**No. 15-1191**

# The Morris Tyler Moot Court of Appeals at Yale

LORETTA LYNCH, UNITED STATES 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 RESPONDENT

KYLE EDWARDS
MARISSA ROY
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4992*

*Counsel for Respondent*

## QUESTION PRESENTED

The Immigration and Nationality Act of 1952 ("1952 Act") establishes separate presence requirements for citizen mothers and citizen fathers in order to confer citizenship on their foreign-born, illegitimate children. An unwed citizen mother must only have spent one year in the United States prior to the birth of her child whereas an unwed citizen father must have spent ten years in the United States, five of which after the age of fourteen. Respondent's father met the lower presence requirement afforded to unwed citizen mothers, but did not meet the longer presence requirement for unwed citizen fathers.

The questions presented are:

1. Whether the 1952 Act's more onerous presence requirements for citizen fathers compared to similarly situated citizen mothers violate the equal protection guarantees of the Due Process Clause.
2. Whether, in light of such a violation of equal protection, the proper remedy is to declare that Respondent is a citizen of the United States by birth.

## LIST OF ALL PARTIES

Petitioner, who was Appellee in the court below, is Loretta Lynch, United States Attorney General.

Respondent, who was Appellant in the court below, is Luis Ramon Morales-Santana.

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## OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit reversing the judgment of the Board of Immigration Appeals is reported at 804 F.3d 520 (2d Cir. 2015). The opinion of the Board of Immigration Appeals denying the motion to reopen removal proceedings is enclosed in Pet. App. 42a. The removal order of the Board of Immigration Appeals is enclosed in Pet. App. 45a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 8, 2015. A petition for a writ of certiorari was timely filed. This Court granted certiorari on June 26, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Amendment XIV, § 1 of the U.S. Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

U.S. Const. amend. XIV, § 1.

## STATEMENT OF FACTS

### I. The Immigration and Nationality Act of 1952

Congress consolidated its fragmented immigration laws in a uniform omnibus law, the Immigration and Nationality Act of 1952 ("1952 Act"). Pub. L. No. 82-414, 66 Stat. 182 (1952) (codified as amended in scattered sections of 8 U.S.C.). In the 1952 Act, Congress sought to clarify the citizenship rights of children born abroad and out of wedlock to one American citizen parent and one noncitizen parent. Congress established differing statutory requirements for conferring citizenship on a foreign-born, illegitimate child depending on the sex of the American citizen parent. A citizen mother could confer American citizenship on her foreign-born, illegitimate child if she had been physically present in the United States for one year at some point prior to the child's birth. *See* 8 U.S.C. §1409(c). However, a citizen father could only

confer American citizenship on his foreign-born, illegitimate child by meeting two conditions. First, the citizen father would have to take formal steps to legitimate his child before the child reached the age of eighteen. *See* 8 U.S.C. § 1409(a)(4). Second, after affirmatively legitimating his child, the citizen father would have to show a decade of continuous presence in the United States before the birth of the child; five of the required years would have to have taken place after the father turned fourteen. *See* 8 U.S.C. § 1401. Therefore, a citizen father who had gone abroad before the age of nineteen could not confer American citizenship on his foreign-born, illegitimate child.

## II. The 1952 Act's Impact on Luis Ramon Morales-Santana and His Father

In 1962, Luis Ramon Morales-Santana was born out of wedlock in the Dominican Republic to an American citizen father and a Dominican mother. Pet. App. 6a. His father had grown up in the United States, but had left twenty days before turning nineteen to further his career in the Dominican Republic. *Id.* After Morales-Santana's birth, his father married his mother, thereby legitimating Morales-Santana. Pet. App. 6a. In 1975, when Morales-Santana was thirteen, his father moved the family back to the United States. *Id.*

Morales-Santana resided with his father as a lawful permanent resident, but not as a recognized citizen. *Id.* Because Morales-Santana's father had traveled to the Dominican Republic just before his nineteenth birthday, he did not meet the 1952 Act's presence requirements of unwed citizen fathers at the time of Morales-Santana's birth. *Id.* A year after Morales-Santana had moved to the United States, his father passed away. *Id.* Fourteen-year-old Morales-Santana continued to live legally and grow up in the United States as a lawful permanent resident. *Id.*

## III. Procedural Background

In 2000, the United States Citizenship and Immigration Services placed Morales-Santana in removal proceedings after he was convicted of various felonies. Pet. App. 45a. Later that year, an immigration judge denied Morales-Santana's application for political asylum and ordered that he be removed to the Dominican Republic. Pet. App. 49a. In 2010, Morales-Santana filed a motion to reopen his removal proceedings with the Board of Immigration Appeals. Pet. App. 42a. There, Morales-Santana argued that he had derived citizenship at birth from his citizen father, and he presented newly-obtained evidence about his father's physical presence in the United States. Pet. App. 43a. The Board rejected his motion to reopen in 2011. Pet. App. 44a.

Morales-Santana petitioned the Second Circuit for review of the Board's decision, seeking a declaration of his inherent citizenship. Pet. App. 3a. The Second Circuit rejected his statutory arguments for citizenship under the 1952 Act, but ruled that the Act's different physical presence requirements for unwed citizen fathers and unwed citizen mothers violated equal protection under the Due Process Clause. Pet. App. 15a. The Second Circuit applied intermediate scrutiny to the challenged provisions on the grounds that they discriminate on the basis of gender. *Id.* The court found that neither of the government's asserted interests—1) ensuring a sufficient connection between citizen children and the United States, and 2) avoiding statelessness—were advanced by the statute's sex-based physical presence requirements. *Id.* To remedy this equal protection violation, the Second Circuit severed the ten-year physical presence requirement for unwed citizen fathers and extended to them the one-year physical presence requirement afforded to unwed citizen mothers. Pet. App. 39a. Applying the statute cured of its constitutional violation, the Second Circuit concluded that Morales-Santana is an American citizen as of his birth. Pet. App. 41a.

## SUMMARY OF ARGUMENT

Sections 1401 and 1409 ("the challenged provisions") violate Respondent's due process and equal protection rights, and the Second Circuit's remedy properly vindicated his rights.

**I.** The challenged provisions violate Respondent's constitutional rights and deprive him of his inherent citizenship.

The challenged provisions threaten Morales-Santana's right to derivative citizenship as well as his father's equal protection rights under the Due Process Clause. The challenged provisions explicitly discriminate based on sex to further the racial prejudices of the 82nd Congress. Because the provisions discriminate facially based on sex and bear racial animus, they compel heightened scrutiny review—either intermediate or strict. The government cannot justify its discriminatory scheme under either level of scrutiny.

As this Court has evaluated related challenges to these provisions under intermediate scrutiny, the Respondent assumes arguendo that intermediate scrutiny applies to the case at hand. The government puts forth two justifications for its discrimination: 1. That the separate presence requirements for mothers and fathers are necessary to guarantee that foreign-born, illegitimate children have strong ties to the United States, and 2. That the separate presence requirements for mothers and fathers save foreign-born, illegitimate children from statelessness. While these interests are important in the abstract, neither interest is furthered by the government's sex-discriminatory scheme. First, no evidence demonstrates that fathers require a longer residency in the United States than mothers to transmit patriotism to their children. Second, while the lower residency requirements for mothers help their foreign-born, illegitimate children avoid statelessness, the foreign-born, illegitimate children of fathers still face the real risk of

statelessness in many countries. The government's onerous presence requirements for fathers cannot withstand judicial scrutiny.

**II.** Application of this Court's standard remedy for a statute that violates equal protection compels the conclusion that Morales-Santana is a citizen by birth.

To remedy the 1952 Act's violation of equal protection, this Court should sever the ten-year physical presence requirement for unwed citizen fathers and extend to them the one-year requirement accorded unwed citizen mothers. When severing an underinclusive federal benefits statute to achieve equal protection, this Court looks to the intent of Congress to determine whether to nullify the benefit in question or extend it to the excluded class. Here, Congress pursued three objectives in drafting the 1952 Act's provisions for children born abroad: 1. ensuring Americans traveling abroad the long-standing benefit of *jus sanguinis*; 2. ensuring a connection between American citizens born abroad and the United States; and 3. addressing issues unique to children born out of wedlock. While these objectives operate in tension, the text and history of the 1952 Act demonstrate that extension of the one-year physical presence requirement is most consistent with these objectives. Providing further support for this conclusion, this Court has long operated a reasonable presumption in favor of extending, rather than contracting, benefits in curing a violation of equal protection through severance.

Because Respondent's father satisfied the less onerous one-year physical presence requirement, Respondent is a citizen by birth under the severed statute. The Second Circuit's conclusion that he is a citizen is compelled by Congress's directive that a court shall rule on a party's legal claim to citizenship in the absence of any genuine issue of material fact. Contrary to the government's position—which rests on a confusion between birthright citizenship and

citizenship by naturalization—recognizing pre-existing birthright citizenship does not "confer" citizenship. Morales-Santana is, and has always been, a U.S. citizen.

## ARGUMENT

### I. The Government cannot deprive Morales-Santana of his citizenship by administering a discriminatory legal scheme.

#### A. Morales-Santana can vindicate his citizenship rights as well as his father's equal protection rights under the Due Process Clause.

The Fifth Amendment fully protects Morales-Santana's fundamental rights even while his citizenship status remains unresolved. For over a century, this Court has held that the Constitution guarantees equal protection and due process of law to all "persons"—citizens, aliens, and visitors alike. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that equal protection and due process are "not confined to the protection of citizens" but rather extend "to all persons within the territorial jurisdiction"); *see also Matthews v. Diaz*, 426 U.S. 67, 77 (1976). The Constitution commands "the federal sovereign [to] govern impartially." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Whenever the government shirks this duty, a person may seek refuge under the Constitution. Morales-Santana seeks this very refuge. Morales-Santana's inherent right to citizenship has been denied because the federal government has not applied its laws equally.[1] He therefore has standing to claim the Fifth Amendment's protection in this Court.

Morales-Santana additionally has standing to defend his father's equal protection and due process rights. A litigant may assert a claim on behalf of a third party if: 1) The litigant has

[1] That Morales-Santana was in removal proceedings is inapposite here. Where a litigant claims to be a U.S. citizen as a matter of law, the Court has jurisdiction to decide the nationality claim. *See* 8 U.S.C. § 1252.

suffered an injury in fact; 2) The litigant has a close relationship to the third party; and 3) Circumstances prevent the third party from asserting his or her own rights. *See Campbell v. Louisiana*, 523 U.S. 392, 397 (1998). Morales-Santana easily meets all three conditions. Denial of inherent citizenship constitutes injury in fact. *See Miller v. Albright*, 523 U.S. 420, 432 (1998) (opinion of Stevens, J., joined by Rehnquist, C.J.); *id.* at 447 (O'Connor, J., concurring). The record shows that Morales-Santana had a close relationship with his father, who legitimated him and brought him to the United States. *See* Pet. App. 6a. Finally, because Morales-Santana's father is deceased, he cannot assert his own rights. *Cf. Hodel v. Irving*, 481 U.S. 704, 711 (1987) ("[I]t has long been recognized that the surviving claims of a decedent must be pursued by a third party."). Absent this claim, the government's sex-based discrimination against Morales-Santana's father and its burden on his constitutionally protected relationship with his son would remain uncompensated. Morales-Santana therefore has standing to vindicate both his own and his father's rights.

### B. The 1952 Act's discriminatory physical presence requirements trigger heightened scrutiny.

The challenged provisions offend constitutional principles of equal protection by discriminating on the basis of sex and race. Equal protection "intend[s] to work [for] nothing less than the abolition of all caste-based and invidious class-based legislation." *Plyler v. Doe*, 457 U.S. 202, 213 (1982). Discrimination on the basis of either sex or race is presumptively invidious and automatically triggers heightened scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The challenged provisions discriminate on both counts. Congress's differing physical presence requirements for citizen mothers and fathers advance a racially discriminatory legislative purpose through the mechanism of facial sex discrimination. Congress did not act pursuant to its plenary power over immigration, but rather

specially burdened citizen fathers to withhold inherent citizenship from biracial children. Therefore, the challenged provisions must undergo heightened scrutiny—either strict or intermediate.

**1. The challenged provisions discriminate on the basis of both sex and race.**

The 1952 Act's facial sex discrimination compels at least intermediate scrutiny. Classifications by sex "have traditionally been the touchstone for pervasive and often subtle discrimination." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979). Distinctions between mothers and fathers, in particular, perpetuate harmful stereotypes that link women to a primarily domestic role and deny that fathers take an interest in their children. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Such stereotypes denigrate "untraditional" families. Laws that encumber unwed fathers—assuming that they will have no role in their children's lives—"explicitly disdain[] present realities in deference to past formalities, [and] needlessly risk[] running roughshod over the important interests of both parent and child." *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). Fathers, like mothers, have a right to a relationship with their children that is enshrined in the Due Process Clause. *See id.* at 651. Broad sex classifications, whether overt or covert, eschew individualized assessment and threaten to deny this right. This discrimination on the basis of sex therefore "must bear a close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273.

Neither party contests that the challenged provisions facially distinguish between unwed mothers and unwed fathers. Section 1409 provides that an unwed citizen mother may transmit U.S. citizenship to an illegitimate child born abroad if she had been continuously present in the United States for one year at some point in her life. 8 U.S.C. § 1409(c). Conversely, an unwed citizen father who affirmatively legitimated his foreign-born child can only transmit citizenship if he had been physically present in the United States for ten years, at least five of which were

attained after age fourteen. 8 U.S.C. §§ 1401, 1409(a); Law of June 27, 1952, title III, § 301, 66 Stat. 235. These provisions significantly burden unwed citizen fathers relative to similarly situated unwed citizen mothers. In the present case, these provisions have devalued the relationship between Morales-Santana and his father as well as denied Morales-Santana his right to citizenship. Though Morales-Santana was born out of wedlock, his father played a crucial role in his upbringing. *See* Pet. App. 6a. His father even took necessary steps to legitimate him at age eight. *Id.* When Morales-Santana's father decided to return to the United States, his father brought Morales-Santana. *Id.* Death, not personal choice, finally separated father and son. *Id.* However, under the 1952 Act's scheme, this close father-son relationship bears no relevance. Both father's and son's rights turn solely on sex classification. The parties here agree that had Morales-Santana's father been a woman—all other facts equal—Morales-Santana would automatically be a citizen. Pet. App. 15a. This facial sex discrimination compels intermediate scrutiny.

While the 1952 Act discriminates on the basis of sex more overtly, it is also motivated by racial animus. This Court has rigorously applied strict scrutiny not only to explicit racial classifications, but also to laws that are "ostensibly neutral but [] obvious pretext[s] for racial discrimination." *Feeney*, 442 U.S. at 272; *see also Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (noting that racially discriminatory laws are "by their very nature odious to a free people"). Courts will infer animus if challengers can show—by direct and circumstantial evidence—that race was a motivating factor underlying an ostensibly neutral policy. *See Hunt v. Cromartie*, 526 U.S. 541, 547 (1999).

Respondent has ample evidence to show racial animus. The 1952 Act maintained immigration per-country quotas proportioned according to the racial make-up of United States

citizens. Law of June 27, 1952, title II, § 201, 66 Stat. 238 (repealed 1965). Congress hoped to "arrest[] the tendency toward a change in the fundamental composition of the American stock"—a stock that was primarily European. S. Rep. No. 81-1515, at 64 (1950). Illegitimate children born abroad to American fathers posed a unique obstacle to this goal. Military and diplomatic personnel—overwhelmingly male—often had relationships with women abroad that produced children. *See* Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2159 (2014). Twentieth-century citizenship law experts found it "clear that [these] illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612 (1915). By creating a scheme that specially burdened citizen fathers, Congress ensured that American men abroad could only bring home their illegitimate children with extraordinary effort. *See* S. Rep. No. 81-1515, at 693 (discussing the burden on American servicemen and their illegitimate children). While Congress made exceptions for children by European women, an estimated 50,000 children in Asia were left—especially during the Korean and Vietnam Wars—to become "children of the dust." Collins at 2211; Jonathan Watts, *GIs Return To End 30 Years of Pain for Vietnam's Children of the Dust*, Guardian (2005), https://www.theguardian.com/world/2005/may/02/usa.jonathanwatts. Congress used sex discriminatory presence requirements as its mechanism to racially discriminate. Such racial discrimination merits strict scrutiny.

Because the challenged provisions discriminate both on the basis of sex and race, they automatically trigger heightened judicial scrutiny—either strict or intermediate. *See Craig*, 429 U.S. at 197; *Bolling*, 347 U.S. at 499. The provisions are presumptively invidious and must withstand the Court's rigorous scrutiny.

**2. The Government cannot evade heightened judicial scrutiny by gesturing to plenary power where inapplicable.**

This case does not question a policy decision within Congress's discretion; it challenges Congress's denial of mandatory rights to Morales-Santana and his father. Congress has broad discretionary authority over the admission and the expulsion of aliens. *See Fiallo v. Bell*, 430 U.S. 787, 792-93 (1977). The Court defers to Congress in these matters because Congress's choices "implicate our relations with foreign powers." *See Matthews*, 426 U.S. at 81. Pursuant to this plenary power, Congress may identify the classes of aliens eligible for admission; establish naturalization requirements for these aliens; and structure proceedings to exclude or deport certain aliens. *See, e.g.*, *Fiallo*, 430 U.S. at 793; *Shaughnessy v. United States*, 345 U.S. 206, 210 (1953). The Court accords these congressional decisions narrow review because of their political character. *Hampton*, 426 U.S. at 101 n.21. In *Fiallo*, for example, the Court did not allow an alien to challenge Congress's decision to exclude alien illegitimate children from a special preference immigration category. *See* 430 U.S. at 798-99. Aliens had no entitlement to special immigration preference; rather, Congress could accord this status at its discretion. *See id.*

However, certain inalienable rights lie beyond Congress's discretion. This Court has repeatedly evaluated sex-based citizenship laws under intermediate scrutiny rather than reflexively defer to Congress. *See Nguyen v. INS*, 533 U.S. 53, 60 (2001) (evaluating the 1952 Act's special legitimation requirements for unwed citizen fathers under intermediate scrutiny); *Miller*, 523 U.S. at 427 (opinion of Stevens, J., joined by Rehnquist, C.J.) (addressing the same issue). Unlike *Fiallo*, these claims involved parties asserting their pre-existing entitlement to citizenship rather than aliens seeking admission to a special preference immigration category. *See id.* at 432. American citizens have also brought these claims against the 1952 Act to remedy the harms they suffered from Congress's sex discrimination. *See Nguyen*, 533 U.S. at 68. These

claims did not involve Congress's discretionary power over admission of aliens, but rather sought to vindicate rights of citizens and would-be citizens that lay beyond Congress's plenary discretion. The Court has repeatedly declined the government's invitation to extend *Fiallo* to these suits by citizens and would-be citizens.[2] *See Nguyen*, 533 U.S. at 61; *Miller*, 523 U.S. at 434 n. 11 (opinion of Stevens, J., joined by Rehnquist, C.J.). Even if the Court ultimately found Congress's actions justified, the Court consistently examined Congress's actions under intermediate scrutiny. *See Nguyen* at 60.

The present case similarly asserts the fundamental rights of American citizens and would-be citizens. Morales-Santana is defending the right of his father to be treated equally under the law rather than to be encumbered because of his sex. Morales-Santana is asserting his father's right to confer citizenship to the child he legitimated. Morales-Santana has come forward to claim his own right to pre-existing citizenship—that should have been conferred absent sex discrimination against his father. These claims do not implicate Congress's discretion over the admission or exclusion of aliens; these claims involve rights that Congress cannot trample. This case is not *Fiallo*. This Court does not owe any special deference to Congress's discriminatory scheme. This Court therefore should not enlarge Congress's discretion by deviating from its custom of applying at least intermediate scrutiny.

### C. The government's discrimination cannot withstand heightened judicial scrutiny.

[2] In neither *Miller* nor *Nguyen* did the Court affirmatively state that intermediate scrutiny was required. *See Nguyen*, 533 U.S. at 61; *Miller*, 523 U.S. at 434 n.11 (opinion of Stevens, J., joined by Rehnquist, C.J.). The Court, however, deliberately chose to apply intermediate scrutiny rather than *Fiallo* deference. A number of circuits have followed suit. *See, e.g.*, *Morales-Santana v. Lynch*, 804 F.3d 520, 529 (2d Cir. 2015); *United States v. Flores-Villar*, 295 F.3d 943 (9th Cir. 2008); *Breyer v. Meissner*, 214 F.2d 415, 425 (3d Cir. 2000); *Nguyen v. INS*, 208 F.3d 528, 535 (5th Cir. 2000). While precedent does not mandate intermediate scrutiny, this standard is consistent with the Court's past practice.

Since the challenged provisions discriminate both on the basis of sex and race, they compel heightened scrutiny. The degree of judicial scrutiny—whether strict or intermediate—can be left to this Court's best judgment. Because this Court has generally evaluated the 1952 Act's facial sex discrimination under intermediate scrutiny, Respondent will proceed under that framework. Even with the benefit of the lower intermediate scrutiny standard, the government cannot show that the challenged provisions "bear a close and substantial relationship to important governmental objectives," as required by this Court. *See Feeney*, 442 U.S. at 273.

Neither of the government's justifications for its differing presence requirements withstand intermediate scrutiny. To meet intermediate scrutiny, government "justification[s] must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The government has offered two potential justifications for its different presence requirements for citizen mothers and fathers: 1. That the differing presence requirements ensure that foreign-born, illegitimate children will have a relationship to the United States, and 2. That the differing presence requirements ensure that foreign-born, illegitimate children are not born stateless. If genuine, both justifications would constitute important government objectives. Yet, the challenged provisions are not substantially related to either purported justification. The presence requirements do not withstand intermediate scrutiny.

**1. The government's discriminatory presence requirements bear no relationship to its purported interest in fostering ties between foreign-born children and the United States.**

The government cannot justify its discriminatory presence requirements by arguing that they promote stronger ties between foreign-born children and the United States. In general, encouraging strong ties between foreign-born children and the United States would be an important government interest. *See, e.g.*, *Nguyen*, 533 U.S. at 66. However, Congress's chosen mechanism must substantially relate to this important government interest. Government

justifications for sex discrimination "must not rely on overbroad generalizations about the different talents, capacities, and preferences of males and females." *See Virginia*, 518 U.S. at 533. Rather, government justifications must make an "exceedingly persuasive" case for treating men and women differently. *Id.* at 531.

This Court has demanded that such exceedingly persuasive justifications rely on evidence of pertinent factual differences between men and women. In *Nguyen*, for example, the Court allowed Congress to require that unwed citizen fathers legitimate their foreign-born children to confer citizenship, a requirement absent for unwed citizen mothers. 533 U.S. at 73. The government claimed an interest in ensuring both that the foreign-born child had a relationship with the citizen father and the United States. *Id.* at 62-65. The government argued that unlike a mother—who knows the child is hers by virtue of pregnancy—a father does not necessarily know the child is his. *Id.* at 63. Therefore, mothers and fathers are not similarly situated with regard to their relationship with the child at birth. *Id.* The government argued that it could therefore require fathers to legitimate their children in order to confer citizenship; without this legitimation, there would be no proof of the father-child relationship and therefore the relationship to a U.S. citizen. *Id.* at 63, 66. The Court found this argument persuasive, noting that "[t]he difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender." *Id.* at 73.

Here, the government interest in fostering ties to the United States does not derive from biological difference. The 1952 Act confers citizenship to foreign-born children with a citizen parent with a two-pronged inquiry. First, the 1952 Act seeks proof of the biological relationship between the U.S. citizen parent and the child. As decided in *Nguyen*, Congress can assume a

biological relationship between the mother and child by virtue of birth whereas the father must take affirmative steps to legitimate his child. *See id.*; 8 U.S.C. § 1409(a). Only after this primary inquiry does Congress secondly consider whether the citizen parent would have met statutory physical presence requirements before the child's birth. *See* 8 U.S.C. §§ 1401, 1409. In this secondary physical presence inquiry, the government no longer has a concern about the biological relationship between the parent and child. At this stage of the inquiry, foreign-born children, like Morales-Santana, have been legitimated by their U.S. citizen parent. *See* Pet. App. 6a.

The government's remaining concern about the foreign-born child's ties to the United States bears no relationship to factual differences between men and women. The government offers no evidence for why men must spend ten continuous years in the United States to transmit a strong American affinity to his child while mothers need only spend one year to transmit such a relationship. To date, no scientific studies have confirmed that women are more biologically able to foster patriotism in their children than men are. Rather, Morales-Santana himself is a counter-example to this notion. Though his father had spent only nine years in the United States before his birth, his father fostered a strong tie between Morales-Santana and the United States—establishing a home with Morales-Santana in the United States when Morales-Santana was just a child. *Id.*

The government's more onerous residency requirements for unwed citizen fathers derive not from fact, but from stereotype and pretext. The government assumes that unwed fathers are less likely to have relationships with their children than unwed mothers. *Cf. Caban v. Mohammed*, 441 U.S. 380, 389 (1979). Furthermore, as previously discussed, Congress employed sex discrimination in the 1952 Act as a tool of racial animus "to keep from the shores

of America undesirable groups of people," like biracial illegitimate children of American personnel abroad. 98 Cong. Rec. H4303 (daily ed. Apr. 23, 1952) (statement of Rep. Jenkins). Neither stereotype nor pretext provide acceptable justifications for discrimination. Therefore, without real evidence, the government has not shown that the challenged policies substantially relate to its interest in fostering ties between foreign-born children and the United States.

**2. The government does not further its purported interest in preventing statelessness by specially burdening unwed fathers.**

While preventing statelessness would be an important governmental objective, the challenged provisions do not further this interest by disadvantaging children of unwed American fathers. Intermediate scrutiny demands that government policies "bear a *close* and *substantial* relationship to important governmental objectives." *See Feeney*, 442 U.S. at 273 (emphasis added). This Court does not allow the government to create policy based on overbroad generalization about the sexes. *See Virginia*, 518 U.S. at 532. Nor does this Court allow the government to "draw a sharp line between the sexes" and deny one sex the benefit of a law simply because inclusivity would require greater effort. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding that the military could not administer a benefits program that allowed servicemen but not servicewomen to claim dependents on their health insurance despite administrative convenience). If the government wishes to further an important interest, it cannot create policies that further that interest for one sex and leave the other without remedy. This Court has invalidated numerous sex-discriminatory schemes under intermediate scrutiny because they were underinclusive in this manner. *See, e.g.*, *Califano v. Wescott*, 443 U.S. 76, 88 (1979); *Frontiero*, 411 U.S. at 690. Even if a governmental interest more often pertains to one sex, the government must afford citizens of both sexes the benefits or protections that they need.

At the time of the 1952 Act, both unwed mothers and unwed fathers bore the risk that their foreign-born illegitimate children will be left stateless. While the United States primarily accorded citizenship to newborns because of their birth on American soil (*jus soli*), many other nations accorded citizenship to newborns based on their blood relationship to a citizen (*jus sanguinis*). *See* Catherine Seckler-Hudson, *Statelessness: With Special Reference to the United States* 217 (1934) (providing an account of the risk of statelessness for American children in the mid-Twentieth Century). In countries that accorded newborns *jus sanguinis* citizenship through the maternal line, children of unwed American mothers would be born stateless. *See id.* at 220. Similarly, in countries that accorded newborns *jus sanguinis* citizenship through the paternal line, children of unwed American fathers would be left stateless. *See id*. at 225. In 1952, many *jus sanguinis* countries accorded citizenship through the maternal line, but other countries stood as notable stalwarts of patrilineal *jus sanguinis* citizenship. For example, Italy only conferred citizenship to newborns through the patrilineal line until 1983. *See* Corte Costituzionale, 28 gennaio 1983, n. 30. Turkey and Iran also had patrilineal *jus sanguinis* traditions. *See* Linda K. Kerber, "Birthright Citizenship: The Vulnerability and Resilience of an American Constitutional Principle," *in Children Without a State: A Global Human Rights Challenge* 263 (Jacqueline Bhabha, ed. 2011).

Congress in 1952 was well-aware that these countries placed foreign-born children of unwed American fathers at risk. The Department of State had reported to Congress that unwed citizen fathers and their children faced this risk in Turkey. *Id.* at 263-64. Furthermore, in 1952, both Turkey and Italy were members of NATO—where America stationed a high number of predominantly male diplomatic personnel that could conceive children out of wedlock. *See Member Countries*, North Atlantic Treaty Organization, http://www.nato.int. While more

illegitimate children may have been born to U.S. servicemen in matrilineal *jus sanguinis* countries like Korea, this does not diminish the risk of statelessness for newborns of unwed citizen fathers in patrilineal *jus sanguinis* countries.

Despite this risk to both sexes, Congress chose to withhold the same protection from unwed fathers that it accorded to unwed mothers. The risk of statelessness was mitigated for unwed mothers who faced lax presence requirements under § 1409, while Congress imposed onerous burdens on similarly situated fathers. *Compare* 8 U.S.C. § 1401 *with* 8 U.S.C. § 1409. Encumbering unwed fathers who faced similar risk does not bear a close and substantial relationship to the government's interest in preventing statelessness. Rather, the government's scheme is underinclusive, drawing sex-based lines for a problem that requires a sex-neutral remedy. The government puts men like Morales-Santana's father at an unnecessary disadvantage. Since the challenged provisions fail to bear a close and substantial relationship to either governmental interest, they do not withstand intermediate scrutiny.

### D. Even if Congress had acted pursuant its plenary power, the Constitution does not permit Congress to abuse this power.

This case is resolved under intermediate scrutiny because Congress's plenary power is not implicated here. But even so, Congress could not use its plenary power to exceed the constraints of the Constitution. Congress's plenary power is broad where applicable, but nevertheless "that power is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (holding that aliens cannot be subject to prolonged detention under Congress's plenary power); *see also, e.g.*, *Hampton*, 426 U.S. at 100-01 (holding that Congress cannot use its plenary power to "arbitrarily subject [] aliens to different substantive rules from those applied to citizens"); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (extending procedural due process rights to aliens despite Congress's plenary power). When Congress uses its plenary

power to deprive basic rights, the Constitution "mandate[s]" judicial scrutiny, rather than deference. *Hampton*, 426 U.S. at 103.

Here, Congress has violated due process and equal protection rights clearly enshrined in the Constitution. Congress created a race-salient scheme of sex discrimination that has harmed both American fathers and their foreign-born children. In the present case, Congress has denied a citizen father the same treatment under the law as similarly situated citizen mothers. Relying on this unequal scheme, Congress has deprived Morales-Santana of his rightful entitlement to U.S. citizenship. Even were the plenary power applicable, the Constitution would not allow Congress to dodge judicial scrutiny and abuse its power. This Court should invalidate Congress's discriminatory scheme under the appropriate standard of heightened judicial scrutiny.

## II. The proper remedy is to affirm Morales-Santana's pre-existing citizenship.

### A. The Second Circuit correctly applied this Court's precedent for remedying a statute that violates equal protection.

Section 1409(c) and § 1409(a) together violate equal protection and due process. When a statute violates equal protection, "a court . . . 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 v. Mathews*, 465 U.S. 728, 738 (1984) (internal quotations omitted) (citing *Welsh v. United States*, 398 U.S. 333, 361 (1970)). Thus, the Second Circuit confronted two options. It could sever § 1409(c), thereby applying the ten-year physical presence requirement to both unwed men and unwed women. Alternatively, it could sever § 1409(a)—thereby applying the less onerous one-year physical presence requirement to both unwed men and unwed women. In choosing between these two alternatives, a court "must look to the intent

of the . . . legislature to determine whether to extend benefits or nullify the statute." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 292 n.31 (1987).

As a preliminary matter, the presence of an explicit severance clause in the 1952 Act, as well as this Court's standard severability doctrine, make clear that wholesale nullification of § 1409 is an inappropriate remedy. The 1952 Act's severability clause states:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby. 8 U.S.C. § 1101.

Addressing this clause in *INS v. Chadha*, this Court held that its "language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon" the validity of one provision. 462 U.S. 919, 932 (1983).

Were this congressional preference for tailored severance over sweeping invalidation not clear enough, this Court's standard severability analysis produces the same result. Even in the absence of an express severability clause, this Court "refrain[s] from invalidating more of the statute than is necessary," and instead "retain[s] those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (citing *Regan v. Time, Inc.*, 468 U.S. 641, 652, 653 (1984); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1984)). By severing just one of the two challenged provisions, the application of the remaining provision to both men and women would be constitutional and functional. Whether the remaining provision is consistent with congressional intent is, of course, the same question the Court asks in deciding whether to extend or contract benefits upon finding a violation of equal protection.

**1. The Second Circuit's remedy is consistent with Congress's intent.**

Severing the ten-year physical presence requirement and extending the one-year requirement is consistent with Congress's intent toward foreign-born children of American citizens. In ascertaining "congressional intent," this Court looks "both in the language and structure of the Act and in its legislative history." *Alaska Airlines, Inc.*, 480 U.S. at 687. Furthermore, this Court has declared, "[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). When Congress's provisions for children born out of wedlock abroad are considered within the context of the 1952 Act and its history, three legitimate[3] objectives are clear: 1) ensuring Americans traveling abroad the long-standing benefit of *jus sanguinis*, 2) ensuring a connection between American citizens born abroad and the United States, and 3) addressing issues unique to children born out of wedlock, through a legitimation requirement and a statelessness safeguard.

First, the 1952 Act sought to assure American citizens traveling abroad that they would be able to pass on their American citizenship to children they might bear while beyond the geographical limits of the United States. Although the Fourteenth Amendment constitutionalized citizenship at birth for all individuals born within the United States, that constitutional commitment was not added until 1868. *See* U.S. Const., amend. XIV, § 1. Earlier Congresses had to legislate in the absence of any constitutional statement defining who was a citizen of the United States. As such, Congress enacted and has long operated a statutory scheme of birthright citizenship that draws on principles of both *jus soli* and *jus sanguinis*. Acting upon the

[3] Because it would "make[] little sense to choose the remedy that best promotes" a "legislative purpose [that] is itself unconstitutional," this section does not take into account any racially discriminatory purposes identified *supra* in Section I.B.1. *See* Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. Rev. 322, 379-80 (2016).

Constitution's grant that "Congress shall have the Power to . . . establish a uniform Rule of Naturalization," U.S. Const., art. I, § 8, the First Congress determined:

> That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof . . . . And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of March 26, 1790, ch. 3, 1 Stat. 103.

Thus, at the nation's founding, children born abroad to American Citizens were treated "as natural born citizens" so long as their fathers had resided at some point prior to their birth in the United States. Though Congresses since have altered the specific conditions under which American citizens may transmit their citizenship to children born abroad, Congress has an unbroken tradition of affording American citizens the opportunity to pass their citizenship to their children by *jus sanguinis* if their travels abroad preclude those children from gaining *jus soli* citizenship.

Second, the 1952 Act sought to ensure a connection between citizens born abroad and the United States. Over the years, Congress has imposed various conditions on both American parents and their children born abroad in order to retain the child's birthright citizenship, from requiring the child to spend some amount of his or her youth in the United States to requiring the child to take an oath of citizenship. *See, e.g.*, Act of May 24, 1934, ch. 344, 48 Stat. 797. These conditions on *jus sanguinis* citizenship—when applied equally without regard to sex or race—represent the legitimate congressional objective of ensuring a connection between children born abroad and the United States. Indeed, even the original 1790 Act, requiring that an American father must have resided in the United States at some point prior to the birth of his child abroad, captured this goal. *See Weedin v. Chin Bow*, 274 U.S. 657, 667 (1927) (denying claim of foreign-

born plaintiff to American citizenship, where the plaintiff's father—though an American citizen—had never resided in the United States, reasoning that it would not have been "in accord with the views of the First Congress" to "extend[] citizenship to a generation whose birth, minority, and majority, whose education, and whose family life have all been out of the United States and naturally within the civilization and environment of an alien country").

Third, Congress's statutory scheme for the citizenship status of children born abroad relates to the special challenges posed by children born *out of wedlock*. In 1940, Congress for the first time created a separate statutory provision for children born out of wedlock to American citizens abroad. *See* Act of October 14, 1940, ch. 876, § 205, 54 Stat. 1137. Before 1940, there were two main phases of *jus sanguinis* citizenship law. Until 1934, the spirit of the 1790 Act remained in place, such that children born abroad to American citizens would be citizens at birth so long as their fathers had resided at some point in the United States. The 1934 Act that operated from 1934 to 1940 extended this to include *mothers* as well as fathers. Act of May 24, 1934, ch. 344, Stat. 797. But in 1940, Congress created a special section of the Act for children born out of wedlock, conferring the same citizenship at birth to illegitimate children as they would have received if they were legitimate, "provided the paternity is established during minority, by legitimation, or adjudication by a competent court." Act of October 14, 1940, ch. 876, § 205, 54 Stat. 1139. The 1952 Act retained this legitimation requirement. *See* 8 U.S.C. § 1409(c). As this Court has reasoned, the legitimation requirement expresses an important government interest of "assuring that a biological parent-child relationship exists," given that such biological relationship is the essence of *jus sanguinis* citizenship. *Nguyen*, 533 U.S. at 62; *see also supra* Section I.C.1.

The 1940 Act included an additional provision—separate from this legitimation requirement—for children born out of wedlock: that, in the absence of legitimation, an unwed citizen mother may transmit citizenship at birth so long as she had been physically present in the United States at some point prior to the birth. Act of October 14, 1940, ch. 876, § 205, 54 Stat. 1139. As discussed previously in Section I.C.2, this expresses a congressional concern for "stateless" children. In retaining this statelessness safeguard in the 1952 Act, Congress alluded to its continued commitment to the statelessness problem: "This provision establishing the child's nationality as that of the [American] mother regardless of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth*." S. Rep. No. 82-1137, at 39 (1952) (emphasis added). Thus, while Congress's gender-based classification is not substantially related to the problem of statelessness, as previously argued, there is some evidence that Congress recognized the vulnerable position of children born out of wedlock and sought to address it by creating a safeguard provision found only in the out of wedlock section of the Act. *See, e.g.*, *Caban*, 441 U.S. 380 (recognizing that the state's interest in providing adoptive homes "is an important one," even though the state's classification based on sex did "not bear a substantial relation to" that interest).

Respondent recognizes that there are inherent tensions between these three congressional objectives of 1) ensuring Americans traveling abroad the long-standing benefit of *jus sanguinis*, 2) ensuring a connection between American citizens born abroad and the United States, and 3) addressing issues unique to children born out of wedlock. For instance, a statutory scheme allowing any American citizen to transmit citizenship at birth while abroad would more easily vindicate the entitlement contemplated by Objective 1, but would undermine the policy of Objective 2. A scheme allowing any unwed citizen to transmit citizenship at birth while abroad

would better protect against the statelessness problem of Objective 3, but might also undercut the policy of Objective 2.

Nevertheless, on balance these three objectives indicate that extension of the less onerous one-year physical presence requirement is most compatible with congressional intent for two main reasons. First, in speaking on the House floor in favor of overriding the President's veto of the 1952 Act, its sponsor, Representative Francis Walter, argued:

> Notwithstanding the fiction contained in the veto message, all existing statutes governing the loss of United States citizenship have been liberalized, and I want to stress the words 'all of them'—those relative to loss of citizenship by dual nationals as well as those relative to children of American citizens born abroad. 82 Cong. Rec. H8216 (1952) (statement of Rep. Walter).

This "liberalization" fits in a much longer trend, stretching from 1790, that "for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child." *Rogers v. Bellei*, 401 U.S. 815, 826 (1971). Had Congress legislated without violating equal protection rights, it would have preferred to continue this trend of leniency for children born abroad by extending the one-year physical presence requirement to unwed men as well as well as unwed women. This less onerous requirement would still prevent Congress' greatest concern underpinning the objective of ensuring a connection to the United States: that generation after generation of foreign-born children would be able to claim American citizenship merely because an ancestor was born in the United States. *See Weedin*, 274 U.S. at 666; Frederick Van Dyne, *Citizenship of the United States* 34 (1904) (explaining that physical presence requirements were "designed to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties"). Second, the 82nd Congress took pains to create the less onerous physical presence requirement for children born out of wedlock. Though it Congress failed to extend it to

unwed citizen fathers in violation of equal protection, this effort indicates its commitment to the problem of statelessness facing illegitimate children. Given this commitment, as well as evidence that statelessness affected the children of unwed citizen fathers as well unwed citizen mothers, *see supra* Section I.C.2, Congress would have extended rather than negated the benefit it created for unwed citizen mothers.

On the basis of the three congressional objectives identified in this section and their relative importance to the enacting Congress, Respondent urges this Court to sever the ten-year physical presence requirement and extend the one-year requirement.

**2. This Court has long recognized a presumption in favor of extending, rather than contracting, benefits to achieve equal protection of the laws.**

Even were this Court to find the text or legislative history of the physical presence requirement inconclusive of Congress's intent, it should nevertheless extend the one-year physical presence requirement to both men and women. "In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." *Califano*, 443 U.S. at 89 (citing *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Frontiero*, 411 U.S. 677); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). It is true that this Court "ha[s] never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." *Heckler*, 465 U.S. at 738. Nonetheless, Respondent, like the Second Circuit, is "unaware of a single case in which the Supreme Court has contracted, rather than extended, benefits when curing an equal protection violation through severance." Pet. App. 39a.

The presumption of extension appears premised on two beliefs: 1) that it is unjust to invalidate an important benefit that individuals have come to rely upon, in this case, citizenship,

and 2) that Congress, even when it violates equal protection, usually has a primary, non-discriminatory goal in extending benefits to the preferred class. Here, Congress in fact had two non-discriminatory goals that favor extension: reducing statelessness and ensuring American citizens the ability to transmit their citizenship to children born abroad. Congress chose to extend the less onerous, one-year physical presence benefit to unwed citizen mothers, even in light of the tension between the goals of reducing statelessness and ensuring a connection between the child and the United States. When curing an equal protection violation, courts—as evidenced by the tradition of extending benefits—are not in the business of revoking entitlements that the legislature has seen fit to provide, absent real and substantial evidence to the contrary. This is especially true for citizenship at birth, for "it must . . . be kept in mind that citizenship at birth is as near a vested right as the individual citizen has . . . ." S. Rep. No. 81-1515, at 685.

Respondent urges that it would, in fact, have been Congress' intent to extend the benefit of the one-year physical presence requirement to unwed fathers as well as unwed mothers. But if the Court finds congressional intent illusive, the long-standing practice within equal protection jurisprudence of extending rather than contracting benefits creates a rebuttable presumption in favor of extension. In remedying "underinclusive federal benefits statutes" where congressional intent is ambiguous beyond preferring severance, "extension, rather than nullification, is the proper course." *Califano*, 443 U.S. at 89.

### B. That the invalid provision pertains to immigration does not excuse it from this Court's well-established treatment of statutes that violate equal protection.

Applying this Court's method for achieving equal protection by severance, the Second Circuit determined that the one-year physical presence requirement must be extended to unwed citizen fathers as well as unwed citizen mothers. After thus "[c]onforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection," the Second Circuit

"exercise[d] [its] traditional remedial powers 'so that the statute, free of its constitutional defect, c[ould] operate to determine whether citizenship was transmitted at birth.'" Pet. App. 39a (citing *Nguyen*, 533 U.S. at 95-96 (O'Connor, J., dissenting)). Because Morales-Santana's father satisfied the one-year physical presence requirement, the Court concluded that Morales-Santana is and always has been a citizen by birth. *Id.* Nevertheless, the government urges that due to the substantive nature of Morales-Santana's claim—namely, that it concerns nationality law—this Court should depart from its settled approach to remedying unconstitutionally discriminatory statutes and refuse to grant Morales-Santana the declaration of citizenship to which he is entitled. The government offers two justifications for creating a 'citizenship exception' to equal protection doctrine: first, that courts' power does not extend to the conferral of citizenship and, second, that Congress has exclusive and plenary authority over questions of naturalization and immigration. Both justifications fail.

**1. The Second Circuit's ruling did not confer citizenship.**

Morales-Santana seeks a judicial declaration of whether he is or is not a citizen of the United States by birth in virtue of Congress' 1952 Act. Congress not only permits the Second Circuit to issue such a judgment, it requires it: in an appeal of a removal order, "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. § 1252(b)(5)(A). Only if there is a "genuine issue of material fact" presented by a party's citizenship claim—*e.g.*, if it was disputed whether Morales-Santana was properly legitimated by his father—does Congress instruct the court of appeals to "transfer the proceeding to the district court of the United States" for a declaratory judgment as to his citizenship. 8 U.S.C § 1252(b)(5)(B). Here, the Court faces no questions of

material fact,[4] only a question of law that this Court addresses routinely in equal protection suits. Upon resolving that question of law by extending the benefits afforded unwed mothers to unwed fathers, the judgment for Morales-Santana "confirm[s] [his] pre-existing citizenship rather than grant[ing] [him] rights that [he] does not now possess." *Miller*, 523 U.S. at 432 (opinion of Stevens, J., joined by Rehnquist, C.J.); *accord id.* at 475 (Breyer, J., dissenting) ("[O]nce the . . . unconstitutional clauses are excised from the statute, that statute operates automatically to confer citizenship upon [Petitioner] 'at birth.'").

The government argues that the Second Circuit's judgment that Morales-Santana is a citizen "conferred" citizenship upon him, but this argument rests on the government's fundamental confusion of citizenship *at birth* with citizenship *by naturalization*. The distinction is crucial and one that Congress clearly recognized in drafting the 1952 Act. Its text and structure are decisive on this matter. Congress distinguished in the Act between "Chapter 1—Nationality at Birth and by Collective Naturalization" and "Chapter 2—Nationality Through Naturalization." Act of 1952, 66 Stat. 163, 165. Within the Nationality at Birth chapter of the Act, Congress declared, "The following shall be nationals and citizens of the United States at birth," and proceeded to list "a person born in the United States" alongside "a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States," so long as the parents of the latter meet the physical presence requirements set out in § 1401(a)(7). 8 U.S.C. § 1401(a)(1)–(a)(7). The separate statutory provision for children born out of wedlock explicitly incorporates the "at birth" pronouncement of § 1401(a)(7) and is included within the Nationality at Birth chapter. *See* 8 U.S.C. § 1409(a).

[4] "The following undisputed facts are drawn from the record on appeal. . . . In 1962 Morales-Santana was born in the Dominican Republic to his father and his Dominican mother. Morales-Santana was what is statutorily described as "legitimate[ed]" by his father upon his parents' marriage in 1970 . . . ." Pet. App. 6a.

Thus, in the 1952 Act, Congress equated the conferral of birthright citizenship upon children born abroad to American citizens with the constitutionally-enshrined conferral of birthright citizenship on American citizens born within the United States. *See* U.S. Const., amend. XIV, § 1. Without a doubt, Congress wields the power to end the long era of statutorily conferring citizenship at birth upon children born abroad to American citizens. *See* U.S. Const., art. I, § 8; Naturalization Act of 1790, 1 Stat. 103 (legislating, in accordance with Article I, § 8, that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as *natural born citizens* . . ." (emphasis added)). Yet, in the absence of such a legislative change of course, citizenship under § 1401(a)(7) and §§ 1409(a) and (c) passes at the moment of birth, as automatically as citizenship is conferred upon a person born within the United States pursuant to § 1401(a)(1) and the Fourteenth Amendment.

In contrast to citizenship at birth, the Nationality Through Naturalization chapter of the 1952 Act sets out "eligibility" requirements for aliens seeking to be naturalized and details the requirements for filing a "petition for naturalization." *See* 8 U.S.C. § 1421 et seq. By this chapter, Congress created a second, distinct pathway to citizenship by naturalization, which does not confer citizenship automatically at birth. Indeed, Congress explicitly defined naturalization by contrast to 'at birth' citizenship: "The term 'naturalization' means the conferring of nationality of a state upon a person *after birth*, by any means whatsoever." 8 U.S.C. § 1101(a)(23) (emphasis added).

The government's reliance on *INS v. Pangilinan*, is misplaced because *Pangilinan* affirms this distinction between citizenship by birth and citizenship by naturalization. *See* 486 U.S. 875 (1988). There, Filipino nationals who served with the United States Armed Forces during World War II sought citizenship through naturalization, pursuant to a "special

immigration statute" intended to provide an easier route to American citizenship for "aliens who served honorably." *Pangilinan*, 486 U.S. at 877. Although that special naturalization route expired in 1946, the Ninth Circuit nevertheless invoked its equitable powers to grant the naturalization petitions of the Filipino citizens. *Pangilinan v. INS*, 796 F.2d 1091, 1102 (9th Cir. 1986), rev'd by 486 U.S. 875 (1988) (granting citizenship based on the "broad remedial powers" of a court sitting in equity, "notwithstanding the untimeliness of the[] naturalization petitions" relative to Congress' statutory provision).

Writing for the Court, Justice Scalia rejected the Ninth Circuit's assumption "that equitable authority to craft a remedy enables the conferral of citizenship." *Pangilinan*, 486 U.S. at 883. In so reasoning, Justice Scalia noted:

> [T]he 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. Rather, it has been given them as a specific function to be performed in strict compliance with the terms of an authorizing statute which says that "[a] person may be naturalized . . . in the manner and under the conditions prescribed in this subchapter, and not otherwise." *Pangilinan*, 486 U.S. at 883-84 (citing 8 U.S.C. § 1421(d)).

That ruling—which Respondent recognizes as an accurate description of the limits of the judicial power to *naturalize* aliens—is inapposite here. Justice Scalia's rationale draws on the first provision of the Nationality through Naturalization chapter, codified at § 1421 et seq. This provision establishes "jurisdiction to naturalize," but has no bearing on the conferral of birthright citizenship set out in the Nationality at Birth chapter. While in *Pangilinan* "it [was] incontestable (and uncontested) that respondents ha[d] no statutory right to citizenship," 486 U.S. at 883, the opposite is true here: Morales-Santana claims that the statute, stripped of its unconstitutional imposition of gender discrimination, conferred citizenship upon him at birth.

Drawing on dicta in *Nguyen*, the government next contends that "[c]itizenship under section § 1409(a) is retroactive to the date of birth, but it is a naturalization under § 1421(d) nevertheless," on the grounds that the child must be legitimated if he or she gains citizenship through an American father. *Nguyen*, 533 U.S. at 72. As a preliminary matter, it is undisputed that Morales-Santana met the legitimation requirements of § 1409(a). Thus, even on the Nguyen court's account of "retroactive citizenship"—a concept foreign to the 1952 Act—the statute, operating free of discrimination, conferred this "retroactive citizenship," not the Second Circuit. More fundamentally, though Congress created certain conditions that children born abroad must fulfill after birth in order to retain their birthright citizenship, it nevertheless believed and intended that such citizenship passed at birth. Discussing conditions placed on children born abroad who gain birthright citizenship through § 1401(a)(7), the Senate Committee on the Judiciary noted:

> [C]ertain conditions are imposed upon the citizenship *gained at birth* by such child. . . . This subsection further provides that a person gaining United States nationality and citizenship *loses* his American citizenship automatically by not residing within the United States . . . the requisite number of years . . . . S. Rep. No. 81-1515, at 691.

That Committee, tasked in 1947 with "mak[ing] a full and complete investigation of our entire immigration system" over the course of two years, did not conclude that the presence of post-birth conditions for retaining *jus sanguinis* citizenship obstructed a child's claim to being a citizen at birth. *Id.* at 3. Congress's inclusion of children born abroad within the 1952 Act's section concerning citizenship at birth—rather than the section concerning citizenship by a process of naturalization—confirms this conclusion.

In declaring that Morales-Santana is a citizen of the United States by birth, the Second Circuit heeded Congress's instruction that a court "shall decide the nationality claim" of a party

who claims to be a citizen, barring any genuine issue of material fact. 8 U.S.C § 1252(b)(5)(B). Because the 1952 Act, stripped of its discriminatory provision, conferred citizenship "at birth" on the class of children that includes Morales-Santana, the Second Circuit's judgment does not require any extraordinary exercise of judicial power, but simply "confirm[s] [his] pre-existing citizenship." *Miller*, 523 U.S. at 432 (opinion of Stevens, J., joined by Rehnquist, C.J.); *accord id.* at 475 (Breyer, J., dissenting).

**2. Though indisputably broad, Congress' plenary power in the realm of immigration is not broad enough to justify unequal protection of citizens' rights.**

Respondent does not dispute the central holding of *Fiallo* that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792. Yet, in the past, where "[t]he Government . . . [has] look[ed] for support to cases holding that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area," this Court has held firm that such "power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. 678, 695; *see also Chadha*, 462 U.S. at 940-41 (recognizing that though "[t]he plenary authority of Congress . . . is not open to question," the challenged issue "is whether Congress has chosen a constitutionally permissible means of implementing that power"). Here, Congress has plenary power to determine whether to statutorily grant American citizens the benefit of conferring citizenship at birth upon their foreign-born children. But fundamental constitutional principles prevent it from abusing that authority to discriminate between American citizens on the basis of sex or race. By virtue of their citizenship, unwed citizen fathers, like Morales-Santana's father, must be treated the same as unwed citizen mothers in this respect, absent a "close and substantial relationship to important governmental objectives," which the government cannot show. *Feeney*, 442 U.S. at 273.

The gerrymandered prospective relief suggested by the government is non-responsive to Respondent's claim to equal treatment. The government argues that this Court may achieve equal treatment by severing the benefit of the one-year physical presence requirement in § 1409(c) and applying the more onerous ten-year requirement to both unwed mothers and unwed fathers. However, to avoid dissolving the citizenship rights relied upon under §1409(c), the government suggests that this Court continue to treat the children of unwed mothers as citizens, but not the children of similarly situated unwed fathers. Such empty relief fails to meet this Court's foundational principle that, where "the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment." *Heckler*, 465 US. at 740 (emphasis added); *see also Virginia*, 518 U.S. at 547 ("A remedial decree . . . must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination.").

## CONCLUSION

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

Respectfully submitted,

Kyle Edwards
Marissa Roy
*Yale Law School*
*127 Wall St.*
*New Haven, CT 06511*
*(203) 432-4992*

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