No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LUIS MAYEA-PULIDO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

In *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1700 n.25 (2017), this Court held that heightened scrutiny applies to distinctions based on gender and "parents' marital status." The question presented is:

Did the Ninth Circuit (and other courts of appeals) misinterpret the phrase "parents' marital status" by holding that it refers exclusively to "legitimacy"?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Luis Mayea-Pulido and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Mayea-Pulido,* U.S. District Court for the Southern District of California, Order issued, March 28, 2018.
- *United States v. Mayea-Pulido*, No. 18-50223, U.S. Court of Appeals for the Ninth Circuit. Opinion issued January 3, 2020.
- *United States v. Mayea-Pulido*, No. 18-50223, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc. March 10, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

LUIS MAYEA-PULIDO,
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- v. -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Luis Mayea-Pulido respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on March 10, 2020.

INTRODUCTION

Three years ago in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), this Court applied heightened scrutiny to distinctions in the nation's citizenship laws based on parents' gender and marital status. The Westlaw headnote characterizes this holding as:

But in applying *Morales-Santana* to a related citizenship statute, the Ninth Circuit held that the phrase "parents' marital status" referred to "legitimacy, rather than parental marital status." *United States v. Mayea-Pulido*, 946 F.3d 1055, 1064 (9th Cir. 2020). The question here is whether this holding conflicts with fifty years of precedent and *Morales-Santana* itself—a question that will decide whether thousands of lawful permanent residents, including many deported veterans such as Mr. Mayea, are actually United States citizens.

OPINION BELOW

The Court of Appeals affirmed Mr. Mayea's conviction for illegal reentry under 8 U.S.C. § 1326. *See United States v. Mayea-Pulido,* 946 F.3d 1055 (9th Cir. 2020) (attached here as Appendix A). Mr. Mayea then petitioned for panel rehearing and rehearing en banc. On March 10, 2020, the panel denied Mr. Mayea's petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

On January 3, 2020, the Court of Appeals affirmed Mr. Mayea's conviction. *See* Appendix A. On March 10, 2020, the Court of Appeals denied rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fifth Amendment of the United States Constitution states, in part:

> No person shall be … deprived of life, liberty, or property, without due process of law[.]

Former section 1432 of Title 8 states:

> A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
>
> (1) The naturalization of both parents; or
>
> …
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents . . . and if
>
> (4) Such naturalization takes place while such child is unmarried and under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization[.]

8 U.S.C. § 1432(a) (1952) (repealed 2000).

STATEMENT OF THE CASE

Luis Mayea-Pulido was born in Mexico in 1978. A few months after his birth, Mr. Mayea's parents brought him to the United States. Mr. Mayea's father became a naturalized United States citizen and applied for a green card for Mr. Mayea and his mother. Although both Mr. Mayea and his mother became lawful permanent residents, neither applied for citizenship. Mr. Mayea's parents remained married throughout his childhood.

At the time Mr. Mayea turned eighteen, the Immigration and Nationality Act stated that a child who is a lawful permanent resident automatically derives citizenship upon:

> (1) The naturalization of both parents; or . . .
>
> (3) The naturalization of the parent having legal custody of the child when there has been a *legal separation of the parents*.

8 U.S.C. § 1432(a) (repealed) (emphasis added). "Legal separation" also refers to divorce. *See United States v. Casasola*, 670 F.3d 1023, 1030 (9th Cir. 2012). So under this law, the lawful permanent resident child of a *separated or divorced* naturalized parent automatically becomes a U.S. citizen, while the lawful permanent resident child of a *married* naturalized parent does not. Because Mr. Mayea's father was a naturalized citizen who was still married to his noncitizen mother, Mr. Mayea did not derive citizenship under the language of § 1432.

In 2000, when Mr. Mayea was 22 years old, Congress passed the Child Citizenship Act, which amended the law regarding derivative citizenship. *See* Child Citizenship Act of 2000, PL 106–395, October 30, 2000, 114 Stat 1631 (codified at 8 U.S.C. § 1431). Under the new law, a child who is a lawful permanent resident automatically derives citizenship if "[a]t least one parent of the child is a citizen of the United States, whether by birth or naturalization." 8 U.S.C. § 1432(a)(1). Congress' motive in passing the Act was to "simplify the naturalization process" in order to "help families." *Casasola*, 670 F.3d at 1028. So under this new law, a lawful permanent resident child of a naturalized citizen would automatically derive citizenship—whether the parent was married or not.

But Congress was silent on whether the Child Citizenship Act would apply retroactively. And courts subsequently declined to apply it retroactively to people like Mr. Mayea and thousands of others who were over 18 years old on the day the

law was passed. *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752, 760 (9th Cir. 2001). So if Mr. Mayea had been four years younger, he would have automatically derived U.S. citizenship. But as it stood, the old statute did not confer citizenship on him.

After Mr. Mayea turned 18, he enlisted in the U.S. Army and served for three years, from 1996 to 1999. He was also enrolled in an R.O.T.C. program at San Diego State University from 1998 to 2000. But after being discharged from the Army, Mr. Mayea suffered several criminal convictions. As a result of these convictions, he was deported to Mexico in 2003.

Over the years, Mr. Mayea illegally reentered the United States on various occasions in an attempt to reunite with his family. When authorities encountered him on these occasions, they either summarily deported him or prosecuted him for illegal reentry under 8 U.S.C. § 1326 (and then deported him).

In early 2017, Mr. Mayea again returned to the United States to reunite with his family. He was arrested near the U.S./Mexico international border and again prosecuted under § 1326 for illegally reentering the United States.

Several months after Mr. Mayea's arrest, this Court issued its decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). In *Morales-Santana*, the Court struck down a statutory disparity in a similar citizenship statute that distinguished between unmarried mothers (who had to show one year of residence to convey citizenship) and unmarried fathers (who had to show five years of residence). *See* 8 U.S.C. §§ 1401(g), 1409(c). After determining that this disparity violated equal protection on the basis of gender, the Court then considered how to fashion a

remedy. *See* 137 S. Ct. at 1698. The Court had two choices: it could either require *fewer* years of residence for unmarried fathers or *more* years of residence for unmarried mothers. *See id.* at 1698–99.

The Court opted for the latter. It explained that the choice of remedy is "governed by the legislature's intent," which required the Court to "consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 1699–1700 (quotations omitted). And the Court found that the potential for disruption if the one-year rule were extended to unwed citizen fathers was "large" because it would be "irrational" to apply a one-year rule to all *unmarried* parents while still applying a ten-year rule to all *married* parents. *Id.* at 1700. After all, the Court explained, "[d]isadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress." *Id.* And "[d]istinctions based on parents' marital status, we have said, are subject to the *same heightened scrutiny* as distinctions based on gender." *Id.* at 1700 n.25 (emphasis added). Based on the Court's unwillingness to treat the children of married parents different than the children of unmarried parents, the Court struck the discriminatory exception for unmarried mothers. *Id.* at 1700.

Mr. Mayea's case proceeded to trial, where he relied on *Morales-Santana* to raise a similar equal protection challenge. He argued that, as in *Morales-Santana*, the court must apply heightened scrutiny to former § 1432 to determine whether conferring citizenship on the child of an *unmarried* naturalized parent while

denying it to the child of a *married* naturalized parent violated equal protection. And because § 1432's distinction on the basis of parental marital status could not survive heightened scrutiny, he requested that the trial court instruct the jury that it must find Mr. Mayea to be a United States citizen (and thus innocent of illegal reentry) if only *one* of his parents naturalized.

The trial court denied this request, holding that *Morales-Santana* related exclusively to gender. Based on this ruling, it instructed the jury that it could only find Mr. Mayea was a U.S. citizen if *both* his parents had naturalized.

During trial, Mr. Mayea presented evidence that his father became a naturalized citizen and that Mr. Mayea became a lawful permanent resident before he turned 18 years old. The prosecutor did not dispute these facts. But because Mr. Mayea's mother had not naturalized, the jury found that Mr. Mayea was not a citizen and convicted him of illegal reentry. The trial court then denied Mr. Mayea's motion for a judgment of acquittal and sentenced him to 65 months in prison, plus eight months for a violation of supervised release.

On appeal, Mr. Mayea's sole argument was that § 1432—like the citizenship statute in *Morales-Santana*—violated equal protection because it discriminated against the children of married parents. Unlike the trial court, the court of appeals acknowledged that in fashioning a remedy for the gender-based equal protection violation, *Morales-Santana* had stated that a distinction based on "parents' marital status" violated equal protection. But the court of appeals held that when *Morales-Santana* used this phrase, it was actually referring to "legitimacy, rather than

parental marital status." 946 F.3d at 1064. The court then defined "legitimacy" as "whether the child's parents were married at the time of the child's birth." *Id.* at 1057. And because § 1432, by contrast, distinguished on the basis of the parents' marital status "at a time *after* [the child's] birth," the court of appeals held that heightened scrutiny did not apply. *Id.* at 1062 (emphasis added).

Mr. Mayea filed a petition for panel and en banc rehearing. He pointed out that *Morales-Santana*'s reference to "parents' marital status" could not have been referring exclusively to legitimacy because the statute contained a separate legitimation requirement that Mr. Morales-Santana himself had already satisfied. He also explained that the modern definition of "legitimacy" includes marital decisions made both before *and* after a child's birth. Finally, he contended that the court's holding would unfairly punish children for their parents' marital decisions and discriminate against parents who remained married—including parents whose religious beliefs forbid divorce.

On March 10, 2020, the panel denied Mr. Mayea's petition for panel rehearing, and the full court declined to hear the matter en banc. This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

Resolving the question presented here will determine whether nearly half a million lawful permanent residents—including veterans like Mr. Mayea—are actually United States citizens. Under the Department of Homeland Security's own calculations, approximately 430,000 people would have derived U.S. citizenship

prior to 2001 if only one of their married parents had been required to naturalize. Many of those people have since been wrongfully deported for minor criminal convictions or prosecuted for illegally reentering the United States. To ensure that the government is not still deporting and prosecuting U.S. citizens, the Court should grant certiorari.

The Ninth Circuit's holding—that *Morales-Santana* used the phrase "parents' marital status" as the equivalent of "legitimacy"—is fundamentally incompatible with *Morales-Santana* itself for three reasons. First, if the Ninth Circuit's reading were correct, this Court would never have needed to reach the central issue in *Morales-Santana*. Second, the Ninth Circuit's interpretation contradicts fifty years of precedent holding that children should not be blamed for their parents' marital decisions. Third, the Ninth Circuit's interpretation punishes parents for choosing to remain married, including parents whose religious beliefs forbid divorce.

Mr. Mayea's case presents the cleanest possible vehicle to resolve this question. He raised this issue and fully exhausted it at every stage of the proceedings. The prosecutor agreed below that Mr. Mayea's father was a naturalized U.S. citizen, and no prosecutor or judge has ever suggested that Mr. Mayea would still be guilty if *Morales-Santana* applied to former § 1432. Because the Ninth Circuit rewrote this Court's plain language on an important issue that directly controls whether Mr. Mayea and thousands of other people are U.S. citizens, the Court should grant certiorari.

REASONS FOR GRANTING THE PETITION

I.

Resolution of this Question Will Determine Whether Thousands of People—Including Veterans Like Mr. Mayea—Are U.S. Citizens.

The Court should grant certiorari to determine whether the Ninth Circuit and other courts of appeals are deciding an important federal question in a way that conflicts with a relevant decision of this Court. *See* Supreme Court Rule 10(c); *see also Levy v. U.S. Attorney General*, 882 F.3d 1364 (11th Cir. 2018) (per curiam) (rejecting an equal protection argument to § 1432 based on parental marital status); *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013) (same).

Resolving the question presented here will have consequences far beyond Mr. Mayea's case. This question determines whether potentially hundreds of thousands of lawful permanent residents are actually U.S. citizens. It would also determine whether thousands of individuals have been wrongfully deported from the United States or unlawfully convicted of illegally reentering the United States as "aliens"—including many military veterans such as Mr. Mayea.

Former § 1432 applies to any lawful permanent resident who turned 18 years old before February 27, 2001—i.e., any lawful permanent resident born before February 27, 1983. *See Hughes*, 255 F.3d at 760. The Department of Homeland Security has estimated that prior to 2002, three percent of all lawful permanent residents (approximately 600,000 people) derived citizenship under former § 1432.[1]

[1] "Estimates of the Legal Permanent Resident Population and Population Eligible to Naturalize in 2002," Dept. of Homeland Security, 2004, *available at*:

But after the Child Citizenship Act amended § 1432 to require that only one child's parent must naturalize, the Department of Homeland Security estimated that five percent of all lawful permanent residents (approximately 1.7 million people) derived citizenship.[2] So since 2001, roughly one million lawful permanent residents derived citizenship who would not have done so under former § 1432.

If the Court were to hold that former § 1432 discriminated against married parents and their children, the effect of this holding would be similar to applying the Child Citizenship Act retroactively to individuals who turned 18 before February 27, 2001. Doing this would likely mean that an additional two percent of the 21.5 million people who became lawful permanent residents in the three decades prior to 2001 derived citizenship.[3] So the question presented here would determine whether approximately *430,000 people are actually U.S. citizens*.

This determination would have a huge effect on individuals who may have been wrongfully deported, particularly veterans like Mr. Mayea. At any given moment, approximately 40,000 immigrants serve in the armed forces, most of whom

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https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20Population%20Eligible%20to%20Naturalize%20in%202002.pdf.

[2] "Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015-2019," Dept. of Homeland Security, Sept. 2019, *available at*: https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015_-_2019.pdf.

[3] "Estimates of the Legal Permanent Resident Population and Population Eligible to Naturalize in 2002," Dept. of Homeland Security, 2004, *available at*: https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20Population%20Eligible%20to%20Naturalize%20in%202002.pdf.

are lawful permanent residents.[4] When these veterans return from serving in overseas conflicts, they often suffer from post-traumatic stress disorder and commit crimes that lead to their deportation. *United States v. Rodriguez-Arroyo*, 467 F. App'x 746, 746 (9th Cir. 2012) (describing the history of "a U.S. Marine Corps veteran who served in Vietnam and was honorably discharged" before being deported and convicted of illegal reentry). Despite their years of service, some estimates suggest that over 2,000 veterans have been deported from the United States.[5]

Mr. Mayea is a prime example of this travesty. After serving three years in the U.S. Army and studying for two years in the R.O.T.C., authorities deported him for several crimes and then prosecuted him for illegal reentry when he tried to return to his family. Mr. Mayea is far from alone in this experience, as the government currently prosecutes thousands of people for illegal reentry every month[6]—some of whom are undoubtedly U.S. citizens if § 1432 violates equal

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[4] "A deported veteran just became a US citizen. Wait ... what?" April 13, 2018, CNN, *available at*: https://www.cnn.com/2018/04/13/politics/deported-veterans-explainer-hector-barajas/index.html.

[5] "ICE deported veterans while 'unaware' it was required to carefully screen them, report says," *Washington Post,* June 8, 2019, *available at:* https://www.washingtonpost.com/nation/2019/06/08/ice-deported-veterans-while-unaware-it-was-required-screen-them-with-care-report-says/.

[6] *See* "Immigration Prosecutions for February 2020," TRAC, *available at*: https://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb20/fil/ (stating that federal prosecutors charged 2,695 individuals with illegal reentry in February 2020).

protection. To ensure that the government is not unlawfully deporting and prosecuting U.S. citizens, the Court should grant certiorari.

II.

The Ninth Circuit Rewrote *Morales-Santana* by Incorrectly Reading Its Reference to "Parents' Marital Status" as "Legitimacy."

Morales-Santana remedied the equal protection violation that existed in a similar citizenship statute by applying the same rule to both married and unmarried parents, explaining that "[d]isadvantageous treatment of *marital* children in comparison to *nonmarital* children is scarcely a purpose one can sensibly attribute to Congress." *Id.* at 1700. It then confirmed that "[d]istinctions based on parents' marital status" are "subject to the same heightened scrutiny as distinctions based on gender." *Id.* at 1700 n.25.

But in Mr. Mayea's case, the Ninth Circuit held that this Court's use of the phrase "parents' marital status" referred only to "legitimacy," and that "legitimacy" was controlled exclusively by "whether the child's parents were married at the time of the child's birth." *Mayea-Pulido*, 946 F.3d at 1057. Three reasons show why this holding directly conflicts with *Morales-Santana* and fifty years of this Court's precedent.

A. Mr. Morales-Santana himself was legitimated *after* his birth.

To understand why the Ninth Circuit's decision directly conflicts with *Morales-Santana*, the Court need look no further than the statement of facts in *Morales-Santana*. There, the Court acknowledged that Mr. Morales-Santana's father "accepted parental responsibility and included Morales–Santana in his

household; he married Morales–Santana's mother and his name was then added to hers on Morales–Santana's birth certificate." 137 S. Ct. at 1683. "[B]y marrying Morales–Santana's mother," the Court held, Mr. Morales-Santana's father satisfied the statute's separate legitimation requirement that exists independent of the residency requirement. *Id.* at 1694 (citing 8 U.S.C. § 1409(a)(4)). Had he *not* cleared this hurdle, Mr. Morales-Santana could not have brought his equal protection challenge in the first place, since the Court in *Truan Anh Nguyen v. INS*, 533 U.S. 53, 62–63 (2001), had previously applied heightened scrutiny to hold that this legitimation provision does not violate equal protection. *See id.*

This fact alone demonstrates that *Morales-Santana* did not intend to equate "parents' marital status" with "legitimacy." By definition, every child of an unmarried father who acquires citizenship has already been legitimated—otherwise, they could not meet the statutory requirement of legitimacy under § 1409(a)(4). *See id.* at 1694. So when *Morales-Santana* sought to avoid the disparity that would result from applying a more onerous residency requirement to married parents than to unmarried parents, it assumed that the children in this class had already satisfied the statute's separate legitimacy requirement. Working within this universe, the Court *then* held that "[d]isadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress" and applied heightened scrutiny. *Id.* at 1700; *see also id.* at 1700 n.25.

In other words, *Morales-Santana* was not applying heightened scrutiny to a legitimacy-based distinction, nor could it, since all the children in the affected class had been legitimated. Instead, it was applying heightened scrutiny to a *separate* provision of the statute that distinguished on the basis of marital status. Any other interpretation would conflate the holdings of *Morales-Santana* and *Nguyen* and ignore the fact that Mr. Morales-Santana and every other child who acquired citizenship under the statute were, by definition, legitimated.

Despite this, the Ninth Circuit claimed that when *Morales-Santana* used the phrase "parents' marital status," it actually meant "legitimacy, rather than parental marital status." *Mayea-Pulido*, 946 F.3d at 1064. But "a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016). If this Court meant to use the term "legitimacy" in *Morales-Santana*, it could have done so. Or it could have used the phrase "paternal acknowledgment"—as it did four other times in the opinion when referring to legitimacy. *See Morales-Santana*, 137 S. Ct. at 1694. But it did neither. Instead, it deliberately chose to use the phrase "parents' marital status," which is not legally interchangeable with "legitimacy." So the Ninth Circuit's decision to rewrite the Court's plain language contradicts—not only the facts of *Morales-Santana* itself—but the Court's own word choice.

Another key fact in *Morales-Santana* undermines the Ninth Circuit's holding. The Ninth Circuit noted that former § 1432 based citizenship on the marital status of the child's parents "at a time *after* [the child's] birth." *Mayea-Pulido*, 946 F.3d at

1062 (emphasis added). But the Ninth Circuit believed that "legitimacy" refers only to "whether the child's parents were married *at the time of* the child's birth." *Id.* at 1057 (emphasis added). On this basis, the Ninth Circuit held that heightened scrutiny would not apply to any parental marital decisions made *after* a child's birth. *See id.*

But Mr. Morales-Santana was only legitimated because his parents married *after* his birth. *Morales-Santana*, 137 S. Ct. at 1694. In fact, the relevant statute permitted his father to legitimate him at any time "while [Mr. Morales-Santana] is under the age of twenty-one years." 8 U.S.C. § 1409(b). So if the Ninth Circuit were correct that legitimation turns solely on the parents' marital status "at the time of the child's birth," *Mayea-Pulido*, 946 F.3d at 1057, then Mr. Morales-Santana himself could never have acquired citizenship, and this Court would have had no need to conduct an equal protection analysis. But it did, which means the Ninth Circuit's definition of "legitimacy" is fundamentally incompatible with that of *Morales-Santana* and the Immigration and Nationality Act itself.

The Ninth Circuit's error appears to stem from its reliance on the common law definition of "legitimacy," rather than the modern definition. To define "legitimacy," the court relied solely on the definition of a "legitimate child" in *Black's Law Dictionary*, citing the part of that definition that defines a "'legitimate child'" as one "'conceived or born in lawful wedlock'" *Mayea-Pulido*, 946 F.3d at 1063 (quoting *Black's Law Dictionary* (11th ed. 2019)). But the full *Black's Law Dictionary* definition states:

> legitimate child. (17c) 1. At *common law*, a child conceived or born in lawful wedlock. 2. *Modernly*, a child conceived or born in lawful wedlock, or *legitimated either by the parents' later marriage or by a declaration or judgment of legitimation*.

Black's Law Dictionary (11th ed. 2019) (emphases added). In other words, the Ninth Circuit quoted only the portion of the *Black's* definition relating to common law "legitimacy" and omitted the portion relating to the modern definition.

But federal immigration law uses the modern definition of "legitimacy." Under the Immigration and Nationality Act, a person born out of wedlock may acquire citizenship if they were "legitimated under the law of the person's residence or domicile" *after* their birth. 8 U.S.C. § 1409(a)(4)(A). *See also* 8 U.S.C. § 1409(b) (conferring citizenship if paternity is established "while such child is under the age of twenty-one years by legitimation"); 8 U.S.C. § 1432(a)(3) (conferring citizenship "if the child was born out of wedlock and the paternity of the child has not been established by legitimation"). State law also uses this definition: forty-five out of fifty states have laws allowing parents to legitimate their children through a subsequent marriage.[7] So both state and federal law confirm that parents' marital

[7] *See* Ala. Code § 26-11-1; Alaska Stat. Ann. § 25.20.050(a); Ark. Code Ann. § 28-9-209(b); Cal. Fam. Code § 7611(c); Colo. Rev. Stat. Ann. § 19-4-105(c); Del. Code Ann. tit. 13, § 1301; Fla. Stat. Ann. § 742.091; Ga. Code Ann. § 19-7-20(c); Haw. Rev. Stat. Ann. § 338-21(a); Idaho Code Ann. § 32-1006; 750 Ill. Comp. Stat. Ann. 46/204(a)(4); Ind. Code Ann. § 29-1-2-7(b)(4); Iowa Code Ann. § 595.18; Kan. Stat. Ann. § 23-2208(a)(3); Ky. Rev. Stat. Ann. § 391.105(1)(a); La. Civ. Code Ann. art. 195; Md. Code Ann., Est. & Trusts § 1-208(c)(3); Mass. Gen. Laws Ann. ch. 209C, § 6(a)(3); Mich. Comp. Laws Ann. § 700.2114(c); Minn. Stat. Ann. § 257.55(c); Miss. Code. Ann. § 93-17-1(2); Mo. Ann. Stat. § 474.070; Mont. Code Ann. § 40-6-203; Neb. Rev. Stat. Ann. § 43-1406(2); Nev. Rev. Stat. Ann. § 122.140; N.H. Rev. Stat. Ann. § 168-B:2(V)(c); N.J. Stat. Ann. § 9:17-43(a)(3); N.M. Stat. Ann. § 40-11A-204 (a)(4); N.Y. Dom. Rel. Law § 24(1); N.C. Gen. Stat. Ann. § 49-12; N.D. Cent.

decisions made years after a child's birth are just as relevant to a legitimacy determination as parents' marital decisions made before a child's birth. *See Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding that "there is no constitutionally sufficient justification" for denying rights to a child "simply because its natural father has not married its mother").

Put simply, if this Court had applied the Ninth Circuit's reasoning in *Morales-Santana* itself, *Morales-Santana* would have turned out differently. This alone shows that the Ninth Circuit's interpretation of "parents' marital status" is incompatible with this Court's precedent.

B. The Ninth Circuit's decision contradicts fifty years of precedent declining to blame children for their parents' marital decisions.

The Ninth Circuit's decision also sharply departs from this Court's longstanding precedent refusing to hold children responsible for their parents' marital decisions. Nearly fifty years, this Court struck down the first illegitimacy statute, holding that while society has an interest in condemning "irresponsible liaisons beyond the bonds of marriage," the act of "visiting this condemnation on the head of an infant is illogical and unjust." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). Such unequal treatment, the Court stated, would be contrary to the

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Code Ann. § 14-20-10(1)(d); Okla. Stat. Ann. tit. 84, § 215; Or. Rev. Stat. Ann. § 109.070(4)(a); 20 Pa. Stat. and Cons. Stat. Ann. § 2107(c)(1); 33 R.I. Gen. Laws Ann. § 33-1-8; S.C. Code Ann. § 20-1-60; Tenn. Code Ann. § 31-2-105(a)(2)(A); Tex. Fam. Code Ann. § 160.204(a)(4); Utah Code Ann. § 78B-15-204 (1)(d); Va. Code Ann. § 20-31.1; Vt. Stat. Ann. tit. 15C, § 401 (a)(3); Wash. Rev. Code Ann. § 26.26A.115(1)(a)(iii); W. Va. Code Ann. § 42-1-6; Wis. Stat. Ann. § 891.41(1)(b); Wyo. Stat. Ann. § 14-2-504 (a)(4).

principle that "legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id.* After all, "no child is responsible for his birth," and penalizing children is "an ineffectual—as well as an unjust—way of deterring the parent." *Id. See also Parham v. Hughes*, 441 U.S. 347, 352 (1979) (explaining that it would be "unjust and ineffective" for society to punish a child who is "in no way responsible for his situation and is unable to change it"). Since then, this Court has always declined to "impos[e] sanctions on the children born" outside of wedlock. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

The Court has also held that parents' marital status creates an "involuntary and immutable" characteristic in a child. *Parham v. Hughes*, 441 U.S. 347, 353 (1979). Relying on such precedent, Erwin Chemerinsky has explained that "immutable characteristics like race, national origin, gender, and the *marital status of one's parents* warrant heightened scrutiny" because it is "unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change." Constitutional Law 672 (3d. 2006) (emphasis added). And for fifty years, the Court has applied heightened scrutiny to this immutable characteristic. *See, e.g., Lalli v. Lalli*, 439 U.S. 259, 265 (1978). *See Pickett v. Brown*, 462 U.S. 1, 8 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 98–99, 102 S. Ct. 1549, 1554-55 (1982) (same); *United States v. Clark*, 445 U.S. 23, 26-27 (1980) (same); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (same). So the Court has a long and distinguished history of applying heightened scrutiny to any distinction that punishes children for the marital decisions of their parents.

The court of appeals' decision would sharply diverge from this precedent by holding that the marital status of one's parents is no longer an "immutable characteristic" beyond the child's control—rather, it is something the child may be held legally responsible for. *See Mayea-Pulido*, 946 F.3d at 1063. So any legislature, executive, or agency could make a law, rule, or regulation that punishes a child for her parents' marital status—laws that range from where she goes to school, to which parent she lives with, to whether she receives benefits, to how much financial aid she receives for college. The lawmaker could then comfortably anticipate that this edict would pass rational basis even if it "results in some inequity" for the child. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (quotations omitted). The only way to avoid this unjust and absurd result is for the Court to follow decades of precedent deeming the marital status of one's parents an "immutable characteristic."

But the Ninth Circuit declined to do so here. The court did not dispute that the only reason Mr. Mayea is not a U.S. citizen is because his parents were married, rather than divorced or separated. As with children born out of wedlock, the marital status of Mr. Mayea's parents was thus an "involuntary and immutable" trait over which he had no control. *Parham*, 441 U.S. at 353. Because of this, it was "unjust and ineffective" for the law to treat him differently since he is "in no way responsible for his situation and is unable to change it." *Id.* at 352. Since Mr. Mayea had no more control over his parents' marital status than the children in *Weber*, *Parham*, *Trimble*, *Lalli*, *Pickett*, *Mills*, or *Clark*, it makes no sense to apply a lower standard of scrutiny to his equal protection claim.

C. The Ninth Circuit's decision would discriminate against married parents—including those whose religious beliefs forbid divorce.

Finally, the court of appeals' decision would lead to absurd results by treating separated or divorced parents more favorably than married parents. For instance, the Ninth Circuit held that the marital-based distinction in § 1432 protects the "parental rights of the non-citizen parent" because "allowing a naturalizing parent to transmit citizenship without regard to the wishes of a non-citizen parent" could "usurp[ ] the parental rights of the non-citizen parent." *Mayea-Pulido*, 946 F.3d at 1065–66 (quotations and alterations omitted).

But by preventing a child from deriving citizenship, § 1432(a)(3) actually usurps the rights of the *married* parent. For instance, unlike a divorced parent whose child will enjoy all the benefits of U.S. citizenship, a married naturalized parent cannot seek medical, financial, diplomatic, or other assistance from the U.S. embassy for their child who is traveling abroad.[8] Married naturalized parents will not share the same nationality as their children, which can lead to complicated international custody disputes. *See, e.g., Chafin v. Chafin*, 568 U.S. 165, 171 (2013) (after citizen father deployed to Afghanistan, noncitizen mother took daughter to Scotland, where she obtained custody and a preliminary injunction against child's return to the U.S.). And married parents who want their child to become a U.S. citizen will *both* have to naturalize—an expensive and time-consuming process that

[8] *See, e.g.,* U.S. Dept. of State, Bureau of Consular Affairs, *available at*: https://travel.state.gov/content/travel/en/international-travel/emergencies.html.

is beyond the financial and educational reach of many parents.[9] So parents who remain married are at a significant legal and economic disadvantage to parents who separate or divorce.

This discrimination against married parents carries particular consequences for religious groups whose beliefs prohibit members from divorcing, such as Roman Catholics, the Amish, some Christian evangelicals, Hindus, and Sikhs. At a minimum, married parents in these religious groups must each naturalize and thus pay twice the cost for their children to derive citizenship. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (holding that a law that "make[s] the practice of religious beliefs more expensive" imposes a burden on the exercise of religion) (internal quotations and alterations omitted). This, as well as other disadvantages married parents suffer, constitutes religious discrimination against the child's parents regardless of the law's effects on the child—which provides a separate basis for applying heightened scrutiny. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (noting that laws burdening religious beliefs "must undergo the most rigorous of scrutiny"). For all these reasons, the Ninth Circuit's decision is fundamentally incompatible with this Court's precedent.

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[9] *See* https://www.uscis.gov/forms/our-fees (stating that the combined fees to file an N-400 Application for Naturalization are $725); 8 U.S.C. § 1427(a) (requiring naturalization applicants to have spent five years as a lawful permanent resident); https://www.uscis.gov/citizenship/learners/study-test/study-materials-civics-test (requiring lawful permanent residents to wait a certain number of years to naturalize and then pass a challenging oral civics test in English).

III.

No Better Case Exists to Resolve This Issue.

It would be difficult to imagine a better vehicle to resolve this issue than Mr. Mayea's case. Mr. Mayea's *only* defense at trial was that he had derived U.S. citizenship, and he preserved this argument in at least two ways. First, he relied on *Morales-Santana* to request that the trial judge instruct the jury that it could not convict him of being an "alien" who unlawfully reentered the United States if the jury found that only one of his parents had naturalized. Second, Mr. Mayea moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, at the close of the government's case and renewed this motion in written form after the trial. And because this was the *only* issue raised on appeal, no other possibilities existed to resolve this case on other grounds. So Mr. Mayea fully raised and preserved this issue at every stage of his case.

Furthermore, Mr. Mayea's guilt or innocence turned solely on this equal protection issue. During trial, the prosecutor admitted during closing arguments that Mr. Mayea became a lawful permanent resident and his father naturalized before Mr. Mayea turned 18 years old. All the evidence in the record supported this conclusion. On appeal, the government never attempted to argue that any error was harmless, and no judge ever found it would be. In other words, no party or judge at any stage of the case has ever disputed that if *Morales-Santana* applied to former § 1432, Mr. Mayea would not be guilty of illegal re-entry. So if the Court were to

grant certiorari, Mr. Mayea's case presents the cleanest possible vehicle for resolving this case.

CONCLUSION

For these reasons, Mr. Mayea respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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s/ Kara Hartzler

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner