Elizabeth A. Cassady (D.C. Bar No. 997160)
cassadye@sullcrom.com
SULLIVAN & CROMWELL LLP
1700 New York Avenue, Suite 700
Washington, D.C. 20006
Telephone: (202) 956-7500
Facsimile: (202) 293-6330

Theodore Edelman (*pro hac vice*)
edelmant@sullcrom.com
Jessica Klein (*pro hac vice*)
kleinj@sullcrom.com
Philip L. Graham, Jr. (of counsel)
grahamp@sullcrom.com
Lauren M. Goldsmith (of counsel)
goldsmithl@sullcrom.com
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Aaron C. Morris (*pro hac vice*)
amorris@immigrationequality.org
IMMIGRATION EQUALITY
40 Exchange Place, Suite 1300
New York, New York 10005-2744
Telephone: (212) 714-2904

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALLISON DAWN BLIXT and LUCAS ALEXANDER ZACCARI-BLIXT Plaintiffs, v. The UNITED STATES DEPARTMENT OF STATE and MICHAEL R. POMPEO in his official capacity as Secretary, U.S. Department of State Defendants.	:	Civ. No. 1:18-cv-00124-EGS

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiffs Allison Dawn Blixt ("Allison") and Lucas Alexander Zaccari-Blixt ("Lucas," together "Plaintiffs") submit the following memorandum of law in opposition to the motion to dismiss filed by the United States Department of State (the "State Department") and Secretary of State Michael R. Pompeo (together "Defendants"). (Dkt. No. 31.)

I. PRELIMINARY STATEMENT

This action challenges the State Department's improper refusal to recognize that Lucas acquired U.S. citizenship under Section 301(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1401(g) ("Section 301(g)"), when he was born to Allison and her wife, Stefania Zaccari ("Stefania"), who were married at the time of Lucas's birth. Allison and Stefania have raised Lucas together as his parents since the day he was born. Allison and Stefania are the only individuals named as Lucas's parents on his birth certificate. They are the only parents Lucas has ever known and the only individuals who have asserted any parental rights over Lucas. No person has ever challenged Allison's or Stefania's status as Lucas's parent.

Nonetheless, the State Department denied Lucas's application for a Consular Report of Birth Abroad ("CRBA") and U.S. passport apparently on the ground that, although Allison is a U.S. citizen, the egg used to conceive Lucas was from Stefania, who is not. In effect, the State Department has by fiat declared that Allison is not Lucas's parent. To reach that conclusion, the State Department erroneously construed Section 301(g) to require a biological relationship between Lucas and Allison, his U.S. citizen parent, even though the statute's text, structure, and legislative history, as well as two decisions of the Ninth Circuit and one of the Second Circuit, confirm that there is no such requirement. Instead of recognizing that Lucas acquired U.S. citizenship when he was born into Allison and Stefania's marriage, the State Department classified Lucas as a child born "out of wedlock," and denied him the rights and

benefits of U.S. citizenship on that basis. The State Department's failure to apply Section 301(g) in accordance with its terms and Congress's purpose—and its importation of a biological relationship requirement that discriminates against same-sex spouses—necessitates the intervention of this Court.

Section 301(g), which applies to children born in wedlock does not require a biological relationship between the petitioner and his or her U.S. citizen parent, and instead codifies the common law presumption of legitimacy by providing that, to be entitled to citizenship at birth, the child must merely be a person "born . . . of parents" one of whom is a U.S. citizen (as Allison indisputably is). *See* 8 U.S.C. § 1401(g). Section 301(g)'s unambiguous language also is consistent with the INA's legislative history, which reflects Congress's intent to eliminate obstacles to "keep[ing] together the family unit wherever possible." *See* H.R. Rep. 85-1199, at 2021 (1957). In contrast to Section 301(g), Section 309 of the INA ("Section 309"), which applies to children born to unmarried parents, deems such children to be born "out of wedlock," and explicitly requires a "blood relationship" between a U.S. citizen parent and the child. 8 U.S.C. § 1409. The differences between these provisions reflect that Congress knew how to impose a biological precondition when it wished to do so, and confirm Congress's intent—consistent with the common law presumption of legitimacy—not to do so for children, such as Lucas, who were born during the marriage of their U.S. citizen parent.

The *Memorandum in Support of Defendants' Motion to Dismiss* (the "Motion" or "Mot.") is nearly silent on this central issue of statutory interpretation. Indeed, in their 26-page Motion, Defendants fail to engage in any statutory interpretation and devote only the last half page of their brief to the text of the INA's relevant provisions. Instead, they rely almost exclusively on the State Department's internal Foreign Affairs Manual ("FAM"), which states

that the presumption that "[c]hildren born in wedlock are generally presumed to be the issue of that marriage . . . is not determinative in citizenship cases" and that "an actual biological relationship to a U.S. citizen parent is required." (Mot. at 6.) The FAM does not ground that requirement in any statutory provision or specify when a further inquiry is required or the protocol for conducting such an investigation other than to state that "[i]f doubt arises that the U.S. citizen 'parent' is biologically related to the child, the consular officer is expected to investigate carefully." (*Id.*)

Defendants do not cite or even acknowledge that the only two courts to consider the issue of statutory interpretation presented in this action—the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Second Circuit—have held that Section 301(g) does not, and was not intended to, impose any biological requirement on the children of a married U.S. citizen. In reaching this conclusion, neither the Ninth Circuit nor Second Circuit accorded any deference to the State Department's interpretation of the INA or its manual, but instead analyzed the statute's text and Congress's purpose and held that they refuted the existence of any biological relationship test.

In short, the Motion never addresses the actual language of the statute or the three federal court of appeals cases that have applied that language, and is entirely silent on the history and purpose of the statute. Instead, Defendants rely upon their own manual (issued without notice-and-comment) to the exclusion of these fundamental sources of statutory interpretation. And in an apparent attempt to avoid the merits of this case entirely, Defendants devote almost their entire Motion to technical and fatally circular arguments that contort the law of this Circuit and of the Supreme Court and that disregard the INA's unambiguous language and Congress's purpose.

II. STATEMENT OF FACTS

A. The Zaccari-Blixt Family

Allison is a U.S. citizen who was born and raised in the United States. (Complaint ("Compl.") ¶ 41.) In 2008, Allison relocated to London, England to live with her now-wife, Stefania, an Italian citizen. (Compl. ¶ 46.) At the time, Stefania was not eligible to immigrate to the United States, and the Defense of Marriage Act, 1 U.S.C. § 7, would have barred the federal government from providing her immigration benefits if she and Allison had been married. (Compl. ¶ 45.) In 2009, Allison and Stefania entered into a civil partnership in England, which on January 3, 2015, was converted retroactively to a valid marriage, following the legalization of same-sex marriage in England. (Compl. ¶ 47.)

Allison and Stefania subsequently decided to start a family and sought to conceive children using assisted reproductive technology. (Compl. ¶ 48.) In 2014, Stefania became pregnant using her own egg and donor sperm. (Compl. ¶ 49.) On January 30, 2015, Allison and Stefania's oldest son, Lucas, was born in London, England. (Compl. ¶ 49.) Allison and Stefania are the only parents listed on Lucas's birth certificate and have been Lucas's parents for all purposes since his birth; no other person has ever claimed to be, or has been declared, his parent. (Compl. ¶ 50.) Allison and Stefania have raised Lucas as their child since the day he was born. (*Id.*) Under the law of England—as well as the law of every residence that Allison or Lucas has ever had—Allison is Lucas's legal parent. (*Id.*)

In 2016, Allison and Stefania decided to have a second child and Allison became pregnant using her egg and the sperm of the same donor whose sperm had been used to conceive Lucas. (Compl. ¶ 51.) On February 25, 2017, Allison's and Stefania's youngest son, Massimiliano Axel Zaccari-Blixt ("Massi"), was born in London, England. (Compl. ¶¶ 2, 51.)

Allison and Stefania are Massi's legal parents, and are the only parents listed on Massi's birth certificate or who claim to have any parental rights with respect to Massi. (*Id.*)

B. The INA

The INA includes specific provisions setting out the eligibility requirements for U.S. citizenship at birth. (Compl. ¶ 19.) The prerequisites differ for children of a marriage, which are covered in relevant part in Section 301(g), and children "born out of wedlock," which are set out in Section 309. (Compl. ¶¶ 20-21.) Section 301(g) includes no requirement of a biological connection between the child and a U.S. citizen parent, and, consistent with Congress's purpose in enacting the INA of keeping families together, courts construing that provision (or its predecessor provision) have uniformly held that no such requirement exists.

Section 301(g) provides that a child born abroad is a citizen at birth if one of his or her married parents is a U.S. citizen and meets certain residency requirements.[1] The statute provides in relevant part that the child is a citizen if her or she is:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

8 U.S.C. § 1401(g).

Section 309, which applies to persons "born out of wedlock," imposes on such persons additional and substantially different requirements than Section 301(g). (Compl. ¶ 21.) Section 309 provides that a child born abroad to an unwed U.S. citizen father is a citizen at birth

[1] Although Section 301(g) does not explicitly state that it applies to children born abroad to married parents, it has been consistently interpreted in this manner by virtue of its contrast to Section 309, which applies to children "born out of wedlock." *See Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (referring to Section 301(g) as "[a]pplicable to married couples").

if he or she establishes "a blood relationship between the person and the father . . . by clear and convincing evidence" and meets certain other statutory requirements. For persons born outside the U.S. to an unwed U.S. citizen mother, Section 309(c) specifies that:

> a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth . . . .

8 U.S.C. § 1409(c).

Other than requiring that one parent be a U.S. citizen meeting the specified residency requirements, Section 301(g) does not restrict the class of persons born in wedlock who are eligible for citizenship at birth. In particular, it makes no mention of a biological relationship requirement as between the citizen parent and the child. The only reference to such a "blood" relationship requirement is in Section 309, and this contrast underscores that Congress's silence on this point in Section 301 was intentional. (Compl. ¶¶ 21-23, 30.) Nonetheless, in the FAM, the State Department has imposed such a requirement, requiring that to be born "in wedlock" (and therefore for the right of citizenship to be governed by Section 301(g)), a child must have a biological relationship with his or her U.S. citizen parent.[2] (Compl. ¶¶ 37-38.) Subsection (c) of 1140 Appendix E of the FAM states that "[t]o say a child was born 'in wedlock' means that the child's biological parents were married to each other at the time of the birth of the child." (Compl. ¶ 38, Exhibit ("Ex.") A.) This unilateral declaration, which is not the product of a formal adjudication or notice-and-comment rulemaking, does not carry the force of law and conflicts with the express terms of, and Congress's clear purpose in enacting, the INA. (Compl. ¶ 39.) The imposition of such a biological relationship requirement under Section 301(g) has been rejected by three unanimous panels of two federal courts of appeals, and

[2] *See* 7 FAM 1140 Appendix E, attached as Exhibit A to the Complaint; *see also* 8 FAM 304.1-2(C).

has never been validated by any federal court.[3] If allowed to stand, this purported requirement would mean that no child of same-sex spouses could ever rely on Section 301(g) to establish citizenship, but rather would be branded by the State Department's fiat as illegitimate.

C. The Application of the State Department's Policy to the Zaccari-Blixt Family

Shortly after Lucas's birth, Allison and Stefania appeared in person at the U.S. Embassy in London to apply for a CRBA and a U.S. passport for Lucas. (Compl. ¶ 53.) Despite having been presented with clear and sufficient proof of Allison's U.S. citizenship, marriage, and status as Lucas's legal parent, an Embassy official inquired into the details of Lucas's birth, asking about such matters as how Allison and Stefania had conceived Lucas, whose genetic material had been used to conceive him, and in whose womb he had been carried. (Compl. ¶ 54.) After Allison and Stefania answered the official's questions, the Embassy informed Allison that it would be futile to submit a citizenship application for Lucas unless she could prove that she either had carried him *in utero* or provided the egg used to conceive him. (Compl. ¶ 55.) Allison and Stefania left the Embassy without submitting an application. (*Id.*)

On May 23, 2017, following Massi's birth, Allison and Stefania returned to the U.S. Embassy in London and submitted CRBA and U.S. passport applications for both Lucas and Massi. (Compl. ¶ 56.) Again, Allison and Stefania were asked a series of intrusive and legally irrelevant questions about how their children were conceived and born. (*Id.*) Again, the Embassy informed them that it would not recognize Lucas as a citizen because of the lack of a genetic or gestational relationship with Allison. (Compl. ¶ 56.)

In May 2017, Allison and Stefania learned that Massi's application for a CRBA and U.S passport had been granted under Section 309, but that Lucas's application had been

[3] *See Jaen* v. *Sessions*, 899 F.3d 182, 184 (2d Cir. 2018); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005); *Scales* v. *INS*, 232 F.3d 1159, 1161 (9th Cir. 2000).

denied. (Compl. ¶¶ 4, 57.) A May 24, 2017 letter from the Embassy to Allison and Stefania stated that the State Department had applied Section 309(c)—the provision that applies to children born out of wedlock—to Lucas's application, and on that basis required proof of Lucas's genetic or gestational relationship to Allison. (*Id.*) The letter did not explain why Section 309 was applied to the child of a valid marriage. (Compl. ¶ 58.)

On September 5, 2017, Allison and Lucas submitted, through their counsel, a letter to the Embassy requesting reconsideration of its denial of Lucas's application on the ground that the State Department had applied the wrong statutory provision of the INA based on an unconstitutional rationale that denies full legal recognition to same-sex marriages. (Compl. ¶ 60.) In a letter dated November 7, 2017, the Embassy stated without any explanation that it "affirm[ed] that Lucas did not acquire U.S. citizenship at birth." (Compl. ¶ 61.)

Rather than fostering Congress's purpose of keeping families together, the State Department's action has fractured the Zaccari-Blixt family, treating one child (Massi) as a citizen while treating his brother as an alien, notwithstanding that they are—and are being raised as—children of the same marriage. As a result of the State Department's denial of Lucas's application, his family must share the intimate details of their lives with U.S. officials and endure the pain and stigma that result from the State Department's refusal to recognize Allison's marriage to Stefania and parentage of Lucas, and its treatment of Lucas as a child born out of wedlock. (Compl. ¶ 59.)

D. The Complaint

On January 22, 2018, Allison and Lucas filed the Complaint in this action (Dkt. No. 1), alleging that "Lucas acquired U.S. citizenship at birth under Section 301(g)," (Compl. ¶ 62; *see also id.* at ¶ 63), and seeking, in part, a declaration of this Court that Lucas is a U.S. citizen at birth. (Compl. at 24.) The Complaint alleges that Lucas satisfies the requirements for

U.S. citizenship under Section 301(g) and that the State Department erroneously applied the wrong provision of the INA (*i.e.*, Section 309(c), the provision that applies to persons born out of wedlock) in summarily denying Lucas's application. (Compl. ¶¶ 3, 63, 64.) The Complaint further alleges that the State Department's refusal to treat Lucas as born in wedlock during Allison's and Stefania's marriage unconstitutionally discriminates against same-sex spouses and their children on the basis of sex and sexual orientation in violation of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶¶ 73-89.) In so doing, the State Department has failed to recognize the "equal dignity of same-sex marriages," *United States* v. *Windsor*, 570 U.S. 744, 770 (2013), and failed to afford opposite-sex and same-sex spouses the same "constellation of benefits . . . linked to marriage," *Pavan* v. *Nathaniel Smith*, 137 S. Ct. 2075, 2077 (2017). Those benefits include the legal recognition that same-sex spouses may both be the parents of a child born during their marriage, and that the children of that marriage are entitled to all the same rights, benefits, and presumptions available to the children of opposite-sex marriages, including the presumption of legitimacy. (Compl. ¶¶ 34, 36.) The Complaint further alleges that the State Department's application of the INA, as reflected in the FAM, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of Section 706(2)(A) of the APA. (Compl. ¶¶ 90-98.) The relief sought in the Complaint includes a declaration of this Court that Lucas is a U.S. citizen, a declaration that the State Department's misinterpretation of the INA is unconstitutional and unlawful, and an injunction against its continued erroneous and discriminatory application of Section 301(g).

III. SUMMARY OF ARGUMENT

Lucas was born to his married parents Allison and Stefania. They are listed as the parents on Lucas's birth certificate and were married at the time of his birth. Section 301(g) of the INA is clear that a child born in wedlock need not be the biological child of his U.S. citizen parent in order for that parent to confer U.S. citizenship on the child. Lucas is therefore entitled to recognition that he is a U.S. citizen. Defendants, however, do not consider Allison to be Lucas's parent under Section 301, and regard Lucas as a child born out of wedlock. The State Department reached this improper result by importing into Section 301(g) a biological relationship requirement that is not mentioned in the statute, is inconsistent with the statutory framework, and is contrary to the stated legislative purpose of the statute. As a consequence, the State Department adjudicated Lucas's application under Section 309 of the INA, which applies only to children born "out of wedlock." The State Department has thereby not only deprived Lucas of his rightful status as a U.S. citizen at birth, but also deprived Allison and Stefania of their constitutional right to have their marriage recognized and treated in all respects as the equal of an opposite-sex marriage. In doing so, the State Department violated the APA and the Constitution.

Instead of addressing the INA's clear terms and meaning, and Congress's purpose in enacting the INA, Defendants focus on a series of erroneous technical arguments regarding standing and claim construction. Defendants first contend that Allison and Lucas lack standing because, even if the Court were to require that Defendants apply Section 301(g) to Lucas's citizenship application, Defendants would continue to read a biological relationship requirement into Section 301(g) and would deny Lucas's application on that basis, and therefore that Allison's and Lucas's injuries are not redressable through this action. This is wrong because, as

shown below, Defendants' proposed reading of Section 301(g) is incorrect in this respect as well—an error that can likewise be redressed in this action. Defendants cannot defeat Allison and Lucas's claims by asking the Court to assume as a threshold matter that it will deny the requested relief in full.

Defendants also wrongly argue that the APA provides no basis for challenging the State Department's interpretation of the INA and denial of Lucas's application because Section 1503 of the INA provides an adequate remedy at law. This argument fails because (i) the relief available under Section 1503 would not be as broad as the relief sought under the APA, which includes both a declaration that the State Department's interpretation of the INA is unconstitutional and unlawful and a corresponding injunction; (ii) Section 1503(b) and (c) were enacted to address persons fraudulently applying at the border in order to gain entry into the United States, not, as here, for persons residing abroad, who seek determination of their citizenship status; and (iii) consistent with this statutory purpose, and on the facts of this case in particular, it would be unduly burdensome to require the Zaccari-Blixt family to move to the United States for the duration of the uncertain application process, particularly given that Allison and Stefania live and work in London, where their children will be starting school.

Defendants' exclusive reliance on the FAM, both in denying Lucas's application and in the Motion, is both procedurally and substantively flawed. In violation of the APA, the State Department failed to engage in reasoned decisionmaking in adopting its current interpretation of the INA. The FAM was issued without notice-and-comment, was not the result of a formal adjudication, and it is not the type of agency determination that is entitled to judicial deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984).[4] Moreover, the FAM's biological relationship requirement for the children of a marriage involving a U.S. citizen finds no support in the language of Section 301, conflicts with the statutory framework that distinguishes between children of a marriage and those born "out of wedlock," undercuts Congress's purpose in enacting the INA, and ignores the decisions of every federal court to consider the issue. Dismissal of the APA claim also would be premature without discovery.

The Complaint also properly asserts claims for relief under the Declaratory Judgment Act ("DJA") and the Equal Protection and Due Process Clauses of the Constitution. Here, it is undisputed that the Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), and the Complaint pleads more than sufficient facts that, if proven, would establish that Allison's and Lucas's constitutional rights are infringed by the State Department's conduct. Moreover, under settled Supreme Court precedent, Allison and Lucas may bring their constitutional claims directly under the Fifth and Fourteenth Amendments because the Complaint seeks only equitable relief.

Defendants' flawed reading of the Complaint's due process claim ignores the Complaint's allegation that the State Department's interpretation of the INA infringes the fundamental right to marry and unfairly burdens same-sex marriages by denying same-sex spouses and their children the full constellation of rights and benefits linked to marriage, including "the legal recognition that same-sex spouses may both be the parents of a child born during their marriage, even if only one spouse is the child's biological parent." (Compl. ¶ 36 (citing *Pavan*, 137 S. Ct. at 2077).) By the Motion's conspicuous failure to address the dispositive issues of statutory interpretation, Defendants all but concede that there is no

[4] *See* Section IV.B.3., *infra*.

legitimate basis for imposing a biological relationship requirement for applications under Section 301(g). The Motion also expressly acknowledges that the biological requirement is applied only in cases of "doubt" by a Consular officer (Mot. at 6), which is left to the officer's discretion. Therefore, same-sex spouses and their children must confront the reality that they will be subjected to a biological prerequisite to citizenship that is, at best, discretionary for opposite-sex spouses and their children. Defendants fail to assert any interest, let alone a compelling interest, to support this distinction, or the State Department's exclusion of Lucas from consideration for citizenship under Section 301(g).

The Complaint also alleges sufficient facts to plead an equal protection claim, including the long history of discrimination against same-sex couples in the United States, the existence of precedent precluding the State Department from imposing its unconstitutional and unlawful interpretation of the INA on children born of heterosexual marriages, and the stark and undeniable disparate impact of the State Department's interpretation on same-sex spouses. This is more than sufficient at the motion to dismiss stage.

IV. ARGUMENT[5]

A. Allison's and Lucas's Injuries Are Redressable Through This Action and, Therefore, Allison and Lucas Have Standing Under Article III.

In order to satisfy Article III's "case-and-controversy requirement," a plaintiff "must allege (i) that it suffered an injury in fact; (ii) that a causal connection exists between the

[5] In adjudicating a motion to dismiss for lack of subject matter jurisdiction, the Court must accept as true all factual allegations of the Complaint. *See, e.g., Am. Freedom Law Ctr.* v. *Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1069 (2017) (subject matter jurisdiction motion). Similarly, for a Rule 12(b)(6) motion, the Court must "treat the complaint's factual allegations as true and must grant the plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." *L. Xia* v. *Tillerson*, 865 F.3d 643, 649 (D.C. Cir. 2017) (internal quotation marks omitted). In order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 649-50 (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)).

injury and challenged conduct; and (iii) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Millennium Pipeline Co.* v. *Seggos*, 860 F.3d 696, 699 (D.C. Cir. 2017) (citing *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). As the D.C. Circuit explained last year in *Carpenters Industrial Council* v. *Zinke*: "Of course, courts do not conduct separate mini-trials on injury-in-fact, causation, and redressability. Rather, courts do their best based on the complaint and declarations to assess whether the plaintiff's assertions suffice to show the elements of standing." 854 F.3d 1, 5 (D.C. Cir. 2017).

Defendants challenge only whether the Complaint adequately pleads redressability (Mot. at 9), arguing that the requested relief (which they characterize incorrectly as seeking only an order requiring Defendants to adjudicate Lucas's application under Section 301(g)) would not redress Allison's and Lucas's injuries, because even under that section, the State Department would apply its biologically dependent interpretation of the words "born . . . of parents" and reject any application that Lucas makes. (Mot. at 9-10.) Defendants' argument is circular and wrong. They cannot prove lack of redressability simply by arguing that they will continue to refuse to redress Allison's and Lucas's injuries, even on remand.

Defendants mischaracterize the relief sought and the harm to be redressed. The harm was, in part, the State Department's determination of Lucas's application as though Lucas were illegitimate when he is not, and also their imposition of an extra-statutory biological test under 301(g), without which Lucas would be entitled, on the face of the statute, to recognition that he was not born out of wedlock and therefore is entitled to consideration under Section 301, and then to a declaration of U.S. citizenship under that Section. By unreasonably isolating one aspect of the relief sought and asking this Court to ignore the interrelated allegations and relief requested in the Complaint (Mot. at 9-10), Defendants avoid addressing this obvious path to

redressing Allison's and Lucas's injuries. If the Court were to find that Lucas was "born in wedlock" for purposes of Section 301(g), by that same logic, the State Department would be precluded from denying Lucas's application under that provision for lack of a biological relationship between Lucas and Allison. *See Miller* v. *Christopher*, 96 F.3d 1467, 1469-70 (D.C. Cir. 1996), *aff'd sub nom. Miller* v. *Albright*, 523 U.S. 420 (1998) (holding that the plaintiff had standing to seek a declaration that Section 309(a) of the INA was unconstitutional).

Defendants nowhere even argue that the Complaint, taken as a whole, fails to assert redressable injuries. (*See* Mot. at 9 (asserting a redressability issue "[t]o the extent" that Allison and Lucas challenge that "Defendants applied 8 U.S.C. § 1409").) Defendants ignore that the Complaint seeks not only "a Court order requiring the State Department to adjudicate Lucas's CRBA application under section 1401(g)" (Mot. at 10), but also, among other things, alleges a violation of the APA based on the denial of Lucas's application and expressly seeks a declaration of citizenship from this Court. (Compl. at 24.) As the D.C. Circuit has explained: "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Orangeburg* v. *FERC*, 862 F.3d 1071, 1083 (D.C. Cir. 2017) (internal quotation marks omitted). A "plaintiff lacks standing when *none of the relief sought* in the complaint would likely remedy that plaintiff's alleged injury in fact." *Young* v. *U.S. Dep't of Labor*, 2018 WL 3941948 at *5 (D.D.C. Aug. 16, 2018) (alterations and internal quotation marks omitted and emphasis added);[6] *see also Jafarzadeh* v.

[6] Defendants' argument that Allison's and Lucas' injuries are not redressable relies exclusively on *Young* v. *Department of Labor*, a district court decision that is readily distinguishable because, there, the "Plaintiffs ha[d] not identified or asked the Court to set aside any HHS regulation that allegedly led to the denial of their benefits claims." 2018 WL 3941948, at *4. Here, in stark contrast, the Complaint seeks both a declaration by this Court of Lucas's citizenship *and* a declaration that the State Department's interpretation of the INA set out in the FAM, which ostensibly led to the denial of Lucas's application, is unconstitutional and unlawful.

Nielsen, 321 F. Supp. 3d 19, 34 (D.D.C. 2018) ("So long as plaintiffs allege some remedy that, were it granted would create some possibility of [relief], plaintiffs will have plausibly pled redressability." (internal citations omitted)). Taking into account the entirety of the relief sought in the Complaint, not just the narrow slice to which Defendants have attempted to confine it, Allison and Lucas clearly satisfy the redressability requirement.[7] *See NTCH, Inc.* v. *FCC*, 841 F.3d 497, 506 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 2277 (2017) ("Because [the plaintiff] has articulated an injury that is traceable to the [agency's] order and might be redressed by a favorable decision from the court, it has met the requirements of Article III so as to achieve standing.").

Allison and Lucas therefore have carried their burden to show, at the motion to dismiss stage, that the redressability requirement of Article III standing has been met. The Court should conclude that they have standing and reach the sufficiency of the Complaint's claims.

B. The Complaint Sufficiently Alleges a Violation of the APA.

1. The State Department's interpretation of the INA is patently unreasonable, and the Complaint pleads sufficiently that the State Department misinterpreted it.

Under the APA, a court must "'hold unlawful and set aside agency action' that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Animal Legal Def. Fund, Inc.* v. *Perdue*, 872 F.3d 602, 610 (D.C. Cir. 2017) (quoting 5 U.S.C. § 706(2)(A)). The State Department's interpretation of the INA fails APA review. There is no rational or legitimate reason, and it is not otherwise in accordance with law, for the State Department to question Allison's status as Lucas's parent, as reflected on Lucas's birth

[7] Nor are Allison and Lucas required to show that the relief sought would remedy all of the harms alleged in the Complaint. *See Urban Health Care Coal.* v. *Sebelius*, 853 F. Supp. 2d 101, 107 (D.D.C. 2012) ("[A] plaintiff does not need to show that the relief sought would redress the injury completely.").

certificate; to adopt an interpretation of the INA that treats brothers who have the same parents identified on their birth certificates as citizens of different countries and the children of same-sex marriages differently from the children of opposite-sex marriages; or to read into the INA an extra-statutory requirement and then use that definition to override the statute's actual text and Congress's clear purpose.

Defendants devote only a single paragraph at the end of their 26-page brief to defending their interpretation of the INA. That perfunctory argument is divorced completely from any analytical framework and relies primarily on the "foundational principle of *jus sanguinis*" or "right of blood" (Mot. at 26), which, as the Second and Ninth Circuits have recognized, Congress declined to import into the INA. *See, e.g.*, *Jaen* v. *Sessions*, 899 F.3d 182, 187-89 (2d Cir. 2018); *Scales* v. *INS*, 232 F.3d 1159, 1164-65 (9th Cir. 2000). Defendants' argument amounts to little more than an unfounded plea for the Court to ignore the INA's plain language, Congress's well-documented legislative intent, and a consistent line of precedent.

a. *The text of Section 301(g) does not impose a biological relationship requirement.*

As the Complaint alleges, the plain language of Section 301(g) does not impose on persons born of legally married spouses, like Lucas—both of whose parents are listed on his birth certificate—a biological relationship requirement. Section 301(g) makes no mention of any such requirement; rather, it provides that a "person born . . . of parents one of whom is an alien, and the other a citizen of the United States" is a citizen, if the U.S. citizen parent satisfies that provision's residency requirement. 8 U.S.C. § 1401(g); *see Scales*, 232 F.3d at 1164. Nothing in

the language of Section 301, or elsewhere in the statute, suggests that in using the term "parent,"[8] Congress intended to refer only to biological parents.[9]

Moreover, Congress's inclusion of a "blood relationship" requirement in Section 309 but not in Section 301(g) is strong evidence that Congress intended children born in and out of wedlock to be treated differently for purposes of acquiring U.S. citizenship, and intended that there be no biological or blood relationship requirement under Section 301(g). *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)); *Jaen*, 899 F.3d at 189 ("[T]he 'textual distinction' between the sections regarding children of married parents and children of unmarried parents is strongly suggestive of a clear Congressional intent to treat the two categories differently on this point."); *see also Scales*, 232 F.3d at 1165 (quoting same passage from *Russello*, 464 U.S. at 23).

Absent evidence of a contrary congressional intent, statutory language should be viewed against the background of the common law. *See Neder* v. *United States*, 527 U.S. 1, 21 (1999) ("It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute

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[8] Except to clarify that the term "parent" includes a deceased parent, Title III of the INA, the Title that includes Sections 301(g) and 309, contains no definition of the term, let alone a definition limiting it to biological and/or gestational parents. *See* 8 U.S.C. § 1101(c)(2).

[9] Under Titles I and II of the INA, the term "parent" is defined as "a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection." Subdivision (1), in turn, defines the term "child" to mean "an unmarried person under twenty-one years of age" who, if not born in wedlock, meets certain criteria, such as having been "legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile . . . ." 8 U.S.C. § 1101(b)(1)-(2). Taken together, Titles I, II, and III reflect that Congress intended a liberal treatment of the term "parent" in the INA and, separately, did not intend to replace the common law definition.

otherwise dictates, that Congress means to incorporate the established meaning of these terms." (alterations and internal quotation marks omitted)). In the United States, nearly every state recognizes that the term "parent" generally refers not only to biological parents but to those who by marriage or otherwise have that status. (Compl. ¶ 24.) *See Jaen*, 899 F.3d at 189 ("New York state—like many states—incorporates the common law presumption of parentage into its domestic relations law."); 41 AM. JUR. 2D *Illegitimate Children* § 8 ("[I]t is clear that such a presumption [of legitimacy] exists independently of statute in practically all jurisdictions."); *see also Parent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term "parent" as "[t]he lawful father or mother of someone" and stating that "[i]n ordinary usage, the term denotes more than responsibility for conception and birth"). The common law presumption that every child born in wedlock is the legitimate offspring of the child's married parents applies even when only one spouse is the child's biological parent. (Compl. ¶ 24.) *See Michael H.* v. *Gerald D.*, 491 U.S. 110, 124 (1989) (describing the "presumption of legitimacy" as "a fundamental principle of the common law"); *see also Christopher YY* v. *Jessica ZZ*, 159 A.D.3d 18, 24 (3d Dep't 2018) ("As the child was born to respondents, a married couple, they have established that the presumption of legitimacy applies, a conclusion unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor").

Every court to consider whether Section 301 imposes a biological requirement between a child born in wedlock and a U.S. citizen parent has reached the same conclusion—it does not. In *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000), the petitioner was born during the marriage of his Philippine citizen mother and U.S. citizen father, but was likely not the biological child of his U.S. citizen father. *Id.* at 1162. The Ninth Circuit nevertheless held that "[a] straightforward reading of [§ 301] indicates . . . that there is no requirement of a blood

relationship." *Id.* at 1164. The court noted that, in contrast, Section 309 requires a blood relationship between a person born out of wedlock and a U.S. citizen father, but stated that the provision "d[id] not apply to Petitioner . . . because he was born to parents who were married at the time of his birth." *Id.* It further observed that "[i]f Congress had wanted to ensure [a blood relationship with a U.S. citizen], 'it knew how to do so.'" *Id.* (quoting *Custis* v. *United States*, 511 U.S. 485, 492 (1994)).

The Ninth Circuit reaffirmed *Scales*' holding in *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2005). There, the petitioner was born in Mexico and raised in the United States by his biological father, a Mexican citizen, and his father's wife, a U.S. citizen, who had been married at the time of his birth. *Id.* at 1091-92. The Board of Immigration Appeals determined that the petitioner "'was born out of wedlock,' because his biological father was not married to his biological mother at the time of his birth." *Id.* at 1092. On appeal, the Ninth Circuit held that *Solis-Espinoza* "presented a situation much like" that in *Scales* and that the petitioner "was a legitimate child, not born out of wedlock, and . . . thus a United States citizen pursuant to 8 U.S.C. § 1401(g)." *Id.* at 1094. The court thus again determined that Section 301 does not condition eligibility for citizenship on a blood relationship with a U.S. citizen parent, confirming that "the requirement applied *only* to an illegitimate child and that it did not apply to someone who was not born 'out of wedlock.'" *Id.* at 1093 (emphasis in original) (citing *Scales*, 232 F.3d at 1164).[10]

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[10] The Ninth Circuit further explained:

> That result is logical. In every practical sense, [the wife of petitioner's biological father] was petitioner's mother and he was her son. There is no good reason to treat petitioner otherwise. Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.

This year, the Second Circuit also rejected the State Department's interpretation of the former version of Section 301(g).[11] *See Jaen*, 899 F.3d 182. There, the petitioner's mother was a citizen of Panama and was married to a U.S. citizen. The petitioner's birth certificate listed another man (with whom his mother had an extramarital relationship) as his father. *Id.* at 184-85. The court held that the petitioner's "parent" for purposes of Section 301 was his mother's husband at the time of his birth, notwithstanding that her husband was not the petitioner's biological father. *Id.* The court reasoned that "the INA incorporates the common law meaning of 'parent' into former Section 1401(a)(7) [now Section 301(g)], such that a child born into a lawful marriage is the lawful child of those parents, regardless of the existence or nonexistence of any biological link." *Id.* at 185. The court further explained that "any apparent ambiguity [concerning the term 'parent'] is foreclosed" because, "[g]iven the statute's use of a term with centuries-old, common law meaning and its failure to articulate any additional or alternative definition of 'parent' . . . it is clear . . . that Congress incorporated the common law meaning of 'parent' . . . [and] therefore incorporated the longstanding presumption of parentage based on marriage." *Id.* at 187-88. The court expressly rejected the same unfounded interpretation of the INA that Defendants advance here, and underscored that in addition to being consistent with New York state law, its decision was "grounded in the common law and Supreme Court precedent." *Id.* at 190. The court further noted that "parentage for purposes of Section 1401 is a legal construct that incorporates the common law's enduring respect for the marital family" and therefore its decision did not "break . . . new ground." *Id.*

Solis-Espinoza, 401 F.3d at 1094.

[11] The statutory language at issue in *Jaen* is substantially identical to the version of Section 301(g) at issue here.

It is telling that Defendants have chosen not to cite or discuss any of these three federal courts of appeals decisions addressing the central substantive issue before this Court.

b. *The State Department's interpretation of the INA conflicts with the INA's legislative purpose of keeping families united.*

The State Department's interpretation of the INA also is inconsistent with the legislative purpose of the statute, the history of which "clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 85-1199, at 7 (1957); *see also Nation* v. *Esperdy*, 239 F. Supp. 531, 538 (S.D.N.Y. 1965) ("[T]hese provisions are designed to clarify or adjust existing provisions of law in the interest of reuniting broken families . . . .") (quoting 103 CONG. REC. 15498 (1957) (statement of Sen. Kennedy)).[12] The Ninth Circuit recognized this purpose in concluding that the concerns animating the blood relationship requirement in Section 309, such as fostering "parental support" and "encouraging the development of a healthy relationship between the citizen parent and the [minor] child," are "not present if a child is born in wedlock." *Scales*, 232 F.3d at 1164 (citing *Miller* v. *Albright*, 523 U.S. 420, 434, 438 (1998)). Likewise, in *Solis-Espinoza*, the Ninth Circuit, in rejecting a biological relationship requirement, stated that "[t]he [INA] was intended to keep families together [and] should be construed in favor of family units and the acceptance of responsibility by family members." 401 F.3d at 1094.

The State Department's interpretation of Section 301(g) improperly disregards this legislative history and undermines Congress's clear purpose of keeping American families together. Indeed, it would have the opposite effect in this case, as it distinguishes, and imposes

[12] In enacting an amendment to the INA, Congress criticized the Attorney General for having read into the then-bill's definition of "stepchild" a requirement that stepchildren be born in wedlock. H.R. Rep. No. 85-1199, at 7.

different travel and other requirements on, Lucas and Massi even though they have the same parents. *See N.Y.S. Dep't of Soc. Servs.* v. *Dublino*, 413 U.S. 405, 419-20 (1973) ("[Courts] cannot interpret federal statutes to negate their own stated purposes.").[13]

Further, in terms of canons of statutory interpretation, the State Department's contrary interpretation of Section 301, which excludes from consideration for citizenship under Section 301(g) children born of same-sex marriages, inevitably implicates the Due Process and Equal Protection Clauses for the reasons described below, and, therefore, should be rejected when, as here, an alternative interpretation does not raise such constitutional questions. *See Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 348-49 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

2. The Complaint pleads sufficiently that the State Department failed to engage in reasoned decision-making.

To withstand challenge under the APA on the ground that an agency decision was arbitrary and capricious, the decision must be demonstrably the product of reasoned decision-making. *See Animal Legal Def. Fund, Inc.*, 872 F.3d at 611. The Complaint here alleges sufficient facts to support an inference that the State Department's denial of Lucas's application

[13] Defendants rely mainly on *Crider* v. *Ashcroft*, an unpublished Ninth Circuit decision holding that the petitioner was not eligible for citizenship at birth under Section 301 because he was born of two alien parents and later adopted by U.S. citizens. 74 F. App'x 729, 730 (9th Cir. 2003). Lucas was not adopted—Allison and Stefania are, and have been, Lucas's only legal parents since birth. The INA includes separate provisions covering, and requirements for, citizenship of adopted children, *see* 8 U.S.C. §§ 1101(b)(1), (c)(1), and the adoption context presents different legal and policy considerations given the need to account for the presence and interests of multiple relationships.

fails that test. The State Department's letters dated May 24, and November 7, 2017, both of which are attached as exhibits to the Complaint (Dkt. No. 1, Exs. D-E), provide no legal authority or explanation for the State Department's consideration of Lucas's application under Section 309. When an agency has so blatantly disregarded a dispositive fact—here, that Lucas was born to Allison and Stefania, his only legal parents, during their marriage—in determining which provision of a statute governs, it is evident that the agency "relied on factors which Congress [did] not intend[] it to consider, [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see Old Dominion Elec. Coop.* v. *FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018) (explaining that a court will uphold an agency's decision "if the agency has 'examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made'" (quoting *FERC* v. *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016))).

3. The State Department's interpretation of the INA is not entitled to *Chevron* deference.

Defendants wisely do not invite the Court to rely upon *Chevron* deference to justify their reliance upon the FAM. *See Chevron*, 467 U.S. 837. *First*, where, as here, Congress "has spoken to the precise question at issue," the Court must "give effect to the unambiguously expressed intent of Congress." *Kaufman* v. *Nielsen*, 896 F.3d 475, 482 (D.C. Cir. 2018) (quoting *Chevron*, 469 U.S. at 842-43). Section 301(g) is unambiguous: it contains no reference to a biological test of parenthood, and none is required in order to make sense of the language Congress has used. When Congress wanted to refer to blood relationships, it did so explicitly a few sections later in the statute. Even if this Court were to conclude that Section 301(g)'s language is ambiguous, the INA's legislative history clearly evidences Congress's intent to keep

American families together under these circumstances, a goal that obviously is not furthered by distinguishing between siblings and excluding children on the basis that their parents were not their biological progenitors.

Second, as both the Second and Ninth Circuits have held, the FAM is not entitled to *Chevron* deference. *See Jaen*, 899 F.3d at 187 n.4; *Scales*, 232 F.3d at 1166. As the Ninth Circuit explained in *Scales*, "the FAM is not specifically an interpretation of § [301] and, importantly, it is not an interpretation 'arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in . . . *agency manuals* . . . which lack the force of law[] do not warrant *Chevron*-style deference." 232 F.3d at 1166 (emphasis in original); *Kaufman*, 896 F.3d at 484 (holding that USCIS' interpretation of the INA in an informal adjudication was not entitled to *Chevron* deference). Even by its own terms, the FAM does not address the text of Section 301, and the State Department has not offered any support for its attempt to supplant the statutory text with the FAM's provision. As the Second Circuit observed in *Jaen*, "the government's reliance upon the FAM language is particularly perplexing" because the FAM "does not even purport to interpret the statute, let alone to apply to the situation at hand." 2018 WL 3826019, at *3 n.4 (holding that the FAM is "not entitled to *Chevron* deference").

Absent *Chevron* deference, the State Department's view of the INA is entitled only to "respect proportional to its 'power to persuade.'" *Kaufman*, 896 F.3d at 485 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 235 (2001)). Here, the State Department denied Lucas's application without regard for the plain language of Section 301(g), Congress's manifest intent in enacting the INA, and the fact that Lucas's parents were married when Lucas was born. Therefore, the State Department's view is neither persuasive nor in accordance with law.

4. Dismissal is improper because the State Department has not produced the administrative record.

Dismissal of Allison and Lucas's APA claim would be premature and improper for the separate and independent reason that the parties have not engaged in any discovery and Defendants have not produced the administrative record. The D.C. Circuit has long recognized that "in order to allow for meaningful judicial review, [an] agency must produce an administrative record that delineates the path by which it reached its decision." *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989); *accord Farrell* v. *Tillerson*, 2018 WL 1801170, at *13 (D.D.C. Apr. 16, 2018). Courts in this Circuit regularly deny motions to dismiss APA claims where, as here, the administrative agency has failed to produce the administrative record explaining the basis for its decision. *See Farrell*, 2018 WL 1801170, at *13 (collecting cases) (denying motion to dismiss the plaintiff's APA claim where "the Court d[id] not have a complete administrative record before it"); *Swedish Am. Hosp.* v. *Sebelius*, 691 F. Supp. 2d 80, 89 (D.D.C. 2010) (relying on *MD Pharm., Inc.* v. *Drug Enf't Admin.*, 133 F.3d 8, 16 (D.C. Cir. 1998)) ("The court is unable to assess the merits of these arguments [on a motion to dismiss] without considering the administrative record."). Dismissal of the APA claim at this time, in the absence of the administrative record, would be inappropriate as Allison and Lucas are challenging not only the State Department's decision, but also the process that led to it.

5. The Complaint pleads a justiciable APA claim because 8 U.S.C. § 1503 does not provide an adequate remedy at law.

Defendants' assertion that the Complaint's APA claim should be dismissed as duplicative of relief available under statutory provisions not asserted here is meritless. As courts in this Circuit have recognized, in a case such as this, that approach would be so restrictive and burdensome as to provide no meaningful relief at all.

The APA's "central purpose" is to provide "a broad spectrum of judicial review of agency action" and therefore is an appropriate vehicle for challenging the State Department's unconstitutional interpretation of the INA and consequent denial of Lucas's application. *See El Rio Santa Cruz Neighborhood Health Ctr., Inc.* v. *U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (quoting *Bowen* v. *Massachusetts*, 487 U.S. 879, 903-04 (1988) (explaining that the prerequisites to jurisdiction in Section 704 should be construed narrowly)); *accord Ramirez* v. *U.S. Immigration & Customs Enf't*, 2018 WL 4178176, at *23 (D.D.C. Aug. 30, 2018). In contrast, Section 1503 is not a means for pursuing all of the relief requested in the Complaint because the only relief available pursuant to Section 1503 is a declaration that Lucas is a U.S. citizen. *See* 8 U.S.C. § 1503(a) (authorizing certain persons to "institute an action . . . for a judgment declaring him to be a national of the United States . . . ."); *see also Hizam* v. *Kerry*, 747 F.3d 102, 108 (2d Cir. 2014) (holding that the "district court exceeded the scope of authority granted to it pursuant to Section 1503(a)" because a suit under 1503(a) "is not one for judicial review of the agency's action" and "authorizes a court only to issue a judgement declaring a person to be a national of the United States." (internal citations and quotations omitted)); *Acosta* v. *United States*, 2014 WL 2216105, at *4 (W.D. Wash. May 29, 2014) ("[U]nder a § 1503(a) action, the district court only has jurisdiction to make a de novo adjudication of citizenship."). Here, the requested relief is broader and includes, in addition to a declaration of this Court that Lucas is a U.S. citizen, a declaration that the State Department's interpretation is illegal and unconstitutional, and an injunction against the State Department's discriminatory application of Section 301(g). Defendants have failed to identify any evidence that Congress intended to bar APA review under these circumstances. *See Citizens for Responsibility & Ethics in Wash.* v. *U.S. Dep't of Justice ("CREW")*, 846 F.3d 1235, 1244 (D.C.

Cir. 2017) ("When considering whether an alternative remedy is adequate and therefore preclusive of APA review, [courts] look for clear and convincing evidence of legislative intent to create a special, alternative remedy and thereby bar APA review." (internal quotation marks omitted)).

Courts in the D.C. Circuit have indicated that Section 1503 does not afford an exclusive remedy. For example, in *Chacoty* v. *Tillerson*, the plaintiffs asserted claims under the APA and the Due Process Clause of the Fifth Amendment based on the State Department's allegedly applying "an impermissibly strict interpretation of the term 'residence'" in denying the plaintiffs' applications for citizenship at birth under Section 301 of the INA. 285 F. Supp. 3d 293, 297 (D.D.C. 2018). The State Department moved to dismiss based on lack of subject matter jurisdiction, arguing that "Plaintiffs' sole remedy lies in 8 U.S.C. § 1503." *Id.* The court rejected the State Department's arguments, holding that Section 1503 "is not an exclusive remedy." *Id.* at 302-03. The court relied on Supreme Court precedent holding that "the language of [§ 1503(b) and (c)] shows no intention to provide an exclusive remedy." *Id.* at 303 (citing *Rusk* v. *Cort*, 369 U.S. 367 (1962), *abrogated on other grounds by Califano* v. *Sanders*, 430 U.S. 99 (1977)). The court also noted that despite the Supreme Court's overruling *Cort* to the extent that it "assumed . . . that the APA is an independent grant of subject-matter jurisdiction," "*Cort*'s holding that § 1503 is not an exclusive remedy . . . remains good law." *Id.* at 303 n.5 (internal quotation marks omitted) (relying on *L. Xia*, 865 F.3d at 658 and *Rafeedie* v.

INS, 880 F.2d 506, 511 (D.C. Cir. 1989) (reiterating that Section 1503 does not foreclose claims under the APA)).[14]

No court in this Circuit has held that Section 1503 provides an adequate remedy under the circumstances of this case. To the contrary, one court in the D.C. Circuit expressly left open the possibility that Section 1503 would not provide an adequate remedy when a plaintiff requests "injunctive or any other form of relief." *Alsaidi* v. *U.S. Dep't of State*, 292 F. Supp. 3d 320, 327-28 (D.D.C. 2018). Likewise, in *L. Xia* v. *Tillerson*, where the complaint alleged that the State Department violated the plaintiffs' rights under the Fifth Amendment's Due Process Clause, the D.C. Circuit left open the possibility that Section 1503 might not provide an adequate remedy, reversing the dismissal of the APA claims and remanding to the district court "for further consideration of the APA claims, or for transfer of those claims together with the section 1503 claims." 865 F.3d at 657-58. This Circuit also has long recognized that it is "apparent from the terms of the APA [that] agency action is presumptively subject to judicial review thereunder." *Rafeedie*, 880 F.2d at 510.

Defendants' argument that Section 1503 provides an adequate remedy fails for the additional reason that, as the Motion illustrates (Mot. at 21-22), Sections 1503(b) and (c), to which Lucas would be relegated because he resides abroad, set out a highly burdensome

[14] This Court should not follow the Fifth Circuit's analysis of Sections 1503(b) and (c) in *Hinojosa* v. *Horn*, 896 F.3d 305, 313-14 (5th Cir. 2018). There, contrary to Congress's legislative intent that the INA be liberally construed to afford complainants fair review of administrative decisions, the court concluded that Sections 1503(b) and (c) provide an exclusive remedy when the petitioner faces no serious obstacles (*e.g.*, a criminal indictment) to proceeding under those provisions of the statute. As the dissent in *Hinojosa* noted, the majority decision is inconsistent with Supreme Court precedent requiring that the APA's "generous review provisions [be given] . . . a 'hospitable' interpretation." *Id.* at 317. And, as discussed below with respect to the Complaint's claims in particular, Sections 1503(b) and (c) impose burdensome prerequisites and processes, particularly for persons such as Allison and Lucas, who are not trying to enter the United States, and who would have to travel there solely to fit within the requirements for review under Section 1503.

procedural framework and therefore were not intended to be an exclusive remedy. At the outset, Lucas would have to apply to the consulate for a "certificate of identity." This may pose an immediate and perhaps insuperable problem for Lucas. Section 1503(b) provides that a certificate of identity is available only to a person who had previously been physically present in the United States "or to a person under sixteen years of age *who was born abroad of a United States citizen parent*." (Emphasis added.) Lucas has visited Allison's family in the United States on occasion (Compl. ¶ 59), but it is by no means clear that the Consulate would find that such visits qualify for Section 1503(b) purposes. If not, Lucas would, in the State Department's view, be ineligible for the required certificate because it contends that Lucas was not born "of a United States citizen parent" as 1503(c) requires. Indeed, that is the crux of Defendants' argument. Regardless of whether Lucas qualifies because he happens to have visited his grandparents, this underscores the illogic of Defendants' position. Defendants would have Sections 1503(b) and (c) provide the sole remedy for denial of citizenship under Sections 301 and 309, but would then use their own unfounded definition of parents and wedlock to foreclose such relief for those who happen to have an alien biological parent and a U.S. citizen non-biological parent.

The Section 1503 framework is in any event unduly burdensome. It involves applications to diplomatic or consular officers and the Secretary of State and Department of Homeland Security, and judicial review by differing means, including writs of habeas corpus and declaratory judgment actions under 8 U.S.C. § 1503(a). To invoke Section 1503, three-year-old Lucas (and therefore his family) would have to leave their home, seek entry into the United States, and attempt to obtain a ruling "subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. . . ." 8 U.S.C. § 1503(c). If that were successful, it still would not establish his citizenship, but only allow

Lucas to apply for a determination of citizenship under Section 1503(a), which is available to persons located in the United States, but not otherwise.

The timeline of such an application and of a subsequent stay in the United States to pursue claims under Section 1503 is uncertain and surely burdens Lucas and his family in ways that were not contemplated by Congress. As the Supreme Court recognized in *Rusk* v. *Cort*, the onerous nature of this process is grounds for allowing a plaintiff to file suit under the APA to challenge the denial of an application for citizenship and that "Congress did not intend to foreclose lawsuits by claimants . . . who do not try to gain entry to the United States before prevailing in their claims to citizenship." 369 U.S. 367 at 379. And the only decision under Sections 1503(b) and (c) that Defendants cite in support of their position specifically notes that the plaintiffs in that case were subject only to lesser burdens associated with being "at the United States border at the time of . . . suit."[15] *Hinojosa*, 896 F.3d at 314.

Nor are the burdens of uprooting the family and disrupting the careers of Lucas's parents the only relevant considerations. Under Section 1503(c), three-year-old Lucas would have to be presented at a "port of entry" to seek admission to the United States. As the United States regards Lucas as an illegitimate alien, it is not beyond the realm of possibility that three-year-old Lucas (whose U.S. citizenship the State Department refuses to acknowledge) could be separated from Allison and Stefania and placed in an Office of Refugee Resettlement facility. Given current circumstances, this risk, however small, and the emotional and psychological toll that presentment at a port of entry may take upon Lucas and his parents, cannot be disregarded.

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[15] The court in *Hinojosa* used this distinction to justify its departure from *Rusk*: "in stark contrast to the plaintiffs in *Rusk*, both [plaintiffs] were at the United States border at the time of this suit." *Hinojosa*, 896 F.3d at 314.

In short, Defendants' arguments for dismissing the Complaint's APA claims based on Section 704 find no support in either the APA or the law of this Circuit and, if adopted, would potentially insulate the State Department's unconstitutional and illegal actions from judicial review. This Court should reject them outright.

C. The Complaint Sufficiently Alleges the Basis for Subject Matter Jurisdiction for Its Constitutional Claims

Defendants wrongly contend that the Complaint's constitutional claims should be dismissed because the DJA, the statutory basis for some of the relief sought, "does not itself provide a cause of action." (Mot. at 11.) Regardless of whether the DJA creates a cause of action, the Complaint pleads sufficient facts to state a claim based on the State Department's violation of the Fifth and Fourteenth Amendments, and the DJA is an additional appropriate vehicle for adjudicating and remedying those violations.

First, where, as here, the basis for subject matter jurisdiction is clear (federal question jurisdiction) and the basis for the claim is the infringement of a fundamental right, courts in the D.C. Circuit have held that no additional cause of action must be identified. For example, in *Committee on the Judiciary, U.S. House of Representatives* v. *Miers*, the court rejected the same argument Defendants make here—that, because the DJA does not provide a cause of action, "no cause of action . . . authorize[d] th[e] lawsuit." 558 F. Supp. 2d 53, 78 (D.D.C. 2008). The court explained that, although "in most cases a plaintiff [must] identify a statutory (or a common law) cause of action," that requirement does not apply in cases "requesting declaratory relief where subject matter jurisdiction [is] present and a plaintiff's constitutional rights [are] arguably implicated." *Id.* at 81-82. The court held, "where the Constitution is the source of the right allegedly violated," a plaintiff seeking declaratory relief

under the DJA need not identify any "other source of a right []or independent cause of action." *Id.*

Here, there is no dispute that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and the Complaint pleads more than sufficient facts to show that Allison's and Lucas's "constitutional rights" under the Due Process and Equal Protection Clauses are, at a minimum, "arguably implicated" by the State Department's conduct. *Miers*, 558 F. Supp 2d at 82. Under the law of this Circuit, nothing more is required.

Second, because the Complaint seeks only equitable relief for the its constitutional claims, Allison and Lucas may bring those claims directly under the Fifth and Fourteenth Amendments, with or without the benefit of the DJA. This is consistent with settled Supreme Court precedent. In *Bolling* v. *Sharpe*, the plaintiffs filed suit directly under the Fifth Amendment, seeking equitable relief based on the allegation that "segregation [in schools] deprive[d] them of due process of law under the Fifth Amendment." 347 U.S. 497, 498 (1954). The Supreme Court reversed the district court's dismissal of the complaint and remanded with an instruction to determine the appropriate equitable relief. *Id.* at 500. *See also Davis* v. *Passman*, 442 U.S. 228, 242-44 (1979) ("[T]his Court has . . . settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right."); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.").

D. The Complaint Sufficiently Alleges a Violation of the Due Process Clause of the Fifth Amendment.

Substantive due process protects "'fundamental' liberties that are 'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.'" *Aka* v. *U.S.*

Tax Ct., 854 F.3d 30, 34 (D.C. Cir. 2017) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997)). The Due Process Clauses of the Fifth and Fourteenth Amendments "forbid[] the government to infringe … 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (emphasis in original). "Under this banner, the Supreme Court has protected certain interests related to sexuality, marriage, and family life" including a same-sex couple's right to "form a civil marriage." *Aka*, 854 F.3d at 34 (citing *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2599 (2015)). The Supreme Court has recognized that government, "throughout our history [has] made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." *Obergefell*, 135 S. Ct. at 2601. Laws that deny same-sex spouses "the constellation of benefits … linked to marriage" violate the fundamental right to marry by consigning them "to an instability many opposite-sex couples would deem intolerable in their own lives" and by "teaching that gays and lesbians are unequal in important respects." *Id.* at 2601-02.

Defendants erroneously claim that Allison and Lucas "fail to identify a fundamental right that Defendants have infringed upon." (Mot. at 17.)[16] Defendants' argument hinges on a mischaracterization of both the Complaint and the right at issue in this case. The Complaint is clear: the State Department has infringed the fundamental right to marry by denying same-sex spouses and their children the full constellation of rights and benefits linked to marriage, including "*the legal recognition that same-sex spouses may both be the parents of a child born during their marriage, even if only one spouse is the child's biological parent*." (Compl. ¶ 36 (emphasis added) (citing *Pavan*, 137 S. Ct. at 2077.) *See also Obergefell*, 135 S.

[16] Defendants mischaracterize the right at issue by describing it myopically as a right "to acquire and confer citizenship at birth pursuant to INA Section 301." (Mot. at 17-18.)

Ct. at 2601-02; *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause.").

The FAM section that the State Department ostensibly used to deny Lucas's citizenship defines legitimate children as only those born during the marriage of their two biological parents to each other. *See* 1140 FAM Appendix E. This is, of course, an impossibility in the case of same-sex parents, meaning that, inevitably, the children of such a marriage are subject to the stigma of illegitimacy simply because of their parents' sex and sexual orientation. Equally important, by dictating that State Department personnel apply Section 309 to analyze the citizenship rights of such children, the FAM dictates that if the biological parent of the child of a same-sex marriage is an alien, the child is ineligible for citizenship at birth. Only in this way could the State Department achieve the perverse result of two siblings (Lucas and Massi) being treated differently despite their common parentage.[17]

Defendants miss the mark in contending that the possibility that the State Department would (or does) apply its interpretation of Section 301(g) to certain children of heterosexual marriages is fatal to the Complaint's due process claim. (Mot. at 19-20.) Defendants admit that the FAM requires an inquiry into the circumstances of a child's birth only when "a doubt may arise" as to whether a child and U.S. citizen are biologically related (Mot. at 6), and therefore acknowledge that the State Department probes for proof of a biological relationship only when its personnel subjectively decide to depart from the common law presumption of legitimacy. Defendants do not contend that they have provided any protocol for

[17] To the extent that Defendants argue that Lucas's application would be denied under Section 301(g) because of the FAM's definition of "born . . . of parents," their argument fails—if the Court were to hold that Section 301(g) does not include a biological relationship requirement, the State Department would be precluded from rejecting Lucas's application on that basis.

doing so, let alone that there is any justification for leaving this determination to the whims and prejudices of Consular officials. More fundamentally, given that same-sex spouses can have children only with the use of assisted reproduction, they will always be subject to the biological relationship inquiry that the State Department otherwise applies only in cases of "doubt." Thus, Defendants effectively concede that they treat same-sex and opposite-sex marriages differently in the application of Section 301(g).

The exclusion of the children of same-sex marriages from consideration for citizenship under Section 301 thus imposes burdens and disadvantages on same-sex spouses, and on the fundamental right to marry, that the Constitution cannot tolerate. *See Obergefell*, 135 S. Ct. at 2590 (stating that the right to marry is fundamental and that same-sex spouses may not be "denied the constellation of benefits that [government] ha[s] linked to marriage"); *Pavan*, 137 S. Ct. at 2078 (holding that the ability to have the name of the wife of the mother who gave birth to the child on the child's birth certificate is part of the "terms and conditions" of marriage and so cannot be denied to same-sex spouses (internal quotation marks omitted)); *Windsor*, 570 U.S. at 771 (holding that DOMA's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages"). This would not be the case under Section 301 if it were properly interpreted.

The State Department's interpretation also unfairly prejudices and drives apart families like the Zaccari-Blixt family, who must share the intimate details of their family life and endure the pain and stigma that result from the State Department's refusal to recognize the validity of Allison's marriage to Stefania and parentage of Lucas and the parity of their marriage with that of opposite-sex marriages. (Compl. ¶ 59.) *See Obergefell*, 135 S. Ct. at 2590 (a "basis

for protecting the right to marry is that it safeguards children and families"). To deny the children of same-sex marriages U.S. citizenship when they otherwise would be entitled to it by virtue of their parents' marriage therefore infringes the right to marry and violates Due Process.

Defendants fail to assert *any* interest, let alone a compelling interest, in the State Department's excluding from consideration for citizenship under Section 301(g) applicants who, like Lucas, were born during the marriage of their U.S. citizen parent and the biological parent of the child. (*See* Mot. at 19-20.) Defendants, however, bear the burden of proving that the State Department's interpretation, which disproportionately and overwhelmingly burdens the fundamental right to marry of same-sex spouses, is narrowly tailored to achieve a compelling government interest. *Heller* v. *District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) ("In applying strict scrutiny, the Court requires the Government to prove its law 'furthers a compelling interest and is narrowly tailored to achieve that interest.'") (quoting *Citizens United* v. *FEC*, 558 U.S. 310 (2010))). Defendants rely on *Miller* and *Nguyen* for the supposed "importance of a biological connection between the child seeking to acquire citizenship and the U.S. citizen seeking to confer citizenship" (Mot. at 19), but offer no explanation as to why those decisions, which describe the importance of a biological relationship *when a child is born out of wedlock*, are applicable here.[18] In any event, Defendants once again put the cart before the

[18] These precedents not only are inapposite—they involve children whose U.S. citizen parents were not married at the time of their birth—but they make clear that Congress intended to confer citizenship on the foreign-born children of married U.S. citizens, like Lucas. *See, e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 433 (1998); *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 62 (2001). In *Miller*, for example, the Supreme Court stated: "Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen . . . . If the two parties engage in a second joint act—if they agree to marry one another—*citizenship will follow*." 523 U.S. at 433 (emphasis added). Even accepting that "the extension of citizenship to foreign-born children … is a right granted by Congress" (Mot. at 18), the decisions that Defendants cite support Allison's and Lucas's entitlement to an order enforcing that right. *See Miller*, 523 U.S. 433; *Nguyen*, 533 U.S. at 62.

horse; the Supreme Court has held that ensuring a biological connection between parent and child is a legitimate government interest only *when the child's parents are not married*, not that a lack of biological connection may be used to *decide that the child is not the legitimate child of a marriage* (an approach that is patently absurd).

In addition to this illogic, Defendants ignore precedent of three unanimous panels in two federal courts of appeals holding that the justification for such a biological connection does not exist when the child is born in wedlock. *See Jaen*, 899 F.3d at 185; *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1093. As Defendants have failed to assert any purported justification for the State Department's policy, they have failed to carry their burden, and their motion to dismiss should be denied.

E. The Complaint Sufficiently Alleges a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The Complaint sufficiently alleges that (i) the State Department discriminated against Allison and Lucas based on Allison's sex and sexual orientation by refusing to recognize Lucas as a child born "in wedlock" within the meaning of the INA; and (ii) the State Department's discrimination was purposeful. Defendants argue that the Complaint fails to state an equal protection claim because it (i) does not identify a similarly situated group that was treated differently from Allison and Lucas; and (ii) does not allege any facts to suggest that the State Department had a discriminatory motive. (Mot. at 11-16.) The Court should reject these arguments, which ask it to ignore clear factual allegations in the Complaint, and should instead draw all inferences based on those allegations in Allison's and Lucas's favor, as required on a motion to dismiss. *See, e.g.*, *L. Xia*, 865 F.3d at 649.

To state an equal protection claim, a plaintiff must allege that he or she (i) "was subjected to disparate treatment"; (ii) "by virtue of intentional or purposeful discrimination."

Stewart v. *Gaines*, 370 F. Supp. 2d 293, 296 n.2 (D.D.C. 2005). A plaintiff need not prove that the defendant's only purpose was a discriminatory one, but rather that it was a "motivating factor." *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). "[D]iscriminations of an unusual character especially require careful consideration." *Windsor*, 570 U.S. at 770 (internal quotation marks omitted). Because direct evidence of discriminatory intent is rare, courts may look to circumstantial evidence, including "(1) whether the impact of the official action bears more heavily on one [class] than another; (2) [t]he historical background of the decision; (3) [t]he specific sequence of events leading up to the challenged decision, including whether the defendant departed from the normal procedural sequence; (4) [s]ubstantive departures from factors normally considered in reaching a decision; and (5) the administrative history of a decision." *Kingman Park Civic Ass'n* v. *Gray*, 27 F. Supp. 3d 171, 184 (D.D.C. 2014) (internal quotation marks omitted). When "a clear pattern, unexplainable on grounds other than [discriminatory intent], emerges from the effect of the state action even when the governing legislation appears neutral on its face," evidence of disparate impact may be sufficient to show discriminatory intent. *Vill. of Arlington Heights*, 429 U.S. at 266.

The Complaint alleges sufficient facts to support an inference that, for purposes of obtaining U.S. citizenship under the INA, the State Department has treated, and continues to treat, married same-sex parents and their children differently from their heterosexual counterparts. Contrary to Defendants' argument that the only appropriate "similarly situated" group with which to compare Allison and Lucas are "heterosexual married couple[s] who used assistive reproductive technology" (Mot. at 16), the Complaint alleges sufficient facts from which the Court can draw the reasonable inference that the State Department ordinarily does not require a U.S. citizen spouse in a heterosexual marriage to prove that he or she shares a

biological relationship with his or her child and, indeed, the Motion concedes that much in explaining that the State Department only makes such inquiries "[i]f doubt arises that the U.S. citizen 'parent' is biologically related to the child" (Mot. at 6)—as it always will in cases involving same-sex parents. (Compl. ¶ 57-58, 67-69, 71-72.) To the extent that the State Department's interpretation of the INA occasionally results in its also treating unfairly children born of opposite-sex spouses who used assisted reproductive technology, that fact in no way undermines the Complaint's allegation that that interpretation overwhelmingly and disproportionately harms children born of same-sex marriages, "for whom such means are the only way to procreate." (Compl. ¶ 71.) The Complaint easily satisfies Allison's and Lucas's burden to plead facts suggesting that the State Department's interpretation of the INA "subjected [them] to disparate treatment." (Mot. at 12.)

The Complaint also pleads sufficient facts to support an inference that the State Department's refusal to consider Lucas as born "in wedlock" was motivated by a discriminatory purpose. The Complaint alleges that the State Department's application of INA Section 301(g) excludes all children born of same-sex marriages involving a U.S. citizen and a non-U.S. citizen. (Compl. ¶ 88.) Thus, under the State Department's interpretation of the INA, a child born of same-sex spouses could never be considered born "in wedlock." (*Id*.) Given the State Department's categorical exclusion of children born of same-sex spouses from consideration for citizenship under Section 301, the Court may infer that the State Department's interpretation of the INA in the FAM (which defines a child born in wedlock as one born of a marriage of his or her two biological parents) was motivated by a discriminatory purpose. *See Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (inferring discriminatory purpose where over 200 permit applications from Chinese applicants, but only

one application from a non-Chinese applicant, were denied). As in *Gomillion* v. *Lightfoot*, where a local act redrawing the boundaries of Tuskegee, Alabama excluded nearly every black citizen, but no white citizen, from the City, the State Department's interpretation uniquely burdens same-sex marriages (and imposes no such burden on opposite-sex spouses). 364 U.S. at 341. In *Gomillion*, the Supreme Court observed that, based on the allegations in the complaint, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id*. Here, the Complaint's allegation that the State Department's interpretation of Section 301(g) categorically excludes children born of same-sex marriages from being considered born "in wedlock" is sufficient to support an inference of discriminatory purpose.

Even if it were not, the Complaint sufficiently alleges other facts to suggest that animus toward same-sex spouses was a "motivating factor." *Vill. of Arlington Heights*, 429 U.S. at 266. In particular, it alleges that there is a long history of sex- and sexual-orientation-based discrimination in the immigration context and in the United States more generally. (Compl. ¶¶ 25-36.) Moreover, as alleged in the Complaint, Defendants have "provided no rationale for this discriminatory policy," which conflicts with the language of the INA, Congress's purpose in enacting it, and multiple federal courts' construction of its provisions. (Compl. ¶ 69.) This Court also should be especially reticent to dismiss the Complaint's equal protection claim given the nature of the discrimination alleged, which is "of an unusual character." *Windsor*, 570 U.S. at 769-70. Given this history of discrimination, the State Department's admission that it inquires as to a child's biological relationship with his or her citizen parent only "[i]f doubt arises," and the undeniable disparate impact of the State Department's interpretation on same-sex spouses,

the Complaint alleges sufficiently that the State Department was motivated, at least in part, by an intent to discriminate on the basis of a protected characteristic. (Mot. at 6.)

V. CONCLUSION

For the foregoing reasons, Allison and Lucas request that the Court deny the Motion and grant them such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: October 17, 2018

/s/ Elizabeth A. Cassady

Elizabeth A. Cassady (D.C. Bar No. 997160)
cassadye@sullcrom.com
SULLIVAN & CROMWELL LLP
1700 New York Avenue, Suite 700
Washington, D.C. 20006
Telephone: (202) 956-7500
Facsimile: (202) 293-6330

Theodore Edelman (*pro hac vice*)
edelmant@sullcrom.com
Jessica Klein (*pro hac vice*)
kleinj@sullcrom.com
Philip L. Graham, Jr. (of counsel)
grahamp@sullcrom.com
Lauren M. Goldsmith (of counsel)
goldsmithl@sullcrom.com
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Aaron C. Morris (*pro hac vice*)
amorris@immigrationequality.org
IMMIGRATION EQUALITY
40 Exchange Place, Suite 1300
New York, New York 10005-2744
Telephone: (212) 714-2904

Attorneys for Plaintiffs

Elizabeth A. Cassady (D.C. Bar No. 997160)
cassadye@sullcrom.com
SULLIVAN & CROMWELL LLP
1700 New York Avenue, Suite 700
Washington, D.C. 20006
Telephone: (202) 956-7500
Facsimile: (202) 293-6330

Theodore Edelman (*pro hac vice*)
edelmant@sullcrom.com
Jessica Klein (*pro hac vice*)
kleinj@sullcrom.com
Philip L. Graham, Jr. (of counsel)
grahamp@sullcrom.com
Lauren M. Goldsmith (of counsel)
goldsmithl@sullcrom.com
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Aaron C. Morris (*pro hac vice*)
amorris@immigrationequality.org
IMMIGRATION EQUALITY
40 Exchange Place, Suite 1300
New York, New York 10005-2744
Telephone: (212) 714-2904

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALLISON DAWN BLIXT and LUCAS ALEXANDER ZACCARI-BLIXT Plaintiffs, v. The UNITED STATES DEPARTMENT OF STATE and MICHAEL R. POMPEO in his official capacity as Secretary, U.S. Department of State Defendants.	:	Civ. No. 1:18-cv-00124-EGS

[Proposed] Order Denying Defendants' Motion to Dismiss the Complaint

Upon consideration of the Complaint and the parties' submissions on this motion, it is hereby ORDERED that Defendants' Motion to Dismiss the Complaint is DENIED in its entirety.

Dated: _____

_____
Hon. Emmet G. Sullivan
United States District Judge