Circuit Courts of Appeals, which hold, *inter alia*, that section 1401 does not include a biological requirement for U.S. citizenship present in section 1409: *Scales*,<sup>13</sup> *Solis-Espinoza*,<sup>14</sup> and *Jaen*.<sup>15</sup> See Pls.’ Op. 19–21. The United States disagrees with the analysis and reasoning of those cases, which do not bind the Court here.

The Department has consistently, for more than a century, interpreted the relevant provisions of the INA and predecessor statutes as including a requirement that a child born abroad must be biologically related to a U.S. citizen in order to acquire citizenship at birth under 8 U.S.C. §§ 1401 and 1409. See 8 FAM 301.4-1(B). Indeed, the Supreme Court, in examining Section 1409, has observed that: “There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective.” *Miller*, 523 U.S. at 436 (opinion of Stevens, J.); see also *Tuan*, 533 U.S. at 62; *Bellei*, 401 U.S. at 834 (referring to the “heritable blood of citizenship”). The Department’s interpretation of 8 U.S.C. §§ 1401 and 1409 is reasonable in light of the Supreme Court’s recognition that “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.” *Smith v. Org.*

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<sup>13</sup> *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000).

<sup>14</sup> *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005).

<sup>15</sup> *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018).

of *Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977). The Department’s reasonable interpretation is entitled to some deference here. See *Ctr. for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85, 90–91 (D.D.C. 2011) (EGS) (“An agency’s interpretation ‘may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires [.]’”) (quoting *United States v. Mead*, 533 U.S. 218, 234 (2001)).

*Scales, Solis-Espinoza, and Jaen* err by assuming that the definition of “parent” had an independent, single meaning at common law (and today). See *Scales*, 232 F.3d at 1164–66; *Solis-Espinoza*, 401 F.3d at 1092–94; *Jaen*, 899 F.3d at 187–90. The INA’s differing definitions of the term “parent” for Titles II and III belie such reasoning. See 8 U.S.C. § 1101(b)(1)-(2) (applicable only to Titles I and II); *id.* 8 U.S.C. § 1101(c)(2) (applicable only to Title III).<sup>16</sup> Additionally, the law as it existed at the time of section 1409’s passage, and Supreme Court law since, confirm that the of the term “parent” does not have one, single meaning for all purposes. In the context of citizenship and naturalization, the marital state of the U.S. citizen legal parent does not act as a substitute for the lack of a biological connection between legal parent and child. For example, Congress excluded “stepchild” from its definition of child for the purposes of citizenship and naturalization, see *Acevedo v. Lynch*, 798 F.3d 1167, 1171 (9th Cir. 2015); see also 8 U.S.C. 1101(c). Further, children born abroad and then adopted by U.S. citizen legal parents may only acquire U.S. citizenship through derivation or naturalization at some point after birth, see 8 U.S.C. §§ 1431(b), 1433—not at birth—even if they were adopted as infants. See *Colaianni v.*

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<sup>16</sup> Plaintiffs’ opposition cites 8 U.S.C. § 1101(b)(1)–(2), the statutory definitions of “parent” and “child” expressly limited to Titles I and II of the INA, and not applicable to 8 U.S.C. §§ 1401 and 1409 (or to any section of Title III of the INA). Pls.’ Opp. 18 n.9, 23 n.13. Plaintiffs argue that these definitions “reflect that Congress intended a liberal treatment of the term “parent” in the INA. Yet § 1101(b)’s expansive definition of the term “parent” is expressly limited to Title I and II of the INA, whereas Congress adopted a different and, in some ways, more restricted definition of “parent” with respect to Title III, see *Acevedo*, 798 F.3d at 1171, which includes the provisions at issue here, 8 U.S.C. §§ 1401 and 1409.

*I.N.S.*, 490 F.3d 185, 187 (2d Cir. 2007); *Marquez-Marquez v. Gonzales*, 455 F.3d 548, 556–57 (5th Cir. 2006) (per curiam); see also *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 552 (2012). *Jaen* also errs by relying on the “common law presumption of legitimacy... when a child is born into a marital union,” 899 F.3d at 188, without recognizing—let alone analyzing—the rebuttable aspect of that presumption. *Id.*; see also, e.g., *Jones*, 11 Ga. App. at 760 (1912); *Smith*, 91 Mich. App. at 287; *State*, 73 N.D. at 591–92.

Defendants also submit that the statutory analysis in *Scales* and *Jaen* is not complete.<sup>17</sup> For example, those cases focus on the meaning of the term “parent” but not on the whole phrase “born of parents” in 8 U.S.C. § 1401 (emphasis added). Effectively, those decisions read that statutory language to mean means the same as “born to parents.” See *Scales*, 232 F.3d at 1166; *Solis-Espinoza*, 401 F.3d at 1092–93; *Jaen*, 899 F.3d at 187, 189–90. Thus, they conclude that being “born to” a couple during the course of marriage satisfies section 1401’s requirement that the child be “born... of parents...” 232 F.3d at 1166; *Solis-Espinoza*, 401 F.3d at 1092–93; *Jaen*, 899 F.3d at 189–90. That does not necessarily follow, however. See, e.g., *Astrue*, 566 U.S. at 552 (“[M]arriage does not ever and always make the parentage of a child certain.”).

Thus, at the time the INA and predecessor statutes were enacted, the term “born of parents” was understood as referring to the reproductive offspring that came from those parents. See, e.g., Note, *Citizenship by Birth*, 41 Harv. L. Rev. 643, 645–46 (1928). Also, the transitive verb “born” means “To cause to be born, to deliver (a child), to bring into existence.” Oxford English Dictionary (1989), available at <http://www.oed.com/view/Entry/21673> (last visited Nov. 7, 2018). And the word “of” “[i]ndicat[es] the thing, place, or direction from which something goes, comes, or is driven or moved: from, away from, out of.” *Id.* (3d Ed. 2004), available at <http://www.oed.com/view/Entry/130549> (last visited Nov. 7, 2018). Historically, use of the word “of” in a figurative sense “[i]ndicat[ed] a situation, condition, or state out of or away from which

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<sup>17</sup> The Ninth Circuit’s opinion in *Solis-Espinoza* largely relied on its prior decision in *Scales*, so flaws in *Scales*’ reasoning would also affect the persuasiveness of *Solis-Espinoza*.

something moves, or is figured as moving: from, out of.” *Id.* Thus, the term “*born of parents*” is susceptible to an interpretation that means the biological offspring of parents.

In sum, 8 U.S.C. § 1401 is susceptible to a reasonable interpretation, consistent with the FAM, that admits of the need for a biological connection to establish the citizenship of a person born overseas to an alien parent, as is required by Section 1409. Therefore, the Department’s action is consistent with statutory law in any event, and does not violate the APA.

**C. Defendants can move to dismiss Plaintiffs’ APA claim without producing an administrative record.**

Plaintiffs contend that their APA claim cannot be dismissed because Defendants have not produced the entire administrative record underlying its decisions. But the D.C. Circuit has explained that a complaint challenging action by an administrative agency can frequently be resolved at the motion to dismiss stage where the motion involves a question of law. As the D.C. Circuit explained in *Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221 (D.C. Cir. 1993), in an APA action, “[t]he entire case on review is a question of law, and only a question of law. And because a court can fully resolve any purely legal question on a motion to dismiss, *there is no inherent barrier to reaching the merits at the 12(b)(6) stage.*” *Id.* at 1225–26 (emphasis added). The district court in *Marshall County Health Care Authority* had examined the entire administrative record, but the D.C. Circuit has also explicitly held that, in appropriate circumstances, a district court reviewing administrative action can dismiss the case at the pleading stage without examining the entire administrative record. In *American Bankers Association v. National Credit Union Administration*, 271 F.3d 262 (D.C. Cir. 2001), a plaintiff argued that the district court had erred when it had granted a motion to dismiss without first compelling the National Credit Union Administration to produce the administrative record. *Id.* at 266. The D.C. Circuit rejected that argument, agreeing with the district court that Plaintiffs’ claims could be resolved through examination of “nothing more than the statute and its legislative history.” *Id.*

Together, *Marshall County Health Care Authority* and *American Bankers Association* make clear that, in appropriate circumstances, a district court can grant a motion to dismiss without first examining the entire administrative record. *See also Banner Health v. Sebelius*, 797 F. Supp. 2d 97, 112 (D.D.C. 2011) (“When presented with a motion to dismiss for failure to state a claim, the district court may, in appropriate circumstances, reach the merits even in the absence of the administrative record . . . .”); *Hassig v. E.P.A.*, 02-1001, 2002 WL 1364297, at \*1 (D.C. Cir. May 24, 2002) (per curiam) (granting motion to dismiss for lack of subject-matter jurisdiction and dismissing as moot motion to defer to filing of the certified index to the administrative record).

In this case, it is appropriate for the Court to dismiss the complaint without requiring production of the administrative record because Defendants’ arguments can be analyzed by referring to the Complaint, the attached exhibits, and publicly available documents such as the FAM. To the extent Defendants attack the merits of Plaintiffs’ claim, they do so because Plaintiffs’ allegations fail to support a plausible claim that Defendants have not engaged in reasoned decisionmaking. *See, e.g., Bean v. Perdue*, No.17-cv-0140 (RC), 2017 WL 4005603, at \*6 (D.D.C. Sept. 11, 2017) (examining on a motion to dismiss the sufficiency of the plaintiff’s factual allegations in support of his APA claim). The cases to which Plaintiffs cite are all distinguishable for that reason. *See Farrell v. Tillerson*, 315 F. Supp. 3d 47, 69 (D.D.C. 2018) (concluding that “the plaintiff has alleged that the Secretary has not engaged in reasoned decisionmaking in this case”); *Swedish Am. Hosp. v. Sebelius*, 691 F. Supp. 2d 80, 88 (D.D.C. 2010) (“The court is unable to assess the merits of these arguments without considering the administrative record” because the plaintiff has sufficiently alleged a challenge “not only [to] the administrative decision, but also the process that led to that decision.”).<sup>18</sup>

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<sup>18</sup> Plaintiffs rely on *Swedish American Hospital v. Sebelius*, 691 F. Supp. 2d 80 (D.D.C. 2010), for support. In that case, the court denied a motion to dismiss and deferred ruling on the plaintiffs’ claims until summary judgment proceedings. But all that the court decided in *Swedish American Hospital* was that the materials that had been submitted to the court in the case so far did not contain enough information for the court to evaluate the plaintiffs’ claims. The court did not say that a court can never resolve a challenge to agency action without examining the entire administrative record. 691 F. Supp. 2d at 88–89.

Therefore, the Court may consider Defendants' arguments in support of dismissing Plaintiffs' APA claim without reference to the administrative record.

**4. Plaintiffs lack standing to challenge Defendants' application of 8 U.S.C. § 1409 to Lucas's CRBA and U.S. passport applications.**

Finally, as explained in Defendants' opening brief, Plaintiffs fail to establish that their purported injuries would be redressed by the relief they seek, insofar as they seek declaratory and injunctive relief from Defendants' adjudication of Lucas's CRBA and U.S. passport applications under 8 U.S.C. § 1409. *See* Prelim. Stmt., Compl. at 24. Plaintiff's arguments to the contrary are all unavailing.

First, Plaintiffs argue that Defendants mischaracterize the relief Plaintiffs seek and the harm they seek to redress because if the Court granted their sought-after declaration, the Department "would be precluded from denying Lucas's application under [section 1401(g)] for lack of a biological relationship between Lucas and Allison." Pls.' Opp. 15; *see also id.* at 14–15. But Plaintiffs do not even challenge Defendants' interpretation of section 1401 in the Complaint, and cannot do so now because the Complaint does not and cannot allege that Defendants have applied section 1401 to Plaintiffs. And Plaintiffs fail to explain *why* Defendants would be compelled to conclude that Lucas was "born . . . of parents one of whom is an alien, and the other a citizen of the United States" under section 1401(g) simply because it would be prohibited from concluding that Lucas was "a person born out of wedlock" under section 1409 if Plaintiffs prevailed. *Id.* at 17 (citation omitted).

Second, Plaintiffs appear to argue that because Defendants do not call for dismissal of the entire case on the basis of standing, no portion of the Complaint should be dismissed. But just because Plaintiffs appear to have sought at least one kind of relief that would redress their injuries—a declaration that Lucas is a U.S. citizen—does not mean that the Complaint as a whole survives a motion to dismiss. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996). "Rather, 'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Fed. Election Comm'n*, 554

U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Dismissal of just one claim for lack of standing (here on redressability grounds) serves to limit and refocus the case and controversy that remains in dispute. Thus, while Plaintiffs may have standing to challenge the Departments' denial of the CRBA and U.S. passport applications filed on behalf of Lucas (and, as explained *supra*, may do so under 8 U.S.C. § 1503), they may not challenge Defendants' application of section 1409 instead of section 1401. The Complaint should be dismissed insofar as Plaintiffs challenge the latter. *See* Compl. ¶ 4.

### **CONCLUSION**

For the foregoing reasons, as well as the reasons set forth in Defendants' moving brief, the Court should grant Defendants' motion to dismiss.

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