NOTES

Playing Favorites: Challenging Denials of U.S. Citizenship to Children Born Abroad to U.S. Same-Sex Parents

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INTRODUCTION

Andrew and Elad Dvash-Banks were married in Toronto, Canada on August 19, 2010.[1] Andrew, who has dual U.S. and Canadian citizenship, was born and raised in the United States and moved to Israel at age twenty-four.[2] Elad is an Israeli citizen.[3] While living in Canada, the couple welcomed their first children, twin boys Aiden and Ethan, on September 16, 2016.[4] The fathers are listed as the only parents on the boys' birth certificates, and no other individual has been recognized as a legal parent of the twins at any time.[5] The twins were conceived via egg donation and surrogacy, with each father donating sperm.[6] Each son is biologically related to one of his fathers.[7]

When Andrew and Elad Dvash-Banks sought legal recognition of their twins' U.S. citizenship at the U.S. consulate in Toronto, their request was met with a strange and unexpected answer: only one twin was recognized as a U.S. citizen.[8] The U.S. Department of State (State Department) took the position that only Aiden—the twin conceived using Andrew's sperm—qualified for citizenship at birth under the Immigration and Nationality Act (INA).[9] Ethan, having no biological connection to a U.S. citizen parent, did not qualify for citizenship.[10]

The family is challenging the legality of the State Department's denial of Ethan's citizenship in federal court in California.[11] The Dvash-Bankses are currently living and working in Los Angeles.[12] Ethan entered the United States on a tourist visa.[13] The outcome of their case will have serious implications for the future of the family.

The Dvash-Bankses are not alone. Allison Blixt, a U.S. citizen living in London, has two children with her wife, who is not a citizen.[14] One of her sons, born to Blixt's wife, was similarly denied U.S. citizenship at birth by the State Department consular office in the United Kingdom.[15] She commenced a lawsuit

1. Complaint for Declaratory and Injunctive Relief at ¶ 41, Dvash-Banks v. U.S. Dep't of State, No. 2:18-cv-00523 (C.D. Cal. Jan. 22, 2018).
2. *Id.* ¶¶ 39–40.
3. *Id.* ¶ 41.
4. *Id.* ¶ 46.
5. *Id.*
6. *Id.* ¶¶ 44–45.
7. *Id.* ¶ 45.
8. *Id.* ¶¶ 52–53.
9. *Id.*
10. *Id.*
11. *Id.* ¶ 1.
12. *Id.* ¶ 58.
13. *Id.*
14. Complaint at ¶¶ 1–2, Blixt v. U.S. Dep't of State, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018).
15. *Id.* ¶ 4.

challenging this action in the District Court for the District of Columbia in January 2018.[16]

This Note will examine the legal landscape of U.S. citizenship by birth to those born abroad and will argue that current treatment of same-sex couples as giving birth "out of wedlock" violates not only the Constitution but also general principles of statutory interpretation. First, this Note will provide an overview of the INA's statutory scheme, agency interpretations, and legislative history, and then will analyze the effect of Supreme Court and Ninth Circuit caselaw on the constitutionality of the State Department's interpretation and application of the INA. Part II will compare definitions and presumptions of parentage under domestic and immigration law, examining what interests the government may have in affording differential treatment to children born abroad. Part III will assess the validity of the State Department's actions under the Administrative Procedure Act (APA) and the Constitution. Finally, Part IV will conclude that there is no legitimate legal basis for denying children like Ethan their rightful citizenship by birth and will argue that the State Department's interpretation of the INA should be amended to include same-sex married couples under the definition of "wedlock."

I. LEGAL LANDSCAPE

There are two sources of U.S. citizenship: birth and naturalization. Typically, citizenship by birth is acquired through physical presence in the United States in accordance with the Citizenship Clause of the Fourteenth Amendment.[17] For persons not born within the geographical limits of the United States, Congress provided the only path to citizenship by birth in the INA.[18] The INA delineates different requirements for citizenship by birth abroad depending on the marital status of an individual's parents. These provisions are interpreted and administered by the State Department and U.S. Citizenship and Immigration Services (USCIS), the agencies responsible for promulgating regulations and processing and deciding citizenship applications. Federal courts have also had the opportunity to interpret and apply the INA's citizenship-by-birth-abroad provisions, reviewing agency actions in some cases. This Part will consider the legal landscape of citizenship by birth abroad by examining the INA's statutory text, legislative history, agency interpretations, and relevant caselaw.

A. STATUTORY SCHEME: THE INA

The INA sets forth the legal landscape of U.S. immigration and nationality policy. The Act contains two provisions relevant to the acquisition of citizenship at birth by those born abroad: section 301 (citizenship by birth abroad, born in

16. *Id.* ¶ 1.

17. U.S. CONST. amend. XIV, § 1, cl. 1.

18. *See generally* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101–1537 (2012)) (describing citizenship by birth requirements in multiple provisions within).

wedlock)[19] and section 309 (citizenship by birth abroad, born out of wedlock).[20] Particularly relevant here, section 301(g) affords citizenship at birth to individuals born to married parents outside the United States, when one parent is a foreign national and the other is a U.S. citizen who has lived in the United States for at least five years, at least two of which were after the U.S. citizen parent's fourteenth birthday.[21] Section 309, applicable only to children born out of wedlock, affords section 301 citizenship rights under certain additional requirements, including—in the case of citizenship by birth acquired through an unmarried, citizen father—that a "blood relationship between the person and the father [be] established by clear and convincing evidence."[22]

B. AGENCY INTERPRETATIONS: STATE DEPARTMENT AND USCIS

The State Department and USCIS have had occasion to interpret these sections through both policy manuals and individual determinations on requests for citizenship documentation by persons born abroad. These interpretations have been strict, requiring in all cases that a child have a biological connection to their U.S. citizen parent to qualify for citizenship under sections 301 and 309.[23]

The State Department and USCIS have only recently considered how to apply these sections for children born through Assisted Reproductive Technology (ART), including sperm donation, egg donation, and surrogacy. The USCIS Policy Manual specifies that a U.S. citizen mother whose egg is not used in the creation of an embryo but who nevertheless carries the fetus to term in her womb (a "gestational mother") may pass citizenship at birth to a child born abroad if she meets all other requirements under section 301 or 309, as applicable, and is recognized as the legal mother at the time of birth.[24] This is a departure from previous policy, under which a non-genetic gestational mother would not confer birthright citizenship in this way due to the lack of genetic connection between parent and child.[25]

In accordance with this change in policy, the USCIS Policy Manual defines "child," for citizenship and naturalization purposes, as "the genetic, legitimated, or adopted son or daughter of a U.S. citizen; or [t]he son or daughter of a non-

19. INA § 301, 8 U.S.C. § 1401.

20. INA § 309, 8 U.S.C. § 1409.

21. INA § 301(g), 8 U.S.C. § 1401(g)

22. INA § 309(a)(1), 8 U.S.C. § 1409(a)(1).

23. *See* 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL, at pt. H, ch. 3(A) (Dec. 12, 2018), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter3.html [https://perma.cc/JE9A-2KK9].

24. *See id.*; *see also* Policy Alert, U.S. CITIZENSHIP & IMMIGRATION SERVS., Effect of Assisted Reproductive Technology (ART) on Immigration and Acquisition of Citizenship Under the Immigration and Nationality Act (INA) (Oct. 28, 2014), https://www.uscis.gov/policymanual/Updates/20141028-ART.pdf.

25. *Cf.* AM. BAR ASS'N, RESOLUTION NO. 113, at 1–3 (Feb. 6, 2017), https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/113.pdf; *see also ABA Policies on Immigration Issues*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_services/immigration/policy/ (last visited Jan. 10, 2018) (detailing the policies established at the 2017 midyear meeting including the passage of resolution 113).

genetic gestational U.S. citizen mother who is recognized by the relevant jurisdiction as the child's legal parent."[26] Thus, apart from the limited exception for non-genetic gestational mothers, this definition of "child" excludes non-genetic, non-adopted children. Under this interpretation, children born via ART outside the United States to U.S. citizen parents, but who lack a genetic or gestational connection to a U.S. citizen, do not qualify for the same citizenship given to genetic children. Despite adopting this restrictive view, the USCIS Policy Manual makes clear that "[i]n general, absent other evidence, USCIS considers a child's birth certificate . . . as sufficient evidence to determine a child's genetic relationship to the parent (or parents)" and presumes that parents listed on the birth certificate have legal custody.[27] As discussed in detail below, this assumption allows for discriminatory application of the policy.[28]

The State Department goes even further in its restrictive view of these sections. In its Foreign Affairs Manual, the Department explicitly states:

> The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) *through whom citizenship is claimed*. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.[29]

The term "parent" in this context thus takes on a stricter meaning than it would assume in everyday parlance and for purposes of domestic family law, as discussed in detail below. The State Department's position that the claimant has "[t]he burden of proving . . . blood relationship" is located in the text of section 309 but is wholly absent from section 301.[30] Despite this difference, the State

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26. 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL, at pt. H, ch. 2(A) (Dec. 12, 2018) (footnote omitted), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html.

27. *Id.*

28. Some family relationships may raise suspicion regarding the existence of a genetic relationship between children and their U.S. citizen parents. Such relationships will generally be limited to same-sex couples, parents of a different race than their children, and children with older mothers. More traditional family units made up of opposite-sex parents, of typical childbearing age, with children of their same race, will naturally face less scrutiny under this policy. *See, e.g.*, Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 672–73 (2014).

29. 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 301.4.1(D)(1)(a) (2018) (emphasis added), https://fam.state.gov/FAM/08FAM/08FAM030104.html [https://perma.cc/9NLA-BGWT].

30. *Id.* 301.4(D)(1)(b) (stating that Section 309 "specifies that the blood relationship of a child born out of wedlock to a U.S. citizen father must be established by clear and convincing evidence. . . . The [INA] does not specify a standard of proof for persons claiming transmission of U.S. citizenship based upon birth (a) in wedlock to a U.S. citizen parent or (b) out of wedlock to a U.S. citizen mother.").

Department's guidance makes clear that it interprets both sections to require a biological relationship between the child and a U.S. citizen parent.[31]

This policy has generated controversy. In February 2017, the American Bar Association urged the State Department to interpret section 301 "to recognize those children born to intended parents, even if those legally recognized parents do not have a biological . . . relationship to the child,"[32] but the State Department has not updated the policy. Additionally, a prominent national nonprofit and advocacy group, Immigration Equality, has taken on the Dvash-Bankses as clients.[33] The group's MoveOn.org petition, urging the State Department to revise its policy, has received almost 6,000 signatures.[34] And some courts have declined to follow agency guidance, adopting a broader view of the INA's parentage provisions.

C. RELEVANT JUDICIAL PRECEDENT

The Ninth Circuit has rejected the State Department's position that section 301 requires any genetic or gestational connection between a child and his or her U.S. citizen parent for citizenship to be acquired by birth abroad. In immigration cases, the Supreme Court has historically followed the "hyper-deferential doctrines of immigration exceptionalism."[35] Under an immigration exceptionalism theory, immigration decisions made by the Executive Branch are given broad deference.[36] However, the Ninth Circuit has laid a strong foundation for refusing such deference in immigration cases. Relatedly, in recent years the Supreme Court and other federal courts have extended constitutional protections to same-sex couples, laying a foundation to reject state-sanctioned discrimination against the LGBT community.

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31. *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html [https://perma.cc/79DV-JM5Y] (last visited Jan. 5, 2019) ("The U.S. Department of State interprets the INA to mean that a child born abroad must be biologically related to a U.S. citizen parent who meets the . . . statutory transmission requirements of INA 301 or 309 . . . . Even if local law recognizes a surrogacy agreement and finds that U.S. parents are the legal parents of a child conceived and born abroad through ART, *if the child does not have a biological connection to a U.S. citizen parent, the child will not be a U.S. citizen at birth*." (emphasis added)).

32. AM. BAR ASS'N, *supra* note 25, at 1.

33. *Meet the Dvash-Banks Family*, IMMIGR. EQUALITY, https://www.immigrationequality.org/dvashbanks/#.W5rkg_5KhE4 [https://perma.cc/3NZU-B23B] (last visited Dec. 13, 2018).

34. Immigration Equality, *Demand Equal Treatment for the Children of Same-Sex Couples*, MOVEON.ORG, https://petitions.moveon.org/sign/demand-equal-treatment-1 [https://perma.cc/F5Y5-GSCD] (last visited Dec. 28, 2018).

35. *See* David Rubenstein, *Immigration Symposium: The Future of Immigration Exceptionalism*, SCOTUSBLOG (Jan. 29, 2017, 2:29 PM), http://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/ [https://perma.cc/4V2L-TG6B] (immigration exceptionalism "captures the idea that special constitutional doctrines apply in immigration cases that don't apply in other contexts.").

36. *See id*. (explaining that the court will review immigration statutes that discriminate on the basis of nationality "under a lax rational basis standard").

1. Cases Interpreting the INA

The Ninth Circuit held in *Scales v. INS* that a child born outside the United States during the marriage of a U.S. citizen father to a Philippine mother satisfied the requirements of INA section 301(g) and acquired citizenship by birth despite lacking any biological connection to the U.S. citizen parent.[37] The three-judge panel found that despite the State Department's guidance that citizenship by birth abroad requires a blood relationship with a citizen parent, a "straightforward reading" of section 301 indicated that such a relationship was not required.[38] In addition, the court found that *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[39] did not warrant heightened deference to the State Department's interpretation because the State Department's role in implementing the INA was limited to administering and enforcing laws relating to "the determination of nationality of a person *not* in the United States."[40] The petitioner in *Scales*, although born abroad, was petitioning for U.S. citizenship while residing within the United States, and was thus granted specific relief.[41]

The Dvash-Banks family now resides within the United States, but unlike the petitioner in *Scales*, Ethan's citizenship determination occurred when the family was residing in Canada.[42] Still, the *Scales* court rejected the State Department's interpretation for broader reasons: the court found that the State Department's interpretation was not specific to section 301 and was not a formal interpretation, such as a formal adjudication or a notice-and-comment rule.[43] Further, the explicit blood-relationship requirement in section 309 carried a negative implication for section 301; the court reasoned that if Congress had intended for section 301 to have the blood-relationship requirement, it would have added it expressly.[44]

The Ninth Circuit again rejected the State Department's interpretation of the INA in *Solis-Espinoza v. Gonzales*.[45] In that case, the petitioner was born abroad to a foreign-national biological mother and a foreign-national biological father. However, the father was married at the time of the birth to a U.S. citizen who was named on the child's birth certificate and accepted the child into her family.[46] The court held that the petitioner satisfied the requirements of section 301(g) and

37. *See* 232 F.3d 1159, 1161, 1164 (9th Cir. 2000) (considering whether INA § 301(g), 8 U.S.C. § 1401(g) (2012), requires a blood relationship between the person born abroad and the U.S. citizen parent).

38. *Id.* at 1164.

39. 467 U.S. 837, 865–66 (1984) (holding that courts should defer to an agency's interpretation of a statute when statutory text is ambiguous, and Congress charged the agency with implementing statute).

40. *Scales*, 232 F.3d at 1165 (emphasis added) ("When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to Chevron deference." (quoting Proffitt v. FDIC, 200 F.3d 855, 860 (D.C. Cir. 2000))).

41. *See id.* at 1166.

42. Complaint, *supra* note 1, ¶ 41.

43. *Scales*, 232 F.3d at 1166.

44. *Id.* at 1164.

45. 401 F.3d 1090 (9th Cir. 2005).

46. *Id.* at 1091–92.

had acquired citizenship at birth through his foreign national biological father and legal but non-biological U.S. citizen mother.[47] In its opinion, the Ninth Circuit observed that the "legislative history of the Immigration and Nationality Act clearly indicates that 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."[48] The court found that in light of the INA's legislative history and public policy supporting "recognition and maintenance of a family unit," treating the petitioner as a citizen under section 301 was "logical."[49]

Not every child of married parents qualifies for citizenship under section 301; courts have declined to extend section 301 to adopted children, for example.[50] However, the rationale excluding adoptive parents does not implicate non-biological, non-adoptive parents who were the parents at the time of birth, as adopted children are specifically provided a statutory path to citizenship.[51] While this question has not been directly addressed in courts of other jurisdictions, no court has explicitly refused to extend section 301 to a non-adopted child born to intended, legal parents where the child lacks a biological connection to the U.S. citizen parent.[52]

Judicial treatment of children of unmarried parents seeking citizenship after birth abroad has been narrower, in line with the more restrictive statutory language. In *Nguyen v. INS*, the Supreme Court upheld section 309(a)(4)'s requirement that, to acquire citizenship by birth abroad under the section, a child of a U.S. citizen father and foreign-national mother born abroad and out of wedlock must, before he turns eighteen, seek legitimization, a declaration of paternity under oath by the father, or a court order of paternity.[53] In reaching its decision, the Court opined that the government has a legitimate interest in "ensur[ing] that [a] child and [unmarried] citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of real, everyday ties that provide a connection between child and citizen parent and, in turn, the United

47. *Id*. at 1094.

48. *Id*. (quoting H.R. REP. NO. 85-1199, pt. 2 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 2016, 2020).

49. *See* 401 F.3d at 1094; *see also* Section I.D, *infra*, for a discussion of the INA's relevant legislative history.

50. *See, e.g*., Colaianni v. INS, 490 F.3d 185, 187 (2d Cir. 2007) (holding that section 301(a)(3), which would later become what is now section 301(g), does not apply to adoptive parents because they were not the parents at the time of birth, as required by the statute). A separate statutory scheme has been set up for citizenship acquisition for children adopted abroad. *See* Child Citizenship Act of 2000, Pub. Law 106-395, sec.101–02, §§ 320, 322, 114 Stat.1631 (codified at 8 U.S.C. §§ 1430, 1433 (2012)).

51. Adopted children may not acquire citizenship abroad at birth when they are born outside the United States to biological parents who are not U.S. citizens. When they later become the legal children of U.S. citizen parents, that parentage does not "relate back" to the time of their birth. These children are provided a statutory avenue towards citizenship through section 322 of the INA, which allows a parent to apply for naturalization of an adopted child born and living outside the United States. *See* INA § 322, 8 U.S.C. § 1433. Children intentionally born to U.S. citizen parents, on the other hand, are legal children of U.S. citizen parents at the time of their birth.

52. No court outside of the Ninth Circuit has yet considered this question directly.

53. 533 U.S. 53, 62 (2001); *see* INA § 309(a)(4), 8 U.S.C. § 1409(a)(4) (2012).

States."[54] The Court reasoned that the higher threshold for unmarried fathers to pass citizenship to children born out of wedlock was appropriate because the father may not live with, have legal custody of, or even know about the child in question.[55]

In sum, the few cases that have interpreted the citizenship-by-birth-abroad provisions of the INA draw a clear line between sections 301 and 309. Section 301, the born-in-wedlock provision, is interpreted liberally, in the spirit of its broad language and legislative history. Section 309, the out-of-wedlock provision, has been interpreted more narrowly, following its more restrictive language and additional statutory proof requirements. This interpretive scheme runs contrary to the agency interpretations, which impose the same burdensome requirements included in section 309 on all individuals seeking citizenship by birth abroad.[56]

2. Cases Applying Constitutional Protections to LGBT Families

It is also worth considering how the Supreme Court has afforded constitutional protections to LGBT families, given the potential applicability of the Court's LGBT jurisprudence to the case at hand. Two recent cases brought a sea change to LGBT equality.[57] In *Windsor*, the Court held that the Defense of Marriage Act, which denied federal recognition of marriage rights to same-sex couples, was unconstitutional.[58] In *Obergefell*, the Court found a constitutional right to same-sex marriage.[59]

More recently, in *Pavan v. Smith*, the Court declared unconstitutional an Arkansas statutory provision requiring state officials to list a woman's male spouse on her child's birth certificate, even if the spouse was not the biological father, while allowing officials to omit a woman's female spouse from her child's birth certificate.[60] Relying on *Obergefell*'s reasoning that same-sex couples should be granted the same "constellation of benefits that the Stat[e] ha[s] linked to marriage," the Court determined that exclusion from a birth certificate could impact a parent's ability to participate in activities of parenthood, especially those activities that require proof of parentage.[61]

As these cases show, the Supreme Court has expressed a need for equality in domestic family law. In *Pavan*, the Arkansas law was not specifically targeted at exclusion of same-sex couples—nevertheless, its functional exclusion was judged unconstitutional discrimination.[62] However, as will be discussed in section I.E., the application of these principles in the immigration context, where the

54. *Nguyen*, 533 U.S. at 64–65.
55. *See id*. at 65.
56. *See supra* Section I.B.
57. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 744 (2013).
58. 570 U.S. at 752.
59. 135 S. Ct. at 2591.
60. 137 S. Ct. 2075, 2078 (2017).
61. *Id*. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601).
62. *Id*. at 2078.

definitions of family relationships have been more restricted than in domestic family law, may lead to different results.

D. LEGISLATIVE HISTORY

Congress has set forth a more liberal picture of the purpose of the INA and its relation to traditionally domestic law goals of family unification in stark contrast to the agency interpretations requiring strict adherence to biological parentage relationships.[63] Recent changes to the INA include an amendment that limits what parental residency requirements are needed to confer citizenship.[64] In approving the amendment, the House Judiciary Committee sought "to promote the acquisition of U.S. citizenship by relaxing or eliminating certain burdensome and unreasonable testing and residency requirements."[65] The legislative purpose—promoting equal treatment and relaxing burdensome requirements—counsels against the strict interpretation adopted by the State Department and USCIS. Additionally, a consistent principle throughout the legislative history of the INA is the promotion of "family reunification."[66]

Despite this legislative history, congressional interpretation of other provisions of the INA has not always been so liberal. For example, the principle of family reunification is This interest is weighed against others, including determinations of optimal citizenship, immigration numbers, and economic priorities.[67] Additionally, the INA contains somewhat restrictive provisions, such as section 321(b) of the INA, which requires that a foreign-born adopted child reside with his or her adoptive parents in the United States at the time of his or her parents' naturalization.[68] The governmental interests behind this provision are to "ensure that a child who becomes an American citizen has a real relationship with a family unit, and with the United States, and is not a mere beneficiary of a legal relationship created in a foreign court;" and to "deter[] immigration fraud by those who, without this restraint, could . . . fraudulently secure derivative citizenship for children."[69]

Nevertheless, the case for a more restrictive interpretation of the INA falls short when considering sections specific to conferral of citizenship. The government's interest in limiting citizenship transmission is "weak on moral terms" because unlike immigration and naturalization policy, citizenship law does not dictate how to best allow foreign nationals to become members of society, but

63. *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY (2018) ("Family reunification has historically been a key principle underlying U.S. immigration policy.").

64. *See* H.R. REP. NO. 103-387, at 3–4 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 3516; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 101, 108 Stat. 4305, 4306.

65. H.R. REP. NO. 103-387, at 3–4.

66. *See* KANDEL, *supra* note 63, at 1.

67. *See id*. at 22–23; *see also* Abrams & Piacenti, *supra* note 28, at 674–75, 701–02.

68. INA § 321(b), 8 U.S.C. § 1432(b) (repealed 2000).

69. *See* Smart v. Ashcroft, 401 F.3d 119, 122 (2d Cir. 2005) (discussing the state interest in deterring fraud in the context of U.S. citizen adoption of foreign-born children).

instead lays out "rules by which the government *must* accept certain people as members."[70]

II. DEFINING PARENTAGE

The agency interpretations denying intended children of same-sex couples the ability to acquire citizenship through birth abroad under section 301(g) appear to be justified only by the mistaken idea that the U.S. citizen, non-biological parent of such a child is not truly his or her "parent." Who counts as "parent" and "child" and how those determinations are made can differ significantly in the domestic family law context as opposed to in the immigration and citizenship context.[71] Although domestic family law is determined at the state level and is therefore inconsistent throughout the country, there has been a shift toward the recognition of functional and intentional parentage concept in that context.[72]

Citizenship and immigration law, however, have remained relatively "more restrictive in [their] recognition of parent-child relationships," often requiring parents to satisfy multiple criterion to show parentage—including through marriage, biology, and sometimes also functional parenthood—to be recognized as parents.[73] Interests in optimal citizenship numbers, avoiding fraud in citizenship cases, and longstanding notions of the importance of blood relationships may underlie this distinction.[74]

III. THE STATE DEPARTMENT'S POLICY CANNOT BE JUSTIFIED

Given this legal backdrop, the Dvash-Bankses filed their complaint in federal court asserting that the State Department's refusal to recognize Ethan's U.S. citizenship is a violation of law.[75] The Dvash-Bankses make this claim on three grounds: the State Department's policy violates (1) the Administrative Procedure Act (APA), (2) federal constitutional guarantees of equal protection, and (3) federal constitutional guarantees of due process.[76] The following section will make the case for those arguments.

A. THE STATE DEPARTMENT'S POLICY VIOLATES THE APA

The interpretation of INA section 301 as requiring a biological connection between a child and his or her U.S. citizen parent is arbitrary in violation of the

70. *See* Abrams & Piacenti, *supra* note 28, at 701–02.

71. *Id*. at 632 ("A person who would be considered a 'parent' in a child custody dispute in California or an inheritance case in New Jersey might not be a 'parent' if he tries to sponsor his child for an immigrant visa or transmit birthright citizenship to a foreign-born child.").

72. *See, e.g*., Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2016) (arguing that marriage equality and the "model of parenthood" it has influenced are transforming domestic families).

73. *See* Abrams & Piacenti, *supra* note 28, at 690.

74. *See id*. at 678, 690, 701.

75. Complaint, *supra* note 1, ¶¶ 8–9.

76. *Id*.

APA.[77] As a preliminary matter, the State Department's interpretation of the INA should not receive *Chevron* deference. Yet regardless of the level of deference accorded to the State Department, its interpretation is in direct contrast with the text and purpose of the INA and would fail under any level of scrutiny. Section 301 is not ambiguous and forecloses the State Department's construction.

1. The State Department's Misguided Reading of Section 301 Is Not a Reasonable Interpretation of the Law Entitled to *Chevron* Deference

Courts should not give *Chevron* deference to the State Department's interpretation of INA section 301. As explained below, the State Department has not been charged with the exclusive administration of the INA and its interpretations are akin to informal policy statements.

The INA charges the Secretary of State with administration and enforcement of provisions relating to "the determination of nationality of a person not in the United States."[78] Ethan Dvash-Banks was born outside of the United States, and the family originally sought recognition of his citizenship status at the U.S. consulate in Canada.[79] In *Scales*, the Ninth Circuit found that the petitioner, despite having been born abroad, did not qualify as a "person not in the United States" because he sought recognition of his citizenship while on U.S. soil.[80] Accordingly, the State Department was "not the agency entrusted with the determination of [the] Petitioner's citizenship" and thus not entitled to *Chevron* deference.[81]

Despite this difference in factual circumstances, there is no reason to apply a different standard in the determination of citizenship in an otherwise identical situation merely because one stands on U.S. soil. The State Department's authority to determine the nationality of people "not in the United States" does not include the exclusive authority to administer sections 301 and 309 because petitions for citizenship under those sections may be made either within or outside of the United States. Thus, the statute does not fall under the State Department's exclusive authority. The State Department shares the administration of the INA with other agencies; in particular, the Attorney General applies sections 301 and 309 to individuals seeking citizenship from within the United States.[82]

Additionally, the Ninth Circuit in *Scales* found that the State Department's interpretation of the INA was neither a specific interpretation of section 301 nor one "arrived at after . . . formal adjudication, or notice-and-comment rulemaking," or an analogous formal process.[83] Rather, the State Department's interpretation was more akin to a policy statement or an enforcement guideline, lacking the

77. 5 U.S.C. § 706(2)(A) (2012) (establishing that a reviewing court may set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

78. 8 U.S.C. § 1104(a) (2012).

79. Complaint, *supra* note 1, ¶¶ 46, 48.

80. Scales v. INS, 232 F.3d 1159, 1165 (9th Cir. 2000) (citing 8 U.S.C. § 1104).

81. *Id.*

82. *See* 8 U.S.C. § 1103(g) (2012).

83. 232 F.3d at 1166.

force of law and not warranting *Chevron* deference.[84] The same considerations apply to the Dvash-Bankses' case and counsel against applying heightened deference to the State Department's interpretation, and against reading Section 301(g) to require a biological connection between a child and their U.S. citizen parent.

2. The Statutory Text Is Unambiguous and Forecloses the State Department's Interpretation

Section 301 of the INA states that "a person born outside the . . . United States . . . of parents one of whom is an alien, and the other a citizen of the United States" is a national and citizen of the United States at birth, given the fulfillment of certain other criteria.[85] Section 309 extends this citizenship to those born out of wedlock outside of the United States, so long as "a blood relationship between the person and the [U.S. citizen] father is established by clear and convincing evidence," among other requirements.[86] "On its face, the INA appears to require a blood relationship between parent and child only when the citizen parent is an unmarried father."[87]

It is apparent from the text of sections 301 and 309, both standing alone and in context of the INA's statutory scheme,[88] that Congress did not limit the term "parent[s]" in section 301 to exclude non-biological parents. This is further supported by the legislative history of the statute, which reflects Congress's desire to afford liberal treatment to allow families to stay together.[89]

The word "parent" is not defined within subchapter III of the INA.[90] Such an oversight may be taken as an ambiguity in the statute, and might therefore be an appropriate place for the relevant agency to make its own determination of who counts as a "parent" under the provision. Other sections of the INA, however, expressly define "parent" and do so rather broadly, encompassing more than just a biological parentage.[91] Additionally, the INA specifically references "natural parent" when referring to biological parentage.[92] section 301, however, refers merely to a "parent."[93] Reading a restrictive definition into sections 301 and 309 is to arbitrarily turn a blind eye to how the term is otherwise used in the Act.

The express requirement in section 309 that biological parentage be proven supports an unambiguous reading of section 301 to lack such requirement. In *INS v. Cardoza-Fonseca*, the Supreme Court opined that "where Congress includes

84. *Id.*

85. INA § 301(g), 8 U.S.C. § 1401(g) (2012).

86. INA § 309(a)(1), 8 U.S.C. § 1409(a)(1) (2012).

87. Abrams & Piacenti, *supra* note 28, at 692; *see also id.* at 696 ("[T]he FAM imposes, contrary to the INA's text, a requirement that mothers," as well as fathers, "must be genetically related.").

88. *See supra* Section I.C.

89. *See supra* Section I.D.

90. Although section 1101(b)(2) defines "parent," the definition is limited to subchapters I and II of chapter 12 of title 8. 8 U.S.C. § 1101(b) (2012). Sections 1401 and 1409 are both in subchapter III, so the definition does not apply to those provisions.

91. *See id.* § 1101(b)(2).

92. *Id.* § 1101.

93. INA § 301, 8 U.S.C. § 1401 (2012).

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."[94] In *Cardoza-Fonseca*, the Board of Immigration Appeals pointed to a strict standard outlined in one provision of the INA, as a guidepost to interpretation of another INA provision, which lacked analogous language dictating the strict approach.[95] In overturning the Board's interpretation that the strict approach should be read into this provision, the Court noted that where a specific standard exists in one but not another section of the same Act, it is an indication that Congress intended the standards to differ.[96] Therefore, the Court rejected imposing a stricter standard when the provision at issue contained no such mandate.[97]

Additionally, no legitimate state interest supports the agency's narrow construction of "parent." Limiting parentage to its narrowest definition—a strictly biological one—may be a reasonable interpretation where the state has an interest in avoiding fraud and restricting citizenship of children born abroad to just those individuals with the most substantial connection to the United States. However, these justifications, to the extent they hold any water, should play no role in a determination of the citizenship of children intentionally born into the marriage of a same-sex couple. To say that Ethan Dvash-Banks has less of a "substantial connection" to the United States than does Aiden, his twin brother, is an argument not rooted in reason. It is outside our societal understanding of familial relationships to assert that a child's connectedness to the United States rests in which of their legal parents they happen to share genetic material with.

The *Cardoza-Fonseca* precedent should be applied to the interpretation of Section 301 of the INA. Because section 309 explicitly requires proof by clear and convincing evidence of biological parentage, and section 301 simply requires that one "parent" be a U.S. citizen, the negative implication is that proof of a biological connection should not be required for purposes of section 301. Therefore, the term "parent" in section 301 is not ambiguous when read in the context of the full statutory scheme of the INA.[98]

3. The Canon of Constitutional Avoidance Counsels Against Upholding the State Department's Interpretation

Finally, courts have departed from agency interpretations of statutes when a more reasonable interpretation exists and when the agency's interpretation would lead to constitutional questions.[99] Here, the court should follow the more

94. 480 U.S. 421, 432 (1987) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

95. *See id.* at 425.

96. *Id.* at 432.

97. *Id.*

98. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (explaining that interpretations of ambiguous statutory words must be read in the context of the broader statutory scheme).

99. *See, e.g.*, Ma v. Ashcroft, 257 F.3d 1095, 1105 (9th Cir. 2001); Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) ("When constitutional rights are implicated . . . the balance of values clearly

reasonable interpretation from Ninth Circuit precedent that poses no constitutional issues. As discussed in the next section, the State Department's interpretation raises the sort of "grave and doubtful constitutional questions" that should lead the Court to "assume Congress did not intend to authorize their issuance."[100] As discussed above, the State Department's interpretation of section 301 to mandate a biological relationship between a child and their U.S. citizen parent is contrary to the plain meaning of the text. Additionally, the unambiguous nature of section 301 is reinforced through legislative history that evinces a congressional intent to apply the INA liberally to allow families to stay together.[101]

B. THE STATE DEPARTMENT'S INTERPRETATION OF THE INA, AS APPLIED TO THE DVASH-BANKSES, IS UNCONSTITUTIONAL

No degree of deference, however broad, absolves an agency in violation of established principles of constitutional law. The Dvash-Bankses' suit claims violations of their constitutional rights under the Due Process and Equal Protection Clauses, among other allegations.[102] They theorize that the State Department necessarily applied the out-of-wedlock provision, section 309, to determine whether Ethan Dvash-Banks qualified for citizenship at birth under the INA, even though he was born "in wedlock" and thus governed by section 301.[103] Although no specific section of the INA was mentioned in the letter informing the Dvash-Banks family that Ethan did not qualify for citizenship at birth, the family argues that the State Department *must* have applied section 309 because Ethan satisfies the criteria of section 301(g)—one of his parents is a citizen of the United States who, prior to Ethan's birth, was physically present in the United States for the required amount of time.[104] They argue that, had the State Department applied section 301, Ethan's citizenship request would have been approved.[105]

Their theory is supported by the State Department's own pronouncement that "[i]f [a] child's *genetic* parents were not married at the time of birth, the child can acquire citizenship only under section 309 of the INA."[106] The Dvash-Bankses claim that the State Department construes Section 301, the "in wedlock" provision, to apply only to those children conceived and carried by women who are married to men, excluding Ethan and other children of same-sex couples violates the Due Process and Equal Protection Clauses of the Fifth Amendment.[107] In addition, the Dvash-Bankses' claim that the State Department discriminated against Andrew on the basis of his sex by "denying him the ability to transmit

shifts against agency deference." (quoting Guido Calabresi & Charles J. Ogletree, Jr., *The Supreme Court, 1990 Term*, 105 HARV. L. REV. 77, 398 (1991)).

100. Rust v. Sullivan, 500 U.S. 173, 191 (1991).

101. *See* KANDEL, *supra* note 63, at 1.

102. Complaint, *supra* note 1, ¶ 8.

103. *Id.* ¶ 63, 66.

104. *Id.* ¶¶ 53, 62–63.

105. *Id.* ¶¶ 62–63.

106. 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 1445.5-7(a) (2013) (emphasis added), https://fam.state.gov/fam/07fam/07fam1440.html.

107. Complaint, *supra* note 1, ¶ 64–66.

citizenship to a child conceived with his husband's sperm," a right that would be available to a similarly situated U.S. citizen woman.[108]

1. Arguments Under the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that no person shall be denied the "equal protection of the laws."[109] The State Department's policy, and its application to the Dvash-Banks family, violates principles of equal protection by discriminating on the basis of sexual orientation. The Supreme Court has stated that the Equal Protection Clause protects individuals from discrimination by state actors on the basis of sexual orientation.[110] Additionally, the Ninth Circuit has made clear that it applies heightened scrutiny to state actions that discriminate on the basis of sexual orientation.[111]

The State Department's discriminatory application and interpretation of the INA violate the Equal Protection Clause by excluding individuals from citizenship on the basis of their parent's sexual orientation.[112] A rule that requires a child's *genetic* parents to be married at the time of birth to qualify as being born "in wedlock" for citizenship acquisition necessarily excludes a same-sex marriage from ever counting as "wedlock" for that purpose. Further, it is not only the LGBT community that may be affected by this interpretation: the State Department's interpretation affects all children born abroad through Assisted Reproductive Technology (ART). If, for instance, a U.S. citizen father and non-citizen mother have a child, conceived through sperm donation and born abroad during their marriage, the State Department theoretically would apply the same rule it applied to Ethan Dvash-Banks and deem that child unqualified for citizenship at birth.[113]

In reality, the State Department's application of section 301 to children born via ART is inconsistent. Consular offices receiving applications for citizenship through birth abroad do not require genetic testing in every circumstance, but

108. *Id.* ¶ 71.

109. U.S. CONST. amend. XIV, § 1.

110. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015); Romer v. Evans, 517 U.S. 620, 631 (1996).

111. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483–84 (9th Cir. 2014) (concluding that Supreme Court precedent supports applying heightened scrutiny to discrimination based on sexual orientation under both the Due Process and Equal Protection clauses).

112. Equal protection claims cannot be brought solely on disparate impact grounds—there must be some discriminatory intent. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). However, even without evidence of a discriminatory motive, discriminatory intent can be proved through a law's impact along with its application to a specific group. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (discussing the importance of the impact of the official action, including "whether it 'bears more heavily on one race than another'" (quoting *Washington*, 426 U.S. at 242)). Here, the complete exclusion of same-sex couples from the "in wedlock" provision of the INA should easily meet this barrier.

113. *See* 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 304.3-1 (2018), https://fam.state.gov/searchapps/viewer?format=html&query=foreign%20surrogate&links=SURROG&url=/FAM/08FAM/08FAM030403.html#M304_3_2 [https://perma.cc/C5GV-PTYD] (discussing birth abroad to a surrogate).

only when they have some reason to believe that the child seeking citizenship may not be genetically connected to one or more U.S. citizen parent.[114] The USCIS policy is to generally accept birth certificates as proof of parentage.[115] This leads to a reality in which heterosexual couples who conceive through ART—but who are the child's legal parents from birth—are not questioned because they do not raise suspicions that the child is not biologically their own.[116] However, the very fact that a couple is same-sex immediately alerts the State Department that a child is not biologically a product of the union, and as in the Dvash-Bankses' case, request for further proof of parentage may ensue.

Because these decisions are made at the discretion of the consular offices, there is a lack of data on the number or proportion of same-sex versus opposite-sex couples whose child's citizenship request is further investigated and denied due to the use of ART. The absence of available data does not, however, defeat an equal protection claim. A child of a same-sex couple can never be the biological product of the marriage; therefore, the State Department's interpretation requires gay parents to go through the extra hurdle of genetic testing any time they apply for citizenship for children born abroad.[117] This functional exclusivity of section 301(g), allowing only opposite-sex couples to be considered "in wedlock," is clear discrimination on the basis of sexual orientation. And as applied, opposite-sex couples who conceive through ART may be able to slip through the cracks, arousing no suspicion, whereas gay couples are continually flagged and scrutinized to determine whether the out-of-wedlock requirements are met despite their legal marriages.

No legitimate state interest can justify the discriminatory harm imposed by the State Department's interpretation and application of INA sections 301 and 309, and the State Department has not espoused any specific reasons to interpret the statute so narrowly. American citizenship is the "right to have rights,"[118] the fundamental turnkey to the constellation of rights and responsibilities envisioned in *Obergefell*. Denying the recognition of the children of same-sex marriages using the INA denies these individuals the equal protection of immigration and citizenship laws.

2. Arguments Under the Due Process Clause

The Fifth and Fourteenth Amendments of the Constitution prohibit the federal and state governments from depriving any person of life, liberty, or property

114. *See* Abrams & Piacenti, *supra* note 28, at 695–96; 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 23, at pt. H, ch. 2(A).

115. 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 23, at pt. H, ch. 2(A).

116. This may not be the case for couples above typical childbearing age, or couples whose child is of a race different than that of one or both parents.

117. This is because gay fathers who are legal parents at the time of proof would necessarily be analyzed under section 309. Therefore, section 309's requirement that fathers prove biological parentage through clear and convincing evidence would always apply. 8 U.S.C. § 1409(a)(1) (2012).

118. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

without due process of law.[119] The State Department's construction of section 301 of the INA violates substantive due process rights to marriage and family. The right to marry is a fundamental right, long recognized by the Supreme Court as part of the "liberty" guaranteed by the Due Process Clause.[120] Enforcing a policy that excludes couples using ART from a core benefit of marriage and family life—the ability to pass citizenship to one's children—deprives them of their substantive due process rights.

In *Obergefell*, the Court explored the foundation on which marriage stands as a fundamental right in our society.[121] Specifically, the Court emphasized that marriage "safeguards children and families and thus draws meaning from related rights of childrearing [and] procreation."[122] These rights can take multiple forms, including the material protections conferred under the laws of the several states as well as the recognition and legal structure bestowed upon a couple which allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[123] In *Moore v. City of East Cleveland*, the Court concluded that it is not just traditional nuclear families who merit constitutional protection.[124] Although in that case the Court was concerned with non-nuclear, extended family units being excluded from the protections of family life under state law,[125] those principles should apply in equal or higher order to an intentional nuclear family. The formation of a family through non-traditional means, like same-sex couples conceiving using ART, does not and should not exclude them from these protections.[126]

Here, as discussed above, the interpretation and application of the INA by the State Department excludes same-sex couples from being treated as "in wedlock" for purposes of conferring citizenship to their children born abroad under section 301. This practice denies Ethan and Andrew their due process rights by denying them the recognition of their marital and familial status under federal law.

Finally, no legitimate state interest justifies this denial of due process. The government has not identified—and, indeed, cannot identify—any harm done by recognizing same-sex couples' marriages for immigration and citizenship purposes.

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119. U.S. CONST. amend. V; *id.* amend. XIV.

120. Obergefell v. Hodges, 135 S. Ct. 2586, 2604–05 (2015).

121. *Id.* at 2599–602.

122. *Id.* at 2600; *see also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause . . . ." (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

123. United States v. Windsor, 570 U.S. 744, 772 (2013).

124. 431 U.S. 494, 504 (1977) (holding that "the tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

125. *Id.* at 500.

126. *See Obergefell*, 135 S. Ct. at 2590 ("There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.").

Children born via ART to legally married couples are no less members of that family than those born biologically to opposite-sex couples. Same-sex couples have their children no less "in wedlock" than do opposite-sex couples. American citizens living abroad who intentionally bring children into the world with their legally married spouses should have the same opportunity to pass on citizenship as do opposite-sex couples. The argument that the State Department's interpretation is justified by the legitimate interest in preventing immigration fraud falls flat. Not only is it hard to imagine a married couple intentionally creating life and raising children just to confer citizenship, but the government itself has not posed this interest as a justification for its policy. Fundamentally, these children are no less worthy of this important right.

CONCLUSION

Despite the deference typically accorded to the Executive Branch on issues of immigration, the possible state interests at stake, and the lack of evidence of discriminatory intent, the State Department's interpretation of sections 301 and 309 is unconstitutional and contrary to the text and purpose of the INA. Andrew and Elad Dvash-Banks are a legally married couple who intentionally brought children into the world using their own genetic material through ART. They were listed as the boys' parents on both birth certificates at the time of birth. Their sons are twins, born minutes apart, who have never had any legally recognized parents besides Andrew and Elad. Both men are equal, legal parents of both twins. And yet, under the State Department's interpretation of the INA, Andrew and Elad can never be treated as having children "in wedlock" for purposes of conveying citizenship at birth under section 301. The complete exclusion of people in same-sex marriages from the ability to transmit citizenship by birth in wedlock is discrimination, plain and simple. Although the government has an interest in preventing citizenship fraud, it is hard to imagine any couple going through the process of legal marriage, intentional childbirth through the often expensive ART process, and legal parenthood just to fraudulently confer citizenship. There is no rational reason to exclude children born through ART from ever qualifying as having been born "in wedlock." And in doing so, the State Department is excluding gay and lesbian couples from realizing the full constellation of benefits granted to couples and families through marriage. The State Department's interpretation cannot stand.