No. 15-1191

In the Morris Tyler Moot Court of Appeals at Yale

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

LUIS RAMON MORALES-SANTANA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED[1]

Under the Immigration and Nationality Act of 1952 (INA), an American citizen who has a child abroad with a non-citizen can transmit derivative citizenship to their child only if they were physically present in the United States for a specified period of time prior to the child's birth. The questions presented are:

1. Whether Congress's decision to impose a more lenient physical-presence requirement on unwed citizen mothers of foreign-born children than those imposed on other parents of foreign-born children is consistent with the Fifth Amendment's guarantee of equal protection; and
2. Whether the Second Circuit erred in bestowing citizenship upon Morales-Santana, absent express statutory authorization to declare him a citizen.

[1] All parties are named in the caption of this case.

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The Second Circuit's opinion is reported at 804 F.3d 520. The Board of Immigration Appeals' decision is unreported. *See* Pet. App. 42a. The immigration judge's decision is also unreported. *See* Pet. App. 45a.

JURISDICTION

The Second Circuit entered its judgment on October 30, 2015. The Second Circuit denied a petition for rehearing on December 1, 2015. *See* Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and a petition for writ of certiorari was filed on March 22, 2016. The Court granted the petition on June 28, 2016. 136 S. Ct. 2545 (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides in relevant part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. The Fifth Amendment of the United States Constitution provides in relevant part:

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

3. Section 301(a)(7) of the Immigration and Nationality Act of 1952 (INA), ch. 477, 66 Stat. 235, 8 U.S.C. § 1401 (1958) provides in relevant part:

> The following shall be nationals and citizens of the United States at birth: * * * 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 * * * *

4. Section 309 of the INA, ch. 477, 66 Stat. 238, 8 U.S.C. § 1409 (1958) provides in relevant part:

> (a) The provisions of paragraph * * * (7) of section 301(a) * * * shall apply as of the date of birth to a child born out of wedlock on or after the effective date of the Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation. * * *

> (c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, 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.

STATEMENT

In 1995, a jury convicted Morales-Santana of four counts of attempted murder, first-degree robbery, second-degree robbery, and second-degree criminal possession of a weapon. *See* Pet. App. 45a. The United States initiated proceedings to remove Morales-Santana as an alien who had committed aggravated felonies and a firearms offense. *Id.* The present case involves Morales-Santana's attempt to avoid that deportation by claiming that he is a United States citizen, since his birth in 1962, under the Immigration and Nationality Act of 1952 ("INA").

A. Statutory Framework

Pursuant to its constitutional power "to establish an uniform rule of naturalization," Congress grants derivative citizenship to certain children born outside of the country to American citizen parents. U.S. Const. art. I, § 8, cl. 4. The conditions that must be satisfied in order for a child born abroad to become a citizen are outlined in various provisions of the INA. 8 U.S.C. § 1401. These rules ensure that children born abroad have a sufficiently strong connection to the United States to merit the benefits and responsibilities associated with citizenship. When both parents are citizens, the requisite strength of this connection is largely presumed and prerequisites to transmitting citizenship are low. *See id*. § 1401(a)(4).

However, when only one of the child's parents is an American citizen, Congress determined that the requisite connection to the United States is less inevitable. In such a situation, only one parent can contribute American values to the child's upbringing, and the child might have a competing allegiance to the non-American parent's country. For that reason, Congress has imposed greater barriers to citizenship for children born abroad when only one of their parents is a citizen.

At the time of Morales-Santana's birth in 1962, the INA provided the following conditions for one parent to transmit citizenship.[2] When an American citizen was married to a non-citizen, their child born abroad would only derive citizenship if the citizen parent had been physically present in the United States for ten years prior to the birth, at least five of which transpired after the parent turned fourteen years old. 8 U.S.C. § 1401(a)(7). But Congress recognized that it also needed to enact rules to govern derivative citizenship for children born abroad and out of wedlock; Congress therefore enacted Section 1409. INA, § 309, 66 Stat. 238, 8 U.S.C. § 1409 (1958).

Section 1409 created two different rules for transmitting citizenship: one rule for unwed citizen fathers, and one rule for unwed citizen mothers. Congress treated unwed citizen fathers just like it treated married citizens of both sexes, applying the provisions of Section 1401(a) to fathers who "legitimate" their child prior to the child's twenty-first birthday. Thus, when a (subsequently legitimated) child was born abroad to an unmarried citizen father and a non-citizen mother, the child would only become a citizen if their father was physically present in the United States for ten years prior to birth, at least five of which occurred after the father turned fourteen.

However, instead of extending the normal ten-year physical-presence requirements to unwed citizen mothers, Congress carved out an exception. The child of an unwed citizen mother would become a citizen if the mother "had previously been physically present in the United States for a continuous period of one year." 8 U.S.C. § 1409(c). Congress instituted this exception for unmarried citizen mothers in order to balance two competing governmental interests: ensuring that derivative citizens have a connection to the United States, and reducing the risk that children would be born without any citizenship. The one-year physical-presence requirement was enacted to accommodate

[2] Over the years, Congress has amended the relevant provisions of the INA, lowering the ten-year physical-presence requirement to a five-year requirement. *See* INA Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3653. However, that amendment only applies to children born after November 14, 1986. *See* Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618. Accordingly, the INA of 1952, which was operative at the time of Morales-Santana's birth, governs his claim. And for that reason, unless otherwise specified, all references to Sections 1401 and 1409 in this brief are to the 1958 edition of the United States Code.

those interests, ensuring a minimal, albeit sub-optimal, connection to United States, while significantly reducing the possibility of statelessness.

B. Factual Background

Morales-Santana was born in the Dominican Republic in 1962. Pet. App. 6a. His father was a United States citizen and his mother was a Dominican citizen; they were not married at the time of Morales-Santana's birth. In 1970, Morales-Santana was "legitimated" before his twenty-first birthday when his parents married. *Id.*; *see* 8 U.S.C. § 1409(a). Morales-Santana moved to the United States as a lawful permanent resident in 1975, and his father died the following year.[3] Pet. App. 6a.

Although Morales-Santana's father legitimated Morales-Santana, he did not meet the physical-presence requirements for unwed citizen fathers to transmit citizenship outlined in Section 1401(a)(7). *Id.* It is undisputed that, prior to Morales-Santana's birth, his citizen father was not physically present in the United States for five years while beyond the age of fourteen. *Id.* However, Morales-Santana's father had been continuously present in the United States for one year prior to Morales-Santana's birth. *Id.* As a result, Morales-Santana's father would meet the lower physical-presence requirements that the INA imposes on unwed citizen mothers.

C. Procedural History

In 2000, the United States initiated proceedings to deport Morales-Santana as an alien who had committed aggravated felonies and firearm offenses. The immigration judge entered a removal order, and Morales-Santana moved for reconsideration on two bases. First, that he was a citizen because his father satisfied the physical-presence requirements. *Id.* at 42a. And, in the alternative, that the distinction in physical-presence requirements between unwed fathers and mothers was

[3] The Government does not contest the third-party standing of Morales-Santana to assert the constitutional rights of his deceased citizen father. *See* Pet. App. 14a n.5; *see Miller v. Albright*, 523 U.S. 420, 449 (1998) (O'Connor, J., concurring) (noting that children can appropriately assert third-party standing to vindicate the constitutional rights of deceased parents who face a "daunting" barrier to asserting their own rights).

unconstitutional. *Id.* The Board of Immigration Appeals denied Morales-Santana's motion because his father had not satisfied the INA's physical-presence requirements. *Id.* Morales-Santana appealed that decision to the Second Circuit.

The Second Circuit rejected Morales-Santana's statutory arguments. However, applying intermediate scrutiny, the court determined that the INA's imposition of longer physical-presence requirements on unwed citizen fathers than on unwed citizen mothers violated the equal protection component of the Fifth Amendment. *Id.* at 38a. In so concluding, the court below declined to apply the more deferential level of scrutiny that this Court has traditionally used to evaluate challenges to the INA. *Id*. at 20a. To fix the perceived violation, the Second Circuit declared, "Morales-Santana is a citizen as of his birth." *Id.* at 41a. The court achieved this result by retroactively extending the one-year continuous physical-presence requirement of Section 1409(c) to unwed citizen fathers. *Id*.

SUMMARY OF ARGUMENT

I. The determination of which individuals born abroad may become members of our national community is a quintessential policy decision within the bailiwick of Congress. It involves an inherently political choice, implicating the fundamental nature of sovereignty, the complexity of foreign relations, and the delicacy of national security. For this reason, the Court has long-recognized that Congress's exercise of its plenary power over immigration and naturalization warrants especially deferential judicial review.

Even when citizens challenge Congress's exercise of this plenary power as violative of their constitutional rights, this Court nonetheless accords substantial deference to the policy determinations of Congress. In *Fiallo v. Bell*, this Court "underscore[d] the limited scope of judicial inquiry into immigration legislation," holding that a "facially legitimate and bona fide" policy decision by Congress in the immigration and naturalization context was valid, notwithstanding its conflict with the equal protection rights of citizens. 430 U.S. 787, 792 (1977).

Although previous cases applying this particular articulation of the deferential standard have specifically involved exclusion and immigration status, their reasoning is equally applicable in the context of naturalization requirements. Naturalization, like immigration, is fundamentally about Congress's power to control which aliens may enter and remain in the United States. Congress enacts immigration and naturalization requirements as interrelated parts of the same complex statutory scheme. Furthermore, not only has this Court expressly left open the question of whether the "facially legitimate and bona fide" standard applies to naturalization requirements, but it has previously applied an equally deferential standard to naturalization requirements. *See Nguyen v. I.N.S.*, 533 U.S. 53, 61 (2001); *Rogers v. Bellei*, 401 U.S. 815, 831 (1971). Applying *Fiallo*'s "facially legitimate and bona fide" standard to the physical-presence requirements of Section 1409 demonstrates the clear constitutionality of the means chosen by Congress to effectuate its naturalization policy.

II. However, the Court not need address the applicability of the "facially legitimate and bona fide" standard to the INA, because the challenged requirements survive intermediate scrutiny. Congress enacted the physical-presence requirements of Sections 1409 and 1401 pursuant to two important objectives: (1) ensuring a sufficient connection between the prospective derivative citizen and the United States; and (2) reducing the risk that the child of a citizen would be born stateless. Furthermore, the physical-presence requirements are substantially related to these objectives. Requiring citizen parents themselves to have a sufficient connection to the United States enables them to pass this connection through to their children. And imposing a less-substantial presence requirement on the category of citizen-parent most likely to have foreign-born children who would otherwise be stateless at birth—unwed mothers—reduces the risk of potential statelessness.

Ultimately, the distinction in physical-presence requirements between unwed mothers and other categories of citizen-parents reflects the differently-situated nature of these parties. To treat them

differently based on this legitimate difference—rather than on any outmoded stereotypes—comports with equal protection principles.

III. Yet, even if the INA's distinction violates equal protection, Morales-Santana would still not be entitled to a judicial declaration of citizenship. Because the Constitution mandates *equal* treatment, fixing a violation "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). Accordingly, this Court could cure the supposed violation in two ways: (1) requiring both unwed citizen fathers and mothers to satisfy one year of continuous physical presence; or (2) requiring both unwed citizen fathers and mothers to satisfy ten years of physical presence.

In choosing the one-year option, the Second Circuit did something that no appellate court—including this one—has ever done before: invalidate a naturalization statute in a way that affirmatively grants citizenship to a category of individuals that Congress did not. *See Miller v. Albright*, 523 U.S. 420, 455 (1998) (Scalia, J., concurring) (finding "no instance" where the "Court has severed an unconstitutional restriction" so as to grant citizenship). The Court should reverse that overextension of constitutional and statutory authority for three reasons: (A) it violates separation of powers tenets; (B) it thwarts the congressional intent surrounding the INA; and (C) it imprudently confers citizenship upon countless individuals in a manner that Congress cannot overturn.

A. Courts lack constitutional power to confer citizenship, unless Congress has granted express statutory authorization. Separation of powers doctrine necessitates "strict compliance" with authorizing statutes, because "Congress *alone* has the constitutional authority to prescribe rules for naturalization." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (emphasis added). Simply put, "the power to make someone a citizen * * * has not been conferred upon the federal courts"—even when remedying constitutional violations. *I.N.S. v. Pangilinan*, 486 U.S. 875, 883-84 (1988).

Congress has not expressly authorized conferring citizenship on Morales-Santana. Actually, on the INA's face, Morales-Santana is plainly not a citizen because his father did not satisfy the ten-year physical-presence requirement. Confronted with this reality, the Second Circuit rewrote the INA to artificially manufacture its own express "*self*-authorization." Courts cannot rewrite immigration statutes to authorize themselves to grant citizenship. Such remedies nullify the express authorization requirement, and endanger the constitutional structure it supports. When confronted with an equal protection violation in a naturalization statute, courts must raise the bar to citizenship for both groups on a prospective basis—not unilaterally lower the bar on a retroactive basis. This circumspect approach is the only way to avoid exercising a power belonging only to Congress.

B. Even if the Court has power to confer citizenship on Morales-Santana, it should not do so. This Court decides how to remedy unconstitutional statutes by analyzing legislative intent. Congress would not want this Court to rectify the INA by lowering the physical-presence requirement for unwed fathers to one year. The statutory scheme, read as a cohesive whole, illustrates that Congress generally intended significant hurdles to transmitting derivative citizenship. Congress merely carved out a narrow exception for unwed citizen mothers, and that exception should not swallow the rule. Furthermore, Congress repeatedly considered—and repeatedly rejected—bills slashing the physical-presence requirement for unwed citizen fathers to a single year. That pattern of legislative behavior illustrates that the Second Circuit's remedy countermands the congressional intent behind the INA.

C. Prudence also dictates that this Court not unilaterally and irrevocably confer citizenship upon countless individuals. While the number cannot be defined exactly, a ruling for Morales-Santana would likely also bestow citizenship on—at minimum—hundreds of thousands of other individuals. Furthermore, if this Court bestows citizenship on those individuals, then Congress will be powerless to reverse course. Congressional power over naturalization normally operates as a one-way ratchet; the Constitution "grants Congress no express power to strip people of their citizenship." *Afroyim v.*

Rusk, 387 U.S. 253, 257 (1967). By contrast, if the Court adopts the Government's proposed remedy, Congress could lower the requirements for both sexes back down.

As a result, Morales-Santana asks this Court to invert the Constitution's well-reasoned division of power. Congress has "plenary authority" over naturalization, and courts "avoid intrusion into this field." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). This Court should not, with a stroke of its pen, reverse that constitutional paradigm by conferring citizenship upon innumerable individuals in a manner that ties Congress's hands. The Constitution demands, and prudence dictates, that decisions to lower the barrier to citizenship can only be made by Congress. Therefore, even if the INA violates equal protection, Morales-Santana is not a citizen, and, in light of his crimes, he can be deported.

ARGUMENT

I. SECTION 1409 SATISFIES THIS COURT'S DEFERENTIAL REVIEW OF IMMIGRATION AND NATURALIZATION LEGISLATION.

For over a century, this Court has declined to second-guess Congress's decisions made pursuant to its plenary power over immigration and naturalization. Under this long-established practice of judicial deference, this Court should uphold the physical-presence requirements of Section 1409.

A. The "facially legitimate and bona fide" standard applies to immigration and naturalization statutes.

Congress has the power and obligation to determine which aliens may be admitted into the United States, and which may take on the added benefits of responsibilities of becoming full members of American society. As Gouverneur Morris of New York proclaimed at the Constitutional Convention, "every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted." Max Farrand, *The Records of the Federal Convention of 1787* at 237 (1966).

The Constitution left this essentially political determination to Congress. And, recognizing the important sovereignty, foreign policy, and national security concerns implicated, the judiciary has long

deferred to congressional decision-making regarding immigration and naturalization policy. This Court developed the "facially legitimate and bona fide" standard of review out of this history of deference, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), and recognizes it as the appropriate standard for analyzing constitutional claims challenging immigration and naturalization statues, *Fiallo*, 430 U.S. at 795. Applying this standard, the parental physical-presence requirements of Section 1409 clearly comprise a constitutional exercise of Congress's power over naturalization.

1. The Court applies the "facially legitimate and bona fide" standard to ensure appropriate deference to Congress in the sphere of immigration and naturalization.

The Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). The breadth of Congress's authority and the "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Plyler*, 457 U.S. at 225. As a result, the Court has never held unconstitutional any provision of immigration and naturalization statutes relating to requirements for gaining admission or obtaining naturalization. *See* Gov't Printing Office, *Acts of Congress Held Unconstitutional in Whole or In Part by the Supreme Court of the United States* (2013), https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013-11.pdf (listing three invalidated provisions relating to the revocation of citizenship).

Judicial deference is appropriate because immigration and naturalization implicate sovereignty, foreign relations, and national security. The State's power to admit or exclude aliens "upon such conditions as it may see fit to prescribe" is "inherent in sovereignty, and essential to self-preservation." *Ekiu v. United States*, 142 U.S. 651, 659 (1892). This status as a "fundamental sovereign attribute exercised by the Government's political departments" makes it "largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Additionally,

naturalization is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Therefore, naturalization is "of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

In light of these considerations, decision-making in the sphere of naturalization and immigration policy is inherently political. Judicial deference is therefore required because the judiciary is ill-equipped to make these sensitive political decisions. This Court has recognized that "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government" and are therefore "entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954). The political character of these decisions makes them "wholly outside the concern and the competence of the Judiciary." *Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring). Therefore, the Court has disclaimed any "judicial authority to substitute [its] political judgment for that of the Congress." *Fiallo*, 430 U.S. at 798.

The Court continues to regularly recognize the broad power of Congress in the immigration and naturalization context. *See Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *Demore v. Kim*, 538 U.S. 510, 521-22 (2003). And the Court continues to recognize the concurrent necessity of judicial deference in this area. *See Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring); *Nguyen*, 533 U.S. at 67 ("If citizenship is to be conferred by the unwitting means petitioners urge * * * it is for Congress, not this Court, to make that determination."). The Court has repeatedly declined to cut back on this deference, and should continue to do so in this case. *See Fiallo*, 430 U.S. at 792 n.4; *Mandel*, 408 U.S. at 767.

To reflect the Constitution's division of power, this Court developed a deferential standard of review for assessing constitutional challenges to immigration and naturalization statutes. The "facially legitimate and bona fide" standard was first articulated in *Kleindienst v. Mandel*. 408 U.S. 753 (1972).

In *Mandel*, citizens alleged that the decision to deny a visa to a Belgian communist who wanted to lecture in the United States violated their First Amendment rights. *Id*. at 756-60. The Court disagreed, concluding that Congress's plenary power trumped citizens' interests. Articulating the relevant standard, the Court held that when this power is exercised "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind [it] * * * nor test it by balancing its justification against" the competing constitutional interests involved. *Id*. at 770.

The "facially legitimate and bona fide" standard was applied again in *Fiallo v. Bell* to uphold an act to Congress. 430 U.S. 787 (1977). In *Fiallo*, illegitimate children and their fathers brought an equal protection challenge to the INA, claiming that the denial of a special preference immigration status to the fathers violated the constitutional rights of the citizen children. *Id*. at 788-91. The Court held that when reviewing a "congressional policy choice" in the immigration and naturalization context, the standard from *Mandel* applies. *Id*. at 794-95. Because Congress made a determination pursuant to its plenary power over immigration, "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Id*. at 799.

Justice Kennedy and Justice Alito recognized the continuing vitality of this standard last year. In *Kerry v. Din*, a citizen asserted that her substantive due process right to live with her husband was violated when the Government denied her spouse's visa application. 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring). Justice Kennedy, joined by Justice Alito, reasoned that an immigration decision "that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.'" *Id.* at 2140 (citing *Mandel*, 408 U.S. at 770).[4] Applying the standard, Justice Kennedy concluded that the decision was "facially legitimate" because it "rested on

[4] The plurality of the Court did not decide to the contrary, but rather resolved the case by determining that the citizen was not asserting a valid constitutional right. 135 S. Ct. at 2133 (plurality op.).

a determination that Din's husband did not satisfy the statute's requirements." *Id*. Furthermore, the Government "relied upon a bona fide" reason because it specifically referenced the statute at issue. *Id.*

The "facially legitimate and bona fide" standard is consistent with those previously applied in assessing other challenges to Congress's exercise of its power over immigration and naturalization. In *Matthews v. Diaz*, the Court upheld the disparate treatment of resident aliens in the receipt of federal benefits, because the statutory requirements were not "wholly irrational." 426 U.S. at 83. Similarly, in *Rogers v. Bellei* the Court upheld naturalization requirements because the requirements were "not unreasonable, arbitrary, or unlawful." 401 U.S. at 831. These deferential standards reflect the separation of powers principles at stake in this case, and recognize the necessity of deferring to Congress in its handling of this sensitive subject matter.

2. The "facially legitimate and bona fide" standard applies to Morales-Santana's constitutional claim.

The court below declined to apply the "facially legitimate and bona fide" standard, because *Fiallo* and *Mandel* involved the admission and exclusion of aliens, whereas this case involves the naturalization of aliens. *See* Pet. App. 20a. However, this Court expressly left open the applicability of the *Fiallo* standard to naturalization in *Miller* and *Nguyen*, determining that it need not decide the question because intermediate scrutiny was satisfied. *Nguyen*, 533 U.S. at 61; *Miller*, 523 U.S. at 434, n.11 (Stevens, J.). Fundamentally, naturalization and immigration are sides of the same constitutional coin; Morales-Santana offers no persuasive justification for declining to apply this Court's established deferential review to naturalization requirements.

Section 1409 was enacted pursuant to Congress's extensive power over naturalization. The Constitution grants Congress the "Power * * * To establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. An individual born abroad—such as Morales-Santana—"is an alien as far as the Constitution is concerned, and 'can only become a citizen by being naturalized, either by treaty * * * or by authority of Congress.'" *Miller*, 523 U.S. at 453 (Scalia, J., concurring) (citing *United States*

v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898)). This Court has recognized that "naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit." *Schneiderman v. United States*, 320 U.S. 118, 131 (1943).

Naturalization requirements—like immigration—involve Congress's power over who may enter and remain in the United States. Granting derivative citizenship to aliens gives them the right to enter, remain in, and leave the country at will. *See Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."). This very case illustrates the point: Morales-Santana seeks to establish his citizenship in order to avoid deportation.

Applying a stricter standard to naturalization decisions is unwarranted because Congress's power over naturalization is fundamentally necessary to its power over immigration. As the Court recognized recently, the Government's "broad, undoubted power over the subject of immigration and the status of aliens * * * rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization.'" *Arizona*, 132 S. Ct. at 2498 (citations omitted). It would be perverse for this Court to afford Congress *more deference* for the exercise of a derivative power—immigration—than the fundamental power committed by the Constitution—naturalization.

The Court and Congress both recognize that the powers over immigration and naturalization are intertwined. That Congress chose to legislate on these matters in the same Act demonstrates their affinity. *See* INA of 1952, 66 Stat. 163 ("An Act to revise the laws relating to immigration, naturalization, and nationality."). Furthermore, the Court has repeatedly recognized that immigration and naturalization are part of the same comprehensive statutory scheme. *See Plyler*, 457 U.S. at 219, 225 ("Congress has developed a complex scheme governing admission to our Nation and status within our borders."); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (recognizing that

Congress enacted "a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization").

Finally, *Diaz* and *Bellei* demonstrate that deferential review is *not* limited to entry and exclusion decisions. *Diaz* involved resident aliens' claims that the requirement that aliens reside in the country for five years before being eligibility for Social Security benefits violated due process rights. 426 U.S. at 69. The Court referenced Congress's "broad power over naturalization and immigration," and concluded that its traditional deference applied to "the relationship between the alien and this country" outside the admission and deportation contexts. *Id*. at 79-80. Similarly, *Bellei* involved a due process challenge to naturalization requirements, and the Court applied a deferential "unreasonable, arbitrary, or unlawful" standard of review. *Bellei*, 401 U.S. at 831.

B. Section 1409 is a "facially legitimate and bona fide" legislative act to regulate naturalization.

Applying the "facially legitimate and bona fide" standard, the parental physical-presence requirements of Section 1409 are constitutional. Under this standard, when the plenary power over immigration and naturalization is exercised "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional] interests of" the challengers. *Fiallo*, 430 U.S. at 794-95 (quoting *Mandel*, 408 U.S. at 770). Imbued within this standard are the questions the Court asked in *Bellei*: whether regulation was "not unreasonable, arbitrary, or unlawful." 401 U.S. at 831.

Section 1409 is "facially legitimate" because it is a rational exercise of Congress's plenary power. Congress legislated attendant to its "legitimate concern * * * that those who bear American citizenship and receive its benefits have some nexus to the United States." *Bellei*, 401 U.S. at 831-32 (citation omitted). Furthermore, the requirements are not "irrational or arbitrary or unfair." *Id.* at 833. A physical-presence requirement is rationally related to ensuring a connection to the United States; a less-strenuous physical-presence requirement for women at risk of having stateless children is

rationally related to reducing the risk of statelessness. This Court concluded in *Bellei* that a physical-presence requirement for children, on top of a physical-presence requirement for parents, "surely is not unreasonabl[e]." *Id.* at 833-34. Therefore, the parental requirement alone is also not unreasonable.

Furthermore, Section 1409 is a bona fide exercise of Congress's power because it creates a uniform rule of naturalization, and it addresses legitimate naturalization concerns. *Cf. Din*, 135 S. Ct. at 2140. Perhaps "the line should have been drawn at a different point," but the Court has "no judicial authority to substitute [its] political judgment for that of the Congress." *Fiallo*, 430 U.S. at 798. Because Congress's enactment of Section 1409 is based on a "facially legitimate and bona fide reason," this Court should not "look behind the exercise of that discretion." *Id*. at 794-95.

II. SECTION 1409 SATISFIES INTERMEDIATE SCRUTINY.

As an exercise of Congress's power over immigration and naturalization, the "facially legitimate and bona fide" standard is appropriate for assessing the constitutionality of Section 1409. However, even if this Court rejects its established deferential review in favor of intermediate scrutiny, Section 1409 would still be constitutional. Under this Court's articulation of intermediate scrutiny in *Nguyen*, a gender-based distinction "withstand[s] equal protection scrutiny" when the challenged distinction "serves 'important governmental objectives and * * * the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 533 U.S. at 60 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). The physical-presence requirements in Section 1409 satisfy intermediate scrutiny because they are substantially related to achieving the important governmental interests of ensuring a connection between derivative citizens and the United States and reducing the risk of statelessness.

A. Important governmental objectives justify distinctions in the physical-presence requirements for U.S. citizen-parents of foreign-born children.

Under the first step of intermediate scrutiny, the challenged statute must serve "important governmental interests." *Nguyen*, 533 U.S. at 61. The Court is "concerned with the objectives of

Congress," which are ascertained "by drawing logical conclusions from [the statute's] text, structure, and operation." *Id*. at 67-68. In enacting the physical-presence requirements in Section 1409, Congress relied on two interrelated objectives. First, the requirements were intended to ensure a sufficient connection between prospective derivative citizens and the United States. Second, the requirements differentiated between unwed citizen mothers on the one hand, and all other categories of parents on the other hand, to reduce the risk of statelessness at birth. These two interests must be understood in tandem: the connection-interest motivated Congress to enact a standard ten-year presence requirement, whereas the statelessness-interest motivated Congress to enact an exception for unwed mothers. In enacting a distinction between minimum presence for single mothers and all others, Congress made a policy judgment of how to balance these competing government interests.

1. Connection to the United States

The Government has an important interest in ensuring that individuals born abroad have a sufficient connection to the United States to merit the extension of derivative citizenship. Since first extending derivative citizenship, Congress has sought to avoid creating a class of expatriates who pass citizenship on for generations without having any contact with the United States. *See* T. Alexander Aleinikoff et al., *Immigration and Citizenship* 51-52 (8th ed. 2016).

A mere blood connection to the United States through one's parents has never been sufficient to merit citizenship for foreign-born children. From the very first act extending derivative citizenship in 1790, parental physical-presence requirements have been employed as a means to ensure that derivative citizens have a sufficient connection to the country. Act of Mar. 26, 1790, ch. 3, 1 Stat. 104 (providing that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States"). This requirement was maintained in subsequent statutes, s*ee Bellei*, 401 U.S. at 823-25, and continues to this day, *see* 8 U.S.C. §§ 1401, 1409 (2012).

The legislative history of these statutes reveals that the physical-presence requirements were intended to ensure a connection between the prospective derivative citizen and the United States. In comments on a proposed draft of the Nationality Act of 1940, the drafting committee explained that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character." *Hearings on H.R. 6127 and H.R. 9980 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 426 (1940) (reprinted 1945). The Senate also specifically recognized that these physical-presence requirements were meant to ensure that foreign-born children eligible for derivative citizenship have "a real American background" and interest in the United States. S. Rep. No. 2150, 76th Cong., at 4 (1940).

This Court has repeatedly recognized the importance of this interest. *Nguyen* was about ensuring the relationship of the prospective citizen to the United States by requiring a sufficient connection between the parent and child. 533 U.S. at 64-65 (characterizing government interest as in the opportunity to "provide a connection between child and citizen parent and, in turn, the United States"). The provisions of Section 1409 at issue here target another aspect of that connection: ensuring that the parent has a sufficient connection to the United States to pass through to the child. *Bellei* also recognized the significance of residence for a connection to United States: "It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States." 401 U.S. at 832 (citation omitted). Furthermore, *Bellei* "emphasized the importance of residence in this country as the talisman of dedicated attachment." 401 U.S. at 834 (citing *Weedin v. Chin Bow*, 274 U.S. 657, 666-67 (1927)).

2. Statelessness

Against its determination that a ten-year parental residency was necessary to ensure a sufficient connection to the country, Congress had to accommodate a contradictory interest: reducing the risk of statelessness. Recognizing that unwed citizen mothers abroad ran a higher risk of having children who

would lack citizenship, Congress enacted an exception to the ten-year residency norm, imposing a more lenient one-year requirement. 8 U.S.C. § 1409(c). Congress's concern with statelessness was evident in its consideration of naturalization legislation in the early twentieth century. In 1933, Congress explicitly discussed the problem of statelessness in connection with proposed amendments to derivative citizenship requirements. *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States etc.: Hearings Before the H. Comm. on Immigration and Naturalization*, 73d Cong. 54-55 (1933).

Congress subsequently held hearings on a draft of the Nationality Act of 1940 proposed by the Executive; the drafting committee's explanatory comments—incorporated into the hearing record—specifically addressed the problem of statelessness. In discussions at the hearings, the State Department explained that the intent was to extend citizenship to children of unwed citizen mothers born abroad. *Hearings on H.R. 6127 and H.R. 9980*, at 43. In explaining the physical-presence distinction for unwed citizen mothers, the comments expressly stated: "[T]he laws of some thirty foreign countries contain provisions for the nationality of illegitimate children * * * such children follow the mother's nationality in the absence of any act legally establishing filiation." *Hearings on H.R. 6127 and H.R. 9980*, at 431. Indeed, the comment relied on a State Department article, focusing on the problem of statelessness for the children of unwed mothers. *See* 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, 258-59 (1935).

Statelessness was also a motivating concern underlying the 1952 act, because problems with people losing their nationalities significantly increased after World War II. *See Hearings Before the President's Comm'n on Immigration and Naturalization Before the H. Comm. on the Judiciary*, 82d Cong. 1-2 (1952). And a Senate report on the act specifically referenced statelessness with regards to

the less stringent requirements for single mothers. This distinction was meant to "[e]nsure that the child shall have a nationality at birth." S. Rep. No. 1137, 82d Cong., at 39 (1952).

Legislative history aside, the "text, structure, and operation" of the statute illustrate that Congress had a particular concern with the citizenship of the children of unwed mothers abroad. *Nguyen*, 533 U.S. at 67-68. From the first recognition of the ability of unwed citizen mothers to pass on citizenship in 1940, they were the only category of single-citizen parent to have a less-restrictive physical-presence requirement. *Compare* Nationality Act of 1940, § 205 para. 2, 54 Stat. 1140, *with id*. § 201(g), 54 Stat. 1139. The statute recognized that children born out of wedlock needed to be legitimated by the unwed father to obtain derivative citizenship through him. *See id*. § 205 para. 1. The statute also evinces an understanding of the complexity of nationality laws: America, a default *jus soli* country (extending citizenship by place of birth), also allows for certain cases of *jus sanguinis* (extending citizenship by blood). Congress understood that in default *jus sanguinis* countries, an unwed American mother without the ability to pass on her citizenship would necessarily have children who are stateless at birth.

This Court has recognized the seriousness of statelessness, and the importance of the Government's objective in preventing it. In *Trop v. Dulles*, the Court called statelessness "deplored in the international community of democracies" and noted that it has "disastrous consequences." 356 U.S. 86, 102 (1958). Because the power to render a person stateless is tied up in "the great powers of Congress to conduct war and to regulate the Nation's foreign relations," the power to prevent statelessness implicates the same concerns, and is necessarily an important objective. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164 (1963). Therefore, in addition to being an important issue in international law, preventing stateless also touches on foreign relations and national security concerns committed to the wisdom of the political branches.

B. Section 1409 is substantially related to the Government's interests in ensuring connection to the United States and reducing the risk of statelessness.

The second step in applying intermediate scrutiny is assessing "whether the means Congress chose to further its objective—the imposition of certain additional requirements upon an unwed father—substantially relate to that end." *Nguyen*, 533 U.S. at 68. In *Nguyen*, the Court analyzed this question by examining whether the regulation made sense in light of the particular governmental interest identified, *id*. at 68-69; and whether the interest can be furthered by the means, *id*. at 70.

Requiring a term of residency by citizen parents substantially relates to the Government's interest in ensuring a connection between derivative citizens and the United States. Congress employs other similar provisions to ensure that the parent passing citizenship can link the prospective derivative citizen to the country. *See* 8 U.S.C. § 1401(a)(7). Additionally, from 1934 to 1978, Congress required the derivative citizen himself to be present in the country for a period of time, to ensure the connection. Aleinikoff et al., at 52. It is reasonable for Congress to require a certain term of residency by the father, if the connection to United States is created through the father.

Furthermore, it is reasonable that the unwed citizen mother need not fulfill as extensive a residency requirement. The substantial relationship between the physical-presence requirement distinction and the interest in ensuring a connection to the United States is best understood by conceptualizing the connection as running from Point A (the country) to Point B (the parent) to Point C (the child). For unwed fathers, the connection from parent to child is particularly weak at birth: "it is not always certain that a father will know that a child was conceived." *Nguyen*, 533 U.S. at 65. Furthermore, fathers must take affirmative steps to legitimate the child in order to strengthen that connection. 8 U.S.C. § 1409(a). To offset this potentially weak parent to child link, the statute requires a particularly strong country to parent link, by mandating ten years of physical presence, with at least five years during early adulthood. *Id.* § 1401(a)(7).

However, for unwed mothers the parent to child link is established "as a matter of biological inevitability." *Nguyen*, 533 U.S. at 65. The unwed mother "knows that the child is in being and is hers and has an initial point of contact with him." *Id*. As a result, she need not take any affirmative steps to legitimate the child. Additionally, the mother's citizenship was likely to be the only one available to a child. Because citizenship is "nothing less than the right to have rights," that child would automatically have a stronger connection to the United States—its sole source of rights—than to other nations. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). Therefore, the country to parent link need not be as strong for unwed mothers to ensure an overall sufficient connection to the United States.

Additionally, unwed American mothers abroad faced a unique risk of having children born into statelessness. They were the only category of single-citizen parent facing this substantial risk, and so they were the only category under Sections 1401 and 1409 with reduced requirements. The interest in ensuring a connection to the United States, while reducing the risk of statelessness, is assuredly furthered by the means enacted by Congress.

As this Court recognized in *Nguyen*, a categorical distinction is acceptable for naturalization purposes. Congress can decline to engage in a case-by-case analysis where the "subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular" circumstance render it impracticable. *Nguyen*, 533 U.S. at 69. So too here, examining on a case-by-case basis whether a particular citizen's child was at risk of statelessness would be too subjective, intrusive, and difficult; it would turn upon whether there would be a natural father to legitimate the child, and the children of American citizens would be left statelessness until their case made it through the bureaucratic backlog. By enacting a categorical distinction, Congress made a policy choice in favor of administrative efficiency and more comprehensive citizenship coverage.

Furthermore, it does not undercut the "fit" between the interest and regulation that statelessness is not at risk in every instance of an unwed American mother giving birth abroad. As this Court

recognized in *Nguyen*, "None of [its] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." 533 U.S. at 70. Some countries were not default *jus sanguinis* in 1952, and in some countries there may have been a risk that the children of unwed citizen fathers would be born stateless. But these counterfactuals do not undermine the overall substantial relationship between the means chosen by Congress to advance its policy ends.

C. The physical-presence requirements do not violate equal protection because they are not based on outmoded gender stereotypes.

Fundamentally, Section 1409 does not violate equal protection because it does "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. As this Court recognized in *Nguyen*:

> There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.

533 U.S. at 68. As a result of this difference, citizenship of the child is derived from the mother at birth. Citizenship could not descend automatically from an unwed father. Congress established the low residency bar for unwed citizen mothers to reduce the risk of statelessness for their children, or the existence of a gap in citizenship between birth and legitimation by the father, if it ever came.

In recognizing the benign distinction of Section 1409, it is crucial to appreciate that the statute *does not* impose a special burden on unwed citizen fathers. Unwed fathers have the same ten-year residence requirement as married men and women. Rather, Section 1409 has a special provision for unwed mothers due to the special concern of statelessness. Unwed mothers and unwed fathers—along with American citizens married to a non-citizen—are differently situated. Equal protection is not violated where "different treatment of men and women * * * reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female [parents] * * * are not

similarly situated." *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). This Court has recognized, "that mothers and fathers of illegitimate children are not similarly situated." *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (plurality op.). And when "a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity." *Id.* at 354.

Congress has evolved its immigration and naturalization statutory scheme over time to eradicate past distinctions and become more equal. *See Bellei*, 401 U.S. at 831 (noting that until 1934, the laws only allowed citizen fathers—not mothers—to pass on derivative citizenship); H.R. Rep. No. 1365, 82d Cong., at 29 (1952) (noting that the INA of 1952 eliminated gendered distinctions on spousal immigration). But despite advancements that eliminated distinctions based on *gender*, some distinctions based on *sex* necessarily remain. The ability to give birth, and the circumstances attendant to this ability, constitute the true enduring marker of sex difference. "Principles of equal protection do not require Congress to ignore this reality." *Nguyen*, 533 U.S. at 66.

III. EVEN IF SECTION 1409 VIOLATES EQUAL PROTECTION, MORALES-SANTANA WOULD STILL NOT BE ENTITLED TO CITIZENSHIP.

When a court strikes down an equal protection violation, it "faces two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Heckler*, 465 U.S. at 738 (citations omitted); *see also Califano v. Westcott*, 443 U.S. 76, 89 (1979). This choice recognizes that the Constitution's mandate of equal treatment "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740.

Accordingly, if the INA violates equal protection, this Court faces two alternatives.[5] First, treat unwed citizen fathers like unwed citizens mothers, requiring both to show *one year* of continuous physical presence. Or second, treat unwed citizen mothers like unwed citizen fathers, requiring both to show *ten years* of physical presence. The Second Circuit erred by choosing the former solution over the latter. While, in many non-naturalization contexts, it may be preferable to cure equal protection violations by extending privileges, in the unique context of naturalization, constitutional and prudential considerations demand the opposite approach.

If ever there was a case in which it was both necessary and appropriate to cure an equal protection violation by constricting privileges: this is it. The Court should reverse the Second Circuit's decision to radically drop the bar to citizenship for three principal reasons. First, courts lack constitutional power to confer citizenship without express statutory authorization. Congress has not expressly authorized declaring Morales-Santana a citizen, and courts cannot fabricate that authorization by rewriting the INA. Second, reducing the physical-presence requirement for unwed citizen fathers would contradict clearly displayed congressional intent, making it an inappropriate remedy under this Court's jurisprudence. And third, this Court should not unilaterally confer citizenship upon countless individuals in a manner that Congress cannot reverse. Instead, the Court should leave Congress flexibility to determine naturalization policy.

A. This Court lacks constitutional power to bestow citizenship upon Morales-Santana.

Because Congress has exclusive power over naturalization, courts are powerless to bestow citizenship without express statutory permission. Consequentially, courts lack power to confer

[5] Another potential solution would be to simply invalidate both Sections 1401 and 1409 (i.e., end derivative citizenship). However, because the INA includes a general severability provision, such an outcome might undermine congressional intent. *See* INA of 1952, § 406. *But see Reno v. ACLU*, 521 U.S. 844, 885 n.49 (1997) (noting that a severance provision "is an aid merely; not an inexorable command"). Yet, severing both clauses together would still be preferable to Morales-Santana's desired remedy, as it would not violate the Constitution by conferring citizenship in the absence of express statutory authorization. Furthermore, while Morales-Santana relies on the *mere existence* of the severability clause, nothing about that clause in and of itself tells this Court whether to sever Section 1401 or to sever Section 1409.

citizenship on Morales-Santana, because his father did not meet the ten years of physical presence demanded by the INA. To circumvent the express authorization requirement, the Second Circuit rewrote the INA to only mandate one year of continuous physical presence. The Second Circuit thereby did something that even this Court has never done: cure an unconstitutional naturalization statute in a manner that affirmatively grants citizenship to a group of people that Congress did not. Courts cannot artificially engineer express congressional authorization to bestow citizenship; otherwise, the express authorization requirement, and the constitutional division of power it supports, would be eviscerated.

1. Courts lack constitutional power to confer citizenship absent explicit statutory authorization.

Under separation of powers doctrine, Congress retains plenary power over naturalization. *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question * * * *"); *Plyler*, 457 U.S. at 225 (noting that Congress's "plenary authority" over naturalization "has counseled the Judicial Branch to avoid intrusion into this field"). Congress's plenary power operates to the exclusion of the other branches. The axiom that naturalization policies are "entrusted *exclusively* to Congress" is "as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo*, 430 U.S. at 793 n.4 (emphasis added); *see also Fedorenko*, 449 U.S. at 506 ("[J]udicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress *alone* has the constitutional authority to prescribe rules for naturalization." (emphasis added)).

Because of that exclusivity, "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *Pangilinan*, 486 U.S. at 883-84. Courts are powerless to confer citizenship when devising remedies, unless acting in "strict compliance with the terms of an authorizing statute." *Id.*; *see also United States*

v. Ginsberg, 243 U.S. 472, 474 (1917) ("Courts are without authority to sanction *changes or modifications* [to naturalization statutes]; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." (emphasis added)). Furthermore, the INA also codifies these constraints on judicial power. *See* 8 U.S.C. § 1421(d) ("A person may only be naturalized * * * under the conditions prescribed in [the INA] and not otherwise.").

2. The INA does not expressly authorize bestowing citizenship upon Morales-Santana, and this Court cannot rewrite the INA to artificially create that authorization.

The implication of the above separation of powers doctrine is clear: courts can only cure equal protection violations by raising the bar to citizenship—not by lowering it. *See Pangilinan*, 486 U.S. at 885 ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by *any other means* does a court have the power to confer citizenship * * * *" (emphasis added)). Courts cannot unilaterally ax the barrier to citizenship; only Congress can make that decision. For that reason, there are "potential problems with fashioning a remedy," whenever a court strikes down an immigration law on equal protection grounds. *Nguyen*, 533 U.S. at 72.

While this limitation might create "potential problems," remedies that extend citizenship without explicit statutory authorization are just not in the judicial toolbox. This bright line rule cannot be bent, even for very sympathetic plaintiffs. For example, in *Pangilinan*, the Court refused to grant citizenship to Filipino nationals who had served honorably in the United States Armed Forces during World War II. The Court lacked power to make them citizens, because it needed to act in "strict compliance with the terms of [the] authorizing statute." *Pangilinan*, 486 U.S. at 884. And, if the Court could not deviate from the express authorization requirement in order to confer citizenship on World War II veterans, then surely it also cannot deviate from the requirement in order to confer citizenship on Morales-Santana.

Congress has not expressly authorized granting citizenship to Morales-Santana; in fact, it has done the opposite. Under the INA, *as written by Congress*, Morales-Santana is plainly not a citizen, because his father was not present for ten years prior to birth. Consequentially, Morales-Santana has no right to citizenship. *See Bellei*, 401 U.S. at 830 ("No alien has the *slightest right* to naturalization unless all statutory requirements are complied with." (emphasis added)). Confronted with this reality, the Second Circuit simply rewrote the statute. The Second Circuit bestowed citizenship on the children of unwed citizen "*parents*" who were "physically present in the United States or its outlying possessions for a continuous period of one year." Pet. App. 40a n.19 (emphasis in original).[6]

However, just because the Second Circuit found an equal protection violation, did not entitle it to concoct its own express authorization to bestow citizenship.[7] The Second Circuit did something that no appellate court—even this one—has ever done: remedy a naturalization statute to affirmatively grant citizenship to a group of individuals that Congress did not. *See Miller*, 523 U.S. at 455 (Scalia, J., concurring) (finding "no instance" where the "Court has severed an unconstitutional restriction" so as to grant citizenship). The Second Circuit argued that, in accordance with judicial power, it merely interpreted the INA as expressly authorizing "replacing" the ten-year requirement with a one-year requirement. Pet. App. 39a. Therefore, according to the Second Circuit, Morales-Santana has always been a citizen. *Id.* That argument is incorrect; there is no way to read the INA's text as even abstractly authorizing—let alone *expressly* authorizing—courts to confer citizenship on Morales-Santana.

If a statute needs to be *interpreted* and *remedied* in order to discern "express" authorization, then how "express" can that authorization possibly be? To reach the conclusion that the INA *expressly*

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[6] The Second Circuit also failed to recognize that its newly revised statute might actually make it *more difficult* for some unwed citizen fathers to transmit citizenship. By focusing exclusively on the length of the requirements, the Second Circuit failed to acknowledge that it was actually comparing "apples" (physical presence) and "oranges" (*continuous* physical presence). Theoretically, it is possible that a small number of unwed citizen fathers, who might, for example, take short business trips, could have met the five or ten-year physical-presence requirements set by Congress, but will not be able to satisfy the one-year *continuous* physical-presence requirement imposed by the Second Circuit.

[7] Instead, the Second Circuit should have "declin[ed] to engage in legislative draftsmanship of this sort," as the Fifth Circuit did when addressing the very same issue. *United States v. Cervantes-Nava*, 281 F.3d 501, 505-06 (5th Cir.), *cert. denied*, 536 U.S. 914 (2002).

bestows citizenship on Morales-Santana, the Second Circuit made at least three major analytical moves. First, it determined that the INA triggers intermediate scrutiny. Second, it ran all steps of intermediate scrutiny, finding an equal protection violation. And third, it examined legislative intent to ascertain how Congress would want the statute to be remedied. Making those analytical maneuvers took the Second Circuit thirty-six pages and eighteen footnotes. *See* Pet. App. 3a-39a. The complexity of that analysis illustrates that the INA's text does not authorize—let alone *expressly* authorize—granting citizenship to Morales-Santana. Furthermore, the Second Circuit's distortion of the statute is particularly flagrant, because it "replac[ed]" the number of years required. While the line between interpretation and revision may sometimes be hazy, if a court needs to engage in subtraction, then it has moved well beyond what Congress expressly authorized. Numbers are not elastic; there is no way to *interpret* the number ten as meaning the number one.

Accordingly, the Second Circuit had only one constitutional option: lift the physical-presence requirements—on a *prospective* basis—for unwed citizen mothers, matching the ten-year physical-presence requirement imposed on unwed citizen fathers.[8] This cure is the only way to avoid granting citizenship to Morales-Santana, and untold others, in the absence of a clear statutory directive. Congress could then reduce the requirement for *both* sexes back down to a year. However, until Congress softens those requirements, courts are powerless to do so. Key separation of powers principles would collapse, if courts rewrite statutes to contrive their own "express *self*-authorization" to grant citizenship. When confronted with an equal protection violation in a naturalization statute, courts must "punt" the problem back to Congress by adopting the circumspect approach.

[8] Key to the Government's proposal is that the remedy operates *prospectively*. The Second Circuit fundamentally erred when it suggested that it could not impose the Government's solution because it has "no more power to strip citizenship conferred by Congress than to confer it." Pet. App. 40a. The Government is not suggesting that the Court remove citizenship from individuals whose mothers satisfied the one-year requirement; just that, in the future, unwed citizen mothers will need to satisfy the ten-year requirement. In rectifying immigration statutes, this Court will sometimes adopt prospective approaches "[i]n order to protect the reliance interests" of affected groups. *Heckler*, 465 U.S. at 733. By contrast, in order to become a citizen, Morales-Santana needs any remedy to operate retroactively.

B. Lowering the physical-presence requirement for unwed citizen fathers would contravene clearly manifested congressional intent.

Even if this Court has constitutional power to slash physical-presence requirements, a straightforward application of precedent demands that it not. When remedying an unconstitutional statutory scheme, this Court assesses how Congress would have preferred to enact the statute, absent the violation. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 186 (1992) (repairing an unconstitutional statute in accordance with "the force contemplated by the legislature," and "without doing violence to the rest of the Act"); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (citations omitted)). Accordingly, the relevant inquiry is how the enacting Congress, in 1952, would have wanted the equal protection violation to be fixed.

Reducing the requirement for unwed citizen fathers to one year would violate clearly displayed legislative intent on two fronts. First, the INA, read as a cohesive whole, illustrates that Congress desired meaningful prerequisites to derivative citizenship. The one-year requirement for unwed citizen mothers is the exception to that general principle, and the Court should not allow the exception to swallow the rule. Second, in 1952, Congress considered—and rejected—cutting the physical-presence requirement for unwed citizen fathers to one year. In fact, over the last six decades, Congress has entertained and spurned numerous bills reducing the physical-presence requirement for unwed citizen fathers to one year. The Court should honor Congress's consistent decision not to trim the physical-presence requirement.

1. Reading the INA as a cohesive whole illustrates that Congress intended significant physical-presence requirements for conveying citizenship.

This Court does not read statutory provisions in isolation; rather, it reads statutory provisions together so that an act makes sense as a coherent unit. *See, e.g.*, *United States v. Atl. Research Corp.*,

551 U.S. 128, 135 (2007) ("[a]pplying th[e] maxim" that "statutes must be read as a whole" (citations omitted)); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("follow[ing] the cardinal rule that a statute is to be read as a whole"). Reading the INA as a cohesive whole illustrates that Congress would not want to hack the derivative citizenship requirement for unwed citizen fathers down to a single year.

The INA's statutory scheme is best understood as creating two rules for derivative citizenship: one general principle, and one exception to it. The general rule is annunciated in Section 1401(a)(7) (made applicable to children born out of wedlock via Section 1409(a)), and establishes a long physical-presence requirement in most cases. The exception to the rule is annunciated in Section 1409(c). The operation of these two rules creates the following four-part scheme:

1. Citizen mothers who are married to an alien father: 10 years of physical presence required for transmitting citizenship.

2. Citizen fathers who are married to an alien mother: 10 years of physical presence required for transmitting citizenship.

3. Unmarried citizen fathers who legally establish paternity: 10 years of physical presence required for transmitting citizenship.

4. Unmarried citizen mothers: 1 year of continuous physical presence required for transmitting citizenship.

Analyzing this framework demonstrates that Congress intended to ordinarily require the meaningful ten-year physical-presence requirement. Married mothers, married fathers, and unmarried fathers all must satisfy the ten-year requirement. Congress merely carved out a narrow exception for unwed citizen mothers.

As a result, Morales-Santana is asking this Court to make the exception swallow the rule, "convert[ing] what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835. This Court should deny his request. Congress designed the INA so that, in the majority of cases, a parent needs ten years of physical presence in order to transmit

citizenship. This demonstrates that Congress desired a meaningful hurdle to derivative citizenship. Moreover, the INA explicitly directs courts not meddle with the statutory framework so as to bestow citizenship on people Congress did not. *See* 8 U.S.C. § 1421(d) ("A person may only be naturalized * * * under the conditions prescribed in [the INA] and not otherwise."). This Court should respect Congress's wish.

Furthermore, if this Court opens the floodgates by expanding the one-year continuous presence exception beyond the single circumstance Congress designated, then it is likely that the one-year exception will eventually colonize the entire framework. Congress would not have preferred a lesser impediment to transmitting citizenship for unmarried citizen parents than for married citizen parents. However, Morales-Santana's argument forces the strange conclusion that Congress would want citizens who are married to foreigners to meet a ten-year requirement, while requiring unmarried citizens to only meet a one-year requirement. There is no logical reason for implementing a higher burden on married parents, and it may well be unconstitutional to do so. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down a contraception law that discriminated on the basis of marital status); *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down a law which discriminated on the basis of a child's legitimacy status).

Accordingly, while Morales-Santana does not explicitly ask this Court to make one year of continuous physical presence the standardized rule for all citizen parents, that is the logical endpoint of his argument. If the Court adopts Morales-Santana's proposed solution, it will soon need to address why Congress can discriminate against married individuals in this area. And, as a result, while Congress intended for the one-year requirement to only apply in one out of the four potential derivative citizenship scenarios, if Morales-Santana is successful, the one-year requirement might eventually apply in all four. When remedying an equal protection violation, this Court "consider[s] the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation."

Heckler, 465 U.S. at 739 n.5. Here, extending the one-year requirement would wreak havoc on the statutory scheme. The Court should not knock over this first domino; it likely will not be the last to fall.

2. Congress has repeatedly rejected bills that lower the physical-presence requirements for unwed citizen fathers to one year.

Congress's repeated consideration and rejection of an action provides strong evidence that Congress does not prefer that action. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) (noting that where Congress has "prolonged and acute awareness" of a potential solution, "Congress' failure to act on the bills proposed" to implement that solution displays antagonistic congressional intent); *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (relying on "evidence that Congress considered and rejected the *precise* issue presented before the Court" (citations omitted)). Consequentially, Congress's repeated rejection of bills lowering the physical-presence requirement for unwed fathers to one year shows that doing so would countermand congressional intent.

Over the last sixty-four years, Congress has uniformly maintained high physical-presence requirements for unwed citizen fathers. First, and most importantly, the 1952 Congress rejected a version of the INA applying the one-year continuous physical-presence requirement to unwed citizen fathers. *See* S. 2842, 82d Cong. § 301(a)(5) (1952). The bill would have granted citizenship to children born abroad to "*parents one of whom is a citizen* of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person." *Id.* (emphasis added). The bill explicitly included "children born out of wedlock" in that grant of citizenship. *Id.* § 309(a).

However, the measure met fierce opposition on the Senate floor, where thirteen Senators threatened to filibuster. *See Aliens Bill Stirs Filibuster Charge: Foes of McCarran Measure to Revise Immigration Laws Offer 136 Amendments*, N.Y. Times, May 14, 1952, at 11. Ultimately, the 1952 Congress passed the version of the INA applicable in this case. The enacted version required that

fathers be physically present for "at least ten years, with at least five of those years occurring after the age of fourteen." *See* 8 U.S.C. § 1409(a). Thus, contemporaneous to the relevant provision's enactment, Congress displayed aversion to the remedy imposed by the Second Circuit.

Later Congresses have displayed similar aversion to extending the one-year exception to unwed citizen fathers. While Congress eventually reduced the physical-presence requirement for unwed citizen fathers from ten to five years, it chose not to match the one-year continuous presence requirement imposed on unwed citizen mothers. *See* INA Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3653. Once again, the INA used a single physical-presence requirement (this time five years) for married mothers, married fathers, and unmarried fathers. But the framework maintained the one-year exception for unmarried mothers. *Id.* This paradigm has survived until today. *See* 8 U.S.C. § 1409(a) (2012).

Although the five-year rule lowered the hurdle to unwed citizen fathers transmitting citizenship, it stopped well short of the insubstantial one-year requirement Morales-Santana asks this Court to unilaterally implement. Furthermore, in settling on five-years as the appropriate threshold, Congress repeatedly considered—and rejected—the possibility of extending the one-year requirement to unwed citizen fathers. In 1989, Congress rejected an amendment to the INA granting citizenship when either citizen parent was physically present for "one year in the aggregate." *See* H.R. 1380, 101st Cong. (1989). Likewise, in 1991, another attempt to hack physical-presence requirements down to one year failed. *See* H.R. 4561, 102d Cong. (1991). In fact, in 2000, Congress even rejected cutting the requirement for unwed citizen fathers to *three* years, deeming that number to also be too low. *See* H.R. 801, 106th Cong. (2000).

Tracing the history of this provision thereby illustrates that, for the last six decades, Congress has maintained high physical-presence requirements for unwed citizen fathers. Congress repeatedly contemplated and spurned the prospect of reducing the requirement to one year. Congress

compromised, finding that the proper threshold should be five years. This Court should not flout Congress's reasoned and negotiated judgment by unilaterally curtailing the physical-presence requirement to a single year. Congress would prefer that this Court rectify any equal protection violation by elevating the bar to transmitting citizenship for unwed citizen mothers, rather than by lowering the bar for unwed citizen fathers.

C. This Court should not unilaterally and irrevocably confer citizenship upon innumerable individuals.

Granting Morales-Santana's desired remedy would galvanize negative consequences that highlight why the Constitution wisely leaves the authority to grant citizenship *exclusively* to Congress. Although it is unclear how many individuals would become citizens overnight if the Court rules for Morales-Santana, evidence suggests that the number is—at minimum—in the hundreds of thousands. This is particularly problematic because congressional power over citizenship normally operates as a one-way ratchet: while Congress has discretion to grant citizenship, once granted, Congress is usually powerless to take citizenship away. As a result, granting Morales-Santana's proposed remedy would bestow citizenship on countless individuals, in a manner that leaves Congress paralyzed.

1. Granting Morales-Santana his proposed relief would also likely bestow citizenship on—at minimum—hundreds of thousands of other individuals.

While it is unclear exactly how many people would be granted citizenship in one fell swoop were this Court to adopt Morales-Santana's proposed remedy, the number is likely substantial. Every (subsequently legitimated) child born to an unwed citizen father who maintained continuous presence for one year prior to birth, between 1952 and 2016, would immediately become a citizen. Furthermore, the children and grandchildren of those individuals might also be entitled to derivative citizenship. The one available estimate comes from an interest group, and suggests that the number is, at least, in the hundreds of thousands.

Testifying before Congress on this issue in 1992, a representative of the World Federation of Americans Abroad ("WFAA") estimated that reducing the physical-presence requirements for unwed citizen fathers to one year would naturalize between 4,000 and 5,000 children annually. *Naturalization and Nationality Amendments and Parole for Funerals: Hearing Before the Subcomm. on Int'l Law, Immigration & Refugees of the H. Comm. on the Judiciary*, 103d Cong., 45-46 (1993) (statement of Michael Adler, Chair, Citizenship Comm., World Fed'n of Am. Abroad). There is reason to take the WFAA's approximation with a grain of salt, because it was in the WFAA's best interest to underestimate the number of implicated individuals. In fact, the WFAA pitched the figure to Congress as "a very small number, relatively speaking." *Id.* Things may also have changed since 1992.

However, assuming the WFAA's estimate is in the correct "ballpark," an overwhelming number of individuals would immediately become citizens. A bit of math illustrates the point. Assume that trimming the physical-presence requirement would retroactively grant citizenship to 5,000 children annually. If that rate is multiplied over the sixty-four years in which the statute has been effective, it yields the conclusion that approximately 320,000 children born abroad would become citizens in the wake of a ruling for Morales-Santana. Yet, the number is probably much larger, because the children and grandchildren of those 320,000 individuals may also be entitled to citizenship. These individuals are unlikely to have a strong connection to the United States, because they never before had reason to consider themselves citizens. As a result, a ruling in favor of Morales-Santana would have widespread reverberations.

Consequentially, while Morales-Santana might be the only name on this case's caption, he is not the only person who will find himself or herself a citizen, if the Court rules in his favor. The executive branch would need to process an onslaught of applications. And verifying that the unwed citizen fathers of these hundreds of thousands of individuals were continuously present for a year prior to birth will impose tremendous administrative costs. Considering that the United States Citizen and

Immigration Service's ("USCIS") backlog has ballooned by *14,000 percent* since 2011, it might lack the capacity to implement the mass extension of citizenship that Morales-Santana asks this Court to impose. *See* Maria. M. Odom, *Citizenship and Immigration Services Ombudsman: Annual Report 2016*, Dep't of Homeland Security 13 (June 29, 2016), https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202016.pdf.

To give the Court a concept of scale: as of last June, "more than 520,000 [citizenship] applications were waiting to be examined" in a "pileup" at UCSIS. Julia Preston, *Immigrants Eager to Vote Obeyed All the Rules. It Didn't Pay*, N.Y. Times, Sept. 30, 2016, at A1. And that figure does not even include asylum applications, which have a significantly worse backlog. *Id.* Now is not a good time for this Court to drop this administrative bombshell on USCIS's lap; Congress is better suited to decide if and when to do so.

2. Congress would be powerless to reverse this Court's mass granting of citizenship.

Congressional power over naturalization is generally a one-way street. While the Constitution accords wide discretion to naturalize, it "grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power." *Afroyim*, 387 U.S. at 257; *see also Trop*, 356 U.S. at 92 ("[C]itizenship * * * cannot be divested in the exercise of those [congressional] powers."). As a result, Congress is ordinarily "without power to rob a citizen of his citizenship." *Afroyim*, 387 U.S. at 267. This rule acknowledges that "[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship." *Id.*[9]

[9] The one exception to this general rule is that Congress can revoke citizenship based on failure to meet "conditions subsequent." *See, e.g., Bellei*, 401 U.S. 815 (upholding Congressional power to impose the "condition subsequent" of a five-year residency period on certain naturalized citizens in order to maintain their citizenship status). In this case, however, if the Court grants citizenship to untold numbers of individuals, Congress would likely not be able to revoke their citizenship based on this "condition subsequent" exception. Physical presence is inherently a "condition precedent," because it demands that a citizen parent live in the United States for a specified period *prior* to birth. And once that condition is fulfilled, the child becomes a citizen "as of the date of birth." 8 U.S.C. § 1401.

The single directionality of congressional authority over citizenship has major implications for the potential remedies before the Court. If the Court cures the alleged equal protection violation in the Government's proposed manner, forcing unwed citizen mothers to meet the ten-year physical-presence requirement on a prospective basis, "critics of [the Court's] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Congress would be able to override that remedy by reducing the requirements for unwed citizen parents of both sexes. By contrast, if the Court extends the one-year exception in Section 1409(c) to include unwed citizen fathers on a retroactive basis, Congress cannot override the remedy.

Consequentially, granting citizenship to Morales-Santana, and innumerable similarly situated individuals, would flip the traditional roles of Congress and the judiciary on their heads. Historically, authority over naturalization belongs to the "*political* departments," and is "*largely immune* from judicial control." *Mezei*, 345 U.S. at 211 (emphasis added). When it comes to conferring citizenship, Congress is meant to be all-powerful, and the judiciary is meant to be powerless. Imposing Morales-Santana's requested remedy would reverse that constitutional framework.

The Court should not invert the constitutional paradigm. The Constitution astutely leaves the capacity to bestow citizenship to the "political departments," because the determination of who becomes a citizen is inherently "of a political character." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976). Indeed, debates over naturalization have dominated the Nation's political discourse since the Founders. *See, e.g.*, Alexander Hamilton (Lucius Crassus), *Examination of Jefferson's Message to Congress of December 7, 1801*, *in* 7 *The Works of Alexander Hamilton* 243 (Henry Cabot Lodge ed. 1886) (criticizing Jefferson's naturalization policy as "admit[ting] the Grecian horse into the citadel of our liberty and sovereignty").

Ultimately, the same "reasons that preclude judicial review of political questions" are also implicated in reviewing statutes "in the area of immigration and naturalization." *Diaz*, 426 U.S. at 81-82. Given that Congress has the best institutional capacity to examine the policy implications of naturalization, and is most politically accountable to citizens, it is logical for Congress to make naturalization determinations. *See Nguyen*, 533 U.S. at 67 ("If citizenship is to be conferred by the unwitting means petitioners urge * * * it is for Congress, not this Court, to make that determination."). By contrast, the Constitution ensures that there is "no judicial authority" to grant citizenship, because courts are poorly suited "to substitute [their] political judgment for that of the Congress." *Fiallo*, 430 U.S. at 798; *see also Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring) (describing naturalization as a "political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary").

The Constitution's choice to leave the power to confer citizenship exclusively to the politically accountable Congress is particularly salient in 2016, when (perhaps the only thing) a polarized electorate agrees upon is that immigration and naturalization policy is "vital to the public welfare." *Ginsberg*, 243 U.S. at 474. *See Clinton, Trump Supporters Have Starkly Different Views of a Changing Nation*, Pew Res. Ctr. (Aug. 18, 2016), http://www.people-press.org/2016/08/18/4-how-voters-view-the-countrys-problems (finding that 83% of major party voters view immigration and naturalization as a "very big problem" facing the Nation). The Constitution demands, and prudence dictates, that this Court not unilaterally confer citizenship upon countless individuals with a single flourish of its pen, in a manner that ties Congress's hands. Congress is the only branch constitutionally capable of making that decision, and it is best situated to do so. As a result, even if the INA violates equal protection, Morales-Santana is not entitled to the relief he requests.

* * *

The INA does not violate equal protection, and, even if it does, Morales-Santana cannot be granted citizenship. Morales-Santana is asking this Court to do two unprecedented things. First, to strike down requirements that Congress enacted pursuant to its plenary power over naturalization. And second, to judicially confer citizenship on a class of individuals, contrary to the express statutory directive of Congress. This Court should decline his invitation to upend the Constitution's well-reasoned division of power.

CONCLUSION

For the foregoing reasons, the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

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