No. 21-161

In the Supreme Court of the United States

DERICK DONOVAN ROBERTS

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Under former 8 U.S.C. 1432 (1982), which was repealed in 2000, a minor lawful permanent resident born outside of the United States to noncitizen parents generally could automatically acquire United States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) (1982). 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) (1982); (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) (1982); 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.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter. The decision of the Board of Immigration Appeals (Pet. App. 5a-6a) is unreported. The oral decision of the immigration judge (Pet. App. 7a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on August

2, 2021 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following removal proceedings in immigration court, an immigration judge found petitioner removable and ordered him removed. Pet. App. 7a-10a. The Board of Immigration Appeals affirmed the removal order and dismissed petitioner's appeal. *Id.* at 5a-6a. The court of appeals denied his petition for review. *Id.* at 1a-2a.

1. Petitioner was born in St. Lucia in January 1974 to unmarried parents, both of whom were citizens of St. Lucia. Pet. App. 45a-46a, 49a. Petitioner's father married a United States citizen in 1978, moved to New York, and became a citizen in 1987. *Id.* at 69a, 78a. Petitioner was admitted to the United States as a lawful permanent resident in 1983 and lived with his father until he left home at age sixteen and ended all contact with his father and stepmother. See *id.* at 78a.

In January 1991, petitioner's father applied for petitioner to naturalize as a United States citizen under 8 U.S.C. 1433 (1988), a provision that is not at issue in this case. See Pet. App. 68a-76a. The application was denied in July 1991. *Id.* at 76a. The denial noted that petitioner would be eligible to apply to naturalize in his own right when he turned eighteen in January 1992, and advised that he apply in late 1991. See *ibid.* There is no indication in the record that petitioner's father sought judicial review of the denial of the application for naturalization, or that petitioner ever applied to naturalize in his own right. Meanwhile, between 1995 and 2013, petitioner accumulated convictions for five felonies and three misdemeanors. See Certified Administrative Record (A.R.) 129-148.

2. In 2018, petitioner was placed in removal proceedings. A.R. 182. Petitioner was charged with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i) based on a 2013 conviction for Criminal Sexual Act in the First Degree, in violation of N.Y. Penal Law § 130.50(02) (McKinney 2013), for which he was sentenced to eighteen years in prison; and a 1996 conviction for Attempted Criminal Sale of a Controlled Substance (cocaine) in the Third Degree, in violation of N.Y. Penal Law §§ 110.00 and 220.39(01) (McKinney 1987 & Supp. 1996), for which he was sentenced to one year in jail. A.R. 111, 130, 152, 182; see 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); 8 U.S.C. 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State * * * relating to a controlled substance * * * is deportable.").

Through counsel, petitioner admitted the factual allegations and conceded that those convictions would make him removable as charged *if* he were a noncitizen. Pet. App. 8a-9a. Petitioner argued (*id.* at 8a), however, that he may have automatically derived citizenship from his father in 1987 under former 8 U.S.C. 1432 (1982) (repealed 2000).*

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* Unless otherwise indicated, subsequent references in this brief to section 1432 are to that section as it appeared in the 1982 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 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

As relevant here, former 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 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).

Although petitioner initially suggested that he might have automatically derived citizenship upon his father's naturalization under former section 1432, after reviewing the documents provided by the government, see Pet. App. 41a-90a, petitioner "concede[d] that he did not derive citizenship through his father's naturalization," *id.* at 8a.

3. Petitioner appealed to the Board of Immigration Appeals, contending that former 8 U.S.C. 1432(a)(3)

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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 may continue to govern the citizenship claims of individuals (such as petitioner) who were born on or before February 27, 1983.

facially violated constitutional principles of equal protection because it discriminated based on sex. Pet. App. 6a. The Board, however, declined to rule on that argument, stating that it "is not empowered to rule on the constitutionality of the statutes and regulations that [it] administer[s]." *Ibid.* The Board thus dismissed the appeal. *Ibid.*

4. The court of appeals granted the government's motion for summary denial and summarily denied the petition for review. Pet. App. 1a-2a. In his appellate brief, petitioner argued that subsection (a)(3) of former section 1432 was facially unconstitutional, Pet. C.A. Br. 11-21, that the court should overrule its precedent finding that provision constitutional, *id.* at 21-31, and that the proper remedy was to confer U.S. citizenship on him, *id.* at 31-36. The court explained (Pet. App. 2a) that petitioner's "sole challenge to his removal order [wa]s foreclosed" by its recent decision in *Dale* v. *Barr*, 967 F.3d 133 (2d Cir. 2020), cert. denied, No. 20-1328 (Oct. 4, 2021). The court observed that *Dale* "reiterates that former 8 U.S.C. § 1432(a)(3) does not violate" constitutional principles of equal protection "by impermissibly discriminating based on" sex. Pet. App. 2a.

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 twenty 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. This Court recently denied review of the question presented in the very case on which the court of appeals relied, see *Dale* v. *Garland*, No. 20-1328 (Oct. 4, 2021), and the same result is warranted here.

1. Relying on its decision in *Dale* v. *Barr*, 967 F.3d 133 (2d Cir. 2020), cert. denied, No. 20-1328 (Oct. 4, 2021), the court of appeals rejected petitioner's contention that former section 1432(a) was facially unconstitutional under principles of equal protection. That decision, as well as the court's earlier decision in *Dale*, were correct. 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 sufficiently close and 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).

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 sufficiently close and 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 virtually 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 in *Dale*, *supra*, petitioner retained other avenues to obtaining citizenship besides former section 1432. For example, petitioner's father could

have filed a petition or application to naturalize petitioner under former section 1433 at any point between 1987 (when petitioner's father was naturalized) and 1990 (when petitioner chose to stop residing with his father), had he taken the simple step of legitimating petitioner. See 8 U.S.C. 1433(a) (1982), 1101(c)(1). Had petitioner's stepmother adopted him during that time, she too could have filed a petition or application for naturalization on his behalf. See 8 U.S.C. 1433(b) (1982). And as petitioner was informed in 1991, see Pet. App. 76a, he could have applied for citizenship in his own right after turning eighteen in 1992, including for several years before he incurred his disqualifying convictions. See 8 U.S.C. 1423, 1427. Petitioner does not explain why none of those events occurred. 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 assertions (Pet. 1-3, 19, 23), neither the decision below nor the court of appeals' earlier decision in *Dale*, *supra*, conflicts with this Court's decision in *Morales-Santana*. *Morales-Santana* 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 (describing *Nguyen*'s holding). 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).

Morales-Santana thus not only does not contradict, but instead affirms the vitality of, *Nguyen* and, as a result, the court of appeals' decision in *Dale*. See *Dale*, 967 F.3d at 142-144. 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 straightforward 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. 1, 20-24), 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 *Dale*, and unlike *Morales-Santana*, this case involves a statutory 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." *Dale*, 967 F.3d at 143 (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 toward 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.

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. 3, 8-10) 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 then-applicable Dominican Republic and New York law, 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 he 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 Dominican Republic and New York 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* neither conflicts with the decision here rejecting petitioner's facial challenge to former section 1432(a)(3) nor supports petitioner's contention (Pet. 3) that the outcome of his case would be different "across the river in New Jersey." *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 Dominican Republic and New York 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 has had no contact at all with his father since petitioner left home at the age of sixteen.

See Pet. App. 78a. 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). In contrast, nothing prevented petitioner's father from vindicating his own interests at the time he submitted the naturalization application on petitioner's behalf, see Pet. App. 78a; nor is there any indication that the father is unable to protect his own interests now. The record thus contains no evidence that petitioner's father is or 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. C.A. Br. 36 (asking that the court "find him to be 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 in his concurring opinion in *Dale*, that remedy would most closely align with Congress's intent to protect the rights of both parents, while providing for automatic derivation of citizenship from one parent in only limited circumstances. 967 F.3d at 149; see *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 ~~the mother~~ 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 generally applies only to individuals who were born abroad to noncitizen parents before February 27, 1983, see p. 3 n.*, *supra*—rendering anachronistic petitioner's invocation (Pet. 21-22) of the effects that the practice of "gestational surrogacy" have since had on assumptions about whether "the mother of a child is the person who gave birth to the child." 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 *ibid.* (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*—including, most recently, in *Dale* itself. See *Dale* v. *Garland*, No. 20-1328 (Oct. 4, 2021); *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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