No. 13-1301

IN THE

Supreme Court of the United States

CLERDE PIERRE,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

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

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND URGING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Asian American Legal Defense and Education Fund, Inc. ("AALDEF"), Asian Americans Advancing Justice – Asian Law Caucus ("Advancing Justice – ALC"), and the National Immigration Project of the National Lawyers Guild ("NIPNLG") submit this brief as *amici curiae* in support of the Petitioner Clerde Pierre in this case. All parties have consented to the filing of this brief.

AALDEF, founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has provided assistance to many individuals and families with citizenship and immigration issues, and the legal and factual problems presented by this lawsuit affect large numbers of Asian-American men, women, and children. AALDEF has a strong interest in ensuring that all persons receive equal protection of the law under the Constitution and in

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief.

protecting mothers, fathers, and children from the harm gender-stereotyped laws can inflict. The provision at issue in this case discriminates on the basis of gender to deny citizenship to many children.

Advancing Justice – ALC, founded in 1972, is the nation's first legal and civil rights organization serving the low-income Asian Pacific American communities. Advancing Justice--ALC – ALC focuses on housing rights, immigration and immigrants' rights, labor and employment issues, student advocacy (through ASPIRE, the nation's first undocumented Asian Pacific American youth group), civil rights and hate violence, national security, and criminal justice reform. Advancing Justice – ALC's broad strategy integrates the provision of legal services, educational programs, community organizing initiatives and advocacy. Since the vast majority of Asians and Pacific Islanders in America are immigrants and refugees, and the proper administration of immigration laws is a major concern to Asian Pacific–Islander communities. Through clinics throughout Northern California and its detention visitation programs, Advancing Justice–ALC is a primary resource for legal representation and information for Asian Pacific-Islander communities.

NIPNLG is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. For over forty years, the NIPNLG has been promoting justice and equality of treatment in all areas of immigration law, the criminal justice

system, and social policies related to immigration. Through its membership network and litigation efforts, the NIPNLG is acutely aware of the problems faced by individuals who are denied the rights and privileges of U.S. citizenship based on the discriminatory, and antiquated, immigration laws at issue in this case.

SUMMARY OF ARGUMENT

At issue in this case are gender-based citizenship requirements that bar some U.S. naturalized citizen fathers from directly transmitting citizenship to their children. If Petitioner's mother had been a U.S. citizen with the same history of naturalization as his father, Petitioner would be a citizen today. Instead, the law makes it impossible for Petitioner to automatically derive citizenship from his father. This is true even though Petitioner has lived in the U.S. as a lawful permanent resident for fifteen years, and Petitioner's mother surrendered all parental rights to his father.

In 2010, this Court granted certiorari in *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011), to consider the same issue presented by Petitioner: whether certain naturalization statutes that discriminate between men and women without any basis in their biological differences could survive scrutiny under the Equal Protection guarantee contained in the Due Process Clause of the Fifth

Amendment.[2] The Court divided 4-4 on this question, with Justice Kagan recused.[3] The Court should grant certiorari in this case to definitively resolve the important question of whether such discrimination is permissible.

America's immigration and naturalization laws have long been shaped by beliefs about certain racial groups and men's and women's relative capacities and roles that our modern equal protection doctrine is intended to repudiate. For example, racial stereotypes that Asians are perpetual foreigners resulted in the exclusion of Chinese immigrants from the United States and also prevented Asian Americans from gaining citizenship.

8 U.S.C. § 1432(a) codifies the same harmful prejudices that have been used to justify discrimination against women and certain racial groups throughout history. The gender-based assumptions inherent in the statute are based on a set of archaic and outdated stereotypes: namely that unmarried fathers will not form long lasting relationships with their children and that unmarried mothers will bear all responsibility for the care of their children.

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[2] Petition for a Writ of Certiorari to the United States Court of Appeals to the Ninth Circuit at i, 10, *Flores-Villar*, 131 S. Ct. 2312 (2011) (No. 09-5801).

[3] *Flores-Villar*, 131 S. Ct. at 2313.

Placed in historical context, it is apparent that § 1432(a) should be repudiated as repugnant to the Constitution. Permitting discrimination by marital status of parents at birth or by gender of the parent, as the statute does here, leaves the door open to other forms of discrimination and threatens to stunt the substantial progress that the American legislature and judiciary have made during the last century in rooting out racial and gender discrimination in our nation's laws.

For these reasons, AALDEF urges the Court to reverse the judgment of the Second Circuit, and hold that § 1432(a) violates the equal protection component of the Fifth Amendment's due process clause.

ARGUMENT

I. DISCRIMINATORY IMMIGRATION AND NATURALIZATION LAWS REPEATEDLY HAVE BEEN PASSED, AND LATER REPUDIATED

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *See United States v. Windsor,* 133 S. Ct. 2675, 2695 (2013). Despite this guarantee, this nation has a long history of passing laws that discriminate on the basis of gender or race in determining citizenship, and which have now been repudiated as repugnant to this nation's principles.

The nation's very first naturalization law—the Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103—limited the right of naturalization to "free white person[s]." Other laws overtly sanctioned racial discrimination. For example, the notorious Chinese Exclusion Act of 1882 prohibited the immigration of Chinese laborers to the United States, and the Immigration Act of 1917 extended this prohibition to much of Asia.[4] The racial motivation behind these statutes was hardly disguised. The Chinese Exclusion Act, for instance, was based on Congress's determination that the presence of a large number of Chinese laborers "tenaciously adhering to the customs and usages of their own country" and "and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests." *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893).

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[4] *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (repealed 1943) (prohibiting immigration of all Chinese laborers); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-77 (repealed 1952) (establishing an "Asiatic barred zone"); *see also* Page Act of 1875, ch. 141, § 1, 18 Stat. 477, 477 (federal law restricting immigration for "lewd and immoral" purposes, targeting Asian women presumed to be prostitutes); Tydings-McDuffie Act of 1934, ch. 84, § 8, 48 Stat. 456, 462 (1934) (amended 1946) (imposing annual quota of fifty Filipino immigrants).

Similarly, the Immigration Act of 1924—which imposed annual limitations on the number of immigrants from any nation to 2 percent of the number of foreign-born individuals of such nation residing in the United States as determined by the census of 1890—undeniably had disparate racial impacts.[5] Although not an overtly racial statute, given the then-existing makeup of the country's foreign-born population, nearly 90 percent of the slots were allocated to immigrants from countries in Northern Europe.[6]

As with racial classifications, this country has a long history of citizenship laws that treat women and men differently.[7] Early citizenship statutes

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[5] Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159.

[6] *See* Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 Nev. L. J. 101, 118-19 (2013).

[7] An amicus brief submitted to the Court in support of petitioner in *Flores-Villar* by professors of history, political science and law with particular expertise in the history of citizenship and gender provided an overview of the manner in which U.S. citizenship and immigration have been "shaped and animated by sex-based stereotypes and outdated gender norms." *See* Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. Rev. 1485, 1497-1518 (2011) [hereinafter *Sex and Citizenship*].

provide that fathers, not mothers, transmitted citizenship to their children. The Immigration Act of 1855, for example, conferred citizenship on foreign born individuals based on their father's citizenship, and not their mothers: foreign-born individuals "whose *fathers* were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States."[8] Congress finally recognized the right of American wives to transmit citizenship to their foreign-born children in 1934.[9] However, additional requirements and related exceptions—such as child and parental U.S. residency requirements—disproportionately constrained wives from transmitting citizenship to their foreign-born children.[10]

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[8] Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 (emphasis added).

[9] Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797.

[10] *See id.* (child U.S. residency requirement); Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1138-40 (age-delimited parental U.S. residency requirement for children of mixed-nationality couples; exceptions to child and parental residency requirements for citizen parents residing abroad at the time of the child's birth and employed by the U.S. government or a "bona fide" American organization); *see also Sex and Citizenship*, *supra*, at 1504-06 (describing how facially gender-neutral

Similarly, citizenship by marriage was initially limited to foreign women who married American men. The Expatriation Act of 1907 provided that "any American woman who marries a foreigner shall take the nationality of her husband."[11] Underlying this differential treatment of married men and women with respect to the transmission of citizenship was a "belief that the husband determined the political and cultural character of the family."[12] These laws were premised on the idea that all members of a family should have the same nationality, as led by the husband, and that a married woman was a dependent who transferred her property and income to her husband.[13]

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exceptions to the child and parental residency requirements were designed to relieve parents who were the "head of the household," a legal term of art for husbands or fathers).

[11] Act of Mar. 2, 1907 (Expatriation Act), ch. 2534, § 3, 34 Stat. 1228, 1228.

[12] *Sex and Citizenship*, *supra*, at 1503.

[13] *See generally id.* at 1497-1515; Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 420-23 (2005); *see also* Letter from Wilbur J. Carr, Assistant Secretary of State, to Rep. Samuel Dickstein, Chairman, House Committee on Immigration and Naturalization, *reprinted in Relating to Naturalization and Citizenship Status of Children Whose Mothers Are*

It was not until fifty years ago that overt racial and gender discrimination was repudiated in the Immigration and Nationality Act of 1965, which expressly prohibited discrimination in the issuance of immigrant visas based on "race, sex, nationality, place of birth, or place of residence."[14] Nevertheless, discrimination in naturalization persists, such as in the statute at issue here.

These historical examples of discrimination make clear why the Constitution does not tolerate laws passed on the basis of invidious stereotypes that attempt to predict conduct on the basis of race and gender. *See, e.g.*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 484 (1982) ("[T]he central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the

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Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. On Immigration and Naturalization, 73d Cong. 29, at 9-10 (1933) ("It is hardly necessary to say that, when a woman having American nationality marries a man having the nationality of a foreign country and establishes her home with him in his country, the national character of that country is likely to be stamped upon the children, so that from the standpoint of the United States they are essentially alien in character.").

[14] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911.

basis of race.") (internal quotation marks and citation omitted). Such distinctions are "odious to a free people whose institutions are founded on the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 128 (1994) (criticizing "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice").

II. PLACED IN HISTORICAL CONTEXT, 8 U.S.C. § 1432(A) IS AN UNCONSTITUTONAL LAW THAT ENDORSES GENDER DISCRIMINATION

Discrimination against unmarried fathers in citizenship decisions involving their children is not new. Historically, U.S. naturalization law made it easier for unmarried citizen mothers to transmit citizenship to their foreign-born children than for unmarried citizen fathers to do so.[15] In part, these laws were based on biological basis,[16] and in part

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[15] *See* Kristin Collins, note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale J.L. 1669, 1689-93 (2000).

[16] One rationale for these laws is that mothers were biologically able to prove lineage whereas fathers were not able to do so. For example, the question of legitimacy was first introduced into citizenship law in 1940 when legislation was passed that entitled an unwed father to pass on his citizenship to his child

they were based on negative stereotypes that unmarried fathers did not create or sustain relationships with their nonmarital children. Greater burdens were imposed on unmarried fathers who had to redeem his negative, unattached image before his child was entitled to his citizenship.[17]

As a result of negative stereotypes associated with unmarried fathers, Congress rejected proposed legislation in the 1930s that would have introduced equal treatment of citizen mothers and fathers with respect to the transmission of citizenship to their

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only if the father's paternity was legally established during the child's minority. Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1137, 1139; *see also Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the H. Comm. On Immigration and Naturalization*, 72d Cong. 18 (1932) at 5-6 (Statement of Burnita Shelton Matthews). Biological basis is not at issue in this case, where it is undisputed that Petitioner's father is his biological father.

[17] *See Sex and Citizenship*, *supra*, at 1509-10; Linda Kelly, *The Alienation of Fathers*, 6 Mich. J. Race & L. 181, 186-89 (2000).

foreign-born nonmarital children.[18] Instead, Congress imposed burdens in 1940 to derivative citizenship laws for unmarried fathers.[19] The basic restrictions, with minor changes, have since been re-codified several times.[20] Collectively, these requirements make conferral of citizenship substantially more burdensome, and, indeed, at times impossible, for the unmarried father. They also perpetuate the negative stereotype of unmarried fathers as less capable of being a parent then unmarried mothers. As Justice Breyer observed in his dissent in *Miller v. Albright*, such statutory distinctions "depend for their validity upon the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children." 523 U.S. 420, 482-83 (1998).

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[18] H.R. 14,684, 71st Cong. § 3 (1930); H.R. 5489, 72d Cong. (1931); *see also Sex and Citizenship*, *supra*, at 1508-09.

[19] Nationality Act of 1940, ch. 876, §§ 201(g) & 205, 54 Stat. 1137, 1138-40. No similar limitations were placed on the unwed mother.

[20] *See, e.g.*, Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, ch. 477, §§ 301 (a)(7) & 309, 66 Stat. 163, 236, 238-39; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657.

There is no justification for gender-based discrimination in determining citizenship where, as here, the legitimacy of Petitioner's biological relationship with his father is unchallenged and not in dispute. Upholding such discrimination would only perpetuate this country's long history of discrimination in immigration and naturalization for numerous families in the U.S. Many of those laws have now been repudiated, and so too should this one.

America is a country of immigrants. Citizenship laws must afford equal treatment to all, regardless of race and gender. This is what the Constitution requires. We respectfully request that the Court grant the petition and reverse the Second Circuit's judgment.

CONCLUSION

For the reasons set forth herein, AALDEF respectfully urges this Court to reverse the judgment of the Second Circuit, and hold that 8 U.S.C. § 1432(a) is unconstitutional.

Respectfully submitted,

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