

No. 09-5801

In The
Supreme Court of the United States

—◆—
RUBEN FLORES-VILLAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
REPLY BRIEF
—◆—

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SUMMARY

Congress's scheme for transmission of citizenship by citizen fathers to non-marital children denies fathers equal protection because it imposes on men a 10-year, age-calibrated residence requirement – insurmountable here – while requiring, without age restrictions, a single year's residence for women. That sex-discrimination survives neither heightened nor rational basis review, and the Court may remedy it based on the INA's strong severability provision. Because fathers and mothers of non-marital children are similarly situated as to risk of statelessness of their children and because single-parent households headed by citizen men or women lack the foreign influence of an alien spouse, extending the residence requirement applicable to women to men is proper.

The Solicitor General claims that Congress undertook this sex-discrimination to avoid statelessness of non-marital children *at birth*. The suggestion that statelessness played *any* role in the imposition of the discriminatory scheme is pure conjecture, as demonstrated by his inability to quote statelessness discussions in the 1940 hearings.

Nor is there any rational, let alone exceedingly persuasive, basis to seek to avoid statelessness arising at birth yet to be indifferent to that “deplored” state if it arose later (during minority). Even if Congress deliberately drew that distinction, it would not justify the discrimination as men, too, are at risk of

having non-marital children who are stateless at birth.

The Solicitor General's arguments that the Court should either refuse to remedy the sex-discrimination or offer only prospective relief fail. His argument that there is no authority to grant relief overlooks the severability clause which contains no exceptions. Prospective "relief" is constitutionally impermissible: it offers Petitioner no remedy. The Solicitor General also exaggerates the scope of requested relief and overlooks the fact that children raised by single citizen-parents are more likely to be imbued with American values than foreign-born children of mixed-nationality marriages.

The attempt to avoid the issue based on third-party standing is meritless. Petitioner has standing because the discriminatory residence requirements enforced against Petitioner during his criminal prosecution indirectly resulted in the violation of his father's equal protection rights. Petitioner's father was also hindered from protecting his rights because he could not intervene in the prosecution, had no economic incentives to initiate separate proceedings, would have exposed his son to removal or prosecution if he had, and any efforts would interfere with Congress's preferred procedures. Petitioner is the "least awkward challenger" and "obvious claimant."

ARGUMENT

I. PLENARY POWER DOES NOT MANDATE LESSER SCRUTINY.

The Court should not undertake the deferential review described in *Fiallo v. Bell*, 430 U.S. 787 (1977), because *Fiallo* addressed only “the admission of aliens,” *id.* at 792, and Congress’s immigration power remains “subject to important constitutional limitations.” *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).¹ The Solicitor General ignores the latter point, but challenges the former, asserting inherent sovereignty, the power to exclude aliens, and the need for flexibility in the political branches. Br.U.S. 17-18.

Those considerations are most persuasive when, as in *Fiallo*, the question is the admission of aliens. The claim that citizenship at birth is indistinguishable from naturalizing an alien, Br.U.S. 19-20, contravenes a tradition predating the Constitution,² adopted by the First Congress,³ and continued in the 1940 hearings,⁴ that considers grants of citizenship at birth

¹ Pet.Br. 15-19.

² *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927) (traditionally, English subjects’ foreign-born children “were[, at birth,] deemed natural-born subjects of that kingdom. . .”).

³ Act of Mar. 26, 1790, ch.3, 1 Stat.104 (defining citizens by birth abroad as “natural born citizens”).

⁴ *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 414 (printed 1945) (*1940 Hearings*) (foreign-born

(Continued on following page)

equivalent to natural-born citizenship, rather than akin to naturalization by an alien. Neither persuasive argument nor precedent supports abandonment of that venerable tradition.

II. THE GOVERNMENT FAILED TO MEET ITS BURDEN TO DEMONSTRATE THAT AVOIDING STATELESSNESS AT BIRTH WAS CONGRESS'S ACTUAL PURPOSE.

Under intermediate scrutiny, legislation may be sustained only based on its “actual” purpose. *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). Lacking any specific statement indicating Congress’s discrimination against fathers of non-marital children was animated by statelessness concerns, the Solicitor General invokes the “evolution of this country’s naturalization laws” and urges inferential leaps from tangential citations to legislative history. Br.U.S. 25-30. The legislative history reveals no evidence that statelessness concerns impelled the differential residence criteria. Rather, the 1940 hearings suggest a distinction informed by sex-based stereotypes.

citizens at birth “have never been termed ‘naturalized citizens.’”).

A. The Legislative History Reveals No Special Concern Regarding Statelessness.

The Solicitor General piles inference upon inference in an effort to conjure up a Congressional goal of avoiding statelessness by way of an expansive reading of a source cited in the legislative record. Br.U.S. 28 (citing Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935)). As the *Brief of Amici Curiae Scholars on Statelessness*, 16-19, demonstrates, the Sandifer survey of 30 countries does not purport to address a concern that non-marital children of citizen mothers and alien fathers would be stateless. *Id.* 16. Not only would such a claim be inaccurate, *id.* 16-17, to the extent the survey supports an inference of a statelessness issue, that inference would also apply to citizen fathers' non-marital children. *Id.*; Sandifer 254, 257-259.⁵ The Solicitor General offers no evidence that any 1940 Hearings participant shared his interpretation of Sandifer.

The Solicitor General's citations to the 1933 and 1940 hearings are based upon inferential leaps of

⁵ The majority rule was that the child took the father's nationality upon legitimation. Sandifer 259. In some nations, including China, legitimation by a U.S. citizen father would deprive the child of its mother's nationality. Pet.Br. 30 n.10. "[A]pproximately 40% of the *jus sanguinis* population [was] contributed by China." Sandifer 257.

similar magnitude. First, he cites a rejected – and never revived – gender-neutral 1933 proposal that would have conferred U.S. citizenship on foreign-born, non-marital children if there was “no other legal parent under the law of the place of birth. . . .” Br.U.S. 29 (quoting *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization, 73d Cong., 1st Sess. 8-9 (1933)* (“1933 Hearings)). His assertion that “the issue of statelessness had been discussed as early as 1933,” *id.*, is unsupported by any mention of statelessness in this citation.

His second 1933 citation is equally unavailing. Although statelessness was discussed “in the context of English-American marriages,” *id.*, the issue raised had nothing to do with non-marital children: it concerned an English woman losing her nationality upon marriage to an American. *1933 Hearings* 54-55.

The Solicitor General asserts, without quotation, that “[t]he issue was raised again in the *1940 Hearings* (at 43).” Br.U.S. 29. His citation refers to non-marital births to women, but does not mention statelessness. *1940 Hearings* 43. Rather, a State Department official observes that the “object” of the scheme is to “give[] citizenship to those unfortunate children who are born illegitimately to American mothers.” *Id.* The term “unfortunate” is far too general to connote the specific misfortune of statelessness. Because

many foreign-born, non-marital children of women had nationality (i.e., if born in *jus soli* states), “giv[ing] citizenship” does not imply curing statelessness. Rather, the official generically characterizes such children as “unfortunate,” invoking the traditionally disfavored status of illegitimacy, consistent with the Administration’s endorsement of the coverture-inspired stereotype of maternal responsibility for non-marital children. *Id.* 431. *See Nguyen v. INS*, 533 U.S. 53, 91 (2001) (“The history of sex discrimination in laws governing the transmission of citizenship and with respect to parental responsibilities for children born out of wedlock counsels at least some circumspection in discerning legislative purposes in this context.”) (O’Connor, J., dissenting).

Finally, the Solicitor General cites a 1952 Senate Report explaining an amendment deleting a provision conditioning transmission of nationality by an unwed mother on the lack of legitimation by the father. Br.U.S. 29-30. That amendment had nothing to do with the differential residence criteria. Pet.Br. 37. Moreover, it was offered concurrently with a slight increase in the residence criterion applied to mothers of non-marital children, Br.U.S. 29-30, which belies the Solicitor General’s contention that avoiding statelessness motivated Congress: that amendment incrementally increased such risks.

Nor is there record support for the Solicitor General’s new refinement of his argument: the notion that Congress was concerned with statelessness *at birth* only. That statelessness is “‘deplored’” and can

have “‘disastrous consequences,’” Br.U.S. 24 (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Op. of Warren, C.J.)), provides no rationale for choosing to avoid it at birth while taking no steps to protect children who might become stateless, a risk the government concedes. See *Respondents’ Brief, Nguyen v. INS*, 2000 WL 1868100, *18 n.9. Accord *Statelessness Scholars* 7-15. Nor does discriminating against fathers make sense: in cases where a father need only be known for nationality to pass through him, *Statelessness Scholars* 8-11, naming a citizen father on the foreign birth certificate would likely render the child stateless at birth if the father cannot transmit citizenship under U.S. law. The same inference obtains in countries where citizenship would pass through the citizen-father if he registers the non-marital child, or if both parents register together. See Sandifer 259 (citing seven countries). Finally, a non-marital child born in a *jus sanguinis* country of which neither parent is a citizen is likely stateless at birth regardless of which parent is a U.S. citizen. *Statelessness Scholars* 12 (as of 1940, three dozen countries did not permit female citizens to transmit nationality to a non-marital, foreign-born child with a foreign father).⁶

⁶ Confining statelessness concerns to the moment of birth makes little practical sense. “[I]n 2000 alone, some 50 million births went unregistered – over 40 per cent of all estimated births worldwide that year.” UNICEF, *Factsheet: Birth Registration*, <http://www.unicef.org/newsline/2003/03fsbirthregistration.htm> (last visited Sept. 23, 2010). Registration, which may occur years

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B. Congress Adopted Residence Requirements in Response to Stereotype-Based Concerns Whether Foreign-Born Children Would Be Raised as Americans.

Unlike the Solicitor General’s conjectures, substantial evidence demonstrates Congress relied on gender stereotypes in adopting discriminatory residence-requirements. Beginning in 1933, the record reveals concerns regarding the American character of children born abroad, *1933 Hearings* 9-10, that coincided with changes in U.S. law permitting women to transmit citizenship, and which were based on beliefs that citizen women married to foreign nationals would be so unlikely to inculcate their foreign-born children with American values that the children would be “essentially alien in character.” *Id.* 9. Those concerns persisted through the 1940 hearings and informed Congress’s assessment of residence requirements.

When the foreign-born child had two citizen-parents, the proposed code recommended the traditional minimal criterion – pre-birth U.S. residence for any length of time – because it was “altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in

after birth, is “fundamental to . . . [s]ecuring the child’s right to a nationality. . . .” *Id.*

character.” *1940 Hearings* 422-23. Thus, some prior U.S. residence and a home in which there was no foreign influence – both parents being citizens – were sufficient.

In the Committee’s view, foreign-born children of mixed-nationality marriages “present[] greater difficulties and require[] correspondingly stricter limitations.” *Id.* 423. It recommended “stricter limitations” – a 10-year residence requirement – reflecting the view that “[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character.” *Id.* 426. The Committee thought it unlikely that children of mixed-nationality marriages would be raised as American and learn English “where the citizen parent who is married to an alien resides abroad for reasons having no connection with the promotion of American interests.” *Id.* 427.

That conclusion was informed by gender-based stereotypes. The Committee noted that, in passing 1934 legislation allowing women who married aliens to confer citizenship, “Congress apparently took into consideration the fact that persons born in foreign countries whose fathers were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States . . . ” and therefore imposed a 5-year residence requirement on foreign-born children. *Id.* 409. *Accord id.* 421. *See also 1933 Hearings* 9. Although the 5-year requirement applied to children of citizen-fathers and mothers, its articulated rationale concerned citizen

mothers deferring to foreign fathers. *1940 Hearings* 409, 421. The 10-year residence requirement was viewed as “strengthening” Congress’s response to this “problem.” *Id.* 409.

Congress’s concern that the American character of the child’s upbringing would be compromised if the child was raised in a mixed-nationality household was inapplicable if the child was born to two U.S. citizens⁷ or to an unwed mother. As to non-marital children, the assumption was the mother was the sole parent. *Id.* 63 (“If the child has only one legal parent, because it is illegitimate, if that parent, the mother, is a national, the child acquires nationality.”). *Accord id.* 62. The Committee adopted this view, invoking a tradition “under American law [in which] the mother has a right to the custody and control of [a non-marital] child as against the putative father, and is bound to maintain it as its natural guardian.” *Id.* 431 (quotation omitted). In *Miller v. Albright*, the government correctly conceded Congress relied upon “an assumption that the citizen mother would probably have custody.” 523 U.S. 420, 430 n.8 (1998) (Op. of Stevens, J.). Because the mother assumedly had custody, Congress’s concerns regarding influential foreign fathers, *1940 Hearings* 409, 421, were inapt,

⁷ Respondent repeatedly, and misleadingly, claims that stringent residence requirements apply to “all other citizen parents (married and unmarried).” Br.U.S. 30. *See id.* 20-23, 31, 40, 45, 48. No significant residence requirement applies when both married parents are citizens. 8 U.S.C. §1401(c).

eliminating any need for an expanded residence requirement. Congress effectively treated single-parent families headed by citizen mothers identically to two-citizen parent families.⁸

The only reason to assume that an unwed father is more like mixed-nationality parents – to whom the expanded residence-requirement applies – than an unwed mother or a two-citizen household is the assumption that the father will not be the custodial citizen-parent of his non-marital child. That postulate is the flipside of Congress’s stereotypical “assumption that the citizen mother would probably have custody.” *Miller*, 523 U.S. at 430 n.8.

III. EVEN IF AVOIDING STATELESSNESS IS THE ACTUAL PURPOSE, THE REQUISITE “FIT” IS LACKING.

Even if the sex-discrimination was adopted to avoid statelessness at birth, the government has not demonstrated an “‘exceedingly persuasive justification,’” *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994), that is “substantially related to the achievement of [important government] objectives.” *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Citizen men, too, have non-marital children who are stateless at birth, and the Solicitor General offers no reason why Congress would seek to avoid statelessness

⁸ Government counsel said as much below. *Excerpt of Record*, Vol. I, 9th Cir. Case No.07-50445 127.

arising at birth yet be indifferent to that “deplored” state if it arose afterward (and during minority).

The Solicitor General’s contention that “Petitioner does not seriously challenge the accuracy of [his] assessment of the risk that unwed U.S. citizen mothers would give birth abroad to stateless children,” Br.U.S. 33, is half-true: there was *a* risk, but not demonstrably greater for mothers than fathers.⁹

Petitioner also disputes the Solicitor General’s claims that “the only parent legally recognized at the time of [non-marital] birth was the mother,” *id.* 32 (citing Sandifer 258 & n.38), and that “the only parent eligible to transmit citizenship *at the time of birth* in a country in which citizenship was based on the citizenship of a parent was the mother.” *Id.* 32-33. Sandifer addresses transmission of nationality – explaining both parents of a non-marital child may do so in some countries and are prevented from doing so in others – not which parent is “legally recognized.” The government’s latter assertion, unsupported but oft-repeated, is incorrect. *Statelessness Scholars* 8-11. The laws of several countries look to fathers of non-marital children to transmit nationality at birth when they are known. *Id.* Thus, the Solicitor General’s “critical point” that non-marital children of citizen fathers are “unlikely to be born stateless

⁹ *Statelessness Scholars* 7-22. Even if mothers’ risk was greater, empirical evidence cannot justify the sex-discrimination. See *Craig v. Boren*, 429 U.S. 190, 201-03 (1976).

because the child will have the citizenship of his mother,” Br.U.S. 34, is mistaken,¹⁰ precluding a finding that the “at birth” distinction he urges provides even a rational basis for the sex-discrimination here.

The Solicitor General does not explain why Congress would avoid statelessness at birth yet tolerate it arising later, as may occur when a father legitimates yet cannot transmit citizenship due to the residence criteria.¹¹ Rather, he posits a punitive scheme under which “a legislature may impose consequences on a child based on his father’s choice of residence, or his choice¹² of whether to establish paternity.” *Id.* at 34-35 (citing *Chin Bow*, 274 U.S. at 669, and *Lehr v. Robertson*, 463 U.S. 248, 264 (1983)). In *Chin Bow*, 274 U.S. at 669, the “consequence[]” of denying transmission of citizenship was justified by the father’s failure ever to live in the United States. In *Lehr*, the “consequence[]” of denial of notice of his child’s adoption was justified by Lehr’s failures to “establish[] a substantial relationship with his daughter,” 463 U.S. at 267, or even “mail[] a postcard

¹⁰ *Statelessness Scholars* 8-15 (identifying scenarios in which a foreign-born, non-marital child would not acquire the mother’s nationality).

¹¹ The Solicitor General’s citations, Br.U.S. 24, demonstrating that statelessness is “deplored,” *Trop*, 356 U.S. at 102, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), involve post-birth expatriation.

¹² Paternity may be established without “choice,” as when the father is merely known. *Statelessness Scholars* 8-11.

to the putative father registry.” *Id.* at 264. That “consequences” were employed to further legitimate goals in *Chin Bow* and *Lehr* hardly supplies an “exceedingly persuasive justification” for imposing the “consequence[.]” of statelessness upon a father’s child because the father accepted paternal responsibility by legitimating.

Discouraging acceptance of paternal responsibility contravenes the interests furthered by 18 U.S.C. §1409(a)(4), which *requires* paternal filiation. *Nguyen*, 533 U.S. at 64-70. Congress sought to advance a “profound” governmental interest, *id.* at 67, in ensuring that the father of a potential citizen had the opportunity to form a “relationship . . . that consists of the real, everyday ties that provide a connection between the child and citizen parent and, in turn, the United States.” *Id.* at 65. *Accord id.* at 70.

But the Solicitor General claims that Congress also took the opposite tack, and he condemns some fathers who legitimate their non-marital children during minority as “inflict[ing] statelessness” on their children when they legitimate in countries that require transmission of nationality by a known or legitimating father. Br.U.S. 33. Perhaps Congress sought both to promote and discourage legitimation of non-marital children depending upon whether the father had met an age-calibrated residence requirement. But if that is so, then a Congress engaging in that sort of double-think on the merits of paternal filiation has not offered an “‘exceedingly persuasive

justification,'” *J.E.B.*, 511 U.S. at 136, for the sex-discrimination here nor even acted rationally.

The Solicitor General also discusses supposed distinctions in other countries’ laws regarding transmission of nationality, incorporating again the mistaken assumption that fathers of non-marital children transmit nationality only after birth. Br.U.S. 36-39. He argues that *Nguyen* supports the discrimination here as Congress could have taken into account that mothers of non-marital children are easily identified and “recognized as having a parental relationship with the child by virtue of birth alone. . . .” *Id.* 38 (citing *Nguyen*, 533 U.S. at 62). He asserts that “[i]f that mother is not permitted to transmit her citizenship to her child at that time or at all, her child may be stateless.” *Id.*

The Solicitor General’s contention is flawed because Congress was not differentiating between *all* potential citizen fathers and mothers of non-marital children when it adopted its discriminatory residence criteria: the relevant population of non-marital fathers under section 1409(a) is those who legitimate during minority. Thus, “potential problems of proof and paternal inaction,” *id.*, cannot justify discrimination against fathers who legitimate during minority; they have proof and they have acted. As to those fathers, a mother may not be able to transmit citizenship to their non-marital child or, if she did at one point, citizenship may be lost. *Statelessness Scholars* 8-9. In the Solicitor General’s terms, “[i]f that [father] is not permitted to transmit [his] citizenship to [his]

child at that time or at all, [his] child may be stateless.” Br.U.S. 38.¹³

The government claims Congress relied upon “the *legal* reality . . . that an unwed mother is established at the time of her child’s birth as the child’s legal parent while the unwed father usually is not,” insisting that the “Court acknowledged that reality in *Nguyen*. . . .” Br.U.S. 39-40 (citing *Nguyen*, 533 U.S. at 63). Rather, *Nguyen* held Congress acknowledged *biological* reality by imposing a legitimation requirement on men: because a father “might not even know of conception,” legitimation ensures “some opportunity” for a father/child relationship. 533 U.S. at 66. The residence requirements provide no “reasonable substitute,” *id.*, accounting for similar biological differences. Thus, *Nguyen* provides no support for elevating “legal reality” – itself derived from stereotypes¹⁴ – to the level of the neutral, immutable biological realities that informed that decision. Providing beneficial treatment to women because they are denominated the “legal parent,” by discriminatory, patriarchal systems of other nations, advances no legitimate

¹³ The Solicitor General observes it is less likely today for a child to lose the mother’s nationality as a consequence of subsequent paternal legitimation. Br.U.S. 35. That is no “exceedingly persuasive justification” for discriminating in 1940 and 1952. Even today, non-marital children of citizen fathers risk statelessness. *Statelessness Scholars* 8-11.

¹⁴ See *id.* at 91-92 (O’Connor, J., dissenting).

interest. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003).

Nor was Congress faced with a unitary “legal reality”; it was (and is) also a “legal reality” that non-marital children of fathers who legitimate during minority risked statelessness. There is no “exceedingly persuasive justification” for ignoring that “legal reality.”

Finally, Petitioner does not argue the Constitution requires elimination of all statelessness. Br.U.S. 40-42. The scheme denies equal protection because disparate levels of protection against statelessness turn on parental gender. The protection provided women is not complete, and Petitioner’s father asks for no better. *See Califano v. Westcott*, 443 U.S. 76, 89 (1979) (“Congress may not legislate ‘one step at a time’ when that step is drawn along the line of gender. . . .”).¹⁵

¹⁵ It is no more equal treatment to insist that non-marital children of men seek secondary routes to citizenship, *see* Br.U.S. 42-44, while non-marital children of women are granted citizenship at birth, than it was to offer one high-quality university to men and an inferior one to women in *Virginia*, 518 U.S. at 553.

IV. THE PROPER REMEDY IS EXTENSION TO NON-MARITAL FATHERS ONLY.

The Solicitor General urges prospective nullification¹⁶ of the residence requirement applicable to women, Br.U.S. 45-51, acknowledging that retrospective nullification would be improper because “[o]nce citizenship is properly conferred, Congress ordinarily may not take it away.” *Id.* 48. But his proposed remedy is equally improper because every right must have a remedy, *Marbury v. Madison*, 5 U.S. 137, 163 (1803), and prospective nullification provides no relief for those injured by the 1940 and 1952 Acts. *See Welsh v. United States*, 398 U.S. 333, 362-64 (1970) (Harlan, J., concurring).¹⁷ Transmission of citizenship by non-marital fathers in the future is subject to different legislation, not before the Court. *See Immigration and Nationality Act Amendments of 1986*, Pub.L. 99-653, §12, 100 Stat. 3655, 3657.

¹⁶ No case supports this proposed non-remedy. Br.U.S. 51. *Heckler v. Mathews* is inapposite as Congress expressly preferred nullification over extension, 465 U.S. 728, 739 n.5 (1984), and *Mathews* found an “exceedingly persuasive justification” supported Congress’s limited re-institution of a gender-biased scheme. *Id.* at 746. Significantly, *Mathews* was not left remediless: he could seek “withdrawal of benefits from the favored class,” *id.* at 740, yet the citizenship “benefit” cannot be withdrawn. Br.U.S. 51.

¹⁷ If prospective relief is granted, the conviction cannot stand as, contrary to Respondent’s claim, Br.U.S. 52, the constitutional violation is not cured. *Welsh*, 398 U.S. at 362-63 (Harlan, J., concurring) (citing *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239 (1931)).

Indeed, extension, not nullification, is the preferred course, and “a strong severability clause . . . counsels against nullification.” *Westcott*, 443 U.S. at 89-90. “[T]he choice between extension and nullification is within the constitutional competence of a federal court. . . .” *Mathews*, 465 U.S. at 739 n.5 (quotations omitted), and while the Solicitor General contends that “Congress is best positioned to structure the balance between the possibility of statelessness and appropriate limits on naturalizing aliens,” Br.U.S. 46, Congress may invoke “the constitutional competence” described in *Mathews* and did so in the severability clause.¹⁸

The Solicitor General argues that extension “would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States.” *Id.* 48. But the Solicitor General offers no evidence that the number of beneficiaries is large, and discounts the strong likelihood that non-marital children of citizen fathers claiming citizenship under section 1409 will have strong U.S. ties. Only children legitimated during minority could claim citizenship at birth, ensuring proof of “a biological parent-child relationship,” *Nguyen*,

¹⁸ *INS v. Pangilinan*, 486 U.S. 875 (1988) and *United States v. Ginsberg*, 243 U.S. 472 (1917), Br.U.S. 47, are inapposite as involving naturalization of aliens, not citizenship at birth, and do not consider a severance clause. Petitioner, unlike *Pangilinan*, does not invoke “equitable” relief.

533 U.S. at 62-64, and an “opportunity for a tie between citizen father and foreign born child.” *Id.* at 66.¹⁹ Because legitimation is often accomplished by an affirmative paternal act, extension could provide greater evidence of a parent-child connection when the parent is a father.

A. Because Custodial Fathers of Non-Marital Children Are Equally Adept at Inculcating American Values, Extension Is Proper.

“[T]his Court has often concluded that, in the absence of legislative direction *not* to sever the infirm provision, ‘extension, rather than nullification,’ of a benefit is more faithful to the legislative design.” *Nguyen*, 533 U.S. at 96 (O’Connor, J., dissenting) (quoting *Westcott*, 443 U.S. at 89-90) (additional citations omitted). Because the actual purpose of the residence requirement was to “ensure[] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship,” Br.U.S. 31, not to avoid statelessness, Pet.Br. 35-38, and, *supra*, 4-12, extension is the proper remedy as it is consistent with the “legislative design” of “ensuring . . . a sufficient connection

¹⁹ Current law imposes additional requirements upon non-marital fathers. See 8 U.S.C. §§1409(a)(1) (clear and convincing evidence of “a blood relationship between the person and the father”), and (a)(3) (agreement to provide financial support while the child is under 18).

to the United States. . . .” Br.U.S. 31. Because fathers of non-marital children are similarly situated to mothers as to that connection, one year’s residence is sufficient connection for both.

Sex discrimination cannot be based upon “overbroad generalizations,” *see Virginia*, 518 U.S. at 533, yet the discriminatory scheme here is based on precisely that, Congress’s “assumption that the citizen mother would probably have custody.” *Miller*, 523 U.S. at 430 n.8 (Op. of Stevens, J.). While the facts of Petitioner’s case make it clear that the stereotype is not always accurate, even empirical support for the assumption “cannot suffice to justify the denigration of the efforts of [men] who do [raise their non-marital children as single parents].” *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). *Accord Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 151 (1980).

Because both mothers and fathers may raise their non-marital children in single citizen-parent households without foreign influence, extending the benefit to fathers of non-marital children will not “disrupt[] the statutory scheme” that was designed to ensure an American background despite the influence of a foreign parent. *See Welsh*, 398 U.S. at 365 (Harlan, J., concurring). *Accord Mathews*, 465 U.S. at 739 n.5. Extension is consistent with the Court’s general rule in favor of that remedy, *Westcott*, 443 U.S. at 89, and avoids burdening “the innocent recipients of government largesse,” *id.* at

90, unlike the government's proposed remedy of prospective nullification of section 1409(c).²⁰

B. Fathers of Non-Marital Children, Not Parents In Mixed Nationality Marriages, Are Similarly Situated to Unwed Mothers As to Both Statelessness Risks And Lack Of Foreign Influence.

If avoiding statelessness was Congress's genuine motivation for the sex discrimination, that would, in the Solicitor General's view, require the Court to consider Congress's balance of avoiding of statelessness with limiting acquisition of citizenship at birth. Br.U.S. 46. If that balance informs the Court's analysis of "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional," *see Welsh*, 398 U.S. at 355-56 (Harlan, J., concurring), it supports extension.

Fathers of legitimated non-marital children are similarly situated to mothers of non-marital children as to both factors specified by the Solicitor General. Fathers of non-marital children, like mothers, run the (conceded) risk that their offspring will be stateless. *Respondent's Brief, Nguyen v. INS*, 2000 WL 1868100,

²⁰ Because parents in mixed-nationality marriages are not similarly situated to single, citizen-parents, relief would not extend to them.

*18 n.9. Similarly, when citizen fathers raise non-marital children, those families, like their maternally-headed counterparts, are less subject to foreign influence, making an American upbringing likely. A Congress that wished to avoid statelessness of the non-marital children of its citizens, and which did not entertain a stereotypical view that mothers, not fathers, raise non-marital children, would plainly prefer extension to non-marital fathers over frustration of its efforts to benefit similarly situated mothers. See *Westcott*, 443 U.S. at 90 (“[A] strong severability clause . . . evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse.”).

The Solicitor General suggests that if the Court grants relief to fathers of non-marital children, it effectively must grant relief to married, mixed-nationality fathers because he believes that the “risk [of statelessness] is even greater with respect to the children of *married* citizen fathers, because such children are legitimate from birth.” Br.U.S. 50. Post-*Nguyen*, the relevant comparison is between fathers who legitimate during minority and mixed-nationality fathers, and there is no evidence of any difference in the risk of statelessness suffered by children of these categories of fathers.

But assuming the risk of statelessness is comparable, the other consideration identified by the Solicitor General, Br.U.S. 46, is not. Fathers in mixed-nationality marriages are not similarly situated to

citizen fathers or mothers of non-marital children because of the foreign influence associated with the alien spouse. Thus, contrary to the Solicitor General's suggestion, *id.* 50, a grant of relief to unwed fathers does not guarantee relief to fathers in mixed-nationality marriages. Still less does it guarantee relief to mothers in such marriages, *see id.*, as they are neither similarly situated to parents of non-marital children as to risk of statelessness nor as to the question of foreign influence on the upbringing of children. The Solicitor General's dire warning of "the exception swallow[ing] the rule," *id.* 49, is not well-taken.

C. The Court May Strike the Inordinate and Unnecessary Restriction On Younger Fathers.

The Court may "sever [a statute's] problematic portions while leaving the remainder intact." *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). The Solicitor General rejects, however, Petitioner's suggestion that the Court sever application of the requirement of 5 years' residence after age 14, largely because it would not fully remedy the constitutional violation Petitioner urges. *Br.U.S. 52. Nguyen* found it significant that the burden placed on the citizen-father there was "minimal," demonstrating "that Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives." 533

U.S. at 70-71. Not so here: Petitioner’s father, who satisfied the residence criterion, was precluded, due to age, from transmitting citizenship despite legitimating and raising his son. The Court should strike application of the age bar as denying equal protection.

V. PETITIONER HAS STANDING

The Solicitor General claims Petitioner lacks standing because his father could have protected his own rights in another proceeding. Br.U.S. 11-13. He disregards the Court’s “quite forgiving” approach in allowing *jus tertii* standing “when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties’ rights,” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quotation omitted), and misinterprets what constitutes “a ‘hindrance’ to the possessor’s ability to protect his own interest.” *Id.*

Because sections 1401 and 1409 “impose[] legal duties and disabilities,” *Craig*, 429 U.S. at 196, upon Petitioner, and “the continued enforcement of [the statutes] will ‘materially impair the ability of’ [citizen fathers to transmit citizenship to non-marital, foreign-born children] despite their classification by an overt gender-based criterion,” *id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972)), Petitioner is the “least awkward challenger” and “obvious claimant.” *Id.* at 197. Thus, as in *Craig*, Petitioner has “standing to raise relevant equal protection

challenges to [the] gender-based law.” *Id.* See also *Miller*, 523 U.S. at 433 (Op. of Stevens, J.) (third-party standing met “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”); *id.* at 454 n.1 (Scalia, J., concurring) (accepting third-party standing citing *Craig*); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (firm had standing to invoke rights of client although client “suffers none of the obstacles discussed in [*Singleton v. Wulff*, 428 U.S. 106 (1976)] to advancing his own constitutional claim”).

The Solicitor General does not contest the *Craig/Kowalski* “forgiving” approach. Instead, he posits that Petitioner’s father “could have” sought to protect his own rights. Br.U.S. 12-13. But the Court requires only “some hindrance to the third party’s ability to protect his or her own interest.” *Powers v. Ohio*, 499 U.S. 400, 411-415 (1991). The conceded inability to intervene in this criminal case, Br.U.S. 12, plainly constitutes “some hindrance.” *Powers*, 499 U.S. at 411 (“These criteria [including “some hindrance”] have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties.”); *id.* at 414 (finding “some hindrance” because “jurors are not parties to the jury selection process and have no opportunity to be heard. . . .”). See also *Brief for the National Immigration Justice Center and the American Immigration Lawyers Association as Amici Curiae* (“NIJC/AILA”) 29 & n.13.

Moreover, other accepted “practical barriers to suit,” *Powers*, 499 U.S. at 415, such as “economic burdens of litigation,” a “small financial stake,” *id.*, privacy concerns, *see Carey v. Population Servs., Int’l*, 431 U.S. 678, 684 n.4 (1977), and other procedural obstacles, all constitute “some hindrance” to a non-marital father’s ability to protect his rights. Pursuing litigation produces no economic benefit, raises privacy concerns (potentially subjecting the child to removal or prosecution), and would also interfere with Congress’s procedure for the administration of removal proceedings. *See NIJC/AILA* 30-31. Thus, the father of a non-marital, foreign-born child has “little incentive to set in motion the arduous process needed to vindicate his own rights.” *Powers*, 499 U.S. at 415.

CONCLUSION

Petitioner’s conviction should be reversed.

Respectfully submitted,

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