

NO. 11-50033

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOSE ANGEL DOMINGUEZ-GONZALEZ,

Plaintiff-Appellant,

vs.

HILLARY RODHAM CLINTON,
UNITED STATES SECRETARY OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court
Western District of Texas
Civil Action Number 5:10-cv-00473

BRIEF IN SUPPORT OF THE PLAINTIFF-APPELLANT

Jorge Aristotelidis
Texas Bar Number 00783557
DEMOTT, MCCHESENEY,
CURTRIGHT & ARMENDARIZ, L.L.P.
800 Dolorosa, Suite 100
San Antonio, Texas 78207
Tel. (210) 590-1844
Fax (210) 590-1845

Matthew Paul Nickson
Texas Bar Number 24056043
1300 McGowen
Houston, Texas 77004
Tel.: (713) 655-8880
Fax: (713) 655-0405
*Counsel of Record for
Plaintiff-Appellant*

NO. 11-50033

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOSE ANGEL DOMINGUEZ-GONZALEZ,

Plaintiff-Appellant,

vs.

HILLARY RODHAM CLINTON,
UNITED STATES SECRETARY OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court
Western District of Texas
Civil Action Number 5:10-cv-00473

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record hereby certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Federal Rules of Appellate Procedure have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant:

Mr. Jose Angel Dominguez-Gonzalez

Counsel for Plaintiff-Appellant:

Mr. George William Aristotelidis
Mr. Matthew Paul Nickson

Defendant-Appellee:

The Honorable Hillary Rodham Clinton
United States Secretary of State
Washington, D.C.

Counsel for Defendant-Appellee:

Mr. Gary Layton Anderson
Mr. J. Max Weintraub

Respectfully submitted,

/s/ Matthew Paul Nickson

Matthew Paul Nickson
***Counsel of Record for
Plaintiff-Appellant***

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff-Appellant, Jose Angel Dominguez-Gonzalez, respectfully requests that this appeal be called for oral argument.

This appeal raises an important question about whether a private litigant ever can estop the federal government from declining to recognize the litigant's United States citizenship from birth. Oral argument may facilitate useful discussion which assists the Court.

TABLE OF CONTENTS

Page:

CERTIFICATE OF INTERESTED PARTIES ii

STATEMENT REGARDING ORAL ARGUMENT iv

TABLE OF CONTENTS..... v

TABLE OF AUTHORITIES vii

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

STATEMENT OF THE COURSE OF PROCEEDINGS 4

 1. The district court proceedings..... 4

 2. The proceedings in this Court 5

STATEMENT OF FACTS 6

SUMMARY OF THE ARGUMENT 9

STANDARD OF REVIEW 13

ARGUMENT AND AUTHORITIES..... 14

 I. *This Court ought to hold that estoppel against the Government is available in citizenship cases* 16

 II. *The Government’s denaturalization of Jose Angel Dominguez constitutes an act of affirmative misconduct which justifies the judicial excuse of the physical presence requirement at 8 U.S.C. § 1401(a)(7) (1952 version)*..... 26

Page:

CONCLUSION AND PRAYER	39
STATEMENT REGARDING RELATED APPEALS	40
CERTIFICATE OF SERVICE	41
CERTIFICATE OF COMPLIANCE WITH FED.R. APP. PROC. R. 32	42

TABLE OF AUTHORITIES

<u>Federal Cases:</u>	<u>Page:</u>
<i>Afroyim v. Rusk</i> , 387 U.S. 253 (1967)	passim
<i>Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough</i> , 354 F.3d 348 (5th Cir. 2003).....	13
<i>Covey v. Arkansas River Co.</i> , 865 F.2d 660 (5th Cir. 1989).....	35
<i>Chin Yow v. United States</i> , 208 U. S. 8 (1908).....	33
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	20
<i>Dong Sik Kwon v. I.N.S.</i> , 646 F.2d 909 (5th Cir. 1981) (en banc)	26
<i>Dred Scott v. Sandford</i> , 19 How. 393, 15 L.Ed. 691 (U.S. 1856).....	30–31
<i>Drozdz v. I.N.S.</i> , 155 F.3d 81 (2d Cir. 1998)	21–23
<i>EPCO Carbon Dioxide Products, Inc. v. J.P. Morgan Chase Bank, N.A.</i> , 467 F.3d 466 (5th Cir. 2006)	13
<i>Federal Crop Insurance Corp. v. Merrill</i> , 332 U.S. 380 (1947).....	37
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981).....	17
<i>Fiallo v. Bell</i> , 430 U.S. 787 (1977).....	19
<i>Fredericks v. Commissioner of Internal Revenue</i> , 126 F.3d 433 (9th Cir. 1997)	16
<i>Harold H. Huggins Realty, Inc. v. FNC, Inc.</i> , 634 F.3d 787 (5th Cir. 2011).....	33
<i>Hedges v. Dixon County</i> , 150 U.S. 182 (1893).	17

<u>Federal Cases:</u>	<u>Page:</u>
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987)	14
<i>I.N.S. v. Hibi</i> , 414 U.S. 5 (1973).....	18, 20
<i>I.N.S. v. Pangilinan</i> , 486 U.S. 875 (1987).....	passim
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963)	29
<i>Mackenzie v. Hare</i> , 239 U.S. 299 (1915)	29
<i>Miller v. Albright</i> , 523 U.S. 423 (1998)	passim
<i>Miller v. Gonzales</i> , 166 Fed.Appx. 769 (5th Cir. 2006) (not selected for publication)	14–15
<i>Miller v. United States</i> , 500 F.2d 1007 (2nd Cir. 1974).....	16
<i>Montana v. Kennedy</i> , 366 U.S. 308 (1961)	18, 37
<i>Moosa v. I.N.S.</i> , 171 F.3d 994 (5th Cir. 1999)	18, 19–20
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	16
<i>Ng Fung Ho v. White</i> , 259 U.S. 276 (1922)	32–33
<i>Nguyen v. I.N.S.</i> , 533 U.S. 33 (2001).....	17
<i>Peacock v. United States</i> , 597 F.3d 654 (5th Cir. 2010)	15
<i>Perez v. Brownell</i> , 356 U.S. 44 (1958).....	10, 27, 29, 32
<i>Perez-Mejia v. Holder</i> , ___ F.3d ___, 2011 WL 1496990 (9th Cir., April 21, 2011)	16
<i>Perkins v. Elg</i> , 307 U.S. 325 (1939).....	29
<i>Rees v. Watertown</i> , 86 U.S. [19 Wall.] 107 (1874).....	17

<u>Federal Cases:</u>	<u>Page:</u>
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978).....	29
<i>Rhodes v. Guiberson Oil Tools</i> , 927 F.2d 876 (5th Cir. 1991).....	14
<i>Salgado-Diaz v. Gonzales</i> , 395 F.3d 1158 (9th Cir. 2005)	16
<i>Savorgnan v. United States</i> , 338 U.S. 491 (1950).....	29
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981).....	37
<i>Suh v. I.N.S.</i> , 592 F.2d 230 (5th Cir. 1979)	26
<i>Thompson v. Allen County</i> , 115 U.S. 550 (1885).....	17
<i>Tullius v. Albright</i> , 240 F.3d 1317 (11th Cir. 2001).....	23
<i>United States v. Cervantes-Nava</i> , 281 F.3d 501 (5th Cir.), <i>certiorari denied</i> , 536 U.S. 914 (2002).....	passim
<i>United States v. Ginsberg</i> , 243 U.S. 472 (1917)	17
<i>United States v. Gomez-Orozco</i> , 188 F.3d 422 (7th Cir. 1999).....	7
<i>United States v. Wong Kim Ark</i> , 169 U.S. 649 (1898)	31
<i>Vance v. Terrazas</i> , 444 U.S. 252 (1980).....	6
<i>Wauchope v. U.S. Department of State</i> , 985 F.2d 1407 (9th Cir. 1993).....	23–25

<u>Administrative Decisions:</u>	<u>Page:</u>
<i>In re Gabor Tomas Nameth</i> , 2006 WL 3712557 (BIA 2006) (not selected for publication).....	23
<i>Matter of Navarrete</i> , 12 I. & N. Dec. 138 (BIA 1967).....	21–23

<u>Federal Constitution:</u>	<u>Page:</u>
U.S. CONST. ART. I, SEC. 2.....	30
U.S. CONST. AMD V.....	passim
U.S. CONST. AMD XIV.....	passim

<u>Federal Codified Statutes:</u>	<u>Page:</u>
8 U.S.C. § 1401(a)(7) (1952 version).....	passim
8 U.S.C. § 1409.....	19–20
8 U.S.C. § 1421.....	17
8 U.S.C. § 1481.....	6, 10, 26–27
28 U.S.C. § 1291.....	1
28 U.S.C. § 1361.....	17
28 U.S.C. § 1651.....	17

<u>Federal Statutes at Large:</u>	<u>Page:</u>
Acts March 26, 1790, c. 3.....	31
Acts January 29, 1795, c. 20 (1 Stat. 103, 414).....	31
Acts April 14, 1802, c. 28.....	31
Acts March 26, 1804, c. 47 (2 Stat. 153, 292).....	31
Acts March 22, 1816, c. 32 (3 Stat. 258).....	31
Acts May 26, 1824, c. 186.....	31

Federal Statutes at Large: **Page:**

Acts May 24, 1828, c. 116 (4 Stat. 69, 310)..... 31

Revised Statutes of 1874, Section 1993 24

Federal Regulations: **Page:**

8 C.F.R. 1003.1 21

Federal Rules of Civil Procedure: **Page:**

FED. R. CIV. PRO. R. 12 1, 13

Other Sources: **Page:**

EPISTLE OF SAINT JAMES 2:1 32

Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV.
680 (1954)..... 9

Note, *Equitable Estoppel of the Government*, 79 COLUM. L.
REV. 551 (1979)..... 9

SAINT THOMAS AQUINAS, ON LAW AND NATURAL LAW: SUMMA
THEOLOGIAE (1271)..... 30

1 J. STORY, EQUITY JURISPRUDENCE (W. LYON ed. 1918) 17

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1291 or pursuant to other applicable law, the Court possesses jurisdiction over this appeal of a trial court order dismissing a civil action for failure to state a claim upon which relief can be granted, FED. R. CIV. PRO. R. 12(b)(6).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by holding that the federal government can never be estopped from refusing to recognize a claim of United States citizenship from birth.
2. Whether the unconstitutional and eventually rescinded stripping, in 1956, of the Plaintiff-Appellant's father's United States citizenship constitutes affirmative misconduct, warranting the estoppel of the Secretary's denial of the Plaintiff-Appellant's claim to have derived citizenship at birth.

The Secretary's denial is premised upon the father's failure to satisfy the ten-year physical presence requirement at 8 U.S.C. § 1401(a)(7) (1952 version). The physical presence requirement is a condition precedent to the transmission of derivative citizenship.

STATEMENT OF THE CASE

Jose Angel Dominguez-Gonzalez, the Plaintiff-Appellant (“Jose Dominguez”), challenges the denial of his claim to United States citizenship from birth.

He contends that the United States Secretary of State, The Honorable Hillary Rodham Clinton, should be estopped from denying his passport application. The Secretary’s denial is premised upon the failure of his father (“Jose Angel Dominguez”) to satisfy the ten-year physical presence requirement at 8 U.S.C. § 1401(a)(7) (1952 version). The physical presence requirement is a condition precedent to the transmission of derivative citizenship.

Before the trial court, the Secretary responded (principally) that she cannot be estopped in citizenship cases. The trial court endorsed this view and dismissed Jose Dominguez’s civil action.

STATEMENT OF THE COURSE OF PROCEEDINGS

1. The district court proceedings—

On June 4, 2010, Jose Dominguez filed his original complaint and action for a declaratory judgment in the San Antonio, Texas Division of the United States District Court for the Western District of Texas. R., at pp. 5–19.¹ Jose Dominguez thereby sought recognition of his United States citizenship, which the Secretary of State has refused by denying his application for a United States passport. *See generally ibid.*

The facts undergirding Jose Dominguez’s claim to United States citizenship are recited within the Statement of Facts, *infra*.

The Secretary responded to the Dominguez complaint by moving for dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure. R., at pp. 54–61 (original motion to dismiss), at pp. 62–69 (amended motion to dismiss). Jose Dominguez timely filed his opposition to the Secretary’s motion. R., at pp. 79–102. The Secretary filed a reply. *Id.*, at pp. 106–111.

On November 30, 2010, the trial court signed an order granting the Secretary’s motion to dismiss. R., at pp. 113–114.

¹ For simplicity, the Appellant shall be referred to as “Jose Dominguez.” The Appellant’s late father shall be referred to as “Jose Angel Dominguez.”

2. *The proceedings in this Court—*

On January 6, 2011, Jose Dominguez timely filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit. R., at pp. 116–118; R.E., at pp. 5–7.

STATEMENT OF FACTS

Plaintiff-Appellant, Jose Angel Dominguez-Gonzalez (“Jose Dominguez”), is a resident of Nuevo Laredo, Mexico. Jose Dominguez was born in Mexico, on October 9, 1962, of a Mexican mother.

Jose Dominguez’s father, Jose Angel Dominguez, derived United States citizenship through his own father, Jose Guillermo Dominguez Benavidez. Yet on January 9, 1956, the United States Department of State determined that Jose Dominguez’s father had relinquished his citizenship by accepting employment for a period of one year—in about 1953—with the municipal government of the City of Torreon, in Coahuila, Mexico.

The relinquishment determination antedated *Afroyim v. Rusk*, 387 U.S. 253 (1967). In *Afroyim*, the Supreme Court held that citizenship can only be relinquished by an act, the expatriating consequence of which is fully known to the citizen, who by the act intends to relinquish his citizenship. *See id.*; *see also Vance v. Terrazas*, 444 U.S. 252, 260 (1980).²

The State Department eventually vacated the involuntary expatriation of Jose Angel Dominguez. By letter dated November 23, 2003 and executed by Ian Brownlee, then-Director of the Office of Overseas Citizens Services

² While a United States citizen’s acceptance of employment with a foreign state remains a ground of expatriation, 8 U.S.C. § 1481(a)(4), the acceptance must be effectuated “with the intention of relinquishing United States nationality.” *See id.*, at § 1481(a).

and Crisis Management, the State Department reinstated Jose Angel Dominguez's citizenship. Mr. Brownlee wrote, "Upon examination of the file, under current guidelines, we cannot sustain a finding that Mr. Dominguez intended to relinquish his U.S. citizenship through his action" of "accepting employment with the Municipal Treasury Office, Torreon, Coahuila, Mexico."³

Nevertheless, as a consequence of the temporary (and since-vacated) stripping of United States citizenship from Jose Angel Dominguez, Jose Dominguez is unable to meet the statutory requirements for deriving United States citizenship from his father. This is because Jose Angel Dominguez was not physically present within the United States for a period of five years after his (Jose Angel Dominguez's) fourteenth birthday. *See* 8 U.S.C. § 1401(a)(7) (1952 version).⁴ In 1962, 8 U.S.C. § 1401(a)(7) conferred citizenship upon "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a

³ The letter is not in the record. But it is quoted from in the amended complaint, R., at p. 41, the facts within which are to be taken as true.

⁴ The law governing Jose Dominguez's entitlement to derivative citizenship is the law in effect at the time of his birth. *United States v. Cervantes-Nava*, 281 F.3d 501, 503 n.2 (5th Cir. 2002) (citing *United States v. Gomez-Orozco*, 188 F.3d 422, 426–27 (7th Cir. 1999)).

period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.” Prior to Jose Dominguez’s birth, Jose Angel Dominguez had resided in Brownsville, Texas from 1945 through 1947. The father subsequently resided in Laredo, Texas from 1947 through 1951, where he attended Saint Joseph’s Academy.⁵

Now deceased, Jose Angel Dominguez averred, in an affidavit, that he had never intended to renounce his United States citizenship. Through affidavit, he deposed, “I want to express that had my citizenship not been revoked, I would have easily met the residence requirements during the previous years.”⁶

⁵ These facts are recited within the complaint. R., at p. 41. *See supra*, note 4.

⁶ The Affidavit is not in evidence but is cited in the complaint. R., at p. 41. *See supra*, note 4.

SUMMARY OF THE ARGUMENT

“THE CLAIM OF THE GOVERNMENT TO AN IMMUNITY FROM ESTOPPEL IS IN FACT A CLAIM TO EXEMPTION FROM THE REQUIREMENTS OF MORALS AND JUSTICE.”

Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 707 (1954)⁷

The Court should reverse the trial court’s dismissal of this civil action. The Court should remand this case for trial or for adjudication of a motion by Jose Dominguez for a declaratory judgment which recognizes his United States citizenship from birth. The Secretary’s administrative denial of Jose Dominguez’s passport application is legally redressable error.

The denial of the passport is predicated upon the ground that Jose Dominguez’s father, Jose Angel Dominguez, did not satisfy the ten-year physical presence requirement at 8 U.S.C. § 1401(a)(7) (as said law existed at the time of Jose Angel Dominguez’s birth on October 9, 1962). Yet this failure—as well as Jose Angel Dominguez’s attendant failure to pass

⁷ Cited in Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 571 n. 118 (1979).

citizenship onto his son—must be excused on account of the January 9, 1956 denaturalization of Jose Angel Dominguez.⁸

The denaturalization of Jose Angel Dominguez was an act of state which violated the Due Process Clause of the Fifth Amendment (including the Clause’s Equal Protection Guarantee), as well as the Nationality Clause of the Fourteenth Amendment. *Accord Afroyim v. Rusk*, 387 U.S. 253 (1967) (the Fourteenth Amendment requires that a denaturalization must be intended by the citizen who renounces his citizenship); *id.*, at 267 (“To uphold Congress’ power to take away a man’s citizenship because he voted in a foreign election in violation of s 401(e) [8 U.S.C. § 1481(a)(5)] would be equivalent to holding that Congress has the power to ‘abridge,’ ‘affect,’ ‘restrict the effect of,’ and ‘take . . . away’ citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with the Chief Justice’s dissent in the Perez case [*Perez v. Brownell*, 356 U.S. 44 (1958)] that the Government is without power to rob a citizen of his citizenship under s 401(e).”) (footnote omitted).

The denaturalization rendered it impossible for Jose Angel Dominguez reasonably to anticipate—prior to Jose Dominguez’s 1962

⁸ Contrary to the Secretary’s protestation below, *see R.*, at p. 108 n.3, the term “denaturalization” embraces the stripping of citizenship. Merriam Webster defines the act of “denaturalization” thus: “to deprive of the rights and duties of a citizen.” *See* <http://www.merriam-webster.com/dictionary/denaturalize>.

birth—that he (the father) could someday regain his citizenship. Thus, the denaturalization justifies estopping the Government from invoking the physical presence requirement as a bar to Jose Dominguez’s passport application.

In the Secretary’s amended motion to dismiss, which the district court sustained, the Secretary raises two principal objections to Jose Dominguez’s civil action. *R.*, at pp. 62–69. Both are unpersuasive.

First, the Secretary contends that estoppel against the Government is always unavailable in citizenship cases. The Secretary is overreaching. Estoppel is not (or, at the very least, should not be) foreclosed in instances in which a plaintiff complains that, on account of the Government’s violation of important constitutional rights (herein, Jose Dominguez’s and Jose Angel Dominguez’s Fifth Amendment and Fourteenth Amendment rights), the plaintiff was hindered from deriving (or transmitting) citizenship. Therefore, precisely because the Government’s denaturalization of Jose Angel Dominguez constitutes an act of affirmative misconduct which should be treated as having prevented Jose Angel Dominguez from passing United States citizenship onto Jose Dominguez, the district court ought to have confirmed its own authority to estop the Government from invoking the

physical presence requirement as a bar to Jose Dominguez's passport application.⁹

Second, the Secretary argues that estoppel is unwarranted because, after having been denaturalized, Jose Angel Dominguez made no effort at meeting the 8 U.S.C. § 1401(a)(7) physical presence requirement. The contention is meritless. Assuming *arguendo* that a duty to mitigate damages is relevant, it is beyond doubt that Jose Angel Dominguez had no reasonable expectation—during the period following his denaturalization yet prior to the birth of Jose Dominguez in 1962—that he could ever procure a rescission of the denaturalization, so as to pass citizenship onto his son. (In addition to meeting the physical presence requirement, one must be a citizen parent in order to transmit citizenship to a son or daughter. 8 U.S.C. § 1401(a)(7) (1952 version).) The law about denaturalization did not change until *Afroyim v. Rusk*, 387 U.S. 253 (1967). Accordingly, Jose Angel Dominguez's failure to reside or to be present long enough within the United States, after his denaturalization, is a *non sequitur*.

⁹ In light of the involuntary denaturalization of Jose Angel Dominguez, it also would be absurd for the Secretary to deny the passport on the ground that, at the time that Jose Dominguez was born, his father was not a citizen. *Cf.* 8 U.S.C. § 1401(a)(7) (1952 version). The trial court should possess the authority to overturn any passport denial on this ground as well.

STANDARD OF REVIEW¹⁰

The standard of review is de novo. “We review a dismissal under rule 12(b)(6) *de novo*. See *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 351 (5th Cir. 2003). We apply the same standard as does the district court: A claim will not be dismissed unless the plaintiff cannot prove any set of facts in support of its claim that would entitle it to relief. *Id.*” *EPCO Carbon Dioxide Products, Inc. v. J.P. Morgan Chase Bank, N.A.*, 467 F.3d 466, 469 (5th Cir. 2006).

¹⁰ The standard of review is discussed in a separate section because the same standard is respectfully believed to touch all issues in this appeal uniformly.

ARGUMENT AND AUTHORITIES

The Court is urged to reverse the district court's dismissal of Jose Dominguez's civil action.¹¹

The district court held that the Government cannot be estopped in citizenship matters. *See R.*, at p. 114; *R.E.*, at p. 9. This Court should confirm that the opposite is true. This Court should hold that estoppel may be appropriate in the wake of unconstitutional, affirmative misconduct by the Government.¹² The Government engaged in unconstitutional, affirmative misconduct when it denaturalized Jose Angel Dominguez. Under the circumstance, case law does not preclude estoppel. *Accord Miller*

¹¹ As an additional preliminary matter (which the Secretary did not place into play below), Jose Dominguez contends that he is a directly interested party herein, and that, as such, he possesses standing to maintain this civil action/appeal. Notwithstanding this assertion, and to the extent that the constitutional and statutory claims at issue herein are adjudged to belong wholly or jointly to the father, Jose Dominguez maintains that he possesses viable third-party standing because: (1) he has suffered an injury-in-fact (the denial of a passport); (2) he is (obviously) a close relation of his father; and, (3) his father, now deceased, is hindered completely in respect of the ability to sue. *Cf. Miller v. Albright*, 523 U.S. 423, 445 (1998) (O'Connor and Kennedy, JJ., concurring) (asserting that the Court ought to reject a petitioner's third-party standing to maintain a derivative citizenship case in which the "rightholder" (the petitioner's father, whose Fifth Amendment right to Equal Protection was allegedly violated by 8 U.S.C. § 1409, when the application of the statute prevented his daughter from deriving citizenship) was alive; the father had been dismissed from the lawsuit, yet had not appealed the dismissal); *cf. id.*, at 449 ("Thus far, we have permitted third-party standing only where more 'daunting' barriers deterred the rightholder. To take an extreme example, in *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), we concluded that plaintiffs had third-party standing to assert the rights of their deceased parents. *Id.*, at 711- 712, 107 S.Ct., at 2080-2081.") (citation omitted).

¹² As a general matter, equitable estoppel forbids one party which prevents another from enjoying certain rights, from benefitting from the fruits of said prevention. *See generally Rhodes v. Guiberson Oil Tools*, 927 F.2d 876, 878 (5th Cir. 1991) (citations omitted).

v. Gonzales, 166 Fed.Appx. 769, 771 & n.3 (5th Cir. 2006) (not selected for publication) (assuming without deciding that the Government may be estopped from refusing to recognize the petitioner’s claim to citizenship; rejecting estoppel on the facts presented).¹³

¹³ This Court instructs that, in order for estoppel to lie against the Government, a party must—in addition to proving affirmative misconduct—also show: “(1) that the party to be estopped was aware of the facts, and (2) intended his act or omission to be acted upon; [and] (3) that the party asserting estoppel did not have knowledge of the facts, and (4) reasonably relied on the conduct of the other to his substantial injury.” *See Peacock v. United States*, 597 F.3d 654, 661 & n.3 (2010) (citation omitted). The Secretary does not adequately challenge the absence herein of any of these four factors, which are “traditional” elements of estoppel. *See id.*, at 661.

The first two elements are satisfied merely by Jose Angel Dominguez’s denaturalization. The third element is inapposite because the denaturalization was unjust. To the extent that the third element is interpreted as mandating an inquiry into whether Jose Angel Dominguez had knowledge, when he accepted work in Torreon, Mexico, that such work would lead to his denaturalization, said inquiry is—at the least arguably—foreclosed by the November 2003 restoration of the father’s citizenship, as well as by the recognition, in *Afroyim v. Rusk*, 387 U.S. 253 (1967), that it is unconstitutional to denaturalize a person who does not intend to renounce his citizenship. The fourth element is irrelevant because, at least after 1956, Jose Angel Dominguez was not a citizen. Therefore, he had no way of transmitting citizenship (through the derivative citizenship law, which requires that a parent be a citizen) to his son.

I. *This Court ought to hold that estoppel against the Government is available in citizenship cases.*

1. The district court cites *I.N.S. v. Pangilinan*, 486 U.S. 875, 883–84 (1987), and *United States v. Cervantes-Nava*, 281 F.3d 501, 505 n.8 (5th Cir.), *certiorari denied*, 536 U.S. 914 (2002), for the proposition that the Government cannot be estopped in any judicial matter respecting citizenship. *See R.*, at p. 114; *R.E.*, at p. 9.¹⁴ It is conceded that the Supreme Court has instructed that the judiciary does not sit in equity with respect to matters of naturalization. *See Pangilinan*, 486 U.S., at 883–884; *Cervantes-Nava*, 281 F.3d, at 505 n.8 (citations to authorities omitted).¹⁵

¹⁴ Even outside of the citizenship context, estoppel against the Government is uncommon. But there is at least one Supreme Court case in which a governmental entity has been permitted to estop another. *See New Hampshire v. Maine*, 532 U.S. 742 (2001). Furthermore, there are several intermediate civil appellate decisions implicating estoppel against the Government. *See, e.g., Salgado-Diaz v. Gonzales*, 395 F.3d 1158 (9th Cir. 2005) (remanding for an evidentiary hearing in respect of whether the petitioner was wrongfully deported to Mexico and holding that, if he were, the Government may be estopped from employing the petitioner’s subsequent re-entry in order to prejudice the petitioner’s prospects for obtaining substantive immigration-related relief); *cf. Perez-Mejia v. Holder*, ___ F.3d ___, 2011 WL 1496990, at p. 9 (9th Cir., April 21, 2011) (“In essence, the evidence only indicates that the government was negligent in improperly granting Perez–Mejia LPR status. Perez–Mejia benefitted from that error. The government was not estopped from correcting the mistake when it was discovered.”). Where misconduct by the Government has been alleged, estoppel has been judicially applied so as to prevent the Government from collecting income taxes. *See Fredericks v. Commissioner of Internal Revenue*, 126 F.3d 433 (9th Cir. 1997). Or from interposing the statute of limitations as a bar to a tax refund lawsuit. *See Miller v. United States*, 500 F.2d 1007, 1010–1011 (2nd Cir. 1974); *see also Fredericks*, 126 F.3d, at 448 (furnishing a long list of cases in which Governmental agencies have been estopped by private litigants) (footnote omitted).

¹⁵ The *Pangilinan* Court explained:

Even assuming the truth of the Ninth Circuit’s unsupported assertion that “[i]n reviewing naturalization petitions, federal courts sit as courts of equity,” 796 F.2d, at 1102, it is well established that “[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.” *Hedges v. Dixon County*, 150 U.S. 182, 192, 14 S.Ct. 71, 74-75, 37 L.Ed. 1044 (1893). “A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law. . . .” *Rees v. Watertown*, 86 U.S. [19 Wall.] 107, 122, 22 L.Ed. 72 (1874). See also, *e.g.*, *Thompson v. Allen County*, 115 U.S. 550, 555, 6 S.Ct. 140, 142, 29 L.Ed. 472 (1885); 1 J. Story, *Equity Jurisprudence* § 19 (W. Lyon ed. 1918).

More fundamentally, however, the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers. See, *e.g.*, 28 U.S.C. § 1361; 28 U.S.C. § 1651. Rather, it has been given them as a specific function to be performed in strict compliance with the terms of an authorizing statute which says that “[a] person may be naturalized . . . in the manner and under the conditions prescribed in this subchapter, *and not otherwise.*” 8 U.S.C. § 1421(d) (emphasis added).

“An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.” *United States v. Ginsberg*, 243 U.S. 472, 474, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1917).

Or as we have more recently said: “Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship.” *Fedorenko v. United States*, 449 U.S. 490, 517, 101 S.Ct. 737, 752-753, 66 L.Ed.2d 686 (1981) (citation omitted).

Pangilinan, 486 U.S., at 883–884; *cf. Nguyen v. I.N.S.*, 533 U.S. 33, 71–72 (2001) (“The INS urges that, irrespective of whether § 1409(a) is constitutional, the Court cannot grant the relief petitioners request: the conferral of citizenship on terms other than those specified by Congress. There may well be ‘potential problems with fashioning a remedy’ were we to find the statute unconstitutional. See *Miller*, 523 U.S., at 451, 118 S.Ct. 1428 (O’CONNOR, J., concurring in judgment); *cf. id.*, at 445, n. 26, 118 S.Ct. 1428 (opinion of STEVENS, J.) (declining to address the question whether the Court could confer the sought-after remedy). Two Members of today’s majority said in *Miller* that this argument was dispositive. See *id.*, at 452-459, 118 S.Ct. 1428 (SCALIA, J., joined by THOMAS, J., concurring in judgment).” *Pangilinan* does not, of course, address the

Yet the Supreme Court has, in earlier precedents, left open the possibility that estoppel is appropriate in citizenship cases involving affirmative misconduct by the Government. *See I.N.S. v. Hibi*, 414 U.S. 5, 8–9 (1973) (“While the issue of whether ‘affirmative misconduct’ on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, 366 U.S. 308, 314, 315, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961), no conduct of the sort there adverted to was involved here.”).

2. This Court recently has assumed, without deciding, that, where Governmental actors engage in affirmative misconduct, the Government may be equitably estopped from denying citizenship. *See Miller v. Gonzales*, 166 Fed.Appx. 769, 771 & n.3 (2006) (not selected for publication) (“It appears Miller is attempting to argue that the government is estopped from denying him derivative citizenship. To make a successful estoppel claim, Miller must at least show affirmative misconduct on the part of the government. *Moosa v. I.N.S.*, 171 F.3d 994, 1004 (5th Cir. 1999). [Begin footnote 3:] We assume without deciding that the ‘INS can *ever* be estopped from enforcing immigration laws because of its misconduct.’ *Id.* at 1003 (citation omitted) (emphasis in original).”).

rightful response to a situation which is created by the Executive’s wrongful destruction of a citizenship.

3. The Dominguez case is distinguishable from others (in which the availability of estoppel against the Government has been repudiated). The Dominguez case involves an estoppel which is sought to be triggered by an unconstitutional exercise of state action. *Cf. Miller v. Albright*, 523 U.S. 420, 432–433 (1998) (Stevens, J., joined by Rehnquist, C.J., writing for the Court) (opinion of two Justices) (*Pangilinan* does not foreclose the recognition of derivative citizenship, where an element for its conferral is struck down as unconstitutional); *but see Miller*, 523 U.S., at 445 n.26 (rejecting the petitioner’s Fifth Amendment challenge to 8 U.S.C. § 1409, and “express[ing] no opinion” with respect to the argument advanced within the concurring opinion by Justice Scalia (in which opinion Justice Thomas joined), who would hold that the Court possesses no authority to confer citizenship as a remedy, in connection with the striking down of an unconstitutional citizenship law);¹⁶ *cf. Moosa v. I.N.S.*, 171 F.3d 994, 1003

¹⁶ The petitioner in *Miller* pressed an (unsuccessful) Equal Protection-based Fifth Amendment challenge to the constitutionality of 8 U.S.C. § 1409, the law governing the derivative citizenship of children born abroad, out of wedlock, of only one United States citizen parent. *See Miller*, 523 U.S., at 424. The *Miller* petitioner, who was born in the Philippines to a United States serviceman and to a Filipino mother, attacked the treatment under 8 U.S.C. § 1409 of children of United States citizen fathers and foreign mothers. The petitioner argued that the requirements imposed upon such children—as condition precedent(s) to the conferral of citizenship—are unconstitutional because they are not imposed upon the children of United States citizen mothers and foreign fathers. *See id.* (“Subject to residence requirements for the citizen parent, the citizenship of the former [children of citizen mothers and foreign fathers] is established at birth; the citizenship of the latter [children of citizen fathers and foreign mothers] is not established unless and until either the father or his child takes certain affirmative steps to create or

(5th Cir. 1999) (citing cases denying estoppel against the Government). If the idea of “affirmative misconduct”—the existence of which may be a condition precedent to the application of civil estoppel against the Government, *see Hibi*, 441 U.S., at 8–9—does not comprehend

confirm their relationship. Petitioner contends that the statutory requirement that those steps be taken while the child is a minor violates the Fifth Amendment because the statute contains no limitation on the time within which the child of a citizen mother may prove that she became a citizen at birth.”).

With respect to jurisdiction (as well as with respect to the remedial judicial power to recognize citizenship), Justice Stevens, joined by Chief Justice Rehnquist, and writing for the Court, explained:

It is of significance that the petitioner in this case, unlike the petitioners in *Fiallo*, see 430 U.S., at 790, n. 3, 97 S.Ct., at 1473, n. 3 is not challenging the denial of an application for special status. She is contesting the Government’s refusal to register and treat her as a citizen. If she were to prevail, the judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess. We therefore agree with the Court of Appeals that she has standing to invoke the jurisdiction of the federal courts. See 96 F.3d, at 1469-1470 (distinguishing *INS v. Pangilinan*, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988)). Moreover, because her claim relies heavily on the proposition that her citizen father should have the same right to transmit citizenship as would a citizen mother, we shall evaluate the alleged discrimination against him as well as its impact on her. See, e.g., *Craig v. Boren*, 429 U.S. 190, 193-197, 97 S.Ct. 451, 454-457, 50 L.Ed.2d 397 (1976).

Miller, 523 U.S., at 432–33 (footnote omitted).

Like the petitioner in *Miller*, Jose Dominguez seeks a declaration of his “pre-existing citizenship.” *Cf. id.* In accordance with the *Miller* decision, Jose Dominguez possesses standing to maintain his complaint, and the Court enjoys subject matter jurisdiction. *See id.*; *but see id.*, at 445 n.26 (rejecting the petitioner’s Fifth Amendment challenge to 8 U.S.C. § 1409, and “express[ing] no opinion” with respect to the argument advanced within the concurring opinion by Justice Scalia (in which opinion Justice Thomas joined), who would hold that the Court possesses no authority to confer citizenship as a remedy, in connection with the striking down of an unconstitutional citizenship law).

unconstitutional action, then, it is hard to see that the term carries any real meaning.

Furthermore, if one can never obtain recognition as a citizen by estoppel, then the Court would have to accept the fundamentally unjust premise that, even if Jose Angel Dominguez had been wantonly shot at by border guards in order that he not re-enter the United States, the residency (and parental citizenship at birth) requirements still could not be overcome.

4. The Second Circuit has held open the possibility of estopping the Government in citizenship cases featuring affirmative misconduct by the Government.

The Second and Eleventh Circuits have reasoned that the Government's erroneous denial of a citizen's entry (or right of entry) into the United States, might, in an appropriate instance, enable the citizen's children to derive citizenship in the face of the citizen's failure to satisfy the physical presence requirement. In *Drozd v. I.N.S.*, 155 F.3d 81 (1998), the Second Circuit reviewed (with apparent approval) an administrative Board of Immigration Appeals¹⁷ precedent which would permit estoppel, where immigration authorities misconstrue the law governing a citizen's right to

¹⁷ The Board of Immigration Appeals is the United States Department of Justice organ which is responsible for, *inter alia*, rendering final determinations about whether immigrants should be deported, *see* 8 C.F.R. 1003.1.

enter the United States, thereby preventing the citizen from entering the country and from accumulating physical presence:

In *Navarrete*, the issue before the BIA was whether a parent's constructive physical presence in the United States for the purpose of retaining her citizenship could also satisfy the physical presence requirement for transmitting citizenship to her foreign-born children. In a prior proceeding, an INS Special Inquiry Officer had determined that petitioners' mother, who had been prevented from entering and residing permanently in the United States by a government official's erroneous interpretation of the law, had constructively completed the necessary physical presence requirement to retain her United States citizenship. *See* 12 I. & N. Dec. at 142. In *Navarrete*, the BIA determined that but for this error, "[t]he same period of physical presence would have qualified [petitioners' mother] to pass on citizenship at birth to [the petitioners]." *Id.* Therefore, the BIA determined that the mother's constructive presence in the United States for retention of her citizenship could be applied also to satisfy the physical presence requirement to transmit citizenship to her children. *See id.*

Here, by contrast, Edward Drozd was not wrongfully prevented from entering the United States to satisfy the physical presence requirements. Despite Drozd's claims that the United States Consulate in Berlin prevented his father's entry back into the United States, the record indicates that consular officials requested documentation, and once Edward Drozd presented the documentation at the United States Embassy in Warsaw, he was issued a passport. Thus, *Navarrete* likewise fails to support Drozd's claim. Accordingly, we find the BIA's rejection of Drozd's claim of constructive physical presence was proper.

Drozd, 155 F.3d, at 88;¹⁸ *Tullius v. Albright*, 240 F.3d 1317, 1321 (11th Cir. 2001) (“Finally, in the instant case as in *Drozd*, there is no allegation here that appellant’s father was wrongfully or erroneously prevented by United States officials from entering the United States, as was the case in *Matter of Navarrete*, 12 I. & N. Dec. 138, 142 (BIA 1967) (distinguished in *Drozd*, 155 F.3d at 88).”) (emphasis added).¹⁹

5. The Ninth Circuit has held that a court may cure an unconstitutionally under-inclusive provision of a citizenship law by adjudging that citizenship applicants who are unconstitutionally denied citizenship under the provision, may nevertheless be recognized as citizens. *See Wauchope v. U.S. Department of State*, 985 F.2d 1407 (9th Cir. 1993).²⁰

¹⁸ As is discussed by the Second Circuit in *Drozd*, the view that estoppel is available in the citizenship context, has long been advanced by the Board of Immigration Appeals. *See, e.g., In re Gabor Tomas Nameth*, 2006 WL 3712557 (BIA 2006) (not selected for publication) (citing *Matter of Navarrete*, 12 I. & N. Dec. 138 (BIA 1967)).

¹⁹ Though Jose Dominguez’s First Amended Complaint does not speak of constructive physical presence, per se, *see R.*, at pp. 37–51, the estoppel claim is indistinguishable from a constructive physical presence claim.

²⁰ *Cf. United States v. Cervantes-Nava*, 281 F.3d 501, 504–505 (5th Cir.), *certiorari denied*, 536 U.S. 914 (2002) (“We will assume, *arguendo*, the unconstitutionality of the derivative citizenship statutes and will consider whether that assumed unconstitutionality would disprove the alienage element of the illegal re-entry conviction. That hypothetical inquiry leads us to conclude that if a court found the derivative citizenship statutes unconstitutional, it either would sever the more lenient residency requirement for citizen mothers of illegitimate children or would strike down the INA in its entirety. Neither remedy would result in Cervantes-Nava’s being granted citizenship. Because any judicial interpretation of the INA would classify him as an alien, the government has met its burden of proving his alien status even if the derivative citizenship statutes are unconstitutional.”).

The *Wauchope* Court determined that—because section 1993 of the Revised Statutes of 1874, the law governing the derivative citizenship status of two women born abroad of United States citizen mothers and foreign fathers, violated the Equal Protection Clause of the Fifth Amendment (because the law did not grant the women derivative citizenship, yet would have done so if they had been born of United States citizen fathers and foreign mothers)—the women ought to be declared to be United States citizens. The *Wauchope* Court explained that an equitable conferral of citizenship can rectify an unconstitutional benefit denial. *Cf. Wauchope*, 985 F.2d, at 1418 (“The United States draws too much from the [*I.N.S. v. Pangilinan* [, 486 U.S. 875 (1988)] Court’s holding. The Court’s holding precludes the judiciary from exercising its statutory powers of naturalization to redress *statutory* violations except in strict conformity with Congress’ authorizing legislation. It does not speak to the courts’ capacity to utilize traditional constitutional remedies to rectify *constitutional* violations. The United States reads *Pangilinan* to bar the courts from redressing constitutionally underinclusive statutes by extending their benefits to a disfavored class where the benefits in question are those of citizenship. *Pangilinan* does not support such a sweeping proposition.”) (emphases supplied).

Especially in light of *Wauchope*, Jose Dominguez respectfully contends that *Pangilinan* (and *Cervantes-Nava*) do not herein preclude estoppel. This is because herein the facts entail unconstitutional state action, forbidden by *Afroyim v. Rusk*, 387 U.S. 253 (1967).

II. The Government's denaturalization of Jose Angel Dominguez constitutes an act of affirmative misconduct which justifies the judicial excuse of the physical presence requirement at 8 U.S.C. § 1401(a)(7) (1952 version).

1. Jose Dominguez alleges that the stripping of his father's citizenship constitutes unconstitutional, affirmative misconduct, sufficient to justify the judicial excuse of the physical presence requirement at 8 U.S.C. § 1401(a)(7) (1952 version). *Cf. Dong Sik Kwon v. I.N.S.*, 646 F.2d 909, 923–24 (5th Cir. 1981) (en banc) (Fay, J., dissenting) (“The final point I would make with respect to *Hibi*, is that whatever else the elusive term ‘affirmative misconduct’ may mean, it most certainly must encompass a situation like that in *Suh* [*v. I.N.S.*, 592 F.2d 230 (5th Cir. 1979)] where the INS fails in its duty to provide the applicant alien with the information which the regulations and its own operating procedures require it to provide.”) (footnote omitted). The stripping of the father's citizenship severed him from his national community. It banished him, even if he could return to the United States for visits. It was cruel. It was a robbery. *Afroyim*, 387 U.S., at 267 (“To uphold Congress’ power to take away a man’s citizenship because he voted in a foreign election in violation of s 401(e) [8 U.S.C. § 1481(a)(5)] would be equivalent to holding that Congress has the power to

‘abridge,’ ‘affect,’ ‘restrict the effect of,’ and ‘take . . . away’ citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with the Chief Justice’s dissent in the Perez case [*Perez v. Brownell*, 356 U.S. 44 (1958)] that the Government is without power **to rob** a citizen of his citizenship under s 401(e).”) (emphasis added) (footnote omitted).

2. The denaturalization was affirmative misconduct because it violates the Fourteenth Amendment, which guarantees that a citizen may only lose his citizenship if: (1) he initially procured the same by fraud or unlawful means, *see Afroyim*, 387 U.S. at 267 n.23; or, (2) he voluntarily relinquishes it. *See Afroyim*, 387 U.S., at 268 (“The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”). The Government’s misconduct hindered both Jose Dominguez’s and Jose Angel Dominguez’s exercise of their

constitutional and statutory rights. The misconduct prevented Jose Dominguez from deriving citizenship pursuant to 8 U.S.C. § 1401(a)(7) (1952 version).²¹

2a. Jose Dominguez’s right to Equal Protection under the Due Process Clause of the Fifth Amendment also stands violated. This is because, without any valid basis (certainly, without any compelling basis), Jose Dominguez is being deprived of a citizenship right which other derivative citizens, who have not suffered—directly or indirectly—from Governmental misconduct, seamlessly are enjoying. Jose Dominguez is suffering impermissible unequal treatment, on account of his membership within a class of individuals, claiming citizenship, who have borne the brunt of Governmental affirmative misconduct.

²¹ In her reply brief below (yet not in her motion to dismiss), the Secretary baldly denies that the State Department has engaged in affirmative misconduct. *See* R., at p. 107 n.2 (“Without additional comment, Defendant explicitly denies that its finding that Plaintiff’s father relinquished his United States citizenship amounts to ‘affirmative misconduct.’ (*See* Opp., ECF 16 at 16) (“In its motion, the Defendant does not explicitly deny that it has previously engaged in affirmative misconduct.”)). But neither the Secretary nor the district court offers a convincing justification for the conclusion that Jose Angel Dominguez’s denaturalization was not affirmative misconduct.

The district court determines, ambiguously and without sufficient elaboration, that the “facts are simply too attenuated to support a claim of equitable estoppel even if the Court could consider it.” *Id.*, at p. 114; R.E., at p. 9.

The Secretary insists that the State Department’s denaturalization was not morally abhorrent. R., at p. 109. But she refuses to engage the matter in any real detail. *Cf. ibid.* She urges that the court “need not address this issue.” *Ibid.* Because Jose Dominguez “has failed to offer this Court a plausible reason to stray from the Supreme Court’s guidance against applying equitable principles to questions of citizenship.” *Ibid.*

The Court should engage in strict scrutiny herein because a fundamental right is at stake, the right to citizenship. *Cf. Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978) (under a Fourteenth Amendment Equal Protection analysis, a practice which restricts “fundamental rights” merits strict scrutiny). The Court should hold that the Government’s affirmative misconduct herein is perpetuation a violation of the Equal Protection Guarantee which inheres within the Fifth Amendment.

3. The defense (which is not raised within the Secretary’s amended motion to dismiss, or even within her reply) that the father’s denaturalization was effectuated under the color of Supreme Court rules of decision, does not prevent the denaturalization from being recognized as entailing affirmative misconduct.²²

Jose Dominguez has not located any case in which a Court has held that affirmative misconduct, sufficient to equitably estop the Government, can consist of an action which, at the time of its undertaking, was consistent with Supreme Court law. Yet he emphatically insists that the mere positivist

²² At the time, the denaturalization of Jose Dominguez was consistent generally with the casuistic gloss on United States nationality laws. *See, e.g., Perez v. Brownell*, 356 U.S. 44, 51–52 (1958) (discussing *Mackenzie v. Hare*, 239 U.S. 299 (1915)); *Perez*, at 58 n.8 (quoting *Perkins v. Elg*, 307 U.S. 325, 329 (1939)); *Perez*, at 61–62 (discussing *Savorgnan v. United States*, 338 U.S. 491, 501 (1950)).

One might say that *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), presaged *Afroyim*, yet the former decision came down in 1963, after the birth of Jose Dominguez.

legality of his father's denaturalization, cannot be a bar to any subsequent judicial treatment of the act as comprising affirmative misconduct.

That something is lawful in any particular country, during any particular era or time period, offers no unassailable assurance that the thing is not morally wrong. *Cf.* SAINT THOMAS AQUINAS, ON LAW AND NATURAL LAW: SUMMA THEOLOGIAE, 93, art. 3 (1271).

Although the context is not analogous to the present case, this is what the Rev. Dr. Martin Luther King, Jr. meant when he famously observed that everything that Adolf Hitler did against the Jews had been legal in Nazi Germany.

If legality were the dispositive barometer of right conduct, then Governmental support for (or acquiescence viz.) the practice of slaveholding, prior to the Civil War, could not be affirmative misconduct, perhaps on account of the original text of the United States Constitution itself (the 3/5ths clause, at Article I, Section 2, Paragraph 3, for example). More to the point, if affirmative misconduct can never exist where the Government acts under color of positive law, then, per *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (U.S. 1856), it would not have been affirmative misconduct for the Secretary to have refused each and every passport application filed by an

African-American prior to Reconstruction.²³ ²⁴ *Cf. id.*, at 404–405 (“The question before us is, whether the class of persons described in the plea in abatement [African-Americans; specifically, descendants of African slaves brought to the United States] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”).

But cannot all reasonable persons agree, that the act of refusing passports to African-Americans, solely upon account of their race and/or

²³ A practice of dispatching such refusals would likely have been lawful. *See United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) (“For many years after the establishment of the original constitution, and until two years after the adoption of the fourteenth amendment, congress never authorized the naturalization of any one but ‘free white persons.’ Acts March 26, 1790, c. 3, and Jan. 29, 1795, c. 20 (1 Stat. 103, 414); April 14, 1802, c. 28, and March 26, 1804, c. 47 (2 Stat. 153, 292); March 22, 1816, c. 32 (3 Stat. 258); May 26, 1824, c. 186, and May 24, 1828, c. 116 (4 Stat. 69, 310).”).

²⁴ The analogy to *Dred Scott* is very relevant. Just as the Fourteenth Amendment’s Nationality Clause was a repudiation of *Dred Scott*, *see Afroyim*, 387 U.S., at 262, so, too, *Afroyim* itself was a repudiation of *Perez v. Brownell*.

their origins, *is and always has been* morally abhorrent? (If there cannot be agreement on this, morality is relative, and slavery has only been abominable since about the Civil War, or, perhaps, the advent of British Abolitionism.)

The relativist argument is a fallacy. Without passing judgment upon any person, one should note that the unjustified subjugation of a group, has always been known to be immoral. By way of example, one can cite Christian Scripture. *See* EPISTLE OF SAINT JAMES 2:1 (“**My brethren, have not the faith of our Lord Jesus Christ, the Lord of Glory, with respect of persons.**”) (emphasis added).

Just so, the stripping of Jose Dominguez’s citizenship was affirmative misconduct because: (1) the (ultimately rescinded) denaturalization was morally abhorrent, tantamount practically to the banishment of a man who had done nothing wrong, simply accept employment with a municipal foreign government; and, (2) the denaturalization—like the errant holding of *Perez vs. Brownell*, 356 U.S. 44 (1958)—was a wrongful abrasion upon the father’s and Jose Dominguez’s substantive Fifth and Fourteenth Amendments rights. *Cf. Vance v. Terrazas*, 444 U.S. 252, 260 (1980). Each had/had been deprived of citizenship—which, emphatically, is life, liberty, and property—without due process of law. *Accord Ng Fung Ho v. White*,

259 U.S. 276, 284–285 (1922) (“To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.”).

Therefore, this Court must not hesitate to allow that the denaturalization of Jose Angel Dominguez may constitute affirmative misconduct. A final determination of misconduct *vel non* can be pronounced on remand, either in summary judgment proceedings or at trial. Since Jose Dominguez is the son of a United States citizen who—were it not for the unconstitutional affirmative misconduct of the State Department—would plausibly²⁵ have satisfied the applicable physical presence requirement at 8 U.S.C. § 1401(a)(7) (1952 version),²⁶ the trial court should,

²⁵ “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim for relief is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A claim for relief is implausible on its face when the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (citations to authorities, internal quotation marks, and footnotes omitted).

²⁶ Of course, there is no way to know for sure whether, had he not been unconstitutionally deprived of his citizenship, Jose Angel Dominguez would have

on motion or after trial, enter a judgment which confirms that Jose Dominguez derived United States citizenship at birth, pursuant to the Fifth and Fourteenth Amendments, and pursuant to 8 U.S.C. § 1401(a)(7) (1952).

4. The district court held that the “alleged facts are simply too attenuated to support a claim of equitable estoppel even if the Court could consider it.” *See R.*, at p. 114; *R.E.*, at p. 9. This is not so. The alleged facts directly militate in favor of estoppel.

Below, the Secretary objected that Jose Dominguez has not plead that his father had made attempts—after the denaturalization—at maintaining his physical presence within the United States. The Secretary supposes that the father could have attempted to obtain a visa or to attend school reunions. *See R.*, at p. 57.

The Secretary does not explain how Jose Angel Dominguez could be expected lawfully to accumulate the necessary physical presence time on any border crossing card. It is implied, however, that under the Secretary’s view, Jose Angel Dominguez would have done better herein if Jose Angel Dominguez had violated immigration laws by living illegally in the United

stayed/resided within the United States for the requisite statutory time period. Perhaps he would have moved to the United States and then been struck by a bus on the very next day. In this instance, Jose Dominguez would not have been born.

All the same, because the Government prevented Jose Angel Dominguez from residing within the United States, the Secretary should—as has been argued elsewhere—be estopped from demurring upon the physical presence rule.

States, prior to the birth of Jose Dominguez. The Secretary writes in her reply: “Defendant notes, however, that physical presence in the United States would have counted regardless of Plaintiff’s father’s status. Accordingly, any time Plaintiff’s father spent in the United States, whether as a citizen, on a visa, or even illegally, would have counted towards his ability to transmit citizenship under the statute.” R., at p. 108.

The Secretary also implies that—just as a party who asks for relief in equity must establish that he has been diligent and has not slumbered upon his rights, *see generally Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) (“It is a common maxim that equity is not intended for those who sleep on their rights.”), or, that he has mitigated his damages—Jose Dominguez ought to show that his late father actively endeavored to satisfy the ten-year residency requirement.

The Secretary’s objection is flawed because—as has been stressed, *supra*—the applicable ten-year physical presence period expired before the Supreme Court decided *Afroyim v. Rusk*, 387 U.S. 253 (1967), which overturned *Perez v. Brownell*. *Afroyim* held that, at least where citizenship is not procured by fraudulent means, the Constitution requires that, as a condition to the loss of citizenship, the citizen must intend to denaturalize.

Denaturalization must be the citizen's free act. *See Vance v. Terrazas*, 444 U.S. 252, 260 (1980).

The ten-year period encompassed by the physical presence requirement at issue herein finished running on October 9, 1962, the date of birth of Jose Dominguez. (In 1962, 8 U.S.C. § 1401(a)(7) conferred citizenship upon “a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.”) Because *Afroyim v. Rusk*, 387 U.S. 253, was not decided until 1967, it is beyond cavil that, at all material times (that is, at any time following the father's denaturalization, yet prior to the birth of Jose Dominguez), the father lacked a judicially cognizable incentive—insofar as passing citizenship onto Jose Dominguez is concerned—at attempting to satisfy the ten-year physical presence requirement. That is, after Jose Angel Dominguez's 1956 denaturalization, there was no way that the man could realistically have been expected to conceive of passing his stripped United States citizenship onto any of his (then-as-yet-unborn) children, exactly because there was no reasonably

available legal avenue—during the period spanning from 1956 to 1962—through which Jose Angel Dominguez could rationally have expected to regain his citizenship. The Secretary’s denaturalization made it impossible for Jose Angel Dominguez to act in order to satisfy 8 U.S.C. § 1401(a)(7) (1952 version). *Cf. Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (“Connelly [an employee of the Social Security Administration] erred in telling respondent [an applicant for Social Security benefits] that she was ineligible for the benefit she sought. It may be that Connelly erred because he was unfamiliar with a recent amendment which afforded benefits to respondent. Or it may be that respondent gave Connelly too little information for him to know that he was in error. But at worst, Connelly’s conduct did not cause respondent to take action, *cf. Federal Crop Insurance Corp. v. Merrill*, *supra*, or fail to take action, *cf. Montana v. Kennedy*, *supra*, that respondent could not correct at any time.”) (citations omitted).

5. In conclusion, it is not reasonable for Jose Dominguez to be held to the ten-year physical presence requirement. Because State Department authorities violated the Fifth and Fourteenth Amendments to the United States Constitution when they denaturalized the father, and because the father did not recover (and could not reasonably have expected to recover) his citizenship until *after* Jose Dominguez was born, the physical presence

requirement at 8 U.S.C. § 1401(a)(7) (1952 version) must not serve as an obstacle to the recognition of Jose Dominguez's derivative citizenship.

Nor, for that matter, should the Court decline to reverse the district court, upon the morally unjustifiable proposition that the Secretary cannot ever be estopped from denying a citizenship claim (or a passport application). Jose Dominguez's Fourteenth Amendment Citizenship right and his Fifth Amendment Due Process and Equal Protection rights, ought to be vindicated through the granting of an estoppel.

On remand, Jose Dominguez should be recognized as a citizen from birth. (The adjudication can be rendered in accordance with the principle, gleaned from the opinion of Justice Stevens in *Miller*, that *Pangilinan* does not necessarily prevent the entry of a judicial decree that a plaintiff has been a citizen from birth. *Cf. Miller*, 523 U.S., at 432–433.)

CONCLUSION AND PRAYER

Wherefore, premises considered, the Plaintiff-Appellant, Jose Angel Dominguez-Gonzalez, prays that the Court reverse the dismissal of the Plaintiff-Appellant's civil action, and that the Court remand this appeal for a trial upon the merits or other motions practice, and for such other and further relief to which the Plaintiff-Appellant is justly entitled.

Respectfully submitted,

Date: May 12, 2011

/s/ Matthew Paul Nickson

Matthew Paul Nickson
Texas Bar Number 24056043
1300 McGowen
Houston, Texas 77004
Tel.: (713) 655-8880
Fax: (713) 655-0405
***Counsel of Record for
Plaintiff-Appellant***

Jorge Aristotelidis
Texas Bar Number 00783557
DEMOTT, MCCHESENEY,
CURTRIGHT & ARMENDARIZ, L.L.P.
800 Dolorosa, Suite 100
San Antonio, Texas 78207
Tel. (210) 590-1844
Fax (210) 590-1845
***Counsel for Plaintiff-
Appellant***

STATEMENT REGARDING RELATED APPEALS

There are no known related appeals.

Date: May 12, 2011

/s/ Matthew Paul Nickson

Matthew Paul Nickson

CERTIFICATE OF SERVICE

I, Matthew Paul Nickson, certify that, on May 12, 2011, a true and correct copy of the Plaintiff-Appellant's Brief in Support of the Plaintiff-Appellant was served via Appellate CM/ECF upon the following counsel of record for Hillary Rodham Clinton, Secretary of State of the United States of America:

Mr. Gary Layton Anderson
United States Department of Justice
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

Mr. J. Max Weintraub
United States Department of Justice
Office of Immigration Litigation
Civil Division
Post Office Drawer 868, Ben Franklin Station
Washington, D.C. 20044

/s/ Matthew Paul Nickson

Matthew Paul Nickson
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH FED.R. APP. PROC. R. 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED.R. APP. PROC. R. 32(a)(7)(B) because:

–this brief contains 8,928 words, including the electronic signature and excluding the parts of the brief exempted by FED.R. APP. PROC. R. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED.R. APP. PROC. R. 32(a)(5) and the type style requirements of FED.R. APP. PROC. R. 32(a)(6) because:

–this brief has been prepared in a proportionally spaced typeface, using Microsoft Word 2003 (and/or Word 2007) in fourteen point font (twelve point for footnotes) in the Times New Roman style.

3. The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limits in FED.R. APP. PROC. R. 32(a)(7) may result in the Court’s striking the brief and imposing sanctions against the person signing the brief.

4. The undersigned has provided an electronic version of the brief to the Court and the Respondent.

Dated: May 12, 2011

/s/ Matthew Paul Nickson

Matthew Paul Nickson
Attorney for Plaintiff-Appellant