UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALLISON DAWN BLIXT and L. Z.-B. Plaintiffs, v. The UNITED STATES DEPARTMENT OF STATE and REX W. TILLERSON in his official capacity as Secretary, U.S. Department of State Defendants.	:	Civ. No. 1:20-cv-02102-KM-JBC **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** Motion Day: February 16, 2021

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INTRODUCTION

Plaintiffs in this action seek a declaration, pursuant to 8 U.S.C. § 1503(a), that plaintiff L. Z.-B., a minor child, meets all of the criteria in Section 301(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1401(g), for the acquisition of U.S. citizenship at birth. Plaintiffs' motion for partial summary judgment on this claim, Pls.' Mot. for Partial Summ. J., ECF No. 66, should be denied, and partial summary judgment granted for the Government, *see* Defs.' Mot. for Partial Summ. J., ECF No. 67.

The Department of State's longstanding interpretation of the acquisition-at-birth citizenship statutes is straightforward, correct as a matter of law and policy, and entitled to deference. In relevant part, under the Department's interpretation, for a child born abroad to acquire U.S. citizenship at birth, 8 U.S.C. § 1401(g) requires the child to be "born . . . of," or to have a biological connection to, a U.S. citizen parent who fulfills the other applicable statutory requirements. This interpretation cannot be defeated by Plaintiffs' strained statutory interpretations or policy arguments, nor by Plaintiffs' suggestion that the Department's interpretation is unconstitutional.

Plaintiffs attack the Department's interpretation on three fronts, none of which have merit. *First*, Plaintiffs argue that the text of 8 U.S.C. § 1401(g), read in conjunction with 8 U.S.C. § 1409, does not require a biological relationship between the child and the U.S. citizen parent from whom the child seeks to acquire citizenship. But Plaintiffs gloss over the "born . . . of" language in 1401(g), which naturally implies a biological connection between the child and parent, and misinterpret the purpose and significance of Section 1409's "blood relationship" language, which did not negate the Department's interpretation of Section 1401(g).

Second, Plaintiffs argue that the Department's interpretation is unreasonable and does not meet the statutory objectives of the INA. But the Department's longstanding adherence to a

biological-relationship requirement is fully consistent with the text of the INA, serves reasonable policy goals, and should be accorded deference in light of the Department's specialized experience; Plaintiffs' arguments to the contrary are overblown.

Third, Plaintiffs contend that the Department's interpretation should be disregarded under the doctrine of constitutional avoidance because it raises "significant constitutional issues" as to the validity of and respect accorded to same-sex marriages. But the Department's understanding of Section 1401(g) to include a biological-relationship requirement raises no such issues; it is a facially neutral interpretation that applies to children born to opposite-sex couples with equal force. The constitutional avoidance doctrine does not support Plaintiffs' declaration of citizenship under Section 1503.

Plaintiffs' motion for partial summary judgment should accordingly be denied, and partial summary judgment should instead be granted to Defendants.

ARGUMENT

Section 1401(g) confers citizenship, at birth, on a child born abroad only if, among other matters, the child is "*born . . . of* parents one of whom is . . . a citizen of the United States." 8 U.S.C. § 1401(g) (emphasis added). As Defendants explain in their moving brief, both the law and common understanding of these statutory terms strongly supports the Department's longstanding interpretation that a child is "born of" a parent only if she is an immediate biological descendent of the parent. Defs.' Br. in Support of Mot. for Partial Summ. J. at 10–18, ECF No. 67-1.

Indeed, the Department's interpretation of Section 1401(g) is fully consistent with the historical conferral of *jus sanguinis* citizenship. As Defendants explained in their opening brief, *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 legal

traditions. *United States v. Marguet-Pillado*, 560 F.3d 1078, 1082 (9th Cir. 2009). Particularly given the backdrop of the *jus sanguinis* citizenship doctrine, Plaintiffs' view—that Congress abandoned the historic biological relationship requirement for at-birth citizenship in the INA without comment—lacks a statutory basis.[1] Plaintiffs' statutory, policy, and constitutional arguments to the contrary are meritless and should all be rejected, as explained below.

I. Plaintiffs' statutory arguments in favor of their interpretation of Section 1401(g) all fail.

Plaintiffs fail to provide any relevant definitions of statutory text in support of their reading of Section 1401(g), nor do they refer to any language in Section 1401(g) itself that expressly supports their reading: that a child born abroad may qualify for citizenship under this provision if she has only a *legal*, but not a biological, relationship with a U.S. citizen parent. Indeed, Plaintiffs' contention that Section 1401(g) requires only a legal parent-child relationship is nowhere apparent from the text. Rather, to support their reading of Section 1401(g), Plaintiffs primarily argue that Section 1401(g) does not expressly include a biological relationship requirement and rely on case law that Defendants have explained is either distinguishable or incorrectly decided.[2] Pls.' Br. in Support of Mot. for Partial Summ. J. at 17–26, ECF No. 66-1;

[1] 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 adoptive 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.

[2] The government recently petitioned for *en banc* rehearing of the Ninth Circuit's panel decision in *E.J. D.-B. v. Pompeo*, No. 19-55517 (9th Cir.). Pet. For Rehearing En Banc, Dkt. No. 59-1, *E.J. D.-B.* The government maintains that the case was incorrectly decided because it relied on prior, erroneous Ninth Circuit decisions, which should be reconsidered: *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). *Id.* at 7–15. Neither *Scales* nor *Solis-Espinoza* addressed § 1401(g)'s reference to the parents "of" whom a child was born. *Id.* at 7–9. Nor did they address the backdrop against which Congress

Defs.' Br. at 12–13. In light of relevant, longstanding authority and historical practice against which Congress enacted Section 1401(g), the statute's "born of … parents" text is most properly read to incorporate a biological relationship requirement. *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (dismissing the argument that a biological relationship is not implied in Section 1401(g) 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.'") (emphasis in original).[3]

Plaintiffs' reliance on the word "parents" in the statute is similarly misplaced. *See* Pls.' Br. at 21–24. Defendants' argument here is not that the term "parents" is limited by itself to biological parents; rather, the phrase "born . . . of" modifies "parents" to limit the acquisition of citizenship at birth to children who are biologically connected to their U.S. citizen parents. *See* Defs.' Br. at 10–15.

Plaintiffs also assert that Congress necessarily intended to exclude a biological relationship requirement from Section 1401 because the current version of Section 1409(a) expressly creates such a requirement. Pls.' Br. at 27–30. But, as explained below, the explicit biological-relationship requirement of § 1409(a) serves a different purpose (as a means of establishing paternity under that provision) and provides no sound basis to construe Section 1401 as lacking such a requirement.

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enacted § 1401(g): the *jus sanguinis* doctrine. *Id.* at 9. Finally, neither decision afforded proper deference to the State Department's consistent, longstanding interpretation of § 1401(g). *Id.* at 9–11.

[3] While the Second Circuit later held in *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), that Section 1401(g) does not require a biological relationship, as Defendants explained in their moving brief, 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."

As outlined in Defendants' opening brief, Defs.' Br. at 3–4, Section 1401(g) provides for the citizenship of 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 (subject to certain physical presence requirements). 8 U.S.C. § 1401(g). Section 1409, meanwhile, identifies the circumstances under which a child born overseas may acquire U.S. citizenship at birth when born "out of wedlock." *Id.* § 1409. In particular, Section 1409(a) applies to children born of U.S. citizen *fathers*, and explicitly requires that "a blood relationship between the person and the father [be] established by clear and convincing evidence" for the child to acquire U.S. citizenship through the unmarried father. *Id.* § 1409(a). In short, Section 1409(a)'s reference to a "blood relationship" in no way implies that a biological relationship is not required for purposes of Section 1401(g).

As an initial matter, when Congress passed the INA in 1952, Section 1409(a)'s predecessor did not contain language explicitly requiring a biological relationship. At that point, Sections 301(a)(3) and 301(a)(7) of the statute—the predecessors to Section 1401(c) and (g), respectively—both applied to children "born . . . of parents" where either both parents were U.S. citizens (Section 301(a)(3)) or one parent was a U.S. citizen and the other an alien (Section 301(a)(7)). INA § 301(a)(3), (7), 66 Stat. 163, 235–36. And Section 309(a)—the predecessor to Section 1409(a)—provided that Section 301(a)(3) and (7) "shall apply as of the date of birth to a child born out of wedlock . . . , if the paternity of such child is established while such child is under the age of twenty-one years by legitimation." *Id.* § 309(a), 66 Stat. at 238.

Thus, when the INA was enacted, the original versions of Sections 1401(g) and 1409(a), taken together, did not suggest that Congress envisioned a biological connection as more (or less) necessary for children born outside of a marriage than for those born within a marriage. To

the contrary, Section 301(a)(3) and (7)'s conferral of citizenship on a child "born . . . of parents" remains the same requirement as in Section 1401 today—and, for the reasons Defendants have explained, requires a biological relationship between the child and the parents. But when a child is born outside a marriage, the child's parentage necessarily has to be "established" through some process. *See, e.g.*, *Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995). In that context, Section 309(a) served to determine who the child's "parents" were for the purpose of applying Section 301(a)(3) or (7) to the child.

Congress amended Section 309(a) in 1986, adding the explicit "blood relationship" language and requiring that the paternal relationship be "established by clear and convincing evidence." INA Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. Thus, by this amendment, Congress elaborated on the framework for establishing biological paternity and heightened the relevant evidentiary burden under that provision. But that amendment does nothing to suggest that Section 1401 excludes a biological-relationship requirement. That is true for several reasons. First, Congress did not alter the operative "born . . . of parents" language of Section 1401 when amending Section 1409(a), nor has it done so since. The Supreme Court has recognized that "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009); *see also Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (describing this as a "familiar rule"). Thus, to the extent Section 1409(a) sheds light on the meaning of Section 1401, the version of Section 1409(a) that is most relevant is the one contemporaneously adopted in 1952—and that provision, like Section 1401, states a biological-relationship requirement implicitly rather than explicitly.

Second, Congress's addition of the "blood relationship" language to Section 1409(a) did not create a biological-relationship requirement where none existed before. As explained, that provision concerns how paternity is established for the child of a U.S. citizen father born overseas out of wedlock. The original Section 309(a) already required a "blood (biological) relationship between the alleged father and the child at birth." *Marguet-Pillado*, 560 F.3d at 1082; *see also Miller v. Albright*, 523 U.S. 420, 435 (1998) (opinion of Stevens, J.). The 1986 amendment simply made the biological relationship requirement more explicit and required the relationship to be "established by clear and convincing evidence." Thus, even if the contrast between modern-day Section 1401 and modern-day Section 1409(a) could shed light on what Congress meant when it enacted Section 1401's operative language in the original INA, modern-day Section 1409(a) does not imply—any more than the original Section 309(a) did—that children born *within* a marriage (for purposes of Section 1401(g)) may claim citizenship through parents to whom they are not biologically related. Section 1409(a) simply serves, as the original Section 309(a) did, to identify the child's male "parent" for the purpose of applying "[t]he provisions of [Section 1401]" to that child, 8 U.S.C. § 1409(a).

Lastly, it bears noting that when Congress amended Section 1409(a) in 1986 to insert the "blood relationship" language for paternity under that provision, it is presumed to have been aware of how the Department of State had long interpreted Section 1401(g) to require a biological relationship. *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[.]'"); *see also Bastardo-Vale v. Attorney Gen. United States*, 934 F.3d 255, 262 (3d Cir. 2019); *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). Congress could have taken the opportunity to clarify that legal parentage was sufficient to convey citizenship under that

provision, but did not do so. "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) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974)). Indeed, Congress amended a *different* part of Section 1401(g), to lower the physical-presence requirement of that provision, when it amended Section 1409(a). *Id.* §§ 12–13, 100 Stat. 3655, 3657. But in the face of the Department's long-standing interpretation, it did not modify the text of Section 1401(g) to require only a legal parental relationship.

There is accordingly no basis to infer that Congress intended to include a biological-relationship requirement only in Section 1409(a). The Department has long interpreted Section 1401 to require a biological relationship, and Congress was presumably aware of that interpretation when it amended Sections 1401 and 1409 in 1986. If Congress wished to eliminate Section 1401'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.

II. The Department's statutory interpretation is reasonable, and any public policy concerns do not defeat the *Skidmore* deference owed to it.

Plaintiffs' remaining arguments are not grounded in the text of the statute but, rather, consist of largely policy-based rationales for disfavoring the Department's textual and historical approach to Section 1401(g). None of those arguments has merit.

Plaintiffs argue that the Department's understanding of Section 1401(g) to require a biological relationship between the citizenship-acquiring child born abroad and his U.S. citizen parent is inconsistent because of a policy change the Department made in 2014. Pls.' Br. at 33–

34. But the Department has not altered its longstanding position that a child can acquire citizenship under Section 1401(g) only if he is biologically related to his parents. The only change the Department made in 2014 was to recognize gestation as a form of biological relationship between mother and child. *See* 8 FAM § 304.3-1. Plaintiffs' various attempts to undermine the validity of this policy change—which expanded the universe of children who could acquire U.S. citizenship at birth, including to children of same-sex married female couples—does not defeat the long-established fact of the Department's understanding of Section 1401(g) to include a biological requirement.

Plaintiffs next characterize the Department's application of the statute against the backdrop of the *jus sanguinis* doctrine as "distorted" because Section 1401(g) and Section 1409 also impose other, unrelated requirements for the successful acquisition of citizenship at birth despite being born abroad. But the existence of additional requirements—which are 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.

Plaintiffs also argue that the Department's interpretation undermines the INA's objective of family unity and stigmatizes L. Z.-B.'s relationship with his parents. Pls.' Br. at 30–33. But as Defendants explained in their moving brief, the Department's interpretation did not foreclose the Zaccari-Blixt family from maintaining unity. Plaintiffs affirmatively state that "Allison, Stefania, L. Z.-B., and M. Z.-B. have lived together as a family since L. Z.-B.'s and M. Z.-B.'s respective births." Pls.' Stmt. of Undisputed Mat'l Facts ¶ 44. And Defendants' interpretation does not foreclose the family from continuing to maintain unity in this country. *See* Defs.' Br. at 19–20 (explaining the paths through which L. Z.-B. could acquire U.S. citizenship, among other paths to maintaining long-term residence in the United States with the rest of his family). Further, as

Defendants explain below, the Department's interpretation does not, as Plaintiffs claim, stigmatize or unconstitutionally burden L. Z.-B. or his parents, because the policy is facially neutral and does not turn on sex or sexual orientation. Moreover, the various statutory requirements to acquire U.S. citizenship demonstrate that Congress clearly did not intend to freely confer citizenship any time it would facilitate family unity. *See* Defs.' Br. at 19.

Plaintiffs finally claim that "the State Department's policy is not entitled to deference because it conflicts with the clear and unambiguous text of Section 301." Pls.' Br. at 35. But as Defendants explain above, Plaintiffs contention that Section 1401's language clearly requires only a legal relationship is wrong. And, as set forth in Defendants' moving brief, the Department's longstanding interpretation of Section 1401(g) and its specialized experience in administering the statute and preventing citizenship fraud counsel in favor of deferring to the Department's interpretation as persuasive in the event that the court concludes that Section 1401(g)'s text is unclear. Defs.' Br. at 15–18; *see also United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

III. The Department's statutory interpretation raises no constitutional concerns.

Plaintiffs also argue that if there is any ambiguity as to whether a biological relationship is required by the statute, the canon of constitutional avoidance disfavors the Department's interpretation. Pls.' Br. at 36–40. They assert that adopting the Defendants' interpretation "unconstitutionally denies married same-sex couples the rights and benefit and respect accorded to married, different sex couples." *Id.* at 37. But the Department's interpretation raises no constitutional concerns, and the constitutional avoidance doctrine does not support Plaintiffs' statutory interpretation or claim for citizenship under Section 1503.

Plaintiffs are simply wrong to claim that the Department "effectively disregards the validity of the marriages of same-sex couples." Pls.' Br. at 32. Rather, Defendants applied a

facially neutral policy, which implements the statutory requirement that the citizenship-conferring parent have a biological relationship with the child—regardless of the sexual orientation of the child's legal parents. Plaintiffs do not allege that the Department refused to accept the documents reflecting the couple's legal marriage as sufficient proof thereof—nor have they made such a showing on their motion. Indeed, the parties agree that Allison Blixt and Stefania Zaccari are married to each other and that L. Z.-B. is their legal child, born during their marriage. *See* Defs.' Resp. to Pls.' Stmt. of Undisputed Mat'l Facts ¶¶ 29, 42, 90, 92. Rather, the pertinent question is whether L. Z.-B. is "born . . . of" his parents. The mere existence of a biological-relationship requirement—which applies to children of all parents seeking to acquire citizenship at birth despite their birth abroad—does not compel the conclusion that Plaintiffs have been denied due process or discriminated based on sexual orientation.

Contrary to Plaintiffs' assertion, Pls.' Br. at 32, 37, Defendants are not, therefore, in violation of the Supreme Court's decisions in *United States v. Windsor*, 570 U.S. 744 (2013), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), requiring the equal treatment of same-sex marriages, including equal access to the full "constellation of benefits" attendant to marriage, *Obergefell*, 135 S. Ct. at 2601. No married person—whether married to someone of the same or the opposite sex—can confer citizenship under § 1401 on a non-biological child.

In addition, Plaintiffs have not pointed to anything in the Department's interpretation of Section 1401 that impedes Plaintiffs' ability to enter into a lawful marriage, have that marriage recognized under the law, or establish families. To the extent that same-sex couples like Plaintiffs using ART to create families may be required to provide evidence of a qualifying

biological relationship to meet the requirement of the statute, such evidence may also be required of opposite-sex couples seeking citizenship for their children pursuant to Section 1401.

Plaintiffs' analysis also fails to set forth the basis for their conclusion that there is a fundamental right to citizenship at birth for children lacking a biological relationship to a qualifying U.S. citizen parent, regardless of whether that parent is in a same- or opposite-sex couple. The extension of citizenship to foreign-born children is not a constitutionally enshrined right for either the U.S. citizen or the child seeking to acquire citizenship; rather, it is a right granted by Congress. *Rogers v. Bellei*, 401 U.S. 815, 827 (1971); *see Miller*, 523 U.S. at 453 (Scalia, J., concurring) ("Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned, and can only become a citizen by being naturalized, either by treaty, . . . or by authority of Congress.") (internal citation and quotation marks omitted). Further, the Supreme Court has underscored the importance of a biological connection between the child seeking to acquire citizenship and the U.S. citizen seeking to confer citizenship. *See, e.g.*, *Miller*, 523 U.S. at 438 ("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.") (plurality op.); *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (acknowledging "the importance of assuring that a biological parent-child relationship exists" for the purposes of a U.S. citizen father conferring citizenship on a child born abroad).

Plaintiffs 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*, 137 S. Ct. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601 (2015)). 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); *see also Holland v. Rosen*, 895 F.3d 272, 293 (3d Cir.), *cert. denied*, 139 S. Ct. 440 (2018). No married couple—whether same- or opposite-sex—has a right to transmit citizenship under Section 1401 to a child who is not biologically related to both parents.

Plaintiffs also incorrectly argue that Defendants' statutory interpretation "unconstitutionally denies married same-sex couples the rights and benefits accorded to married, different-sex couples." Pls.' Br. at 37. The Department's interpretation of Section 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 Section 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 Section 1401(c) or (g). Instead, they may acquire citizenship through a U.S. citizen father under Section 1409(a) or through a U.S. citizen mother under Section 1409(c).

Additionally, the Department's relevant policies require *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. Defs.' Ex. A at 4. Plaintiffs fail to point to any policy or allegations of fact to establish that the Department applies its policies in a manner that treats same-sex and opposite-sex couples differently.

Finally, a facially neutral policy like the Department's interpretation of Section 1401(g) 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); *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir. 1996) ("[A] facially neutral policy does not violate equal protection solely because of disproportionate effects."). Many children of

opposite-sex couples lack a biological relationship with both parents,[4] and some children of same-sex couples have a biological relationship with both parents.[5] 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. 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). Moreover, as established above, the Department's understanding of Section 1401(g) is "rationally related to legitimate government interests," *Heller v. Doe*, 509 U.S. 312, 318–19 (1993), like the prevention of fraud. *See* Defs.' Br. at 16–17.

Plaintiffs' conclusory assertion of the constitutional avoidance doctrine to support L. Z.-B.'s claim for citizenship under Section 1503, therefore, must be rejected because Plaintiffs muster no "serious doubt" about the constitutionality of the Department's interpretation. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment and grant summary judgment in favor of Defendants.

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[4] Infertility affects more than one in ten couples (Office of Population Affairs, xpM2r), and clinics in the United States perform nearly 300,000 ART cycles each year (CDC, Dep't of Health & Human Servs., *ART Success Rates* (Nov. 15, 2019), https://go.usa.gov/xpM2Y).

[5] As a result of the Department's policy change in 2014, 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).

Dated: January 4, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALLISON DAWN BLIXT and L. Z.-B. Plaintiffs, v. The UNITED STATES DEPARTMENT OF STATE and MICHAEL POMPEO in his official capacity as Secretary, U.S. Department of State Defendants.	:	Civ. No. 1:20-cv-02102-KM-JBC

DEFENDANTS' RESPONSIVE STATEMENT OF MATERIAL FACTS

In accordance with Local Rule 56.1(a), Defendants furnish the following responses to Plaintiffs' statement of material facts:

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

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12. Undisputed.

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34. Undisputed.

35. Undisputed.

36. Undisputed.

37. Undisputed.

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43. Undisputed.

44. Undisputed.

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46. Undisputed.

47. Undisputed.

48. Undisputed.

49. Undisputed.

50. Disputed. The deposition testimony used to support it merely notes that the FAM provides more detail and "gives guidance to a universe of scenarios that are covered in the INA." Makar Decl. Ex. A, at 103:5–11. Defendants submit that this dispute is immaterial for the purposes of deciding the parties' partial-summary-judgment motions.

51. Undisputed.

52. Undisputed.

53. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable

citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State Department interprets and applies the applicable citizenship-at-birth statutes.

54. Undisputed.

55. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State Department interprets and applies the applicable citizenship-at-birth statutes.

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58. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State

Department interprets and applies the applicable citizenship-at-birth statutes.

59. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State Department interprets and applies the applicable citizenship-at-birth statutes.

60. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State Department interprets and applies the applicable citizenship-at-birth statutes.

61. Undisputed.

62. Undisputed.

63. Undisputed.

64. Undisputed.

65. Undisputed.

66. Undisputed.

67. Undisputed.

68. Undisputed.

69. Undisputed.

70. Undisputed.

71. Undisputed.

72. Undisputed. that Congress did not make a corresponding amendment to the INA.

Defendants dispute Plaintiffs' characterization of the reasons for the 2014 policy guidance to the extent it implies that the guidance was improperly adopted. Defendants note that the characterization is incomplete and the relied-upon deposition testimony was objected to as solicited outside the scope of the agreed-upon topics for which the deponent was prepared to be questioned about. *See* Makar Decl. Ex. A, at 243:7–8. Defendants submit, however, that this dispute is immaterial for the purpose of deciding the parties' partial-summary-judgment motions.

73. Undisputed.

74. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State Department's interpretation of the applicable citizenship-at-birth statutes intersects with the appellate rulings that also examine this legal issue.

75. Defendants dispute that this is a statement of fact; instead, this is an issue of law concerning how the State Department interprets and applies the applicable citizenship-at-birth statutes. Defendants refer Plaintiffs and the court to their summary-judgment briefing for Defendants' explanation of how the State Department's interpretation of the applicable citizenship-at-birth statutes intersects with the appellate rulings that also examine this legal issue.

Defendants further note that State Department's statutory interpretations are uniformly applied and that applications for Consular Reports of Birth Abroad are

adjudicated at embassies around the world, beyond the reach of a particular federal circuit's decision. See Makar Decl. Ex. A, at 92:12–15; 250:22–24.

76. Undisputed.

77. Undisputed.

78. Undisputed.

79. Undisputed.

80. Undisputed.

81. Defendants dispute Plaintiffs' characterization of the nature of the questions asked during the CRBA application interview, but this dispute is immaterial for the purpose of deciding the parties' partial-summary-judgment motions. Defendants do not dispute that Allison and Stefania were informed that L. Z.-B.'s applications would be denied because he did not have a biological relationship with Allison.

82. Undisputed.

83. Undisputed.

84. Undisputed.

85. Undisputed.

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109. Undisputed.

110. Undisputed.

111. Undisputed.

Dated: January 4, 2021

Respectfully submitted,

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