No. 09-5801

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN FLORES-VILLAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's inability to claim derivative citizenship through his United States citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers, see former 8 U.S.C. 1401(a)(7) and 1409 (1970), violated the equal-protection guarantee of the Fifth Amendment's Due Process Clause and afforded petitioner a defense to criminal prosecution under 8 U.S.C. 1326.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 536 F.3d 990. The order of the district court granting the government's motion in limine (Pet. App. A1-A7) is reported at 497 F. Supp. 2d 1160.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2008. A petition for rehearing was denied on May 5, 2009 (Pet. App. C1). The petition for a writ of certiorari was filed on August 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted of illegal reentry after having been removed, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 42 months of imprisonment. The court of appeals affirmed. Pet. App. B.

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 opted to confer United States citizenship by statute on certain persons born outside of the United States or its outlying possessions through various provisions in the Immigration and Nationality Act (INA). At the time of petitioner's birth in 1974, a child born outside the United States to married parents, only one of whom was a United States citizen, could acquire citizenship through his or her United-States-citizen parent if, before the child's birth, the citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned fourteen years of age. 8 U.S.C. 1401(a)(7) (1970).[1] The same residency requirement applied if the

[1] Section 1401 has since been amended, with former Section 1401(a)(7) redesignated as Section 1401(g) and the term of the required residence in the United States reduced to a total of five years, two of which must be after the parent turned fourteen. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3657. That amendment does not apply unless the child was born on or after November 14, 1986, however, and thus

child's parents were not married to each other and the father was a United States citizen, although the father in such a case must take additional steps to establish his paternity. 8 U.S.C. 1409.[2]

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does not govern petitioner's citizenship claim. See Pet. App. A4, citing Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 23(d), 102 Stat. 2609. At the time of petitioner's birth in 1974, Section 1401 provided, in relevant part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (7) a person born outside the geographic 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. 1401(a)(7) (1970). Unless otherwise specifically stated, references herein to Section 1401(a)(7) pertain to this provision in the 1970 version of the INA.

[2] Section 1409(a) sets forth the following additinoal requirements where the father is the citizen parent and the mother is an alien:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years --
>
> (A) the person is legitimated under the law of the person's residence or domicile,

If, however, the child was born outside the United States to unmarried parents and only his mother was a United States citizen, Section 1409(c) allows the child to claim United States citizenship through his mother as long as the mother was a citizen of the United States at the time of the child's birth and had been physically present in the United States (or a United States possession) before the child's birth for a continuous period of at least one year.[3] See Miller v. Albright, 523 U.S. 420, 430 (1998).

2. In 1974, petitioner was born to unwed parents in Tijuana, Mexico. Pet. App. A2, B6. His mother was a citizen and national of Mexico and his father, who was 16 at the time of petitioner's birth, was a United States citizen. Id. at A2-A3, B6. When petitioner was two months old, his father and paternal grandmother brought him to the United States to receive medical treatment. Id.

> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

In addition, Section 1409(a) incorporates by reference, as to the citizen parent, the residency requirement of Section 1401.

[3] 8 U.S.C. 1409(c) provides:

> (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.

at A3. After petitioner was released from the hospital, he lived with his father and grandmother in the San Diego area, where he grew up. Id. at A3, B6. Although petitioner's father is not listed on his birth certificate, in 1985 he acknowledged petitioner as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico. Id. at A3, B6.

On March 17, 1997, petitioner was convicted of importation of marijuana in violation of 21 U.S.C. 952 and 960. Pet. App. B6. Thereafter, petitioner was removed from the United States pursuant to removal orders on multiple occasions. Ibid. Petitioner repeatedly returned to the United States following removal, resulting in additional removal proceedings on two occasions in 1999 and again in 2002. Ibid. In June 2003, following another illegal reentry, petitioner was convicted of two counts of illegal entry into the United States in violation of 8 U.S.C. 1325, after which he was removed in October 2003. Ibid. Petitioner again entered the United States illegally and was yet again removed in March 2005, after which he unlawfully returned to the United States one more time. Ibid.

3. On February 24, 2006, petitioner was arrested and charged with being a deported alien found in the United States after deportation, in violation of 18 U.S.C. 1326(a) and (b). Pet. App. B6. After being indicted, petitioner filed an application for a "Certificate of Citizenship" with the federal government, claiming that he had acquired United States citizenship through his father.

Ibid. Petitioner's application was denied because it was physically impossible for petitioner's father, who was 16 when petitioner was born, to have been present in the United States for five years after his fourteenth birthday at the time of petitioner's birth, as required by Section 1401(a)(7) in order to be eligible to confer his citizenship on petitioner. Id. at B6-B7.

Before petitioner's trial on the illegal-reentry charge, the government filed a motion in limine to exclude evidence of petitioner's purported derivative citizenship because petitioner did not qualify for derivative citizenship under the INA. Pet. App. A3, B6-B7. The district court granted the motion after finding that no reasonable juror could find that petitioner could establish derivative citizenship through his father because his father had failed to satisfy the transmission-of-citizenship requirements of the INA. Id. at A3. The district court also rejected petitioner's equal-protection challenge to Section 1401(a)(7)'s residency requirements. Id. at A5-A7. Following a bench trial on stipulated facts, petitioner was convicted of violating 8 U.S.C. 1326 by illegally entering the United States without permission after having been removed, and he was sentenced to 42 months of imprisonment. Id. at B7; Pet. 7.

4. The court of appeals affirmed. Pet. App. B1-B12. On appeal, petitioner reasserted his argument that the version of Section 1401(a)(7) applicable at the time of his birth violated the equal-protection component of the Fifth Amendment's Due Process

Clause because it (in conjunction with Section 1409(a)) required a citizen father of a child born out of wedlock outside of the United States to have lived in the United States for five years following his fourteenth birthday before he could transmit his citizenship to his child while a citizen mother in such a situation need only have resided in the United States for a continuous period of one year. The court of appeals rejected petitioner's argument, relying in part on this Court's holding in Nguyen v. INS, 533 U.S. 53 (2001), that Section 1409 of the INA does not discriminate on the basis of gender in violation of equal-protection principles by requiring citizen fathers -- but not citizen mothers -- to take steps to legitimate their children born out of wedlock outside the United States before conferring their citizenship on those children. Pet. App. B7-B10.

The court of appeals reasoned that the differential treatment of citizen fathers and citizen mothers in such cases was substantially related to the important government interest in avoiding stateless children because many countries confer citizenship based on bloodline rather than on place of birth. Pet. App. B8-B9. Thus, the court held, applying a more lenient residency rule to unwed citizen mothers than to fathers survived intermediate scrutiny. Id. at B8-B10.[4] The court rejected petitioner's argument that the scheme was rendered unconstitutional

[4] Because of that conclusion, the court did not decide whether a lesser standard of review would be appropriate for gender classifications made in the immigration context. Pet. App. B7-B8.

because Iran applies a different rule governing citizenship, assigning to a child born out of wedlock to an Iranian mother and non-Iranian father the citizenship of the child's father. As the court explained, "[a]voiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests" and "[t]he means chosen substantially further th[os]e objectives." Pet. App. B9. "Though the fit is not perfect," the court of appeals concluded, "it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship." Ibid.[5]

ARGUMENT

Petitioner asks this Court to review of the court of appeals' rejection of his equal-protection challenge to the residency requirements formerly applicable to citizen fathers of children born out of wedlock outside the United States under 8 U.S.C.

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[5] The court of appeals also rejected petitioner's argument that former Section 1401(a)(7) unconstitutionally discriminates on the basis of age between men younger than 19 years old and similarly situated men older than nineteen because it was impossible for United States citizen fathers younger than 19 to confer citizenship upon their foreign-born, children born out of wedlock. Pet. App. B10. Petitioner does not renew his age-based equal-protection claim in this Court. Nor does petitioner seek further review of the court of appeals' rejection of his arguments that Sections 1401 and 1409 violate substantive due process; that Section 1401(a)(7) should have been interpreted to count his grandmother's residence in the United States; and that, even if he is not a citizen, he should have been permitted to assert as a defense to the illegal reentry charge that he believed he was a United States citizen. Id. at B10-B12.

1401(a)(7) (1970). Further review of that decision is not warranted, however, because it does not conflict with any decision of this Court or of any other court of appeals, because it is correct, and because it concerns a statute that has been materially amended.

1. Petitioner does not assert that the court of appeals' decision conflicts with any decision of this Court or of any other court of appeals. Indeed, he fails to identify any other court that has even considered whether the former Section 1401(a)(7) violates equal-protection principles. That alone is a sufficient reason to deny the petition for a writ of certiorari.

2. The equal-protection issue raised by petitioner also does not merit review because it does not appear that petitioner has prudential standing to raise that issue. This Court has held that one party to a lawsuit may assert the constitutional rights of a third party who is absent from the litigation if, but only if, the litigant has suffered an injury in fact, the litigant has a "close relation" to the party whose rights are asserted, and there is "some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 411 (1991); see also, 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, 112-116 (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 prudential 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 (O'Connor, J., concurring in the judgment) (quoting Singleton, 428 U.S. at 113-114 (opinion of Blackmun, J.)).

Although the court of appeals held that petitioner did not have standing to assert other constitutional rights on behalf of his father, Pet. App. B10, the court rejected his equal-protection challenge to Section 1401(a)(7) without discussing whether he had standing to assert it. Petitioner does not argue that the country's derivative citizenship rules discriminate against him because he is a man. Rather, he argues that the rules treat citizen fathers of out-of-wedlock children less favorably than they treat citizen mothers of such children in violation of the equal-protection guarantee of the Due Process Clause. That is a challenge properly raised by petitioner's father, who is the subject of the allegedly unconstitutional differential treatment. As the court of appeals found, because "the record discloses no obstacle that would prevent [petitioner's father] from asserting his own constitutional rights," petitioner "lack[ed] standing to pursue rights that belong to his father." Pet. App. B10.

3. Review by this Court is also not warranted because the court of appeals' decision is correct. Section 309 of the INA,

8 U.S.C. 1409, prescribes the terms on which a United States citizen parent may transmit his or her citizenship to a child born outside the United States and out of wedlock. In Nguyen v. INS, 533 U.S. 53 (2001), this Court held that the requirement that citizen fathers -- but not citizen mothers -- undertake certain steps to establish the paternity of such children before their eighteenth birthday as a prerequisite to conferring citizenship upon such children did not violate equal-protection principles.[6] Although gender-based classifications are generally subject to an intermediate form of equal-protection scrutiny, as this Court noted Nguyen and as the court of appeals below noted, it is an open question whether a more lenient form of scrutiny should apply when a statute implicates Congress's immigration and naturalization power. Id. at 61; Pet. App. B8 n.2. As the United States urged in Nguyen and below, the exceptionally deferential standard that this Court has traditionally applied in reviewing congressional enactments in the unique context of legislation governing matters of immigration and nationality should apply in challenges such as this one. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 587-589 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 711-

[6] The Court had previously granted certiorari in Miller to consider the same question, but a majority opinion did not emerge on the constitutionality of the provisions in question in that case. See Nguyen, 533 U.S. at 58.

713 (1893). As was the case in Nguyen, however, the provision challenged in this case passes even a more stringent level of review.

As the court of appeals correctly held, the differential treatment of citizen mothers and citizen fathers of out-of-wedlock children born outside the United States to one non-citizen parent is substantially related to achieving at least two important governmental objectives: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent -- and thus to the United States -- to justify the conferral of citizenship on them; and second, preventing such children from being stateless. Pet. App. B9.

At the time of petitioner's birth, children born outside of the United States to one citizen parent and one non-citizen parent generally could derive citizenship from the citizen parent only if that parent had resided in the United States for a minimum of ten years, at least five of which were after attaining the age of 14. 8 U.S.C. 1401(a)(7) (1970). That rule applied to children of married parents regardless of which parent was a United States citizen and to children of unmarried parents if the father was a United States citizen and established his paternity while the child was a minor. 8 U.S.C. 1401(a)(7), 1409(a) (1970). That general rule furthers the government's substantial interest in ensuring that there is a link between an unwed parent and his or her country

on one side and the child who is to become a United States citizen on the other. See Nguyen, 533 U.S. at 68 (recognizing Congress's "desire to ensure some tie between this country and one who seeks citizenship"); see also Rogers v. Bellei, 401 U.S. 815, 833-834 (1971) (noting that Congress has historically been concerned with a potential citizen's physical presence in the United States as a condition precedent to conferring citizenship).

Applying one uniform rule to all children born abroad to one citizen parent and one non-citizen parent, regardless of whether the parents were married, would have been a permissible means of pursuing the government's strong interest in extending the privileges of citizenship only to children whose citizen parents had substantial ties to the United States. Congress opted, however, to relax the residency requirement in the case of an unwed citizen mother who has a child abroad out of concern that such children could otherwise be rendered stateless. The United States has always applied the rule of "jus soli, that is, that the place of birth governs citizenship status except as modified by statute." Bellei, 401 U.S. at 828. Many other nations, however, apply the civil-law rule of jus sanguinis, under which citizenship is acquired principally based upon the blood relationship with a parent. See authorities cited in Miller, 523 U.S. at 477 (Breyer, J., dissenting). When the President in 1938 submitted to Congress a proposed revised immigration code, the Administration surveyed the citizenship laws of other nations and discovered that, in

approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 431 (printed 1945); see Durward V. Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 258-259 (1935). Against the background of the American rule of jus soli, the result of these jus sanguinis laws was to create a risk of statelessness among the foreign-born children of unwed United States citizen mothers. Thus, unless the law of the United States accommodated the jus sanguinis rules of other nations, those children would not be citizens of any nation. As the court of appeals noted, "[t]he residence differential" in citizenship law between unwed mothers and fathers "is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth." Pet. App. B9.

Petitioner conceded below that preventing stateless children is a legitimate governmental objective, Pet. App. B9, and he does not appear to challenge that proposition in his petition. Instead, he continues to argue (Pet. 13-15) that the means Congress chose to achieve this purpose -- i.e., relaxing the residency requirement only for unwed citizen mothers who give birth abroad -- is an

unconstitutional denial of equal protection because it is underinclusive. Specifically, petitioner argues (Pet. 15) that the citizenship scheme at issue is unconstitutional because it does not "ensure that all children born abroad to a U.S. citizen parent will have a nationality -- it only helps women." But, as discussed above, the risk that a child who is born abroad to unmarried parents will be rendered stateless is much higher when his mother is a United States citizen. Petitioner's identification of one country -- Iran -- that assigns to a child born out of wedlock the father's nationality rather than the mother's does not undermine the legitimacy of Congress's scheme. Indeed, the lack of other contrary examples reinforces the close fit between Congress's important interest and the means it employed to serve that interest.[7]

4. In addition, further review is not warranted because even if this Court did find that the statutory scheme established by Sections 1401(a)(7) and 1409 violates the equal-protection component of the Fifth Amendment, it could not grant petitioner citizenship. See United States v. Cervantes-Nava, 281 F.3d 501 (5th Cir. 2002) (rejecting equal-protection challenge to 8 U.S.C. 1401(a)(7) physical-presence requirements because, even if

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[7] Petitioner notes (Pet. 19 n.6) that some other countries refuse to grant citizenship to a child born to a citizen mother and a non-citizen father. But it is not clear that the examples he cites are relevant to the challenge he raises in his petition because he does not contend that those countries apply that rule where the child's parents are unmarried.

offending provisions were found to be unconstitutional, court's only options would be to strike the more lenient provision applicable to citizen mothers); see also INS v. Pangilinan, 486 U.S. 875, 883-885 (1988) (where Congress has set specific statutory limits on a provision for naturalization, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations"); Miller v. Albright, 523 U.S. 420, 452-459 (1998) (Scalia, J., concurring in the judgment) (concluding that a court lacks the power to confer citizenship on a foreign-born individual in the absence of a statute that provides for citizenship, even as a remedy for a constitutional infirmity in the citizenship statute itself); id. at 451 (O'Connor, J., concurring in the judgment) (citing Justice Scalia's opinion and acknowledging the "potential problems with fashioning a remedy").

5. Finally, review by this Court is not appropriate in this case because Congress amended the provisions in question more than 20 years ago to ameliorate some of the burdens that stem from the relevant residency requirement that was applicable to unwed fathers, married fathers, and married mothers. In 1986, Congress amended Section 1401(a)(7) to reduce a citizen parent's physical presence requirement in the United States or its outlying possessions to a total of five years, only two of which are required to be after the parent had obtained the age of 14.

Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653 § 12, Nov. 14, 1986, 100 Stat. 3657 (amending redesignated Section 1401(g)). The amended version of the statute applies to children born on or after November 14, 1986. See Pet. App. A4, citing Immigration Technical Corrections Act of 1988, Pub. L. 100-525 § 23(d), 102 Stat. 2609. The current version of Section 1401 maintains the reduced physical-presence requirement adopted in 1986. 8 U.S.C. 1401(g) (2006). Although the current version of the law continues to apply a less stringent residency requirement to unwed citizen mothers who give birth abroad, the shortened residency requirement otherwise applicable to mixed-citizen parents, whether married or unmarried, substantially eliminates the risk petitioner identifies that young fathers -- such as petitioner's own father -- will be physically unable to satisfy the residency requirements applicable to them if they father a child before the age of 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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