No. 15-1191

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

—v.—

LUIS RAMON MORALES-SANTANA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE NATIONAL IMMIGRATION LAW CENTER, AND THE NATIONAL WOMEN'S LAW CENTER, IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. 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), *Nguyen v. INS*, 533 U.S. 53 (2001), and *Flores-Villar v. United States*, 564 U.S. 210 (2011). Through its Women's Rights Project, the ACLU has litigated many cases challenging gender-based classifications on constitutional grounds. 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. The New York Civil Liberties Union is the New York state affiliate of the ACLU.

The National Immigration Law Center (NILC) is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity,

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[1] The parties have consented to the filing of *amicus* briefs by submitting blanket letters of consent to the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae,* its members or its counsel made a monetary contribution to this preparation or submission of this brief.

and justice. This work has included litigation seeking to protect access to status for immigrants, and to ensure all individuals, regardless of immigration status, are provided equal protection under the law.

The National Women's Law Center (NWLC) is a non-profit legal organization that has worked since 1972 to advance and protect legal rights and opportunities for women, at school, at work, at home, and in their communities. NWLC focuses on major areas of importance to women and their families, including income security, workplace justice, education, and reproductive rights and health, with special attention to the needs of low-income women and women of color. NWLC has participated as counsel or amicus curiae in a range of cases before this Court to secure the equal treatment of women under the law and has a strong interest in ensuring that all persons receive equal protection under the Constitution and in protecting mothers, fathers, and children from the harm gender-stereotyped laws can inflict.

STATEMENT OF THE CASE

Respondent Luis Ramon Morales-Santana was born in the Dominican Republic in 1962. Pet. App. 6a. His father, a U.S. citizen, later married Morales-Santana's mother, a citizen of the Dominican Republic, and they moved to the United States. Morales-Santana has lived in the U.S. for more than forty years.

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

8 U.S.C. § 1401(a)(7) (1958) (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 (1958) (emphasis added)

Children born out of wedlock.

> (a) The provisions of paragraphs … (7) of section 1401(a) of this title . . . shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, 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*.

The statute thus imposed disparate requirements on U.S. citizen fathers and mothers for the transmission of citizenship to children born out of wedlock. A mother was required 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) (1958). In contrast, a father must have legitimated the child while he or she was 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) (1958). A gender-based difference in residency requirements continues in the current version of the statute.[2]

Morales-Santana's father legitimated his son when he was eight years old by marrying his mother and resided in the U.S. for more than ten years prior to Morales-Santana's birth. However, he could not meet the five-year prong of the residency requirement because he left the U.S. when he was 18

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[2] These provisions were amended in 1986. Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3657 (1986). Because Morales-Santana 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). Mothers must have one continuous year of residency prior to the child's birth. 8 U.S.C. § 1409(c).

years old – 20 days shy of his 19th birthday and of reaching five years of residence after the age of 14 years old – returning after Morales-Santana's birth. Pet. App. 6a.

After he was placed in removal proceedings in 2000, Morales-Santana asserted his status as a U.S. citizen. The Board of Immigration Appeals rejected his argument, concluding that he could not satisfy the residency requirements laid out in the law. Pet. App. 8a.

Morales-Santana challenged the gender-based residency requirements on equal protection grounds. The U.S. Court of Appeals for the Second Circuit concluded that the statute was subject to, but failed, heightened scrutiny. Pet. App. 15a-25a. The Second Circuit determined that the governmental interest in ensuring a sufficient tie between the child and the United States was not advanced by subjecting mothers and fathers to different residency requirements. Pet. App. 21a-25a. The court of appeals also found that avoiding statelessness of children was neither the actual purpose for relaxing the residency requirement for mothers nor substantially related to gender-based residency distinctions. Pet. App. 25a-34a. Lastly, it ruled that the appropriate remedy was to permit fathers to transmit citizenship subject to the same one-year residency requirement as mothers of non-marital children. Pet. App. 35a-41a.

SUMMARY OF ARGUMENT

At issue in this case are gender-based residency requirements that make it more difficult, or in some cases create an absolute bar, for fathers to transmit U.S. citizenship to their children, and that blocked Morales-Santana's citizenship claims in this case. If his mother had been a U.S. citizen with the same history of residency in the United States as his father, Morales-Santana would be a citizen today. But despite having legitimated his son, Morales-Santana's father could not transmit citizenship because he fell just weeks short of meeting the much more onerous residency requirement for fathers. Moreover, the law prohibits all fathers under the age of 19 years old from transmitting citizenship to their children.

Amici submit this brief to address two points. 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, like the Court of Appeals, this Court should conclude that the government has not presented an exceedingly persuasive justification for differentiating between fathers and mothers in imposing residency requirements.[3]

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[3] The government also argues that the Court of Appeals exceeded its authority in concluding that the one-year residency requirement for mothers should be extended to fathers of non-marital children. We agree with Morales-Santana on this point, but do not separately address it in this brief.

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.[4] The government contends, however, that heightened scrutiny is the wrong standard because this case involves Congress's plenary power over immigration and the Court should therefore apply a more deferential standard, as the Court has done in immigration cases such as *Fiallo v. Bell*, 430 U.S. 787 (1977). U.S. Br. at 12. But here, the issue is birthright citizenship, 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

[4] Although the issue is not before the Court, *amici* note that heightened scrutiny would also apply to any review of the current residency requirements, which reduce but do not eliminate the gender disparity. *See* n.2, *supra*.

gender. Consequently, 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 established exceedingly persuasive justifications for the gender classification, one of the few that persist in federal law. The gender classification is not substantially related to important governmental interests today, and neither of the interests asserted by the government motivated the enactment of the statute. Because the law creates an insurmountable hurdle to citizenship transmission for some fathers and gender-neutral alternatives exist, it cannot be rationalized as a beneficent allowance to U.S. citizen mothers.

ARGUMENT

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

The Court of Appeals correctly concluded that Congress's plenary power over immigration matters does not justify reducing the level of equal protection scrutiny applicable here. Pet. App. 16a-20a. 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. 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."); *Miller*, 523 U.S. at 480 (Breyer, J., dissenting) ("The Court has applied a deferential standard of review in cases involving aliens, not in cases in which only citizens' rights were at issue.").

In contrast, this case concerns the right of a U.S. citizen to transmit his citizenship to his citizen or putative citizen child. 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 must satisfy constitutional standards, including equal protection.[5]

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

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[5] 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).

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 rather than grant her rights that she does not now possess").[6]

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

[6] 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 with an American parent 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)).

those who originally owed loyalty to a different nation.").

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

As the Court of Appeals noted, Pet. App. 18a, 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 and 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. *See Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting) (explaining that in *Bellei*, "[w]hen the Court [] considered a case "in which only citizens' rights were at issue," the Court did "not lower[] the standard of review") (citing *Bellei*, 401 U.S. at 828-36).

The government nonetheless asserts that the gender-based classifications at issue here are subject to a deferential standard of review in light of

Congress' plenary power in the immigration area, relying on *Fiallo*. U.S. Br. at 17. 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. The Court indicated, however, that such deference would not extend beyond immigration, since "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 78 (1976)).[7]

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,

[7] Although two of the petitioners in *Fiallo* were U.S. citizens, those citizens sought immigration benefits on behalf of relatives who were aliens, and the case therefore implicated the considerations that underlie the plenary power doctrine. In contrast, here, where citizenship at birth is the sole issue, such deference is not appropriate.

whereas here petitioner claims that she is, and for years has been, an American citizen."); *see also id.* at 432-33 (distinguishing *Fiallo*); *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. Accordingly, the Court "need not decide" whether the plenary power doctrine would otherwise dictate a more deferential standard of review if this were a traditional immigration or naturalization case. *Miller*, 523 U.S. at 429 (Stevens, J.).

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, 304 (2001) (construing provision of immigration statute to avoid Suspension Clause concerns); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that statute applicable to noncitizens detained at Guantánamo 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 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 added). 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.*, *Virginia*, 518 U.S. at 555; *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.

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.

Once heightened scrutiny is applied, it is clear that the disparate residency requirements in § 1409 cannot survive constitutional challenge. The court of appeals correctly concluded that the purposes proffered by the government fall far short of justifying the discriminatory treatment of fathers. To hold otherwise would undermine the equal protection standard that this Court has enforced for decades.

The framework for analyzing gender-based equal protection challenges under heightened scrutiny 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 533. The state's burden is "demanding," and the justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

Gender classifications warrant heightened scrutiny because "the sex characteristic frequently bears no relation to ability to perform." *Frontiero v.*

Richardson, 411 U.S. 636, 686 (1973) (plurality opinion). Too often, classifications based on sex are rooted in "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Thus, 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*, 411 U.S. at 688-89 (plurality opinion). 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).

The government argues that the sex-based residency requirements represent a tailored response to ensuring a sufficiently strong connection between a child born abroad and the United States. According to the government, because other countries and the U.S. typically treated mothers as the only "legal parent" at birth for children born outside of marriage, mothers were not similarly situated to fathers and thus can enjoy a lower residency requirement. The government also contends that the residency requirements furthered an interest in reducing the risk of statelessness faced by non-marital children born abroad to U.S. citizen mothers. This Court's equal protection jurisprudence,

however, demonstrates that the government has not met its burden.

First, the government completely fails to demonstrate the disparate residency requirements are substantially related to an important state interest *today*. Shifting gender roles and legal regimes can undermine the relationship that may have once existed between a classification and a state interest. "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *see also United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

For this reason, the Court frequently has emphasized that heightened scrutiny is intended to root out sex classifications based on "archaic" justifications out of line with "contemporary reality." *Califano v. Goldfarb*, 430 U.S. 199, 206 (1977); *see, e.g.*, *J.E.B.*, 511 U.S. at 135 (heightened scrutiny recognizes the danger of gender classifications based on "archaic" generalizations); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) (gender classifications generally based on "outmoded" rationales); *Craig*, 429 U.S. at 198-99 (striking down gender classification when rationale was "outdated"). A law should not survive constitutional scrutiny solely because it accurately described a world of more than six decades ago.

The government does not attempt to show that its justifications for the gender-based distinctions in

the statute remain salient today, even as the law continues to impose a longer residency requirement on fathers. *See, e.g.*, U.S. Br. at 10 (analyzing the government interests in the statute in 1940 and 1952). Its analysis rests on assertions about parenthood, statelessness, and nationality laws that discriminated based on gender existing around the world in 1940 and 1952, the years the provisions at issue were first adopted and amended.

The equal protection doctrine demands more. 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 outside of marriage, as well as furthering racially nativist immigration policies. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2199-2206, 2230-33 (2014). Just as this Court's jurisprudence has acknowledged changed understandings of marriage, *see Obergefell*, 135 S. Ct. at 2596, changed understandings of parenthood and the bonds between fathers and children must be addressed.

Fathers' roles in the lives of their children have transformed dramatically over the last sixty years. In 2015, fathers made up 16 percent of single parents with minor children in the United States. United States Census Bureau, Current Population Survey (CPS), America's Families and Living Arrangements: 2015: Family Groups, FG6 and FG10, http://www.census.gov/hhes/families/data/cps2015FG.html. From 1950 to 2007, the number of

households with children headed by fathers with no spouse present increased fivefold. U.S. Census Bureau, America's Families and Living Arrangements: 2007 2 (2009), http://www.census.gov/prod/2009pubs/p20-561.pdf. The number of fathers who care for their children and do not work outside the home has doubled since 1989, now reaching two million. Gretchen Livingston, Pew Research Center, Growing Numbers of Dads Home with the Kids: Biggest Increase Among Those Caring for Family 5 (2014), http://www.pewsocialtrends.org/2014/06/05/growing-number-of-dads-home-with-the-kids/. In 2015, nearly 1.5 million paternities were established and acknowledged for children born to unmarried parents in the United States. Office of Child Support Enforcement, FY 2015 Preliminary Report 8 (Apr. 2016), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_preliminary.pdf.

Moreover, there is no doubt that nationality laws around the world have undergone major reforms since the enactment and amendment of the statute. Many countries today grant equality to men and women with regard to the nationality of their children. United Nations High Commissioner for Refugees, Background Note on Gender Equality, Nationality Laws and Statelessness 1-3 (2016), http://www.refworld.org/docid/56de83ca4.html (hereinafter UNHCR). It would turn the equal protection doctrine on its head for this Court to uphold a gender classification based on governmental justifications that depend on the discriminatory nature of other countries' laws, when many of those countries no longer discriminate based on gender.

Second, a decision upholding the disparate residency requirements cannot be reconciled with *Nguyen v. INS*, 533 U.S. 53 (2001), in which the Court upheld the statute's legitimation requirement for fathers. Central to the holding was that the statute furthered the "facilitation of a relationship between parent and child." *Id.* at 68. Yet, the disparate residency requirements have the opposite effect, by making it more difficult for fathers to transmit citizenship to children they legitimate. Moreover, they create a disincentive for fathers to legitimate their children. As the government itself has conceded, many 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. *See* U.S. Br. at 37-38; U.S. Br., *Nguyen v. INS*, 2000 WL 1868100 *17, *18 n.9 (5th Cir. 2000) (No. 99-2071). Thus, U.S. citizen fathers who choose to facilitate relationships with their children through legitimation then risk rendering them stateless. Heightened scrutiny demands that the government explain how a gender classification can be substantially related to its interests when the classification also undermines interests previously advanced to, and accepted by, this Court.

Moreover, the residency requirements for transmitting citizenship pose the sort of absolute bar that *Nguyen* called into question. Specifically, the *Nguyen* Court emphasized that the legitimation requirements at issue were not "inordinate and unnecessary hurdles" and "can be satisfied on the day of birth, or the next day, or the next 18 years" by the father through pre-existing legal procedures. 533

U.S. at 70-71. That is not true with respect to the residency requirements. For fathers who are 18 years old or younger, such as the petitioner in *Flores-Villar*, it is "physically impossible" to have the required physical presence because they became parents when less than 19 years old and could not acquire five years of residency after the age of 14 years old. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd,* 564 U.S. 210 (2011).

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"). The complete and unexplained exclusion of fathers under the age of 19 years underscores the inadequacy of the justifications put forth by the government. *See Goldfarb*, 430 U.S. at 215 (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).

Third, the government impermissibly relies on the contention that "when a child is born out of wedlock, there ordinarily is only one legally recognized parent – the mother – at the time of birth." U.S. Br. at 5. It draws on this assumption to argue that mothers and fathers of non-marital children are not similarly situated and thus different

residency criteria can be imposed upon them to establish connection to the U.S.

The government's emphasis on the legal status of mothers versus fathers at the moment of birth turns a blind eye to the many fathers who have legal relationships with their non-marital children at or soon after birth, by acknowledging paternity, supporting the child, marrying the mother, or through other legal means. *See, e.g.*, United States Children's Bureau, Child Welfare Info. Gateway, The Rights of Unmarried Fathers 1 (2014), http://www.childwelfare.gov/pubPDFs/putative.pdf. Ignoring this reality would authorize the government to discriminate against fathers of non-marital children in every circumstance, an outcome that this Court's decisions do not allow. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 389-94 (1979); *Stanley v. Illinois*, 405 U.S. 645, 649-58 (1972). It also reinforces prevailing stereotypes that unmarried fathers lack responsibility for their children by assuming that the legal relationship between them does not change after birth. There is no distinction for purposes of determining a child's connection to the U.S. between a family with a U.S. citizen mother and non-citizen father who legitimates the child soon after birth and a family with a non-citizen mother and U.S. citizen father who legitimates soon after birth.

In addition, the seemingly gender-neutral concept of "legal parent" does not insulate the government's rationale from scrutiny. The government's definition of legal parent focuses only on parents at birth, which it then posits as "ordinarily" mothers. It is unclear why, in the

government's view, the moment of birth is decisive, especially when fathers might sometimes be the only legal parent. *See* Resp't. Br. at 35. Moreover, the federal government imposed stricter requirements for what constituted legitimation by a father for a non-marital child under the 1952 Act than did many states and foreign countries. *See* Br. Amici Curiae of Professors of History, Political Science, and Law In Support of Petitioner; Collins, 123 Yale L.J. at 2198 n.256. It mandated marriage to the mother, which was frequently impossible if the mother refused, was no longer alive, or for a host of other reasons. *Id.* In doing so, the federal government of that time constructed legal parenthood according to its own assumptions about how fathers should, or should not, relate to their non-marital children.

The Court previously has noted that justifying a gender classification based on the "legal" status of a father can itself reflect biased decision-making by the government. Striking down a state law that placed a non-marital child in state custody upon the death of the mother, the Court observed that the state's refusal to recognize an unmarried father as a parent denigrated the familial bond between father and child. "'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.'" *Stanley*, 405 U.S. at 652 (quoting *Giona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968)). *See also Trimble v. Gordon*, 430 U.S. 762, 772-73 (1977). Here, the government draws the line at parenthood at the moment of birth. In doing so, it

"needlessly risks running roughshod over the important interests of both parent and child" by disregarding the actual nature of the connections between fathers, children, and the United States. *Stanley*, 405 U.S. at 657. In combination with the strict requirement of marriage in order to legitimate, the residency requirements erected an impossible barrier for many fathers to transmit citizenship, even when they had close relationships with their children.

Fourth, the government has not established that statelessness justifies or was intended by Congress to justify the disparate residency requirements. 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. Many non-marital children of U.S. citizen fathers were and are at risk of statelessness because they are born in countries that recognize the paternal transmission of statutory birthright citizenship. *See* Brief of Amici Curiae Scholars on Statelessness in Support of Petitioner, *Flores-Villar v. United States*, 2010 WL 2569160, at *10 (June 24, 2010); UNHCR, *supra* at 3-4 (identifying laws of the father's country that do not permit him to confer nationality in certain circumstances, such as when the child is born abroad, as increasing the risk of statelessness); Equal Rights Trust, My Children's Future: Ending Gender Discrimination in Nationality Laws III, 1, 22-23 (2015) http://www.equalrightstrust.org/ertdocumentbank/My%20Children%27s%20Future%20Ending%20Gender%20Discrimination%20in%20Nationality%20Laws.pdf. 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); UNHCR, *supra* at 3.

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 government did not attempt to do so – for example, by showing 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.

Furthermore, the government's assertion that Congress adopted the disparate residency requirements in § 1409 as a considered response to the problem of statelessness is not supported by the legislative history. 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 U.S. citizen fathers. Pet. App. 26a-32a. In other words, there is no support for 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 different residency requirements in response.

Moreover, 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. Collins, 123 Yale L.J. at 2199-2200.[8] 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.[9]

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. at 38. The 1952 Act made various changes to the provisions governing birthright citizenship, and the Senate Report explained one of those changes by

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[8] 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. 1139 (1940) (repealed 1952).

[9] 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. 236 (1952).

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 recognized 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. This change also advanced the prevailing understanding at the time that mothers would naturally be the caretakers of their non-marital children. 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.

Fifth, 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.[10]

Sixth, the government fails to adequately address the existence of gender-neutral alternatives,

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[10] 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 – legitimation as defined by the federal government 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. Moreover, Congress crafted an exception to the residency requirements for married parents that effectively exempted a large group of married fathers who worked abroad for the U.S. government or American companies from the parental residency requirements, along with the child residency requirements discussed in n.8, *supra*. *See* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. at 1139 (1940); Br. Amici Curiae of Professors of History, Political Science, and Law In Support of Petitioner.

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.[11] 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. Congress previously has replaced laws relying on gender classifications with gender-neutral laws providing for the automatic citizenship of children based on the citizenship of their parents. *See* Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 101-103, 114 Stat. 1631, 1631-1633 (2001) (replacing former 8 U.S.C. 1432(a), which barred children of unmarried fathers from automatically acquiring citizenship of fathers, while children of unmarried

[11] 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.

mothers could transmit citizenship). There has been no showing as to why the government cannot implement gender-neutral options here.

Lastly, 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 requirements of § 1409 are not substantially related to any interest in ensuring a sufficient connection between the parent, child, and U.S. or in reducing statelessness. They completely shut out some members of one sex from transmitting citizenship and were not designed to redress disparate treatment of women. By impermissibly distinguishing between similarly situated parents, the statute violates the right to equal protection.

CONCLUSION

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

Respectfully submitted,

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