No. 13-1301

In the Supreme Court of the United States

CLERDE PIERRE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under former 8 U.S.C. 1432(a)(3) (1994) (repealed 2000), a child born outside of the United States to non-U.S. citizen parents became a citizen of the United States upon the fulfillment of various conditions, including upon the "naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation." The question presented is:

Whether Congress's decision to automatically confer citizenship on an alien child upon the naturalization of either a legally separated parent with custody of the child or the child's unwed mother if the paternity of his unwed father was not established by legitimation, but not upon naturalization of his unwed father, violates the equal protection component of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution treaty, and statutes:

Treaty and statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 738 F.3d 39. The decisions of the Board of Immigration Appeals (Pet. App. 38a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2013. On February 25, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 24, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I of the United States Constitution assigns to Congress the "Power * * * To establish

an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has elected to confer United States citizenship by statute on certain persons born outside the United States through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. At the time of petitioner's birth in 1978, a "child born outside of the United States of alien parents" would become a United States citizen "upon fulfillment" of the "conditions" identified in 8 U.S.C. 1432(a) (1994), which was repealed in 2000.[1] Section 1432(a) provided for conferral of citizenship in certain circumstances for children under the age of 18 who were not married and were residing in the United States pursuant to a lawful admission for permanent residence. 8 U.S.C. 1432(a)(4) and (5).

The general rule under Section 1432 was that both parents had to become naturalized U.S. citizens in order for their child to automatically obtain citizenship. 8 U.S.C. 1432(a)(1). The statute also provided three exceptions permitting a child to obtain citizen-

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[1] References herein to Section 1432 are to that Section as it appears in the 1994 edition of the United States Code. Since 2001, a child born outside the United States automatically becomes a U.S. citizen if one or both of his or her parents is or becomes a citizen before the child reaches the age of 18 and the child resides "in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." Child Citizenship Act of 2000 (2000 Act), Pub. L. No. 106-395, § 101(a), 114 Stat. 1631 (8 U.S.C. 1431(a)(3)). Because that statute does not apply to children who were 18 years of age or older when the law became effective on February 27, 2001 (see 2000 Act § 104, 114 Stat. 1633; 8 U.S.C. 1431(a)(2)), Section 1432 continues to govern the citizenship claims of individuals (such as petitioner) who were born on or before February 27, 1983.

ship if only one parent naturalized. First, Subsection 1432(a)(2) allowed a child to become a citizen if the naturalized parent was the surviving parent and the other parent was deceased. Second, Subsection 1432(a)(3) allowed a child to become a citizen if "there ha[d] been a legal separation of the parents" and the naturalizing parent had legal custody of the child. Finally, Subsection 1432(a)(3) allowed a child to become a citizen upon the naturalization of his mother if "the child was born out of wedlock and the paternity of the child has not been established by legitimation."

2. Petitioner was born in Haiti in 1978 to a mother and father who were not and have never been married to each other. Pet. App. 3a. Petitioner contends that his father has always had legal custody of him. *Id.* at 3a, 42a.

In 1981, petitioner's father moved to the United States and left petitioner in Haiti with other family members. Pet. App. 3a. In 1992, petitioner's father became a naturalized citizen. *Ibid.* In 1993, petitioner's father brought petitioner (who was still a minor) to the United States as a lawful permanent resident. *Ibid.* Since arriving in the United States, petitioner has lived with his father in Connecticut, except during times when petitioner was incarcerated. *Ibid.*

In 1994, petitioner's father filed an application for naturalization on behalf of petitioner pursuant to 8 U.S.C. 1433 (1988 & Supp. III 1991). Pet. App. 4a. That statute provided that, upon application by a U.S.-citizen parent on behalf of a child born abroad, the Attorney General would issue a certificate of naturalization for the child if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18, and the child resided perma-

nently in the United States pursuant to a lawful admission for permanent residence. 8 U.S.C. 1433 (1988 & Supp. III 1991); see Pet. App. 4a. In support of the application, petitioner's father submitted an affidavit from petitioner's mother in which she formally disclaimed all parental rights. Pet. App. 4a. For reasons that are not apparent in the record, the application was never decided and a certificate of naturalization never issued. *Ibid.*

In 2001, petitioner was convicted of two counts of robbery in the third degree. Pet. App. 4a. He served two years of imprisonment and three years of probation. *Ibid.* On July 7, 2006, petitioner was convicted of selling a controlled substance and of illegally possessing a weapon. *Ibid.*

3. On May 15, 2008, after petitioner had completed his second prison term, the United States Department of Homeland Security initiated removal proceedings, charging petitioner with removability pursuant to 8 U.S.C. 1227(a)(2)(A) and (C), based on his criminal convictions. Pet. App. 4a, 38a-39a. During the proceedings before the immigration judge, petitioner argued that he could not be removed to Haiti because he is a U.S. citizen. *Id.* at 5a. He argued in the alternative that he could not be removed to Haiti because he would be subject to torture and was entitled to protection under the Convention Against Torture (CAT).[2] *Ibid.* The immigration judge found that petitioner was not a U.S. citizen, that he was removable as charged, and that he was not eligible for protection under CAT. *Id.* at 5a.

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[2] See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

4. a. Petitioner appealed to the Board of Immigration Appeals (Board), and the Board dismissed the appeal. Pet. App. 41a-45a. The Board agreed with the immigration judge that petitioner did not obtain derivative citizenship through his father pursuant to Section 1432(a). *Id.* at 42a-43a. The Board explained that Section 1432(a) "provide[d] for derivative citizenship upon the naturalization of a parent having legal custody over a child when there has been a legal separation of the parents, or upon the naturalization of the surviving parent when the other parent is deceased." *Ibid.* "Because [petitioner's] parents were never married," the Board explained, "there could not have been a legal separation under former" Section 1432(a). *Id.* at 43a. Petitioner had not alleged, moreover, "that his mother was deceased when his father naturalized in 1992." *Ibid.* The Board thus concluded that petitioner "is ineligible for derivative citizenship under former" Section 1432(a). *Ibid.* The Board further concluded that it lacked jurisdiction to consider petitioner's constitutional challenge to Section 1432(a). *Ibid.* Finally, the Board upheld the immigration judge's determination that petitioner is removable and is not entitled to protection under CAT. *Id.* at 43a-45a.

b. Petitioner filed a timely petition for review with the court of appeals. Pet. App. 5a. While that petition was pending, petitioner filed a motion to reopen with the Board, seeking reconsideration of his request for protection under CAT in light of new evidence that petitioner suffers from paranoid-type schizophrenia. *Ibid.* The Board granted petitioner's motion to reopen and remanded the case to the immigration judge with instructions to reevaluate petitioner's eligibility for

CAT protection. *Ibid.* On remand, the immigration judge again denied petitioner's request for protection under CAT. *Ibid.* The Board then reversed the denial of CAT protection, finding it more likely than not that petitioner would be tortured in Haiti based on his mental illness. *Ibid.* The case was remanded and the immigration judge granted a deferral of removal to Haiti under CAT. *Ibid.* Petitioner filed a second petition for review in the court of appeals, challenging only the Board's earlier rejection of his citizenship claim. *Id.* at 5a-6a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-35a.

The court of appeals first rejected petitioner's argument that, as a matter of constitutional avoidance, Section 1432(a)(3)'s reference to "a legal separation of [a child's] parents" should be construed not to require that the parents in question had been married in order to have become legally separated. Pet. App. 12a-17a. The court held that the statutory term "legal separation" is "not ambiguous in this context." *Id.* at 14a. The court noted that it has "consistently construed" that term "to apply only to marital relationships," as have other courts of appeals. *Id.* at 14a-15a; *id.* at 15a ("Petitioner does not cite, nor can we find, cases to the contrary.").

Turning to petitioner's constitutional claims, the court of appeals first determined that petitioner has standing to argue that Section 1432(a) impermissibly discriminated on the basis of legitimacy, in violation of the Equal Protection Clause, because it automatically conferred citizenship on a child born in wedlock when the parent with custody after a legal separation naturalized, but did so on an out-of-wedlock child only

when the mother naturalized (if the father had not established paternity through legitimation). See Pet. App. 12a. The court rejected petitioner's contention that Section 1432(a) must be reviewed under intermediate scrutiny. *Id.* at 17a-21a. In the court of appeals' view, Section 1432(a) "did not classify based on legitimacy" because, "viewing § 1432(a) as a whole, the marital status of a child's parents at the time of birth did not determine the child's eligibility for automatic citizenship." *Id.* at 19a. The court explained that "[a] child born out of wedlock was as eligible as a child born to married parents to obtain automatic derivative citizenship based on the naturalization of both parents or the naturalization of the sole surviving parent." *Ibid.* (citations omitted). The court further concluded that, "fairly read, § 1432(a)(3) does not impose extra burdens on children born out of wedlock" because "the distinction drawn in § 1432(a)(3) * * * reflected an evident policy judgment that, where two parents survived but only one had naturalized, respect was due for the interests of the alien parent, lest those interests be usurped by the naturalization of the other parent." *Id.* at 19a-20a.

The court of appeals held in the alternative that, even if Section 1432(a) were viewed as containing a classification on the basis of legitimacy, it would survive intermediate scrutiny. Pet. App. 21a-30a. The court concluded that Section 1432(a) was substantially related to two important governmental interests: "the preservation of the family unit and protection of the parental rights of the alien parent." *Id.* at 21a; *id.* at 21a-24a. The court explained that, by "limiting automatic naturalization only to * * * narrow situations in which it was reasonable to infer that the alien

parent had a lesser interest in the child's citizenship," Section 1432(a) was "substantially related to, and served to vindicate, the governmental interest in respecting the rights of the alien parent." *Id.* at 24a.

The court of appeals also concluded that petitioner has standing to argue that Section 1432(a) "improperly classified on the basis of gender, in that, under some circumstances, it permitted an out-of-wedlock child of a naturalizing mother to obtain automatic derivative citizenship, but did not permit the same for such a child of a naturalizing father." Pet. App. 30a; *id.* at 30a-32a. The court acknowledged that, because petitioner's father did formally legitimate him (or, at least, the parties so assumed for purposes of this litigation, see *id.* at 31a & n.11), neither the naturalization of his mother alone nor the naturalization of his father alone would have conferred derivative citizenship on him. *Id.* at 31a. The government argued that petitioner's lack of derivative citizenship is therefore "not traceable to the gender distinction in § 1432(a)(3)." *Ibid.* But the court of appeals credited petitioner's alternative theory that Section 1432(a) "disparately treat[ed] out-of-wedlock children where one parent has effectively abandoned the child" because an unmarried mother could "pass her American citizenship to her child when the father, by failing to legitimate the child, had absented himself from the child's life," but an unmarried father could not do the same when the mother had abandoned the child. *Id.* at 31a-32a. The court concluded that petitioner had standing to assert that claim and that his standing was not defeated by prudential limits on third-party standing. *Id.* at 32a & n.12.

On the merits, the court of appeals rejected petitioner's sex-discrimination claim. Pet. App. 32a-35a. The court of appeals relied on this Court's decision in *Nguyen* v. *INS*, 533 U.S. 53 (2001), which rejected an equal-protection challenge to a set of rules governing the conferral of U.S. citizenship of children born abroad to unmarried parents, one of whom was a U.S. citizen and one of whom was not. Pet. App. 32a-33a. This Court upheld those rules, which made it more difficult for the child to obtain U.S. citizenship when the unmarried U.S.-citizen parent was his father rather than his mother. *Nguyen*, 533 U.S. at 59-71. The court below concluded that, like the statutory scheme challenged in *Nguyen*, Section 1432(a) was justified in light of the government's interests in "assuring that a biological parent-child relationship exists" and "assuring that the child and its citizen parent had a demonstrated opportunity to develop an actual relationship." Pet. App. 33a (citing *Nguyen*, 533 U.S. at 62, 64-65). The court of appeals explained that "it was no violation of equal protection for the statutory scheme to require a naturalizing, unwed father to apply for citizenship for his child, rather than grant it automatically." *Id.* at 34a.

ARGUMENT

Petitioner renews his arguments (Pet. 9-17) that the now-repealed 8 U.S.C. 1432(a)(3) unconstitutionally discriminated on the basis of legitimacy and sex. Neither argument merits further review, however, because the court of appeals correctly affirmed the constitutionality of Section 1432(a)(3), as has every other court of appeals to consider the issue. And even if the question presented did warrant review, petition-

er's case is ill-suited to a proper resolution of that question.

1. a. Former Section 1432(a) permitted the automatic naturalization of a child born outside the United States to alien parents upon the naturalization of both parents or upon the naturalization of one parent if the other parent was deceased. 8 U.S.C. 1432(a)(1) and (2). The statute also provided for the automatic naturalization of such a child upon the naturalization of only one parent (when both parents were living) in two situations: (1) "when there ha[d] been a legal separation of the parents" and the naturalizing parent had legal custody of the child, or (2) upon "the naturalization of the mother if the child was born out of wedlock and the paternity of the child ha[d] not been established by legitimation." 8 U.S.C. 1432(a)(3). Petitioner has apparently abandoned his argument that Section 1432(a)(3) should be construed such that he would qualify for automatic naturalization under the first clause, which governs the "legal separation" of parents. See Pet. App. 12a-17a. The court of appeals correctly held—as has every other court to consider the question—that the requirement in that clause that there have been a legal separation of a child's parents may be satisfied only when the parents were first married. See *id.* at 13a-17a; *Ayton* v. *Holder*, 686 F.3d 331, 336-337 (5th Cir. 2012); *Lewis* v. *Gonzales*, 481 F.3d 125, 130 & n.4 (2d Cir. 2007); *Brissett* v. *Ashcroft*, 363 F.3d 130, 134 (2d Cir. 2004) (Sotomayor, J.); *Barthelemy* v. *Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003); *Wedderburn* v. *INS*, 215 F.3d 795, 799-800 (7th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *Charles* v. *Reno*, 117 F. Supp. 2d 412, 418 (D.N.J. 2000). There is thus no conflict in the circuits, and no error on the

part of the Second Circuit, in interpreting the language of this provision.

b. Petitioner instead renews his arguments (Pet. 9-17) that the distinctions drawn in Section 1432(a)(3) unconstitutionally discriminated on the basis of legitimacy and sex, in violation of the equal protection component of the Fifth Amendment's Due Process Clause. Every court of appeals to consider whether Section 1432(a)(3) is unconstitutional has agreed that it is not. See Pet. App. 17a-30a, 32a-35a; *United States* v. *Casasola*, 670 F.3d 1023, 1028-1032 (9th Cir. 2012); *Johnson* v. *Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011), cert denied, 132 S. Ct. 1005 (2012); *Catwell* v. *Attorney Gen.*, 623 F.3d 199, 211 (3d Cir. 2010); *Rodrigues* v. *Attorney Gen.*, 321 Fed. Appx. 166, 169 (3d Cir. 2009); *Marquez-Morales* v. *Holder*, 377 Fed. Appx. 361, 364-366 (5th Cir. 2010); *Van Riel* v. *Attorney Gen. of the U.S.*, 190 Fed. Appx. 163, 165 (3d Cir. 2006); *Barthelemy*, 329 F.3d at 1065-1068 (9th Cir.); *Wedderburn*, 215 F.3d at 800 (7th Cir.); *Nehme* v. *INS*, 252 F.3d 415, 429-430 (5th Cir. 2001); see also *Barton* v. *Ashcroft*, 171 F. Supp. 2d 86, 89-90 (D. Conn. 2001); *Charles*, 117 F. Supp. 2d at 419-421 (D.N.J.).[3] The uniformity of view among the courts of appeals on the constitutionality of Section 1432(a)(3) is itself a sufficient reason to deny the petition for a writ

[3] In *Grant* v. *United States DHS*, 534 F.3d 102 (2008), cert. denied, 556 U.S. 1238 (2009), the Second Circuit "assume[d] without deciding" that a child born abroad out of wedlock would be automatically naturalized upon his father's naturalization if the father legitimated the child before the child turned 18 in order to avoid "serious constitutional and statutory interpretation problems." *Id.* at 106-107. That dictum has no force, however, as the decision below reached the opposite conclusion in a case where the question was squarely presented.

of certiorari. And indeed the Court previously denied certiorari on this question in *Johnson* v. *Whitehead*, *supra*.

c. The court of appeals correctly held that Section 1432(a)(3) is constitutional under either rational basis or a heightened standard of review because the distinctions it makes are substantially related to an important governmental objective. Pet. App. 17a-30a, 32a-35a. See *Nguyen* v. *INS*, 533 U.S. 53, 60 (2001); *Clark* v. *Jeter*, 486 U.S. 461 (1988). Section 1432 governed the past conferral of citizenship on a child born abroad to alien parents upon the naturalization of both parents or one parent. The statutory scheme embodied in Section 1432 is substantially related to the government's important objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens. The general rule of Section 1432, "with few exceptions, [is that] *both* parents must naturalize in order to confer automatic citizenship on a child." *Lewis*, 481 F.3d at 131. That baseline "recognizes that either parent—naturalized or alien—may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard." *Ibid.*; *id.* at 130 ("The governing principle * * * is respect for the rights of an alien parent who may not wish his child to become a U.S. citizen."); see *Barthelemy*, 329 F.3d at 1066 (Congress sought to "prevent[] the naturalizing parent from usurping the parental rights of the alien parent."); *ibid.* ("If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien's parental rights could be effectively extinguished."); *Nehme*, 252 F.3d at 425 (explaining that the rule that both parents must naturalize "pro-

mote[s] marital and family harmony and * * * prevent[s] the child from being separated from an alien parent who has a legal right to custody"); *Wedderburn*, 215 F.3d at 800 ("Both the child and the surviving but non-custodial parent may have reasons to prefer the child's original citizenship.").

Consistent with its concern for the rights of both parents, Congress permitted only a few limited exceptions to the general rule. The first exception provided for automatic naturalization upon the naturalization of one parent when the other parent was deceased. 8 U.S.C. 1432(a)(2). The second exception provided for automatic naturalization when the parents were married but then legally separated and the child was in the custody of the naturalizing parent. 8 U.S.C. 1432(a)(3). As the court of appeals noted, those exceptions applied equally to all relevant children "regardless of the marital status of the child's parents at the moment of birth." Pet. App. 21a. The third exception applied when a child was born out of wedlock, the child was in the custody of his naturalizing mother, and his father had never taken the steps necessary to establish his paternity of the child through legitimation. 8 U.S.C. 1432(a)(3). That exception could not have applied to petitioner (had his mother naturalized instead of his father) because he contends (and the court of appeals assumed, see Pet. App. 31a n.11) that his father formally legitimated him.[4]

Significantly, eligibility for each of the statutory exceptions was determined by the existence of a

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[4] Amici Asian American Legal Defense and Education Fund, *et al.* therefore err in asserting (at 3) that, "[i]f Petitioner's mother had been a U.S. citizen with the same history of naturalization as his father, Petitioner would be a citizen today."

legally-defined relationship. A child was automatically naturalized if the naturalizing parent was (1) the only living parent, (2) legally separated from the other parent and had legal custody of the child, or (3) the mother of a child born out of wedlock if the father had never legitimated the child and therefore never established a formal legal relationship with the child. It is true that there were some situations in which a child was prevented from automatically naturalizing upon the naturalization of one parent even though the non-naturalizing parent did not have significant ties to the child. But Congress is entitled to set forth clear rules that can be uniformly administered without a fact-intensive inquiry into the nature and extent of a child's relationship (or lack thereof) with an alien parent, who will typically not be a party to immigration or naturalization proceedings in the United States. That is particularly so when Congress has provided other avenues through which a naturalized citizen such as petitioner's father may secure U.S. citizenship for his foreign-born child. See pp. 17-18, *infra*.

Petitioner argues (Pet. 3, 9-10, 28-33) that Section 1432(a)'s framework is based on stereotypes and outmoded views about the stigma attached to children born out of wedlock. But that is not true. When a child is born out of wedlock, the child's legal relationship to his mother is typically established by virtue of the birth itself. See *Nguyen*, 533 U.S. at 62-63. In such situations, a child's father must take some step to establish a formal legal relationship with the child through legitimation. When an unwed father did so—as petitioner contends his father did, see Pet. App. 31a n.11—naturalization of the child's mother would not automatically trigger naturalization of the child under

former Section 1432(a). In other words, when (as petitioner asserts and the court of appeals assumed was the case here) the unwed father took steps to put himself on the same footing as the mother with respect to being recognized as a parent as a legal matter, the scheme in Section 1432(a) made no sex-based distinction between a child's mother and father. Similarly, the statute's requirement of a legal separation did not treat children born in wedlock different from children born out of wedlock based on stereotypes about or animus towards the latter. If a child's parents were married and then separated only informally, the child would have been treated the same under Section 1432(a) as the child of parents who were apart but had never legally formalized their relationship to begin with through marriage and the father had formally legitimated his relationship to the child.

By limiting the circumstances in which a child was automatically naturalized upon the naturalization of only one of his parents, the statute protected both parents' legal rights concerning their child's citizenship and prevented separation of the child from a parent who did not naturalize.[5] Naturalization is a "significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship." *Lewis*, 481 F.3d at 131; see *Wedderburn*, 215 F.3d at 800 (noting that citizenship "may affect obligations such as military service and taxation"). Under Section 1432, the grant of citizenship is automatic when certain conditions are met. Such "au-

[5] In enacting Section 1432, Congress also sought to "ensure that only those alien children whose 'real interests' were located in America with their custodial parent, and not abroad, should be automatically naturalized." *Nehme*, 252 F.3d at 425.

tomatic naturalization of the couples' children upon the naturalization of one spouse could have unforeseen and undesirable implications for many families." *Brissett*, 363 F.3d 134 (Sotomayor, J.). Because the distinctions Congress made in Section 1432(a) were substantially related to the government's important objective of protecting parental rights, those distinctions were fully consistent with the Constitution even if, contrary to *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977) (applying "a facially legitimate and bona fide reason" standard to immigration legislation), heightened scrutiny were applied.

2. Review is also not warranted here because this case is an unsuitable vehicle for addressing and resolving the constitutionality of former Section 1432(a) or any of the other issues petitioner seeks to raise here.

a. Initially, the question whether former Section 1432 violated the Constitution's guarantee of equal protection is of limited prospective significance because the statute was repealed in 2000 and now only applies to individuals who were born before February 27, 1983, and were thus no longer under age 18 when the 2000 amendments became effective. See note 1, *supra*. Section 1432's successor provision—8 U.S.C. 1431—does not link eligibility for automatic naturalization of a child with the naturalizing parent's status as mother or father or with the marital status of the child's parents. See *ibid.* (providing for naturalization of a minor child when "[a]t least one parent" becomes a citizen). Accordingly, the provision at issue affects a diminishing set of individuals.

The diminishing significance of the question presented is highlighted by the fact that someone in peti-

tioner's position had and has other avenues available to achieve naturalization without relying solely on Section 1432. From the time of petitioner's father's naturalization through the time petitioner turned 18, petitioner's father had the ability to seek a certificate of naturalization or citizenship for petitioner pursuant to 8 U.S.C. 1433 (1988 & Supp. III 1991, and 1994). Before 1995, that section provided that a child born abroad would be naturalized upon petition of the child's parent if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18 and unmarried, and the child resided permanently in the United States pursuant to a lawful admission for permanent residence. 8 U.S.C. 1433 (1988 & Supp. III 1991). From 1995 until petitioner turned 18 in 1996, Section 1433 provided that a child born abroad would be naturalized if similar conditions were met. 8 U.S.C. 1433 (1994). And, in fact, petitioner's father did file an application pursuant to Section 1433 on petitioner's behalf in 1994, although he never received an adjudication from the agency. See Pet. App. 4a & n.3. As the court of appeals noted, petitioner did not challenge the agency's failure to act on his father's Section 1433 petition before the Board, and at one point he abandoned (without prejudice) his pursuit of a mandamus action in district court seeking to challenge the agency's failure to act. *Id.* at 29a-30a n.10. An Act of Congress should not be deemed to violate the Constitution merely because in petitioner's case the application his father filed on his behalf pursuant to 8 U.S.C. 1433 was not adjudicated (for reasons that are not apparent in the record).

Moreover, a foreign-born child who develops substantial connections to the United States, through

marriage or permanent residence in the United States, may become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1427, 1430, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process or because he rendered himself ineligible by engaging in criminal activity. Cf. *Lehr* v. *Robertson*, 463 U.S. 248, 264 (1983).

b. In addition, there is a serious question about whether petitioner has standing to raise a sex discrimination claim on behalf of his father.[6] The distinction in the statute turns on the child's legal relationship to the father and mother, not the sex of the child. In order for petitioner to be entitled to assert equal protection rights on behalf of his father, he must affirmatively establish that he has a "close relation[ship]" to his father and that there is "some hindrance to [his father's] ability to protect his * * * own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991); see, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 445-451 (1998) (O'Connor, J., concurring in the judgment); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623-624 n.3 (1989); *Singleton* v. *Wulff*, 428 U.S. 106, 113-116 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). Those restrictions "arise[] from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" *Miller*, 523 U.S. at 446

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[6] It does appear that petitioner has standing to raise his illegitimacy-based equal protection claim.

(O'Connor, J., concurring in the judgment) (quoting *Wulff*, 428 U.S. at 114 (opinion of Blackmun, J.)).

In this case, the record discloses no obstacle that would prevent petitioner's father from asserting his own constitutional rights. See *Powers*, 499 U.S. at 411; see also *Wulff*, 428 U.S. at 116 (opinion of Blackmun, J.). Petitioner's father could have applied for a U.S. passport for petitioner and, if such an application were denied, he could have filed an action on petitioner's behalf challenging the denial pursuant to 8 U.S.C. 1503, and raising the claim that Section 1432(a)'s failure to confer citizenship on petitioner violated his Fifth Amendment rights. As an adult, petitioner could have followed the same course and joined his father as a party to any legal challenge.

c. Moreover, as the Court recognized in *Nguyen*, even if petitioner could establish that the distinctions drawn in former Section 1432 were unconstitutional, he would still face "additional obstacles before [he] could prevail." 533 U.S. at 71-73. In particular, he would not be entitled to the relief he seeks—a declaration that he is a naturalized U.S. citizen.

As a general matter, "when a statutory violation of equal protection has occurred, it is not foreordained which particular statutory provision is invalid." *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment). The Court "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (brackets in original) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J.,

concurring in the result)); see *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is a mandate of equal treatment, a result that in other contexts "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision * * * as to the disparately parsimonious one.").

In choosing which statutory provision to strike, a court must be guided by congressional intent. Here, such an inquiry might lead to the conclusion that the proper way to cure any equal protection violation would be to apply the general rule for automatic conferral of citizenship—*i.e.*, that both parents must naturalize—uniformly to all children. Moreover, that result would avoid the serious questions that would be raised by judicial extension of citizenship to a category of persons not chosen for citizenship by Congress, all of whom have long since attained adulthood without any reasonable expectation of citizenship. Such a result would be inconsistent with this Court's admonition that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully ob-

tain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."); see also *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) (stating that even if the statute at issue in *Miller* were unconstitutional, no remedy would be available because "the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress").

These difficulties in determining what remedy would be appropriate if the Court did find a constitutional problem further counsel against granting the petition for a writ of certiorari. Indeed, because such remedial difficulties derive from and underscore Congress's plenary power over immigration and naturalization, they illustrate why the statutory conditions Congress has prescribed for conferral of U.S. citizenship do not violate the Constitution to begin with.

3. Finally, there is no merit to petitioner's argument (Pet. 23-28) that the Court should grant his petition for a writ of certiorari in order to resolve a disagreement among various courts of appeals about whether classifications based on sex or legitimacy are subject to rational-basis review or heightened scrutiny when Congress makes such classifications in the exercise of its plenary authority over matters concerning immigration and naturalization. The court of appeals did not resolve the issue but found that Section 1432(a)(3) passed even intermediate scrutiny. Pet. App. 19a-21a. This Court does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421,

1430 (2012) (quoting *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)). And review of that question is particularly unwarranted here where the disposition of petitioner's constitutional challenge did not turn on the standard of review. The court of appeals expressly held that petitioner's challenge would fail even under the more exacting standard of review. Pet. App. 21a, 32a-33a.[7] And, as noted at p. 11, *supra*, every court of appeals to consider the constitutionality of Section 1432(a) has upheld it regardless of the standard of review applied.

Petitioner does not identify any court of appeals that has squarely held that the distinctions drawn in Section 1432(a) must survive heightened scrutiny. In *Marquez-Morales*, the Fifth Circuit stated that, in general, "gender based classifications receive review under a heightened standard," even in the INA context. 377 F. Appx. at 365. But that statement was dictum because the court also held that Section 1432(a) made no gender-based classification as to the

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[7] In the government's view, Congress's judgments about the requirements that must be satisfied in order for a person born abroad to become a U.S. citizen are entitled to considerable deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Fiallo*, 430 U.S. at 794 (citation omitted). As this Court has explained, the principle that courts must accord deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Id.* at 792, 793 n.4 (quoting *Galvin* v. *Press*, 347 U.S. 522, 531 (1954)); *id.* at 792 ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)).

alien in that case—because the alien's father had formally legitimated him, the same automatic-citizenship rule would have applied to the alien regardless of whether his mother or his father naturalized. *Ibid.* In a more recent case, the Fifth Circuit stated that Section 1432(a) would survive heightened scrutiny, but again did not squarely decide that heightened scrutiny applies to a constitutional challenge to the classifications in Section 1432(a). *Ayton*, 686 F.3d at 338. Because the father of the alien in that case had also formally legitimated him, the court of appeals held that the alien's "claim [did] not implicate equal protection." *Ibid.* Petitioner also claims that his father formally legitimated him; his constitutional claim would therefore not be subject to heightened scrutiny even in the Fifth Circuit.

The decisions of the Third and Ninth Circuits on which petitioner relies (see Pet. 24) also do not establish a circuit split. In *Catwell*, the Third Circuit held that "[t]he differential treatment embodied in" 8 U.S.C. 1432(a)(3) "withstands equal protection scrutiny because it serves the important governmental objective of allowing single parent derivative citizenship while protecting the rights of alien parents by limiting circumstances in which it (derivative citizenship) can occur." 623 F.3d at 211. But the court did not expressly resolve the question of what standard of review applies. Indeed, the court also stated: "Former 8 U.S.C. § 1432's restrictions on derivative citizenship based solely on the father's naturalization are *rationally related* to the government's objective of protecting the rights of non-naturalized parents." *Ibid.* (emphasis added). The Ninth Circuit similarly rejected a sex-discrimination challenge to Section

1432(a) "without deciding that [the alien] would be entitled to the heightened standard of scrutiny applicable to gender-based discrimination." *Barthelemy*, 329 F.3d at 1067. Petitioner has therefore failed to identify a circuit split warranting this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2014