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Taking the "FAM" out of Family: Adjudicating the State Department's Discriminatory Treatment of Same-Sex Parents on the Merits

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Cover Page Footnote

I am incredibly thankful for the advisement and mentorship of Professor Anna R. Welch (Maine Law); her edits, encouragement, advice, and insights have all been instrumental to this Comment. I am also thankful for Professor Jessica Feinberg's (Maine Law) advisement on this Comment. She has truly elevated this piece beyond where I could have taken it on my own. Thank you to Suzy Dowling (Maine Law, Class of '21) for the years-worth of mentorship, endlessly reviewing my drafts, and all of your encouragement along the way. Finally, thank you to my loving family, ACNF and Tucker, for always keeping me grounded and reminding me to take breaks.

TAKING THE “FAM” OUT OF FAMILY: ADJUDICATING THE STATE DEPARTMENT’S DISCRIMINATORY TREATMENT OF SAME-SEX PARENTS ON THE MERITS

Camrin M. Rivera

ABSTRACT

INTRODUCTION

I. BACKGROUND

A. Cases

- 1. The Kiviti Family*
- 2. The Mize and Gregg Family*
- 3. The Dvash-Banks Family*

B. The Immigration and Nationality Act: Citizenship from Birth

- 1. Section 301 of the INA. Children Born in Wedlock*
- 2. INA Section 309. Children Born Out of Wedlock*

C. The Foreign Affairs Manual

D. The Resulting Lawsuits and Constitutional Avoidance

- 1. Kiviti v. Pompeo*
- 2. Mize v. Pompeo*
- 3. Dvash-Banks v. Pompeo*
- 4. The Failures of Constitutional Avoidance*

II. CONSTITUTIONAL PROTECTIONS FOR SAME-SEX PARENTS

A. The Right to Marry and the Benefits that Follow

B. Bostock: A Shift in How the Supreme Court May View Discrimination on the Basis of Sexual Orientation

C. Bostock’s Potential Impacts on the INA

III. ADJUDICATION ON THE MERITS

CONCLUSION

TAKING THE “FAM” OUT OF FAMILY: ADJUDICATING THE STATE DEPARTMENT’S DISCRIMINATORY TREATMENT OF SAME-SEX PARENTS ON THE MERITS

Camrin M. Rivera*

ABSTRACT

Cisgender same-sex male married couples, unlike cisgender opposite-sex married couples, will always require artificial reproductive technology (ART) for at least one of the spouses to attain biological parenthood. Due to legal and financial barriers to ART, many of these couples turn to international ART services to grow their families. In doing so, these families may face immigration battles when they apply for recognition of their child’s United States citizenship. For example, a prior State Department policy sparked three lawsuits after the State Department refused to recognize children as United States citizens from birth because the children were not biologically related to *both* of their cisgender same-sex male married parents. Because it is currently impossible for both parents in a cisgendered same-sex male marriage to be biologically related to their child, these families have been forced to litigate and challenge the constitutionality of the State Department’s policy. This Comment summarizes the relevant immigration law and the State Department policy that has resulted in this disparate treatment of married cisgendered same-sex parents and their children. In addition, this Comment outlines the three of the resulting lawsuits brought by such parents after their children were denied United States Citizenship—as well as the shortcoming that stem from the court’s failure to adjudicate the claims on the merits. Finally, this Comment provides a framework for how courts ought to adjudicate such claims and argues that analyzing the constitutional rights of married cisgendered same-sex male parents is needed to best protect similarly situated families. In doing so, this Comment posits that the Supreme Court’s broad sweeping and compelling reasoning in *Bostock v. Clayton County* might be used to provide further constitutional protections for these LGBTQIA individuals.

INTRODUCTION

Imagine that you have just married the love of your life. Prior to getting married, you and your spouse agreed that your marriage will involve raising children, and you both cannot wait to begin growing your family. Either through marriage or some

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other immigration process, you have both established your United States citizenship and you plan to raise your children within the United States. However, because you are in a cisgender same-sex male marriage, you are not able to biologically conceive a child on your own. So, you begin to investigate your options, finding Assisted Reproductive Technology (ART) as a way for at least one of you to be biologically connected to your future child.

Broadly speaking, ART refers to any “method of causing pregnancy other than sexual intercourse” and includes procedures like *in vitro* fertilization (IVF) and artificial insemination.¹ The use of ART has increased fifty-seven percent in recent years,² and nearly 81,500 children were born in the United States as a result of ART in 2018 alone.³ Although some of these numbers are in part due to cisgender opposite-sex couples utilizing ART for increased fertility, many cisgender same-sex male couples utilize, or plan to utilize, ART to grow their families.⁴

Cisgender same-sex male couples, unlike cisgender opposite-sex couples, will *always* need to utilize ART to attain biological parenthood. This is because they will always require participation of at least one third party: a surrogate and, most often, an egg donor.⁵ There are two types of surrogacy arrangements available for cisgender same-sex male couples: traditional surrogacy and gestational surrogacy.⁶ Traditional surrogacy involves utilizing the sperm of the father and fertilizing the

1. 19-A M.R.S. § 1832(3) (2021). The federal government defines ART as fertility procedures and treatments that require the handling of eggs or embryos; however, this definition is overly narrow because it does not include artificial insemination (“AI”), which raises similar legal issues to federally recognized ART procedures. Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 313-14, 315 (2019) (“The U.S. Code defines Assisted Reproductive Technology . . . as any treatment or procedure that includes the handling of human eggs (oocytes) or embryos.”). Many states have also included AI within their family law definitions of ART. See, e.g., 19-A M.R.S. § 1832(3) (2021) (defining assisted reproduction within the Maine Parentage Act to include “[i]ntrauterine or vaginal insemination” and “[i]n vitro fertilization and transfer of embryos”); N.Y. FAM. CT. ACT § 581-102 (McKenney 2001) (defining assisted reproduction within the Family Court Act to include “[i]ntrauterine or vaginal insemination” and “[i]n vitro fertilization and transfer of embryos”). Thus, this Comment takes the broader definition for ART, subsuming AI.

2. CTR. FOR DISEASE CONTROL, DIV. REPRODUCTIVE HEALTH, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 50 (2017). The birth rate of children born as a result of ART increased by nearly 57% between 2006 (54,656 births) and 2015 (71,169 births). *Id.* at 50.

3. The use of ART has doubled over the last decade, and 81,478 newborn infants in 2018 were conceived through ART. *ART Success Rate*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/9RN8-MUSK>] (last visited Dec. 23, 2021).

4. See FAM. EQUALITY, LGBTQ FAMILY BUILDING SURVEY, 2 (2019) (reporting that “77% of LGBTQ Millennials (aged 18-35) are either already parents or are considering having children”); Julie Compton, *LGBTQ Families Poised for ‘Dramatic Growth,’ National Survey Finds*, NBC NEWS (Feb. 7, 2019), <https://www.nbcnews.com/feature/nbc-out/lgbtq-families-poised-dramatic-growth-national-survey-finds-n968776> [<https://perma.cc/Z6JW-LYTE>] (reporting that “[w]hile the current percentage of LGBTQ people who use ART to have children is only around five percent, [forty] percent of them are currently considering it”).

5. Scott C. Mackenzie, Dita Wickins-Drazilova, & Jeremy Wickins, *The Ethics of Fertility Treatment for Same-Sex Couples: Considerations for a Modern Fertility Clinic*, 244 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 71, 72 (2020).

6. Wendy Norton, Nicky Hudson, & Lorraine Culley, *Gay Men Seeking Surrogacy to Achieve Parenthood*, 27 REPROD. BIOMEDICINE ONLINE 271, 273 (2013).

egg taken from the surrogate.⁷ Gestational surrogacy, on the other hand, involves fertilizing a donated egg with the sperm of the father, which is then implanted into the gestational surrogate.⁸ Gestational surrogacy is the more prevalent form⁹ and is “estimated to represent 95% of all surrogacy arrangements.”¹⁰

However, cisgender same-sex male couples often face substantial legal and economic barriers to utilizing ART services. For example, gestational surrogacy can cost parents more than \$100,000, which is typically not covered by insurance providers,¹¹ and the cost can increase substantially when parents begin to factor in multiple rounds of IVF, genetic testing, and surgical procedures.¹² In addition, less than half of the states have addressed gestational surrogacy within a statute, and some states have not addressed the legality of gestational surrogacy at all.¹³ Other states have refused to recognize and enforce surrogacy contracts altogether.¹⁴ Even in some of the states that permit surrogacy arrangements, cisgender same-sex male couples may still be excluded because the state may require that *all* genetic materials come from both of the intended parents.¹⁵

Another legal and financial barrier may stem from a cisgender same-sex male couple’s need to hire an attorney with expertise in Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, and Asexual (LGBTQIA) family law to assure that both intended parents are recognized as the child’s legal parents.¹⁶ This is because many state laws are written in a way that presumes parentage through marriage only when the intended parent is married to the gestational parent.¹⁷ Thus, for a cisgender same-sex male couple, where neither spouse can be the gestational parent, the couple is “excluded from the marriage-based avenues of establishing

7. *Id.*

8. *Id.*

9. *Id.*

10. Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 U.C. DAVIS L. REV. 1507, 1524 (2021).

11. David Kaufman, *The Fight for Fertility Equality*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/22/style/lgbtq-fertility-surrogacy-coverage.html> [<https://perma.cc/N6FT-RBE2>].

12. Amy Klein, *I.V.F. is Expensive. Here’s How to Bring Down the Cost.*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/article/ivf-treatment-costs-guide.html> [<https://perma.cc/5UWZ-PHYA>].

13. Feinberg, *supra* note 10, at 1524.

14. *Id.*

15. *Id.* at 1526 (“[A] few jurisdictions restrict eligibility by requiring that gametes from at least one of the intended parents be used to conceive the child. Louisiana and North Dakota go even further, requiring that gametes from both of the intended parents be used to conceive the child—thereby excluding cisgender male same-sex couples from eligibility.”).

16. *See id.* at 1509. “[I]f one member of the couple is unable to establish legal parentage, they will lack important parental rights relating to, *inter alia*, custody, visitation, and medical decision-making . . . [and] the child will be deprived of important rights relating to, *inter alia*, support, inheritance, healthcare, and social security.” *Id.* In addition, some states that have addressed gestational surrogacy through a statute or through common law require that all parties have legal representation and follow complex legal procedures in order to recognize the intended parents as the legal parents. *Id.* at 1524-25; *see also* David Dodge, *Legal Basics for L.G.B.T.Q. Parents*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/article/legal-basics-for-lgbtq-parents.html> [<https://perma.cc/C8AX-AVLA>] (reporting that legal fees associated with surrogacy can cost “thousands of dollars”).

17. Feinberg, *supra* note 10, at 1510-11.

parentage” and will be forced to navigate the adoptive process to establish legal parenthood.¹⁸

In an attempt to circumvent these economic and legal barriers to domestic ART services, many LGBTQIA parents turn to international alternatives. This may be because many countries have “more relaxed laws,” are “completely unregulated,”¹⁹ or offer substantially cheaper services.²⁰ Alternatively, some couples may be seeking to grow their families while they are temporarily living abroad. Or, perhaps a close friend, who lives in another country, has volunteered to be the gestational carrier. Regardless of the couple’s particular reasons for choosing to utilize international ART services, their choice does not circumvent all legal hurdles, and they may actually face greater ones.

For example, cisgender same-sex male couples, in particular, may face immigration battles when they return to the United States with their child. Married cisgender same-sex male couples have had their child’s United States citizenship from birth applications denied after using international ART services.²¹ Despite having indisputable evidence that the couple are the sole legal parents of their child, the United States Department of State (State Department) has failed to consider the child to be the marital child of both parents. Instead, because of a State Department policy that required both parents to be biologically related to their child—which is currently impossible for cisgender same-sex male couples—the State Department refused to recognize the child’s citizenship from birth.²² As a result, families across the country have had to face a stress that they could not have imagined: a mixed-status family, where the parents are United States citizens, but their child is not.

This Comment addresses the inadequate relief granted by courts after the State Department denied citizenship from birth to the children of married cisgender same-sex male parents. This Comment also argues that the families’ constitutional claims need to be addressed on the merits in order to prevent future discriminatory action. In Section I, this Comment first outlines three cases from the Districts of Maryland, Georgia, and California. This Section also provides the relevant statutory provisions,

18. *Id.* at 1511.

19. Claire Fenton-Glynn, *Surrogacy: Why the World Needs Rules for ‘Selling’ Babies*, BBC NEWS (Apr. 26, 2019), <https://www.bbc.com/news/health-47826356> [<https://perma.cc/XFR7-RVVV>] (“If their own country does not allow surrogacy, or places restrictions on it, prospective parents can simply travel to somewhere with more relaxed laws, or more problematically, a country where the practice is completely unregulated.”).

20. Surrogacy in India is regularly quoted as costing \$30,000. Darlena Cunha, *The Hidden Cost of International Surrogacy*, THE ATLANTIC (Dec. 22, 2014), <https://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/> [<https://perma.cc/CA9Y-ZP3P>].

21. *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 298 (D. Md. 2020); *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1327 (N.D. Ga. 2020); *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799, at *2 (C.D. Cal. Feb. 21, 2019), *aff’d sub nom.* E. J. D.-B v. United States Dep’t of State, 825 F. App’x 479 (9th Cir. 2020).

22. The Biden Administration has since implemented a policy that recognizes both men in a cisgender same-sex marriage as parents of a child born through international ART services. Press Statement, Ned Price, Dep’t Spokesperson, U.S. Dep’t of State, U.S. Citizenship Transmission and Assisted Reproductive Technology (May 18, 2021), <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/> [<https://perma.cc/DC6R-NK3F>]. However, this relief is inadequate because subsequent administrations could simply revoke the administrative policy. Thus, as this Comment argues, additional protection for cisgender same-sex married men is necessary.

as well as the State Department policy that resulted in these three lawsuits. Section II of this Comment provides an overview of the constitutional protections that have been recognized for LGBTQIA individuals, including the right to marry. This section also discusses *Bostock v. Clayton County* and argues that its broad-sweeping and compelling reasoning ought to provide further constitutional protections for LGBTQIA individuals under the Equal Protection Clause. Finally, in Section III, this Comment proposes how courts might address these three cases if they were to be adjudicated on the merits and argues that such an analysis is needed to best protect cisgender same-sex male parents who choose to utilize international ART services to grow their families.

I. BACKGROUND

A. Cases

Between 2018 and 2019, three families filed actions in federal district courts across the country after each of their children—who were all conceived via international ART services—were denied passports by the State Department. All of the parents were United States citizens and had strong ties to the United States. The State Department, effectuating an administrative policy,²³ refused to issue the passports to all three children because the children did not share a biological tie with *both* of their legal parents. However, because all three families were headed by cisgender same-sex male parents, they could not have both been the biological parents of the children even if they had wanted to be. Despite the parents' lawful marriages, the State Department refused to acknowledge the children as the couples' marital children. As addressed later in this Comment, not only does the relevant statutory provision not require a biological relationship between the child and both parents, but the State Department's policy violates constitutional protections afforded to same-sex married parents. The following subsections share each family's story, in turn.

1. The Kiviti Family

Like many married couples, the Kiviti's relationship developed with the hope and understanding that their family would eventually include children.²⁴ Roe Kiviti, a United States citizen, was born in Israel and moved to the United States in 1982, at the age of four.²⁵ In 2009, after living in the United States as a citizen for nine years, Roe moved back to Israel for work, where he met and fell in love with Adiel, a then-Israeli citizen.²⁶ Adiel and Roe eventually married in Santa Barbara, California, and they both ultimately moved to the United States.²⁷ Eventually, Adiel became

23. This policy has since been amended by the Biden Administration. *Infra* notes 209-10 and accompanying text.

24. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgement and in Opposition to Defendants' Motion to Dismiss at 4, *Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020) (No. TDC-19-2665) [hereinafter Memo in Support of Kiviti].

25. *Kiviti*, 467 F. Supp. 3d at 297.

26. *Id.*

27. *See id.* The Kivitis were married in 2013. *Id.*

naturalized as a United States citizen.²⁸ After they moved back to the United States, but before Adiel was naturalized as a citizen, Roe and Adiel made the decision to begin to grow their family, utilizing international ART services.²⁹

The Kivitis used a Canadian volunteer gestational surrogate, a donor egg, and Roe's genetic material, and, in 2016, Roe and Adiel became the proud parents of L.R.K.³⁰ After L.R.K. was born in Canada, the Kivitis received a Canadian court order that found Roe and L.R.K. shared a biological and genetic relationship, and ordered that L.R.K.'s sole parents were Roe and Adiel.³¹ The surrogate was explicitly found to not be a parent of L.R.K.³² After being issued a Canadian birth certificate, which identified the Kivitis as L.R.K.'s only parents, the Kivitis returned to the United States and sought recognition of L.R.K.'s citizenship from birth.³³ The family applied for L.R.K.'s United States passport with the State Department.³⁴ Without any further inquiry, the State Department issued L.R.K. his passport in January 2017.³⁵

Two years later, hoping to give their son a younger sibling, Roe and Adiel decided to grow their family through an identical reproductive plan.³⁶ This time, however, Adiel—who had been naturalized as a United States citizen—donated his genetic material.³⁷ K.R.K. was born in Canada in 2019.³⁸ Soon thereafter, a Canadian court found that Adiel and K.R.K. shared a genetic and biological relationship, and ordered that Roe and Adiel were K.R.K.'s only parents.³⁹ The surrogate was explicitly found to not be a parent of K.R.K.⁴⁰ The Kivitis subsequently received a Canadian birth certificate that identified Roe and Adiel as K.R.K.'s only parents.⁴¹ The family then applied for K.R.K.'s passport with the State Department.⁴² However, K.R.K., born only two years after L.R.K., did not share the same result as her brother.

Although the State Department told the Kivitis that they could pick up K.R.K.'s passport in a few days, a State Department employee also wrote “surrogacy” on their application.⁴³ Moreover, unlike the passport application process with L.R.K., the State Department called the Kivitis the next day and began inquiring about the Kivitis' surrogacy arrangement.⁴⁴ On July 3, 2019, the State Department informed the Kivitis that K.R.K. had been denied a passport because the State Department did

28. *Id.*

29. Memo in Support of Kiviti, *supra* note 24, at 4.

30. *Kiviti*, 467 F. Supp. 3d at 297-98.

31. *Id.* at 298.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* The State Department never investigated the circumstances of L.R.K.'s conception. *Id.*

36. Memo in Support of Kiviti, *supra* note 24, at 4.

37. *Kiviti*, 467 F. Supp. 3d at 297, 298.

38. Memo in Support of Kiviti, *supra* note 24, at 5.

39. *Kiviti*, 467 F. Supp. 3d at 298.

40. *Id.*

41. *Id.*

42. *Id.*; Memo in Support of Kiviti, *supra* note 24, at 14.

43. Memo in Support of Kiviti, *supra* note 24, at 14.

44. *Kiviti*, 467 F. Supp. 3d at 298.

not find her to be a citizen from birth.⁴⁵ The State Department had applied the Immigration and Nationality Act (INA) “born out of wedlock” statute,⁴⁶ notwithstanding Adiel and Roe’s six-year marriage. Applying that provision, the State Department reasoned that, because K.R.K. was conceived using Adiel’s genetic material, K.R.K. could only derive citizenship from birth from Adiel.⁴⁷ However, Adiel had only resided within the United States as a citizen for approximately four months,⁴⁸ and he did not meet the five-year residency requirements prescribed by the “born out of wedlock” statute.⁴⁹ Because the State Department concluded that K.R.K. was not a citizen from birth,⁵⁰ the Kiviti Family was comprised of three United States citizens and K.R.K., a foreign national.

The Kivitis sued the State Department in the United States District Court for the District of Maryland, raising four claims:⁵¹ (1) the State Department’s basis for denying K.R.K.’s passport was contrary to the text of the INA;⁵² (2) the State Department had impermissibly infringed on their Fifth Amendment substantive due process right “to marry, procreate, and raise their children, and of K.R.K. to obtain United States citizenship at birth;”⁵³ (3) the State Department’s actions “discriminated against the Kivitis as a same-sex couple and against K.R.K. based on the circumstances of her birth and parentage,” which violated the equal protection component of the Fifth Amendment;⁵⁴ and (4) the State Department’s actions violated the Administrative Procedure Act.⁵⁵ The Kivitis petitioned the court to issue a declaratory judgment that K.R.K. is a citizen from birth, order that the State Department issue K.R.K. a passport, declare that the State Department’s policies requiring a biological relationship are unconstitutional and violate the INA, and issue a permanent injunction against the State Department to discontinue their discriminatory treatment.⁵⁶

45. Memo in Support of Kiviti, *supra* note 24, at 15.

46. *Kiviti*, 467 F. Supp. 3d at 298.

47. *See id.* (explaining that because “Roe Kiviti did not have a biological relationship with K.R.K. . . . the State Department evaluated K.R.K.’s passport application under [the born out of wedlock statute]” in reference only to Adiel as the biological father).

48. *See id.* at 297, 298 (Adiel was naturalized on January 8, 2019, and the family applied for K.R.K.’s citizenship on May 1, 2019).

49. *See id.* at 298.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 298-99.

2. The Mize and Gregg Family

James “Derek” Mize was born in Jackson, Mississippi in 1980.⁵⁷ After attending law school in Ohio, Derek moved to New York City, where he met Jonathan Gregg.⁵⁸ Jonathan was a United States citizen who had grown up in London, but had visited the United States frequently throughout his life.⁵⁹ After several months of their long-distance relationship, Jonathan transferred his work from England to his employer’s New York offices.⁶⁰ Similar to the Kivitis, Jonathan and Derek hoped and understood that their future together would include children.⁶¹ The two were married in May 2015, in New York City.⁶²

Jonathan and Derek, ready to grow their family, accepted their close friend’s offer to be their gestational surrogate.⁶³ Their U.K.-based surrogate underwent an ART procedure in October 2017, and S.M.-G. was born the next summer.⁶⁴ Jonathan and Derek were present in the delivery room, cut the umbilical cord, and held their daughter.⁶⁵ After the family spent three days in the hospital with their surrogate, Jonathan and Derek finally left with S.M.-G.⁶⁶ On March 21, 2019, a U.K. court issued a parental order declaring that Jonathan and Derek were, under the law, the parents of S.M.-G, and they were issued a new birth certificate that identified Jonathan and Derek as the only parents of S.M.-G.⁶⁷ However, upon returning to the United States and applying for S.M.-G.’s social security number, they were told that “additional evidence of S.M.-G.’s citizenship was required” and that they should return to London.⁶⁸

Once back in London, the family applied for S.M.-G.’s United States passport at the London-based United States Embassy, providing proof of Jonathan and Derek’s United States citizenship and their marriage certificate.⁶⁹ When asked who S.M.-G.’s father was, the two responded that they both were.⁷⁰ The staff person next asked which of the men’s sperm had been used to conceive S.M.-G., forcing the two parents to describe the ART process.⁷¹ Then, after waiting for three hours, the embassy staff relayed that S.M.-G.’s application was denied.⁷² They were provided

57. Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment 4, *Mize v. Pompeo*, 482 F. Supp. 3d 1317 (N.D. Ga. 2020) [hereinafter *Memo in Support of Mize*]. This article refers to James “Derek” Mize as Derek because the organization representing this family refers to him by his middle name. See, e.g., *Mize v. Pompeo*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/mize-v-pompeo> [https://perma.cc/C4BU-3LCD] (last visited Dec. 23, 2021).

58. See *id.* at 4-5.

59. *Id.* at 5. James was born in 1981 to a U.S.-citizen mother and a U.K.-citizen father. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 6.

65. *Id.*

66. *Id.*

67. *Id.* at 7.

68. *Id.*

69. *Id.*

70. *Id.* at 8.

71. *Id.*

72. *Id.*

both a verbal notice, which dictated that S.M.-G. did not qualify for citizenship from birth, and a written statement, which clearly demonstrated that the embassy had treated them similarly to the Kivitis and refused to recognize that S.M.-G. was the marital child of both Derek and Jonathan.⁷³ Even more shockingly, the embassy concluded that S.M.-G. was not Derek's daughter at all.⁷⁴ Blatantly ignoring their marriage, the embassy determined that Derek's parental relationship with his daughter was irrelevant—simply because he did not share a biological relationship with her.⁷⁵ The embassy denied S.M.-G.'s application because Jonathan, although a long-time United States citizen, had not resided within the United States for the five-year duration prescribed by the INA.⁷⁶ The two parents left the embassy in pain, and with feelings of humiliation.⁷⁷

Derek Mize and Jonathan Gregg brought a lawsuit against the State Department, which alleged nearly identical claims and sought nearly identical relief as the Kivitis.⁷⁸

3. *The Dvash-Banks Family*

Andrew Dvash-Banks was born in the United States, is a United States citizen, and continuously resided in the United States from 1981 to 2005.⁷⁹ Andrew met and fell in love with his husband, Elad Dvash-Banks, while enrolled in a master's degree program in Israel.⁸⁰ Elad and Andrew eventually moved to Canada and were married in Toronto in 2010.⁸¹ The Dvash-Bankses also decided to grow their family through international ART services.⁸² In 2015, the two men entered into a contract with a gestational surrogate who agreed to carry and deliver two embryos.⁸³ Andrew's genetic material was used to fertilize one of the embryos, and Elad's was used to fertilize the other.⁸⁴ The twin boys, E.J. and A.J., were delivered in Ontario, Canada, four minutes apart, in September 2016.⁸⁵

In that same month, an Ontario court declared that Elad and Andrew were the only legal parents of the twin boys.⁸⁶ Four months later, the Dvash-Bankses applied for a United States passport for E.J. and A.J. at the United States Consulate Office in Toronto (the Consulate), providing evidence of the twins' United States citizenship.⁸⁷ In their applications, the parents disclosed that the twins were

73. *Id.*

74. *Id.*

75. *Id.* at 9.

76. *Id.*

77. *See id.*

78. *Compare* Mize v. Pompeo, 482 F. Supp. 3d 1317, 1327 (N.D. Ga. 2020) *with* Kiviti v. Pompeo, 467 F. Supp. 3d 293, 298-99 (D. Md. 2020).

79. Dvash-Banks v. Pompeo, No. 18-523, 2019 WL 911799, at *1 (C.D. Cal. Feb. 21, 2019), *aff'd sub nom.* E. J. D.-B v. United States Dep't of State, 825 F. App'x 479 (9th Cir. 2020).

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at *2.

conceived using ART, and provided documentation that Elad and Andrew were the twins’ fathers, evidence of Andrew’s United States citizenship and residency history, and their marriage certificate.⁸⁸ Despite all this evidence, they were told during their interview that, unless there was a biological relationship between the twins and Andrew, neither twin would qualify for United States citizenship from birth.⁸⁹ Moreover, in order to proceed in their applications, the Consulate required that Andrew and Elad provide additional evidence of Andrew’s biological relationship to each of the twins.⁹⁰ Thus, Elad and Andrew had DNA tests arranged and submitted the results back to the State Department.⁹¹

The DNA results established that A.J. was the biological child of Andrew, and that E.J. was the biological child of Elad.⁹² The Consulate processed A.J.’s passport application, but denied E.J.’s.⁹³ The basis for the denial was “the lack of evidence of a biological connection between Andrew and E.J.”⁹⁴ Thus, the Consulate refused to recognize that the twins were the marital children of both Elad and Andrew.⁹⁵ Rather, through applying the State Department’s policy, the Consulate only recognized that Andrew was the father of A.J. and that Elad was the father of E.J., but refused to recognize that *both* men were the fathers of *both* twins.⁹⁶ In doing so, the Consulate disregarded the marital status of Elad and Andrew. Had the Consulate recognized A.J. and E.J. as the Dvash-Bankses’ marital children, the twins would have both been citizens from birth through Andrew.⁹⁷ Instead, Andrew and Elad were the proud parents of twin boys, but only one of the twins was a United States citizen.⁹⁸ Andrew Dvash-Bank filed a lawsuit against the State Department, alleging nearly identical claims to the Kivitis, and Mize and Gregg Families, and sought nearly identical relief.⁹⁹

To better address how each of the district courts decided all three families’ claims, the subsequent two subsections of this Comment will provide necessary background of the INA provisions at issue, as well as the State Department policy that, when applied, has resulted in the disparate treatment of married cisgender same-sex male parents.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See* Lena K. Bruce, *How to Explain to Your Twins Why Only One Can be American: The Right to Citizenship of Children Born to Same-Sex Couples Through Assisted Reproductive Technology*, 88 *FORDHAM L. REV.* 999, 1002 (2019).

99. *Compare* Complaint for Declaratory & Injunctive Relief, *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019), *aff’d sub nom.* E. J. D.-B v. United States Dep’t of State, 825 F. App’x 479 (9th Cir. 2020), *with* *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 298 (D. Md. 2020), *and* Memo in Support of Mize, *supra* note 57, at 1327. *See also supra* notes 51-56 and accompanying text.

B. The Immigration and Nationality Act: Citizenship from Birth

The United States Constitution “contemplates two sources of citizenship, and two only, —birth and naturalization.”¹⁰⁰ Citizenship by naturalization¹⁰¹ is dictated by the INA.¹⁰² On the other hand, citizenship by birth, pursuant to the Fourteenth Amendment,¹⁰³ is automatically established when an individual is merely born within the United States.¹⁰⁴ Thus, if a child is born outside of the United States, having parents who are United States citizens does not constitutionally guarantee their citizenship from birth.¹⁰⁵ Rather, citizenship by birth for children born abroad is derived if the parents can establish that they meet the requirements within the INA.¹⁰⁶ To this end, Congress has enacted sections 301 and 309 of the INA, which codify the requirements that the parents must meet in order for the child to derive citizenship from birth.¹⁰⁷

1. Section 301 of the INA. Children Born in Wedlock

Section 301 of the INA provides the circumstances in which citizenship is granted to children who are “born of . . . parents,” who are in wedlock, outside of the United States.¹⁰⁸ Specifically, section 301 applies if a child is born abroad to parents who were married at the time the child was born, and at least one of the parents is a United States citizen.¹⁰⁹ If section 301 is applicable, then the statute places residency requirements on the United States citizen parent, which must be satisfied for the child to be a citizen from birth.¹¹⁰ The length of the residency requirement depends upon which of the three statutory categories the parents are classified:¹¹¹ (1) both parents are United States citizens;¹¹² (2) one parent is a United States citizen and the other is a noncitizen United States national;¹¹³ or (3) one parent is a United States citizen and

100. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).

101. Naturalization, as used in this Comment, refers to the process in which the United States confers citizenship upon a person *after* birth through various provisions in the INA. *See* Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(23).

102. *See Wong Kim Ark*, 169 U.S. at 702; INA §§ 101-507, 8 U.S.C. §§ 1101-1537.

103. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

104. *Wong Kim Ark*, 169 U.S. at 702.

105. *See id.* at 702-03.

106. *See id.*

107. *See generally* INA §§ 301, 309, 8 U.S.C. §§ 1401, 1409.

108. *See id.* § 301(c)-(e), (g), 8 U.S.C. § 1401(c)-(e), (g).

109. *See id.*; 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-2(a), <https://fam.state.gov/FAM/08FAM/08FAM030401.html> [<https://perma.cc/N2KF-855U>].

110. INA § 301(c)-(d), (g), 8 U.S.C. § 1401(c)-(d), (g).

111. Bruce, *supra* note 98, at 1007.

112. INA § 301(c), 8 U.S.C. § 1401(c).

113. *Id.* § 301(d), 8 U.S.C. § 1401(d). A United States National is “a citizen of the United States, or [] a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” *Id.* § 101(a)(22), 8 U.S.C. § 1101(a)(22). A United States national typically, though not exclusively, refers to a lawful permanent resident. *See id.* § 101(a)(21), 8 U.S.C. § 1101(a)(21); 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-1(b)(1), <https://fam.state.gov/FAM/08FAM/08FAM030101.html> [<https://perma.cc/UM3P-N459>] (“While most people and countries use the terms ‘citizenship’ and ‘nationality’ interchangeably, U.S. law differentiates between the two. Under current law all U.S. citizens

the other is neither a citizen, nor a United States national.¹¹⁴ Each category is provided different residency requirements, which the parents must have satisfied *prior* to the child’s birth.¹¹⁵

Section 301’s residency requirements decrease as the married couple’s ties to the United States increase.¹¹⁶ For example, the third category has the most stringent requirements, and citizenship is only derived at birth if the United States citizen parent has been “physically present in the United States,” while holding citizenship status, for at least five years.¹¹⁷ In contrast, the first category merely requires that one of the United States citizen parents resided in the United States, while holding citizenship status, at any time before their child is born.¹¹⁸ The second category provides a middle ground, requiring that the United States citizen parent reside in the United States, while holding citizenship status, for one year prior to the child’s birth.¹¹⁹

Thus, the threshold question in determining when to apply section 301 of the INA is whether the child is “born of . . . parents” who are married at the time of the child’s birth. For a cisgender opposite-sex couple, this threshold question is typically met through the child’s father being married to the child’s mother at the time of the child’s birth. However, because neither spouse within a cisgender same-sex male marriage can biologically give birth to a child, this threshold question needs to be satisfied by an alternative means. As argued throughout this Comment, such an alternative ought to involve applying a marital presumption of paternity to the parent who did not donate biological material to conceive the child but is married to the parent that did.

For example, if it is presumed, because of their marital status, that Adiel and Roe are *both* the parents of K.R.K., then section 301 should apply. This is because K.R.K.’s parents, were married at the time that K.R.K. was born, and K.R.K. was born outside of the United States. Because the Kivitis, through a marital presumption, satisfy the threshold question of section 301 of the INA, the analysis would then turn to consider the immigration status of the parents. The Kivitis would be classified within the first category (both parents are United States citizens) because both Adiel and Roe were United States citizens at the time that K.R.K. was born. Finally, looking to the residency requirements, because Roe had resided within the United States as a citizen for at least nine years, and Adiel for three years and five months, *both* fathers would easily surpass the residency requirement associated with the first category (lived in the United States at any time before the child’s birth). Therefore, if Adiel and Roe were *both* presumed to be the parents of K.R.K., then K.R.K. is a citizen from birth pursuant to section 301 and should be issued a passport.

are also U.S. nationals, but not all U.S. nationals are U.S. citizens. The term ‘national of the United States,’ as defined by statute . . . includes all citizens of the United States, and other persons who owe allegiance to the United States but who have not been granted the privilege of citizenship.”).

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

115. *Id.* § 301(c)-(d), (g), 8 U.S.C. § 1401(c)-(d), (g).

116. *Id.*

117. *Id.* § 301(g), 8 U.S.C. § 1401(g).

118. *Id.* § 301(c), 8 U.S.C. § 1401(c).

119. *Id.* § 301(d), 8 U.S.C. § 1401(d).

The predecessor statutes to section 301 of the INA extend back to the early twentieth-century.¹²⁰ The Ninth Circuit held that the intent behind one of the predecessor statutes was to “ensure that parents who transmitted their United States citizenship were sufficiently imbued with American values to convey these ideals to their children.”¹²¹ The Supreme Court echoed this reasoning when it concluded that the residency requirements within the modern statute are evidence of the legislature’s important recognition that “residence in this country [is] the talisman of dedicated attachment.”¹²² Section 301 creates an inversely proportional relationship between the residency requirements and the strength of the parent’s ties to the United States, which are indicated by the parent’s immigration status: the more permanent the parent’s immigration status, the shorter the residency requirement.

2. INA Section 309. Children Born Out of Wedlock

Section 309 of the INA provides the circumstances in which citizenship is granted to children who are “born out of wedlock” to at least one United States citizen parent while outside of the United States.¹²³ Unlike section 301, section 309 categorizes the United States citizen parent(s) by “father” or “mother.”¹²⁴ Citizenship from birth is only derived from a United States citizen “father” if they can meet all four criteria of section 309(a), including having a “blood relationship.”¹²⁵ Additionally, section 309 requires that “fathers” also satisfy section 301(g) (five-year residency requirement).¹²⁶ For “mothers,” section 309(c) grants citizenship if the “mother” merely was a United States national and had resided in the United States for one continuous year prior to the child’s birth,¹²⁷ but does not require them to meet the elements of section 309(a). However, after the enactment of this provision, the Supreme Court held that “mothers” must also satisfy the five-

120. The statute, in its original form, was codified as section 1993 and later replaced by the Nationality Act of 1940. Ann K. Wooster, Annotation, *Validity, Construction, and Application of 8 U.S.C.A. § 1401(c)-(g), Providing for American Citizenship in Certain Circumstances of Child Born Outside United States, or Found Within United States and of Unknown Parentage, and Predecessor Statutes*, 175 A.L.R. FED. 67, at I §2[a] (2002) (explaining that section 1993 was also amended by a 1934 act of Congress to make the statute gender neutral).

121. *Id.* at III § 6 (citing *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000), *reh’g denied*, 529 U.S. 1083 (2000)).

122. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1700 (2017) (quoting *Rogers v. Bellei*, 410 U.S. 815, 834 (1971)); *see id.* (citing *Weedin v. Chin Bow*, 274 U.S. 657, 665-66 (1927)) (“Congress ‘attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent [T]he heritable blood of citizenship was thus associated unmistakably with residence within the country which was thus recognized as essential to full citizenship.’”).

123. INA § 309, 8 U.S.C. § 1409.

124. *Id.*

125. *Id.* § 309(a)-(b), 8 U.S.C. § 1409(a)-(b). Aside from meeting the requirements pursuant to section 301(g), a father must also be able to establish that (1) there is “a blood relationship” between them and the child; (2) the father was a United States national when the child was born; (3) “the father . . . agreed in writing to provide financial support for the [child] until the [child] reaches the age of 18 years;” and (4) the child, while under the age of eighteen, “is legitimated under the law of the [child’s] residence or domicile” and the father has “acknowledge[d] paternity” or “paternity . . . [has been] established by adjudication of a competent court.” *Id.* § 309(a), 8 U.S.C. § 1409(a).

126. *Id.* §§ 301(g), 309(b), 8 U.S.C. §§ 1401(g), 1409(b).

127. *Id.* § 309(c), 8 U.S.C. § 1409(c).

year residency requirement of section 301(g) and held that section 309(c)'s different residency prescription for “mothers” violated the Constitution.¹²⁸

Therefore, if a couple is unable to satisfy the threshold question of section 301 of the INA, then section 309 is applied. A married cisgender same-sex male couple might fail to satisfy the threshold question of section 301 if, for example, the definition of “parent,” within the meaning of the INA, required a biological relationship, and did not recognize a marital presumption. This was exactly what happened to the Kivitis. The State Department refused to recognize *both* parents as the parents of their children because one of them lacked a biological relationship with their child.¹²⁹ Therefore, the State Department applied section 309 instead of section 301.

Likewise, because of the State Department's biological-parent definition, which could only be applied between Adiel and K.R.K., the State Department only considered whether Adiel met the standards of section 309 of the INA.¹³⁰ Therefore, in order for K.R.K. to derive citizenship from birth, Adiel would need to satisfy the requirements of section 309(a) and the residency requirements of section 301(g).¹³¹ Adiel, who had resided in the United States as a citizen for three and a half years, would fail to satisfy the five-year residency requirement of section 301(g), and K.R.K. would not be a citizen from birth.¹³² As demonstrated by this example, whether a parent is analyzed under section 309 or section 301 may have a direct impact on the immigration status of their family, especially if the biological parent is unable to meet the stringent residency requirements of section 301(g).

Some have argued that sections 301 and 309 of the INA essentially adopt the aforementioned common-law presumption that children born in wedlock are the legitimate children of the mother and the mother's spouse, regardless of whether the spouse is the biological parent of the child.¹³³ In this light, section 309 might be most reasonably justified through the purpose of the INA itself: “a liberal treatment of children and . . . keeping families of United States citizens and immigrants united.”¹³⁴ Taking the INA's overarching purpose and balancing it against the aims underlying section 301's residency requirements, Congress may have found a middle ground in section 309 by requiring “fathers” to meet the five-year residency requirement of section 301(g). This balancing also provides justification for why section 309(a)(1) requires that there be a blood relationship for fathers and not

128. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (holding that applying the five-year residency requirement exclusively to “fathers” was a violation of the Equal Protection Clause and, in order to make the provision constitutional while still complying with the legislative intent, the five-year residency requirement pursuant to section 301(g) should also extend to “mothers”). *See also* Bruce, *supra* note 98, at 1008.

129. *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 298 (D. Md. 2020).

130. *See supra* notes 45-50 and accompanying text.

131. *Id.*

132. *Id.*

133. *See, e.g.,* Ashley D. Craythorne, *Same-Sex Equality in Immigration Law: The Case for Birthright Citizenship for Foreign-Born Children of U.S. Citizens in Same-Sex Binational Unions*, 97 TEX. L. REV. 645, 652-53 (2019).

134. H.R. REP. NO. 85-1199, at *2020 (1957); *see also* Craythorne, *supra* note 133, at 652-53 (“Federal courts have repeatedly looked to Congress's legislative intent in interpreting the INA and construed its statutes liberally to preserve the family unit.”).

mothers: rather than trying to tie citizenship to a blood-right, Congress sought to assure that the connection between the child and the father was sufficient.¹³⁵

Although the INA thoroughly details *how* a parent can transmit citizenship to their child, it is ironically silent on *what* constitutes a sufficient parent-child relationship to actually transmit citizenship,¹³⁶ and no holding has answered this question on a national level.¹³⁷ How the parent-child relationship is defined for INA sections 301 and 309 is critical, especially when parents utilize international ART services. This is because citizenship can hinge on whether the parent-child relationship exists between the United States citizen and the child.¹³⁸ In fact, all three cases addressed in this Comment turn on how this relationship is defined. As explained above, if the parent-child relationship is defined in a way that presumed Adiel and Roe—because of their marital status—were *both* the parents of K.R.K., then K.R.K. would have been a citizen from birth under section 301 of the INA. On the other hand, if the parent-child relationship is defined to only recognize biological parents, then a family headed by a married cisgender same-sex male couple will always be subjected to analysis under section 309. This is because, under section 309, for a cisgender same-sex male couple, both parents cannot be the biological parent of their child.

The State Department, through an administrative policy, has defined parent-child relationships as only those that consist of a biological tie,¹³⁹ and this definition is precisely what led to the State Department denying K.R.K., S.M.-G., and E.J. their passports.¹⁴⁰ Under the State Department’s section 309 analysis, if the biological parent is unable to satisfy the five-year residency requirement—like Adiel, Jonathan, and Elad—their child will be denied citizenship from birth.¹⁴¹

135. See *Nguyen v. INS*, 533 U.S. 53, 66-67 (2001). Indeed, the Supreme Court has recognized that the blood relationship requirement of section 309(a) assures that the father knows of the child and has developed a relationship with the child. *Id.*

136. The INA does not define the parent-child relationship with any of the applicable sections. Bruce, *supra* note 98, at 1008; see also Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 420 (2011). While the INA defines “parent” and “child” separately, the definitions are not useful in interpreting INA sections 301 or 309. Bruce, *supra* note 98, at 1008-09.

137. *But see Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (holding that “[t]here is no requirement of a blood relationship” under section 301); *Jaen v. Sessions*, 899 F.3d 182, 186 (2d Cir. 2018) (holding that section 301’s statutory language “born . . . of parents both of whom are citizens of the United States” only pertains to the child’s acquisition of citizenship from birth).

138. Bruce, *supra* note 98, at 1008-09; see also 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-2, <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/N2KF-855U>].

139. 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-2(a)(2), <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/N2KF-855U>] (“To say a child was born ‘in wedlock’ means that the child’s biological parents were married to each other at the time of the child’s birth . . .”). This policy has since been amended by the Biden Administration. See *infra* notes 209-10 and accompanying text.

140. Memo in Support of Kiviti, *supra* note 24, at 6.

141. See, e.g., *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 298 (D. Md. 2020); Memo in Support of Mize, *supra* note 57, at 9; *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799, at *1-2 (C.D. Cal. Feb 21, 2019), *aff’d sub nom.* E. J. D.-B v. United States Dep’t of State, 825 F. App’x 479 (9th Cir. 2020); see also 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-2, <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/N2KF-855U>].

C. The Foreign Affairs Manual

The Secretary of State is statutorily provided the authority to administer the INA regarding “the determination of nationality of a person not in the United States.”¹⁴² A passport issued by the Secretary of State’s proper authority has “the same force and effect as proof of . . . citizenship issued by the Attorney General or by a court having naturalization jurisdiction.”¹⁴³ The Foreign Affairs Manual (the FAM), issued by the Secretary of State, provides “written guidance for [State Department] officials adjudicating passport applications” and governs the operations of the State Department.¹⁴⁴ Through the FAM, the State Department has further defined the parent-child relationship and has provided guidance for consular officers on how to determine whether section 301 (born in wedlock) or section 309 (born out of wedlock) should apply.¹⁴⁵

In order for a consular officer to apply section 301 of the INA, the FAM requires that “*there be a biological relationship between the [United States] citizen parent and the child*”¹⁴⁶ and that “the child’s *biological* parents were married to each other at the time of the child’s birth.”¹⁴⁷ In other words, for section 301 to apply, the FAM requires that the child be biologically related to *both* parents, and the biological parents must have been married when the child was born. Therefore, if both parents are not biologically related to their child—which is always the case for cisgender same-sex male couples—the State Department will consider the child born out of wedlock, notwithstanding the parent’s marital status, and apply section 309 of the INA instead.

Moreover, the FAM states that if a consular officer doubts that “the citizen putative ‘parent’ is biologically related to the child” then “[they] must investigate carefully.”¹⁴⁸ Careful investigation might be triggered, for example, if a cisgender same-sex male couple were to appear before the State Department seeking a passport for their child. Cisgender same-sex male couples cannot possibly both be related to the child by blood, so an officer is more likely to investigate the circumstances of

142. INA § 104(a), 8 U.S.C. § 1104(a).

143. 22 U.S.C. § 2705.

144. *Kiviti*, 467 F. Supp. 3d at 302; see 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL §§ 301.1-1 to 101.2-1, <https://fam.state.gov/Fam/FAM.aspx?ID=08FAM> [<https://perma.cc/UQ3P-2V5K>].

145. *Kiviti*, 467 F. Supp. 3d at 302; see 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL §§ 304.1, 304.2, <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/N2KF-855U>].

146. 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.2-1(b), <https://fam.state.gov/fam/08fam/08fam030402.html> [<https://perma.cc/6TZ4-GJVK>]. The FAM provides discretion to the passport agency, embassies, and consulates to “[a]ssess whether a claimant *has provided sufficient evidence* to establish a derivative claim to U.S. citizenship . . . through review of documentary evidence provided by the claimant.” *Id.* If any doubt arises regarding a biological relationship between the parent and child, the consular officer is “*expected to investigate carefully.*” *Id.*

147. 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-2(a)(2), <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/N2KF-855U>] (emphasis added).

148. *Id.* § 304.1-1(d). This provision provides three examples of when circumstances may raise doubt that the child is not born to “biological parents.” *Id.* Specifically, a consular officer is encouraged to investigate if a child is conceived or born “when either of the alleged biological parents [were not] married,” when names on a birth certificate as the “father and/or mother” are different from the names of “the alleged biological parents,” or if there is “[e]vidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother.” *Id.*

their child's birth. In contrast, a cisgender opposite-sex couple may not be subjected to the same careful investigation because the couple may not raise the officer's suspicions. Careful investigation might include questions about the couple's surrogacy arrangements, biological relationship to the child, citizenship status, and residency history.

In this regard, the State Department's policy categorically and disparately affects married cisgender same-sex male parents who choose to participate in international ART services.¹⁴⁹ Under the FAM's definition of the parent-child relationship, the children of these parents will never be considered born in wedlock, even when their legal parents are married long before they were born. Not only can this directly impact the child's immigration status, but it also marks the federal government's failure to treat same-sex and opposite-sex couples equally.

Prior scholarship has brought attention to the State Department's erroneous interpretation of section 301 of the INA, as well as the constitutional concerns that the policy raises.¹⁵⁰ Lena Bruce argues that biology-based parentage is incongruent with the INA's emphasis on "[f]amily unification" and that the State Department's policy relies on technicalities that are arbitrary and do not align with many states' movements towards intent-based parental rights.¹⁵¹ Bruce correctly argues that same-sex parent's intentional use of ART to grow their families meets the aims of section 301. Contrary to the State Department's contentions otherwise, K.R.K. should have been found to be a citizen from birth because she was the marital child of Adiel and Roe. As the marital child of the Kivitis, the State Department should have analyzed K.R.K.'s citizenship from birth under section 301. Instead, the State Department only considered K.R.K.'s citizenship status under section 309, as it applied to Adiel. The State Department reasoned that K.R.K. lacked a "biological relationship to Roe" and, therefore, could only claim citizenship from birth through her relationship with Adiel.¹⁵²

Bruce's conclusion is underscored by the constitutionally protected substantive due process rights that have been extended to married same-sex couples.¹⁵³ In addition, the Supreme Court's compelling and broad-sweeping reasoning in *Bostock v. Clayton County*, although specific to Title VII of the Civil Rights Act, suggests

149. See Bruce, *supra* note 98, at 1010 ("This means that, in same-sex relationships, at least one intended parent will always lack a biological connection with the child and, as a result, never be legally recognized as the parent of the child under the INA."). Although the FAM creates a small exception by defining a biological mother as "either the genetic mother or the gestational mother," it only covers same-sex parents in which one parent is able to provide an egg donation and the other is able to be the gestational carrier. *Id.* at 1010-11 (emphasis in original); see also 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 304.4-1(D)(1)(c), <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/N2KF-855U>] ("A woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship. In other words, a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby).").

150. See, e.g., *id.* at 1012-24.

151. See *id.* at 1016-20 (arguing that recent cases arising pursuant to the State Department's policy "exemplify how, in the age of ART, a biology-based definition of parentage leads to senseless citizenship results").

152. Memo in Support of Kiviti, *supra* note 24, at 6.

153. See *infra* Section II.

that the Court may begin to recognize that discrimination based on sexual orientation is a form of sex-based discrimination and subject to intermediate scrutiny under the Equal Protection Clause.¹⁵⁴ Although the Kivitis, Mize and Gregg, and Dvash-Banks families asked the courts to recognize their families’ constitutional rights and protections, each district court refused to evaluate their constitutional claims, instead focusing on the plain language of the statute.

D. The Resulting Lawsuits and Constitutional Avoidance

Although all three families raised constitutional issues in their complaints, the district courts failed to adjudicate those claims on the merits. The canon of constitutional avoidance applies when “statutory language is susceptible of multiple interpretations,” and one of the interpretations reasonably raises constitutional doubts.¹⁵⁵ If invoked, the canon allows the court to “shun [such] an interpretation” and, instead, “adopt an alternative [interpretation] that avoids those problems.”¹⁵⁶ However, the alternative interpretation must be “plausible,” “fairly possible,” or “reasonable.”¹⁵⁷ Additionally, even if the court is to rely on the canon of constitutional avoidance, it “still must *interpret* the statute, [and] not rewrite it.”¹⁵⁸ Therefore, at its core, the canon of constitutional avoidance permits a court to adopt an interpretation of an ambiguous statute in a way that would not raise constitutional questions, and it allows the court to avoid a holding on the merits of the constitutional claim.¹⁵⁹

In the Kiviti’s case, the court reasoned that it did not need to invoke the canon of constitutional avoidance because section 301 of the INA, based on its plain language, does not require a biological relationship between both parents.¹⁶⁰ In the Mize and Gregg family’s claim, the court also found that section 301 did not require a blood relationship between both parents; however, the court hinged its reasoning on the canon of constitutional avoidance.¹⁶¹ Finally, in the Dvash-Bankses’ claim, the United States District Court for the Central District of California held that the family’s constitutional claims were mooted after finding that the plain language of section 301 does not require a biological relationship.¹⁶² Despite reaching a favorable outcome for the plaintiffs in each case, failing to adjudicate the constitutional claims on the merits enables the State Department to resume this discriminatory practice. Further, this failure leaves an unacceptable ambiguity as to which immigration benefits, if any, apply to married same-sex couples and their children under the equal protection guarantees of the Due Process Clause.

154. See generally Andrew Koppelman, Headnote, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1 (2020) (arguing that, despite the persuasive reasoning in the dissents, the reasoning in *Bostock* should apply generally to LGBT-based discrimination).

155. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

156. *Id.*

157. *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1333 (N.D. Ga. 2020) (citing *Jennings*, 138 S. Ct. at 842).

158. *Jennings*, 138 S. Ct. at 837 (emphasis in original).

159. See *id.* at 836.

160. *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 313 (D. Md. 2020).

161. *Mize*, 482 F. Supp. 3d at 1335-42.

162. *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799, at **7-8 (C.D. Cal. Feb. 21, 2019), *aff’d sub nom.* *E. J. D.-B v. United States Dep’t of State*, 825 F. App’x 479 (9th Cir. 2020).

I. Kiviti v. Pompeo

The Kivitis filed their lawsuits in the United States District Court for the District of Maryland in September 2019. They asked the court to, *inter alia*, declare that the State Department's biological definition of the parent-child relationship is contrary to the intent of the INA, and that the State Department's policy violated their and K.R.K.'s Fifth Amendment rights.¹⁶³ However, after the State Department's motion for summary judgment, the court refused to invoke the canon of constitutional avoidance, finding that, under the plain language of the statute, section 301 of the INA does not require a biological tie between both parents and the child.¹⁶⁴ Therefore, the court did not need to reach the constitutional question.¹⁶⁵

The court recognized that, on its face, section 301 does not provide for a biological requirement.¹⁶⁶ Thus, the narrow issue before the court was whether the statutory language "born . . . of parents" *implies* that section 301 requires "both married parents [be] biologically related to [the] child."¹⁶⁷ After acknowledging that both the Ninth and Second Circuits have held that section 301 of the INA does not require a biological relationship,¹⁶⁸ the court next turned to its own statutory interpretation.¹⁶⁹

The court first concluded that the term "parents" did not require a biological tie.¹⁷⁰ It reasoned that although the INA references "parents" and provides contextual definitions in some provisions, no decisive definitions are found within the same subchapter as sections 301 and 309 of the INA.¹⁷¹ Therefore, the court turned to the common law meaning of the word "parent," found that the term refers to relationships that do not have a biological tie, and recognized the common law presumption of legitimacy, which presumes that a child born to a married couple is the child of both spouses.¹⁷²

The court also rejected the State Department's contention that "the dictionary definitions of 'born' and 'of,'" when combined, create a meaning "that the child 'originates or derives from those parents,'" which can only apply to biological parents.¹⁷³ The court first reasoned because Congress used "born of," a judicially created concept, Congress intended to invoke the judicially recognized meaning.¹⁷⁴ Additionally, the court reasoned that the term "born . . . of" inherently raises a range

163. *Kiviti*, 467 F. Supp. 3d at 298.

164. *Id.* at 311-13.

165. *Id.* at 313.

166. *Id.* at 304.

167. *Id.*

168. *Id.* at 304-05; *see Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (holding that "[t]here is no requirement of a blood relationship" under section 301); *Jaen v. Sessions*, 899 F.3d 182, 189-90 (2d Cir. 2018) (holding that section 301's statutory language "born . . . of parents both of whom are citizens of the United States" does not require a blood relationship).

169. *Kiviti*, 467 F. Supp. 3d at 306.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 307.

174. *See id.* at 307-308 (citing *Midlantic Nat'l Bank v. N.J. Dep't Env't Prot.*, 474 U.S. 494, 501 (1986)).

of interpretations, some of which do not include a biological relationship, such as couples who “play a fundamental and instrumental role in the creation of [a] child” via ART.¹⁷⁵

Next, the court compared the statutory scheme of section 301 with section 309 of the INA.¹⁷⁶ Despite the State Department’s contentions to the contrary, the court reasoned that the contrast between the two provisions only underscores its finding that section 301 does not require a biological relationship.¹⁷⁷ The court reasoned, in part, that Congress would have included a blood relationship requirement in section 301 if it wanted to, and that Congress’s inclusion of a “blood relationship” in section 309 of the INA demonstrated that it knew how to do so.¹⁷⁸

Finally, the court recognized that the State Department’s analysis of K.R.K.’s citizenship from birth under section 309 led to a result that conflicted with the language of that statute.¹⁷⁹ This is because, under the State Department’s analysis, if both Adiel and Roe are not considered the parents of K.R.K., then her parents must be Adiel and either an anonymous egg donor or the gestational surrogate.¹⁸⁰ However, neither the egg donor nor the surrogate have any legal parent status.¹⁸¹ It follows that the State Department cannot strictly apply section 301(g), which is only triggered when a child is born out of wedlock to one United States citizen parent *and* one noncitizen parent, because K.R.K. would technically only have one parent.¹⁸² Thus, section 309 cannot be strictly adhered to, nor reconciled with, the circumstances of K.R.K.’s birth.¹⁸³

Because the District Court concluded that section 301 does not require a blood relationship, it follows that K.R.K. qualified for citizenship from birth because she was born in wedlock to Adiel and Roe, both of whom had resided in the United States before K.R.K.’s birth.¹⁸⁴ Because the court was able to interpret section 301 of the INA based on its plain language, the court did not need to apply the canon of constitutional avoidance.¹⁸⁵ According to the *Kiviti* court, the statutory language was not ambiguous and did not raise any interpretations that would possibly be unconstitutional.¹⁸⁶ Therefore, the court failed to address the Kivitis’ constitutional claims on their merits and merely provided dicta to how the constitutional argument might result.

175. *Id.* at 308.

176. *Id.*; *see also supra* Section I.B.

177. *Kiviti*, 467 F. Supp. 3d at 308.

178. *Id.* Likewise, Congress uses the term “natural parent” elsewhere in the INA but does not include such a term in section 301. *Id.*

179. *Id.* at 309. The court also addressed some of the State Department’s arguments that fell outside of the plain language of the INA. *Id.* at 309-12. This Comment does not address these arguments.

180. *See id.* at 310.

181. *See id.*

182. *Id.*

183. *Id.*

184. *See id.* at 314.

185. *Id.* at 313.

186. *Id.* Nonetheless, the court provided an alternative argument that outlined the constitutional protections and rights that have been recognized for married same-sex couples and their children. *Id.* at 313-14. The constitutional considerations raised by the court are addressed in Section II of this Comment.

2. *Mize v. Pompeo*

Derek and Jonathan filed their lawsuit in the District Court for the Northern District of Georgia in July 2019.¹⁸⁷ Like the *Kivitis*, they requested that the court declare that the State Department's biological definition for the parent-child relationship is contrary to the INA and that the State Department's policy violated their and S.M.-G.'s Fifth Amendment rights.¹⁸⁸ However, unlike the *Kiviti* court, the *Mize* court held that section 301 of the INA does not require that a biological relationship exist between both parents and the child *because of* the canon of constitutional avoidance.¹⁸⁹

The court first identified Supreme Court precedent that ultimately requires that the government give "married same-sex couples access to the constellation of benefits that the State has linked to marriage," and recognize that citizenship from birth "could reasonably be viewed as a 'benefit.'"¹⁹⁰ Therefore, the court concluded that the State Department's definition of the parent-child relationship, which disparately impacts the children of married cisgender same-sex male parents, could reasonably raise serious doubts about section 301's constitutionality.¹⁹¹

Next, the court concluded that the ordinary meaning of the term "born . . . of parents" within section 301 is "reasonably consistent" with both the biological and non-biological readings.¹⁹² The court concluded that the word "of" indicates "origin," similar to how "born of" is a common way to describe ancestral descent.¹⁹³ In the alternative, the court reasoned that the term could be read liberally because "of" has lost its precision over time and may indicate an attenuated connection in some instances.¹⁹⁴ Therefore, the biological requirement may be "more weight . . . than ["of"] can bear."¹⁹⁵ Moreover, under the broader meaning, the term could refer to a child that "originate[s] from parents other than through a genetic relationship, such as where two married parents both play a fundamental and instrumental role in the creation of the child" via ART.¹⁹⁶ Like the *Kiviti* court, the *Mize* court also concluded that Congress would have included a blood relationship in section 301 if it wanted one, and because "Congress does not 'hide elephants in mouseholes,'" it is unlikely that Congress would have used a "vague, two-letter preposition to implicitly incorporate such a weighty [biological] requirement."¹⁹⁷

Because the biological and non-biological definitions both were "reasonably consistent" with the language and construction of section 301, and the biological definition "would raise serious constitutional questions," the court concluded that the canon of constitutional avoidance required that section 301 be interpreted to not

187. *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1327 (N.D. Ga. 2020).

188. *Compare id.*, with *Kiviti*, 467 F. Supp. 3d at 298.

189. *Mize*, 482 F. Supp. 3d at 1332.

190. *Id.* at 1334-35 (citing *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017)).

191. *Id.* at 1335.

192. *Id.* at 1338.

193. *Id.* at 1336-37.

194. *Id.* at 1337.

195. *Id.*

196. *Id.* (quoting *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 308 (2020)).

197. *Id.* at 1339.

require a biological tie between both parents and the child.¹⁹⁸ Although the court ordered that the State Department issue S.M.-G. a passport, the court’s use of the canon of constitutional avoidance allowed it to circumvent addressing the constitutional claims on the merits.

3. *Dvash-Banks v. Pompeo*

The Dvash-Bankses filed their lawsuit in the District Court for the Central District of California in January 2018.¹⁹⁹ The couple moved for summary judgment, requesting that the court declare (1) that E.J. is a citizen from birth pursuant to section 301 of the INA; and (2) declare that the State Department’s policy violated their and S.M.-G.’s Fifth Amendment rights.²⁰⁰ In addressing the first claim, the court relied heavily on *Scales v. INS* and *Solis-Espinoza v. Gonzales*, which established Ninth Circuit precedent that section 301 “does not require a person born during their parents’ marriage to demonstrate a biological relationship with both of their married parents.”²⁰¹ The court reasoned that the circumstances of E.J.’s birth, aside from the gender of his parents, were indistinguishable from the facts in *Scales* and *Solis-Espinoza*, and that those cases should control.²⁰²

Additionally, the *Dvash-Banks* court reasoned that by including a blood relationship in section 309 of the INA, but not section 301, “Congress made it clear that it intended children born in and out of wedlock to be treated differently for purposes of acquiring [United States] citizenship.”²⁰³ Moreover, such a finding is consistent with the legislative history of the provision, which prioritizes keeping families comprised of both citizens and noncitizens together and treating children generously.²⁰⁴ Despite the court’s simple analysis in holding that E.J. was a citizen from birth,²⁰⁵ the court failed to address the Dvash-Bankses’ constitutional claims on the merits.²⁰⁶ Instead, the court dismissed their constitutional claims for mootness after it held that E.J. was a citizen from birth because the statutory interpretation favored the Dvash-Bankses’ first claim.²⁰⁷ Subsequently, the Ninth Circuit affirmed the district court.²⁰⁸

198. *Id.* at 1342. The court also founded its reasoning on the State Department’s inability to foreclose the non-biological definition as the only reasonably consistent interpretation. *Id.* at 1340-42.

199. *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799, at *2 (C.D. Cal. Feb. 21, 2019), *aff’d sub nom.* E. J. D.-B v. United States Dep’t of State, 825 F. App’x 479 (9th Cir. 2020).

200. *Id.*

201. *Id.* at *7 (citing *Scales v. INS*, 232 F.3d 1159, 1162 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093 (9th Cir. 2005)).

202. *Id.*

203. *Id.*

204. *Id.* at *8.

205. *Id.*

206. *Id.*

207. *Id.* at **8-9.

208. E. J. D.-B v. United States Dep’t of State, 825 F. App’x 479, 480 (9th Cir. 2020), *aff’g* *Dvash-Banks v. Pompeo*, No. 18-523, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019).

4. *The Failures of Constitutional Avoidance*

Despite each family obtaining a favorable outcome, it remains critical for the federal courts to analyze all three families' claims on the merits. First and foremost, within the first five months of President Biden's term, the State Department updated its policy so that children born via international ART services to married cisgender same-sex male couples are granted citizenship from birth.²⁰⁹ Although the State Department updated its interpretation and application of section 301 of the INA,²¹⁰ this update remains an administrative policy that is subject to the political ebbs and flows of the executive branch. In other words, administrative actions are implemented unilaterally, and subsequent Presidents may undo this policy within the first few months of their administration. Therefore, without federal courts also reaching a conclusion on the merits, any State Department policy updates may only provide relief that is limited in duration and dependent upon the political climate of the moment.

Second, as a matter of jurisdictional authority, federal court precedent is only controlling for the administrative agency offices that operate within its jurisdiction.²¹¹ For example, the holding in the *Kivitis*' case that section 301 does not require that both parents have a biological relationship with their child is only controlling for the government agency offices operating within the District of Maryland. As a result, if the State Department's policies were reverted to their pre-Biden Administration version, a married cisgender same-sex male couple who uses international ART services and seeks a passport for their child outside of the Ninth Circuit, Maryland, or Georgia, will likely face the same discriminatory treatment. Therefore, it is crucial that the State Department's disparate treatment of same-sex parents is held to be constitutionally impermissible by the Supreme Court. Finally, because Congress has been unable to pass comprehensive immigration reform since 1986,²¹² establishing long-lasting protections for future couples will likely be left to the Supreme Court or piecemeal legislative amendments to the INA.

More importantly, *Mize* underscores that some courts may conclude that section 301 of the INA requires a biological tie. Although the cases mentioned in this Comment reached the same outcome, such results are not guaranteed in future cases. For example, although the *Kiviti* court was convinced that the plain language of

209. See Press Statement, Ned Price, Dep't Spokesperson, U.S. Dep't of State, U.S. Citizenship Transmission and Assisted Reproductive Technology (May 18, 2021), <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/> [<https://perma.cc/DC6R-NK3F>].

210. *Id.* (announcing the updated State Department policy to grant citizenship from birth to children who are "born abroad to parents, at least one of whom is a U.S. Citizen and who are married to each other at the time of birth . . . if [the children] have a genetic or gestational tie to at least one of their parents and meet the INA's other requirements . . ."); see Sarah Zhang, *The IVF Cases that Broke Birthright Citizenship*, THE ATLANTIC (June 10, 2021), <https://www.theatlantic.com/science/archive/2021/06/ivf-us-birthright-citizenship/619155/> [<https://perma.cc/U8YT-5F7U>].

211. *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987), *cert. denied*, 501 U.S. 1217 (1991) ("Administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit . . .").

212. See Mariela Olivares, *The 1986 Immigration Reform and Control Act as Antecedent to Contemporary Lantina/o/x Migration*, 37 CHICANA/O-LATINA/O L. REV. 65, 70 (2020) (the IRCA was passed by Congress in 1986).

section 301 did not require a biological tie, the *Mize* court was willing to entertain the notion that the term “born . . . of parents” could possibly be construed to require that both parents and the child are biologically related. Therefore, it is plausible that a district court in another state might go one step further than the *Mize* court and conclude that Congress intended the term “born . . . of parents” to require a biological tie. If this were the case, that court would likely deny the child citizenship from birth and allow the State Department to continue its discriminatory application of section 309 within its jurisdiction.

Furthermore, if lower courts fail to address the issue on the merits, the Supreme Court may decide to only take up the narrow issue of whether the methods of statutory interpretation or the canon of constitutional avoidance were properly applied. Likewise, courts that fail to address the constitutional issues on the merits leave important questions unanswered: (1) whether citizenship status falls within the constellation of benefits associated with marriage and is, therefore, protected under the equal protection guarantees of the Due Process Clause; and (2) if citizenship from birth is not a constitutionally protected benefit, whether discrimination based on an individual’s sexual orientation, in light of *Bostock v. Clayton County*, is entitled to closer scrutiny under the Equal Protection Clause.

II. CONSTITUTIONAL PROTECTIONS FOR SAME-SEX PARENTS

The Supreme Court of the United States, throughout the last three decades, has gradually become more cognizant of the LGBTQIA community and the discrimination that community faces. The Due Process Clause guarantees same-sex couples the right to marry, as well as the same benefits given to opposite-sex couples through marital status—including those associated with parental rights.²¹³ Additionally, the Supreme Court, in *Bostock v. Clayton County*, has recently accepted compelling and broad-sweeping reasoning that may classify LGBTQIA discrimination as a form of sex-based discrimination.²¹⁴ Such a classification, if extended to the Equal Protection Clause, would raise the level of scrutiny currently applied to same-sex couples from rational basis to intermediate scrutiny. Regardless of whether *Bostock* might be extended, the Supreme Court should find that the State Department’s analysis of families like the Kivitis, Mize and Gregg, and Dvash-Bankses is constitutionally impermissible.

A. *The Right to Marry and the Benefits that Follow*

Over the last decade, the Supreme Court has continually recognized and affirmed the existence of constitutional protections for LGBTQIA persons under the Due Process and Equal Protection Clauses. In the 1996 case *Romer v. Evans*, the Court first recognized that the Equal Protection Clause prohibits a state from barring legislative, executive, or judicial action aimed at protecting “gays and lesbians” as a

213. See *Obergefell v. Hodges*, 576 U.S. 644, 665-66 (2015).

214. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

class.²¹⁵ In that case, the Court reasoned that the Colorado amendment impermissibly “harm[ed] a politically unpopular group” because it did not rationally relate to “a legitimate governmental interest.”²¹⁶ Thus, *Romer* recognized that “gays and lesbians” should be afforded at least some protections as a class.²¹⁷ Moreover, some Justices have argued that the standard of review applied in *Romer* was actually “a more searching form of rational basis” for a law that “desired to harm a politically unpopular group.”²¹⁸

In *Lawrence v. Texas*, the Supreme Court overruled *Bowers v. Hardwick*²¹⁹ and struck down a Texas anti-sodomy law²²⁰ because it was unconstitutional pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²²¹ In *Bowers*, the Court had upheld a Georgia anti-sodomy law that Hardwick had been charged with after “committing [sodomy] with another adult male in the bedroom of [Bowers’s] home.”²²² The *Bowers* Court reasoned that granting “homosexual conduct” privacy protections would create a slippery slope for protecting actions of “adultery, incest, and other sexual crimes . . . committed in the home.”²²³ In its decision to overturn *Bowers*, the *Lawrence* Court reasoned that, under the Due Process Clause, a state may not demean or control gay individuals through criminalizing their private sexual conduct, and a person’s right to liberty prevents such government intervention.²²⁴ Thus, in *Lawrence*, the Court recognized, for the first time, that the Due Process and Equal Protection Clauses recognize a “realm of personal liberty” for LGBTQIA individuals.²²⁵

Ten years later, in *United States v. Windsor*, the Supreme Court struck down a provision within the Defense of Marriage Act of 1996 (“DOMA”)²²⁶ because it too violated the Fifth Amendment’s Due Process Clause and the Equal Protection Clause.²²⁷ DOMA contained two separate provisions that targeted same-sex couples. The first provision allowed States to refuse to recognize same-sex marriages performed under the laws of other States.²²⁸ The second provision amended the federal definition of “marriage” within the United States Code to exclude same-sex

215. *Romer v. Evans*, 517 U.S. 620, 623-24 (1996). This article uses LGBTQIA to reference sexual orientation, sexual identity, and gender identity, and only uses “gays and lesbians” here because of the classification drawn by the *Romer* Court.

216. *Id.* at 634 (emphasis omitted) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

217. *Id.*

218. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

219. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

220. TEX. PENAL CODE ANN. § 21.06 (West 2003) (“A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”).

221. *Lawrence*, 539 U.S. at 578-79.

222. *Bowers*, 478 U.S. at 188, 196.

223. *Id.* at 195-96.

224. *Lawrence*, 539 U.S. at 578.

225. *See id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

226. 1 U.S.C. § 7 (1997), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013).

227. *Windsor*, 570 U.S. at 775.

228. 28 U.S.C. § 1738C (1997), *invalidated by* *Obergefell v. Hodges*, 576 U.S. 644 (2015) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”).

marriages.²²⁹ As a result of the second provision, Edith Windsor, who had received the entirety of her deceased wife’s estate, was not afforded the same tax benefits that a cisgender opposite-sex couple would have been given.²³⁰ The *Windsor* Court reasoned that DOMA “[restricts] and [restrains] . . . persons who are joined in same-sex marriages made lawful by the State” and that the Act “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.”²³¹ Moreover, the *Windsor* Court concluded that the government had failed to assert a “legitimate purpose [that] over[ame] the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”²³² Though, because *Windsor* only raised the issue of the second provision, the Court did not consider whether the right to marry was also constitutionally guaranteed for same-sex couples.²³³

However, in *Obergefell v. Hodges*, the Court answered that remaining question.²³⁴ In 2015, the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee that “same-sex couples may exercise the right to marry” in all states and that marriages of both opposite-sex and same-sex couples must be “on the same terms and conditions.”²³⁵ The *Obergefell* Court founded its reasoning on “four principles and traditions,” which demonstrated why “marriage is fundamental under the Constitution” and why it must “apply with equal force to same-sex couples.”²³⁶ In its first principle, the Court analogized the right to marry with the personal choices of “contraception, family relationships, procreation, and childrearing . . . which are [all] protected by the Constitution.”²³⁷ The first principle recognized that the right to marry is “a personal choice . . . inherent in the concept of individual autonomy.”²³⁸ In its second principle, the Court reasoned that the right for same-sex couples to marry is fundamental because “it supports a two-person union unlike any other in its importance to the committed individuals.”²³⁹ The Court also recognized that same-sex couples’ right to intimacy, as found in *Lawrence*, does not stop at prohibiting

229. 1 U.S.C. § 7 (1997), *invalidated by Windsor*, 570 U.S. 744 (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

230. *Windsor*, 570 U.S. at 749-751.

231. *Id.* at 775.

232. *Id.*

233. *See Id.* at 752.

234. *See Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015).

235. *Id.*

236. *Id.* at 665.

237. *Id.* at 666.

238. *Id.* at 665.

239. *Id.* at 666.

criminalization, but extends into marriage, where same-sex couples can “achieve the full promise of liberty.”²⁴⁰

Most importantly, the Court’s third principle focused on the “safeguards” that the right to marry provides for “children and families,” and that the concept of marriage is meaningfully related to “childrearing, procreation, and education.”²⁴¹ The Court went so far as to say that child rearing is so “central [a] premise” to the right to marry that denying this right to same-sex couples conflicts with marriage as a whole.²⁴² Thus, the effect on the child was a significant factor for the Court, which reasoned that “without the recognition, stability, and predictability marriage offers, [same-sex couples’] children suffer the stigma of knowing their families are somehow lesser . . . [which] harm[s] and humiliate[s] the children.”²⁴³ Even though the ability to procreate “is not . . . a prerequisite for a valid marriage,” the Court clearly identified that the stability that marriage brings to parenting is an essential factor in recognizing a same-sex couple’s right to marry.²⁴⁴ The Court also realized that marriage, parental rights, and childrearing—which are all protected by the Due Process Clause—are intrinsically intertwined.

Finally, the fourth principle recognized that “marriage is a keystone of our social order” because it bestows significant legal rights to the married couple and “marriage is ‘the foundation of family and of society, without which there would be neither civilization nor progress.’”²⁴⁵ Thus, marriage serves as a building block of our community at a national level.²⁴⁶ For this reason, states have extended rights, benefits, and responsibilities to its citizens through marriage.²⁴⁷ Likewise, state-recognized marriage also confers a significant degree of federal status through thousands of provisions.²⁴⁸ Accordingly, the Court reasoned that, by linking marriage to a constellation of rights and benefits, the states have made the right to marry a fundamental right and excluding same-sex couples from these rights is stigmatizing, demeaning, and “lock[s] them out of a central institution of the Nation’s society.”²⁴⁹

240. *Id.* “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.” *Id.* at 667.

241. *Id.* at 668; *see also* *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”).

242. *Id.* (reasoning that because “many same-sex couples [already] provide loving and nurturing homes to their children, whether biological or adopted,” the children will ultimately “suffer the significant material costs of being raised by unmarried parents”).

243. *Id.*

244. *Id.* at 669.

245. *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

246. *Id.*

247. *Id.* at 670 (“These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.”).

248. *Id.*

249. *Id.*

Two years later, the Supreme Court affirmed *Obergefell* in *Pavan v. Smith* and further solidified the concept that marriage and parental rights are inseparable.²⁵⁰ In that case, an Arkansas law required that “the name of the mother’s male spouse [] appear on the child’s birth certificate—regardless of his biological relationship to the child.”²⁵¹ Yet the Arkansas Supreme Court had ruled that Arkansas did not need to, when issuing a birth certificate, include the female spouses of women who give birth in the state, despite the child being born under the same circumstances as a heterosexual couple.²⁵² The case was brought by two cisgender married same-sex female couples, who had each conceived their child via anonymous sperm donation.²⁵³ Both couples were issued birth certificates that only listed the gestational mother as a parent—even though both parents had completed the required paperwork.²⁵⁴ The couples argued that the Arkansas law violated their constitutional rights recognized in *Obergefell*.²⁵⁵

The Supreme Court held that Arkansas’s “differential treatment [of same-sex parents] infringes *Obergefell*’s commitment to provide same-sex couples ‘the constellation of benefits that the States have linked to marriage.’”²⁵⁶ The Court affirmed that, when it listed the constellation of benefits in *Obergefell*, it expressly stated that both same-sex and opposite-sex couples must have equal access to “birth and death certificates.”²⁵⁷ The Court reasoned that the “Arkansas law makes birth certificates about more than just genetics”²⁵⁸ because even when an opposite-sex couple conceives with artificial insemination, state law requires that both married parents be listed on a birth certificate.²⁵⁹ However, the same requirement was not applied to same-sex couples.²⁶⁰ Because Arkansas had used its “[birth] certificates to give married parents a form of legal recognition that is not available to unmarried

250. See *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017).

251. *Id.* at 2077. The law required that “when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child’s birth certificate.” *Id.* at 2078 (citing ARK. CODE ANN. § 20-18-401(f)(1) (2015)).

252. *Id.* at 2077-78 (The “state law, as interpreted by the court below, allows Arkansas officials in those very same circumstances to omit a married woman’s female spouse from her child’s birth certificate. As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school”).

253. *Id.* at 2077.

254. *Id.*

255. *Id.*

256. *Id.* (quoting *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015)).

257. *Id.* at 2078 (quoting *Obergefell*, 576 U.S. at 670). The court had intentionally listed “birth and death certificates” within the examples provided in *Obergefell* because “[s]everal of the plaintiffs in *Obergefell* challenged a State’s refusal to recognize their same-sex spouses on their children’s birth certificates” and the Court explicitly wished to hold “the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples.” *Id.*

258. *Id.* Arkansas had defended its law by arguing that “being named on a child’s birth certificate is not a benefit that attends marriage [but instead] . . . a device for recording biological parentage—regardless of whether the child’s parents are married.” *Id.*

259. *Id.*

260. *Id.*

parents . . . Arkansas may not . . . deny married same sex couples that recognition.”²⁶¹

Thus, the Supreme Court has held and reaffirmed that same-sex couples are not only guaranteed the right to marry, but also must be granted the same benefits associated with marriage that are provided to opposite-sex couples. Moreover, this “constellation of benefits,” as well as the foundation that guarantees the right to marry, are fundamentally intertwined with parental rights. Therefore, it is not a far stretch to imagine that extending citizenship to a child born to same-sex parents ought to be considered a benefit within the constellation of benefits of marriage. Without such a benefit, United States citizen parents may not rear their children within the United States and their children surely face the stigma of knowing that because of the circumstances of their birth, their family is lesser.

Pavan supports the understanding that states must extend their presumption of parentage laws to married same-sex couples where one of the spouses gives birth to the child.²⁶² Moreover, some states have made their marriage-based presumptive parentage laws gender-neutral to align with *Pavan* and *Obergefell*.²⁶³ However, these revised, gender-neutral presumptions cannot apply to cisgender same-sex male couples because neither parent can give birth to their child.²⁶⁴ Thus, even these statutes do not meet the requirements of *Obergefell* and *Pavan*. Similarly, when the State Department grants immigration benefits to opposite-sex couples and cisgender same-sex female couples, but withholds such benefits from cisgender same-sex male couples, it violates the cisgender same-sex male parents’ due process and equal protection rights.

B. Bostock: A Shift in How the Supreme Court May View Discrimination on the Basis of Sexual Orientation

In *Bostock v. Clayton County*, the Supreme Court extended Title VII of the Civil Rights Act, which prohibits discriminatory employment decisions based on “race, color, religion, sex, or national origin,”²⁶⁵ to also prohibit an employer from firing a person for being gay or transgender.²⁶⁶ *Bostock* consolidated three cases, all of which involved long-term employees who were fired shortly after their employers learned of their sexual orientation or transgender identity and “allegedly for no reason other than the employee’s [sexual orientation or transgender identity].”²⁶⁷ The Court reached its decision by accepting a position that has been long-promoted by LGBTQIA activists in the fight for marriage equality: discrimination on the basis of

261. *Id.* at 2078-79.

262. Feinberg, *supra* note 10, at 1511.

263. *Id.* (“[S]tates have been able to extend laws providing marriage-based avenues of establishing parentage to female same-sex couples simply by adopting gender neutral language to refer to the person who is deemed a parent on the basis of their marriage to the individual who gave birth.”).

264. Feinberg, *supra* note 10, at 1511 (“Cisgender male same-sex couples . . . , however, continue to be excluded from marriage-based avenues of establishing parentage.”).

265. 42 U.S.C. § 2000e-2.

266. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

267. *Id.*

sexual orientation or gender identity is a form of sex-based discrimination.²⁶⁸ The Court’s reasoning, although narrowly addressing the scope of sex-based discrimination prohibited by Title VII, is both compelling and broad-sweeping, and it may have implications that extend far beyond the Civil Rights Act.

In beginning its analysis, the Court considered the plain meaning of “sex,” as well as how the word “sex” is used within the 1964 Act.²⁶⁹ The Court, citing prior precedent on the issue, affirmed that Title VII creates a but-for causation test, which “directs [a court] to change one thing at a time and see if the outcome changes.”²⁷⁰ If a single sex-based cause changes the outcome, regardless of other contributing factors, then such a decision “is enough to trigger the law.”²⁷¹ In other words, regardless of any pretextual or legitimate reasons for an employment decision, if just one intentional, outcome-determinative reason was based on sex, the employer is subject to Title VII.²⁷² The Court also recognized that Title VII’s prohibitions are specific to an “individual, [and] not groups,” which is significant because, otherwise, the employer could “treat men and women as groups more or less equally” but still discriminate against an individual.²⁷³

From this foundation, the Court concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²⁷⁴ Justice Gorsuch, writing for the Court, provided a clear example:

Consider . . . an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.

268. Compare *id.* (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”), with *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring) (“[A] man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual’s right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation.”).

269. *Bostock*, 140 S. Ct. at 1739. The Court never fully considered what the term “sex” meant in the 1964 statute, rather, they assumed that the word “refer[s] only to biological distinctions between male and female” because the parties had all conceded to the application of this definition. *Id.* at 1739. However, this definition of sex is arguably narrow and binary, and fails to consider “sex-linked traits, such as anatomy, sexual orientation, gender presentation, and gender identity.” Shirley Lin, *Dehumanization “Because of Sex”: The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 738-39 (2020).

270. *Bostock*, 140 S. Ct. at 1739 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 350, 360 (2013)).

271. *Id.* The Court reasoned that if Congress wanted the courts to adopt a stricter approach, then they would have used words to indicate it, such as “solely” or “primarily because of.” *Id.* at 1739-40.

272. The Court concluded that “an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.” *Id.* at 1740. Title VII prohibits an employer from “otherwise . . . discriminat[ing] against” an employee, however, in disparate treatment cases, “the difference in treatment based on sex must be intentional.” *Id.*

273. *Id.* at 1740-41.

274. *Id.* at 1741.

Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.²⁷⁵

In other words, an employer who fires someone because they are homosexual or transgender must, in part, intend to penalize the employee based on their sex.²⁷⁶ Thus, "homosexuality and transgender status are inextricably bound up with sex."²⁷⁷ That is not to say that the Court views the two as the same; they are distinct concepts, but "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; [and] the first cannot happen without the second."²⁷⁸

In dissent, Justice Alito reasoned that "sex," as used in 1964, cannot support the Court's application in *Bostock*.²⁷⁹ Looking directly to a 1964 provision within the INA, Justice Alito highlighted that individuals were previously excluded from the United States if they were "afflicted with psychopathic personality,"²⁸⁰ which the Court, in *Boutilier v. INS*, interpreted to include persons who are gay.²⁸¹ According to Justice Alito, because the Court did not find impermissible sex-based discrimination within that INA provision, the term "sex," as used in 1964, could not have meant to include sexual orientation or transgender status.²⁸² Justice Alito concluded that "in 1964, it was as clear as clear could be that ['because of sex'] meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth."²⁸³

However, Justice Alito's argument is unconvincing and cannot support the weight of his erroneous conclusion. First, *Boutilier* did not raise a claim of sex-based discrimination.²⁸⁴ Thus, Justice Alito's central argument is merely supported by dicta. Second, Justice Alito's premise that the Court is changing the definition of "sex" is misplaced. The Court's reasoning in *Bostock* does not alter the definition of "sex" to make it synonymous with sexual orientation and transgender status. In fact, Justice Gorsuch is explicit that the Court did not alter the meaning of "sex."²⁸⁵ Rather, the Court merely recognized that an employer cannot discriminate on the basis of sexual orientation or transgender status without also considering that

275. *Id.*

276. *Id.* at 1745.

277. *Id.* at 1742 ("[D]iscrimination on [the basis of homosexuality or transgender status] . . . requires an employer to intentionally treat individual employees differently because of their sex."). "There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decision making." *Id.*

278. *Id.* at 1746-47.

279. *See id.* at 1755-56 (Alito, J., dissenting).

280. *Id.* at 1771 (Alito, J., dissenting) (citing 8 U.S.C. § 1182(a)(4) (1964) (current version at INA § 212(a)(4), 8 U.S.C. § 1182(a)(4)).

281. *Id.* at 1771 (Alito, J., dissenting) (citing *Boutilier v. INS*, 387 U.S. 118 (1967)). In *Boutilier*, the Court upheld that a person's sexual orientation could be grounds for deportation. *Id.* (Alito, J., dissenting).

282. *See id.* (Alito, J., dissenting).

283. *Id.* at 1756 (Alito, J., dissenting).

284. *Boutilier*, 387 U.S. at 118-119 (the narrow issue concerned whether "psychopathic personality" was overly vague and whether the term included an individual's homosexuality).

285. *Bostock*, 140 S. Ct. at 1739 ("[F]or argument's sake, we proceed on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female.").

person’s sex.²⁸⁶ Finally, Justice Alito fails to recognize that the term “sex” within the Civil Rights Act has been interpreted since 1964 to include other concepts that were not explicitly illuminated by Congress. For instance, Title VII was later recognized to prohibit sexual harassment and discrimination based on parental status.²⁸⁷ Thus, if Justice Alito’s conclusion was strictly applied, numerous Title VII opinions may also be invalidated.

Finally, it is reasonable to consider whether the Court’s reclassification of discrimination on the basis of sexual orientation or transgender status—as a subtype of sex-based discrimination—could be expanded beyond the scope of Title VII. In response to the concern that its reasoning might have expansive implications, the Court did not explicitly preempt the possibility of future claims attempting to apply its reasoning to other legal frameworks. Rather, the Court seemed to invite such future actions by simply stating that “none of these other [possibly implicated] laws are before us.”²⁸⁸ Although Justice Gorsuch declined an invitation to acknowledge just how far the ripples of his reasoning might go, Justice Alito suggested that “[o]ver 100 federal statutes [that] prohibit discrimination because of sex” would be implicated.²⁸⁹

Justice Alito pointed out that, even though the Fourteenth Amendment and Title VII have “important differences[,] . . . the Court’s decision may exert a gravitational pull in constitutional cases.”²⁹⁰ Referencing *Sessions v. Morales-Santana*, Justice Alito suggested that the reasoning applied in *Bostock* might also apply to the Equal Protection Clause framework, which “prohibits sex-based discrimination unless a ‘heightened’ standard of review is met.”²⁹¹ Under this heightened standard, the government must provide an “exceedingly persuasive justification” and show that the law “serves *important governmental objectives* and that the discriminatory means employed are *substantially related* to the achievement of those objectives.”²⁹² In contrast, a law that does not draw a distinction based on a suspect classification receives only rational basis review, under which the “law must bear a *rational relationship* to a *legitimate government purpose*.”²⁹³ Therefore, Justice Alito is

286. *Id.* at 1743.

287. In 1998, the Court held that sexual harassment falls within in the meaning of sex-based discrimination and was prohibited by Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (“[W]e conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.”). In 1971, the Court found an employer’s refusal to hire women with children and willingness to hire men with children discriminated partially on the basis of sex and was impermissible under Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

288. *Bostock*, 140 S. Ct. at 1753.

289. *Id.* at 1778 (Alito, J., dissenting) (implicating Title IX, the Fair Housing Act, and Equal Credit Opportunity Act).

290. *Id.* at 1783 (Alito, J., dissenting).

291. *Id.* (Alito, J., dissenting) (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017)). The reasoning in *Bostock* “may have effects that extend well beyond the domain of federal antidiscrimination statutes.” *Id.* (Alito, J., dissenting). It is just a matter of time before “[t]he entire Federal Judiciary will be mired for years in disputes about the reach of the Court’s reasoning.” *Id.* (Alito, J., dissenting).

292. *Morales-Santana*, 137 S. Ct. at 1690 (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996)) (emphasis added).

293. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (emphasis added). While a traditional rational basis analysis places the burden on the petitioner to prove that the law is not rationally related to a legitimate

correct in suggesting that an extension of *Bostock*'s reasoning would subject discrimination on the basis of sexual orientation or transgender status to a higher level of scrutiny than it currently receives under the Equal Protection Clause.²⁹⁴ If homosexuality and transgender status are inextricably bound up in sex, then discrimination on the basis of sexual orientation or transgender status should not be subjected to rational basis, but instead, the same standard of review used for sex-based discrimination: intermediate scrutiny.

Although Justice Alito's interpretation of the word "sex" is unconvincing at best, he was correct in concluding that *Bostock*'s impacts on numerous federal statutes could be tremendous. The *Bostock* Court, although directly discussing Title VII, found a strong but-for link between sex-based discrimination and LGBTQIA status. The Court's reasoning is compelling and has implications that extend far beyond Title VII of the Civil Rights Act. Thus, the Supreme Court may one day scrutinize laws that draw distinctions based on sexual orientation or transgender status to the same degree as sex-based distinctions. Until then, courts will inevitably grapple with how the broad-sweeping reasoning in *Bostock* fits within the Equal Protection framework, as well as within other federal statutes—such as the INA.

C. Bostock's Potential Impacts on the INA

The Supreme Court has previously considered whether section 309 of the INA (children born out of wedlock) unconstitutionally discriminates on the basis of sex. Section 309 proscribes differential treatment for "mothers" and "fathers."²⁹⁵ In part, section 309(a) requires that "fathers" establish a blood relationship between them and the child.²⁹⁶ "Mothers," on the other hand, do not have any burden to establish their parental relationship with their child.²⁹⁷ In *Nguyen v. INS*, the Court held that section 309(a)'s different standards for "mothers" and "fathers" does not violate the equal protection component of the Due Process Clause.²⁹⁸ In part, this is because mothers are always present at the child's birth, generating authenticated birth records and providing guarantees of legitimacy.²⁹⁹ In contrast, a child's birth is not "incontrovertible proof of fatherhood" because a father does not need to be physically present during the child's birth.³⁰⁰ Therefore, *Nguyen* demonstrates that section 309(a) is subject to the equal protection guarantees of the Constitution, even though it has, thus far, withstood sex-based discrimination claims.³⁰¹

However, section 309 of the INA also proscribes different residency requirements for United States citizen "mothers" and "fathers."³⁰² If a child is born out of wedlock to a United States citizen "father," then the "father" must also meet

government purpose, for laws that are "born of animosity towards the class of persons affected," the Court may shift at least part of the burden to the government. *Id.* at 634-35.

294. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting).

295. Compare INA § 309(a), 8 U.S.C. § 1409(a), with INA § 309(c), 8 U.S.C. § 1409(c).

296. *Id.* § 309(a), 8 U.S.C. § 1409(a).

297. *See id.* § 309(c), 8 U.S.C. § 1409(c).

298. *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

299. *Id.* at 62-64.

300. *See id.* at 62.

301. *Id.* at 74.

302. *See* INA § 309, 8 U.S.C. § 1409.

the residency requirements of section 301(g) (five years) in order for their child to be a citizen from birth.³⁰³ In contrast, the statutory language of section 309(c) only requires “mothers” to meet a one-year residency requirement.³⁰⁴ However, in *Sessions v. Morales-Santana*, the Court held that section 309’s different residency requirements for “mothers” and “fathers” violated the equal protection guarantees implicit within the Due Process Clause because it constituted an impermissible sex-based distinction.³⁰⁵

In *Morales-Santana*, the plaintiff, a child of a United States citizen father seeking citizenship from birth, alleged that section 309 impermissibly discriminated against his father based on his father’s sex.³⁰⁶ Justice Ginsburg, writing for the Court, concluded that section 309(c) must be applied in a manner that was free from sex-based discrimination.³⁰⁷ However, due to the legislative history and construction of section 309(c), which was interpreted to ensure that fathers were sufficiently tied to the United States, the Court reasoned that it could not merely apply the lower standard for unwed mothers to unwed fathers.³⁰⁸ Additionally, after pointing to a line of cases, the Court reasoned that it ordinarily extends a residency requirement, rather than nullify it.³⁰⁹ Following that approach, the Court decided to “strik[e] the discriminatory exception” for mothers and extend the residency requirement for mothers to make it equal to that of fathers (*i.e.*, five years).³¹⁰ Thus, the Court ultimately held that unwed mothers, like unwed fathers, must meet the more stringent residency requirements within section 301(g).³¹¹

Morales-Santana and *Nguyen* confirm that the equal protection guarantees of the Due Process Clause apply to the entirety of section 309 of the INA. As Justice Alito correctly identified, it is only a matter of time before we begin to see LGBTQIA discrimination claims that request courts to apply the broad-sweeping reasoning in *Bostock* to other constitutional doctrines—such as the equal protection guarantees of the Due Process Clause. In fact, the Biden Administration has positioned the Court’s reasoning in *Bostock* as a cornerstone in its initiative to combat discrimination on the basis of sexual orientation and transgender status, including laws other than the Civil Rights Act.³¹² Therefore, it is worthwhile to consider how the reasoning in *Bostock*

303. *Id.* § 309(b), 8 U.S.C. § 1409(b).

304. *Id.* § 309(c), 8 U.S.C. § 1409(c); *see also supra* notes 124-28 and accompanying text.

305. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

306. *Id.* at 1688.

307. *Id.* at 1688-1701.

308. *Id.* at 1698.

309. *Id.* at 1699 (citing *Califano v. Westcott*, 443 U.S. 76, 89 (1979)).

310. *Id.*

311. *Id.* at 1701 (quoting *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 427 (2010)) (the Court “must adopt the remedial course Congress likely would have chosen ‘had it been apprised of the constitutional infirmity’”).

312. Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021) (“Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation”). The Biden Administration recognized that *Bostock*’s reasoning extends to other laws that prohibit sex discrimination, including Title IX, the Fair Housing Act, and the INA. *Id.* The executive order demands a review of all administrative actions that “are or may be inconsistent” with the Biden Administration’s policy of prohibiting “discrimination on the basis of gender identity or sexual orientation” under laws that prohibit sex-based discrimination. *Id.* at 7023-24. Nonetheless, adjudication on the merits by the Supreme Court remains

might apply to provisions within the INA that discriminate on the basis of sexual orientation, such as sections 301 and 309 of the INA—as applied through the FAM.

If *Bostock* may be applied to these claims, the Court would no longer subject LGBTQIA-based discrimination to rational basis review. Instead, such claims would be analyzed through the lens of intermediate scrutiny. This is an important consideration because if the Supreme Court were to find that citizenship status is not within the constellation of benefits associated with marriage, then the Court might conclude that the State Department has not infringed upon a married couple's fundamental right when it denies their child citizenship from birth. If that were the result, married cisgender same-sex male couples would not have cognizable substantive due process claims and would need to rely, exclusively, upon the Court's equal protection analysis. Applying the reasoning of *Bostock* in such situations would provide some additional protections for these families because they would undeniably fare better under intermediate scrutiny rather than rational basis review.

III. ADJUDICATION ON THE MERITS

As detailed earlier in this Comment, courts' use of the cannon of constitutional avoidance or mootness have, thus far, provided inadequate relief. Because the relief granted in *Kiviti*, *Mize*, and *Dvash-Banks* only have local impacts within Maryland, Georgia, and the Ninth Circuit, there is no guarantee that a similarly situated child in another state would receive the same relief from that state's federal court. This jurisdictional divide will undoubtedly cause at least some, if not most, married cisgender same-sex male couples to make *two* stops after returning to the United States with their child conceived through international ART services: first to the State Department to apply for the passport; and then second, to the federal courts in order to challenge the State Department's denial. In contrast, a similarly situated opposite-sex couple is unlikely to need to make the second stop. Moreover, the State Department's disparate treatment of married cisgender same-sex male couples is bound to repeat itself until the Supreme Court weighs in and issues a decision. Ultimately, the Court should conclude that the State Department's disparate application of section 301 and section 309 is unconstitutional. This conclusion will likely be based upon the substantive due process protections afforded to same-sex married couples and, quite possibly, looming equal protection guarantees for sexual orientation stemming from *Bostock*.

Regardless of whether *Bostock* is extended to the equal protection guarantees of the Due Process Clause, the Supreme Court would likely first turn to *Obergefell* as a guidepost in its constitutional analysis. Justice Kennedy's third principle was central to *Obergefell*'s holding: marriage provides families "safeguards" to procreating, rearing children, and education. Marriage—and the benefits that follow—provide children with recognition, stability, and predictability, and the Court feared that children might suffer stigma if they learned that their same-sex family was somehow lesser than an opposite-sex family. Thus, Justice Kennedy

critical because executive orders can easily be revoked by the subsequent administration and any relief provided by executive order may only be temporary.

made it clear that marriage, parental rights, and child rearing are all intrinsically intertwined and protected by the Due Process Clause.

Although the *Obergefell* Court did not explicitly include it in the list of benefits associated with marriage, citizenship from birth is not dissimilar from those enumerated.³¹³ Nonetheless, the explicitly clear premise that divides sections 301 (born in wedlock) and 309 (born out of wedlock) rests fully on whether the parents of the child are married. Therefore, Congress itself has made citizenship from birth a right associated with marriage and as such, has assured that it is protected by the Due Process Clause. If citizenship from birth is presumed to be a benefit that is protected by the fundamental right to marry, the constitutionality of the State Department’s policy would likely turn on whether same-sex couples and opposite-sex couples are treated equally. For the Kivitis, Mize and Gregg, and Dvash-Banks families, this is simply not the case.

The FAM only requires a further investigation of the circumstances of a child’s birth if the parents both do not appear to be related to the child by blood. However, because the consular officer is likely to presume that both parents in a cisgender opposite-sex couple are biological parents of the child, the consular officer is far less likely to investigate further. In contrast, the cisgender same-sex male couple will almost always trigger further investigation because the officer will reason that they cannot both be the biological parents of their child. As a result, the child born to the cisgender opposite-sex couple is more likely to be considered born in wedlock, and the parents will be analyzed under the less burdensome residency requirements of section 301 of the INA. On the other hand, a child born to the cisgender same-sex male couple is likely to be considered born out of wedlock, and the child’s biological parent will be placed under the more stringent residency requirements of section 309. Ending the analysis here, it is clear that the State Department’s treatment of opposite-sex and same-sex couples is disparate and unequal.

If the analysis is taken further, the disparate impact becomes starker when one of the same-sex couples cannot satisfy the five-year residency requirement of section 309. For families like the Kivitis, Mize and Gregg, and Dvash-Bankses, where the biological father is a United States citizen but has not resided in the United States for over five years, their child will be denied a passport under section 309. However, a similarly situated, cisgender opposite-sex couple would be granted the passport because section 301 only requires that both United States citizen parents reside in the United States for *any period* prior to the child’s birth. This disparate outcome violates *Obergefell*’s requirement that married opposite-sex couples and married same-sex couples be treated equally.

Notwithstanding the Court’s analysis of these claims in light of *Obergefell*, an interesting outcome results if the Court were to only address the issue through its extension of the broad-sweeping and persuasive reasoning in *Bostock*. If *Bostock* were extended and citizenship from birth was not found to be within the constellation of benefits associated with marriage, or the married cisgender same-sex male couple were only to allege an equal protection claim, the Court would likely analyze the issue under intermediate scrutiny. This is because the couple’s sexual orientation is

313. See *supra* note 247 and accompanying text.

inextricably bound with sex. Under the intermediate scrutiny framework, the State Department would need to sufficiently demonstrate that its disparate treatment of same-sex and opposite-sex couples under sections 301 and 309 is substantially related to an important governmental purpose. Thus, through applying the reasoning of *Bostock*, the Court could review the State Department's policy more closely than it did in *Romer*, and the burden would be on the government to provide the important interest.

In cases like the Kivitis, Mize and Gregg, and Dvash-Banks families', the State Department is unlikely to prevail under an equal protection analysis that has incorporated the reasoning of *Bostock*. Unlike *Nguyen*, the issue would not be about the requirements of section 309(a) only being applied to "fathers" and not "mothers." Rather, the claim would consider whether requiring a biological relationship between the child and *both* parents for section 301 to apply is substantially related to an important governmental interest. Likewise, the holding in *Morales-Santana* is unlikely to control in an equal protection claim seeking to invoke the reasoning of *Bostock*. This is in part because the claims would likely allege that the State Department discriminates against married cisgender same-sex male couples when it decides whether to apply section 301 or 309, and not the nuances of the individual statutes themselves. In other words, it is how the State Department answers the threshold question of a section 301 and 309 analysis (*i.e.*, whether the child is to be considered born in or out of wedlock) that creates this disparate outcome for cisgender same-sex male couples and not the requirements within the statutes themselves.

Thus, the State Department is unlikely to succeed in relying on the prior Supreme Court jurisprudence that has validated sex-based discrimination within the INA. Moreover, the State Department is also unlikely to succeed in relying on the subsections of the statutes themselves. The State Department must provide an important purpose for subjecting the married cisgender same-sex male couple to the more stringent standards of section 309 while it subjects married cisgender opposite-sex couples to the less burdensome standards of section 301.

The State Department would likely assert that the important purpose of its policy is to assure that children are sufficiently connected to their parents before obtaining citizenship from birth and that any disparate impact is minimal; however, it is unlikely to prevail on this argument for a number of reasons. First, the three cases addressed in this Comment underscore that the FAM continues to disparately impact cisgender same-sex male couples and that, until a national conclusion is reached on the issue, future cases are likely to arise. Moreover, denying infants citizenship from birth and subsequently requiring that a family redetermine where to raise their child is hardly minimal. Second, there are more narrowly tailored means for the State Department to assure that both fathers in a married cisgender same-sex couple are sufficiently connected to their child, such as through considering birth certificates, court orders determining parenthood, and marriage certificates. Finally, any State Department-alleged important interest is unlikely to align with the overall legislative intent of the INA: liberal treatment of children and keeping families united. Thus, the State Department's burden under the equal protection guarantees of the Due Process Clause is likely insurmountable.

CONCLUSION

Even though K.R.K., S.M.-G., and E.J. were recognized to be United States citizens from birth under section 301 of the INA, all three courts took different routes to arrive at the same result. It is easy to assume that these results bolster the argument that section 301 does not require a biological relationship to apply; however, upon further inspection, the result is more concerning than it first appears. The canon of constitutional avoidance, by definition, allows a court to circumvent the constitutional issue by merely predicting that a statutory interpretation *might* interfere with a constitutional protection. Failing to adjudicate the constitutional issue leaves future litigants and courts questioning whether a constitutional protection actually exists. Second, as exemplified in *Mize*, not all agree that the plain text of section 301 does not require that both parents share a biological tie to their child. If a court were to use this interpretation, and simultaneously fail to invoke the canon of constitutional avoidance, the child might be denied citizenship from birth. Finally, and most importantly, without nationwide recognition of a married same-sex couple’s constitutional right for their child to derive citizenship from birth, the State Department’s discriminatory pattern and practice is likely to continue. A family with a birth plan identical to the Kiviti, Mize and Gregg, or Dvash-Banks families may be denied a passport for their child if they apply at a State Department office that falls outside of the Ninth Circuit, Maryland, or Georgia’s jurisdictional reach.

If the Supreme Court were to analyze these claims on their constitutional merits, it should find that the State Department’s disparate treatment of married cisgender same-sex male couples undermines the substantive due process and equal protection guarantees of the Due Process Clause. *Obergefell* held that opposite-sex and same-sex couples must be on the same terms and conditions, and that same-sex couples must have equal access to the same constellation of rights and benefits. Granting a child citizenship from birth ought to be considered a right and benefit closely associated with marriage and as such, the State Department infringes on the same-sex couple’s fundamental rights when they deny their marital child citizenship from birth but do not do the same for a similarly situated opposite-sex couple. Alternatively, if the Court were to only address the equal protection claim, the Court might also be inclined to include the broad-sweeping and compelling reasoning of *Bostock*. This would place the significant burden on the State Department to withstand intermediate scrutiny, which it is unlikely to meet.

Therefore, if we are to adequately address the discriminatory treatment of cisgender same-sex male couples seeking recognition of their child’s citizenship, we must do more than the district courts have done thus far. These decisions provide inadequate relief. Likewise, administrative policies are unlikely to provide long-lasting relief because subsequent administrations can revoke these policies far easier than a legislative amendment to the INA or Supreme Court precedent. Because it is unlikely that Congress will address this issue anytime soon, long-term relief may only come through the Supreme Court analyzing these claims on their constitutional merits. Until then, the State Department’s disparate treatment of married cisgender same-sex male parents who decide to grow their families through international ART

services remains possible, and these parents are left with the ambiguity of whether their child's citizenship from birth is a benefit associated with their marriage.