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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Section 1432(a) unconstitutionally discriminates on the basis of sex and legitimacy by barring children whose parents never married, and whose sole naturalizing parent is a father rather than a mother, from directly acquiring citizenship. The petition demonstrated, and the government makes no effort to deny, that this case presents the question considered but left unresolved by the Court in *Flores-Villar* v. *United States*, 131 S. Ct. 2312 (2011) (per curiam) (Kagan, J., recused): whether *Nguyen* v. *INS,* 533 U.S. 53 (2001), authorizes sex-based discrimination that has no biological basis. The government has presented no satisfactory reason the Court should delay resolution of that outstanding question any longer.

Notwithstanding the government's rehearsal of the same objections to certiorari it made in *Flores-Villar,* this case is an appropriate vehicle to address the application of *Nguyen*'s holding to citizenship statutes. First, because it concerned naturalization rather than citizenship, *INS* v. *Pangilinan,* 486 U.S. 875 (1988), is no bar to this Court remedying the harm Petitioner has suffered. Second, the government concedes that Petitioner has standing to challenge the legitimacy-based aspect of the statute's classification. It follows that he has standing to contest the classification as a whole, since the sex- and legitimacy-based discrimination in §1432 are inseparable. In any case, Petitioner has standing because the government has initiated removal proceedings against him, and a claim of citizenship is an absolute

defense to such proceedings. Third, although § 1432(a) has been repealed, it continues to affect a significant population—a point the government has not contested—and the discriminatory effect of the statute is not diminished by the availability of separate provisions allowing naturalization by application.

Certiorari is further warranted in order to resolve a circuit split regarding the appropriate standard of review for sex- and legitimacy-based distinctions in citizenship statutes. Contrary to the government's assertions, such a split exists and reflects persistent confusion about the application of this Court's equal protection jurisprudence in the citizenship context. The lower courts have relied reflexively on *Nguyen* without critically examining the stated governmental purpose and the fit between the purpose and the statute, thereby misunderstanding the standard of review required. This Court's review is necessary to clarify that heightened scrutiny is required for sex- and legitimacy-based distinctions in the citizenship context.

Contrary to the government's assertion here and in *Flores-Villar*, *Nguyen* does not justify discriminatory classifications in statutes that provide for direct transmission of citizenship. *Nguyen*'s rationales—that the sex-based distinction in §1409 had a valid biological basis, 533 U.S. at 73, and that it imposed only a "minimal" additional burden on unmarried fathers, *id*. at 70—are inapposite here. Section 1432(a) involves termination of a parental relationship, which has no biological basis, and it renders citizenship transmission by unmarried fathers impossible, rather than merely imposing an additional burden. By reading *Nguyen* to apply to § 1432(a), both the

government and lower courts have improperly extended its holding. To the extent that the biological-basis reasoning advanced in *Nguyen* does apply to citizenship statutes, the holding in that case is a stark departure from settled precedent and should be overruled.

Finally, the government fails to demonstrate a basis for the purported governmental interests in protecting parental rights and promoting family unity, and fails to establish that those purported interests are substantially related to the sex- and legitimacy-based classifications in § 1432(a). The mismatch between the purported governmental objective and the statutory means merits the Court's review.

ARGUMENT

I. The case is an appropriate vehicle for review because a remedy is available, Petitioner has standing, and the statute affects a significant population.

The present case is a suitable vehicle for addressing the scope and applicability of *Nguyen*. The government rehearses here the same arguments from its opposition to certiorari in *Flores-Villar*: that the Court lacks authority to grant an appropriate remedy, that Petitioner lacks standing to raise a sex-based discrimination claim, and that the question is "of limited significance," because of the statute's repeal in 2000 and the availability of other avenues to achieve naturalization. See Brief for United States at 9-17, *Flores-Villar* v. *United States*, 2010 WL 3392008 (U.S.). Just as the Court rejected those arguments in *Flores-Villar*, it should do so here.

A. *This Court has the authority to remedy the violation of equal protection in this case.*

Relying on *INS* v. *Pangilinan,* 486 U.S. 875 (1988), the government erroneously argues that the Court is without the authority to confer citizenship upon Petitioner. Opp. at 21. As Justice O'Connor reasoned in her dissent in *Nguyen* with respect to the statute at issue there, *Pangilinan* is inapposite in the present case because § 1432(a) is not a naturalization statute, but one regarding automatic citizenship. See *Nguyen*, 533 U.S. at 97 (O'Connor, J. dissenting). Furthermore, as in *Nguyen*, Petitioner does not seek a grant of citizenship as an equitable power of this Court, but through extension of a benefit denied his class by an under-inclusive statute.[1] *Cf. id.* at 95-96 (distinguishing the remedy in *Pangilinan* and extension of citizenship when denied by an invalid statute). Furthermore, *Pangilinan* is inapposite because, unlike the present case, it did not involve a constitutional violation. See *Pangilinan*, 486 U.S. at 886 (finding no violation of the Equal Protection Clause). When a statute violates the Constitution, as Petitioner alleges, this Court has both the authority

[1] This Court has often concluded that "extension, rather than nullification," of a benefit is more faithful to the legislative design. *Nguyen*, 533 U.S. at 96 (citing *Califano* v. *Westcott*, 443 U.S. 76, 89-90 (1979); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); and *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25) (citations omitted)). As in *Nguyen*, extension rather than nullification would "have the virtue of avoiding injury to parties who are not represented in the instant litigation." *Id.*

and the duty to invalidate it or modify its application.[2]

Nor does the government's reliance on Justice Scalia's concurrence in *Miller* v. *Albright*, 523 U.S. 420, 423 (1998), Opp. at 21, counsel in favor of denying the petition, since Justice Scalia later acknowledged that his view had been rejected by a majority of the Court. *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring) (citations omitted).

To the extent that a question exists regarding this Court's ability to remedy the harm caused by unconstitutional citizenship laws, this counsels in favor of granting certiorari to resolve this important question. Lower courts have recognized directly transmitted citizenship where it had been denied in violation of the Constitution. See, *e.g.*, *Breyer* v. *Meissner*, 214 F.3d 416, 429 (3d Cir. 2000) (holding that petitioner was entitled to citizenship at birth); *Wauchope* v. *U.S. Dep't of State*, 985 F.2d 1407, 1418 (9th Cir. 1993) (recognizing plaintiffs as U.S. citizens to redress "impermissible gender-based discrimination."). If, as the government suggests, these decisions exceed the scope of judicial authority, Opp. at 19, this issue merits review by the Court.

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[2] Even if the courts lack the jurisdiction to declare Petitioner a citizen, they still have the authority to remedy the equal protection violation by granting an injunction against removal of Petitioner.

B. *Because the sex- and legitimacy-based classifications in the statute are inextricably tied, Petitioner has standing for the entirety of his claim.*

The government concedes that Petitioner has standing to challenge § 1432(a) on the basis of legitimacy, but contends that "there is a serious question" regarding whether Petitioner has standing to contest the sex-based classification in § 1432(a). Opp. at 18. In fact, the sex- and legitimacy-based classifications in the statute are inextricably linked: Petitioner suffered harm only as a result of the sex of his sole naturalizing parent, his father, *and* his parents' marital status at the time of his birth. Pet. at 2-3. It follows that Petitioner has standing as to the entirety of his claim.

In addition, as the subject of removal proceedings initiated by the government, Petitioner has standing to raise a constitutional issue that would negate a jurisdictional fact. This Court has repeatedly found standing where criminal defendants claim constitutional issues arising in the context of an ongoing prosecution. See, *e.g.*, *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) (defendant prosecuted as distributor of contraceptive entitled to assert the rights of unmarried persons denied access to contraceptives). Although Petitioner is not a criminal defendant, the government initiated removal proceedings against him, which may result in his permanent banishment, and citizenship is an absolute defense to such proceedings. See *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922) ("The claim of citizenship is thus a denial of essential jurisdictional fact."); *Rivera* v. *Ashcroft*, 387 F.3d 835, 843 (9th Cir. 2004), modified on other

grounds, 394 F.3d 1129 (2005) ("[t]he executive may deport certain aliens but has no authority to deport citizens."). The government's position that Petitioner lacks standing to raise a citizenship defense presents serious questions of fairness.

As in *Flores-Villar,* the government's standing argument relies heavily on Justice O'Connor's opinion in *Miller*. Opp. at 18-19. However, standing did not prevent this Court from granting certiorari in *Flores-Villar*, and Justice O'Connor's views on standing were rejected by seven Justices in *Miller*. See 523 U.S. at 432-433 (Op. of Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-474 (Breyer, J., dissenting).

Even if Petitioner lacks standing to challenge the sex-based distinction in § 1432(a), he satisfies the elements of third-party standing: (1) he has "suffered an 'injury in fact'"; (2) he and the putative third party, his father, have a "close relationship"; and (3) there was "some hindrance" to the third party's asserting his "own rights." See *id.* at 473 (Breyer, J. dissenting) (quoting *Campbell* v. *Louisiana*, 523 U.S. 392, 397 (1998)). The jeopardy of deportation Petitioner faces by virtue of his noncitizen status establishes injury in fact. Petitioner has also established that he enjoys a "close relationship" with his father. See Pet. at 4. Furthermore, Petitioner's father would not be able to intervene to assert his own rights, which are not at stake in this case, making Petitioner the proper plaintiff for both claims. See *Miller* at 454 n.1 (Scalia, J., concurring) (accepting petitioner's third-party standing because she was "certainly the 'least awkward challenger'") (quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)).

C. *Section 1432(a) continues to harm a significant number of individuals, and the availability of naturalization statutes does not diminish this discriminatory effect.*

Section 1432(a) continues to bar directly acquired citizenship for a significant number of individuals born before February 28, 1983, even though it was repealed in 2000. Pet. at 8 n.9. The government argues that the statute affects "a diminishing set of individuals," Opp. at 16, but it does not contest that the affected population is nonetheless substantial. Studies suggest that § 1432(a) still affects a large number of people in Petitioner's position. Pet. at 30-32. Furthermore, in addition to affecting those to whom § 1432(a) applies, the question presented by this case, regarding the scope and vitality of *Nguyen*, may affect an even larger population.

The Court has repeatedly granted certiorari to decide the validity of repealed statutes and regulations when they continue to have discriminatory effects, especially when the group affected has suffered constitutionally cognizable harms. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996) (holding that a repealed tax law unconstitutionally discriminated against interstate commerce); *Bryson* v. *United States*, 396 U.S. 64 (1969) (granting petition challenging the validity of a conviction under a repealed statute). Notably, the statute in question in *Flores-Villar* had also been amended, but that did not prevent this Court from granting certiorari. See Brief of United States in Opposition at 17, *Flores-Villar*, 131 S. Ct. 2312.

Furthermore, the government's contention that individuals like Petitioner have "other avenues available to achieve naturalization," Opp. at 16-18, erroneously equates the directly transmitted citizenship provided for by § 1432 with avenues of naturalization requiring application, payment of fees, and production of documents, such as 8 U.S.C. § 1433. Petitioner's case demonstrates the inadequacy of § 1433 as a substitute provision for § 1432(a): Petitioner's father applied for naturalization on his behalf through § 1433, but for reasons the government has been unable to explain, the application was never adjudicated. Pet. at 4-5; see Opp. at 17.

The government's argument that alternative naturalization procedures are available to all lawful permanent residents, Opp. at 18, likewise does not erase this crucial distinction between naturalization-by-application and direct transmission of citizenship. By relying on §§ 1445 and 1430, the government argues that childhood derivation of citizenship by operation of law under § 1432(a) is equivalent to Petitioner aging into majority or marrying a U.S. citizen, satisfying residency and other requirements, and applying for naturalization on those bases. These are plainly unequal avenues to citizenship, and they do not render the discrimination in § 1432(a) harmless.

II. Contrary to the government's contention, there exists a circuit split as to the appropriate standard of review for § 1432(a).

The government fails to refute Petitioner's argument that there exists a circuit split over the appropriate standard of review for § 1432(a). The standard of review a court chooses is inextricably related to—if not determinative of—its merits holding. Indeed, no appellate court has upheld § 1432(a)

without either 1) failing to apply heightened scrutiny or 2) relying on an overly broad interpretation of *Nguyen*.

Of the five circuits that have considered equal protection challenges to § 1432(a), only three have applied heightened scrutiny, and none engaged in the required equal protection analysis. Furthermore, the lower courts have articulated conflicting understandings of the interaction between this Court's equal protection precedents and Congress' plenary power over immigration and naturalization. Compare *Johnson* v. *Whitehead*, 647 F.3d 120, 126-127 (4th Cir. 2011) ("Classifications based on legitimacy are typically reviewed under intermediate scrutiny * * * [b]ut the immigration context is a special one") (citing *Fiallo* v. *Bell*, 430 U.S. 787 (1977)) (other citations omitted) with *Barthelemy* v. *Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003) (applying the "facially legitimate and bona fide" standard to § 1432(a)); *Marquez-Morales* v. *Holder*, 277 Fed. App'x 361, 365 (5th Cir. 2010); *Catwell* v. *Att'y Gen. of U.S.,* 623 F.3d 199, 211 (3d Cir. 2010) (applying "equal protection scrutiny" to § 1432(a)(3)); and *Wedderburn* v. *INS*, 215 F.3d 795, 800 (7th Cir. 2000) (applying rational-basis review without mentioning the naturalization context). Not only do courts differ in whether they apply heightened scrutiny to § 1432(a), they differ in whether to apply it to all or part of the statute. See, *e.g.*, *Ayton* v. *Holder*, 686 F.3d 331, 338-339 (5th Cir. 2012) (applying heightened scrutiny to the statute's sex-based classification and rational-basis review to its legitimacy-based classification).

These divergent approaches reflect deep-seated confusion among the courts of appeals—much of it

flowing from this Court's decision in *Nguyen*—regarding whether equal protection principles apply with full force to statutes like § 1432(a). However, this Court has consistently applied heightened scrutiny to statutes that discriminate on the basis of sex and legitimacy. See, *e.g.*, *Johnson* v. *California*, 543 U.S. 499, 509 (2005) (rejecting the government's invitation to "make an exception to the rule that strict scrutiny applies to all racial classifications" and to instead apply a more deferential standard in the prison context). The Court should resolve the confusion among the lower courts by confirming that all sex- and legitimacy-based classifications, including those in citizenship transmission statutes, receive review under heightened scrutiny.

III. The government reads *Nguyen* too broadly because the biological-basis rationale in that case does not apply to § 1432(a).

The question presented is whether *Nguyen* should apply to citizenship laws even where the biological basis rationale of its holding does not apply, an issue that the Court in *Flores-Villar* sought to resolve but could not. In relying on *Nguyen*, the government ignores that case's specific rationale, which only justified imposing an additional burden on fathers to prove the *establishment* of a relationship with their nonmarital children. See *Nguyen*, 533 U.S. at 70. The government fails to provide a justification for applying *Nguyen* to § 1432(a), a statute designed to discern the *termination* of a parental relationship with the child. Biology has no bearing on determining whether a person has terminated his or her parental rights. Therefore, the holding in *Nguyen* cannot be extended to justify the discrimination in § 1432(a). See Pet. at 10-14.

IV. The government fails to establish the governmental interests of § 1432(a) or to show a close fit with the statutory means.

The government fails to demonstrate that § 1432(a) reflects a legitimate governmental interest in protecting noncitizen parents' rights and family unity. Rather, it points to several lower court opinions, which merely cite each other. Opp. at 12-13 (citing *Lewis* v. *Gonzales*, 481 F.3d 125, 131 (2d Cir. 2007); *Barthelemy*, 329 F.3d at 1066; *Nehme* v. *INS*, 252 F.3d 415, 425 (5th Cir. 2001); *Wedderburn*, 215 F.3d at 800). No evidence of these purported governmental objectives exists in the legislative history. Such a post hoc justification cannot withstand this Court's equal protection analysis. *United States* v. *Virginia,* 518 U.S. 515 (1996) (holding that the justification must be "genuine, not hypothesized or invented post hoc in response to litigation.").

Even assuming, *arguendo*, that the purported governmental objectives are in fact the statute's objectives, the government concedes that § 1432(a) excludes a whole category of parents—unmarried fathers—from this scheme. Opp. at 14. Such a significant gap cannot survive heightened scrutiny.

Despite the government's claim that Congress is authorized to devise a scheme that can be "uniformly administered, without a fact-intensive inquiry," Opp. at 14, administrative ease has never been a sufficient justification for sex- and legitimacy-based discrimination. See, *e.g.*, *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Furthermore, the Child Citizenship Act of 2000 provides direct transmission of citizenship for parents who have legal and actual custody, thus belying the government's contention that including

unmarried fathers in § 1432(a) would require burdensome fact-intensive inquiries.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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JULY 16, 2014