NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

═══════════════════════

RUBEN FLORES-VILLAR,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

═══════════════════════

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

═══════════════════════

STEVEN F. HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT'S DECISION IN *NGUYEN V. INS*, 533 U.S. 53 (2001), PERMITS GENDER DISCRIMINATION THAT HAS NO BIOLOGICAL BASIS?

IN THE SUPREME COURT OF THE UNITED STATES

═══════════════════════

RUBEN FLORES-VILLAR,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

═══════════════════════

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

═══════════════════════

Petitioner, Ruben Flores-Villar, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 6, 2008.

OPINIONS BELOW

On May 16, 2007, the district court published an opinion granting the government's motion in limine to exclude evidence regarding petitioner's claim to derivative United States citizenship at his trial on a charge of being a deported alien found in the United States in violation of 8 U.S.C. § 1326.[1] On August 6, 2008, the

[1] A copy of the Opinion, *United States v. Flores-Villar*, 497 F. Supp.2d 1160 (S.D. Cal. 2007) is attached as Appendix A.

Ninth Circuit issued an Opinion[2] affirming his conviction under section 1326. Petitioner's Petition for Rehearing and Rehearing En Banc was denied on May 5, 2009.[3]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution

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

8 U.S.C. § 1401(a)(7) (1974)

> a) The following shall be nationals and citizens of the United States at birth:
>
> ...
>
> (7) a person born outside the geographic 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.

---

[2] A copy of the Opinion, *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), is attached as Appendix B.

[3] A copy of the order denying petitioner's petition for rehearing and rehearing en banc is attached hereto as Appendix C.

8 U.S.C. §§ 1409(a), (c)

> (a) The provisions of
>
> paragraphs (3) to (5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock ... if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.
>
> ...
>
> (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.

STATEMENT OF THE CASE

A. The Charges

On February 24, 2006, Petitioner was arrested in San Diego, California. *See Flores-Villar*, 536 F.3d at 994. The following day, Petitioner was charged with being a deported alien found in the United States after deportation. ERVol.II at 182.[4] Petitioner was indicted on a charge of violating 8 U.S.C. § 1326. *Id.* at 178-179.

[4] "ER" refers to the Excerpt of Record filed with the Court of Appeals.

Prior to trial, the government moved to exclude evidence of Petitioner's claims to derivative citizenship through his father. *See generally Flores-Villar*, 497 F. Supp.2d 1160. The district court granted the motion. *See id.*

Petitioner was tried on stipulated facts and found guilty of the section 1326 charge. *See Flores-Villar*, 536 F.3d at 994. He was convicted. *See id.*

B. Background

On February 24, 2006, Petitioner was arrested by border patrol in San Diego, California as he was waiting for the bus. ERVol.II at 182. Although Petitioner was born in Tijuana, Mexico, *id.* at 79-84, 109, his father, Ruben Trinidad Flores-Villar, is a United States citizen and has been since birth. *Id.* at 80-81. Petitioner's father also resided in the United States for at least ten years prior to Petitioner's birth. *Id.* at 80-81, 95. However, at the time Petitioner was born, his father was only sixteen years old. *Id.* at 55.

When Petitioner was only two months old, his father and his paternal grandmother (who is also a United States citizen since birth) brought him to the United States in order to receive medical treatment at University Hospital in San Diego. *Id.* at 81, 84, 109. Shortly thereafter, University Hospital sent a letter to the border authorities requesting a permit for Petitioner to enter the United States. *Id.* at 109. The letter was written on behalf of Petitioner's father. *Id.* At the time of his

release from the hospital, Petitioner's biological mother signed a form authorizing him to be released to his paternal grandmother for adoption planning. *Id.* at 111.

Petitioner grew up in the San Diego area with his father and his paternal grandmother and attended San Diego area schools. *Id.* at 80-84, 121-123. In fact, Petitioner had almost no contact with his biological mother. *Id.* at 80-81. Although Ruben Trinidad Flores-Villar is not listed on Petitioner's birth certificate, he formally recognized him as his son by filing an acknowledgment of paternity with the civil registry in Tijuana, Mexico in 1985, when Petitioner was eleven years old. *Id.* at 117-119. Petitioner's father also claimed Petitioner as his son on his income taxes. *Id.* at 125-130.

On September 22, 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship. *Id.* at 55. On December 14, 2006, his application was denied. *Id.* The original opinion denying his application states:

> The fact of your legitimation is not in question. What is in question is whether or not your United States citizen father had the required physical presence in the United States prior to your birth in order for you to acquire United States citizenship . . .. Since you were born prior to November 14, 1986, your father must have been physically present in the United States for ten years. At least five of those years had to be after his fourteenth birthday. 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.

Prior to trial, the district court held several hearings at which Petitioner's citizenship defense was discussed. ERVol.I at 47, 72, 91, 155. The government filed a motion in limine seeking to preclude evidence of derivative citizenship, arguing that because it was physically impossible for Petitioner to present evidence that his father was physically present in the United States for at least 5 years after the age of 14, the court should preclude the defense. ERVol.II at 142-150. Petitioner responded to the government's motion in limine and incorporated the arguments presented in his appeal from the district director's decision on his N-600 application by attaching a copy of that appeal. *Id.* at 23-141. Petitioner contended, *inter alia*, that the substantial residence requirement, which applied only to fathers, violated the Equal Protection guarantee of the Due Process Clause of the Fifth Amendment.

The district court issued a written, published decision granting the government's motion in limine. *See Flores-Villar*, 497 F. Supp.2d 1160. The district court declined to resolve what level of scrutiny applied to the Equal Protection claim, reasoning that the government would prevail under either approach. *See id.* at 1164. Noting that "special deference" to immigration statutes was required (even though it purported not to resolve the level of scrutiny issue), the district court recounted that the legislative history of the statute suggested that it was devised to avoid statelessness in foreign countries that would attribute the nationality of the mother to

a child born out of wedlock. *See id.* at 1165. The district court rejected the challenge on the theory that Congress's effort to avoid statelessness of the child by giving it the mother's nationality was a "bona fide reason[]." *See id.*

In light of the district court's pre-trial rulings, Petitioner elected to waive his right to a jury trial and instead consent to a bench trial. [ERVol.I at 6]. The district court found Petitioner guilty and denied his motion for a judgment of acquittal. *Id.* at 32-38. Petitioner' was sentenced to 42 months' custody and 3 years supervised release. *Id.* at 2-3.

Petitioner appealed the district court's rulings precluding his defenses. Among other things, Petitioner argued that former sections 1401(a)(7) and 1409(a) of the Immigration and Nationality Act, as interpreted by the district court, discriminate against United States citizen fathers on the basis of gender, in violation of the Equal Protection guarantee of the Due Process Clause of the Fifth Amendment of the United States Constitution. The discrimination arose from the facts that an unwed father could pass United States citizenship to his child only if he resided in the United States for at least five years after his 14th birthday while an unwed mother needed to show only a continuous period of one year prior to the birth of the child. *See Flores-Villar*, 536 F.3d at 995.

The Court of Appeals rejected Petitioner's argument and affirmed his conviction, reasoning that although the precise question raised by Petitioner had not been addressed before, "the answer follows from the Supreme Court's opinion in *Nguyen v. INS*, 533 U.S. 53 (2001)." *See Flores-Villar*, 536 F.3d at 993.

> Avoiding 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, are important interests. The means chosen substantially further the objectives. Though the fit is not perfect, it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship.

Id. at 996. Although the panel claimed to be applying intermediate scrutiny, the panel did not cite any evidence that the alleged objectives were the actual objectives of the discriminatory scheme or that women suffered a disadvantage with respect to those objectives. Moreover, in attempting to bolster its analogy to *Nguyen*, the Court of Appeals observed that the residence differential is directly related to statelessness; the one year period applicable to unwed mothers seeks to insure that the child will have a nationality at birth." *See id.* at 997. But it also claimed that the discrimination "furthers the objective of developing a tie between the child, his or her father, and this country." *See id.* It did not explain how a U.S. residence requirement would affect the father/child relationship.

SUMMARY OF ARGUMENT

The former versions of 8 U.S.C. §§ 1401 and 1409 violated the guarantee of Equal Protection contained in the Due Process Clause of the Fifth Amendment because they imposed substantial residence burdens on the fathers of out-of-wedlock children born abroad as prerequisites to passing U.S. citizenship to the child while at the same time imposing only a minimal burden on similarly situated women. The prerequisites for men are so severe that it was impossible for Petitioner's father to qualify, yet Petitioner would be a citizen if his mother, not his father, had been a U.S. citizen. The Court of Appeals relied primarily on the Court's decision in *Nguyen*, 533 U.S. 53, but that case approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers. The Court should grant the petition and clarify the reach of *Nguyen*.

ARGUMENT

THE COURT SHOULD HOLD THAT *NGUYEN* DOES NOT PERMIT GENDER DISCRIMINATION THAT HAS NO BIOLOGICAL BASIS.

A. Unlike the Residence Requirement Here, Which Is Entirely Unrelated to Parenthood, *Nguyen* Addressed A Biologically-Based Distinction.

The Court's divided opinion in *Nguyen* does not resolve the question as to whether the gender discrimination worked by sections 1401(a)(7) and 1409, which has no basis in the biological differences between men and women, can survive scrutiny under the Equal Protection guarantee of the Due Process Clause. The issue in *Nguyen* was whether a requirement that a father, but not a mother, legitimate an out-of-wedlock child before the child's eighteenth birthday comports with Equal Protection. 533 U.S. at 69. The Court found that Congress sought to insure that all parents have the *opportunity* to establish a relationship with their out-of-wedlock children, but did not seek to guarantee the greater goal of ensuring establishment of an actual parent-child relationship. *Id.* at 64-65. Women, by virtue of delivering the child, are at an advantage with respect to the *opportunity* to form that bond — they necessarily have knowledge of the child's birth and thus the opportunity to form a parent-child relationship. *Id.* The legitimation requirement imposed on men, to be undertaken during the child's minority, compensates for that biological difference. *Id.* at 66. It ensures men have knowledge of the child's birth and the

opportunity to develop a relationship with the child. *Id.* at 66-67. Although petitioner argued that delivering a child does not ensure a parent-child relationship, that argument was not responsive to what the *Nguyen* Court found was the congressional goal: seeking to ensure only that each parent had an opportunity to form such a relationship. *Id.* at 69.

The Court of Appeals held that the Congressional goal identified in *Nguyen* was somehow similar to that sought by the instant statutory scheme. *See* 536 F.3d at 997. *Flores-Villar* correctly identified a crucial goal of the legislation in *Nguyen* as advancing the "'interest of ensuring at least an opportunity for a parent-child relationship to develop.'" *See id.* (quoting *Nguyen*, 533 U.S. at 69). The passage from *Nguyen* the Opinion quotes addressed the petitioners' argument that the legitimation requirements imposed only on men are unconstitutional because they do not guarantee that a mother will establish a relationship with her child, even though she will have knowledge that she has a child. *See Nguyen*, 533 U.S. at 69. *Nguyen* rejected the petitioners' argument because it confused fostering a relationship with the more modest goal of ensuring an opportunity to form one, *id.*, not because the over or under-inclusiveness of a statute is irrelevant to the Equal Protection analysis or because it would be proper to benefit or burden one gender. Although Congress could have required both men and women to show an actual parent-child relationship,

Congress ensured that men, like women, had the *opportunity* for a parent-child relationship to develop before conferring citizenship on the child. "Such an opportunity inheres in the event of birth in the case of a citizen mother and her child, but does not result as a matter of biological inevitability in the case of an unwed father." *See id.* at 54. Congress chose to remedy that lack of a "biological inevitability," but its means were not restrictive; Congress imposed minimal requirements on men to fulfill during the child's minority that women already met by virtue of delivering the child.

Part of *Nguyen*'s rationale for upholding the legitimation requirements was the fact that a person born to a citizen parent of either gender has the opportunity to acquire citizenship under the statutory scheme. *See Nguyen*, 533 U.S. at 62. It is physically possible for a child to derive citizenship from a citizen father, so long as a "minimal" effort is made to legitimate during minority. *Id.* at 70.

The same is not true with respect to the different residency requirements imposed on unmarried citizen fathers and mothers. As Petitioner's case establishes, despite his father's establishment and recognition of a parent-child relationship, it was physically impossible for Petitioner to derive citizenship from his father simply because his father was 16 years old when he was born. His father's age prevented conferring citizenship on Petitioner, even though Petitioner's biological mother took

no part in raising him. Had their roles been reversed, and Petitioner's mother was a young United States citizen and his father an alien, he would undoubtedly be a citizen, despite the lack of a relationship between Petitioner and his mother and regardless of her age. In sharp contrast to the "minimal" requirements at issue in *Nguyen*, Congress erected "unnecessary"[5]–often insurmountable–hurdles to the conferral of citizenship on the children of unmarried citizen fathers by requiring unmarried fathers, but not mothers, to establish 10 years' physical presence in the U.S. prior to the child's birth, at least 5 years of which must be after the father's fourteenth birthday. *See Nguyen*, 533 U.S. at 71 ("Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives.").

In contrast to *Nguyen*, by enacting different residency requirements for men and women, Congress did not further a gender-neutral goal through means that account for critical biological differences between the sexes. Nor did Congress

---

[5] Congress has acknowledged that there were no public policy considerations which preclude fathers who legitimate children born out-of-wedlock from passing citizenship to their children, confirming that the different residency requirements imposed on unmarried men and women by the 1940 Act were unnecessary. *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at V (House Comm. On Immigration and Naturalization 1939. The fact that Congress has since amended the law to alleviate the disparity, at least to a certain degree, is further evidence that the residency differential created by the 1940 Act was unnecessary. *See* 8 U.S.C. § 1401(g) (2008).

choose to advance an interest that is less demanding to satisfy than the alternatives or impose only minimal requirements on men. Assuming, as the panel did, that Congress was attempting to prevent statelessness, Congress chose means that were certain to advance that interest only as to the children of unmarried mothers. The children of young, unwed fathers received no protection from statelessness.

The same was not true in *Nguyen*. Although Congress only imposed legitimation requirements on men, women already had the opportunity to form a parent-child relationship with their children based on fundamental biological differences between the situation of mothers and fathers at the time of birth. The additional obligation imposed on men compensated for that biological difference—it ensured that men, like women, had knowledge of the child's birth at some point during the child's minority, and thus, the opportunity to form a relationship with the child. Thus, the objective was gender-neutral, and the means ensured that every parent, man or woman, had the opportunity to form a relationship with his or her child before granting that child citizenship.

The different residency requirements imposed on men and women do not do the same. Although the meager residency requirement applicable to unmarried mothers makes it easier for women to confer citizenship on their children, including any children who would otherwise be stateless, it does not make it any easier for men to confer citizenship. Unlike the fundamental biological difference between men and

women that guarantees that women will have knowledge of their child's birth, there is no fundamental difference between men and women that suggests that gender differences have anything to do with a parent's ties to the United States. In other words, while a mother's delivery of a child supports an inference that she has at least had an opportunity to form a relationship with the child, nothing about motherhood says anything about the woman's relationship to the United States. The differing residency requirements have no biological basis.

Moreover, the statutory scheme leaves the children of unwed U.S. citizen fathers at the mercy of the laws of foreign countries. There is a risk that a child born abroad to a citizen father, like a citizen mother, will be stateless. While Congress may have eliminated that risk as to children born abroad to citizen mothers, there is no comparable provision to ensure that children born abroad to citizen fathers will have a nationality. Thus, in contrast to the requirements in *Nguyen*, Congress did not elect to advance an interest that is less demanding for men to satisfy than some other alternative. The statutory scheme does not directly and substantially ensure that all children born abroad to a U.S. citizen parent will have a nationality—it only helps women. The objective, to help only U.S. citizen mothers, is not valid. It is also impossible for some men, like Petitioner's father to satisfy, not merely less demanding.

In short, unlike the distinctions upheld in *Nguyen*, the residency differential is not based on any innate biological differences between men and women. Likewise, there is no gender-specific connection between the length of a parent's residence in the U.S. prior to the child's birth and either the biological relationship between the parent and child or the likelihood that the parent will foster the "real, everyday ties that provide a connection between child and citizen parent . . .." *Id.* at 65. In fact, residency in the United States has no logical relationship to a parent's relationship to a child. The exaggerated residence requirement imposed even on men who, like Petitioner's father, have unquestionably established paternity, is completely divorced from the fundamental biological truths that animated *Nguyen*, and its predecessor, *Miller v. Albright*, 523 U.S. 420 (1998). *Nguyen* thus undermines, rather than supports, the Opinion.

B. The Purported Goals Were Not the Actual Purpose of the Statutory Scheme and the Gender Benefitted (Women) Did Not Actually Suffer a Disadvantage.

For a gender-based classification to withstand equal protection review, the government must "establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982). *See also United States v. Virginia*, 518 U.S. 515, 533 (1996) (the justification "must be genuine, not hypothesized or invented *post hoc* in

response to litigation.") The gender benefitted by the classification must "actually suffer a disadvantage related to the classification." *Id.* at 728.

The Opinion does not require the government to prove that the alleged objective (preventing statelessness) was the actual purpose of the legislation or that women actually suffer a disadvantage related to the classification (that women had more stateless children than men). Rather, it simply cites the government's argument that "avoiding stateless children is an important objective that is substantially furthered by relaxing the residence requirement for women because many countries confer citizenship based on bloodline (*jus sanguinis*) rather than, as the United States does, on place of birth (*jus soli*)." *Flores-Villar*, 536 F.3d at 996.

The legislative history demonstrates that the more lenient residency requirement for women was based on stereotypes about who will raise, nurture and be responsible for a child born out of wedlock, and thus which parent's values the child will adopt, not an effort to prevent statelessness. First, a 1939 report accompanying the proposed legislation explains, with regard to the provision regarding conferral of citizenship on the children of unmarried mothers, "Under American law 'the mother has a right to the custody and control of such a child as against the putative father and is bound to maintain it as its natural guardian.'" *Nationality Laws of the United States: Message from the President of the United States,* 76th Cong., 1st Session, Pt. 1 at V (House Comm. On Immigration and

Naturalization 1939). It further states that "[t]he mother, as guardian by nurture, has the right to custody and control of her bastard child until it attains an age when it can, in contemplation of the law, make an election between father and mother." *Id.* Citizenship law "is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *See Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting).

> Under this law, as one advocate explained to Congress in a 1932 plea for a sex-neutral citizenship law, "when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background."

Id. (citation omitted). Prevention of statelessness was thus not the actual purpose; Congress acted to reinforce stereotypic gender roles with regard to nonmarital children.

In addition to the legislative reports, the effect of the legislation suggests that the prevention of statelessness was not its actual purpose. The Nationality Act of 1940 imposed, for the first time, strict residency requirements on the children of U.S. citizen fathers, yet exempted unmarried women from those requirements. Strict residency requirements on men increased the risk of statelessness on the part of their out-of-wedlock children. Congress did this despite the fact that the 1939 report indicated that there were no considerations of public policy which support precluding fathers who legitimate out-of-wedlock children from passing citizenship along to

their children. *See Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at V (House Comm. On Immigration and Naturalization 1939). The increase in the risk of statelessness, at least for children of U.S. citizen fathers, suggests that the prevention of statelessness was not the actual purpose of the legislation.

There is no empirical evidence that women had significantly more stateless children than men. Rather than require the government to present evidence that women actually suffered a disadvantage, the Court of Appeals disregarded petitioner's examples[6] of countries in which the children of unwed citizen fathers would be stateless, noting only that "we do not expect statutory classifications always to be able to achieve the ultimate objective." *See Flores-Villar*, 536 F.3d at 996.

---

[6] In Iran, for example, an illegitimate child born to an Iranian mother and a father who is not an Iranian citizen is regarded by the Iranian authorities as having the same nationality as the father, not the mother. UNICEF, *Birth Registration in Iran: An Analysis of the state of relevant laws in Iran*, p. 8 (July 2005). Therefore, under the Congressional scheme, a child born out of wedlock to a United States citizen father and an Iranian woman would be stateless. It appears that this would be the case with respect to children born out of wedlock in other countries as well. *See* Human Rights Watch, *The Bedoons of Kuwait: Citizens Without Citizenship*, p. 103 (Aug. 1995) ("Kuwait's Citizenship Law denies children the right to Kuwaiti citizenship if their fathers were foreign or Bedoon."); *see also* William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, Vol. 45, The American Journal of International Law, No. 3, 476, 479 (Jul. 1951), ("In Belgium, Czechoslovakia, and Poland, the nationality of the child follows the father's upon legitimation . . .").

While that may be true, the more lenient residency requirement for women never achieves the alleged ultimate objective of avoiding statelessness as to the out-of-wedlock children of U.S. citizen men.

The Court rejected a similar one-gender-benefits plan in *Virginia*,

> A purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant plan-a plan to "affor[d] a unique educational benefit only to males." However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

518 U.S. at 539-540. If the actual purpose of the liberal residency requirement applicable to unwed mothers was statelessness prevention, it is clearly designed only to help prevent women from having stateless children, not preventing statelessness generally. To paraphrase the Court's holding, it is not equal protection to devise a plan that protects the United States' daughters' out-of-wedlock children, "but makes no provision whatever for her [sons]," *see id.*, such as Petitioner's who was flatly precluded from passing citizenship to his son because of his gender and his age. Regardless of how the law serves the children of unwed mothers, it fails to serve the children of unwed fathers.

C. The Secondary Goal Found By the Opinion (But Not Urged By the Government) is Itself Discriminatory, in Violation of *Mississippi University of Women* and *Virginia*.

The Court of Appeals added a second justification, not urged by the government—the statute assures that there is a link between the father and the out-of-

wedlock child and this country, a link not required of a mother. *See Flores-Villar*, 536 F.3d at 997. This purpose is itself discriminatory; it requires only one gender to establish this link. And, as noted before, there is no biological basis from which Congress could have concluded that women would be more adept at forming ties to the United States.

It is constitutionally impermissible for Congress to pursue an objective that is itself discriminatory. *See Mississippi University of Women*, 458 U.S. at 725 ("[I]f the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."). *See also Virginia*, 518 U.S. at 532 (Equal Protection principle is offended when a law or official policy denies to one sex, such as women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities); *id.* at 539-540 (concluding that VMI's mission to produce men prepared for leadership in civilian life and in military service afforded unique educational benefits only to males, and thus, regardless of how "liberally" the plan served men, it made no comparable provision for women). *Mississippi University of Women* and *Virginia* thus stand for the proposition that not even laudable goals permit discriminatory purposes.

The imposition of a burden or a benefit on one gender therefore cannot constitute an important governmental interest. Consequently, assuring a link between this country and an unwed citizen father of an out-of-wedlock child, but not a mother, is not an important governmental interest.

D. <u>The Means are Not Substantially and Directly Related to the Purported Problem</u>.

To comport with equal protection principles, there must be an "exceedingly persuasive justification" for a gender-based classification. *See Mississippi University for Women*, 458 U.S. at 731. The classification must be substantially and directly related to an actual problem, which Congress was actually attempting to solve. *See id.* at 728-730.

A law may still violate equal protection principles, even where there is empirical evidence demonstrating a disparity between the situation or behavior of males and females. *See Craig v. Boren*, 429 U.S. 190 (1976). For example, *Craig* found that evidence showing that 2% of males between 18 and 21 years of age were arrested for drunk driving in comparison to only .18% of women in that age group was insufficient to justify a prohibition on the sale of 3.2% alcohol to men under age 21.

> While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly, if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'" Indeed,

> prior cases have consistently rejected the use of sex as a decision making factor even though the statute in question certainly rested on far more predictive empirical relationships than this.

Id. at 201-202. To withstand Equal Protection review, gender must represent a legitimate and accurate proxy. *Id.* at 204. Because the statistical evidence offered was insufficient to show that sex was a legitimate, accurate proxy for the regulation of drinking and driving, the Court found that the statute invidiously discriminated against males between 18-20 years of age. *Id.*

Similarly, *Caban v. Mohammed*, 441 U.S. 380 (1979) found that a New York law which allowed unmarried mothers but not unmarried fathers to block the adoption of illegitimate children by withholding consent was not substantially related to the State's interest in promoting the adoption of illegitimate children. *Id.* at 382, 389-91. The Court emphasized that a gender-based classification "Must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Id.* at 391.

The Court recognized that the State's interest in providing for the well-being of illegitimate children is an important one. *See id.* But, the Court stated, "the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction." *See id.* In *Caban*, as in *Craig*, the Court looked to the poor fit between the gender-based classification and

the purported objective, noting the over-inclusiveness and under-inclusiveness of the law. *See id.* at 394 ("In sum, we believe that § 111 is another example of 'over-broad generalizations' in gender-based classifications"). The Court noted that the law "exclude[d] some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enable[d] some alienated mothers arbitrarily to cut off the paternal rights of fathers." *Id.* In effect, it discriminated against unwed fathers even when their identity was known, paternity was established, and they had manifested a significant paternal interest in the child. *See id.* In light of the broad application of the law in all circumstances, the Court found that the law did not bear a substantial relationship to the State's asserted interests. *See id.*

The Court of Appeals ignored these well-established legal principles and upheld former sections 1401(a)(7) and 1409 despite the poor fit between the means and the proffered goal. Instead of requiring the government to show an "exceedingly persuasive justification," i.e., empirical evidence of real, non-trivial differences between the rate of stateless children born abroad to unmarried men and women, directly related to the residence requirement, the panel simply concluded that there was a "sufficiently persuasive" justification for the discriminatory classification because the more lenient residency requirement "seeks to insure the child will have a nationality" and that men who have children abroad have ties to this country. *See Flores-Villar*, 536 F.3d at 997.

The Court of Appeals' conclusion that the requirement sought to prevent statelessness misses the point. Even if the actual purpose of the requirement was to prevent statelessness (and no evidence supports that), showing a legitimate purpose is insufficient to show that there is a direct *and* substantial relationship between the classification and the asserted goal. As *Craig* and *Caban* make clear, the fact that a gender-based classification may sometimes achieve a lofty goal (prevent drunk-driving, facilitate adoption, or prevent a child from being stateless) does not render the classification constitutional. Although the fit need not be perfect, to withstand the Equal Protection Clause, sex must represent a legitimate and accurate proxy for statelessness. *See Craig*, 429 U.S. at 204. The classification must rest upon some ground of difference having "a fair and substantial relation" to the prevention of statelessness so that all persons similarly circumstanced shall be treated alike. *See Caban*, 441 U.S. at 391.

Gender is not an accurate proxy for statelessness. There is a risk that children born abroad to both unmarried men and unmarried women will be stateless. Yet, the degree of discrimination caused by former sections 1401(a)(7) and 1409 is significantly more marked than the discrimination at issue in *Craig*, 429 U.S. 190. Under former sections 1401(a)(7) and 1409, an unmarried woman need only establish one year of physical presence in the U.S. to confer citizenship on her child. Thus, any woman of child bearing age has the opportunity to confer citizenship on her child,

regardless of whether the child would otherwise be stateless. In contrast, under former sections 1401(a)(7) and 1409, it is physically impossible for an unmarried man under age 19 to confer citizenship on his child, regardless of whether his child would be stateless. In short, even assuming there is some difference between the rate of stateless children born to unmarried women and men, the discriminatory classification at issue here does not have "a fair and substantial relation" to the asserted objectives and doesn't insure that all persons similarly circumstanced shall be treated alike. See *Caban*, 441 U.S. at 391. Thus, the gender based differential contained in former sections 1401(a)(7) and 1409 constitutes a denial of equal protection of the laws.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

Date: March 22, 2010

STEVEN F. HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008
Telephone: (619) 234-8467
Attorneys for Petitioner