No. 15-1191

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

v.

LUIS RAMON MORALES-SANTANA,
Respondent.

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

BRIEF FOR *AMICI CURIAE* CONSTITUTIONAL LAW, FEDERAL COURTS, CITIZENSHIP, AND REMEDIES SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici, scholars of constitutional law, citizenship, and of the jurisprudence of the federal courts, believe that their expertise would be of use to this Court in considering the scope and proper exercise of the federal courts' remedial authority in cases challenging the constitutionality of gender disparities in citizenship statutes.

A complete list of the Amici joining in this brief is provided in an Appendix at the back of this brief.

SUMMARY OF ARGUMENT

Three well-established principles outline the proper approach for a federal court to follow when faced with a statute that violates equal protection. First, and centrally, the victim of the wrong is to be placed, to the maximum extent possible, in the position he or she would have occupied but for the wrong. Second, out of respect for legislative decisions and separation of powers, courts remedying unconstitutional disparities in a statute should alter the statute as little as possible. Third, this Court's jurisprudence typically aims to eliminate unconstitutional disparities in the provision of a statutory benefit by extending and applying the specified benefit to the disfavored class rather than by withdrawing it from the favored class.

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[1] Counsel of record for all parties have consented in writing to the filing of this brief.

No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Here, the Second Circuit properly applied this Court's conventional practices when finding a constitutional violation. The fundamental remedial goal of restoring Respondent to his rightful position can only be achieved in this case through extension, not nullification: citizenship cannot be withdrawn from those who have already become citizens pursuant to § 1409(c), even though they are—but for the sex of their American-citizen parent—identically situated to Respondent. Moreover, even prospective nullification of § 1409(c) would frustrate Congress's clear intention to confer citizenship on the children covered by it. Thus, what the Second Circuit did here was to follow established precedent when faced with an unconstitutional aspect of a statute by replacing a gender-specific term with its gender-neutral equivalent.

The finding that Respondent is entitled to citizenship under § 1409(c)—once the unconstitutional gender disparity is removed from the statute—is well within the authority of the courts. Respondent's claim is that, but for an unconstitutional gender classification, he satisfies the statutory criteria for citizenship. It is the responsibility of the federal courts to adjudicate such claims, and—if a statute is found unconstitutional—to determine how the statute can be applied in the way most consistent with the congressional enactment. Indeed, statutory grants of citizenship—and citizenship more generally—are of special concern to this Court, which has repeatedly recognized the citizenship of individuals upon the invalidation of statutes that denied them citizenship.

Thus, this Court ought not depart from its ordinary practice of remedying unconstitutional provisions while leaving statutes intact.

The central issue of gender-based classifications in this case has been before this Court previously, and six Justices have recognized that if § 1409(c) is found unconstitutional, there is no constitutional obstacle to the type of relief sought in this case.

ARGUMENT

I. THIS COURT, RESPECTFUL OF THE SEPARATION OF POWERS, ORDINARILY REMEDIES STATUTORY VIOLATIONS OF EQUAL PROTECTION BY KEEPING INTACT AS MUCH OF THE CONGRESSIONAL ENACTMENT AS POSSIBLE.

A holding that a statute violates equal protection raises the question of how federal courts should remedy the constitutional defect while hewing as closely as possible to the congressional scheme. That question is not a novel one. Rather, three well-established principles outline the proper approach. First, the most fundamental principle of remedies is that the victim of a legal wrong is to be placed, as near as may be, in the position he or she would have occupied but for the wrong. Second, out of respect for legislative decisions and separation of powers, this Court strives to implement the provisions of statutes to the maximum extent consistent with remedying the unconstitutional disparity. Third, ordinarily, unconstitutional disparities in the provision of a statutory benefit are eliminated by extending the

benefit to the disfavored class rather than by withdrawing it from the favored class.

The Second Circuit's remedial approach—"[c]onforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection," Pet. App. 41a—adheres to these longstanding principles. The Government's proposed remedy—which would deny citizenship to many on whom Congress expressly conferred it, while at the same time leaving the Equal Protection violation largely unremedied—does not.

A. Equal Protection Violations Are Remedied By Placing Victims of Discrimination in the Position They Would Have Occupied But For the Violation.

The core principle of the law of remedies—and the ordinary remedy for constitutional violations—is that the victim of a legal wrong is to be restored, to the maximum extent feasible, to the position he or she would have occupied in the absence of the wrong. "With respect to both compensatory and preventive remedies, the goal is to restore or maintain plaintiff's rightful position." Douglas Laycock, *Modern American Remedies* 265 (4th ed. 2010); *see also id.* at 14–15 (defining the rightful position as the "position plaintiff would have been in but for the wrong"); 1 Dan B. Dobbs, *Law of Remedies* § 2.4(7) at 118 (2d ed. 1993) (equitable remedy should "restore the plaintiff to her entitlement, no more, no less").

This principle is particularly clear in equal protection cases. As this Court explained in *United*

States v. Virginia, 518 U.S. 515 (1996), "[a] remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" *Id.* at 547 (third alteration in original) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)); *see also Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (goal is "restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct"); *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 447 (1980) (same). As this Court has interpreted the principle, it means not only that ongoing unconstitutional discrimination must be eliminated, but that the remedy must "'eliminate [so far as possible] the discriminatory effects of the past.'" *Virginia*, 518 U.S. at 547 (alteration in original) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

B. The Court Should Invalidate As Little Of a Statute As Necessary to Correct the Constitutional Infirmity.

When one aspect of an otherwise valid statute is unconstitutional, this Court has long applied a "presumption of separability." Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 6; *see also, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1333 (2000). This principle that the unconstitutional portion of a statute ordinarily may be excised, leaving the rest of the statute effective, goes back to *Marbury v. Madison*, 5 U.S. (1

Cranch) 137 (1803), which invalidated only a single provision of the Judiciary Act of 1789 while leaving the rest of the statute standing. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 250 (1994).

The principle reflects both the practice of this Court and the severance clauses frequently provided in statutes. Indeed, the principle was expressly incorporated into the Immigration and Nationality Act of 1952 (Pub. L. No. 82–414, 66 Stat. 163 (1952)) ("1952 Act"), which contains a severance clause that provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby." 1952 Act § 406.

In severing the unconstitutional portion of a statute, this Court is careful to avoid "nullify[ing] more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). Indeed, because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality op.), this Court is guided by congressional intent and seeks the narrowest invalidation possible, "enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force, or . . .sever[ing] its problematic portions while leaving the remainder intact." *Ayotte*, 546 U.S. at 328–29 (internal citation omitted) (citing *United States v. Raines*, 362 U.S. 17, 20-22 (1960) and *United States v. Booker*, 543 U.S. 220, 227-29 (2005)).

Although the cases frequently speak of "severing" the unconstitutional portion of a statute, the remedy for an unconstitutional statute may, as applied in particular situations, stop the unconstitutional application of a provision while applying the rest of the statute with minor alterations that are necessary to eliminate constitutional deficiencies. For example, in *Califano v. Westcott*, the Court endorsed the district court's decision to replace the statutory word "father" with its "gender-neutral equivalent." 443 U.S. 76, 92 (1979). Similarly, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), after finding that a prohibition on material that "incites . . . lust" violated the First Amendment, the Court did not excise the word "lust" but instead effectively qualified it by holding that the statute would be "invalidated only insofar as the word 'lust' is to be understood as reaching protected materials." *Id.* at 504.

At the same time, respect for legislative prerogatives has also led this Court to minimize any alteration of statutes; when there are several ways in which a statute's constitutional defect might be remedied, this Court has disapproved options that require "more extensive" rewriting of a statute in favor of those that minimize any such rewriting. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509–10 (2010) (declining to "blue pencil" multiple provisions of statute); *see* Tobias A. Dorsey, *Sense and Severability*, 46 U. RICH. L. REV. 877, 894 (2012) ("When there is more than one way to [render the statute constitutional], the Court should choose the approach that does the least damage to the institutions and activities contemplated by the law.")

In short, "when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem," *id.* at 904, by fashioning a remedy consistent with what "'Congress would have intended' in light of the Court's constitutional holding," *Booker*, 543 U.S. at 246 (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality op.)).

C. This Court Ordinarily Remedies Unconstitutional Discrimination In the Provision of A Statutory Benefit by Extending the Benefit to the Disfavored Class, Not by Withdrawing It From the Class Congress Intended to Benefit.

When this Court finds that a disparity in conferring statutory benefits violates the Equal Protection Clause, it must then decide *how* it will eliminate the unconstitutional disparity. Such a disparity can be eliminated by either "withdrawal of benefits from the favored class [or] by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984); *see also Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring).

Thus, the Court must decide whether to "level up" or "level down" the statute such that the unconstitutional classification is removed, and it makes this decision by looking to congressional intent. *See Welsh*, 398 U.S. at 365 (Harlan, J., concurring) ("In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and confer the degree of potential disruption of

the statutory scheme that would occur by extension as opposed to abrogation."); *see also* Deborah Beers, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROBS. 115 (1975) (the Court focuses primarily on legislative intent when determining whether to extend or invalidate a constitutionally defective statute).

In addressing this question of how to cure an unconstitutional disparity in conferring benefits, this Court has consistently "suggested that extension, rather than nullification, is the proper course." *Califano*, 443 U.S. at 89. As then-Professor Ginsburg wrote in 1979, by extending under-inclusive statutes when they fail to comport with the Equal Protection Clause, "[t]he courts act legitimately . . . to preserve a law by moderate extension where tearing it down would be far more destructive of the legislature's will." Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 324 (1979).

Califano v. Westcott is instructive. There, the Court addressed an unconstitutional classification in the Social Security Act that granted benefits to families with dependent children only if the father, not the mother, became unemployed. 443 U.S. at 78. After first concluding that its prior decisions "suggest[ed] strongly" that the Court possessed the remedial capacity "to order extension" of benefits under a statute, the Court held that the statute's constitutional defect was properly remedied "by ordering that 'father' be replaced by its gender-neutral equivalent." *Id.* at 91–92. As a result of this

modification, "benefits simply will be paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father." *Id* at 92.

The Court emphasized that it reached this conclusion because extension of benefits was in line with congressional intent, noting that the withdrawal of benefits from "[a]pproximately 300,000 needy children . . . would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id.* at 90. Moreover, the Court explained that "[t]he presence in the Social Security Act of a strong severability clause likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Id.* (internal citation omitted); *see also Welsh*, 398 U.S. at 363–64 (Harlan, J., concurring) (noting that a "broad severability clause" is "[i]ndicative of the breadth of the judicial mandate" to "extend[] the statute"). Thus, the Court "adopted the simplest and most equitable extension possible" to ensure that the "beneficiaries whom Congress plainly meant to protect" remained covered by the statute. *Califano*, 443 U.S. at 90, 92–93.

Many other cases are to the same effect. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (extending Social Security benefits to men and women on equal terms to remedy Equal Protection violation); *Jiminez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (same); *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25 (1973) (plurality op.) (same, and noting that its "conclusion in no wise invalidates the

statutory schemes except insofar as they require a female member to prove the dependency of her spouse"); *see also* Candace S. Kovacic, *Remedying Underinclusive Statutes*, 33 WAYNE L. REV. 39, 49-50 nn.66-72 (1986) (collecting cases).

Thus, as the Second Circuit noted in this case, this Court has consistently remedied Equal Protection violations by extending, rather than contracting, the statutory benefit. Pet. App. 38a–39a. Indeed, the only case in which the Court took a contrary view is the exception that proves the rule, as it turned on the existence of clear congressional intent *not* to extend the statutory benefits. In *Heckler v. Mathews*, 465 U.S. 728 (1984), the statute's severability clause and the legislative history behind it made clear that if the statutory provision was "found invalid . . . the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." *Id.* at 733-34. Consistent with that specific congressional directive, the Court in *Mathews* recognized that "the severability clause would prevent a court from redressing [any] inequality by increasing the benefits payable to appellee." *Id.* at 738. At the same time, the Court recognized that, absent such clear congressional intent, "ordinarily 'extension, rather than nullification, is the proper course.'" *Id.* at 739 n.5 (quoting *Califano*, 443 U.S. at 89).

II. THE SECOND CIRCUIT PROPERLY REMEDIED THE CONSTITUTIONAL DEFECT HERE BY APPLYING THE BENEFITS OF SECTION 1409(C) TO BOTH MOTHERS AND FATHERS.

In this case, the Court is faced with a choice between remedying the constitutional defect in § 1409 by (1) nullifying § 1409(c) altogether, thereby withdrawing the benefit of citizenship from children of unwed citizen mothers who cannot otherwise meet the longer presence requirements of § 1409(a), or (2) expanding § 1409(c) to apply to both men and women, thereby providing the congressional benefit of citizenship to children born abroad to unwed citizen fathers on the same terms as this benefit is granted to children of unwed citizen mothers. *Amici* submit that under the well-established principles described above, the Second Circuit's decision to remedy the constitutional defect by application of the provisions of § 1409(c) to Respondent and others in his position was correct.

First, the fundamental remedial goal of restoring Mr. Morales-Santana to his rightful position can only be achieved through extension, not nullification. As the Government concedes, nullification can create only *prospective* equality, making citizenship under § 1409(c) unavailable in the future both to children born to unwed male citizens and those born to unwed female citizens. It cannot produce equality as to those, like Respondent, who have already been born, because the Constitution does not permit the withdrawal of citizenship from those who are already citizens. *See* Pet. Br. 52; *Afroyim v. Rusk*, 387 U.S.

253 (1967). Respondent will be denied citizenship, while otherwise identically situated children of unwed female citizens will continue to be citizens.

A remedy that leaves such an ongoing disparity falls short of what this Court has traditionally considered necessary to remedy an Equal Protection violation. As the Court stated in *United States v. Virginia*, "[a] proper remedy for an unconstitutional exclusion . . . aims to '*eliminate [so far as possible] the discriminatory effects of the past*' and to 'bar like discrimination in the future.'" 518 U.S. at 547 (second alteration in original) (quoting *Louisiana v. United States*, 380 U.S. at 154).

In that respect, this case resembles *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), in which a taxpayer subjected to discriminatory taxation was held to be entitled to a refund, where the "nullification" remedy—"an increase of the taxes which the [favored taxpayers] should have paid," *id.* at 247—was likely impossible. As Professor Ginsburg noted, "due process . . . would impede state officials from reaching back to impose and collect additional taxes from the favored competitors." 28 CLEVE. ST. L. REV. at 307; *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 34–35 (1990) (describing an earlier case, *Montana National Bank*, as finding prospective-only relief inadequate to remedy a discriminatory tax because that would "not cure the mischief which had been done under the earlier construction" (quoting *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 504 (1928)). As in these cases, the inability of a nullification remedy to remedy the past

unconstitutional discrimination should weigh heavily against its adoption.

Second, in the absence of a "clearly expressed [] preference for nullification, rather than extension" from Congress, as there was in *Heckler v. Mathews*, 465 U.S. at 739 n.5, this Court should follow its ordinary practice, described above, of remedying Equal Protection violations by applying the benefits of § 1409(c) on a nondiscriminatory basis, rather than nullifying them. We are aware of no evidence that Congress would have preferred nullifying § 1409(c) altogether, let alone the sort of clear expression necessary to justify a departure from this Court's ordinary preference for extension over nullification.

Third, although *Amici* do not purport to have special expertise concerning the intentions of the Congress that enacted § 1409(c), it appears that nullification of § 1409(c) would do far more to alter and frustrate the legislative scheme than would its extension to Respondent and those similarly situated. At a minimum, nullification would frustrate Congress's clear intention to grant derivative citizenship to children of unwed citizen mothers who had been present in the United States for at least one continuous year before giving birth. Further, one of the motivations behind the Act, was the "policy of preserving the unity of the family." S. Rep. No. 81-1515 at 433–34 (Apr. 20, 1950). And the increased difficulty of children obtaining the same citizenship as their American parent only heightens the possibility that family members will be separated from one another, contrary to Congress' intention, through § 1409(c), to *promote* family unification. For

this reason, too, extension, rather than nullification, of the conferred benefit here appears more consistent with Congress's intent.

Moreover, the INA, like the statute at issue in *Califano*, contains a strong severability clause. Although this clause alone does not fully address the question of congressional intent here, *see Welsh*, 398 U.S. at 365 (Harlan, J., concurring), its presence "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse," *Califano*, 443 U.S. at 90.

Perhaps more significantly, the "burdens" that would result from nullification of the benefit conferred by Congress here are particularly heavy because of the importance of the benefit at issue: citizenship. "Citizenship is a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), particularly in the United States. *See, e.g.*, *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) ("[I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men."). Just as the nullification of a benefits program that impacted "300,000 needy children . . . would impose hardship on beneficiaries whom Congress plainly meant to protect," the elimination of derivative citizenship for the class covered by § 1409(c) would exclude from the national community a group that Congress expressly deemed to be citizens. *See Califano*, 443 U.S. at 90.

In addition, by the Government's account, in the absence of § 1409(c), there was a "substantial risk that a child born out of wedlock to a U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of his mother." Pet. Br. at 34.[2] Whatever the congressional motivation related to statelessness when the statute was enacted, the possibility that nullification of § 1409(c) would not only have deprived its beneficiaries of U.S. citizenship, but by the Government's account might have rendered many of them stateless, makes it even less likely that Congress, faced with the choice, would have elected to eliminate § 1409(c).

The Government warns that extension of § 1409(c) to Respondent and others like him would open the floodgates to "untold numbers" of foreigners. Pet. Br. 51. But the Government provides no basis to believe that the "untold" number of individuals who (1) desire to claim U.S. citizenship, (2) were born out of wedlock to a U.S. citizen father, and (3) met the other applicable requirements of § 1409(c), including those relating to legitimation and/or parental responsibility,

[2] As the Statelessness Scholars demonstrate, when enacted any risk of statelessness was not specific to children of American mothers; the ten-year residence requirement also put the foreign-born nonmarital children of American fathers at risk of statelessness. Resp. Br. 37–38. Hence, a remedy that "levels down" would arguably increase statelessness among foreign-born nonmarital children of American mothers and fathers, and would thus run contrary to the Congress's purported purpose in enacting § 1409(c).

is extraordinarily large.[3] Nor does the Government explain why a Congress that chose to confer citizenship on an equally "untold" number of children of unwed U.S. citizen mothers would have been so deterred by this prospect that it would have preferred to eliminate § 1409(c) entirely.

Further, surely one could have characterized the impact of *Weinberger v. Weisenfeld* as involving "untold numbers" of widowers, but whatever the numbers, the lessons of this Court's law is clear. Equal Protection remedies should respect the congressional scheme and implement as much as can be implemented while adjusting the statute to eliminate its unconstitutional facets.

In sum, *Amici* are aware of no persuasive reason to depart from the usual practice of remedying an Equal Protection violation by extending the statutory benefit to the disfavored class.

III. THE SECOND CIRCUIT'S DETERMINATION REFLECTS A CONVENTIONAL APPLICATION OF ESTABLISHED EQUAL PROTECTION PRINCIPLES, AND IS WELL WITHIN THE AUTHORITY OF THE FEDERAL COURTS.

The Second Circuit's determination that, "[c]onforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection . . . Morales-Santana is a citizen as of his birth," Pet. App. 41a, was a faithful and conventional

[3] Those requirements have varied in different versions of § 1409(c) applicable between 1940 and the present.

application of this Court's guidance for remedying Equal Protection violations. Contrary to the Government's assertion that this holding "exceeds the court's authority with respect to naturalization," Pet. Br. 49, in violation of *INS v. Pangilinan*, 486 U.S. 875 (1988), the Second Circuit applied the provisions of § 1409(c), save for its unconstitutional distinction between fathers and mothers.

A. The Second Circuit's Finding That Respondent Is a Citizen Under the Statute, Once Rendered Constitutional, Is Squarely Within the Judicial Power.

The Government's contention that the Second Circuit's decision was beyond judicial authority, because the courts lack "the power to make someone a citizen of the United States," Pet. Br. 50 (quoting *Pangilinan*, 486 U.S. at 883-84), misconstrues *Pangilinan* and mistakenly conflates naturalization with at-birth citizenship.

Although the federal courts have traditionally shown significant deference to the political branches with respect to immigration and naturalization, they have properly distinguished between claims of citizenship and claims seeking naturalization, and have recognized the special status of citizenship. This Court made clear nearly a century ago, in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), that individuals claiming citizenship are in a fundamentally different category from foreign nationals, and unlike such foreign nationals—who were subject to exclusively executive deportation proceedings—are entitled to judicial review of their claims. "Jurisdiction in the executive to order

deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact." *Id.* at 284; *see also Agosto v. INS*, 436 U.S. 748, 753 (1978) ("[T]he Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings.")

Moreover, the authority of the political branches over immigration and naturalization exists only within the bounds set by the Constitution. When "what is challenged . . . is whether Congress has chosen a constitutionally permissible means of implementing that power," this Court has recognized its "duty . . . of which it may not shrink, to give full effect to the provisions of the Constitution." *INS v. Chadha*, 462 U.S. 919, 940–41, 943 (1983). Indeed, the Court has never hesitated to exercise its judicial review responsibilities when, as here, an individual claims that statutory provisions that would deny him or her citizenship are unconstitutional. *See, e.g., Miller v. Albright*, 523 U.S. 420, 432 (1998) (plurality op.); *Afroyim*, 387 U.S. 253 (termination of citizenship unconstitutional); *Schneider v. Rusk*, 377 U.S. 163, 166 (1964) (unconstitutional to discriminate between native-born and derivative citizens); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation provision unconstitutional).

This Court's assumption of its responsibility to recognize the citizenship of an individual upon the invalidation of a statute that denied him or her citizenship has deep roots. In *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898), this Court invalidated the application of the Chinese Exclusion

Act, 22 Stat. 61—which, among other things, stated that no "court of the United States shall admit Chinese to citizenship." Finding that the Act ran afoul of the Citizenship Clause of the Fourteenth Amendment, the Court held that Wong Kim Ark was a citizen of the United States. *See id.* at 704-05.

In confirming the petitioner's citizenship after it had invalidated the statute's unconstitutional application, the Court emphasized that it was not granting citizenship in contravention of Congress's plenary authority under Article I, Section 8, Clause 4. Rather, it was recognizing that the individual met the legal requirements for citizenship once the unconstitutional statutory provisions were removed, and that Congress' plenary authority over naturalization did not prevent a court from so holding. *See id.* at 704 ("The fact, therefore, that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution . . . ."). Thus, the Court in *Wong Kim Ark*—as in later cases like *Afroyim* and *Trop*—saw its holding as a straightforward exercise of its traditional judicial responsibility to "say what the law is." *See Marbury*, 5 U.S. (1 Cranch) at 178.

This case is similar. As in *Wong Kim Ark*, the Government denies that the Respondent is a citizen on the ground that he fails to satisfy an allegedly unconstitutional statutory requirement. In addressing the constitutional claim, it is within the courts' power both to determine whether the gender-based classification here violates Equal Protection,

and—if it does—to determine whether it is more faithful to Congress's intent to cure the violation by extending the benefits of § 1409(c) to fathers or by withdrawing them from mothers. Choosing the former remedy does not amount to the creation of a judge-made right to citizenship; rather, it is an ordinary effort to effectuate congressional intent to the maximum extent possible.

This case is therefore entirely different from *Pangilinan*, in which the lower court ordered that certain foreign nationals be naturalized as a judge-made equitable remedy that was concededly contrary to congressional intent. Critically, it was "incontestable (and uncontested) that respondents have no statutory right to citizenship," 486 U.S. at 882-83, and the plaintiffs asked the Court to order their naturalization by the "invocation of [its] equitable powers." *Id.* at 885. The Court rejected this request, holding that it lacked *independent* power to confer citizenship upon non-citizens: "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*." *Id.* at 883–84 (emphasis added). However, while ruling out any *independent* judicial authority to confer citizenship, the Court left untouched the courts' responsibility to adjudicate constitutional or statutory claims to citizenship.

Indeed, in *Pangilinan* itself, after rejecting the respondents' request for an exercise of the courts' general equitable powers as beyond judicial authority, this Court went on to address on the merits—with no suggestion of any lack of judicial authority—the

respondents' constitutional claims seeking identical relief.

Here, the Court is in no way being asked to exercise any purported independent judicial authority to confer citizenship. Nor is it being asked to order the naturalization of any non-citizen. Respondent argues that under § 1409, as properly (and constitutionally) interpreted, he became a citizen *at birth*. The Court is being asked to perform the core judicial function of remedying an Equal Protection violation—a task which includes determining how to eliminate the unconstitutional portion of the statute in the way most consistent with congressional intent. This classic judicial function does not intrude on Congress's authority over naturalization in any way, and implicates no constitutional concern. This Court's role in filling gaps and fashioning remedies for constitutional violations is a familiar one, and one that properly respects congressional authority. *See* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 26-27 (1994).

For similar reasons, the Government's reliance on 8 U.S.C. § 1421(d), which specifies that "[a] person may only be *naturalized* as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the INA] and not otherwise," is misplaced. Pet. Br. 51 n.11. Here, what Respondent seeks is not naturalization—the subject of § 1421(d)—but rather a determination that by operation of law he is already a citizen. As this Court established long ago in *Ng Fung Ho*, individuals claiming citizenship are in a fundamentally different

category from non-citizens. 259 U.S. at 284–85. Congress, moreover, has incorporated that constitutional principle into the INA: Determination of an individual's claim of citizenship in a removal proceeding is *not* governed by § 1421(d), but by § 1252(b)(5), which not only permits but *requires* the federal courts to decide such claims: *See id.* (determination by court "[i]f the petitioner claims to be a national of the United States"); *see also Agosto*, 436 U.S. at 753 ("In carving out this class of cases [for judicial review], Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." (citing *Ng Fung Ho*, 259 U.S. at 284)).

Because Respondent claims citizenship by operation of law, and because he is not seeking an exercise of general equitable authority, *Pangilinan* has no application. Rather, the courts are fully empowered to remedy the claimed Equal Protection violation in conformity with conventional principles. Whatever the breadth of the so-called "plenary powers" doctrine, it cannot be read to reach citizenship rights obtained through birth abroad, if the statutory criteria for such citizenship are met.

B. Six Justices Have Indicated that an Extension of § 1409(c) to Remedy a Constitutional Violation Is a Permissible Exercise of Judicial Authority.

This issue has been before this Court before, and six Justices have, on prior occasions, determined that there is no constitutional obstacle to the relief sought

here. In *Miller v. Albright*, 523 U.S. 420 (1998), as in this case, the Court considered a Fifth Amendment Equal Protection "challenge to the distinction drawn by section § 309 of the [INA], as amended, 8 U.S.C. § 1409, between the child of an alien father and a citizen mother, on the one hand, and the child of an alien mother and a citizen father, on the other." *Id.* at 424 (plurality op.). Although the Court splintered on the merits, five Justices expressly recognized that confirmation of the Petitioner's citizenship following the severance of an unconstitutional provision would be an appropriate remedy and would not encroach upon Congress's plenary authority over matters of naturalization.

First, Justice Stevens, writing for the plurality and joined by Chief Justice Rehnquist, rejected the notion that the Petitioner lacked standing because, due to the gender-based classification in § 1409, she was not a citizen of the United States, and therefore had "no substantive rights cognizable under the Fifth Amendment." *Id.* at 433 n.10. The plurality opinion noted that "[e]ven if th[is] is so, the question to be decided is whether petitioner is such an alien or whether, as she claims, she is a citizen." *Id.* In the event that the Court concluded that the Petitioner was indeed a citizen, the plurality explained, that holding would not infringe Congress's plenary authority under Article I, Section 8, Clause 4 of the Constitution because a "judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess." *Id.* at 432.

Justice Breyer, joined by Justices Souter and Ginsburg, echoed this principle in dissent. Rejecting the claim that the Court was "powerless to find a remedy," Justice Breyer noted that the "remedy is simply that of striking from the statute the two subsections that offend the Constitution's equal protection requirement." *Id.* at 488 (Breyer, J., dissenting). "With those [unconstitutional] subsections omitted," the Petitioner would then meet all of the requirements of the statute. *Id.* As a result, unlike in *Pangilinan*, the Petitioner in *Miller* became a "citizen of the United States at birth" by virtue of the statue passed by Congress, once cured of its constitutional defect. *Id.* at 488–89 (alteration omitted). As Justice Breyer explained: "Whatever limitations there may be upon the Court's power to grant citizenship, those limitations are not applicable here, for the Court need not grant citizenship. The statute itself grants citizenship automatically, and 'at birth.' And this Court need only declare that that is so." *Id.* at 488.

Three years later, in *Nguyen v. INS*, 533 U.S. 53 (2001), Justice O'Connor added her voice to this consensus.[4] *Nguyen*, like *Miller* and the present dispute, again involved a Fifth Amendment Equal Protection challenge to the "different requirements" imposed by 8 U.S.C. § 1409 "for the child's acquisition of citizenship depending upon whether the citizen

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[4] While Justice O'Connor participated in *Miller*, she concurred in the judgment on standing grounds, and therefore had no occasion to address the remedial issue. *See Miller*, 523 U.S. at 445 (O'Connor, J., concurring in the judgment).

parent is the mother or the father." 533 U.S. at 56–57. Writing in dissent, and joined by Justices Souter, Ginsburg, and Breyer, Justice O'Connor expressed her disagreement with the suggestion by the majority that "[t]here may well be 'potential problems with fashioning a remedy' were [the Court] to find the statute unconstitutional." *Id.* at 72 (quoting *Miller*, 523 U.S., at 451 (O'Connor, J., concurring in judgment)).

She offered three reasons for this conclusion. First, severance of the unconstitutional portions of § 1409 was possible, and therefore a remedy could be afforded to the Petitioner, because Congress included a "general severability clause" in the INA which "is unambiguous and gives rise to a presumption that Congress" intended for the "validity of the INA as a whole, or any part of the INA to depend on whether' any one provision was unconstitutional." *Id.* at 94–95 (O'Connor, J., dissenting) (brackets omitted) (quoting *Chahda*, 462 U.S. at 932).

Second, she argued, as Respondent does here, that nothing in *Pangilinan* precludes the confirmation of citizenship by this Court, because petitioners did not "seek the exercise of . . . equitable power[s]," but instead the "severance of the offending provisions so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." *Id.* at 95-96.

Finally, Justice O'Connor noted that "this Court has often concluded that, in the absence of legislative direction *not* to sever the infirm provision, extension, rather than nullification, of a benefit is more faithful to the legislative design." *Id.* at 96. Accordingly,

Justice O'Connor agreed with the plurality and dissenting opinions in *Miller* that a remedy recognizing the Petitioner's citizenship would not intrude on Congress's exclusive authority to regulate naturalization under the Constitution.

In sum, six Justices, including five of the Justices in *Miller*, have recognized that no constitutional problem is raised by the requested remedy here. *Amici*'s point is not that this creates a binding precedent entitled to *stare decisis*. Rather, it simply confirms the extent to which the Second Circuit's ruling in this case—and the argument offered above—is deeply consistent with longstanding views on the authority of the federal courts to remedy equal protection violations, in the field of immigration law and otherwise. In contrast, only two Justices have ever appeared to endorse the government's argument here—that the requested remedy confers citizenship in violation of Congress's plenary authority over immigration. *See Nguyen v. INS*, 533 U.S. 53, 73, 74 (2001) (Scalia, J., concurring) (joined by Thomas, J.); *Miller*, 523 U.S. at 452–53 (Scalia, J., concurring in the judgment) (joined by Thomas, J.). Indeed, as Justice Scalia himself acknowledged, a "majority of the Justices in *Miller* . . . concluded otherwise." *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring).

* * *

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

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[*] Institutional Affiliations are listed solely for purposes of identification and do not indicate institutional support for the positions articulated in this amicus brief.