No. 15-1191

IN THE
Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,
v.
LUIS RAMON MORALES-SANTANA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF PROFESSORS OF HISTORY, POLITICAL SCIENCE, AND LAW IN SUPPORT OF RESPONDENT

KRISTIN A. COLLINS
765 Commonwealth Ave.
Boston, MA 02215

CATHERINE E. STETSON
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@
hoganlovells.com

JESSICA K. JACOBS
JASMEET K. AHUJA
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Amici Curiae

October 4, 2016

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Weinberger v. Wiesenfeld,
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6 Fed. Stat. Ann. § 2169 (1918) 9, 11

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7 Am. Jur. Bastards § 54 (1937) 29
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7 Am. Jur. Bastards § 57 (1937) 29
7 Am. Jur. Bastards § 59 (1937) 29
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Kan. Stat. Ann. § 59-501 (1949) 29
Kan. Stat. Ann. §506 (1949) 29

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Nationality Act of 1940, ch. 876, 54 Stat. 1137 ..... 13, 14, 19, 20, 25

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H.R. 14,684, 71st Cong. (3d Sess. 1930) 24, 35

H.R. 5489, 72d Cong. (1st Sess. 1931) 24

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Relating to the 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 on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization, 73d Cong. (1st Sess. 1933) 10

OTHER AUTHORITIES:

Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641 (2005) 9

Kerry Abrams & Kent Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629 (2014) 30

Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982) 7

1 William Blackstone, *Commentaries* 17, 30

Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) 23

Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (1998) 7, 8, 9, 24

Homer L. Calkin, *Women in American Foreign Affairs* (Aug. 1977) 14

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Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134 (2014) ..... *passim*

Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 Am. Hist. Rev. 1440 (Dec. 1998) 5, 9

Cyclopedic Law Dictionary (3d ed. 1940) 13

Ernst Freund, *Illegitimacy Laws of the United States and Certain Foreign Countries,* U.S. Dep't of Labor, Children's Bureau (1919) 30

Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985) ..... *passim*

2 James Kent, *Commentaries on American Law* 53 (8th ed. 1854) 5

Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998) 5, 9

Alice Kessler-Harris, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th-Century America* (2001) 14

T.A. Larson, *Woman Suffrage in Western America*, 38 Utah Hist. Q. 7 (1970) 6

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39 Op. Att'y Gen. 290 (1939) 24

Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 Pol. & Soc'y 1 (1984) 5, 9

Catharine Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934) 34, 35

TABLE OF AUTHORITIES—Continued

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Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073 (1994) 6

Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997) 6

Rose Cuison Villazor, *The Other* Loving: *Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. Rev. 1361 (2011) 28

INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are professors of history, political science, and law with particular expertise in the history of citizenship, gender, and family law. Amici have a professional interest in ensuring that the Court has adequate historical perspective on the law of citizenship and the extent to which it has been shaped by outdated gender-based stereotypes and norms.

SUMMARY OF ARGUMENT

Sex-based laws premised on archaic presumptions about the proper roles of men and women run afoul of established constitutional principles, especially when they interfere with the parent-child relationship. Amici write to explain the history of the federal government's use of sex-based classifications in the regulation of citizenship. In its regulation of intergenerational and interspousal citizenship transmission, the federal government has perpetuated outdated gender-based norms concerning proper parental roles, even when those norms have been rejected in other legal and social contexts. In addition, the laws governing derivative citizenship have significantly encumbered the ability of American fathers to transmit citizenship to their foreign-born nonmarital children.

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1. All parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of amici's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

In its brief, the government contends that the purpose behind the explicitly sex-based citizenship statute at issue in this case is "gender neutral." The historical sources tell a very different story. As this Court has observed, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1977). The law governing derivative citizenship is part of that history.

Traditionally, the notion that the husband was the legal and political head of the marital family was one of the most powerful beliefs to shape the United States' regulation of derivative citizenship. The male-headship principle has informed every aspect of the derivative citizenship statute. For married citizen parents, well into the twentieth century the headship principle led to dramatic differences between the rights of citizen fathers and citizen mothers to transmit citizenship to their foreign-born children. Married citizen fathers could transmit citizenship to their foreign-born children starting in 1790; it was another 150 years before Congress recognized the right of married citizen mothers to do the same.

Outside of marriage, the reverse pattern prevailed. Social norms dictated that the mother bore responsibility for nonmarital children, while the father played little role in their care and upbringing. Based on these gender-based views about parental roles, the federal government substantially limited citizenship transmission between citizen fathers and their foreign-born nonmarital children in ways unrelated to the need to ascertain the existence of a biological or meaningful father-child relationship. At

the same time, the federal government readily recognized the citizenship claims of foreign-born nonmarital children of citizen mothers.

These gender-based patterns continue in the federal government's regulation of derivative citizenship today, separating fathers from their children in a manner that is contrary to this Court's equal protection jurisprudence.

ARGUMENT

This Court has recognized time and again that laws that distinguish between men and women based on outdated understandings of their "talents, capacities, or preferences" are contrary to constitutional gender-equality principles. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero* 411 U.S. at 684 (1977); *Reed v. Reed*, 404 U.S. 71 (1971). One undeniable theme of these decisions is that such sex-based distinctions are suspect whenever they presume separate societal roles for the sexes, both vis-à-vis each other and vis-à-vis their children. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (upholding a federal family leave law designed to redress the "pervasive sex-role stereotype that caring for family members is women's work"); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (recognizing that gender-based roles are no longer fundamental to marriage).

Another important theme in this Court's equal protection jurisprudence is that undue legal restrictions on the recognition of the father-child relationship outside marriage are constitutionally infirm and socially harmful, especially where those restrictions contribute to the stigma of "illegitimacy."

See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing the interest of an unwed father "in the children he has sired and raised"); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility.").

A reconstruction of the history of American citizenship law reveals that the sex-based parental presence requirements in the derivative citizenship statute that governs Respondent's citizenship contravene these well-established constitutional principles.

I. FEDERAL CITIZENSHIP LAW HISTORICALLY PRIVILEGED THE RIGHTS OF MARRIED CITIZEN FATHERS AND SEVERELY LIMITED THE RIGHTS OF MARRIED CITIZEN MOTHERS.

A. The Derivative Citizenship Laws Were Premised on the Belief That the Husband-Father Determined the Political and Cultural Character of His Wife and Children.

Historically, the husband's position as "head of the family" in domestic law gave him enormous power over both his wife and children.[2] In the early nineteenth century, the father had far greater legal rights with respect to the marital children than the mother. *See* Michael Grossberg, *Governing the*

2. *See generally Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("[I]t became a maxim of * * * [the common law] that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.").

Hearth: Law and the Family in Nineteenth-Century America 235, 242 (1985). He was considered the children's "legal guardian[]." *Id.* at 242. Moreover, the "headship" principle enhanced married men's cultural, political, and legal authority far beyond the household itself. Citizenship law was no exception. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 Am. Hist. Rev. 1440, 1452 (Dec. 1998); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 Pol. & Soc'y 1, 11 (1984).

Operating under the presumption that the husband-father shaped the political and cultural character of his dependents, federal law privileged the father as the source of citizenship for foreign-born marital children from 1790, when the first citizenship statute was enacted, until 1934. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 [hereinafter "Act of 1855"]; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103-104. *See generally* Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 33-38 (1998).

The male headship principle was so powerful that even ambiguous statutory language in the citizenship statutes of 1790, 1795, and 1802—which referred to the citizenship of children of "citizens"—was generally understood to require that the *father* was an American citizen. *See* 2 James Kent, *Commentaries on American Law* 53 (8th ed. 1854).

In 1855, Congress affirmed that interpretation, rewording the statute to clarify that only children

"whose *fathers* were or shall be at the time of their birth citizens of the United States, shall be deemed * * * citizens of the United States." Act of 1855, § 1 (emphasis added). In keeping with the established norm of male headship, Congress also declared that a non-citizen woman would become an American citizen simply by marrying an American man. *Id.* § 2. *See* Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 234-35 (1997).

In the late nineteenth and early twentieth centuries, the social and legal foundations of the male headship principle began to erode. State legislatures and courts gradually revised domestic laws giving husbands power over their wives' legal and economic personae.[3] By the late nineteenth century, judges and legislators began to abandon the common law principle that the husband-father was the "legal guardian" of his children, with parental rights superior to those of the married mother. *See* Grossberg, *supra*, at 253. Nevertheless, Congress continued to presume that the husband determined the political and cultural character of his dependents—both wife and children—and hence that their citizenship should conform to his.

For example, in 1922 Congress enacted the Cable Act which, among other things, limited an American man's absolute power to endow his foreign wife with citizenship simply by marrying her. Act of Sept. 22,

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3. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073, 1083 (1994); T.A. Larson, *Woman Suffrage in Western America*, 38 Utah Hist. Q. 7, 19 (1970); *see also* U.S. Const. amend. XIX.

1922 (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022. But the Cable Act and other federal statutes continued to give preference to American men's foreign wives by expediting their naturalization process, *id.* §§ 2(a), (b), exempting them from race-based and national-origin immigration restrictions, and otherwise giving them preferential immigration status. Act of May 26, 1924, ch. 190, §§ 4(a), (d), 13(c), 43 Stat. 153, 155, 162. An American woman who married a foreign husband received no such preferential treatment. To the contrary, for many decades she was expatriated upon marriage to a foreigner and was denied the ability to transmit citizenship to her foreign-born children. *See infra* at 10-13; Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 84 (1998).

In short, well into the twentieth century, laws governing citizenship transmission reflected and perpetuated prevailing social and legal norms that secured men's place as head of the marital family.

B. The Gender-Based Belief That the Wife Had No Independent Political Identity Shaped the Interpretation and Development of the Derivative Citizenship Statute.

The same norms that informed married fathers' power to transmit citizenship to their non-citizen wives and foreign-born children conversely led to substantial limitations on the citizenship rights of married American women. Under the doctrine of coverture, married women had no independent civil or legal identity—they were "dead" in the eyes of the law. *See* Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-*

Century New York 50-55 (1982). A wife's legal and political identity was "merged" into that of her husband. That principle was pervasive, shaping the political and legal rights of married women, including their rights as mothers. Although strong social and cultural norms made mothers the primary caregivers of children, for most of the nineteenth century the wife-mothers' parental rights remained secondary to those of the husband-father. *See* Grossberg, *supra*, at 235-36.

Even as these powerful norms were successfully challenged in other areas of law in the late nineteenth and early twentieth centuries, *see supra* n.3, they continued to inform Congress's regulation of married women's citizenship rights with respect to both their own citizenship and that of their foreign-born children. Three examples are especially revealing.

First, the principle of coverture was integrated into citizenship law through the expatriation of American women who married foreign men. This had not been the common law practice. *See Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) (Story, J.); Bredbenner, *supra*, at 59. Nevertheless, in the late nineteenth century, some courts began expatriating American women who married non-citizens. *See*, *e.g.*, *Pequignot v. City of Detroit*, 16 F. 211, 216 (C.C.E.D. Mich. 1883).

Consistent with its tendency to enhance the sex-discriminatory function of citizenship law, Congress codified the *Pequignot* holding in the Expatriation Act of 1907, which provided that "any American woman who marries a foreigner shall take the nationality of her husband." Act of Mar. 2, 1907

(Expatriation Act), ch. 2534, § 3, 34 Stat. 1228, 1228. Affirming the constitutionality of that Act eight years later, this Court observed that "[t]he identity of husband and wife is an ancient principle of our jurisprudence [which] * * * worked in many instances for her protection" and "give[s] dominance to the husband." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).

After the ratification of the Nineteenth Amendment in 1920, women's opposition to the Expatriation Act gained force. *See* Bredbenner, *supra*, at 81; Cott, 103 Am. Hist. Rev. at 1464; Sapiro, 13 Pol. & Soc'y at 13. Over fierce resistance by legislators and advocates who insisted that the principle of coverture should continue to dictate married women's citizenship status, in 1922 Congress ended the automatic expatriation of some, but not all, American women who married non-citizens. Cable Act, ch. 411, § 3, 42 Stat. at 1022. Most notably, under the Cable Act, the American woman whose foreign husband was racially ineligible to naturalize—at the time, individuals of Asian descent—continued to be stripped of her citizenship. *Id.* §§ 3, 5, 42 Stat. at 1022; 6 Fed. Stat. Ann. § 2169 (1918); *see also* Kerber, *supra*, at 42-43; Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 662, 694 n.335 (2005). No such racist penalty burdened an American man who did the same.

Second, even after the enactment of the Cable Act, married American women were still unable to transmit citizenship to their foreign-born children. *See* Bredbenner, *supra,* at 84; Kristin A. Collins,

Illegitimate Borders: Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2156-57 (2014). By the late nineteenth century, American women had gained far greater legal rights as parents within marriage. *See* Grossberg, *supra*, at 281-82. Nevertheless, the federal government resisted recognizing the married mother's right to transmit citizenship due to the persistent belief that the husband determined his children's political and cultural character.

This belief was apparent in debates over bills proposed in the 1930s that would have recognized married American mothers' foreign-born children as American citizens. As an Assistant Secretary of State explained in a letter submitted to Congress in 1933, "when a woman having American nationality marries a man having the nationality of a foreign country, and establishes her home with him in his country, the national character of that country is likely to be stamped upon the children," making the children "alien in character." Letter from Assistant Sec'y of State Wilbur J. Carr to Samuel Dickstein, Chairman of the House Comm. on Immigration and Naturalization (Feb. 10, 1933), *reprinted in Relating to the 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 on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization*, 73d Cong. 9 (1st Sess. 1933).

According to many officials, this concern was especially acute where the American mother had married a non-citizen who was racially excludable

under the naturalization laws. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876; 6 Fed. Stat. Ann. § 2169 (1918). In 1931, Congress had repealed the race-based exception in the Cable Act, so that a woman who married a husband "ineligible to citizenship" would no longer be expatriated. Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1511-12. However, there was great resistance to recognizing the children born to such marriages as American citizens. Not only might such a child be especially "alien" in his or her "character," but recognition of married American mothers' right to transmit citizenship to their foreign-born children would create a new path for entry into the United States for children who were otherwise racially excludable. *See* Collins, 123 Yale L.J. at 2191-95. As one representative explained in 1933, by allowing married women to transmit citizenship to their foreign-born children, "we are increasing the probability of bringing in more of the Chinese and Japanese, and 'what have you,' from these nations over there." Hearings on H.R. 3673, at 73d Cong. at 37 (statement of Representative Charles Kramer). Resistance to recognizing the right of married American mothers to secure citizenship for their foreign-born children was thus particularly intense because of concern that other priorities in American nationality law would be compromised.

Third, it was not until 1934 that Congress finally recognized the right of married American mothers to transmit citizenship to their foreign-born children. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797. But, even then, beliefs about married women's lack

of authority within marriage continued to shape the derivative citizenship law in significant ways.

The introduction of a child residence requirement is a revealing example. When, after almost 150 years, married women finally secured the right to transmit citizenship to their foreign-born children in 1934, Congress included a provision requiring the foreign-born child of an American parent and a non-citizen parent to reside in the United States for five years prior to turning 18. *Id.* § 1, 48 Stat. at 797. Although facially non-discriminatory, that requirement was animated by the persistent belief that the husband-father controlled the political character of the children. A 1938 letter to Congress from the Secretary of State, the Secretary of Labor, and the Attorney General explained that the five-year child-residence requirement was included in the 1934 Act because "Congress apparently took into consideration the fact that persons born in foreign countries whose *fathers* were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States." House Comm. on Immigration & Naturalization, 76th Cong., Rep. Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments VI (1st Sess. 1939) [hereinafter "Proposed Code"] (Letter from Sec. of State Cordell Hull, Att'y Gen. Homer Cummings, and Sec. of Labor Frances Perkins to President Franklin D. Roosevelt (June 1, 1938)).

The same belief informed the derivative citizenship provision in the Nationality Act of 1940. That Act was drafted not by Congress, but by an

interdepartmental committee appointed by President Franklin Roosevelt in 1933, charged with revising the laws pertaining to citizenship, immigration, and naturalization. Exec. Order No. 6115, Revision and Codification of the Nationality Laws of the United States (Apr. 25, 1933). That committee, drawn from high-level administrators in the Departments of Labor, State, and Justice, proposed a five-year, age-calibrated child U.S. residence requirement that applied if the child was born to a mixed-nationality married couple. Proposed Code at 13-14; *see also* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1139. However, as explained by the Secretary of State, the Secretary of Labor, and the Attorney General, the committee also was concerned that "these residence requirements will impose great hardship in some cases" where the "head of the family" worked abroad for the American government or an American enterprise of some sort. They therefore proposed a special statutory *exception* to the child residence requirement when the citizen parent was the "head of the family"—a legal term of art that, in this period, referred to the husband-father.[4] Proposed Code at VI.

The resulting statutory exception to the child residence requirement, while facially gender-neutral, relieved the children of many citizen *fathers* from that onerous requirement, while severely diminishing the likelihood that the children of citizen *mothers* would benefit from it. The exception was

4. *See, e.g.*, *Cyclopedic Law Dictionary* 522 (3d ed. 1940) (defining "head of a family" in terms of the relationship between "father and child" or "husband and wife").

triggered only when the citizen parent "*at the time of the child's birth* [was] residing abroad *solely or principally in the employment* of the Government of the United States or a bona fide American * * * organization * * * for which *he* receives a substantial compensation." Nationality Act of 1940, § 201(g), 54 Stat. at 1139 (emphasis added). In the 1940s, married women with children were seldom engaged in such employment, especially not "at the time of [her] child's birth," and hence the exception was of virtually no use to citizen mothers.[5]

In the very design of the derivative citizenship statute, as it applied to mixed-nationality married couples, one can see the imprint of the male headship principle and the corresponding belief that the wife and children derived their political and cultural character from the husband-father Although married American mothers had acquired far greater legal parental rights in domestic law by 1940, the Nationality Act of 1940 did not treat them as equal citizens—or equal parents—for purposes of parent-child citizenship transmission.

Moreover, beliefs concerning the husband-father's disproportionate influence on his children's national character continued to inform the interpretation of the derivative citizenship statute even after the

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5. Women seeking employment abroad as Foreign Service officers faced pervasive sex discrimination. *See* Homer L. Calkin, *Women in American Foreign Affairs* 102-03, 110 (Aug. 1977). Moreover, in the mid-twentieth century, working women were regularly lawfully dismissed during pregnancy, and few had access to maternity leave or job security following the birth of a child. *See* Alice Kessler-Harris, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th-Century America* 210-11 (2001).

Immigration and Nationality Act of 1952 (the 1952 Act) secured greater formal equality for married citizen mothers. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163. In *Rogers v. Bellei*, decided in 1971, this Court discussed the concern that children who grow up in a mixed-nationality family will develop "divided" loyalties. The Court observed that such a concern was especially valid "when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality." 401 U.S. 815, 832 (1971).

In sum, the historical sources show that beliefs regarding men's and women's respective roles as parents—especially the father's role as "head of the family"—shaped the development and interpretation of the derivative citizenship law as it applied to the marital family well into the late twentieth century. Those beliefs continued to inform citizenship law even after their influence had significantly diminished in other domains of law, including the law of parent and child. The constitutional infirmity of these laws today is clear to modern jurists. Reflecting on these and similar sex-based immigration statutes in *Kerry v. Din*, Justice Antonin Scalia observed that "[m]odern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens" and that "modern moral judgment rejects the premises of such a legal order." 135 S. Ct. 2128, 2136 (2015).

II. GENDER-BASED BELIEFS ANIMATED—AND CONTINUE TO ANIMATE—THE DISPARATE RIGHTS OF CITIZEN FATHERS AND MOTHERS OF CHILDREN BORN OUTSIDE MARRIAGE.

Outside the bonds of marriage, a mirror-opposite pattern of sex-based regulation of derivative citizenship prevailed. Starting in the early twentieth century, federal officials readily recognized the citizenship claims of the foreign-born children of unmarried citizen mothers. By contrast, the transmission of citizenship between citizen fathers and their foreign-born nonmarital children was severely restricted. This system, which remains in place today, has constrained the ability of individual mothers and fathers to parent their children free of sex-based regulations that presume that they will perform particular gender-specific roles. As significant, it has created legally insurmountable hurdles to the recognition of the father-child relationship and, in the process, has divided fathers from their children. In so doing, it has perpetuated the ignominy and disadvantages of "illegitimacy" by extending that status to the child's citizenship. In these ways, the gender-asymmetrical derivative citizenship laws contravene this Court's well-established equal protection jurisprudence. *See Hibbs*, 538 U.S. at 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171 (1972) (worker's compensation provision that barred collection by illegitimate children is

unconstitutional where father is unable to legally acknowledge his child).

A. The Sex-Based Requirements in the Derivative Citizenship Statute Are Premised on and Perpetuate the Gender Stereotype That the Mother Is the "Natural" Caregiver of the Nonmarital Child.

Premised on the view that mothers are responsible for the care of nonmarital children, the federal government has been far more solicitous of the citizenship claims of foreign-born nonmarital children of citizen mothers than it has been of claims of foreign-born nonmarital children of citizen fathers. This practice reflected an important development in the law governing the relationship of the mother and her nonmarital child. While long considered "the son of nobody" under the common law, the nonmarital child was customarily in the care of the mother. 1 William Blackstone, *Commentaries* *458-59. Gradually, the mother-child relationship was given legal recognition by American jurists and legislators, reflecting the customary understanding that the mother was the child's "natural" caregiver. Grossberg, *supra* at 207-09.

Based on that understanding, as well as powerful maternalist norms that shaped American law in the early twentieth century, federal officials of that era recognized the citizenship claims of foreign-born nonmarital children of citizen mothers even before Congress addressed the subject in legislation. *See, e.g.*, Proposed Code at 18 (noting that "[t]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the

nationality of the mother * * *."); *see also* Collins, 123 Yale L.J. 2200-01.

In the 1920s, this special recognition of the foreign-born nonmarital children of American mothers was memorialized in a cross-border agreement between the Department of Labor's Bureau of Immigration and Canadian immigration officials. In this agreement, officials of both countries agreed to recognize the foreign-born nonmarital child as a citizen of the mother's country. *See id.* at 2201-03. The Department of State followed the same practice. Proposed Code at 18.

In numerous memoranda and letters explaining the cross-border agreement, federal officials opined that nonmarital children were in need of special recognition under the derivative citizenship statute, which at the time provided for citizenship transmission only through the married father. *See* Collins, 123 Yale L.J. at 2203. Because mothers were the presumed caregivers of nonmarital children, that patrilineal rule would leave the child divided by citizenship law from his or her caregiver. "[T]he only purpose [for the rule] is to provide against separation of mothers and children," explained the Commissioner General of the Bureau of Immigration in 1929. Letter from Harry E. Hull, Comm'r Gen., U.S. Bureau of Immigr., to T.M. Ross, Acting U.S. Comm'r of Immigr., Montreal, Can. (Nov. 8, 1929)[6]; *see also* Collins, 123 Yale L.J. at 2202-03 (describing similar memoranda).

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6. Archival sources cited herein are located in the National Archives and Records Administration in Washington, D.C. Amici will provide copies to the Court upon request.

In the late 1930s, as the interdepartmental committee revised the entire corpus of American nationality law, *see supra* at 13, it included a provision that would codify the administrative practice of recognizing the foreign-born nonmarital children of American mothers as American citizens. Cabinet-level officials endorsed this provision. For example, in 1939, when the issue came to the attention of Secretary of Labor Frances Perkins, she opined that "steps should be taken to avoid subjecting these unfortunate individuals to unnecessary hardships." Letter from Frances Perkins, Sec'y of Labor, to Cordell Hull, Sec'y of State 3 (Mar. 15, 1939). Attorney General Frank Murphy concurred, noting that "exclusion of [such] children is not only harsh, but largely impracticable." Letter from Frank Murphy, Att'y Gen., to Cordell Hull, Sec'y of State 2 (May 10, 1939).

When Congress enacted the Nationality Act of 1940, it adopted the language in the committee's Proposed Code concerning the citizenship status of foreign-born children of American mothers. Section 205 of the Act provided that 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," the child "shall be held to have acquired at birth her nationality status." Nationality Act of 1940, § 205, 54 Stat. at 1139-40; *see also* Proposed Code at 18. Thus, citizenship transmission between the citizen mother and her nonmarital child was limited only by a *de minimis* parental residence requirement—a situation that continued under the 1952 Act (the

version of the statute at issue in this case)[7] and every revision of the derivative citizenship statute since then. Immigration and Nationality Act of 1952, § 309, 66 Stat. at 238-39; Act of Nov. 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655.[8]

In short, the historical sources make clear that the federal government's ready recognition of citizen mothers as the source of citizenship for foreign-born nonmarital children was largely driven by concern that the citizenship of the nonmarital child should align with that of his or her caregiver, and that the "natural" caregiver was the mother. In so doing, it has reinforced fixed notions concerning the roles and abilities of men and women as parents, thus running afoul of this Court's well-established equal protection jurisprudence. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (internal quotations omitted) (presumption that "the father has the primary responsibility to provide a home" while "the mother is the center of home and family life" is not a valid basis for legislation).

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7. Sections 301 and 309 of the 1952 Act were codified in the 1958 edition of the United States Code. See Pet. Br. at 3 n.1.

8. In 1952, Congress deleted a primary limitation on mother-child citizenship transmission outside marriage—that the child would take the citizenship of his or her American mother only "in the absence of * * * legitimation" by the father. Nationality Act of 1940, § 205, 54 Stat. at 1140; Immigration and Nationality Act of 1952, § 309(c), 66 Stat. at 238-39. Congress also lengthened the parental presence requirement applicable to citizen mothers of foreign-born nonmarital children to one year. *Id.* § 309(c), 66 Stat. at 238-39.

B. The Sex-Based Requirements in the Derivative Citizenship Statute Place Undue Burdens on the Father-Child Relationship and Reinforce Gender-Based Parental Roles.

Premised on the outdated view that unwed fathers have attenuated relationships with their nonmarital children, American citizenship law has consistently burdened father-child citizenship transmission outside marriage. In this regard, the derivative citizenship statutes have not only reinforced gender-based understandings of parental roles and responsibilities, they have also thwarted—and continue to thwart—the development of father-child relationships outside marriage in contravention of this Court's equal protection jurisprudence. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating a state adoption law that discriminated against unwed fathers, thus classifying them "as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children").

1. Historically, the Derivative Citizenship Statute Has Been Narrowly Interpreted to Restrict Citizenship Transmission Between Citizen Fathers and Their Foreign-Born Nonmarital Children.

The 1952 Act's ten-year parental presence requirement—which applies to American fathers of nonmarital children, but not to American mothers of nonmarital children—is just one of many legal barriers that restrict citizenship transmission between American fathers and their foreign-born nonmarital children. In the present case, the government urges that this ten-year presence

requirement is "gender neutral" in its purpose and function in that it simply incorporated the legal "reality" of the father-child relationship at the time. Pet. Br. at 5, 9, 11, 40. The historical evidence shows instead that it is one of several statutory provisions that reflected and reinforced federal administrators' and legislators' inability to conceive of fathers as caregivers responsible for the well-being of their nonmarital children.

Such gender-based biases concerning parental roles outside marriage were pervasive in the nineteenth century and resulted in the restriction of father-child citizenship transmission outside marriage, even before Congress explicitly addressed the citizenship status of foreign-born nonmarital children in 1940. From 1790 to 1940, the derivative citizenship statutes were silent as to the marital status of the citizen parent. Act 1855, § 1; Act of Apr. 14, 1802, § 4, 2 Stat. at 155; Act of Jan. 29, 1795, § 3, 1 Stat. at 415; Act of Mar. 26, 1790, 1 Stat. at 103-104. Nevertheless, these statutes were interpreted to allow transmission of citizenship to the *marital* children of citizen fathers, but not to their *nonmarital* children.

The lead nineteenth-century case on this subject, *Guyer v. Smith*, 22 Md. 239 (1864), was routinely cited as the authoritative interpretation of the pre-1940 derivative citizenship statute by jurists, administrators, and commentators through the 1930s. *See* Collins, 123 Yale L.J. at 2153-54 nn. 67-68. In *Guyer,* the father had recognized his two sons by giving them his name and naming them in his will. *See Guyer*, 22 Md. at 246. Yet the *Guyer* court refused to recognize the sons as citizens under

the governing citizenship statute, which provided that "the children of persons who now are or have been citizens of the United States" born in another country, "shall * * * be considered as citizens of the United States," *id.* at 244 (internal quotation marks omitted). The court concluded that the sons were "illegitimate" and thus not contemplated by the statute. *Id.* at 249.

By 1920, judges and administrators gradually recognized the citizenship claims of at least some foreign-born nonmarital children who had been "legitimated" by the citizen father. *See* 32 Op. Att'y Gen. 162, 164-65 (1920). But this administrative legitimation exception was narrow and uncertain. *See, e.g.*, *Mason ex rel Chen Suey v. Tillinghast*, 26 F.2d 588, 589 (1st Cir. 1928) (affirming rejection of evidence of legitimation for purposes of determining citizenship of foreign-born nonmarital child of American father of Chinese descent); *see also* Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612-13 (1915) (questioning the propriety of legitimation as a basis for father-child citizenship transmission and observing that "illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens"); Collins, 123 Yale L.J. at 2174-80.

The federal government's resistance to recognizing the foreign-born nonmarital children of American fathers as citizens continued into the early 1930s. Legislators considered bills that would have secured parental gender equality with respect to the transmission of citizenship from citizen parents to their foreign-born children, regardless of the parents' sex or marital status.

> Any child, *whether legitimate or illegitimate*, born out of the limits and jurisdiction of the United States, whose father or mother may be at the time of the birth of such child a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any child whose father or mother had never resided in the United States previous to the birth of such child.

H.R. 14,684, 71st Cong. § 3 (3d Sess.1930) (emphasis added); *see also* H.R. 5489, 72d Cong. (1st Sess.1931).

Supporters of such bills urged that equal treatment of the citizen mothers and fathers of foreign-born nonmarital children was warranted pursuant to the gender-equality principles that informed the 1922 Cable Act. *See supra* at 9; Hearings on H.R. 5489, 72d Cong. 3-5 (statement of Burnita Shelton Matthews); *id.* at 17-19 (statement of Laura M. Berrien). Nevertheless, resistance to full gender equality in matters relating to derivative citizenship was fatal to the inclusion of "illegitimate" in the bill. *See* Bredbenner, *supra*, at 230-31. And in 1934, when Congress passed a statute enabling married citizen mothers to transmit citizenship to their foreign-born children, the final version of the bill said nothing about parental marital status, but was understood to apply to the foreign-born children of married citizen parents only. 78 Cong. Rec. 7357 (Apr. 25, 1934) (statement of Rep. Jenkins) ("[This bill] applies to the children of wives and the children of husbands."); 39 Op. Att'y Gen. 290, 291 (1939)

(recognizing "that the applicable statutory provisions apply only to legitimate children").

Six years later, Congress finally addressed the citizenship status of foreign-born nonmarital children of American citizens, making explicit in law what had been understood for many decades: American citizenship law would distance fathers from their nonmarital children. Nationality Act of 1940, §§ 201(g), 205, 54 Stat. at 1139-40.

Written by the administrators appointed by President Roosevelt to the interdepartmental committee, *supra* at 13, the Nationality Act of 1940 required that the father prove paternity by "legitimation" or by "adjudication by a competent court," *id.* § 205, and contained a five-year, age-calibrated U.S. residence requirement for the child, as had the 1934 Act, *id.* § 201(g). In addition, the 1940 Act extended the law's sex-based differential treatment of citizen parents of nonmarital children by imposing new limitations on the transmission of citizenship from citizen fathers to foreign-born nonmarital children, including: (1) a ten-year, age-calibrated U.S. presence requirement for the father, *id.* § 201(g), and (2) a requirement that the child must be in the father's custody at the time of legitimation, *id.* § 102(h). None of these requirements applied to unmarried American mothers or their foreign-born children. *Id.* § 205.

In 1952, Congress essentially recodified these provisions, making one significant change with respect to fathers of nonmarital children: it eliminated the possibility that paternity could be established by a "competent court." Immigration and Nationality Act of 1952, § 309, 66 Stat. at 238.

2. The 1952 Act Places Undue Burdens on the Father-Child Relationship and Is Premised on Outdated Gender-Based Beliefs About Parental Roles.

Careful examination of the text and implementation of the 1952 Act demonstrates that the gender-asymmetrical requirements in the derivative citizenship provision both: (1) place substantial burdens on the American father's ability to establish a relationship—legal and social—with his nonmarital child, and (2) reinforce the gender-based stereotype that fathers are not proper or adequate caregivers, especially without a wife-mother's presence. In both respects, these provisions run afoul of well-established equal protection principles.

First, the "legitimation" requirement in the 1952 Act has left many fathers divided by citizenship from children with whom they had a legally recognized relationship under the domestic law of the relevant jurisdiction,[9] and for whom the fathers were willing and able to provide care.

This is because both today and in the past, federal officials interpreting the term "legitimation" in the 1952 Act have refused to recognize children as citizens unless the process of paternal legitimation used by the American father gave the child *exactly* the same rights and entitlements as a marital child.

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9. Section 101(c) of the 1952 Act specifies that the child has to have been "legitimated" under "the law of the child's residence or domicile, or * * * the law of the father's residence or domicile," whether U.S. or foreign. Immigration and Nationality Act of 1952, § 101(c), 66 Stat. at 171.

See In re Reyes, 17 I&N Dec. 512, 514-15 (BIA 1980) (noting that the BIA has long interpreted "legitimation" to require that the nonmarital child had "attained the full legal status of legitimate children"). In the mid-twentieth century, as today, in many jurisdictions the nonmarital child could achieve full equality with the marital child only if the father married the mother. *See id.* at 514 ("legitimation laws have commonly required the subsequent marriage of a child's natural parents"); *see also Retuya v. Mueller*, 412 F. App'x 185, 188-189 (11th Cir. 2010) (holding that paternity established by formal acknowledgment allowed under Florida law did not satisfy the 1952 Act's "legitimation" requirement)[10]; Collins, 123 Yale L.J. at 2198 n.256 (providing examples of federal officials' refusal to recognize paternal acknowledgment as "legitimation" absent marriage of the parents). Thus, the 1952 Act required fathers to do far more than prove paternity and recognize the child in writing during the child's minority, as is permitted under the 1986 version of the derivative citizenship statute that this Court described as imposing only "minimal" requirements on the father in *Nguyen v. INS*, 533 U.S. 53, 70 (2001).

Moreover, because the legitimation requirement has been held to require much more than formal paternal acknowledgment, it is often impossible—legally or otherwise—for a father to secure

10. For additional examples of Board of Immigration Appeals opinions rejecting various acts of paternal acknowledgment recognized under the laws of the relevant jurisdictions as insufficient to qualify as "legitimation," *see Matter of D—*, 7 I&N Dec. 438 (BIA 1957) (collecting cases).

citizenship for his foreign-born nonmarital child. For example, if full "legitimation" under the relevant jurisdiction's domestic laws requires marriage of the parents—as was, and still often is, the case—then the American father may be completely precluded from satisfying the derivative citizenship statute's legitimation requirement. Marriage to a child's mother may be legally or physically impossible, either because the child's mother refuses, is married to another, or has died, or because the marriage was prohibited, as was the case of many interracial marriages prior to this Court's opinion in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* Collins, 123 Yale L.J. at 2209-11; *see also* Rose Cuison Villazor, *The Other* Loving: *Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. Rev. 1361, 1429, 1434 n.451 (2011). Indeed, in the past, when a father could not marry his foreign-born child's mother because a state ban on interracial marriage made it impossible for him to fully legitimate his child, the legitimation requirement in the derivative citizenship statute operated as a sex-*and* race-based barrier to the transmission of American citizenship.

The government contends that the derivative citizenship statute's gender-differentiated treatment of mothers and fathers outside marriage reflected the legal "reality" that domestic family law did not recognize the unwed father as a legal parent at birth. Pet. Br. at 5, 10, 11, 40. Thus, the government reasons, the derivative citizenship statute distinguished between two "gender-neutral" categories of parents: those who were "legally recognized" under the domestic law of the relevant

jurisdiction and those who were not. Pet. Br. at 9, 11, 28, 40.

The historical sources show, however, that the laws governing the parent-child relationship outside marriage in the 1940s and 1950s were not "gender neutral." Indeed, in the 1970s and 1980s, this Court found that many of those laws were informed by impermissible gender-based beliefs about men as fathers, thus violating the equal protection and due process rights of unmarried fathers and their children. *See, e.g.*, *Trimble* 430 U.S. at 769; *Stanley*, 405 U.S. at 651; *Weber*, 406 U.S. 171; *Caban*, 441 U.S. at 389.

Moreover, even though the laws in the early twentieth century limited recognition of the father's relationship with his nonmarital child in ways that are no longer tolerated, the legal principles that governed that relationship were far more varied than the government now suggests. By 1952, many jurisdictions allowed fathers to establish paternity through formal or informal acknowledgment, which often conferred inheritance rights on the nonmarital child.[11] Significantly, some jurisdictions granted inheritance rights even absent voluntary legitimation or recognition by the father.[12] These inheritance laws augmented the ubiquitous and

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11. *E.g.*, Idaho Code Ann. § 14-104 (1932); Okla. Stat. Ann. § 1619 (Harlowe 1931); Wash. Rev. Code § 11.04.080 (1951); Iowa Code Ann. § 636.46 (1946); Kan. Stat. Ann. §§ 59-501, 506 (1949); Ala. Code tit. 27, § 11 (1940). *See also* 7 Am. Jur. Bastards §§ 54-55, 57, 59 (1937).

12. *E.g.*, Iowa Code Ann. § 636.46; Kan. Stat. Ann. §§ 59-501, 506. *See also* 7 Am. Jur., *supra*, n.11 § 53.

traditional paternity statutes that enabled the nonmarital child, or someone acting on his or her behalf, to sue the father for financial support.[13] Taken together, these statutes signaled important changes in the laws governing the father-child relationship as they substantially abandoned the common law principle that the nomarital child "was the son of nobody." 1 Blackstone, *Commentaries* *459. Despite significant changes in the laws governing the father-child relationship outside of marriage, however, federal officials enforcing the 1952 Act refused to recognize that relationship unless the father fully "legitimated" the child. *Cf.* Kerry Abrams & Kent Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 698 (2014) ("The same person who might likely be declared a legal parent under state family law will often find himself to be a legal stranger to his child for citizenship law purposes.").

In short, Congress did not simply incorporate domestic laws governing what counted as a legal parent-child relationship when it drafted the 1952 Act's derivative citizenship provision. Rather, by requiring full "legitimation" by the citizen father of his nonmarital child, the Act, as interpreted by federal officials, imposed an often insurmountable, undeniably sex-discriminatory burden on the transmission of citizenship between fathers and their nonmarital children. In so doing, it has thwarted fathers' efforts to establish legal and social

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13. *See* Ernst Freund, *Illegitimacy Laws of the United States and Certain Foreign Countries* 27-30, U.S. Dep't of Labor, Child. Bureau (1919). *See also* 7 Am. Jur., *supra*, n.11 § 69.

relationships with their children. *See Trimble*, 430 U.S. at 769 (state probate law that barred "illegitimate" children from inheriting from their fathers and allowed "legitimation" only by subsequent marriage of the parents violates equal protection).

Second, taken together, the numerous statutory burdens placed on American fathers attempting to secure citizenship for their nonmarital children—burdens not placed on American mothers—reflect the gender-based belief that mothers are the natural caregivers for nonmarital children.

This point is amply demonstrated by the joint operation of the legitimation requirement and the ten-year parental presence requirement in the 1952 Act. Under the terms of that statute, once the father "legitimated" the child, which often required marriage to the mother, the statute required him to satisfy the ten-year presence requirement. Immigration and Nationality Act of 1952, § 309(b), 66 Stat. at 238. No statute or policy has ever required American mothers to marry the nonmarital child's foreign father or go through *any* legal procedure in order to transmit citizenship to that child. Indeed, if the mother *did* marry the child's non-citizen father, under the 1952 Act the mother was exempt from satisfying the significantly longer parental presence requirement that applied to fathers of nonmarital children.[14] Immigration and Nationality Act of 1952, § 309(c), 66 Stat. at 238-239.

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14. The government acknowledges this fact, Pet. Br. at 6, 39 n.8, but appears to assert a contrary position elsewhere its brief, *id.* at 10.

Operating together, the sex-based legitimation requirement and the sex-based ten-year presence requirement reveal the outdated presumption that courses through the 1952 Act: mothers invariably raise nonmarital children and fathers do not. Early- and mid-twentieth century legislators and administrators who crafted this derivative citizenship law felt an imperative to relax the generally-applicable requirements for citizenship transmission for the nonmarital children of American *mothers* out of concern that children would be separated from their caregivers. *See supra* at 18-19. Yet, they declined to give such consideration to the nonmarital children of American *fathers.*

This occurred not because Congress was beholden to a particular immutable, legal conception of the "legally recognized" father-child relationship outside of marriage. Indeed, as has been shown, federal officials charged with implementing the derivative citizenship law routinely used a far more restrictive understanding of the legal father-child relationship than was provided in the domestic laws of state and foreign jurisdictions. Rather, consistent with its long-standing practice, Congress codified and maintained anachronistic gender-based norms concerning the father-child relationship in the laws governing citizenship transmission to nonmarital foreign-born children.

It continues to do so today, despite developments in this Court's equal protection jurisprudence, which for several decades has recognized that "maternal and paternal roles are not invariably different in importance," *Caban*, 441 U.S. at 389, and that the belief that "caring for family members is women's

work" is no longer an acceptable legislative purpose, *Hibbs,* 538 U.S. at 731.

III. HISTORICAL EVIDENCE DOES NOT SUPPORT THE CONTENTION THAT CONGRESS ENACTED THE GENDER ASYMMETRICAL CITIZENSHIP STATUTE IN AN EFFORT TO PROTECT CERTAIN CHILDREN AGAINST STATELESSNESS.

The government contends that Congress eased the conditions under which mothers transmit citizenship to their nonmarital foreign-born children—and, in particular, exemption from the ten-year parental presence requirement—out of concern for the risk of statelessness for these children. Pet. Br. at 33-39. This assertion ignores the best evidence of why the gender-asymmetrical presence requirement, which was so generous toward unmarried mothers and their foreign-born children, was first introduced into the derivative citizenship statute in 1940.

As already noted, the primary origin of the 1940 Act's recognition of foreign-born nonmarital children of American mothers as citizens was the policies of the Department of Labor and the Department of State, including a cross-border agreement with Canada in which officials of both countries agreed to recognize the foreign-born nonmarital child of an American or Canadian mother as a citizen of the mother's country. *See supra* at 18. In the memoranda and letters by administrators discussing and memorializing that agreement, there is virtually no mention of statelessness. *See* Collins, 123 Yale L.J. at 2204-05 n.283. Rather, the documents reflect early twentieth-century officials' understanding that

mothers are the presumed and natural caregivers of their nonmarital children, and their concern that the separation of mothers from their nonmarital children was both harsh and impractical. *Id.* at 2200-03. The same is true of memoranda and letters by cabinet-level officials and members of the interdepartmental committee concerning why special solicitude should be shown to foreign-born nonmarital children of American mothers: the need to keep the child with his or her "natural" caregiver. *See supra* at 18-19.

In addition, even assuming that early twentieth-century administrators and legislators were concerned that the foreign-born nonmarital children of American mothers were at risk of statelessness, any such concern appears to reflect the same gender bias that long structured intergenerational citizenship transmission in American law. In the 1930s, experts in citizenship law knew that the foreign-born nonmarital children of American mothers *and* fathers were at risk of statelessness. In the most important early twentieth-century American treatise on the subject, *Statelessness: With Special Reference to the United States* (1934), Professor Catharine Seckler-Hudson described the risk of statelessness facing all nonmarital children. *See id.* at 224-25. She was skeptical that, in 1934, the United States would recognize foreign-born nonmarital children of citizen fathers as American citizens, whether legitimated or not. *Id.* at 224, 220-221 (citing *Guyer*, 22 Md. 239). Accordingly, she observed that when these children were born in *jus sanguinis* countries in which they did not acquire nationality through the mother, they "had no effective citizenship." *Id.* at 221.

Also—and of particular significance here—Seckler-Hudson noted the risk of statelessness for nonmarital children born to American fathers who did not satisfy the parental presence requirement in the derivative citizenship statute, which in 1934 was *de minimis*. *Id.* at 220, 225.

Thus, the risk of statelessness for foreign-born nonmarital children of citizen fathers was well known when members of the interdepartmental committee and legislators were considering the question of how to regulate citizenship transmission to nonmarital foreign-born children in the 1930s. Indeed, Congress was presented with legislative proposals that would have helped remedy the various risks of statelessness confronting foreign-born children of American citizens, and would have done so in a gender-neutral manner, but chose not to enact them. These were bills introduced in the early 1930s that provided that "[a]ny child, legitimate or illegitimate" born abroad of a citizen mother or father was an American citizen, subject to a modest (and gender-neutral) parental presence requirement. *E.g.*, H.R. 14,684, 71st Cong. § 3 (3d Sess.1930); *supra* at 24. Congress rejected those bills, despite the fact that Seckler-Hudson endorsed this legislation in her book. Seckler-Hudson, *supra*, at 222. Instead, Congress enacted a statute that imposed a ten-year presence requirement on American fathers who "legitimated" their foreign-born children, thus exposing them to a substantial risk of statelessness if they did not acquire the citizenship of their mothers, or were divested of that citizenship upon legitimation by their American fathers.

In sum, the historical sources provide scant evidence that federal officials in the 1930s and 1940s—who were responsible for the initial codification of the sex-based parental presence requirement—acted out of a particular concern about statelessness for American mothers' foreign-born nonmarital children. Instead, these sources support the conclusion that the sex-based distinctions in the derivative citizenship statute reflect then-prevailing views about mothers' and fathers' respective parental roles and responsibilities outside of marriage.

Laws premised on historically rooted gender-based assumptions concerning how men and women behave as parents—and how they *should* behave—have no place in the regulation of American citizenship. It is no longer acceptable for the federal government to maintain citizenship laws that perpetuate and reinforce gender-differentiated family roles by limiting individuals' rights as parents through sex-based classifications, *see Hibbs*, 538 U.S. at 736, especially when these laws have also been used for other constitutionally suspect ends. The historical record demonstrates, however, that the federal government has done just that in its regulation of derivative citizenship of foreign-born nonmarital children of American citizen parents.

Similarly, laws that unduly burden the recognition of the father-child relationship also run afoul of modern equal protection and due process principles. *See*, *e.g.*, *Trimble*, 430 U.S. at 769; *Stanley*, 405 U.S. at 651; *Weber*, 406 U.S. 171; *Caban*, 441 U.S. at 389. Yet the derivative citizenship statutes have created legal barriers to

father-child citizenship transmission that thwart the development of the father-child bond—even where the father has legally acknowledged and raised the child—thus separating fathers from children. These barriers are unbefitting a constitutional system that respects the dignity of the father-child relationship and that recognizes that "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of 'the children he has sired and raised.'" *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (quoting *Stanley*, 405 U.S. at 651).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@
hoganlovells.com

JESSICA K. JACOBS
JASMEET K. AHUJA
HOGAN LOVELLS US LLP
1835 Market St.
Philadelphia, P.A. 19103
(267) 675-4600

KRISTIN A. COLLINS
765 Commonwealth Ave.
Boston, MA 02215

OCTOBER 4, 2016 *Counsel for* Amici Curiae

APPENDIX

APPENDIX

AMICI CURIAE PROFESSORS OF HISTORY, POLITICAL SCIENCE, AND LAW*

Kerry Abrams is Professor of Law at the University of Virginia School of Law, where she is the Co-Director of the Center for Children, Families, and the Law. Professor Abrams teaches courses on immigration law, citizenship law, family law, and the history of marriage law. She has written extensively on the gendered aspects of immigration and citizenship law in American history. Her articles have appeared in the *Columbia Law Review*, *California Law Review, Michigan Law Review, Virginia Law Review,* among others.

Candice Bredbenner is an Associate Professor of History at the University of Northern Carolina Wilmington. She is the author of *A Nationality of Her Own: Women, Citizenship, and the Politics of Marriage* (1998), which was selected as an Outstanding Academic Book in 1998 by *Choice* magazine, a publication of the American Library Association's Association of College & Research Libraries. Professor Bredbenner teaches courses in U.S. history, citizenship, and civil liberties.

Christopher Capozzola is an Associate Professor of History at the Massachusetts Institute of Technology, where he teaches courses in political and legal history and the history of immigration. He was a 2004 Carnegie Scholar, has been a fellow in the Visiting Scholars Program of the American Academy of Arts & Sciences, and is an elected Fellow of the

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* Affiliations of amici curiae are listed for identification purposes only.

Massachusetts Historical Society. He is the author of *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (2008). Professor Capozzola was awarded the Louis Pelzer Memorial Award of the Organization of American Historians and the Biennial Article Prize of the Society for Historians of the Gilded Age and Progressive Era. His articles have appeared in *American Quarterly*, the *Georgetown Law Journal*, *Journal of American History*, *Journal of Women's History*, *Law and History Review*, and the *New England Quarterly*.

Kristin Collins is a Peter Paul Career Development Professor and the Associate Dean for Research & Intellectual Life University School of Law. Professor Collins teaches courses on federal courts, civil procedure, citizenship law, family law, and legal history. She has written extensively on the legal history of the family, and in particular on the history of parent-child citizenship transmission. Her articles have appeared in the *Yale Law Journal*, *Duke Law Journal,* the *Vanderbilt Law Review*, *Law and History Review*, among others. In 2013-2014, Professor Collins was the Sidley Austin-Robert D. McLean Visiting Professor of Law at Yale Law School.

Nancy F. Cott is the Jonathan Trumbull Professor of American History at Harvard University and the Pforzheimer Family Foundation Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. She is an elected fellow of the American Academy of Arts and Sciences. From 1975 to 2001, she taught at Yale University, where she co-founded

the Women's Studies Program, which she chaired from 1980 to 1987. She chaired the American Studies Program at Yale from 1994 to 1997. Her books include *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (1977) and *Public Vows: A History of Marriage and the Nation* (2000). Her articles have appeared in the *American Historical Review*, *Journal of American History*, *Journal of Social History, Yale Review, and American Quarterly*.

Sam Erman is an Associate Professor at the University of Southern California Gould School of Law. He is a scholar of law and history whose work focuses on citizenship and the Fourteenth Amendment since the Civil War. His work has appeared in the *Journal of American Ethnic History Michigan Law Review*, *California Law Review*, and *Southern California Law Review*. He is at work on a book, tentatively titled, *Citizenship Ends: Puerto Rico and the Reconstruction Constitution*.

Michael Grossberg is the Sally M. Reahard Professor of History and a Professor of Law at Indiana University. His 1985 book, *Governing the Hearth, Law and the Family in Nineteenth-Century America*, won the Littleton-Griswold Prize in the History of Law and Society in America given by the American Historical Association. He also published *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America* (1996) and *Reinventing Childhood in the Post World War II World* (2011). He has held fellowships from the Guggenheim Foundation, the National Endowment of the Humanities, the American Council of Learned Societies, the Newberry Library, the American Bar

Foundation, and has been a Fellow at the National Humanities Center. From 2013 to 2015, Professor Grossberg was President of the American Society for Legal History.

Linda K. Kerber is the May Brodbeck Professor in the Liberal Arts, Professor of History and Lecturer in Law Emerita at the University of Iowa. She is an elected member of the American Philosophical Society and the American Academy of Arts and Sciences, and past-President of the American Historical Association, the Organization of American Historians, and the American Studies Association. Her books include, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998) which won awards from the American Historical Association for the best book in U.S. legal history and the best book in women's history. Her articles include, *The Stateless as the Citizen's Other: A View from the United States*, 1 American Historical Review 1 (2007).

Serena Mayeri is a Professor of Law and History at the University of Pennsylvania Law School, where she teaches courses in legal history, antidiscrimination law, and family law. She is the author of *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (2011), which received the Littleton-Griswold Prize from the American Historical Association and the Darlene Clark Hine Award from the Organization of American Historians. Her historical work on the legal treatment of nonmarital parents and children has appeared in the *California Law Review* and the *Yale Law Journal*.

Virginia Sapiro is Professor of Political Science at Boston University. From 1976 to 1995, she was a Professor of Political Science and Women's Studies at the University of Wisconsin-Madison, and was the Sophonisba P. Breckinridge Professor from 1995 to 2007. She is an elected Fellow of the American Academy of Arts and Sciences, has served as Secretary and Vice President of the American Political Science Association (APSA), and is the founding President of the APSA Organized Section on Women and Politics Research. She has written extensively on the role of gender in American politics and law, including, *The Political Integration of Women: Roles, Socialization, and Politics* (1983) and *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States,* 13 Politics and Society 1 (1984).

Reva Siegel is the Nicholas deB. Katzenbach Professor of Law at Yale University. Professor Siegel's writing draws on legal history to explore questions of law and inequality in a wide variety of settings, including marriage and family life. Professor Siegel is an elected fellow of the American Academy of Arts and Sciences and an honorary fellow of the American Society for Legal History. She is a co-author of *Processes of Constitutional Decisionmaking* (2014), and has published widely on constitutional law and legal history in the *Yale Law Journal*, and *Harvard Law Review*, among others.

Rogers M. Smith is the Christopher H. Browne Distinguished Professor of Political Science at the University of Pennsylvania. He is an elected Fellow of the American Academy of Arts and Sciences and a recipient of the Wadsworth Publishing Award (2004),

the David Easton Award (2001), the Horace Mann Bond Book Award (2000), and the Ralph Bunche Award (1998). From 2008 to 2009, he served as the Vice President of the American Political Science Association (APSA). He is the author of *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997), which was named a Pulitzer Prize Finalist, and co-author of *Citizenship Without Consent* (1985). He teaches courses on constitutional law and civil liberties.

Patrick Weil is the Oscar M. Ruebhausen Distinguished Senior Fellow and Visiting Professor of Law at Yale Law School, and a senior research fellow at the French National Research Center in the University of Paris1, Pantheon-Sorbonne. His most recent book is *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (2013). His other recent publications include, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, 123 Yale Law Journal Forum 565 (2014) and *From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World*, 9 International Journal of Constitutional Law 615 (2011).