

NOTES

Terms and Conditions Matter: Marriage Equality in Birthright Citizenship

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I. OVERVIEW

If you are married in the United States, you are entitled to many material benefits that unmarried people cannot access.¹ These benefits include taxation privileges, medical decision-making authority, spousal privileges in the law of evidence, worker’s compensation benefits, child custody support, and many more.² Married U.S. citizens also enjoy the privilege of conferring birthright citizenship upon their foreign-born children so long as either spouse has resided in the U.S. for at least five years.³ The U.S. Supreme Court has held that same-sex couples are entitled to civil marriage on the same terms and conditions as opposite-sex couples; this includes not only symbolic recognition, but also equal access to the material benefits that accompany marriage.⁴

James Derek Mize and Jonathan Daniel Gregg are both U.S. citizens.⁵ Mize was born in the States and Gregg was born in the United Kingdom but moved to the U.S. in 2014.⁶ About a year later, Mize and Gregg were married.⁷ When they decided to have a child, they utilized a practice through which many U.S. citizen children are born—assisted reproductive technology (ART).⁸ In 2018, Mize and Gregg had a child using Gregg’s sperm, an anonymously donated egg, and with their friend

1. See Mize v. Pompeo, 482 F. Supp. 3d 1317, 1334 (N.D. Ga. 2020).

2. *Id.*

3. *Id.* at 1324-25.

4. *Id.* at 1334 (citing Obergefell v. Hodges, 576 U.S. 644, 669 (2015)).

5. *Id.* at 1326.

6. *Id.*

7. *Id.*

8. See *id.*

living in England serving as the gestational surrogate.⁹ Their child, S.M.-G., was born in England.¹⁰ England issued a birth certificate naming Mize and Gregg as the parents, which accurately reflected the agreement that all involved had reached: Mize and Gregg were the intended and only parents of S.M.-G.¹¹

The new parents applied for a Consular Report of Birth Abroad (CRBA) and a U.S. passport for S.M.-G.¹² At the U.S. Embassy, Mize and Gregg explained to the staff that S.M.-G. had been conceived using Gregg's sperm through the ART process.¹³ Because S.M.-G. is biologically related only to Gregg, embassy staff evaluated the applications under Sections 309(a) and 301(g) of the Immigration and Nationality Act (INA), which govern children born "out-of-wedlock" to one citizen parent and one alien parent.¹⁴ Under this evaluation, staff concluded that S.M.-G. was not a citizen: together, Sections 309(a) and 301(g) required that S.M.-G.'s biological father reside in the U.S. for at least five years prior to her birth.¹⁵ Gregg did not meet this requirement.¹⁶

Mize and Gregg filed suit against Michael Pompeo in his official capacity as Secretary of State and the Department of State in July 2019.¹⁷ Plaintiffs asserted that S.M.-G.'s citizenship never should have been evaluated under the INA's out-of-wedlock provision (Section 309(a)) because her parents are married U.S. citizens.¹⁸ Instead, they maintained that S.M.-G. was a U.S. citizen under the INA's "in wedlock" provision (Section 301(c)), and the State Department should have applied that provision when evaluating S.M.-G.'s applications.¹⁹ Plaintiffs also asserted a substantive due process claim under the Fifth Amendment, stating that, by refusing to recognize S.M.-G.'s citizenship, the State Department violated their fundamental right to marry and to enjoy marital benefits, and to be recognized as a family.²⁰

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1327.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Plaintiffs asserted an equal protection claim under the Fifth Amendment as well, on the grounds that S.M.-G. was denied citizenship under Section 301(c) of the INA because of her parents' status as a same-sex married couple."²¹ Lastly, Plaintiffs asserted an Administrative Procedure Act (APA) claim seeking judicial review of the denial of S.M.-G.'s applications.²² The complaint requested "(1) a declaration that S.M.-G. is a U.S. citizen under Section 301(c); (2) an order requiring Defendants to issue a U.S. passport for S.M.-G.; (3) a declaration that Defendants' 'policy and practice' toward the children of married same-sex couples is unconstitutional . . . and (4) a permanent injunction enjoining Defendants from continuing to apply that policy and practice."²³

Defendants moved to dismiss the complaint in November 2019 for failure to state a claim; both parties then moved for summary judgment on Plaintiffs' claim that S.M.-G. is a citizen under Section 301(c) of the INA.²⁴ Following oral argument Defendants again moved to dismiss, claiming the case was moot because S.M.-G. obtained lawful permanent residence status in 2020 and thus became a naturalized U.S. citizen.²⁵ The United States District Court for the Northern District of Georgia *held* that S.M.-G. is a U.S. citizen by birth and directed the Defendants to issue her a U.S. passport. *Mize v. Pompeo*, 482 F. Supp. 3d 1317 (N.D. Ga. 2020).

II. BACKGROUND

This case centers around the Immigration and Nationality Act (INA), which is "the primary Act of Congress governing birthright citizenship for foreign-born children."²⁶ Two sections of the INA are especially relevant: 301 and 309.²⁷ Plaintiffs' and Defendants' differing interpretations of the INA lead to the court's discussion of another central point in the case: the doctrine of constitutional avoidance.²⁸ Specifically, the issue is whether Defendants' interpretation of the INA would raise serious constitutional problems regarding "same-sex couples' [right] to civil marriage on the same terms and conditions as opposite-sex couples."²⁹

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1328.

25. *Id.*

26. *Id.* at 1324.

27. *See id.*

28. *See id.* at 1332-34.

29. *Id.* at 1334 (quoting *Pavan v. Smith*, 137 S. Ct. 2075, 2076 (2017)).

A. *The Immigration and Nationality Act*

The Immigration and Nationality Act makes citizenship for foreign-born children dependent upon the child's parents.³⁰ Section 301 provides "the general rules for acquiring U.S. citizenship" and pertains only to children born in wedlock, whereas Section 309 provides the rules applicable to children born out of wedlock.³¹ The State Department's Foreign Affairs Manual (FAM)—a comprehensive and authoritative source of codified information regarding the Department's policies and procedures—defines "in wedlock" and "out of wedlock" for purposes of interpreting the State Department's policy on birthright citizenship for children born abroad.³² The FAM states that children are born "in wedlock" if their biological parents were married at the time of their birth, and children are born "out-of-wedlock" if their biological parents were unmarried at the time of birth.³³

Section 301(c) of the INA grants U.S. citizenship to foreign-born children of married citizen parents (children born in wedlock) so long as one parent resided in the U.S. prior to the child's birth.³⁴ Section 301(g) is also relevant to this case: it states that if only one married parent is a U.S. citizen, their foreign-born child is granted citizenship so long as the citizen parent lived in the U.S. for at least five years prior to the child's birth.³⁵

Section 309, which is applicable to children born to unmarried parents (children born out-of-wedlock), has different rules depending on whether citizenship is pursued through the mother or the father.³⁶ For citizenship sought via the father, Section 309(a) incorporates the requirements from Section 301 and adds that the child and father must possess a blood relationship through clear and convincing evidence, the father must be a U.S. citizen at the time of the child's birth, the father acknowledges paternity in writing under oath, and paternity is established by adjudication of a competent court, among others.³⁷ For citizenship sought via the mother, Section 309(c) states that foreign-born children

30. See 8 U.S.C. § 1401(c) (1994).

31. *Mize*, 482 F. Supp. 3d at 1324 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686-87 (2017)); 8 U.S.C. § 1401 (1994); 8 U.S.C. § 1409 (1988).

32. 304.1 MARRIAGE, 8 FAM 304.1-2.

33. *Id.*

34. 8 U.S.C. § 1401(c).

35. *Id.*

36. 8 U.S.C. § 1409.

37. 8 U.S.C. § 1409(a).

may receive their mother's nationality status if the mother was a U.S. citizen at the time of birth, and the mother had previously been physically present in the U.S. for a continuous period of one year.³⁸

In addition to its guidance on the wedlock provisions, the FAM describes another biological principle underlying the State Department's policy on acquisition of birthright citizenship for foreign-born children.³⁹ This principle is that foreign-born children must share a biological relationship with the parent(s) through whom U.S. citizenship is claimed in order to acquire birthright citizenship.⁴⁰ The result of this interpretation of the Department's policy is that Section 301 applies only to children born in wedlock if they share a biological relationship with both parents.⁴¹ Otherwise, the State Department will apply Section 309, the out-of-wedlock provision, when evaluating birthright citizenship applications for foreign-born children.⁴²

The principle that children born abroad to married U.S. citizen parents can only attain birthright citizenship if they are biologically related to *both* parents leaves out many children that would otherwise qualify.⁴³ Recognizing the increased prevalence of ART, the State Department modified the FAM to provide that "a woman may establish a biological relationship with her child either by virtue of being the genetic mother (the woman whose egg was used in conception) or the gestational mother (the woman who carried and delivered the baby)."⁴⁴

Although the INA itself was not amended, the change in the interpretation of the statute has been reflected in its implementation.⁴⁵ The result is that when U.S. citizen wives are gestationally—but not genetically—the mother of a foreign-born child they have with their U.S. citizen husband who is genetically related to the child, that child is considered to be born in wedlock.⁴⁶ Similarly, when two U.S. citizen wives have a foreign-born child that is biologically related to one of them

38. 8 U.S.C. § 1409(c).

39. See 301.4 ACQUISITION BY BIRTH ABROAD TO U.S. CITIZEN PARENT(S) AND EVOLUTION OF KEY STATUTES, 8 FAM 301.4 (2022).

40. *Id.*

41. See 8 FAM 301.4; 8 U.S.C. § 1401.

42. See 8 FAM 301.4; 8 U.S.C. § 1409.

43. See 8 FAM 301.4.

44. *Mize v. Pompeo*, 482 F. Supp. 3d 1317, 1326 (N.D. Ga. 2020); 301.4 ACQUISITION BY BIRTH ABROAD TO U.S. CITIZEN PARENT(S) AND EVOLUTION OF KEY STATUTES, 8 FAM 301.4(D)(1)(d).

45. *Mize*, 482 F. Supp. 3d at 1326.

46. *Id.*; see 8 FAM 301.4(D)(1)(d).

(through an egg donation) and carried to term by the other (making her the gestational mother), that child is deemed to be born in wedlock.⁴⁷ The change in statutory interpretation has not similarly benefitted two married U.S. citizen men seeking to acquire birthright citizenship for their foreign-born child.⁴⁸

B. Constitutional Avoidance

The U.S. Supreme Court has established that constitutional avoidance is a canon of statutory interpretation that comes into play when, “after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*.”⁴⁹ The Court has held that when “an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”⁵⁰ Although an agency’s statutory interpretation is generally entitled to *Chevron* deference so long as Congress has not spoken to the “precise question at issue” and the interpretation is “based on a permissible construction of the statute,” the Court has held that, when serious constitutional problems are at stake, “constitutional avoidance trumps even *Chevron* deference.”⁵¹

The doctrine of constitutional avoidance contains several critical factors that must be analyzed before it is invoked.⁵² First, constitutional avoidance does not require an actual finding that the construction of the statute is unconstitutional—it requires only that the problematic construction give rise to “serious constitutional questions,” “grave doubts,” or a “serious likelihood that the statute will be held unconstitutional.”⁵³

Next, when faced with serious doubts as to the constitutionality of a statutory construction, courts must answer the threshold question of

47. *Id.*

48. *Id.*

49. *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

50. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

51. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Union Pac. R. Co. v. U.S. Dep’t of Homeland Sec.*, 738 F.3d 885, 893 (8th Cir. 2013); *see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

52. *Mize*, 482 F. Supp. 3d at 1332-34.

53. *See N.L.R.B. v. Cath. Bishop of Chicago*, 440 U.S. 490, 501 (1979); *see also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998).

whether an alternative construction that avoids the constitutional question is fairly possible.⁵⁴ The Supreme Court has stressed that the alternative construction must be plausible: “In the absence of more than one plausible construction, the canon simply ‘has no application.’”⁵⁵ An equally essential requirement is that the statute be “genuinely ambiguous”—courts must undergo ordinary textual analysis *and* establish that more than one interpretation of the statute is plausible before invoking constitutional avoidance.⁵⁶

If a court establishes these critical facts regarding a statute in question (that the statute is genuinely ambiguous, that the problematic construction gives rise to serious constitutional questions, and that a plausible alternative construction exists), then it must adopt the alternative, constitutionally permissible interpretation.⁵⁷ The Supreme Court has emphasized that “every reasonable construction must be resorted to in order to save a statute from unconstitutionality.”⁵⁸ Thus, even if the language and legislative history of a statute point more toward its unconstitutional construction, if there is a plausible, constitutionally permissible construction, it must be favored.⁵⁹

Finally, the Supreme Court has taken care to stress that the doctrine of constitutional avoidance is not utilized “‘to the point of perverting the purpose of a statute’ or judicially rewriting it.”⁶⁰ Although courts may strain to interpret a statute in accordance with the constitution, they must not adopt said construction if it is “‘foreclosed’ by the statutory text, or ‘plainly contrary to the intent of Congress.’”⁶¹

III. COURT’S DECISION

In the noted case, the United States District Court for the Northern District of Georgia adopted the Non-Biological Reading of Section 301(c) of the INA, holding that the statute “does not require children to share a

54. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

55. *Id.* (citing *Warger v. Shauers*, 574 U.S. 40, 50 (2014)).

56. *Mize*, 482 F. Supp. 3d at 1333; *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

57. *See Mize*, 482 F. Supp. 3d at 1333; *see also Clark*, 543 U.S. at 385; *Cath. Bishop of Chicago*, 440 U.S. at 501; *Jennings*, 138 S. Ct. at 842.

58. *Hooper v. People of State of Cal.*, 155 U.S. 648, 657 (1895).

59. *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) (quoting *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 944 (Reg’l Rail Reorg. Ct. 1974)).

60. *Aptheker v. Sec’y of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)).

61. *Mize*, 482 F. Supp. 3d at 1334 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)).

biological relationship with both citizen parents in order for those children to acquire citizenship at birth.”⁶² Thus, the court held that S.M.-G. is a U.S. Citizen by birth under Section 301(c) and is entitled to a U.S. passport.⁶³

In reaching this holding, the court considered whether the State Department’s Biological Reading of Section 301(c) of the INA would raise serious constitutional questions, thus invoking the doctrine of constitutional avoidance.⁶⁴ The court stated that the Constitution grants same-sex couples a right to marriage under the same terms and conditions as opposite-sex couples and that, accordingly, “the government cannot deny married same-sex couples access ‘to the constellation of benefits . . . linked to marriage.’”⁶⁵ The court found that Section 301(c)’s grant of birthright citizenship to foreign-born children if either married parent resided previously in the United States could reasonably be viewed as a benefit linked to marriage.⁶⁶ Under the Biological Reading of the statute, this benefit would not be available to married same-sex male couples, because two men cannot be biologically related to the same child.⁶⁷ Thus, by denying married same-sex male couples a benefit linked to marriage, the court determined that the Biological Reading raised serious concerns about the constitutionality of Section 301(c).⁶⁸

Having established that the Biological Reading was constitutionally suspect, the court next turned to the Non-Biological Reading to determine whether it was a plausible interpretation of the statute.⁶⁹ If this alternative construction of the statute was fairly possible, the doctrine of constitutional avoidance required the court to adopt it.⁷⁰ The court began by examining the text of Section 301(c) to determine whether its meaning was clear.⁷¹ The statute “grants citizenship to a person ‘born . . . of parents both of whom are citizens of the United States.’”⁷² Since all parties agreed that S.M.-G. was “born” and that Mize and Gregg were her “parents,” the

62. *Id.* at 1342.

63. *Id.*

64. *Id.* at 1335; *see id.* at 1333.

65. *Id.* at 1334 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015)).

66. *Id.* at 1335.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.* at 1335-36.

72. *Id.* at 1336 (quoting 8 U.S.C. § 1401(c)).

pivotal question emerging from the text was whether she was born “of” Mize and Gregg.⁷³

The INA does not define the word “of,” so the court turned to dictionary definitions for guidance in determining its ordinary, everyday meaning at the time the INA was enacted, in 1952.⁷⁴ The court concluded that a child is born “of” parents if he or she “originated” from those parents, and that a child could reasonably be deemed to “originate” from parents through means other than a genetic relationship.⁷⁵ Thus, the court found that the ordinary meaning of the statutory phrase “born of” was “reasonably consistent with both the Biological Reading and the Non-Biological Reading.”⁷⁶ The court also noted that the State Department conceded that a reasonable person could read Section 301(c) either as requiring a biological relationship or not.⁷⁷

Next, the court took up the question of whether the Non-Biological Reading remained plausible under the INA’s statutory context.⁷⁸ Defendants acknowledged that “the INA incorporates the common law meaning of ‘parent’ into Section 301.”⁷⁹ The court explained that the common law contains a presumption of parental legitimacy, “such that a child born into a lawful marriage is the lawful child of those parents, regardless of the existence or nonexistence of any biological link.”⁸⁰ Because Section 301(c) contains this presumption, the court found that the statutory language can be plausibly read to apply to S.M.-G., who is biologically related to only one of her married parents.⁸¹ In reaching its decision, the court noted that “at least six cases have held that Section 301 does not require a biological parent-child relationship. No court has expressed the contrary view.”⁸² The court treated this evidence not as dispositive, but as lending credence to the idea that the Non-Biological Reading was fairly possible.⁸³

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1338.

77. *Id.* at 1337.

78. *Id.* at 1338.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1339-1340.

83. *Id.*

Lastly, the court reviewed defendants' arguments in support of the Biological Reading.⁸⁴ Defendants asserted that their interpretation of Section 301(c) was entitled to deference under *Skidmore v. Swift & Co.*, which established that an agency's statutory interpretation should generally receive deference.⁸⁵ The court rejected this argument, stating that "constitutional avoidance trumps *Skidmore* deference" (and even trumps *Chevron* deference).⁸⁶ The court also examined two Supreme Court cases defendants put forth stating that "ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective."⁸⁷ The court found that these cases did not preclude the Non-Biological Reading because they were both brought by unmarried parents challenging Section 309 of the INA's "out of wedlock" provision—Section 301's "in wedlock" provision was not involved in either case.⁸⁸

IV. ANALYSIS

Prior to the Supreme Court's decision in *Obergefell v. Hodges* in 2015, the constitutional right of same-sex couples to marry was not recognized.⁸⁹ In *Obergefell*'s monumental decision, Justice Kennedy articulated not only the importance of the institution of marriage to American society, but also the reverence the Court has always held toward protecting the right to marry.⁹⁰ In emphasizing the importance of a constitutionally protected right to marry for same-sex couples, Justice Kennedy stated that:

[B]y virtue of their exclusion from that institution [marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage . . . As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects.⁹¹

This recognition, not only of the intrinsic importance of protecting same-sex marriage, but also of the need to ensure that the benefits that come

84. *Id.* at 1340.

85. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

86. *Id.*

87. *Id.* at 1342 (quoting *Miller v. Albright*, 523 U.S. 420, 436 (1998)).

88. *Id.*

89. *See Obergefell v. Hodges*, 576 U.S. 644, 652 (2015).

90. *See generally id.* (explaining the historic and present context surrounding marriage's place in American society and the Court's role in cementing it).

91. *Id.* at 670.

with married status are not denied to same-sex couples, provides the backdrop for the decision in *Mize*.⁹² What was at stake was validating *Obergefell*'s recognition that same-sex couples are entitled to the same marital protections and benefits as opposite-sex couples.⁹³

In holding that the Biological Reading of Section 301(c) would deny certain same-sex couples their constitutional right to the same marital benefits as opposite-sex couples, the court correctly looked to the Supreme Court's decision in *Pavan v. Smith* for guidance.⁹⁴ In *Pavan*, the Court found an Arkansas statute requiring a mother's husband to be listed on her child's birth certificate—regardless of the husband's biological relationship with that child—but not requiring a mother's wife to be listed on her child's birth certificate, to be unconstitutional.⁹⁵ Here, the court aptly applied the Supreme Court's *Pavan* analysis and found that “the Biological Reading would result in a statute that (1) provides a benefit, (2) conditioned on marriage, (3) that is unavailable to married same-sex couples”⁹⁶ As the *Pavan* opinion states, “*Obergefell* proscribes such disparate treatment.”⁹⁷

The court also laid a foundation for future courts to find that stigmatization on the basis of same-sex marriage is a cognizable Article III injury.⁹⁸ In addressing the State Department's contention that the Mize-Gregg family's harms were resolved when S.M.-G. became a naturalized citizen under a different provision of the INA, thus rendering their claims moot, the court correctly found it irrelevant that S.M.-G. became a U.S. citizen via another avenue.⁹⁹ The court held that Mize and Gregg “alleged an actual, palpable stigmatic injury resulting from Defendants' conduct,” which was sufficient for Article III standing.¹⁰⁰ This holding validates the injury Defendants caused by refusing to recognize Plaintiffs' marriage and “denying the reality of the father-daughter relationship between S.M.-G. and both of her fathers.”¹⁰¹ The

92. See *id.* at 646-47; see generally *Mize*, 482 F. Supp. 3d (analyzing *Obergefell*'s discussion of marital benefits in concluding that S.M.-G. was entitled to birthright citizenship).

93. See generally *Obergefell*, 576 U.S. (holding that same-sex couples have a constitutionally protected right to marry, including access to all the societal benefits of marriage).

94. *Mize*, 482 F. Supp. 3d at 1334-35 (citing *Pavan v. Smith*, 137 S. Ct. 2075, 2078-79 (2017)).

95. *Id.* at 1334 (citing *Pavan*, 137 S. Ct. at 2078-79).

96. *Id.*

97. *Pavan*, 137 S. Ct. at 2078.

98. *Mize*, 482 F. Supp. 3d at 1329-31.

99. *Id.* at 1329, 1331.

100. *Id.*

101. *Id.* at 1329.

recognition that Mize, Gregg, and S.M.-G.'s injuries encompassed so much more than the black-and-white denial of S.M.-G.'s citizenship application is essential to ensuring true marriage equality.¹⁰²

The court effectively used statutory construction and context analysis to support its holding that the Non-Biological Reading was fairly possible.¹⁰³ In examining the meaning of the word "of" in the INA, the court found that—although the word could be interpreted as narrowly referring to a biological parent-child relationship—it could also be read more broadly.¹⁰⁴ The court convincingly supported this proposition by pointing out that the State Department's previous decision (not triggered by an amendment to the statute) to change their interpretation of "born of" to grant birthright citizenship to a child born to a gestational, but not biological, mother demonstrates that the language was ambiguous enough to be read in different ways.¹⁰⁵

The court also correctly considered how the absence of a biological relationship requirement from Section 301(c) fit into the statutory context of the INA as a whole.¹⁰⁶ The court found that Section 309(a)(1)—unlike Section 301(c)—includes a blood relationship requirement, indicating that Congress was aware of the option "to require a biological relationship and that it intentionally declined to do so in Section 301(c)."¹⁰⁷ Congress also used "blood relationship" language in a 1986 amendment to the INA, but did not add a biological requirement to Section 301(c). The court took these findings together as strongly suggesting that the statutory language in question was not intended to require a biological relationship.¹⁰⁸ Finally, and perhaps most presciently, the court stated that "if Congress wanted to require a biological parent-child relationship, 'it certainly could have spoken in clearer terms.'"¹⁰⁹

By limiting foreign-born children eligible for U.S. citizenship under its "in wedlock" provision to only those whose parents were married U.S. citizens *and* both biologically related to the child, the State Department was not abiding by *Obergefell*'s directives.¹¹⁰ Through its holding that the State Department's Biological Reading of Section 301(c) was

102. *See id.* at 1329-1331.

103. *See id.* at 1336-39.

104. *Id.* at 1336-37.

105. *Id.* at 1338.

106. *Id.* at 1339.

107. *Id.*

108. *Id.*

109. *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001)).

110. *Id.* at 1326; *see Obergefell*, 576 U.S. at 675-76).

constitutionally suspect, and that S.M.-G. is a U.S. citizen under that provision, the court refused to acquiesce to a watered down reading of *Obergefell*.¹¹¹ Although the intangible value of protecting the right of all U.S. citizens to marry is incalculably enormous, under our current societal construction the right to marry is not complete without access to its attending benefits. The District Court for the Northern District of Georgia recognized this, and just as it looked to other cases upholding the right of same-sex couples to be married under the same terms and conditions as opposite-sex couples, now future courts may look to its decision in doing the same.¹¹²

Emma Guida*

111. *See Mize*, 482 F. Supp. 3d at 1342.

112. *See generally id.* (holding that foreign-born children are not proscribed from obtaining birthright citizenship because they are not biologically related to both married U.S. citizen parents).

* © 2023 Emma Guida. J.D. Candidate 2024, Tulane University Law School; B.A. 2016, Barnard College of Columbia University. The author would like to thank her friends and family for their encouragement, editing, and support. She would also like to thank the Journal and its members for their hard work, scholarship, and advocacy.