No. 19-55517

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E.J. D.-B., a Minor, Elad Dvash-Banks as the guardian ad litem, and ANDREW MASON DVASH-BANKS,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

Defendants-Appellants.

On Appeal from the United States District Court for the Central District of California, No. 2:18-cv-00523-JFW-JC

BRIEF OF AMICI CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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December 19, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici curiae hereby certify that none of the amici curiae have a parent corporation. Amici curiae are civil rights and non-profit organizations and have no shares or securities that are publicly traded.

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STATEMENT OF AMICI CURIAE'S IDENTITY AND INTEREST[1]

Amici curiae are civil rights and non-profit organizations that advocate for equality and greater legal rights for lesbian, gay, bisexual, and transgender (LGBT) people and their families. Amici curiae have an interest in this case because they are committed to ensuring that the government fulfills its constitutional obligation to provide equal rights to same-sex couples, including with respect to married same-sex couples and their children.

GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation through strategic litigation, public policy advocacy, and education. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that the constitutional rights of married same-sex couples and their children are respected.

[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The National Center for Lesbian Rights (NCLR) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting the constitutional rights of married same-sex couples and their children and represents LGBT people in cases in courts throughout the country.

INTRODUCTION

As the Dvash-Bankses and their amici explain, the government's position in this appeal is contrary to the plain text of the Immigration and Nationality Act, which provides that for a married couple's children, citizenship passes under 8 U.S.C. § 1401(g) if the child is the legal child of the citizen spouse at birth and the citizen spouse meets the statute's durational residency requirement. *See generally* Family Law Professors Br. The government's argument (at 16) that a biological relationship to the citizen parent is required for citizenship to pass to a marital child has no basis in the statute. Likewise, there is no statutory basis for the government to apply § 1409, a provision of the INA governing citizenship of *nonmarital* children, to this couple's twin sons.

This brief addresses a different issue. The Supreme Court has clarified, in a series of decisions over the last decade, that the Constitution respects not only the marriages of same-sex couples, but also all their equal access to the rights ordinarily appurtenant to marriage—including the crucial right to safeguard the integrity and stability of the family and the parent-child relationship. The government's rule derogates the marriages of same-sex couples by depriving them of a benefit crucial to family integrity—namely, the right to pass derivative citizenship on to a child. The rule thus strips a married couple of the right to a benefit ordinarily associated with marriage, fails to recognize a valid marriage, and

derogates the citizenship rights of a child with a United States citizen parent—all contrary to long-settled law and practice. Under the canon of constitutional avoidance, if the statute is viewed as ambiguous—though it should not be here—it must be interpreted to avoid the grave constitutional concerns that arise from interpreting it to undermine the family stability of married same-sex parents.

ARGUMENT

I. SECTION 1401(g) DOES NOT REQUIRE BOTH SPOUSES TO HAVE A BIOLOGICAL RELATIONSHIP, AND EVEN IF § 1401(g) WERE AMBIGUOUS, CONSTITUTIONAL AVOIDANCE WOULD BAR THAT INTERPRETATION

As the Dvash-Bankses and their amici powerfully explain, § 1401(g) does not require that the citizen parent be biologically related to the child. This straightforward conclusion is confirmed by the provision's plain text, the statutory structure, Ninth Circuit precedent, and historical practice. *See* Dvash-Banks Br. 19-40; *see also Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000). The government's interpretation—that § 1401(g) requires a biological relationship between the child and both parents—appears nowhere in the statute. It requires the imaginary interposition of the word "biological" before the statutory term "parents" and resort to the government's slapdash law office history of *jus sanguinis*, which it misconstrues in an excessively literal manner. The proper outcome based on the plain language of § 1401(g) is clear: for the child of married parents at birth like

E.J., derivative citizenship passes directly through the U.S. citizen parent if that parent meets the statute's residency requirement. No biological relationship to that legal parent is required.

Under a proper interpretation of § 1401, then, both twins are citizens under that provision even though only A.J. is biologically related to his American father. However, the State Department's Foreign Affairs Manual (FAM), which here is wholly unmoored from the statutes on which it purports to rely, erroneously requires that children who qualify for citizenship-at-birth under § 1401 are born "during the marriage of the biological parents to each other." 8 FAM § 304.1-2.[2] And under that interpretation, *neither* twin is a citizen under § 1401. Gov't Br. 10. Instead, the government has rejected E.J.'s citizenship claim altogether and has recognized A.J. as a citizen at birth through a different provision of the INA—the provision that governs the citizenship of *nonmarital* children, 8 U.S.C § 1409. As the Supreme Court has differentiated those sections, "Section 1401 sets forth the INA's rules for determining who 'shall be nationals and citizens of the United States at birth'. … The primacy of § 1401 in the statutory scheme is evident. … [Whereas s]ection 1409 pertains specifically to children with unmarried parents."

[2] The FAM acknowledges a narrow category of same-sex spouses that can both be biologically related to their children—a couple of two women in which one spouse donates her egg to the other for gestation after fertilization. 8 FAM § 304.3-1.

Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686-1687 (2017). Because the government interprets § 1401(g) to require a child to have a biological relationship to both marital parents—thus disqualifying both twins from citizenship under that provision—when the State Department recognized A.J. as a citizen, it did so under § 1409 (due to, among other reasons, his genetic relationship to Andrew). It thus necessarily treated Andrew and Elad in the Court's words as "unmarried parents," *id.* at 1687, and in the words of the statutory text, "out of wedlock," 8 U.S.C § 1409(a).

As we show below, the government's convoluted interpretation of the INA deprives virtually all married same-sex couples of a crucial benefit of marriage, one that directly implicates the family's integrity, by preventing U.S. citizen parents from passing on derivative citizenship under § 1401(g). Because the statute may be interpreted consistent with its text in a manner that does not raise any of these constitutional concerns, it must be interpreted in such a manner.

Constitutional avoidance requires courts to avoid construing a statute to "raise serious constitutional problems" if an alternative interpretation is "fairly possible." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (quotation marks omitted). This well-established canon is "an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *see also Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *Rodriguez v. Robbins*, 715 F.3d 1127, 1134 (9th Cir. 2013) (in applying the canon of constitutional avoidance, the "task is … to determine whether the government's reading … raises constitutional concerns and, if so, whether an alternative construction is plausible without overriding the legislative intent of Congress").

As the Supreme Court recently explained, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). That alternative interpretation of a statute need only be "fairly possible" for courts to be "obligated to construe the statute to avoid [constitutional] problems." *St. Cyr*, 533 U.S. at 299-300. Constitutional avoidance "is followed out of respect for

Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Congress therefore must speak clearly when it seeks to toe the constitutional line. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-173 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (recognizing that the Supreme Court has "read significant limitations into … immigration statutes in order to avoid their constitutional invalidation" and similarly adhering to the canon of constitutional avoidance to "read an implicit limitation into [a section of the INA]"); *Rodriguez*, 715 F.3d at 1142 (applying "the doctrine of constitutional avoidance" to "construe [a section of the INA] to avoid potential constitutional concerns").

Adhering to the canon does not require a decision on the merits of the constitutional question, but "merely a determination of serious constitutional doubt." *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting). In other words, there is no requirement that the court hold that a contested interpretation is in fact unconstitutional (although in this case, the government's interpretation is). Rather, only serious doubts are required for the canon to apply. *See, e.g.*, *Edward J. DeBartolo*, 485 U.S. at 575 (explaining that the canon merely calls for a determination that a certain interpretation "would *raise*

serious constitutional *problems*" (emphasis added)); *United States ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407-408 (1909) (rejecting view that constitutional avoidance requires courts "to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution"); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012) (holding that "[b]ecause [a statute could] reasonably be read [to avoid constitutional difficulties], we can and must choose the construction that avoids raising constitutional concerns").

The district court's interpretation of § 1401(g) is more than a "fairly possible" interpretation—it is the only reasonable one and the one consistently adopted by this Court. By contrast, the construction advocated by the government flouts the text of the law and raises grave constitutional concerns. Therefore, even if the statute were ambiguous—which it is not—constitutional avoidance would require adhering to this Court's and the district court's, at minimum, "fairly possible" interpretation that § 1401(g) lacks a requirement that both parents be biologically related.

Adherence to the canon is particularly important here because the government's construction implicates sensitive constitutional issues related to personal autonomy and family life. *See, e.g.*, *Roommate.com*, 666 F.3d at 1221-

1222 (adopting construction of Fair Housing Act that avoids "substantial constitutional concerns" implicating personal "privacy, autonomy and security"); *United States v. Myers*, 426 F.3d 117, 125 n.8 (2d Cir. 2005) (Sotomayor, J.) (explaining that constitutional avoidance required construing probation condition narrowly to honor the "constitutional right to enter into and to maintain certain intimate human relationships").

Accordingly, given the grave constitutional issues raised by the government's interpretation, if the statute were ambiguous—which it is not—then § 1401(g) still may not be interpreted to require a biological relationship.[3]

II. THE GOVERNMENT'S CONSTRUCTION OF § 1401(g) RAISES GRAVE CONSTITUTIONAL CONCERNS

The ability to pass citizenship to children through § 1401(g) is one of the signal benefits of marriage. The government's reading of the statute deprives married same-sex couples of the right to this crucial benefit, which protects their

[3] The State Department's erroneous interpretation of § 1401(g) does not warrant *Skidmore* respect because, among other reasons, the statute is not ambiguous. Even if it were, the canon of constitutional avoidance overrides *Skidmore*. As the government acknowledges (at 27), *Skidmore* comes into play only when a statute is ambiguous, but application of the canon of constitutional avoidance renders a previously ambiguous statute susceptible to only one reading. Constitutional avoidance is a tool of statutory construction that must be applied to an ambiguous statute *before* a court determines whether an agency warrants deference. In short, constitutional avoidance has primacy over *Skidmore* respect. *See United States v. Clark*, 445 U.S. 23, 33 n.10 (1980); *Lowe v. SEC*, 472 U.S. 181, 216 (1985) (White, J., concurring).

parent-child relationship and directly implicates the integrity of their families. For Andrew and Elad, the government's policy means that though they are the lawfully married and legal parents of their twins, they cannot pass on citizenship through § 1401(g) even though one parent is a U.S. citizen. By requiring that both marital parents be biologically related to their children in order to recognize the children as citizens under § 1401(g), the government disregards their marriage and treats their children as nonmarital, deeming only one child a citizen and the other child an "alien." And the citizen child, A.J., was recognized as a citizen based on the government's designation of Andrew and Elad as "out of wedlock." That is an untenably fragile and precarious position for a family to be in, and one that the Constitution does not tolerate merely because the twins have two (married) fathers. The State Department's policy, and the government's statutory defense of it, raises grave constitutional concerns because it violates the constitutional right to the "benefits … linked to marriage," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015), and denies couples "federal recognition of their marriages," *United States v. Windsor*, 570 U.S. 744, 770 (2013).

A. The Constitution Protects The Right To The Benefits Of Marriage, Including The Ability To Pass Citizenship To Children

The Constitution protects the right to marry. But, as the Supreme Court has repeatedly explained, that right is hollow without its attendant benefits and responsibilities. And so the Constitution also protects the right of married same-

sex couples to equal access to the benefits of marriage—from tax treatment to hospital visitation. Marriage stripped of its bundle of benefits is not marriage at all, and the right to marry includes equal access to the substantive protections that marriage affords. The Supreme Court has repeatedly confirmed these principles, from *United States v. Windsor*, 570 U.S. 744 (2013), to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and most recently in *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

In *Windsor*, the Court struck down the Defense of Marriage Act (DOMA), which excluded the spouses in legally married same-sex couples from the definition of "marriage" and "spouse" in federal statutes. 570 U.S. at 751. That statute, the Court explained, represented an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," and "operate[d] to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." *Id.* at 770. With respect to marriage, the lesson of *Windsor* is that marital status entails a bundle of benefits and responsibilities that cannot be disaggregated at the state and federal level, and the federal government cannot selectively deprive a lawfully married couple of the *federal* benefits and responsibilities that normally apply to married persons. Once the federal government recognizes a marriage as lawful, as the government acknowledges here (at 2), the couple is entitled to the full panoply of federal benefits and responsibilities that stem from their marriage.

In *Obergefell*, the Court reaffirmed that "the right to marry is protected by the Constitution," including for same-sex couples, and explained that "by virtue of their exclusion from that institution, same-sex couples [were being] denied the constellation of benefits … linked to marriage." 135 S. Ct. at 2598, 2601; *id*. at 2604 (state bans on marriage between same-sex couples violate "central precepts of equality" by making marriages "in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right"). The Court recognized that same-sex couples marry for the same reasons that different-sex couples do: It reasoned that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples" *id.* at 2599, because marriage implicates "the right to personal choice … inherent in the concept of individual autonomy," and is "among the most intimate [decisions] that an individual can make," among other "protected" choices like "contraception, family relationships, procreation, and childrearing," *id.*

Further, the Court emphasized that "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union," and cataloged examples. 135 S. Ct. at 2601. And the Court specifically held that given such denials, "*children* … suffer the significant material costs of being raised by unmarried

parents, relegated to a more difficult and uncertain family life." *Id.* at 2590 (emphasis added).

Most recently, in *Pavan*, the Court struck down Arkansas's rule that required the name of a mother's male spouse to appear on a child's birth certificate, regardless of whether he was the biological father, but did not require the state to issue birth certificates including the female spouses of women who give birth in Arkansas. 137 S. Ct. at 2078. Because husbands automatically appeared on birth certificates regardless of any biological connection, the Court held that rule had to apply equally to a birth mother's female spouse. *Id.* In short, Arkansas denied married same-sex parents the same opportunity as different-sex parents to be listed on their children's birth certificates. *Id.* *Pavan* reiterated the requirements of *Obergefell*: the government may not "den[y] married same-sex couples access to the 'constellation of benefits … linked to marriage.'" *Id.* (quoting *Obergefell*, 135 S. Ct. at 2601). The Court held that as to the "rights, benefits, and responsibilities [of marriage,] same-sex couples, *no less than* opposite-sex couples, must have access." *Id.* (quotation marks omitted) (emphasis added).

As prescribed by these cases, lower courts have routinely recognized that the Constitution protects not only the right of same-sex couples to marry, but also to its attendant benefits—particularly those associated with the right to bear and raise children. *See, e.g.*, *McLaughlin v. Jones*, 401 P.3d 492, 497 (Ariz. 2017) ("It

would be inconsistent with *Obergefell* to conclude that same-sex couples can legally marry but states can then deny them the same benefits of marriage afforded opposite-sex couples."), *cert. denied sub nom. McLaughlin v. McLaughlin*, 138 S. Ct. 1165 (2018); *Sheardown v. Guastella*, 920 N.W. 2d 172, 177 (Mich. Ct. App. 2018) ("*Obergefell* requires states to recognize a legal marriage between individuals of the same sex and, as *Pavan* held, once the state recognizes these marriages it cannot deny government benefits that are offered to heterosexual married couples."); *In re Estate of Carter*, 159 A.3d 970, 977 (Pa. Super. Ct. 2017) ("[S]ame-sex couples in Pennsylvania can legally marry and must be afforded the same rights and protections as opposite-sex married couples, including inheritance rights and survivor benefits."); *In re Gestational Agreement*, 449 P.3d 69, 82 (Utah 2019) ("Under these decisions, states may no longer deny benefits conditioned on the institution of marriage to same-sex couples which are freely granted to couples of the opposite sex.").

B. The Government's Construction Of § 1401(g) Deprives Married Same-Sex Couples Who Are Legal Parents Of The Right To A Crucial Benefit Of Marriage To Which They Are Entitled—Passing On Citizenship To Their Children

One of the "benefits … linked to marriage" under federal law, *Pavan*, 137 S. Ct. at 2078, is the ability to pass on derivative citizenship. 8 U.S.C. §§ 1401(g), 1409. "Citizenship is no light trifle." *Afroyim v. Rusk*, 387 U.S. 253, 267-268 (1967). The denial of "citizenship can mean that a [person] is left without the

protection of citizenship in any country in the world." *Id.* Indeed, the government acknowledges (at 34) that its policy here carries a "risk of statelessness." Like marriage, U.S. citizenship is the source of "priceless benefits." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). The Supreme Court has long recognized that "nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized [people]." *Id.* In view of its importance, Congress understandably undertook to codify married parents' right to pass citizenship onto their children. It is thus beyond cavil that the right to do so is one of the signal benefits of marriage; any rule that strips married same-sex couples of that right raises serious constitutional concerns.

At issue in this appeal is a State Department policy that deprives nearly all married same-sex couples of access to derivative citizenship for their children under § 1401(g) because the government erroneously requires that both spouses be biologically related to their children. Even though Andrew and Elad are married and E.J.'s legal parents from birth, the government denies them the benefit of passing on derivative citizenship. With this denial, the government destabilizes E.J.'s future, disregards a same-sex couple's marriage, and throws an entire family into a state of upheaval.

The government's policy has no basis in the statutory language and is but another "unusual deviation" from the tradition of recognizing marriages from other jurisdictions and conferring on married couples the full complement of rights attendant to marriage. *Windsor*, 570 U.S. at 770. With validly married legal parents from birth, one of whom is a U.S. citizen, E.J. (and his brother) should have been instantly recognized as citizens at birth under § 1401(g) rather than divided under § 1409 into non-marital units of Andrew and A.J. separate from Elad and E.J. And two men like Andrew and Elad have no option to pass on citizenship under § 1401(g) *or* § 1409 without the government deeming them "out of wedlock," as it did even when it acknowledged A.J.'s citizenship under § 1409.[4] This is something out of Alice in Wonderland: A married couple seeking to establish their child's citizenship is suddenly deemed "out of wedlock" in disregard of *Windsor*'s requirement to treat married same-sex couples as married. Like the federal government's failure to recognize valid state marriages prior to *Windsor*, the government's policy disregards and disparages same-sex parents' marriages and fractures their families.

[4] The FAM acknowledges that some female couples can both be biologically related to a child when one spouse donates her egg to the other for gestation. *See* 8 FAM § 304.3-1, *supra* n.2. But this is rare, expensive, and only applies to women. Thus, all couples of two men can never both be biologically related to their children in order to pass on citizenship via § 1401(g) and have their marriage recognized.

In derogating marriages in this way, the government stamps same-sex parents' marriages with a badge of inferiority. As with DOMA, the government's policy here "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." *Windsor*, 570 U.S. at 775. Similarly, the government here "places same-sex couples in an unstable position of being in a second-tier marriage" and broadcasts "that their otherwise valid marriages are unworthy of federal recognition." *Id.* at 772. As the Court said in *Obergefell*, "exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects." 135 S. Ct. at 2602. Telling married same-sex couples that they are "out of wedlock" for the crucial purpose of consolidating the parent-child relationship under the protective umbrella of U.S. citizenship and ensuring the integrity of the family disparages these families as unequal in precisely the same way.

The constitutional harm done to married same-sex couples is only deepened by the injury it visits on their children. The derivative citizenship rule is meant to keep families together; it intends to provide an automatic route for citizen parents to ensure that they and their children will, no matter the circumstance, have the promise of shared U.S. citizenship to protect them. By depriving children like E.J. of derivative citizenship and exposing him to the risk of removal or statelessness,

the State Department policy at issue denies E.J. and his family the same stability and protection as the children of married different-sex couples, which Congress could not have constitutionally intended.

The government does not merely disregard the marriages of same-sex couples, it does so here by depriving their children of a benefit to which they would otherwise be entitled. This deprivation runs counter to the Supreme Court's holding in *Obergefell* that the right to marry is constitutionally protected because "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." 135 S. Ct. at 2590. For that reason, the Court explained, bans on marriage for same-sex couples "harm[ed] and humiliate[d] the children of same-sex couples." *Id.* at 2600-2601. And "many same-sex couples," the Court acknowledged, "provide loving and nurturing homes to their children." *Id*. at 2600. By disrupting the legal status of a couple's children, the government materially destabilizes the integrity of the family itself. As the Court similarly held in *Windsor*, DOMA was unconstitutional in significant part because it "humiliate[d] tens of thousands of children now being raised by same-sex couples [and made] it even more difficult for the children to understand

the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 570 U.S. at 772.[5]

Likewise, the policy here deprives the children of married same-sex couples of a critical statutory right and subjects them to the type of humiliation and material harm repeatedly ruled unacceptable by the Court. For one, by denying citizenship to a child rightly entitled to it, the government severs the main artery through which federal benefits flow, *see Schneiderman*, 320 U.S. at 122, just as the denial of marriage licenses to same-sex couples prevented them from accessing key governmental benefits. When the State Department treats the children of married same-sex couples differently than the children of married different-sex couples by denying them derivative citizenship, the same concerns that earlier motivated the Court reappear. By denying the benefit of derivative citizenship to children like E.J., for instance, the government sends the message that the marriage of a same-sex couple is inferior to the marriage of a different-sex couple. The government also sends the message that families resulting from the marriage of a same-sex couple are not entitled to the same stability and protection afforded to families resulting from the marriage of a different-sex couple. These messages are

[5] This case concerns only the constitutionally protected rights of married same-sex couples and their children to enjoy the same federal benefits as married different-sex couples. It does not require the Court—or amici—to opine on the rights of non-married couples, and so we do not do so here.

damaging not only to married same-sex couples, but also to their children. As the Court warned in *Obergefell*, "[w]ithout the recognition, stability, and predictability marriage offers, … children suffer the stigma of knowing their families are somehow lesser." 135 S. Ct. at 2600. Here, the government subjects children of married same-sex couples to those same harms. By rejecting the rightful citizenship of a child, the government creates significant instabilities for families. This rejection carries significant risks—not just stigma, but also the prospect of removal from the United States and statelessness.

The government's attempts to camouflage the grave constitutional concerns its policy raises are unavailing. Beyond asserting erroneously that the INA requires a biological relationship, the government tries to justify that requirement by attempting to show similar injuries that different-sex couples who use assisted reproductive technology (ART) may face. Gov't Br. 9-10. But the government's analysis ignores the uniquely substantial harm its policy exacts upon same-sex couples. Same-sex couples almost never have an option for securing citizenship for their children based on both parents having a biological relationship, whereas different-sex couples usually do. Married same-sex couples are thus dramatically more likely to take advantage of ART than married different-sex couples. Given that practical reality, the government's policy imposes a distinctly asymmetrical disadvantage on same-sex couples; because that disadvantage concerns the

fundamental right to bear and raise children, it raises distinct constitutional concerns that weight heavily against the government's interpretation. As *Obergefell* made clear, the government may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," as this unequal treatment violates "[r]ights implicit in liberty and rights secured by equal protection." 135 S. Ct. at 2603, 2605; *Pavan*, 137 S. Ct. at 2078.

And as a practical matter, the government admits that "a same-sex couple's use of [ART] may more readily be apparent to consular officers than an opposite-sex couple's use of ART." Gov't Br. 10. In other words, same-sex couples are more likely to raise the suspicion of consular officials based on immutable features of their appearance. This scrutiny means that, in reality, same-sex couples will face the overwhelming brunt of efforts to separate their children from the derivative citizenship to which they are entitled. In fact, the government has not provided evidence of a single case in which this policy has *ever* been affirmatively applied to a different-sex couple.[6]

[6] Even if the government occasionally applies its policy to different-sex couples who use ART and deprives their children of derivative citizenship through § 1401(g), this separate harm also violates the statute and does not rescue the government's policy from the grave constitutional concerns it raises. Penalizing marital couples in this manner for using ART itself raises grave constitutional concerns for it is well-established that "choices concerning … family relationships, procreation, and childrearing … are protected by the Constitution," regardless of sexual orientation. *Obergefell*, 135 S. Ct. at 2599 (holding that "the Court must respect the basic reasons why the right to marry has been long protected" and

Married same-sex couples like Andrew and Elad are doubly burdened both because the government uniquely targets and harms them based on the non-recognition of their marriage and because it deprives them of their right to enjoy the benefits of marriage, which they possess regardless of sexual orientation.

C. The Government's Defense Of Its Erroneous Interpretation Rests On The Suggestion Of "Alternatives" That Themselves Are Constitutionally Problematic

To couples like Andrew and Elad, the government says they need not worry because the government has identified three "alternative paths to citizenship." Gov't Br. 33. But these alternatives cannot save the government's policy because they are themselves constitutionally suspect and burdensome.

As one option, the government hypothesizes (at 35), couples may choose which parent "contributes biologically" to the conception of a child to satisfy the government's erroneous construction of the statute. Or, translated into plain terms, the government tells couples which sperm or egg to use if they hope to pass U.S. citizenship on to their children. Under this option, as discussed above, the State Department recognizes citizenship only under § 1409, which expressly applies to

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emphasizing the importance of safeguarding due process rights (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-454 (1972)). For both same-sex *and different-sex* couples, this interference threatens to burden married couples' choices about whether and under what circumstances to have children, as further detailed below. *See infra* Section II.C.

children "born out of wedlock," thus disparaging a lawful marriage and formally severing the unitary marital family.

This "alternative" raises grave constitutional concerns for two reasons. First, it places significant obstacles in the path of couples seeking to exercise their right to a benefit of marriage—passing on derivative citizenship. Instructing couples to use one spouse's sperm or egg ignores the many intimate reasons why a couple might choose to use the other spouse's sperm or egg, such as respecting one spouse's religious beliefs, avoiding the risk of passing on certain genetic disorders, reducing healthcare costs or preventing other financial hardships, and achieving successful fertilization and implantation, among others. In any event, the couple may have no real choice to do what the government suggests because of infertility or the inability to carry a pregnancy.

Second, this alternative represents the prospect of government interference with private decision-making about whether and how to bear children. The government requires married couples to waive certain constitutional rights in order to access the governmental benefit of derivative citizenship. It is well-established that "choices concerning … family relationships, procreation, and childrearing … are protected by the Constitution." *Obergefell*, 135 S. Ct. at 2599. Here, the government tells couples what choices they must make concerning their "family relationships, procreation, and childrearing," i.e. who should be the biological

parent of a child, or face a penalty of being unable to pass on derivative citizenship.

As a second alternative, the government proposes (at 33-34) that a child it deems born "out of wedlock," like E.J., could become a citizen under 8 U.S.C. § 1431(a). That process, as the government explains at length, has multiple steps. First, the family moves to the United States. Second, the child becomes a lawful permanent resident of the United States. This step can be accomplished, in the government's words, by designating "the U.S. citizen parent, who qualifies—through marriage to the child's biological parent—as the child's *stepparent*." Gov't Br. 33-34 (emphasis added). Third, the noncitizen parent becomes a lawful permanent resident of the United States. Fourth, the family must continue to reside in the United States for a minimum of three years. Fifth, the noncitizen parent naturalizes. Sixth, after three years of upheaval and paperwork, the child becomes a citizen. In all, this process would require a family like the Dvash-Banks family to move back to the United States, switch the citizenship of one parent, and wait at least three years before E.J. could acquire citizenship.

This alternate "path to citizenship," Gov't Br. 33, is constitutionally insufficient, more aptly termed a "marathon to citizenship." Its six steps significantly burden couples like Andrew and Elad. It forces one parent to naturalize. It forces both parents to uproot their career or educational plans in their

country of residence. And it forces the whole family to move internationally, regardless of the many important reasons they might have for living overseas. The result, in short, is instability for the entire family. The process's length underscores its insufficiency—it requires a family to leave their country of residence for longer than the time it takes someone to earn a law degree.

Finally, as a third alternative, the government relies on a twenty-year-old law review article to suggest that the U.S. citizen parent could "adopt" the child. Gov't Br. 33-34. Besides the fact that requiring a legal parent to "adopt" their own child is yet another way in which the government fails to recognize valid marriages, this alternative fails for the same reasons detailed above. As the government acknowledges, this process works "in much the manner described [for the prior alternative]," including requiring a costly, disruptive move to the United States. *Id*. at 34-35.

Because all three of the government's alternatives are neither practically nor legally viable, they cannot save its constitutionally problematic and erroneous construction of the INA. They subvert important constitutional rights and give same-sex couples access to a benefit of marriage unconstitutionally "less than" different-sex couples. *Pavan*, 137 S. Ct. at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601). In short, they threaten to impermissibly "burden the liberty of same-sex couples." *Obergefell*, 135 S. Ct. at 2604.

D. The Government Has Not Asserted Any Interest That Would Justify Its Unconstitutional Policy

The government has not asserted any governmental interest that would justify its unconstitutional construction of § 1401(g). The thinness of the government's rationales further underscores the constitutional infirmity of its policy. *Windsor*, 570 U.S. at 775 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." (citation omitted)).

First, as noted above, this Court cannot defer to the State Department's assessment in this area, given the grave constitutional issues at stake. *See United States v. Clark*, 445 U.S. 23, 34 n.10 (1980); *Lowe v. SEC*, 472 U.S. 181, 216 (1985) (White, J., concurring). As the Supreme Court has recognized, "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency*, 531 U.S. at 172-173.

Second, as Dvash-Banks and his amici explain, the government's claims of fraud contradict the record in this case, where the government asserted no interest in fraud prevention, and in any event are unsubstantiated. While citizenship fraud

of course exists, the government has not presented any specific evidence that fraud would increase in the context of ART. The general ubiquity of some minimal amount of fraud is not an argument for disfavoring ART, particularly when weighed against the grave constitutional concerns raised by the government's policy. Moreover, by admitting (Gov't Br. 29) that "[t]he [State] Department has long been concerned about the phenomenon of individuals fraudulently claiming citizenship on behalf of a child who is not actually theirs," the government reveals that it has no real justification for having separate policies regarding ART. In other words, the State Department's concerns about citizenship fraud would not be resolved by a biological requirement. Indeed, the government has offered no evidence to the contrary.

Finally, the government asserts (at 32) that consular officers would have to resolve difficult questions of foreign law if its interpretation of § 1401(g) is not adopted. This argument is without merit. As the government acknowledges consular officers confront difficult questions of foreign law on a regular basis, which is precisely the type of "specialized experience" that the government touts in its brief as attributable to the State Department. Gov't Br. 29-31. The government offers no explanation regarding how the biological requirement it imposes would alleviate any alleged burden on consular officers associated with ART cases for

married same-sex couples. And the government fails to address the added burden to consular offices associated with enforcing a biological requirement.

CONCLUSION

For the reasons above, this Court should affirm the judgment of the district court.

Respectfully submitted,
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December 19, 2019

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