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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. Derivative Citizenship: *Morales-Santana*

As discussed in *Digest 2015* at 1-6, the *Morales-Santana* case involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Plaintiff Morales-Santana was born out of wedlock in the Dominican Republic to a Dominican mother and a U.S. citizen father. His U.S. citizen father did not have the physical presence required under the relevant provision of the Immigration and Nationality Act (“INA”) to transmit U.S. citizenship to Morales-Santana; later, while living in the United States as a lawful permanent resident, Morales-Santana committed a crime and was ordered deported. Morales-Santana challenged the deportation, arguing that the differing requirements for out of wedlock citizen fathers and mothers to transmit U.S. citizenship violate the Fifth Amendment’s equal protection clause. The Court of Appeals for the Second Circuit invalidated the ten-year physical presence requirement for out of wedlock fathers, requiring them to instead show the same one-year continuous physical presence required for out of wedlock mothers. The U.S. request for *en banc* review in the Court of Appeals was denied.

On March 22, 2016, the United States filed a petition for a writ of certiorari, which the Supreme Court granted on June 28, 2016. *Lynch v. Morales-Santana*, No. 15-1191. The U.S. brief submitted to the Supreme Court on August 19, 2016, seeking reversal of the Second Circuit’s decision, is excerpted below (with footnotes omitted). The case was argued before the Supreme Court on November 9, 2016.

* * * *

...The court of appeals ... erred in holding that the relevant provisions of 8 U.S.C. 1401 and 1409 violate equal protection. The court compounded its error when it remedied the perceived constitutional problem by extending U.S. citizenship to respondent—and to an untold number of

other individuals who never had reason to consider themselves U.S. citizens. In doing so, the court of appeals exceeded its constitutional authority and ignored congressional intent.

* * * *

As this Court has long held, the Fourteenth Amendment “contemplates two sources of citizenship, and two only: birth and naturalization.” *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). ...[T]he Constitution’s vesting in Congress of plenary authority to decide which persons born abroad should be granted U.S. citizenship requires that judicial review of Congress’s judgments be highly deferential.

* * * *

The court of appeals erred in declining to adhere to that principle. The ... power to grant or deny citizenship to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is a different aspect of the same overarching sovereign power. ...

* * * *

In exercising its plenary authority over naturalization, Congress has been cautious in extending U.S. citizenship at birth to foreign-born individuals, consistently requiring that they satisfy statutory criteria designed to ensure that they have a sufficiently robust connection to the United States to warrant the conferral of citizenship. This Court in *Nguyen* [*v. INS*, 533 U.S. 53 (2001)] recognized that Congress has a legitimate “desire to ensure some tie between this country and one who seeks citizenship.” 533 U.S. at 68. Of particular relevance here, when a foreign-born child is presumptively subject to competing claims of national allegiance because his parents have different nationalities, Congress has required a stronger connection to the United States than it has when the child’s national allegiance is likely to be exclusively to the United States. The physical-presence requirements codified in Sections 1401 and 1409 are constitutionally sound means of serving that interest.

* * * *

...Since 1790, Congress has, “by successive acts,” provided “for the admission to citizenship of * * * foreign-born children of American citizens, coming within the definitions prescribed by Congress.” *Wong Kim Ark*, 169 U.S. at 672. From the outset, Congress has sought to ensure that children born abroad would not become citizens by virtue of a mere blood relationship to a U.S. citizen, without any other tie to this country. Congress has accomplished that goal primarily by extending citizenship to foreign-born children *only* if a U.S.-citizen parent satisfied a statutory requirement that the parent was physically present in (or had a residence in) the United States for a specified period of time.

* * * *

...In 1940, Congress (at President Roosevelt's request) undertook a comprehensive overhaul of the Nation's nationality laws. The resulting Nationality Act of 1940, ch. 876, 54 Stat. 1137, again addressed the circumstances in which a foreign-born child of at least one U.S.-citizen parent would be granted U.S. citizenship from birth. Congress crafted that law against the backdrop of World War I, ... at a time when ...the United States faced grave difficulties in defending its interests and citizens abroad. ...

The provisions of the 1940 Act governing the citizenship of foreign-born children of married parents imposed varying physical-presence or residency requirements depending on the citizen status of the child's parents. The least demanding requirement applied when a foreign-born child had two U.S.-citizen parents...

In contrast, when a foreign-born child had connections to two different countries through parents with different nationalities, and therefore was likely to have competing national allegiances, Congress required a more established connection between the U.S.-citizen parent and the United States. Thus, when a child was born abroad to married parents of different nationalities, Congress provided that the child would be a U.S. citizen from birth only if the U.S.-citizen parent had ten years' residence in the United States, at least five of which were after attaining age 16. 1940 Act § 201(g), 54 Stat. 1139.

The requirement of that greater connection to the United States in part reflected a concern that individuals born and residing abroad will be "alien in all their characteristics and connections and interests," notwithstanding a biological connection to a U.S. citizen. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 37* (printed 1945) (1940 Hearings); see *Nationality Laws of the United States* 14. The 1940 Act thus embodied a determination to "prevent the perpetuation of United States citizenship by citizens born abroad who remain there, or who may have been born in the United States but who go abroad as infants and do not return to this country." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940) (1940 Senate Report). "Neither such persons nor their foreign-born children," Congress concluded, "would have a real American background, or any interest except that of being protected by the United States Government while in foreign countries." *Ibid.* And conferring citizenship at birth on foreign-born children of parents of different nationalities presented "greater difficulties" and "require[d] correspondingly stricter limitations." 1940 Hearings 423.

...Congress also was reluctant to create dual citizens except in rare cases. This Court has recognized on several occasions that "Congress has an appropriate concern with problems attendant on dual nationality." *Bellei*, 401 U.S. at 831; see *Kawakita v. United States*, 343 U.S. 717, 733 (1952) ...

This Court has recognized the risk that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship." *Kawakita*, 343 U.S. at 736. "An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation," *id.* at 734, and he could be conscripted into military service against the United States. Congress therefore had compelling reasons to limit the extension of citizenship from birth to only those children born abroad to parents of different nationalities who could establish, through a U.S.-citizen parent, a sufficiently strong connection to the United States.

* * * *

...Before the 1940 Act, none of the laws granting citizenship to foreign-born children had expressly addressed the status of children born abroad out of wedlock. ...

...Congress took up that issue in its overhaul of the Nation's nationality laws in 1940. The first paragraph of Section 205 of the 1940 Act stated that "[t]he provisions of section 201" (which set forth the rules applicable to foreign-born children of married parents) "hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 1940 Act § 205, 54 Stat. 1139. The second paragraph of Section 205 further stated that, "[i]n the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 1940 Act § 205, 54 Stat. 1140 (emphasis added).

The first paragraph of Section 205 thus treated children born out of wedlock to U.S.-citizen mothers and those born to U.S.-citizen fathers the same (in terms of a physical-connection or residence requirement) in cases where the father legitimated the child before the child reached the age of majority—treating the children as if their parents had been married when the child was born. If both parents were U.S. citizens, the more lenient rule in Section 201(c) applied, requiring only prior U.S. residence by one parent. But if, as in respondent's case, only one parent was a U.S. citizen, the longer residence requirements in Section 201(g) applied, just as they would have if the child's parents had been married when the child was born.

But in addition to that general rule, the second paragraph of Section 205 provided that, when the unwed father (whether U.S.-citizen or alien) failed to take the steps necessary to legally establish his relationship to his child, the child was (at least retroactively) considered to have acquired U.S. citizenship from birth if the child's unwed mother was a U.S. citizen and had previously resided in the United States or an outlying possession. But Section 205 was ambiguous in one important respect: the use of the phrase "in the absence of legitimation or adjudication" left open the possibility that the citizenship of a child born out of wedlock abroad to a U.S.-citizen mother could not be determined until either the child's father legitimated him or he reached the age of majority, or that he would be divested of citizenship upon legitimation. See *Matter of M*—, 4 I. & N. Dec. 440, 442-445 (B.I.A. 1951).

Under the 1940 Act, when a child had two legally recognized U.S.-citizen parents, Congress required only a minimal physical connection (prior residency of any length) between at least one U.S.-citizen parent and the United States. 1940 Act §§ 201(c), 205, 54 Stat. 1138-1139. A similarly minimal physical connection was deemed sufficient when a foreign-born child had only one legally recognized parent at birth and that parent was a U.S. citizen. 1940 Act § 205, 54 Stat. 1140. By contrast, when a foreign-born child had two legally recognized parents, only one of whom was a U.S. citizen—because his parents were married at the time of his birth or were unmarried but his father later legitimated him—Congress understood that the child would likely be subject to competing national loyalties. In those instances (like respondent's), Congress required that the U.S.-citizen parent establish a stronger physical connection to the United States as a means of ensuring that the child would form a stronger cultural and emotional tie and allegiance to the United States to offset any competing connection to another country.

A decade later, Congress revisited the subject of children born abroad out of wedlock when it enacted Section 309 of the INA, 66 Stat. 238 (8 U.S.C. 1409), in 1952. Congress made

two relevant changes: (1) it required that, in order for a child born abroad out of wedlock to a U.S.-citizen mother to be granted U.S. citizenship at birth, the mother must have been physically present in the United States for one continuous year (rather than merely residing in the United States at some point) before the child's birth; and (2) made clear that the foreign-born child whose U.S.-citizen mother satisfied that physical-presence requirement would retain U.S. citizenship from birth regardless of whether his father later legitimated him. 8 U.S.C. 1409(a) and (c).

The first change ensured a somewhat stronger connection between the U.S.-citizen mother and the United States in order for her child to obtain citizenship. The second change eliminated the qualifier “[i]n the absence of such legitimation or adjudication” that had created uncertainty in Section 205 of the 1940 Act, 54 Stat. 1140, which had granted citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother. The new provision replaced that qualifier with the phrase “[n]otwithstanding the provision of” subsection (a) of 8 U.S.C. 1409, which provided that the rule for the children of married parents would apply to the children of unmarried parents upon legitimation. That amendment made explicit that a child born out of wedlock to a U.S.-citizen mother could have his citizenship definitively determined at birth—without regard to whether the father's paternity was later legally established, through legitimation, which otherwise could have triggered the ten- and five-year physical-presence requirements under Sections 1401(a)(7) and 1409(a) applicable when there were two parents of different nationalities.

Although Section 1409(c) used gendered terms by referring to “the mother” of a child born out of wedlock, the differential treatment under that provision, as under the 1940 Act, turned on whether a foreign-born child had one legally recognized parent or two at the time of his birth.

Respondent errs in disputing (Br. in Opp. 14-16) that, at the moment of birth, the mother of a child born out of wedlock was typically treated throughout the world as the child's only legal parent. Although the father of such a child could establish a legally recognized relationship by marrying the mother or taking another step prescribed by law, in most of the world his relationship to his child was not legally recognized at the time of the child's birth. . . .

When Congress overhauled the Nation's nationality laws in 1940, it understood that the mother of a child born out of wedlock is typically the only legally recognized parent at the time of the child's birth. . . . Congress had before it a comprehensive study of foreign citizenship laws, undertaken by an Assistant to the Legal Adviser in the Department of State, which determined that 30 of the countries studied had enacted laws governing the citizenship of children born out of wedlock. The laws of 29 of those 30 countries provided that the child acquired the citizenship of his mother at birth (assuming the mother was a citizen of the relevant country), and in 19 of those 29 countries, the child would take the father's citizenship upon legitimation. Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258- 259 & n.38 (1935) (Sandifer) (cited in 1940 Hearings 431). The study recognized that in most countries a child could not obtain his father's citizenship unless or until the father took “any act *legally establishing* filiation.” *Id.* at 258 (emphasis added). . . .

This Court has similarly recognized that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr v. Robertson*, 463 U.S. 248, 266-268 (1983); *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (opinion of Stewart, J.); cf.

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2558-2559 (2013). Indeed, this Court explained in *Nguyen* that a “significant difference” exists “between the[] respective relationships” of those mothers and fathers “to the potential citizen at the time of birth.” 533 U.S. at 62. In particular, the Court explained that, while “the fact of parenthood” is established for an unwed mother “at the moment of birth,” *id.* at 68, “that legal determination with respect to fathers” may constitutionally be subject to “a different set of rules” because the two parents are not similarly situated, *id.* at 63. See *Miller*, 523 U.S. at 443 (Stevens, J.) (“[I]t is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a *legal relationship* between parent and child—the birth itself for citizen mothers, but postbirth conduct for citizen fathers and their offspring.”) (emphasis added).

When respondent was born out of wedlock in the Dominican Republic, his mother was not a U.S. citizen, and respondent therefore had no legally recognized connection to the United States *at all*, much less a claim to U.S. citizenship. When respondent’s U.S.-citizen father later legitimated respondent by marrying respondent’s mother, respondent then had two legal parents, one of whom remained an alien. The general rule in 8 U.S.C. 1409(a) and 1401(a)(7) for that two-parent situation therefore applied. Respondent’s father thus was not similarly situated to a U.S.-citizen mother of a child born abroad out of wedlock, either when respondent was born or when his father later married his mother. A U.S.-citizen mother, at the time of her child’s birth, would have been a legally recognized parent and typically the only such parent, and there accordingly would have been no competing parental claim of a connection to a foreign country. By contrast, when respondent was born, he had no *legal* relationship to the U.S.-citizen father who later legitimated him, and therefore no legal relationship to the United States; and when his father *did* later legitimate him and thereby established a legal relationship with him for the first time, there were then *two* legally recognized parents, each with a different nationality. It was entirely reasonable for Congress to conclude that in that situation, assurance of a sufficient connection to the United States called for application of the general rule requiring ten- and five-years of physical presence in the United States by the U.S.-citizen parent that is applicable even to *married* couples of different nationalities.

Because a U.S.-citizen mother and U.S.-citizen father were therefore not similarly situated in their relationship to a child born abroad out of wedlock, the separate provision in 8 U.S.C. 1409(c) for acquisition of citizenship by the child of an unwed U.S.-citizen mother does not violate equal protection, even under intermediate scrutiny. See *Heckler v. Mathews*, 465 U.S. 728, 745-750 (1984) (*Mathews*).

C. The Rules Established By Sections 1401 and 1409 Are Substantially Related To The Government’s Important Interest In Reducing The Risk That A Foreign-Born Child Of A U.S. Citizen Would Be Born Stateless

The challenged statutory provisions also served a second important interest: reducing the risk that the child of a U.S. citizen would be stateless at birth. Although the court of appeals acknowledged that reducing the risk of statelessness at birth is an important government interest, it erroneously concluded that such an interest did not justify the statutory provisions Congress enacted. Pet. App. 25a-34a.

* * * *

The differences embodied in the physical-presence requirements in Sections 1409 and 1401 reflect the reality that children born out of wedlock abroad to a U.S.-citizen mother were at

risk of having no citizenship at birth. When Congress enacted the comprehensive nationality code in 1940 and substantially revised it in 1952, that risk was greater for those children than it was for children born out of wedlock to an alien mother and a U.S.-citizen father who only later legitimated the child.

Unlike the United States, which affords citizenship on a “*jus soli*” basis to all who are born in the United States and subject to its jurisdiction, many other countries apply “*jus sanguinis*” rules, under which a child’s citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. See *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). In most of those countries (as in most *jus soli* countries), when a child was born to an unwed mother, the only parent legally recognized as the child’s parent at the time of the birth usually was the mother. . . . As a result, there was a substantial risk that a child born out of wedlock to a U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of his mother. The court of appeals rejected this important government interest because it was not convinced “that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers.” Pet. App. 31a. That was error.

When a child was born in a *jus sanguinis* country to parents of different nationalities, the child was stateless unless either the laws of that country or the laws of the country of one parent’s nationality conferred citizenship on him at the time of his birth. . . . Experts in nationality and international law have long agreed that the risk of being born stateless was particularly high for a child born out of wedlock in a *jus sanguinis* country unless the child could obtain his mother’s citizenship. See, e.g., *Treatise on International Law* § 69, at 238 (quoted at p. 28, *supra*). Thus, when a U.S.-citizen mother had a child out of wedlock abroad in a *jus sanguinis* country, her child was at great risk of being born stateless unless U.S. law provided U.S. citizenship for the child.

The circumstances were different for a child born abroad out of wedlock to an alien mother and a U.S.-citizen father who only later established his paternal status. The same foreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father’s citizenship at birth) would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother’s citizenship.

* * * *

The court of appeals compounded its error by rejecting the government’s submission that Congress “enacted the 1952 Act’s gender-based physical presence requirements out of a concern for statelessness.” Pet. App. 31a; see *id.* at 26a-32a. Abundant evidence demonstrates that Congress was aware of and concerned about the problem of statelessness, and that Congress revised the relevant provisions in 1952 with the specific intent of reducing the risk that a child born out of wedlock abroad to a U.S.-citizen mother would be born stateless.

During and following the First and Second World Wars, Congress and the world became acutely aware of the problem of statelessness. See, e.g., United Nations, *A Study of Statelessness* 4-7 (1949), <http://www.unhcr.org/3ae68c2d0.pdf>. The 1952 legislative overhaul enacted as the INA was undertaken pursuant to a 1947 Senate resolution that directed the Senate Judiciary Committee “to make a full and complete investigation of our entire immigration system” and to submit a report “with such recommendations for changes in the immigration and naturalization laws as [the Committee] may deem advisable.” S. Res. No. 137, 80th Cong., 1st Sess. (1947),

reprinted in S. Rep. No. 1515, 81st Cong., 2d Sess. 803 (1950) (1950 Senate Report). The same resolution directed the Committee to investigate “the situation with respect to displaced persons in Europe and all aspects of the displaced-persons problem,” which encompassed the problem of statelessness, and to submit a separate report on that topic. *Ibid.* Congress thus viewed the task of addressing problems of statelessness as part and parcel of the 1952 overhaul of the Nation’s immigration and naturalization laws.

Section 205 of the 1940 Act on its face presented a real risk of statelessness. Section 205 provided that, “[i]n the absence of such legitimation or adjudication” “during minority,” a child born out of wedlock abroad to a U.S.-citizen mother would “be held to have acquired at birth” the U.S. citizenship of his mother if his mother “had previously resided in the United States or one of its outlying territories.” 1940 Act § 205, 54 Stat. 1139-1140 (emphasis added). On its face, that language suggested that the acquisition of U.S. citizenship by a child born abroad to an unmarried U.S.-citizen mother could not be determined definitively either until the father legally established his parental relationship through legitimation or adjudication or until the child reached the age of majority and no such legitimation or adjudication had occurred. Under that view of the 1940 Act, such a child would have been at great risk of having no nationality (*i.e.*, being stateless) from the time of his birth until either legitimation or majority. Although in 1951 the BIA interpreted Section 205 as granting U.S. citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother, regardless of later legitimation (and the Department of State now concurs in that interpretation of the statute), the Department of State held the view that such a child would not be a citizen upon legitimation by his father unless his mother or father could satisfy the applicable residence requirement in Section 201. See *Matter of M—*, 4 I. & N. Dec. at 442-445. And Congress understood that the text of Section 205 of the 1940 Act could be interpreted to render such a child stateless from his birth until such time as his father legally established paternity— or until the child reached age 21 if the father’s paternity had not been legally established. See 1950 Senate Report 676 (explaining that a child born abroad out of wedlock would “have the nationality status of [his] mother,” but only “in the absence of legitimation”).

One of the revisions Congress enacted in 1952 was to make explicit that the conferral of citizenship based on a U.S.-citizen mother’s one year of continuous physical presence in the United States was effective at the time of the child’s birth and was not contingent on whether the child’s father later established his own legal relationship. The enactment in the INA of 8 U.S.C. 1409(c) removed any ambiguity on that point. In explaining the purpose of that provision, the Senate Report directly addressed the issue of statelessness, stating: “This provision establishing the child’s nationality as that of the [U.S.-citizen] mother *regardless* of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*” S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphases added). The court of appeals dismissed that clear statement of congressional purpose: “Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue.” Pet. App. 29a n.10. That reasoning cannot be reconciled with the Report’s words, which directly link the rule applicable to unmarried U.S.-citizen mothers of children born abroad to the purpose that such children “shall have a nationality at birth.” 1952 Senate Report 39.

...The court of appeals dismissed the government's interest in reducing the risk of statelessness based in part on speculation that the different physical-presence requirements "arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Pet. App. 31a. The statutory scheme reflects no such gender-based generalizations.

The challenged distinctions turned instead on rules establishing the legal status of parent and child, both abroad and in this country. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same when they are not similarly situated. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). And this Court has already held in *Nguyen*, a case also involving Section 1409, that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr*, 463 U.S. at 266-268; *Parham*, 441 U.S. at 355 (opinion of Stewart, J.). The difference in each parent's treatment under Section 1409(a) and (c) is attributable to what this Court in *Nguyen* described as the "significant difference between their respective relationships to the potential citizen at the time of birth," 533 U.S. at 62, not to impermissible stereotypes.

The court of appeals apparently speculated that the domestic and international laws that recognized the mother of a child born out of wedlock as the only legally recognized parent at the time of birth were developed based on stereotypes about which parent of such a child *should* care for and be responsible for the child. See Pet. App. 31a n.13. But such speculation about motivations for other laws here and abroad cannot be a basis for invalidating an Act of Congress, and Congress cannot be expected to ignore the relevant foreign and domestic laws that did exist. Indeed, Congress obviously has no authority to override the citizenship or paternity laws of other countries; and Congress has historically left it to the States to regulate familial relationships in the United States. Congress therefore did not engage in "impermissible stereotyping," *id.* at 32a, when it legislated against the reality that, in most of the world (as in the United States), when a child was born out of wedlock, his mother was his only legally recognized parent at the time of birth and therefore the only possible source of citizenship through a legally recognized parent.

...The implications of the constitutional rule respondent seeks could be far-reaching. If this Court were to find that Congress may not treat the parental relationship of unwed citizen fathers at the moment of a child's birth differently than the parental relationship of unwed citizen mothers in the context of immigration and naturalization, where Congress has particularly broad discretion, there surely would be a flood of litigation contending that the States must revise their laws—including those governing adoption, inheritance, wrongful death, and residency—that similarly distinguish between those two relationships.

Even today, the father of a child born out of wedlock anywhere in the United States must take some affirmative step to establish his legal status as the child's father. For mothers, parental status is generally established by the act of giving birth. See *Nguyen*, 533 U.S. at 64. The fact that respondent's arguments would call into question the constitutionality of laws in every State of the Union is an additional reason to reject respondent's position.

D. Congress Chose Appropriate Means To Achieve Its Important Interests

In enacting the challenged laws, Congress faced a complex task: to craft a set of uniform rules that would apply to individuals not located in the United States and that would serve important, but sometimes competing, government interests. Even in the context of considering gender-based equal protection challenges in the domestic context, this Court has never required a perfect fit between means and ends. Flexibility is especially necessary in the context of

naturalization, where the rules Congress enacts must operate in combination with the rules of other nations—rules over which Congress has no control and that are likely to change over time. Here, as this Court concluded with respect to another aspect of Section 1409, “[t]he fit between the means [Congress chose] and the important end[s] is ‘exceedingly persuasive.’” *Nguyen*, 533 U.S. at 70 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

...The court of appeals erroneously concluded that the government’s important interest in reducing statelessness was not sufficient to justify the statutory scheme because, it reasoned, “effective gender-neutral alternatives” were available at the time of the statute’s enactment. Pet. App. 32a. The court based that assertion exclusively on a 1933 proposal by then-Secretary of State Cordell Hull that would have amended the nationality laws to provide:

A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Id. at 33a (quoting Letter from Cordell Hull, Secretary of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), reprinted in *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (1933 Hearing)). The court of appeals erred in relying on Secretary Hull’s proposed amendment because the amendment, while gender-neutral on its face, would have applied in the same manner as Section 1409(c). It was only when the child was born out of wedlock to a U.S.-citizen mother that the child would have only one legally recognized parent. That was clear to observers at the time. See 1933 Hearing 56 (testimony of Burnita S. Williams, National Woman’s Party) (noting that “[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have an idea that it would just apply to women”). For purposes of assessing respondent’s equal protection challenge, the salient fact is how the challenged law *operates*, not the words it uses. As this Court explained in *Nguyen*:

The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference [and in this case, a legal difference] between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64. The court of appeals therefore erred in relying on a proposal Congress declined to adopt more than 80 years ago to invalidate a statutory framework that has governed the acquisition of U.S. citizenship in this context since 1940.

During a hearing on Secretary Hull’s proposed amendment, moreover, Congress considered an objection (from a member of the National Women’s Party) to the amendment based on the fact that it would “require[.]” State Department personnel “to know what the law is on the subject of illegitimacy in every country of the world” because “[t]hey would have to know what the law is on the subject of illegitimacy in order to determine whether or not at the place of birth there was a legal parent, or whether one or the other was a legal parent.” 1933 Hearing 56. Such a requirement, the witness testified, “would create an extraordinary situation” in which “we would not know where we were.” *Ibid.* As a practical matter, official determinations about the

U.S. citizenship of foreign-born children are often made many years after the child's birth, as was the case here. A post-hoc inquiry into the laws and informal interpretations that a foreign nation applied many years earlier could be quite difficult. Such a system also would not have provided notice to an expectant U.S.-citizen parent about the consequences of choosing to have the child born abroad rather than in the United States.

This court acknowledged in *Nguyen* that Congress has leeway in crafting citizenship laws to “enact[] an easily administered scheme,” 533 U.S. at 69, instead of requiring more specific inquiries. It is worth noting, moreover, that the provision suggested in 1934 would offer no help to respondent, who has never even suggested that he was stateless at the time of his birth in the Dominican Republic.

* * * *

...Finally, as this Court recognized in *Nguyen*, the rules set out in Sections 1401 and 1409 were not (and are not) the exclusive means by which a foreign-born child could become a U.S. citizen. Under Section 322(a) of the INA, 66 Stat. 246, for example, if the foreign-born child of a U.S.-citizen parent did not secure U.S. citizenship at birth because his parent(s) did not satisfy the applicable physical-presence requirement, the citizen parent could petition to naturalize the child if the child was under the age of 18 and was residing permanently in the United States in the custody of the citizen parent, pursuant to a lawful admission for permanent residence. 8 U.S.C. 1433(a) (1958). That option was presumably available to respondent's father when respondent was admitted to the United States as a lawful permanent resident in 1975. And under current law, if the foreign-born child of one citizen parent does not secure U.S. citizenship at birth because that parent did not have sufficient physical presence in the United States, the child is *automatically* a citizen under 8 U.S.C. 1431(a) if the child moves to the United States before turning 18 and resides in the legal and physical custody of that parent pursuant to a lawful admission for permanent residence.

In addition, a foreign-born child who does not qualify for citizenship at birth pursuant to Sections 1401 and 1409, but nevertheless develops substantial connections to the United States through permanent residence in the United States, may apply to become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1423, 1427, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process (or if he rendered himself ineligible by engaging in criminal activity, see Pet. App. 46a). ...

II. THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL AND STATUTORY AUTHORITY BY EXTENDING U.S. CITIZENSHIP TO RESPONDENT

This Court has noted that, when a court sustains an equal protection claim, it “faces ‘two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.’ ” *Mathews*, 465 U.S. at 738 (citation omitted; brackets in original). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is to bring about equal treatment, “a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.” *Id.* at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) (“The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here,

supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers).”). The court of appeals chose to remedy the equal protection violation it perceived by “replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c).” Pet. App. 40a. In other words, the court extended what it viewed as the more favorable treatment to unmarried U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers). The court erred in choosing that remedy because it flouts congressional intent and exceeds the court’s authority with respect to naturalization.

...If made generally applicable, the court of appeals’ choice of remedy—imposed more than 60 years after Section 1409(c) was enacted, 50 years after respondent was born, and 40 years after his father legitimated him—would have the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set by Congress and who grew up with no expectation that they were citizens of the United States—and would do so in order to remedy the perceived violation of their *parents’* rights, rather than their own. That result is inconsistent with this Court’s cases holding that “the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers.” *INS v. Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States v. Ginsberg*, 243 U.S. 472, 474 (1917) (“An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.”). Indeed, this Court acknowledged in *Nguyen* that “[t]here may well be potential problems with fashioning a remedy” if the Court were to find that the additional requirements applicable to unwed citizen fathers pursuant to Section 1409(a) violated equal protection. 533 U.S. at 72 (quoting *Miller*, 523 U.S. at 451 (O’Connor, J., concurring in the judgment)) (internal quotation marks omitted); accord *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) (“[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.”).

In this context, any judicially crafted remedy must be carefully tailored to preserve the degree of flexibility necessary for Congress to address the problem, balancing competing interests while exercising its exclusive authority over naturalization. If this Court were to conclude that the existing scheme violates equal protection, it should remedy such a violation by extending, on a prospective basis, the longer physical-presence requirements in Section 1401(a), made applicable through Section 1409(a), to children born out of wedlock to U.S.-citizen mothers. Such a ruling would allow Congress to decide whether or how to extend U.S. citizenship to children born out of wedlock to U.S.-citizen mothers and fathers who do not meet the physical-presence requirements in Sections 1401(a). In contrast, the court of appeals’ chosen solution would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States, and it would raise questions concerning the status of their children, grandchildren, and other descendants.

* * * *

2. *Tuaua*: Notation on Passports Issued to Non-Citizen U.S. Nationals

As described in *Digest 2015* at 6-11 and *Digest 2014* at 22-26, *Tuaua et al. v. United States*, 788 F.3d 300 (D.C. Cir. 2015) is an action challenging the notation on the U.S. passports of American Samoan individuals indicating they are U.S. nationals, but not U.S. citizens, in accordance with INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an “outlying possession” of the United States. Plaintiffs argued that children born in American Samoa are citizens at birth by virtue of the Citizenship Clause of the 14th Amendment. The district court dismissed all claims. The U.S. Court of Appeals for the D.C. Circuit affirmed the district court and subsequently denied a petition for rehearing. On February 1, 2016, the plaintiffs below filed a petition for writ of certiorari in the Supreme Court of the United States. *Tuaua v. United States*, No. 15-981. On May 11, 2016, the federal respondents filed their brief in opposition. Excerpts follow from the opposition brief (with footnotes omitted). The petition for certiorari was denied on June 13, 2016.

* * * *

Petitioners seek review (Pet. 15-35) of the court of appeals’ conclusion that persons born in American Samoa are not entitled to United States citizenship at birth under the Citizenship Clause of the Fourteenth Amendment to the Constitution. The court of appeals correctly rejected petitioners’ constitutional challenge to the Act of Congress governing the nationality status of persons born in American Samoa. The decision below is consistent with the decisions of four other courts of appeals that have held that persons born in unincorporated territories of the United States do not acquire U.S. citizenship at birth under the Citizenship Clause. Petitioners’ contrary position also is inconsistent with Congress’s longstanding practice under the Citizenship Clause.

Further, the democratically elected government of American Samoa and its delegate in Congress oppose petitioners’ constitutional claim. To the extent that the people of American Samoa may in the future desire to obtain U.S. citizenship, the proper course is to seek that result from Congress, through enactment of a law conferring citizenship. That is the manner in which U.S. citizenship has been conferred on residents of other unincorporated territories of the United States. Further review is therefore unwarranted.

1. The Fourteenth Amendment’s Citizenship Clause provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. Amend. XIV, § 1, Cl. 1. The question in this case is whether persons born in the United States territory of American Samoa are born “in the United States” within the meaning of this Clause.

Like the court of appeals below, every other court of appeals that has considered the issue has held that the Citizenship Clause does not apply to unincorporated territories of the United States, meaning territories that are not destined for statehood. See *Valmonte v. INS*, 136 F.3d 914, 917-920 (2d Cir.) (holding that the Citizenship Clause does not apply to individuals born in the Philippines while it was a U.S. territory), cert. denied, 525 U.S. 1024 (1998); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (same); *Nolos v. Holder*, 611 F.3d 279, 282-284

(5th Cir. 2010) (per curiam) (same); *Rabang v. INS*, 35 F.3d 1449, 1451-1453 (9th Cir. 1994) (same), cert. denied, 515 U.S. 1130 (1995); see also *Eche v. Holder*, 694 F.3d 1026, 1027-1028, 1030-1031 (9th Cir. 2012) (construing “the United States” in the Naturalization Clause, U.S. Const. Art. I, § 8, Cl. 4, not to apply to the Northern Mariana Islands because “federal courts have repeatedly construed similar and even identical language in other clauses to include states and incorporated territories, but not unincorporated territories”), cert. denied, 133 S. Ct. 2825 (2013). Petitioners acknowledge (Pet. 34) that every court of appeals that has considered the question whether the Citizenship Clause applies to an unincorporated territory has held that it does not.

2. The court of appeals correctly concluded that persons born in American Samoa do not obtain citizenship at birth under the Citizenship Clause. The Clause extends citizenship to persons who are “born or naturalized in the United States” and “subject to the jurisdiction thereof.” U.S. Const. Amend. XIV, § 1, Cl. 1. By constitutional design, a U.S. territory is under the sovereignty of the United States, and Congress has plenary power to administer the territory. See U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Accordingly, persons born in the territories are “subject to the jurisdiction” of the United States. Cf. *Elk v. Wilkins*, 112 U.S. 94, 99-103 (1884) (explaining that members of Indian Tribes did not obtain citizenship under the Citizenship Clause because Tribes are not “subject to the jurisdiction” of the United States in the relevant sense). But there remains another, prior question: whether U.S. territories are “in the United States” for purposes of the Clause.

a. The best reading of the Citizenship Clause is that U.S. territories are not “in the United States” within the meaning of the Clause because “in the United States” means in the 50 States and the District of Columbia. At the time the Constitution was adopted, “the United States” consisted of the 13 States, and the Constitution contemplated creation of a district carved out of those States to “become the Seat of the Government of the United States.” U.S. Const. Art. I, § 8, Cl. 17...

The Constitution expressly distinguishes between States and territories of the United States. The Constitution reserves to the States all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States,” U.S. Const. Amend. X, thereby recognizing that States have “sovereignty concurrent with that of the Federal Government,” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Territories, on the other hand, are defined as lands “belonging to the United States” that are under the plenary authority of Congress. U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause). The Constitution itself therefore sets out a fundamental distinction between “the United States” and the territories belonging to the United States.

Further, while the Citizenship Clause of the Fourteenth Amendment is confined to individuals born “in the United States, *and* subject to the jurisdiction thereof,” U.S. Const. Amend. XIV, § 1, Cl. 1 (emphasis added), the Thirteenth Amendment prohibits slavery “within the United States, *or* any place subject to their jurisdiction,” U.S. Const. Amend. XIII, § 1 (emphasis added). The Thirteenth Amendment’s broader language demonstrates that “there may be places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words.” *Downes v. Bidwell*, 182 U.S. 244, 336-337 (1901) (White, J., concurring); see also *id.* at 251 (opinion of Brown, J.). At a minimum, this textual distinction underscores the soundness of the settled understanding that unincorporated territories, while subject to the jurisdiction *of* the United States, are not “*in* the United States” for purposes of the Citizenship Clause.

b. The meaning of “in the United States” under the Citizenship Clause is further informed by this Court’s decisions concerning application of the Constitution to U.S. territories. The Court has long recognized that the Constitution does not automatically apply in full to all territories of the United States. In the *Insular Cases*—a series of decisions about the application of the Constitution to territories the United States acquired at the turn of the 20th century, such as Puerto Rico, Guam, and the Philippines—the Court explained that the Constitution has more limited application in “unincorporated Territories” that are not intended for statehood than it does in States and “incorporated Territories surely destined for statehood.” *Boumediene v. Bush*, 553 U.S. 723, 756-757 (2008). In those cases, the Court set out a “general rule” that in an “unincorporated territory,” the Constitution does not necessarily apply in full. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Such a rule is necessary to provide the United States with flexibility in acquiring, governing, and relinquishing territories. For example, the Court has explained that some territories (such as the former Spanish colonies) operated under civil-law systems quite unlike our own, and in some cases, like the Philippines, “a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory.” *Boumediene*, 553 U.S. at 757-758.

The *Insular Cases* invoked the distinction between incorporated and unincorporated territories both to determine the reach of constitutional provisions that are silent as to geographic scope, see, e.g., *Dorr v. United States*, 195 U.S. 138, 144-149 (1904) (Sixth Amendment jury-trial right), and to interpret constitutional provisions that specify a geographic reach, see *Downes*, 182 U.S. at 287 (opinion of Brown, J.) (Tax Uniformity Clause). Here, the Citizenship Clause confers citizenship on those born “in the United States,” and the Court’s decision in *Downes* confirms that “in the United States” excludes unincorporated territories.

The particular question in *Downes* was whether the requirement that “all Duties, Imposts and Excises shall be uniform throughout the United States,” U.S. Const. Art. I, § 8, Cl. 1, applies to Puerto Rico, a U.S. territory. 182 U.S. at 249 (opinion of Brown, J.). The Court held that Puerto Rico is not part of “the United States” for purposes of that provision. *Id.* at 263, 277- 278, 287 (opinion of Brown, J.); *id.* at 341-342 (White, J., concurring); *id.* at 346 (Gray, J., concurring). . . .

As particularly relevant here, the Court recognized in *Downes* that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories. Justice Brown explained that “the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants.” 182 U.S. at 279; see *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring). The right to acquire territory “could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States.” *Id.* at 306 (White, J., concurring). The Justices in the majority thus recognized that when the United States acquires various territories, the decision to afford citizenship is to be made by Congress. *Id.* at 280 (opinion of Brown, J.) (“In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.”); see *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring).

Petitioners suggest (Pet. 29-30) that this reasoning is inapplicable to American Samoa because it has been a territory of the United States for many years. But the relevant point is that the Constitution grants Congress plenary power with respect to the territories and that this Court has recognized that reading the Constitution to mandate citizenship for residents of

unincorporated territories would be a significant and unwarranted limitation on that power. And an unincorporated territory does not lose that status by passage of time. See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465, 468-470 (1979) (recognizing Puerto Rico to be an unincorporated territory 80 years after its acquisition). Petitioners also suggest (Pet. 33) that the *Insular Cases* “should be modified or overruled,” but this Court has reaffirmed their core principle, which is that the political Branches determine whether newly acquired territory is incorporated into the United States. See *Boumediene*, 553 U.S. at 756-757; *Torres*, 442 U.S. at 469; *Reid v. Covert*, 354 U.S. 1, 8-9 (1957) (plurality opinion); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

c. American Samoa is an unincorporated territory of the United States. The agreements by which American Samoa was acquired did not contemplate that it would become a State, and Congress has not enacted any law that provides a path to statehood. Persons born in American Samoa therefore are not born “in the United States” for purposes of the Citizenship Clause.

The Constitution grants Congress plenary power to administer the territories, U.S. Const. Art. IV, § 3, Cl. 2, and that power, combined with Congress’s broad authority over naturalization, U.S. Const. Art. I, § 8, Cl. 4, inform the meaning of “in the United States” under the Citizenship Clause. In particular, Congress must have flexibility, when it acquires territories, to determine whether and when the inhabitants of those territories become citizens or nationals. *Downes*, 182 U.S. at 279-280 (opinion of Brown, J.).

That flexibility has proven important when the United States has acquired territories. For example, in 1898, when the United States acquired Puerto Rico and the Philippines from Spain in the Treaty of Paris, the Treaty provided that “[t]he civil rights and political status of the native inhabitants of the[se] territories * * * shall be determined by the Congress.” Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. IX, 30 Stat. 1759. Congress later extended U.S. citizenship to residents of Puerto Rico, see Organic Act of 1917 (Jones Act), ch. 145, § 5, 39 Stat. 953; see also Nationality Act of 1940, § 202, 54 Stat. 1139, but it provided that residents of the Philippines would be “citizens of the Philippine Islands,” rather than citizens of the United States, Autonomy Act, ch. 416, § 2, 39 Stat. 546; see *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954). As this Court has recognized, it was important for Congress to have the authority to make different arrangements for these territories, particularly because a territory (such as the Philippines) may not permanently remain under the sovereignty of the United States. See *Boumediene*, 553 U.S. at 757-758; see also *Downes*, 182 U.S. at 318 (White, J., concurring). As the court of appeals recognized, there would be “vast practical consequences” if the Citizenship Clause now were applied to unincorporated territories, including that such a development would raise questions about “the United States citizenship status of persons born in the Philippines during the territorial period,” and “potentially their children through operation of statute.” Pet. App. 9a n.6.

The “years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right” confirm that the Citizenship Clause does not apply to American Samoa. Pet. App. 42a; see *id* at 14a n.7. Congress has long understood that it has the authority to decide whether and when to deem residents of U.S. territories (particularly residents of unincorporated territories) to be U.S. citizens or nationals, and Congress has exercised that authority to fashion rules for individual territories based on their particular characteristics and political futures. *Downes*, 182 U.S. at 251-258, 267-270 (opinion of Brown, J.). Congress’s longstanding practice provides strong evidence that the Citizenship Clause was not intended to override Congress’s plenary powers with respect to the territories—at least with respect to unincorporated territories like American Samoa. See *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) (“If a thing has been practiced for two hundred years by common

consent, it will need a strong case for the Fourteenth Amendment to affect it.”).

3. Petitioners contend (Pet. 3, 5, 24-27) that this Court has recognized that the Citizenship Clause applies in U.S. territories. They are mistaken. This Court recognized in *Downes* that application of the Clause to the territories would substantially impair Congress’s constitutional authority to administer the territories, especially newly acquired territories. See pp. 14-15, *supra*. And the Court has continued to assume that persons born in U.S. territories obtain citizenship only by Act of Congress, not through the Constitution. *Barber*, 347 U.S. at 639 n.1; see *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting); see also *Rabang v. Boyd*, 353 U.S. 427, 432 (1957) (reiterating Congress’s power to “prescribe upon what terms the United States will receive [a territory’s] inhabitants, and what their status shall be” (emphasis and citation omitted)).

Petitioners primarily rely (Pet. 25-27) on *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), where the Court held that the Citizenship Clause conferred citizenship at birth on a child born in California whose parents were citizens of China. *Id.* at 705. As the court of appeals explained (Pet. App. 8a-9a), it was undisputed that the plaintiff in *Wong Kim Ark* was born in the United States because he was born in a State. 169 U.S. at 652. ...

* * * *

4. There are two additional factors that counsel against further review in this case. First, “the American Samoan people have not formed a collective consensus in favor of United States citizenship.” Pet. App. 18a. As a result, the democratically elected government of American Samoa and the territory’s delegate in Congress have participated in this case to oppose application of the Citizenship Clause to American Samoa. As the court of appeals explained, the people of American Samoa have been reluctant to seek citizenship because they fear it would upset “the traditional Samoan way of life,” including the territory’s longstanding “system of communal land ownership.” *Ibid.* This is not to say that the wishes of the people of American Samoa are controlling with respect to the application of the Citizenship Clause. But the opposition of the government of American Samoa (which represents the people of American Samoa) counsels strongly against reaching out to upset the settled constitutional understanding. See *id.* at 22a-23a (declining to “mandate an irregular intrusion into the autonomy of Samoan democratic decision-making”)....

Second, and relatedly, the ability to resolve the question of citizenship for American Samoans through the political process makes clear that there is no occasion for this Court’s review. ...

If a consensus view on citizenship were to develop in American Samoa, the territory’s delegate could bring the issue to Congress. By contrast, if this Court were now to extend the Citizenship Clause to impose U.S. citizenship on all persons born in American Samoa, that would eliminate the opportunity for democratic consideration and consensus by the people of American Samoa. It also would disrupt the long-settled understanding with respect to all of the territories, including territories (like the Philippines) that are no longer under the sovereignty of the United States. The appropriate course under our constitutional structure, which affords Congress broad authority over the administration of the territories, is to permit the people of American Samoa to continue to assess whether they wish to obtain U.S. citizenship, and perhaps to seek citizenship through an Act of Congress, rather than construing the Constitution to mandate U.S. citizenship based on the urging of the petitioners in this case. For these reasons as

well, further review is unwarranted.

* * * *

3. Citizenship Transmission on Military Bases: *Thomas*

As discussed in *Digest 2015* at 11-14, in *Jermaine Amani Thomas v. Loretta Lynch*, 796 F.3d 535 (5th Cir. 2015), the Fifth Circuit considered the argument that children born on U.S. military bases abroad are citizens at birth by virtue of the Citizenship Clause of the 14th Amendment. Petitioners argue that *Tuaua* (discussed above) creates a circuit split (and potentially opens the door for children born on military bases to acquire U.S. citizenship under the Constitution) with its holding that the meaning of “in the United States” in the Citizenship Clause is ambiguous. The Fifth Circuit rejected that claim and denied rehearing. Thomas petitioned the U.S. Supreme Court for a writ of certiorari on January 12, 2016. On May 18, 2016, the United States filed its brief in opposition to the petition for certiorari. Excerpts follow (with footnotes omitted) from the U.S. opposition brief. The Supreme Court denied certiorari on June 27, 2016.

* * * *

Petitioner does not identify any court that has held that a person born on a U.S. military base outside the United States and its territories acquires citizenship at birth under the Constitution. So far as the government is aware, only one other court of appeals has addressed a claim that birth on a U.S. military installation abroad confers citizenship under the Citizenship Clause, and that court also rejected the claim. In *Williams v. Attorney General of the United States*, 458 Fed. Appx. 148 (2012) (per curiam), the Third Circuit held that a person born at the U.S. Naval Station at Guantanamo Bay, Cuba, was not born “in the United States” for purposes of the Citizenship Clause. *Id.* at 152. The court explained that, as a general matter, military installations abroad “are not part of the United States within the meaning of the Fourteenth Amendment.” *Ibid.* The court also explained that Guantanamo Bay, in particular, is not “in the United States” because “Cuba retains de jure sovereignty over Guantanamo Bay.” *Ibid.*

The courts of appeals also have addressed the meaning of “in the United States” in the Citizenship Clause in the context of persons born in United States territories. As an initial matter, U.S. territories are meaningfully different from U.S. military bases abroad, because the United States exercises sovereignty over U.S. territories. See, e.g., *Simms v. Simms*, 175 U.S. 162, 168 (1899); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). But in any event, the circuit decisions addressing U.S. territories do not aid petitioner, because every court of appeals that has considered the issue has held that the Citizenship Clause does not apply to unincorporated territories of the United States (meaning territories that are not destined for statehood). ...

Petitioner contends (Pet. 8-13) that there is disagreement in those decisions warranting this Court’s review. He is mistaken: every court of appeals to consider the question has reached the same conclusion, namely, that birth in an unincorporated U.S. territory is not birth “in the United States” under the Citizenship Clause. And even if there were disagreement about the application of the Citizenship Clause to persons born in U.S. territories, this would not be an

appropriate case in which to address that issue, because petitioner was not born in a U.S. territory.

2. The court of appeals correctly concluded that a person born on a U.S. military base in Germany does not obtain citizenship at birth under the Citizenship Clause. The Clause confers citizenship at birth on persons who are “born or naturalized in the United States” and “subject to the jurisdiction thereof.” U.S. Const. Amend. XIV, § 1, Cl. 1. Even assuming that a person born on a U.S. military base in a foreign country is “subject to the jurisdiction” of the United States within the meaning of the Citizenship Clause, such a person does not meet the first condition for U.S. citizenship at birth under that Clause, namely, that he be “born * * * in the United States.”

a. Under the plain text of the Citizenship Clause, a U.S. military base in a foreign country—Germany—is not “in the United States.” The phrase “the United States” generally refers to the 50 States and the District of Columbia. See, e.g., *Black’s Law Dictionary* 1769 (10th ed. 2014) (defining “United States of America” as a republic comprised of the 50 States and the District of Columbia). That meaning reflects the constitutional design: at the time the Constitution was adopted, “the United States” consisted of the 13 States, and the Constitution contemplated creation of a district carved out of those States to “become the Seat of the Government of the United States.” U.S. Const. Art. I, § 8, Cl. 17.

The Constitution distinguishes between “the United States” and its territories and “foreign Nations,” “[f]oreign State[s],” or “foreign Power[s].” See, e.g., U.S. Const. Art. I, § 8, Cl. 3; U.S. Const. Art. I, § 9, Cl. 8; U.S. Const. Art. I, § 10, Cl. 3; U.S. Const. Art. III, § 2, Cl. 1; U.S. Const. Amend. XI. And the Constitution recognizes the sovereignty of foreign nations when it empowers the President (with the advice and consent of the Senate) to make treaties with them and to receive their ambassadors. U.S. Const. Art. II, § 2, Cl. 2. Nothing in the Constitution suggests that when the Framers of the Fourteenth Amendment referred to “the United States,” they meant to include an area within “foreign Nations” where a U.S. military installation is located.

* * * *

Indeed, Congress has long exercised its authority to specify when persons born outside of the United States acquire U.S. citizenship. . . . That longstanding congressional practice confirms that the Constitution does not automatically confer U.S. citizenship on a person born on a U.S. military base in a foreign country. See also 7 *Foreign Affairs Manual* § 1113(c) (noting that “U.S. military installations abroad and U.S. diplomatic or consular facilities abroad are not part of the United States within the meaning of the 14th Amendment,” and “[a] child born on the premises of such a facility is not born in the United States and does not acquire U.S. citizenship by reason of birth”).

b. A U.S. military installation abroad is not “in the United States” under the Citizenship Clause because it is not part of the sovereign territory of the United States. The courts of appeals have uniformly held that unincorporated U.S. territories are not “in the United States” for purposes of the Citizenship Clause, and that is consistent with this Court’s teachings and with longstanding congressional practice of conferring citizenship or nationality at birth in those territories by statute. But even if the Citizenship Clause were read to include an incorporated territory of the United States, the Clause still would not encompass a U.S. military base in Germany. That is because the Citizenship Clause would at least require that an individual be

born in U.S. sovereign territory, and as the court of appeals correctly recognized, the United States does not exercise sovereignty over a U.S. military base in Germany.

When the United States and a foreign nation agree that the United States may place a military installation within the foreign nation's territory, that does not make the United States "sovereign" over that territory. Rather, the host nation retains sovereignty, and the extent to which the United States exercises jurisdiction on the land depends on terms of the agreement with the host nation. This Court has long recognized that a U.S. military base in a foreign country is "beyond the limits of national sovereignty." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1948) (applying federal labor law to a U.S. military base in Bermuda even though the base was in "foreign territory"); see *Johnson v. Eisentrager*, 339 U.S. 763, 777-778 (1950) (prisoners of U.S. military forces held at Landsberg Prison in Germany "at no relevant time were within any territory over which the United States is sovereign"); *United States v. Spelar*, 338 U.S. 217, 221-222 (1949) (recognizing that placement of U.S. military base in Newfoundland "effected no transfer of sovereignty" and that base was in a "foreign country" for purposes of Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*). Like the court below (Pet. App. 11-12), the courts of appeals have recognized that U.S. military bases in foreign countries are not part of the sovereign territory of the United States. And as this Court has recognized, the "determination of sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380; see *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) ("[Q]uestions of sovereignty are for the political branches to decide.").

Petitioner relies (Pet. 26) on *Boumediene*, but that decision does not establish that a U.S. military installation in Germany is "in the United States" under the Citizenship Clause. In *Boumediene*, the Court held that aliens detained at the U.S. Naval Station at Guantanamo Bay, Cuba, could challenge their detention through habeas corpus, in part because of the particular degree of control the United States exercised over that base. 553 U.S. at 739-771. But the Court recognized that "Guantanamo Bay is not formally part of the United States," and that under the lease between the United States and Cuba, "Cuba retains ultimate sovereignty over the territory while the United States exercises complete jurisdiction and control." *Id.* at 753 (internal quotation marks omitted); see *id.* at 755 ("Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay.").

Further, the text of the Citizenship Clause itself demonstrates that United States jurisdiction or control in a foreign country is not sufficient to confer citizenship, because the Clause requires *both* that a person be "born * * * in the United States" and be "subject to [its] jurisdiction." U.S. Const. Amend. XIV, § 1, Cl. 1. While the Citizenship Clause of the Fourteenth Amendment is thus confined to individuals born "in the United States, *and* subject to the jurisdiction thereof," *ibid.* (emphasis added), the Thirteenth Amendment prohibits slavery "within the United States, *or* any place subject to their jurisdiction," U.S. Const. Amend. XIII, § 1 (emphasis added). The Thirteenth Amendment's broader language demonstrates that "there may be places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words." *Downes v. Bidwell*, 182 U.S. 244, 336-337 (1901) (White, J., concurring); see *id.* at 251 (opinion of Brown, J.); see also Pet. App. 9.

The court of appeals therefore correctly concluded that a U.S. Army base in Germany is not "in the United States" for purposes of the Citizenship Clause. Pet. App. 9-12. Germany, not the United States, possesses sovereignty over that area. The United States is able to operate the installation because of an agreement with Germany. At the end of the agreement, the area of the

base would revert to Germany's sole control. And even while the agreement remains in effect, Germany retains jurisdiction over the base to enforce certain of its own laws in accordance with the terms of the agreement.

* * * *

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. *Sidhu v. Kerry*

On January 26, 2016, the U.S. District Court for the Western District of Washington issued its decision in *Sidhu v. Kerry*, No. 15-1470 (W.D.Wash. 2016). Plaintiff challenged the finding that his sister, along with her husband and son as derivative beneficiaries, were ineligible for immigrant visas pursuant to 8 U.S.C. § 1182(a)(3)(B), which relates to terrorist activities. Section 1182(a)(3)(B) was also the basis for the visa eligibility determination at issue in the Supreme Court's 2015 decision in *Kerry v. Din*, discussed in *Digest 2015* at 15-20. The district court's opinion dismissing Sidhu's claims and referencing *Din* is excerpted below with footnotes omitted.

* * * *

1. Plaintiff Lacks Standing

Standing is a threshold element of subject matter jurisdiction without which plaintiff cannot maintain a suit in federal court. See *White v. Lee*, 227 F.3d 1214, 1242. To satisfy this requirement, plaintiff must show that "he has suffered, or will imminently suffer, a concrete and particularized injury to a judicially cognizable interest." *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015) (internal quotations omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). The injury must be "fairly traceable" to defendants' conduct, such that it is likely that the injury would be redressed by a favorable decision. *Id.* The Court concludes that plaintiff has not suffered an injury to a judicially cognizable interest.

Ms. Samra is an unadmitted and nonresident alien, and thus has no right to sue to further press her claim for admission. See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Plaintiff seeks to evade this clear jurisdictional issue by reframing his challenge as based on a violation of his own constitutional rights. Construing the Complaint in the light most favorable to plaintiff, the Court understands the alleged harm to be the separation of plaintiff and his sister. However, there is no liberty interest in the companionship of one's sibling. See *Ward v. City of San Jose*, 967 F.2d 280, 283-84 (9th Cir. 1991); see also *Adeyemo v. Kerry*, 2013 WL 498169, *3 (D. Md. Feb. 7, 2013) (dismissing due process claim brought by sister of alien whose visa application was denied). Plaintiff has not alleged any other possible harm. Lacking a cognizable injury, plaintiff cannot establish standing and therefore the case must be dismissed.

2. *Due Process Was Satisfied*

Even if plaintiff had a liberty interest sufficiently harmed to satisfy standing, defendants have satisfied their due process burden. In *Kerry v. Din*, the American wife of an unadmitted alien brought a suit challenging the denial of her husband’s visa. 135 S. Ct. 2128 (2015). Just as in this case, the government denied the visa application by citing to § 1182(a)(3)(B) without providing further explanation. *Id.* at 2139. Justice Kennedy’s concurrence, which the parties agree controls, held that even if the wife had a liberty interest, “the Government satisfied due process when it notified Din’s husband that his visa was denied under the immigration statute’s terrorism bar, § 1182(a)(3)(B).” *Id.* No more than a bare citation to the basis for denial was necessary, which the government has satisfied in this case.

Plaintiff is correct that Justice Kennedy’s opinion left available a more searching analysis of the government’s decision where there was “an affirmative showing of bad faith on the part of the consular officer.” *Id.* at 2141. However, plaintiff has failed to allege with particularity how the government denied his sister’s visa application in bad faith. He suggests the failure to provide any specific reasons for the denial “constitutes bad faith actions,” but this argument is foreclosed by *Din*. Beyond that, there is no allegation in the Complaint that could be interpreted as constituting bad faith.

* * * *

b. Allen v. Milas

On February 23, 2016, the U.S. District Court for the Eastern District of California issued its decision in *Allen v. Milas*, No. 15-705 (E.D. Cal. 2016). The court’s reasoning relies on *Din* to reject plaintiff’s challenge to the denial of an application for an immigrant visa for his German wife. Excerpts follow from the court’s opinion with footnotes and record citations omitted.

* * * *

Here, Plaintiff asserts that his claim for relief implicates his fundamental liberty interest in his marriage and family life. While it is not at all clear that Plaintiff has a procedural due process right stemming from a constitutional right to live in the United States with his spouse, the Court assumes, for purposes of the pending Motion, that he does. Compare *Bustamante*, 531 F.3d at 1062 (“Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause.”) with *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (“Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of Berashk’s visa application implicates any of [his spouse’s] fundamental liberty interests.”) (Scalia, J.) (plurality opinion).

Assuming that the denial of Mrs. Allen’s visa application implicates Plaintiff’s liberty interest in marriage, the Court turns to whether the reasons offered for the denial were “facially legitimate and bona fide.” *Bustamante*, 531 F.3d at 1062; *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). Here, the consular officer who denied Mrs. Allen’s application gave two reasons for the denial. First, the consular office determined that she was ineligible for a visa under § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act because she was “convicted in a

German court of theft pursuant to paragraphs 242 and 248 of the German criminal code” in July 1998. Second, the officer determined that Mrs. Allen was ineligible for an immigrant visa because she was “convicted in a German court for illicit acquisition of narcotics pursuant to paragraphs 29, 35, 1, and 3 of the German criminal code” in March 1997.

These reasons are facially legitimate. Section 212(a)(2)(A)(i)(I) provides that an applicant is ineligible for a visa if she “was convicted of . . . a crime of moral turpitude (other than purely political offense) or an attempt or conspiracy to commit such a crime[.]” Plaintiff argues that Mrs. Allen’s criminal conviction for theft under paragraphs 242 and 248 of the German criminal code does not constitute a crime of moral turpitude.

Specifically, Plaintiff points to cases involving appeals from orders issued by the Board of Immigration Appeals for the proposition that this Court must undergo a multi-step process to determine whether Mrs. Allen’s theft conviction constitutes a crime of moral turpitude. . . . Such an inquiry may well be appropriate in the context of an appeal from the Board of Immigration Appeals, but none of the cases cited by Plaintiff involve a consular officer’s decision to deny an immigrant visa application. . . . In this context, the Court cannot revisit the consular officer’s statutory interpretation of the German criminal code.

Similarly, the consular officer’s citation of § 212(a)(2)(A)(i)(II) in the refusal letter, combined with Mrs. Allen’s conviction for illicit acquisition of narcotics, provided a facially legitimate reason for her denial. Plaintiff’s argument that Mrs. Allen was convicted by a juvenile court of violating paragraphs 29, 35, 1, and 3 of the German criminal code is unavailing. The Court may not second-guess the consular officer’s decision by analyzing the circumstances of Mrs. Allen’s narcotics conviction to determine its effect under German law. See *Din*, 135 S. Ct. at 2141 (explaining that courts may not look for additional factual details behind a decision to deny a visa application “beyond what its express reliance on [the statute] encompassed.”) . . .

Furthermore, Plaintiff has not alleged facts sufficient to establish that the consular officer who denied Mrs. Allen’s application did so in bad faith. See *Twombly*, 550 U.S. at 570. If Plaintiff has some reasonable basis for believing the consular officer denied his wife’s application in bad faith, he may amend his Complaint to incorporate the factual allegations necessary for his claim to survive another Motion to Dismiss. But here, Plaintiff’s failure to allege such facts prevents him from stating a due process claim at this time. See *id.*; see also *Din*, 135 S. Ct. at 2141. . . .

* * * *

c. Cardenas v. United States

On June 21, 2016, the U.S. Court of Appeals for the Ninth Circuit revisited its application of the “facially legitimate and bona fide” standard of limited review after the Supreme Court’s decision in *Din*, which was on appeal from a decision of the Ninth Circuit. The court applied Justice Kennedy’s concurrence in *Din* to determine that the consular officer in this case satisfied the “facially legitimate and bona fide reason” test. In this case, plaintiff Cardenas’s spouse was found ineligible for a visa under 8 U.S.C. § 1182(a)(3)(A)(ii) as an alien who intends to enter with the intent to engage in “unlawful activity.” Excerpts follow from the court’s opinion. *Cardenas v. United States*, No. 13-35957 (9th Cir. 2016).

* * * *

Because no single rationale commanded a majority of the Court in *Din*, Cardenas urges us to re-adopt the standard in our opinion in that case. However, our *Din* approach was squarely rejected by a majority of the Supreme Court, *Din*, 135 S. Ct. at 2131, and therefore we are not free to return to it.

The government argues that Justice Kennedy’s concurrence controls. We agree. In *Marks v. United States*, the Supreme Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted). As we recently explained, “the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” *United States v. Davis*, No. 13-30133, slip op. at 14 (9th Cir. June 13, 2016) (en banc) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)); accord *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012) (the narrowest opinion must be the “logical subset of other, broader opinions” (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir. 2005)). “Stated differently, Marks applies when, for example, ‘the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position.” *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (quoting *King*, 950 F.2d at 782).

Justice Kennedy’s concurrence fits this description. The *Din* plurality’s broad position was that (1) “an unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission,” and (2) the Due Process Clause does not enable an alien’s citizen spouse to bring suit on his behalf. 135 S. Ct. at 2131. The Kennedy concurrence’s narrower position is that, even assuming a citizen spouse can bring such a challenge, the challenge fails as long as the consular officer has cited a valid statute of inadmissibility which implies a bona fide factual basis behind the denial. *Id.* at 2140–41. The plurality would necessarily agree that, when the consular officer cites such a statute, the denial stands, at least in a case only raising the due process rights of a citizen spouse. The Kennedy concurrence therefore represents the holding of the Court.

Under the *Din* concurrence, the facially legitimate and bona fide reason test has two components. First, the consular officer must deny the visa under a valid statute of inadmissibility. *Id.* (consular officer’s citation to § 1182(a)(3)(B) “suffices to show that the denial rested on a determination that Din’s husband did not satisfy the statute’s requirements,” and “the Government’s decision to exclude an alien it determines does not satisfy one or more of [the statutory conditions for entry] is facially legitimate under *Mandel*”). Second, the consular officer must cite an admissibility statute that “specifies discrete factual predicates the consular officer must find to exist before denying a visa,” or there must be a fact in the record that “provides at least a facial connection to” the statutory ground of inadmissibility. *Id.* at 2141. Once the government has made that showing, the plaintiff has the burden of proving that the reason was not bona fide by making an “affirmative showing of bad faith on the part of the consular officer who denied [] a visa.” *Id.*

C. Application of the *Din* Test

As Cardenas implicitly recognizes by advocating for a broader standard of review, adoption of Justice Kennedy’s *Din* concurrence as the controlling opinion of the Court dooms her claims in this case. The consular officer gave a facially legitimate reason to deny Mora’s visa because he cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii), which denies entry to an alien who intends to enter with the intent to engage in “unlawful activity.” He also provided a bona fide factual reason that provided a “facial connection” to the statutory ground of inadmissibility: the belief that Mora was a “gang associate” with ties to the Sureno gang.

Cardenas argues that she properly alleged bad faith because, when Mora appeared for the second interview, the consular officer refused to accept or review the proffered expert opinion that Mora had never been a gang member or the letter showing his acceptance into a tattoo removal program. But, the allegations about the second interview obviously cannot raise a plausible inference that the officer acted in bad faith in making the original decision. And, although counsel’s purpose in arranging the second interview was to allow Mora to submit additional evidence, that the consular officer did not accept Mora’s new documents does not show bad faith. During his second interview, Mora was extensively questioned by two officials and was given the opportunity to argue that he had no ties to the Sureno gang.

* * * *

d. Santos v. Lynch

In *Santos v. Lynch*, No. 15-979 (E.D. Cal. 2016), the court considered whether there is a liberty interest in residing with one’s adult child equivalent to the liberty interest in residing with one’s spouse that was at issue in *Din*. On June 29, 2016, the court issued its opinion, concluding that there was no equivalent right and proceeded to find that, applying the standard in *Din*, the visa application had been denied based on a facially legitimate and bona fide reason. Excerpts follow from the opinion, with footnotes and record citations omitted.

* * * *

Plaintiff argues that “[t]here is no support for Defendant’s proposition that the due process rights under the constitution[] are implicated only where the U.S. citizen’s right to reside with his or her spouse are implicated.” Defendants argue that a marriage relationship is not the equivalent of an adult child-parent relationship. Defendants cite *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 26 (D.D.C. 2010), in which the District Court of the District of Columbia found that “all circuits to address the issue have expressly declined to find a violation of the familial liberty interest where state action has only an incidental effect on the parent’s relationship with his adult child, and was not aimed specifically at interfering with the relationship.” Plaintiffs have not provided any authority, and the Court is not aware of any authority, that an adult child has a constitutional interest in living in the United States with his or her noncitizen parents. The Court finds that the Ninth Circuit’s use of the phrase “in matters of marriage and family life” when finding procedural due process protection for marriages in the context of the denial of a visa or admission and exclusion of aliens has not extended, and does not extend to adult children living

with their alien parents in the United States. The Court notes that the Federal Government is not attempting to forbid parents and adult children from living together. Plaintiff remains free to live with her parents anywhere in the world where they are permitted to reside.

At the hearing on June 22, 2016, and in her June 27, 2016 supplemental brief, Plaintiff argued that because the Citizen and Immigration Service (CIS) allows a quicker turn-around of visa applications for spouses and parents of United States citizens than for other relatives, an adult child's right to live with her alien parents in the United States should be the equivalent of spouses. In order for an alien to obtain an immigrant visa to enter and permanently reside in the United States, "the alien must fall within one of a limited number of immigration categories." *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191, 2197 (2014) (citing 8 U.S.C. §§ 1151(a)-(b)). The parents, spouses, and unmarried children under the age of 21 of United States citizens fall within the "immediate relatives" category. See *Scialabba*, 134 S.Ct. at 2197 (citing 8 U.S.C. §§ 1151(b)(2)(A)(i), 1101(b)(1)). The five less-favored categories are called "preference" categories for "family-sponsored immigrants" and are "distant or independent relatives of [United States] citizens, and certain close relatives of [legal permanent residents]." *Scialabba*, 134 S.Ct. at 2197 (citing 8 U.S.C. §§ 1151(a)(1), 1153(a)(1)-(4)). However, the fact that the Executive Branch includes parents and spouses of United States citizens in the "immediate relatives" category for purposes of visa applications does not mean that an adult child has a liberty interest in their parents living in the United States.

Therefore, the Court finds that Plaintiff does not have a liberty interest as an adult child to live in the United States with her parents. As the denials of Mr. and Mrs. Santos's visa applications do not implicate Plaintiff's liberty interest in family life, there is no process due to her under the United States Constitution. The Court does not need to conduct any further review of the reasons for the consular official's denials of Mr. and Mrs. Santos's visa applications.

Even if the Court was to find that Plaintiff stated a liberty interest in living in the United States as an adult child with her parents, Plaintiff has failed to allege that the reasons offered by the consular official for denying her parents' visa applications were not "facially legitimate and bona fide." *Bustamante*, 531 F.3d at 1062; *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). The Ninth Circuit in *Cardenas* found that based on the *Din* concurrence there are two components to the "facially legitimate and bona fide" test:

First, the consular officer must deny the visa under a valid statute of inadmissibility. [*Din*, 135 S.Ct. at 2140-41] (consular officer's citation to § 1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements," and "the Government's decision to exclude an alien it determines does not satisfy one or more of [the statutory conditions for entry] is facially legitimate under Mandel"). Second, the consular officer must cite an admissibility statute that "specifies discrete factual predicates the consular officer must find to exist before denying a visa," or there must be a fact in the record that "provides at least a facial connection to" the statutory ground of inadmissibility. *Id.* at 2141. Once the government has made that showing, the plaintiff has the burden of proving that the reason was not bona fide by making an "affirmative showing of bad faith on the part of the consular officer who denied [] a visa." *Id.*

See *Cardenas*, 2016 WL 3408047, at *6.

Here, the consular officer who denied Mr. and Mrs. Santos's visa applications determined that they were ineligible for visas under § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act because they lived unlawfully in the United States for a period exceeding 1 year. The

consular officer also denied Mr. Santos's visa application under § 212(a)(6)(E), because as an alien, Mr. Santos knowingly encouraged, induced, assisted, abetted, or aided an alien to enter or to try to enter the United States in violation of law.

Plaintiff concedes that "the consular officer in this case provided a facially legitimate reason for denying visas to Plaintiff's parents, [so] the "facially legitimate" prong of the *Bustamante* test is satisfied." (ECF No. 24 at 13.) The consular officer cited a valid admissibility statute that "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Cardenas*, 2016 WL 3408047, at *6 (quoting *Din*, 135 S.Ct. at 2141). The burden then shifts to Plaintiff to make an "affirmative showing of bad faith on the part of the consular officer who denied [] a visa." *Id.* Plaintiff alleges that the consular officer acted in bad faith in denying visas to Mr. and Mrs. Santos because the record showed that Mr. and Mrs. Santos were not inadmissible under INA § 212(a)(9)(B)(i)(II). Plaintiff argues that Mr. and Mrs. Santos qualified for the bona fide asylum exception to inadmissibility under INA § 212(a)(9)(B), and they applied and received employment authorization in the United States prior to April 1, 1997, and continued to receive employment authorization until they left the United States on September 29, 2013. Plaintiff also argues that the consular officer acted in bad faith because the consular officer only found that Mr. Santos was inadmissible under INA § 212(a)(6)(E) for allegedly assisting Mrs. Santos to enter the United States illegally after the complaint was filed in this Court.

However, the Court notes that Plaintiff has not alleged facts sufficient to establish that the consular officer who denied Mr. and Mrs. Santos's applications did so in bad faith. See *Twombly*, 550 U.S. at 570. As Plaintiff has not plausibly alleged with sufficient particularity an affirmative showing of bad faith on the part of the consular officer who denied Mr. and Mrs. Santos's visa applications, the Court may not second-guess the consular officer's decision by analyzing the reasons for the denials of Mr. and Mrs. Santos's visa applications. See *Din*, 135 S. Ct. at 2141 (explaining that courts may not look for additional factual details behind a decision to deny a visa application "beyond what its express reliance on [the statute] encompassed.").

* * * *

2. Special Immigrant Visa Programs: *Nine Iraqi Allies v. Kerry*

The Refugee Crisis in Iraq Act of 2007 ("RCIA") and the Afghan Allies Protection Act of 2009 ("AAPA") established the Iraqi and Afghan Special Immigrant Visa ("SIV") programs for nationals of Iraq and Afghanistan who experience an ongoing serious threat as a consequence of their employment by the U.S. government. Spouses and children of eligible applicants may also receive SIVs. See *Digest 2008* at 15 for background on the RCIA and *Digest 2009* at 7 for background on the AAPA.

In *Nine Iraqi Allies v. Kerry*, 168 F.Supp.3d 268 (D.D.C. 2016), the U.S. District Court for the District of Columbia considered claims by Iraqi and Afghan nationals (proceeding using pseudonyms) that the U.S. government improperly failed to adjudicate or grant their applications for SIVs. The court granted the U.S. motion to dismiss with respect to counts 1 and 2 of the complaint and denied the U.S. motion to dismiss with respect to Counts 3-6 with respect to all but three of the plaintiffs (for whom the claims were moot). Counts 3 and 4 sought an order under the Mandamus

Act, 28 U.S.C. § 1361, directing adjudication of plaintiffs' SIV applications. Counts 5 and 6 similarly asked the court to compel agency action within a reasonable time under 5 U.S.C. § 706(1) of the Administrative Procedure Act ("APA"). Excerpts follow from the court's opinion (with footnotes and record citations omitted).

* * * *

1. Standing

The Government contends that Plaintiffs lack standing to litigate Counts 3-6. ...

As alleged in the Amended Complaint, Plaintiffs' primary injury is the deprivation of final decisions on their SIV applications within a reasonable time as required by RCIA § 1242 (c) (1), AAPA § 602 (b) (4) (A), and the APA, 5 U.S.C. § 555 (b). Plaintiffs also allege that the Government's failure to provide timely adjudication of their applications has exposed them and their families to serious, imminent threats to their life and well-being as a result of their service to the United States.

The Government argues that Plaintiffs lack standing to pursue their claims because their applications have, in fact, been finally refused. According to the Government, because Plaintiffs have received final refusals, they have received everything to which they are entitled and have suffered no redressable injury.

The Government is incorrect. Because the Government's contention that Plaintiffs' SIV applications have already been finally adjudicated is intricately intertwined with its other jurisdictional argument based on the doctrine of consular nonreviewability, it can only be unraveled with close scrutiny of the factual record. Accordingly, the Court addresses this issue in detail in section [2].

For present purposes, however, the Court notes the following conclusions that are fully explained below: Ronald, Fox, India, Juliet, Alice, Hotel, and Lima's SIV applications have not been finally refused and instead, remain in "administrative processing," see *infra* section III.B.2.a.; Mike and Kilo's SIV applications likewise await additional actions by the Government and thus, have not been finally refused, see *infra* section III.B.2.c.; Alpha, Bravo, and Delta's applications have been granted, and thus, their claims are moot, see *infra* section [2]. Accordingly, Ronald, Fox, India, Juliet, Alice, Hotel, Lima, Mike, and Kilo have suffered an injury in fact: the failure to receive final decisions on their SIV applications within a reasonable period.

Having shown that they have suffered an injury, Plaintiffs must also show that their alleged injury is caused by the complained of conduct. The Government raises no argument with respect to causation. Plaintiffs' alleged injury—the lack of final decisions on their SIV applications—is quite clearly caused by Defendants' conduct (*i.e.*, Defendants' failure to adjudicate the applications). Thus, Plaintiffs have satisfied the causation prong of the standing inquiry.

Finally, the Government argues that a favorable decision by this Court would not redress Plaintiffs' injury. The Government first contends that Plaintiffs are not entitled to redress because the timelines set out by Congress for the adjudication of SIV applications are discretionary. This argument, like the Government's contention that Plaintiffs' applications have been finally refused, is also deeply interwoven with other jurisdictional arguments, which will be

fully discussed and rejected below in section III.B.3. In summary, the APA, 5 U.S.C. § 555(b), creates a duty for the Government to reach a final decision on Plaintiffs’ applications “within a reasonable period,” and RCIA § 1242(c) (1) and AAPA § 602(4) (A) clarify that that duty is non-discretionary and must “ordinarily” be completed within nine months. See *infra* section III.B.3.

The Government also argues that the Court may not redress Plaintiffs’ injuries because courts are not free to fashion their own “coercive sanctions” to bring about compliance with statutory deadlines. ...

... Plaintiffs do not seek to construct any sanction for the Government’s failure to process their SIV applications, nor do they seek review of any substantive decisions by the Government. Instead, Plaintiffs ask the Court to do just what the APA and the Mandamus Act authorize: issue an order to adjudicate their applications, whatever the substantive results may be. See 5 U.S.C. § 706(1); 28 U.S.C. § 1361. Such an order would directly redress Plaintiffs’ injury caused by the Government’s failure to decide.

In short, Plaintiffs have been injured by the failure to obtain final decisions on their SIV applications, that injury is caused by the Government’s failure to act, and the injury would be redressed by an order from this Court. Accordingly, Plaintiffs have made the injury, causation, and redressability showings required to establish standing to pursue their claims. *Lujan*, 504 U.S. at 560-61.

2. The Doctrine of Consular Nonreviewability

As already discussed, the Government’s major argument is that Plaintiffs’ applications have already been finally refused and the doctrine of consular nonreviewability precludes any further review of those decisions. This fact, the Government contends, deprives Plaintiffs of standing to bring their claims, and deprives the Court of jurisdiction to hear them.

* * * *

In support of their contention that their applications have not received a final decision, Plaintiffs put forth a significant body of evidence. First and foremost, the Government’s own Case Status Tracker states that Plaintiffs’ applications remained in “administrative processing” as of September 24, 2015.

* * * *

Despite the convincing evidence Plaintiffs cite to show that Defendants have not finally adjudicated their SIV applications, which still remain in “administrative processing,” the Government contends that the Court should treat those applications as finally denied as a matter of law. ... The Court disagrees.

The Government contends that because regulations and State Department guidance documents governing the visa process require consular officers to “either issue or refuse the visa” when presented with a complete application, the Court should treat Plaintiffs pending applications as refused. ... However, it is clear that visa applications are not always being finally refused in any meaningful sense immediately upon presentation of a completed application. The Foreign Affairs Manual’s statement that “[t] here is no such thing as an informal refusal or a pending case once a formal application has been made[,]” 9 FAM 42.81 NI, simply does not accord with Defendants’ practices, as the record demonstrates.

The Government also cites 8 U.S.C. § 1201(g) itself for the proposition that Plaintiffs have all received final refusals as a matter of law. . . . But § 1201(g) merely contains the (expansive) criteria for refusing an application; it does not establish when or whether, as a matter of law, an application has been refused.

The Government next turns to case law, arguing that “Plaintiffs fail to meet their burden to demonstrate standing because there is a long line of cases explaining that non-resident aliens lack standing to challenge the determinations associated with their visa applications, which belong to the political and not judicial branches of government.”

* * * *

The Government also makes much of a passage in Justice Kennedy’s concurrence in *Kerry v. Din*, 135 S.Ct. 2128, 2141 (2015), in which he states that the Government satisfies any due process duty owed to visa applicants and their citizen relatives when it cites the statutory basis for a visa application’s denial. But again, the Government’s reliance is misplaced. Plaintiffs do not contend that they were entitled to a more fulsome explanation of the Government’s decision on each of their SIV applications they merely claim that they are entitled to a decision.

* * * *

In short, the doctrine [of consular nonreviewability] holds only that “there may be no judicial review of [] decisions to exclude aliens unless Congress has expressly authorized this[,]” *Saavedra Bruno*, 197 F.3d at 1162 (emphasis added and internal quotation marks omitted), but does not preclude Plaintiffs from challenging the Government’s failure to decide, *Patel*, 134 F.3d at 932. Accordingly, because the applications of Ronaldo, Foxtrot, India, Juliet, Alice, Hotel, and Lima remain in “administrative processing” and, therefore, have not been finally refused, the doctrine of consular nonreviewability does not bar their claims. See *Maramjaya*, 2008 WL 9398947, at *4; *Patel*, 134 F.3d at 931-32.

* * * *

3. Judicially Manageable Standards to Enforce a Non-discretionary Duty

The Government next contends that Counts 3-6 must be dismissed for lack of jurisdiction because Plaintiffs fail to identify a non-discretionary duty owed them as well as judicially manageable standards by which the Court may measure compliance with that duty.

The APA provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Thus, “[t]he APA imposes a general but nondiscretionary duty upon an administrative agency to pass upon a matter presented to it ‘within a reasonable time,’ 5 U.S.C. § 555(b), and authorizes a reviewing court to ‘compel agency action unlawfully withheld or unreasonably delayed,’ *id.* § 706 (1).” *Fort Sill Apache Tribe v. Nat’l Indian Gaming Comm’n*, No. CV 14-958, 2015 WL 2203497, at *4 (D.D.C. May 12, 2015) (citing *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099-1100 (D.C. Cir. 2003)).

The RCIA and AAPA provide additional guidance, instructing that Defendants shall process SIV applications within nine months. RCIA § 1242 (c) (1); AAPA §§ 602 (4) (A). The text of the statutes makes clear that the nine-month timeline applies to “all steps” under Defendants’ control “incidental to the issuance of such [SIV] visas[.]” *Id.* Thus, the timeline

applies to each of the 14 steps in the SIV adjudication process identified in the Joint Reports that are within Defendants' control, including "administrative processing" and "[Chief of Mission or] COM Approval." ... Simply put, the APA imposes a duty on Defendants to act within a "reasonable" time on Plaintiffs' applications, and the RCIA and AAPA provide manageable standards (an explicit timeline) by which a Court may assess the Government's compliance. ...

Finally, the Government actually acknowledges that its duty to eventually reach a decision on pending SIV applications is non-discretionary. ...

Nevertheless, the Government contends that the pace at which it adjudicates SIV applications is entirely discretionary, citing *Beshir v. Holder*, 10 F. Supp. 3d 165 (D.D.C. 2014) for support.

Admittedly, *Beshir* takes an expansive view of the Government's power to decide certain immigration applications on its own timeline. *Beshir*, 10 F. Supp. 3d at 174 (holding that "the pace of adjudication is discretionary"). However, the *Beshir* court based its conclusion on factors which are not present in this case. First, the *Beshir* court relied on "[t]he absence of a congressionally-imposed deadline or timeframe to complete the adjudication of [immigrant] adjustment [of status] applications [as] support[] [for] the conclusion that the pace of adjudication is discretionary and thus not reviewable[.]" *Id.* at 176. In the case at bar, Congress has provided a clear nine-month timeline for the adjudication of SIV applications.

Second *Beshir* relied on relevant statutory language permitting the Government to consider certain applications "in the Secretary [of Homeland Security] or the Attorney General's discretion and under such regulations as the Secretary or Attorney General may prescribe." *Id.* at 173 (quoting 8 U.S.C. § 1159(b)). The Government points to no similarly explicit grants of discretion applicable to Plaintiffs' applications. Thus, the *Beshir* Court's reasoning is wholly inapplicable.

The Government also contends that the pace of adjudication of SIV applications is discretionary because Congress provided for the possibility that "national security concerns" might cause some applications to require additional time. See RCIA § 1242 (c) (2) ("Nothing in this section [which includes the nine-month timeline quoted above] shall be construed to limit the ability of [the] Secretary [of State and the Secretary of Homeland Security] to take longer than 9 months to complete those steps incidental to the issuance of such visas in high-risk cases for which satisfaction of national security concerns requires additional time."); see also AAPA § 602 (4) (B) (same).

As the Government reads them, the statutes' mention of national security returns absolute discretion to the Government's hands. ...

The RCIA and AAPA follow the same structure. Both statutes introduce the nine-month timeline and define its application in one paragraph and then introduce the safety valve for "high-risk cases" in the very next paragraph. RCIA § 1242(c) and AAPA § 602 (b) (4). The statute sets forth that additional time may be permitted when national security issues arise. Obviously, Congress would not have adopted this rule-and-exception structure if it expected the exception to apply in every case. Moreover, the words "high-risk bases" indicate a distinction between the run-of-the-mill case, which must be adjudicated within nine months, and a subset of cases presenting "national security concerns" that do not arise in the typical application. RCIA § 1242(c); AAPA § 602(b) (4). The Government's reading would allow the national security exception to swallow the nine-month rule in its entirety.

Moreover, the presence of the national security exception does not eliminate the judicially-manageable standards described above. If the Government credibly claimed that a particular case was “high-risk” because it presented “national security concerns[.]” RCIA § 1242(c)(2); AAPA § 602(b)(4)(B), a court should, of course, appropriately defer to the Government’s expertise in the area of foreign policy and national security.

In this case, the Government has not even attempted to show that Plaintiffs’ applications fall into the “high-risk” exception. To be sure, the Government has stated that national security concerns are present in this case..., but the Government has never specified in any way what those concerns are.

The Government has suggested that because the applications of Charlie and Golf, named as Plaintiffs in the initial Complaint, were refused on terrorism-related grounds, the current Plaintiffs’ applications are also suspect. ... However, the Government never even describes what relationship Charlie and Golf have to the other Plaintiffs that would cause such concern.

It is implied by the Government that “national security concerns,” as the term is used in RCIA § 1242 (c) (2) and AAPA § 602(b) (4) (B), are present in all SIV applications by Iraqis and Afghan citizens. But such an interpretation conflicts with Congress’s statutory design. The RCIA applies only to SIV applications by Iraqis, and the AAPA, likewise, applies only to applications by Afghans. If Iraqi or Afghan citizenship were enough to render an application “high-risk,” the nine-month timeline would, again, be rendered a dead letter.

* * * *

C. Counts 1 & 2: Failure to Protect

RCIA § 1244(e) provides that “[t]he Secretary of State, in consultation with the heads of other relevant Federal agencies, shall make a reasonable effort to provide an alien described in this section who is applying for a special immigrant visa with protection or the immediate removal from Iraq, if possible, of such alien if the Secretary determines after consultation that such alien is in imminent danger.” AAPA § 602 (b) (6) contains nearly identical language with respect to Afghan SIV applicants.

Plaintiffs contend that this passage gives rise to two related duties: “(1). [to] consult with the heads of other relevant Federal agencies to assess whether the threats faced by Plaintiffs are imminent; and, if so, (2) make a reasonable effort to provide protection or the immediate removal of Plaintiffs from such threats, if possible.” ... Counts 1 and 2 of Plaintiffs’ Amended Complaint allege that Defendants have failed to fulfil these duties. ...

As already discussed, the APA empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed[.]” ... Plaintiffs ask the Court to compel Defendants to undertake the duties described in RCIA § 1244(e) and AAPA § 602(b) (6).

The Government contends that this Court is without jurisdiction to hear Claims 1 and 2. The Court agrees for the following reasons.

“[A] claim under section 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1098 (D.C. Cir. 2015) (emphasis and brackets omitted) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). Moreover, the APA expressly precludes judicial review of agency action that is “committed to agency discretion by law.” 5 U.S.C. § 701(a) (2). Agency action is committed to agency discretion by law when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion[.]” *Sierra Club v. Jackson*, 648 F.3d

848, 855 (D.C. Cir. 2011) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1984)). If no “judicially manageable standard” exists by which to judge the agency’s action, meaningful judicial review is unavailable under the APA. *Id.*

The statutory duties that Plaintiffs cite are of the type described in *Sierra Club*. Plaintiffs point to no standards by which the Court could assess whether Defendants have adequately assessed the dangers that Plaintiffs face.

The language of RCIA § 1244(e) and AAPA § 602(b) (6) strongly indicates that significant discretion has been left to the Secretary of State as to how to carry out his mandate. Under the statutes the Secretary “shall make a reasonable effort” to provide protection or removal to SIV applicants. *Id.* What efforts are reasonable will depend upon “complex concerns involving security and diplomacy” far beyond the expertise of the Court but squarely within that of the Secretary. *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997). In addition, Plaintiffs fail to point to any standards by which the Court may assess whether Plaintiffs are in “imminent danger” or whether the Secretary has adequately acted ...

* * * *

In short, under RCIA § 1244 (e) and AAPA § 602 (b) (6), “the agency is entrusted by a broadly worded statute with balancing complex concerns involving security and diplomacy” that are “peculiarly with the agency’s expertise[.]” *Vietnamese Asylum Seekers*, 104 F.3d at 1353. Counts 1 and 2 of Plaintiffs’ Amended Complaint must be dismissed.

* * * *

3. Visa Waiver Program

In 2016, the United States began implementing the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. See *Digest 2015* at 20 for background on the Act. A January 21, 2016 State Department media note, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251577.htm>, explains the changes to the Visa Waiver Program under the Act.

* * * *

...Under the Act, travelers in the following categories are no longer eligible to travel or be admitted to the United States under the Visa Waiver Program (VWP):

- Nationals of VWP countries who have traveled to or been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011 (with limited exceptions for travel for diplomatic or military purposes in the service of a VWP country).
- Nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria. These individuals will still be able to apply for a visa using the regular immigration process at our embassies or consulates. For those who need a U.S. visa for urgent

business, medical, or humanitarian travel to the United States, U.S. embassies and consulates stand ready to process applications on an expedited basis.

Beginning January 21, 2016, travelers who currently have valid Electronic System for Travel Authorizations (ESTAs) and who have previously indicated holding dual nationality with one of the four countries listed above on their ESTA applications will have their current ESTAs revoked.

Under the new law, the Secretary of Homeland Security may waive these restrictions if he determines that such a waiver is in the law enforcement or national security interests of the United States. Such waivers will be granted only on a case-by-case basis. As a general matter, categories of travelers who may be eligible for a waiver include:

- Individuals who traveled to Iran, Iraq, Sudan or Syria on behalf of international organizations, regional organizations, and sub-national governments on official duty;
- Individuals who traveled to Iran, Iraq, Sudan or Syria on behalf of a humanitarian NGO on official duty;
- Individuals who traveled to Iran, Iraq, Sudan or Syria as a journalist for reporting purposes;
- Individuals who traveled to Iran for legitimate business-related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015); and
- Individuals who have traveled to Iraq for legitimate business-related purposes.

Again, whether ESTA applicants will receive a waiver will be determined on a case-by-case basis, consistent with the terms of the law. In addition, we will continue to explore whether and how the waivers can be used for dual nationals of Iraq, Syria, Iran and Sudan.

Any traveler who receives notification that they are no longer eligible to travel under the VWP are still eligible to travel to the United States with a valid nonimmigrant visa issued by a U.S. embassy or consulate. Such travelers will be required to appear for an interview and obtain a visa in their passports at a U.S. embassy or consulate before traveling to the United States.

The new law does not ban travel to the United States, or admission into the United States, and the great majority of VWP travelers will not be affected by the legislation.

* * * *

4. Visa Restrictions and Limitations

a. Caribbean

On February 4, 2016 the United States government announced changes to entry requirements for certain Caribbean residents coming to the United States as H-2A agricultural workers. See February 4, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252167.htm>. New rules, effective February 19, 2016, require certain Caribbean residents seeking to come to the United States as H-2A agricultural workers to have both a valid passport and visa. The change applies to a British, French, or Netherlands national, or a national of Barbados, Grenada, Jamaica, or Trinidad and Tobago, who has residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean, or has residence in Barbados, Grenada, Jamaica, or Trinidad and Tobago.

The State Department media note explains:

Eliminating this visa exemption, which was originally created to address labor shortages during World War II, will ensure those traveling to the United States, like other H-2A agricultural workers, have been sufficiently screened via the Department of State's visa issuance process prior to their arrival. This visa requirement will also better ensure that these workers are protected from potential employment and recruitment-based abuses. The spouses and children who travel with these workers to the United States will also be required to have both a valid passport and visa.

b. *Revised definition of "immediate family" for certain visas*

On December 7, 2016, the State Department issued a rule amending the definition of "immediate family" for purposes of A, C-3, G, and NATO visa classifications. 81 Fed. Reg. 88,101 (Dec. 7, 2016). The Federal Register notice provides supplementary background information on the change:

This rule amends the definition of immediate family in the A, C-3, G, and relevant NATO nonimmigrant visa classifications so that unmarried adult sons and daughters who reside with the principal will not be automatically classified as immediate family for visa purposes irrespective of their age. Unmarried sons and daughters residing with the principal who are under the age of 21, or under the age of 23 and in full-time attendance as students at post-secondary educational institutions, will continue to be considered immediate family. However, any other unmarried son or daughter residing with the principal will only qualify if he or she meets the same criteria the rule imposes on other family members. In particular, he or she must be recognized as an "immediate family member" by the sending government or international organization for purposes of eligibility for rights and benefits and be individually authorized by the Department. An adult son or daughter who is no longer recognized as an immediate family member may be eligible to apply for another visa classification or seek a change of status to another nonimmigrant status. This rule also clarifies that for purposes of G-4 visa classification, the employing international organization recognizes immediate family members. . . .

Prior to this amendment, an unmarried adult son or daughter who is not part of any other household and resides regularly in the household of the principal alien must be classified in A or G visa classifications, even if otherwise eligible for another nonimmigrant classification and regardless of age or the intention of the sending government or international organization. Yet for purposes of privileges and immunities, the Department of State accepts only unmarried children under the age of 21, or unmarried sons and daughters under the age of 23 and in full-time attendance as students at post-secondary educational institutions, as dependents. Similarly, under 8 CFR 214.2(a)(2) and

(g)(2) for employment authorization purposes, Department of Homeland Security (DHS) regulations generally only consider unmarried children under the age of 21, or unmarried sons and daughters under the age of 23 and in full-time attendance as students at post-secondary educational institutions, to be dependents. (Under certain circumstances, DHS, under its regulations, may also recognize as dependents sons and daughters up to the age of 25 or of any age if physically or mentally challenged.) In practice, requiring A or G classification for sons and daughters above these age limits precludes them from obtaining a nonimmigrant classification that would enable them to accept employment in the United States.

As described in a circular note to foreign missions explaining the change:

The requirements for unmarried adult sons and daughters age 21 or older were revised under the regulations at 22 CFR 41.21(a)(3). ... Sons and daughters who do not meet these requirements may still qualify as immediate family under the third category for other individuals, but must be recognized as dependents of the principal alien by the sending government or international organization, as demonstrated by eligibility for rights and benefits, such as the issuance of a diplomatic or official passport, or travel or other allowance. An adult son or daughter who is no longer recognized as an immediate family member may be eligible to apply for another visa classification or seek a change of status to another nonimmigrant status.

5. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an obligation to accept the return of its nationals who cannot remain in the United States or any other country. In July 2016, Michelle T. Bond, Assistant Secretary for the Bureau of Consular Affairs, testified on the issue of removals before the House of Representatives Committee on Oversight and Government Reform. Her written statement is available at <https://oversight.house.gov/wp-content/uploads/2016/07/Bond-DOS-Statement-Recalcitrant-Countries-7-14.pdf>.

C. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act (“INA” or “Act”), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with

appropriate agencies, to designate a state (or any part of a state) for temporary protected status (“TPS”) after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; *Digest 2004* at 31–33; *Digest 2010* at 10–11; *Digest 2011* at 6–9; *Digest 2012* at 8–14; *Digest 2013* at 23–24; *Digest 2014* at 54–57; and *Digest 2015* at 21–24. In 2016, the United States extended TPS designations for Sudan, Honduras, Nicaragua, Nepal, and El Salvador; extended and redesignated South Sudan and Syria; and extended and announced the termination of TPS for Guinea, Liberia, and Sierra Leone, as discussed below.

a. South Sudan

On January 25, 2016, the Department of Homeland Security (“DHS”) announced the extension of the designation of South Sudan for TPS for 18 months, from May 3, 2016 through November 2, 2017, and redesignated South Sudan for TPS for 18 months, effective May 3, 2016 through November 2, 2017. 81 Fed. Reg. 4051 (Jan. 25, 2016). The extension and redesignation are based on the determination that the conditions in South Sudan that prompted the 2014 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have persisted, and in some cases deteriorated, and these conditions pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country. *Id.*

b. Sudan

Also on January 25, 2016, DHS announced the extension of the designation of Sudan for TPS for 18 months from May 3, 2016 through November 2, 2017. 81 Fed. Reg. 4045 (Jan. 25, 2016). The extension was based on the determination that the conditions in Sudan that prompted the 2013 TPS redesignation continue to exist, specifically there continues to be ongoing armed conflict and extraordinary and temporary conditions within the country that prevent its nationals from returning to Sudan in safety. *Id.*

c. Guinea

On March 22, 2016, DHS announced the extension of the designation of Guinea for TPS for six months from May 22, 2016 through November 21, 2016. 81 Fed. Reg. 15,339 (Mar. 22, 2016). The extension is based on the determination that conditions supporting the 2014 determination due to the epidemic of Ebola Virus Disease, although improved, continue to prevent Guinean nationals (or aliens having no nationality who last habitually resided in Guinea) from returning to Guinea in safety. *Id.*

On September 26, 2016, DHS announced, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, the determination that conditions in Guinea no longer support its designation for TPS. DHS extended TPS benefits for six more months “for the purpose of orderly transition before the TPS designation of Guinea terminates,” effective May 21, 2017. 81 Fed. Reg. 66,064 (Sep. 26, 2016).

d. Liberia

Also on March 22, 2016, DHS announced the extension of the designation of Liberia for TPS for six months from May 22, 2016 through November 21, 2016. 81 Fed. Reg. 15,328 (Mar. 22, 2016). The extension is based on the determination that conditions supporting the 2014 determination due to the epidemic of Ebola Virus Disease, although improved, continue to prevent Liberian nationals (or aliens having no nationality who last habitually resided in Liberia) from returning to Liberia in safety. *Id.*

On September 26, 2016, DHS announced, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, the determination that conditions in Liberia no longer support its designation for TPS. DHS extended TPS benefits for six more months “for the purpose of orderly transition before the TPS designation of Liberia terminates,” effective May 21, 2017. 81 Fed. Reg. 66,059 (Sep. 26, 2016).

e. Sierra Leone

As with Guinea and Liberia, the designation of Sierra Leone for TPS was extended for six months from May 22, 2016 through November 21, 2016 based on lingering conditions relating to the epidemic of Ebola Virus Disease. 81 Fed. Reg. 15,334 (Mar. 22, 2016). TPS for Sierra Leone was also extended for six additional months later in the year to prepare for the termination of Sierra Leone’s TPS designation, effective May 21, 2017. 81 Fed. Reg. 66,054 (Sep. 26, 2016).

f. Honduras

On May 16, 2016, DHS announced the extension of the designation of Honduras for TPS for 18 months from July 6, 2016 through January 5, 2018. 81 Fed. Reg. 30,331 (May 16, 2016). The extension was based on the determination that conditions in Honduras supporting the TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, which struck Honduras in 1998, and subsequent environmental disasters, and Honduras remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

g. Nicaragua

Also on May 16, 2016, DHS announced the extension of the designation of Nicaragua for TPS for 18 months from July 6, 2016 through January 5, 2018. 81 Fed. Reg. 30,325 (May 16, 2016). The extension was based on the determination that conditions in Nicaragua supporting the TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting from Hurricane Mitch, which struck Nicaragua in 1998, and subsequent environmental disasters, and Honduras remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

h. El Salvador

On July 8, 2016, DHS announced the extension of the designation of El Salvador for TPS for 18 months from September 10, 2016 through March 9, 2018. 81 Fed. Reg. 44,645 (July 8, 2016). The extension was based on the determination that conditions in El Salvador supporting the TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

i. Syria

On August 1, 2016, DHS announced that it was extending the designation of the Syrian Arab Republic (Syria) for TPS for 18 months, from October 1, 2016 through March 31, 2018, and redesignating Syria for TPS for 18 months, effective October 1, 2016 through March 31, 2018. 81 Fed. Reg. 50,533 (Aug. 1, 2016). The extension and redesignation are based on the determination that that the ongoing armed conflict and other extraordinary and temporary conditions that prompted the 2015 TPS redesignation have not only persisted, but have deteriorated, and the ongoing armed conflict in Syria

and other extraordinary and temporary conditions would pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. *Id.*

j. Nepal

On October 26, 2016, DHS announced the extension of the designation of Nepal for TPS for 18 months, through June 24, 2018. 81 Fed. Reg. 74,470 (Oct. 26, 2016). Nepal was designated in 2015 on environmental disaster grounds due to a severe earthquake on April 25, 2015. As explained in the notice of the extension in the Federal Register, recovery and reconstruction from the 2015 earthquake were delayed due to civil unrest and obstruction of Nepal's border with India. As a result, Nepal continues to have a large number of its population without permanent or safe housing and strains on its infrastructure impacting housing, food, medicine, and education. DHS accordingly determined that Nepal continues to be unable to handle adequately the return of aliens who are nationals of Nepal and the conditions supporting its designation for TPS in 2015 continue to be met. *Id.*

2. Refugee Admissions in the United States

On January 13, 2016, President Obama issued a memorandum for the Secretary of State conveying Presidential Determination No. 2016-05 regarding unexpected urgent refugee and migration needs. 81 Fed. Reg. 68,925 (Oct. 4, 2016). The memorandum states:

By the authority vested in me as President by the Constitution and the laws of the United States, including section 2(c)(1) of the Migration and Refugee Assistance Act of 1962 (the "Act") (22 U.S.C. 2601(c)(1)), I hereby determine, pursuant to section 2(c)(1) of the Act, that it is important to the national interest to furnish assistance under the Act, in an amount not to exceed \$70 million from the United States Emergency Refugee and Migration Assistance Fund, for the purpose of meeting unexpected urgent refugee and migration needs related to the U.S. Refugee Admissions Program, through contributions and other assistance to international and nongovernmental organizations funded through the Bureau of Population, Refugees, and Migration of the Department of State. Funds will be used by the Department of State to meet the unexpected urgent need for additional resources within the U.S. Refugee Admissions Program, in light of the unprecedented number of refugees in need of resettlement.

On September 28, 2016, President Obama issued a memorandum for the Secretary of State, conveying Presidential Determination No. 2016-13 regarding refugee admissions for fiscal year 2017. 81 Fed. Reg. 70,315 (Oct. 11, 2016). The Presidential Determination is excerpted below.

* * * *

In accordance with section 207 of the Immigration and Nationality Act (the “Act”) (8 U.S.C. 1157), and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions:

The admission of up to 110,000 refugees to the United States during Fiscal Year (FY) 2017 is justified by humanitarian concerns or is otherwise in the national interest; provided that this number shall be understood as including persons admitted to the United States during FY 2017 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below.

The admissions numbers shall be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations; provided that the number of admissions allocated to the East Asia region shall include persons admitted to the United States during FY 2017 with Federal refugee resettlement assistance under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, as contained in section 101(e) of Public Law 100– 202 (Amerasian immigrants and their family members):

Africa	35,000
East Asia	12,000
Europe and Central Asia4,000
Latin America and the Caribbean5,000
Near East and South Asia	40,000
Unallocated Reserve	14,000

* * * *

Additionally, upon notification to the Judiciary Committees of the Congress, you are further authorized to transfer unused admissions allocated to a particular region to one or more other regions, if there is a need for greater admissions for the region or regions to which the admissions are being transferred. Consistent with section 2(b)(2) of the Migration and Refugee Assistance Act of 1962, I hereby determine that assistance to or on behalf of persons applying for admission to the United States as part of the overseas refugee admissions program will contribute to the foreign policy interests of the United States and designate such persons for this purpose.

Consistent with section 101(a)(42) of the Act (8 U.S.C. 1101(a)(42)), and after appropriate consultation with the Congress, I also specify that, for FY 2017, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:

- a. Persons in Cuba
- b. Persons in Eurasia and the Baltics
- c. Persons in Iraq
- d. Persons in Honduras, Guatemala, and El Salvador

e. In exceptional circumstances, persons identified by a United States Embassy in any location.

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3. Migration

On September 9, 2016, the United States provided an explanation of position on the outcome document for the UN General Assembly’s summit on large movements of refugees and migrants, held on September 19, 2016. The outcome document is referred to as the New York Declaration for Refugees and Migrants. U.N. Doc. A/71/L.1. The U.S. explanation of position follows.

* * * *

The United States is pleased to have joined consensus on the resolution entitled “Draft outcome document of the high-level plenary meeting of the General Assembly on addressing large movements of refugees and migrants” which the General Assembly adopted on September 9. The United States looks forward to the General Assembly’s high-level plenary meeting on addressing large movements of refugees and migrants on September 19 and to adopting the “New York Declaration for Refugees and Migrants” at that meeting. The United States previously had joined consensus when Member States concluded negotiations on that declaration on August 2. The United States further understands that the final text of the New York Declaration that member states adopt on September 19 will be set out in a new U.N. document that reflects minor editorial corrections to the text included as the annex to A/70/L.61. These modifications include the restoration of references by name to the Special Representative of the Secretary-General for International Migration, Peter Sutherland, in paragraph 62 of the declaration and paragraph 13 of Appendix 2.

The General Assembly is convening this high-level meeting on September 19 in recognition that more and more people today are on the move to escape persecution, conflict, severe human rights abuses, extreme poverty, and other perilous situations. Given the present scale of these movements and the vulnerability of those undertaking these journeys, global cooperation to protect and assist refugees, internally displaced persons, victims of human trafficking, and vulnerable migrants is critical. Importantly, the New York Declaration affirms key principles of responsibility-sharing and international cooperation and states’ commitments to protect and assist refugees and to work toward durable solutions to address their plight. The declaration and its appendices set out important principles that, when applied, will make the international response to humanitarian crises more effective. Since addressing the needs of affected individuals is paramount, responses must be fine-tuned and adapted to reflect specific circumstances on the ground.

The declaration also reflects a growing recognition that large numbers of highly vulnerable migrants are not refugees as defined under international law, but are nevertheless in need of protection and assistance. It highlights the benefits of migration and underscores the importance of respecting the human rights of all migrants, regardless of immigration status, and

of combating xenophobia, discrimination against refugees and migrants, trafficking in persons, and migrant smuggling. Above all, the declaration calls on all of us, first and foremost, to save lives and ensure protection for those who need it. We embrace that goal.

In joining consensus on the New York Declaration, we would like to clarify our views on several elements in the text. First, we underscore our understanding that none of the provisions in this declaration or its accompanying appendices create or affect rights or obligations of States under international law, as paragraph 21 recognizes. The United States will pursue the commitments, including those aspiring to changed circumstances, in the declaration and its appendices consistent with U.S. law and policy and the federal government's authority. In pursuing these important goals, the United States will also continue to take steps to ensure national security, protect territorial sovereignty, and maintain the health and safety of its people, including by exercising its rights and responsibilities to prevent irregular migration and control its borders, consistent with international obligations.

In this context, we note the document's important commitments concerning humanitarian financing, which is central to meeting humanitarian needs. The United States has long been the world's largest humanitarian donor and has provided more than \$6 billion in each of our last two fiscal years—providing life-saving assistance to millions of the world's most vulnerable people. Our commitment to meeting life-saving needs is an enduring one, and we will pursue the declaration's commitments relating to financing or national budgets within and subject to our appropriations process.

The declaration also contains numerous commitments concerning migration and lays out a process for member states to elaborate a Global Compact on Safe, Orderly, and Regular Migration in keeping with the 2030 Agenda for Sustainable Development for adoption in 2018. A strong role for the International Organization for Migration (IOM), which will become strengthened upon the entry into force on September 19 of the relationship agreement between the United Nations and the IOM, is essential to this follow-on process. IOM is uniquely positioned for this role as the sole global organization with an exclusive mandate on migration. By relying on its policy and secretariat expertise on all aspects of the preparatory process and ensuing negotiations, member states will gain immeasurably from IOM's broad and deep knowledge and be better positioned to respond to crises and protect the most vulnerable among them. This in turn will enhance their deliberations and avoid potentially unnecessary parallel processes and costly duplication of efforts. Finally, we believe it is critical to hold the negotiations in Geneva, where states can benefit not only from IOM's expertise but also the proximity of other Geneva-based organizations with migration and refugee expertise, including the International Labor Organization, the UN High Commissioner for Refugees, and the UN Office for the High Commissioner for Human Rights. We will engage in discussions on modalities and subsequent negotiations of the new global compact on this understanding.

We are pleased the declaration refers to the "Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster" (MICIC) initiative. The MICIC Initiative, an important state-led effort, resulted in guidelines that states and other stakeholders can use as they see fit and that may serve as a useful model for subsequent state-led efforts on broader issues.

We are pleased to see specific language on persons in vulnerable situations and emphasize that LGBTI persons fall within this category. The United States strongly supports any language on protecting the rights of members of vulnerable groups, including LGBTI persons, persons with disabilities, women, children, and indigenous persons, among others.

We are also pleased that the declaration includes specific language reaffirming the principle of non-refoulement. We underscore the importance of the core principle of non-refoulement to the protection of refugees and asylum-seekers and regret that Appendix I (Comprehensive refugee response framework) does not refer to it. Protection must remain central in all refugee responses, which includes ensuring the voluntary nature of any refugee return.

While the declaration and its Appendix I rightly emphasize the importance of finding durable solutions for refugees, including voluntary return and resettlement, we are disappointed that local integration is not mentioned. Local integration continues to be important, and it is statistically the most likely of the three durable solutions for refugees.

The declaration correctly emphasizes the particular vulnerabilities and needs of refugee and migrant children. Efforts to protect and promote the well-being of children in our country and abroad are a longstanding priority for the United States. We underscore our unwavering commitment to children around the world, evidenced in part by our annual contributions as UNICEF's largest donor—totaling more than \$868 million last year and our recent pledge of \$20 million to support “Education Cannot Wait”—a fund to strengthen education in emergencies and protracted crises. In addition, U.S. initiatives such as “Let Girls Learn” support girls around the world so they can transition to and succeed in secondary school. In advance of the Leaders' Summit for Refugees on September 20, the United States is also providing nearly \$37 million to the UN High Commissioner for Refugees to allow tens of thousands of refugee children to enroll in school and to support education-related Summit commitments by refugee-hosting countries.

The U.S. government draws from a wide range of available resources to safely process migrant children, in accordance with applicable laws. In the limited circumstances in which migrant children are placed in custody of the U.S. government, the United States is committed to ensuring that they are treated in a safe, dignified, and secure manner. The United States believes that current practices with respect to children are consistent with this commitment. Further, the United States does provide appropriate procedural safeguards for all migrants and asylum seekers, whether or not they are in U.S. government custody, and we interpret the declaration's references to due process and other protections, including for persons seeking to cross an international border and in the context of returns, to be consistent with our existing national laws and policies in this regard.

Additionally, while delegates showed flexibility in reaching an outcome of which we can all be proud, we regret that some important topics were omitted. More than 40 million internally displaced persons (IDPs) globally form one of the world's most vulnerable populations, and the declaration should have included stronger and more specific language on their protection and assistance needs. Nonetheless, many of the solutions the declaration outlines for refugees are equally relevant for IDPs; the causes of displacement are often the same while the vulnerabilities they face are often life-threatening. We encourage States to draw on the commitments in this text in their efforts to protect and assist IDPs, to adopt laws and policies to do so, and to promote the inclusion of IDPs in their development strategies. The UN system needs to remain focused on this critical issue, mindful of the Human Rights Council's recognition, in its recently adopted resolution on IDPs, of the need for further consideration of reestablishing the position of Special Representative of the Secretary-General on IDPs.

Lastly, we are pleased that the declaration includes language on the problem of statelessness. Together with a cross-regional group of 107 co-sponsors, the United States was proud to introduce a resolution on women's equal nationality rights at the Human Rights Council's June session. That resolution highlights the discrimination against women in their

ability to confer nationality to their spouses and children, a problem that persists in every region of the world, and increases the risk of statelessness. Statelessness, in turn, increases vulnerability of people to human rights abuses and violations, including those involving human trafficking, arbitrary detention, and restrictions on movement. We underscore the importance of resolving existing situations of statelessness to address protracted refugee crises, to avoid discrimination against women as well as racial or ethnic discrimination in nationality laws, and to ensure robust civil registration—particularly birth registration—for all.

As we look ahead, we intend to build upon the elements of this declaration to improve the lives of millions of refugees and vulnerable migrants. The United States looks forward to cooperating with other Member States and the United Nations to advance these objectives, including through the development and adoption of the compacts on refugees and on safe migration that the declaration envisions.

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Cross References

Evacuation of U.S. citizens in Yemen, **Chapter 5.C.1.**

Lin v. United States (nationality of residents of Taiwan), **Chapter 5.C.3**

Asylum and non-refoulement at IACHR, **Chapter 7.D.1.f.**

Diplomatic relations, **Chapter 9.A.**

World Bank Global Crisis Response Platform (response to refugee crisis), **Chapter 11.J.4.a.**