No. 09-5801

In the Supreme Court of the United States

RUBEN FLORES-VILLAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

In order for a United States citizen who has a child abroad with a non-United States citizen to transmit his or her citizenship to the foreign-born child, the U.S. citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. The question presented is:

Whether Congress's decision to impose a shorter physical-presence requirement on unwed citizen mothers of foreign-born children than on other parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1970) violates the Fifth Amendment's guarantee of equal protection.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 169-186) is reported at 536 F.3d 990. The order of the district court granting the government's motion in limine (J.A. 135-146) is reported at 497 F. Supp. 2d 1160.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2008. A petition for rehearing was denied on May 5, 2009 (J.A. 187). The petition for a writ of certiorari was filed on August 3, 2009, and was granted on March 22, 2010. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to petitioner's brief.

STATEMENT

1. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has elected to confer United States citizenship by statute on certain persons born outside the United States through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* At the time of petitioner's birth in 1974, a child born outside the United States to married parents, only one of whom was a U.S. citizen, could acquire citizenship through his or her U.S. citizen parent if, before the child's birth, the citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned fourteen years of age. 8 U.S.C. 1401(a)(7) (1970).[1] The same physical-presence requirement applied if the child was born out of wedlock and the father was a U.S. citizen

[1] Section 1401 has since been amended, with former Section 1401(a)(7) redesignated as Section 1401(g) and the term of the required physical presence in the United States reduced to a total of five years, two of which must be after the parent turned fourteen. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. That amendment does not apply unless the child was born on or after November 14, 1986, however, and thus does not govern petitioner's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618. Unless otherwise specifically stated, references herein to Section 1401 or Section 1401(a)(7) are to the 1970 version.

(and if the paternity was established through legitimation while the child was under age 21). 8 U.S.C. 1409(a) (1970); see *Nguyen* v. *INS*, 533 U.S. 53, 59-73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18).[2] If, however, the child was born out of wedlock outside the United States and only his mother was a U.S. citizen, Section 1409(c) transmits U.S. citizenship to the child if the mother was a citizen of the United States at the time of the child's birth and had been physically present in the United States before the child's birth for a continuous period of at least one year. *Id.* at 59-60.

2. In 1974, petitioner was born in Tijuana, Mexico, to unmarried parents. J.A. 85, 91-93. His mother is a citizen and national of Mexico, and his father, who was 16 years old at the time of petitioner's birth, is a U.S. citizen who resided in the United States for much of his life. J.A. 84, 92. Although petitioner's father was a U.S. citizen from birth, petitioner's father did not obtain formal documentation of that fact until May 24, 1999 (almost 25 years after petitioner was born), when he was issued a certificate of citizenship upon his own application. J.A. 84. Petitioner's father was confirmed as a citizen from birth based on the fact that his mother—petitioner's paternal grandmother—was a U.S. citizen by birth in the United States, and met the requirements of Section 1409(c) to transmit citizenship to her out-of-wedlock child (petitioner's father) at the time of his

[2] Section 1409(a) was amended in 1986 to revise the requirements that must be satisfied for a child born abroad out of wedlock to obtain citizenship through a United States citizen father. 1986 Act, Pub. L. No. 99-653, § 13(b), 100 Stat. 3657; *Miller* v. *Albright*, 523 U.S. 420, 468 (1998) (Ginsburg, J., dissenting).

birth. J.A. 8, 88, 170. It is not clear that petitioner's father was aware of his U.S. citizenship prior to adulthood.

When petitioner was two months old, his father and paternal grandmother brought him to the United States to receive medical treatment. J.A. 85-86, 90, 94-96. After petitioner was released from the hospital, he lived with his father and grandmother in the San Diego area, where he grew up. J.A. 86, 90. Although petitioner's father is not listed on his birth certificate, J.A. 92, in 1985 the father acknowledged petitioner as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico, J.A. 98-100.

On March 17, 1997, petitioner was convicted of importation of marijuana, in violation of 21 U.S.C. 952 and 960 (1994), and was sentenced to 24 months of imprisonment. J.A. 171. After serving his sentence, petitioner was ordered removed from the United States, and he was removed on October 16, 1998. *Ibid.* Petitioner repeatedly returned to the United States following removal, resulting in additional removal proceedings in 1999 (when he was twice deported) and again in 2002. *Ibid.* In June 2003, following another illegal reentry, petitioner was convicted of two counts of illegal entry into the United States in violation of 8 U.S.C. 1325, and was again removed in October 2003. *Ibid.* Petitioner again reentered the United States illegally and was once again removed in March 2005, after which he yet again unlawfully returned to the United States. J.A. 148-150, 171.

3. On February 24, 2006, petitioner was arrested and charged with being a deported alien found in the United States after deportation, in violation of 8 U.S.C. 1326(a) and (b). J.A. 5-6, 149-150, 171. Petitioner

sought to defend against the charge by establishing that he had acquired U.S. citizenship at birth through his father. J.A. 171. After his indictment, petitioner filed an application for a certificate of citizenship with the Department of Homeland Security (DHS), pursuant to 8 U.S.C. 1452(a). J.A. 65-80. DHS denied petitioner's application (and his administrative appeal) because it was physically impossible for petitioner's father, who was 16 years old when petitioner was born, to have been present in the United States for five years after his fourteenth birthday, but prior to petitioner's birth, as required by former Section 1401(a)(7) in order for him to transmit U.S. citizenship to petitioner. J.A. 61-63, 126-134.

The government filed a motion in limine in petitioner's illegal-reentry prosecution to exclude evidence of petitioner's purported citizenship because petitioner did not qualify for citizenship under the INA. J.A. 7-23. The district court granted the motion after concluding that no reasonable juror could find that petitioner's father satisfied the transmission-of-citizenship requirements of the INA. J.A. 135-146. The district court also rejected petitioner's equal protection challenge to application of the physical-presence requirements to his father. J.A. 143-146. Following a bench trial on stipulated facts, petitioner was convicted of violating 8 U.S.C. 1326 by illegally entering the United States without permission after having been removed. He was sentenced to 42 months of imprisonment.[3] J.A. 158-160.

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[3] Petitioner has since served his sentence and been released under supervision and then deported. The completion of petitioner's sentence and his deportation do not, however, render the present proceeding moot. See *Spencer v. Kemna*, 523 U.S. 1, 8, 12 (1998).

4. On appeal, petitioner reasserted his contention that the versions of Sections 1401(a)(7) and 1409 applicable at the time of his birth violated the equal protection component of the Fifth Amendment's Due Process Clause because they required a U.S. citizen father of a child born abroad out of wedlock to have been physically present in the United States for a total of at least five years following his fourteenth birthday in order to transmit his citizenship to his child, while a U.S. citizen mother in such a situation need only have been physically present in the United States for a continuous period of one year. J.A. 169-170, 180-182. The court of appeals rejected petitioner's contention and affirmed his conviction. J.A. 169-186. The court concluded that the answer to petitioner's equal protection argument "follows from the Supreme Court's opinion in *Nguyen* v. *INS*." J.A. 170. In *Nguyen*, *supra*, this Court held that Section 1409 does not discriminate on the basis of gender in violation of equal protection principles by requiring a citizen father—but not a citizen mother—to take steps to establish his connection (through legitimation, adjudication, or acknowledgment) to a child born out of wedlock outside the United States before he can transmit U.S. citizenship to the child. J.A. 174-175.

Assuming that intermediate scrutiny applies to petitioner's equal protection challenge, the court of appeals determined that, "[a]lthough the means at issue are different in this case—an additional residence requirement for the unwed citizen father—the government's interests are no less important, and the particular means no less substantially related to those objectives, than in *Nguyen*." J.A. 175-176 & n.2. The court reasoned that applying different physical-presence requirements to unwed citizen mothers and fathers was substantially re-

lated to the important government interests in minimizing the risk of statelessness of foreign-born children and in "assuring a link between an unwed citizen father, and this country, to" the child. J.A. 176-177. The court relied on its analysis in *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990), in which it observed that "illegitimate children are more likely to be 'stateless' at birth" because "if the U.S. citizen mother is not a dual national, and the illegitimate child is born in a country that does not recognize citizenship by *jus soli* (citizenship determined by place of birth), the child can acquire no citizenship other than his mother's at birth." J.A. 176 (quoting *Runnett*, 901 F.2d at 787). The court found that concern about statelessness justified a shorter physical-presence requirement for mothers of out-of-wedlock children to "insure that the child will have a nationality at birth." J.A. 176, 179. The Court acknowledged that the "fit" between the means and the objectives was "not perfect," but found it "sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship." J.A. 177.[4]

SUMMARY OF ARGUMENT

Pursuant to its authority under Article I of the Constitution, Congress has enacted comprehensive rules governing immigration and naturalization. One subset of those rules governs the acquisition of citizenship by children born abroad to U.S. citizen parents. When a U.S. citizen has a child abroad with a non-citizen, Congress requires that the U.S. citizen parent have satisfied a physical-presence requirement prior to the child's birth before the parent may transmit his or her citizen-

[4] The court of appeals also rejected petitioner's other constitutional and statutory arguments. See U.S. Br. in Opp. at 8 n.5; J.A. 180-185.

ship to the child as of birth. That requirement applies to married fathers and married mothers—and it applies to unmarried fathers such as petitioner's. In an effort to reduce the number of children who may be born stateless, Congress has applied a shorter physical-presence requirement to unmarried U.S. citizen mothers who give birth abroad. Such physical-presence requirements on the U.S. citizen parents of children born abroad ensure that foreign-born children will have sufficient connections to the United States to merit citizenship, and this Court has long upheld Congress's decision to require such a connection.

Petitioner asserts an equal protection challenge to this statutory framework on behalf of his father. But petitioner's father has never asserted such a claim on his own behalf, and petitioner cannot demonstrate any hindrance to his father's having done so. Petitioner therefore lacks third-party standing to assert his father's equal protection claim.

Congress's choice of rules governing naturalization is entitled to deference by this Court and is subject to review under rational basis standards. But even if heightened review is applied to the equal protection challenge asserted here on behalf of petitioner's father, the statutory provisions are constitutional. There is no serious dispute that reducing the number of children born stateless is an important government objective. Congress chose to pursue that objective by applying a shorter physical-presence requirement to unwed U.S. citizen mothers of foreign-born children than to other U.S. citizen parents. That statutory scheme is constitutionally permissible because it is substantially related to the government's important interest.

As Congress knew, most countries apply *jus sanguinis* citizenship laws, pursuant to which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. In most of those countries—as indeed in most *jus soli* countries such as the United States—the only parental relationship that is legally recognized or formalized at birth for a child born out of wedlock is usually that of his mother. Thus, at birth, the child's only means of taking citizenship is through his mother. Although such a child's father may subsequently take actions to establish a legally recognized parental relationship, there is no guarantee that he will ever do so. Because impediments to an unwed mother's ability to transmit her citizenship to a child at birth create a substantially higher risk that a child will be born stateless, Congress eased the requirements for acquisition of U.S. citizenship by the children of those mothers.

The fact that Congress did not eliminate the possibility that any foreign-born child of a U.S. citizen parent would be stateless, either at birth or at some point later in his life, does not render its chosen framework unconstitutional. No foreign-born person has a free-standing constitutional right to U.S. citizenship, and no U.S. citizen has a free-standing right to transmit his or her citizenship to a foreign-born child. Congress balances competing interests in enacting laws governing naturalization. The carefully measured rules Congress enacted serve the important governmental interest in ensuring that children born abroad have sufficient ties to this country to merit citizenship and the interest in reducing statelessness—and consequently do not violate equal protection.

Even if this Court were to determine that the differing physical-presence requirements in Sections 1401 and 1409 violated equal protection, petitioner is not entitled to the relief he seeks, namely a reversal of his criminal conviction based on a determination that he has been a citizen from birth. The fact that Congress chose to apply the more stringent physical-presence requirements in Section 1401 to a substantial majority of U.S. citizen parents of foreign-born children, the need to preserve necessary flexibility for Congress, as well as adherence to this Court's longstanding treatment of naturalization requirements lead to the conclusion that the proper way to cure any equal protection violation would be to apply the longer physical-presence requirements in Section 1401, on a prospective basis, to unwed citizen mothers. Petitioner's suggestions that the Court either extend the shorter physical-presence requirement in Section 1409(c) to unmarried fathers (but not to married parents of either gender) or retain the unequal treatment but reduce the length of the physical-presence requirement applicable to unmarried men make little sense and could foreclose future revision by Congress. Equalizing the treatment of all citizen parents of foreign-born children as suggested here would eliminate any equal protection problem and most faithfully preserve Congress's policy choices.

ARGUMENT

I. PETITIONER LACKS STANDING TO ASSERT THE EQUAL PROTECTION RIGHTS OF HIS FATHER

Petitioner has not suffered any differential treatment by virtue of his own gender. Petitioner's equal protection complaint instead is that his father is treated less favorably than a U.S. citizen mother with respect to

the ability to transmit U.S. citizenship to a child born abroad out of wedlock. That claim is properly raised by petitioner's father, who is the subject of the allegedly unconstitutional differential treatment.

This Court has held that a party ordinarily "cannot rest his claim to relief on the legal rights or interests of third parties." *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (*Munson*) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). In such a case, a litigant may not assert the constitutional rights of an absent third party unless the litigant has a "close relation" to the party whose rights are asserted, and there is "some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991); see also, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 445-451 (1998) (O'Connor, J., concurring in the judgment); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623-624 n.3 (1989) (*Caplin & Drysdale*); *Singleton* v. *Wulff*, 428 U.S. 106, 113-116 (1976) (opinion of Blackmun, J.); *Warth*, 422 U.S. at 499-500; *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). Those restrictions "arise[] from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" *Miller*, 523 U.S. at 446 (O'Connor, J., concurring in the judgment) (quoting *Wulff*, 428 U.S. at 113-114 (opinion of Blackmun, J.)).

Although we may assume that petitioner has a close relationship with his father, petitioner cannot satisfy this Court's limits on *jus tertii* standing because, as the court of appeals found (J.A. 182), "the record discloses no obstacle that would prevent [petitioner's father] from asserting his own constitutional rights." See *Powers*,

499 U.S. at 411; see also *Singleton*, 428 U.S. at 116 (opinion of Blackmun, J.). It is true that petitioner's father is not entitled to intervene in petitioner's criminal case in order to assert his equal protection challenge; but the inquiry is not whether a third party may assert his own rights in this particular case, but whether he may effectively assert them at all. Petitioner has not demonstrated any "daunting" or "considerable practical" barriers—or indeed, any barriers at all—to his father's protection of his own rights if he chose to do so. See *Powers*, 499 U.S. at 414-415; see also *Munson*, 467 U.S. at 956.

Shortly after petitioner's birth in 1974, his father brought him to the United States to receive medical care. J.A. 135-136. After his release from the hospital, petitioner lived with his father and paternal grandmother near San Diego. J.A. 136. Although petitioner's father formally acknowledged his paternity in 1985 in Mexico, *ibid.*, he took no steps to have petitioner declared a U.S. citizen. Petitioner's father did not, for example, apply for a certificate of citizenship on behalf of petitioner when petitioner was a minor. See 8 C.F.R. 341.1. If that application was turned down, petitioner's father could have brought an action on petitioner's behalf challenging that denial under 8 U.S.C. 1503, and raising the claim that his inability to transmit citizenship to petitioner violated his Fifth Amendment rights. Nor did petitioner's father ever apply to have petitioner naturalized when petitioner was a child. See, *e.g.*, 8 U.S.C. 1433 (1970); cf. J.A. at 7, *Miller*, *supra* (No. 96-1060) (First Amended Complaint); *Miller*, 523 U.S. at 426 (father initially filed suit with foreign-born child seeking such a declaration).

Petitioner offers no justification for his father's failure to assert his equal protection claim by bringing his own action. It is true that petitioner's father did not himself obtain a certificate of citizenship until 1999, J.A. 84, when petitioner was already 24 years old. But petitioner's father was automatically a citizen at birth by virtue of his mother's citizenship, and his ignorance of that fact does not constitute the type of hindrance to assertion of his own rights that would confer on petitioner third-party standing to raise those rights. See *Lehr* v. *Robertson*, 463 U.S. 248, 264 (1983).

Moreover, once petitioner became an adult, petitioner's father could have joined an equal protection claim a later suit by petitioner himself under 8 U.S.C. 1503, following a denial of an application by petitioner for such a certificate. See also *Nguyen*, 533 U.S. at 58 (father asserted claim under the Fifth Amendment by participating in child's petition for judicial review of removal order). Petitioner is correct (Br. 63) that a majority of the Court in *Miller* found that the petitioner in that case had third-party standing to assert her citizen father's equal protection rights. But that finding in *Miller* was based on the existence of an actual hindrance to the citizen father's demonstrated efforts to pursue his equal protection claim. In *Miller*, the petitioner and her father had together sought a declaration that the father's inability to transmit citizenship to his foreign-born daughter violated the Fifth Amendment. 523 U.S. at 426. At the government's urging, the district court had dismissed the petitioner's father from the suit and the father had failed to appeal that ruling. See *id.* at 473-474 (Breyer, J., dissenting). The Court concluded that, under those circumstances, the right-holder (the petitioner's father) faced a sufficient barrier to the ac-

tual assertion of his rights to confer third-party standing on his daughter. *Id.* at 432-433 (Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-475 (Breyer, J., dissenting).

That holding does not apply to petitioner in this case, however, because two crucial elements are missing: (1) unlike petitioner's father, the father in *Miller* had in fact taken steps to attempt to assert his equal protection rights; and (2) the father in *Miller* was prevented through dismissal from the suit from pursuing vindication of his rights, while no obstacle prevented petitioner's father from pursuing those rights in the proper manner. "Here, although we have an injured party before us, the party actually discriminated against is both best suited to challenging the statute and available to undertake that task." *Miller*, 523 U.S. at 450 (O'Connor, J., concurring). Petitioner has failed to demonstrate that his father is unable "to advance his own rights," *Caplin & Drysdale*, 491 U.S. at 624 n.3, because of a "genuine obstacle" that rises to the level of a hindrance, *Singleton*, 428 U.S. at 116. Cf. *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004); *Powers*, 499 U.S. at 411; *Craig* v. *Boren*, 429 U.S. 190, 196-197 (1976); *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953).

II. THE RULES ESTABLISHED BY SECTIONS 1401 AND 1409 FOR CONFERRAL OF CITIZENSHIP ON A CHILD BORN ABROAD OUT OF WEDLOCK ARE FULLY CONSISTENT WITH THE CONSTITUTION

If the Court concludes, contrary to our submission in Point I, that petitioner may assert the rights of his father to challenge the physical-presence requirements in Sections 1401 and 1409, the Court should reject that challenge.

At the time of petitioner's birth, the general rule was that a child born abroad to one U.S. citizen parent and one non-U.S. citizen parent became a citizen at birth only if the citizen parent had been physically present in the United States for a minimum of ten years, at least five of which were after attaining the age of 14. 8 U.S.C. 1401(a)(7). That rule applied both to children of married parents regardless of which parent was a U.S. citizen and to children born out of wedlock if the father was a U.S. citizen at the time of the child's birth and subsequently established his paternity while the child was a minor. 8 U.S.C. 1401(a)(7), 1409(a). The physical-presence requirement applicable to petitioner's father in 1974 was a constitutionally permissible exercise of Congress's plenary authority over naturalization. Congress's enactments in the area of immigration and naturalization are entitled to great deference by the courts. Indeed, even under the heightened review accorded to congressional classifications in the domestic context, the different physical-presence requirements in Sections 1401 and 1409 are constitutional.

A. Congressional Enactments Governing Immigration And Naturalization Are Subject To A Deferential Standard Of Review

1. As this Court has long held, the Fourteenth Amendment to the Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Although "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, * * * [a] person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty

* * * or by authority of Congress." *Id.* at 702-703. There is no dispute in this case that petitioner was born outside the United States and is therefore not entitled—as a constitutional matter—to citizenship by virtue of his birth. Instead, he asserts a right to the "acquisition of citizenship by being born abroad of an American parent," which is "obviously" not governed by the Fourteenth Amendment. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971); see *Wong Kim Ark*, 169 U.S. at 688.

Article I of the Constitution vests in Congress the authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; *Wong Kim Ark*, 169 U.S. at 688. Authority over naturalization is thus "vested exclusively in Congress" by the Constitution. *Id.* at 701. That authority of course encompasses the power to grant citizenship to children who are born abroad of U.S. citizen parents. But "the Court has specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent." *Bellei*, 401 U.S. at 830 (emphasis added); *id.* at 831. Like any individual who seeks citizenship through naturalization, petitioner is bound by the rules set forth by Congress, see *id.* at 828 (noting that "naturalization by descent" is "dependent * * * upon statutory enactment"), and such citizenship is available "only upon terms and conditions specified by Congress," *Schneiderman* v. *United States*, 320 U.S. 118, 172 (1943) (Stone, C.J., dissenting).

The Judiciary has a crucial role in protecting rights accorded under the Constitution to citizens and to those aliens who have been allowed to become legal residents of this country, but it has not been thought to be the province of the Judiciary to determine which foreign-born persons should be permitted to become members

of our society in the first place. Nor are the courts well-positioned to second-guess Congress's judgments about what classes of persons should be eligible for statutory citizenship, for at least three reasons.

First, the Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893); see 2 *The Records of the Federal Convention of 1787* at 238 (Max Farrand ed., 1966) (remarks of Gouverneur Morris) ("[E]very Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted."). Deciding who should be admitted to citizenship involves fundamental questions of who should be entitled to share in the benefits, protections, and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990); *Dames & Moore* v. *Regan*, 453 U.S. 654, 663-665, 676-679 (1981). That determination requires a complex weighing of competing considerations, including the presence or likelihood of ties to the United States, moral and equitable factors, the laws of other nations on the subject, and the potential for dual citizenship or statelessness.

Second, the power to confer or deny citizenship to individuals born abroad—individuals who are aliens insofar as the Constitution is concerned—is also an aspect of the power to exclude aliens from the Nation. That power "is an incident of every independent nation." *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign at-

tribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

Third, the United States' "policy toward aliens" is "vitally and intricately interwoven with * * * the conduct of foreign relations," a power that likewise is vested in the political Branches. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

As this Court explained in *Plyler* v. *Doe*, 457 U.S. 202 (1982), drawing upon its powers under the Naturalization Clause and over foreign relations and attributes of inherent sovereignty, "Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. For the reasons discussed above, that principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 793 n.4 (1977) (quoting *Galvin* v. *Press*, 347 U.S. 522, 531 (1954)); see also *id.* at 792 ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Accordingly, Congress's judg-

ments regarding the requirements that must be satisfied in order for a person born abroad to become a U.S. citizen are entitled to considerable deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Id.* at 794 (citation omitted).

2. Petitioner argues (Br. 15-17) that the deferential review normally accorded to Congress concerning immigration and naturalization does not apply to decisions regarding a foreign-born individual's acquisition of citizenship at birth. Petitioner is incorrect. The fact that Congress has enacted a law under which some foreign-born individuals acquire U.S. citizenship at birth by virtue of a parent's citizenship does not mean that such individuals are not naturalized citizens for purposes of the Constitution. As explained above, when Congress enacts rules to govern acquisition of citizenship, it acts pursuant to its constitutional authority to establish a uniform rule of naturalization. See *Miller*, 523 U.S. at 434 n.11 (opinion of Stevens, J.) ("Though petitioner claims to be a citizen from birth, * * * citizenship does not pass by descent. * * * Thus she must still meet the statutory requirements set by Congress for citizenship."); see also *id.* at 453 (Scalia, J., concurring in the judgment) ("Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned."); cf. *Nguyen*, 533 U.S. at 72 (acquisition of citizenship through an unmarried citizen father "is a naturalization," even though it "is retroactive to the date of birth").[5]

[5] The INA defines the term "naturalization" more narrowly as a statutory matter than this Court has construed the term as a constitutional matter. 8 U.S.C. 1101(a)(23); see *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality*

Petitioner's attempt (Br. 15) to distinguish *Fiallo* on the basis that it "[a]ddresses the [a]dmission of [a]liens, [n]ot [c]itizenship [b]y [b]irth," is also unavailing. In *Fiallo*, the Court rejected a constitutional challenge to an immigration preference that sought to reunite unwed mothers and their children, but did not afford a similar preference to unwed fathers and their children. 430 U.S. at 788-791. The plaintiffs in that case included U.S. citizens, *id.* at 790 n.3, who argued that a deferential standard of review should not apply because the statutory provision at issue "implicated 'the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship,'" *id.* at 794 (quoting Appellant's Br. at 54, *Fiallo*, *supra* (No. 75-6297)). The Court found "no reason to review the broad congressional policy choice at issue [t]here under a more exacting standard than" in prior cases applying deferential review to immigration laws, noting that the Court had previously "rejected the suggestion that more searching judicial scrutiny [of immigration statutes] is required" when the constitutional rights of citizens are implicated. *Id*. at 794-795.

B. Congress May Apply A Physical-Presence Requirement To U.S. Citizen Parents Of Foreign-Born Children

The physical-presence requirement to which petitioner ascribes injury is a rule that applies not only to unmarried fathers, but also to married fathers and mothers. Petitioner argues (Br. 28, 34) that the "age-calibrated, 10-year residence requirement" applicable to

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Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 413-414 (printed 1945) (noting that INA's definition of "naturalization" is "narrower" than the "broad[]" meaning of the term in the Constitution).

his father—and to most U.S. citizen parents of foreign-born children—unconstitutionally "disabl[es] a class of U.S. fathers * * * from transmitting citizenship to their legitimated children." There is nothing constitutionally suspect, however, about that physical-presence requirement in its own right. As petitioner concedes (Br. 29), "[t]he requirement of pre-birth residence vindicates a well-established Congressional goal of ensuring that citizenship not pass through generations of expatriate citizens living outside the United States for their entire lives." The validity of that goal, as well as the legitimacy of achieving it through physical-presence requirements, is well established in this Court's cases. As the Court recognized in *Nguyen*, Congress has a legitimate "desire to ensure some tie between this country and one who seeks citizenship." 533 U.S. at 68. One means Congress has employed to ensure that a sufficient tie exists between a foreign-born individual and this country is the imposition of physical-presence requirements on the citizen parents of such children. Cf. *Weedin* v. *Chin Bow*, 274 U.S. 657, 665-667 (1927). This Court has thus "emphasized the importance of residence in this country as the talisman of dedicated attachment." *Bellei*, 401 U.S. at 834.[6]

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[6] Prior to 1940, the governing statute required physical presence prior to the child's birth, but not of any particular length. When Congress first enacted a physical-presence requirement of a particular length in the 1940 code, it was concerned that individuals born and residing abroad will be "alien in all their characteristics and connections and interests," notwithstanding a biological connection to a U.S. citizen. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 37 (printed 1945).

C. Congress Constitutionally May Apply A Shorter Physical-Presence Requirement To Unmarried U.S. Citizen Mothers Of Foreign-Born Children Than To All Other U.S. Citizen Parents Of Foreign-Born Children

Although the general rule at the time of petitioner's birth was that a U.S. citizen parent (married or unmarried) had to satisfy a physical-presence requirement of 10 years prior to the birth of the child (5 of which had to be after the parent was 14 years old), Congress carved out an exception to that general rule by adopting a shorter physical-presence requirement for unwed citizen mothers of foreign-born children. That decision by Congress was constitutionally permissible. In *Nguyen*, this Court upheld Congress's decision to apply a set of conditions on the conferral of U.S. citizenship by U.S. citizen fathers of children born abroad out of wedlock, but not to the citizen mothers of such children. 533 U.S. at 60-73. In so holding, the Court concluded that the distinction satisfied the heightened equal protection review this Court applies to gender-based classifications in the domestic context, and therefore did not need to decide "whether some lesser degree of scrutiny pertains because [Section 1409] implicates Congress's immigration and naturalization power." *Id.* at 60-61; see also *id.* at 72-73 (the Court's holding rendered it unnecessary to assess the "implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power") (citing *Fiallo*, *Galvin*, and *Oceanic Steam Navigation Co.*).

For the reasons discussed above, Congress's choice of physical-presence requirements for U.S. citizen parents of foreign-born children is entitled to rational basis review. That is particularly true in this case because, as

discussed below, unmarried mothers and unmarried fathers of foreign-born children are not similarly situated with respect to the interest (reduction of statelessness) Congress sought to advance. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). Just as in *Nguyen*, however, this Court need not decide what level of review is warranted because Congress's legislative classification serves "important governmental objectives" through means that are "substantially related to the achievement of those objectives" and that do not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)).

1. Reducing The Risk Of Statelessness Is An Important Governmental Objective Supporting The Shorter Physical-Presence Requirement In Section 1409(c)

a. In deciding to impose a shorter physical-presence requirement on unmarried citizen mothers of foreign-born children than on all other parents of such children, Congress sought to reduce the incidence of statelessness among children at the time of their birth. As this Court has noted, citizenship in the United States has always been principally governed by the rule of "*jus soli*, that is, that the place of birth governs citizenship status except as modified by statute." *Bellei*, 401 U.S. at 828. Many other nations, however, apply the civil-law rule of *jus sanguinis*, under which citizenship is acquired principally based upon a blood relationship with a parent. See authorities cited in *Miller*, 523 U.S. at 477 (Breyer,

J., dissenting).[7] The potential for statelessness arises when a child is born in a *jus sanguinis* country but is unable to obtain the nationality of either of his parents. This Court has declared the issue of statelessness to be "of the utmost import," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and has noted that statelessness is "deplored in the international community of democracies" and can have "disastrous consequences" for a stateless individual. *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958) (opinion of Warren, C.J.). See *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967) ("In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country."); see generally U.N. High Comm'r for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection* iv (2008), http://www.unhcr.org/49a271752.html. Congress's goal of diminishing the incidence of stateless children born to U.S. citizens is therefore an important government interest.

b. Petitioner does not dispute that diminishing the incidence of statelessness is an important government interest. Petitioner argues (Br. 35-38), however, that

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[7] We have been informed by the Department of State that U.S. posts in 14 countries and Jerusalem each submitted more than 1,000 consular reports of births abroad in 2009. A "Consular Report of Birth" is filed for any U.S. citizen under the age of 18 who was born abroad and who acquired U.S. citizenship at birth. See United States Dep't of State, *Form DS-2029, Application for a Consular Report of Birth* (Jan. 2010), http://www.state.gov/documents/organization/83127.pdf. In descending order of numerosity, those posts were in: Mexico, Germany, Great Britain, Japan, Canada, Jerusalem, Israel, Philippines, Yemen, Vietnam, Dominican Republic, People's Republic of China (including Taiwan), Australia, Italy, and South Korea. Of those 15 posts, only two—Mexico and Canada—apply *jus soli* laws.

that was not, in fact, Congress's goal when it enacted the shorter physical-presence requirement applicable to unmarried mothers of foreign-born children. Petitioner is incorrect. The evolution of this country's naturalization laws, as well as the legislative history of the relevant Acts of Congress in 1940 and 1952, shows that Congress was concerned with the possibility that too many foreign-born children of unwed U.S. citizen mothers would be born stateless.

i. Prior to 1940, Congress had provided "by successive acts" "for the admission to citizenship of * * * [f]oreign-born children of American citizens, coming within the definitions prescribed by Congress." *Wong Kim Ark*, 169 U.S. at 672. The first Act of Congress governing foreign-born children of citizen parents provided 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: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. From 1790 through until 1934, federal statutes extended citizenship to foreign-born children based upon the U.S. citizenship of a child's father. See Frederick Van Dyne, *Citizenship of the United States* 32-34 (1904). In 1934, Congress eliminated—on a prospective basis—the distinction between children of citizen fathers and children of citizen mothers by providing that any child "whose father or mother or both * * * is a citizen" would be a citizen, if (1) at least one citizen parent satisfied a requirement of residency in the United States before the child's birth, and (2) the child, if born to one citizen parent and one non-citizen parent, satisfied a residency requirement and took an oath of allegiance.

Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (reprinted in *Bellei*, 401 U.S. at 818 n.2).[8]

Before 1940, none of the laws granting U.S. citizenship to foreign-born children had expressly addressed the issue of children born out of wedlock. For many years, the 1855 and 1934 Acts had been interpreted and applied to afford citizenship to children born out of wedlock who had a U.S. citizen father, if the child subsequently was legitimated by marriage of the child's parents or otherwise in accordance with the governing state or foreign law. See *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (printed 1945) (*1940 Hearings*); 32 Op. Att'y Gen. 162 (1920); 39 Op. Att'y Gen. 556 (1937). When a child was born abroad out of wedlock to a U.S. citizen mother, the State Department's practice was to recognize the child as a citizen, on the rationale that the mother stood in the position of the father in such cases. *1940 Hearings* 431. However, the Attorney General rejected that view in 1939, at least with respect to children born before the 1934 Act. 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). In so doing, the Attorney General suggested that the unavailability of citizenship to children born abroad out of wedlock to a U.S. citizen mother would be a proper subject for congressional action. 39 Op. Att'y Gen. at 291.

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[8] In 1994, Congress eliminated the distinction for children born prior to the effective date of the 1934 Act. See 8 U.S.C. 1401(h) (conferring citizenship on children of a citizen mother who meets a residency requirement, if the child was born abroad prior to May 24, 1934), as added by the Immigration and Nationality Technical Corrections Act of 1994 (1994 Act), Pub. L. No. 103-416, § 101(a)(2), 108 Stat. 4306.

ii. Congress addressed that issue when it undertook a general overhaul of the naturalization laws in 1940. In 1938, President Roosevelt had submitted to Congress a proposed new nationality code (Proposed Code) that had been prepared by his Secretary of State, Attorney General, and Secretary of Labor. *1940 Hearings* 405-507. In drafting the Proposed Code, "[t]he problem of the child born abroad to parents of different nationalities was the subject of extended consideration." *Id.* at 409. The drafters proposed that citizenship be conferred at birth on such a child if the citizen parent had resided in the United States for at least ten years before the child's birth, and suggested that the child be required to satisfy a residency requirement and take an oath of allegiance after turning 21. *Id.* at 426-427. The drafters 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." *Id.* at 426. Congress eliminated the oath of allegiance, toughened the parental residency requirement, and altered the wording slightly, but otherwise adopted the drafters' proposal as Section 201(g) of the Nationality Act of 1940 (1940 Act), Ch. 876, 54 Stat. 1139. The physical-presence requirements have been reduced over the years, but the same basic provision remains in force today as 8 U.S.C. 1401(g).

Section 205 of the 1940 Act (Pet. Br. App. 3) in turn addressed the status of children born abroad out of wedlock, which had been thrown into some confusion by the Attorney General's 1939 opinions, discussed above. The first paragraph of Section 205 provided that, in the case of a child born out of wedlock to a U.S. citizen father, the provisions of Section 201 (governing the status of children born in wedlock) would apply, "provided the pater-

nity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139; see *Nguyen*, 533 U.S. at 60-73. The second paragraph of Section 205 ensured that children born abroad out of wedlock could obtain U.S. citizenship based upon the U.S. citizenship of their mother, which would have been in doubt in the absence of a specific statutory provision. *1940 Hearings* 43; see 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). Because the situation of unwed citizen mothers was different from that of unwed citizen fathers, however, Congress deemed it appropriate to apply different rules. As relevant here, Congress reduced the physical-presence requirement as applied to unwed citizen mothers, by requiring only that the mother have been physically present in the United States at some point prior to the birth of the child.

In preparing the Proposed Code, the Administration surveyed the citizenship laws of other nations and discovered that in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). *1940 Hearings* 431; 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, 258-259 (1935) (Sandifer, *Comparative Study*). Combined with the American rule of *jus soli*, the result of those *jus sanguinis* laws was to create a risk of statelessness among the foreign-born children of unwed U.S. citizen mothers. Such children, having been born abroad, would not be citizens of the United States by birth under the Fourteenth Amendment. But, unless the child's mother had dual citizenship, such a child generally would also not be a citizen at birth of any foreign country. Thus, unless

the law of the United States took into account the *jus sanguinis* rules of other nations, those children would be born stateless if the mother had not satisfied a 10-year physical-presence requirement prior to the child's birth.

Petitioner argues (Br. 35-38) that the issue of statelessness was not discussed in enacting the different physical-presence requirements. To the contrary, as explained above, the Proposed Code Congress considered was crafted specifically to address the citizenship of children born abroad out of wedlock to a U.S. citizen mother whose child could not obtain the citizenship of his father. Indeed, the issue of statelessness had been discussed as early as 1933, when Congress considered (but did not adopt as part of the 1934 Act) a provision addressed explicitly to the situation of children born abroad out of wedlock. See *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (State Department proposed amendment providing that a child born out of wedlock outside the United States to a U.S. citizen parent who has resided in the United States, if there was "no other legal parent under the law of the place of birth, shall have the nationality of such American parent"); see also *id.* at 54-55 (discussing statelessness problem in the context of English-American marriages). The issue was raised again in the *1940 Hearings* (at 43).

In 1952, Congress sought to strengthen the assurance of a connection to the United States by requiring that, in order to transmit citizenship to her foreign-born

child, an unwed U.S. citizen mother must "ha[ve] previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." INA, ch. 477, § 309(c), 66 Stat. 239. Congress did not, however, alter the judgment it made in 1940 that it was inappropriate to subject unwed U.S. citizen mothers who gave birth abroad to the same physical-presence requirements as all other citizen parents (married or unmarried). And Congress afforded additional protection against statelessness for children born abroad out of wedlock to a U.S. citizen mother by expressly providing that the child would not lose his U.S. citizenship upon legitimation by the father. The Senate Report explained that that change was appropriate to further "insure[] that the child shall have a nationality at birth." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952).

Thus, petitioner is incorrect that Congress was not concerned with diminishing the chance of a child's being born stateless when it enacted (and amended) the different physical-presence requirements applicable to citizen parents of children born abroad out of wedlock.

2. The Physical-Presence Requirement In Section 1409(c) Is Substantially Related To The Important Government Objective Of Reducing Statelessness

In enacting the statutory provisions at issue in this case, Congress sought to reduce the number of children who would be born stateless. Petitioner argues (Br. 23-34, 38-44) that the statutory framework violates the Fifth Amendment's guarantee of equal protection because it leaves some foreign-born children of unwed U.S. citizen fathers at risk of statelessness as well. But that argument is unavailing. In theory, Congress could have

chosen to eliminate the possibility that *any* child with at least one U.S. citizen parent would be born or become stateless by enacting a broad *jus sanguinis* law to supplement the Fourteenth Amendment's *jus soli* rule. But Congress had competing goals in enacting rules of naturalization—including ensuring that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship. Congress implemented the latter goal by requiring that U.S. citizen parents satisfy physical-presence standards before being eligible to transmit citizenship to their foreign-born children. In an effort to accommodate both important government interests, Congress likewise chose to apply a physical-presence requirement to unwed citizen mothers of foreign-born children, but adopted one of shorter duration because it understood that the children of unwed mothers were at greater risk of being born stateless than the foreign-born children of all other citizen parents, both married and unmarried. Because Congress's choice was substantially related to the important government interest of reducing statelessness, it is constitutional under either rational basis or heightened equal protection review.

a. Unwed U.S. Citizen Mothers And Fathers Are Not Similarly Situated With Respect To The Risk That Their Foreign-Born Child Will Be Stateless At Birth

i. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same in a particular context in which they are not similarly situated. See, *e.g.*, *Ballard*, 419 U.S. at 508. And this Court has held, in particular, that unwed U.S. citizen mothers and unwed U.S. citizen fathers are not

similarly situated in every respect. See *Nguyen*, 533 U.S. at 63; *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979); see also *Lehr*, 463 U.S. at 266-268. In enacting Section 1409, Congress reasonably concluded that unwed mothers are less favorably situated than unwed fathers with respect to the risk that a foreign-born child will be born stateless. The difference in each parent's situation is attributable to what this Court in *Nguyen* described as the "significant difference between the[] respective relationships" of unwed mothers and unwed fathers "to the potential citizen at the time of birth." 533 U.S. at 62.

As noted above, when Congress enacted a new naturalization code in 1940, it understood that a majority of countries employed *jus sanguinis* laws rather than *jus soli* laws. Sandifer, *Comparative Study* 249-259.[9] In most of those countries (indeed, in most *jus soli* countries as well), when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of the birth usually was the mother. See *id.* at 258 & n.38. Although the child's father could subsequently obtain the status of a legal parent through legitimation (typically through marriage) or perhaps through other formal means, the establishment of such a relationship did not occur as a result of the birth alone. Thus, the only parent eligible to transmit citizenship *at*

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[9] In describing the laws of the countries he surveyed, Sandifer classified them as "unconditional" *jus soli*, "principally" *jus soli*, "solely" *jus sanguinis*, "virtually" *jus sanguinis*, and "principally" *jus sanguinis*. See *Comparative Study* 249-254. But for purposes of determining the risk that the foreign-born child of a U.S. citizen parent would be born stateless, any rule that is predicated in part or in whole on the citizenship of a child's parent or on the child or parent's taking some action after the birth—rather than being predicated on the birthplace of the child alone—would qualify as a *jus sanguinis* rule.

the time of birth in a country in which citizenship was based on citizenship of a parent was the mother. That state of affairs created a substantial risk that a child born to an unwed U.S. citizen mother in a country employing *jus sanguinis* laws would be stateless at birth unless the mother could pass her citizenship to her child.

Petitioner does not seriously challenge the accuracy of this assessment of the risk that unwed U.S. citizen mothers would give birth abroad to stateless children. Instead, he argues (Br. 38-44) that it was unconstitutional for Congress not to also take account of the risk that some U.S. citizen fathers might inflict statelessness upon children born in *jus sanguinis* countries by legitimating the child or otherwise legally formalizing their relationship with the child at some point *after* the child's birth, because in some *jus sanguinis* countries, a child of unwed parents of different nationalities might not have retained his mother's citizenship after the foreign father had established his paternity.[10] In so arguing, petitioner still fails to take account of the relevant ways in which unwed mothers and unwed fathers are not similarly situated. The unwed U.S. citizen father of a child born in a *jus sanguinis* country does not run the same risk that his child will be *born* stateless. To be sure, his child is unlikely to be a U.S. citizen from birth unless the father has satisfied the physical-presence requirements in Section 1401.[11] But the same is true for the children

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[10] Petitioner is in no position to assert any unfairness on that basis because he was born in a *jus soli* country and was therefore entitled to Mexican citizenship by virtue of his birth. See Constitución Política de los Estados Unidos Mexicanos, as amended, Art. 30, Diario Oficial de la Federación, 5 de Febrero de 1917 (Mex.).

[11] Unwed citizen fathers are also required to satisfy conditions subsequent, such as acknowledging paternity. See 8 U.S.C. 1409(a); *Nguyen*,

of married citizen fathers and married citizen mothers. Congress need not ensure that all children with one U.S. citizen parent will be born U.S. citizens—and, in fact, Congress has affirmatively chosen not to do so. The critical point for present purposes is that, even if the unwed U.S. citizen father of a child born abroad has not satisfied the requirements for transmission of U.S. citizenship, the child is unlikely to be *born stateless* because the child will have the citizenship of his mother. By contrast, there is a significant risk that the child born abroad of an unwed U.S. citizen mother would be stateless at birth if the mother has not satisfied the requirements for transmission of U.S. citizenship. It was to prevent that condition of statelessness—a condition that is "deplored in the international community of democracies." *Trop*, 356 U.S. at 102—that Congress provided a shorter physical-presence requirement for the unwed citizen mother in Section 1409(c).

The constitutional validity of the balance Congress struck is not impugned by the possibility that a citizen father who cannot satisfy the physical-presence requirements in Sections 1401 and 1409(a) might take some step *after* the birth of his child that could render the child stateless. Whether such a father takes steps to establish his paternity when doing so would have the effect of terminating the citizenship the child obtained at birth from his mother is entirely within the father's control. This Court has acknowledged that a legislature may impose consequences on a child based on his father's choice of residence, see *Chin Bow*, 274 U.S. at 669, or his choice whether to establish paternity, see *Lehr*, 463 U.S. at

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533 U.S. at 59. When such conditions are satisfied, the child is deemed to have been a citizen from his date of birth. *Id.* at 72.

264. See also *Miller*, 523 U.S. at 441 (opinion of Stevens, J.). Whatever the consequences of such post-birth actions, however, Congress reasonably concluded that, because of the differing legal treatment of the parental relationship of unwed U.S. citizen mothers and unwed U.S. citizen fathers at the time of their child's birth, unwed mothers and unwed fathers are not similarly situated with respect to the risk that their foreign-born children would be stateless at birth. Moreover, it is far less likely today than in 1940 or 1952 that subsequent legitimation of the foreign-born child by the U.S. citizen father would result in the child's losing the citizenship determined at birth through his mother.[12]

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[12] Petitioner relies in part (Br. 30 n.10) on 1929-era laws in China, Costa Rica, Germany, Romania, Iraq, Netherlands, Japan, and Monaco, and 1954-era law in Jordan that expatriated the child born out of wedlock who had acquired its mother's citizenship if the child's foreign father legitimated the relationship. But (as is apparently suggested by amici Scholars on Statelessness (at 9-11)) few countries today expatriate a child born out of wedlock upon legitimation by a foreign father. See Nationality Law (promulgated by the Standing Comm. of the Nat'l People's Congress, Sept. 10, 1980, effective Sept. 10, 1980) 1 P.R.C. Laws (1979-1982) 182 (1987) (except the People's Republic of China does not permit dual nationality, see *id.* Art. 3); Constitución Política de la República de Costa Rica de 1949, with amendments through 2003, Tit. II; Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, Reichsgesetzblatt [RGBl.] 583, as last amended by Gesetz, Feb. 5, 2009, Bundesgesetzblatt [BGBl.] I at 1970 (F.R.G.); Lege Nr. 21 din 1 martie 1991, Legea cet eniei române [Law No. 21 of Mar. 1, 1991, as amended through May 17, 2009] [Nationality Act] (Rom.); Loi 1.155 relative à la Nationalité modifiée par la loi 1.276 du 22 décembre 2003 [Law 1.155 of December 18, 1992 on Nationality as amended by Law 1.276 of December 2003], Codes et Lois de la Principauté de Monaco, I Lois, Règlements, Arrêtés, Heading 11.21 (Editions du Jurisclasseur).

In the Netherlands, legitimation or recognition results in the loss of nationality only if the child thereby acquires the nationality of the alien parent or already possesses it and the loss of nationality does not occur

ii. In a *jus sanguinis* country, if steps are not taken to legitimate the child or otherwise formalize the father's status—steps that may never be taken or may never be completed successfully—the unwed mother will almost always remain the only legal parent from the time of the child's birth forward. Simply as a practical matter, therefore, for a child born out of wedlock, the

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"if and for as long" as a parent possesses Netherlands nationality. Rijkswet op het Nederlanderschap [Kingdom Act on Netherlands Nationality] Stb. 1984, p. 628, Art. 16. Indeed, it appears that Taiwan is the only one of the nine countries cited by petitioner in which could a child born today could lose his foreign nationality if his U.S. citizen father legitimated him in circumstances that would then render the child stateless. But even in Taiwan, the loss of citizenship is not automatic but conditional on the "permission of the Ministry of the Interior." Guo Ji Fa [Nationality Act] (promulgated Feb. 5, 1929, last amended Jan. 27, 2006), Yue Dan Jian Ming Liu Fa I-105 (2009) (Taiwan), Art. 11. Iraqi law, which previously did not permit a child to acquire the nationality of his mother, now provides that a child is Iraqi if born to an Iraqi father or mother, and it does not contain provisions dictating expatriation of a child born out of wedlock upon legitimation or recognition by a foreign father. Nationality Law 26 of 2006 (Iraq), Art. 3.

In Japan, which previously allowed a mother to transmit her citizenship to her child born out of wedlock only if the father was unknown or stateless, or if the mother acknowledged her parentage first, either the father or the mother can now equally transmit citizenship, although the father must adhere to additional procedures to establish paternity; there is no provision for expatriation upon acknowledgment of paternity or legitimation by a foreign father. Kokuseki hō [Nationality Law], Law No. 147 of 1950, last amended by Law No. 88 of 2008 (Japan), Arts. 2, 3. In one other country cited by petitioner, Jordan, citizenship is currently transmitted through the mother only if filiation with the father is not established, or if the father's nationality is unknown or he is stateless. The current law does not contain any specific provision for expatriation upon establishment of filiation to an alien father, although the provision described in the foregoing sentence suggests as much. The nationality law, however, also permits dual nationality. Jordanian Nationality Law No. 6 of 1954, Arts. 3(4), 17.

surest source of citizenship at the time of birth was and remains the child's mother, and obstacles to the transmission of that citizenship substantially increase the risk that the child will be born stateless.

It is true that some countries today permit either a mother or a father to transmit citizenship to a child, regardless of the marital status of the parents or the place of the child's birth.[13] Others, however, retain older laws specifying that only the mother of a child born out of wedlock may transmit citizenship, at least in the absence of legitimation.[14] And, as discussed *supra*, even when a father *can* transmit citizenship to a child born out of wedlock, the father (or the child himself, or the mother on the child's behalf) must in almost all cases take *some* affirmative and formal step in order to establish the father's connection to the child—steps ordinarily not required for a mother to establish her relationship to the child.[15] Indeed, such affirmative steps are required for

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[13] See, *e.g.*, Lov nr. 51/2005 om norsk statsborgerskap [Act No. 51/2005 on Norwegian Citizenship], as amended by Act No. 36 of 30 June 2006, chap. 2, § 4; Lege Nr. 21 din 1 martie 1991, Legea cet eniei române [Law No. 21 of Mar. 1, 1991, as amended through May 17, 2009] [Nationality Act] (Romania), Art. 5.

[14] See, *e.g.*, Staatsbürgerschaftsgesetz 1985 [Federal Law on Austrian Nationality 1985] Bundegesetzblatt [BGBl] No. 311/1985, as amended by Staatsbürgerschaftsrechts-Novelle 2005 BGBl I No. 37/2006, arts. 7(3), 7a (Austria)

[15] See, *e.g.*, Nationality Act, as last amended Aug. 19, 2007, § 4 (F.R.G.); Kay Hailbroner, EUDO Citizenship Observatory, *Country Report: Germany* 16 (rev. Apr. 2010); British Nationality Act 1981, § 50(9A), as amended by British Nationality, Immigration and Asylum Act 2002, § 9; British Nationality (Proof of Paternity) Regulations 2006 (setting forth requirements as to proof of paternity); Turkish Citizenship Law, Law No. 5901/2009, Art. 7, Sect. 3; Netherlands Nationality Act (as in force on 13 April 2010), Art. 4; Immigratie-en Natural-

a U.S. citizen father to transmit citizenship, as set forth in 8 U.S.C. 1409(a), and those requirements were sustained by this Court against an equal protection challenge in *Nguyen*. Thus, the establishment of the father's connection to the child may not be completed until months or years after the child's birth, or may not be undertaken at all.

By contrast, an unwed mother, whose name generally appears on the birth certificate and who is present with the child at birth, is almost universally recognized as having a parental relationship with the child by virtue of the birth alone, without her needing to take any further action. *Nguyen*, 533 U.S. at 62. If that mother is not permitted to transmit her citizenship to her child at that time or at all, her child may be stateless. It therefore follows from *Nguyen* that Congress could properly take account of the different status of children born abroad out of wedlock to U.S. citizen mothers, as compared to U.S. citizen fathers, by adopting a shorter physical-presence requirement to minimize that risk of statelessness.

Thus, today, as in 1940, the application of foreign law, combined with potential problems of proof and paternal inaction, puts the foreign-born child of an unwed U.S. citizen mother at significantly greater risk of being stateless at the time of the birth (and thereafter) than the foreign-born child of other U.S. citizen parents. Congress's decision to minimize the physical-presence threshold that an unwed U.S. citizen mother must satisfy before she can transmit citizenship to her foreign-born child is therefore substantially related to its important interest in reducing statelessness. See *Fiallo*, 430

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isatiedienst (Netherlands Immigration and Naturalisation Service), How Can You Acquire Dutch Citizenship.

U.S. at 795 n.6 (finding that it is appropriate for Congress to take into account "problems of identification, administration, and the potential for fraud" in determining who should be admitted).[16]

b. The Statutory Framework Is Not Premised On Stereotypes About Mothers And Fathers

Petitioner and his amici assert (Pet. Br. 35-38; ACLU Br. 23-24; Nat'l Women's Law Ctr. Br. 12-21) that the different physical-presence requirements applicable to unwed U.S. citizen parents of a child born abroad are impermissibly based on generalizations and stereotypes about men and women. That is not so. Congress's decision to apply a shorter physical-presence requirement to unwed mothers was based on the *legal* reality—not stereotypes about differing talents or behavior of men and women—that an unwed mother is established at the time of her child's birth as the child's legal parent while the unwed father usually is not. This Court acknowledged that reality in *Nguyen*, and found the differential treatment of unwed mothers and fathers on that basis

[16] Amici Scholars on Statelessness point out (at 20) that many countries do not specifically provide for the transmission of citizenship for children born out of wedlock. But even when a country does not explicitly take into account whether a child's parents are married in determining its citizenship rules, it remains true by virtue of the unwed mother's giving birth to the child that the only parent likely to be legally recognized as an out-of-wedlock child's parent at birth is the mother. See Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 217 (1934). Thus, it is more likely that a child born out of wedlock in a *jus sanguinis* country will take his mother's citizenship because, as recognized in *Nguyen*, the parental relationship of an unmarried mother is established by the birth, whereas an unmarried father must thereafter undertake some affirmative steps (or they must be undertaken by the mother or child) to establish the parental relationship.

"is neither surprising nor troublesome from a constitutional perspective." 533 U.S. at 63; *ibid.* ("Fathers and mothers are not similarly situated with regard to proof of biological parenthood."); see also *Miller*, 523 U.S. at 444 (opinion of Stevens, J.).

At base, Congress's decision to impose a shorter physical-presence rule on unwed mothers than on all other parents was based on the fact that other countries apply *jus sanguinis* laws that require a child to acquire the citizenship of one or both of his legal parents at the time of his birth—and for children born out of wedlock, the mother is generally the only legal parent at birth. If, as this Court held in *Nguyen*, 533 U.S. at 63, it is permissible for Congress to apply different rules regarding the conferral of citizenship based on the different positions an unwed mother and an unwed father occupy with respect to the child at the time of birth, it is surely within Congress's constitutional authority to take account of the fact that other countries do so as well. Thus, "the different treatment of men and women [in Sections 1401 and 1409] reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female [unwed citizen parents] are *not* similarly situated with respect to" their child's claim to United States citizenship at birth. *Ballard*, 419 U.S. at 508.

c. Congress Can Constitutionally Address An Aspect Of The Problem Of Statelessness Without Eliminating The Problem In Its Entirety

i. Petitioner and his amici contend (Pet. Br. 38-44; Scholars on Statelessness 8-15) that Congress violated the Fifth Amendment's guarantee of equal protection by attempting to reduce the incidence of unwed citizen mothers' children being born stateless because it did

not, in so doing, eliminate the possibility that any child of a U.S. citizen would be born—or later become—stateless. That contention is not based on any established constitutional principle. On the contrary, the Constitution requires at most a substantial fit between Congress's objective and the means of achieving it. Congress's statutory scheme need not "be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Even under heightened equal protection review, a classification need not be drawn with mathematical precision. In particular, this Court has recognized that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (citations omitted). Moreover, when, as in enacting Section 1409, Congress is *balancing* competing interests, it cannot serve both interests fully, and indeed must accommodate each to the other. It is true that the current statutory scheme in place both leaves some foreign-born children of a U.S. citizen parent at risk of becoming stateless and permits unwed citizen mothers to transmit their citizenship to a foreign-born child even in circumstances when that child is not at risk of statelessness because he (like petitioner) is born in a *jus soli* country. But Congress's goal in enacting the statutes at issue was to *reduce* the risk of statelessness, not to eliminate it completely at all costs, and at the same time to take account of any countervailing considerations. Congress could permissibly choose to address its efforts to that more multifaceted goal. *Nguyen*, 533 U.S. at 69 (stating statute should not be invalidated "because Congress elected to advance an interest that is less demanding to satisfy than some other alternative"). And Congress's decision to apply different physical-

presence rules on a categorical basis rather than based on a case-by-case congressional or administrative assessment of the laws governing citizenship in particular foreign countries at a particular time—and for a particular child—represents a legitimate accommodation of foreign policy, feasibility, and other interests.

ii. Petitioner argues (Br. 29, 32, 37, 41-42) that Congress is not permitted (even under rational basis review) to enact a naturalization scheme that may have the effect of discouraging some unwed fathers from legitimating their children. But petitioner takes an overly narrow view of the options available to such parents. First of all, unwed U.S. citizen fathers are treated exactly the same for purposes of physical-presence requirements as *married* citizen fathers and mothers, whose parental relationship is legally established at the time of their children's birth. See also pp. 50-51, *infra*. More significantly, petitioner ignores the many avenues to U.S. citizenship open to the foreign-born child of an unwed U.S. citizen father.

Petitioner's argument seems premised on the view that the only acceptable means of transmitting U.S. citizenship to the foreign-born child of a citizen parent is to do so automatically and at birth. Constitutionally, of course, no foreign-born child is entitled to U.S. citizenship, and no U.S. citizen is entitled to bestow citizenship on a foreign-born child either at birth or later in the child's life. But Congress has provided a number of other means by which petitioner could have acquired U.S. citizenship, through the efforts of his father or on his own behalf. The availability of other avenues demonstrates that "Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers," *Nguyen*, 533 U.S. at 70-

71, but has instead employed various means of granting citizenship consistent with its underlying determination that there should be a sufficient connection between the United States and the child.

As part of the 1940 Act, Congress enacted Section 315, which permitted a U.S. citizen parent to "petition[] for the naturalization of" his or her "child born outside of the United States" if the child was under the age of 18 years and was "residing permanently in the U.S. with the citizen parent." 54 Stat. 1146. That provision represented "entirely new legislation" intended in part to address the situation of a U.S. citizen parent who did not meet the physical-presence requirements to transmit citizenship to a foreign-born child at birth, but who later returned to live in the United States with the child. *1940 Hearings* 91. It "seem[ed] a humane and reasonable thing" to allow that child to acquire citizenship once the family moved back to the United States. *Ibid.* Congress reenacted Section 315 in slightly modified form as Section 322 of the INA in 1952 (8 U.S.C. 1433 (1970)). As modified, that provision permitted a citizen parent to petition for the naturalization of his or her "child born outside of the United States," if the child was under the age of 18 years and "residing permanently in the United States, with the citizen parent, pursuant to a lawful admission for permanent residence." 8 U.S.C. 1433(a) (1970). The statute further specified "that no particular period of residence or physical presence in the United States shall be required." *Ibid.*

In more recent years, Congress has continued to liberalize the naturalization rules applicable to foreign-born children of U.S. citizen parents, amending Section 1433 in 1994, see 1994 Act, § 102(a), 108 Stat. 4306, and in 2000, see Child Citizenship Act of 2000, Pub. L. No.

106-395, § 102(a), 114 Stat. 1632. Under current law, for example, if the foreign-born child of one citizen parent does not secure U.S. citizenship at birth because that parent did not have sufficient prior physical presence in the United States, the child will *automatically* be deemed a citizen under 8 U.S.C. 1431(a) if the child moves to the United States before the child turns 18 and resides in the legal and physical custody of that parent pursuant to a lawful admission for permanent residence. This provision was intended to "liberalize then-existing law to make it easier for foreign-born children of United States citizens to obtain citizenship." *Pina* v. *Mukasey*, 542 F.3d 5, 8 (1st Cir. 2008) (citing H.R. Rep. No. 852, 106th Cong., 2d Sess. 4 (2000)). And 8 U.S.C. 1433(a) now makes it possible for a child who does not automatically become a U.S. citizen under Section 1431 to become a citizen if the child is under 18 years of age, his U.S. citizen parent has resided in the United States for five years, the child is residing outside the United States in the legal and physical custody of the citizen parent, and the child is even temporarily present in the United States pursuant to a lawful admission.

In addition, a foreign-born child who does not qualify for citizenship at birth pursuant to Sections 1401 and 1409, but nevertheless develops substantial connections to the United States through marriage or permanent residence in the United States, may become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1423, 1427, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process (or if he rendered himself ineligible by engaging in criminal activity). Cf. *Lehr*, 463 U.S. at 264.

III. EVEN IF THE DISTINCTIONS CONGRESS DREW IN SECTIONS 1401 AND 1409 WERE FOUND TO BE UNCONSTITUTIONAL, PETITIONER WOULD NOT BE ENTITLED TO RELIEF

Even if this Court were to determine that Congress's decision to impose a shorter physical-presence requirement on unwed U.S. citizen mothers than on all other U.S. citizen parents of foreign-born children violates equal protection principles, petitioner would not be entitled to the relief he seeks—a reversal of his criminal conviction based on a determination that he has been a U.S. citizen from birth. As Justice Scalia explained in his concurrence in *Miller*, "when a statutory violation of equal protection has occurred, it is not foreordained which particular statutory provision is invalid." 523 U.S. at 458; see *Nguyen*, 533 U.S. at 72 (acknowledging "'potential problems with fashioning a remedy' were [the Court] to find the statute unconstitutional") (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)). An examination of the statutory framework, the need to preserve necessary flexibility for Congress, as well as adherence to this Court's longstanding treatment of naturalization requirements, leads to the conclusion that the proper way to cure any equal protection violation would be to apply the longer physical-presence requirements in Section 1401, on a prospective basis, to unwed citizen mothers. See *United States* v. *Cervantes-Nava*, 281 F.3d 501, 505-506 (5th Cir.), cert. denied, 536 U.S. 914 (2002). Such a ruling would allow Congress to decide whether or how to extend U.S. citizenship to children of unwed U.S. citizen fathers and mothers who do not meet the physical-presence requirements in Sections 1401 and 1409(a).

1. This Court has noted that, when a court sustains an equal protection claim, 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* v. *Mathews*, 465 U.S. 728, 738 (1984) (brackets in original) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)); see also *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is a mandate of equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers).").

As petitioner acknowledges (Br. 50, 61), however, in choosing which statutory provision to strike, the Court must be guided by congressional intent. Indeed, Congress is best positioned to structure the balance between the possibility of statelessness and appropriate limits on naturalizing aliens. Petitioner relies (see Br. 46-62) on the INA's severability clause, § 406, 66 Stat. 281, as evidence that Congress would have intended to apply the shorter physical-presence requirement in Section

1409(c) to unwed citizen fathers rather than to apply the longer requirement in Section 1409(a) to unwed citizen mothers. But the inclusion of a severability clause provides no indication about *which* statutory provision Congress would have severed had it known the Court would find that the shorter period for children of unwed citizen mothers violates equal protection. Other aspects of the constitutional and statutory framework supply that answer.

a. A judicially crafted regime of the type petitioner seeks would be inconsistent with this Court's cases holding that "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." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is to enforce the legislative will in respect of a matter so vital to the public welfare."). Indeed, this Court acknowledged in *Nguyen* that "[t]here may well be potential problems with fashioning a remedy" if the Court were to find that the additional requirements applicable to unwed citizen fathers under Section 1409(a) violated equal protection. 533 U.S. at 72 (internal quotation marks omitted) (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)); accord *Miller*, 523 U.S. at 523 (Scalia, J., concurring in the judgment) ("[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress."). If this Court finds an equal protection violation, it should not, therefore, ex-

tend the shorter physical-presence requirement in Section 1409(c) to unwed citizen fathers, thereby in turn conferring citizenship on a new category of individuals (the children of such fathers) who do not satisfy the statutory criteria set by Congress.

That conclusion is underscored by the consequences of the categorical expansion of citizenship petitioner seeks. That approach would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States, and it would raise questions concerning the status of their children, grandchildren, etc. Moreover, a ruling by this Court expanding citizenship to such persons would potentially be irreversible by Congress. If the Court equalized the treatment of children of unwed citizen mothers and other citizen parents by declaring invalid the exception in Section 1409(c) that creates the one-year physical-presence requirement for unwed mothers, Congress could at least override that resolution through constitutionally valid legislation. But it is less clear that Congress could reverse a ruling by this Court that extended the shorter physical-presence requirement to citizens in the position of petitioner's father. Once citizenship is properly conferred, Congress ordinarily may not take it away. See *Afroyim*, *supra*.

b. The result called for by the foregoing principles is reinforced by the interaction of the particular statutory provisions at issue here. As discussed above, Congress chose to apply the longer physical-presence requirement in the case of foreign-born children of the great majority of citizen parents—married mothers, married fathers, and unmarried fathers. The shorter period applies only in the case of the child of an unwed

citizen mother. If forced to choose between the two rules, there is no basis for assuming that Congress necessarily would have preferred to let the exception swallow the rule. Indeed, since 1940, when Congress first addressed the issue of an unwed citizen's ability to transmit U.S. citizenship to a foreign-born child (when the other parent is not a U.S. citizen), it has always applied to unmarried U.S. citizen fathers the longer physical-presence requirements applicable to married U.S. citizen fathers (and mothers).[17] Petitioner's requested holding "would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835.

In urging this expansion of citizenship that Congress has not authorized, petitioner stops short of arguing that the shorter physical-presence requirement in Section 1409(c) should be extended not only to unwed citizen fathers covered by Section 1409(a), but to *all* citizen parents of foreign-born children, including married citizen parents who (like unwed citizen fathers) are covered by the physical-presence requirements in 8 U.S.C. 1401. Ironically, petitioner justifies that result by suggesting

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[17] Congress has also regularly declined to pass bills to further reduce the general physical-presence requirement in Section 1401(g) applicable to both married couples of different nationalities and unmarried U.S. citizen fathers. See, *e.g.*, H.R. 801, 106th Cong., 1st Sess. (2007); *Naturalization and Nationality Amendments and Parole for Funerals: Hearing before the Subcomm. on Int'l Law, Immigration & Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 45-46 (1993) (statement of Michael Adler, Chair, Citizenship Comm., World Fed'n of Americans Abroad); 138 Cong. Rec. 33,469 (1992) (statement of Rep. Alexander); H.R. 1380, 101st Cong., 1st Sess. (1989); *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on H.R. 783 and H.R. 97 before the Subcomms. of the Comms. on the Judiciary*, 82d Cong., 1st Sess. 81 (1951).

that it would address Congress's concern—which petitioner otherwise impugns throughout his brief—about stateless children, because extending that benefit would result in fewer stateless children otherwise born to unwed citizen fathers. But petitioner's reliance on that interest when he turns to the question of remedy highlights two further statutory anomalies in petitioner's proposed solution.

First, to the extent petitioner is correct that some foreign-born children of unwed citizen fathers are at risk of statelessness if the father later legitimates the child, that risk is even greater with respect to the children of *married* citizen fathers, because such children are legitimate from birth. There is thus no reason of fairness to treat children of married fathers less favorably than those of unmarried fathers. But if those two categories were treated the same and both were permitted to benefit from the shorter physical-presence requirement in Section 1409(c), the result would be to leave married citizen mothers as the only parents subject to the longer physical-presence requirements, the mirror image of the equal protection violation petitioner sees in the current scheme. Second, given that unmarried fathers are at less risk than married fathers of having stateless children born abroad, petitioner offers no reason why Congress would choose to treat all unmarried U.S. citizen parents more favorably than all married U.S. citizen parents.

2. For the foregoing reasons, if the Court finds that the different physical-presence requirements applicable with respect to the children of unwed U.S. citizen mothers and the children of unwed U.S. citizen fathers violated the equal protection rights of petitioner's father, the appropriate means of curing that violation would be

to apply the longer physical-presence requirement to unwed citizen mothers. In doing so, however, the Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for at least a year prior to the birth (but less than the 10 or five years required by Section 1401(a)(7)). The Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. Cf. *Mathews*, 465 U.S. at 745-750 (upholding Congress's decision to continue for a limited time a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests). For children born abroad to unwed U.S. citizen mothers in the future, this result would engender the risk of statelessness that Congress sought to minimize by enacting Section 1409(c). But, critically, it would preserve the ability of Congress to devise a statutory solution to address that issue and other relevant considerations.

The complexities of any remedial approach do, however, reinforce the conclusions, set forth in Point II of this brief, that Congress's legislation in the area of immigration and naturalization should be subject to highly deferential judicial review, that the distinctions Congress drew in Sections 1401 and 1409 in any event pass constitutional muster under *Nguyen*, and that any perceived unfairness in the statutory scheme is for Congress to remedy, taking account of the numerous and often competing considerations involved in conferring U.S. citizenship.

3. Petitioner suggests (Br. 59-62) that, as an alternative to his preferred approach, the Court could excise only the portion of Section 1401, as applied through Section 1409(a), that required unmarried fathers to reside in the United States for five years after the age of 14. Such a result would give petitioner what he desires—citizenship and reversal of his conviction—and it would have a somewhat more limited impact, but it would not cure the supposed constitutional violation, because it would continue to impose a longer physical-presence requirement on unwed citizen fathers as a general matter. And it would encounter the other obstacles identified above.

4. Finally, petitioner asks (Br. 62) that his conviction be reversed even if the Court finds an equal protection violation but does not extend the shorter physical-presence requirement to his father. Petitioner reasons that, in that event, he would have been convicted based on a finding of alienage made pursuant to an unconstitutional scheme. But that is not so. If this Court finds an equal protection violation and corrects that violation by excising the shorter physical-presence requirement in Section 1409(c), the constitutional violation would be cured, but petitioner would remain an alien.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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