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

PETITION FOR REHEARING EN BANC

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

NICOLA T. HANNA
United States Attorney

H. THOMAS BYRON III
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulation:

Legislative Material:

Other Authorities:

INTRODUCTION

This case presents the exceptionally important question whether a child born outside the United States can acquire U.S. citizenship at birth without a biological relationship to a U.S. citizen. The relevant provision, 8 U.S.C. § 1401(g), confers citizenship at birth on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States" satisfying a physical-presence requirement. As this Court observed in *United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009), "[t]here can be little doubt that the 'born of' concept generally refers to a blood relationship." *Id.* at 1083. Yet this Court has construed § 1401(g)'s "born … of parents" requirement to be satisfied without such a relationship. *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005).

Those precedents dictated the panel's decision here, but the government respectfully submits they are incorrect. Neither *Scales* nor *Solis-Espinoza* addressed § 1401(g)'s reference to the parents "of" whom a child was born. Nor did they address the backdrop against which Congress enacted § 1401(g): the *jus sanguinis* ("right of blood") doctrine, which allows children biologically related to a citizen to acquire citizenship. Finally, neither decision afforded proper deference to the State Department's consistent, longstanding interpretation of § 1401(g), which reflects the Department's worldwide expertise in preventing and detecting citizenship fraud. The Court should grant en banc review to reconsider and overrule its erroneous precedents.

STATEMENT

1. Domestic law concerning the acquisition of U.S. citizenship at birth reflects the two "traditional ways of transmitting and acquiring citizenship at birth": "*jus soli* and *jus sanguinis*." *Marguet-Pillado*, 560 F.3d at 1081-1082. *Jus soli* means "right of land or ground—conferral of nationality based on birth within the national territory." Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 15 (6th ed. 2008). *Jus sanguinis* means "right of blood—the conferral of nationality based on descent, irrespective of the place of birth." *Id.* Since the Fourteenth Amendment's ratification, "the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*." *Miller v. Albright*, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting). But Congress has, since 1790, provided for certain foreign-born children to acquire citizenship through a parent. Two current provisions are most relevant here.

First, § 1401(g) confers citizenship "at birth" on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States" if the citizen parent had been "physically present in the United States or its outlying possessions" for periods totaling at least five years (at least two of which were after turning 14).

Second, 8 U.S.C. § 1409(a) states as relevant that "[t]he provisions of" § 1401(g) "shall apply … to a person born out of wedlock," if

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—
>
> > (A) the person is legitimated under the law of the person's residence or domicile,
> >
> > (B) the father acknowledges paternity of the person in writing under oath, or
> >
> > (C) the paternity of the person is established by adjudication of a competent court.

Section 1409(a) thus allows children born overseas and "out of wedlock" to acquire citizenship through a U.S. citizen father. Section 1409(c) allows such children to acquire citizenship from a U.S. citizen mother.

2. The Secretary of State is "charged with" determining the "nationality of a person not in the United States." 8 U.S.C. § 1104(a). The parents of a child born overseas may apply to a consulate for a Consular Report of Birth Abroad of a Citizen of the United States of America (CRBA), which reflects the Department's determination that the child acquired citizenship at birth. 22 C.F.R. § 50.7. Consulates also issue U.S. passports. 22 U.S.C. § 211a.

To ensure consular officers apply the law consistently, the Department interprets the statute in its Foreign Affairs Manual (FAM) (available at https://fam.state.gov/). The FAM explains the Department's understanding that, "[s]ince 1790," "[a]t least one biological parent" of a child born abroad "must have been a U.S. citizen" for the child to acquire citizenship at birth. 8 FAM § 301.4-1(B); *see id.* § 301.4-1(D)(1)(a). Genetic relationships are the typical form of biological relationship, but the Department also recognizes gestation by a legal mother as a biological relationship. *Id.* § 301.4-1(D)(1)(c).

Although the law of the birth jurisdiction may for some purposes presume that children born during the marriage of their legal parents are "the issue of that marriage," 8 FAM § 301.4-1(D)(1)(d), the FAM explains that any such "presumption is not determinative in citizenship cases, … because an actual biological relationship to a U.S. citizen parent is required." *Id.*; *see id.* § 301.4-1(D)(1)(a).

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

The Department understands a child to have been born "in wedlock" if born or conceived "during the marriage of the biological parents to each other." 8 FAM § 304.1-2. It treats a child as born "out of wedlock," and subject to § 1409, if the biological parents were not married to each other when the child was born or conceived, including where a couple uses certain types of ART.

These rules apply to opposite-sex couples exactly as they do to same-sex couples. For example, "[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor," can acquire citizenship only under § 1409(c)—not § 1401—"regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth." 8 FAM § 304.3-2(c). Likewise, "[a] child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor," can acquire citizenship only through § 1409(a), "regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth." *Id.* § 304.3-2(f).

Of course, a same-sex couple's use of ART may more readily be apparent than an opposite-sex couple's use of ART. To facilitate equal treatment, the CRBA application form requires parents to indicate whether they were "married to the child's other biological parent when the child was born." ER65.

3. Plaintiff Andrew Mason Dvash-Banks, a male U.S. citizen, met and began a relationship with Elad Dvash-Banks, a male Israeli citizen. ER5. Elad and Andrew moved to Canada, and married, in 2010. *Id.* Several years later, they entered a contract

with a gestational surrogate. *Id.* Two embryos created from anonymous donor eggs—one with Andrew's sperm, another with Elad's—were transferred to the surrogate. *Id.* In September 2016, the surrogate gave birth to two boys, E.J. and A.J. *Id.* Twelve days later, a Canadian court declared Elad and Andrew to be the parents of both. *Id.*; *see* ER76-77.

In January 2017, Elad and Andrew visited the U.S. Consulate in Toronto to apply for CRBAs and U.S. passports for both children. ER5. The consular official accepted their marriage as valid and recognized that they were the children's legal parents. *Id.* But she informed them that the children would qualify for citizenship at birth only if they were biologically related to Andrew, the U.S. citizen parent. *Id.* DNA testing showed that A.J. is Andrew's biological child and E.J. is not, so the consulate determined that only A.J. acquired U.S. citizenship at birth. ER6; ER56.

In June 2017, Elad, Andrew, and both children moved to California. ER36 ¶ 57. Andrew then brought this suit on behalf of himself and E.J. The operative complaint sought, among other forms of relief, a declaration under 8 U.S.C. § 1503(a) that E.J. is a U.S. citizen. The district court granted that relief. *Dvash-Banks v. Pompeo*, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019). It reasoned that, "under controlling Ninth Circuit authority, [§ 1401(g)] does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their married parents." *Id.* at *7. A

panel of this Court affirmed by memorandum disposition, noting (at 2) that "[t]he government concedes that *Scales* and *Solis-Espinoza* control this case and has appealed to preserve the argument that those cases were incorrectly decided."

ARGUMENT

I. *SCALES* AND *SOLIS-ESPINOZA* WERE INCORRECTLY DECIDED

A. The Statutory Text And Context, And *Skidmore* Deference, Support The Department's Interpretation

1. Section 1401(g) confers citizenship on individuals "born … of parents" who meet the statutory requirements. This Court has recognized that "the 'born of' concept generally refers to a blood relationship." *Marguet-Pillado*, 560 F.3d at 1083. And that characterization is supported by the definition of the word "of"—a word that "[i]ndicat[es] the thing, place, or person from which or whom something originates, comes, or is acquired or sought." *Oxford English Dictionary*, https://oed.com (last visited Dec. 22, 2020) (definition III of "of, *prep.*"); *see, e.g.*, *American Heritage Dictionary* 1221 (5th ed. 2016) ("[d]erived or coming from"). For a child to be "born 'of' parents," then, means he originates or is derived from those parents. *Mize v. Pompeo*, 2020 WL 5059253, at *12 (N.D. Ga. Aug. 27, 2020). A child obviously originates or is derived from his biological parents. Although district courts have concluded that a child *could* be deemed to originate or derive from parents who use ART, even without a biological relationship, *see Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 308 (D. Md. 2020); *Mize*, 2020 WL 5059253, at

*13, that is hardly the most plausible interpretation of "born of." *See Mize*, 2020 WL 5059253, at *11-13 (adopting it only in light of constitutional avoidance concerns).

Section 1401(g)'s plural reference to "parents" further supports the inference that it requires a biological relationship. Not every child has two legal parents at birth, and that was true in 1952 when Congress enacted the "born … of" language. Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 301(a)(7), (b), 66 Stat. 163, 236 (1952). But every child in 1952 had two biological parents. Thus, when Congress wrote the statute to assume every child would be "born … of" two parents, it was presumably referring to a biological relationship. Had Congress meant to refer to other types of parental relationships—such as a married couple's legal parentage of a child conceived through the wife's extramarital affair (*see infra* p. 13)—it would have written the statute differently, perhaps referring simply to a child whose parents were married.

The Second Circuit has interpreted the parallel language of 8 U.S.C. § 1401(c)—which confers citizenship on certain children "born outside of the United States … of parents both of whom are citizens of the United States"—as requiring a biological relationship between the child and parents. In *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007), the petitioner claimed citizenship under a predecessor to § 1401(c). One reason the claim failed was that the provision "pertains only to the acquisition of citizenship 'at birth,'" and the petitioner had been adopted by U.S. citizens only later. *Id.* at 187; *see id.* at 186. But the court also rejected the 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 regarded that argument as "contradicted by the plain language of the statute, which refers to persons 'born … *of* parents both of whom are citizens of the United States[.]'" *Id.* (emphasis in original).[1]

2. The Department's interpretation of § 1401(g)'s text is further supported by its context: the conferral of *jus sanguinis* citizenship. As noted, *jus sanguinis* literally means "right of blood," 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. Congress could have chosen to depart from the historical doctrine in enacting § 1401(g). But given the historical backdrop, Congress would likely have spoken more clearly if that were its intention.[2]

3. To the extent § 1401(g) remains ambiguous notwithstanding its text and context, a tiebreaking factor is the deference owed to the Department's interpretation

[1] The Second Circuit later held in *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), that § 1401(g) does not require a biological relationship, but it did so only by ignoring the "born … of" language, incorrectly assuming that "the sole question" was whether the husband of a child's mother was the child's "parent" at birth. *Id.* at 185. Whether or not *Jaen*'s analysis of parentage was correct, *Jaen* is not inconsistent with *Colaianni*'s analysis of "born … of."

[2] A committee report on the 1940 predecessor to the INA, which first included the "born … of" language (Nationality Act of 1940, § 201(g), 54 Stat. 1137, 1139), similarly suggests Congress's focus on biology. The report noted that under then-current law, non-biological adopted children could not acquire citizenship even if entitled to the rights of biological children under state law. S. Rep. No. 2150, at 5 (1940). The 1940 statute provided for such individuals to become naturalized citizens.

under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The *Skidmore* doctrine recognizes that agency interpretations lacking the force of law may warrant deference "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted).

The Department's consistent, longstanding interpretation reflects its "'specialized experience'" and its appreciation of the need for "uniformity," *Mead*, 533 U.S. at 234. The Department has long been concerned about individuals fraudulently claiming citizenship on behalf of a child who is not theirs. In 2012, for example, the Department considered whether it could "interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through ART in a broader range of circumstances," but the Assistant Secretary of State for Consular Affairs explained to the Secretary that any such change would have "serious potential fraud implications" because consulates "regularly encounter people seeking to document children who are not theirs." ER20-21. Citizenship fraud is not limited to the ART context, and a biological-relationship requirement is not a failsafe means of preventing it. But because biological relationships can be objectively verified, such a requirement is a powerful way to prevent fraud. *See infra* pp. 15-16.

Nor is fraud the only relevant concern. If U.S. citizenship could be conferred through legal parentage alone, then foreign laws that recognize novel forms of parentage could potentially open the door to U.S. citizenship wider than Congress likely intended. For example, Ontario—where E.J. was born—automatically recognizes up to four intended parents designated in a surrogacy agreement, and allows courts to recognize more than four. Children's Law Reform Act, R.S.O. 1990, c. C.12, §§ 10, 11, *available at* https://www.ontario.ca/laws/statute/90c12.

B. Contrary Arguments Are Unpersuasive

1. *Scales* relied on the fact that 8 U.S.C. § 1409(a), unlike § 1401(g), "does expressly require a blood relationship between a person claiming citizenship and a citizen father, if the person is born out of wedlock." 232 F.3d at 1164. "If Congress had wanted to ensure the same about a person born in wedlock," the Court opined, "'it knew how to do so.'" *Id.* Both *Solis-Espinoza* and the district court's opinion here relied on the same inference. 401 F.3d at 1093; 2019 WL 911799, at *7.

But that inference is unwarranted. When Congress enacted § 1401(g)'s relevant language in 1952, there was no explicit biological-relationship requirement in § 1409(a)'s predecessor. *See* INA § 309(a), 66 Stat. at 238 (predecessor to § 1409(a), providing that § 1401(g)'s predecessor "shall apply as of the date of birth to a child born out of wedlock … , if the paternity of such child is established while such child is under the age of twenty-one years by legitimation"). "'[N]egative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when

the language raising the implication was inserted.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). And here, Congress did not address § 1401(g)'s "born … of" language when it later amended § 1409(a) to make the biological-relationship requirement explicit and heighten the threshold of proof to "clear and convincing evidence." INA Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. Thus, one cannot infer anything about § 1401(g)'s "born … of" language from Congress's later clarification of the biological-relationship requirement in § 1409(a).

Congress did amend a *different* part of § 1401(g), to lower the physical-presence requirement, when it amended § 1409(a). *Id.* §§ 12-13, 100 Stat. at 3657. But that does not suggest Congress meant for § 1401(g) to require only a legal relationship, by contrast with § 1409(a)'s explicit biological-relationship requirement. Quite the opposite. By the time Congress amended the statute, the Department had long interpreted § 1401(g) to require a biological relationship, and "'Congress is presumed to be aware of an administrative or judicial interpretation of a statute[.]'" *Chugach Mgmt. Servs. v. Jetnil*, 863 F.3d 1168, 1174 (9th Cir. 2017). If Congress disagreed with the Department's interpretation of § 1401(g), it would surely have taken the opportunity—while amending § 1401(g) in another respect—to state clearly that legal parentage was sufficient 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).

2. The district court also opined that "the presumption of legitimacy that applies when a child is born to married parents" is "codified in the INA" and "cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent." 2019 WL 911799, at *7. But that reasoning—as in *Jaen*, noted above (at 9 n.1)—ignores the text of § 1401(g). The Department has not disputed in this case that Elad and Andrew are E.J.'s "parents," but the statute requires more than a U.S. citizen parent who meets the residency requirement; it confers citizenship only on children "*born* … *of* parents" who meet the requirements.

The traditional presumption of legitimacy has no bearing on that question, because as the Supreme Court explained in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the presumption is not a rule of evidence for the determination of a child's biological father. It is "a substantive rule of law" providing that, "except in limited circumstances, [it is] *irrelevant* … whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband." *Id.* at 119 (plurality opinion). Whether or not that rule is relevant to determining a child's "parents" for purposes of § 1401(g), it is irrelevant to determining whether the child was "born … of" his parents, since that determination turns on precisely those biological facts that the presumption may render irrelevant to legal parentage.

3. Two district courts have determined that the biological-relationship requirement raises constitutional concerns, on the theory 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*, 576 U.S. 644, 670 (2015)). *See Mize*, 2020 WL 5059253, at *11; *Kiviti*, 467 F. Supp. 3d at 312-314.

But no U.S. citizen, whether married to someone of the same or the opposite sex, may transmit citizenship under § 1401 to a non-biological child. The Department's interpretation treats the children of married same-sex couples exactly like those of married opposite-sex couples. If children are biologically related to both parents, they are "born … of" their parents and eligible to acquire citizenship under § 1401 if the other requirements are satisfied. If not, they may acquire citizenship through a U.S. citizen father under § 1409(a) or mother under § 1409(c).

It is legally irrelevant that the children of opposite-sex couples more often have a biological relationship with both parents than the children of same-sex couples. Disparate effects of a facially neutral policy do not raise equal protection concerns. *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 children of same-sex couples, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

4. Finally, the district court opined that the Department's interpretation of § 1401(g) is not "consistent with the legislative history of the INA" because it undermines the goal "'of keeping families of United States citizens and immigrants united.'" 2019 WL 911799, at *8. But even if the objective of family unity could inform the construction of ambiguous statutory language, it is not implicated here. The law affords alternative paths to citizenship for children who, like E.J., (1) are born overseas with one U.S. citizen parent to whom they are not biologically related and one noncitizen parent to whom they are biologically related and (2) now reside in the United States.

Among other options, a child in that position can become a lawful permanent resident (LPR) of the United States through his relationship to the U.S. citizen parent, who qualifies (by marriage to the child's biological parent) as the child's stepparent for purposes of 8 U.S.C. § 1101(b)(1)(C). The noncitizen parent also qualifies to become an LPR, *id.* § 1151(b)(2)(A)(i), and can then qualify to become a U.S. citizen after residing in the United States for three years, *id.* § 1430(a). And once the noncitizen parent naturalizes, the child automatically acquires citizenship under the Child Citizenship Act if he "reside[s] in the United States in the legal and physical custody of" that parent. *Id.* § 1431(a). The Department's interpretation thus does not threaten the ability of Elad, Andrew, and their children to reside together in the United States.

II. EN BANC REVIEW IS WARRANTED

En banc review is warranted for two reasons. *First*, this issue is exceptionally important. As noted above, the Department is concerned that citizenship fraud will be

harder to detect and prevent if citizenship can be claimed solely on the basis of legal relationships. In countries where legal documents can easily be falsified or fraudulently obtained, someone seeking U.S. citizenship for a child could acquire a certificate of marriage to a U.S. citizen and papers showing the U.S. citizen to be a legal parent of the child. If the applicant did not claim that the U.S. citizen was a biological parent of the child—for example, if he or she claimed to have conceived the child through an extra-marital relationship—then DNA testing would not shed light on the truth of the asserted basis for citizenship. The consulate could investigate the veracity of the claimed marriage and parental relationship, but investigations consume time and resources and can be inconclusive. With a biological-relationship requirement, by contrast, citizenship eligibility can often be determined by a simple DNA test (together with evidence of the other requirements).

Second, this issue warrants the thorough consideration that en banc review can provide. Although the Court addressed § 1401(g) in *Scales* and *Solis-Espinoza*, its analysis in those cases fell short of meaningful engagement with the issues discussed above, likely because they were inadequately presented. *Scales* and *Solis-Espioza* also arose in different circumstances (on petitions for review of removal orders), and neither case involved ART. And since those cases were decided, the volume of cases presenting this issue, or variations, has grown considerably. Similar cases have been and are likely to be brought both within and outside this Circuit. *See, e.g.*, *Blixt v. Department of State*, No.

20-cv-2102 (D.N.J.) (pending case where, as here, child is not biologically related to U.S. citizen parent); *Fielden v. Pompeo*, No. 20-cv-409 (D.D.C.) (same).

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
NICOLA T. HANNA
United States Attorney
H. THOMAS BYRON III

/s/ Daniel Winik
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849
daniel.l.winik@usdoj.gov

December 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

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

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is *(select one)*:

[x] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,200.
(Petitions and answers must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature */s/Daniel Winik* **Date** December 23, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

NOT FOR PUBLICATION

FILED

OCT 9 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

E. J. D.-B., a Minor, Elad Dvash-Banks as the guardian ad litem; ANDREW MASON DVASH-BANKS, Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF STATE; MICHAEL POMPEO, US Secretary of State Successor Rex W. Tillerson, Defendants-Appellants.	No. 19-55517 D.C. No. 2:18-cv-00523-JFW-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Submitted October 7, 2020**
Pasadena, California

Before: KLEINFELD, HURWITZ, and BRESS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The sole issue in this case is whether the district court correctly concluded that E.J. Dvash-Banks ("E.J.") is a citizen of the United States. Because the district court's decision was correct under binding circuit precedent, we affirm.

E.J. was conceived through Assisted Reproductive Technology and born in Canada. In January 2017, his legal parents, United States citizen Andrew Dvash-Banks ("Andrew") and Israeli citizen Elad Dvash-Banks ("Elad"), applied for a passport for E.J. under 8 U.S.C. § 1401(g), which confers citizenship on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States." The United States consulate in Ontario, Canada, denied the application because E.J. was conceived using Elad's sperm. The district court, however, held that E.J. was a citizen under 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), which hold that § 1401(g) does not require a biological relationship between a child and the citizen parent through whom citizenship is claimed.

The government concedes that *Scales* and *Solis-Espinoza* control this case and has appealed to preserve the argument that those cases were incorrectly decided. As a three-judge panel, we are bound by *Scales* and *Solis-Espinoza*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Because the district court did

not err in applying Ninth Circuit law, we affirm.[1]

AFFIRMED.

[1] Appellees' motion for judicial notice, **Dkt. 22**, is **GRANTED.**