No. 99-2071

In the Supreme Court of the United States

TUAN ANH NGUYEN AND JOSEPH BOULAIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under Section 309(a) of the Immigration and Nationality Act, 8 U.S.C. 1409(a), a child born abroad out of wedlock to a father who is a citizen of the United States and a mother who is not a citizen becomes a citizen of the United States, as of his date of birth, only if, *inter alia*, paternity is formally established by legitimation, written acknowledgment, or court decree while the child is under the age of 18, and the father agrees in writing to provide financial support for the child during the child's minority. Section 309(c) of the INA, 8 U.S.C. 1409(c), permits a child born abroad out of wedlock to claim citizenship on the basis of his relation to a citizen mother, so long as the mother had previously been physically present in the United States, before the child's birth, for a continuous period of at least one year. The question presented is as follows:

Whether the requirements for transmission of citizenship imposed upon United States citizen fathers by Section 1409(a) violate the equal protection component of the Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 208 F.3d 528. The opinion of the Board of Immigration Appeals on reconsideration (Pet. App. 14a-16a) is unreported. The initial opinion of the Board of Immigration Appeals (Pet. App. 17a-19a) is unreported. The deportation order of the immigration judge (Pet. App. 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2000. The petition for a writ of certiorari was filed on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 309(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1409(a), permits a child born outside the United States to unmarried parents to claim United States citizenship on the basis of the child's relation to a United States citizen father, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to provide financial support for the child while the child is under the age of 18, and (iii) before the child turns 18 there is some formal legal acknowledgment of paternity, either by legitimation under the laws of the child's residence or domicile, by adjudication of a competent court, or simply by the father's execution of an acknowledgment in writing under oath. The citizen father must also meet a residency requirement imposed through Section 1409(a), by 8 U.S.C. 1401(c), (d), (e), or (g). Section 309(c) of the INA, 8 U.S.C. 1409(c), permits a child born abroad out of wedlock to claim citizenship on the basis of his relation to a United States citizen mother, so long as the mother had previously been physically present in the United States, before the child's birth, for a continuous period of at least one year.

2. In *Miller* v. *Albright*, 523 U.S. 420 (1998), this Court considered, but failed definitively to resolve, the question whether Section 1409(a) violates the equal protection component of the Due Process Clause of the Fifth Amendment. Two Members of the Court concluded that Section 1409(a) does not violate the equal protection rights of either the child or the citizen father. See *id.* at 432-445 (opinion of Stevens, J.). Two Justices agreed that the statute does not violate the child's equal protection rights. *Id.* at 451-452 (O'Connor, J.,

concurring in the judgment). Those Justices declined to consider whether the statute unconstitutionally discriminates against citizen fathers, since the father involved in that case had abandoned his equal protection claim and was not a party in this Court, and the child did not, in the view of those Justices, have third-party standing to raise the father's equal protection rights. *Id.* at 445-451. Two Justices declined to address the constitutional claim of either the father or the child on the ground that the Court would lack power to confer citizenship as a remedy even if the statute were held to be unconstitutional. *Id.* at 452-459 (Scalia, J., concurring in the judgment). Three Justices would have held that the statute is unconstitutional. *Id.* at 461-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting).

3. Petitioner Tuan Anh Nguyen was born in South Vietnam on September 11, 1969. His mother, a Vietnamese citizen, abandoned him at birth. His natural father is petitioner Joseph Alfred Boulais, an American citizen. In June 1975, Nguyen came to the United States as a refugee, and he subsequently became a lawful permanent resident. He was raised in Texas by Boulais. Pet. App. 2a.

On August 28, 1992, Nguyen pleaded guilty in Texas state court to two felony charges of sexual assault on a child, and he was sentenced to eight years in prison for each crime. The Immigration and Naturalization Service (INS) subsequently initiated deportation proceedings against him. The gravamen of the deportation charges was that Nguyen was deportable under 8 U.S.C. 1251(a)(2)(A)(ii)-(iii) as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony. Pet. App. 2a.

In the course of the deportation proceedings, Nguyen sought to challenge the show cause order on the ground that he is a United States citizen. He ultimately testified under oath, however, that he was not a citizen of the United States, but a citizen of Vietnam, and he admitted that he was convicted of the aforementioned crimes. The immigration judge found Nguyen to be deportable, and Nguyen appealed to the Board of Immigration Appeals (BIA). Pet. App. 3a.

While the BIA appeal was pending, petitioner Boulais instituted a paternity proceeding in a Texas state court. Pet. App. 3a. In February 1998, he obtained an "Order of Parentage" (based upon DNA test results) adjudging him to be Nguyen's father. *Ibid.* The BIA nevertheless dismissed his appeal (*id.* at 17a-19a), explaining that Nguyen had "failed to provide the Immigration Judge with evidence to support [his] citizenship claim," *id.* at 17a-18a. The BIA subsequently denied Nguyen's motion for reconsideration, relying in part on this Court's decision in *Miller*. *Id.* at 14a-16a.

4. Petitioners Nguyen and Boulais sought review of the BIA's decision in the court of appeals.[1] The INS moved to dismiss petitioners' appeal for lack of jurisdiction. The INS relied on Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-626 to 3009-627, which provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having com-

[1] Petitioners also filed a habeas corpus petition in the United States District Court for the Southern District of Texas, which was held in abeyance pending the court of appeals' decision. Pet. App. 4a & n.2.

mitted" specified criminal offenses. See Pet. App. 4a. The court of appeals granted the government's motion to dismiss the petition for review. *Id.* at 1a-13a.

The court of appeals stated that because there was no dispute that Nguyen had been convicted of crimes covered by IIRIRA § 309(c)(4)(G), the court would lack jurisdiction over the appeal if Nguyen were in fact an alien. Pet. App. 4a-5a. The court therefore held that the "determin[ation] whether Nguyen is a citizen" was "a threshold question in the determination of [the court's] jurisdiction." *Id.* at 5a. The court of appeals treated the state court's "Order of Parentage" as conclusively "establishing[ing] that Boulais is Nguyen's biological father." *Id.* at 6a. The court found on that basis that "there [we]re no genuine issues of material fact regarding Nguyen's nationality leaving this court to determine whether Nguyen is a citizen of the United States." *Ibid.*

The court of appeals found it "clear that Nguyen has failed to establish the citizenship requirements outlined in" 8 U.S.C. 1409, since "Boulais failed to 'legitimate' Nguyen before his eighteenth birthday by acknowledging paternity in writing or establishing Nguyen's paternity in a court of competent jurisdiction." Pet. App. 8a. The court therefore addressed petitioners' contention that the requirements of 8 U.S.C. 1409(a) should not be applied to Nguyen's claim of citizenship on the ground that Section 1409(a) violates the equal protection component of the Due Process Clause. In analyzing the constitutional issue, the court considered the impact of the statutory scheme both on Nguyen and on Boulais. The court explained that Boulais—unlike the father in *Miller*—had "made every effort to represent his own interests in the present suit" and

therefore "should be allowed to represent his own interest in the present action." Pet. App. 9a.

On the merits, principally for the reasons stated in Justice Stevens's opinion in *Miller*, the court of appeals held that Section 1409(a) is constitutional. Pet. App. 11a-13a. The court explained that the statute "helps to ensure reliable proof of a biological relationship between the citizen parent and the child," and is "well tailored to meet the important governmental objectives of encouraging healthy parent-child relationships while the child is a minor, and fostering ties between the foreign born child [and] the United States." *Id.* at 12a. Having rejected petitioners' constitutional challenge to Section 1409(a), the court concluded that "Nguyen does not meet the [statutory] criteria for citizenship" and that his petition for review of the deportation order should be dismissed. *Id.* at 13a. The court explained that

> Boulais did not establish Nguyen's paternity before he reached the age of majority. Although Boulais has now obtained an order of parentage that order was decreed in 1998, and Nguyen was twenty eight years old. Thus, due to Nguyen's status as an alien, under IIRIRA this court is precluded from reviewing the BIA's final deportation order. Thus, we grant the INS's motion to dismiss the appeal.

Ibid.

DISCUSSION

The Fifth Circuit in this case upheld Section 1409(a) against petitioners' equal protection challenge. That decision is correct. As petitioners explain (Pet. 10-11), however, the Fifth Circuit's ruling squarely conflicts with the Ninth Circuit's decision in *United States* v.

Ahumada-Aguilar, 189 F.3d 1121, 1125-1127 (1999), petition for cert. pending, No. 99-1872, which held that Section 1409(a) violates the equal protection rights of citizen fathers. We agree with petitioners that the constitutional issue warrants review by this Court, in view of the circuit conflict on the issue and the recurring nature of the question.[2]

The government has filed a petition for a writ of certiorari in *Ahumada-Aguilar*.[3] In our view, however, the instant case provides a better vehicle for ultimate resolution of the constitutional issue by this Court. *Ahumada-Aguilar* (like *Miller*) presents the threshold question whether an individual who bases his claim to citizenship on a constitutional challenge to Section 1409(a) may assert the equal protection rights of his father. Although the Ninth Circuit held that Ahumada-Aguilar had third-party standing to assert his father's rights because the father is deceased, see 189 F.3d at 1126, our petition in that case explains (at 10-16) why that holding is erroneous. Thus, while we believe that the Ninth Circuit's decision in *Ahumada-Aguilar* warrants reversal by this Court, we do not believe that the equal protection claim brought on behalf of the citizen father is properly presented in that case.

We suggested in our certiorari petition in *Ahumada-Aguilar* that the Court might wish to consider summary reversal of the judgment of the Ninth Circuit in that case on third-party standing grounds. We explained that summary reversal on that ground would

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[2] The Second Circuit has not yet rendered its decision in *Lake* v. *Reno*, No. 99-4125 (argued Mar. 31, 2000), which, as petitioners note (Pet. 14), presents the same issue.

[3] We are furnishing petitioners' counsel with copies of the petition and reply brief filed by the government in *Ahumada-Aguilar*.

eliminate the Ninth Circuit's judgment holding an Act of Congress unconstitutional, the circuit conflict on the constitutional issue, and the prospect that the Court would grant plenary review due to the Ninth Circuit's constitutional ruling only to find itself precluded from reaching that issue because of the threshold standing obstacle. See 99-1872 Pet. at 16-17, 22, 23. The instant case, by contrast, presents no third-party standing issue, because the father whose equal protection rights are alleged to have been violated was a party in the court of appeals and is a petitioner in this Court. We therefore believe it would be appropriate for the Court to grant certiorari in this case and to hold our petition in *Ahumada-Aguilar* pending the Court's decision in this case.[4]

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[4] The government does not dispute that petitioner Boulais is petitioner Nguyen's natural father, or that Boulais's equal protection rights may properly be resolved in this case. We note that, if the Court were to find 8 U.S.C. 1409(a) unconstitutional, it would need to decide a remedial question presented but not resolved in *Miller—i.e.*, whether a court has the power to declare petitioner Nguyen to be a citizen of the United States despite the absence of a statute conferring citizenship. Compare *Miller*, 523 U.S. at 452-459 (Scalia, J., concurring in the judgment) (concluding that a court lacks the power to confer citizenship on a foreign-born individual in the absence of a statute that provides for citizenship, even as a remedy for a constitutional infirmity in the citizenship statute itself), with *id.* at 445 n.26 (opinion of Stevens, J.) (noting but not reaching remedial issue); *id.* at 451 (O'Connor, J., concurring in the judgment) (citing Justice Scalia's opinion and acknowledging the "potential problems with fashioning a remedy"); *id.* at 488-490 (Breyer, J., dissenting) (concluding that the Court may appropriately declare the plaintiff to be a citizen). See also *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988) (where Congress has set specific statutory limits on a provision for naturalization, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2000

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power to confer citizenship in violation of [those] limitations"). That remedial issue, however, will presumably be implicated by every constitutional challenge to Section 1409(a).