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## "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

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# **“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**

## ABSTRACT

*Federal statutes granting U.S. citizenship to children born abroad to an American parent became law long before the advent of reproductive technologies that have helped millions of people grow their families. As written, the laws require further interpretation to address situations where a child is born to a married couple when one parent is American but does not have a biological link to the child. The U.S. Department of State’s interpretation of the laws requires staff to review a series of factors when a family applies for their child’s citizenship by birth abroad, and these factors result in gay and lesbian headed families always having to prove a biological link between the American parent and child, while families with straight parents generally do not.*

*The State Department’s biological test does not reflect federal appellate courts’ understanding of parent-child legal relationships. Courts understand the law as interested in the marital status of the parents at the time of birth, deeming a child born during the course of a valid marriage to be the legal child of the two married parents. This test ignores biology and can be more equitably applied to gay and lesbian parents as well as their straight peers, since the focus is on the parents’ marriage rather than the child’s conception.*

*Families whose children have been denied U.S. citizenship by birth abroad to a gay or lesbian American parent are suing the State Department, relying on the judicial test. This comment explores the laws and lawsuits and proposes changes to State Department policy.*

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## INTRODUCTION

There are two ways for a child to become a United States (U.S.) citizen upon birth: birth on American soil and birth abroad to an American parent. The latter occurrence triggers a statutory scheme that involves the American parent's marital status and amount of time spent in the U.S. As a general rule, a showing that a child was born in wedlock outside of the U.S. to at least one American parent is sufficient to establish that child as a U.S. citizen by birth. A child born out of wedlock outside of the U.S. must demonstrate a biological connection to an American parent in order to prove citizenship by birth.

A series of pertinent lawsuits filed in early 2018 are pending in the federal court system. Gay and lesbian parents who are U.S. citizens are suing the U.S. Department of State, urging the recognition of U.S. citizenship by birth for their children who were conceived using assisted reproductive technology (ART) and born outside of the U.S. The plaintiffs in each of these lawsuits contend that the State Department miscategorized the children as "born out of wedlock," failing to recognize the validity of the parents' marriages due to their same-sex character. The plaintiffs further argue that this miscategorization wrongly prevents the children from inheriting their parents' U.S. citizenship since the U.S. citizen parents cannot demonstrate a biological link to their children. The plaintiffs also assert that opposite-sex couples are not required to demonstrate a biological link between U.S. citizen parents and the children for whom they seek recognition of U.S.

citizenship by birth and that the disparate application of the law is unconstitutional.

This Comment examines the facts and arguments of two of the families that have filed suit, the relevant Constitutional provisions and citizenship statutes, the relevant case law, the State Department's interpretation of these laws, and suggests appropriate changes to State Department policy which would allow the children of legally married gay and lesbian couples to inherit their parents' U.S. citizenship upon birth in the exact same way as the children of legally married straight couples.

### I. UNITED STATES LAW GOVERNING CITIZENSHIP BY BIRTH

The United States grants citizenship to a person in one of two ways. The first, known as *jus soli*<sup>1</sup> or "by the soil" citizenship, is granted to any person born on United States soil as enshrined in the Fourteenth Amendment of the U.S. Constitution.<sup>2</sup> The second is through naturalization as prescribed by Congress.<sup>3</sup> The Supreme Court has interpreted Constitutional provisions regarding citizenship to mean that "[t]here are 'two sources of citizenship, and two only: birth and naturalization.'"<sup>4</sup> Congress has exercised its power to establish rules of naturalization to recognize *jus sanguinis*,<sup>5</sup> or citizenship passed by one's parent irrespective of the place of birth.<sup>6</sup> This means that, in general, a child born outside of the United States is an American citizen when at least one of her parents is also an American citizen and has met certain residency requirements.<sup>7</sup> However, as the lawsuits evidence, the State Department has carved out exceptions to this general rule.

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1. Brooke Kirkland, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States*, 12 BUFF. HUM. RTS. L. REV. 197, 199 (2006).

2. U.S. CONST. amend. XIV, § 1 ("All persons *born* or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.") (emphasis added).

3. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization.")

4. *Miller v. Albright*, 523 U.S. 420, 423 (1998) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)).

5. Kirkland, *supra* note 1.

6. 8 U.S.C. § 1401(b)–(g) (2012).

7. 8 U.S.C. § 1401(c)–(d).

### A. *Jus Sanguinis U.S. Citizenship*

At the time of its ratification, the U.S. Constitution made reference to U.S. citizenship by allocating to Congress the “Power . . . [t]o establish an uniform Rule of Naturalization[,]”<sup>8</sup> by setting citizenship requirements for eligibility to serve as a member of the U.S. House of Representatives and of the U.S. Senate,<sup>9</sup> and by setting a citizenship requirement for eligibility to serve as U.S. President.<sup>10</sup> The first Congress enacted the first federal naturalization law in 1790, allowing any “free white person” who met certain residency requirements to apply for U.S. citizenship.<sup>11</sup> The same legislation provided for *jus sanguinis* citizenship to pass to “children of citizens of the United States, that may be born beyond Sea, or out of the limits of the United States,” provided that “citizenship shall not descend to persons whose fathers have never been resident in the United States.”<sup>12</sup> Thus, the newly ratified Constitution and early naturalization laws did not explicitly create *jus soli* citizenship, but did imply that birth to a U.S. citizen parent made one a natural born U.S. citizen in line with *jus sanguinis* traditions.

### B. *Jus Soli U.S. Citizenship*

The Fourteenth Amendment to the U.S. Constitution, ratified in 1868, establishes that a person born in the United States is a U.S. citizen.<sup>13</sup> The Amendment directly overturned the infamous *Dred Scott* decision, which held that persons of African descent were barred from U.S. citizenship due to their ancestry,<sup>14</sup> effectively removing the requirement that U.S. citizens be white. The Chinese Exclusion Act of 1882 gave occasion for the Supreme Court to determine in *United States v. Wong Kim Ark* that “[t]he Fourteenth Amendment affirms the ancient and fundamental rule of

8. U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish an uniform Rule of Naturalization.”).

9. U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States . . . .”); U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States . . . .”).

10. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .”).

11. An Act to Establish an Uniform Rule of Naturalization, Pub. L. No. 1-3, § 1, 1 Stat. 103 (1790) (repealed 1795).

12. *Id.*

13. U.S. CONST. amend. XIV, § 1 (“All persons *born* or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.”) (emphasis added).

14. *Scott v. Sandford*, 60 U.S. (1 How.) 393 (1856).

citizenship by birth within the territory . . . including all children here born of resident aliens."<sup>15</sup> It has since been understood that the Fourteenth Amendment extends *jus soli* U.S. citizenship to virtually all children born on U.S. soil, irrespective of their parents' citizenship. *Jus soli* citizenship is not at issue in the lawsuits the parents have filed because none of the harmed children were born on U.S. soil.

### *C. Current Naturalization Laws for Children of U.S. Citizens*

In 1952, Congress passed the Immigration and Naturalization Act (INA).<sup>16</sup> Section 1401 of the INA prescribes the circumstances necessary for a child to be a U.S. citizen by birth.<sup>17</sup> Among them are birth on U.S. soil,<sup>18</sup> birth abroad to two U.S. citizen parents when at least one has resided in the U.S. prior to the child's birth,<sup>19</sup> birth in an outlying U.S. possession to one U.S. citizen parent when that parent was physically present in the U.S. for a full year at any point prior to the child's birth,<sup>20</sup> and birth abroad to one U.S. citizen parent when that parent was physically present in the U.S. for a total of at least five years at various points prior to the child's birth.<sup>21</sup>

Persons seeking to establish *jus sanguinis* U.S. citizenship for themselves or their children must do so through the State Department.<sup>22</sup> Embassy and consulate officials rely on the State Department's Foreign Affairs Manual (FAM) in their role of "assist[ing] the President, through the Secretary of State, in formulating and executing the foreign policy and relations of the United States of America."<sup>23</sup> These federal government employees have the authority to "decide cases involving acquisition of citizenship by

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15. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). Note that the Court did not include children born on U.S. soil to foreign diplomats as eligible for U.S. *jus soli* citizenship. *Id.*

16. See sections 8 U.S.C. § 1401–1504 (2012) for the sections in the INA pertaining to naturalization and nationality.

17. 8 U.S.C. § 1401.

18. 8 U.S.C. § 1401(a). This provision is presumably redundant since the Fourteenth Amendment provides a Constitutional basis for *jus soli* U.S. citizenship. See *supra* note 13.

19. 8 U.S.C. § 1401(c).

20. 8 U.S.C. § 1401(e).

21. 8 U.S.C. § 1401(g).

22. 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 301.4-1(A)(1)(b) (2018) ("Section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) gives the Secretary of State the responsibility for the administration and enforcement of all nationality laws relating to 'the determination of nationality of a person not in the United States.'").

23. 1 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 011.2 (2018).

birth abroad.”<sup>24</sup> The FAM does not indicate an appeals process, instead only directing consular officers to contact “technical support”<sup>25</sup> if “guidance is needed.”<sup>26</sup>

Title Eight Section 1409 of the U.S. Code specifies when a child born out of wedlock may acquire *jus sanguinis* U.S. citizenship. This provision appears to assume that all children have (1) a father (either biological or legal) and (2) that the child’s biological mother is her legal mother.<sup>27</sup> These assumptions ignore the fact that laws in many jurisdictions do not assume that a child has one mother and one father, as demonstrated by same-sex couples’ ability to appear as the parents on their child’s birth certificate, to the exclusion of anyone else (such as a sperm or ova donor). Despite the FAM’s assertion that “[t]he laws on acquisition of [*jus sanguinis* U.S. citizenship] have always contemplated the existence of a blood relationship between the child and the parent(s)[,]”<sup>28</sup> the FAM still differentiates the sort of relationship the State Department requires. The FAM specifies that a U.S. citizen father can only transmit citizenship to his biological children, while a U.S. citizen mother can transmit citizenship as either a biological mother or as a gestational mother.<sup>29</sup> This distinction means that a U.S. citizen could transmit her citizenship either by donating her ova to a surrogate mother or by carrying to term a child conceived with a donor’s ova, but not if she was listed as her child’s mother on her birth certificate after working with a surrogate mother who conceived with an anonymous donor’s ova.

The following section of the FAM makes clear that this provision rarely affects the children of opposite-sex married couples, and always affects the children of same-sex married couples: “Children born in wedlock are generally presumed to be the issue of that marriage . . . . If doubt arises that the U.S. citizen ‘parent’ is biologically related to the child, the consular officer is expected to investigate carefully.”<sup>30</sup> The FAM goes on to give examples of when a consular officer should be suspicious and ought to “request additional evidence”<sup>31</sup>: (1) conception or birth when one of the parents

24. 8 U.S. DEP’T OF STATE, *supra* note 22, § 301.4-1(A)(3).

25. *Id.* § 105.1-1.

26. *Id.* § 301.4-1(A)(3).

27. *See* 8 U.S.C. § 1409 (2012).

28. 8 U.S. DEP’T OF STATE, *supra* note 22, § 301.4-1(D)(1)(a).

29. *Id.* § 301.4-1(D)(1)(c). The policy change recognizing gestational mothers occurred during President Barack Obama’s second term and was influenced by recommendations from the American Immigration Lawyers Association. *See* Jessica Schulberg, *The Dumb Reason Some Kids Born to LGBTQ Americans Aren’t U.S. Citizens*, HUFFPOST (Mar. 3, 2018), <https://perma.cc/4BMA-QGCA>.

30. 8 U.S. DEP’T OF STATE, *supra* note 22, § 301.4-1(D)(1)(d).

31. *Id.* § 301.4-1(D)(1)(e).

was married to another person<sup>32</sup>; (2) when someone other than a biological parent is named on the birth certificate<sup>33</sup>; (3) reason to believe conception occurred when the parents did not have access to one another<sup>34</sup>; (4) statements from the biological father, the mother's husband, or other credible sources about whose sperm may have given rise to the conception<sup>35</sup>; and, (5) when there is evidence that the child was born through ART.<sup>36</sup> As explained below, there is one option for growing a family that is exclusively available to opposite-sex couples—unassisted reproduction—which also constitutes the vast majority of births each year.<sup>37</sup>

The distinction between children born to opposite-sex parents and children born to same-sex parents hinges on three words in the FAM: "[i]f doubt arises."<sup>38</sup> The negative inference of this provision is that if doubt does *not* arise, the consular officer is not expected to investigate carefully. Opposite-sex couples who were married at the time of their child's birth are less likely to encounter such doubt because "[c]hildren born in wedlock are generally presumed to be the issue of that marriage[,]" the listing of one father and one mother on a birth certificate is not an indication that ART was used, and strangers reasonably assume that children born to opposite-sex couples were born via unassisted reproduction.<sup>39</sup> Same-sex couples who were married at the time of their child's birth, on the other hand, will virtually *always* encounter the doubt of consular officers. This is because the naming of two parents of the same sex on their child's birth certificate automatically raises doubt that both are the biological parent since, at most, only one of them can be, and because ART is the only option for same-sex couples to grow their families by childbirth.

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32. *Id.* § 301.4-1(D)(1)(d)(1).

33. *Id.* § 301.4-1(D)(1)(d)(2).

34. *Id.* § 301.4-1(D)(1)(d)(3).

35. *Id.* § 301.4-1(D)(1)(d)(4).

36. *Id.* § 301.4-1(D)(1)(d)(5).

37. *See infra* Part III.

38. 8 U.S. DEP'T OF STATE, *supra* note 22, § 301.4-1(D)(1)(d).

39. *Id.* § 301.4-1(D)(1)(d).



II. THE PLAINTIFFS: GAY AND LESBIAN-HEADED FAMILIES WHOSE CHILDREN HAVE BEEN DENIED RECOGNITION OF U.S. CITIZENSHIP BY BIRTH

*A. The Zaccari-Blixt Family*

Lucas Zaccari-Blixt was born on January 30, 2015, in England to his mothers, Stefania Zaccari and Allison Blixt.<sup>40</sup> Allison, a United States citizen who was raised in North Carolina,<sup>41</sup> met Stefania, an Italian citizen, when Stefania was vacationing in New York City in 2006.<sup>42</sup> After dating long-distance, Allison and Stefania both decided to relocate to England; Stefania was free to live in the United Kingdom as a citizen of a European Union member state, and Allison was able to obtain a work transfer to her employer's London office.<sup>43</sup> In 2009, the couple entered a civil partnership under English law, and in 2015 their relationship was legally recognized as a marriage in that country.<sup>44</sup>

The couple made the decision to grow their family through the use of assisted reproductive technology.<sup>45</sup> Stefania gave birth to their first son, Lucas Zaccari-Blixt, on January 30, 2015 after conceiving with sperm of an unknown donor.<sup>46</sup> Allison gave birth to their second son, Massimiliano Zaccari-Blixt, on February 25, 2017 after conceiving with sperm of the same unknown donor.<sup>47</sup> Allison and Stefania are both recognized as the parents of their sons on each child's birth certificate to the exclusion of anyone else.<sup>48</sup>

Believing that their children would inherit Allison's U.S. citizenship, the Zaccari-Blixt family visited the U.S. Embassy in London after each child was born, seeking American documentation of their births abroad and to obtain U.S. passports for each child.<sup>49</sup> However, questions arose about the nature of the relationship between Allison, Stefania, and the children.

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40. Complaint at 12, *Blixt v. U.S. Dep't of State*, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018).

41. *Id.* at 11. Allison Blixt has been a U.S. citizen since her birth in 1978 in Illinois. *Id.* Her family relocated to North Carolina, and she later earned a J.D. from the University of North Carolina School of Law. *Id.*

42. *Id.*

43. *Id.* at 12.

44. *Id.*

45. *Id.* An explanation of ART is given *infra* Part III. See *infra* note 70.

46. *Id.*

47. *Id.* at 13.

48. *Id.*

49. *Id.* at 13–14.

Embassy officials questioned the relationship because of Allison and Stefania's sex.<sup>50</sup> Because Allison could only demonstrate a biological link to Massimiliano and not Lucas, Massimiliano alone was recognized as a U.S. citizen by birth to a U.S. citizen parent, and Lucas' application for recognition of citizenship upon birth was denied.<sup>51</sup>

The Embassy explained in a letter to the Zaccari-Blixt family that due to the lack of "a biological relationship . . . between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship, as required under the provisions of section 309(c) of the Immigration and Nationality Act[.]" Lucas' application for recognition as a U.S. citizen by birth was denied.<sup>52</sup>

Section 309(c) of the Immigration and Nationality Act (codified at 8 U.S.C. Section 1409) relates exclusively to children born out of wedlock.<sup>53</sup> Having received legal recognition as married in 2015 under both English<sup>54</sup> and American law,<sup>55</sup> the family filed suit against the State Department under the theories that (1) Lucas was incorrectly deemed born out of wedlock and (2) the State Department's interpretation of the law violated the U.S. Constitution by discriminating on the basis of sex and sexual orientation.<sup>56</sup>

### *B. The Dvash-Banks Family*

Ethan Dvash-Banks and Aiden Dvash-Banks were born on September 16, 2016 in Canada to their fathers, Andrew and Elad Dvash-Banks.<sup>57</sup> Andrew, a U.S. citizen from California,<sup>58</sup> met Elad, an Israeli citizen, when Andrew was a graduate student in Tel Aviv in 2008.<sup>59</sup> Andrew and Elad eventually relocated to Canada and were married in 2010.<sup>60</sup> Andrew and

50. *Id.* at 14.

51. *Id.* at 14–15.

52. *Id.* at 15.

53. 8 U.S.C. § 1409 (2012).

54. Complaint, *supra* note 40, at 12.

55. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that states must recognize the fundamental right of same-sex couples to marry and that States have no lawful basis to refuse recognition of a same-sex marriage lawfully performed in another jurisdiction).

56. Complaint, *supra* note 40, at 16–17.

57. Complaint for Declaratory and Injunctive Relief at 2, *Dvash-Banks v. U.S. Dep't of State*, No. 2:18-CV-00523 (C.D. Cal. Jan. 22, 2018).

58. *Id.* at 10. Andrew Dvash-Banks has been a U.S. citizen since his birth in 1981 in California.

59. *Id.* at 11.

60. *Id.* Same-sex marriages have been recognized federally in Canada since 2005. Civil Marriage Act, S.C. 2005, c 33 (Can.).

Elad decided to expand their family through assisted reproductive technology.<sup>61</sup> Using an anonymous egg donor and the assistance of a surrogate mother, Andrew and Elad conceived sons using sperm from each father.<sup>62</sup> Andrew and Elad are both recognized as the parents of their sons on each child's birth certificate to the exclusion of anyone else.<sup>63</sup>

Believing that their children would inherit Andrew's U.S. citizenship, the Dvash-Banks family visited the U.S. consulate in Toronto after the boys were born to seek American documentation of their births abroad and to obtain U.S. passports for them.<sup>64</sup> However, questions arose about the nature of the children's relationship with their fathers because of Andrew and Elad's sex, and the two were required to reveal genetic information about the twins which they had planned to keep private even from their sons.<sup>65</sup> The consulate required a DNA test and when Andrew could only demonstrate a biological link to Aiden and not to Ethan, Aiden alone was recognized as a U.S. citizen by birth to a U.S. citizen parent.<sup>66</sup> Ethan's application for recognition of citizenship upon birth was denied.<sup>67</sup> The consulate explained in a letter to the Dvash-Banks family that American citizenship laws require "a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship."<sup>68</sup> Having wed legally under Canadian law and received legal recognition of their marriage under American law in 2015,<sup>69</sup> the family filed suit against the State Department under the theories that (1) Ethan was incorrectly deemed born out of wedlock and (2) the State Department's interpretation of the law violated the U.S. Constitution by discriminating on the basis of sex and sexual orientation.<sup>70</sup>

In February 2019, the United States District Court for the Central District of California granted partial summary judgment for the Dvash-Banks family, ruling in favor of their claim that Ethan acquired U.S. citizenship at birth under Section 301(g) of the INA because "under controlling Ninth Circuit authority, Section 301 does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their

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61. Complaint for Declaratory and Injunctive Relief, *supra* note 57, at 11.

62. *Id.* at 11–12.

63. *Id.* at 12.

64. *Id.*

65. *Id.* at 12–13.

66. *Id.* at 13.

67. *Id.*

68. *Id.* at 13–14.

69. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

70. Complaint for Declaratory and Injunctive Relief, *supra* note 57, at 16–17.

married parents."<sup>71</sup> In May 2019, the Government filed its notice of appeal.<sup>72</sup> The case is now before the United States Court of Appeals for the Ninth Circuit.<sup>73</sup>

### III. A QUICK WORD ABOUT ASSISTED REPRODUCTIVE TECHNOLOGY AND GAY AND LESBIAN PARENTS

In 1981, Elizabeth Carr became the first child born in the United States conceived through assisted reproductive technology (ART).<sup>74</sup> Perhaps the most widely understood ART procedure is in vitro fertilization, but ART generally encompasses any procedure by which sperm is combined "with ova that have been surgically removed from a woman's body and return[ed] [as] fertilized eggs to the uterus or donat[ed] . . . to another woman or couple."<sup>75</sup> In the years that have followed Carr's birth, the number of children born through ART has increased significantly; 59,334 children were conceived through ART and born in the U.S. in 2015 alone.<sup>76</sup>

The reasons for choosing ART to have a child can vary with each individual who participates in such a procedure.<sup>77</sup> However, the importance of the ability to choose ART may be more obvious to gay and lesbian couples than to their straight peers: while opposite-sex couples aiming to grow their family may consider unassisted reproduction, ART, or adoption, same-sex couples lack the first option. They know from the outset that any children they parent will not share a biological offspring connection with both parents, while straight couples generally assume just the opposite. Years before marriage equality was federally recognized, Professor Scott Titshaw noted:

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

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71. *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCx), 2019 U.S. Dist. LEXIS 30525, at \*18 (C.D. Cal. Feb. 21, 2019).

72. Notice of Appeal at 2, *Dvash-Banks v. Pompeo*, No. CV 2:18-523-JFW(JCx) (C.D. Cal. Feb. 21, 2019).

73. *Id.*

74. Walter Sullivan, 'Test-Tube' Baby Born in U.S., *Joining Successes Around the World*, N.Y. TIMES, Dec. 29, 1981, at C1.

75. Jillian Casey, Courtney Lee & Sartaz Singh, *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 85 (2016) (explaining that in vitro fertilization is "the dominant form of ART" but is one of many procedures included under the term).

76. Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2015*, 67 MORBIDITY & MORTALITY WKLY. REP., Feb. 16, 2018 at 5.

77. See Ctr. of Reprod. Med., *Fertility Treatments vs. Adoption: What You Should Consider*, HOUS. FERTILITY J. (Jan. 26, 2017), <https://perma.cc/SECM-92N7>.

Practical considerations, social reluctance, and assumptions also are likely to result in the very different treatment of straight and gay parents who have a child using artificial insemination, in vitro fertilization, and surrogacy.<sup>78</sup>

Even after the United States Supreme Court recognized marriage as a fundamental right for both opposite- and same-sex couples in *Obergefell v. Hodges*, adoption laws were not amended or interpreted overnight to extend the same application to gay- and lesbian-headed households as to their straight peers.<sup>79</sup> Indeed, because family law is largely an issue of state jurisprudence, states lacking the political will to embrace LGBTQ rights have either allowed exclusionary laws to stand<sup>80</sup> or have worked to carve out preferences for opposite-sex couples over same-sex couples.<sup>81</sup>

In sum, public policies related to ART mostly impact straight people because they make up a larger percentage of the population, but such policies also have a disparate and disproportionate impact on gay men and lesbians because the latter group has fewer options by which to grow a family.

#### IV. RELEVANT CASE LAW

The FAM's assertion that *jus sanguinis* U.S. citizenship is transmitted only by a genetic or gestational connection between the parent and child is inconsistent with case law from federal appellate courts. The cases analyzed below show that courts understand "born in wedlock" status—that is, that the child's parents were married at the time of birth—to negate any biological requirement to establish U.S. citizenship by birth.

##### A. *Scales v. INS*

In *Scales v. INS*, the United States Court of Appeals for the Ninth Circuit determined that the INA does not require a blood relationship for a parent to transmit U.S. citizenship to a child when the child is born to married

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78. 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).

79. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

80. Lacking the legislative will to amend the state's gendered domestic violence laws, North Carolina's legislature left untouched the legal definition of "dating relationship," failing to acknowledge that such relationships exist between people of the same sex. Lisa Needham, *North Carolina Domestic Violence Laws Don't Protect People in Same-Sex Relationships*, REWIRE NEWS (Jan. 18, 2019), <https://perma.cc/X85H-JQKL>.

81. Oklahoma enacted a law in May 2018 allowing private adoption groups to preference opposite-sex couples over same-sex couples and transgender parents. Jacey Fortin, *Oklahoma Passes Adoption Law That L.G.B.T. Groups Call Discriminatory*, N.Y. TIMES (May 12, 2018), <https://perma.cc/A7CL-LCF3>.

parents.<sup>82</sup> In *Scales*, U.S. citizen Stanley Scales, Sr. met Philippine citizen Aily Topaz in 1976.<sup>83</sup> Topaz quickly informed Scales "that she was pregnant, probably from a prior relationship."<sup>84</sup> They were married six months later and Stanley Scales, Jr. ("Junior") was born approximately eight months after the two met.<sup>85</sup> The family moved to the U.S. two years later and Stanley always treated Junior as his son.<sup>86</sup> At the age of eighteen, Junior was convicted of a drug offense and the Immigration and Naturalization Service (INS) sought to deport him to the Philippines, where he held citizenship.<sup>87</sup> When Junior asserted that he was a U.S. citizen and therefore ineligible for deportation, the Board of Immigration Appeals (BIA) cited the FAM's language that "to acquire United States citizenship at birth there must be a blood relationship between the child and the parent through whom citizenship is claimed."<sup>88</sup>

The court noted that "[t]he statutory provisions concerning citizenship do not address [] situation[s] . . . where the child is 'legitimate' by virtue of his parents being married at the time of his birth, yet he may not be the 'natural,' or biological child of the citizen parent."<sup>89</sup> The court went on to assert that "[a] straightforward reading of § 1401<sup>90</sup> indicates, however, that there is no requirement of a blood relationship" and that Junior had acquired citizenship upon birth under the Immigration and Nationality Act.<sup>91</sup> The court drew the distinction between children born out of wedlock and children born to married parents: "The INA does expressly require a blood relationship between a person claiming citizenship and a citizen father, *if the person is born out of wedlock* . . . . This provision does not apply to [Junior], however, because he was born to parents who were married at the time of his birth."<sup>92</sup>

Further, the court declined to defer to the State Department's interpretation of the INA outlined in the FAM, because "it is not an interpretation

82. *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000).

83. *Id.* at 1162.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (citing 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 301.4-1(D)(1) (2018)).

89. *Id.* at 1164.

90. 8 U.S.C. § 1401 (2012). This portion of the United States Code is the codification of the section of the Immigration and Nationality Act of 1952 which prescribes the ways a person acquires *jus sanguinis* U.S. citizenship.

91. *Scales*, 232 F.3d at 1164.

92. *Id.* (emphasis added).

‘arrived at after, for example, a formal adjudication of notice-and-comment rulemaking. Interpretations such as those in . . . agency manuals . . . do not warrant *Chevron*-style deference.’”<sup>93</sup> The court concluded by holding that “Section 1401 requires only that [Junior] be ‘born . . . of parents,’ one of whom is a U.S. citizen, in order to acquire citizenship.”<sup>94</sup>

In the wake of *Obergefell*, which legally recognized same-sex marriages, the *Scales* court would have us apply one simple test for children born to married parents: was the child born to legally married parents, one of whom was a U.S. citizen “who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years[?]”<sup>95</sup> If the answer to this question is yes, then *Scales* declares that the U.S. citizen parent transmitted citizenship to the child at birth. This is in direct conflict with the State Department’s demand for proof of a biological link in the pending lawsuits, which center on the children of parents who were married at the time of birth.

#### B. *Solis-Espinoza v. Gonzales*

The Ninth Circuit clarified in *Solis-Espinoza v. Gonzales* that the Immigration and Naturalization Act also grants *jus sanguinis* U.S. citizenship to the children of U.S. citizen mothers who have neither a biological nor gestational relationship with their child.<sup>96</sup> In that case, U.S. citizen Stella Cruz-Dominguez was married to Mexican citizen Refugio Solis when Solis impregnated Mexican citizen Maria Luisa Cardoza.<sup>97</sup> Cardoza gave birth to Eduardo Solis-Espinoza in Tijuana in 1967 and abandoned him.<sup>98</sup> Cruz-Dominguez stepped in as Eduardo’s mother and was listed as such on his birth certificate, and raised him into adulthood as part of her family with Solis.<sup>99</sup> At the age of thirty-three, Eduardo was convicted of a drug offense and the INS sought to deport him.<sup>100</sup>

Relying on *Scales*, Eduardo’s immigration judge determined that Cruz-Dominguez had transmitted citizenship to Eduardo upon his birth “because a blood relationship was not necessary to legitimate a child born to a

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93. *Id.* at 1166 (citing *Christensen v. Harris County*, 529 U.S. 576 (2000)) (emphasis omitted).

94. *Id.*

95. 8 U.S.C. § 1401(g).

96. *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005).

97. *Id.* at 1091.

98. *Id.*

99. *Id.* at 1091–92.

100. *Id.* at 1092.

couple during the course of marriage.”<sup>101</sup> The BIA reversed the immigration judge’s decision, deeming Eduardo born out of wedlock “because his biological father was not married to his biological mother at the time of his birth” and subject to 8 U.S.C. § 1409.<sup>102</sup> The Ninth Circuit noted that, under relevant state law, illegitimate children born to fathers otherwise married were legitimate from the time of birth if the father’s wife consented to the father publicly acknowledging the child and bringing it into the family.<sup>103</sup> The court went on to reverse the BIA because “[i]n every practical sense, Cruz-Dominguez was [Eduardo’s] mother and he was her son[,]” and because state law deemed him to be born within her marriage to Solis and thus not subject to the blood relationship requirement.<sup>104</sup>

Post-*Obergefell*, application of the holding in *Solis-Espinoza* shows that a child born during the marriage of a lesbian who is a U.S. citizen inherits *jus sanguinis* U.S. citizenship from her, irrespective of whether she shares either a genetic or gestational connection. Likewise, it would instruct that a child born during the marriage of a gay man who is a U.S. citizen inherits U.S. citizenship from him, even if there is no genetic connection. As with straight couples, evidence that the birth occurred during a valid marriage of the U.S. citizen parent supersedes the need for evidence of a biological link.

### C. Marquez-Marquez v. Gonzalez

The United States Court of Appeals for the Fifth Circuit explained in *Marquez-Marquez* that the subsequent adoption of a child born out of wedlock by a U.S. citizen does *not* confer *jus sanguinis* citizenship on that child.<sup>105</sup> In that case, Claudia Marquez-Marquez was born in Mexico to two unmarried Mexican citizens.<sup>106</sup> At the age of nine she was adopted by her mother’s U.S. citizen husband, who made no claim that he was her biological father.<sup>107</sup> At the age of thirty-two the Department of Homeland Security sought to deport Marquez-Marquez based on convictions of drug trafficking and false imprisonment.<sup>108</sup> She asserted that she could not be deported because she had obtained *jus sanguinis* citizenship through adoption by a U.S.

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101. *Id.*

102. *Id.*

103. *Id.* at 1093–94.

104. *Id.* at 1094.

105. *Marquez-Marquez v. Gonzalez*, 455 F.3d 548, 556–60 (5th Cir. 2006).

106. *Id.* at 549.

107. *Id.*

108. *Id.* at 551.



citizen.<sup>109</sup> The immigration judge and BIA both agreed that 8 U.S.C. Section 301(g) “relates to individuals who acquire United States citizenship *at birth*; it does not provide for the acquisition of citizenship after birth, by adoption or any other means[.]”<sup>110</sup> Likewise, the court stated that the provision “requires that the ‘person’ be ‘born . . . of’ a citizen parent, obviously reflecting a relationship *when* ‘born.’”<sup>111</sup> The court noted that Marquez-Marquez’s circumstances were distinct from both *Scales* and *Solis-Espinoza* because unlike in those cases, it was undisputed that Marquez-Marquez was born out of wedlock.<sup>112</sup>

With *Obergefell*’s recognition of same-sex marriage, the *Marquez-Marquez* court’s analysis would go unchanged if applied to a child of same-sex parents: a child born out of wedlock is subject to the blood relationship requirement. Even if a U.S. citizen adopts the child of a noncitizen same-sex partner, that child would not be deemed to have acquired U.S. citizenship at birth if she had not been born to the couple during the U.S. citizen’s marriage to her noncitizen parent. This is an important distinction for the children of opposite-sex and same-sex parents. It may seem that the simple solution for the Dvash-Banks and Zaccari-Blixt families is for the U.S. citizen parent to simply adopt the child with whom they do not share a biological connection. Although adopted children are eligible for citizenship, they are only eligible for naturalization rather than citizenship by birth. Naturalized citizens are ineligible for dual citizenship and additional privileges granted to U.S. citizens by birth. Thus, the families suing the State Department seek more than mere citizenship rights, they specifically seek citizenship by birth. Further, because these parents are listed on the child’s birth certificate and have had legal parental status since the birth, adoption would require them to renounce their legal parenthood, leaving their spouse as their child’s only parent before initiating adoption, which would put them in the position of a step-parent who adopts a spouse’s child.

In sum, the relevant case law explains that when a child is born to married parents, the test for citizenship is whether one of her parents in that marriage is a U.S. citizen who meets the INA’s residency requirements. Post-*Obergefell*, children born to parents in a same-sex marriage acquire *jus sanguinis* citizenship when one parent in the marriage is a U.S. citizen and meets the residency requirements. This understanding has yet to be reflected by the State Department.

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109. *Id.*

110. *Id.* at 552.

111. *Id.* at 557.

112. *Id.* at 559.

## V. PROPOSED CHANGES TO THE FAM

In order to comply with the rulings of federal courts and to give effect to the *Obergefell* Court's determination that same-sex marriages are recognized as valid in the U.S., the State Department must make changes to the FAM. In particular, changes are necessary at Title Eight, Section 301.4 of the FAM: *Acquisition by Birth Abroad to U.S. Citizen Parent(s) and Evolution of Key Statutes*.<sup>113</sup> The FAM currently states: "Since 1790, there have been two prerequisites for transmitting U.S. citizenship at birth to children born abroad: (1) At least one *biological* parent must have been a U.S. citizen when the child was born."<sup>114</sup> The word "biological" should be stricken to reflect both the federal case law as well as the FAM's own distinctions regarding gestational mothers.

The FAM further misstates that "[t]he 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."<sup>115</sup> As evidenced by *Scales* and *Solis-Espinoza*, this assertion is out of line with federal appellate court rulings. The FAM should thus remove the entirety of Section 301.4-1(D): *A Biological Relationship, or Blood Relationship, Is Required for a U.S. Citizen Parent of a Child Born Aboard to Transmit U.S. Citizenship to the Child*. Doing so would end the State Department's invitation to consular officers to incorrectly base *jus sanguinis* citizenship for the children of married parents on whether or not a genetic or gestational relationship could be shown. As a result, the removal would make certain that U.S. citizens in both opposite-sex and same-sex marriages pass U.S. citizenship to children born in their marriage.

Additionally, the FAM only explains how ART impacts the acquisition of citizenship at birth by the children of opposite-sex couples. Title Eight, Section 304.3: *Acquisition of U.S. Citizenship at Birth—Assisted Reproductive Technology* should be amended to explain that (in line with *Scales* and *Solis-Espinoza*) a child born abroad to same-sex married parents acquires *jus sanguinis* U.S. citizenship from a U.S. parent who meets residency requirements. Language should be added to mirror the standing provisions for opposite-sex headed families, so that each section reads as follows:

Title Eight, Section 304.3-1(e) of the FAM: A child born abroad to an alien gestational mother who is a legal parent of the child at the time of birth in the location of birth, and who is married to a U.S. citizen wife, is considered for citizenship purposes to be born in wedlock of a U.S. citizen mother

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113. 8 U.S. DEP'T OF STATE, *supra* note 22, § 301.4.

114. *Id.* § 301.4-1(B)(1) (emphasis added).

115. *Id.* § 301.4-1(D)(1)(a).

and an alien mother, with a citizenship claim under INA 301(g), irrespective of the U.S. citizen mother's genetic relationship to the child.

Title Eight, Section 304.3-2(g) of the FAM: A child born abroad to a surrogate, whose genetic father is an alien who is married to a U.S. citizen, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen and alien spouse, with a citizenship claim adjudicated under INA 301(g).

Title Eight, Sections 304.3-2(f) and (g) of the FAM are inconsistent with *Scales* and *Solis-Espinoza* and should be removed. These sections automatically classify a child whose genetic father is a U.S. citizen as born out of wedlock when the child is carried by a surrogate and was conceived with ova of a woman not married to the U.S. citizen. As it stands, these provisions prohibit a U.S. father from passing *jus sanguinis* citizenship despite being married to the child's legal mother if the couple use a surrogate and the surrogate or a donor's ova.

These revisions to the FAM will bring State Department policy in line with federal appellate court rulings and end needless obstacles for families seeking U.S. citizenship by birth for their children under Section 1401 of the Immigration and Naturalization Act.<sup>116</sup>

#### CONCLUSION

The Supreme Court recognized in *Obergefell* that when laws discriminate against gay and lesbian Americans, their children suffer:

[T]he right to marry . . . safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples.<sup>117</sup>

Because family and immigration laws are still catching up to the reality of the millions of Americans whose family dynamic looks different from the traditional opposite-sex couple headed household, the State Department relies on federal law that does not seem to contemplate that Allison Blixt and Stefania Zaccari are both Lucas' mothers by birth or that Andrew and Elad Dvash-Banks are both Ethan's fathers by birth. While the FAM appears on its face to treat the children conceived through ART and born

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116. 8 U.S.C. § 1401 (2012).

117. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (citation omitted).

abroad to U.S. citizens the same irrespective of the parents' sexual orientation, for the children of gay and lesbian Americans, it is a matter of *when* doubt arises, not *if*. By making the changes proposed in this Comment, the State Department can move into the modern day, comply with relevant case law, and give citizenship to all children conceived by ART and born abroad to a married U.S. parent, as is such children's birthright.

*David B. Joyner\**

#### EDITOR'S NOTE

The *Campbell Law Review* selects student comments for publication after a voting committee reviews each publishable comment without knowledge of the authors' identities. After voting members selected this Comment, and this Author, editors, and members of the *Campbell Law Review* worked for an entire semester to bring it to publication, it was discovered that the United States Department of State had quietly revised its Foreign Affairs Manual to conform with a ruling by the United States District Court for the Central District of California, despite appealing that ruling. The Author discusses that ruling and notice of appeal in this Comment.\*\* The editorial board has decided to publish this Comment, notwithstanding the revision, in order to reflect the Author's research and policy proposals, which *Campbell Law Review* feels is worthy of publication.

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\*\* See Part II, *supra*.