No. 19-55517

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

Defendants-Appellants.

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

REPLY BRIEF FOR APPELLANTS

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SUMMARY OF ARGUMENT

As our opening brief explained, the State Department has long interpreted 8 U.S.C. § 1401(g), which confers citizenship on a child "born … of parents" meeting certain conditions, to require a biological relationship between the child and his legal parents. Although this Court's precedents foreclose that interpretation, plaintiffs' response brief offers no persuasive defense of those precedents, which are incorrect for several reasons.

First, plaintiffs offer no valid interpretation of the statute's "born … of" language that supports their position—much less one that "clear[ly]" favors them, as they claim (at 24). This Court has recognized that the phrase "'born of' … generally refers to a blood relationship." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009). Plaintiffs give no reason to construe the phrase differently in § 1401(g). Their principal argument is that the word "born" should be read as modified by only one of the two phrases that immediately follow it—the one concerning the location of a child's birth, not the one concerning the child's parentage. But that would render the provision grammatically nonsensical. More broadly, plaintiffs would read the statute as if it conferred citizenship on any child born "to a marriage" in which the spouses meet the statutory criteria, regardless of their biological relationship with the child. But the statute confers citizenship only on a child born "of parents" who meet those criteria.

Second, plaintiffs argue that § 1401(g) should be construed as lacking a biological-relationship requirement because a related provision, 8 U.S.C. § 1409(a), was later

amended to explicitly contain such a requirement. But as our opening brief explained, the relevant version of § 1409(a) is the one enacted at the same time as § 1401(g)'s relevant language, and that version of § 1409(a) required a biological relationship only implicitly, as § 1401(g) does. Plaintiffs note that Congress later made § 1409(a)'s biological-relationship requirement explicit, in the course of amending that provision for other reasons, and that Congress simultaneously amended § 1401(g) in an unrelated way. But none of that implicitly eliminated the biological-relationship requirement created by § 1401(g)'s "born … of parents" language.

Third, plaintiffs fail to reconcile their interpretation with the historical understanding of *jus sanguinis* citizenship. They argue that a biological relationship with a citizen was historically *insufficient* for a child to acquire citizenship. That is true (and consistent with the Department's interpretation), but the relevant question is whether a biological relationship with a citizen was historically *necessary* for a child to acquire *jus sanguinis* citizenship. Amici further argue that a man could historically transmit citizenship to his wife's biological child because the common law presumed him to be the child's biological father, whether or not he was. But that does not weaken the biological foundation of *jus sanguinis* citizenship; it simply shows that, under citizenship laws no longer in effect, a biological relationship could be recognized by legal fiction even if absent in fact. That legal fiction is irrelevant to whether a child is "born … of" his parents for purposes of § 1401(g), even if it may sometimes remain relevant to determining who a child's "parents" are.

Fourth, in attempting to downplay the ways in which a biological-relationship requirement helps the Department to prevent fraud, plaintiffs illustrate the wisdom of deferring to the Department's expertise in applying citizenship laws around the globe. Plaintiffs misunderstand the nature of the Department's concerns, and their position would substantially undermine the Department's ability to combat fraud.

Fifth, plaintiffs are wrong to suggest the Department's policy poses a risk of family separation. Under the Department's interpretation, the law affords an open path to citizenship for children in E.J.'s circumstances: E.J. could become a lawful permanent resident of the United States by virtue of his relationship to Andrew, and Elad could become a naturalized U.S. citizen by virtue of his marriage to Andrew, at which point E.J. could acquire U.S. citizenship. Plaintiffs misunderstand this path as affording only lawful permanent residence, when in reality it would afford full citizenship to E.J. and similarly situated children.

Finally, plaintiffs raise constitutional concerns with the Department's interpretation, but no such concerns exist. The Department has given Elad and Andrew's marriage the full measure of recognition and respect that it would give to an opposite-sex marriage, and it has treated E.J. precisely as it would treat the child of an opposite-sex couple who was not biologically related to both parents. Plaintiffs and amici resort to baseless speculation while ignoring record evidence of the Department's actual policy. In particular, their accusation that the Department inquires into biological parentage for same-sex but not opposite-sex couples is refuted by the application form

for a Consular Report of Birth Abroad (CRBA), which requires *all* parents to indicate whether they were "married to the child's other biological parent when the child was born." ER65.

This Court's precedents require that the judgment be affirmed unless this case is heard initially en banc. The Court may wish to consider initial hearing en banc, however, given the infirmities of circuit precedent.

ARGUMENT

THE STATE DEPARTMENT APPROPRIATELY INTERPRETS § 1401(g) TO REQUIRE A BIOLOGICAL RELATIONSHIP BETWEEN A CHILD AND HIS PARENTS

A. The Text Of The Relevant Statutory Provisions Favors The Department's Interpretation

1. "Born … of" refers to a biological relationship

As the opening brief explains (at 18-19), this Court has recognized in a closely related context that "the 'born of' concept generally refers to a blood relationship." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009). That is consistent with the ordinary meaning of the words "born" and "of." And it is the same conclusion courts have reached in construing similar provisions—including the Second Circuit, in *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (per curiam).

Contrary to plaintiffs' assertion (at 20 n.7), the government does not contend that § 1401(g) provides an unambiguous textual answer to the question presented. The text does not *expressly and clearly* state whether a child must be biologically related to his

parents in order to acquire citizenship from them.[1] But the Department's longstanding interpretation is by far the best reading of the statutory text, and it is bolstered, as discussed separately, by § 1401(g)'s context. Plaintiffs' textual arguments all fail.

a. Plaintiffs' attempts (at 27-28 & n.10) to distinguish *Marguet-Pillado* and *Colaianni* are unpersuasive. Plaintiffs note (as the opening brief did, at 19 n.5) that *Marguet-Pillado* involved a distinct question: whether a child could acquire citizenship from a U.S. citizen who was not his biological father and was *not* married to his noncitizen mother at the time of birth. *See* 560 F.3d at 1080-1084. But the Court's observation that "the 'born of' concept generally refers to a blood relationship," *id.* at 1083, was not limited to those facts. Even as the Court distinguished its § 1401(g) precedents, it commented on the "erosion of a biological nexus" reflected in those decisions and attributed that "erosion" to "the tradition that a man is considered to be the natural father of a child born during wedlock." *Id.* For reasons discussed below (at 12-13), that "tradition" is irrelevant to whether a child is "born … of" his parents for purposes of § 1401(g).

And plaintiffs simply misread the Second Circuit's decision in *Colaianni*. The petitioner in that case claimed citizenship under a predecessor to 8 U.S.C. § 1401(c)—a provision, parallel to § 1401(g), for children "'born outside of the United States … of parents *both* of whom are citizens of the United States.'" 490 F.3d at 187 (emphasis

[1] Plaintiffs thus fail to identify (at 20 n.7) any inconsistency between the government's textual arguments here and the positions it took in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). The government does not oppose plaintiffs' motion for judicial notice of its prior briefs.

added; quoting the predecessor statute); *see also* 8 U.S.C. § 1401(c) (same language in current statute). One reason the petitioner's claim failed was that § 1401(c) "pertains only to the acquisition of citizenship 'at birth,'" and the petitioner had been adopted by his U.S. citizen parents only after his birth. 490 F.3d at 187; *see id.* at 186. But the Second Circuit did not base its ruling solely on that ground, as plaintiffs claim (at 28 n.10). The court also rejected the petitioner's argument that by following the word "born" with "the preposition 'of,' rather than 'to,' Congress implied that biological parentage is not necessary for a person to claim citizenship under" § 1401(c). 490 F.3d at 187. It found that argument "contradicted by the plain language of the statute, which refers to persons 'born … *of* parents both of whom are citizens of the United States'" as well as "pertain[ing] only to the acquisition of citizenship 'at birth.'" *Id.* (emphasis in original).[2]

b. Plaintiffs claim (at 27) that, because the statute contains additional words between "person born" and "of parents," those two terms should not be read as a phrase. In effect, plaintiffs would read the word "born" as modified only by the immediately following phrase ("outside the geographical limits of the United States and its outlying possessions") and not by the subsequent phrase ("of parents one of whom is

[2] As plaintiffs note (at 28), and as the opening brief discussed (at 25-27), the Second Circuit subsequently held in *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), that the husband of a child's biological mother was the child's "parent" at the time of his birth for purposes of § 1401(g). *Id.* at 184-188. But *Jaen* ignored the statute's "born … of" language; the Court wrongly believed that "the sole question" was whether the husband was the child's "parent," *id.* at 185. *Jaen* is therefore not inconsistent with *Colaianni*'s analysis of "born … of" precisely because it erroneously disregarded that language.

an alien, and the other a citizen of the United States"). But that would leave the second phrase modifying only the word "person," and "person of parents …" makes no sense. The only intelligible way to read the sentence is that "person born" is a single term modified by *both* prepositional phrases that follow it—one relating to location and one relating to parentage. The law-professor amici's related argument (at 19-20) fails for the same reason.

Plaintiffs also fail to explain what, exactly, they think the statutory text means. They suggest (at 27) that "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." But a child's biological relationship to his parents (or lack of one) is among "the circumstances of [his] birth," and although plaintiffs assert (at 27) that the statute "is not limited to children with biological connections to a U.S. parent," they do not explain how the text supports that conclusion. Much less do they explain how the statute could be read as "clear[ly]" favoring them, as they assert (at 24).

In essence, plaintiffs seek to rewrite § 1401(g) to grant citizenship to any "person born … [to] ~~of~~ [a marriage in which one] parent~~s one of whom~~ is an alien, and the other a citizen …." As the opening brief explained (at 20), that is how § 1401(g) would have been written if, as plaintiffs contend, it were sufficient for a child's parents to be married and to satisfy the other statutory conditions, whether or not they are biologically related to the child. But that is not what § 1401(g) says. And the ease with which the statute could have been written to say that itself refutes plaintiffs' odd suggestion

(at 31 n.12) that it "would make no substantive—or grammatical—sense" for Congress to have said so. Congress instead chose to refer to a child "born … of parents," because its focus was on whether the child has the requisite biological relationship to his parents.

c. Plaintiffs are also wrong to claim (at 29-31) that the Department's interpretation would "strip the term 'parents' of any significance" in § 1401(g). That misunderstands the Department's interpretation of § 1401(g), under which citizenship turns *both* on who a child's legal "parents" are *and* on whether the child was "born … of" those parents. Opening Br. 25. A child cannot acquire citizenship through a biological relationship alone, or else he could acquire citizenship through a sperm or egg donor (contrary to 8 Foreign Affairs Manual (FAM) § 304.3-3). Far from reading "parents" out of the statute, the Department gives clear meaning to that term.

2. Section 1409(a)'s later-enacted explicit requirement of a biological relationship does not undercut § 1401(g)'s biological-relationship requirement

Plaintiffs next assert (at 35-40) that, by including an explicit biological-relationship requirement in § 1409(a), Congress necessarily intended to exclude such a requirement from § 1401(g). But plaintiffs acknowledge (at 7) that in 1952, when Congress added the operative "born … of" language to § 1401(g)'s predecessor, the predecessor to § 1409(a) likewise required a biological relationship only implicitly. *See* Opening Br. 22-25. The juxtaposition between the relevant versions of § 1401(g) and § 1409(a) thus does not imply that § 1401(g) lacks a biological-relationship requirement.

Plaintiffs respond (at 36-37) that Congress amended § 1401(g) at the same time as it amended § 1409(a) to make the biological-relationship requirement explicit. Immigration and Nationality Act (INA) Amendments of 1986, Pub. L. No. 99-653, §§ 12-13, 100 Stat. 3655, 3657. But that amendment to § 1401(g) had nothing to do with the "born … of" language; it simply lowered the residency requirement. *Id.* § 12. There is accordingly no basis to infer from the simultaneous amendments of § 1401(g) and § 1409(a) that Congress intended to include a biological-relationship requirement only in the latter. That is particularly true because the Department had long interpreted § 1401(g) to require a biological relationship. *See, e.g.*, *Chugach Mgmt. Servs. v. Jetnil*, 863 F.3d 1168, 1174 (9th Cir. 2017) ("'Congress is presumed to be aware of an administrative or judicial interpretation of a statute[.]'"). If Congress wished to eliminate § 1401(g)'s existing biological-relationship requirement and abrogate the Department's practice, it would have done so not through implied repeal by negative inference but by an express amendment. In other words, Congress would have taken the opportunity—while amending a different part of § 1401(g)—to clarify that legal parentage was sufficient to convey citizenship under that provision. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

Plaintiffs further argue (at 37) that Congress would not have clarified the biological-relationship requirement only for nonmarital children if it also meant for such a requirement to apply to children born during their parents' marriage. But Congress's amendment of § 1409(a) clarified the biological-relationship requirement only as an incident of elaborating the framework for children to acquire citizenship through their unmarried fathers, by heightening the burden for unmarried fathers to prove a biological relationship (to "clear and convincing evidence") and adding other requirements. INA Amendments of 1986, § 13, 100 Stat. at 3657. Congress saw no similar need to elaborate on the framework for acquiring citizenship through married parents, perhaps because the biological parentage of children born to married parents is less often disputed.

Plaintiffs are equally incorrect to argue (at 39-40) that the Department's interpretation "renders redundant the 'blood relationship' requirement in" § 1409(a). As noted above, § 1409(a) requires unmarried fathers not only to prove a biological relationship with their children but to do so by clear and convincing evidence. Section 1401(g)'s biological-relationship requirement, by contrast, can be satisfied by a preponderance of the evidence. 8 FAM § 301.4-1(D)(1)(b)(2).[3]

[3] Plaintiffs accuse the Department (at 38) of "unilaterally" adopting the preponderance standard, but it is sensible—and hardly unusual—for an agency to apply a default rule where the statute is silent. *See* 8 FAM § 301.4-1(D)(1)(b)(2) ("Where no other standard of proof is explicitly required by law, the Department applies the general standard of a preponderance of the evidence."). And the preponderance standard is

The statutory text thus supports the Department's view that a child can acquire citizenship under § 1401(g) only if he is biologically related to his parents.[4]

B. The Statute's Context And Purpose Bolster The Biological-Relationship Requirement

The Department's interpretation is strengthened by the statutory context: the conferral of *jus sanguinis* citizenship (rather than *jus soli* citizenship based on birth within this country). As the opening brief explains (at 21), *jus sanguinis* literally means the "right of blood," Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008), and the requirement of a biological relationship between a child and the parent whose citizenship he seeks to claim is ingrained in "our traditions," *Marguet-Pillado*, 560 F.3d at 1082. That is a strong reason to hesitate before concluding that Congress meant to confer citizenship on children born abroad who lack a biological connection to any U.S. citizen. *Cf. id.* Plaintiffs' and amici's contrary arguments are unpersuasive.

1. Plaintiffs (at 32-33) and their law-professor amici (at 5-9) argue that a child could not historically acquire citizenship through a biological relationship alone. A legal

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the traditional standard in administrative proceedings as in civil judicial proceedings. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981); *see also, e.g.*, *Waziri v. INS*, 392 F.2d 55, 57 (9th Cir. 1968).

[4] Plaintiffs claim (at 23 n.8) that the government "do[es] not contest … that [§ 1401] is the appropriate section under which to adjudicate E.J.'s claim of citizenship." That is imprecise. Under the Department's interpretation, a child (like E.J.) who is not biologically related to both parents must acquire citizenship through § 1409, not § 1401. But all agree that E.J.'s U.S. citizen father cannot satisfy § 1409(a)'s requirements because he lacks "a blood relationship" with E.J. The relevant question, then, is whether the Department's interpretation of § 1401(g) is correct.

relationship between the parent and child was also required. The existence of that *additional* requirement—which is entirely consistent with the Department's interpretation of § 1401(g)—in no way negates the basic requirement of a biological relationship supporting *jus sanguinis* citizenship.

2. Amici go on to assert (at 9-11) that, because the common law "treated a husband as the legal father of a child to whom his wife gave birth," a husband could historically "confer citizenship on his child even if he was not the child's biological father." As the opening brief explains (at 26-27 & n.6), that rule—known as the presumption of legitimacy—may affect who a child's legal "parents" are for purposes of § 1401(g). *See, e.g.*, *Jaen v. Sessions*, 899 F.3d 182, 184-188 (2d Cir. 2018) (applying the presumption to hold that the husband of a child's biological mother was his "parent"). And it might have been sufficient to confer citizenship under earlier statutes, which "referred simply to 'children' and 'fathers'" (Professor Br. 6) rather than requiring a child to be "born … of" his legal parents. *See* Opening Br. 4-5 (surveying the early statutes); Professor Br. 4 (same). But the presumption has no bearing on whether a child was "born … of" his legal parents, as § 1401(g) requires.

That is because the presumption is not a rule of evidence concerning the determination of a child's actual biological father. It is instead the opposite: "a substantive rule of law" providing that it is "*irrelevant* … whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband." *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion). In effect, the presumption

supplies a legal fiction that paternity exists, irrespective of a biological relationship. But in enacting § 1401(g), Congress made a specific choice about the relevance of an actual biological relationship. The determination whether a child is "born … of" his parents turns on exactly the biological facts that the presumption treats as irrelevant.

Nor does the presumption undercut the Department's view that biology was historically central to *jus sanguinis* citizenship. Insofar as the historical citizenship laws allowed children to acquire citizenship from their mothers' husbands without any consideration of biological paternity, they treated "marriage as a proxy for a blood relationship." Abrams & Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 658 (2014). That is no basis to conclude, as amici suggest, that biological relationships are unimportant to *jus sanguinis* citizenship. To the contrary, it highlights the importance of biological relationships: When they did not exist, it was considered better to pretend that they existed than to eliminate the requirement that they exist.

C. Interpretation Of § 1401(g) Should Take Account Of The State Department's Expertise

At a minimum, the text and context of § 1401(g) do not favor plaintiffs' position with sufficient clarity to negate the deference due to the Department's interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Deference is appropriate because the interpretation reflects the Department's "'specialized experience'" in applying citizenship laws overseas, *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001), its understanding of the need for "uniformity" in that task, *id.*, and the consistent and

longstanding nature of its views, *see, e.g.*, *Tablada v. Thomas*, 533 F.3d 800, 806-808 (9th Cir. 2008).

1. Deference is available here

Plaintiffs suggest (at 43) that the Court should decline to consider *Skidmore* deference because the Department did not invoke *Skidmore* before the district court. But there was good reason for that omission: The Department did not dispute before the district court that, under this Court's § 1401(g) precedents, E.J. is a citizen of the United States. The Department's sole argument concerning the citizenship claim was that the district court need not address the claim because plaintiffs could have obtained a certificate of citizenship for E.J. after moving to California. *See* Dkt. No. 101 at 3-5 (opposition to plaintiffs' motion for summary judgment); *see also* Dkt. No. 89 (Department's summary judgment motion, limited to the Administrative Procedure Act and due process claims). The Department is addressing the citizenship claim on appeal, unlike in the district court, because this Court has the power to revisit its precedents. *Cf. United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc) (argument may be considered when first raised in a petition for rehearing en banc, if circuit precedent barred the argument). In any event, this Court can and does consider issues raised for the first time on appeal so long as they involve "'pure question[s] of law and

the opposing party will suffer no prejudice,'" *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1068 n.4 (9th Cir. 2010), as is true here.[5]

Plaintiffs further argue (at 45) that the Department's interpretation does not warrant *Skidmore* deference because it is "neither the product of formal adjudication nor [of] notice-and-comment rulemaking." But that is a general precondition for *Chevron* deference, not *Skidmore* deference. *See Mead*, 533 U.S. at 229-230. *Skidmore* affords "some deference" to interpretations that do not satisfy *Mead*'s threshold for *Chevron* deference. *See id.* at 234-235.

2. The Department's interpretation is consistent and longstanding

On the merits of *Skidmore* deference, plaintiffs contend (at 45) that the Department's position "lacks the requisite consistency" because it was modified in 2014. But the Department has not altered its longstanding position that a child can acquire citizenship under § 1401(g) only if he is biologically related to his parents. That is the position for which the Department seeks deference. As the opening brief explains (at

[5] Nor is the government forever precluded from invoking *Skidmore* deference because it did not raise the issue in *Scales* and *Solis-Espinoza*. That is especially so since the government sought *Chevron* deference in the prior cases, rendering it unsurprising that the government did not separately invoke *Skidmore*'s more limited form of deference.

8), the only change the Department made in 2014 was to recognize gestation as a form of biological relationship between mother and child.[6]

3. The Department's interpretation implicates its expertise in preventing fraud

Plaintiffs (at 46-47), the law-professor amici (at 23-27), and the organizational amici (at 28-29) suggest that the Department's interpretation of § 1401(g) is unnecessary to advance the public interest in preventing fraud. Those arguments are misplaced.

As the opening brief explains (at 27-29), an agency's interpretation warrants deference to the extent it reflects "the 'specialized experience and broader investigations and information' available to the agency," as well as the agency's appreciation of the need for "uniformity" in administering "a national law." *Mead*, 533 U.S. at 234. A central premise of *Skidmore* deference, in other words, is that agencies are better able than outsiders to identify what interpretations will serve the public interest. That is a sufficient reason to discount plaintiffs' and amici's second-guessing of what measures are necessary to prevent citizenship fraud.

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[6] Plaintiffs are doubly wrong to contend (at 45) that the 2014 change "is at odds with the State Department's contention that the status of legal parenthood is 'emphatically irrelevant' to the construction of" § 1401(g). As discussed above (at 8), the Department considers legal parentage to be relevant—though not dispositive—to § 1401(g). And the 2014 policy does not allow gestational mothers to confer citizenship unless they are also legal mothers. *See* 8 FAM § 304.3-1 (limiting the 2014 policy to a "gestational mother who is also the legal parent of the child at the time of birth"); *id.* § 304.3-2 (citizenship of a surrogate, who gives birth to a child but is not the child's legal parent, is "irrelevant to the child's citizenship analysis").

Plaintiffs and amici also misunderstand the Department's policies in several ways, further illustrating the wisdom of deferring to agency expertise.

First, plaintiffs assert (at 46) that the Department "inquir[es] into biological relationships only in a subset of cases," a premise from which they infer the Department must "have alternative means to prevent fraud in citizenship adjudications." But as the opening brief notes (at 10), the CRBA application form requires *all* parents to indicate whether they were "married to the child's other biological parent when the child was born." ER65. Plaintiffs offer no response; they simply ignore the record.

Second, the law-professor amici (at 23-24, 25-26) note a range of contexts in which states or the federal government assign significance to a child's legal parentage. Relatedly, the law-professor amici (at 24-25) and the organizational amici (at 28-29) note that the State Department is capable of applying state and foreign domestic relations law. Those objections miss the point. The Department is indeed capable of applying state and foreign domestic relations law to determine who a child's legal "parents" are for purposes of § 1401(g). But if legal parentage *alone* were enough to convey citizenship, then fraud would be far harder to detect and prevent, especially in countries where documents purporting to show marriage and parentage can be obtained on the black market. *See* Opening Br. 29-31. And United States citizenship would be defined at the whim of foreign laws governing legal parentage—such as Canada's provision for a child born through surrogacy to have four or more legal parents—no matter how inconsistent with the intent of Congress or this country's traditions of *jus sanguinis*. *Id.* at 32.

Finally, plaintiffs (at 46-47) and the law-professor amici (at 26-27) attempt to reassure the Court that their position would not undermine the Department's ability to insist on DNA testing when it suspects fraud. That reassurance is hollow. As amici acknowledge (at 26-27), plaintiffs' interpretation would give the Department a basis to request DNA testing only where a citizenship claim was "founded on an asserted genetic connection." But it is easy to imagine potentially fraudulent citizenship claims where that is not the case. Suppose, for example, that a male U.S. citizen seeks citizenship for a person he claims is his legal child, born to a woman he claims is his wife. And suppose he disavows any biological relationship with the child; he might say, for example, that the child was conceived using a sperm donor or through his wife's extramarital relationship. Under plaintiffs' theory, the Department would have no basis to request DNA testing in that circumstance, because the citizenship claim would not be "founded on an asserted genetic connection." The Department could try to verify the story in other ways, but that could require laborious investigation of the asserted marital and parental relationships. And the potential for fraud would be high, at least in countries where fake marriage and birth certificates could be easily obtained.[7]

[7] Plaintiffs state (at 46) that the Department's Rule 30(b)(6) deponent "disclaimed that the FAM policy had any connection to concerns about possible fraud." Plaintiffs rely on one cherry-picked answer during the deposition (SER16), but the deponent elsewhere stated that fraud concerns *were* relevant to the Department's interpretation of § 1401 (though they were "secondary," in his view, to the "primary concern" of "compl[ying] with the law"). Further Excerpts of Record 4.

D. Alternative Paths To Citizenship Are Available For A Child In E.J.'s Circumstances

As the opening brief explains (at 33-35), the Department's interpretation poses no risk of statelessness or family separation, because Congress has provided an open path to citizenship for children in E.J.'s circumstances—*i.e.*, children who (1) are born overseas with a U.S. citizen parent to whom they are not biologically related and a noncitizen parent to whom they are biologically related and (2) now reside in the United States. Both the child and the noncitizen parent qualify to become lawful permanent residents by virtue of their relationships to the U.S. citizen parent. After three years, the noncitizen parent is eligible to naturalize. And the child can then automatically acquire citizenship through the naturalized parent by satisfying the requirements of the Child Citizenship Act, 8 U.S.C. § 1431(a)—that is, by residing in the United States, in the custody of his U.S. citizen parent, while under the age of eighteen.

Plaintiffs misunderstand this pathway, referring to it (at 41) as the "proposed alternative of applying for lawful permanent residence," which "would convey a status less than citizenship." But lawful permanent residence is merely a necessary step on the road to citizenship under the Child Citizenship Act.

The organizational amici argue (at 25) that the pathway would be "more aptly termed a 'marathon,'" largely on the theory that it "forces" the family in question to migrate to the United States. That misses the point: Plaintiffs' family has migrated to the United States, so this case does not present the question of remedies available to

families residing outside the United States. Opening Br. 33.[8] Amici also note that the Child Citizenship Act pathway "forces" the noncitizen parent "to naturalize," but that hardly seems an onerous burden when plaintiffs' claim is to obtain United States citizenship for their child and a central rationale of their claim is the desire to maintain family unity in the United States.

E. The Department's Interpretation Raises No Constitutional Concerns

Finally, plaintiffs (at 25-26) and the organizational amici (at 10-29) argue that the Department's position raises constitutional concerns. It does not.

Amici are utterly wrong to say (at 3, 11) that the Department "fails to recognize" or "disregards" Elad and Andrew's marriage. Plaintiffs recognize (at 9) that the consular officer who adjudicated E.J.'s application accepted documents provided by Elad and Andrew "as sufficient proof of [their] marriage," and the Department has never wavered from that position. Nothing in the Department's position even remotely calls into question the validity of Elad and Andrew's marriage.

[8] In any event, a different provision of the Child Citizenship Act, 8 U.S.C. § 1433, provides a route to citizenship for children born outside the United States who continue to reside outside the United States. In broad terms, that provision allows the child to obtain a certificate of citizenship if at least one parent is a U.S. citizen (by birth or by naturalization) who has at some point accrued five years of presence in the United States. 8 U.S.C. § 1433(a).

Plaintiffs and amici are equally wrong to suggest that the Department's policy relegates the children of same-sex couples to a lesser status. The Department's interpretation of § 1401 treats the children of married same-sex couples exactly as it treats the children of married opposite-sex couples. When children are biologically related to both parents, they are "born … of" their parents and eligible to acquire citizenship under § 1401(c) or (g), if the other statutory requirements are satisfied. When children are not biologically related to both parents, they are not "born … of" their parents and thus cannot acquire citizenship under § 1401(c) or (g). Instead, they may acquire citizenship through a U.S. citizen father under § 1409(a) or through a U.S. citizen mother under § 1409(c). Plaintiffs and amici are thus wrong to suggest that the transmission of citizenship to a non-biological child is among "'the constellation of benefits … linked to marriage,'" *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)). No married couple—whether same- or opposite-sex—has a right to transmit citizenship under § 1401 to a child who is not biologically related to both parents.[9]

Many children of opposite-sex couples lack a biological relationship with both parents,[10] and some children of same-sex couples have a biological relationship with

[9] Nor is the asserted right to transmit citizenship to a non-biological child "'deeply rooted in this Nation's history and tradition,'" as would be necessary for the Due Process Clause to protect it, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

[10] Infertility affects more than one in ten couples (Office of Population Affairs, Dep't of Health & Human Servs., *Female Infertility* (Feb. 21, 2019), https://go.usa.gov/

both parents.[11] It is not legally relevant that the children of opposite-sex couples more often have a biological relationship with both parents than the children of same-sex couples. A facially neutral policy does not raise equal protection concerns simply because it may have a disproportionate effect on one group. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Plaintiffs have not suggested—nor could they—that the Department adopted or reaffirmed the challenged policy "at least in part 'because of,'" rather than "merely 'in spite of,'" any disproportionate effect on the children of same-sex couples, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Plaintiffs (at 10) cite the Foreign Affairs Manual (FAM) for the proposition that the Department does not "inquir[e]" as to the biological parentage "of every applicant" for citizenship documents. But the record shows that the Department requires *all* parents to indicate (on the CRBA application form) whether they were "married to the child's other biological parent when the child was born." ER65. The cited section of the FAM says only that consular officers should "investigate" the biological parentage of children born during their parent's marriage when "doubt arises" about the existence

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xpM2r), and clinics in the United States perform nearly 300,000 assisted reproductive technology cycles each year (CDC, Dep't of Health & Human Servs., *ART Success Rates* (Nov. 15, 2019), https://go.usa.gov/xpM2Y).

[11] Two women who are married to each other may both have a biological relationship with their child if one spouse contributes the egg and the other gestates the fetus. *See* 8 FAM § 301.4-1(D)(1)(c); *id.* § 304.3-1(b).

of a biological relationship, 8 FAM § 301.4-1(D)(1)(d). A negative answer to the question on the form would supply such "doubt." The organizational amici more broadly suggest (at 22) that the Department applies its policy in a manner that treats same-sex and opposite-sex couples differently. But they point to no basis in the record or elsewhere to support that accusation.

Finally, plaintiffs and amici are incorrect to suggest it is pejorative for the Department to treat children who lack a biological relationship with both of their married parents as "born out of wedlock" under § 1409. That phrase should be understood in light of the circumstances in which Congress adopted it, first in the Nationality Act of 1940 and then in the Immigration and Nationality Act of 1952 (Opening Br. 5-6). In those years, long before the advent of assisted reproductive technology (ART),[12] a child born to married parents would have lacked a biological relationship with both parents only if the child had been conceived through an extramarital relationship. Such a child is naturally described as "born out of wedlock." The phrase is less natural as applied to children who lack a biological relationship with both parents because they were conceived through ART. But the history makes clear that Congress did not mean it as pejorative to such children or their parents (whether the parents are a same-sex or an

[12] The first birth through in vitro fertilization did not occur until 1978. CDC, Dep't of Health & Human Servs., *National ART Surveillance* (May 7, 2019), https://go.usa.gov/xpMT7.

opposite-sex couple). Congress intended the phrase simply to describe children whose biological parents were not married to each other at a time when ART did not exist.

CONCLUSION

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

Respectfully submitted,

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February 3, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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