No. 20-1328

In the Supreme Court of the United States

OMAR EVERTON DALE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under former 8 U.S.C. 1432 (1988), which was repealed in 2000, a minor lawful permanent resident born outside of the United States to noncitizen parents generally could automatically acquire United States citizenship upon "[t]he naturalization of both parents." 8 U.S.C. 1432(a)(1) (1988). The statute also listed three circumstances in which such a child could automatically acquire citizenship upon the naturalization of only one parent: (1) "[t]he naturalization of the surviving parent if one of the parents is deceased," 8 U.S.C. 1432(a)(2) (1988); (2) "[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents," 8 U.S.C. 1432(a)(3) (1988); and (3) "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation," *ibid.*

The question presented is whether Congress's decision to provide automatic citizenship for a child in the third circumstance violated constitutional principles of equal protection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution, statutes, and rule:

Statutes and rule—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 967 F.3d 133. The decision of the Board of Immigration Appeals (Pet. App. 39a-41a) is unreported but is available at 2018 WL 2761464. A contemporaneous decision of the Board of Immigration Appeals (Pet. App. 42a-44a) is unreported. The order of the immigration judge (Pet. App. 45a-46a) is unreported. A prior decision of the immigration judge (Pet. App. 47a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2020. A petition for rehearing was denied on October 20, 2020 (Pet. App. 37a-38a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court

judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following removal proceedings in immigration court, an immigration judge (IJ) found petitioner removable, ordered him removed, and denied his subsequent motion to reopen. Pet. App. 45a-46a, 47a-51a. The Board of Immigration Appeals (Board) affirmed the removal order and dismissed petitioner's appeals. *Id.* at 39a-41a, 42a-44a. The court of appeals denied the petition for review. *Id.* at 1a-36a.

1. a. Petitioner was born in Jamaica in September 1979. Pet. App. 3a. In 1981, petitioner and his mother were admitted to the United States as lawful permanent residents; they lived in New York with petitioner's maternal grandmother. *Id.* at 4a. Petitioner's father came separately to the United States, and became a naturalized citizen in 1988. *Ibid.* Petitioner's father never married petitioner's mother, never had legal or physical custody of petitioner, and never lived with petitioner. *Ibid.*; Administrative Record (A.R.) 148, 253, 275, 278. Petitioner was convicted of petit larceny in 2004, possession of cocaine in 2008, possession of MDMA in 2011, assault in the third degree in 2011, and assault in the second degree in 2014, all under New York law. Pet. App. 4a-5a; A.R. 315.

In 2017, the Department of Homeland Security (DHS) issued to petitioner a notice to appear in immigration court, charging that he was subject to removal based on his criminal convictions. Pet. App. 5a. Petitioner, who was represented by counsel before the IJ,

admitted that he had been convicted as alleged in the notice. *Ibid.* Petitioner argued, however, that he was not removable because, among other things, he had allegedly "derived citizenship through his father's naturalization" in 1988 under the former 8 U.S.C. 1432(a) (1988) (repealed 2000).* Pet. App. 6a (citation omitted); see *id.* at 6a-8a.

As relevant here, section 1432(a) provided that a "child born outside of the United States of alien parents" who was "unmarried and under the age of eighteen" and "residing in the United States pursuant to a lawful admission for permanent residence" could automatically acquire United States citizenship "upon fulfillment" of any of a list of specified "conditions." 8 U.S.C. 1432(a), (a)(4), and (a)(5). The principal condition was "[t]he naturalization of both parents." 8 U.S.C. 1432(a)(1). The statute also listed three exceptions under which a child could derive citizenship upon the naturalization of only one parent: (1) "[t]he naturalization of the surviving parent if one of the parents is

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* Unless otherwise indicated, subsequent references in this brief to section 1432 are to that section as it appeared in the 1988 edition of the United States Code. Section 1432 was repealed by the Child Citizenship Act of 2000, Pub. L. No. 106-395, § 103(a), 114 Stat. 1632. Since the 2000 statute, a child born outside the United States automatically acquires U.S. citizenship if one or both of his or her parents is or becomes a citizen before the child reaches the age of eighteen and the child resides "in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." § 101(a), 114 Stat. 1631 (8 U.S.C. 1431(a)(3)). Because that statute does not apply to children who were eighteen years of age or older when the law became effective on February 27, 2001, see § 104, 114 Stat. 1633; 8 U.S.C. 1431(a)(2), former section 1432 continues to govern the citizenship claims of individuals (such as petitioner) who were born on or before February 27, 1983.

deceased"; (2) "[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents"; and (3) "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation." 8 U.S.C. 1432(a)(2)-(3). Petitioner asserted that he had satisfied the third exception, contained in subsection (a)(3), arguing that the provision "'suggest[s] that if paternity * * * had been established by legitimation, then [petitioner] could have derived citizenship through his father's naturalization,'" and that his "father had 'legitimated' [petitioner] by receiving an order of filiation" in New York. Pet. App. 8a (brackets and citations omitted).

b. The IJ found petitioner removable and ordered him removed. Pet. App. 47a-51a. As relevant here, the IJ determined that petitioner had not derived citizenship upon his father's naturalization. *Id.* at 49a. The IJ explained that because petitioner "did not live in the father's custody and he was in fact born out of wedlock," he "d[id] not satisfy the conditions" of section 1432(a). *Ibid.*

Petitioner moved to reopen his case, "assert[ing] that he had recently obtained his father's 1989 order of filiation" and "contend[ing] that this order established that he had been legitimated by his father, and it thus served as 'material evidence' supporting his claim to derivative citizenship under section 1432(a)(3)." Pet. App. 10a (citation omitted). The IJ denied the motion to reopen, explaining that the "evidence submitted does not materially affect [the IJ's] prior analysis and decision." *Id.* at 46a.

c. The Board dismissed petitioner's appeal of the IJ's decision finding him removable, affirmed the

removal order, and separately dismissed the appeal of the IJ's denial of the motion to reopen. Pet. App. 39a-41a, 42a-44a. The Board rejected petitioner's argument that he had derived citizenship upon his father's naturalization, explaining that former section 1432(a)(3) "did not provide any means for a child born out of wedlock to derive citizenship solely through the naturalization of the *father*." *Id.* at 43a. Instead, the Board observed that section 1432(a)(3) provided for derivative citizenship "upon 'the naturalization of the *mother* if the child was born out of wedlock.'" *Id.* at 40a (citation omitted). For that reason, the Board also agreed with the IJ that petitioner's new evidence of his father's order of filiation "was not material to [petitioner's] eligibility for derivative citizenship." *Ibid.*

2. Petitioner sought review in the court of appeals, which denied his petition for review. Pet. App. 1a-36a.

a. As relevant here, petitioner argued that "by treating unwed fathers differently from unwed mothers, former section 1432(a)(3) violates the Constitution's equal protection guarantee." Pet. App. 11a. The court of appeals rejected that argument, observing (*id.* at 12a) that it had previously rejected the same argument in *Pierre* v. *Holder*, 738 F.3d 39 (2d Cir. 2013), cert. denied, 574 U.S. 816 (2014). The court acknowledged that *Pierre* had relied on this Court's decision in *Nguyen* v. *INS*, 533 U.S. 53 (2001), which addressed the conditions under which a child born abroad and out of wedlock to only one U.S.-citizen parent could acquire citizenship from that parent. See Pet. App. 13a-14a. The relevant statute, 8 U.S.C. 1409(a), imposed certain additional requirements if the citizen parent was the father, including "legitimation; a declaration of paternity

under oath by the father; or a court order of paternity." *Nguyen*, 533 U.S. at 62.

In *Nguyen*, this Court upheld those additional requirements against an equal-protection challenge, explaining that they helped both to "assur[e] that a biological parent-child relationship exists" and to "ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop * * * the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." 533 U.S. at 62, 64-65. The Court explained that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood," and therefore the "imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective." *Id.* at 63. And the Court observed that "the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth" in the case of a mother, whereas "[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father." *Id.* at 65. Relying on *Nguyen*, the court of appeals in *Pierre* concluded that the "'gender classification in § 1432(a)(3) was justified' * * * because it 'reflected the practical reality that the interests of the alien father merited protection only where that father had legitimated the child and thereby demonstrated a connection to the child.'" Pet. App. 16a (quoting *Pierre*, 738 F.3d at 57).

Petitioner acknowledged that *Pierre* foreclosed his claim, but he argued that the case "ha[d] been invalidated" by this Court's subsequent decision in *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678 (2017). Pet. App.

16a (brackets and citation omitted). *Morales-Santana* also addressed the acquisition of citizenship by a child born abroad to unwed parents when only one of them was a U.S. citizen. 137 S. Ct. at 1686. But the equal-protection challenge there was to a statute that required the citizen father to have been physically present in the United States for five (or ten) years before the child's birth, whereas the citizen mother had only a one-year physical-presence requirement. See *ibid.* The Court found that differential treatment unconstitutional, explaining that it served "no 'important governmental interest'" and was based on "the obsolescing view that 'unwed fathers are invariably less qualified and entitled than mothers' to take responsibility for nonmarital children." *Id.* at 1692 (brackets and citation omitted). The Court distinguished *Nguyen* on the ground that "the physical-presence requirements now before [the Court] relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child." *Id.* at 1694.

On the basis of that distinction, the decision below concluded that *Morales-Santana* had not overruled *Nguyen*, "broke[n] the link on which [the court of appeals had] premised *Pierre*[,] or undermined an assumption of that decision." Pet. App. 21a. Instead, the court explained that the requirement that was invalidated in *Morales-Santana* pertained to "the amount of pre-birth time a parent must be physically present in the country in order to later transmit citizenship-related values to his or her child," which "is a matter in which men and woman are more than similarly situated—they are virtually the same." *Id.* at 23a. Here, however, the challenged provision involves "the process of a parent['s] establishing a filial tie to his

or her child," with respect to which "men and women * * * are not similarly situated." *Id.* at 22a-23a. The court therefore found "no substantial inconsistency between *Morales-Santana* and *Pierre*." *Id.* at 24a.

The court of appeals also observed that "[u]nder the *Morales-Santana* provisions, if a father had been physically present in this country for less time than the law required, * * * there was no other course through which the child could derive his father's citizenship." Pet. App. 24a. By contrast, the court explained that "former section 1432(a)(3) was enacted as part of a larger 'statutory scheme' that provided an additional route—former section 1433—by which a child could derive his father's citizenship so long as the father took a few 'modest' and 'readily available' steps, the most demanding of which required him to obtain custody over the child." *Ibid.* (citation omitted). The court further observed that "since *Morales-Santana*, five judges of [the court of appeals] and a judge from [the district court] sitting by designation ha[d] reached the same conclusion" that *Pierre* remained good law. *Id.* at 25a. The court of appeals thus concluded that it was "bound by [its] decision in *Pierre*," particularly in light of "the explicit distinction *Morales-Santana* drew between the statute before the Court in that case, and statutes, like those at issue in *Nguyen* and *Pierre*, which require 'minimal' 'paternal-acknowledgments.'" *Id.* at 26a (brackets and citation omitted).

b. Judge Rakoff, sitting on the court of appeals panel by designation, concurred. Pet. App. 28a-36a. In his view, former section 1432(a)(3) "(i) was not a 'paternal-acknowledgement requirement'; (ii) was not aimed at ensuring 'the parent's filial tie to a child,' but was instead related to an area in which men and women

are similarly situated; and (iii) was not 'minimal.'" *Id.* at 30a (brackets and citation omitted). Judge Rakoff thus would have found that former section 1432(a)(3) constituted "discrimination on the basis of sex" because it "reflect[ed] th[e] same stereotypes" as the statute in *Morales-Santana*, including that "'the unwed mother was regarded as the child's natural and sole guardian,' and that 'unwed fathers care little about, indeed are strangers to their children.'" *Id.* at 34a (brackets and citations omitted). Nevertheless, Judge Rakoff agreed that the petition for review should be denied because "the proper remedy" for a finding of unconstitutionality "would not be to extend § 1432(a)(3)'s benefit to [petitioner's] father, but instead to abrogate the benefit entirely, leaving it to Congress, if it wished, to extend the benefit equally to men and women." *Id.* at 35a.

ARGUMENT

Petitioner renews his contention that the second clause of former 8 U.S.C. 1432(a)(3) was facially unconstitutional because it discriminated on the basis of sex. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, the question presented is of limited and diminishing importance because Congress repealed the challenged statute more than 20 years ago, and because petitioner would not be entitled to the remedy he seeks—judicial conferral of citizenship—even if he were to demonstrate that he has Article III standing and prevail on the merits. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's contention that former section 1432(a) was facially unconstitutional under principles of equal protection. This Court has explained that "[f]or a gender-

based classification to withstand equal protection scrutiny, it must be established 'at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Nguyen* v. *INS*, 533 U.S. 53, 60 (2001) (brackets, citations, and internal quotation marks omitted); see *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); but see *Fiallo* v. *Bell*, 430 U.S. 787, 792, 794 (1977) (emphasizing that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens," and concluding that the exercise of Executive discretion should be upheld as long as there exists "'a facially legitimate and bona fide reason'") (citations omitted); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2419-2420 (2018) (same, applying rational-basis review).

a. Former section 1432(a) served the important governmental objective of protecting the rights of *both* parents with respect to their child's citizenship, as well as the rights of the child, when only one parent became a naturalized United States citizen. Accordingly, the general rule of section 1432, "with few exceptions, [was that] *both* parents must naturalize in order to confer automatic citizenship on a child." *Lewis* v. *Gonzales*, 481 F.3d 125, 131 (2d Cir. 2007) (per curiam); see 8 U.S.C. 1432(a)(1). That baseline "recognize[d] that either parent—naturalized or alien—may have reasons to oppose the naturalization of their child, and it respect[ed] each parent's rights in this regard." *Lewis*, 481 F.3d at 131; see *Barthelemy* v. *Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003) (explaining that Congress sought to "prevent[] the naturalizing parent from usurping the parental rights of the alien parent");

Nehme v. *INS*, 252 F.3d 415, 425 (5th Cir. 2001) (explaining that former section 1432(a) "prevent[ed] the child from being separated from an alien parent who has a legal right to custody").

That objective was important, because acquiring citizenship is a "significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship." *Lewis*, 481 F.3d at 131; see *Wedderburn* v. *INS*, 215 F.3d 795, 800 (7th Cir. 2000) (observing that citizenship "may affect obligations such as military service and taxation"), cert. denied, 532 U.S. 904 (2001). Indeed, "[b]oth the child and the surviving but non-custodial parent may have reasons to prefer the child's original citizenship." *Wedderburn*, 215 F.3d at 800. Former section 1432(a), however, provided for *automatic* derivation of citizenship for a qualifying child, and such "automatic [derivation of citizenship for] the couple's children upon the naturalization of one spouse could have unforeseen and undesirable implications for many families." *Brissett* v. *Ashcroft*, 363 F.3d 130, 134 (2d Cir. 2004) (Sotomayor, J.). Former section 1432(a) protected those familial interests by establishing a general rule that a child born abroad to noncitizen parents would automatically derive United States citizenship only if both parents naturalized. See 8 U.S.C. 1432(a)(1).

Consistent with that important objective, former section 1432(a) permitted a child born abroad to noncitizen parents to derive citizenship upon the naturalization of just one parent in only three narrow circumstances: when the other parent was deceased, 8 U.S.C. 1432(a)(2); when the parents were "legal[ly] separat[ed]" and the naturalizing parent had legal custody of the child, 8 U.S.C. 1432(a)(3); and upon "the

naturalization of the mother if the child was born out of wedlock *and* the paternity of the child ha[d] not been established by legitimation," *ibid.* (emphasis added).

Significantly, all three of those statutory exceptions involved circumstances in which the child had a legally recognized relationship with only *one* parent. The first two obviously applied without regard to whether that parent was the mother or the father. And the third applied only when the father had refused to undertake the "minimal" obligation to legitimate the child in order to establish a legally recognized biological parent-child relationship. *Nguyen*, 533 U.S. at 70. As this Court held in *Nguyen*, "assuring that a biological parent-child relationship exists" is an important governmental objective, and requiring a father to legitimate a child does not violate equal-protection principles in this context, since "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 62-63.

Indeed, consistent with the governmental objective of protecting the rights of both parents, a child born abroad and out of wedlock to noncitizen parents could *not* derive citizenship from a naturalizing mother under former section 1432(a)(3) once the father had legitimated the child and thereby established a legally recognized parent-child relationship. See 8 U.S.C. 1432(a)(3). Instead, after legitimation by the father, such a child generally could derive citizenship only upon the naturalization of both parents under section 1432(a)(1), or after the death of one parent under section 1432(a)(2). The court of appeals thus correctly concluded that the order of filiation that petitioner sought to introduce in his motion to reopen was irrelevant to his claim of having derived citizenship under section 1432(a)(3). In fact,

to the extent that a New York order of filiation is equivalent to legitimation, it would have made automatic acquisition of citizenship under section 1432(a)(3) unavailable to petitioner.

b. Former section 1432(a)(3) also employed means that were "substantially related to the achievement of th[e] [governmental] objective[]." *Nguyen*, 533 U.S. at 60 (citation omitted). As noted, Congress sought to protect the rights of both parents in all cases when the child had two legally recognized parents. The exceptions in former section 1432(a) to dual-parent naturalization were thus tailored to situations in which the child had a legally recognized relationship with only one parent. Congress reasonably could have concluded that it would be unfair to deny such children the opportunity to derive citizenship from their sole parent, and to achieve that goal Congress addressed the three most common circumstances in which that situation might arise: the death of one parent, the legal separation of the parents, and the circumstance when a child born out of wedlock has not been legitimated by the father. 8 U.S.C. 1432(a)(2)-(3).

The sex-based distinction in that last circumstance was not just substantially related to Congress's goal; it was the only way to achieve it. Although it spoke to legitimation only by the *father*, that is because there is no analogous situation involving legitimation by the *mother* of a child born out of wedlock; the mother necessarily has a legally recognized biological connection with her child by virtue of the birth itself. See *Nguyen*, 533 U.S. 66-68; *Morales-Santana*, 137 S. Ct. at 1694. In other words, absent the death of the mother or legal separation of the parents, it is impossible for a child born out of wedlock to have a legally recognized

biological relationship with the father but *not* a legally recognized biological relationship with the mother. Thus, former section 1432(a)(3) simply reflected the fact that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Nguyen*, 533 U.S. at 63. The only way Congress could have avoided drawing a sex-based distinction in that provision would have been to deny to children born out of wedlock the chance to derive citizenship from their sole legally recognized parent—which would have been contrary to the governmental objective.

Moreover, any sex-based distinction in former section 1432(a) vanished entirely once the father took the minimal step of legitimation. That, too, underscores that Congress's chosen means were substantially related to its goal of protecting the rights of both parents while still affording children who had only one legally recognized parent the chance to derive citizenship. When paternal legitimation is the only act required to make a statute sex-neutral, the statute does not violate equal protection. *Nguyen* held as much, explaining that a legitimation requirement is "easily administered" and promotes the "substantial interest of ensuring at least an opportunity for a parent-child relationship to develop," while avoiding "the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie." 533 U.S. at 69.

Furthermore, as the court of appeals observed (Pet. App. 24a), petitioner retained other avenues to obtaining citizenship besides former section 1432. For example, petitioner's father could have filed a petition to naturalize petitioner under former section 1433 at any point between 1988 (when petitioner's father was naturalized) and 1997 (when petitioner turned eighteen),

had he simply resided with, see 8 U.S.C. 1433(a) (1988), or obtained legal custody of, see 8 U.S.C. 1433(a)(3) (1994), petitioner. And after turning eighteen, petitioner could have applied for citizenship in his own right, including for many years before he suffered his disqualifying convictions. See 8 U.S.C. 1423, 1427 (1994); 8 U.S.C. 1423, 1427 (2000). Petitioner incorrectly asserts (Pet. 17) that section 1433 was unavailable to him because he was "not residing outside the United States"; in fact, no version of that statute in effect before he turned eighteen contained such a requirement, including the 1952 version petitioner cites. See 8 U.S.C. 1433(a) (1952) (requiring the child to be "residing permanently *in* the United States, with the citizen parent") (emphasis added); 8 U.S.C. 1433(a) (1988) (same); 8 U.S.C. 1433(a)(2)-(3) (1994) (requiring the child to be "physically present in the United States pursuant to a lawful admission" and "in the legal custody of the citizen parent"). And petitioner does not explain why he did not apply for citizenship in his own right. As this Court has recognized, the existence of those alternative avenues to citizenship further underscores that former section 1432(a)(3) was substantially related to the furtherance of the important governmental objective described above and did not violate constitutional principles of equal protection. See *Nguyen*, 533 U.S. at 71; cf. *Lehr* v. *Robertson*, 463 U.S. 248, 266-267 (1983).

c. Contrary to petitioner's repeated assertions (Pet. 6-19), the decision below does not conflict with this Court's decision in *Morales-Santana*, which involved a requirement for acquiring citizenship at birth for a child born abroad to unwed parents, only one of whom was a U.S. citizen. See 137 S. Ct. at 1686. Under provisions now codified at 8 U.S.C. 1401(g) and 1409(a) and (c), an

unwed citizen father generally must have resided in the United States for five (or ten) years before the child's birth—whereas an unwed citizen mother had only a one-year physical-presence requirement. See *Morales-Santana*, 137 S. Ct. at 1686-1687. The Court found that treating unwed mothers more favorably than unwed fathers violates principles of equal protection because that differential treatment was based on "the obsolescing view that 'unwed fathers are invariably less qualified and entitled than mothers' to take responsibility for nonmarital children." *Id.* at 1692 (brackets and citation omitted). The Court explained that "a man needs no more time in the United States than a woman 'in order to have assimilated citizenship-related values to transmit to his child.'" *Id.* at 1694 (brackets and citation omitted).

Importantly, the Court in *Morales-Santana* did not call into question the conclusions in *Nguyen* that "ensuring the existence of a biological parent-child relationship" is an important governmental interest, and that "the mother establishes" such a relationship with the child by virtue of "giving birth." 137 S. Ct. at 1694. Instead, the Court distinguished *Nguyen* on the ground that "the physical-presence requirements" at issue in *Morales-Santana* "relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child." *Ibid.* And "unlike *Nguyen*'s parental-acknowledgment requirement, [the] age-calibrated physical-presence requirements cannot fairly be described as 'minimal.'" *Ibid.* (citation omitted).

As the court of appeals thus correctly concluded (Pet. App. 16a-26a), *Morales-Santana* not only does not contradict, but instead affirms the vitality of, *Nguyen*

and, as a result, the court of appeals' earlier decision in *Pierre* v. *Holder*, 738 F.3d 39 (2d Cir. 2013), cert. denied, 574 U.S. 816 (2014). As explained above, this case involves a statute in which the only sex-based distinction disappears when the father of a child born out of wedlock takes the simple step of legitimation, which (unlike the physical-presence requirement in *Morales-Santana*) both is "'minimal'" and relates to "the parent's filial tie to the child." *Morales-Santana*, 137 S. Ct. at 1694 (citation omitted).

Contrary to petitioner's contention (Pet. 19-25), former section 1432(a)(3) did not rely on stereotypes or outmoded views about the stigma attached to children born out of wedlock. Like *Nguyen* and *Pierre*, and unlike *Morales-Santana*, this case involves a distinction "not * * * based on some outdated stereotype, but rather on the biological inevitability that a mother, by nature of her status as the parent giving birth, 'inherently legitimates,' and establishes an immediate biological connection with her child in a way that fathers—as a matter of nature—cannot." Pet. App. 22a (brackets and citation omitted). Indeed, once a father took the "minimal" step of legitimating his child, *Morales-Santana*, 137 S. Ct. at 1694 (citation omitted), former section 1432(a) drew no further sex-based distinctions between a child's mother and father for purposes of citizenship derivation. See 8 U.S.C. 1432(a)(1)-(3). Similarly, the statute's requirement of a legal separation for married parents, see 8 U.S.C. 1432(a)(3), did not treat children born in wedlock differently from those born out of wedlock based on stereotypes about or animus towards the latter. It simply required a level of formality for recognizing a separation of parents who otherwise had the more formal bond of marriage. If a child's parents were

married and then separated only informally, the child would receive the same treatment under section 1432(a) as the child of parents who were apart but had never legally formalized their relationship through marriage. If anything, the challenged provision in former section 1432(a)(3) *benefited* children born out of wedlock, compared to the sex-neutral alternative. See pp. 13-14, *supra*.

2. The decision below does not conflict with any decision of another court of appeals. See Sup. Ct. R. 10. Indeed, every other court of appeals to consider the issue—including each of the three that addressed the question after this Court's decision in *Morales-Santana*—has agreed that former section 1432(a)(3) was not facially invalid under principles of equal protection. See *Wedderburn*, 215 F.3d at 802 (7th Cir.); *Roy* v. *Barr*, 960 F.3d 1175, 1183 (9th Cir. 2020), cert. denied, 141 S. Ct. 1517 (2021); *Levy* v. *United States Attorney General*, 882 F.3d 1364, 1367 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 1168 (2018); see also *Van Riel* v. *Attorney General*, 190 Fed. Appx. 163, 165 (3d Cir. 2006); *Marquez-Morales* v. *Holder*, 377 Fed. Appx. 361, 364-366 (5th Cir. 2010) (per curiam).

Petitioner's reliance (Pet. 14-15) on the Third Circuit's decision in *Tineo* v. *Attorney General*, 937 F.3d 200 (2019), is misplaced. *Tineo* did not find subsection (a)(3) of former section 1432 *facially* unconstitutional under principles of equal protection. Rather, *Tineo* addressed only an *as-applied* challenge to subsection (a)(2) in light of the unusual facts in that case. See *id.* at 210. Tineo, whose mother had died, sought to derive citizenship from his father—who had legal custody of him as a child—under former subsection (a)(2). See 8 U.S.C. 1432(a)(2) (1994) (allowing a child born abroad

to noncitizen parents to derive citizenship upon "[t]he naturalization of the surviving parent if one of the parents is deceased"). To qualify as a surviving "parent," however, a father of a child born out of wedlock must legitimate his child. 8 U.S.C. 1101(c)(1).

But legitimation was impossible in Tineo's case because under the then-applicable law of New York or the Dominican Republic, the only way for a father to legitimate his child was to marry the mother—and Tineo's mother, as noted, was dead. See *Tineo*, 937 F.3d at 204. As a result, "Tineo's father was forever precluded from having his son derive citizenship through him, despite being a citizen and having cared for his son until the child was 21 years old." *Ibid.* Had the parental situations been reversed—that is, had Tineo's mother been the surviving citizen parent who cared for Tineo, and Tineo's father the one who died—Tineo would not have been similarly precluded from deriving citizenship from his mother under subsection (a)(2), and additionally might have had subsection (a)(3) available to him as well. See *id.* at 212. Accordingly, the Third Circuit determined that those provisions of former section 1432(a), combined with the legitimation requirement in section 1101(c)(1) and the relevant provisions of New York and Dominican Republic law at the time, all conspired to violate principles of equal protection as applied to Tineo's unusual and "particular family circumstances." *Id.* at 210; see *id.* at 215.

The narrow, as-applied holding in *Tineo* does not conflict with the decision here rejecting petitioner's facial challenge to former section 1432(a)(3). Indeed, *Tineo* largely addressed subsection (a)(2), not (a)(3), and relied heavily on the idiosyncrasy that the very event triggering that provision—the death of Tineo's

mother—simultaneously made it impossible for Tineo to invoke it because of the particular attributes of New York and Dominican Republic law at the time. No such impossibility exists here. And even to the limited extent that *Tineo* addressed subsection (a)(3), a narrow fact-specific decision finding that provision unconstitutional on an as-applied basis in light of its interaction with state and foreign law does not conflict with the multiple decisions finding that the provision, standing alone, is facially constitutional. Cf. *Tineo*, 937 F.3d at 210 (explaining that "a facial challenge 'tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case,'" and distinguishing such a challenge from Tineo's "as-applied" challenge, which "turn[ed] on the particular circumstances at hand") (citation omitted).

3. Several additional considerations counsel against further review of the question presented in this case.

First, there is a serious question whether petitioner has Article III standing to assert a sex-discrimination claim. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (explaining that a party generally "must assert his own legal rights" and "cannot rest his claim to relief on the legal rights * * * of third parties"). Petitioner does not assert any discrimination on the basis of *his* sex; instead, the statute draws a distinction based on the sex of the child's parent. For petitioner to be entitled to assert equal-protection rights on behalf of his father, however, he must affirmatively establish that he has a "close relation[ship]" to his father and that there is "some hindrance to [his father's] ability to protect his * * * own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991).

Petitioner has not demonstrated a "close relationship" with his father; to the contrary, the record indicates that petitioner's father had to be haled into state court in 1989 to acknowledge paternity and pay child support, see A.R. 115-123, and that he did not have any direct involvement in petitioner's life after that point, see A.R. 253. In *Morales-Santana*, this Court stated that a father's "ability to pass citizenship to his son * * * easily satisfies the 'close relationship' requirement." 137 S. Ct. at 1689. But the father in that case had "accepted parental responsibility and included [the son] in his household" for many years. *Id.* at 1687. That is not the case here.

Petitioner likewise has not demonstrated any "hindrance" to his father's raising an equal-protection claim. In *Morales-Santana*, this Court observed that the father's "failure to assert a claim in his own right 'stems from disability,' not 'disinterest,' for [he] died in 1976, many years before the current controversy arose." 137 S. Ct. at 1689 (citations omitted). Petitioner's father, by contrast, was alive during petitioner's immigration proceedings (and is, to the government's knowledge, still alive). See A.R. 253. The record contains no evidence that petitioner's father was disabled from bringing a claim to vindicate his own rights—as opposed to merely being "disinterest[ed]," *Morales-Santana*, 137 S. Ct. at 1689 (citation omitted), in doing so.

At a minimum, those serious questions about petitioner's Article III standing to raise a sex-discrimination claim in these circumstances would complicate review of the question presented in the petition.

Second, even if petitioner could demonstrate Article III standing, and even if he could establish that the

distinction drawn in former section 1432(a)(3) was facially unconstitutional, he still would not be entitled to the relief he seeks: a judicial conferral of citizenship. Cf. Pet. 5 (claiming that "the proper remedy should be to declare him a United States citizen"). As this Court recognized in *Morales-Santana*, "this Court is not equipped to grant th[at] relief." 137 S. Ct. at 1698; see *id.* at 1701 (Thomas, J., concurring); *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring).

As a general matter, "[w]hen the 'right invoked is that to equal treatment,' the appropriate remedy 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." *Morales-Santana*, 137 S. Ct. at 1698 (citations omitted). The Court has explained that "[t]he choice between these outcomes is governed by the legislature's intent," and that "[o]rdinarily" that entails "striking the discriminatory exception" to an otherwise neutral rule. *Id.* at 1699. *Morales-Santana* applied that principle by eliminating the favorable physical-presence exception for unwed mothers, and subjecting them to the same physical-presence requirement applicable to married mothers and all fathers (wed or unwed). See *id.* at 1700.

Application of that principle here would mean invalidation of the exception in former section 1432(a)(3) that allowed a child born abroad to noncitizen parents to derive citizenship from an unwed naturalizing mother, but not an unwed naturalizing father. That would leave in place the general (sex-neutral) rule that such a child could derive citizenship upon the naturalization of both parents, 8 U.S.C. 1432(a)(1), along with the (sex-neutral) exceptions to that rule allowing the child to derive citizenship upon the naturalization of just one

parent when the other parent was deceased or when the parents were legally separated and the naturalizing parent had legal custody of the child, 8 U.S.C. 1432(a)(2)-(3). As Judge Rakoff recognized (Pet. App. 35a), that remedy would most closely align with "the legislature's intent" to protect the rights of both parents, while providing for automatic derivation of citizenship from one parent in only limited circumstances. *Morales-Santana*, 137 S. Ct. at 1699.

Indeed, it would be nonsensical to attempt to implement the alternative remedy that petitioner seeks—namely, an "extension of benefits to the excluded class." *Morales-Santana*, 137 S. Ct. at 1698 (citation omitted). Because this is a facial challenge, such a remedy would in effect require the Court to modify former section 1432(a)(3) by adding a clause permitting a child to derive citizenship upon "the naturalization of the [father] if the child was born out of wedlock and the [maternity] of the child has not been established by legitimation." But maternity is necessarily established by virtue of the birth itself. See *Nguyen*, 533 U.S. at 66-68. As a result, the alternative remedy would be self-defeating, because the "[maternity] of the child" will *always* be "established"—leaving no occasion for acquiring citizenship from the unwed father under the hypothetically added clause.

For petitioner to benefit from any remedy on this facial challenge, therefore, the Court would have to eliminate the filial-relationship condition altogether for both mothers and fathers, effectively redlining the statute to allow a child to derive citizenship upon: "the naturalization of [either parent] if the child was born out of wedlock ~~and the paternity of the child has not been established by legitimation~~." That would judicially remove a

statutory condition that is itself constitutional, see *Nguyen*, 533 U.S. at 71; would effectively treat children born out of wedlock more favorably than children born to married parents (perhaps then requiring further tinkering with the rest of the statute); and would undermine the statutory goal of protecting the rights of both parents. Petitioner provides no authority to support that kind of wholesale judicial rewriting of the statutory text, much less for concluding that such a remedy would best effectuate "the legislature's intent, as revealed by the statute at hand," *Morales-Santana*, 137 S. Ct. at 1699.

Third, the question presented is of limited and diminishing prospective importance. Former section 1432 was repealed more than twenty years ago, and now applies only to individuals who were born abroad to noncitizen parents before February 27, 1983. See p. 3 n.*, *supra*. Section 1432's successor provision, 8 U.S.C. 1431, does not link a child's eligibility for automatic derivation of citizenship with the naturalizing parent's status as mother or father, or with the marital status of the child's parents, although it does continue to require a father to legitimate a child born out of wedlock. See 8 U.S.C. 1431 (generally providing for automatic acquisition of citizenship when "[a]t least one parent" of the child becomes a citizen); cf. 8 U.S.C. 1101(c). Accordingly, the provision at issue affects a dwindling number of individuals. Moreover, many of those individuals—like petitioner himself—would have had alternative means of obtaining citizenship, such as a petition from the custodial parent or an application in the individual's own right.

Finally, this Court has repeatedly declined to grant previous petitions raising the question presented, both

before and after its decision in *Morales-Santana*. See *Roy* v. *Wilkinson*, 141 S. Ct. 1517 (2021) (No. 20-966); *Levy* v. *Sessions*, 138 S. Ct. 1168 (2018) (No. 17-7205); *Pierre* v. *Holder*, 574 U.S. 816 (2014) (No. 13-1301); *Grant* v. *Department of Homeland Security*, 556 U.S. 1238 (2009) (No. 08-7865). The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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