No. 11-378

In the Supreme Court of the United States

DAVID JOHNSON, PETITIONER

v.

J.D. WHITEHEAD, WARDEN, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under former 8 U.S.C. 1432(a)(3) (1994) (repealed 2000), a child born outside of the United States to non-U.S. citizen parents became a citizen of the United States upon the fulfillment of various conditions, including upon the "naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or 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." The question presented is:

Whether Congress's decision to automatically confer citizenship on an alien child upon the naturalization of either a legally separated parent with custody of the child or the child's unwed mother if the paternity of his unwed father was not established by legitimation, but not upon naturalization of his unwed father, violates the equal protection component of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 647 F.3d 120. The decisions of the Board of Immigration Appeals (Pet. App. 35a-43a) and the immigration judge (Pet. App. 44a-54a and Pet. App. 55a-61a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2011. On August 10, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 22, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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 1983, a "child born outside of the United States of alien parents" would become a United States citizen "upon fulfillment" of the "conditions" identified in 8 U.S.C. 1432(a) (1994), which was repealed in 2000.[1] Section 1432(a) provided for conferral of citizenship in certain circumstances for children under the age of 18 who were not married and were residing in the United States pursuant to a lawful admission for permanent residence. 8 U.S.C. 1432(a)(4) and (5).

The general rule under Section 1432 was that both parents had to become naturalized U.S. citizens in order

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[1] References herein to Section 1432 are to that Section as it appears in the 1994 edition of the United States Code. That version of Section 1432 was applicable in 1996. Since 2001, a child born outside the United States automatically becomes a U.S. citizen if one or both of his or her parents is or becomes a citizen before the child reaches the age of 18 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." Child Citizenship Act of 2000 (2000 Act), Pub. L. No. 106-395, § 101(a), 114 Stat. 1631 (8 U.S.C. 1431(a)(3)). Because that statute does not apply to children who were 18 years of age or older when the law became effective on February 27, 2001 (see 2000 Act § 104, 114 Stat. 1633; 8 U.S.C. 1431(a)(2)), Section 1432 continues to govern the citizenship claims of individuals (such as petitioner) who were born on or before February 27, 1983.

for their child to automatically obtain citizenship. 8 U.S.C. 1432(a)(1). The statute also provided three exceptions permitting a child to obtain citizenship if only one parent naturalized. First, Subsection 1432(a)(2) allowed a child to become a citizen if the naturalized parent was the surviving parent and the other parent was deceased. Second, Subsection 1432(a)(3) allowed a child to become a citizen if "there ha[d] been a legal separation of the parents" and the naturalizing parent had legal custody of the child. Finally, Subsection 1432(a)(3) allowed a child to become a citizen upon the naturalization of his mother if "the child was born out of wedlock and the paternity of the child has not been established by legitimation."

2. a. Petitioner was born in Jamaica in 1965 to a mother and father who were not and have never been married to each other. Pet. App. 63a. Petitioner's mother ceded custody of him to his father shortly after his birth. *Id.* at 63a-64a.

In 1972, at the age of seven, petitioner entered the United States with his father as a lawful permanent resident. Pet. App. 3a, 63a-64a. Less than 15 months later, petitioner's father became a naturalized citizen. *Id*. at 3a, 63a. Although the version of Section 1433(a) in effect at the time permitted petitioner's father to apply for United States citizenship on his minor son's behalf, he did not do so. *Id.* at 3a; see 8 U.S.C. 1433(a) (1970). Petitioner also never applied for United States citizenship on his own behalf prior to 1996. Pet. App. 3a.

In January 1989, petitioner was convicted of carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1) (1988), and was sentenced to five years of imprisonment. Pet. App. 3a-4a, 46a-47a. In May 1989, he was convicted in a Texas

state court of both unlawful possession of a controlled substance (cocaine) and aggravated assault, and was sentenced to ten years of imprisonment. *Id.* at 4a, 47a.

b. In June 1996, the former Immigration and Naturalization Service (INS), whose powers in this area have since been transferred to the Department of Homeland Security (DHS), issued to petitioner an Order to Show Cause in immigration court as to why he should not be deported from the United States based on his criminal offenses.[2] Pet. App. 4a. The immigration judge terminated the proceedings on February 9, 1998, stating that petitioner "appears to be [a] U.S. citizen by [his] father's [naturalization]." *Ibid.* (brackets in original). The INS waived appeal of that decision. *Id.* at 38a.

c. In December 1996, during the pendency of his removal proceedings, petitioner filed a Form N-600 Application for Certificate of Citizenship with the INS, claiming that he had become a United States citizen at the time of his father's 1973 naturalization pursuant to the first clause of 8 U.S.C. 1432(a)(3), which confered citizenship on a child upon "[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." Pet. App. 4a, 62a-65a. The INS denied the application because petitioner, whose parents had never married, could not show that his parents were ever legally separated. *Id.* at 4a-5a, 64a. Petitioner did not pursue an administrative appeal of that denial. *Id.* at 5a.

d. In January 2002, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) (2000), and was sentenced to

[2] The INS had previously issued a similar order in August 1992, but the immigration judge terminated those proceedings for reasons that are not explained in the record. Pet. App. 4a.

108 months of imprisonment. Pet. App. 5a, 47a. In 2008, near the end of petitioner's term of imprisonment, DHS initiated removal proceedings against petitioner by filing a Notice to Appear against him in immigration court. *Id.* at 5a, 46a. Based on his criminal history, petitioner was charged with being removable on four grounds: (1) for having been convicted of a firearms offense, see 8 U.S.C. 1227(a)(2)(C); (2) for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct, see 8 U.S.C. 1227(a)(2)(A)(ii); (3) for having been convicted of a controlled-substance offense, see 8 U.S.C. 1227(a)(2)(B)(i); and (4) for having been convicted of an aggravated felony, specifically, a crime of violence, see 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 44a-45a.

Petitioner filed a motion to terminate proceedings, arguing that DHS was precluded from relitigating the issue of his citizenship because, in terminating the prior proceedings in 1998, an immigration judge had found him to be a United States citizen. Pet. App. 5a, 47a-48a. He also contended that he had become a citizen upon his father's naturalization pursuant to Section 1432(a)(3) because that provision's requirement of a "legal separation" should be interpreted to encompass situations in which a child's parents were permanently apart, even if they had never married. Admin. R. 300-303. He argued that to interpret the statute otherwise would place it in conflict with equal protection principles by virtue of its unequal treatment of children born out of wedlock vis-a-vis children born to married parents. *Id.* at 301-303; see Gov't C.A. Br. 11.

The immigration judge denied petitioner's motion to terminate the proceedings, found petitioner to be removable on all charges, and ordered him removed. Pet. App.

44a-61a. The immigration judge first concluded that DHS was not precluded from litigating the issue of petitioner's citizenship because the 1998 termination order, which stated only that petitioner "'appears to be' a United States citizen," did not constitute a formal finding of citizenship. *Id.* at 48a-52a. In the alternative, the immigration judge stated that, even if the 1998 order did constitute a finding of citizenship, under the Third Circuit's decision in *Duvall* v. *Attorney General of the United States*, 436 F.3d 382 (2006), petitioner's commission of an additional crime since the 1998 proceedings eliminated any preclusive effect that might otherwise have existed. Pet. App. 52a-54a.

Turning to the merits of petitioner's citizenship claim, the immigration judge concluded that petitioner had not obtained citizenship under Section 1432(a) upon his father's naturalization because he could not satisfy the "legal separation" requirement as a result of his parents' never having married each other. Pet. App. 50a-51a (citing *Afeta* v. *Gonzales*, 467 F.3d 402 (4th Cir. 2006)).

3. Petitioner appealed to the Board of Immigration Appeals (Board), and the Board dismissed the appeal. Pet. App. 35a-43a. The Board agreed with the immigration judge that, under the Third Circuit's decision in *Duvall*, even if res judicata might have applied with respect to the prior 1998 termination order, it would not apply here because petitioner was "later correctly found to be an alien who has committed additional serious crimes rendering him removable." *Id.* at 41a. The Board also concluded that it was "apparent" that petitioner is not a United States citizen, relying on the longstanding view of both the Board and the courts of appeals that, in order "to demonstrate a 'legal separation'

under [Section 1432(a)], the alien must first demonstrate a legal marriage." *Id.* at 42a-43a. The Board also explained that it did not have authority to make petitioner a citizen on the basis of "an Immigration Judge's error stemming from an incomplete record." *Id.* at 42a. Finally, the Board rejected petitioner's argument that reading a marriage requirement into the first clause of Section 1432(a) violates equal protection guarantees because it discriminates against children born out of wedlock. *Id.* at 43a.

4. A divided panel of the Fourth Circuit denied petitioner's petition for review.[3] Pet. App. 1a-34a.

The court first rejected petitioner's argument that Section 1432(a)(3)'s reference to "a legal separation of [a child's] parents" does not require that the parents in question had been married before being legally separated. Pet. App. 8a-11a. The court credited as "the clear meaning of the statute" the Board's interpretation of the statutory term "legal separation" to "require[] that there first be a marriage and then formal steps to end that marriage." *Id.* at 9a; see *id.* at 8a (noting that the Board "read[s] the statute in accordance with its unambiguous meaning"). In addition, the court acknowledged that "[e]very circuit that has considered the issue has found a marriage requirement in the term 'legal sep-

[3] The court of appeals consolidated petitioner's petition for review with a separate appeal from a district court's dismissal of a petition for writ of habeas corpus, in which petitioner had raised the same citizenship issue he litigated in the removal proceedings. Pet. App. 6a. After petitioner conceded that the petition for review was the only proper avenue for review of his claims, the court of appeals affirmed the district court's dismissal of his habeas petition for lack of jurisdiction. *Id.* at 6a-7a. Petitioner does not seek review of that disposition in his petition for a writ of certiorari.

aration.'" *Id.* at 9a. That unanimity, the court explained, is based on "the strength of the underlying arguments for a marriage requirement." *Ibid.* In particular, the court observed that Section 1432(a)(3) creates two paths for citizenship, one applicable when a child's parents have been "legal[ly] separat[ed]" and the other applicable when a child was born "out of wedlock." *Ibid.*; 8 U.S.C. 1432(a)(3). By "contrast[ing] 'legal separation' with 'out of wedlock,'" the court reasoned, Congress intended the two situations to apply in different circumstances—the first when a child's "parents had married but had undergone a 'legal separation,'" and the second when a child's "parents had never married." Pet. App. 9a-10a. In the court's view, interpreting the statutory provision to apply only when a "legal separation" occurs after marriage "also makes sense in light of the broader statutory scheme," which aims "to protect the rights of both parents." *Id.* at 10a. The court noted that the "automatic conferral of citizenship usually requires the naturalization of both parents, and exceptions to this rule, including § 1432(a)(3), are narrowly tailored to avoid undue interference in the parent-child relationship." *Id.* at 10a-11a. Applying that rule to this case, the court held that petitioner was not entitled to citizenship under the first clause of Section 1432(a)(3) because his parents were never married.[4] *Id.* at 10a.

Over the dissent of Judge Gregory (Pet. App. 23a-34a), a majority of the court of appeals panel also rejected petitioner's equal protection challenge to Section 1432(a)(3). *Id.* at 11a-13a & n.1. Specifically, the court rejected petitioner's contention that the statute uncon-

[4] The court also noted that petitioner had not sought citizenship under the second clause of Section 1432(a)(3) because his mother never naturalized. Pet. App. 10a.

stitutionally discriminated on the basis of legitimacy by automatically conferring citizenship on a child born in wedlock when the parent with sole custody after a legal separation naturalized and on an out-of-wedlock child only when the mother naturalized (if the father had not established paternity through legitimation). See Pet. C.A. Amended Br. 7, 23-29; Pet. App. 11a-13a. The court applied the rational basis standard of review this Court employed in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), to review distinctions made in the immigration context based on legitimacy. Pet. App. 12a-13a & n.1. In drawing the distinctions in the statute, the court reasoned, Congress rationally sought to "limit[] automatic changes" in a child's status "to situations in which the other parent has been removed from the picture," such as "via death, a combination of legal separation and sole custody, or a father's failure to legitimate his child." *Id.* at 13a (quoting *Wedderburn* v. *INS*, 215 F.3d 795, 800 (7th Cir. 2000), cert. denied, 532 U.S. 904 (2001)).

Finally, the court held that issue preclusion did not apply to preclude the government from arguing that petitioner is not a citizen because the "equivocal language" of the immigration judge's 1998 order did not "indicate any conferral of citizenship." Pet. App. 18a. In any event, the court concluded, an immigration judge is not empowered to confer citizenship. *Id.* at 19a. In the alternative, the court held that, even if petitioner "could overcome that obstacle, preclusion still would not apply," *id.* at 15a, because he had continued to engage in criminal conduct after termination of the earlier proceedings, *id.* at 22a (citing *Duvall*, 436 F.3d at 391).[5]

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[5] In his petition for a writ of certiorari, petitioner does not seek further review of the court's rejection of his preclusion argument.

ARGUMENT

Petitioner renews his argument that the now-repealed 8 U.S.C. 1432(a)(3) unconstitutionally discriminates on the basis of legitimacy and argues for the first time that Section 1432(a)(3) unconstitutionally discriminates on the basis of sex. Neither argument merits further review, however, because the court of appeals correctly affirmed the constitutionality of Section 1432(a)(3), as has every other court of appeals to consider the issue. And even if the question presented did warrant review, petitioner's case is particularly ill-suited to a proper resolution of that question.

1. a. Former Section 1432(a) permitted the automatic naturalization of a child born outside the United States to non-U.S. citizen parents upon the naturalization of both parents or upon the naturalization of one parent if the other parent was deceased. 8 U.S.C. 1432(a)(1) and (2). That provision also provided for the automatic naturalization of such a child upon the naturalization of only one parent (when both parents were living) in two situations: (1) "when there ha[d] been a legal separation of the parents" and the naturalizing parent had legal custody of the child, or (2) 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." 8 U.S.C. 1432(a)(3). Petitioner has apparently abandoned his argument that he qualified for automatic naturalization under the first clause of Section 1432(a)(3). As the Board and every court to consider the question have agreed, the requirement in that clause that there have been a legal separation of a child's parents may be satisfied only when the parents were married to each other before the legal separation. See *Marquez-Morales* v. *Holder*, 377 Fed.

Appx. 361, 364 (5th Cir. 2010); *Lewis* v. *Gonzales*, 481 F.3d 125, 130 & n.4 (2d Cir. 2007); *Barthelemy* v. *Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003); *Wedderburn* v. *INS*, 215 F.3d 795, 799-800 (7th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *Charles* v. *Reno*, 117 F. Supp. 2d 412, 418 (D.N.J. 2000); *In re H—*, 3 I. & N. Dec. 742, 744 (Cent. Office 1949). There is thus no conflict in the circuits, and no error on the part of the Fourth Circuit, in interpreting the language of this provision.

b. Petitioner argues instead (Pet. 11-24) that the distinctions drawn in Section 1432(a)(3) unconstitutionally discriminate on the basis of legitimacy and sex, in violation of the equal-protection component of the Fifth Amendment's Due Process Clause. Initially, this Court should decline to review petitioner's sex-discrimination claim because he failed to raise it before the immigration judge, the Board, or the court of appeals, see Pet. App. 30a (Gregory, J., dissenting), and the panel majority did not address it, see *id.* at 11a-13a & n.1. The Court generally declines to review issues not addressed below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In addition, every court of appeals to consider whether Section 1432(a)(3) unconstitutionally discriminates has agreed that it does not. See Pet. App. 11a-13a & n.1; *Marquez-Morales*, 377 Fed. Appx. at 364-366; *Barthelemy*, 329 F.3d at 1065-1068; *Van Riel* v. *Attorney Gen. of the U.S.*, 190 Fed. Appx. 163, 165 (3d Cir. 2006); *Wedderburn*, 215 F.3d at 800-802; see also *Barton* v. *Ashcroft*, 171 F. Supp. 2d 86, 89-90 (D. Conn. 2001); *Charles*, 117 F. Supp. 2d at 419-421; but see *Grant* v. *United States DHS*, 534 F.3d 102, 106-107 (2d Cir. 2008) (assuming that a child born abroad out of wedlock would be automatically naturalized upon his father's natural-

ization if the father legitimated the child before the child turned 18 in order to avoid "serious constitutional and statutory interpretation problems"), cert. denied, 129 S. Ct. 2377 (2009). The uniformity of view among the courts of appeals on the constitutionality of Section 1432(a)(3) is itself a sufficient reason to deny the petition for a writ of certiorari.

c. The court of appeals here correctly reviewed the constitutionality of Section 1432(a)(3) under a rational-basis standard. The principle that courts must accord 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 judgments 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). Petitioner's attempt (Pet. 18-19) to distinguish *Fiallo* on the basis that it concerned entry visas rather than citizenship is unavailing. In *Fiallo*, the Court rejected a constitutional challenge, alleging discrimination on the basis of both sex and illegitimacy, 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 asserted constitutional interests of citizens are implicated. *Id*. at 794-795.

In any event, Section 1432(a)(3) passes constitutional muster even under a heightened standard of review because the distinctions it makes are substantially related to an important governmental objective. See *Nguyen* v. *INS*, 533 U.S. 53, 60 (2001); *Clark* v. *Jeter*, 486 U.S. 461 (1988). Section 1432 governed the past conferral of citizenship on a child born abroad to non-U.S. citizen parents upon the naturalization of both parents or one parent. The statutory scheme embodied in Section 1432 is substantially related to the government's important objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens.[6]

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[6] Petitioner is mistaken in asserting (Pet. 20-21) that "Congress's actual purpose in developing the 'legal separation' requirement was to lift the penalty of expatriation imposed on an American-born woman who had married a foreign man and lost her U.S. citizenship as a consequence of that marriage." As confirmed by a 1933 Attorney General opinion, see 37 Op. Att'y Gen. 90, and by the district court's decision in *In re Lazarus*, 24 F.2d 243 (N.D. Ga. 1928) (both cited at Pet. 21), a

The general rule of Section 1432, "with few exceptions, [is that] *both* parents must naturalize in order to confer automatic citizenship on a child." *Lewis*, 481 F.3d at 131. That baseline "recognizes that either parent—naturalized or alien—may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard." *Ibid.*; *id.* at 130 ("The governing principle * * * is respect for the rights of an alien parent who may not wish his child to become a U.S. citizen."); see *Barthelemy*, 329 F.3d at 1066 (Congress sought to "prevent[] the naturalizing parent from usurping the parental rights of the alien parent."); *ibid.* ("If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien's parental rights could be effectively extinguished."); *Nehme* v. *INS*, 252 F.3d 415, 425 (5th Cir. 2001) (explaining that the rule that both parents must naturalize "promote[s] marital and family harmony and * * * prevent[s] the child from being separated from an alien parent who has a legal right to custody"); *Wedderburn*, 215 F.3d at 800 ("Both the child and the surviving but non-custodial parent may have reasons to prefer the child's original citizenship.").

Consistent with its concern for the rights of both parents, Congress permitted only a few limited exceptions to the general rule. The first exception permitted

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woman who had lost her U.S. citizenship by marrying a foreign citizen was already entitled to resume her citizenship, and to have citizenship conferred on any minor children in her custody, before Congress enacted the predecessor to Section 1432(a). See *Nationality Laws of the United States*, 76th Cong., 1st Sess. Pt. 1, at 30 (Comm. Print 1939) (noting that predecessor to Section 1432, which added the "legal separation" language to the Code, provided a means of automatic naturalization that had "already received official recognition").

automatic naturalization upon the naturalization of one parent when the other parent was deceased. 8 U.S.C. 1432(a)(2). The second exception provided for automatic naturalization when the parents were married but then legally separated and the child was in the custody of the naturalizing parent. 8 U.S.C. 1432(a)(3). And the third exception applied when a child was born out of wedlock, the child was in the custody of his naturalizing mother, and his father had never taken the steps necessary to establish his paternity of the child through legitimation. *Ibid.*

Significantly, eligibility for each of the statutory exceptions was determined by the existence of a legally-defined relationship. A child was automatically naturalized if the naturalizing parent was (1) the only living parent, (2) legally separated from the other parent and legally entitled to custody of the child, or (3) the mother of a child born out of wedlock if the father had never legitimated the child. It is true that there were some situations in which a child was prevented from automatically naturalizing upon the naturalization of one parent even though the non-naturalizing parent did not have significant ties to the child. But Congress is entitled to set forth clear rules that can be uniformly administered without a fact-intensive inquiry into the nature and extent of a child's relationship (or lack thereof) with an alien parent who will typically not be a party to immigration or naturalization proceedings in the United States. That is particularly so when Congress has provided other avenues through which a naturalized citizen such as petitioner's father may secure U.S. citizenship for his foreign-born child. See p. 18, *infra*.

Petitioner argues (Pet. 22-24) that Section 1432(a)'s framework is based on stereotypes and outmoded views

about the stigma attached to children born out of wedlock. But that is not the case. When a child is born out of wedlock, the child's legal relationship to his mother is typically established by virtue of the birth itself. See *Nguyen*, 533 U.S. at 62-63. In such situations, a child's father must take some step to legally formalize his relationship to the child through legitimation. When an unwed father did so, naturalization of the child's mother would not automatically trigger naturalization of the child under former Section 1432(a). In other words, if the unwed father took steps to put himself on the same footing as the mother with respect to being recognized as a parent as a legal matter, the scheme in Section 1432(a) made no sex-based distinction between a child's mother and father. Similarly, the statute's requirement of a legal separation did not treat children born in wedlock different from children born out of wedlock based on stereotypes about or animus towards the latter. If a child's parents were married and then separated informally, the child would have been treated the same under Section 1432(a) as the child of parents who were apart but had never legally formalized their relationship through marriage.

By limiting the circumstances in which a child was automatically naturalized upon the naturalization of only one of his parents, the statute protected *both* parents' legal rights concerning their child's citizenship and prevented separation of the child from a parent who did not naturalize.[7] Naturalization is a "significant legal event with consequences for the child here and perhaps within

[7] In enacting Section 1432, Congress also sought to "ensure that only those alien children whose 'real interests' were located in America with their custodial parent, and not abroad, should be automatically naturalized." *Nehme*, 252 F.3d at 425.

his country of birth or other citizenship." *Lewis*, 481 F.3d at 131; see *Wedderburn*, 215 F.3d at 800 (noting that citizenship "may affect obligations such as military service and taxation"). Under Section 1432, the grant of citizenship is automatic when certain conditions are met. Such "automatic naturalization of 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). Because the distinctions Congress made in Section 1432(a) are substantially related to the government's important objective of protecting parental rights, those distinctions are fully consistent with the Constitution even if, contrary to *Fiallo* v. *Bell*, *supra*, heightened scrutiny were applied.

3. Review is also not warranted here because this case is a particularly unsuitable vehicle for addressing and resolving the constitutionality of former Section 1432(a).

a. Initially, the question whether former Section 1432 violates the Constitution's guarantee of equal protection is of limited prospective significance because the statute was repealed in 2000 and now only applies to individuals who were born before February 27, 1983, and were thus no longer minors when the 2000 amendments became effective. See note 1, *supra*. Section 1432's successor provision—8 U.S.C. 1431—does not link eligibility for automatic naturalization of a child with the naturalizing parent's status as mother or father or with the marital status of the child's parents. See *ibid.* (providing for naturalization of a minor child when "[a]t least one parent" becomes a citizen). Accordingly, the provision at issue affects a diminishing set of individuals.

The diminishing significance of the question presented is highlighted by the fact that someone in petitioner's position had and has other avenues available to achieve naturalization without relying solely on his father's act of naturalization. From the time of petitioner's father's naturalization through the time petitioner turned 18, petitioner's father could have sought a certificate of citizenship for petitioner pursuant to Section 1433. That provision provided that a child born abroad would be a citizen upon petition of the child's parent if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18, and the child resided permanently in the United States pursuant to a lawful admission for permanent residence. Petitioner offers no explanation for why his father failed to secure petitioner's citizenship under Section 1433 other than an assertion that his father was not aware that he needed to do so (see Pet. 5). But an Act of Congress cannot be deemed to violate the Constitution merely because an individual's misreading of the law and consequent inaction deprived his son of the readily-available benefit of citizenship. Moreover, a foreign-born child who 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 because he rendered himself ineligible by engaging in criminal activity. Cf. *Lehr* v. *Robertson*, 463 U.S. 248, 264 (1983).

b. In addition, even if petitioner could properly assert a sex-discrimination claim after failing to raise it below, see p. 11, *supra*, there is a serious question about

whether petitioner has standing to do so.[8] The distinction in the statute turns on the child's legal relationship to the father and mother, not the sex of the child. In order for petitioner to be entitled to assert equal-protection rights on behalf of his father, 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); see, *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); *Singleton* v. *Wulff*, 428 U.S. 106, 113-116 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); *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 114 (opinion of Blackmun, J.)). Petitioner has not offered any information about his father's current situation. He has therefore failed to demonstrate either the necessary close relationship with his father at the time of the proceedings or that there is any hindrance that would have prevented his father (who is not a party to this litigation) from seeking to vindicate his own alleged rights.

c. Moroever, as the Court recognized in *Nguyen*, even if petitioner could establish that the distinctions

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[8] It does appear that petitioner has standing to raise his illegitimacy-based equal-protection claim.

drawn in former Section 1432 were unconstitutional, he would still face "additional obstacles before [he] could prevail." 533 U.S. at 71-73. In particular, he would not be entitled to the relief he seeks—a declaration that he is a naturalized U.S. citizen. See Pet. 25 (claiming that petitioner has "rightfully been a derivative U.S. citizen since his father naturalized nearly four decades ago").

As a general matter, "when a statutory violation of equal protection has occurred, it is not foreordained which particular statutory provision is invalid." *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment). The Court "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (brackets in original) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)); see *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 in other contexts "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 in the judgment) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision * * * as to the disparately parsimonious one.").

In choosing which statutory provision to strike, a court must be guided by congressional intent. Here,

such an inquiry might itself well lead to the conclusion that the proper way to cure any equal protection violation would be to apply the general rule for automatic conferral of citizenship—*i.e.*, that both parents must naturalize—uniformly to all children. Moreover, that result would avoid the serious questions that would be raised by judicial extension of citizenship to a category of persons not chosen for citizenship by Congress, all of whom have long since attained adulthood without any reasonable expectation of citizenship. Such a result would be inconsistent with this Court's admonition 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."); see also *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) (stating that even if the statute at issue in *Miller* were unconstitutional, no remedy would be available because "the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress").

These difficulties in determining what remedy would be appropriate if the Court did find a constitutional problem further counsels against granting the petition for a writ of certiorari. Indeed, because such remedial difficulties derive from and underscore Congress's plenary power over immigration and naturalization, they

illustrate why the statutory conditions Congress has prescribed for conferral of U.S. citizenship do not violate the Constitution to begin with.

d. Finally, there is no merit to petitioner's argument (Pet. 11-24) that the Court should grant his petition for a writ of certiorari in order to resolve a disagreement among various courts of appeals about whether classifications based on sex or legitimacy are subject to rational-basis review or heightened scrutiny when Congress makes such classifications in the exercise of its plenary authority over matters concerning immigration and naturalization. Petitioner cites no court of appeals case that has held that the distinctions drawn in Section 1432 must survive heightened scrutiny. It is true that the Third Circuit, in an unpublished decision, upheld Section 1432 under intermediate scrutiny, but in doing so it avoided determining what level of scrutiny was appropriate. *Van Riel*, 190 Fed. Appx. at 165. And, in addition to the court of appeals here, see Pet. App. 11a-13a & n.1, the Ninth Circuit has expressly held that the distinctions set forth in Section 1432 should be reviewed under *Fiallo*'s deferential standard of review. See *Barthelemy*, 329 F.3d at 1065.[9] The absence of any division among the courts of appeals on the question presented is itself sufficient reason to deny the petition for a writ of certiorari.

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[9] Petitioner relies in part (see Pet. 13-17) on cases from the courts of appeals holding that government classifications based on legitimacy or sex are subject to intermediate scrutiny outside the immigration context. The United States does not dispute that heightened scrutiny applies to most statutory classifications based on legitimacy or sex. As explained in the text, however, rational-basis review applies when Congress exercises its plenary authority in the immigration and naturalization context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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