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Jus Sanguinis or Just Plain Discrimination? Rejecting a Biological Requirement for Birthright Citizenship of Children Born Abroad to Same-Sex Couples Via Assisted Reproductive Technology

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Cover Page Footnote

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I would like to thank Dean Jason A. Cade for his mentorship on this Note and for his tireless advocacy for immigrant rights.

JUS SANGUINIS OR JUST PLAIN DISCRIMINATION? REJECTING A BIOLOGICAL REQUIREMENT FOR BIRTHRIGHT CITIZENSHIP OF CHILDREN BORN ABROAD TO SAME-SEX COUPLES VIA ASSISTED REPRODUCTIVE TECHNOLOGY

Thomas Andres Sanchez Evans[*]

Until recently, the State Department had a policy deeming children born abroad to married same-sex couples to be children born out of wedlock. Then, applying the statute for children born out of wedlock with more rigorous requirements, the State Department only allowed citizenship to pass through a biological relationship between the biological parent and the child.

Although the State Department updated this policy in May 2021 to allow for birthright citizenship of children born abroad to married same-sex couples, the new policy does not go far enough. This Note argues that Congress should amend the Immigration and Nationality Act to allow passage of birthright citizenship regardless of marital status based on intentional parentage rather than biology. This Note also argues that Congress should eliminate Section 309 of the Immigration and Nationality Act to eradicate distinctions between births in and out of wedlock in order to eliminate discriminatory treatment based on sexual orientation, gender identity, and marital status.

[*] J.D. Candidate, 2022, University of Georgia School of Law; B.S., 2019, Georgia Institute of Technology. I would like to thank Dean Jason A. Cade for his mentorship on this Note and for his tireless advocacy for immigrant rights.

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I. INTRODUCTION

The last decade has seen a dramatic improvement in the rights of the LGBTQ+ community in the United States.[1] Although the U.S. Supreme Court officially recognized same-sex marriage in 2015,[2] issues related to same-sex marriages have persisted in the American legal system, particularly as they relate to immigration and nationality law. One issue concerns children born abroad to same-sex couples via assisted reproductive technology (ART).[3]

Until recently, the U.S. Department of State had a policy that considered children born abroad to married same-sex couples to be born out of wedlock based on Congress's statutory scheme for this field.[4] The State Department made these citizenship decisions by requiring a biological relationship to both parents, an impossible requirement for children born to same-sex couples to satisfy.[5] After this determination, the State Department would apply the statute

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[1] *See, e.g.*, United States v. Windsor, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act's definition of marriage as a union between a man and a woman); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the fundamental right to marriage extends to same-sex couples); Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act provides protections for sexual orientation and gender identity).

[2] *See Obergefell*, 576 U.S. at 675 ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

[3] *See, e.g.*, Dvash-Banks v. Pompeo, No. CV 18-523, 2019 WL 911799, at *1–2 (C.D. Cal. Feb. 21, 2019) (determining whether twins born abroad to a married United States citizen father and an Israeli citizen father through ART was a child born in wedlock to determine if the twins were citizens at birth), *aff'd sub nom.* E.J.D.-B. v. U.S. Dep't of State, 825 F. App'x. 479 (9th Cir. 2020); Kiviti v. Pompeo, 467 F. Supp. 3d 293, 297–99 (D. Md. 2020) (determining whether a child born abroad to two married United States citizen fathers originally from Israel was a child born in wedlock and therefore a United States citizen at birth), *appeal dismissed*, No. 20-1882, 2020 WL 8509833 (4th Cir. Oct. 26, 2020); Mize v. Pompeo, 482 F. Supp. 3d 1317, 1323–24 (N.D. Ga. 2020) (determining whether a child born abroad to two married United States citizen fathers was a child born in wedlock and therefore a United States citizen at birth); Complaint, Blixt v. U.S. Dep't of State, No. 1:18-CV-00124, 2018 WL 500137 (D.D.C. Jan. 22, 2018) [hereinafter Blixt Complaint] (challenging the State Department policy construing the INA to deny birthright citizenship to children of married same-sex couples).

[4] *See* 8 U.S.C. § 1401 (providing the requirements for birthright citizenship for children born in wedlock); *id.* § 1409 (providing the requirements for birthright citizenship for children born out of wedlock).

[5] *See Mize*, 482 F. Supp. 3d at 1326 ("The State Department says two married men can never have a child abroad that it considers having been born in wedlock.").

for children born "out of wedlock."[6] Consequently, citizenship could only pass from the biological parent, even if that parent's spouse is a United States citizen who would otherwise satisfy the statutory requirements for their children to receive United States citizenship.[7] On May 18, 2021, the State Department amended its policy to allow for citizenship to pass through either parent of a child born abroad using ART, regardless of a biological relationship, thus recognizing "the realities of modern families and advances in ART."[8]

Based on this change, this Note first argues that future administrations, including those less friendly to LGBTQ+ and immigrant rights, should continue to follow this updated administrative policy recognizing that children born to married couples via ART are children born in wedlock. Second, this Note argues that the new interpretation does not go far enough; Congress should recognize modern families' needs by eliminating distinctions between children born in or out of wedlock and instead only require intentional parenting based on parents' names on a birth certificate.

Part II provides background information on ART. Part III examines the statutory framework involved in the State Department's policies, as analyzed in relevant district court cases. Part IV discusses public policy reasons for not returning to the pre-May 2021 policy. Finally, Part V argues for amending the statute to convey birthright citizenship to children born abroad based on intentional parenting instead of a biological requirement and advocates for eliminating any distinctions in citizenship determinations based on biology and birth in wedlock.

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[6] *See id.* ("The State Department applies Section 301 to marital children only if they share a biological relationship with both parents. Otherwise, the State Department applies Section 309, even though that provision is statutorily limited to children born 'out of wedlock.'" (citation omitted)).

[7] *See id.* at 1325 (noting the State Department's policy that "foreign-born children cannot acquire birthright citizenship unless they share 'a blood relationship with the parent(s) through whom citizenship is claimed'" (citation omitted)).

[8] Press Statement, Ned Price, U.S. Citizenship Transmission and Assisted Reproductive Technology, U.S. Dep't of State (May 18, 2021), https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/.

II. BACKGROUND ON ASSISTED REPRODUCTIVE TECHNOLOGY

According to the Centers for Disease Control and Prevention, "ART includes all fertility treatments in which either eggs or embryos are handled."[9] The most common form of ART is in vitro fertilization (IVF), which involves extracting eggs, fertilizing the eggs in the laboratory, and then transferring the resulting embryos into the uterus through the cervix.[10] Another common form of ART is artificial insemination, in which sperm is introduced via injection to the cervix.[11]

Fertility clinic data indicate that the use of ART is becoming more common: 2.1% of all births in the United States result from ART.[12] Although there are no published figures on the number of children born to same-sex couples via ART in the United States or globally, one author has suggested that the increase in ART usage in the United States is in part due to increased use among same-sex couples.[13] This increase in ART use raises questions about the financial costs of starting a family, especially given same-sex couples' limited options for having children.

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[9] *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 1, 2022), https://www.cdc.gov/art/artdata/index.html.

[10] *Id.*

[11] *See* Lena K. Bruce, Note, *How to Explain to Your Twins Why Only One Can Be American: The Right to Citizenship of Children Born to Same-Sex Couples Through Assisted Reproductive Technology*, 88 FORDHAM L. REV. 999, 1001 (2019) ("In artificial insemination, sperm is introduced into the female reproductive system via injection, while during in vitro fertilization, eggs are surgically removed, combined with sperm in a laboratory, and returned to the woman's uterus.").

[12] *ART Success Rates*, *supra* note 9.

[13] *See* Alice J. Shapiro et al., *Effect of Race and Ethnicity on Utilization and Outcomes of Assisted Reproductive Technology in the USA*, REPROD. BIOLOGY & ENDOCRINOLOGY 1, 5 (June 8, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5465464/ ("[A]n increase in the number of same-sex couples and of single men and women seeking parenthood, likely, also contributed to increased use of 3ART.").

A. FINANCIAL BURDEN OF ART

ART is a costly procedure that is often only available to wealthy couples, unless covered by an insurance plan.[14] In states that require insurance mandates to cover the costs of IVF, there are higher rates of ART usage and improvements in IVF procedures.[15] Despite the benefits of offering insurance coverage for ART, as of January 2022, only seventeen states have enacted laws that require insurers to cover, or offer at least some coverage, for fertility treatments and diagnoses.[16] As a result, this "lack of coverage has forced many couples to go into debt or mortgage their homes in order to access ART."[17] Due to the 25–30% live birth success rate of IVF, several rounds of IVF are often required to result in a viable pregnancy, which could lead to out-of-pocket costs reaching hundreds of thousands of dollars.[18] Couples may take other drastic measures to afford having a child, including "borrowing money from friends and family, pulling money from savings and retirement accounts, pawning or selling property, sharing prescription drugs, 'donating' extra fertilized eggs to obtain a discount on fertility services, participating in clinical trials, joining the military, draining flexible medical-spending accounts, taking additional

[14] *See* Seema Mohapatra, *Assisted Reproduction Inequality and Marriage Equality*, 92 CHI.-KENT L. REV. 87, 91 (2017) ("ART services are costly, and as a result—unless one has access to insurance coverage—primarily the wealthy have access to this avenue of reproduction.").

[15] *See* Ada C. Dieke, Yujia Zhang, Dmitry M. Kissin, Wanda D. Barfield & Sheree L. Boulet, *Disparities in Assisted Reproductive Technology Utilization by Race and Ethnicity, United States, 2014: A Commentary*, J. WOMEN'S HEALTH (June 6, 2017), https://pubmed.ncbi.nlm.nih.gov/28586255/ ("Insurance coverage of *in vitro* fertilization (IVF), a common ART treatment, is associated with higher utilization and improvements in practice and outcomes such as the transfer of fewer embryos and lower percentages of multiple births.").

[16] *See State Laws Related to Insurance Coverage for Infertility Treatment,* NAT'L CONF. ST. LEGISLATURES (June 12, 2019), https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx ("Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Texas and West Virginia[] have passed laws that require insurers to either cover or offer coverage for infertility diagnosis and treatment. Of those states, 15 have laws that require insurance companies to *cover* infertility treatment and two states—California and Texas—have laws that require insurance companies to *offer* coverage for infertility treatment.").

[17] Mohapatra, *supra* note 14, at 92.

[18] *Id.*

jobs," and moving to another state or overseas to a place with insurance coverage of ART.[19]

In comparison to IVF cost burdens in the United States, virtually all European countries offer some form of coverage for ART.[20] Denmark, France, Hungary, Russia, Slovenia, and Spain offer national health plans that provide complete coverage for ART procedures.[21] Israel also provides complete coverage, and Portugal, Turkey, and Sweden offer some coverage.[22] Most countries in the Global South, however, offer no coverage, "making ART inaccessible to those who might need it most."[23] Due to insurance coverage restrictions or prohibitive costs, those who cannot afford ART may be incentivized to travel overseas to have children through ART.[24]

B. REPRODUCTIVE OPTIONS FOR SAME-SEX COUPLES

ART is often one of the only options for same-sex couples to build a family[25] because based on current scientific techniques, same-sex

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[19] Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 L. & CONTEMP. PROBS. 147, 157–58 (2009) (footnotes omitted).

[20] *See* Patrick Präg & Melinda C. Mills, *Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care*, *in* CHILDLESSNESS IN EUROPE: CONTEXTS, CAUSES & CONSEQUENCES 289, 296 (2017), https://link.springer.com/chapter/10.1007/978-3-319-44667-7_14 (discussing the availability of insurance coverage of ART internationally).

[21] *See id.* (differentiating complete and partial coverage for ART).

[22] *See* G.O. Igberase, A. Adeyinka & O.U.J. Umeora, *Funding Options for Assisted Reproductive Technologies in Developing Countries*, J. PREGNANCY & CHILD HEALTH (2016), https://www.omicsonline.org/open-access/funding-options-for-assisted-reproductive-technologies-in-developingcountries-2376-127X-1000264.php?aid=75667 ("[S]ome countries like France, Spain and Israel cover ART costs fully, while Portugal, Turkey and Sweden cover varying percentages of the cost.").

[23] *Id.*; *see also* Effy Vayena, Herbert B. Peterson, David Adamson & Karl-G Nygren, *Assisted Reproductive Technologies in Developing Countries: Are We Caring Yet?*, 92 FERTILITY & STERILITY 413, 415 (2009), https://www.fertstert.org/action/showPdf?pii=S0015-0282%2809%2900362-8 (noting that IVF costs are "approximately 50% higher than the gross national income per capita of many countries, including China, India, Indonesia, Iran, Jordan, Lebanon, Malaysia, and Pakistan").

[24] *See* Jacoby, *supra* note 19, at 158 (indicating that some people "engage in overseas fertility tourism").

[25] *See* Scott Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 115 (2010) ("Same-sex

couples are not able to have a child biologically related to both parents.[26] Alternative methods of having children, like adoption, present unique difficulties for same-sex couples, making ART the only viable option.[27]

Even after the U.S. Supreme Court's decision in *Obergefell v. Hodges*, which legalized same-sex marriage,[28] state family law continues to lag behind in recognizing the fundamental rights of families with same-sex parents.[29] Family law is normally under states' purview, so some states reluctant to embrace *Obergefell* have passed legislation that permits private adoption agencies to choose not to place children in same-sex family homes based on religious grounds.[30] Many same-sex couples are turned away from faith-based adoption agencies who use "conscience clause" adoption laws to allow preferential treatment for opposite-sex couples.[31] This may discourage same-sex couples from pursuing adoption to start a family, leaving ART as the only suitable option.

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couples face limited options for conceiving or adopting children, and ART is frequently their only option to build a family.").

[26] *See* David B. Joyner, Comment, *"If Doubt Arises": How the Department of State's Interpretation of the Immigration and Naturalization Act Invites Discrimination Against the Children of Gay and Lesbian Americans*, 42 CAMPBELL L. REV. 119, 129 (2020) (noting that children of same-sex couples born through ART "will not share a biological connection with both parents," a situation not generally implicated for opposite-sex couples).

[27] *See id.* at 130 (comparing reproductive options for same-sex and opposite sex parents).

[28] *See generally* 576 U.S. 644 (2015) (holding that the fundamental right to marriage extends to same-sex couples).

[29] See Joyner, *supra* note 26, at 130 ("Even after the United States Supreme Court recognized marriage as a fundamental right . . . adoption laws were not amended or interpreted overnight to extend the same application to [same-sex] households as to their straight peers.").

[30] Jacey Fortin, *Oklahoma Passes Adoption Law That L.G.B.T. Groups Call Discriminatory*, N.Y. TIMES (May 12, 2018), https://www.nytimes.com/2018/05/12/us/oklahoma-gay-adoption-bill.html (noting that eight states passed legislation to allow private adoption agencies to discriminate against same-sex parents).

[31] Macy Mize, Note, *Congratulations, You're Having Twins! But Only One is a U.S. Citizen: How Constitutional Avoidance Should Be Used to Avoid Discrimination Against Same-Sex Couples Through the Denial of Birthright Citizenship*, 88 GEO. WASH. L. REV. 1014, 1021–22 (2020). *See also*Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (finding that the interest in equal treatment for foster parents and children based on sexual orientation did not outweigh a faith-based agency's religious exercise rights when the agency denied placing foster children with same-sex parents)..

Time and financial constraints may otherwise bar same-sex couples from choosing adoption. Although adoption costs vary greatly, adoption can be almost as financially onerous as ART, with adoption costs reaching over $30,000.[32] In states that offer insurance coverage for ART but offer no similar insurance policy for adoption, ART is often the only financially feasible option for some same-sex couples wanting to have a family.[33] Additionally, American adoption agencies have strict requirements for prospective parents, often involving a home study, background checks, probationary placement periods, and health and age requirements.[34] There is an even higher burden on prospective parents considering international adoptions due to regulations in the child's birth country, the United States, and the state laws where the parents live.[35] Because adoption can be a "time-consuming, costly, and invasive process," many same-sex couples resort to ART to have children.[36]

Because ART serves as the only viable method for many same-sex couples to have children, U.S. courts and legislatures should recognize that having children through ART is part of the "constellation of benefits that the States have linked to marriage," as the Court described in *Obergefell*.[37] This recognition includes

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[32] Jacoby, *supra* note 19, at 168.

[33] *See id.* at 153 ("[P]roviding insurance for expensive fertility treatments but not adoption (which can also cost thousands of dollars) ironically makes these technologies the only alternative some people can afford." (quoting DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 255 (1997))); *see also* Seema Mohapatra, *Fertility Preservation for Medical Reasons and Reproductive Justice*, 30 HARV. J. RACIAL & ETHNIC JUST. 193, 219 (2014) ("Adoption is a long, expensive, and exclusive process in the United States.").

[34] *See* Shauna L. Gardino, Andrew E. Russell & Teresa K. Woodruff, *Adoption After Cancer: Adoption Agency Attitudes and Perspectives on the Potential to Parent Post-Cancer*, 156 CANCER TREATMENT RSCH. 153 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3086473/ (noting the strict requirements for prospective adoptive parents).

[35] *See id.* at 155 ("Individuals pursing international adoptions are burdened with another layer of inconsistent regulations: to adopt a foreign child, an individual must satisfy the laws of the sending country and United States immigration law, on top of the laws of the state where he or she lives.").

[36] Michael J. Higdon, *Biological Citizenship and the Children of Same-Sex Marriage*, 87 GEO. WASH. L. REV. 124, 168 (2019) (quoting Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264 (2017)).

[37] Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

ensuring that the State Department does not reinstate its policy of deeming children born abroad to married same-sex couples as children born out of wedlock, therefore denying those children the ability to claim United States citizenship.

III. STATUTORY FRAMEWORK FOR DETERMINING CITIZENSHIP OF CHILDREN BORN ABROAD

There are two ways to obtain United States citizenship at birth: *jus soli* citizenship and *jus sanguinis* citizenship.[38] *Jus soli* ("right of soil") citizenship "is the principle that a person born inside the borders of a nation is a citizen at birth," which is explicitly described in the Fourteenth Amendment.[39] *Jus sanguinis* ("right of blood") citizenship, on the other hand, allows for heritable citizenship,[40] which is the principle issue concerning children born abroad to LGBTQ+ United States citizens. Because the U.S. Constitution is silent as to the citizenship of children born abroad, "[p]ersons not born in the United States acquire citizenship by birth only as provided by Acts of Congress."[41] The relevant Act of Congress is the Immigration and Nationality Act (INA), which describes the requirements for obtaining United States citizenship for children born abroad,[42] as discussed next.

A. THE IMMIGRATION AND NATIONALITY ACT: SECTIONS 301 AND 309

Section 301 of the INA, codified in 8 U.S.C. § 1401, describes the citizenship requirements for children born abroad to married parents.[43] Section 301(c) conveys citizenship to a person born abroad to two United States citizen parents, one of whom resided in the

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[38] *See* Gillian R. Chadwick, *Legitimating the Transnational Family*, 42 HARV. J.L. & GENDER 257, 263 (2019) (discussing transmission of birthright citizenship).

[39] *See* U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[40] *See* Chadwick, *supra* note 38, at 265 (distinguishing *jus sanguinis* citizenship from *jus soli* citizenship).

[41] Miller v. Albright, 523 U.S. 420, 424 (1998).

[42] 8 U.S.C. §§ 1401, 1409.

[43] *Id. §* 1401.

United States before the person's birth.[44] Section 301(g) conveys citizenship to a person born abroad to one noncitizen parent and one United States citizen if the citizen parent was physically present in the United States for at least five years prior to such birth.[45]

Section 309 of the INA, codified in 8 U.S.C. § 1409, prescribes different rules for establishing birthright citizenship for children born "out of wedlock,"[46] which are significantly harder to satisfy than those established under Section 301 for children of married parents.[47] In its current form, the statutory requirements vary depending on whether the child is seeking citizenship through a father or mother.[48] According to Section 309(a), an unmarried citizen father must meet the requirements of Section 301, establish a blood relationship with the child through clear and convincing evidence, agree to provide financial support for the child until the child is eighteen years old, and legitimate or acknowledge paternity of the child.[49] By contrast, Section 309(c) dictates that an unmarried mother must only demonstrate that she is a United States citizen at the time of the child's birth and establish a physical residence in the United States for at least one continuous year prior to such birth.[50]

Section 309 initially put a heightened burden on unmarried fathers seeking birthright citizenship for their children by requiring additional years of residence, proof of paternity, and the willingness to father children born out of wedlock.[51] However, the U.S. Supreme Court recently found that Section 309 violated the Equal Protection Clause of the U.S. Constitution.[52] In *Sessions v. Morales-Santana*, the Court resolved this unconstitutionality by "leveling-down"—holding that United States citizen mothers who have a child born

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[44] *Id.* § 1401(c).

[45] *Id.* § 1401(g).

[46] *Id.* § 1409.

[47] *See* Bruce, *supra* note 11, at 1003 ("The criteria under section 309 are significantly harder to satisfy than those under section 301.").

[48] 8 U.S.C. § 1409.

[49] *Id.* § 1409(a)–(c).

[50] *Id.* § 1409(c).

[51] *See* Bruce, *supra* note 11, at 1007–08 (describing the additional requirements that unwed fathers must satisfy to convey birthright American citizenship).

[52] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (analyzing the gendered requirements of Section 309).

out of wedlock on or after the Court's decision on June 12, 2017 must have resided in the United States for five years.[53] The one-year period under Section 309(c) still applies to children born before the *Morales-Santana* decision.[54]

Under Sections 301 and 309, the Secretary of State determines the nationality of children born outside the United States.[55] To help officials adjudicate these circumstances, the State Department provides recommended guidelines in the Foreign Affairs Manual (FAM).[56] Even after the new policy in May 2021, the FAM requires a blood relationship for Section 309, which explicitly lists a biological requirement, and for Section 301, which is silent as to a blood relationship requirement.[57] The FAM states that American citizenship laws "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."[58] In 2014, however, the State Department modified the FAM to state that a "woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby)."[59] This change only allowed a marginal advantage to same-sex mothers, though, because this benefit only applied to a United States citizen woman who gestates the egg of

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[53] *See* Bruce, *supra* note 11, at 1008 (noting the *Morales-Santana* opinion's change to the residency requirement of section 309(c)).

[54] *See id.* (analyzing the effects of the *Morales-Santana* decision).

[55] *See* 8 U.S.C. § 1104(a) ("The Secretary of State shall be charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to . . . the determination of nationality of a person not in the United States.").

[56] *See* Kiviti v. Pompeo, 467 F. Supp. 3d 293, 302 (D. Md. 2020) (describing the role of the FAM).

[57] *See* 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 301.4-1(D)(1)(a) (2018) [hereinafter FAM] ("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.").

[58] 8 FAM § 301.4-1(D)(1)(a).

[59] *Id.* § 301.4-1(D)(1)(c)).

her noncitizen wife.[60] Additionally, the FAM does not allow for a surrogate who is not the legal parent to pass citizenship onto their child,[61] nor does the FAM factor the citizenship of an anonymous sperm or egg donor into the citizenship analysis.[62]

In the context of a married couple, the FAM states that "[i]f a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The same is true for a child born to a married man and a person other than his spouse."[63] The FAM considers a child to be born in wedlock when a United States citizen gives birth to a child whose genetic parents are: (a) an anonymous egg donor and the gestational parent's husband; (b) an anonymous sperm donor and the gestational parent's United States citizen wife; or (c) an anonymous egg donor and the gestational parent's non-United States citizen husband.[64] Under this standard, at least one parent—the gestational parent—is a United States citizen, regardless of whether the other parties involved are United States citizens. Notably, this amendment did *not* provide for United States citizenship of a child born to a non-United States citizen gestational mother with a United States citizen wife.[65] Additionally, if a United States-citizen gestational parent is not married to the biological mother or father of the child, that child is considered born out of wedlock.[66] The FAM is even stricter for

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[60] *See* Bruce, *supra* note 11, at 1011 ("[I]f a child is conceived using the eggs of one mother but is carried by the other mother, both intended parents will be recognized as parents under the INA. However, even this exception provides limited solace to same-sex couples . . . .").

[61] *See* 8 FAM § 304.3-2(a) ("[T]he surrogate's citizenship is irrelevant to the child's citizenship analysis.").

[62] *See id.* § 304.3-3 ("U.S. citizenship cannot be transmitted by an anonymous sperm or egg donor").

[63] *Id.* § 304.1-2(c)(1).

[64] *Id.* § 304.3-1(a)–(c).

[65] *See id.* § 304.3-1(d) (stating that a gestational mother must be married to the genetic mother or father of the child for the child to be considered born in wedlock); *see also* Blixt Complaint, *supra* note 3, at 2 (illustrating how two children with married same-sex parents were considered born out of wedlock and not awarded citizenship because neither mother was married to the biological father of each child).

[66] *See* 8 FAM § 304.3-1(d) ("A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, and who is not married to the genetic mother or father of the child at the time of the child's birth, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c)."); *see also* Blixt Complaint, *supra* note 3, at

families with two fathers: "The State Department sa[id] two married men can never have a child abroad that it considers having been born in wedlock."[67] This was because the FAM required a biological relationship to both fathers in a same-sex relationship to consider the child born in wedlock.[68]

B. DISTRICT COURT APPLICATIONS OF SECTIONS 301 AND 309 TO MARRIED SAME-SEX PARENTS

1. Dvash-Banks v. Pompeo. In *Dvash-Banks*, the U.S. District Court for the Central District of California held that for children born to same-sex couples via ART, "Section 301 does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their married parents."[69] The court cited *Scales v. INS*, a case in which the U.S. Court of Appeals for the Ninth Circuit deemed the petitioner to have had American birthright citizenship because he was born during the marriage of his mother, a Philippine citizen, and his non-biological father, a United States citizen.[70] In *Scales*, the Ninth Circuit held that "[a] straightforward reading of [Section 301] indicates . . . that there is no requirement of a blood relationship."[71] The Ninth Circuit also noted that because Section 309 mentions a blood relationship in the context of children born out of wedlock, "[i]f Congress had wanted to ensure the same about a person born in wedlock, 'it knew how to do so.'"[72] The *Dvash-Banks* court also noted that in *Solis-Espinoza v. Gonzales*, the Ninth Circuit similarly determined that the petitioner, born in Mexico to his biological father, a Mexican citizen, and his father's wife, a United States citizen who was not his

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3 (noting that the State Department granted United States citizenship to one of the couple's two children by relying on the statute for children born out of wedlock).

[67] Mize v. Pompeo, 482 F. Supp. 3d 1317, 1326 (N.D. Ga. 2020).

[68] *See* 8 FAM § 304.3-2(f) ("A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.").

[69] Dvash-Banks v. Pompeo, No. CV 18-523, 2019 WL 911799, at *7 (C.D. Cal. Feb. 21, 2019).

[70] *Id.* (citing Scales v. INS, 232 F.3d 1159, 1162 (9th Cir. 2000)).

[71] *Scales*, 232 F.3d at 1164.

[72] *Id.* (quoting Custis v. United States, 511 U.S. 485, 492 (1994)).

biological mother, "was a legitimate child, not born out of wedlock, and . . . thus a United States citizen pursuant to [Section 301(g)]."[73]

The *Dvash-Banks* court found that the facts of its case and those of *Scales* and *Solis-Espinoza* were indistinguishable and that "in the Ninth Circuit, a biological relationship is not required under Section 301(g)."[74] The *Dvash-Banks* court also found similar language in *Jaen v. Sessions*, a Second Circuit case that stated that under the INA, "a child born into a lawful marriage is the lawful child of those parents, regardless of . . . any biological link."[75] In *Jaen*, the petitioner was born to a Panamanian citizen mother and her United States citizen husband, although the petitioner's biological father was a Panamanian citizen with whom the petitioner's mother had an extramarital affair.[76] There, the Second Circuit found that the petitioner acquired United States citizenship from his non-biological father following the common law rule that "a child born into a legal marriage is presumed to be the child of the marriage," even though the husband was not his biological father.[77]

In addition to considering these precedents, the *Dvash-Banks* court noted the difference in language between Sections 301 and 309, emphasizing that Section 301 references a biological relationship, while Section 309 includes an explicit "blood relationship" requirement.[78] Therefore, "Congress made it clear that it intended children born in and out of wedlock to be treated differently for purposes of acquiring United States citizenship."[79]

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[73] *Dvash-Banks*, 2019 WL 911799, at *7 (quoting Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005)).

[74] *Id.*

[75] *Id.* (quoting Jaen v. Sessions, 899 F.3d 182, 185 (2d Cir. 2018)).

[76] *See Jaen*, 899 F.3d at 184 (describing the petitioner's relationship to his father and biological father).

[77] *Id.* at 190.

[78] *Dvash-Banks*, 2019 WL 911799, at *7 ("[T]he dramatic difference in the language of Section 301 and Section 309 makes it clear that a biological relationship is not required between a child and his U.S. citizen parent if that child his [sic] born during the marriage of his parents to each other.").

[79] *Id.*; *see also* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here 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." (quoting United States v. Wong Kim Bo, 473 F.2d 720, 722 (5th Cir. 1972))).

The court also noted that Section 301's lack of a biological requirement is consistent with the INA's legislative history and intent to keep families together.[80] Ultimately, the *Dvash-Banks* court held that the plaintiffs' child acquired United States citizenship at birth based on mandatory Ninth Circuit authority, persuasive Second Circuit authority, a plain reading of Sections 301 and 309, and the INA's legislative history.[81]

2. Mize v. Pompeo. Using an alternative method for determining the citizenship of a child born abroad to a married same-sex couple via ART, the U.S. District Court for the Northern District of Georgia in *Mize v. Pompeo* relied on the doctrine of constitutional avoidance and held that Section 301 does not require a biological relationship.[82] Under this doctrine, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems."[83]

The court determined that a biological construction of the statute raises serious constitutional issues, especially considering the U.S. Supreme Court's recent decisions in *Obergefell v. Hodges*

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[80] *See Dvash-Banks*, 2019 WL 911799, at *8 ("[C]oncluding that Section 301 does not impose a biological relationship requirement is consistent with the legislative history of the INA . . . ."); *see also* Solis-Espinoza v. Gonzales, 401 F.3d 1090,1094 (9th Cir. 2005) ("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.").

[81] *Dvash-Banks*, 2019 WL 911799 at *8. In *Kiviti v. Pompeo*, the District of Maryland largely followed the same reasoning as the court in *Dvash-Banks*, holding that it "is clear and unambiguous that the phrase 'born . . . of parents' in [Section 301] does not require a biological relationship with both parents." Kiviti v. Pompeo, 467 F. Supp. 3d 293, 310 (D. Md. 2020).

[82] *See* Mize v. Pompeo, 482 F. Supp. 3d 1317, 1342 (N.D. Ga. 2020) ("Because the Non-Biological Reading is 'fairly possible,' and because the Biological Reading would raise serious constitutional questions, the Court must adopt the former under the doctrine of constitutional avoidance . . . . Having adopted the Non-Biological Reading, the Court finds that Section 301(c) does not require children to share a biological relationship with both citizen parents in order for those children to acquire citizenship at birth."). By contrast, the court in *Kiviti v. Pompeo* found that Section 301 does not require a biological relationship as a matter of the plain text of the statute and that applying constitutional avoidance is therefore unnecessary. *Kiviti*, 467 F. Supp. 3d 293 at 313. Nonetheless, the court mentioned that even if the statute was found ambiguous, applying the doctrine of constitutional avoidance would lead to the same holding. *Id.*

[83] *Mize*, 482 F. Supp. 3d at 1332–33 (quoting INS v. St. Cyr, 533 U.S. 289, 299–300 (2001)).

and *Pavan v. Smith*.[84] In *Pavan*, the U.S. Supreme Court found an Arkansas statute that required listing a mother's husband's name on a birth certificate but not the mother's wife unconstitutional.[85] The *Pavan* Court held that "[u]ltimately, the government cannot 'den[y] married same-sex couples access to the constellation of benefits that the State has linked to marriage,' whatever those benefits might be."[86] The *Mize* court determined that the ability of married United States citizen couples to convey birthright citizenship to their children born abroad could be considered a "benefit" under both *Obergefell* and *Pavan*; thus, denying same-sex couples this benefit by applying a biological reading of the statute would deny a benefit available to similarly situated opposite-sex couples who do not have children via ART, contrary to binding precedent.[87] The court found that if the statute were read narrowly, it could require a biological requirement, but if read more broadly, it could include children born to parents who are not the biological parents.[88] Because a non-biological reading was possible and a biological reading would raise constitutional issues, the court adopted the non-biological reading using constitutional avoidance, and in turn, determined that the plaintiffs' daughter is a United States citizen under Section 301(c).[89]

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[84] Obergefell v. Hodges, 576 U.S. 644 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017); *see also Mize*, 482 F. Supp. 3d at 1335 ("These cases raise serious doubts about the constitutionality of a biological parent-child requirement in Section 301(c).").

[85] *Pavan*, 137 S. Ct. at 2078–79 ("The State uses [birth] certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.").

[86] *Mize*, 482 F. Supp. 3d at 1334 (quoting Pavan, 137 S. Ct. at 2078); *see also Obergefell*, 576 U.S. at 670 ("Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage.").

[87] *See Mize*, 482 F. Supp. 3d at 1334–35 ("The ability to confer citizenship under these circumstances, without the additional burdens imposed by other provisions, could reasonably be viewed as a 'benefit.' That benefit is 'linked to marriage' because it is unavailable to unmarried couples.").

[88] *See id.* at 1336–37 (discussing the possible interpretations of Section 301).

[89] *See id.* at 1341–42 (applying the canon of constitutional avoidance to reach the same holding as the courts in *Dvash-Banks* and *Kiviti* because a biological reading would raise serious constitutional questions).

IV. PUBLIC POLICY CONCERNS REGARDING BIRTHRIGHT CITIZENSHIP OF CHILDREN BORN ABROAD TO SAME-SEX COUPLES VIA ART

In addition to the statutory issues surrounding the State Department's policies, there are public policy reasons for future administrations to advocate against the previous State Department policy. Maintaining the current policy will recognize the legitimacy of families with same-sex parents, conserve judicial resources, and avoid a *de facto* wealth test on families with same-sex parents.

A. RECOGNIZING THE LEGITIMACY OF FAMILIES WITH SAME-SEX PARENTS

Preventing the State Department from returning to its previous policy would save same-sex couples and their children from the humiliation of not being recognized as a family and of being asked invasive questions to determine a biological relationship between a United States citizen and their child.

1. Recognizing the Legitimacy of Same-Sex Couples. In both *Windsor* and *Obergefell*, the U.S. Supreme Court recognized that same-sex couples face humiliation when the legitimacy of their family unit is denied or questioned.[90] In *Windsor*, the Court stated that the Defense of Marriage Act (DOMA) "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage."[91]

The State Department's treatment of children born to married same-sex couples as children born out of wedlock, thereby failing to recognize the legitimacy of same-sex marriages, implicated the same concerns mentions in *Windsor*. In effect, this treatment led to the precise outcome that *Windsor* sought to avoid—the treatment of

[90] *See* United States v. Windsor, 570 U.S. 744, 772 ("[DOMA] humiliates tens of thousands of children now being raised by same-sex couples."); *Obergefell*, 576 U.S. at 646 ("The marriage laws at issue thus harm and humiliate the children of same-sex couples.").

[91] *Windsor*, 570 U.S. at 772 (2013).

same-sex couples as a "second-tier marriage"[92]: married same-sex couples could never give birth to a child via ART that the State Department's previous policy would have deemed a child born in wedlock unless a United States-citizen mother gestated the egg of her non-citizen wife.

The Zaccari-Blixt family's citizenship struggles illustrate this humiliation.[93] The State Department determined that the children of married wives, Allison Blixt and Stefania Zaccari, were children born out of wedlock. When the Zaccari-Blixt family traveled from Italy to the United States to visit Allison's family, they had to go through the customs line for non-citizens on behalf of their son and explain that he was considered illegitimate under U.S. law and therefore not a citizen because only Stefania, an Italian citizen, conceived him.[94] Thus, each time the Zaccari-Blixts traveled to the United States, they were reminded that the State Department failed to recognize the legitimacy of Allison and Stefania's marriage and parentage to their son.[95] Stigma also persisted for the Zaccari-Blixt family even when the State Department determined that their child was a United States citizen at birth because the State Department still deemed their child as born out of wedlock.[96]

The Fielden-Calle family faced a similar burden: after the State Department determined that the daughter of married wives María Calle Suarez and Laura Fielden could not obtain United States citizenship through birth based on the same policy, the State Department advised the family that she might be able to seek citizenship through naturalization.[97] The United States Citizenship

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[92] *Id.*

[93] *See* Blixt Complaint, *supra* note 3, at 8 (discussing how the restrictions imposed by the State Department's policy "impose[d] concrete harms on Lucas and his family, as well as governmentally imposed diminutions of their fundamental protections and dignity, that are overwhelming and ongoing").

[94] *Id.* at 6, 8.

[95] *See id.* at 8 ("Not only does this make traveling [to the United States] more burdensome, it also exposes Allison, Stefania, and their young children to the pain and stigma of knowing that these burdens result from the State Department's refusal to recognize Allison's marriage to Stefania and parentage of Lucas.").

[96] *See id.* at 2–3 (discussing how for the Zaccari-Blixt family, the State Department applied Section 309 to their sons Massi and Lucas, considering only Massi to be a U.S. citizen due to his biological relationship to Allison, a United States citizen).

[97] *See* Complaint at 20, Fielden v. Pompeo, No. 1:20-cv-00409 (D.D.C. Feb. 12, 2020) [hereinafter Fielden Complaint] (noting that "[a]s part of [the State Department's] Denial,

and Immigration Services (USCIS), the government agency responsible for determining immigration to the United States[98] rejected this application, comparing Laura's relationship with her daughter to a relation between step-mother and step-daughter.[99] USCIS policy at the time did not recognize the daughter's United States citizenship status because of the relationship between her two mothers:

> [W]hen a child is not the biological child of the United States citizen parent, but such parent was married to the child's biological parent at the time of birth, USCIS treats such child as the step-child of the United States citizen parent. . . . In this case, you, as the United States citizen step-parent of a child, are unable to transmit citizenship to [your daughter].[100]

Although USCIS is a different agency, the State Department's failure to recognize the legitimacy of the Fielden-Calle's marriage led them to seek relief from USCIS that further failed to recognize the legitimacy of their marriage.[101]

While the State Department's policy was still in effect, married same-sex couples also faced humiliating questions when they

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the Department advised that Ms. Fielden should consider applying for [her daughter's] naturalization").

[98] *See Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 7, 2022), https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-1 ("USCIS is the government agency that administers lawful immigration to the United States.").

[99] *See* Fielden Complaint, *supra* note 97, at 23–24 ("USCIS then likened Ms. Fielden's relationship to her daughter as that of a step-parent and step-child . . . .").

[100] *Id.* USCIS has since changed this policy. *See* Policy Alert, U.S. Citizenship & Immigration Servs., PA-2021-17, Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes (Aug. 5, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210805-AssistedReproductiveTechnology.pdf (explaining the change in policy that "USCIS now considers a child to be born in wedlock when the child's legal parents are married to one another at the time of birth and at least one of the legal parents has a genetic or gestational relationship to the child").

[101] *See* Fielden Complaint, *supra* note 97, at 31 (stating that DHS and USCIS "illegally denie[d] same-sex couples a crucial benefit of the right to marry based on protected personal characteristics" and that "[i]n carrying out this policy, USCIS has stigmatized and denigrated same-sex parents and their children, specifically, Plaintiffs").

sought recognition that their child was a United States citizen.[102] When "doubt arose" as to a biological relationship between same-sex parents and their children, consular officers were allowed to probe into the means of conception of the child.[103] Thus, to determine their child's citizenship during consular interviews, same-sex couples almost always faced invasive and humiliating questions as to how their children were conceived, whereas opposite-sex couples were presumed to be the parents of their child and could avoid invasive and humiliating questioning.[104] For example, a U.S. embassy official, without explanation, asked Allison and Stefania intimate questions about how Lucas was conceived, whose genetic material was used, and who carried Lucas to term.[105]

2. Preventing Feelings of Stigma for Children of Same-Sex Parents. In addition to these humiliating experiences, the Court in *Windsor* also stated that DOMA "humiliates tens of thousands of children now being raised by same-sex couples[,] . . . mak[ing] it even more difficult for the 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."[106] The Court in *Obergefell* similarly reasoned that "[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser."[107] U.S. Supreme Court jurisprudence therefore recognizes the detrimental effects of the failure of the U.S. government to recognize the legitimacy of same-sex marriage on children.

The indignity that these children face is also illustrated in the Zaccari-Blixt family's case. Under the initial policy, Lucas might one day realize that the United States does not recognize the legitimacy of his relationship to his mother and brother and that the government discriminated against him because of his parents'

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[102] *See* Blixt Complaint, *supra* note 3, at 7 (describing the State Department's invasive questions like the details of their sons' birth, how he was conceived, and whose womb he had been carried in).

[103] Joyner, *supra* note 26, at 124–25 (quoting 8 FAM § 301.4-1(D)(1)(d)).

[104] *See id.* at 125 (explaining how opposite-sex couples are not asked the same invasive questions during consular visits as same-sex couples who "will virtually *always* encounter the doubt of consular officers").

[105] Blixt Complaint, *supra* note 3, at 7.

[106] United States v. Windsor, 570 U.S. 744, 772 (2013).

[107] Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

sexual orientation.[108] This discrimination violates the U.S. Supreme Court's intent to prevent children of same-sex couples from feeling that the United States does not recognize the validity of their family and its intent to prevent children from thinking of their families as "somehow lesser" than children of opposite-sex couples.[109]

3. Maintaining Family Unity. In addition to implicating the public policy concerns raised in *Windsor* and *Obergefell* regarding stigma, the State Department's previous policy also contravened the legislative intent of the INA. Scholars have noted that "family unification has never been a controversial or debatable issue in Congress, but rather has been considered obviously desirable."[110] Congress itself has noted that "[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families and United States citizens and immigrants united."[111] Congress also stated that the INA "implements the underlying intentions of our immigration laws regarding the preservation of the family unit" and that "the statutory language makes it clear that the underlying intent of the legislation was to preserve the family unit upon immigration to the United States."[112]

Thus, when applying its policies, the State Department should liberally construe the INA to reflect its underlying policy rationale of keeping families together. This interpretation would involve recognizing that both members of a married same-sex couple are the parents of the child, regardless of genetics, and allowing either parent to pass United States citizenship to the child.[113] This application in turn would also eliminate the humiliation that same-sex couples and their children face, as mentioned in *Windsor* and *Obergefell*, because the State Department would continue to recognize the legitimacy of same-sex marriage as on par with

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[108] Blixt Complaint, *supra* note 3, at 4 (discussing the lasting effects of the State Department's policies).

[109] *Obergefell*, 576 U.S. at 644.

[110] E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 505 (1981).

[111] H.R. REP. NO. 85-1199, at 2020 (1957).

[112] *Id.*

[113] This should also be applied to unmarried same-sex and opposite-sex couples. *See infra* Part V.

opposite-sex marriage, as opposed to its applications of the previous policy.

B. CONSERVING JUDICIAL RESOURCES

Preventing the State Department from returning to its previous policy deeming children born abroad via ART to same-sex couples to be children born out of wedlock would additionally help conserve judicial resources, as well as the time and money of both potential plaintiffs and the State Department. As more same-sex couples start to use ART to start a family, there will likely be more litigation brought by same-sex couples if a future administration reinstates the old discriminatory policy. Therefore, maintaining the new State Department policies will prevent courts from hearing similar cases, especially because all cases litigated on this issue came out in favor of the plaintiffs thus far.[114]

C. *DE FACTO* WEALTH TEST ON THE FAMILIES OF SAME-SEX COUPLES

The State Department's previous policy of denying citizenship to children born abroad to same-sex parents via ART created a *de facto* wealth test on families with same-sex parents. These families paid for the medical costs of ART, genetic tests to determine the biological parent of their child, and attorney's fees to overcome State Department resistance or denials.

Same-sex parents face tremendous costs for having children via ART, especially if the child is born in a state where insurance does not cover ART costs.[115] United States citizens could be incentivized to have children abroad if they do not reside in one of the few states that provides coverage for ART, thus negating the ability of their children to attain *jus soli* United States citizenship. ART alone may not be a viable option financially for many same-sex couples, and the added financial constraints imposed by the State Department's

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[114] *See, e.g.*, Mize v. Pompeo, 482 F. Supp. 3d 1317, 1339–40 (N.D. Ga. 2020) ("At least six cases have held that Section 301 does not require a biological parent-child relationship. No court has expressed the contrary view.").

[115] *See supra* Section II.B (noting the high costs of ART without insurance).

previous policy on same-sex couples who have children abroad via ART is a further deterrent.

The policy also required some same-sex couples to undergo genetic testing to prove which parent in a same-sex marriage was the biological parent if the biological relationship was not readily apparent.[116] As the FAM notes, genetic testing is usually a last resort to determine proof of parentage absent other credible proof due to "the expense, complexity, and logistical delays inherent in parentage testing."[117] Although not every same-sex couple pays for this additional step, it was necessary for families like the Dvash-Bankses who kept the genetic identity of their children anonymous so that each child felt "equally connected" to both parents.[118]

After similarly situated same-sex parents suffer the costs of ART, and possibly the additional cost of genetic testing, these couples then must also pay litigation costs to have courts recognize their children as United States citizens. Although same-sex couples prevailed in individual cases,[119] undoubtedly many more lacked or would lack the resources to challenge adverse decisions if the State Department returns to its previous policy. This return could force some same-sex couples who have children abroad through ART to only allow the United States citizen parent to donate genetic material to avoid the added financial, emotional, and time-consuming burden of genetic testing and litigation.

The added financial burden of litigation is particularly troubling because use of ART has been linked to socioeconomic status,[120]

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[116] *See* Dvash-Banks v. Pompeo, No. 18-523, 2019 WL 91179, at *2 (C.D. Cal. Feb. 21, 2019) (noting that the Consul selected to adjudicate the applications for "documents evidencing each [t]win's U.S. citizenship" and informed the children's parents that the State Department required "evidence of a biological relationship with [the parent who was a U.S. citizen]" before either child could qualify for U.S. citizenship). Couples like the Kivitis, Mize-Greggs, Zaccari-Blixts, and Fielden-Calles would not have to pay for genetic testing because they knew which parent supplied their genetic material.

[117] 8 FAM § 304.2-1(c) (2019).

[118] *See* Complaint at 49, Dvash-Banks v. U.S. Dep't of State, No. 2:18-cv-00523, 2018 WL 550224 (C.D. Cal. Jan. 22, 2018) ("Andrew and Elad had planned to keep the genetic identity of their children private so that both children would feel equally connected to each of their parents.").

[119] *See supra* Section III.B (providing an overview of the cases challenging the State Department's policy).

[120] *See supra* Section II.B (discussing how ART is often only economically feasible to wealthy individuals).

indicating that wealthy same-sex couples are more likely to be able to have children using ART. The financially and emotionally arduous process of litigating recognition of a child's citizenship status further increases this burden. For example, the Dvash-Banks family sought attorney's fees of approximately $1.2 million and additional legal costs of approximately $30,000 for one law firm's assistance, plus approximately $70,000 in attorney's fees and approximately $1,000 in costs for a non-profit group's assistance.[121] Even if families like the Dvash-Bankses are awarded attorney's fees, the prospect of potentially spending millions of dollars in litigation costs serves as a strong deterrent for many same-sex couples having children abroad or having children in general, even if their children would have a valid claim to United States citizenship under the INA.

V. PROPOSAL FOR A NEW STATUTORY SCHEME

Congress should amend Section 301 to prevent same-sex families from having to litigate recognition of their children's citizenship. An amendment would allow citizenship to be passed through intentional parentage, regardless of marriage and blood relationships. Congress should completely eliminate Section 309 because it relies on heteronormative views of family structures and perpetuates outdated gender roles of unmarried mothers and fathers. Eliminating Section 309 would also allow for same-sex and opposite-sex couples who choose not to marry to convey citizenship and would eliminate the only reference to "blood" in the context of conveying birthright citizenship.[122]

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[121] Plaintiff's Notice of Motion and Motion for Attorney's Fees and Costs at 15, Dvash-Banks v. U.S. Dep't of State, No. 2:18-cv-00523 (C.D. Cal. Mar. 20, 2019) (noting the high costs that the Dvash-Banks family expended in seeking to establish their son's birthright citizenship).

[122] Bruce, *supra* note11, at 1027–28 (noting that Section 309 is the only reference to blood when referring to *jus sanguinis* citizenship).

A. AMENDING SECTION 301 TO ALLOW FOR BIRTHRIGHT CITIZENSHIP THROUGH INTENTIONAL PARENTAGE

The Uniform Parentage Act (UPA) "provides states with a uniform legal framework for establishing parent-child relationships."[123] The UPA was amended in 2017 to define an intended parent as "an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction."[124] As of April 2022, six states—California, Connecticut, Maine, Rhode Island, Vermont, and Washington—have enacted the 2017 UPA, while three states—Massachusetts, Hawaii, and Pennsylvania—have introduced legislation to enact the 2017 UPA.[125] State family law increasingly recognizes the concept of intended parentage,[126] a trend further bolstered by the fact that many members of Congress; the American Bar Association; the Uniform Law Commission; and the surrogacy laws of Connecticut, Maine, Nevada, and New Hampshire all endorse intent-based parentage.[127]

Congress could incorporate intent-based parentage into the INA's definition of "parent," by defining "parents" as "individuals who, at the time of birth, demonstrate an intent to be legally bound as a parent of the child born naturally or through assisted reproductive technology."[128] This amendment would recognize the legitimacy of both biology-based and intent-based parentage, thus acknowledging the "deliberate efforts of intended parents who invest time, money, and emotions into ART to have a child"[129] and

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[123] *Parentage Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited Apr. 20, 2022).

[124] UNIF. PARENTAGE ACT § 102(13) (Unif. L. Comm'n 2017).

[125] *See Parentage Act*, *supra* note 123 (showing the states that have enacted or introduced legislation to adopt the 2017 UPA).

[126] *See* Chadwick, *supra* note 38, at 282 ("Family courts, empowered by statutes and equity interests, are increasingly looking to intent as a dispositive factor in determining parentage."). In contrast to progress made in family law, immigration law continues to lag. *See* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 690 (2014) (noting that immigration and citizenship law "largely ignore[] [the] broadening trend" of new types of parentage, including intentional parentage).

[127] *See* Bruce, *supra* note 11, at 1022 (listing various groups that support intent-based parentage).

[128] *Id.* at 1027.

[129] *Id.* at 1019.

that "parents who utilize ART do so for the singular purpose of producing a child."[130]

This change would also streamline the State Department's citizenship determinations for children born abroad to same-sex couples. For determining parentage, the State Department would only need to look at the names on a birth certificate to determine parentage without inquiring into the genetic relationship between parent and child. This would be consistent with USCIS policy, which states that "[i]n general, absent other evidence, USCIS considers a child's birth certificate as recorded by a proper authority as sufficient evidence to determine a child's genetic . . . relationship to the parent (or parents)."[131] If a birth certificate, without genetic testing, is sufficient evidence of a genetic relationship to the parent for USCIS, it should also be sufficient to establish parentage—regardless of biology and marriage—for the State Department.

The State Department's determinations can be particularly arduous because children born via ART can have up to five "parents," including the sperm donor, egg donor, surrogate, and two non-biologically related intended parents.[132] Thus, simply looking at the names on a birth certificate would also reduce confusion when a couple uses both a sperm and egg donor. Under the current version of the FAM, if a couple uses a sperm and egg donor and does not gestate the child, no single individual can be legally recognized as the child's parent because anonymous sperm and egg donors are not considered for citizenship purposes.[133]

Relying solely on a birth certificate may be difficult for some immigrants from the Global South where obtaining a reliable birth certificate is difficult.[134] For example, in Nigeria, "only thirty percent of births are registered at birth."[135] Insufficient birth

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[130] *Id.* (quoting AM. BAR ASS'N, RESOLUTION WITH REPORT NO. 113, at 8 (2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2017-hod-midyear-electronic-report-book.pdf).

[131] *Chapter 2 – Definition of Child and Residence for Citizenship and Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last visited Jan. 22, 2022), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html.

[132] Bruce, *supra* note 11, at 1001.

[133] *See* 8 FAM § 304.3-3 (2018) (noting that anonymous sperm and egg donors cannot transmit United States citizenship).

[134] Abrams & Piacenti, *supra* note 126, at 666–67.

[135] *Id.* at 666–67.

certificates, however, can be supplemented with secondary materials such as "medical, religious, or school records that identify the [parents] of the individual" or "[s]worn affidavits of those having personal knowledge of the fact . . . [like] health care workers, clergy, relatives, and close friends with personal knowledge of the birth."[136] Admittedly, relying on intent-based parentage must overcome any state interests in preventing birth certificate fraud or other types of fraud that could lead to illegal claims of citizenship, which are addressed next.

B. ADDRESSING RELEVANT STATE INTERESTS

In the State Department's press statement announcing its new policy recognizing United States citizenship for children born abroad through ART, the Department stated that it must "remain vigilant to the risks of citizenship fraud, exploitation, and abuse."[137] Thus, the State Department must consider several potential government interests before allowing a birth certificate to prove birthright citizenship, including the prevention of fraudulent marriages and birth certificates. But these interests are minimal, easily addressed, and substantially outweighed by other interests and same-sex families' rights.

1. Fraudulent Marriages. The State Department might claim that requiring a blood relationship deters fraudulent marriages. For example, a pregnant woman could seek to marry a United States citizen spouse who is not the biological father to pass citizenship to her child[138] by listing both names on the birth certificate. This concern, however, is unwarranted because the INA already sets out criminal penalties of up to five years imprisonment and fines of up to $250,000 for an "individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws."[139]

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[136] *Id.* at 668 (quoting *In re* Athar, 2007 WL 4182369, at *1 (B.I.A. Oct. 18, 2007)).

[137] Press Statement, Ned Price, U.S. Citizenship Transmission and Assisted Reproductive Technology, U.S. DEP'T OF STATE (May 18, 2021), https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology.

[138] *See* Ashley D. Craythorne, Note, *Same-Sex Equality in Immigration Law: The Case for Birthright Citizenship for Foreign-Born Children of U.S. Citizens in Same-Sex Binational Unions*, 97 TEX. L. REV. 645, 665 (2019) (providing an example of how people could take advantage of birth certificate-based birthright citizenship).

[139] 8 U.S.C. § 1325(c)); *see also* Craythorne, *supra* note 138, at 656–66.

Other deterrents include criminal prosecution of United States citizens participating in marriage fraud, potentially resulting in either imprisonment or fines, and charges under the Immigration Marriage Fraud Amendments, which Congress passed to reduce immigration-related marriage fraud.[140] Even with these strong deterrents, eliminating a distinction for children born in and out of wedlock would eliminate any incentive to engage in marriage fraud to convey birthright citizenship. By relying on the names on a birth certificate, the State Department would be able to determine parentage more easily without having to consider biology or marriage, rendering Section 309 obsolete.

2. Birth Certificate Fraud. Relying solely on a birth certificate may raise questions of a state interest in preventing birth certificate fraud, in which non-citizens fabricate birth certificates and list the name of a United States citizen parent for their child to be classified as a United States citizen. Indeed, recognizing intentional parentage "could be especially threatening to the government's anti-fraud interest."[141] There are possible solutions to avoiding parentage fraud on birth certificates, though.

One possible solution is to rely on the principle of functional parenting, which "allows a genetically unrelated adult who has fulfilled the role and function of a parent for a meaningful amount of time to gain the legal status of a parent."[142] The State Department could determine whether the family meets functional requirements by examining "living arrangements, church and school records, financial arrangements, and affidavits of third parties."[143]

This approach would also obviate the need for a marriage requirement because the child could meet the requisite connection to an American parent by residing with that parent, regardless of whether that parent is the biological parent or married. This serves the government interest of "ensur[ing] that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent and, in turn, the United

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[140] *See* 8 U.S.C. § 1325(c) (seeking to deter immigration-related marriage fraud through imposition of prison time and large fines).

[141] Abrams & Piacenti, *supra* note 126, at 681.

[142] Chadwick, *supra* note 38, at 283.

[143] Abrams & Piacenti, *supra* note 126, at 689.

States."[144] Adjustments would have to be made to account for cultural differences regarding family conduct, thus ensuring that families do not need to conform to a narrow view of what constitutes a family and family behavior.[145] This change may, however, put a higher burden on the State Department to monitor families over a period of time, which is much more difficult than simply supplying documents or genetic tests. Additionally, this level of intrusiveness in monitoring the ways that a couple raises a family would likely spark objections from both the government and families.

Another possible solution for avoiding birth certificate fraud that would not require the State Department to monitor families over time would be to look at supplementary secondary materials that are already used in other countries when a reliable birth certificate is not easily obtained.[146] When the State Department is suspicious of the authenticity of a birth certificate, it could request additional documentation such as records or sworn affidavits to verify that the parents on the birth certificate are actually the child's parents. As an even stronger deterrent, Congress could amend the INA to set out penalties for birth certificate fraud similar to those for marriage fraud, including fines or other measures.

C. ELIMINATING SECTION 309

The current version of Section 309 is highly gendered and relies on a cis-heteronormative view of a family requiring a mother and father that simply does not make sense in the context of same-sex, non-binary, transgender, or other LGBTQ+ parents.[147] Section 309 also relies on outdated stereotypes of unmarried mothers and fathers and their roles in parenting a child out of wedlock.[148] Section 309 should therefore be eliminated in favor of an amended Section 301.

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[144] Nguyen v. INS, 533 U.S. 53, 54 (2001).

[145] *See* Abrams & Piacenti, *supra* note 126, at 689 (noting necessary adjustments for a functional parentage approach).

[146] *See supra* Section V.B.*2* (demonstrating supplementary materials to use in place of a birth certificate).

[147] *See* 8 U.S.C. § 1409(a)–(c) (referring to the "father," "mother," and "paternity" of the child).

[148] *See id.* § 1409(b)–(c) (using the terms "out of wedlock" and "legitimation" of paternity).

1. Reliance on a Heteronormative View of Family Structure. The current structure of Section 309, which has different rules for unmarried mothers and fathers,[149] cannot logically be applied to same-sex fathers. Under a current reading of Section 309, two unmarried men would both have to satisfy the blood relationship component, legitimate or acknowledge paternity of their child, write statements pledging financial support to the child, and satisfy the five-year residence requirement.[150] There would be an obvious disparity between the requirements for same-sex fathers and same-sex mothers because unmarried mothers must only satisfy the residency requirement. To alleviate this problem, the State Department could apply a narrower reading, in which only one father has to meet the requirement, but this approach might suggest that the other father—because that section is not applied to him—is somehow lesser and not actually the father of the child. This essentially boils down to the State Department asking the classic homophobic question, "So who's the man in the relationship?" The State Department could argue that only the biological father is the father for purposes of Section 309, but this question still lessens the legitimacy of a non-biological father's claim to fatherhood.

Similarly situated unmarried lesbian couples would also face similar questions. Although they would not have to meet the more rigorous requirements of pledging financial support, legitimating the child, and establishing a biological relationship, it is unclear whether Section 309(c) would apply to both mothers or only the biological mother. The same concerns exist for situations involving transgender people who give birth to children. It is unclear whether they would be misgendered to comply with the terms of Section 309. Must non-binary parents or parents of other gender identities conform to the gendered roles of mother and father? What if the couple decides to use both an egg and sperm donor? These questions underline the need to eliminate Section 309. These requirements do not conform to modern views of gender, parentage, and sexual orientation. Marriage should not be the only indication of good

[149] *See id.* § 1409(a)–(c) (setting out a separate legal standard for children born to parents outside of marriage).

[150] *See id.* § 1409(a)(1)–(4) (1988) (establishing a heightened burden for unwed fathers to convey birthright citizenship to their children).

parents, and today, marriage is not simply the union of a cisgender man and cisgender woman.

2. Reliance on Antiquated Stereotypes of Unmarried Parents. Section 309 relies on stereotypes of the roles of mothers and fathers in parenting, especially if unmarried. In *Nguyen v. INS*, the U.S. Supreme Court acknowledged the different stereotypical requirements for mothers and fathers but stated that the government has an interest in "ensuring that children develop a relationship with their citizen parent and thus, the United States."[151] In fact, both Congress and the U.S. Supreme Court have noted concerns about limiting the claims of children born out of wedlock to American male soldiers and tourists abroad.[152]

In the 2017 case *Sessions v. Morales-Santana*, however, Justice Ginsburg, writing for the Court, recognized the stereotypes behind Section 309 as violative of the Fourteenth Amendment's Equal Protection Clause, finding that the statute relied on the principles that "[i]n marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child."[153] Regarding the Court's justification for a state interest in the varying requirements of Section 309, Justice Ginsburg noted that "[c]oncern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children."[154] Justice Ginsburg reasoned that "[f]or unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture."[155] Despite recognizing this disparity between mothers and fathers, the Court in *Morales-Santana* decided to instead replace the one-year resident requirement for women, rather than reducing

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[151] Nguyen v. INS, 533 U.S. 53, 69 (2001).

[152] *See* Abrams & Piacenti, *supra* note 126, at 702 (noting concerns of citizenship claims of children born abroad to unmarried American soldiers and tourists). This fear may be exaggerated, though: "[I]t is not at all clear that there is a legitimate government interest in restricting who can choose to exercise citizenship, or in protecting male U.S. citizens' ability to spread their seed abroad, in contrast to the legitimate interest in limiting legal immigration." *Id.* at 703.

[153] 137 S. Ct. 1678, 1690–91 (2017).

[154] *Id.* at 1692.

[155] *Id.*

the heightened burden on fathers, requiring both men and women to meet the five-year residency requirement that was previously only required for men.[156] The Court thereby increased the burden on unmarried women, leaving the highly gendered terms intact.

Eliminating differences in the treatment of citizenship in and out of wedlock would make immigration and nationality law consistent with other areas of United States jurisprudence, including family law, that are moving away from a reliance on births in wedlock.[157] Thus, relying solely on intent-based parenting in Section 301 regardless of biology and marriage and eliminating Section 309 would in turn reduce the discrimination based on sexual orientation, gender, gender identity, and marital status that this statute perpetuates.

VI. CONCLUSION

The State Department's previous policy deeming children born abroad to married same-sex couples through ART to be children born out of wedlock and then requiring a biological connection to a citizen parent violated the INA, U.S. Supreme Court jurisprudence, and public policy. In particular, the State Department's previous policy violated the Supreme Court's recognition of the legitimacy of same-sex marriage by failing to ensure that same-sex parents and their children felt like their country recognized the legitimacy of their family. The previous policy was also contrary to the legislative purpose of the INA to keep families together and wasted judicial resources. Further, these determinations created a *de facto* wealth test on same-sex couples who had children abroad because these couples were forced to pay for ART procedures, genetic testing, and litigation to recognize their children as citizens. Future administrations should ensure that biology-based restrictions on birthright citizenship are eliminated.

To help achieve this goal, Congress should amend Section 301 to allow passage of birthright citizenship based on intent rather than

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[156] *Morales-Santana*, 137 S. Ct. at 1701; *see also* Chadwick, *supra* note 38, at 289.

[157] *See* Chadwick, *supra* note 38, at 294–95 ("The concept of 'legitimation' has become increasingly fraught in recent years as its persisting saliency in immigration and nationality law increasingly diverges from its obsolescence in family law and other areas of law and society.").

marriage or biology, especially because any state interests in fraud prevention are not compelling and because alternative measures can be implemented to deter immigration fraud. This amendment would render Section 309 obsolete, thereby removing archaic impediments to citizenship recognition under immigration and nationality law. Additionally, Section 309's highly gendered terms rely on outdated, cis-heteronormative views of parentage that presume nonmarital mothers to be the sole caretaker and nonmarital fathers to be out of the picture. This amended approach would reduce discrimination based on sexual orientation, gender, gender identity, and marital status and would put LGBTQ+ families on the same footing as opposite-sex families while streamlining the State Department's process of determining birthright citizenship for children born abroad.