

No. 19-55517

IN THE
United States Court of Appeals
for the Ninth Circuit

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

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 2:18-cv-00523
District Judge John F. Walter

**BRIEF FOR *AMICI CURIAE* FAMILY LAW PROFESSORS IN SUPPORT
OF APPELLEES AND AFFIRMANCE**

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STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* submit this brief without an accompanying motion for leave to file because all parties have consented to its filing. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae—sixty-five scholars of family law—respectfully submit this brief in support of Appellees. *Amici* have substantial knowledge of the past and current laws regulating family relationships, including the parent-child relationship. This brief demonstrates that citizenship law long has looked to and incorporated family law principles. Contrary to the government’s representations, under those principles, derivative citizenship for marital children depended on legal rather than biological relationships. A full list of *amici* can be found in the Appendix.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From the moment he was born, E.J. has been—in the eyes of the law—the child of a married U.S. citizen, Andrew Dvash-Banks. Under the operative provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1401(g), that

makes E.J. an American citizen from birth. Yet the government refuses to recognize E.J. as a U.S. citizen. It claims that Section 1401(g) requires not only a legal parent-child relationship at birth, but also a biological one. The government cites no express requirement of a biological relationship in the statute itself; instead, it relies heavily on a supposed “historical understanding of *jus sanguinis* citizenship”—one that the government claims has always turned on a biological relationship. U.S. Br. 2.

The government’s argument is wrong both as a matter of history and as a matter of statutory construction. Throughout this Nation’s history, the rules governing derivative citizenship have looked to and incorporated relevant principles of family law in determining whether a person born abroad is the child of a U.S. citizen. Under those principles, a biological relationship historically has been neither sufficient nor necessary to transmit citizenship to children born abroad. Rather, historically, nonmarital children did not obtain citizenship even if their biological parents were citizens; marital children did not obtain citizenship if only their biological mother was a citizen; and—most importantly for this case—children of married parents *were* eligible to obtain citizenship even if they were not biologically connected to their citizen father. The government’s suggestion that a “blood” relationship was necessary to establish derivative citizenship, U.S. Br. 15,

is simply wrong: For centuries, marriage, not biological relationships, animated derivative citizenship rules.

The government's argument is also unsupported by principles of statutory construction. Section 1401(g) does not require a biological relationship between parent and child. Congress knows how to require proof of a biological relationship in statutes governing citizenship when it wishes to do so: It included such a requirement in Section 1409, which governs the derivative citizenship of *nonmarital* children. In stark contrast, Section 1401(g), which governs the derivative citizenship of *marital* children, contains no such requirement.

Despite our long history of relying on *legal* parentage to determine whether a foreign-born marital child is eligible for derivative citizenship, the government suggests that a *biological* parentage requirement is necessary to prevent fraud. Fraud is a genuine and legitimate concern, but it is—and long has been—adequately addressed through other means. Accordingly, this Court should adhere to its holdings in *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), that Section 1401(g) does not require the existence of a biological relationship, and affirm the district court's holding that E.J. acquired citizenship from his father, Andrew, at birth.¹

¹ The government agrees that this Circuit's existing law requires this result. U.S. Br. 2.

ARGUMENT

I. GUIDED BY PRINCIPLES OF FAMILY LAW, HISTORICALLY THE CITIZENSHIP LAWS DEEMED A BIOLOGICAL RELATIONSHIP NEITHER SUFFICIENT NOR NECESSARY TO TRANSMIT DERIVATIVE CITIZENSHIP.

From the earliest years of this Nation’s history, Congress has provided for some form of derivative citizenship. Early Congresses did so through a series of statutes that conferred citizenship on “children of citizens” who were born abroad. *See* Act of Mar. 26, 1790, § 1, 1 Stat. 103, 103–104; Act of Jan. 29, 1795, § 3, 1 Stat. 414, 415; Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155. In 1855, Congress revised the language to confer citizenship on “persons . . . whose *fathers* were . . . citizens.” Act of Feb. 10, 1855, § 1, 10 Stat. 604, 604 (emphasis added). Congress did not provide an express definition of the terms in these statutes. And so, for centuries, the government has looked to principles of family law—including the rules governing the parentage of marital and nonmarital children and the differential status of husbands and wives in marriage—to determine which children are entitled to derivative citizenship under these statutes. Contrary to the government’s claim, derivative citizenship law in this country historically has not been a rule “of blood.” U.S. Br. 15. Rather, for centuries, family law—and thus citizenship law—has deemed a biological relationship neither sufficient nor necessary to establish a parent-child relationship. Instead, legal relationships based on family law principles governed.

A. Historically, A Biological Relationship Was Not Sufficient For A Child To Acquire Derivative Citizenship From A Parent.

For much of our history, two principles permeated local domestic relations law: the strong preference for marital families and the role of the father as head of the family. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690–91 (2017). These principles led the law not only to treat the children of married parents more favorably than the children of unmarried parents, but also to treat father-child relationships more favorably than mother-child relationships within marital families. These family law principles were reflected in the rules governing derivative citizenship, which conferred citizenship at birth on neither the biological children of unmarried parents nor the biological children of married American mothers where the child’s father was a noncitizen.

1. At common law, a child born outside of marriage was considered “illegitimate” and had no legal relationship to his biological parents. Instead, the common law deemed nonmarital children *nullius filii*—literally, “sons of nobody.” *See, e.g.*, 2 William Blackstone, *Commentaries* *247; *Nullius Filius*, *Black’s Law Dictionary* (11th ed. 2019); Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 Va. L. Rev. 629, 637 (2014). Eventually, even as family law continued to discriminate against nonmarital children, it recognized a legal relationship between a nonmarital child and his mother. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1691 (noting that “[a]t common law, the mother, and only

the mother, was ‘bound to maintain [a nonmarital child] as its natural guardian’” (quoting 2 James Kent, *Commentaries on American Law* *215–216 (8th ed. 1854))). But the law refused to recognize a legal parent-child relationship between a father and his nonmarital child, even when their biological relationship was known and uncontested. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 *Yale L.J.* 2260, 2272–73 (2017); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 197–198 (1985).

Historically, these family law principles were reflected in citizenship rules. Early citizenship statutes did not differentiate between marital and nonmarital children; instead, they referred simply to “children” and “fathers.” *See supra* 4. Accordingly, “administrators, government attorneys, and judges rel[ied] on [local] domestic relations law” in applying citizenship law. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *Yale L.J.* 2134, 2184 (2014); *see also* Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 *Duke L.J.* 1727, 1737–39 (2017) (discussing how administrators relied on “the law of the father’s domicile” when applying these statutes).

Consistent with that approach, courts and administrators determined that citizenship could not pass from fathers to their nonmarital children (that is, *nullius filii*), even where biological relationships were certain. Derivative citizenship

required a *legal* parental relationship, and unmarried men had no such relationship with their biological children. *See Guyer v. Smith*, 22 Md. 239, 249 (1864) (holding that children “not born in lawful wedlock . . . under our law [are] *nullius filii*, and clearly therefore not within the provisions of [the citizenship act]”); *see also* Abrams & Piacenti, *supra*, at 657 (under “nineteenth century . . . citizenship laws,” “the children acquiring citizenship at birth had to be legitimate children”).

As family law’s treatment of nonmarital children evolved, so too did citizenship law’s. For example, as family law began to recognize the relationship between nonmarital mothers and their biological children, federal officials administering the citizenship statutes did so as well. Thus, even before Congress amended the citizenship statute in 1934 to expressly include mothers, “in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children.” *Morales-Santana*, 137 S. Ct. at 1691–92; *see also* Act of May 24, 1934, § 1, 48 Stat. 797, 797 (amending statute to include mothers).

Eventually, family law enabled a biological father to legally recognize (or “legitimize”) his nonmarital child, and thereby become a legal parent, through a variety of mechanisms. Abrams & Piacenti, *supra*, at 638. Citizenship law followed suit, extending citizenship to nonmarital children of some citizen fathers where the fathers established legal relationships with their children under family law rules. It did so first through administrative practice, Collins, *Illegitimate*

Borders, supra, at 2174 (discussing the State Department’s “legitimation exception” to the rule that nonmarital children were precluded from acquiring citizenship), and later through codification, *see, e.g.*, Nationality Act of 1940, § 205, 54 Stat. 1137, 1139–40 (conferring citizenship on children “born out of wedlock” in the event of “legitimation, or adjudication of a competent court” of “paternity”).

2. Historically, the citizenship statutes’ treatment of married women also reflected family law’s gendered view of the marital family. And there, too, the law prevented the biological children of some U.S. citizens from obtaining citizenship at birth.

During the Nation’s early history, family law embodied a deeply entrenched view that women were subordinate to men in the marital family. Indeed, the system of coverture ensured that a married woman had no legal identity separate from her husband. *See* 1 William Blackstone, Commentaries *442 (“By marriage the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . .”). As the Supreme Court has explained, “[i]n marriage, husband [wa]s dominant, wife subordinate.” *Morales-Santana*, 137 S. Ct. at 1691. Although it has since been repudiated, that gendered view of marriage was considered an “ancient principle” of the American

legal system. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915); see *Morales-Santana*, 137 S. Ct. at 1691 n.9.

Following this view of the mother’s subordinated legal standing within marriage, nineteenth century derivative citizenship statutes relied on the married father’s citizenship to determine the citizenship of his family members: “Marriage automatically conferred citizenship on his wife, and the children of the marriage acquired citizenship at birth.” *Abrams & Piacenti*, *supra*, at 657. Consistent with this view, citizenship law barred married mothers from transmitting citizenship to their biological children. *Morales-Santana*, 137 S. Ct. at 1691. Indeed, American women who married foreign citizens were expatriated, and the biological children of such women were categorically excluded from derivative citizenship until 1934. *Id.* at 1691 & nn.10–11; see Act of Mar. 2, 1907, § 3, 34 Stat. 1228, 1228–29; see also *Collins, Illegitimate Borders*, *supra*, at 2199. In this area, too, a biological relationship was not sufficient to establish parentage under the citizenship laws. Instead, citizenship determinations followed the gender-based principles embodied in family law.

B. Historically, A Biological Connection Was Not Necessary For A Child To Acquire Derivative Citizenship From A Married Father.

With regard to married fathers, by contrast, the law deemed a biological connection *unnecessary* to obtain derivative citizenship: Because the law treated a

husband as the legal father of a child to whom his wife gave birth, a husband could confer citizenship on his child even if he was not the child's biological father.

The marital presumption, or presumption of legitimacy, “was a fundamental principle of the common law.” *Michael H. v. Gerald D.*, 491 U.S. 110, 124–125 (1989) (plurality op.). Under this presumption, “when a married woman gave birth to a child, the law recognized her husband as the child's father.” NeJaime, *supra*, at 2266. As a historical matter, the presumption was very difficult—often, practically speaking, impossible—to rebut. See 1 William Blackstone, Commentaries *457 (providing that it was only “if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, [that] her issue during that period shall be bastards”). Thus, the presumption operated to “hide biological facts to maintain the husband's parental status and the child's legitimacy.” NeJaime, *supra*, at 2271; accord Abrams & Piacenti, *supra*, at 638 (“The marital presumption of paternity . . . meant that a man's non-genetic child might nonetheless be his legal child.”).

The fact that the marital presumption did not depend on a biological relationship was no accident; it “was based at least in part on policy concerns.” Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 Iowa L. Rev. 1467, 1491 (2013). By assigning parentage to the husband, the presumption

ensured that families, rather than the state, bore the financial burdens of child-rearing. *See Michael H.*, 491 U.S. at 125 (plurality op.). It also served the goal of promoting social stability by protecting families from interference by outsiders making claims to parentage. *See Pearson v. Pearson*, 182 P.3d 353, 357 (Utah 2008) (explaining that the presumption of legitimacy “promotes family harmony between parents and children by protecting and preserving these crucial relationships”); *see also* J. Schouler, *A Treatise on the Law of the Domestic Relations* § 225, p. 304 (3d ed. 1882). Of course, by ensuring a source of support and protecting the integrity of the family, the presumption promoted the interests of children. *See Michelle W. v. Ronald W.*, 703 P.2d 88, 92–93 (Cal. 1985).

Citizenship determinations reflected the important principle that a child born to a married woman is the legal child of her husband, even in the absence of a biological relationship between the husband and the child. Accordingly, “[t]he interaction of the marital presumption of paternity with nineteenth-century courts’ interpretations of these early citizenship acts meant that, almost certainly, citizenship sometimes passed from U.S. citizen fathers to foreign-born marital children to whom they were not biologically related.” Abrams & Piacenti, *supra*, at 658. Again, marriage, not biological relationships, animated derivative citizenship rules. *Id.* Because marital fathers were *legal* fathers, they could confer citizenship on their children.

II. MODERN FAMILY LAW DOES NOT REQUIRE A BIOLOGICAL CONNECTION TO ESTABLISH A PARENT-CHILD RELATIONSHIP.

As the foregoing discussion illustrates, under family law principles, biology has never been the sole or dispositive consideration for determinations of parentage. Joslin, *Marriage, Biology, and Federal Benefits*, *supra*, at 1491–92. That remains true today. In fact, as medical and scientific advances have allowed more people to have children through assisted reproduction, most states have supplemented their existing parentage rules to expressly address these new means of family formation. These supplemental rules also allow for the recognition of legal parent-child relationships at birth even in the absence of biological connections.

1. The presumption of legitimacy continues to exist in all fifty states. Leslie Joan Harris, Lee E. Teitelbaum & June Carbone, *Family Law* 865 (5th ed. 2014). As a result, the law continues to recognize a husband as a legal parent even when there is clear evidence that he is not the child’s biological parent. And the U.S. Supreme Court has approved this result. In *Michael H. v. Gerald D.*, the Court considered the legal parentage of a child born to a married woman but conceived as the result of an extramarital relationship. 491 U.S. at 113. Although it was undisputed that Gerald, the husband, was not the child’s biological parent—a point confirmed by blood tests—California law recognized Gerald as the legal father by

virtue of the marital presumption. In its decision, the Supreme Court affirmed the state-law designation of Gerald as the legal father and upheld California’s law that barred the biological father from even disputing Gerald’s paternity under state law. *See id.* at 119–120, 124–126 (plurality op.).²

State reporters abound with other recent cases relying on the marital presumption to conclude that a husband is a child’s legal father despite clear evidence that he is not the child’s biological father. *See, e.g., Pearson*, 182 P.3d at 359 (upholding application of the marital presumption against challenge by a biological father); *Merkel v. Doe*, 635 N.E.2d 70, 71 (Ohio Ct. Com. Pl. 1993) (barring a putative biological father from bringing a paternity action “because of the obvious trauma to families and marital instability that” it would cause); *John M. v. Paula T.*, 571 A.2d 1380, 1386, 1388 (Pa. 1990) (rejecting challenge to the marital presumption brought by the biological father).

2. Today, practically all states have supplemented the presumption of legitimacy by enacting additional rules that account for changes in how families are formed. Like the marital presumption, these additional rules allow for the

² Justice Stevens concurred in the judgment, concluding that a California statute that allowed people other than legal parents to seek visitation adequately protected any rights of the biological father. 491 U.S. at 133 (Stevens, J., concurring in the judgment).

recognition of a spouse as a legal parent even in the absence of a biological relationship.

Beginning in the second half of the twentieth century, increasing numbers of children have been conceived using assisted reproductive technologies. Initially, the law in many states adapted the marital presumption's recognition of non-biological fathers to these new methods of family formation. Thus, for example, courts relied on the marital presumption to deem a husband a legal father when his wife gave birth to a child conceived with donor sperm. *See* NeJaime, *supra*, at 2292–93; *see also In re Adoption of Anonymous*, 74 Misc. 2d 99, 105 (N.Y. Sur. Ct. 1973) (“It is determined that a child born of consensual [artificial insemination by donor] during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage. The father of such child is therefore the ‘parent’”).

Over time, states enacted additional family law rules that expressly apply to marital families formed through assisted reproduction. Under these rules, a husband is treated as the legal parent of a child born to his wife through assisted reproduction even if he is not, and knows he is not, biologically related to that child. *See, e.g.,* Minn. Stat. § 257.56 (“If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if

he were the biological father of a child thereby conceived.”); Ark. Code Ann. § 9-10-201(b) (“A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman’s husband”); *see also* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177, 1179 (2010) (“[T]he existing rules provide that a husband is the legal parent of a child born to his wife through alternative insemination so long as he consented to the insemination.” (footnotes omitted)).

In addition, and most relevant to this case, many states and foreign jurisdictions have enacted statutes governing the parentage of children conceived through surrogacy arrangements. For instance, many states and countries recognize the intended parents as the legal parents of the resulting child from the time of birth, regardless of whether they are biologically related to the child. This is true, for example, in Ontario, where E.J. was born. Consistent with the law of Ontario, the order entered by the Ontario court declares Andrew and Elad to be E.J.’s legal parents, and directs the appropriate authorities to “register the birth of the child so as to show the Applicants, Elad Dvash-Banks and Andrew Dvash-Banks, as the parents of the child.” Excerpts of Record 76–77. The same would be true under California law, Cal. Fam. Code § 7962, and the laws of many other states, *see, e.g.*, Me. Rev. Stat. Ann. tit. 19-A, § 1933(1) (“The intended parent or

parents [of children conceived under a compliant surrogacy agreement] are by operation of law the parent or parents of the resulting child immediately upon the birth of the child, and the resulting child is considered the child of the intended parent or parents immediately upon the birth of the child.”).

In sum, as a matter of family law—the body of law on which parentage determinations for purposes of derivative citizenship historically have relied—a biological relationship never has been required to establish the parentage of marital children. Today, there are multiple rules, contemplating various methods of family formation, under which a spouse is recognized as a legal parent absent a biological relationship to the child.

III. THE TEXT OF SECTION 1401(g) DOES NOT REQUIRE A BIOLOGICAL RELATIONSHIP.

Since 1940, U.S. law has conferred citizenship on “a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States.” 8 U.S.C. § 1401(g); *see also* Nationality Act of 1940 § 201. Nothing in this provision requires a biological connection between a child and his U.S. citizen parent. Rather, this provision is properly interpreted to require a *legal* parent-child relationship under the applicable rules of family law—in this case, the rules of Ontario law, which deem Andrew the father of E.J. from birth.

Start with the text of the provision itself. Section 1401(g) makes citizenship hinge on whether, at birth, the person is the child “of parents one of whom is . . . a citizen.” 8 U.S.C. § 1401(g). The term “parent” is not defined in the statute. But it is well-established that the “scope of a federal right” may “be determined by state, rather than federal law.” *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956); *see also Butner v. United States*, 440 U.S. 48, 55 (1979). “This is especially true where a statute deals with a familial relationship” *De Sylva*, 351 U.S. at 580. Accordingly, courts and federal agencies and officials regularly “draw on the ready-made body of state [family] law,” *id.*, to determine whether a person qualifies as a “child” for purposes of a range of federal statutes, *see, e.g.*, Soc. Sec. Admin., Program Opportunity Manual System (POMS) (setting forth “information used by Social Security employees to process claims for Social Security benefits”)³—even when the statute does not expressly direct consideration of state law, *De Sylva*, 351 U.S. at 580–581 (looking to state family law rules to interpret the word “child” for purposes of the Copyright Act). The same is true of “parent.” *See, e.g., King v. Smith*, 392 U.S. 309, 329 (1968) (“Congress must have meant [in the Aid to Families With Dependent Children statute] by the term ‘parent’ an individual who owed to the child a state-imposed legal duty of support.”); *Prudential Ins. Co. of Am. v. Ellwein*, 435 F. Supp. 248, 251 (W.D.N.Y. 1977)

³ Available at <https://secure.ssa.gov/apps10/poms.nsf/Home?readform>.

(holding that, at the relevant time, “the [Serviceman’s Group Life Insurance statute] did not define the term ‘parent’ and presumably left such definition to local state law”). Thus, when Congress used the word “parents” in what is now Section 1401(g), it stands to reason that it sought to refer to the rules of parentage in family law, not to superimpose a strict requirement of a biological relationship that has never been a feature of this country’s family (or citizenship) laws.

A comparison between Section 1401 and Section 1409 powerfully reinforces the conclusion that Section 1401 turns on the existence of a parent-child relationship as defined in family law and does not require proof of a biological relationship. Section 1409 states that “paragraph[] . . . (g) of section 1401 . . . shall apply . . . to a person born out of wedlock if . . . a *blood relationship* between the person and the father is established by clear and convincing evidence.” 8 U.S.C. § 1409(a)(1) (emphasis added). There would be no need to separately require proof of a biological relationship for nonmarital children in Section 1409 if Section 1401(g) required proof of a biological relationship for *all* children. Indeed, such a reading would render the requirement of a “blood relationship” in Section 1409(a)(1) superfluous, and courts “generally presume that statutes do not contain surplusage.” *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) (internal quotation marks and alterations omitted).

This reading of Sections 1401 and 1409 is also supported by the statutory history. The early citizenship statutes conferred citizenship on the “children of citizens” or “persons . . . whose fathers were . . . citizens.” Act of Mar. 26, 1790, § 1; Act of Jan. 29, 1795, § 3; Act of Apr. 14, 1802, § 4; Act of Feb. 10, 1855, § 1. As detailed above, courts and government administrators interpreted those terms in light of the then-prevailing rules of family law, which made biology neither sufficient nor necessary to establish a parent-child relationship. *See supra* 4–11. When Congress enacted Section 1401 in 1940, it presumably sought to continue, rather than dramatically depart from, this established practice.

With no other textual evidence to stand on, the government tries to support its reading of Section 1401(g) by looking to the statute’s use of the words “*born . . . of parents.*” U.S. Br. 18–20 (emphasis added). That argument is flawed for several reasons. For one thing, the phrase “born of” does not appear in the statute. Rather, Section 1401(g) states that a child is a U.S. citizen if he or she is “a person *born* outside the geographical limits of the United States and its outlying possessions *of* parents one of whom is an alien, and the other a citizen of the United States.” 8 U.S.C. § 1401(g) (emphases added). The past participle “born” plainly modifies the phrase “outside the geographical limits of the United States and its outlying possessions.” It is doubtful whether it also modifies the words “of parents,” which appear substantially later in the sentence, and as part of a differently structured

grammatical phrase. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) (“When the syntax involves something other than a parallel series of nouns or verbs, a . . . modifier normally applies only to the nearest reasonable referent.”). Moreover, the surrounding subsections of Section 1401 use the word “born” only when it immediately precedes a geographic designation. *See* 8 U.S.C. § 1401(a)–(f), (h). When Section 1401(f) refers simply to a child’s parentage, it omits the word “born” entirely, *see id.* § 1401(f) (referring simply to “a person *of* unknown parentage”)—suggesting that Congress did not intend the word “born” to modify those words in Section 1401(g), either.⁴

In any event, even if the statute did refer to children “born . . . of parents,” that phrase is a term of art that does not require a biological relationship. *See Scales*, 232 F.3d at 1164. As noted, the law has long deemed a person a “child” of both of his marital parents at birth regardless of whether there is evidence of biological parentage. *See, e.g., Cross v. Cross*, 3 Paige Ch. 139, 140 (N.Y. 1832) (“the *husband* must be taken to be the *father* of the *child*” (emphases added)).

⁴ The language in Section 1409 also supports this point. In the one place where that provision uses the word “born” to modify two consecutive phrases, it includes the word “and” to clearly link the clauses. 8 U.S.C. § 1409(c) (“a person *born*, after December 23, 1952, outside the United States *and* out of wedlock” (emphases added)). There is no parallel “and” in Section 1401(g). *See* Scalia & Garner, *supra*, at 170 (“a material variation in terms suggests a variation in meaning”).

The government also tries to support its argument by emphasizing (at 20–21) the literal translation of the term “*jus sanguinis*”—the historical name for the body of citizenship law governing the transmission of citizenship through the parent-child relationship. That argument fails as well. As the history recounted above makes abundantly clear, the citizenship laws have never deemed a “blood” relationship dispositive. Indeed, the misleading moniker “*jus sanguinis*” is no longer the primary term used to describe the law governing citizenship by birth. Instead, the modern statutes and judicial decisions governing citizenship by birth commonly refer to “citizenship by descent,” “derivative citizenship,” or “acquired citizenship,” terms that lack any connotation of a biological relationship and instead rely on legal relationships.⁵ See, e.g., 8 U.S.C. § 1444(b)(2) (“derivative citizenship”); *Morales-Santana*, 137 S. Ct. at 1698 (discussing the transmission of citizenship “derivatively”); *Jaen v. Sessions*, 899 F.3d 182, 186 (2d Cir. 2018) (discussing “the transmission of citizenship from U.S. citizen parents to their children” by “derivative citizenship and acquired citizenship”); *Rabang v. INS*, 35 F.3d 1449, 1450 (9th Cir. 1994) (“citizenship by descent”); see also Br. for

⁵ The word “descent” describes the “[t]ransmission of a title, status, dignity, [or] personal quality” either “to heirs *or* offspring,” recognizing that “inheritance” does not always flow through biological connections. *Descent*, Oxford English Dictionary (3d ed. 2015) (emphasis added). And the terms “derivative” and “acquired” are entirely neutral as to the source of that which has been transmitted. *Derivative*, Oxford English Dictionary (2d ed. 1989); *Acquired*, Oxford English Dictionary (3d ed. 2011).

Appellee United States at 8 & n.6, *United States v. Llamas-Gonzales*, No. 10-50014 (9th Cir. Sept. 30, 2010) (“derivative” and “acquired” citizenship); U.S. Citizenship & Immigration Servs., A4—I am a U.S. Citizen: How do I get proof of my U.S. Citizenship?, at 1–2 (Oct. 2013) (same).

Likewise, the government’s two-sentence discussion (at 21) of the history does not undermine the wealth of evidence presented by *amici* that family law rules, rather than biology, predominated in citizenship law. The government cites only three cases, all decided in the last 25 years, in which courts required a biological relationship for a parent to confer citizenship on a child. But all three involve the interpretation of Section 1409, which governs acquisition of citizenship by *nonmarital* children, not Section 1401, which governs the acquisition of citizenship by *marital* children. Those cases are thus inapposite to this case, which concerns the meaning and application of Section 1401. U.S. Br. 21 (citing *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), *Miller v. Albright*, 523 U.S. 420 (1998) (opinion of Stevens, J., joined by Rehnquist, C.J.), and *United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009)). That the government relies on cases involving children of unmarried parents only underscores the fact that for a child of married parents—like the child at issue here—a biological relationship is not the basis on which citizenship is conferred.

IV. A RULE BASED ON LEGAL PARENT-CHILD RELATIONSHIPS IS ADMINISTRABLE.

Despite the clear evidence that derivative citizenship for marital children has long turned on legal parentage, the government argues that this long-established practice is not administrable and would pose a serious risk of fraud. *See* U.S. Br. 31–32. These assertions do not hold up.

1. A rule based on legal parentage is both straightforward and administrable. As noted, the federal government and the states regularly apply such a rule in a wide variety of contexts, including citizenship. For instance, it is legal parents who are obligated to pay child support. *See, e.g., Stacy M. v. Jason M.*, 858 N.W.2d 852, 858 (Neb. 2015) (declaring that “[t]he obligation of support is a duty of a legally determined parent” and rejecting a husband’s request to be relieved of his child support obligations based on evidence that he is not the child’s biological parent). The same is true for questions of custody and visitation. *See, e.g., Cesar C. v. Alicia L.*, 800 N.W.2d 249, 256, 258 (Neb. 2011) (remanding case to trial court to adjudicate custody dispute between mother and nonbiological father who had established his legal parentage by signing an acknowledgment of paternity). Similarly, the federal government looks to state family law in determining eligibility for a variety of federal benefits. *See, e.g., De Sylva*, 351 U.S. at 580–581 (Copyright Act); *see generally* Joslin, *Marriage, Biology, and Federal Benefits*, *supra*, at 1473 (“[I]n a vast array of federal benefits programs,

eligibility is not conditioned on a child’s biological connection with his or her parent(s). Instead, Congress long has both implicitly and explicitly extended benefits to biologically unrelated children.”). In fact, the Supreme Court recently rejected a party’s argument in favor of a biology-based parentage rule for purposes of determining children’s eligibility for federal Social Security benefits. *See Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 551 (2012) (observing that nothing in the statute “indicate[s] that Congress intended ‘biological’ parentage to be prerequisite to ‘child’ status under” the Social Security Act).

In the citizenship context specifically, the government already routinely assesses legal relationships by reference to state and foreign domestic relations law. When deciding whether a person is subject to Section 1401(g) or Section 1409, a threshold question is whether a child was born “out of wedlock.” *See* 8 U.S.C. §§ 1401(g), 1409(a). That determination requires the government to consider whether the parents were validly married according to the relevant local domestic relations law. *See, e.g., Hernandez v. Lynch*, No. 12-00639 JMS-BMK, 2015 WL 3935373, at *1 (D. Haw. June 25, 2015) (“The details of this case are confusing, although the ultimate issue is straightforward—whether Petitioner was born ‘out of wedlock’ under Philippine law.”); *In re M-D-*, 3 I. & N. Dec. 485, 487–488 (B.I.A. 1949) (looking to Mexican family law to determine whether the child was entitled to citizenship under the then-applicable version of Section

1401); *cf. United States v. Gomez-Orozco*, 188 F.3d 422, 427 (7th Cir. 1999) (ruling in favor of the defendant because he “presented substantial evidence that his parents were married under [Texas] common law at the time he was born,” and was therefore potentially a citizen incapable of committing the crime of illegal re-entry).

In addition, the INA’s definition of “child” specifically requires reference to local parentage rules. 8 U.S.C. § 1101(c)(1) (providing that “child” “includes a child legitimated under the law of the child’s [or father’s] residence or domicile”). Accordingly, officials are regularly required to look to foreign and local family law in determining whether a child may acquire derivative citizenship under Section 1409. *Id.* § 1409(a)(4)(A); *see, e.g., Iracheta v. Holder*, 730 F.3d 419, 423–427 (5th Cir. 2013) (holding that, because the petitioner was legitimated “under the laws of the Mexican state where he resided” by his U.S.-citizen father, he qualified for derivative citizenship under Section 1409); *In re Reyes*, 17 I. & N. Dec. 512, 515 (B.I.A. 1980) (collecting citizenship cases that turn on the application of the family laws of many different countries), *overruled on other grounds by In re Cabrera*, 21 I. & N. Dec. 589 (B.I.A. 1996) (en banc)).

2. The government’s suggestion that a biological connection is necessary to eliminate parental citizenship fraud is likewise misguided. U.S. Br. 29. States and the federal government regularly administer benefits programs that look to state

parentage rules to determine eligibility. The government identifies no evidence—and *amici* are aware of none—that the government’s fears of fraud have materialized in any of those contexts. *See* Abrams & Piacenti, *supra*, at 689 (suggesting people are less likely to commit parenthood fraud than marriage fraud “given that fraudulently sponsoring a child would be more likely to lead to a legally binding obligation to continue her support”). That is perhaps because there are many other mechanisms for policing fraud in this area: For instance, many of the same tools from the government’s kit for evaluating marriage fraud would be equally effective in detecting fraud in the context of derivative citizenship. *See id.* (explaining that the government might conduct in-person interviews or review the parties’ living arrangements, among other things, to assess whether the claimed relationship is genuine); *see, e.g.*, 8 C.F.R. § 216.4(a)(5) (listing examples of documentation that can demonstrate that a “marriage was not entered into for the purpose of” immigration fraud); *id.* § 216.4(b) (discussing interview requirement). And, of course, the burden to prove citizenship remains on the applicant, *see Hussein v. Barrett*, 820 F.3d 1083, 1087–88 (9th Cir. 2016), meaning that truly doubtful cases may be resolved against the applicant.

Finally, reading Section 1401(g) to recognize legal parentage does not foreclose the government from relying on genetic testing in appropriate cases. Where a claim is founded on an asserted genetic connection—for instance, under

Section 1409(a)(1)—the government may still use genetic testing to verify that claim. But where the legal parent-child relationship does not rest on proof of a genetic relationship, genetic testing is unnecessary, because the absence of a genetic relationship cannot rule out the citizenship claim.

That is the case here. There is no dispute that E.J. is the legal child of Andrew, his U.S.-citizen father, and was so at the moment of E.J.’s birth. Andrew is therefore E.J.’s “parent” for the purposes of Section 1401(g), and the District Court properly deemed E.J. a U.S. citizen from birth.

CONCLUSION

For the forgoing reasons, the Court should affirm the decision below.

December 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,354 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ Mitchell P. Reich
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Mitchell P. Reich
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