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

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT'S DECISION IN NGUYEN V. INS, 533 U.S. 53 (2001), PERMITS GENDER DISCRIMINATION THAT HAS NO BIOLOGICAL BASIS?

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The court of appeals' and district court's orders are published, *United States v. Flores-Villar*, 497 F. Supp.2d 1160 (S.D. Cal. 2007), *aff'd*, 536 F.3d 990 (9th Cir. 2008). J.A. 135-46, 169-86.

JURISDICTION

The court of appeals' judgment was entered August 6, 2008. J.A. 169-86. Rehearing was denied May 5, 2009. *Id.* 187. The Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are in the appendix. App. 1-6.

STATEMENT

Petitioner, Ruben Flores-Villar, was born out-of-wedlock on October 7, 1974, in Tijuana, Mexico. J.A. 84-85, 91-92. His father, Ruben Trinidad Floresvillar, was then a 16-year-old U.S. citizen. *Id.* 63, 84. Although Petitioner's father would have testified at trial that he resided in the United States for at least ten years before Petitioner's birth, *id.* 84-87, he was too young to have five years' presence after turning

14 as required for transmission of citizenship under the version of 8 U.S.C. § 1401 effective at Petitioner's birth.

When two months old, Petitioner's father and paternal grandmother brought him into the United States for medical treatment. *Id.* 85-86. Thereafter, the hospital sent, on Petitioner's father's behalf, a letter to border authorities requesting a permit for Petitioner to enter the United States. *Id.* 94. Petitioner's mother authorized his release from the hospital to his paternal grandmother for adoption planning. *Id.* 95-96. Although Petitioner was not adopted, his mother took no part in his upbringing. *Id.* 86, 90.

Petitioner grew up in San Diego county with his father, attending local schools. *Id.* 86, 90, 101. Petitioner's father formally recognized him by filing a paternity acknowledgment in the Tijuana civil registry in 1985, when Petitioner was 11, and claimed Petitioner as his son on his United States income taxes. *Id.* 98-100, 102-10.

In 2006, Petitioner was indicted for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. *Id.* 5. On September 22, 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship. *Id.* 65-79. Petitioner's father and paternal grandmother submitted supporting declarations. *Id.* 84-90. On December 14, 2006, his application was denied:

> The fact of your legitimation is not in question. . . . Since your father was only sixteen at the time of your birth, it is physically impossible for him to have [the] required physical presence necessary (five years after age fourteen) in order for you to acquire United States citizenship through him.

Id. 63-64. This denial was affirmed by the Administrative Appeals Office. *Id.* 111-21, 126-34.

Petitioner nonetheless sought to defend against the section 1326 charge by contending that he is a citizen. *Id.* 155. The government moved to preclude the defense based on the reasoning of the N-600 denial. *Id.* 7-12. Petitioner responded that the statutory scheme in place at his birth violated the Fifth Amendment's equal protection guarantee. *Id.* 44-58. Petitioner sought a jury instruction applying the shorter physical presence requirement in 8 U.S.C. § 1409(c) to his father. *Id.* 123. His father would have testified in Petitioner's defense, *id.*, but the district court precluded the testimony. *Id.* 135-46, 155-56.

Because his defense was excluded, Petitioner consented to a bench trial. *Id.* 153. The district court found Petitioner guilty and sentenced him to 42 months' custody. *Id.* 158-60.

The Ninth Circuit affirmed, finding the statutory scheme did not deny equal protection. *Flores-Villar*, 536 F.3d at 996.

SUMMARY OF ARGUMENT

Since 1940, citizen fathers, but not citizen mothers, have been required to meet a lengthy residency requirement before transmitting citizenship to their foreign-born, non-marital children. The 1952 Act, effective at Petitioner's birth, perpetuated the discrimination, maintaining a physical presence requirement under which men below age 19 could not transmit citizenship. Age never prevented transmission of citizenship to a woman's non-marital child. Because this statutory scheme discriminates against fathers of non-marital children based on gender, it denies equal protection.

Intermediate scrutiny is warranted because of our Nation's history of sex discrimination in laws governing transmission of citizenship, and the significance of citizens' interest in transmitting citizenship to their children. The "plenary power" doctrine, which the Court has applied in the context of the entry of aliens into the United States, does not warrant some lesser standard of scrutiny, because acquisition of citizenship at birth is fundamentally different from the immigration or naturalization of an alien. Further, even if the plenary power doctrine applies, the classification of a congressional power as "plenary" does not exempt congressional action in that area from constitutional scrutiny.

Regardless, the discriminatory scheme at issue survives neither intermediate scrutiny nor rational basis review. While the government has consistently

contended that Congress adopted the discriminatory, sex-based residence requirements to avoid statelessness of non-marital children of U.S. citizen mothers, it has not met its burden to demonstrate that avoiding statelessness was the actual purpose of the discriminatory residency requirements. Moreover, the risk of statelessness applies to the non-marital children of U.S. citizen mothers *and* fathers. The discriminatory scheme actually creates new risks of statelessness for non-marital children of U.S. fathers. Thus, the "statelessness" rationale cannot justify the discrimination under any standard.

Nguyen v. INS, 533 U.S. 53 (2001), is not to the contrary. *Nguyen* approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers or that fathers' non-marital children experience statelessness in any different way.

The denial of equal protection effected by section 1409's gender discrimination can and should be fully remedied by extension of the benefit offered by section 1409(c) – the limited residence requirement –

to both men and women. Extension of benefits is a traditional remedy for equal protection violations and is supported by the INA's severability provision. Alternatively, severance of the application of former section 1401(g)'s requirement of 5 years' residence in the United States after age 14, which disables some younger men, but not younger women, from transmitting citizenship to their non-marital children, could partially remedy the discrimination against Petitioner's father such that Petitioner could at least offer evidence of his father's 10-year U.S. residence at trial. Even if the equal protection violation cannot be remedied by a grant of citizenship, the government nonetheless should be estopped from invoking that unconstitutional scheme to support a criminal conviction.

Finally, Petitioner meets the requirements of third-party standing to litigate the gender discrimination against his father in defending against this government-initiated prosecution.

ARGUMENT

I. BECAUSE THE STATUTORY SCHEME IMPOSES GENDER-BASED DIFFERENTIAL RESIDENCE REQUIREMENTS, INTERMEDIATE SCRUTINY APPLIES.

A. The Statutory Scheme for Acquisition of Citizenship by Non-Marital, Foreign-Born Children Discriminates Based On Gender

Since 1940, citizen fathers, but not citizen mothers, have been required to meet a lengthy residency requirement before transmitting citizenship to their foreign-born, non-marital children. The 1940 Act required an unwed citizen father to demonstrate ten years' physical presence in the United States prior to the child's birth, five of which had to be after the age of sixteen. Nationality Act of 1940, ch. 876, §§ 201(g), 205; 54 Stat. 1137, 1139-40. Fathers under age 21 could not transmit citizenship. Prior residence of any length was sufficient for women. *See id.* § 205. The 1952 Act, in effect at Petitioner's birth, perpetuated the discrimination, maintaining the ten years' physical presence requirement, before the non-marital child's birth, five of which had to be after age 14. Immigration & Nationality Act (INA), ch. 477, Title III, ch. 1, §§ 301(a)(7), 309(a), 66 Stat. 163, 235-38 (1952). Men under 19 were disabled from transmitting citizenship. For women, the law required only one year's residence prior to the non-marital child's birth. *Id.* § 309(c). A woman's age never prevented transmission of citizenship to her non-marital child.

Petitioner was born out-of-wedlock, in Mexico, to a U.S. citizen father and an alien mother. Although his father legitimated and raised him in the United States from infancy, the district court precluded Petitioner's citizenship defense because his father's age at Petitioner's birth, 16, made it impossible to transmit citizenship. Because the statutory scheme discriminates against fathers of non-marital children by imposing a differential residence requirement based on gender, it denies equal protection.

Nguyen does not address this question. The issue there was whether a requirement that a father, but not a mother, legitimate a non-marital child before the child's eighteenth birthday comports with equal protection. 533 U.S. at 60. Congress sought to insure that all parents have the *opportunity* to establish a relationship with their non-marital children, but did not seek to guarantee establishment of an actual parent-child relationship. *Id.* at 64-65. Such an opportunity inheres in the event of birth in the case of a citizen mother and her child, but does not result, "as a matter of biological inevitability, in the case of an unwed father." *Id.* at 65. The legitimation requirement imposed on men, to be undertaken during the child's minority, compensates for that biological difference, ensuring that men have knowledge of the child's birth and the opportunity to develop a relationship with the child. *Id.* at 66-67.

The differential residence requirement at issue here has nothing to do with the opportunity to form a parent/child relationship; it relates only to ties to the

United States. No biological difference between men and women suggests that women form stronger ties to the United States in shorter time periods than men.

Nguyen also upheld the legitimation requirement because a person born to a citizen parent of either gender has the opportunity to acquire citizenship under the statutory scheme. *See id.* at 61-62. *Nguyen* recognized that a non-marital child could acquire citizenship from a citizen father, if a "minimal" effort was made to legitimate during minority. *Id.* at 70. The same is not true for the differential residency requirements imposed on unmarried citizen fathers and mothers. Despite Petitioner's father's establishment and formal recognition of a parent-child relationship, it was impossible for Petitioner's father to transmit citizenship because he was under 19-years-old at Petitioner's birth. In many cases, it will also be impossible to meet even the 10-year requirement because the residence period must precede the child's birth. In sharp contrast to the "minimal" requirements at issue in *Nguyen* – they can be met between birth and majority – Congress has erected often insurmountable hurdles to the conferral of citizenship on the children of unmarried citizen fathers by requiring, under the scheme applicable to Petitioner, that unmarried fathers, but not mothers, establish 10 years' physical presence prior to the child's birth, at least 5 years of which must be after the father's fourteenth birthday. *Compare id.* at 70-71 ("Congress has not erected inordinate and unnecessary hurdles

to the conferral of citizenship on the children of citizen fathers in furthering its important objectives."). *Nguyen*'s analysis does not control here.

B. Intermediate Scrutiny Applies Because the Statutory Scheme Discriminates Based on Gender.

Intermediate scrutiny applies to laws which discriminate on the basis of gender. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Heightened scrutiny applies to sex-based classifications because "our Nation has had a long and unfortunate history of sex discrimination." *Virginia*, 518 U.S. at 531 (citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). *See also Nguyen*, 533 U.S. at 91 ("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).

From 1790 until 1934, Congress enacted, consistently with common-law notions of coverture,[1]

[1] Blackstone explained that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every

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citizenship legislation that focused only on fathers, granting citizenship to the children of U.S. citizens born abroad so long as the father – with no mention of the mother – had, prior to birth of the child, resided in the United States. *See Rogers v. Bellei*, 401 U.S. 815, 825 (1971) (noting the consistent requirement from 1790 to 1934 that the father have resided in the United States prior to the child's birth). Notions of coverture also informed legislation depriving women who married aliens of their citizenship. The Expatriation Act of 1907 is illustrative:

> [A]ny American woman who marries a foreigner shall take the nationality of her husband. At the termination of the matrimonial relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228-29. The Court upheld this statute, explaining "[t]he identity of husband and wife is an ancient principle of our jurisprudence." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). *Accord United States v. Cohen*, 179 F. 834, 835 (2d Cir. 1910) ("the general trend of legislation has

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thing. . . ." 1 William Blackstone, *Commentaries On The Laws Of England* 441 (17th ed. 1830).

been constantly toward the recognition of the proposition that the husband is the head of the family and that his wife and minor children take his citizenship, it being inconsistent with the theory of our laws that the wife shall be a citizen and the husband an alien and vice versa.").

In 1934, Congress altered the citizenship scheme to allow for citizenship for children born abroad upon a showing of prior residence in the United States by a U.S. citizen mother *or* father. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797. Despite the paternally-focused text of the pre-1934 citizenship statutes, the State Department's practice was to grant citizenship to foreign-born children of unmarried U.S. citizen mothers. *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. 43 (printed 1945) (*1940 Hearings*). The coverture-inspired rationale was that in such cases the mother "stands in the place of the father." *Id.* 431.

In 1939, the Attorney General rejected that State Department practice. *See* 39 U.S. Op. Att'y Gen. 397 (1939); 39 U.S. Op. Att'y Gen. 290, 290-291 (1939). Shortly afterward, Congress codified the practice of freely allowing unwed mothers to confer citizenship on their foreign-born children, *see* Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138-1140, but simultaneously created the gender discrimination challenged here by imposing formidable, sometimes

insurmountable, barriers to the transmission of citizenship by fathers to legitimated, foreign-born children.

Explaining the proposed code, a State Department representative revealed the discriminatory assumption behind the law; a non-marital child would, naturally, be raised by her mother, not her father: "If the child only has one legal parent, because it is illegitimate, if that parent, the mother, is a national, the child acquires nationality." *1940 Hearings* 63. The coverture-inspired stereotype is that for an out-of-wedlock child, the sole parent is the mother, vindicating a tradition, presented to Congress, "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 control it as its natural guardian.'" *Id.* 431. Thus, materials provided to Congress specifically sought to justify the discrimination here on the notion the mother was "bound" to care for and control the non-marital child as its "natural guardian." If the unwed father *chooses* to participate – he is not stereotypically "bound" to do so – his parenting role is assumed to be secondary to that of the mother. The 1940 hearings thus reflect precisely the sort of "history which warrants the heightened scrutiny [the Court] afford[s] all gender-based classifications today," *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994), necessitating that the discrimination be justified by "'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *Id.* (citations omitted).

The significance of citizens' interest in transmitting citizenship to their children also supports heightened scrutiny. *See Miller v. Allright*, 523 U.S. 420, 476-78 (1998) (Breyer, J., dissenting). "Since the founding of our Nation, American statutory law, reflecting a long-established legal tradition, has provided for the transmission of American citizenship from parent to child – even when the child is born abroad." *Id.* at 471. While transmission of citizenship to children born abroad is statutory, not constitutional, it is a venerable attribute of citizenship. *See United States v. Wong Kim Ark*, 169 U.S. 649, 668-74 (1898) (tracing history of statutes permitting citizenship to descend to foreign-born children back to 1350 in England and 1790 in this country). Citizenship is "'a most precious right,'" *Miller*, 523 U.S. at 476-77 (Breyer, J., dissenting) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963)), and the inability of certain classes of U.S. citizens to transmit citizenship to their children born abroad impinges upon the "special" tie of parent to child. *See id.* at 477 (citations omitted). Both the history of gender discrimination and the significance of the "special tie" at stake "mean that courts should not diminish the quality of review – that they should not apply specially lenient standards – when they review these statutes." *Id.* at 478.

C. The "Plenary Power" Doctrine Does Not Warrant Creation of An Exception to the Rule That Gender Discrimination Is Subject To Heightened Scrutiny.

Nguyen, 533 U.S. at 72-73, pretermitted the question whether the plenary power doctrine, *see, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977), created an exception to the Court's holdings that gender discrimination is subject to intermediate scrutiny. It does not. First, acquisition of citizenship at birth is fundamentally different from the immigration or naturalization of an alien. Second, even if the plenary power doctrine applies, classifying a congressional power as "plenary" does not exempt congressional action from constitutional scrutiny.

1. *Fiallo* Addresses the Admission of Aliens, Not Citizenship By Birth.

Any deference owed to Congress in the context of the entry of aliens into the United States, *see Fiallo*, 430 U.S. 787, does not carry over into determination of who is a citizen as of birth. As four Justices explained in *Nguyen*, "[t]he instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place." *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting).[2] *Accord Wauchope v. U.S. Department of*

[2] The notion that "'Congress regularly makes rules that would be unacceptable if applied to citizens,'" *Fiallo*, 430 U.S. at

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State, 985 F.2d 1407, 1414 (9th Cir. 1993). A majority of Justices in *Miller* agreed. *See* 523 U.S. at 480 (Breyer, J., dissenting) ("The Court has applied a deferential standard of review in cases involving aliens, not in cases in which only citizens' rights were at issue."). *Accord id.* at 429 (op. of Stevens, J.). Moreover, acquisition of citizenship at birth "does not involve the same transfer of loyalties that underlies the naturalization of aliens." *Id.* at 478 (Breyer, J., dissenting).

The deference to Congress at the heart of *Fiallo* is focused on "the admission of aliens." 430 U.S. at 792. *See also id.* at 794 ("Congress has . . . exceptionally broad power to determine which classes of aliens may lawfully enter the country") (citation, internal quotation omitted). Even though *Fiallo*'s subject matter included grants of immigration preferences to the offspring of U.S. citizens, those children were aliens, not citizens. The children's alienage implicated the "power to admit or exclude foreigners." *Id.* at 795 n.6. A citizen as of birth is no "foreigner."

Application of the plenary power doctrine here is inconsistent with Congress's recognition that foreign-born citizens as of birth stand on different footing than aliens seeking to enter and naturalize. The 1940 Act's legislative history confirms that distinction. *See 1940 Hearings* 414 ("[P]ersons who were born abroad

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792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)), presupposes alienage, undisputed in *Fiallo*, but not here.

of citizens of the United States and who acquired citizenship of the United States at birth . . . have never been termed 'naturalized citizens.'"). [3] The First Congress shared that perspective: the 1790 Act stated that children born abroad to U.S. citizens "shall be considered as natural-born citizens," Act of March 26, 1790, ch. 3, 1 Stat. 103-04, honoring the English tradition in which children born abroad to subjects "were[, at the time of birth,] deemed natural-born subjects of that kingdom to all intents and purposes whatsoever." *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927).

The distinction between acquisition of citizenship by birth and naturalization continues: Congress declares a person who acquires citizenship by descent a citizen "as of the date of birth," 8 U.S.C. § 1409(a), while "naturalization" refers to "the conferring of nationality of a state upon a person after birth, by any means whatsoever." *Id.* § 1101(a)(23).

2. The Classification of a Congressional Power as "Plenary" Does Not Exempt Congressional Action From Constitutional Scrutiny.

The Court's recognition that "Congress must choose 'a constitutionally permissible means of implementing' [its immigration] power," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 940-941 (1983)), counsels against reading

[3] *See infra* at 54-58.

Fiallo so broadly as to embrace a Congressional authority to disregard the equal protection guarantee and permit gender discrimination in the transmission of U.S. citizenship as of birth. "[C]ongressional power is 'limited by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.'" *Id.* (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)). It is the Court's duty to ensure compliance with those limitations: "in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank." *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Thus, "a law repugnant to the constitution is void. . . ." *Id.*

Congress's plenary power over a particular subject matter does not lead ineluctably to the conclusion that no constitutional restraints can apply to the exercise of that power. "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (citation omitted). *See also Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (the commerce power "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."). Even where plenary, Congress's grant of authority must not

"be employed in such a manner as to offend well-established constitutional restrictions. . . ." *Id.* The Court has confirmed the applicability of the equal protection guarantee in various plenary power contexts. *See, e.g., Johnson v. United States*, 543 U.S. 499, 511 (2005) (operation of prisons, where "the government's power is at its apex"); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (Indian affairs). *See also Mendoza-Martinez*, 372 U.S. at 164-165 ("the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process.").

A constitutional grant of plenary power thus does not supplant the remainder of the Constitution: the immigration "power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695 (citations omitted). While reviewing an Act of Congress is the "gravest and most delicate duty this Court is called upon to perform," it must undertake that duty "with recognition of the transcendent status of our Constitution." *Mendoza-Martinez*, 372 U.S. at 159 (quotation omitted). And the Constitution does not tolerate gender discrimination. *See, e.g., Virginia*, 518 U.S. at 531-33.

II. BECAUSE THE DISCRIMINATORY SCHEME, PURPORTEDLY CREATED TO AVOID STATELESSNESS, CREATES THAT RISK FOR THE LEGITIMATED CHILDREN OF MEN, IT SURVIVES NEITHER INTERMEDIATE SCRUTINY NOR RATIONAL BASIS REVIEW.

The differential residence requirements discriminate based on gender. Most harshly, the scheme applicable here made it impossible for a U.S. citizen father under age 19[4] to transmit U.S. citizenship, even to a legitimated child. For women, it is never impossible to transmit citizenship to a non-marital child due to age. The scheme thus discriminates in two significant ways: in some cases, it is impossible for a man to transmit citizenship to his non-marital children, and, in every case, a man must demonstrate longer residence.

The sex discrimination here should be subjected to a searching inquiry, whether pursuant to intermediate scrutiny, *see Virginia*, 518 U.S. at 533 ("The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to achievement of those objectives.") (quotations omitted) or rational basis review. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("We have been most likely

[4] *See* INA § 301(a)(7), 66 Stat. 236.

to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.") (citations omitted). The discrimination fails under either standard.

A. The Discrimination, Which the Government Justifies as an Attempt to Avoid Statelessness, Is Unwarranted Because Under the 1940 Act, and its Successors, the Foreign-Born Children of U.S. Citizen Men Also Faced Risks of Statelessness But Received Little or No Protection.

Nguyen approved section 1409's legitimation requirements because "the use of gender specific terms takes into account a biological difference between the parents." 533 U.S. at 64. No such claim can be made here: the government consistently contends that Congress adopted the discriminatory, sex-based residence criteria in sections 1401 and 1409 because the "*jus sanguinis* laws of other nations . . . create[d] a risk of statelessness among the foreign-born children of unwed citizen mothers." Cert. Opp. at 14; Respondent United States' Brief, *Nguyen v. INS*, 2000 WL 1868100, *17-19 (same); *Miller*, 523 U.S. at 430 n.8 (op. of Stevens, J.) (noting same government argument). The government claims Congress intended to ameliorate the risk of statelessness of foreign-born children of U.S. citizen parents, observing that, in 1940, "unless the law of the United States accommodated the *jus sanguinis* rules of other nations,

those children would not be citizens of any nation." *Id.*

Jus sanguinis countries determine citizenship based upon the parents' nationality rather than place of birth. *See Wong Kim Ark*, 169 U.S. at 667. In *jus soli* countries, place of birth controls. *See Bellei*, 401 U.S. at 828. The risk of statelessness arises upon birth in a *jus sanguinis* nation – because birth within that nation does not confer its nationality – when there are impediments to the child's claim of nationality through the child's parents. If the child acquires nationality through neither parent, statelessness results.

A "survey" submitted to Congress in 1938 indicated that "in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother." Cert. Opp. at 13-14 (citing *inter alia* 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, 258-259 (1935)). From this survey the government implies that a non-marital child born to U.S. citizen mother in a *jus sanguinis* nation would run a risk of statelessness in the event that the mother could not transmit her nationality to her child. *Id*. at 14. But non-marital, foreign-born children of U.S. citizen fathers were also at risk of statelessness. *See* Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 225 (1934).

While Petitioner disagrees it was the basis for the discrimination, there was a risk of statelessness on the part of the non-marital children of U.S. citizen mothers. That risk cannot justify the discrimination against U.S. citizen fathers and their children inherent in the statutory scheme, because the scheme did not protect the non-marital children of men from statelessness and, indeed, increased their risk. This gender discrimination therefore cannot survive rational basis review, let alone heightened scrutiny.

1. Pre-1940 Legislative Background

As of 1940, when Congress first adopted the instant sex-discrimination, it had never before explicitly addressed non-marital children born abroad. At least until 1934, the plain language of Nation's citizenship laws focused exclusively on fathers, making no textual provision for transmission of citizenship by women. *See Miller*, 523 U.S. at 461-65 (Ginsburg, J., dissenting) (tracing this history). The 1934 Act altered the citizenship scheme to allow for citizenship upon a showing of prior residence in the United States by a U.S. citizen mother *or* father. *See* Act of May 24, 1934, § 1, 48 Stat. 797.[5]

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[5] A proposal addressing non-marital children failed. *See* Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669, 1695 (2000).

2. Implementation of U.S. Citizenship Laws Prior To the 1940 Act With Respect to Non-Marital Births.

Even though the pre-1940 statutes were silent as to non-marital births, and made no mention, prior to 1934, of mothers, the various statutory schemes were implemented in a manner such that the non-marital children of U.S. citizen mothers were granted U.S. citizenship, as were the legitimated, non-marital children of U.S. citizens fathers. *See* Sandifer, *A Comparative Study*, 29 Am. J. Int'l L. at 258-259. As to mothers, "the Department of State has for a long time followed the rule that an illegitimate child follows the nationality of the mother, in the absence of legitimation according to law by the father." *Id.* at 258. As to fathers, "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality. Although in the law of the United States there is no statutory rule providing specifically for cases of this kind, the Department of State in practice follows this majority rule." *Id.* at 259 (footnote omitted). The practice, as presented to Congress in the 1940 hearings, was that both the non-marital children of U.S. citizen mothers and the legitimated, non-marital children of U.S. citizen fathers were granted U.S. citizenship.

Sandifer's conclusion that women were able to pass citizenship to non-marital children enjoyed substantial contemporaneous support. *See* Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934); Note, *Citizenship By Birth*, 41 Harv. L.

Rev. 643, 646 (1928); Frederick Van Dyne, *Citizenship of the United States* 49 (1904). *But see* Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612 (1915). The contemporary understanding of the pre-1940 practice is the same. *See Miller*, 523 U.S. at 463 (Ginsburg, J., dissenting). That conclusion was presented to Congress in 1940. *1940 Hearings* 43, 431. Its basis was the common-law stereotype: "the mother in such a case stands in the place of the father." *Id.* 431.[6]

In 1939, the Attorney General reversed the *de facto* rule, concluding that women were unable to pass U.S. citizenship to non-marital children under pre-1934 law. *See* 39 U.S. Op. Att'y Gen. at 291; 39 U.S. Op. Att'y Gen. at 397-98. The State Department disagreed with that reading, and the Board of Immigration Appeals concluded that "[i]t was undoubtedly the purpose of the second paragraph of section 205 of the Nationality Act of 1940 to conclude that disagreement and give to such child, at birth, the

[6] This notion is consistent with the "soften[ing]," in the United States, of the common-law view "that nonmarital children were legally parentless." Collins, *When Fathers' Rights Are Mothers' Duties*, 109 Yale L.J. at 1692. *Cf. Guyer v. Smith*, 22 Md. 239, 1864 WL 1611, *4 (1864) (holding that foreign-born, non-marital sons of a U.S. citizen father by an alien woman were not U.S. citizens because they were "under our law *nullius filii*"). Under this view, the mother is effectively assigned parental responsibility with no need for an affirmative act by her. Men are given a choice as to whether they will assume responsibility, gaining concomitant parental rights, by opting to legitimate.

nationality status of its mother." *See In the Matter of M-*, 4 I. & N. Dec. 440, 444 (BIA 1951).

As of 1940, "if there has been legitimation [of a foreign-born child of a U.S. citizen father], then the child acquires citizenship through the father," *1940 Hearings* 62[7], a conclusion supported by an opinion issued by the Attorney General.

> The State Department has for many years held that a child born out of wedlock which, by the laws of its father's domicile has been legitimated, is a citizen of the United States. . . . There appear to be no considerations of public policy which require a different decision.

32 U.S. Op. Att'y Gen. 162, 164-65 (1920). *Accord* 39 U.S. Op. Att'y Gen. 556 (1937); Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. at 105 n.22; Note, *Citizenship By Birth*, 41 Harv. L. Rev. at 646. *See also* 7 Charles Gordon et al., *Immigration Law and Procedure* §§ 93.04[2][b][ii], [iii], pp. 93-44, 93-45 (Matthew Bender, Rev. Ed. 2010).

This practice, too, was questioned by the Attorney General in 1939. *See* 39 U.S. Op. Att'y Gen. at 291. While the Attorney General stopped short of rejecting the State Department practice, his opinion likely created uncertainty about the nationality of legitimated children of U.S. citizen fathers. A

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[7] *Accord id.* 431.

non-legitimated child "obviously . . . could not acquire [citizenship] through the father." *1940 Hearings* 62.

Seen from the perspective of Congress in 1940, there were practices of conferring citizenship on both the non-marital children of women and the legitimated, non-marital children of men, even though the statutory schemes did not expressly address these non-marital children. Thus, those children had claims to U.S. citizenship.

The protection as to both groups of children was questioned subsequent to the passage of the 1934 legislation. The Attorney General, unlike the State Department, flatly declared that the non-marital children of women born before the 1934 Act would not be granted citizenship, *see* 39 U.S. Op. Att'y Gen. at 291, but also questioned the citizenship of legitimated children of American fathers. *Id.* The 1940 legislation thus represented an opportunity to codify the protections given non-marital children of women and the legitimated children of men.

3. The 1940 Act Allowed Women Freely To Transmit Citizenship To Non-Marital Children, But Created New Barriers to Transmission of Citizenship To Legitimated Children By Men.

Explicitly addressing non-marital children for the first time, Congress adopted section 205 of the Nationality Act of 1940, 54 Stat. 1139-1140, which

provided that men could transmit citizenship after satisfying an age-calibrated, 10-year residence requirement and upon legitimation of the child during the child's minority. As to women, section 205 provided that, absent legitimation, her non-marital child would be a U.S. citizen if she "had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of the outlying possessions." *Id.* The framework established in the 1940 Act remains in place today, albeit with a less onerous residence requirement.[8]

Commentary published before passage of the 1940 Act suggested the non-marital, foreign-born children of both men *and* women were at risk of statelessness. *See* Seckler-Hudson, *Statelessness* 218, 220-21, 224. *Accord* Borchard, *The Diplomatic Protection of Citizens Abroad* 612-13. If Congress had sought to alleviate concerns that the non-marital children of female U.S. citizens would be stateless, it accomplished that by providing for U.S. nationality for the non-marital children of women subject to a modest pre-birth residence requirement, of any length, in the United States. *See* Nationality Act of 1940, § 205, 54 Stat. 1139-1140. In *jus sanguinis* countries where the father would not transmit citizenship to his non-marital child, *see, e.g.*, Seckler-Hudson,

[8] Current law reduces the residence requirement applicable to men to 5 years and imposes a one-year requirement on women. *See* 8 U.S.C. §§ 1401(g), 1409(c).

Statelessness 218, the child would be granted U.S. citizenship. The requirement of pre-birth residence vindicates a well-established Congressional goal of ensuring that citizenship not pass through generations of expatriate citizens living outside the United States for their entire lives. *See Chin Bow*, 274 U.S. at 666-67.

But the 1940 Act's discriminatory residence requirements lead to very different results as to the children of U.S. citizen fathers, exposing many children of U.S. fathers to risks of statelessness and discouraging such fathers from legitimating their offspring. Congress would have been aware of a significant risk of statelessness on the part of the foreign-born, non-marital children of U.S. citizen fathers as the Attorney General had suggested that such children were not citizens even when legitimated. *See* 39 U.S. Op. Att'y Gen. at 291. "If, in these cases, the country of birth adhered strictly to the principle of *jus sanguinis* in determining nationality, these children had no effective citizenship, unless it was acquired through the mother." *See* Seckler-Hudson, *Statelessness* 221.

In stark contrast to its solicitousness as to the children of U.S. citizen mothers, Congress's response to this grave risk was to limit severely the ability of fathers to transmit citizenship to non-marital children, requiring lengthy residence (10 years) in the United States for legitimated children and making no provision for non-legitimated children. *See* Nationality Act of 1940, §§ 201(g), 205, 54 Stat. 1139-1140. The incongruity of this approach is illustrated by the

study cited to Congress in support of the proposed legislation.

> [T]he Department of State has for a long time followed the rule that an illegitimate child follows the nationality of the mother, in the absence of legitimation according to law by the father. It is significant to observe that the same *lacuna* exists in the statutory law of about half the states studied.

Sandifer, *A Comparative Study*, 29 Am. J. Int'l L. at 258.[9] *See also id.* at 259 ("The majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality."). Thus, as of 1940, many states attributed the mother's nationality to the non-marital child *unless* the father legitimated the child. The legitimated, non-marital children of U.S. fathers therefore faced the prospect of being denied the nationalities of their mothers by virtue of legitimation, leaving them dependent upon their U.S. citizen fathers to provide nationality.[10] The

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[9] *See* Cert. Opp. at 13-14.

[10] The State Department's witness at the hearings on the proposed code identified a number of countries in which legitimation deprived a child of her mother's nationality. *See A Collection of Nationality Laws* 177 (Richard W. Flournoy, Jr. & Manley O. Hudson eds., 1929) (China); *id.* at 186 (Costa Rica, if the mother consents to legitimation); *id.* at 309 (Germany); *id.* at 501 (Rumania). In Iraq, citizenship could not be acquired through the mother, although a child born in Iraq whose father was ordinarily resident in Iraq at the time of the child's birth could opt for Iraqi citizenship upon attaining his majority (provided the child had not already acquired the nationality of a

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Congressional scheme, however, would often make it impossible for those fathers to fulfill that need.[11]

By requiring 10 years of residence, Congress created a serious risk that non-marital, legitimated children of U.S. citizen fathers would be rendered stateless unless the father met a stringent residence requirement that no mother of a non-marital child was obliged to satisfy. Moreover, Congress made it impossible, not merely difficult, for a non-marital, legitimated child born to a U.S. citizen father under age 21 to claim U.S. citizenship as of birth because at least 5 of the 10 years' residence in the United States must take place after age 16.[12]

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foreign country). *Id.* at 349-350. In the Netherlands, a child could only acquire citizenship through the mother if "the child [was] born outside of wedlock [and] acknowledged only by the mother, provided that that mother, at the time of the birth, had the status of a Dutch national. . . ." *Id.* at 441. In other countries such as Japan and Monaco, a child born out of wedlock would only obtain the mother's nationality if the mother acknowledged the child before the father (or in Japan, if the father was unknown or had no nationality). *See id.* at 382, 437. In Jordan, the risk of statelessness would exist regardless of legitimation because citizenship is derived only through the father. *See* U.N. Legislative Series, *Laws Concerning Nationality* 274 (1954).

[11] The loss of nationality suffered by a child when the father legitimates is based upon a fiction of "constructive consent" to expatriation. *See generally* Myres S. McDougal et al., *Nationality and Human Rights: the Protection of the Individual in External Arenas*, 83 Yale L.J. 900, 972-73 (1974).

[12] Under the version of section 1401(g) applicable to Petitioner's father, the requirement was 5 years' residence after age 14. *See* INA § 301(a)(7), 66 Stat. 236.

Indeed, a U.S. citizen father who could not meet the residence requirements would be forced to consider carefully whether legitimation was in his child's interest, inasmuch as formal legitimation – even marriage to the child's mother – might result in statelessness, because a claim to the mother's nationality could be extinguished while at the same time no claim to U.S. citizenship would be possible. Children who were not legitimated, of course, would be able to claim the mother's nationality in approximately half the states that Sandifer surveyed. *See* Sandifer, *A Comparative Study of Laws*, 29 Am. J. Int'l L. at 258. Thus, Congress both visited statelessness upon many legitimated children of U.S. citizen fathers and perversely gave U.S. citizens who fathered non-marital children strong incentives not to legitimate their children.

The government conceded that rules denying citizenship to many legitimated, non-marital children of U.S. citizen fathers create a grave risk of statelessness, acknowledging that, under the 1940 scheme, "[t]here would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father." *See* Respondent's Brief, *Nguyen*, 2000 WL 1868100, *18 n.9.[13] Indeed, the government

[13] The government contended that the "problem . . . had been addressed by the first paragraph of Section 205, which provided that such children would be eligible for U.S. citizenship as a result of the same legitimation that might endanger the

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conceded that the risk of statelessness persists today, acknowledging in 2000 that "it remains the case that children born out of wedlock generally are recognized to have the citizenship of the mother *unless and until* legitimated or formally acknowledged by the father." *Id.* at *35-36 (emphasis added; footnote omitted). Thus, even today, U.S. citizen fathers who responsibly fulfill their obligations to their non-marital children run the risk of rendering those children stateless if the father cannot meet a residence requirement that is not imposed upon mothers of non-marital children.[14]

Even if statelessness concerns prompted differential residence requirements, concerns that the

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child's foreign citizenship." *See* Respondent's Brief, *Nguyen*, 2000 WL 1868100, *18 n.9. The brief did not mention, however, that Section 205 offered no remedy at all to a child rendered stateless because his or her father was not old enough or because the father could not satisfy the 10-year residence requirement.

[14] While various international covenants have sought to eliminate statelessness risks by conditioning expatriation on the acquisition of a new nationality, the document which most directly addresses expatriation by way of legitimation, The Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175, *see* McDougal, et al., *Nationality and Human Rights*, 83 Yale L.J. at 974-75, has enjoyed little acceptance. According to the United Nations Treaty Collection, only 40 states have ratified the Convention, *see* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en#3 (last visited May 28, 2010), which, at any rate, was drafted nearly ten years after the 1952 statute that governs here was passed.

children of U.S. mothers might be stateless in no way justifies disabling a class of U.S. fathers – those under 21 under the 1940 Act and those under 19 under the 1952 Act – from transmitting citizenship to their legitimated children. No class of U.S. citizen mothers is so disabled from ensuring that her non-marital child has a nationality.

Thus, Congress in 1940 was faced with challenges to practices under which both the non-marital, foreign-born children of women and legitimated children of men had claims to U.S. citizenship. Congress codified the practice as to women bearing non-marital children, but adopted a discriminatory scheme that offered narrow protection to fathers. It exposed citizen-fathers' non-marital children to risks of statelessness if the fathers were younger, or could not meet a 10-year residence requirement, or had not legitimated their children. The 1940 Act therefore tolerated substantial risks of statelessness as to non-marital children of men.

B. The Sex Discrimination Introduced By the 1940 Scheme, Which Continues Today In a Slightly Less Aggravated Form, Should Be Struck Down Under Either Intermediate Scrutiny or Rational Basis Review.

1. Intermediate Scrutiny

Under intermediate scrutiny, the discrimination is presumptively unconstitutional. *J.E.B.*, 511 U.S. at

152, (Kennedy, J., concurring) (noting "a strong presumption that gender classifications are invalid"). The scheme can only be upheld if it is substantially related to an actual and important governmental objective. *Virginia*, 518 U.S. at 533. The government cannot demonstrate that avoiding statelessness, rather than perpetuating gender stereotypes, was the actual purpose. Nor can the government meet its burden to show an "exceedingly persuasive justification," for the gender-based classification, *Mississippi Univ.*, 458 U.S. at 731, because the scheme does little to lessen the risk of statelessness to non-marital children of men.

a. The 1940 Hearings Reveal An Emphasis On Stereotype, Not Avoidance of Statelessness.

"[A] tenable justification [for gender discrimination] must describe actual state purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-536. A "searching analysis" must be conducted to determine whether there is a close resemblance between the alleged objective and the actual purpose. *Id.* at 536. The Court has looked to both recent and distant history to determine whether the government's alleged objective is the actual purpose. *See id.* A searching inquiry into the 1940 Act's legislative history, our nation's historic discrimination against women in citizenship laws, and the nationality laws of other countries (which result in a significant risk of statelessness to the

foreign-born children of U.S. citizen fathers) does not support the government's claimed objective of avoiding statelessness.

The 1940 hearings contain no discussion of statelessness other than a reference to infants of unknown parentage found in outlying possessions. *1940 Hearings* 430. Nor is there discussion of why an effort to avoid statelessness would be served by sex discrimination in the context of non-marital births even though contemporaneous authority acknowledged that there was such a risk for legitimated children of men, *see* Seckler-Hudson, *Statelessness* 224, and the Attorney General had called into question the ability of fathers to transmit citizenship to such children. 39 U.S. Op. Att'y Gen. at 291. *Accord* Borchard, *The Diplomatic Protection of Citizens Abroad* 612-13.

In contrast, the hearings repeatedly refer to the stereotypical assignment of parental responsibility for a non-marital child to the mother, including statements that a non-marital child has only one parent, the mother, *1940 Hearings* 62-63, that the mother of a non-marital child "stands in the place of the father," *id.* 431, and that the mother is "bound to maintain [such a child] as its natural guardian." *Id.* (quotations omitted). The modest residence requirement imposed on mothers of non-marital children would preserve that assignment of responsibility while the onerous residence requirements substantially inhibited transmission of citizenship by non-marital fathers, thus reinforcing their secondary parental status.

The 1952 legislative history does not support a different conclusion. It does not address the gender-based differential residence requirements as to non-marital children; it explains why the legislation deleted a provision conditioning transmission of nationality by such a mother on the father's failure to legitimate:

> This provision establishing the child's nationality as that of the mother regardless of legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth.

S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). The amendment removed the theoretical risk of loss of U.S. nationality of a woman's non-marital child if the child was legitimated.[15] Ironically, that sort of expatriation gives U.S. citizen fathers an incentive not to legitimate: a legitimating U.S. father might deprive his non-marital child of the mother's nationality, leaving the child stateless if the father cannot meet the onerous requirements introduced in 1940. *See supra* at 29-34.

Congressional silence on statelessness in 1940 and 1952 is not the only evidence undermining the government's contention. The discriminatory scheme exacerbated risks of statelessness of legitimated children of U.S. citizen fathers and did nothing for

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[15] *See Matter of M-*, 4 I. & N. Dec. at 443-44 (narrowly construing that provision).

non-legitimated children of men. *See supra* at 29-34. Thus, both the absence of any discussion of statelessness and the scheme's failure to address adequately the statelessness risks of the children of men suggest that avoidance of statelessness was not the actual purpose of the scheme. It is not an "exceedingly persuasive" justification, *Mississippi Univ.*, 458 U.S. at 731, but rather a *post hoc* rationalization for a gender-discriminatory statute.

b. The Sex Discrimination Is Not Substantially Related to the Goal of Avoiding Statelessness.

Even if the scheme was directed at diminishing statelessness, the government cannot demonstrate that the scheme was "substantially related to the achievement of [important government] objectives." *Mississippi Univ.*, 458 U.S. at 724 (quotation omitted). The stereotypes regarding the gender roles presented to Congress in the 1940 Hearings fall far short of justifying the sex discrimination here, particularly since Petitioner's father assumed full responsibility for his son. *See Caban v. Mohammed*, 441 U.S. 380, 394 (1979) ("The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers. . . .").

Nor can the standard be met here where the scheme protected women's non-marital children from statelessness, yet provided minimal protection to

non-marital children of men. The expansive protection that the scheme offers to women bearing non-marital children, but not to men fathering and legitimating non-marital children, is analogous to the policy of providing a "unique educational benefit only to males" that the Court struck down in *Virginia*: "However 'liberally' [that] plan serve[d] the Commonwealth's sons, it ma[de] no provision whatsoever for her daughters. That is not *equal* protection." 518 U.S. at 540.

"Because [the Court] require[s] a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification." *See Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) (citations omitted). *Accord Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000). The pre-1934 practice, as presented to Congress, was itself discriminatory: a non-legitimated child of a U.S. citizen "obviously" could not "acquire [citizenship] through the father," *1940 Hearings* 62, while non-marital children of women did. *Id.* 63. Non-legitimated children of men were at risk of statelessness, *see* Seckler-Hudson, *Statelessness* 221, and the 1940 Act did nothing to protect them.

To the extent there was any gender equivalence reflected in the pre-1934 status quo, it was that legitimated children of men could gain citizenship. *1940 Hearings* 62, 431. These children, too, were at risk of statelessness, *see* Seckler-Hudson, *Statelessness* 224, yet the 1940 scheme erected formidable

barriers – the differential residence requirements – to their acquisition of citizenship. The discriminatory scheme thus offered little protection to the non-marital children of men, and withdrew a substantial portion of the protection legitimated children enjoyed prior to the 1940 Act. *See 1940 Hearings* 431 ("a child born out of wedlock which . . . has been legitimated[ ] is a citizen . . . "). There is no "exceedingly persuasive justification," *see Mississippi Univ.*, 458 U.S. at 731, for granting nearly full protection for women bearing non-marital children, and only very narrow protection to fathers of non-marital children, particularly in light of the Court's recognition that there is no "universal difference between maternal and paternal relations at every phase of a child's development." *Caban*, 441 U.S. at 389.

Moreover, the 1940 legislation represented another iteration of the values underlying the discredited doctrine of coverture. By making it impossible for younger men to transmit citizenship to non-marital children and difficult for older fathers – thereby aiding fathers shirking their obligations – and by making it virtually automatic for all women to do so, regardless of age, the 1940 scheme, which has carried forward to the present day albeit in slightly less severe form, "is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting). Such discrimination, embracing "the very stereotype the law condemns," *J.E.B.*, 511 U.S. at 138 (quotation

omitted), frustrates the goal of "carry[ing] out the principle of equality between men and women in the matter of nationality," *1940 Hearings* 422, and denies equal protection, "which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citation omitted).

2. Because the 1940 Scheme Was Purportedly Intended to Ameliorate Statelessness Concerns Yet Created New Risks of Statelessness, It Is Irrational.

Nor can the scheme survive rational basis review. The Court has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). "[T]he tie of parent to child is a special one, which in other circumstances by itself has warranted special constitutional protection," *Miller*, 523 U.S. at 477 (Breyer, J., dissenting), yet the discrimination here prohibited Petitioner's father, who legitimated and raised his son, from transmitting citizenship even though "American statutory law has consistently recognized the rights of American parents to transmit their citizenship to their children." *Id.* (citations omitted). The scheme here "inhibits" this most significant "personal relationship [ ]," *see Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring), based on

the gender of the parent involved. *See Caban*, 441 U.S. at 394 (rejecting presumption that unwed fathers are "invariably less qualified" than non-marital mothers).

No rational legislative goal is served by codifying the ability of women to pass citizenship to non-marital children while simultaneously diminishing the ability of fathers to avoid statelessness of their non-marital children through legitimation. *See 1940 Hearings* 431. Because the 1940 scheme imposed substantial residence requirements that in some instances made transmission of citizenship to the children of men impossible – either because of the father's age or his lack of ten years' residence – it does not rationally advance the goal of decreasing statelessness. Indeed, the government conceded that under the 1940 scheme "[t]here would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father." Respondent's Brief, *Nguyen*, 2000 WL 1868100, *18 n.9.

In *City of Cleburne*, the question was whether there was a rational basis for requiring a permit for a group home for retarded persons when there was no permit required for a number of other high-density uses. *See* 473 U.S. at 447. While the City offered a number of justifications, the Court found that none offered a rational basis for the discrimination. *See id.* at 448-50.

Congress chose virtually to eliminate the risk of statelessness as to the non-marital children of women, and offered little protection to fathers of non-marital children, going so far as to preclude claims of citizenship by legitimated children who would have qualified under the pre-1934 practice. *See 1940 Hearings* 431. It is irrational to expose one group of children to a risk of statelessness while protecting another based on nothing more than the gender of the U.S. citizen parent, just as there was no basis for requiring one high-density use of real property to be supported by a permit while another is not. The government has never offered a reason why avoiding statelessness of the non-marital children of U.S. citizen women is a greater priority than avoiding statelessness of the non-marital, legitimated children of U.S. citizen fathers. Surely the non-marital children of men do not experience the condition of statelessness in any different way. Nor would fathers be any less interested than mothers in ensuring that their children have a nationality. *Cf. Caban*, 441 U.S. at 392 (concluding, in rejecting a scheme that allowed non-marital mothers, but not fathers, to object to adoption, that there was no "self-evident reason why as a class [such fathers] would be [more likely to object to adoption than mothers]").

There is no rational basis for believing that the non-marital children of men would have any lesser ties to the United States than did their counterparts

born to women.[16] In fact, there is a strong basis to conclude that the opposite is true. Men are required to legitimate their non-marital children as a pre-condition to transmitting citizenship. *See* INA § 309(a), 66 Stat. 238. That criterion does not apply to women, who transmit citizenship even if, like Petitioner's mother, they play no continuing role in their child's life. Fathers are required to demonstrate an actual tie between the U.S. citizen parent and the non-marital child. As was the case in *City of Cleburne*, there is no rational basis for the statutory scheme.

III. THE COURT MAY REMEDY THE EQUAL PROTECTION VIOLATION

The scheme denies equal protection by discriminating against fathers of non-marital children by requiring a 10-year overall residence requirement while women bearing non-marital children need demonstrate only one year. That discrimination can be remedied by extending the benefits of section 1409(c) to both men and women: "this 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 *Califano v. Westcott*, 443 U.S.

[16] The Court of Appeals concluded otherwise, but it did not explain its conclusion. *See Flores-Villar*, 536 F.3d at 997.

76, 89-90 (1979)). Extension is the proper course here as it would fully remedy the constitutional violation.

Alternatively, the discrimination could be partially remedied by severing application of former section 1401(g)'s 5-year requirement to the fathers of non-marital children. That provision required 5 years' residence in the United States after age 14, thus disabling some younger men, but no women, from transmitting citizenship to their non-marital children. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem.").

The Court has power to grant either remedy. While Justices have argued that courts cannot grant citizenship, *see Miller*, 523 U.S. at 452 (Scalia, J., concurring), "[a] majority of Justices in *Miller* . . . concluded otherwise." *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring). Indeed, "the Court need not grant citizenship. The statute itself grants citizenship automatically, and 'at birth.'" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). Petitioner thus seeks the Court's exercise of its traditional remedial powers "so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." *Nguyen*, 533 U.S. 95-96 (O'Connor, J., dissenting) (citation omitted).

Finally, if the Court is powerless to remedy the equal protection violations, and Congress may disregard the equal protection guarantee in legislating

acquisition of citizenship at birth, then Petitioner stands convicted based upon an unconstitutional scheme. The government should be precluded from invoking that unconstitutional scheme to support a criminal conviction. *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

A. The INA's Severability Clause Demonstrates the Court Can Remedy the Equal Protection Violation.

1. The Court Should Order Extension of Section 1409(c)'s Benefits.

The constitutional defect here is that men, but not women, must meet a lengthy residence requirement as a precondition of transmitting citizenship to non-marital children. "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class the legislation was intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). *Accord Heckler v. Mathews*, 465 U.S. 728, 738-39 (1984); *Westcott*, 443 U.S. at 89. "In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." *Westcott*, 443 U.S. at 89 (citing *Jimenez v.*

Weinberger, 417 U.S. 628, 637-38 (1974); and *Frontiero*, 411 U.S. at 691 & n.25).[17] *Accord United States v. Booker*, 543 U.S. 220, 247 (2005); *Mathews*, 465 U.S. at 739 n.5. "[T]his Court regularly has affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class." *Id.* at 90 (collecting cases).[18]

a. Extension Is Supported By A Strong Severance Clause.

The susceptibility of the INA to extension of section 1409(c)'s remedial scheme to men as well as women is supported by the INA's severability provision. *See Westcott*, 443 U.S. at 90 (observing that "a strong severability clause . . . counsels against nullification"); *Welsh*, 398 U.S. at 364 (Harlan, J., concurring) ("While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may

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[17] *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 252 (1994) ("In severing unconstitutional portions of statute one seeks to preserve as much of the statute as possible. Thus, broadening the statute accomplishes this goal, whereas whittling the statute down to nothing does not. Severance by nullification kills the patient along with the disease.").

[18] *See also Soto-Lopez v. New York City Civil Service Comm'n*, 755 F.2d 266, 280-81 (2d Cir. 1985) (remedying equal protection violation by extending benefits); *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466, 470 (10th Cir. 1972) (same).

properly be considered fixed by the legislative pronouncement on severability."). In short, the presence of a severability provision reveals a Congressional judgment that its scheme is not sacrosanct; there is sufficient flexibility to permit extension. In the equal protection context, the Court has interpreted that flexibility to permit remedial extension of benefits when such extension is consistent with Congressional intent. *See, e.g.*, *Westcott*, 443 U.S. at 89-91.

In *Westcott*, the Court reasoned that the "strong severability clause" contained in the legislation at issue "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *See* 443 U.S. at 90. Inasmuch as nullification here would visit significant burdens on the innocent offspring of unwed U.S. citizen mothers – they would risk expatriation and statelessness – *Westcott*'s observation is equally potent here. In fact, the severability clause here, *see* INA § 406, 66 Stat. 281, is essentially identical to both that in *Westcott*, which the Court described as "strong," *see* 443 U.S. at 90 & n.8, as well as the one Justice Harlan characterized as "broad" in *Welsh*, 398 U.S. at 364, and is therefore similarly "[i]ndicative . . . of the judicial mandate" to preserve the statutory scheme even if it is necessary to extend its coverage. *See id.* at 363-64. *See also Nguyen*, 533 U.S. at 94-95 (O'Connor, J., dissenting) (relying upon the INA's severability clause to support remedy of severing requirements imposed by section 1409(a) on fathers

but not mothers); *Miller*, 523 U.S. at 489 (Breyer, J., dissenting) (same).[19]

[19] Remedial extension of a statute's benefits is not analytically so different from severance. *Booker*, which severed two provisions of the Sentencing Reform Act, fundamentally changed federal sentencing based on the Court's conclusion that Congress would have preferred that remedy. *See* 543 U.S. at 246. *Booker* also implied a standard of appellate review, an action bearing a strong resemblance to the Court's extension of benefits cases. *See id.* at 260-62. In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), a statute authorized the use of deadly force against all fleeing felony suspects in violation of the Fourth Amendment. The Court did not strike the statute down on its face, but effectively read an exception into it, invalidating its application to cases where the fleeing suspect does not pose a "threat of serious physical harm." *Id.* at 11-12. Thus, the Court's remedial authority is not limited to excising language; it permits remedial actions that have the effect of "revising" statutes such that benefits are extended to excluded classes, *e.g., Westcott*, 443 U.S. at 89-90, or an application of the statute's language is deleted. *E.g., Garner*, 471 U.S. at 11-12. *See also* David H. Gans, *Severability As Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 654 (2008) (arguing that "[r]ather than removing parts of the statute enacted by the legislature, severing applications means adding new words to qualify what the legislature did."). The touchstone of the Court's approach is not formalistic adherence to excision from, instead of addition to, statutory language, but, rather, vindication of Congress's preference between remedial "revisions" and nullification. *See, e.g., Mathews*, 465 U.S. at 738, 740 (indicating the Court would not extend the benefits at issue because Congress expressed its preference for invalidation in the event of unconstitutionality). The strong severance clause here supports the notion that Congress would prefer the scheme's preservation, in a modified form, to nullification. *See Westcott*, 443 U.S. at 90.

While the Court may grant relief "only if Congress likely would prefer [relief from the residence requirements imposed on fathers of non-marital children], rather than imposing similar requirements upon mothers[,]" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting), the severability clause provides support for the notion that the Court may ascertain which course Congress would prefer. *See Welsh*, 398 U.S. at 355-56 (relief can be justified "by a different type of legislative intent, namely the presumed grant of power to the courts to decide 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.") (Harlan, J., concurring) (citations omitted). *Accord Booker*, 543 U.S. at 246 ("We answer the remedial question by looking to legislative intent.").

In *Westcott*, a statutory scheme granted benefits to children of unemployed men but not to children of unemployed women, and the Court affirmed the lower court's decision to remedy that inequity by extending benefits to children of unemployed women. 443 U.S. at 91-93. The Court rejected a remedy that would terminate benefits to the class Congress intended to benefit, children of the unemployed. *See id.* at 92.

Here, in a manner analogous to the remedy granted in *Westcott*, the Court should "order[ ] that ['mother' in section 1409(c)] be replaced by its gender neutral equivalent." *Id.* If the government is correct that Congress's motivation for the discriminatory

scheme was to avoid the possibility of statelessness, nullification of section 1409(c) and application of the residence requirement to women would frustrate that goal in many cases. Non-marital children born abroad to mothers who could not meet the age or residence criteria would be denied U.S. citizenship and risk statelessness.

Even if the government is not correct, there is no reason to believe that Congress would wish to create the risk of statelessness that would result if nullification was chosen over extension. Citizenship is a "most precious right," *Mendoza-Martinez*, 372 U.S. at 159, and transmission of citizenship by mothers to non-marital children has been the norm since at least 1912. *See 1940 Hearings* 431. There is no reason to believe Congress would prefer compromise of that tradition to extension. Nullification – and the imposition of onerous residence requirements – is also impractical, calling into question rights to U.S. citizenship that vested at birth as to individuals not before the Court. *See* 8 U.S.C. § 1409(c) (citizenship "acquired at birth"). *See also Wauchope*, 985 F.2d at 1417 (observing as to a similar claim, "[n]o one has suggested [that the violation should] be remedied by invalidating the statute, thereby stripping citizenship from the foreign-born offspring of male citizens."). Citizenship cannot be taken away absent a showing that the citizen committed some expatriating act and "also intended to relinquish his citizenship." *Vance v. Terrazas*, 444 U.S. 252, 261 (1980). In short, revoking citizenship conferred at birth "would undoubtedly

lead to many strange results." *In the Matter of M-*, 4 I. & N. Dec. at 445. Because nullification would create risks of statelessness (and also frustrate what the government claims is a primary Congressional goal), interrupt a long-standing tradition of citizenship transmission, and expose citizens at birth to expatriation, "extension, rather than nullification, is the proper course." *Westcott*, 443 U.S. at 89.

While it is true that Congress did intend to narrow the ability of U.S. citizens to transmit citizenship to foreign-born children with less substantial ties to the United States, the Court must "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Welsh*, 398 U.S. at 356 (Harlan, J., concurring) (citations omitted). *Accord Mathews*, 465 U.S. at 739 n.5. If the government's interpretation is correct, Congress viewed the goal of narrowing access to U.S. citizenship as secondary to the avoidance of statelessness. And there is no reason to believe that statelessness of citizen fathers' children is any less worthy of avoidance. Thus, the "intensity of commitment" to limitation of the ability to transmit citizenship to foreign-born children does not counsel against extension because Congress has already demonstrated that its commitment to avoidance of statelessness is of surpassing importance. Even if statelessness prevention was not Congress's purpose, "the degree of potential disruption of the statutory scheme [resulting from] extension," *id.*, is

minimal: relief would be limited to legitimated children of men, *see Nguyen*, 533 U.S. at 62, and children legitimated by their citizen fathers are likely to have strong ties to the United States, as is true for Petitioner.

b. Section 1421(d) does not extinguish the Court's remedial power.

Language in 8 U.S.C. § 1421(d), referring to naturalization, does not prevent application of the severance provision to citizenship at birth. Section 1421(d), contained in a provision entitled "Naturalization authority," provides that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter." *Id.* In *Miller* and *Nguyen*, Justices debated, but did not resolve, the relevance of section 1421(d) to the question whether Congress would prefer nullification of the scheme to exercise of the Court's remedial powers to address the gender discrimination worked by section 1409. *Compare Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting), and *Miller*, 523 U.S. at 489-90 (Breyer, J., dissenting), *with Nguyen*, 533 U.S. at 72-73 (dicta),[20] and *Miller*, 523 U.S. at 457-58 (Scalia, J., concurring).

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[20] *See Nguyen*, 533 U.S. at 72 ("In light of our holding that there is no equal protection violation, we need not rely on [the section 1421(d)] argument.").

The dissents in both *Miller*, 523 U.S. at 490 (Breyer, J.), and *Nguyen*, 533 U.S. at 95 (O'Connor, J.), conclude that section 1421(d) does not diminish the force of the severability provision as to statutes regulating the acquisition of citizenship at birth because naturalization differs from acquisition of citizenship at birth. "'[N]aturalization' means the conferring of nationality of a state upon a person *after* birth. . . ." 8 U.S.C. § 1101(a)(23) (emphasis added). Section 1421(d), part of the "naturalization" scheme, thus applies only to acquisition of nationality after birth. The statutes at issue here address citizenship acquired at birth. *See* 8 U.S.C. §§ 1401 ("at birth"); 1409(a) ("as of the date of birth"); 1409(c) ("at birth"). Section 1421(d) speaks to a different mode of acquiring citizenship.

Unlike the severability provision, which applies only in the event that a provision or application of the INA is found unconstitutional, section 1421(d) "does not specifically address the scenario where a particular provision is held invalid." *Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting).[21] Thus, section 1421 does not, by its terms, discourage application of the Court's traditional remedial approach.

The *Nguyen* majority acknowledges the tension between "naturalization" and citizenship acquired at birth, 533 U.S. at 72, but concludes that because "[t]he conditions specified by § 1409(a) for conferral of

[21] The *Nguyen* majority opinion did not address this point.

citizenship . . . must take place after the child is born, . . . [s]ection 1409(a) . . . is subject to the limitation imposed by § 1421(d)." *Id*.[22] The structure of section 1421 and its legislative history undercut that conclusion.

The structure of section 1421 strongly suggests that section 1421(d) does not apply to citizenship at birth, but is, rather, limited to the administrative naturalization of aliens. The Proposed Code, that became the 1940 Act, contained chapters entitled "Nationality at Birth" and "Nationality through Naturalization;" what became section 1421 was in the latter. *See 1940 Hearings* 407, 434. That distinction is maintained today, with citizenship at birth found in

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[22] This reading of sections 1101(a)(23) and 1421(d) exacerbates the equal protection violation here. The post-birth "conditions" to which the *Nguyen* majority refers apply only when the father is the source of the citizenship claim. *See* 8 U.S.C. § 1409(a). There are no post-birth criteria applicable when a child born out-of-wedlock claims citizenship through a U.S. citizen mother. *See* 8 U.S.C. § 1409(c). Consequently, under the *Nguyen* dicta, section 1409 claims made through citizen fathers are statutory "naturalization" claims subject to section 1421, while claims made through U.S. citizen mothers are not. Under this reasoning, any judicial authority to remedy the equal protection violation occasioned by the differential residence requirements of sections 1409(a) and (c) is frustrated by the complementary discrimination against fathers worked by the differential application of section 1421. The Court's canon of avoidance of constitutional doubt, *see, e.g., Zadvydas*, 533 U.S. at 689, counsels in favor of construing any ambiguity in section 1101(a)(23)'s definition of "naturalization" such that section 1421(d) does not apply to citizenship acquired as of birth.

Part I of Subchapter III of the INA and naturalization in Part II.

Section 1421 is entitled "Naturalization authority." It assigns naturalization authority to the Attorney General, *see* 8 U.S.C. § 1421(a), and includes two additional subsections, (b) and (c), that relate to the naturalization of aliens, not citizenship at birth. Subsection (b) addresses the oath of allegiance and renunciation. *See* 8 U.S.C. §§ 1421(b) and 1448. Neither section 1401 nor 1409 requires an oath. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005) (derivative citizen doesn't need certificate of citizenship).

Similarly, section 1421(c) provides for judicial review of a denial of a naturalization application after a hearing under 8 U.S.C. § 1447(a). *See* 8 U.S.C. § 1421(c). A section 1447(a) hearing is a proceeding before an immigration officer that takes place if a petition for naturalization is denied after an examination under 8 U.S.C. § 1446. *See* 8 U.S.C. § 1447(a). Applications for naturalization are filed under 8 U.S.C. § 1445, and can only be filed by persons who "have attained the age of eighteen years," *see* § 1445(b), and who can make "an averment of lawful admission for permanent residence." *See id.* Neither of those criteria are required when a non-marital child seeks citizenship though a U.S. citizen parent.

Both sections 1421(b) and (c) relate to naturalization of aliens, not grants of citizenship at birth to the offspring of U.S. citizens. The term "naturalization,"

used by Congress in a provision which concerns the naturalization of aliens, should be "'known by [its] companions,'" *see Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (citations omitted), and construed to refer only to the naturalization of aliens and not grants of citizenship at birth.

The legislative history strongly supports that construction. The term "naturalization" was employed "according to the usual acceptance of the term in the United States [which] undoubtedly means the grant of a new nationality to a natural person after birth." *1940 Hearings* 414. The Explanatory Comments transmitted with the Proposed Code acknowledged that the Court's cases had given the term "naturalization," as employed in the Constitution, a different, and more broad, meaning in which the term was "intended to cover cases in which citizenship might be conferred by statute at birth upon children born to citizens of the United States in foreign lands." *Id.* (citing *Minor v. Happersett*, 88 U.S. 162, 168 (1874), and *Wong Kim Ark*, 169 U.S. at 672, 702-03). Those Comments eschewed the Court's broad definition: "it does not follow that in the proposed new act the narrower meaning indicated by the definition under discussion cannot properly be used, especially as this meaning is now universally attributed to the word." *Id.* Thus, Congress did not understand the term "naturalize" to refer to persons seeking citizenship as of birth; persons claiming citizenship in that manner "have *never* been termed 'naturalized citizens.'" *Id.* (emphasis added).

Congress similarly would not have understood that section 1421(d) had any application to claims of citizenship at birth under sections 1401 and 1409.[23] In short, "Congress does not believe that this kind of citizenship involves 'naturalization.'" *Miller*, 523 U.S. at 480 (Breyer, J., dissenting). The government conceded that this was the correct reading of the legislative history in *Nguyen*. *See* 2000 WL 1868100 at *28-29. Section 1421(d) does not apply to claims of citizenship as of birth.

Because section 1421(d) is directed to the naturalization of aliens, rather than citizenship at birth, that provision gives rise to a negative implication that Congress did not intend to limit the courts' ability to remedy constitutional defects in its scheme granting citizenship at birth. *See generally Lindh v. Murphy*, 521 U.S. 320, 330 (1997). The negative implication is strongly supported by Congress's adoption of limitations on judicial intervention in naturalization cases while at the same time adopting a definition of naturalization that excluded citizenship at birth claims. *See id.* Congress could easily have expanded its definition of "naturalization" to the constitutional meaning of the term, *see Wong Kim Ark*, 169 U.S. at 702, or included citizenship at

[23] Congress had the same understanding of the dichotomy between citizenship by birth and naturalization in 1952, observing that the 1940 Act "defined who are citizens at birth and who may or who may not become citizens by naturalization." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952).

birth claims in section 1421(d) if it had wished to cabin the courts' remedial powers. It did neither.

2. Alternatively, the Most Egregious Discrimination Can Be Remedied by Severing Application of the Requirement of 5 Years' Residence After Age 14 To Fathers of Non-Marital Children.

In *Miller*, Justice Breyer argued that, had there been a finding of an equal protection violation as to section 1409(a)'s various legitimation-related criteria, "[t]he remedy is simply striking from the statute the two subsections that offend the Constitution's equal protection requirement, namely, subsections (a)(3) and (a)(4)." 523 U.S. at 488 (Breyer, J., dissenting). *Accord Nguyen*, 533 U.S. at 94-96 (O'Connor, J., dissenting). Such relief would not be a judicial grant of citizenship, but, rather, a declaration that the statute, with its unconstitutional portions severed, granted citizenship. *Id.* at 488-89.

The severance provision states: "If any particular provision of the Act, *or application thereof to any person or circumstance*, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." INA § 406, 66 Stat. 281 (emphasis added). The Court has "concluded that this severability clause 'is unambiguous and gives rise to a presumption that Congress did not intend the validity of the [INA] as a whole, or any part of the

[INA], to depend on whether' any provision was unconstitutional." *Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting) (quoting *Chadha*, 462 U.S. at 932) (brackets in original). Thus, the Court may sever either provisions *or* applications of the statute.

The authority to sever applications is significant because the Court "prefer[s] . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . . or to sever its problematic portions while leaving the remainder intact." *See Ayotte*, 546 U.S. at 328-29 (citations omitted). *See also Booker*, 543 U.S. at 320-21 (Thomas, J., concurring and dissenting) (concluding that in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-07 (1985), and *Garner*, 471 U.S. at 4, "the Court recognized that the unconstitutional applications of statutes were severable from the constitutional applications."). In *Ayotte*, for example, the Court remanded for state courts to determine whether a state legislature would prefer injunctive or declaratory relief to invalidation of a parental notification statute. The statute was defective for failure "explicitly [to] permit a physician to perform an abortion in a medical emergency without parental notification." *Id.* at 324. There was no dispute that "it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks." *Id.* at 328. The Court remanded, reasoning that it was unclear whether the state legislature would have preferred total invalidation of the scheme to the "issu[ance of] a declaratory judgment and an injunction prohibiting the statute's

unconstitutional application." *Id.* at 331. Thus, the Court necessarily concluded that the constitutional defect could be cured by severing the application of the notification statute as to minors facing medical emergencies as a result of which parents cannot be notified.

The same reasoning applies here. As applied, the statute, purportedly enacted based upon a desire to avoid statelessness, completely disables some fathers from transmitting citizenship under circumstances in which mothers can do so. In addition to violating the constitutional "directi[ve] that all persons similarly situated should be treated alike," *City of Cleburne*, 473 U.S. at 439, the scheme creates, as to the non-marital children of men, the very risk of statelessness that it remedies as to the non-marital children of women. Severing application of the requirement of 5 years' residence after age 14 will at least make it possible for men fathering non-marital children to transmit citizenship and help their children avoid statelessness, and would permit Petitioner to present his defense.

The Court "can excise the [unconstitutional application] only if Congress likely would prefer [its] excision, rather than imposing similar requirements on mothers." *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). Congress would prefer excision of this application for all the reasons discussed above, including the risk of statelessness that would be created by nullification. Moreover, severance of this application would result in even less "potential disruption of the

statutory scheme," *Welsh*, 398 U.S. at 365 (Harlan, J., concurring), because it would extend relief only to fathers who both legitimated their children and met the 10-year residence requirement. Excision of the 5-year requirement "is . . . compatible with the Legislature's intent as embodied in the [INA]." *See Booker*, 543 U.S. at 246.

B. If Section 1409 Violates the Equal Protection Clause, But the Court Cannot Remedy the Violation, the Conviction Should Be Reversed Because It Is Based On a Finding of Alienage Made Pursuant to an Unconstitutional Scheme.

If the Court concludes it cannot remedy the instant denial of equal protection, Petitioner's conviction should nonetheless be reversed. Petitioner challenges a criminal conviction that required, as an element, a finding of alienage. *Smith-Baltiher*, 424 F.3d at 921. Even if Petitioner cannot be made a citizen based upon the constitutional violation, he should have been able to defend on the theory that the government cannot invoke a scheme that violates equal protection in order to imprison him. *See Yick Wo*, 118 U.S. at 374.

IV. PETITIONER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE USED TO DENY HIM CITIZENSHIP AND IMPRISON HIM

As a "prudential limitation" on standing, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Third party standing is appropriate, however, when: 1) "the party asserting the right has a 'close' relationship with the person who possesses the right," and 2) "there is a 'hindrance' to the possessor's ability to protect his own interest." *Id*. at 130 (citing and quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Moreover, the Court is "quite forgiving with these criteria . . . 'when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Id*. (quoting *Warth*, 422 U.S. at 510). Petitioner's claim – based upon gender discrimination leveled at his father – meets these requirements.

Seven Justices agreed that a child had third-party standing to raise an equal protection challenge based on the discriminatory impact on a parent in *Miller*. *See* 523 U.S. at 432-33 (Op. of Stevens, J.) (citing *Craig v. Boren*, 429 U.S. 190, 193-97 (1976)); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-75 (Breyer, J., dissenting). As Petitioner's claim arises

from a criminal prosecution and relates to an element of the offense, he stands on even firmer ground.

Petitioner, who has been both denied citizenship and imprisoned based upon an offense for which alienage is an element, plainly has "suffered an 'injury in fact,'" and he enjoys a "'close relationship'" with his father. *See id.* at 473 (Breyer, J., dissenting). *See also id.* at 447 (O'Connor, J., concurring) (finding no standing but noting "it seems clear that petitioner has a significant stake in challenging the statute and a close relationship with her father"). Further, there is even more of a hindrance than existed in *Miller*.

In *Miller*, the Petitioner and her father filed a complaint in federal court "seeking a judgment declaring that petitioner is a citizen of the United States and that she therefore has the right to possess an American passport." *Id.* at 426. Upon the government's motion, however, the father was dismissed from the case and he never appealed. *Id.* at 448. Justice O'Connor concluded that the father did not demonstrate "a hindrance." *Id.* Instead, "because he failed to appeal the erroneous dismissal of his claim, any hindrance to the vindication of Charlie Miller's constitutional rights is ultimately self imposed." *Id.*

The hindrance here was not self-imposed. Petitioner's father had no basis to interject in the government-initiated criminal prosecution against his son. *See Powers*, 499 U.S. at 414 (noting that potential jurors "are not parties" to the proceeding and "have no opportunity to be heard at the time of

their exclusion"). Petitioner's father was even precluded from testifying at trial. J.A. 123. Because Petitioner's father was procedurally barred from being an actual party, and was denied even the opportunity to participate as a witness, the third-party right holder "did not simply decline to bring the claim on his own behalf, but could not do so." *Miller*, 523 U.S. at 450.[24]

Moreover, the Court has been especially "forgiving" when a criminal defendant challenges a conviction by raising the rights of third parties. *See Powers*, 499 U.S. at 411 ("These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties.") (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *McGowan v. Maryland*, 366 U.S. 420 (1961)). *See also Griswold*, 381 U.S. at 481 ("Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime."). Indeed, permitting third-party standing is particularly appropriate in circumstances – such as those presented here – where the right holder is not subject to

[24] Even the concurring opinion would allow standing to raise a claim under rational basis scrutiny. *See id.* at 451 ("Given that petitioner cannot raise a claim of discrimination triggering heightened scrutiny, she can argue only that § 1409 irrationally discriminates between illegitimate children of citizen fathers and citizen mothers.") (O'Connor, J., concurring).

prosecution. *See Baird*, 405 U.S. at 446 ("the case for according standing to assert third-party rights is stronger . . . [when the right holders] are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.").

Finally, a denial of standing would raise serious questions of fairness. Petitioner did not choose to initiate the instant litigation; he is an unwilling participant. The government chose to charge him with a serious crime, a felony, an element of which is that he must be an alien. *Smith-Baltiher*, 424 F.3d at 921. Having charged Petitioner with such an offense, invoking the jurisdiction of the courts to try and imprison him, the Solicitor General should not be heard to argue that Petitioner lacks standing to pursue the issues intimately connected with his defense. Because of the government's actions, "petitioner is the 'least awkward challenger,' since it is [his] right to citizenship [and freedom] that is at stake." *Miller*, 523 U.S. at 454 n.1 (Scalia, J., concurring) (quoting *Craig*, 429 U.S. at 197).

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

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

2. Nationality Act of 1940, ch. 876, § 201, Title I, ch. 2, 54 Stat. 1138-1139:

   SEC. 201. The following shall be nationals and citizens of the United States at birth:

   (a) A person born in the United States, and subject to the jurisdiction thereof;

   (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

   (c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

   (d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the

Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

3. Nationality Act of 1940, ch. 876, § 205, Title I, ch. 2, 54 Stat. 1139-1140:

The provisions of section 201, subsections (c), (d), (e), and (g), and: section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

4. Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 301(a)(7), 66 Stat. 235-236 (1952):

> SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:
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> . . .
>
> (7) 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: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

5. Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 309(c), 66 Stat. 238-239 (1952):

> (c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United

States or one of its outlying possessions for a continuous period of one year.

6. Immigration and Nationality Act, as amended Nov. 14, 1986, Pub.L. 99-653, § 12, 100 Stat. 3657; 8 U.S.C. § 1401(g):

(g) 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 five years, at least two of which were after attaining the age of fourteen years; *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

7. Immigration and Nationality Act, as amended Nov. 14, 1986, Pub.L. 99-653, § 13, 100 Stat. 3657; 8 U.S.C. § 1409(c):

> (c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8. Immigration and Nationality Act, Title IV, 66 Stat. 281 (1952); 8 U.S.C. § 1101, note entitled "Separability Provisions":

> SEC. 406. If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

9. Immigration and Nationality Act, ch. 477, Title III, ch. 2, § 310, 66 Stat. 239 (1952); 8 U.S.C. § 1421(d):

> (d) A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise.