No. 09-5801

IN THE

Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU of San Diego & Imperial Counties is a regional affiliate of the national ACLU.

The ACLU has appeared before this Court in numerous equal protection cases as both direct counsel and *amicus curiae*, including *Miller v. Albright*, 523 U.S. 420 (1998), and *Nguyen v. INS*, 533 U.S. 53 (2001). Through its Women's Rights Project, the ACLU has litigated many cases concerning constitutional challenges to gender-based classifications. The ACLU's Immigrants' Rights Project engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* its members or its counsel made a monetary contribution to this brief's preparation or submission.

STATEMENT OF THE CASE

Petitioner Ruben Flores-Villar was born in Mexico in 1974. *U.S. v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008). His father, a U.S. citizen, brought the Petitioner to the U.S. when he was only two months old, legally acknowledged paternity, and raised him in this country. *Id.* Petitioner's mother, a foreign national, took no part in his upbringing. Pet'r Br. at 2, 8.

At the time of the Petitioner's birth, the following provisions governing statutory birthright citizenship were in force:

8 U.S.C. § 1401(a)(7) (1970) (emphasis added)

> (a) The following shall be nationals and citizens of the United States at birth:
>
> > (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, *at least five of which were after attaining the age of fourteen years* . . .

8 U.S.C. § 1409(c) (1970) (emphasis added)

> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . . outside 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*.

The statute thus imposes disparate requirements on U.S. citizen fathers and mothers for the transmission of citizenship to children born out of wedlock. A mother needs to have been present in the U.S. for a period of only one year, any time before the child's birth, in order to transmit citizenship. 8 U.S.C. § 1409(c) (1970). On the other hand, a father must legitimate the child while he or she is under the age of 21 and must have resided in the U.S. for a period of ten years before the child's birth, at least five of which were after the father was 14 years old. 8 U.S.C. §§ 1401(a)(7), 1409(a) (1970).

The Petitioner's father legitimated his son and resided in the U.S. for more than ten years prior to Petitioner's birth. However, he could not meet the five-year prong of the residency requirement because he was 16 years old when Petitioner was born (and the five years must accrue after the father turns 14). Pet'r Br. at 1.

After he was charged in 2006 with illegally reentering the U.S. in violation of 8 U.S.C. § 1326, Petitioner sought to raise a citizenship defense. Pet'r Br. at 3. However, his application for a Certificate of Citizenship was denied. The government stated:

> The fact of your legitimation is not in question. . . . Since your father was only

> sixteen at the time of your birth, *it is physically impossible for him to have [the] required physical presence necessary (five years after age fourteen)* in order for you to acquire United States citizenship through him.

Id. (emphasis added).

The Petitioner challenged the gender-based residency requirements on equal protection grounds in his criminal prosecution. The trial court upheld the law under both heightened scrutiny and rational basis review. *U.S. v. Flores-Villar*, 497 F. Supp. 1160, 1164 (S.D. Cal. 2007). The Court of Appeals affirmed. The Ninth Circuit assumed without deciding that heightened scrutiny applied, and found that the gender classification substantially furthered the important governmental interest in "[a]voiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen." 536 F.3d at 996.

SUMMARY OF ARGUMENT

At issue in this case are gender-based residency requirements that absolutely bar some U.S. citizen fathers from transmitting citizenship to their children. If Petitioner's mother had been a U.S. citizen with the same history of residency in the United States as his father, Petitioner would be a citizen today. Instead, the law makes it literally impossible for Petitioner's father to transmit citizenship to his son.

Amici submit this brief to address two points regarding the applicable level of equal protection scrutiny. First, the Court should apply heightened scrutiny, as it ordinarily does in gender discrimination cases, and should reject the government's request for a more deferential standard of review based on the plenary power doctrine. Second, in invalidating the law, this Court should correct the Court of Appeals' misapplication of the heightened scrutiny standard by making clear that the Ninth Circuit failed to require a sufficiently substantial fit between the gender-based classification and the governmental interest, and failed to require a sufficiently persuasive justification for relying on gender as a proxy.

1. Under this Court's precedents, former 8 U.S.C. §§ 1401(a)(7) and 1409 are subject to heightened scrutiny because they facially discriminate on the basis of gender.[2] The government contends, however, that heightened scrutiny is the wrong standard because this case involves Congress's plenary power over immigration and argues that the Court should therefore apply a more deferential standard, as the Court has done in

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[2] These provisions were amended in 1986. Immigration and Nationality Act, Pub. L. 99-653, 100 Stat. 3657 (1986). Because Petitioner was born before the amendments, the former 8 U.S.C. §§ 1401(a)(7) and 1409 are applicable. Under the current version of the statute, fathers of children born out of wedlock must have five years of total residency, with at least two years occurring after the age of 14 years old, in order to transmit citizenship. 8 U.S.C. §§ 1401(g), 1409(a) (2010). Mothers must have one continuous year of residency prior to the child's birth. 8 U.S.C. § 1409(c) (2010).

immigration cases such as *Fiallo v. Bell*, 430 U.S. 787 (1977). Cert. Opp. at 11. But here, birthright citizenship is at issue, and not Congress's traditional immigration or naturalization powers. *Amici* are not aware of any case in which the Court has applied the plenary power doctrine in a case involving birthright citizenship.

Even assuming, however, that the Court were to view birthright citizenship as falling within the scope of Congress's immigration powers, the Court should nonetheless apply heightened scrutiny, and not the deferential standard of review applied in *Fiallo*. Since *Fiallo*, the Court has rejected attempts to shield congressional action on immigration matters from meaningful judicial scrutiny. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (detention). More particularly, since *Fiallo* was decided, this Court has made unequivocally clear, in numerous cases, that heightened scrutiny should be applied whenever laws explicitly discriminate on the basis of gender. Consequently, at least in immigration cases involving discrimination on the basis of gender, the Court should apply heightened scrutiny. Whether the plenary power doctrine should be discarded altogether in light of modern developments is not an issue that need be addressed, as this case unquestionably involves an explicit gender-based classification.

2. Once former 8 U.S.C. §§ 1401(a)(7) and 1409 are analyzed under this Court's precedents on heightened scrutiny, it is clear they fail to meet that demanding standard. The government has not demonstrated that the gender classification is

substantially related to an important governmental interest. Rather than reducing statelessness for children of U.S. citizen parents, the differential residency requirements exacerbate the risk that children of U.S. citizen fathers will be rendered stateless simply because of the sex of their U.S. citizen parent. The law violates the right to equal protection by creating an insurmountable hurdle to citizenship transmission for some fathers and cannot be justified as a beneficent allowance to U.S. citizen mothers.

ARGUMENT

I. HEIGHTENED SCRUTINY IS THE PROPER STANDARD OF EQUAL PROTECTION REVIEW.

Amici agree with Petitioner that Congress's plenary power over immigration matters does not justify reducing the level of equal protection scrutiny applicable here. Pet'r Br. at 15-19. Statutory citizenship at birth is not an immigration or naturalization matter, and this Court has never applied the plenary power doctrine to birthright citizenship laws. Thus, because immigration is not at issue here, the Court need not decide whether Congress's plenary power over immigration and naturalization would otherwise alter the level of scrutiny. But, even if birthright citizenship were deemed to be within the scope of Congress's plenary immigration power, the Court should nonetheless hold, consistent with its post-*Fiallo* precedents, that heightened scrutiny applies where Congress explicitly legislates on the basis of gender.

A. The Court Need Not Decide Whether The Plenary Power Doctrine Limits The Level Of Equal Protection Scrutiny Because This Case Involves Birthright Citizenship.

1. Statutory Citizenship At Birth Does Not Involve Immigration Or Naturalization.

Congress's conferral of citizenship at birth to children born abroad to citizen parents is fundamentally distinct from the regulation of immigration. At its core, the immigration power pertains to Congress's authority to exclude persons for whom it recognizes no present claim to citizenship, or even entry. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners . . . ."); *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting) ("The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place.").

In contrast, this case concerns the right of a U.S. citizen to transmit his citizenship to his citizen or putative citizen child based on a significant familial connection. It is beyond dispute that citizenship is an important and unique right. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (recognizing that the right of citizenship is "a most precious right"); *see also Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do

so under the name of one of its general or implied grants of power. . . . [The] citizenry is the country and the country is its citizenry."). While Congress may generally restrict the conferral of *jus sanguinis* citizenship by statute, Congress's determinations in this regard must satisfy constitutional standards, including equal protection.[3]

Similarly, although citizenship through naturalization rests upon proven ties to the country, it is legally distinct from statutory citizenship at birth. Naturalization involves acquisition of a new status that begins only when naturalization is complete. *See* 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).

Statutory citizenship at birth constitutes recognition of a status created at the time of the child's birth by virtue of the child's parentage. If the conditions for statutory citizenship at birth are met, that existing status is recognized. *See* 8 U.S.C. § 1409(a) (acknowledging citizenship "as of the date of birth"); *see also Miller*, 523 U.S. at 432 (Stevens, J.) (explaining that a judgment in Miller's favor would "confirm [the petitioner's] pre-existing citizenship

[3] Even where 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, e.g.*, *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).

rather than grant her rights that she does not now possess").[4]

Statutory citizenship at birth thus does "not involve the transfer of loyalties that underlies the naturalization of aliens." *Miller*, 523 U.S. at 478 (Breyer, J., dissenting); *see also id.* at 481 ("[T]he statutes that automatically transfer American citizenship from parent to child 'at birth' differ significantly from those that confer citizenship on those who originally owed loyalty to a different nation."). Perhaps in light of these distinctions between naturalized citizens and "natural born" citizens, the Framers chose to disqualify naturalized citizens from serving as President or Vice President. U.S. Const. art. II, § 1, cl. 5.[5]

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[4] The Immigration and Nationality Act contains several categories of citizens at birth, including some categories not based on any relationship to a citizen parent. In addition to the type of citizenship at issue here, the categories of birthright citizenship include persons born in the United States to a member of an American Indian or other native tribe (8 U.S.C. § 1401(b)), children of unknown parentage found in the U.S. (8 U.S.C. § 1401(f)), persons born in Puerto Rico (8 U.S.C. § 1402), and persons born in the Panama Canal Zone (8 U.S.C. § 1403), as well as persons born in the U.S. who are subject to U.S. jurisdiction (8 U.S.C. § 1401(a)).

[5] While there has been no shortage of debate on the question, most commentators take the view that statutory citizens at birth are eligible, as "natural born" citizens, to serve as President or Vice President under the Qualifications Clause. *See, e.g.*, Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968).

2. The Court Has Never Extended The Plenary Power Doctrine To Citizenship At Birth.

So far as we have been able to determine, this Court has never exempted birthright citizenship determinations from ordinary constitutional analysis, much less held that heightened scrutiny would not apply if such determinations were based on explicit gender classifications. *See Miller*, 523 U.S. at 480 (Breyer, J., dissenting) ("The Court to my knowledge has never said, or held, or reasoned that statutes automatically conferring citizenship 'at birth' upon the American child of American parents receive a more lenient standard of review."); *see also Nguyen*, 533 U.S. at 97 (O'Connor, J., dissenting) ("Because §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply.").

In *Rogers v. Bellei*, 401 U.S. 815 (1971), for example, the Court scrutinized a statute governing citizenship at birth under ordinary constitutional standards. In that case, the foreign-born plaintiff child of a U.S. citizen mother challenged the five-year residency requirement then imposed on such children who wished to claim statutory citizenship at birth. In upholding the residency requirements, the Court did not treat the plaintiff as an alien without standing to raise such constitutional arguments, nor did it lower the standard of review based on the plenary power doctrine. 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 conditions lawfully placed on his citizenship by Congress. *See id.* at 827 (noting plaintiff's claim to "continuing" citizenship). *Accord Nguyen*, 533 U.S. at 96-97 (O'Connor, J., dissenting) ("A predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens. But whether that predicate obtains is the very matter at issue in this case."); *see also Miller*, 523 U.S. at 433 n.10 (Stevens, J.).

Nor did the Court in *Bellei* 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." 401 U.S. at 833. In the absence of a classification requiring heightened review (the statute there was gender-neutral), the Court exercised rational basis review, 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.* Critically, the Court did not apply a more deferential standard of review pursuant to the plenary power doctrine.

Here, however, the Court of Appeals relied on *Fiallo* in concluding that the gender-based provisions at issue must be assessed in light of "the virtually plenary power that Congress has to legislate in the area of immigration and *citizenship*." *Flores-Villar*, 536 F.3d at 996 (citing *Fiallo*, 430 U.S. 791-93) (emphasis added). Yet unlike this case, *Fiallo* did not involve a citizenship claim, much less a birthright citizenship claim.

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. Thus, because *Fiallo* involved immigration benefits, it does not resolve the appropriate level of equal protection scrutiny where Congress draws explicit gender-based lines in the context of *birthright* citizenship. *See, e.g.*, *Miller*, 523 U.S. at 429 (Stevens, J.) (*Fiallo* "involved the claims of several aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen."); *see also id.* at 432-33; *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting) ("*Fiallo* . . . is readily distinguished. *Fiallo* involved constitutional challenges to various statutory distinctions, including a classification based on the sex of a United States citizen or lawful permanent resident, that determined the availability of a special immigration preference to certain aliens by virtue of their relationship with the citizen or lawful permanent resident.").

Congress's decisions regarding the identity of our citizenry must not be permitted to be infected with discrimination that is tolerated neither by our legal system nor our society in other contexts. As Justice Breyer cautioned in *Miller*, applying a "specially lenient" standard to statutory citizenship

at birth would mean that such statutes "could discriminate virtually free of independent judicial review." 523 U.S. at 478 (Breyer, J., dissenting). *Cf. Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion) (holding that a statute stripping military deserters of U.S. citizenship was unconstitutional, and observing that "[w]hen it appears that an Act of Congress conflicts with [a constitutional] provision[], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.").

For centuries, Congress has recognized that birth to a United States citizen is a sufficiently strong tie to this country to make a child eligible for citizenship at birth. Because this case involves birthright citizenship, heightened scrutiny is the appropriate standard of review. The Court need not determine, therefore, whether the plenary power doctrine would otherwise dictate a more deferential standard of review if this were a traditional immigration or naturalization case.

B. Heightened Scrutiny Is The Proper Standard Even If The Court Were To View Birthright Citizenship As A Traditional Immigration And Naturalization Issue.

Even if the Court were to conclude that birthright citizenship is an immigration and naturalization issue, heightened scrutiny is nonetheless the applicable standard. As an initial matter, the Court's recent immigration precedents have taken a more measured approach to the plenary

power doctrine than suggested by the government in this case. Indeed, since *Fiallo*, the Court has been increasingly reluctant to insulate immigration legislation from searching constitutional scrutiny. *See*, *e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32-35, 37 (1982) (holding that exclusion procedures for lawful permanent residents returning from brief trips abroad must comply with due process); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (invalidating a provision authorizing one house of Congress to veto a decision by the Executive to grant relief from deportation, stating that although "[t]he plenary authority of Congress over aliens . . . is not open to question," the Court must inquire into "whether Congress has chosen a constitutionally permissible means of implementing that power"); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (rejecting government's argument that the plenary power doctrine justified an expansive construction of statute authorizing immigration detention, emphasizing that a "statute permitting indefinite detention of an alien would raise a serious constitutional problem"); *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (construing provision of immigration statute to avoid Suspension Clause concerns); *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2262 (2008) (holding that statute applicable to noncitizens detained at Guantanamo was unconstitutional, stating that "[i]f the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause").

The Court's recent measured approach to the plenary power doctrine is appropriate given the extraordinary nature of the doctrine. But the Court need not decide in this case whether the plenary power doctrine should generally be discarded or tempered in all immigration contexts, because this case involves discrimination on the basis of gender. At least in such cases, the Court ought to apply ordinary constitutional standards of review, and reject the outdated *Fiallo* approach.

Rejecting the *Fiallo* approach in this case is especially appropriate in light of this Court's post-*Fiallo* gender precedents. Indeed, it was after *Fiallo* was decided that this Court issued its "pathmarking decisions" instructing that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citation omitted). Both *Virginia* and the "pathmarking decisions" it cited, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), were handed down after *Fiallo*.

In particular, *J.E.B.* emphasized in categorical terms that "[the] long and unfortunate history of sex discrimination" in this country "warrants the heightened scrutiny we afford *all* gender-based classifications today." 511 U.S. at 136 (emphasis supplied). And since that time, the Court has continued to make clear that heightened scrutiny is the proper standard whenever laws are drawn in explicitly gender-based terms. *See*, *e.g.*, *Nevada*

Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

To allow gender discrimination to exist in one area of the law damages the entire fabric of the Court's equal protection jurisprudence and perpetuates the harms that jurisprudence seeks to eliminate. *See, e.g.*, *Nguyen*, 533 U.S. at 83 (O'Connor, J., dissenting). It also sounds a powerfully negative message that the Nation's highest institutions do not truly believe that unequal treatment on the basis of gender is *always* intolerable. *Id.* at 74.

As the Court has repeatedly made clear, the purpose of applying heightened scrutiny is to ensure that the Court can flush out instances where the legislature has relied on antiquated views: "[T]his Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.'" *J.E.B.*, 511 U.S. at 135 (citations omitted).

In sum, the Court should reject the government's request for deferential review and should apply heightened scrutiny because this case involves birthright citizenship laws that are based on explicit gender classifications. Indeed, the logical consequence of the government's argument is that the plenary power doctrine would not only dictate a deferential standard of review in gender cases, but

also where Congress enacted legislation based on the most rank racial stereotypes. At this stage in the country's history, the Court should not endorse the government's position.

II. THE GENDER-BASED RESIDENCY REQUIREMENTS DO NOT SURVIVE HEIGHTENED SCRUTINY.

Heightened scrutiny is the requisite standard for all cases involving laws that explicitly discriminate based on sex. Once heightened scrutiny is correctly applied, the disparate residency requirements in § 1409 cannot survive constitutional challenge. *See Hibbs*, 538 U.S. at 728; *Virginia*, 518 U.S. at 532-33; *see also J.E.B.*, 511 U.S. at 135; *Hogan*, 458 U.S. at 723-24.

While purporting to apply heightened scrutiny, the Ninth Circuit departed sharply from this Court's precedents. The framework for analyzing gender-based equal protection challenges is well-established. An "exceedingly persuasive justification . . . must be the solid base for any gender-defined classification." *Virginia*, 518 U.S. at 546. "The State must show at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 532. An equal protection violation can occur even when empirical evidence might suggest that there is some correlation between gender and the trait for which it is serving as a proxy. *J.E.B.*, 511 U.S. at 139 n.11; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975);

Craig v. Boren, 429 U.S. 190, 202 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (plurality opinion). Central to the analysis is whether the treatment of the different groups of men and women created by the classification furthers the governmental interest. *See Califano v. Goldfarb*, 430 U.S. 199, 215 (1977) (noting that Congress had not given any attention to the specific case of nondependent widows and their need of benefits when striking down a federal law that granted benefits to all widows but only to dependent widowers). The state's burden is "demanding," and the justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533.

Gender classifications warrant heightened scrutiny because "[w]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform." *Frontiero*, 411 U.S. at 686. To tolerate a gender-based classification unsupported by an exceedingly persuasive justification would violate a core constitutional principle: "At the heart of the constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring).

This Court's equal protection jurisprudence mandates a much more skeptical inquiry into the fit between a gender classification and the asserted governmental interest than the Ninth Circuit's

decision reflects. Viewed through the proper constitutional lens, the fit here is far too tenuous to satisfy heightened scrutiny.

The government argues, and the court below found, that § 1409 represents a tailored response to the risk of statelessness faced by non-marital children born abroad to U.S. citizen mothers. That conclusion is wrong on numerous grounds.

First, the problem of statelessness is not confined to the non-marital children of U.S. citizen mothers. It exists for the non-marital children of U.S. citizen fathers as well. Under heightened scrutiny, the government faces a heavy burden of showing why a problem faced by both men and women should be addressed by a statute that differentiates based on gender. Yet, the court below did not require the government to show how many non-marital children at risk of statelessness with one U.S. citizen parent are children of U.S. citizen mothers, or the extent to which being born abroad out of wedlock to a U.S. citizen mother correlates with statelessness generally. Nor did the government offer such proof. Indeed, the government has not pointed to any study or compilation of data that supports its assertion that "the risk that a child born abroad to unmarried parents will be rendered stateless is much higher when his mother is a United States citizen," Cert. Opp. at 15. Pet'r Br. at 27-34; Br. of Amici Curiae Scholars on Statelessness.

Second, lacking record evidence, the Ninth Circuit assumed that Congress adopted the disparate residency requirements in § 1409 as a considered

response to the problem of statelessness, and that this conclusion was sufficiently persuasive in light of Congress's authority in the area of immigration and citizenship. *Flores-Villar*, 536 F.3d at 996. The legislative history is far less clear. The provisions governing the transmission of citizenship to children born out of wedlock were first adopted in 1940. The legislative hearings that led to passage of the 1940 Act are silent on the risk of statelessness facing the non-marital children of either U.S. citizen mothers or fathers. Pet'r Br. at 36. This silence simply does not support the conclusion that Congress recognized a unique problem faced by the non-marital children of U.S. citizen mothers, but not fathers, and drafted the statutory language in response.

In fact, the problem of statelessness is not unique to the non-marital children of U.S. citizen mothers. Many non-marital children of U.S. citizen fathers are at risk of statelessness because they are born in countries that recognize the paternal transmission of statutory birthright citizenship. Pet'r Br. at 30-31 n.10; Br. of Amici Curiae Scholars on Statelessness. Many other children become stateless because they are born in countries where acknowledgement or legitimation by the father deprives the child of acquiring the citizenship of his mother, as the government has recognized on other occasions. *See* U.S. Br., *Nguyen v. INS*, 2000 WL 1868100 *17, *18 n.9 (5th Cir. 2000) (No. 99-2071); Pet'r Br. at 29-32.

If Congress was concerned about the problem of children's statelessness, the 1940 Act was a strange response because it exacerbated the risk of

statelessness for non-marital children born abroad to U.S. citizen fathers. For U.S. citizen mothers, the rules matched prior State Department policy: the non-marital child of a U.S. citizen mother was entitled to U.S. citizenship if the mother had resided in the U.S. for any period of time prior to the child's birth. Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669, 1689-93 (2000).[6] As a result of the 1940 Act, however, a U.S. citizen father under the same circumstances was required to show that he had resided in the U.S. for a total of ten years, five of which were after the age of 16 years old.[7]

The government seeks to explain the disparate residency requirements adopted in 1940 by pointing to a passage from the Senate Report accompanying the 1952 Act, but its reliance is misplaced. U.S. Br., *U.S. v. Flores-Villar*, 2008 WL 1848810 *14 (9th Cir. 2008) (No. 07-50445). The 1952 Act made various changes to the provisions governing birthright citizenship, and the Senate Report explained one of

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[6] Furthermore, non-marital children of U.S. citizen mothers and fathers faced differential residency requirements to *retain* their citizenship. While children of U.S. citizen mothers absolutely acquired citizenship at birth, children of U.S. citizen fathers were required to reside in the U.S. for a period of five years between the ages of 13 and 21 years old or lose their citizenship. Nationality Act of 1940, ch. 876, §§ 201(g), 205, 54 Stat. 1138-1139 (repealed 1952).

[7] The age after which the five years of residency must occur was changed from 16 years old to 14 years old by the Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 301(a)(7), 66 Stat. 235-236 (1952).

those changes by stating: "This provision establishing the child's nationality as that of the mother regardless of the legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth." S. Rep. 1137, 82d Cong., 2d Sess. 39 (1952). This statement, however, did not address the disparate residency requirements at issue here. Rather, it referred to the deletion of a provision that allowed mothers to transmit citizenship only when legitimation by the father had not occurred. The Report recognizes that this non-legitimation condition had created uncertainty for children because legitimation remained a possibility until the child reached the age of majority. By eliminating that contingency, Congress ensured that children could acquire a nationality through their mothers at birth, rather than being forced to wait to discover whether or not they were U.S. citizens. Because the Report language was not even trying to justify the disparate residency requirements, it certainly does not meet the government's burden of justification under heightened scrutiny.

Third, as demonstrated by Petitioner and other *amici*, the most plausible explanation for the disparate residency requirements is that Congress was legislating based on stereotypical assumptions regarding maternal responsibility and paternal irresponsibility for children born out of wedlock. Pet'r Br. at 10-13, 35-41; Br. of Amici Curiae Professors of Law, History, and Political Science. This Court's modern equal protection jurisprudence has consistently rejected such gender-based

generalizations as a basis for legislative classifications.

The facts of this case highlight the unfairness of such generalizations. The Petitioner's father is just one of millions of American fathers who are primary caretakers of their children. In 2007, there were 5.2 million households with children headed by males with no spouse present, representing a two million household increase from 1995. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007 3 (2009), http://www.census.gov/prod/2009pubs/p20-561.pdf; U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1995 2 (1996), http://www.census.gov/prod/2/pop/p20/p20-488.pdf. A 1996 federal study found that approximately 18% of children five years old or younger had fathers as primary caregivers, and fathers with less than a high school education were primary caregivers to 27% of preschool age children. U.S. DEP'T OF HEALTH AND HUMAN SERV., CHARTING PARENTHOOD: A STATISTICAL PORTRAIT OF FATHERS AND MOTHERS IN AMERICA 25 (2002), http://fatherhood.hhs.gov/charting02/ChartingParenthood02.pdf. In 2008, about 1.8 million paternities were established and acknowledged in the United States. OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2008 PRELIMINARY REPORT (2009), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/preliminary_report_fy2008/.

Fourth, even assuming that the disparate residency requirements were adopted as a benign

benefit for U.S. citizen mothers whose non-marital children were born abroad, section 1409 is an unconstitutional means of accomplishing that goal because it unfairly and unnecessarily disadvantages the similarly situated children of U.S. citizen fathers. This Court's precedents establish that "[s]ex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, or to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533 (citations omitted). But they cannot be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes." *Wiesenfeld*, 420 U.S. at 648.[8]

[8] Furthermore, the disparate residency requirements that apply to fathers and mothers of non-marital children under § 1409 cannot be justified on the ground that fathers of non-marital children are subject to the same residency requirements as parents of marital children. The equivalency is incomplete and misleading. For married parents, the citizen mother or father simply needs to establish that she or he meets the residency requirement in order to transmit citizenship, 8 U.S.C. § 1401(a)(7) (1970). But citizen fathers of non-marital children must meet multiple statutory hurdles – the legitimation requirement approved in *Nguyen* as well as the residency requirement at issue here – that act together to prevent some fathers from transmitting citizenship regardless of their best efforts, render non-marital children stateless due to legitimation by their fathers, or discourage the legitimation of these children.

Fifth, the Ninth Circuit failed to address the existence of gender-neutral alternatives, an important factor in evaluating the validity of a gender-based classification. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 281 (1979); *Craig*, 429 U.S. at 199. If statelessness is the true concern, the government could simply adopt the length of residency required of mothers for fathers, or it could make individualized determinations about the risk of statelessness depending on the circumstances of the child's birth. Unconstitutional discrimination cannot be justified on the basis of administrative convenience.[9] As this Court has noted: "[A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated.'" *Frontiero*, 411 U.S. at 690. *See also Wengler*, 446 U.S. at 152; *Craig*, 429 U.S. at 197-98.

Sixth, in relying on *Nguyen*, the Ninth Circuit failed to recognize a critical distinction between this case and that one, although both address aspects of § 1409. In *Nguyen*, this Court emphasized that the procedural legitimation requirements at issue were not "inordinate and unnecessary hurdles" and "can be satisfied on the day of birth, or the next day, or

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[9] In any case, there has been no showing that processing requests from all non-marital children of U.S. citizen mothers who have resided in the U.S. for one year, including those children with a nationality, is less burdensome than the gender-neutral alternatives.

the next 18 years." 533 U.S. at 70-71. That is not true here. In denying the Petitioner's claim to citizenship, the government openly acknowledged that the law made it "'physically impossible for [his father] to have the required physical presence necessary,'" because he became a parent when he was less than 19 years old. Pet'r Br. at 3 (citation omitted).

The distinction between procedural barriers and absolute bars has constitutional significance, as this Court has recognized in other gender discrimination cases. *See Califano v. Westcott*, 443 U.S. 76, 85 (1979). *See also Virginia*, 518 U.S. at 546 (state's goal of producing citizen-soldiers "is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit").

Indeed, even prior to the adoption of heightened scrutiny as the standard of review for gender classifications, this Court recognized that a simple preference for one sex as a proxy for deciding the merits of an issue is frequently arbitrary, *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), and that distinctions drawn between similarly situated men and women are generally "gratuitous" and "entirely irrational," *Wiesenfeld*, 420 U.S. at 650, 653. Because the residency requirements gratuitously differentiate based on gender, they also would not survive a more deferential standard of review.

A fortiori, the government has failed to demonstrate the exceedingly persuasive justification that the Constitution requires under these circumstances. The gender-based residency require-

ments of § 1409 are not substantially related to any interest in reducing statelessness, completely shut out some members of one sex from transmitting citizenship, and were not designed to redress disparate treatment of women. They impermissibly distinguish between similarly situated parents and thus violate the right to equal protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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