

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

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ABSTRACT

Assisted Reproductive Technology has become a widely used way to start a family around the world, specifically for same-sex couples. With it have also come emerging legal problems regarding parentage and birthright citizenship. Currently, for a child born abroad to be granted birthright citizenship in the United States, they must either be “born in wedlock” and have one parent who meets the subsequent requirements or be a child born “out of wedlock” and have a biological father that meets the statute requirements. The State Department, following the policies laid out in its internal Foreign Affairs Manual, has determined that a child born through Assisted Reproductive Technology to a same-sex couple qualifies as a child born “out of wedlock” because the child is not biologically related to both parents in the marriage. This Note argues that this policy raises grave constitutional concerns because it violates the rights of same-sex couples and their families under the Fifth Amendment. Thus, federal courts should apply the canon of constitutional avoidance, finding that the statute does not require a biological relationship, in order to avoid constitutional infirmity.

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INTRODUCTION

Two letters arrived in the mail, one for each of the twin boys. The first letter granted Aiden's application for his Consular Report of Birth Abroad, affirming his birthright United States citizenship; his brother Ethan's letter, however, flatly stated one word: Denied.¹

Andrew and Elad Dvash-Banks, a married same-sex couple, had their twins through the use of a surrogate in Canada.² The twins were conceived after Andrew and Elad's marriage through the use of their sperm and an anonymous egg donor.³ Andrew's sperm was used to conceive Aiden, and Elad's sperm was used to conceive Ethan.⁴ An-

¹ Complaint ¶ 52, *Dvash-Banks v. Pompeo*, No. 18-523-JFW(JCx), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019).

² *See id.* ¶ 2.

³ *Id.*

⁴ *Id.*

drew, an American citizen who was born and raised in the United States, met his husband, Elad, an Israeli citizen, during his master's program in Tel Aviv.⁵ The couple moved to Canada, where Andrew possesses dual citizenship, and decided to start a family, with the hopes of moving to Los Angeles, California to raise their children.⁶

Andrew and Elad presumed that both of their sons would be birthright United States citizens, through their United States citizen parent, Andrew, under section 301(g) of the Immigration Nationality Act ("INA").⁷ Shortly after the boys were born, Andrew and Elad took them to the U.S. consulate to apply for their Consular Reports of Birth Abroad and U.S. passports.⁸ Even though both parents were listed on the boys' birth certificates, as Canada recognized them as the only legal parents of the twins, they were told there would be additional documentation required.⁹ The consular official then required the boys to "undergo a DNA test to determine whether either child was genetically linked to Andrew."¹⁰

Soon after sending in the DNA tests, the Dvash-Banks family received two letters in the mail: one granting Aiden's application for his Consular Report of Birth Abroad and U.S. passport and the other denying Ethan's application.¹¹ According to the letter denying Ethan's application, U.S. birthright citizenship "requires among other things, a blood relationship between a child and the U.S. citizen parent in order for the parent to transmit U.S. citizenship."¹² The Dvash-Banks family sued the Department of State, claiming that its policy, when applied to Ethan, unconstitutionally discriminates on the basis of sex and sexual orientation, violating their Fifth Amendment rights.¹³ Because the State Department did not approve Ethan's application under the provision in the INA that confers U.S. citizenship at birth, it necessarily classified him as "a child born out of wedlock," which imposes additional requirements to confer citizenship.¹⁴ Specifically, the consulate followed the State Department's Foreign Affairs Manual ("FAM"), an "authoritative source for the Department's organization structures,

⁵ *Id.* ¶¶ 39–41.

⁶ *Id.* ¶ 39–42, 57–58.

⁷ Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C. (2018)); Complaint, *supra* note 1, ¶ 3.

⁸ Complaint, *supra* note 1, ¶ 48.

⁹ *See id.* ¶ 49.

¹⁰ *Id.* ¶ 50.

¹¹ *Id.* ¶ 52.

¹² *Id.* ¶ 53.

¹³ *Id.* ¶¶ 64–65.

¹⁴ *Id.* ¶¶ 4, 62; *see* Immigration and Nationality Act of 1965 § 309, 8 U.S.C. § 1409 (2018).

policies, and procedures,”¹⁵ which states that “[t]o say a child was born ‘in wedlock’ means that the child’s biological parents were married to each other at the time of the birth of the child.”¹⁶ According to the United States government, “Andrew and Elad could never have children in wedlock because they could not both be married to each other and be the biological parents of the same child.”¹⁷

After the Supreme Court decisions of *United States v. Windsor*¹⁸ and *Obergefell v. Hodges*,¹⁹ same-sex couples and their children maintain the same rights under the United States Constitution as opposite-sex couples. The Dvash-Banks story, however, reflects yet another inequality that same-sex couples face at the hands of the United States government, and they are not the only family affected by this policy.²⁰

Prior to the decision in *Windsor*, the Defense of Marriage Act (“DOMA”)²¹ precluded same-sex couples from participating in or receiving federal benefits from the U.S. government.²² In *Windsor*, the Supreme Court held that “the principal purpose and the necessary effect of” DOMA was to demean same-sex married couples.²³ The 5–4 decision held that DOMA was “unconstitutional as a deprivation of the liberty” of same-sex couples who are protected under the Fifth Amendment of the United States Constitution.²⁴ “[T]he decision’s emphasis on same-sex couples’ dignity and their children signaled a sea change that the Court was poised to defend same-sex couples’ families.”²⁵

¹⁵ U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL AND HANDBOOK, <https://fam.state.gov/> [<https://perma.cc/2NH5-6LGB>] [hereinafter FAM]. This “authoritative” manual has not gone through the notice and comment rule making process required by the Administrative Procedures Act. See Complaint, *supra* note 1, ¶ 37.

¹⁶ 8 FAM § 304.1-2(c) (2018), <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/929X-A2LZ>].

¹⁷ Complaint, *supra* note 1, ¶ 60.

¹⁸ 570 U.S. 744 (2013).

¹⁹ 135 S. Ct. 2584 (2015).

²⁰ See Complaint, Blixt v. Tillerson, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018) (detailing complaint from a lesbian couple, who each carried and birthed one of their two children during their marriage and similarly sued the State Department on the same grounds when one of the children was denied birthright United States citizenship).

²¹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1783C (2012)), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

²² See Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 889 (2018) (“DOMA barred lawfully married same-sex couples from a wide array of federal benefits with respect to Social Security, housing, taxation, copyright, and veterans’ affairs.”).

²³ *Windsor*, 570 U.S. at 774.

²⁴ *Id.*

²⁵ Kreis, *supra* note 22, at 889.

This Note argues that the State Department's policy in FAM, which classifies *all* children born through Assisted Reproductive Technology ("ART") to same-sex couples as children born out of wedlock, is a constitutionally problematic reading of section 301 of the INA under the Fifth Amendment because it denies benefits to married same-sex couples that are available to opposite-sex married couples and their families. Because there is an alternative, constitutionally sound reading of the statute, this Note argues that federal courts should apply the canon of constitutional avoidance, declaring that the statute does not contain a biological relationship requirement.

Part I of this Note provides a history of same-sex couples and their families' rights, along with a background of the increasing use of ART to start families. Part II provides a background of the INA and the relevant statutes regarding acquired citizenship. Part III explores the federal appellate cases, from the Second and Ninth Circuit, which have interpreted the statutes regarding opposite-sex couples. Part IV provides the solution, discussing the canon of constitutional avoidance and addressing opposing arguments.

I. HISTORY OF SAME-SEX FAMILIES' RIGHTS

The Supreme Court's landmark decisions in *Windsor* and *Obergefell* recognized more rights and liberties under the United States Constitution for same-sex couples as well as increased their equality in other areas of the law.²⁶ In the immigration context, married same-sex couples can now be considered on an equal basis for immigration benefits like the non-immigrant K-1 visa, which allows a non-immigrant fiancé of a U.S. citizen to come to the U.S. for 90 days in order to get married, and the immigrant visa for the spouse of a U.S. citizen.²⁷ Despite these policy advancements ensuring rising equality, same-sex families "still experience stigmatization and dis-

²⁶ Matthew L. Kreitzer, *To Have and to Hold After Obergefell*, 42 VBA J. 22, 22 (2015). Since *Obergefell*, married same sex couples can now "file joint tax returns, own property in tenancy by the entirety, and even file for divorce and ask for spousal support and an equitable distribution of the martial estate." *Id.*

²⁷ See Press Release, Dep't of Homeland Security, Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), <https://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court> [<https://perma.cc/D2P8-GKNX>] (directing USCIS to review visa petitions from same-sex couples "in the same manner as those filed on behalf of an opposite-sex spouse"); see also *Immigrant Visa for a Spouse or Fiancé(e) of a U.S. Citizen: Important Notice: Same-sex Marriage*, U.S. DEP'T OF STATE - BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/immigrant-visa-for-a-spouse-or-fiance-of-a-us-citizen.html> [<https://perma.cc/V7AS-YEG4>] (stating

crimination,”²⁸ and new questions surrounding the legal recognition of families are emerging.²⁹

A. *The Path to Legal Same-Sex Marriage*

The now-invalidated DOMA defines marriage as “a legal union between one man and one woman as husband and wife” for determining any federal law, regulation, or act of Congress.³⁰ This definition precluded married same-sex couples from being eligible for a multitude of federal benefits.³¹ In *Windsor*, the Supreme Court granted certiorari to decide whether this definition was unconstitutional under the Due Process Clause of the Fifth Amendment of the United States Constitution, which states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”³² Substantive Due Process, at issue in *Windsor*, “provides heightened protection against government interference with certain fundamental rights and liberty interests.”³³ In its 5–4 decision, the Court struck down DOMA’s definition as a “deprivation of the equal liberty of persons that is protected by the Fifth Amendment.”³⁴ It found that the law sought to displace the protections of “personhood and dignity” that were afforded to same-sex couples by states’ marriage laws.³⁵

Immediately following the decision in *Windsor*, then-President Barack Obama directed the U.S. Attorney General to “review all relevant federal statutes . . . including . . . implications for Federal benefits and obligations” to ensure that the decision was appropriately implemented.³⁶ Although same-sex *married* couples were now seemingly equal under federal law, the decision only applied to same-sex

that same-sex spouses are now eligible for the same immigration benefits as opposite-sex spouses).

²⁸ Sarah Prendergast & David MacPhee, *Family Resilience Amid Stigma and Discrimination: A Conceptual Model for Families Headed by Same-Sex Parents*, 67 FAM. REL. 26, 26 (2018).

²⁹ See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1186 (2016).

³⁰ Defense of Marriage Act, 1 U.S.C. § 7 (2012), *invalidated* by *United States v. Windsor*, 570 U.S. 744 (2013); Sarah C. Loehr, *Strictly Speaking, DOMA is Unconstitutional*: *United States v. Windsor*, 5 CHARLOTTE L. REV. 165, 166 (2014) (quoting 1 U.S.C.A. § 7 (West 1996), *invalidated* by *United States v. Windsor*, 570 U.S. 744 (2013)).

³¹ See Kreis, *supra* note 22, at 889.

³² U.S. CONST. amend. V.

³³ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1996); Michael J. Higdon, *Biological Citizenship and the Children of Same-Sex Marriage*, 87 GEO. WASH. L. REV. 124, 136 (2019) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion)).

³⁴ *United States v. Windsor*, 570 U.S. 744, 745 (2013).

³⁵ *Windsor*, 570 U.S. at 775.

³⁶ Statement by the President on the Supreme Court Ruling on the Defense of Marriage

marriages and not civil unions;³⁷ only 13 states allowed same-sex marriage at the time.³⁸ Following *Windsor*, questions arose about whether states were required to recognize the marriages of same-sex couples who were “legally married in one state and then move[d] to another state where same-sex marriage” was prohibited.³⁹ Additionally, public opinion began to shift rapidly in support of legalizing same-sex marriage.⁴⁰

By June 2015, when the Court handed down the decision in *Obergefell*, 37 states and the District of Columbia recognized same-sex marriage.⁴¹ In *Obergefell*, the Supreme Court legalized same-sex marriage, recognizing that “[t]he right to marry is fundamental as a matter of history and tradition.”⁴² The Court suggested that “the state and individual interests served by permitting different-sex couples to marry are also served by permitting same-sex couples to marry”⁴³ and thus held that same-sex marriage bans were a violation of the rights guaranteed under the Fourteenth Amendment.⁴⁴ This decision was the logical next step after *Windsor*, as the Court recognized that the Fourteenth Amendment informs the equal protection guarantees under the Due Process Clause of the Fifth Amendment.⁴⁵

Act, The White House, (June 26, 2013) <https://obamawhitehouse.archives.gov/doma-statement> [<https://perma.cc/H3WV-Q3MD>].

³⁷ *Id.* at 67.

³⁸ Lee-ford Tritt, *United States v. Windsor: The Marital Deduction That Changed Marriage*, 42 ACTEC L.J. 113, 117 (2016).

³⁹ Anna Stolley Persky, *The State of Same-Sex Marriage After Windsor*, 28 WASH. LAW. 25, 26 (2013).

⁴⁰ Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), <https://news.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx> [<https://perma.cc/L5Z4-QMZX>] (finding that 52% of Americans surveyed would vote to legalize gay marriage); see also Jacob R. McMillian, *After “I Do”*, FED. LAW., June 2015, at 42, 43 (“Without question, the LGBTQ rights community has seen impressive momentum with regard to marriage equality over the past few years, particularly since the Supreme Court’s ruling in *United States v. Windsor* in 2013.”).

⁴¹ See Nancy Levit, *After Obergefell: The Next Generation of LGBT Rights Litigation*, 84 UMKC L. REV. 605, 606 (2016).

⁴² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

⁴³ Mark Strasser, *Obergefell, Dignity, and the Family*, 19 J. GENDER, RACE & JUST. 317, 318–19 (2016) (summarizing *Obergefell*, 135 S. Ct. at 2599–2601).

⁴⁴ U.S. CONST. amend. XIV; *Obergefell*, 135 S. Ct. at 2591; see Strasser, *supra* note 43, at 348.

⁴⁵ U.S. CONST. amend. XIV, § 1; *United States v. Windsor*, 570 U.S. 744, 774 (2013) (“While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes th[e] Fifth Amendment right all the more specific and all the better understood and preserved.”).

Further, the Court acknowledged that “[w]ithout the recognition, stability, and predictability marriage offers,”⁴⁶ the children of same-sex couples “suffer the stigma of knowing their families are somehow lesser.”⁴⁷ In her article, *Obergefell and the “New” Reproduction*, Courtney Megan Cahill argues that *Obergefell* went one step beyond affirming the constitutional right for same-sex couples to marry.⁴⁸ She argues that the Supreme Court extended constitutional protections to same-sex couples’ decisions regarding childbearing and procreation, effectively establishing procreation as a fundamental right under the Due Process Clause.⁴⁹ Regardless of whether *Obergefell* established the right to procreation, it did establish that the fundamental right to marry applies equally to same-sex couples.⁵⁰ As Justice Kennedy stated, a right to marry “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁵¹ With this right comes important tax, immigration, and employment benefits.⁵²

B. Lingering Legal Issues Surround Same-Sex Families’ Rights

Although *Obergefell* was a landmark decision and settled a long-debated legal matter, it opened the door to multiple new legal questions.⁵³ In his article *After Obergefell*, G.M. Filisko recounts areas in which these legal issues are emerging, such as “when babies are born or adopted, when spouses pass away, and when all the other life events that affect families take place.”⁵⁴ Although “[c]ourts and legislatures claim in principle to have repudiated the privileging of . . . different-sex over same-sex couples,”⁵⁵ the law surrounding parental recognition shows that this privileging still exists.⁵⁶ For example, many same-sex couples have extreme difficulty with adopting due to “conscience clause” adoption laws that allow faith-based adoption agencies

⁴⁶ *Obergefell*, 135 S. Ct. at 2590.

⁴⁷ *Id.*

⁴⁸ See Courtney Megan Cahill, *Obergefell and the “New” Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6 (2016).

⁴⁹ See *Id.*

⁵⁰ See *Obergefell*, 135 S. Ct. at 2600.

⁵¹ *Id.*

⁵² See Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1695 (2016).

⁵³ See G. M. Filisko, *After Obergefell*, A.B.A. J., June 2016, at 57, 58 (“*Obergefell* didn’t foreclose debate on the multitude of legal issues that arise from marriage.”).

⁵⁴ *Id.*

⁵⁵ Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2265 (2017).

⁵⁶ Filisko, *supra* note 53, at 59, 61.

to choose opposite-sex couples over same-sex couples for adoption eligibility based on religious beliefs.⁵⁷

Scholars have argued that the marital parentage presumption is one of the largest unresolved issues following *Obergefell*.⁵⁸ Pursuant to the presumption, when a child is born to married different-sex parents, hospitals presume that the married persons are the child's biological parents;⁵⁹ so, for example, "[w]hen there's a sperm donor, nobody asks if it's the husband's sperm."⁶⁰ Many states are beginning to recognize the marital parentage presumption for same-sex couples.⁶¹ People who form families through the use of ART such as "donor insemination, *in vitro* fertilization, and gestational surrogacy"⁶² regularly establish parental relationships without genetic correspondence to their children.⁶³ Some states, however, do not apply this same presumption to same-sex couples, and some even refuse to put two women or two men on a child's birth certificate.⁶⁴ Although the Supreme Court has not issued a parentage decision to date, many foreign countries recognize same-sex parents as the only legal parents of a child born through ART.⁶⁵

For years, many aspiring parents who could neither become pregnant nor carry a child to term, as well as many same-sex couples, were unable to start families.⁶⁶ Although adoption was an option for some, for many would-be parents, it was unavailable due to strict adoption requirements.⁶⁷ Others "simply decided to forego parenting without

⁵⁷ See, e.g., Allison L. McQueen, Note, *Michigan's Religious Exemption for Faith-Based Adoption Agencies: State-Sanctioned Discrimination or Guardian of Religious Liberty?*, 93 NOTRE DAME L. REV. 895, 898 (2017).

⁵⁸ See Filisko, *supra* note 53, at 59; NeJaime, *supra* note 55, at 2350; NeJaime, *supra* note 29, at 1190.

⁵⁹ Filisko, *supra* note 53, at 59.

⁶⁰ *Id.* at 60.

⁶¹ NeJaime, *supra* note 55, at 2294–95.

⁶² *Id.* at 2264.

⁶³ *Id.*; see also Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 23–24 (2008) (describing "functional infertility" as when a man, woman, or both, experience malfunctions in their ability to procreate and "structural infertility" as when an individual or couple desires a child but must do so through means other than sexual intercourse because of their social structure, i.e., single individuals or same-sex couples).

⁶⁴ See NeJaime, *supra* note 55, at 2296.

⁶⁵ See Complaint, *supra* note 1, ¶ 46 (noting that the birth certificates for both twin boys born in Canada to same-sex couple contained both men as the only legal parents of the children); see also Complaint, *supra* note 20, ¶ 2 (noting that the English birth certificates for both sons of same-sex couple contained both women as the only legal parents of the children).

⁶⁶ See NeJaime, *supra* note 55, at 2285.

⁶⁷ See *id.* In 2010, only 10 states and the District of Columbia explicitly permitted same-sex

the possibility of biological children.”⁶⁸ The longing for a biological child, however, is not lessened by the fact that currently, medicine allows for only one half of a same-sex couple to be the genetic parent of the child the two plan to have together.⁶⁹

Since the birth of the first child through ART in 1978, ART has rapidly advanced and been widely used by different-sex couples, same-sex couples, and single individuals wanting to have biological children.⁷⁰ The number of children born through ART has rapidly increased, both in the United States and worldwide.⁷¹ Although there is no specific data regarding how often same-sex couples use ART to start families, there is no doubt that this number is rapidly increasing around the world as more countries begin to legalize same-sex marriage, normalizing same-sex families.⁷²

II. HISTORY OF THE IMMIGRATION NATIONALITY ACT AND THE RELEVANT STATUTES

Multiple tribunals, including the Board of Immigration Appeals, have recognized that according to its legislative history, the INA “intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of U.S. citizens and immigrants united.”⁷³ Thus, courts have held that the INA should be construed to favor keeping family units together when possible.⁷⁴ Although the INA was enacted with this goal in mind, the application of

couples to adopt using the same procedures as opposite-sex couples. Michael J. Ritter, Note, *Adoption by Same-Sex Couples: Public Policy Issues in Texas Law & Practice*, 15 TEX. J. ON C.L. & C.R. 235, 240 (2010).

⁶⁸ NeJaime, *supra* note 55, at 2285.

⁶⁹ Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1083.

⁷⁰ See Elizabeth J. Samuels, *An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction, in the Interest of Science and Human Rights*, 48 N.M. L. REV. 416, 423–24 (2018) (discussing the increase in children born through ART internationally).

⁷¹ According to the European Society of Human Reproduction and Embryology, more than 9 million babies have been born using ART since the first baby in 1978. See EUROPEAN SOCIETY OF HUMAN REPRODUCTION AND EMBRYOLOGY, ART FACT SHEET, <https://www.eshre.eu/Press-Room/Resources> [<https://perma.cc/M88A-HGSG>] (click “ART fact sheet” to automatically download the report).

⁷² See David Masci et al., *Same-Sex Marriage Around the World*, PEW RES. CTR. (Oct. 28, 2019), <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/> [<https://perma.cc/G934-QLHB>] (listing 30 jurisdictions where same sex marriage is now legal).

⁷³ *In re G*, 8 I. & N. Dec. 355, 358 (B.I.A. 1959); see also *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005).

⁷⁴ *Solis-Espinoza*, 401 F.3d at 1094; see also *Hong v. Napolitano*, 772 F. Supp. 2d 1270, 1278 (D. Haw. 2011) (finding Board of Immigration Appeals policy “entirely ignore[d] Congress’s stated purposes of promulgating an immigration policy that accords liberal treatment to children and strives to keep bona fide families together”).

current immigration law does not prioritize family preservation and often separates children from their parents.⁷⁵ Specifically for same-sex couples and their families, U.S. immigration law has historically and systematically discriminated against binational same-sex relationships.⁷⁶

Traditionally, there are two ways to become a U.S. citizen: by birth or by naturalization.⁷⁷ U.S. citizenship was not originally defined in the U.S. Constitution.⁷⁸ This changed with the adoption of the Fourteenth Amendment, which states that “[a]ll 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.”⁷⁹ The Fourteenth Amendment, however, does not cover citizenship acquired by being born abroad to U.S. citizen parents.⁸⁰ It “left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.”⁸¹ Thus, if a child is not born on United States soil, it can only gain citizenship as provided by Congress.⁸²

Congress has established two categories in which a parent can transmit citizenship to their children: through derivative citizenship,⁸³ which is transmitted from the parent to the child after birth, or

⁷⁵ See Patrick Greenfield, *Family Separations: Hundreds of Migrant Children Still Not Reunited with Families in U.S.*, GUARDIAN (July 26, 2018, 8:32 PM), <https://www.theguardian.com/us-news/2018/jul/26/trump-administration-family-separations-children-reunited> [<https://perma.cc/RT36-XD4G>] (describing the Trump administration’s policy ordering criminal prosecution of anyone who crossed the border illegally, which lead to parents being deported while their children were kept in detention centers in the United States).

⁷⁶ See Moni Basu, *Love Wins in Gay Couple’s 40-Year Immigration Fight*, CNN (June 28, 2014, 8:26 AM), <http://www.cnn.com/2014/06/26/us/gay-rights-immigration-struggle/index.html> [<https://perma.cc/6AU7-VJFM>] (noting that a gay couple was denied marriage-based immigration from Department of Justice in 1975 with hateful letter that stated “[y]ou have failed to establish that a bona fide marital relationship can exist between two faggots”); see generally Dennis A. Golden, *The Policy Considerations Surrounding the United States’ Immigration Law as Applied to Bi-National Same-Sex Couples: Making the Case for the Uniting American Families Act*, 18 KAN. J.L. & PUB. POL’Y 301, 302 (2009) (providing a history of immigration law’s discrimination of same-sex couples).

⁷⁷ *Miller v. Albright*, 523 U.S. 420, 423 (1998); see also 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) (discussing the doctrines of jus soli, granting citizenship to anyone born in the U.S., and jus sanguinis, citizenship given to children born to one or more U.S. citizens).

⁷⁸ *Rogers v. Bellei*, 401 U.S. 815, 828 (1971).

⁷⁹ U.S. CONST. amend. XIV, § 1.

⁸⁰ See *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898).

⁸¹ *Id.*

⁸² *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000).

⁸³ See Immigration Nationality Act of 1952 § 320, 8 U.S.C. § 1431 (2018).

through acquired citizenship,⁸⁴ which “renders the child a U.S. citizen from the moment of his or her birth.”⁸⁵

There are two provisions in the INA that govern citizenship when a child is born abroad and has one U.S. citizen parent, depending on whether the child is considered to be born during a marriage or “born out of wedlock.”⁸⁶

If a child is born during a marriage, the relevant statute, section 301(g), states that

[A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years,⁸⁷

will be a citizen of United States at birth. Thus, the statute requires that the child is born of one alien parent and one U.S. citizen parent who has lived in the United States for the requisite amount of time. Section 309 of the INA⁸⁸ has different eligibility requirements for a child’s citizenship when the child is not born during a marriage.⁸⁹ It states that the provisions of section 301(g) only apply if

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person’s birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
 - (A) the person is legitimated under the law of the person’s residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or
 - (C) the paternity of the person is established by adjudication of a competent court.⁹⁰

⁸⁴ *Id.* § 1401.

⁸⁵ *Jaen v. Sessions*, 899 F.3d 182, 186 (2d Cir. 2018).

⁸⁶ 8 U.S.C. § 1409 (2018).

⁸⁷ *Id.* § 1401(g).

⁸⁸ *Id.* § 1409.

⁸⁹ *Id.*

⁹⁰ *Id.*

The differentiating requirement of section 309 is a blood relationship, established by clear and convincing evidence, between the child and the father.⁹¹ The biological requirement is expressly stated in section 309 as a prerequisite to citizenship for a child born out of wedlock.⁹² For a U.S. mother to transmit citizenship to a child not born during a marriage, the mother must only show that she has spent the necessary amount of time in the United States.⁹³ The biological relationship between a mother and child is presumed.⁹⁴

The Supreme Court has consistently held that “[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.”⁹⁵ Thus, the exclusion of an express biological relationship requirement in section 301(g) demonstrates that Congress decided to explicitly require this relationship when the child was not born during a marriage but did not choose to impose that requirement when the child was born during a marriage.

Even though the world has changed rapidly and perspectives about what constitutes a family have evolved, the definitions of “parent” and “child” under the INA, which was enacted in 1952, have changed very little. Section 301(g) contains the text “born . . . of parents,”⁹⁶ yet the INA does not provide a definition for the word “parent,” “mother,” or “father” as those words apply to the statute.⁹⁷ This is significant because the State Department’s interpretation implicitly imposes a definition of “parent” as it applies to the statute; by requiring a biological relationship to be present between the child and both parents, the policy necessitates one male and one female parent.⁹⁸ In

⁹¹ *See id.*

⁹² *See id.*

⁹³ *Id.* § 1409(c).

⁹⁴ *Id.*

⁹⁵ *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 631 (2018) (“Courts are required to give effect to Congress’ express inclusions and exclusions, not disregard them.”).

⁹⁶ 8 U.S.C. § 1401(g) (2018).

⁹⁷ *See, e.g., id.* § 1401(c)–(g) (consistently using the word “parent”); *id.* § 1409(a)(1)–(4) (using the word “father”); *id.* § 1409(c) (using the word “mother”); *see also Jaen v. Sessions*, 899 F.3d 182, 187 (2d Cir. 2018) (finding that the INA did not define the word “parent” with respect to INA § 301(g)).

⁹⁸ *See FAM, supra* note 15 (“The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed.”).

other words, by imposing a biological relationship requirement, the policy inherently defines parents as one male and one female.

Specifically, for children born through medical technology such as ART, the traditional views of legal parenthood are not applicable as “neither genetics nor gestation provide a consistent answer as to who should assume legal parental obligations.”⁹⁹ In the United States, parentage law, similar to marital law, is left to the states under the Tenth Amendment,¹⁰⁰ and thus varies state by state.¹⁰¹

In many states, courts have recognized that the word “parent” refers to more than a biological relationship, finding that it includes persons who either by marriage or otherwise also have legal parental status.¹⁰² Specifically, these courts have held that the traditional marital presumption, that a man is the legal parent of a child if he is married to the child’s mother, equally applies to same-sex couples.¹⁰³

After *Obergefell*, however, some states tried to limit the Court’s holding by using gender-specific language in their statutes that defined and determined legal parentage.¹⁰⁴ In *Pavan v. Smith*,¹⁰⁵ the Supreme Court granted certiorari to analyze an Arkansas state statute that allowed for a husband married to woman to be automatically listed as the father on a child’s birth certificate, even if he was not the biological father.¹⁰⁶ The statute’s requirement specifically applied when a married couple conceived a child through artificial insemination.¹⁰⁷ This automatic classification was denied to same-sex couples.¹⁰⁸ In its

⁹⁹ Meg Nemeth Ledebuhr, *Parentage and the Modern Family: The Only Constant is Change*, FAM. ADVOC., Spring 2018, at 12, 13.

¹⁰⁰ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁰¹ See June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 663 (2016).

¹⁰² See, e.g., LC v. MG, 430 P.3d 400, 418 (Haw. 2018) (holding that the presumption that a man is the legal parent of a child if he is married to the child’s natural mother equally applies to a woman who is married to a child’s natural mother); see also *McLaughlin v. Jones ex rel. Cty. of Pima*, 401 P.3d 492, 498 (Ariz. 2017) (“Because the marital paternity presumption does more than just identify biological fathers, Arizona cannot deny same-sex spouses the benefit the presumption affords.”).

¹⁰³ See NeJaime, *supra* note 55, at 2294–95 (discussing various gender-neutral state provisions and court decisions that apply the marital presumption to same-sex couples).

¹⁰⁴ Ledebuhr, *supra* note 99, at 14.

¹⁰⁵ 137 S. Ct. 2075 (2017).

¹⁰⁶ See *id.* at 2077 (“[I]f the mother was married at the time of either conception or birth,’ the statute instructs that ‘the name of [her] husband shall be entered on the certificate as the father of the child.’” (quoting ARK. CODE ANN. § 20-18-401(f)(1) (2014))).

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* The Arkansas Supreme Court held that “the statute centers on the relationship

holding, the Supreme Court reiterated that *Obergefell* forbids state laws that prohibit same-sex couples from receiving benefits linked to marriage that are provided by a state to opposite-sex couples.¹⁰⁹ Because Arkansas used a birth certificate “to give married parents a form of legal recognition that is not available to unmarried parents,” it chose to make its birth certificates more than a mere genetic marker.¹¹⁰ Thus, it could not deny those benefits to similarly situated same-sex married couples.

Although this decision was made in the context of state law, it reinforced *Obergefell*’s promise that same-sex couples would not be differentially treated with regard to the “constellation of benefits”¹¹¹ that come with the right to marry. Furthermore, the federal government has created a benefit of marriage, the transmission of U.S. citizenship, through federal law in section 301 of the INA.¹¹²

When making citizenship decisions for children born to same-sex married couples through the use of ART, the State Department has consistently—and incorrectly—applied section 309 to children not biologically related to the U.S. citizen.¹¹³ This application is due to the State Department’s policy in its internal manual, the FAM, which imposes a biological relationship requirement in order for section 301(g) to apply.¹¹⁴ This additional requirement is imposed “[d]espite the silence of Section 301 on the subject.”¹¹⁵ The State Department bases its prerequisite on its interpretation of the statute, that the language “born . . . of parents” necessarily implicates that both parents are the biological parents of the child.¹¹⁶

of the biological mother and the biological father to the child, not on the marital relationship of husband and wife,’ and so it ‘does not run afoul of *Obergefell*.’” *Id.* (quoting *Smith v. Pavan*, 505 S.W.3d 169, 178 (Ark. 2016)).

¹⁰⁹ See *id.* at 2078 (“[A] State may not ‘exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.’” (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015))).

¹¹⁰ See *id.* at 2078–79.

¹¹¹ See *Obergefell*, 135 S. Ct. at 2601.

¹¹² Immigration and Nationality Act § 301, 8 U.S.C. § 1401(g) (2018).

¹¹³ See Plaintiff’s Motion for Partial Summary Judgment at 11, *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCx), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019); see also Scott Titshaw, *Sorry Ma’am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FL. COASTAL L. REV. 47, 54 (2010) (arguing incorrect application of FAM prior to DOMA’s invalidation).

¹¹⁴ See 8 FAM § 304.12 (2018), <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/C74L-V8NF>].

¹¹⁵ Plaintiff’s Motion for Partial Summary Judgment, *supra* note 113, at 7.

¹¹⁶ See *id.*

III. APPELLATE CASES FINDING NO BIOLOGICAL RELATIONSHIP REQUIREMENT

Three appellate cases thus far, in the Second and Ninth Circuits, have established the lack of a biological relationship requirement to transmit birthright citizenship. In the first case, *Scales v. INS*,¹¹⁷ a Filipino woman, pregnant from a previous relationship, married a U.S. citizen. She proceeded to have the child during their marriage.¹¹⁸ An immigration judge and the Board of Immigration Appeals (“BIA”), rejected the birthright citizenship claim for the child, because there was no biological relationship between the child and the U.S. citizen father.¹¹⁹ The Ninth Circuit, however, reversed the BIA’s decision and held that “[a] straightforward reading” of section 301(g) does not require a biological relationship between children claiming citizenship and their U.S. citizen parent.¹²⁰ The court also specifically addressed FAM, declining to give deference to a manual that did not go through notice-and-comment rulemaking.¹²¹

Five years later in *Solis-Espinoza v. Gonzales*,¹²² a child claimed birthright citizenship through a woman he knew as his mother, although they had no biological relationship.¹²³ The woman, Ms. Cruz-Dominguez, was married to the child’s biological father at the time he was born.¹²⁴ The couple raised him as their child, and Ms. Cruz-Dominguez was listed as his mother on his birth certificate.¹²⁵ The Ninth Circuit followed its decision in *Scales* and held that the child was not born out of wedlock and thus could claim birthright citizenship through his non-biological mother.¹²⁶ Again, it held that “a blood relationship was not necessary to legitimate a child born to a couple during the course of marriage.”¹²⁷ The court specifically stated that this was a logical result, as Ms. Cruz-Dominguez was the petitioner’s mother “[i]n every practical sense” and “[t]here [was] no good reason to treat petitioner otherwise.”¹²⁸

¹¹⁷ 232 F.3d 1159 (9th Cir. 2000).

¹¹⁸ *See id.* at 1162.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1164.

¹²¹ *Id.* at 1166.

¹²² 401 F.3d 1090 (9th Cir. 2005).

¹²³ *Id.* at 1091.

¹²⁴ *Id.* at 1091–92.

¹²⁵ *See id.* at 1092.

¹²⁶ *See id.* at 1094.

¹²⁷ *Id.* at 1092, 1094.

¹²⁸ *Id.* at 1094.

The Second Circuit has also recently addressed this issue in *Jaen v. Sessions*.¹²⁹ Jaen was a child born in Panama. At the time of his birth, his mother, Leticia, was married to Jorge Boreland, a naturalized U.S. citizen.¹³⁰ During their marriage, Leticia had an extramarital relationship with Jaen's biological father.¹³¹ Leticia and Jorge remained married for 47 years until Jorge's death, and Jaen was raised as a child of the Boreland family for his entire childhood.¹³² The Second Circuit, when deciding the question of whether Jorge was Jaen's parent for the purposes of section 301, held that because the INA does not contain a definition of the word "parent" in the statute, it incorporates the common law meaning.¹³³ Thus, "a child born into a lawful marriage is the lawful child of those parents, regardless of the existence or nonexistence of any biological link."¹³⁴ For purposes of the INA, it held that parentage "is a legal construct that incorporates the common law's enduring respect for the marital family."¹³⁵

In *Jaen*, the Second Circuit granted birthright citizenship through the child's relationship to his nonbiological father, who was not the father named on his birth certificate.¹³⁶ Yet, the State Department has denied, on at least two occasions, birthright citizenship to children born during a same-sex couples' marriage, when both parents are the only legal parents on the child's birth certificate.¹³⁷

The U.S. District Court for the Central District of California recently ruled on the *Dvash-Banks* case, granting the family summary judgment and holding that Ethan acquired United States citizenship under section 301(g) of the INA at birth.¹³⁸ Specifically, the court held that under Ninth Circuit precedent, the INA does not require a biological relationship between children and their parents in order to confer citizenship.¹³⁹ The court found that "[o]ther than the gender of [Ethan's] parents, the factual circumstances in *Scales* and *Solis-Espi-*

¹²⁹ 899 F.3d 182 (2d Cir. 2018).

¹³⁰ *Id.* at 184.

¹³¹ *See id.* Jaen's biological father was the father listed on his Panamanian birth certificate. *Id.*

¹³² *See id.* at 185.

¹³³ *Id.* at 188.

¹³⁴ *Id.* at 185, 190.

¹³⁵ *Id.* at 190.

¹³⁶ *See id.* at 184.

¹³⁷ *See* Complaint, *supra* note 1, ¶ 52–53; Complaint, *supra* note 20, at 2.

¹³⁸ *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCx), 2019 WL 911799, at *8 (C.D. Cal. Feb. 21, 2019).

¹³⁹ *Id.* at *6.

noza are indistinguishable from the facts in this case.”¹⁴⁰ The court based its decision on the clear lack of a biological relationship requirement in section 301, as opposed to the requirement evident in section 309, and the legislative history of the INA.¹⁴¹ Although justice was granted to the *Dvash-Banks* family,¹⁴² the State Department continues to apply this problematic policy in other jurisdictions not governed by Ninth Circuit precedent.¹⁴³

IV. A CONSTITUTIONAL-AVOIDANCE BASED SOLUTION

All of the appellate court cases discussed in the prior section involved specific familial relationships that resulted in individual injustices, rather than class-wide discrimination. Recent cases involving same-sex families, like the *Dvash-Banks* case, however, demonstrate how the State Department’s policy discriminates against all same-sex couples who have children through ART abroad, since the best-case scenario for a same-sex married couple is to have one biological relationship between a parent and child.¹⁴⁴

The Supreme Court has recognized the rights of U.S. citizens married to foreign partners to transmit their citizenship to their foreign-born children:

Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen, regardless of whether the citizen parent is the male or the female partner. If the two parties engage in a second joint act—if they agree to marry one another—citizenship will follow.¹⁴⁵

After *Scales*, *Solis-Espinoza*, and *Jaen*, it logically follows that the transmission of citizenship from a U.S. citizen parent in a same-sex marriage is an incident of that marriage. The states who are beginning

¹⁴⁰ *Id.* at *7.

¹⁴¹ *Id.*

¹⁴² This case has been appealed to the Ninth Circuit. See Notice of Appeal, *Dvash-Banks v. Pompeo*, No. 2:18-cv-00523-JFW(JCx) (C.D. Cal. May 6, 2019).

¹⁴³ See Complaint, *supra* note 20, at ¶ 4. The *Blixt* case is now pending in the U.S. District Court for the District of New Jersey. See Joint Motion for Transfer Pursuant to 28 U.S.C. § 1404(a), *Blixt v. Dep’t of State*, No. 1:18-cv-00124-EGS (D.D.C. Feb. 13, 2020). Allison Blixt accepted a position of employment in the United States. Complaint, *supra* note 20, at 2. Her son was given lawful permanent residence and her and her family now reside in New Jersey. *Id.* The plaintiffs seek to amend the complaint to assert a “claim for a judgment declaring that [their son] acquired U.S. citizenship at birth.” See Joint Status Report at 2, *Blixt v. Dep’t of State*, No. 1:18-cv-00124-EGS (D.D.C. Jan. 17, 2020).

¹⁴⁴ Higdon, *supra* note 33, at 159.

¹⁴⁵ *Miller v. Albright*, 523 U.S. 420, 433 (1998).

to recognize that legal parenthood includes more than a biological relationship have done so in the wake of *Windsor* and *Pavan*,¹⁴⁶ finding that they cannot deny same-sex couples benefits that are afforded to opposite-sex couples.¹⁴⁷ Federal courts, however, have an option to avoid deciding the question of constitutionality. Often used in immigration law, the statutory canon of constitutional avoidance allows federal courts to protect same-sex couples from the discrimination they are currently enduring, without having to try to decide how far the fundamental right of marriage and substantive Due Process rights extend.¹⁴⁸

A. *Federal Courts Should Apply the Canon of Constitutional Avoidance and Reject the State Department's Statutory Interpretation that Section 301(g) of the INA Contains a Biological Relationship Requirement.*

The Supreme Court should reject the statutory interpretation adopted in the State Department's FAM and instead hold that section 301 does not require a biological relationship between a child and the child's U.S. citizen parent in order for the child to possess birth-right citizenship. Under the canons of statutory construction endorsed by the Supreme Court, federal courts should avoid the constitutional question the statute poses under *Windsor* and *Obergefell* and instead resolve this issue under the doctrine of constitutional avoidance.

In order for the canon of constitutional avoidance to apply, an ordinary textual analysis must first be conducted to determine if there is more than one plausible construction of the statute.¹⁴⁹ As the current litigation surrounding this issue suggests,¹⁵⁰ there are two ways the text of the statute can be plausibly read. The language in section 301(g), "born . . . of parents,"¹⁵¹ can be read to either require a

¹⁴⁶ *Pavan v. Smith*, 137 S. Ct. 2075 (2017); *United States v. Windsor*, 570 U.S. 744 (2013).

¹⁴⁷ See *McLaughlin v. Jones ex rel. Cty. of Pima*, 401 P.3d 492, 498 (Ariz. 2017); *LC v. MG*, 430 P.3d 400, 418 (Haw. 2018).

¹⁴⁸ See Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 498 (2018).

¹⁴⁹ *Jennings v. Rodriguez*, 138 S. Ct. 830, 834 (2018).

¹⁵⁰ Compare Plaintiff's Notice of Motion and Motion for Partial Summary Judgment at 14, *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCx), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019) ("There is no dispute that Section 301(g) does not expressly impose a biological relationship requirement."), with Defendant's Response and Opposition to Plaintiff's Motion for Partial Summary Judgment at 11, *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCx), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019) (arguing that the language "'born of . . . parents' has an inherently biological connotation" (quoting Immigration and Nationality Act § 301(g), 8 U.S.C. § 1401(g) (2018) (emphasis in original))).

¹⁵¹ 8 U.S.C. § 1401(g) (2018).

child's biological relationship to both parents in order to be "born of" them, or it can be read to only require that the child be born to two people during the course of their marriage. As shown above in *Scales*, *Solis-Espinoza*, and *Jaen*, the statute can be interpreted to include relationships between parents and children that lack a biological connection.¹⁵²

Once there are two plausible constructions, the canon of constitutional avoidance is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."¹⁵³ Thus, it must be determined whether the State Department's interpretation raises these constitutional doubts.

Although state parentage law is not yet a constitutionally settled issue, following the Supreme Court decisions in *Windsor*, *Obergefell*, and *Pavan*, the State Department's policy requiring a biological relationship between a child and *both* married parents in order for a child to be considered born "in wedlock" would likely not pass constitutional review. This interpretation presents two sources of constitutional infirmity. First, the FAM policy likely violates *Windsor*, because it is rendering the relationship between same-sex couples and the children they have together as unequal to different-sex couples and their children under federal law.¹⁵⁴ Additionally, it burdens the fundamental right to marry by depriving same-sex couples of one of the benefits of marriage—the ability to have their children presumed to carry their citizenship.

When determining the constitutionality of the State Department's policy, the first step is to determine what level of scrutiny should be applied.¹⁵⁵ "Laws that discriminate based on gender are subject to heightened scrutiny."¹⁵⁶ Although *Obergefell* made no explicit reference to or determination of the standard of review, it is clear from the decision's reference to elements traditionally reviewed in a heightened-scrutiny analysis, that more than mere rational-basis re-

¹⁵² See *supra* Part III.

¹⁵³ *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

¹⁵⁴ See *United States v. Windsor*, 570 U.S. 744, 775 (2013) ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.").

¹⁵⁵ See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–441 (1985) (addressing standards the courts have devised for determining the constitutional validity of a law or official action).

¹⁵⁶ Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1078–79 (2014).

view was applied.¹⁵⁷ Assuming that a higher standard than rational basis would apply here, the State Department's interpretation creates strong constitutional doubt.

By choosing the language "born . . . of parents"¹⁵⁸ and leaving out an explicit biological relationship requirement which exists in the "born out of wedlock" statute alternative,¹⁵⁹ Congress deliberately chose to write the statute in a way that confers a benefit onto a married couple. Under *Windsor* and the Fifth Amendment, it is unconstitutional for the federal government to afford federal benefits to opposite-sex couples but deny them to same-sex couples.¹⁶⁰

The State Department has argued that the biological relationship requirement does not unconstitutionally discriminate against same-sex couples because there is a narrow subset of lesbian couples who could transmit citizenship under their reading of section 301(g).¹⁶¹ In 2014, the U.S. Citizen and Immigration Services ("USCIS") issued a new policy expanding the definition of "mother" and "parent" under the INA to include gestational mothers using ART.¹⁶² This expansion was extremely narrow, however, and only recognizes a child's acquisition of citizen under section 301(g) where two women in a same-sex marriage have a child together through ART, where one mother is the gestational, and thus legal, mother of the child and the other is the genetic mother whose egg inseminated into her wife's body.¹⁶³ This odd and narrow expansion, however, does not serve to show the lack of discrimination against same-sex couples, as gay married men are still unable to transmit citizenship through the statute. Rather than bolstering the argument that a biological relationship requirement is a constitutional reading of the statute, this FAM policy acknowledges that to be a legal mother does not require a biological relationship to the child.

¹⁵⁷ See Jane S. Schacter, *Obergefell's Audiences*, 77 OHIO ST. L.J. 1011, 1016–17 (2016).

¹⁵⁸ 8 U.S.C. § 1401(g) (2018).

¹⁵⁹ *Id.* § 1409.

¹⁶⁰ U.S. CONST. amend. V; *United States v. Windsor*, 570 U.S. 744, 775 (2013).

¹⁶¹ See Defendant's Response and Opposition to Plaintiff's Motion for Partial Summary Judgment, *supra* note 150, at 6.

¹⁶² U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS EXPANDS THE DEFINITION OF "MOTHER" AND "PARENT" TO INCLUDE GESTATIONAL MOTHERS USING ASSISTED REPRODUCTIVE TECHNOLOGY (ART) PA-2014-009 (2014), <https://www.uscis.gov/sites/default/files/policymanual/updates/20141028-ART.pdf> [<https://perma.cc/WH54-N3GL>].

¹⁶³ 8 FAM § 301.4-1(D)(1)(c), (D)(1)(d)(5) (2018), <https://fam.state.gov/FAM/08FAM/08FAM030104.html> [<https://perma.cc/LC6U-ZQZS>].

Some may question whether the biological relationship requirement actually discriminates against same-sex couples because, in many cases, the U.S. citizen parent could sponsor the child as a stepparent for the child to become eligible for an immigrant visa. After learning of this option, Allison Blixt, a mother affected by the biological requirement when her non-biologically related son was denied birthright citizenship, responded “[t]he principle of that is just a bit too hard to swallow I’m not his stepmother. I’m his mother.”¹⁶⁴ This “alternative” path to citizenship for children born abroad to same-sex parents through ART, however, shows the disparity between same-sex and opposite-sex married couples. If a child was born to opposite-sex parents, one of whom he was not biologically related to, yet both parents were listed on the birth certificate, there is very little chance a parent would have to sponsor that child as his stepchild in order to obtain citizenship because the biological relationship would be assumed.

Similar to DOMA in *Windsor*, the statutory interpretation requiring a biological requirement of section 301(g) has the practical effect of imposing a “disadvantage” and “separate status” on same-sex couples and their children.¹⁶⁵ Additionally, since the Supreme Court has declared that marriage is a fundamental right,¹⁶⁶ the ability for same-sex couples to transmit birthright citizenship on the same footing as opposite-sex married couples can be seen as one of the benefits of the right to marriage.

Under the constitutional avoidance doctrine, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”¹⁶⁷ A court does not, however, need to hold that the interpretation of the statute is unconstitutional; one interpretation must only raise “grave and doubtful constitutional questions.”¹⁶⁸ Once a court determines that one of the constructions of the statute raises constitutional infirmity, a court can reject this interpretation and adopt the opposing one.

¹⁶⁴ Maria Sacchetti, *In Lawsuits, Same-Sex Couples Say U.S. Wrongly Denied Their Children Citizenship*, WASH. POST (Jan. 22, 2018, 10:29 AM) (quoting Interview with Allison Blixt), https://www.washingtonpost.com/local/immigration/in-lawsuits-same-sex-couples-say-us-wrongly-denied-their-children-citizenship/2018/01/22/1c83c98a-fd34-11e7-8f66-2df0b94bb98a_story.html [https://perma.cc/U5DA-CNG9].

¹⁶⁵ *Windsor*, 570 U.S. at 770.

¹⁶⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

¹⁶⁷ *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

¹⁶⁸ *Jones v. United States*, 526 U.S. 227, 239 (1999).

For example, in *Zadvydas v. Davis*,¹⁶⁹ the Supreme Court used the avoidance doctrine to interpret a statute that stated that aliens who fall into certain categories “may be detained beyond the [90-day] removal period.”¹⁷⁰ The Court found that the government’s interpretation—that the statute permitted indefinite detention of these aliens—presented constitutional infirmity under the Fifth Amendment’s Due Process Clause.¹⁷¹ After finding that Congress did not manifest a clear intent to allow indefinite detention, the Court interpreted the statute to avoid the constitutional problem, holding that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”¹⁷² In doing so, the Court acknowledged its practice of relying on the doctrine to avoid constitutional infirmities, even reading “significant limitations” into immigration statutes.¹⁷³

In the same way as *Zadvydas*, after deciding that the State Department’s interpretation raises sufficient constitutional concern, federal courts should adopt the alternative interpretation of section 301(g)—the interpretation without a biological relationship requirement.

B. Utilizing the Doctrine of Constitutional Avoidance Allows Federal Courts to Avoid Both the Constitutional Question and Judicial Intervention.

Federal courts and the Supreme Court “increasingly interpret immigration statutes to avoid constitutional conflict and avert holding that the political branches have complete deference.”¹⁷⁴ Federal courts have historically had limited ability to judicially intervene regarding constitutional questions in immigration statutes.¹⁷⁵ This is due to a long line of precedent giving plenary power to Congress when deciding immigration law issues.¹⁷⁶ The Supreme Court afforded this deference to Congress based on the Constitution, which gives

¹⁶⁹ 533 U.S. 678 (2001).

¹⁷⁰ 8 U.S.C. § 1231(a)(6) (Supp. V 1994).

¹⁷¹ *Zadvydas*, 533 U.S. at 690.

¹⁷² *Id.* at 699.

¹⁷³ *Id.* at 689.

¹⁷⁴ Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT’L L. 1345, 1351 n.20 (2007).

¹⁷⁵ Das, *supra* note 148, at 494.

¹⁷⁶ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 553 (1990) (discussing the history of the doctrine starting with the Chinese exclusion cases from the late 1800s).

Congressional authority to “establish a[] uniform Rule of Naturalization,”¹⁷⁷ and “out of concerns for national security, territorial sovereignty, and self preservation.”¹⁷⁸

Because of the expansive power given to Congress, scholars have noted a trend that aliens have historically received more favorable outcomes when “subconstitutional” decisions are rendered through the use of statutory interpretation than when constitutional issues are actually decided.¹⁷⁹ Specifically, courts have aggressively used the doctrine of constitutional avoidance with respect to immigration statutes.¹⁸⁰

Additionally, Congress has delegated many rulemaking powers in the immigration context to federal agencies like the Department of Justice and the State Department.¹⁸¹ This allows for internal policy decisions to be made, giving “the executive branch significant control over the outcome . . . where stakeholders’ concerns may be confronted only after the proposal of the initial rule.”¹⁸² This power also allows the agencies to interpret and apply constitutional mandates as narrowly as they see fit.¹⁸³ In the immigration context, the doctrine of constitutional avoidance can provide a check on Congress’ plenary power by sidestepping deference to the federal government.¹⁸⁴ It can also be used to provide a narrow directive to federal agencies by allowing a court to choose a valid interpretation rather than declaring an internal, interpretive policy unconstitutional.¹⁸⁵ Said otherwise, the doctrine allows the Court to engage in a dialogue with the political branches about the limits of their authority without resorting to the

¹⁷⁷ U.S. CONST. art. I, § 8.

¹⁷⁸ Sanford G. Hooper, Note, *Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis*, 59 WASH. & LEE L. REV. 975, 992 (2002).

¹⁷⁹ See Motomura, *supra* note 176, at 548.

¹⁸⁰ See Das, *supra* note 148, at 498.

¹⁸¹ *Id.* at 501.

¹⁸² *Id.* at 526.

¹⁸³ *Id.* (explaining an example where the Department of Justice distinguished a Supreme Court’s constitutional decision in rule-making, which has yet to be challenged).

¹⁸⁴ See Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 192 (2015). When an agency determination raises a serious constitutional concern, courts have declined to defer to the government’s interpretation and instead apply constitutional avoidance. *Id.*; see also *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (rejecting the government’s plenary power argument, explaining that all governmental power is subject to “constitutional limitations.”).

¹⁸⁵ See Das, *supra* note 184, at 191. When the constitutional avoidance doctrine is applied to agency interpretations it is rooted in the idea that “Congress should not delegate constitutional questions to an agency through ambiguous language.” *Id.*

much more drastic step of invalidating congressional or executive directives.

Thus, utilizing the doctrine of constitutional avoidance is the most efficient and effective solution in this case. It is unnecessary for this issue to go to the Supreme Court to decide its constitutionality when the basis for the constitutional question is not the statute itself, but the self-imposed interpretation the State Department has decided to follow. Avoidance is also particularly attractive in this case because the interpretation it favors—i.e., the absence of a biological relationship requirement—is consistent with the best reading of the text itself. Congress clearly knew how to impose a “blood relationship” requirement, having done so in section 309,¹⁸⁶ yet declined to do so in section 301.¹⁸⁷ To avoid constitutional doubt, the Supreme Court should read section 301 of the INA as not imposing a biological relationship requirement.

C. Alternative Solutions Would Not Be Feasible.

Some of the critics of the State Department’s interpretation of section 301 have argued that the Supreme Court should—and would—hold that policy unconstitutional.¹⁸⁸ Although this is certainly a possibility, it is an inferior solution for several reasons. First, as noted previously, the Court has been reluctant to declare federal immigration laws or agency interpretations unconstitutional.¹⁸⁹ There is no reason to think that this would change for this statute, and the Court might not even take up the issue at all.

In addition, even if the Court *were* to engage with the question, there is no guarantee that it would rule in the challengers’ favor. The Supreme Court precedent regarding the fundamental right to marriage is a murky area of law.¹⁹⁰ The Court merely speaks of marriage as a “constellation of benefits”¹⁹¹ rather than specifically stating what

¹⁸⁶ 8 U.S.C. § 1409 (2018).

¹⁸⁷ See *supra* Part III (discussing Supreme Court decisions holding that Congress’ inclusions and exclusions should not be ignored).

¹⁸⁸ See Higdon, *supra* note 33, at 127.

¹⁸⁹ See *supra* text accompanying notes 174–79.

¹⁹⁰ See Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021, 1022 (2016) (arguing that the Supreme Court should have based its decision on Equal Protection rather than substantive Due Process); Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 64 (2016) (questioning whether substantive Due Process from Obergefell will be extended to protect polygamy).

¹⁹¹ Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

those benefits are or how far substantive due process rights extend.¹⁹² The notion that passing birthright citizenship on to your children is one of those benefits that is a creation of multiple Supreme Court decisions, many of which were decided before same-sex marriage was declared legal.¹⁹³ Thus, any predictions that the State Department's policy would be declared unconstitutional can be summed up in one word: hopeful.

Alternatively, since the statute currently has two plausible interpretations, Congress could amend the language of the statute to clearly state that a biological relationship is not required to transmit citizenship under section 301. This would require Congress to amend part of the INA. Although the INA has been amended many times, it has typically been a part of sweeping immigration reform, such as the Immigration Reform and Control Act¹⁹⁴ and the Antiterrorism and Effective Death Penalty Act.¹⁹⁵ It would be a rare occurrence for Congress to notice this constitutional harm and amend the statute without judicial intervention. Even if it did, an amendment is unlikely to happen in our current political climate, where Congress is divided on every hot-button issue, including immigration.¹⁹⁶

Thus, although judicial intervention is limited in this area of law, the doctrine of constitutional avoidance will ensure that married same-sex couples and their children are no longer discriminated against. Federal courts should declare that the interpretation requiring only that a child be born during a marriage, rather than biologically related to both of those parents, must be adopted because it avoids the alternative constitutionally-doubtful interpretation.

¹⁹² See Dave Rodkey, Note, *Making Sense of Obergefell: A Suggested Uniform Substantive Due Process Standard*, 79 U. PITT. L. REV. 753, 755 (2018) ("Justices have always differed about how and to what extent fundamental due process should be invoked.").

¹⁹³ See Higdon, *supra* note 33, at 144 (providing a history of the fundamental rights of marriage and parenthood using case law starting in 1923).

¹⁹⁴ Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C. (2018)).

¹⁹⁵ Pub. L. No. 104-132, 110 Stat. 1214 (1996); see *Public Laws Affecting Immigration and Nationality*, U.S. CITIZEN & IMMIGR. SERVS., <https://www.uscis.gov/legal-resources/public-laws-affecting-immigration-and-nationality> [<https://perma.cc/QCG6-ACSL>]; see also HENRY HYDE, ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, H.R. REP. NO. 104-828 (1996) (Conf. Rep.).

¹⁹⁶ See Diane Hessian, *Immigration—The Problem Congress Doesn't Want to Solve*, BOSTON GLOBE (Dec. 10, 2018, 2:40 PM), <https://www.bostonglobe.com/opinion/2018/12/10/immigration-problem-congress-doesn-want-solve/aR2QxaPxgxSH7xQfX8GKyL/story.html> [<https://perma.cc/AK8J-JPE7>].

D. Although Worries of Immigration Fraud May Be Implicated by This Interpretation, Same-Sex Couples Will be Investigated in the Same Way as Opposite-Sex Couples.

A constant worry for advocates of stricter immigration laws is that a “lenient” interpretation of an INA statute will lead to immigration fraud.¹⁹⁷ In this case, it is likely that these advocates would be worried that allowing the transmission of citizenship absent a demonstrated biological relationship will lead to people abusing the statute by claiming to be the parents of children they have no biological or parental relationship to. Immigration procedures, however, currently rely on children’s birth certificates to prove the existence of familial relationships.¹⁹⁸

The USCIS Policy Manual specifically states that “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).”¹⁹⁹ Thus, not every child, indeed most children, are not required to submit a DNA sample because a birth certificate is sufficient. This is true even though in many states it is allowed, and even required, to place a non-biological parent on a child’s birth certificate.²⁰⁰

Further, the subsequent requirements of the statute, that the couple be married at the time the child is born and the U.S. citizen parent has a residence in the United States,²⁰¹ are sufficient requirements to deter immigration fraud in this context. ART is a very expensive procedure that in many cases is the only way for same-sex couples

¹⁹⁷ *USCIS Needs Direct Access to Law Enforcement Power to Curb Rampant Immigration Fraud*, CTR. FOR IMMIGR. STUD. (May 6, 2019), <https://cis.org/CIS/USCIS-Needs-Direct-Access-Law-Enforcement-Power-Curb-Rampant-Immigration-Fraud> [<https://perma.cc/5MQS-4W9Z>].

¹⁹⁸ *See, e.g.*, 8 C.F.R. § 320.3(b)(i) (2020) (listing “[t]he child’s birth certificate or record” and the “[m]arriage certificate of child’s parents” as sufficient to show the child was born in wedlock and thus is eligible to acquire automatic citizenship); 22 C.F.R. § 50.5 (2019) (stating that “proof of child’s birth usually consists of, but is not limited to, an authentic copy of the record of the birth filed with local authorities, a baptismal certificate, a military hospital certificate of birth, or an affidavit of the doctor or the person attending the birth” for purposes of an application for registration of birth abroad).

¹⁹⁹ *Policy Manual, Definition of Child and Residence for Citizenship and Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., (Apr. 24, 2020), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html> [<https://perma.cc/ZE2E-XTGK>].

²⁰⁰ *See, e.g.*, MICH. COMP. LAWS ANN. § 333.2824(1) (West 2018) (“The name of the husband at the time of conception or, if none, the husband at birth shall be registered as the father of the child.”); *supra* Part IV (Arkansas statute required a father’s name to be put on the birth certificate of a child born to his married wife through artificial insemination of a sperm donor).

²⁰¹ 8 U.S.C. § 1409 (2018).

to have children biologically related to them in any way.²⁰² Thus, the fear of unlikely immigration fraud should not be a deterrent in granting these same-sex couples the right to transmit their U.S. citizenship to their children.

CONCLUSION

Federal courts should apply the doctrine of constitutional avoidance and thus reject the State Department's interpretation of the birthright citizenship statute for children born during wedlock, implemented in the FAM, which requires a foreign-born child to be biologically related to *both* parents in a marriage in order to acquire citizenship through the parent who is a U.S. citizen. This interpretation presents strong constitutional doubts under *Windsor* and *Obergefell* because it discriminates against same-sex couples who use ART to have children. It is impossible for two married men to both be biologically related to a child they have together. Thus, this interpretation of the statute forecloses gays couples' ability to transmit acquired citizenship to their children, even when the child was born during the marriage and both parents are the only legal parents on the child's birth certificate. Because of this constitutional infirmity, federal courts, under the canon of constitutional avoidance, should adopt the opposing interpretation: that the statute does not require a biological relationship, but merely requires that a child be born during a marriage. This interpretation has been affirmed in the Second²⁰³ and Ninth²⁰⁴ Circuits and should be adopted nationwide to avoid constitutional vulnerability and ensure that same-sex couples are treated equally to opposite-sex couples under federal law.

²⁰² See Lacie Glover, *Building a Family: Options and Costs for Same-Sex Couples*, NERD WALLET (July 5, 2017), <https://www.nerdwallet.com/blog/health/building-family-sex-couples-common-options-costs/> [https://perma.cc/6TJM-DAB5].

²⁰³ See *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018).

²⁰⁴ See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000).