No. 15-1191

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

LUIS RAMON MORALES-SANTANA

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

REPLY BRIEF FOR THE PETITIONER

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The Second Circuit erroneously declared an important provision of an Act of Congress unconstitutional in a decision that creates an acknowledged circuit split. The court then compounded that error by granting U.S. citizenship to respondent, exceeding its constitutional and statutory authority in doing so. This Court previously granted review of the same questions, even in the absence of a circuit split—and even though the constitutionality of the relevant provisions of the governing Act of Congress had been upheld by the court of appeals. *Flores-Villar* v. *United States*, 564 U.S. 210 (2011) (per curiam) (affirming by an equally divided Court). *A fortiori*, review is warranted here, where the relevant provision has been held unconstitutional, particularly in light of the Constitution's call for "an uniform Rule of Naturalization"

to apply "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4.

A. Review Is Warranted Because An Act Of Congress Was Declared Unconstitutional

The court of appeals has held that an important provision of an Act of Congress is unconstitutional. That is a sufficient reason (though not the only reason) to grant the government's petition for a writ of certiorari. See, *e.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding * * * invalidated a portion of an Act of Congress, we granted certiorari."); *FCC* v. *Beach Comm'ns, Inc.*, 508 U.S. 307, 313 (1993) (same); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.12, at 264 (10th ed. 2013) ("Where the decision below holds a federal statute unconstitutional * * * , certiorari is usually granted because of the obvious importance of the case."). Respondent does not even attempt to argue that the questions presented are not important. And this Court has already deemed the questions presented to be sufficiently important that it granted certiorari in *Flores-Villar*, *supra*, even in the absence of a circuit conflict.

B. Review Is Warranted Because The Division Among The Courts Of Appeals Undermines The Uniform Nationwide System of Naturalization Called For In The Constitution

1. Respondent does not deny that the decision below created a conflict with the Ninth Circuit's decision in *United States* v. *Flores-Villar*, 536 F.3d 990 (2008), aff'd by an equally divided Court, 564 U.S. 210 (2011) (per curiam), on the first question presented. The Second Circuit acknowledged that its decision created

that conflict. Pet. App. 22a, 34a n.17. Respondent instead argues that this Court's review is not warranted because the circuit split "may be resolved without this Court's intervention." Br. in Opp. 8 (capitalization altered). In support of that assertion, respondent contends (*id.* at 8-11) that "[t]he Ninth Circuit is likely to have ruled the same as the Second Circuit did if the record before it had contained the same information at the time of its decision." Such speculation about what another court in a circuit split might do furnishes no basis for leaving unreviewed an appellate decision holding a statutory scheme unconstitutional.

In any event, respondent has no answer to the consequences of the division of authority created by the Second Circuit's decision. The Constitution calls for "an uniform Rule of Naturalization" to apply "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Respondent does not acknowledge that constitutional command, let alone attempt to explain why the Court's intervention is not warranted to eliminate a regime in which different rules of naturalization apply in different parts of the United States. Moreover, administering a patchwork system of citizenship rules would require resolution of difficult questions not addressed by the court of appeals—*e.g.*, whether the applicable rule of citizenship should be determined based on where removal proceedings were instituted against a person who the governing Act of Congress deems to be an alien, where an alien not in removal proceedings files his application for a citizenship document, where in the United States an applicant's father was physically present during the relevant time, or some other basis. This office has been informed that, in 2015, the State Department issued

more than 15 million passport cards and books (domestically and at foreign posts). The administrative burden that would result from determining and then applying disparate rules in processing passport applications is reason enough for this Court's review.

2. Respondent's further contention (Br. in Opp. 11-12), that review of the second question presented is unwarranted because there is no division among the courts of appeals on that question, also should be rejected. As even respondent acknowledges (*ibid.*), the second question presented—concerning a court's authority to remedy an equal protection violation in this context—arises only when a court has already concluded that the statutory scheme violates equal protection. Because the Second Circuit is the only court of appeals to have reached that conclusion, it is the only court of appeals to choose a remedy. But the second question presented is of paramount importance because it addresses constitutional and statutory limits on a federal court's remedial authority. And review of that question is intertwined with the review of the first question presented, as suggested by this Court's decision in *Nguyen* v. *INS*, 533 U.S. 53 (2001), which, in rejecting an equal protection challenge to a related statutory provision, noted the "potential problems with fashioning a remedy." *Id.* at 72 (citation omitted.

C. Review Is Warranted Because The Court Of Appeals' Decision Is Wrong

For the reasons explained in the government's certiorari petition, the court of appeals erred in holding that the statutory scheme at issue is unconstitutional. Respondent's contrary arguments are unpersuasive.

First, respondent contends (Br. in Opp. 12) that the court of appeals correctly applied heightened scrutiny notwithstanding this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), because "*Fiallo* involved Congress's plenary authority over immigration laws affecting *non*-citizens." Respondent ignores the fact (noted in the government's petition, see Pet. 12) that the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790-791 n.3, who unsuccessfully argued that rational-basis review should *not* apply because the statutory provision at issue implicated "constitutional interests of United States citizens and permanent residents," *id.* at 794 (citation marks omitted).

Second, respondent argues (Br. in Opp. 14-16) that the different physical-presence or residence rules applicable to unwed U.S.-citizen mothers and unwed U.S.-citizen fathers under 8 U.S.C. 1409 (1958) did not further the important government objective of ensuring a sufficient tie between the United States and a child born abroad. Respondent simply ignores the government's explanation (see Pet. 13-16) that a child born abroad out of wedlock to a U.S.-citizen mother and an alien father was *not* similarly situated to such a child with a U.S.-citizen father and an alien mother. At the time of respondent's birth, a child born out of wedlock generally had only one legally recognized parent (his mother) at the moment of his birth—indeed, throughout the child's life unless and until his father legitimated him (typically through marriage). When a child had only one legally recognized parent and that parent was a U.S. citizen, there were no competing national interests through another parent, and Congress could reasonably conclude that a one-year period of continuous physical presence in the United

States by the U.S.-citizen parent would be adequate to ensure that the child would have a sufficient tie to the United States (through his or her parent). In contrast, when a child was born to married parents or when the father of a child born out of wedlock legitimated the child at some point after the child's birth, then the child had two legally recognized parents. When only one of those parents was a U.S. citizen, the child had competing claims on his national allegiance. In that circumstance, it was reasonable for Congress to require that the U.S.-citizen parent have a greater connection to the United States to warrant conferring U.S. citizenship on the child.

Indeed, because respondent's father legitimated him by marrying his mother eight years after respondent was born, the Act treats him the same as if his parents had been married when he was born. There is nothing unfair, much less unconstitutional, about that result. The Senate Report accompanying the 1952 amendments to the naturalization laws confirms this understanding of the statutory scheme, which is in any event evident on the face of the Act. That Report explained that, when the paternity of a child born out of wedlock is established before the child's 21st birthday, the child "acquires the citizenship status which it would have had at birth, if the birth had been legitimate." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (Senate Report).

When enacting laws that will govern the granting of U.S. citizenship to individuals born outside the United States, Congress is entitled to act on the basis of existing laws—including the existing laws of other countries, which Congress has no authority to change. This Court has noted, moreover, that "mothers and

fathers of illegitimate children are not similarly situated." *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979). In particular, the Court has explained that, because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood," the application of "a different set of rules for making" the "legal determination" of that connection "is neither surprising nor troublesome from a constitutional perspective." *Nguyen* v. *INS*, 533 U.S. 53, 63 (2001).

Third, respondent argues (Br. in Opp. 16-19) that Congress was not actually motivated by a desire to reduce statelessness when it enacted and amended the statutory scheme at issue. Respondent is incorrect. As noted above, the legislative history shows that the provision that became 8 U.S.C. 1409(c) (1958) was intended to "insure[] that the child" of an unwed U.S.-citizen mother "shall have a nationality at birth." Senate Report 39; see Pet. 17-19.

Respondent further errs in arguing (Br. in Opp. 18-19) that the scholarly survey of other countries' citizenship laws that preceded Congress's passage of the Nationality Act of 1940, ch. 876, 54 Stat. 1139, did not in fact support Congress's concerns about statelessness because the article's conclusions did not apply "worldwide." As this Court explained in *Nguyen*, in the course of rejecting an equal protection challenge to a similar statutory scheme, even under heightened scrutiny, "[n]one of [the Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance," particularly in the "difficult context of conferring citizenship on vast numbers of persons." 533 U.S. at 70.

Fourth, respondent errs in asserting (Br. in Opp. 19-21) that the court of appeals held that Congress was motivated by discriminatory gender stereotypes when it enacted and amended the challenged scheme. The court of appeals neither accepted nor rejected respondent's stereotype argument, see Pet. App. 31a, and respondent's reliance on it misapprehends the basis for the statutory scheme he challenges, compare *Nguyen*, 533 U.S. at 63 (concluding that "impos[ing] a different set of rules for making th[e] *legal* determination" of the identity of an out-of-wedlock child's mother or father is "no[t] troublesome from a constitutional perspective" because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood") (emphasis added).

Finally, respondent errs in arguing (Br. in Opp. 21-26) that the court of appeals imposed a proper remedy for the constitutional violation it found by granting citizenship to respondent. Respondent is incorrect (*id.* at 22) that this Court's cases "requir[e] the government to remedy equal protection violations by leveling up rather than leveling down." Although some cases call for extending the benefit sought by a plaintiff rather than contracting it, this Court has left no doubt that, as a general matter, when a court sustains an equal protection claim, it has "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) (citation omitted; brackets in original); see *Miller* v. *Albright*, 523 U.S. 420, 458 (1998) (Scalia, J., concurring in the judgment).

In light of this Court's holdings 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), the Second Circuit's only remedial option in this case was to declare invalid the exception in Section 1409(c) that creates the one-year continuous-physical-presence requirement for unwed U.S.-citizen mothers. That remedy would be consistent with congressional intent. See Pet. 28-29. Respondent's observation (Br. in Opp. 23) that such a remedy would undermine Congress's goal of reducing the risk of statelessness ignores the fact that the remedy the court of appeals imposed undermines Congress's goal of ensuring that the parent of a child born abroad has established sufficient ties to the United States through significant physical presence when the child has another legally recognized parent who is an alien. Because the court of appeals declared unconstitutional the scheme that Congress chose to balance its competing interests, no remedy can equally serve those interests. Respondent's additional argument (*id.* at 24) that the government's proposed remedy would strip individuals of U.S. citizenship ignores the fact (acknowledged by respondent in the very next paragraph) that the government would seek application of the longer physical-presence requirement only on a prospective basis. In any event, respondent's protest rings hollow because the court of appeals' remedy could have the same effect unless applied prospectively. See Pet. 26-27 n.12.

D. This Case Is An Appropriate Vehicle For Reviewing The Questions Presented

Finally, respondent argues (Br. in Opp. 26-30) that this case is a poor vehicle for deciding the questions presented. He relies on statutory arguments, rejected by the court of appeals, that he is a citizen from birth because his father satisfied the ten- and five-year physical-presence requirements in 8 U.S.C. 1401(a)(7) (1958) for respondent to be a citizen as of his birth. The existence of those alternative arguments is no obstacle to this Court's review of the Second Circuit's erroneous constitutional holding.

First, respondent's non-constitutional arguments do not stand in the way of this Court's review of the questions presented because, as the Second Circuit correctly held, they are meritless. Briefly, respondent argues (Br. in Opp. 27-28) that his father, who was born in Puerto Rico and lived there until he was age 18, should be deemed to have satisfied the requirement in Section 1401(a)(7) that he lived in the United States (or an outlying possession of the United States) for five years *after* his 14th birthday. Respondent concedes (Br. in Opp. 27) that his father left Puerto Rico for the Dominican Republic 20 days before he might have satisfied that requirement on his nineteenth birthday. But respondent argues (*ibid.*) that courts should fashion a "grace period[]" exception to the clear rule set forth in Section 1401(a)(7) because *other* immigration laws explicitly incorporate such grace periods. Respondent's grace-period argument answers itself: Congress plainly knew how to create a grace period and did not do so in Section 1401(a)(7).

Respondent also argues (Br. in Opp. 28-30) that the Dominican Republic was an outlying possession of the

United States in 1919 (when respondent's father arrived there from Puerto Rico) because the United States had a military presence in the country, and that his father's presence there should count toward the period required by Section 1401(a)(7). Respondent acknowledges that the relevant statutory scheme defined "outlying possessions" to include "American Samoa, Swains Island and 'any other territory which was, in fact and law, an outlying possession of the United States during the period of the citizen parent's physical presence therein.'" *Id.* at 29 (quoting *In re V—*, 9 I. & N. Dec. 558, 561 (B.I.A. 1962)). And respondent does not identify any source that would establish the Dominican Republic's status "in law" as an outlying possession of the United States. The court of appeals correctly rejected respondent's statutory arguments.

Second, the existence of alternative statutory arguments in favor of respondent's position does not diminish the importance of the questions presented or alleviate the difficulties created by the circuit split. If this Court were to conclude that the Second Circuit erred in reaching the constitutional question because it should have ruled in respondent's favor on statutory grounds, such a ruling would have the effect of vacating the court of appeals' decision declaring an Act of Congress unconstitutional and would eliminate the circuit conflict.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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