No. 99-2071

In The

Supreme Court of the United States

TUAN ANH NGUYEN AND
JOSEPH ALFRED BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the distinction in 8 U.S.C. § 1409 between out-of-wedlock children of United States citizen mothers and out-of-wedlock children of United States citizen fathers is a violation of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Factual Background 4

B. Statutory Framework and Proceedings Below 5

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. SECTION 1409 UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF SEX 12

A. A Majority Of This Court's Members Have Recognized That Section 1409 Reflects Impermissible Sex-Based Stereotypes and Must Fail Under Heightened Scrutiny 12

B. The Government Has Failed To Demonstrate An Exceedingly Persuasive Justification For The Sex-Based Classifications in Section 1409 16

1. The Sex-Based Classifications In Section 1409 Are Not Substantially Related To The Purported Government Interest Of Fostering Close Ties Between The Child, The Parent And The United States 16

2. The Sex-based Classifications In Sections 1409(a)(3) And (a)(4) Are Not Substantially Related To The Purported Government Interest Of Ensuring A Blood Tie Between The Parent And The Child And Reducing False Claims of Citizenship 21

II. SEX-BASED DISCRIMINATION IN STATUTORY CITIZENSHIP AT BIRTH IS SUBJECT TO HEIGHTENED SCRUTINY 24

A. Statutory Citizenship At Birth Is Distinct From Immigration and Naturalization 24

B. Whatever Plenary Power Congress May Possess Over Immigration Does Not Bar Heightened Scrutiny of Section 1409(a) 26

1. This Court Has Never Extended Plenary Power to Citizenship At Birth.....26

2. Congress's Plenary Powers Have Not Barred Heightened Scrutiny of Constitutional Violations In Areas.....30

III. AS IN OTHER EQUAL PROTECTION CHALLENGES TO FEDERAL AND STATE STATUTES THIS COURT CAN PROPERLY GRANT RELIEF BY SEVERING THE OFFENDING PROVISION.....32

A. Congress Would Have Favored Severing The Offending Provision Had It Known of Its Unconstitutionality.....32

B. This Court's Exercise Of Its Remedial Authority To Strike The Discriminatory Provisions Of Section 1409(a) Does Not Constitute An Illicit Grant of Citizenship.....36

CONCLUSION.....40

TABLE OF AUTHORITIES

FEDERAL CASES

Ablang v. Reno,
52 F.3d 801 (9th Cir. 1995).....22

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987).....33

Breyer v. Meissner,
214 F.3d 416 (3d Cir. 2000).....27

Caban v. Mohammed,
441 U.S. 380 (1979).....17, 18

Califano v. Goldfarb,
430 U.S. 199 (1977).....30

Califano v. Webster,
430 U.S. 313 (1977).....30

Califano v. Westcott,
443 U.S. 76 (1979).....18, 30, 34

Fiallo v. Bell,
430 U.S. 787 (1977).....8, 28, 29

Frontiero v. Richardson,
411 U.S. 677 (1973).....34

INS v. Chadha,
462 U.S. 919 (1982).....32, 33, 34

INS v. Pangilinan,
486 U.S. 875 (1988) 37, 38

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 ..... 14, 19

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 25

Kleindienst v. Mandel,
408 U.S. 753 (1972) 29

Knauer v. United States,
328 U.S. 654 (1946) 25

Lake v. Reno,
226 F.3d 141 (2d Cir. 2000) 27, 38

Lawrence v. State Tax Commission of Miss.,
286 U.S. 276 (1932) 31

Lehr v. Robertson,
463 U.S. 248 (1983) 36

Mathews v. Diaz,
426 U.S. 67 (1976) 28, 29

Miller v. Albright,
523 U.S. 420 (1998) ..... *passim*

Mississippi University for Women, v. Hogan,
458 U.S. 718 (1982) 12, 14, 19

Moritz v. Commissioner,
469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412
U.S. 906 (1973) 32

New York v. United States,
505 U.S. 144 (1992) 32

Nguyen v. INS
208 F.3d 528 (5th Cir. 2000) 1, 8, 9, 16, 28

Parham v. Hughes,
441 U.S. 347 (1979) 36

Pickett v. Brown,
462 U.S. 1 (1983) 23

Rainey v. Chever,
527 U.S. 1044 (1999), *denying cert. to* 510 S.E.
2d 823 (Ga. 1999) 36

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) 31

Reno v. ACLU,
521 U.S. 844 (1997) 34

Rogers v. Bellei,
401 U.S. 815 (1971) 27, 28, 30, 36

Rostker v. Goldberg,
453 U.S. 57 (1981) 31

Schneider v. Rusk,
377 U.S. 163 (1964) 25

United States v. Ahumada-Aguilar,
189 F.3d 1121 (9th Cir. 1999) 33

United States v. Virginia,
518 U.S. 515 (1996) 10, 12, 19, 24

Wauchope v. U.S. Department of State,
985 F.2d 1407 (9th Cir. 1993) 27, 37

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 17, 30

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II, § 1, cl. 5 25

U.S. Const. amend. V 2

FEDERAL STATUTES

8 U.S.C. § 1101(a)(23) 25

8 U.S.C. § 1105a(5) (1994) 7

8 U.S.C. §§ 1251(a)(2)(A)(ii) and (iii) 6

8 U.S.C. § 1401(g) 5, 20, 21, 33

8 U.S.C. § 1409 ..... *passim*

10 U.S.C. § 1447(11)(A)(iii) 21

28 U.S.C. § 1254(1) 2

50 U.S.C. § 2002(b)(1)(A)(iii) 21

Act of May 24, 1934, § 1, 48 Stat. 797 21

Child Support Enforcement Amendments of 1984,
Pub. L. No. 98-378, § 466 (a) (5), 98 Stat. 1305,
1307 (1985) 23

Illegal Immigration Reform and Immigration
Responsibility Act ("IIRIRA"), Pub. L. 104-208,
110 Stat. 3009, § 309(c)(I)(4) 7

Immigration and Nationality Act, Pub. L. No. 82-
414, § 406, 66 Stat. 163, 281 (1952) 3, 33

SCHOLARLY AUTHORITY

Mary Ann Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L. Rev. 1447 (2000) 35, 36

Lynne M. Casper & Ken Bryson, U.S. Census Bureau, *Household and Family Characteristics* (1998) 15

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Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 B.Y.U. L. Rev.129 (1994) 23

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions below were submitted to this Court in the Appendix of the Petition for the writ of *certiorari* (Pet. App.). The opinion of the Court of Appeals is reported at 208 F.3d 528 (5th Cir. 2000). Pet. App. 1a-13a. The opinion of the Board of Immigration Appeals on reconsideration is unreported and is reproduced at Pet. App. 14a-16a. The initial opinion of the Board of Immigration Appeals is unreported and is reproduced at Pet. App. 17a-21a. The deportation order of the Immigration Judge is unreported and is reproduced at Pet. App. 20a-21a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 17, 2000. The Court granted the petition for a writ of *certiorari* on September 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), as amended, 8 U.S.C. § 1409, provides in pertinent part:

> Children born out of wedlock.
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 (8 U.S.C. § 1401), and of paragraph (2) of section 308 (8 U.S.C. § 1408), shall apply as of the date of birth to a person born out of wedlock if –
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

> (4) while the person is under the age of 18 years–
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.
>
> * * * * *
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . .outside of the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

3. Section 309(a) of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), provides in pertinent part:

> The provisions of paragraphs . . . (7) of section 301(a). . . shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation. * * *

4. Section 406 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), note following 8 U.S.C. § 1101 provides:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the

remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

STATEMENT OF THE CASE

A. Factual Background

Joseph Boulais, an American citizen by birth, was born in Hartford, Connecticut on June 21, 1937. Joint Appendix at 6 [hereinafter J.A.]. He lived in the United States continuously through his early adulthood, attending public schools in Hartford. Appellate Record at 84-86 [hereinafter R.]. In 1960, at age 23, Boulais enlisted in the United States Army. J.A. 10. He served in Germany, receiving an honorable discharge in January 1963. J.A. 9.

Following his discharge from the army, Boulais relocated to Vietnam. In 1969, while he was working for Pacific Architect Engineer, a military contractor, he began a relationship with a Vietnamese citizen, Hung Thi Nguyen. J.A. 20; R. at 45. As a result of that relationship, Joseph Boulais's son, Tuan Anh Nguyen ("Nguyen"), was born in Vietnam on September 11, 1969. J.A. 20; R. at 44.

Soon after his son's birth, Boulais's relationship with Hung Thi Nguyen soured. J.A. 20. Thus, from early infancy, Tuan Anh Nguyen lived with his father, who later married another Vietnamese national.

In 1975, Saigon fell to North Vietnamese troops. Six year-old Nguyen escaped from Vietnam with the family of Boulais's wife. J.A. 20. Within a few months, Nguyen was paroled into the United States as a refugee, and was reunited with Boulais. R. at 149. In the chaos surrounding the fall of

Saigon and his family's separation, Boulais lost contact with Nguyen's biological mother. J.A. 21. She never again communicated with Boulais, and he does not know whether she survived the war. J.A. 21.

Since 1975, Boulais, his wife and Nguyen have lived as a family in the United States. Nguyen adjusted his status to that of lawful permanent resident in 1975 pursuant to the Indochinese Refugee Act. R. 149. He never returned to Vietnam. While Boulais provided financial support to Nguyen throughout his minority, he did not legitimate or otherwise formally establish his paternity prior to Nguyen's 18th birthday. In 1997, Boulais underwent a DNA test confirming that Nguyen is indeed his son. J.A. 15.

B. Statutory Framework and Proceedings Below

Section 1401(g) of the Immigration and Nationality Act provides that a child who is born abroad of one alien parent and one United States citizen parent is generally deemed to be a citizen of the United States at birth if, prior to the birth, the parent was physically present in the United States for not less than five years, at least two of which were after the parent turned fourteen. 8 U.S.C. § 1401(g). If, however, such a child is born out of wedlock and the citizen parent is the father, Section 1409(a) imposes additional conditions, including: that a blood relationship between the child and the father be established by clear and convincing evidence; that the father agree in writing to provide financial support for the child until he or she turns eighteen; and that, while the child is under the age of eighteen, the father legitimate the child or acknowledge paternity in writing under oath, or that paternity be established by adjudication. 8 U.S.C. §§

1409(a)(1), (3), (4).[1] A child born out of wedlock to a United States citizen mother is not subject to Section 1409(a), but instead acquires citizenship at birth provided the mother had United States nationality at the time of the birth and had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. § 1409(c).

In 1992, Nguyen pled guilty in Texas state court to two felony charges. He was sentenced to eight years in prison for each crime, to be served concurrently. While Nguyen was serving his term, the Immigration and Naturalization Service ("INS") began deportation proceedings against Nguyen, charging that he was subject to deportation as an alien who had been convicted of two crimes involving moral turpitude and an aggravated felony under 8 U.S.C. §§ 1251(a)(2)(A)(ii) and (iii). On January 30, 1997, Nguyen was ordered deported to Vietnam by the immigration judge. Pet. App. 20a. Nguyen timely appealed the immigration judge's order to the Board of Immigration Appeals ("BIA"). In his appeal, Nguyen argued that he was a United States citizen under 8 U.S.C. § 1409 and accordingly not subject to deportation.

[1] Before 1986, the pertinent portions of Section 1409(a) required only that paternity be "established by legitimation" before the child's 21st birthday. By virtue of his birth date, Nguyen belongs to a class of children who may elect whether to have the "old" or "new" Section 1409 govern their cases. *See* note following 8 U.S.C. § 1409 (effective date of 1986 Amendment) (quoting § 23(e), Pub. L. 100-525, § 8(r), 102 Stat. 2619). Because Nguyen has not made such an election, and because he does not meet the requirements of either the pre-1986 law or the current Sections 1409(a)(3) and (4), he challenges both versions of the statute.

While the appeal was pending, Boulais instituted a paternity proceeding in a Texas district court. In February 1998, based on DNA testing results indicating to a certainty of 99.98 percent that Boulais is Nguyen's father, Boulais obtained an "Order of Parentage" from the Texas court. This evidence of paternity, along with the claim of Nguyen's United States citizenship, was submitted to the BIA, but apparently was not initially considered by the Board. Pet. App. 15a. On June 2, 1998, the BIA dismissed Nguyen's appeal. A motion for reconsideration based on the evidence of Boulais's paternity was denied by the BIA on May 28, 1999, based on this Court's decision in *Miller v. Albright*, 523 U.S. 420 (1998). Pet. App. 14a. According to the BIA, *Miller* stood for the proposition that "different proof requirements for the father, as opposed to the mother, did not represent an unconstitutional denial of equal protection." Pet. App. 16a.

On June 30, 1998, Boulais and Nguyen timely filed a petition for review of the BIA ruling with the United States Court of Appeals for the Fifth Circuit pursuant to 8 U.S.C. § 1105a(5) (1994), which confers jurisdiction on the courts of appeal to hear appeals of deportation orders based on nonfrivolous claims to United States citizenship.[2] On July 2, 1998, Nguyen and Boulais also jointly filed an action in the District Court for the Southern District of Texas seeking review of the BIA ruling and requesting a declaration that

[2] The petition for review was governed by former 8 U.S.C. § 1105a, as amended by "transitional" judicial review rules which apply to deportation proceedings initiated before April 1, 1997. *See* Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009, § 309(c)(1)(4).

Nguyen has been a United States citizen since birth.[3] Pet. App. 3a-4a.

On April 17, 2000, the Fifth Circuit ruled on the petition for review. The court first ascertained that it had jurisdiction to determine the citizenship claim. *Nguyen v. INS*, 208 F.3d 528, 531-532 (5th Cir. 2000); Pet. App.5a. According to the court, because a Texas court had entered an "Order of Parentage" establishing that Boulais is Nguyen's biological father, no issue of material fact existed and there was therefore no need to remand the case to the district court for any factual determination. *Id.* at 532; Pet. App. 6a. Reviewing the opinions of this Court in *Miller v. Albright*, 523 U.S. 420 (1998), the court then concluded that Boulais was a proper party to the proceedings, who had "made every effort to represent his own interests in the present suit," and who had standing to challenge the constitutionality of 8 U.S.C. §§ 1409(a)(3) and (4). *Nguyen*, 208 F.3d at 534; Pet. App. 9a-10a.

Turning to the equal protection argument, the court rejected the application of the deferential "facially legitimate and bona fide reason" standard applied in *Fiallo v. Bell*, 430 U.S. 787 (1977), to Petitioners' claim of citizenship at birth. As the court of appeals noted, "there are significant differences between INA § 1409 which is challenged in the present case, and the INA statute challenged in *Fiallo*. Specifically, the statute in *Fiallo* dealt with the claims of aliens for special immigration preferences, whereas the petitioner's claim in this case is that he is a citizen." *Id.* at 534-535; Pet. App. 11a.

[3] That case, captioned *Nguyen v. Reno*, Civ. No. H-98-2086 (S.D. Tex., complaint filed July 2, 1998), is being held in abeyance by the District Court pending the outcome of this matter.

The court then examined whether the requirements of Section 1409(a)(3) and (4) can survive heightened constitutional scrutiny. On this point, the court of appeals followed the plurality opinion in *Miller*, upholding Section 1409 as "well tailored" to meet "several important government objectives." *Nguyen*, 208 F.3d at 535; Pet. App. 12a. The court concluded that because Boulais did not meet the requirements of Section 1409 to establish citizenship at birth, Nguyen was an alien convicted of an aggravated felony. The court accordingly granted the Government's motion to dismiss the petition for review. *Id.* at 536; Pet. App. 13a.

SUMMARY OF ARGUMENT

Title 8 U.S.C. § 1409, which governs the transmission of citizenship at birth to non-marital children born to United States citizens abroad, is one of the few remaining federal laws that treats individuals differently based solely on their sex. Specifically, a female citizen can transmit citizenship upon proof of three elements: United States nationality at the time of the child's birth, maternity, and physical presence in the United States prior to the birth. 8 U.S.C. § 1409(c). By contrast, a male citizen must prove not only U.S. nationality, paternity, and physical presence, but must also, prior to the child's eighteenth birthday, (a) agree in writing to provide financial support to the child, 8 U.S.C. § 1409(a)(3); and (b) legitimate the child, acknowledge paternity in writing under oath or establish paternity through a court. 8 U.S.C. § 1409(a)(4). Under this regime, a father like Joseph Boulais who has supported his son from infancy may be forever barred from transmitting citizenship after his child's eighteenth birthday, whereas a citizen mother who left her child at birth and provided no emotional or financial support whatsoever could nevertheless transmit citizenship at birth.

In *Miller v. Albright*, 523 U.S. 420 (1998), a majority of this Court's members indicated that Section 1409 would not withstand scrutiny under the Equal Protection Clause. In particular, five Justices observed that the law reflects gender-based stereotypes that have been previously condemned by this Court. These stereotypes include the generalization that mothers are typically caregivers, and thus no additional proof of their relationship to their child is needed. At the same time, the special requirements imposed on fathers, including the time limit for legitimating or acknowledging the child, reflect the stereotype that fathers will not typically have such connections to their children. By giving these stereotypes the force of law, Section 1409 operates to deny rights to fathers like Joseph Boulais who do not conform to expected sex-based social roles.

In defending an official classification based on gender, the Government must shoulder the demanding burden of demonstrating an "exceedingly persuasive justification" for the classification. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Here, the asserted governmental interests include ensuring ties between the child, the parent, and the United States and protecting against fraudulent claims. Even assuming that Congress intended to protect these governmental interests – an assertion that the construction of the statute itself calls into question – each of these interests can easily be met through gender neutral criteria. Indeed, the existing requirements of proving parentage, nationality, and physical presence in the United States prior to the child's birth are deemed sufficient to establish such connections when the citizen parent is a mother, and could be relied on to serve the same purpose for fathers. As to the Fifth Circuit's determination that special

requirements on fathers are necessary to deter fraudulent claims, the statute's requirement that proof of paternity be "clear and convincing" coupled with the existence of genetic testing provide a complete answer. There can be no fraud when such testing is available to establish paternity to 99.98 percent accuracy. Accordingly, because no persuasive justification supports its reliance on sex-based classifications, Section 1409 violates the equal protection guarantee of the Fifth Amendment of the United States Constitution.

Plenary constitutional review is entirely appropriate here. The statute at issue is solely concerned with citizen parents' transmission of citizenship at birth to their children. Accordingly, as seven Justices suggested in *Miller*, Congress's policy choices reflected in Section 1409 are not entitled to any special deference. Indeed, this Court has never failed to conduct a full constitutional review of a citizenship at birth statute directly affecting the rights of citizens to transmit *jus sanguinis* citizenship.

Finally, the proper remedy for this violation of the Constitution is to sever the provisions of the law – Sections 1409(a)(3) and (4) – that impermissibly impose additional burdens solely on fathers. Congress has specifically indicated that this is its desired result by including a severance clause in the Immigration and Nationality Act. Severing the provisions challenged here that unconstitutionally bar fathers' transmittal of citizenship will both cure the statute's sex-based inequality and effectuate Congress's purpose by allowing the remainder of the statute to continue in operation. Following this excision, the statute itself – and not this Court – will grant citizenship at birth on a non-discriminatory basis.

ARGUMENT

I. SECTION 1409 UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF SEX

A. A Majority Of This Court's Members Have Recognized That Section 1409 Reflects Impermissible Sex-Based Stereotypes And Must Fail Under Heightened Scrutiny

This Court requires that heightened scrutiny be used in reviewing an "official classification based on gender." *United States v. Virginia*, 518 U.S. 515, 532 (1996) [hereinafter *VMI*]. Focus must be on the differential treatment from which relief is sought, and the Government "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women, v. Hogan*, 458 U.S. 718, 724 (1982); *see also VMI*, 518 U.S. at 533 (1996). This burden is "demanding" and rests entirely on the Government, which must demonstrate that the challenged classification is "substantially related" to the achievement of "important governmental objectives." *VMI*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). The Government's justification must be genuine; it cannot be "invented *post hoc* in response to litigation." *Id.* Further, the Government cannot rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977) (Stevens, J., concurring in judgment)). Physical differences between men and women may be "enduring," but they cannot be a basis for "denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.*

Applying this standard in *Miller v. Albright*, 523 U.S. 420 (1998), a majority of this Court's members indicated that Section 1409 would not withstand heightened scrutiny under the Equal Protection Clause. *Miller*, 523 U.S. at 451-52 (O'Connor, J., concurring in judgment); 523 U.S. at 476 (Breyer, J., dissenting). In addition, a majority of the *Miller* Court condemned the sex-based stereotypes on which Section 1409 rests. *Miller*, 523 U.S. at 451-52 (O'Connor, J., concurring in judgment); *id.* at 482-83 (Breyer, J., dissenting).[4]

Indeed, the sex-based stereotypes boldly repeated by the Government in defending Section 1409(a) are reminiscent of an earlier time. These "familiar generalizations . . . [are that] mothers, as a rule, are responsible for a child born out of wedlock; fathers, unmarried to the child's mother, ordinarily, are not." *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting). Because the statute does not require a mother to take any special steps after the child's birth in order to transmit citizenship, it "depend[s] for [its] validity upon the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children." *Miller*, 523 U.S. at 482-83 (Breyer, J., dissenting). By the same token, the statute

[4] Citizenship laws have long reflected gender stereotypes. *See Miller*, 523 U.S. at 461-69 (Ginsburg, J., dissenting) (describing how U.S. citizenship laws historically discriminated against women). For example, the Supreme Court of Canada recently reviewed the Canadian statute governing the citizenship of the children of Canadian citizens born abroad, striking it down as a violation of the Canadian Charter of Rights and Freedoms. *See Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, 365. The Canadian statute imposed additional hurdles on married citizen mothers seeking Canadian citizenship, beyond the requirements imposed on children of married citizen fathers.

perpetuates the notion that fathers have less responsibility than do mothers for non-marital children. *See* Cornelia T.L. Pillard and T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 Sup. Ct. Rev. 1, 22 (observing that Section 1409 reinforces men's "sexual irresponsibility" by giving "U.S. men, but not U.S. women, a choice to disavow the children they conceive with foreign partners").

As Justice O'Connor observed in *Miller v. Albright*, "[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny." *Miller*, 523 U.S. at 452 (O'Connor, J., concurring in judgment). *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (Kennedy, J., concurring in judgment) (noting that prevailing case law "reveal[s] a strong presumption that gender classifications are invalid"). Such generalizations have been repeatedly condemned by this Court because they deny rights to individuals who do not conform to socially defined gender roles. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

The facts here demonstrate the consequences for individuals when gender stereotypes define their statutory rights. Nguyen's mother disappeared in war torn Vietnam soon after his birth.[5] Defying the stereotype, and accepting full responsibility for his child, Boulais cared for his son first

[5] Many Vietnamese mothers were forced to abandon their Amerasian children under similar circumstances. *See* Ranjana Natarajan, *Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 Colum. Human Rights L. Rev. 123, 124 (1998) (noting that Amerasian children are sometimes abandoned by mothers who cannot afford to care for them).

in Vietnam and later in the United States.[6] Boulais was a responsible father who provided support to his son throughout his minority. He failed, however, to take the necessary formal steps required by Sections 1409(a)(3) and (4) before Nguyen's eighteenth birthday. *See* Pillard & Alienikoff, *supra*, at 22 n.86 (discussing reasons that motivated father might fail to meet statute's age deadline such as lack of awareness, or failure to realize need or benefit of citizenship until child is ready to work). Accordingly, Boulais cannot now transmit citizenship to his son. In contrast, if an American mother had given birth to an out-of-wedlock child abroad and did everything that Boulais did not – left the child, provided no financial or emotional support, and had no subsequent contact with the child – she could still transmit citizenship at birth to her child. This case clearly underscores the danger, recognized by a majority of this Court in *Miller*, of permitting sex-based stereotypes to define legal rights.

[6] Boulais may be in the minority, but he is not alone. According to 1998 Census data, in the United States more than 700,000 never-married fathers are raising more than a million children. *See* Lynne M. Casper & Ken Bryson, U.S. Census Bureau, Household and Family Characteristics 108 (1998); Terry A. Lugaila, U.S. Census Bureau, Marital Status and Living Arrangements iii (1998).

B. The Government Has Failed To Demonstrate An Exceedingly Persuasive Justification For The Sex-Based Classifications In Section 1409

The Fifth Circuit held that Section 1409 was "well tailored" to meet two governmental objectives: first, encouraging ties during a child's formative years between the non-marital child, the parent, and the United States, and second, ensuring reliable proof of a biological relationship between the citizen parent and child. *See Nguyen v. INS*, 208 F.3d 528, 535; Pet. App. 12a-13a. Neither of these asserted objectives passes muster under this Court's stringent test for sex-based classifications.

1. The Sex-Based Classifications In Section 1409 Are Not Substantially Related To The Purported Government Interest Of Fostering Close Ties Between The Child, The Parent And The United States

While the Government may have an interest in fostering close and early ties between the non-marital child, the citizen parent and the United States, sex-based classifications are not necessary to further that interest. Indeed, the special restrictions placed on a father's transmittal of citizenship at birth may stand in the way of maintaining those ties. Moreover, the fact that mothers are not subject to any time limits or support requirements that might promote such early ties undermines the assertion that this interest is "important" and cannot be achieved by some gender-neutral means.

As a matter of biology, a mother may be presumed to know of a child's existence at the time of birth. But knowledge that one is a parent, no matter how it is acquired, does not guarantee a relationship with one's child. Just as

both men and women may abandon their children, both men and women may take responsibility for and raise their non-marital children. This undeniable reality is illustrated by the facts in this case where the father alone provided care and support. Yet the special requirements of Sections 1409(a)(3) and (4) rest on the assumption that men and women represent different extremes without overlap with respect to care and support of their children. By imposing additional requirements on fathers alone to demonstrate an ongoing relationship with their child, the statute effectively assumes that women will invariably establish such a relationship and that men will not.

This scheme "rests upon a host of unproved gender-related hypotheses," *Miller*, 523 U.S. at 485 (Breyer, J., dissenting), which this Court has rejected in other contexts. In fact, under heightened scrutiny this Court has repeatedly struck down statutory distinctions based on assumptions that women, not men, are caregivers, and men, not women, bear the burden of providing financial support.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1982), this Court recognized that a social security statute that provided mothers, but not fathers with survivors benefits when the other parent died was based on stereotypes that mothers, but not fathers, would stay home with their children. The Court concluded, "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." *Weinberger*, 420 U.S. at 652.

In *Caban v. Mohammed*, 441 U.S. 380 (1979), this Court refused to accept gender as a proxy for an individual's ability or inclination to make decisions about his child's life when it struck down a New York adoption statute that permitted mothers, but not fathers, to unilaterally block the adoption of

their non-marital children. Like this case, *Caban* involved an unwed father who had a close relationship with his non-marital children. The Court observed that the case "illustrate[d] the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children." *Caban*, 441 U.S. at 394. The Court further criticized the statutory scheme which, like the one at issue here, excluded "some loving fathers" from making decisions about their children while enabling "some alienated mothers" to continue to do so. *Id.*

Similarly, in *Califano v. Westcott*, 443 U.S. 76 (1979), this Court invalidated a federal statute that provided welfare benefits to families when a breadwinner father was unemployed, but denied benefits to families when a breadwinner mother was unemployed. According to the Court, such a rule was "not substantially related to the attainment of any important and valid statutory goals" but was "rather, part of the 'baggage of sexual stereotypes'" that presumed that fathers provided financial support to the family while mothers stayed home to raise children. *Westcott*, 443 U.S. at 89.

The additional requirements in Section 1409(a) that only a father must legitimate or acknowledge paternity of his non-marital child and undertake to provide for the child's support limit rights based on the gender-based caregiver/breadwinner dichotomy in a way that this Court has repeatedly disapproved. Like Stephen Wiesenfeld, the respondent in *Weinberger v. Wiesenfeld*, Joseph Boulais cared for his son as a parent yet is now treated as a stranger because he is male. Ironically, though Boulais supported his child, because he undertook that obligation freely as a parent and without any formal written promise, he fails to meet the

requirements of Section 1409(a)(3). A citizen mother is not formally required to provide such support; if Nguyen's mother had been the U.S. citizen instead of his father, then Nguyen would be a citizen, even though his mother took no part in his upbringing. The reason for the distinction lies in stereotype: the stereotype that a connection is automatically established between mothers and their children but not fathers and their children, and the stereotype that men, not women, are sole providers for their families. *See Miller*, 523 U.S. 488 (Breyer, J., dissenting) (noting that because "either men or women may be 'breadwinners,' one could justify [Section 1409's] gender distinction only on the ground that more women are caretakers than men, and more men are 'breadwinners' than women. This, again, is the kind of generalization that we have rejected as justifying a gender-based distinction in other cases").

As this Court has repeatedly recognized, the fact that such sex-based generalizations and stereotypes may contain a measure of truth or may be statistically defensible, does not justify the Government's reliance on those generalizations. *See J.E.B. v. T.B.*, 511 U.S. 127, 139 n.11 (noting that "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."). The Equal Protection Clause nevertheless prohibits using sex as a proxy for other characteristics unless it is supported by an "exceedingly persuasive" justification. *VMI*, 518 U.S. at 515, 537; *Mississippi Univ. for Women*, 458 U.S. at 718, 724. Here, the Government's justifications fall short of this high standard.

First, the relationship between Section 1409 and the purported governmental interest in fostering close ties between non-marital children and their citizen parents, far

from being "substantially related," is quite attenuated. The fact that mothers are not required to comply with the same special requirements imposed on fathers suggests that in enacting Section 1409, Congress was not overly concerned about limiting transmittal of citizenship at birth only to children who have close ties to a citizen parent. As noted above, a citizen mother who has provided no emotional or financial support to her child whatsoever can nevertheless transmit citizenship to the child at any point during the child's life upon proof of the requisite physical presence, nationality, and maternity. *See* 8 U.S.C. § 1409(c). Indeed, even Section 1409(a) does not require any actual evidence of close ties during the child's minority, but relies on support and paternity establishment as rough proxies for such ties.

Second, to the extent that the Government has a real concern about encouraging close ties between the non-marital child, the parent, and the United States, sex-based classifications are not necessary to satisfy that interest. Indeed, such ties are already encouraged by the statutory provisions remaining after the unconstitutional provisions challenged here are severed. *See* discussion *infra* at Part III. A. (discussing severance). Both Sections 1401(g) and 1409(c) include physical presence requirements applicable to the parent prior to the child's birth. These requirements mandate parental ties to the United States that may be shared with the child. Similarly, Sections 1409(a)(1) and (2) and Section 1409(c) require proof of the parent's United States citizenship at the time of birth, and the blood relationship between the parent and the child. All of these proof requirements contribute to encouraging a significant connection between the citizen parent, the child, and the United States, whether the parent is a mother or a father. Significantly, Congress has found such gender-neutral approaches satisfactory in other relevant contexts. *See, e.g.*,

8 U.S.C. § 1401(g) (according citizenship at birth to foreign-born marital child of U.S. citizen and alien based on gender-neutral criteria); Act of May 24, 1934, § 1, 48 Stat. 797 (according citizenship to foreign-born non-marital child of citizen parent based on gender-neutral criteria) (in effect from 1934 to 1940). *See also* 10 U.S.C. § 1447(11)(A)(iii) (child eligible for armed services survivor benefits includes "recognized natural child who lived with [covered parent] in a regular parent-child relationship."); 50 U.S.C. § 2002(b)(1)(A)(iii) (child eligible for benefits under CIA retirement and disability plan includes "recognized natural child").

2. The Sex-Based Classifications In Sections 1409(a)(3) And (4) Are Not Substantially Related To The Purported Government Interest Of Ensuring A Blood Tie Between The Parent And The Child And Reducing False Claims Of Citizenship

While Congress may properly seek to ensure that an individual who claims citizenship is truly a citizen's child, the statute already includes provisions – not challenged here – that meet this objective as to both parents in a gender neutral manner. Section 1409(a)(1) requires that paternity be established by "clear and convincing evidence." 8 U.S.C. § 1409(a)(1). Likewise, Section 1409(c) requires proof of maternity, which the Government has previously acknowledged is judged by "clear and convincing evidence."[7] Brief for Respondent at 31-32, *Miller v.*

[7] While a mother will generally be aware of the birth, proving maternity of a particular child may require additional evidence. A birth certificate will typically suffice, but such documentation is not always available, particularly in developing countries or areas in political turmoil. *See, e.g., Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995) (noting that

Albright, 523 U.S. 420 (1998) (No. 96-1060). Joseph Boulais met this requirement by taking a DNA blood test that confirmed Nguyen is his son. J.A. 15-19.

The statutory requirements challenged in this case – a written promise of support and legitimation or acknowledgement, both before age 18 – are additional to the requirement to submit clear and convincing evidence of paternity. However, given the accuracy of genetic tests, these requirements are unnecessary to the governmental objectives of ensuring a blood tie and discouraging fraud. *See Miller*, 523 U.S. at 487 (Breyer, J., dissenting) (distinguishing *Lehr v. Robertson*, 463 U.S. 248 (1983), in that it was "decided before the DNA advances" that make formal legitimation requirements unnecessary to prove paternity). Since the interests in accurately determining paternity and reducing false claims are squarely met by the gender neutral requirement of proving parentage by clear and convincing evidence, the Government's purported rationale for Section 1409(a)'s sex-based classifications is not an "exceedingly persuasive" justification.

Succinctly put, because genetic testing is widely available, accurate to more than 99 percent accuracy, and can be done at any time, time limits on establishing connections between fathers and their offspring are not necessary to reduce fraud.[8] As this Court squarely recognized even prior to enactment of Section 1409:

Ablang's birth certificate was eaten by white ants). Accordingly, under some circumstances a mother may also be required to submit to blood tests or other means of establishing her relationship to the child.

[8] The accuracy of current DNA testing has been widely accepted. *See, e.g.*, Comm. on DNA Tech. in Forensic Science, Nat'l Research Council, DNA Technology in Forensic Science (1992); David H. Kaye, *DNA*

> [A]dvances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.

Pickett v. Brown, 462 U.S. 1, 17-18 (1983). *See also* H.R. Rep. No. 98-527, at 38 (1983) (noting in amending federal child support statute, that recent "advances in scientific paternity testing eliminate the rationale" for arbitrary limitations on paternity establishment).[9]

The governmental interest in ensuring that only true children of American fathers claim citizenship is thus amply satisfied by Section 1409(a)(1). Genetic testing allows that provision's "clear and convincing" standard to shoulder the burden of meeting the government's interest. Because reliable genetic testing – which can be done at any time –

Evidence: Probability, Population Genetics, and the Courts, 7 Harv. J. L. & Tech 101 (1993); Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 B.Y.U. L. Rev. 129 (1994).

[9] The child support statute enacted by Congress specified the process by which paternity could be established only up to the child's 18th birthday because the parent's support obligation would cease after that date. There is no valid reason that a father's ability to transmit citizenship status should be similarly limited. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 466 (a) (5), 98 Stat. 1305, 1307 (1985).

levels the field between mothers and fathers in demonstrating that the children they claim are their actual children, it undermines any assertion that sex-based classifications are necessary to further that government interest.

In sum, the impermissible sex discrimination contained in Sections 1409(a)(3) and (4) is apparent on the face of the statute. There is no "exceedingly persuasive justification" to support this discriminatory scheme. The provision therefore cannot survive the test articulated by this Court in *VMI*.

II. SEX-BASED DISCRIMINATION IN STATUTORY CITIZENSHIP AT BIRTH IS SUBJECT TO HEIGHTENED SCRUTINY

The Government has further asserted that even if the statute is discriminatory, it is beyond the Court's power to provide a remedy. These arguments are without merit. Neither Congress's plenary power over immigration nor limitations on this Court's remedial authority bar Petitioners' claim to non-discriminatory access to citizenship at birth.

A. Statutory Citizenship At Birth Is Distinct From Immigration and Naturalization

This case concerns the right of American citizen Joseph Boulais to be free of discrimination in transmitting statutory "citizenship at birth" to his son Nguyen, establishing that his son rightfully is, and for years has been, an American citizen. *See, e.g., Miller v. Albright*, 523 U.S. at 432 (Stevens, J.) (noting that judgment in Miller's favor would "confirm her pre-existing citizenship rather than grant her rights that she does not now possess").

It is beyond dispute that citizenship is an important and unique right. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (the right of citizenship is "a most precious right"). Congress's provision of citizenship at birth to children born abroad to citizen parents is clearly distinct from the regulation of immigration, where Congress exercises its authority to exclude persons for whom it recognizes *no* present claim to citizenship, or even entry. *See Miller v. Albright*, 523 U.S. at 433 n.10 (Stevens, J.) (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), because complainants were not citizens or nationals of the United States).

Similarly, though naturalization rests on proven ties to the United States, it is legally distinct from statutory citizenship at birth. Once the conditions for statutory citizenship at birth are met, an existing status is recognized; in contrast, citizenship through naturalization accords a new status that begins only when naturalization is complete. *Compare* 8 U.S.C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person *after* birth, by any means whatsoever") (emphasis added) *with* 8 U.S.C. § 1409(a) (acknowledging citizenship "as of the date of birth").[10] Accordingly, recognition of citizenship

[10] In addition, naturalized citizens who secure citizenship after birth cannot serve as President or Vice President, since the United States Constitution requires that such an officer holder be a "natural born" citizen. U.S. Const. art. II, § 1, cl. 5. *See Schneider v. Rusk*, 377 U.S. 163, 165, 177 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946) (citing *Luria v. United States*, 231 U.S. 922 (1913)). While there has been considerable debate on this subject, most commentators have concluded that statutory citizens at birth are eligible for these positions. *See* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach*

at birth does "not involve the transfer of loyalties that underlies the naturalization of aliens." *Miller*, 523 U.S. at 478 (Breyer, J., dissenting). This is particularly true because under Section 1409, Congress has linked statutory citizenship at birth to clear and convincing proof of a blood relationship with an American citizen parent, ensuring that citizenship at birth coincides with and reinforces a significant familial connection. 8 U.S.C. § 1409(a)(1), (c); *see also* Brief for Respondent at 31-32, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060).

B. Whatever Plenary Power Congress May Possess Over Immigration Does Not Bar Heightened Scrutiny Of Section 1409(a)

1. This Court Has Never Extended Plenary Power To Citizenship At Birth

Petitioners here are entitled to the protection of the Equal Protection Clause. While the Court has often referred to the "plenary power" of the federal political branches in regulating immigration to the United States, this Court has never permitted Congress's plenary power to shield citizenship at birth laws from constitutional scrutiny. Indeed, in *Miller v. Albright*, seven members of this Court examined a putative citizen's challenge to Section 1409(a) on equal protection grounds without according any special deference to Congress. *See* 523 U.S. at 433-41 (Stevens, J.) (employing heightened scrutiny); *id.* at 476 (Breyer, J, dissenting) (employing heightened scrutiny); *id.* at 451 (O'Connor, J., concurring in judgment) (employing rational

for Resolving Two Hundred Years of Uncertainty, 97 Yale L.J. 881 (1988).

basis scrutiny in light of petitioner's lack of standing to raise constitutional sex discrimination claims). *See also Lake v. Reno*, 226 F. 3d 141, 148 (2d Cir. 2000) ("As a United States citizen, Joseph Lake's claim of equal protection . . . is not governed by the standards applied to equal protection claims of aliens, and we have found no case holding otherwise."); *Breyer v. Meissner*, 214 F.3d 416, 424 (3d Cir. 2000) ("Because [this statute] created a gender classification with respect to Breyer's mother's ability to pass her citizenship to her foreign-born child at his birth, the action is subject to heightened scrutiny."); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1414 (9th Cir. 1993) ("decision as to who is a citizen in the first instance" is "fundamentally different from one concerning individuals as to whose alienage there exists no dispute, such that we should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it").

Miller v. Albright is only the most recent confirmation of this principle. In *Rogers v. Bellei*, 401 U.S. 815, 828-36 (1971), this Court similarly scrutinized a statute governing citizenship at birth in accordance with constitutional standards. In *Rogers*, the foreign-born plaintiff child of a United States citizen mother challenged the gender-neutral five-year residency requirement then imposed on such children who wished to claim statutory citizenship at birth. In upholding the residency requirements, this Court did not rebuff the plaintiff as an alien without standing to raise such constitutional arguments. Rather, the Court acknowledged that Bellei was a citizen for purposes of his claim until such time as the Court determined that he had failed to meet any permissible conditions placed on his citizenship by Congress. *See id.* at 827 (noting plaintiff's claim to "continuing" citizenship). Nor did the Court simply defer to Congress's judgment as to what conditions to place on

statutory citizenship at birth. Instead, the Court satisfied itself that the congressional scheme reflected "careful consideration," and was "purposeful, not accidental." *Id.* at 833. In the absence of a classification requiring heightened review, this Court exercised rational basis scrutiny under the Due Process Clause of the Fifth Amendment, holding that while the residency requirement "may not be the best that could be devised . . . we cannot say that it is irrational or arbitrary or unfair." *Id.*

The Government nevertheless argued below that *Fiallo v. Bell*, 430 U.S. 787 (1977), warrants deference in this case. But as the court of appeals correctly concluded, *Fiallo* does not control here because this case concerns recognition of citizenship at birth, not immigration – a distinction also recognized by the *Fiallo* Court itself. *Nguyen*, 208 F.3d at 534-535; Pet. App. 11a. In *Fiallo*, three sets of unwed natural fathers and their children each sought a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent. Rather than employ full-fledged constitutional scrutiny, this Court deferred to Congress's plenary power in setting immigration policy, examining only whether the challenged statute was based on a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794. The Court indicated, however, that such deference would not extend beyond immigration, since "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 792. *See also Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (there is "a legitimate distinction between citizens and aliens [that] may

justify attributes and benefits for one class not accorded to the other").[11]

Given the rationale for the plenary power doctrine, there is good reason not to extend its lenient standard of review to statutory citizenship at birth. Principal among the purposes of the plenary power doctrine was this Court's recognition that Congress and the Executive exercised authority for foreign relations, and that regulation of immigration was a component of that authority *Mathews v. Diaz*, 426 U.S. at 81 n.17 (1976). Citizenship at birth, however, has little relevance to Congress's foreign relations power. Rather, citizenship at birth constitutes recognition of a long-standing status created at the time of a child's birth by virtue of the child's parentage. Plainly, Congress should not have the same broad leeway to draw lines between citizens that may be necessary when dealing with immigration or naturalization. It is unthinkable, for example, that this Supreme Court would defer to Congress's enactment of a law requiring black citizen parents seeking *jus sanguinis* citizenship for their children to submit additional proof beyond that required of white citizen parents. As Justice Breyer cautioned in *Miller*, applying an unusually lenient constitutional standard of review to statutory citizenship at birth would ensure that such statutes – which also apply to married American couples traveling or working abroad – "could discriminate virtually free of independent judicial

[11] Though this Court has sometimes employed more relaxed review when examining immigration provisions affecting the constitutional rights of United States citizens, *see, e.g., Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977), such deference is not appropriate when citizenship at birth is the sole issue. *Kleindienst* and *Fiallo* directly concerned immigration benefits sought by or on behalf of aliens, and therefore implicated the considerations that underlie the plenary power doctrine in a way that citizenship at birth does not.

review," placing many children "outside the domain of basic constitutional protections." 523 U.S. at 478 (Breyer, J., dissenting).

None of this is to suggest that Joseph Boulais holds any constitutional right to convey citizenship at birth to his son. Indeed, this is the significance of *Rogers v. Bellei*, 401 U.S. 815 (1971), which held that there is no Fourteenth Amendment right to acquisition of citizenship by being born abroad of an American parent. *Id.* at 831. However, this Court has repeatedly recognized that it is immaterial whether a right is constitutionally or statutorily based for purposes of evaluating whether there is unconstitutional discrimination. Even when the government acts through statute to grant rights that it is under no constitutional mandate to grant, it may not do so in a discriminatory manner. *See Califano v. Westcott*, 443 U.S. 76, 85 (1979) (prohibiting discriminatory distribution of Aid to Families With Dependent Children even though benefits granted by statute); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (barring gender discrimination in statutory old-age insurance); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (holding that dependency test on men but not women to qualify for dependents' benefits under Social Security statute violates the Equal Protection Clause); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 653 (1975) (holding that statutory Social Security widow's benefits must be distributed in a way that does not violate the Equal Protection Clause).

2. Congress's Plenary Powers Have Not Barred Heightened Scrutiny Of Constitutional Violations In Other Areas

Recognition that the citizenship at birth statute is subject to heightened scrutiny is consistent with this Court's rulings

in other substantive contexts where Congress is accorded substantial deference. In none of these contexts has the Court suspended the operation of the Equal Protection Clause.

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), for example, this Court made clear that even though enormous deference is due to Congress's exercise of its sovereign power over national security and foreign affairs, such deference does not trump the heightened scrutiny standards of the Equal Protection Clause. *Rostker* concerned a challenge to a congressional statute requiring only men to register for the draft. A group of male plaintiffs sued arguing that the statute violated equal protection under the Due Process Clause of the Fifth Amendment. In reviewing that argument, the Court first stressed that "[t]he case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64-65. Nevertheless, the *Rostker* Court explained that, even though deference may be due because of the "context" of the "congressional choice," still:

> Congress is [not] free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . .

Id. at 67 (internal citations omitted).

Similarly, this Court has stated that taxation is "the exercise of the most plenary of sovereign powers," *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932), and has noted Congress's "broad power in this area." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550

(1983). Nevertheless, there is no dispute that a higher standard of review is appropriate if a tax provision employs a suspect classification, such as race. *Id.* at 547-48. *See also Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (striking down sex-based classification).

Clearly, appropriate deference to congressional choices need not mean giving the legislature carte blanche to create discriminatory schemes based on impermissible stereotypes and antiquated classifications. Constitutional scrutiny of congressional action with respect to putative citizens should be no less rigorous than that applied to these other sensitive areas.

III. AS IN OTHER EQUAL PROTECTION CHALLENGES TO FEDERAL AND STATE STATUTES, THIS COURT CAN PROPERLY GRANT RELIEF BY SEVERING THE OFFENDING PROVISION

A. Congress Would Have Favored Severing The Offending Provision Had It Known Of Its Unconstitutionality

The Equal Protection Clause requires this Court to hold Sections 1409(a)(3) and (4) unconstitutional. In such circumstances, the remedy should respect Congress's choices to the extent possible, based on an evaluation of what Congress would have done had it known of the statute's unconstitutionality. *See INS v. Chadha*, 462 U.S. 919, 931-32 (1982) (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). *See also New York v. United States*, 505 U.S. 144, 186 (1992). This inquiry is eased considerably because Congress has explicitly provided for severance by including a

severability clause in the statute. A severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Absent strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. *Id.*

Here, the severance clause included in the INA directs this Court to strike the unconstitutional provisions. *See Chadha*, 462 U.S. at 932 (reconstruction of congressional intent not necessary in light of INA's severance clause).[12] Once severed, the requirements of Section 1409(a)(3) and (4) no longer restrict the conferral of citizenship under 8 U.S.C. § 1401(g) upon children born outside the United States to a citizen father and alien mother. It is undisputed that Boulais meets the remaining requirements under Sections 1409(a)(1) and (2), and Section 1401(g), which would continue to be "fully operative as law." *Chadha*, 462 U.S. at 934 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)). *See also United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999) (striking Sections 1409(a)(3) and (4) and applying remaining provisions to establish citizenship). There is no evidence whatsoever that Congress intended any other result.

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[12] The severability clause provides:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Immigration and Nationality Act, Pub. L. No. 82-414, § 406, 66 Stat. 163, 281 (1952).

This approach is sound for several reasons. First, severance is favored because, as Congress intended when it enacted the severance clause of the INA, it leaves the constitutional portions of the statute intact. This Court has frequently employed this type of localized, minor surgery, particularly when it seeks to avoid rewriting complex legislation. *See Reno v. ACLU*, 521 U.S. 844, 882-83 (1997) (honoring severability clause to sever unconstitutional portion of Communications Decency Act and leave intact remainder of provision); *Chadha*, 462 U.S. 919, 934-35 (1982) (employing severability clause to sever unconstitutional provision of INA). As this Court noted in *Califano v. Wescott*, 443 U.S. 76 (1979), the presence of a "strong severability clause . . . evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." 443 U.S. at 90.

Second, severing Sections 1409(a)(3) and (4) comports with the overall statutory scheme. The "virtually unbroken tradition" of transmitting American citizenship from parent to child "at birth," subject only to certain residency requirements, *Miller*, 523 U.S. at 478 (Breyer, J., dissenting), requires a remedy that ensures the continued ability of parents to transmit *jus sanguinis* citizenship to their children. Striking the entire statute, or imposing the more stringent legitimation requirements and time limits now applicable to fathers on all parents, would frustrate Congress's intent. *See Califano v. Wescott*, 443 U.S. 76, 89-90 (1979) (approving extension of statute to excluded class); *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (invalidating statutory schemes only "insofar as they require a female member [of the military] to prove the dependency of her husband"). Further, as discussed *supra* at Point I.B.1., the statute is not finely honed to achieve its asserted governmental purpose,

but relies on rough (and therefore, often inaccurate) proxies to assess whether non-marital children have ties to their citizen parents and the United States. Thus, eliminating sex-based classifications by striking Sections 1409(a)(3) and (4) will not undermine some precise and refined statutory scheme.

Third, severance of Sections 1409(a)(3) and (4) fully redresses the unconstitutionality challenged in this action. As discussed in Point I, *supra*, citizen mothers are essentially required to prove three elements under the current statute: physical presence, nationality, and maternity. 8 U.S.C. § 1409(c). While the statute does not specify a standard of proof applicable to establishing maternity, the Government has conceded that the standard is "clear and convincing" evidence. Brief for Respondent, at 32, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060) (stating there is "little practical difference in the proof of blood relationship required" for mothers and fathers). Upon severance of Sections 1409(a)(3) and (4), citizen fathers will also be required to prove three elements to transmit citizenship to their out-of-wedlock children: physical presence, nationality, and paternity. Thus, this is a case in which this Court can easily cure the challenged unconstitutionality.[13]

Finally, this approach is particularly appropriate where, as here, the "question is not one of zero-sum competition between males and females as mothers and fathers, but of the ability of each to transmit benefits to . . . their children." Mary Ann Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for*

[13] While mothers will remain subject to different physical presence requirements than fathers, Boulais meets the requirements applicable to fathers under Section 1401(g), and thus does not challenge that provision.

Perfect Proxies, 85 Cornell L. Rev. 1447, 1480 (2000) (discussing potential remedies in *Miller*). In contrast to circumstances addressed in *Rainey v. Chever*, 527 U.S. 1044 (1999), *denying cert. to* 510 S.E. 2d 823 (Ga. 1999) (Thomas, J., dissenting) (concerning inheritance), *Lehr v. Robertson*, 463 U.S. 248 (1983) (concerning consent to adoption), or *Parham v. Hughes*, 441 U.S. 347 (1979) (concerning wrongful death), where finite benefits are at issue and must be fairly distributed among multiple parties with legitimate and competing claims, generosity to fathers in expanding rights to transmit citizenship undermines no one else's claims or rights. *See* Mary Ann Case, *supra* at 1483. Thus, considerations that might augur in favor of contracting, rather than expanding, rights are absent here.

B. This Court's Exercise Of Its Remedial Authority To Strike The Discriminatory Provisions Of Section 1409(a) Does Not Constitute An Illicit Grant Of Citizenship

Boulais and Nguyen do not ask this Court to "grant" citizenship. In upholding Boulais's claim that he is entitled to transmit citizenship at birth to his son, this Court will not be impermissibly exercising a power reserved to Congress, but will be simply acknowledging Nguyen's pre-existing status, which began at birth. *See Miller*, 523 U.S. at 432 (Stevens, J.) (judgment for plaintiff in *Miller* "would confirm her pre-existing citizenship rather than grant her rights that she does not now possess"); *id.* at 489 (Breyer, J., dissenting) (acknowledging citizenship at birth does not intrude on congressional power); *Rogers v. Bellei*, 401 U.S. 815, 827 (1971) (noting claim for "continuing" citizenship). In the absence of the unconstitutional portions of Section 1409(a), Nguyen's citizenship at birth can now be confirmed through regular administrative channels. Boulais and Nguyen ask

simply that this Court remove those unconstitutional impediments and let the remaining statute operate on Nguyen's behalf.

While the Government suggested in its brief in opposition to *certiorari* in this case, that *INS v. Pangilinan*, 486 U.S. 875 (1988), bars this Court from exercise of its equitable power to remedy the unconstitutionality here, this is a misstatement of the case. *See* Resp't Op. Cert. Br. at 8 n.4. *Pangilinan* concerned a group of Filipino nationals who would have been eligible for naturalization under the Nationality Act of 1940 if they had filed their applications before December 31, 1946. More than 30 years later, they sought equitable relief for their failure to timely file claiming, among other things, that official acts of the United States government had frustrated their efforts to meet the deadline. This Court found that the official acts complained of did not give rise to a violation of the Fifth Amendment, *see id.* at 885-86, and further, that under the circumstances, the courts had no authority to fashion an equitable remedy according citizenship to the plaintiffs. *See id.* at 883-84.

Far from limiting this Court's ability to remedy unconstitutionality, *Pangilinan* simply held that no equitable remedy was available *in the absence* of any unconstitutional government action. *See id.* Had this Court intended to outlaw all equitable relief in immigration-related matters, there would have been no need to separately opine on the absence of any constitutional due process violation. Instead, the Court's opinion stands solely for the proposition that equitable relief is not available in the absence of any actionable constitutional violation. *See Wauchope*, 985 F. 2d at 1418 (stating that *Pangilinan* "does not speak to the courts' capacity to utilize traditional constitutional remedies to rectify constitutional violations"). Moreover, the relief

barred by this Court in *Pangilinan* was the equitable grant of naturalized citizenship. In sharp contrast, the relief sought here is not this Court's *grant* of citizenship at birth, but severance of unconstitutional provisions of the Immigration and Naturalization Act that violate petitioners' equal protection rights. *See Lake v. Reno*, 226 F. 3d 141, 148-49 (2d Cir. 2000) (holding that *Pangilinan* is limited to naturalization and is "inapposite" to citizenship at birth claim).

Though *Pangilinan* itself is inapposite, the Court should not lose sight of the extreme nature of the position the Government asks it to embrace. Under the Government's view, no court could ever resolve the constitutionality of a statutory provision affecting citizenship because the remedy sought in such cases – striking the offending provision – would result in the conferral of citizenship contrary to Congress's precise intent in enacting the statute. Thus, under this view, a statute that conferred citizenship upon only the children of white citizens would be beyond this Court's power to cure because the remedy – extending the benefits of the statute to the excluded non-white class – would violate the principle that "only Congress has the power to set requirements for acquisition of citizenship by persons not born within the territory of the United States." *Miller*, 523 U.S. at 456 (Scalia, J., concurring in the judgment). Neither the Constitution nor case law support such a crabbed view of this Court's remedial authority.

This, however, is not a case where Congress evinced an intent to deny citizenship to a particular group – here, the children of citizen fathers. To the contrary, Congress explicitly intended members of this group to receive the benefits of citizenship. The offending provision merely places an unconstitutional procedural burden on this group to

achieve recognition of their status. The remedy sought by Boulais and Nguyen – acknowledgement of Nguyen's citizenship at birth – is effectuated by the statute itself once this Court has taken the step of striking the unconstitutional provisions of Section 1409(a) in accordance with the INA's severability clause. Far from usurping Congress's authority, this approach respects congressional intent to extend uninterrupted benefits under the statute even if unconstitutional portions are severed. This relief is well within this Court's authority.

CONCLUSION

For the foregoing reasons, the Court should declare 8 U.S.C. §§ 1409(a)(3) and (4) unconstitutional and reverse the judgment below.

Respectfully submitted,

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