No. 09-5801

IN THE

Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* EQUALITY NOW, HUMAN RIGHTS WATCH AND OTHER HUMAN RIGHTS ORGANIZATIONS AND INSTITUTIONS IN SUPPORT OF PETITIONER

(List of additional *Amici* continued on inside cover)

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INTEREST OF AMICI CURIAE

Amici Curiae file this brief in support of Petitioner. The statements of interest of Amici Curiae are set forth in Appendix I.[1]

SUMMARY OF ARGUMENT

This Court has often examined the opinions of the world community when considering constitutional cases that address common concerns among nations. The case at bar is just such a case, presenting a question of domestic citizenship criteria that both affects other nations and relates to fundamental issues of sex equality that cut across jurisdictional boundaries.

The world community's position on sex-based classifications in citizenship laws is clear. Amici have identified nine supreme courts from other nations that have addressed these issues in the past four decades; all but one has rejected sex-based classifications, with several characterizing the citizenship distinctions between men and women in this context as "irrational" and "unreasonable."

International law is also unequivocal on this point. International and regional treaties and

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[1] Pursuant to Supreme Court Rule 37, counsel of record for both parties have received timely notice of amici's intention to file an *amici curiae* brief in support of the petition for *certiorari*, and letters of consent to the filing of this brief have been submitted to the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amici themselves, made a monetary contribution to the preparation or submission of this brief.

decision-making bodies register concern about statelessness, but uniformly demand that any national policies to avoid statelessness be reconciled with accepted norms of equal citizenship, without sex-based classifications that undermine equality.

A decision to strike the statute at issue here under the Equal Protection Clause would find ample support from the opinions of the world community. In contrast, a decision upholding sex-based classifications would not only dilute domestic equal protection jurisprudence but would also run the risk of undermining equality norms worldwide, as other national supreme courts look to this Court for guidance on this common issue.

ARGUMENT

I. THE JUDGMENTS OF OTHER NATIONS AND THE WORLD COMMUNITY ARE RELEVANT TO THIS COURT'S REVIEW OF 8 U.S.C. §§ 1401(A)(7) AND 1409 (1974)

Since the founding generation, this Court has examined the position of the world community and paid "decent respect to the opinions of mankind," when relevant, in its opinions. *The Declaration of Independence* para. 1 (U.S. 1776); Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 5-6, 14, 99 (2006) (citing *Lawrence v. Texas,* 539 U.S. 558, 576-77 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg and Breyer, JJ., concurring); *Perkins v. Elg*, 307 U.S. 325, 329 (1939); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157 (1820); *Ware v. Hylton*, 3 U.S. (3 Dall.) 196, 261 (1796)).

A majority of the Court continues to find utility in this longstanding practice. The recent decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), addressing the constitutionality of life without parole sentences for juveniles who did not commit homicide, includes eloquent reference to the judgments of other nations and a clear explanation of their relevance. 130 S. Ct. at 2033-34. Noting that the sentencing practice at issue has been "rejected the world over," the Court makes clear that "[t]his observation does not control our decision." *Id.* at 2033. Rather, the global consensus provides support for the Court's "independent conclusion that a particular punishment is cruel and unusual." *Id.* According to the Court, "the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Id.* at 2034.

While this Court's rationale for canvassing the laws and practices of the world community has been most recently reiterated in a case involving the Eighth Amendment, it is not only those cases where international and foreign law has been found relevant. Indeed, Justice O'Connor has asserted that U.S. judges have reason to look to international decisions in a range of circumstances where constitutional democracies are struggling with common concerns. Sandra Day O'Connor, Commentary, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law,* 45 Fed. Law. 20, 21 (Sept. 1998).

This Court has not hesitated to make note of relevant foreign and international law in such cases.

For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court reasoned that because the holding in *Bowers v. Hardwick,* 478 U.S. 186 (1986), relied on the "values we share with a wider civilization," decisions from other countries and international entities that protected the liberty of individuals to engage in private intimate conduct were relevant to its decision. 539 U.S. at 576-77. Further, the Court found international opinion to be relevant because there was no showing that the government interest in proscribing a right that was accepted as an "integral part of human freedom in many other countries" was "more legitimate or urgent" in the U.S. than internationally. *Id.* at 577. Similarly, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), arising under the Due Process Clause of the 14th Amendment, a majority of this Court catalogued the practices "in almost every western democracy" that criminalize assisted suicide. 521 U.S. at 710. Thus, in determining the scope of liberty and due process under the Fourteenth Amendment, this Court looked to foreign and international law to bolster its reasoning.

Individual justices have also opined on the value of comparative glances. Writing in concurrence, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Ginsburg underscored the consonance between the majority's observation that "race-conscious programs 'must have a logical end point'" and relevant international law, including the Convention on the Elimination of All Forms of Discrimination Against Women. 539 U.S. at 344 (Ginsburg, J., concurring). Further, looking beyond the sphere of individual rights to issues of

Constitutional structure, Justice Breyer noted in *Printz v. United States*, 521 U.S. 898 (1997), that the experiences of other nations may "cast an empirical light on the consequences of different solutions to a common legal problem." 521 U.S. at 977 (Breyer, J., dissenting).

The case at bar presents a similar issue of "common concern." Conflicts between sex equality norms and citizenship laws have confronted national courts around the globe and have been specifically addressed by many international and regional bodies.[2] *See, e.g.*, International Law Association Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law* (2000), http://www.unhcr.org/3dc7cccf4.pdf [hereinafter ILA Report] (analyzing comparative case law and international law on sex equality and citizenship as of 2000). As Professor Vicki C. Jackson recently observed, cases involving this tension are particularly appropriate for comparative analysis, not only because of the potential impact of this Court's decision on other nations, but also because of the ways in which comparative analysis can illuminate and clarify this Court's reasoning about sex equality – an issue that transcends national boundaries while still requiring analysis tailored to domestic contexts. Vicki C. Jackson, *Transnational*

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[2] In *Miller v. Albright*, 523 U.S. 420 (1998), Justice Ginsburg noted the formal distinction between "citizenship" and "nationality," while concluding that "the distinction has little practical impact today." 523 U.S. at 467 n.2 (Ginsburg, J., dissenting). In this brief, amici use "citizenship" and "nationality" interchangeably unless otherwise noted.

Discourse, Relational Authority, and the U.S. Court: Gender Equality, 37 Loy. L.A. L. Rev. 271, 351-58 (2003).

II. THE OVERWHELMING WEIGHT OF WORLD OPINION REJECTS SEX-BASED CITIZENSHIP LAWS

A. National Supreme Courts Have Repeatedly Recognized the Presumptive Importance of Sex Equality in Citizenship Laws, and Have Criticized Sex-Based Citizenship Classifications as Irrational and Unreasonable

The case at bar presents a specific question regarding the treatment of a foreign-born, out-of-wedlock child of a citizen father under U.S. citizenship law, and raises the more general question of when, if ever, sex-based classifications are a defensible component of the nation's citizenship laws. Rather than provide a listing of global laws and practices, this brief canvasses the conclusions and reasoning of jurists who have addressed this question in their own domestic contexts. In total, amici have identified nine supreme courts – the highest courts of their respective nations – that have issued rulings of this type in the past four decades.[3]

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[3] The supreme court (or equivalent) cases identified by amici are from Austria, Botswana, Canada, Egypt, Germany, Italy, Japan, Nepal and Zimbabwe. The decision from Austria strikes down a citizenship law making distinctions based on

All but one of these courts rejected the use of sex-based classifications to limit citizenship rights. Many of the courts rejecting sex-based classifications used the strongest possible terms to criticize the distinctions. As described below, the reasoning of these jurists sounds a number of themes that resonate with the case at bar.

1. All Non-U.S. Supreme Courts Ruling in Recent Decades, Save One, Have Recognized the Presumptive Importance of Sex Equality in Citizenship Laws

All of the national supreme courts identified by amici that have addressed sex-based citizenship laws have, with the exception of Egypt, found that the important legal norm of equality overrides competing concerns offered to justify sex-based classifications. Thus, when the Supreme Court of Canada struck down a law providing that children born abroad to a Canadian mother would be subjected to a security check and an oath when seeking citizenship, while those born abroad to a Canadian father would not, it reviewed the classification under its constitutional guarantee of

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both sex and birth status, but the court's opinion focuses primarily on birth status. Amici also make note of lower court opinions from Pakistan, Bangladesh and Lebanon. With this brief, amici submit a letter to the Court offering to lodge copies of the relevant decisions that are not available from online sources. Because the opinions of Austria, Germany and Italy are not available in English translations, amici's discussions of those cases rely on reputable secondary sources.

equality protection and equal benefit of the law "without discrimination based on . . . sex." *Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358, paras. 10, 90-1 (Can.). There was no question that the government's legislative goals were important; the parties and the court readily accepted that "establishing a commitment to Canada and safeguarding the security of its citizens" were "pressing" and "substantial" governmental objectives. *Id*. at para. 94. Yet the justices concluded that the law was irrational. *Id*. at paras. 95-101.

According to the court, "the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nation-building or national security underlying the Citizenship Act."[4] *Id.* at para. 67. Further, the court held, "[t]here is clearly no inherent connection between this distinction and the desired legislative objectives: children of Canadian mothers are not in and of themselves less committed or more dangerous than those of Canadian fathers." *Id.* at para. 95. The court was particularly concerned about the immutable nature of the classification, noting that the strict application of equality principles is critically important when access to citizenship is restricted based on factors "so completely beyond the control of an applicant as the gender of his or her Canadian parent." *Id.* at para. 85.

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[4] The Canadian Supreme Court summarily rejected the claim that the remeliorative nature of the challenged legislation, which provided more generous citizenship provisions to women than earlier laws, would insulate the sex-based classifications from review. *Benner*, [1997] 1 S.C.R. at para. 75.

Likewise, in 2008, the Supreme Court of Japan struck down a sex-based classification affecting the ability of out-of-wedlock children to acquire Japanese citizenship. The court examined the statute in light of the Japanese constitution's equality guarantee. Saikō Saibansho [Sup. Ct.] June 6, 2008, Hei 6 (Gyo-Tsu) no. 135, 62 Saikō Saibansho Minji Hanreishū [Minshū] Majority § 2 (Japan), *translated at* http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html (discussing Japanese Constitution, art. 14, para. 1). The Japanese high court credited the importance of ensuring close ties between the out-of-wedlock child and Japan, noting that the sex-based provisions might have served this purpose in the past. *Id.* at § 4(4)(2)(a), (b). However, the court concluded that this antiquated rationale was insufficient to uphold discriminatory provisions in contemporary times. As the majority stated, many other nations are "moving toward scrapping discriminatory treatment by law against children born out of wedlock," and "the realities of family life and parent-child relationships have changed and become diverse." *Id.* at § 4(4)(2)(c). Justice Izumi's concurrence, addressing sex equality as well as birth status discrimination, added that in light of these societal changes, this law seemed to be based on a "stereotyped and rigid way of thinking." *Id.* at Izumi Concurrence § 3. The majority concluded that the distinction in the statute did not demonstrate the "reasonable relevance" necessary to pass constitutional muster. *Id.* at Majority § 4(3).

Ruling decades before the Japanese court, in 1974, the Federal Constitutional Court of Germany struck sex-based nationality laws that precluded German mothers, but not fathers, from transmitting citizenship to their children. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 21, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 217 (Ger.), http://www.servat.unibe.ch/fallrecht/bv037217.html.[5] The German government argued that abolition of sex-based classifications would lead to more instances of dual citizenship, a status that was deemed legally problematic at the time. The court rejected this justification, however, concluding that it was not sufficiently compelling to warrant overriding constitutional equality principles. *Id.*; *see also*, Verfassungsgerichtshof [VfGH] [Constitutional Court] 1984, Erkenntnisse und Beschlusse Verfassungsgeruchtshofes [VfSlg] No. 10.036/1984 (Austria), http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_10159388_82G00054_00/JFT_10159388_82G00054_00.pdf (decision of Austrian Constitutional Court striking down sex- and illegitimacy-based citizenship law that conflicted with constitutional equality protections).[6]

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[5] Described in Claus Hofhansel, *Citizenship in Austria, Germany, and Switzerland: Courts, Legislatures, and Administrators*, 42 Int'l Migration Rev. 163, 178-79 (2008); Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* 231 (2000).

[6] Described in Hofhansel, *supra* note 5, at 171.

In 1983, the Italian Constitutional Court also invoked constitutional equality principles to strike down a 1912 law providing that the child of a male Italian citizen was an Italian citizen by birth but making no such provision for the child of a female Italian citizen. Corte Costituzionale, 28 Gennaio 1983, Giur. it. 1983, I, 91 (It.).[7] As in Germany, the court entertained government arguments that sex-based citizenship classifications were necessary to avoid dual nationality. The court concluded, however, that the desire to avoid dual nationality was not a valid reason to ignore the equality guarantees of the Italian constitution. Instead, according to the court, the constitutional principle of equality took precedence, despite the serious inconveniences caused by dual nationality. *Id.*

In *Attorney General v. Unity Dow*, (1992) 103 I.L.R. 128, 131 (Bots.), the Court of Appeal for Botswana, the highest court of that nation, judged as irrational a law that conditioned the citizenship of a child born in Botswana to married parents solely on the citizenship of the child's father, regardless of the mother's citizenship.[8] In reaching this conclusion, the court determined that the Botswana Constitution guaranteed equal protection on the basis of sex – citing as a model the jurisprudence of the U.S.

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[7] Described in ILA Report, *supra*, at 33; Karen Knop, *Gender and Nationality in International Law*, *in* Citizenship Today: Global Perspectives and Practices 89, 106 (2001).

[8] Reprinted in *The Citizenship Case: The Attorney General of The Republic of Botswana vs Unity Dow Court Documents, Judgments, Cases and Materials*, 123-97 (Unity Dow ed., 1995), *available at* http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm.

construing our own equal protection clause. Dow, ed., *supra* note 8, at 132 (citing, *inter alia*, *Craig v. Boren*, 429 U.S. 190 (1976)).

Two other high courts have reached similar conclusions. In 1995, the Zimbabwe Supreme Court struck a sex-based classification impinging on individuals' citizenship rights under its constitutional equality principle, providing that "every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual," regardless of sex. *Rattigan and Others v. Chief Immigration Officer*, 1995(2) SA 182 (ZS) (Zim.), http://www.unhcr.org/refworld/docid/3ae6b6d62c.html. Further, in *Meera Gurung v. Her Majesty's Gov't, Dep't of Central Immigration, Ministry of Home Affairs*, Dec'n No. 4858 2051 (S. Ct. 1994) (Nepal), the Supreme Court of Nepal struck down a provision that dictated different treatment as between citizen men and citizen women when transmitting visa rights to their spouses. *Id.* at ¶ 14. According to the court, the statutory provisions "awarding more importance and weight to the relation with a Nepalese man than that to the relation with a Nepalese woman" constitute discrimination in violation of constitutional equality principles. *Id.*

Amici have identified only one foreign supreme court that has upheld sex-based classifications in recent decades. In June 2010, the Supreme Administrative Court of Egypt upheld a law that establishes a process for stripping the citizenship of Egyptian men who marry Israeli women in circumstances where the government determines that the marriage raises a threat of

foreign spying.[9] *Cairo Court Rules on Egyptians Married to Israeli Women*, BBC News, June 5, 2010, http://news.bbc.co.uk/2/hi/world/africa/10247437.stm. However, the persuasive value of this case is extremely limited. First, the decision is the judgment of a supreme administrative court, not a constitutional court. Second, the specific law upheld by the Egyptian court reflects longstanding tensions between two nations that have no analog in the proceeding here. Third, this law can be characterized as an aberration. Egyptian nationality law has generally bent toward equality, and was amended in 2004 to allow married Egyptian women the same right as married men to pass their nationality to their children in conformity with the Egyptian Constitution. Law No. 154 of 2004 (To Amend Provisions of Law No. 26 of 1975 Concerning

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[9] The issue of sex-based classifications in nationality law has also recently been litigated in Lebanon, though no case has reached the nation's highest court. *See* Dalila Mahdawi and Carol Rizk, *Landmark Ruling Granting Citizenship to Children of Lebanese Mother Overturned*, Lebanon Daily Star, May 19, 2010, *available at* http://www.dailystar.com.lb/article.asp?edition_id=1&categ_id=1&article_id=115007#axzz0rDNIdd00 (noting that a recent appeals court decision on this issue will likely be appealed to the highest court). In 1994, the High Court division of the Supreme Court of Bangladesh upheld sex-based nationality classifications based on a specific analysis of the language of the Bangladesh Constitution. The case was not appealed to the Appellate Division of the Supreme Court, which is the nation's highest court. *Malkani v. The Secretary, Minister of Home Affairs*, Writ Petition no. 3192 of 1992, Bangl. Sup. Ct., High Ct. Div. (1997). The legislature subsequently amended the law at issue. The Citizenship (Amendment) Act (Act no. 17/2009) (Bangl.), http://www.unhcr.org/refworld/docid/4a8032182.html.

Egyptian Nationality) *Al-Jarida Al-Rasmiyya*, 26 July 2004 (Egypt).

Notably, this recent Egyptian approach to restrict citizenship of those who marry foreigners is not entirely alien to U.S. law; American women faced general restrictions on marriage to non-citizens almost a century ago, for similar reasons. *See*, *e.g.*, *Miller v. Albright*, 523 U.S. 420, 463-64 (1998) (Ginsburg, J., dissenting); *Mackenzie v. Hare*, 239 U.S. 299, 307 (1915). While those particular restrictions were repealed in 1922, the sex-based classifications that remain a part of U.S. citizenship law, and that are challenged here, are a legacy of that period. *Miller*, 523 U.S. at 463-68 (Ginsburg, J., dissenting); *Nguyen v. INS*, 533 U.S. 53, 89 (2001) (O'Connor, J., dissenting).

2. National Supreme Courts Considering the Issue Have Determined that the Judiciary has an Important Role to Play in Ensuring Sex Equality in Citizenship Laws

Recognizing the importance of citizenship criteria to sovereign identity, a number of national courts have grappled with the question of the judicial role in reviewing citizenship laws. The supreme courts that have squarely addressed this issue have concluded that the judiciary has an important role to play in enforcing equality norms, and that the court can serve that function without impinging on legislative authority over citizenship.

The issue of the court's role was directly addressed by the Japanese Supreme Court. There,

the court noted that criteria for acquiring nationality are generally left to the legislature, which is in a position to take into account a range of social and political issues. 62 Minshū at Majority § 4(1). However, wrote the court, any law that "amounts to discriminatory treatment without reasonable grounds" should be subject to constitutional scrutiny by the courts. *Id*. The court proceeded to strike down Japan's sex-based nationality law as an unreasonable exercise of legislative power. *Id.* at § 5(1).

The Court of Appeal of Botswana was similarly explicit in addressing the parameters of judicial review. In considering the constitutionality of the sex-based provision of the Botswana Citizenship Act, the court observed that "[w]here the legislature is confronted with passing a law on citizenship, its only course is to adopt a prescription which complies with the imperatives of the Constitution, especially those which confer fundamental rights to individuals in the State." Dow, ed., *supra* note 8, at 139. Finding that the sex-based approach taken by the legislature was irrational, the court held the citizenship law to be *ultra vires* the Constitution. *Id.* at 158.

Finally, the Supreme Court of Nepal noted that under the language of its constitution, "[t]he matter as to which or what foreigners are to be allowed to enter into the Kingdom of Nepal . . . is a matter of reason and discretion of His Majesty's Government." *Meera Gurung*, at ¶ 14. However, where the government policy violated a constitutional provision, the court opined, "there should be reasonable cause" to support the policy.

Id. The court concluded that the sex-based law at issue did not meet even the minimal test of reasonableness.

In sum, all of the supreme courts described here that reached the constitutional question presented by sex-based citizenship laws apparently accepted that they had an important role to play in enforcing constitutional equality norms. The three courts that directly addressed the issue provide additional illumination of that question that may be helpful to this Court.

B. International Treaties and Decisions of International Bodies Consistently Require Sex Equality in Citizenship Laws

Beyond the rulings of individual supreme courts, the world community has spoken clearly through international treaties and decisions of international bodies to reject sex-based citizenship classifications. Indeed, many of the courts cited above specifically noted the relevance to their decisions of international law. *See, e.g.*, Minshū Vol. 62, No. 6, 2006 (Gyo-Tsu) No. 135.

International law universally recognizes sex equality as a fundamental human right. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . sex"); International Covenant on Civil and Political Rights art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter

ICCPR] ("[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"); Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's . . . sex"); Convention on the Elimination of All Forms of Discrimination against Women art. 2(a), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (stating that the purpose of the convention is "[t]o embody the principle of the equality of men and women in their national constitutions… and to ensure, through law and other appropriate means, the practical realization of this principle").

CEDAW Article 9(2) specifically addresses sex equality in the citizenship context, stating that "States Parties shall grant women equal rights with men with respect to the nationality of their children." Although the U.S. has signed but not ratified CRC and CEDAW, both conventions have been widely ratified by member countries of the United Nations. The U.S. is one of only two countries that have not ratified CRC,[10] and one of only seven countries that

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[10] The U.S. and Somalia are the only two countries not party to the CRC. *See* OHCHR, Status of Ratification of Human Rights Instruments, http://www2.ohchr.org/english/law/docs/HRChart.xls (last updated May 12, 2010).

have not ratified CEDAW.[11]

This principle of sex equality, and in particular sex equality in citizenship law, has been reinforced by international and regional declarations, conventions and conferences. For instance, the United Nations Fourth World Conference on Women in 1995 adopted the Beijing Platform, highlighting the commitment of member countries to the principle of sex equality. *See* Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Sep. 15, 1995). In addition, numerous regional inter-governmental bodies have announced strong commitments to sex equality. European Convention on Human Rights art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 ("The enjoyment of the rights and freedoms...shall be secured without discrimination on any ground such as sex..."); American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter ACHR] ("The States Parties to this Convention undertake to . . . ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of . . . sex . . .."); The African Charter on Human and Peoples' Rights arts. 18.1, 19, June 27, 1981, 1520 U.N.T.S. 217 ("The State shall ensure the elimination of every discrimination against women"; "All people shall be equal; they shall enjoy the same respect and shall have the same rights.").

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[11] The only countries that have not ratified CEDAW are the U.S., Iran, Nauru, Palau, Somalia, Sudan and Tonga. *See* OHCHR, *supra* note 10. This chart also lists two other entities, the Holy See and Niue, that have not ratified CEDAW.

To combat the problem of statelessness, international conventions and treaties frequently include a right to nationality. *See, e.g.*, ICCPR art. 24(3) (promising every child a right to acquire nationality); CRC art. 7(1) (guaranteeing right to acquire nationality). In addition, numerous regional treaties include similar provisions. *See, e.g.*, European Convention on Nationality art. 4(a), Nov. 6, 1997, 2135 U.N.T.S. 213 [hereinafter "ECN"] ("[E]veryone has the right to a nationality."); ACHR art. 20(1) ("Every person has the right to a nationality."); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) ("Every child has the right to acquire a nationality."). This right to nationality complements the right to equal protection universally found in these treaties. *See*, *e.g.*, ECN art. 5 ("The rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour, national or ethnic origin."). Indeed, in a widely-circulated report, the International Law Association Committee on Feminism and International Law argued that where a treaty contains both provisions, they must be read together to "prohibit sexual discrimination in the laws awarding nationality." ILA Report, *supra*, at 37. Following completion of this report, the International Law Association issued a resolution calling for the elimination of sex-based preferential treatment in nationality rules, and recommending that in cases where parents are of different nationalities "each parent should have the right to transmit her or his nationality to the child." International Law

Association, *Feminism and International Law*, Res. 5/2000 §§ 3, 7 (July 25, 2000).

When faced with laws that create tension between the rights to citizenship and equal protection, international courts and tribunals have held that sex equality is an inviolable principle that must apply to citizenship law. This international case law establishes that the goal of avoiding statelessness does not trump the goal of sex equality, especially when the statelessness can be minimized without giving preference to one sex over another. For instance, in 1985, the European Court of Human Rights ruled that disparate treatment of men and women in the United Kingdom with respect to the ability of non-citizen spouses to enter and remain in the country violated the equal protection clause of the European Convention on Human Rights. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (Ser. A) at ¶ 83 (1985). The court recognized that "the advancement of the equality of the sexes is today a major goal," and that, accordingly, there must be "very weighty reasons" to justify "a difference of treatment on the ground of sex." *Id.* at ¶ 78. The court found that the United Kingdom's argument that the law should pass scrutiny because it gave "more favourable" treatment to a traditionally disfavored group did not qualify as such a reason. *See id.* at ¶ 82. *See also Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), http://www.unhcr.org/refworld/docid/3f520c562.html (finding that a sex-based citizenship classification automatically conferring legal rights and protections

to foreign wives of Mauritian citizens, but not to foreign husbands, violated the ICCPR's equality provisions). The Inter-American Court of Human Rights [hereinafter IACHR] came to the same conclusion when it responded to Costa Rica's request for an advisory opinion on its citizenship laws. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No.4 (Jan. 19, 1984). The proposed Costa Rican law allowed women who married Costa Rican nationals to apply for citizenship, but did not extend the same opportunity to men. *Id.* at ¶ 64-68. Relying on provisions of the ACHR that guaranteed equal protection under the law, equality in marriage, and access to nationality, the court directed Costa Rica to remove the specific reference to women so that the law would apply to all foreigners who married Costa Rican nationals. *Id.* at ¶ 67. *See also Case of the Yean and Bosico Children v. The Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, at 141 (Sept. 8, 2005) (holding that state authority to determine rights to nationality must be reconciled with principles of equality); Brad K. Blitz, Refugee Studies Centre, *Statelessness, Protection and Equality* 22 (2009), http://www.rsc.ox.ac.uk/PDFs/RSCPB3-Statelessness.pdf (discussing approaches to reconciling statelessness concerns and equality norms).

The international community has committed unequivocally to both sex equality and the elimination of statelessness, and has determined

that the former must not be sacrificed for the latter. Nor can restrictive citizenship laws, such as the law in question here, be justified on the grounds that they preference women. This Court, therefore, should follow and adhere to the growing international consensus for equal protection under nationality law.

III. A DECISION TO STRIKE DOWN THE SEX-BASED CLASSIFICATIONS AT ISSUE HERE WOULD BE AMPLY SUPPORTED BY "RESPECTED REASONING" FROM THE WORLD COMMUNITY

The international and comparative evidence presented here provides important support for principles that are dictated in the first instance by domestic law. The overwhelming weight of the cases and international law authority cited above support the domestic law arguments presented by the petitioner and other amici that the statutory provisions challenged here are both irrational and fail to pass muster under intermediate scrutiny.

Just as other nations have concluded when considering their own laws, the sex-based classifications at issue here are simply not sufficiently tailored to the governmental goal of preventing statelessness. Indeed, though operating in a very different legal regime than this Court or the other courts cited herein, even the Shariat court in Pakistan has recognized the weight of equality norms in the context of citizenship laws. The 1951

Pakistan Citizenship Act established that citizenship would be conferred upon a foreign woman married to a Pakistani man, but not a foreign man married to a Pakistani woman. Security concerns, along with a roster of social and political issues such as concerns about increased unemployment, were offered to justify the law. *In re Gender Equality*, (2008) 40 PLD (FSC) 1, 4-5 (Pak.). However, the Shariat Court summarily rejected these arguments, concluding that the classification violated the equality provisions of the Pakistan constitution and was also "repugnant" to the fundamental principles of Islam. *Id*. at 21 (the Quran and Sunnah in "unequivocal terms treat man and woman alike and repeatedly mention gender equality").

Importantly, as recognized by the European Nationality Convention and other international sources, a statute that would reconcile statelessness concerns with principles of equality could be crafted by holding both mothers and fathers to the less onerous residency standards currently applied only to mothers. Although both discrimination and statelessness can be easily avoided, the U.S. continues to opt for an approach that does neither, confirming the irrationality of the current legislative approach.

In continuing to defend such discriminatory citizenship laws, the U.S. undermines the domestic principles of sex equality and dilutes the meaning of constitutional equality worldwide. Respected reasoning from a wide range of international and comparative sources support a reversal of this approach.

CONCLUSION

For the reasons stated, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX I

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STATEMENTS OF INTEREST OF AMICI CURIAE

Equality Now is an international human rights organization working for the protection and promotion of the rights of women and girls worldwide with a membership network of more than 35,000 individuals and organizations in 160 countries. In July 1999, Equality Now issued a report, *Words and Deeds - Holding Governments Accountable in the Beijing + 5 Review Process*, highlighting a representative sampling of laws in 45 countries around the world that explicitly discriminate on the basis of sex. One of the discriminatory laws highlighted in this report, updated in February 2010, is Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), *as amended*, 8 U.S.C. § 1409, which grants citizenship to children born overseas and out of wedlock to only one U.S. citizen parent based on the sex of that parent and whether their unequal obligations as a father or mother under the statute have been met. Equality Now has continued its efforts to get 8 U.S.C. 1409 amended in accordance with the commitment made by the U.S. government, together with other governments, in ¶ 232(d) of the Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 4-15 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, to revoke laws that discriminate on the basis of sex. Equality Now submitted a brief with other organizations as *amici*

curiae in support of petitioners in *Nguyen v. INS*, 533 U.S. 53 (2001), which challenged the constitutionality of 8 U.S.C. § 1409 with reference to the equality rights set forth in the United Nations International Covenant on Civil and Political Rights and in emerging customary international law. The brief also argued that the U.S. Supreme Court has greatly influenced the jurisprudence of other countries and should therefore play a leading role in the establishment and promotion of international human rights law.

Bahrain Women Association For Human Development (BWA) is a non-profit organization established in July 2001 and was recognized in 2007 as the only non-governmental organization in Bahrain with special consultative status to the United Nations Economic and Social Council. BWA's vision is to empower leaders for the human development era. One of BWA's main goals is to modify the existing laws regarding women and nationality in Bahrain. BWA aims to contribute to the development of legislation that supports women and their rights and to raise awareness to eradicate negative attitudes and practices against women.

Ethiopian Women Lawyers Association (EWLA) is a non-governmental organization based in Addis Ababa, working for the protection and promotion of women's rights in Ethiopia. The organization is engaged in various legislative initiatives, particularly in relation to family law and laws relating to violence against women. The organization is also engaged in the provision of legal

services to women, and in broader educational initiatives for the promotion of legal literacy among women in Ethiopia.

Forum for Women, Law and Development (FWLD) is an autonomous, non-profit, non-governmental organization established in 1995 in Kathmandu, Nepal. FWLD is committed to promoting, protecting and fulfilling the human rights of women and marginalized groups. One of FWLD's major objectives is to facilitate the amendment of discriminatory laws in Nepal to ensure an equal and just society. FWLD is continuously working on the reformation of law and policy and its effective implementation resulting in a real-life positive impact on the target population. FWLD has been involved in a number of test cases on equality issues using international law in the domestic courts of Nepal and is currently conducting a study on access to justice in Nepal with a view to assessing how justice can be made more accessible. FWLD has submitted shadow reports to the United Nations Committee on the Elimination of Discrimination against Women on the implementation of the government of Nepal's obligations under the Convention on the Elimination of All Forms of Discrimination against Women.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and responds to violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights

organization based in the U.S. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

The International Human Rights Law Clinic at the University of Virginia School of Law (U.Va. Clinic) gives students direct, practical experience in human rights advocacy under the supervision of international human rights lawyers. Projects are chosen to help students build the knowledge and skills necessary to be effective human rights lawyers and to integrate the theory and practice of human rights. The U.Va. Clinic collaborates with non-governmental organizations and individual advocates on a wide range of human rights issues through various means, including litigation. The U.Va. Clinic's work regularly involves comparative legal analyses and international law analyses of alleged human rights violations or domestic legislation.

International Women's Rights Action Watch (IWRAW) was founded in 1985 and is affiliated with the University of Minnesota Human Rights Center, based at the Law School. IWRAW is a resource and communication center focusing on the implementation of women's human rights under the UN human rights treaties. It pioneered shadow reporting on the status of women in countries under

review by the United Nations Committee on the Elimination of Discrimination against Women and other treaty monitoring bodies and provides technical assistance on treaty implementation.

International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific) is an international non-governmental organization established in Kuala Lumpur, Malaysia, in 1993. IWRAW Asia Pacific works toward the progressive interpretation, implementation, and realization of the human rights of women through the lens of the United Nations Convention on the Elimination Against All Forms of Discrimination Against Women (CEDAW Convention) and other international human rights treaties. IWRAW Asia Pacific promotes the domestic implementation of international human rights standards by building the capacity of women and human rights advocates to claim and realize women's human rights. The organization has worked consistently with the CEDAW Convention and its Committee to support the recognition and enjoyment of women's human rights in national contexts, by facilitating the participation of women from national organizations in over 120 countries in the CEDAW review process.

The Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), founded in 1987, is a regional network of individuals and non-governmental organizations based in Lima, Peru with affiliates in fourteen countries working for the full enjoyment of women's rights, based on principles of equality and non-

discrimination, among others. CLADEM has had consultative status with the United Nations since 1995 and was authorized to take part in activities at the Organization of American States in 2002. CLADEM promotes the drafting and approval of international and regional human rights instruments, and it holds governments accountable for the lack of implementation of women's human rights standards by submitting reports as well as filing strategic litigation cases at the national and international levels. In March 2009, CLADEM was awarded the King of Spain Human Rights Prize.

Women in Law and Development in Africa (WiLDAF) is a pan-African, non-governmental organization working to bring together organizations and individuals using law to promote and protect women's rights in African countries. WiLDAF's goal is to promote the effective use of legal strategies by women in Africa for self, community and national development. The organization, which was established in 1990, has chapters in 21 countries of Africa. The Regional Office is based in Lusaka, Zambia.