No. 09-5801

IN THE

SUPREME COURT OF THE UNITED STATES

RUBEN FLORES-VILLAR,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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I.

INTRODUCTION

The versions of 8 U.S.C. §§ 1401 and 1409 applied to Petitioner violate the Fifth Amendment's guarantee of Equal Protection because they impose substantial residence burdens on the fathers of out-of-wedlock children born abroad as prerequisites to passing U.S. citizenship to their children while at the same time imposing only a minimal burden on similarly situated women. Because of that gender-based discrimination, which lacks any biological basis, Petitioner's attempt to defend against the alienage element of the reentry after deportation charge[1] filed against him failed. Because the Ninth Circuit misapplied *Nguyen v. INS*, 533 U.S. 53 (2001), specifically, and the Court's Equal Protection jurisprudence, generally, Petitioner seeks the Court's review.

The Solicitor General urges the Court to deny the petition on four primary grounds. She claims Petitioner lacks standing, the Ninth Circuit correctly rejected Petitioner's claim, courts cannot remedy Equal Protection violations in statutes addressing citizenship arising at birth, and the statutory scheme at issue here has been amended to discriminate to a lesser degree. Her objections lack merit.

A majority of the Court has rejected the Solicitor General's narrow view, Opp. at 9-10, that Petitioner cannot urge a claim based upon gender discrimination leveled

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[1] *See* 8 U.S.C. § 1326(a).

at his father that resulted in denial of Petitioner's claim to U.S. citizenship. *See Miller v. Albright*, 523 U.S. 420, 432-33 (1991) (Op. of Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-74 (Breyer, J., dissenting). Moreover, the Court has repeatedly found standing where criminal defendants, such as Petitioner, assert constitutional issues arising in the context of an ongoing prosecution. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 410-16 (1991).

On the merits, the Solicitor General contends that the discriminatory scheme survives intermediate scrutiny because the differential residence requirements advance two legitimate goals. First, she contends that the differential residence requirement ensures links between the unwed parent, the child, and the United States. Opp. at 12-13. Her argument is frivolous: there is no basis for believing that men and women are not equally adept at forming such connections.

Second, she contends that the discrimination was designed to avoid statelessness. That contention is no basis for denying the petition. The Solicitor General has not met her burden to demonstrate that avoidance of statelessness was the actual purpose of the discrimination. *See Nguyen*, 533 U.S. at 76 (O'Connor, J., dissenting). Nor has she demonstrated that the children of unwed women are disproportionately in danger of statelessness. Finally, even if there were a correlation

between gender and grossly increased risk of statelessness, it lacks the "tighter fit between means and ends" required by the Court's cases. *See id.* at 78.

The Solicitor General's claim that courts cannot grant citizenship, Opp. at 15-16, counsels in favor of granting the writ as the Solicitor General has no response to Justice O'Connor's analysis in *Nguyen*, 533 U.S. at 94-97, and the Court has never resolved the tension between her opinion and Justice Scalia's contrary view set forth in his concurring opinion in *Miller*, 523 U.S. at 452-59. The instant case offers an opportunity to resolve that question.

Finally, the Solicitor General's contention that the Court should deny review because the new scheme does not discriminate so harshly as the old one, Opp. at 16-17, is insubstantial. *See Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) ("the absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law") (citation, internal quotations omitted).

II.

PETITIONER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE USED TO DENY HIM CITIZENSHIP AND IMPRISON HIM.

The Solicitor General contends Petitioner lacks standing to contest the sex-discrimination worked by sections 1401 and 1409 that made it impossible for his

unwed father to convey citizenship to him because of the father's gender. *Opp.* at 9-10 (citing *Miller*, 523 U.S. at 445-51 (O'Connor, J., concurring)). She is mistaken.

First, Justice O'Connor's views on standing were rejected by a majority (seven Justices) of the *Miller* Court. *See* 523 U.S. at 432-33 (Op. of Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-74 (Breyer, J., dissenting). Specifically, the Court looks to three factors in evaluating third party standing:

> a party can "assert" the constitutional rights of another person ... where (1) that party has "suffered an 'injury in fact'"; (2) the party and the other person have a "close relationship"; and (3) "there was some hindrance" to the other person's "asserting" his "own rights."

Id. at 473 (Breyer, J., dissenting) (quoting *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998)). Petitioner, who has been both denied citizenship and imprisoned based upon an offense for which alienage is an element, plainly has "suffered an 'injury in fact'" and he enjoys a "'close relationship'" with his father. *See id.*[2] *See also id.* at 432-33 (Op. of Stevens, J.); *Breyer v. Meissner*, 214 F.3d 416, 423 (3d Cir. 2000).

The only question is whether "'there was some hindrance' to petitioner's father]'s 'asserting' his 'own rights.'" *See id.* As a practical matter, petitioner's claim arises out of a criminal prosecution; his father could not intervene to assert his own rights. Such practical considerations are plainly relevant to the hindrance issue, as

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[2] Petitioner's father sought to testify on petitioner's behalf, but his testimony was excluded. Excerpt of Record (on file with the Ninth Circuit Court of Appeals) Vol. I at 98 (explaining that the father would travel to testify at the trial).

Justice Breyer's dissenting opinion in *Miller* demonstrates. *See id.* at 474 (relying upon considerations of complexity of the litigation and its expense). Indeed, Justice Scalia pointed out that Justice O'Connor's reading of the Court's "hindrance" cases is unfounded. *See id.* at 454 n.1 (Scalia, J., concurring) ("I do not read our cases as demanding as significant an impairment of the rightholder's ability to sue as [Justice O'Connor] does."). In short, the Solicitor General's claim that petitioner lacks standing is insubstantial.

Second, the Court has repeatedly found standing where criminal defendants assert constitutional issues arising in the context of an ongoing prosecution. *See, e.g., Powers*, 499 U.S. at 410-16 (asserting the rights of excluded jurors); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (defendant prosecuted as distributor of contraceptive entitled to assert the rights of unmarried persons denied access to contraceptives). *Powers* and *Baird* strongly suggest that petitioner has standing here. Indeed, the relationship between petitioner and his claims and the interests of his father is far more substantial than those at issue in *Powers* and *Baird.*

Finally, the Solicitor General's position raises serious questions of fairness. Petitioner did not choose to initiate the instant litigation; he is an unwilling participant. The government chose to charge him with a serious crime, a felony, an element of which is that he must be an alien. *See* 8 U.S.C. § 1326(a). Having

charged Petitioner with such an offense, and invoked the jurisdiction of the courts to try and imprison him, the Solicitor General should not be heard to argue that petitioner lacks standing to pursue the issues intimately connected with his defense.

III.

THE SOLICITOR GENERAL'S DEFENSE OF THE INSTANT GENDER DISCRIMINATION DEMONSTRATES THE NECESSITY OF THE COURT'S REVIEW TO CLARIFY THE APPLICABILITY OF INTERMEDIATE SCRUTINY AND THE GOVERNMENT'S BURDEN TO DEMONSTRATE COMPLIANCE WITH THE FIFTH AMENDMENT GUARANTEE OF EQUAL PROTECTION.

The Solicitor General urges the Court to deny the petition because she asserts the Ninth Circuit's decision was correct. None of her defenses of the lower court's decision are persuasive.

The Solicitor General notes that the Court has simply assumed, not held, that intermediate scrutiny applies to gender discrimination in statutes addressing citizenship, and cites cases involving other immigration issues for the proposition that deference is required. Opp. at 11. Justice O'Connor refuted that argument in her *Nguyen* dissent, explaining that *Nguyen*, like 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." 533 U.S. at 96. Because the Solicitor General does not address Justice O'Connor's argument, her contention provides no basis for denying the petition.

On the merits, she contends that former sections 1401 and 1409 survive higher scrutiny because "the differential treatment of citizen mothers and citizen fathers of out-of-wedlock children born outside the United States" is justified as "first, ensuring [that the child] attained a sufficiently recognized or formal relationship to their United States parent -- and thus to the United States ... and, second, preventing such children from being stateless." Opp. 11. The former contention is frivolous, the "differential treatment" here -- requiring a much shorter residence period for women -- bears no rational relationship to the goal of ensuring "a sufficiently recognized or formal relationship to their United States parent -- and thus to the United States."

As to the latter, the Solicitor General offers no more than her *ipse dixit*, Opp. at 13-14, that avoiding statelessness, rather than, say, perpetuating gender stereotypes as to the care of our-of-wedlock children,[3] was the actual motivation for the discrimination. She relies heavily on the President's 1938 message to Congress, yet that document does not mention statelessness, although it is replete with stereotypes about the rights and duties of women with respect to illegitimate children. *See Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at 18.

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[3] *See, e.g., Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting).

Because the government must "establish that the alleged objective is the actual purpose underlying the discriminatory classification," *see Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982), the Solicitor General is obliged to prove that avoiding statelessness was the actual motivation for the discrimination. Neither the Solicitor General nor the lower court, *see United States v. Flores-Villar*, 536 F.3d 990, 996-97 (9th Cir. 2008), meet that burden; they simply assume it is so.

Assuming, arguendo, that the Solicitor General correctly identified the Congressional goal, the discrimination here is not justified. The Solicitor General cites to a "survey" submitted to Congress in 1938 indicating that "in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother." Opp. at 13-14 (citing *inter alia* Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935)). Based upon this statement, she asserts that "the result of these *jus sanguinis* laws of other nations was to create a risk of statelessness among the foreign-born children of unwed citizen mothers" and thus, "unless the law of the United States accommodated the *jus sanguinis* rules of other nations, those children would not be citizens of any nation." *Id.* at 14.

The materials cited by the Solicitor General do not, however, conclude that unwed mothers suffer, compared to unwed fathers, a grossly disproportionate risk that

their children born abroad would be stateless. Rather, she simply infers it. Her assumption is unwarranted. Because "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality," 29 Amer. J. Int'l Law at 258-259, their appears to be a significant risk of statelessness whenever the father has recognized or legitimated the child, yet cannot demonstrate compliance with the more onerous residence requirements applicable to men. Moreover, a more recent survey of citizenship laws confirms that in approximately 39 countries, a child born out of wedlock is considered a citizen of the father's country unless (in approximately 30 countries) the identity of the father is unknown. *See Citizenship Laws of the World*, U.S. Office of Personnel Management (March 2001), available at http://www.opm.gov/EXTRA/INVESTIGATE/is-01.PDF (last visited Jan. 21, 2010) (providing a country-by-country analysis).[4] Thus, the children of unmarried

[4] It appears from the 2001 survey that a child born out of wedlock to a U.S. citizen father would be stateless in the following countries: Algeria (unless father unknown), Bangladesh (unless father unknown), Bhutan, Botswana, Brunei Darussalam, Cameroon (unless father unknown), Cyprus (unless father unknown), Djibouti (unless father unknown), Egypt (unless father unknown or stateless), Germany (unless father unknown), Greece (unless father unknown), Guinea (unless father unknown), Iran, Japan (unless father unknown), Jordan, Kiribati (unless father unknown), Kuwait (unless father unknown), Lebanon, Maldives (unless father unknown), Monaco (unless father unknown), Morocco (unless father unknown), Myanmar (unless father unknown), Namibia (unless father unknown), Oman, Papua New Guinea, Qatar, Rwanda (unless father unknown), Senegal (unless father unknown), Seychelles (unless father unknown), Sierra Leone, Sudan (unless born prior to 1957 and parents had established residence in Sudan), Swaziland, Sweden (unless father unknown), Syria (unless father unknown), Taiwan (unless father

fathers may bear the risk of statelessness in those countries. Because the Government must justify the discrimination, *see United States v. Virginia*, 518 U.S. 515, 533 (1996), the Solicitor General's showing of a disproportionate risk borne by unwed mothers is inadequate.

Indeed, the Solicitor General appears to shirk that burden. She agrees with Petitioner that Iran imposes the father's nationality, but insists that his example "does not undermine the legitimacy of Congress's scheme" and that "the lack of other examples reinforces the close fit between Congress's important interest and the means it employed to serve that interest." Opp. 15. But it is the Solicitor General who bears the burden, *see Virginia*, 518 U.S. at 533, and criticizing Petitioner's showing without affirmatively demonstrating that the children of unmarried men face only a trivial risk of statelessness cannot discharge that burden. Because she has not provided that affirmative demonstration, she has not proved a grossly disproportionate risk of statelessness suffered by unwed mothers. The discrimination is therefore unjustified.

Even if the Solicitor General did prove a significant risk differential, the lower court still erred in approving the discrimination because it lacks the requisite "fit." *See Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) ("Because we require a much

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unknown), Togo (unless father unknown), United Arab Emirates (unless father unknown), Vanuatu (until age 18 when child can apply for citizenship), Yemen (unless father unknown).

tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification") (citations omitted). *Accord Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000). *See also Craig v. Boren*, 429 U.S. 190, 200 (1976) (requiring that "the gender-based distinction closely serve[]" the legitimate objective). The Solicitor General has made no showing as to the proportion of out-of-wedlock births as to which there is a risk of statelessness. Yet the statutory scheme imposes its residence differential in every out-of-wedlock birth abroad in which the mother is a United States citizen. Thus, women are favored over men even in cases where there is no risk of statelessness. And in cases where there is a risk of statelessness, women are again favored even though the Solicitor General does not deny that there will be cases in which the out-of-wedlock children of U.S. citizen fathers will be stateless.

The Solicitor General believes that the discrimination is justified because the stateless children of U.S. citizen men will be a small percentage of the total births and, presumably, that justifies discriminating against men even when statelessness is not an issue. But that reasoning echoes the statistical analyses rejected in *Craig*, where the Court overturned gender-based limitations on the ability of young men to purchase beer imposed because, *inter alia*, men of that age group were arrested for alcohol-related offenses more often than similarly situated women, and were involved

in more alcohol-related traffic accidents. *See* 429 U.S. at 200-01. *Craig* rejected that evidence as not meeting the "requirement that the gender-based difference be substantially related to achievement of the statutory objective." *Id.* at 204.

Here, statelessness is an issue in some unknown proportion of out-of-wedlock births, and the Solicitor General contends that the percentage of that group of births involving U.S. citizen mothers exceeds that of U.S. fathers by some unknown amount. Nothing about these unknown percentages serves to distinguish *Craig*'s rejection of statistical analyses. The Solicitor General has not demonstrated that the Court should deny the petition because the lower court's decision was correct.

IV.

AS JUSTICE O'CONNOR EXPLAINED IN *NGUYEN*, THIS COURT HAS THE POWER TO REMEDY THE INSTANT EQUAL PROTECTION VIOLATION, AND, TO THE EXTENT THAT THIS COURT'S REMEDIAL POWER IS IN DOUBT, THAT DOUBT MILITATES IN FAVOR OF GRANTING THE PETITION TO RESOLVE THE QUESTION.

The Solicitor General contends that further review is unwarranted because, even in the event of a constitutional violation, this Court cannot grant Petitioner citizenship. Opp. at 15. Justice O'Connor's dissent in *Nguyen*, 533 U.S. at 94-97, reaches the opposite conclusion, and the Solicitor General has no response to her analysis. *See also Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting). Specifically, Justice O'Connor reasoned that because section 1409 is not a naturalization statute,

INS v. Pangilinan, 486 U.S. 875 (1988), which the Solicitor General relies upon, Opp. at 16, is inapposite. *See Nguyen*, 533 U.S. at 95-96 (O'Connor, J., dissenting). Like the claimant in *Nguyen*, Petitioner seeks not naturalization, but rather to resolve "whether citizenship was transmitted at birth." *Id.* As for the remedy, Justice O'Connor observed that "this Court has often concluded that, in the absence of legislative direction not to sever the infirm provision, 'extension, rather than nullification,' of a benefit is more faithful to the legislative design." *Id.* at 96 (quoting *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979)) (additional citations omitted). Indeed, the Solicitor General's position here, that Congress's goal was to ameliorate statelessness, Opp. at 12, would support "extension [of the benefit], rather than nullification." *See Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting).

The Solicitor General places primary reliance on *United States v. Cervantes-Nava*, 281 F.3d 501 (5th Cir. 2002), Opp. at 15, but *Cervantes-Nava* rejected a similar claim to that advanced by Petitioner without addressing Justice O'Connor's *Nguyen* opinion or her citation to *Westcott*.[5] Rather, *Cervantes-Nava*, which involved a challenge to the fact that the residence requirement for married mothers exceeded that of unmarried mothers, concluded that the only potential remedies were to "sever the more lenient residency requirement for citizen mothers of illegitimate

[5] Additionally, *Cervantes-Nava* conflicts with *Wauchope v. United States Department of State*, 985 F.2d 1407, 1410 (9th Cir. 1993).

children or [to] strike down the INA in its entirety." 281 F.3d at 504. Because *Cervantes-Nava* overlooks the third course identified by Justice O'Connor's *Nguyen* dissent and set forth in *Westcott*, it not only fails to support the Solicitor General's position, it also affirmatively demonstrates that the Court should grant the petition to resolve this difficult question.

Nor does the Solicitor General's citation, Opp. at 16, to Justice Scalia's concurring opinion in *Miller*, 523 U.S. at 452-59, counsel in favor denying the petition. In *Nguyen*, Justice Scalia reaffirmed his views expressed in *Miller*, 533 U.S. at 73 (Scalia, J. concurring), but noted that a majority of the Justices in *Miller* "concluded otherwise" there and "proceed[ed] on the same assumption" in *Nguyen*. *Id.* As a result, Justice Scalia joined the *Nguyen* merits opinion and declined to respond to Justice O'Connor's remedial analysis in *Nguyen*. The upshot is that the debate is unresolved, and the instant case offers an ideal opportunity to settle it.

V.

THE FACT THAT THE SUCCESSOR STATUTES DISCRIMINATE LESS HARSHLY IS NO REASON TO DENY THE PETITION.

The Solicitor General observes that Congress amended the relevant provisions to discriminate less harshly, but concedes that "the current version of the law continues to apply a less stringent residence requirement to unwed citizen mothers who give birth abroad." Opp. at 16-17. Because "the absence of an insurmountable

barrier will not redeem an otherwise unconstitutionally discriminatory law," *Kirchberg*, 450 U.S. at 461, the amendment is no reason to deny the instant petition.

VI.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Dated: March 22, 2010

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