No. 99-2071

In the Supreme Court of the United States

TUAN AHN NGUYEN AND JOSEPH BOULAIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Section 1409(a) of Title 8 of the United States Code provides for the conferral of United States citizenship upon a child who is born out of wedlock outside the United States and whose father is a United States citizen. The question in this case is whether certain conditions Congress placed on the conferral of citizenship on such a child under Section 1409(a) violate the equal protection component of the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 208 F.3d 528. The opinions of the Board of Immigration Appeals (Pet. App. 14a-16a, 17a-19a) are unreported. The order of the immigration judge (Pet. App. 20a-21a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2000. The petition for a writ of certiorari was filed on June 26, 2000, and granted on September 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. Article I of the 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. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute. In relevant part, 8 U.S.C. 1401 grants United States citizenship at birth to: persons born in the United States, 8 U.S.C. 1401(a) and (b), who in most cases are guaranteed citizenship under Section 1 of the Fourteenth Amendment; persons born outside the United States to parents who are citizens of the United States, if one parent meets a residency requirement, 8 U.S.C. 1401(c); persons born outside the United States to a citizen parent who meets a requirement of physical presence in the United States, where the other parent is a non-citizen national of the United States, 8 U.S.C 1401(d); persons born in a possession of the United States to a citizen parent who meets a physical-presence requirement, 8 U.S.C. 1401(e); and persons born outside the United States to a citizen parent who meets a physical-presence requirement, and a non-citizen parent, 8 U.S.C. 1401(g).

The provisions of 8 U.S.C. 1401 that apply to persons born outside the United States provide for the conferral of citizenship when the parents were married at the time of the birth. Section 1409 of Title 8 establishes provisions applicable to children born outside the United States to unmarried parents.[1] Section 1409(a) allows a claim of citizenship based upon the father's ties to the United States. A child born outside the United States to an unmarried American father, and who otherwise satisfies the requirements for citizenship under subsections (c), (d), (e), or (g) of Section 1401, is deemed a citizen "as of the date of birth" if, but only if: there is clear and convincing evidence of a blood relationship between the child and the father, 8 U.S.C. 1409(a)(1); the father had United States nationality at the time of the child's

[1] We use the terms "unmarried" and "unwed" to describe the status of parents who were not married to each other as of the date of their child's birth, regardless of either parent's actual marital status.

birth, 8 U.S.C. 1409(a)(2);[2] the father (if living) has agreed in writing to provide financial support for the child until the child is 18 years old, 8 U.S.C. 1409(a)(3); and, before the child turns 18, the child is legitimated under the law of his or her residence or domicile, the father acknowledges paternity of the child in writing under oath, or the paternity of the child is established by adjudication by a court of competent jurisdiction, 8 U.S.C. 1409(a)(4).

Section 1409(c) allows a child born abroad out of wedlock to claim citizenship based upon the mother's United States citizenship. In order for a child to become a United States citizen under Section 1409(c), the mother must have been a citizen of the United States at the time of the child's birth, and the mother must have 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. 8 U.S.C. 1409(c).

2. In *Miller* v. *Albright*, 523 U.S. 420 (1998), this Court considered, but failed definitively to resolve, the question whether Section 1409(a)'s prerequisites for conferring citizenship on a child on the basis of the United States citizenship of the child's unmarried father are consistent with the equal protection component of the Due Process Clause of the Fifth Amendment. Two Members of the Court concluded that the citizenship requirements of Section 1409(a), which the petitioning child did not satisfy, do not violate the equal protection rights of either the child or the citizen father. See *id.* at 429-445 (opinion of Stevens, J.). Those Justices noted that "[d]eference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization,'"

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[2] The statutory distinction between "nationality" and "citizenship" "has little practical impact today" because there are few nationals of the United States who are not citizens. *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

but held that the requirements of Section 1409(a) are, in any event, "substantially related to important governmental objectives." *Id.* at 434-435 n.11 (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 82 (1976)). Two other Justices agreed that Section 1409(a) does not violate the child's equal protection rights. *Id.* at 451-452 (O'Connor, J., concurring in the judgment). Those concurring Justices declined to consider whether Section 1409(a) unconstitutionally discriminates against United States citizen fathers, because the petitioner's father had abandoned his own equal protection claim in the litigation and was not a party before this Court, and the child did not, in the view of those Justices, have third-party standing to raise the father's equal protection rights. *Id.* at 445-451. Two Justices declined to address the constitutional claim of either the father or the child, on the ground that the Court would lack power to confer citizenship on the child as a remedy even if Section 1409 were held unconstitutional. *Id.* at 452-459 (Scalia, J., concurring in the judgment).[3] Three Justices would have held that Section 1409 draws an impermissible distinction between unwed citizen fathers and unwed citizen mothers, and thus denies unwed citizen fathers equal protection. *Id.* at 460-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting). Those Justices would have further held that the Court could remedy that violation by striking what they found to be the offending provisions (paragraphs (3) and (4)) from Section 1409(a) and thereby providing for the child to be a citizen if she satisfied the remaining requirements. *Id.* at 488-490 (Breyer, J., dissenting).

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[3] Justice Stevens and Justice O'Connor noted the remedial issue discussed in Justice Scalia's opinion but did not address it in light of their concurrence in the disposition on other grounds. See 523 U.S. at 445 n.26 (opinion of Stevens, J.); *id.* at 451 (O'Connor, J., concurring in the judgment).

3. The lead petitioner in this case, Tuan Ahn Nguyen, was born in Vietnam on September 11, 1969. Pet. Br. 4; Pet. App. 2a. Co-petitioner Joseph Boulais is Nguyen's father and a United States citizen by birth. Pet. App. 2a & n.1; J.A. 6, 8. Nguyen's mother is a Vietnamese citizen. Pet. App. 2a. Boulais and Nguyen's mother never married. Pet. Br. 4; J.A. 20. When Boulais and Nguyen's mother ended their relationship, Nguyen went to live with the family of Boulais's new Vietnamese girlfriend. J.A. 20. In June 1975, Nguyen came to the United States as a refugee, and he subsequently became a lawful permanent resident. Pet. App. 2a. Boulais thereafter raised Nguyen in Texas. *Ibid.*

In 1992, when Nguyen was 22 years old, he pleaded guilty in Texas state court to two felony charges of sexual assault on a child. Nguyen was sentenced to eight years in prison for each crime. Pet. App. 2a.

In 1995, the Immigration and Naturalization Service initiated deportation proceedings against Nguyen on the ground that he was deportable as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony. Pet. App. 2a. See 8 U.S.C. 1227(a)(2)(A)(ii) and (iii) (Supp. IV 1998) (formerly codified at 8 U.S.C. 1251(a)(2)(A)(ii) and (iii) (1994)). Nguyen challenged deportation, alleging that he is a United States citizen. Pet. App. 3a. Nguyen testified at his deportation hearing, however, that he was a citizen of Vietnam, not the United States. Nguyen also did not dispute the sexual assault convictions that had triggered the deportation proceedings. *Ibid.* The immigration judge accordingly found Nguyen to be deportable. *Id.* at 20a.

Nguyen appealed to the Board of Immigration Appeals (Board). Pet. App. 3a. In 1998, while that appeal was pending, petitioner Boulais obtained an order of parentage (based upon DNA test results and other evidence, see J.A. 7-21) adjudging him to be Nguyen's father. Pet. App. 3a; J.A. 22-

29. The Board dismissed Nguyen's appeal, Pet. App. 17a-19a, and denied his motion to reconsider, *id.* at 14a-16a. In rejecting Nguyen's claim of United States citizenship, the Board relied upon Nguyen's failure to provide the immigration judge with evidence to support his claim of citizenship under Section 1409(a), as well as this Court's judgment against the petitioner in *Miller*. *Id.* at 15a-16a, 17a-18a.

4. The court of appeals held that it lacked jurisdiction over the ensuing petition for review filed by Nguyen and Boulais.[4] The court of appeals relied upon Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-626 to 3009-627, which provides that "there shall be no appeal [from a decision of the Board] permitted in the case of an alien who is inadmissible or deportable by reason of having committed" specified criminal offenses. See 8 U.S.C. 1101 note; Pet. App. 4a. The court of appeals stated that because there was no dispute that Nguyen had been convicted of crimes covered by that statute's jurisdictional bar, it would lack jurisdiction over the appeal if Nguyen is an alien. *Id.* at 4a-5a. Whether Nguyen is an alien, or instead a citizen of the United States, therefore was "a threshold question" in determining the court's jurisdiction. *Id.* at 5a.

The court of appeals treated the Texas state court's order of parentage as conclusive proof that Boulais is Nguyen's biological father. Pet. App. 6a. Nguyen, however, "clear[ly] * * * failed to establish the citizenship requirements outlined in [Section 1409(a)]" because he obtained a legal confirmation of Boulais's paternity when he was 28, rather

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[4] In addition to their petition for review of the Board's decision, Nguyen and Boulais filed a habeas corpus petition and request for a declaratory judgment in the United States District Court for the Southern District of Texas. That habeas petition was held in abeyance pending the court of appeals' decision. Pet. App. 3a-4a & n.2.

than before turning 18, as required by Section 1409(a)(4). *Id.* at 8a, 13a.

The court therefore addressed petitioners' contention that the requirements of Section 1409(a) should not be applied because they violate the equal protection component of the Due Process Clause of the Fifth Amendment. In analyzing the constitutional issue, the court considered the impact of the statutory scheme on both the child (Nguyen) and the father (Boulais). The court explained that Boulais—unlike the father in *Miller*—had "made every effort to represent his own interests in the present suit" and therefore should be allowed to do so. Pet. App. 9a. But on the merits, the court of appeals held that Section 1409(a) is constitutional, for the reasons stated in Justice Stevens's opinion in *Miller*. *Id.* at 11a-13a. Accordingly, having rejected petitioners' constitutional challenge to Section 1409(a), the court concluded that Nguyen secured legal proof of Boulais's paternity ten years too late to meet the statutory deadline, and that petitioners' challenge to the deportation order should be dismissed. *Id.* at 13a.[5]

SUMMARY OF ARGUMENT

I. A. Section 1409 is the product of careful congressional consideration in 1940, 1952, and 1986. In 1940, Congress determined that it is appropriate to have different criteria for granting citizenship to children who are born abroad to a

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[5] The Second and Ninth Circuits have read *Miller* differently. See *United States* v. *Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), petition for cert. pending, No. 99-1872; *Lake* v. *Reno*, 226 F.3d 141 (2d Cir. 2000), petition for cert. pending, No. 00-963. In both cases, the court of appeals held that because the citizen-father of the child seeking citizenship was deceased, the child had third-party standing to assert the father's rights. Extrapolating from the opinions in *Miller*, both courts of appeals were of the view that, in that situation, Justices O'Connor and Kennedy would join Justices Souter, Ginsburg, and Breyer in finding Section 1409(a) unconstitutional. See *Ahumada-Aguilar*, 189 F.3d at 1126; *Lake*, 226 F.3d at 147.

United States citizen father out of wedlock, rather than in a marriage. Congress's distinction between children born out of wedlock and children born in a marriage—which petitioners do not challenge—reflects a legislative judgment that children who have no formal relationship with their United States citizen father are less likely to be raised as Americans. Accordingly, Congress adopted an additional requirement that the unwed father put himself in the same legal position as a married father, by legitimating the child or obtaining an adjudication of paternity, in order to be treated equally with a married father for purposes of rendering a child eligible for citizenship.

Congress also found special requirements appropriate in the case of unwed citizen mothers. Here, Congress relied upon evidence that the foreign-born children of unwed citizen mothers might become stateless if they were not eligible for United States citizenship, because the children would not be eligible for citizenship in their country of birth or in the country of the unwed father. Congress addressed that danger by defining a particularly broad class of citizen mothers whose foreign-born children are statutory citizens at birth.

In 1952 and 1986, Congress made the requirements for acquiring citizenship through an unwed citizen mother somewhat more restrictive, but made the requirements for acquiring citizenship through an unwed citizen father more generous. In particular, Congress offered unwed citizen fathers a new option, whereby they can render their child eligible for citizenship without taking the steps (such as marrying the child's mother) necessary to legitimate the child under the laws of some jurisdictions. In sum, Congress drew reasonable distinctions between married and unmarried fathers in 1940, and thereafter amended the provisions to benefit unwed citizen fathers, such as petitioner Boulais, and their foreign-born children, such as petitioner Nguyen.

B. The legislative judgments embodied in Section 1409 lie at the core of Congress's power to grant naturalized citizenship. That power is textually committed to Congress in Article I, Section 8, Clause 4 of the Constitution. Its exercise involves political decisions about who should share in the privileges, protections, and duties of citizenship, and implicates questions of national security and foreign policy. "[O]ver no conceivable subject is the legislative power of Congress more complete." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). This Court's cases, moreover, establish that deference is due to Congress's judgments about who should be eligible for statutory citizenship, notwithstanding that a citizenship statute may implicate the constitutional rights of current citizens (*id.* at 792-795), and that Congress may have chosen to convey citizenship on persons as of their birth (see *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971)).

C. The narrow issue presented by this as-applied challenge to Section 1409 is whether Section 1409(a)(4)—which requires a citizen father seeking citizenship for his foreign-born child to legitimate the child, acknowledge the child under oath, or be adjudicated the father before the child reaches age 18—discriminates against fathers on the basis of gender in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. There is no violation, as the distinction between unwed citizen fathers and unwed citizen mothers appropriately reflects important and enduring legislative concerns.

It remains the case that children born abroad out of wedlock to a United States citizen mother and a non-citizen father, unlike children born abroad to a United States citizen father and a non-citizen mother, would often be stateless if United States citizenship were not granted liberally. Section 1409(c) addresses that concern. And it remains the case that an unwed father typically will have no legally recognized parental rights or responsibilities toward his child, and will

not be similarly situated to an unwed mother or a married father, unless he takes steps to formalize the paternal relationship. Section 1409(a) establishes reasonable steps an unwed father must take to equalize his status with that of an unwed mother or a married father, for purposes of rendering a foreign-born child eligible for citizenship. In the domestic context, this Court has held that legislatures may require unwed fathers to establish a formal relationship with the child as a condition of being treated on an equal plane with the mother or a married father. *Lehr* v. *Robertson*, 463 U.S. 248 (1983). Such a requirement is particularly permissible when, as here, it is established in the context of a naturalization statute and does not impose a substantial burden on the father.

II. Even if this Court were to determine that Section 1409's distinction between unwed fathers and unwed mothers is not constitutional, petitioners still would not be entitled to the relief they seek. Congress manifestly intended that children born abroad out of wedlock would be treated differently, for citizenship purposes, than children born abroad to married parents. The permissibility of that distinction is undisputed. Accordingly, the remedial question in this case would be whether the terms applicable to unwed fathers and unwed mothers should be equalized by making unwed fathers eligible for the same preference as unwed mothers under Section 1409(c), notwithstanding that the rationale of avoiding statelessness does not apply, or whether the Court should strike down Section 1409(a) and (c) entirely or, alternatively, subject unwed citizen mothers to the same requirements as unwed citizen fathers under Section 1409(a) (neither of which would afford petitioners relief). If it were necessary to choose between those remedies, the appropriate course would be to deny unwed mothers their current preference. Vitiating Congress's preconditions for obtaining citizenship through an unwed

United States citizen father would intrude unnecessarily upon Congress's exclusive authority to define eligibility for naturalized citizenship, create an irrational statutory scheme, and result in judicially mandated grants of citizenship that Congress may be powerless to reverse.

ARGUMENT

I. THE DISTINCTIONS IN SECTION 1409 DO NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE

The naturalization rules set out in Section 1409 serve at least two important interests: 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 upon them; and second, preventing such children from being stateless.[6] Rather than relying upon outmoded stereotypes, Congress has revised Section 1409 over the years to accomplish those purposes in light of current law in the United States and abroad and to promote gender equality, without unnecessarily disadvantaging any group of citizens or would-be citizens.

A. Congress Tailored The Provisions Of Section 1409 To Reflect The Special Circumstances Of Children Born Out Of Wedlock, And To Address The Problem Of Statelessness

1. Congress has provided "by successive acts," beginning with the Act of March 26, 1790, "for the admission to citizenship of * * * [f]oreign-born children of American citizens, coming within the definitions prescribed by Congress." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 672 (1898).

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[6] The United States relied upon those same purposes as respondent in *Miller* v. *Albright*. See 96-1060 Resp. Br. at 24-31 (establishment of formal ties to parent and nation), 33-34 (statelessness).

The first Act of Congress relating to foreign-born children provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. The proviso served to ensure that generations of children born abroad were not to become "citizens" by virtue of a mere blood relationship, unaccompanied by any other tie to this country. That principle persisted in similar statutes of 1795, 1802, 1855, and 1874. See *Bellei*, 401 U.S. at 823-825 (describing history).

Until 1934, those laws extended citizenship to foreign-born children based upon the United States citizenship of their father. In 1934, however, Congress eliminated that distinction between children of citizen fathers and children of citizen mothers, providing instead, on a prospective basis, that any child "whose father or mother or both * * * is a citizen" would be a citizen, if (1) at least one citizen parent satisfied a requirement of residency in the United States before the child's birth, and (2) the child, if born to one citizen parent and one non-citizen parent, satisfied a residency requirement and took an oath of allegiance. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (*reprinted in Bellei*, 401 U.S. at 818 n.2).[7]

2. Before 1940, none of the laws granting citizenship to foreign-born children had addressed the issue of children born out of wedlock. The 1874 and 1934 Acts were interpreted and applied for many years to afford citizenship

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[7] In 1994, Congress eliminated the distinction for children born prior to the effective date of the 1934 Act. See 8 U.S.C. 1401(h) (conferring citizenship on children of a citizen mother who meets a residency requirement, if the child was born abroad prior to May 24, 1934), as added by Pub. L. No. 103-416, Tit. I, § 101(a)(2), 108 Stat. 4306.

to children born out of wedlock who had a United States citizen father, if the child subsequently was legitimated by marriage of the father to the child's mother or otherwise in accordance with the governing state or foreign law. See *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) (*1940 Hearings*); 32 Op. Att'y Gen. 162 (1920); 39 Op. Att'y Gen. 556 (1937). When a child claimed citizenship on the basis of an unwed United States citizen mother, the State Department recognized the child as a citizen if the identity of the child's father had not been legally established by legitimation or adjudication, on the ground that the mother stood in the position of the father in such cases. *1940 Hearings* 431. The Attorney General, however, rejected that view in 1939, at least with respect to children born before the 1934 Act. 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). In so doing, the Attorney General suggested that the unavailability of citizenship to children born out of wedlock abroad to a United States citizen mother would be a proper subject for congressional action. 39 Op. Att'y Gen. at 291.

Congress took up that issue as part of its general overhaul of the naturalization laws in 1940. In 1938, President Roosevelt had submitted to Congress a proposed new nationality code ("Proposed Code") that had been prepared by his Secretary of State, Attorney General, and Secretary of Labor. *1940 Hearings* 405-515. Congress considered the Proposed Code against the background of European and Asian wars that threatened the lives, liberty, and property of Americans abroad. At a time when democracy was under attack throughout the world, and the United States faced grave problems in defending its interests and citizens abroad, Congress undertook "a studied effort to * * * facilitate the naturalization of worthy candidates and,

at the same time, protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset." H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940).

The drafters of the Proposed Code first addressed the status of children of married parents, and in particular married parents who were United States citizens. The drafters noted that in the "great majority" of foreign-birth cases, "husband and wife are both citizens of the United States." *1940 Hearings* 422. The drafters concluded that citizenship should be conferred generously on the children of those couples, because "[i]n such cases it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character." *Ibid.* Accordingly, Section 201(c) of the Nationality Act of 1940, ch. 876, 54 Stat. 1138 (1940 Act), which became Section 301(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1401(c), conferred citizenship on any child born abroad to two United States citizens in wedlock, retaining only the longstanding requirement that at least one parent "has resided in the United States * * * prior to the birth of [the child]." 54 Stat. 1138.

By contrast, "[t]he problem of the child born abroad to parents of different nationalities was the subject of extended consideration." *1940 Hearings* 409. That was because, in the view of the drafters of the Proposed Code, conferring citizenship at birth on the foreign-born children of married couples with mixed citizenship presented "greater difficulties" and "require[d] correspondingly stricter limitations." *1940 Hearings* 423; see *id.* at 42 (claims for protection made by children born abroad, to parents with mixed citizenship, are "the most difficult" citizenship problem). The drafters proposed that citizenship be conferred in that context if the citizen parent had resided in the United States for at least

ten years before the child's birth, and suggested that the child be required to satisfy a residency requirement and take an oath of allegiance after turning 21. *Id.* at 426-427. The drafters of the Proposed Code explained that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character." *Id.* at 426.[8] Congress eliminated the oath of allegiance, toughened the parental residency requirement, and altered the wording slightly, but otherwise adopted the drafters' proposal as Section 201(g) of the 1940 Act, 54 Stat. 1139. The residency requirements have been reduced over the years, but the same basic provision remains in force today as Section 301(a)(7) of the INA, 8 U.S.C. 1401(g).

Section 205 of the 1940 Act (App., *infra*, 6a) addressed the status of children born abroad out of wedlock, which had been thrown into some confusion by the Attorney General's opinions of 1939, discussed above. The first paragraph of Section 205 provided that, in the case of a child born out of wedlock to a United States citizen father, the provisions of Section 201 (governing the status of children born *in* wedlock) would apply "provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139. In the United States and most other nations in 1940, legitimation typically required marriage (or attempted marriage) of the father and the mother or, in some jurisdictions, a formal acknowledgment of paternity by the father. See *1940 Hearings* 431; Harry D. Krause, *Illegitimacy: Law and Social Policy* 11-14, 19-20 (1971) (surveying state laws). Adjudication or legitimation

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[8] The residency requirement applicable to the child was not to apply if the citizen parent was working abroad for the United States government or certain American institutions, on the premise that such parents were likely to "retain their American sympathies and character" and to "bring up their children as Americans." *1940 Hearings* 427.

by marriage or other authorized method after the child was born supplied, at that later date, the necessary element of a legally recognized relationship between father and child that was present at birth for children born in wedlock. As a result, the first paragraph of Section 205 enabled the father of a child born out of wedlock to acquire the same legal recognition of and protection for his "interest in assuming a responsible role in the future of his child" with respect to citizenship as the father of a child born in wedlock possesses upon the child's birth. *Lehr* v. *Robertson*, 463 U.S. at 263. Thus, consistent with the principle "that rights of the parents are a counterpart of the responsibilities they have assumed," *id.* at 257, Section 205 equalized the status of married and unmarried citizen fathers if the unmarried fathers entered into a legal relationship with their children born abroad that was comparable to the legal relationship between a married father and his children, and thereby assumed the legal obligations of married fathers to their children. The children of such unwed fathers would be eligible for citizenship if they met the requirements, set out in Section 201, for children of married citizen parents to have "a real American background." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940).

The second paragraph of Section 205 ensured that children born abroad out of wedlock could obtain United States citizenship based upon the United States citizenship of their mother, which would have been in doubt—particularly for children born before 1934—in the absence of a specific statutory provision giving unwed mothers the right to convey citizenship. *1940 Hearings* 43; see 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). The situation of unwed citizen mothers was different than that of unwed citizen fathers, however, and different rules were deemed appropriate.

In the first place, there was no question of the mother's legal right to custody and control of the illegitimate child, as that was established under American law (and the law of most other nations) at the child's birth. *1940 Hearings* 431 (noting domestic laws of United States, Spain, and France, and citizenship laws of 30 nations); see Harry D. Krause, *supra*, at 5 ("[W]ith respect to its mother, the illegitimate has long been equal or substantially equal to his legitimate sibling."); see also, *e.g.*, *Quilloin* v. *Wallcott*, 434 U.S. 246, 248-249 (1978) (discussing Georgia law under which "the mother is the only recognized parent" of a child born out of wedlock absent legitimation by the father). It thus was not necessary to have a provision in the second paragraph of Section 205 analogous to the "legitimation, or adjudication" provision of the first paragraph.

Congress also found it appropriate, in the case of children of unwed mothers, to relax the residency requirements of Section 201. 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). In connection with the Proposed 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). *1940 Hearings* 431; 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. Such children, having been born abroad, would not be citizens of the United States by birth under the Fourteenth Amendment. But, unless the mother had dual citizenship, the children generally would not, due to the United States citizenship of the mother, be citizens of any foreign country. See Frederick Van Dyne, *Citizenship of the United States* 49 (1904) ("The nationality of an illegitimate child born to an American mother abroad would, by the law of nations, follow that of the mother."). 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.[9]

The statelessness issue had been discussed as early as 1933, when Congress considered (but did not adopt as part of the 1934 Act) a provision addressed specifically to the situation of children born abroad out of wedlock. See *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (State Department proposed amendment); see also *id.* at 54-55 (discussing statelessness problem in the context of English/American marriages). The issue was raised again during the *1940 Hearings* (at 43). Recognizing that statelessness is "deplored in the international community of democracies" and can have "disastrous consequences" for the individual, *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958) (opinion of Warren, C.J.), Congress took steps in 1940 to reduce the risk. Under

[9] There would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father. That problem, however, had been addressed by the first paragraph of Section 205, which provided that such children would become eligible for United States citizenship as a result of the same legitimation that might endanger the child's foreign citizenship.

the second paragraph of Section 205, the foreign-born child of an unwed United States citizen mother—who might not be eligible for citizenship in any other nation—would be guaranteed United States citizenship if the mother "had previously resided in the United States" for any period of time, unless the child was legitimated by the father and thus became eligible to receive the father's citizenship. See App., *infra*, 6a.

3. In 1952, Congress reenacted the first paragraph of Section 205 without material change as Section 309(a) of the new INA, 8 U.S.C. 1409(a) (App., *infra*, 5a). The second paragraph of Section 205 became Section 309(c), 8 U.S.C. 1409(c) (App., *infra*, 5a-6a), with two changes. *First*, the child of an unwed citizen mother could be a citizen regardless of legitimation by the father. *Second*, Congress adopted a somewhat stricter requirement for ensuring a connection between the unwed mother and the United States by providing that, in order to transmit citizenship to her foreign-born child, an unwed United States citizen mother must "ha[ve] previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." *Ibid.* Legislators determined, however, that it remained inappropriate to subject unwed United States citizen mothers who gave birth abroad to the same physical-presence requirements as other citizen parents. As the Senate Report explained, the relatively generous one-year period applicable to unwed citizen mothers under Section 1409(c) "insure[d] that the child shall have a nationality at birth." See S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). Both changes made in 1952 survive today in the current version of Section 1409(c).

4. In 1986, Congress revised Section 1409 to make it easier for unwed citizen fathers to secure citizenship for

their foreign-born children.[10] *Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 118, 155 (1986) (*1986 Hearing*). Although a father still could obtain formal recognition of his paternal relationship through the traditional means of legitimation or adjudication, the 1986 amendment to Section 1409(a) additionally allowed fathers to secure citizenship for their foreign-born child by "acknowledg[ing] * * * paternity of the [child] in writing under oath," even if that option was not recognized as a form of legitimation by the relevant jurisdiction. With this change, codified in current Section 1409(a)(4)(B), Congress eliminated the indirect limitation on citizenship that had resulted from the failure of some jurisdictions to recognize legitimation by paternal acknowledgment of the child. See Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 310 & nn.10, 11 (2d ed. 1987) (listing States that required marriage to legitimate the child). Fathers who could not legitimate their child due to the death or marriage of the mother gained the opportunity to have the child become a United States citizen through a process that approximated legitimation. The new acknowledgment option also "simplif[ied] and facilitate[d]" administration of Section 1409(a), "by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction." *1986 Hearing* 150.

At the same time, however, the inclusion of a method of formalizing a paternal relationship that might not be recognized by the child's place of residence or domicile created new problems. If a child was acknowledged under Section

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[10] Congress also made non-substantive changes to Section 1409(a) in the Immigration Technical Corrections Act of 1988 (ITCA), Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

1409(a), but not legitimated (or adjudicated to be a father) in the appropriate jurisdiction, then a putative father could secure citizenship for the child without assuming the obligation of support that married fathers have, and that unmarried fathers would have assumed as a result of the provisions in the 1940 and 1952 versions of Section 1409(a) that conditioned citizenship on legitimation or an adjudication of paternity. The new opportunity to obtain the benefits of legitimation without the attendant responsibilities also would create a risk of fraud, whereby men who were not natural fathers might claim paternity solely for the purpose of securing citizenship for the child. See *1986 Hearing* 150. To address those concerns, new Section 1409(a)(1) required "clear and convincing evidence" of a blood relationship between the child and the father, while new Section 1409(a)(3) required the father to agree in writing to support the child financially until the age of 18.

The 1986 amendments did not change Section 1409(c), which continues to provide that a child born abroad out of wedlock "shall be held to have acquired at birth the nationality status of his mother, * * * 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." 8 U.S.C. 1409(c).

B. Section 1409(a) Must Be Upheld If It Reflects A "Facially Legitimate And Bona Fide" Policy Choice By Congress

Petitioners seek to have Nguyen declared a naturalized citizen through one more modification of Section 1409(a)—this one accomplished by the Court. See Pet. Br. 32-39. The fact that petitioners claim Nguyen is entitled to citizenship under a (judicially revised) statutory grant—and concede he has no entitlement to citizenship under the Fourteenth Amendment—is critical, for it dictates a highly deferential standard of equal protection review.

1. The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *Wong Kim Ark*, 169 U.S. at 702. Under Section 1 of the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Ibid.*[11] Although not expressly guaranteed by the Constitution until after the Civil War, citizenship by place of birth was the fundamental rule of citizenship established by Anglo-American common law (see *id.* at 674-675, 688), and the rule in this country has always been "that the place of birth governs citizenship status except as modified by statute." *Bellei*, 401 U.S. at 828.[12]

Before the Fourteenth Amendment formally recognized citizenship by birth within the United States, the Constitution had specifically addressed only Congress's power to grant naturalized citizenship. Article I, Section 8, Clause 4, provides that "[t]he Congress shall have Power * * * To establish an uniform Rule of Naturalization." As discussed above, Congress first exercised that power in the Act of March 26, 1790. In successive naturalization laws, Congress revised the statutory rules for conferring United States citizenship upon foreign-born children of United States citizens, and also established naturalization rules for non-

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[11] The exception for persons born within the United States but not "subject to the jurisdiction thereof" has been held to cover children born in this country to foreign diplomats, children born on foreign ships, children born to hostile occupying forces, and tribal Indians, who were considered to be subject in the first instance to the sovereign jurisdiction of their respective Tribes. *Wong Kim Ark*, 169 U.S. at 693; see also 8 U.S.C. 1401(b) (extending citizenship at birth to members of Indian Tribes).

[12] Enshrining citizenship by birth in the Fourteenth Amendment served to overrule the *Dred Scott* case (*Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857)), which rejected the claim that a native-born black man who had been a free man, but was later returned to slavery in a different State, was a citizen of the United States.

citizen aliens resident in the United States, and their children. See generally *Wong Kim Ark*, 169 U.S. at 672-674 (discussing statutes relating to foreign-born children); *Bellei*, 401 U.S. at 823-824 (same).

During two centuries of congressional lawmaking, this Court has consistently held that Congress's determinations about who should receive the benefits and protections of citizenship are subject only to a particularly deferential form of rationality review. In *Wong Kim Ark*, the Court stressed that "nationality by descent is based wholly upon statutory enactments." 169 U.S. at 670 (internal quotation omitted). The Fourteenth Amendment "left that subject to be regulated, as it has always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization." *Id.* at 688. And later cases confirm that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917). Accordingly, the question whether the foreign-born child of a United States citizen should be made a citizen is a policy matter committed to Congress. *Bellei*, 401 U.S. at 830.

Courts are particularly ill-suited to second-guess Congress's judgments about what classes of persons should be eligible for statutory citizenship, for several reasons. *First*, admission to citizenship involves the question of who is entitled to share in the benefits, protections, and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990). The judiciary has an unquestioned role in protecting rights accorded under the Constitution to citizens and to those aliens who have been allowed to become legal residents of this country, but it has no role in adopting the policies for determining which foreign-born persons should be permitted to become members of our society in the first place. See *Fong Yue*

Ting v. *United States*, 149 U.S. 698, 707 (1893) ("Every society possesses the undoubted right to determine who shall compose its members" (internal quotation marks omitted)); 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 237 (1966) (remarks of Gouverneur Morris) ("every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted"). In our society, the right to include or exclude is exercised by the Executive and Legislative Branches, not by the Judiciary. See *Fong Yue Ting*, 149 U.S. at 705; *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19, 225 (1982).

Second, the power to deny citizenship is also the power to keep an alien outside the Nation's borders, and that authority "is an incident of every independent nation." *The Chinese Exclusion Case* (*Chae Chan Ping* v. *United States*), 130 U.S. 581, 603 (1889); see *Fong Yue Ting*, 149 U.S. at 705-713. Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953); see *Plyler*, 457 U.S. at 225 ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.").

Third, "any policy toward aliens is vitally and intricately interwoven with * * * the conduct of foreign relations." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); see *Plyler*, 457 U.S. at 219 n.19 ("alienage classifications may be intimately related to the conduct of foreign policy"). The power to exclude and expel aliens (which, again, necessarily subsumes the power to deny them citizenship) is "a weapon of defense and reprisal confirmed by international law as a

power inherent in every sovereign state." *Harisiades*, 342 U.S. at 587-588. Use of that "weapon" is committed to the political Branches, which are responsible for "the entire control of international relations." *Fong Yue Ting*, 149 U.S. at 705 (quoting *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892)); see *Diaz*, 426 U.S. at 81 ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.").

For these reasons, the principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo*, 430 U.S. at 792, 793 n.4 (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Harisiades*, 342 U.S. at 588-589. When Congress makes a policy choice in those areas, its choice will be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for Congress's decision. *Fiallo*, 430 U.S. at 794. Indeed, "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete.'" *Id.* at 792 (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)).

Such deference affords Congress the practical latitude it needs to fulfill its responsibilities for national security, foreign affairs, and nation-building. The immigration and naturalization laws routinely include distinctions based upon nationality, parentage, marital status and other family relationships, occupation, age, and education (see *Diaz*, 426 U.S. at 79-80 n.13; see also 8 U.S.C. 1153 (immigration preferences)), yet judicial review is highly deferential. As a practical matter, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes

rules that would be unacceptable if applied to citizens." *Diaz*, 426 U.S. at 79-80.

2. Petitioners suggest that the above-cited decisions, and the constitutional framework that supports them, are inapposite because petitioner Boulais is asserting his own rights as a citizen. Br. 24. But neither the Constitution's textual assignment of the naturalization power to Congress, nor the institutional limitations of the judiciary, depend upon the identity of the litigant. Indeed, *Fiallo* v. *Bell* squarely forecloses petitioners' argument. In *Fiallo*, the Court rejected a constitutional challenge to an immigration preference that served to reunite unwed mothers and their children in this country, where there was no similar preference based upon the relationship between unwed fathers and their children. 430 U.S. at 788-791. The parties bringing the due process and equal protection challenges included United States citizens, and they sought to distinguish prior immigration cases on that basis. *Id.* at 790 n.2, 794. The Court found that purported distinction untenable, explaining that its cases "rejected the suggestion that more searching judicial scrutiny [of immigration statutes] is required" when the constitutional rights of citizens are implicated. *Id.* at 794. "[L]imited judicial review" is appropriate "despite the impact of [entry] classifications on the interests of those already within our borders." *Id*. at 796 n.6. The Court explained that the "facially legitimate and bona fide reason" standard of review applicable in the immigration and naturalization area had been articulated in *Kleindienst* v. *Mandel*, which involved a First Amendment challenge by citizens. 430 U.S. at 794-795. The Court found no reason why a Fifth Amendment challenge (such as the one in *Fiallo*, as well as the one in this case) would warrant any stricter standard of review than the highly deferential standard applied to resolve the First Amendment challenge in *Kleindienst*. *Id.* at 795.

Petitioners further rely (Br. 25-26) upon the fact that Section 1409(a) grants eligible, foreign-born children of unwed citizen fathers United States citizenship "as of the date of birth." They argue that because Congress chose to convey citizenship as of the child's date of birth, a party seeking citizenship under Section 1409(a) is seeking a declaration of *pre-existing* citizenship, rather than a change of status from alien to citizen. Thus, petitioners maintain, Section 1409(a) should not be reviewed under the deferential standard that is employed when an alien challenges a naturalization statute. The three dissenting Justices in *Miller* made the same argument, see 523 U.S. at 478-481, but, we submit, it is incorrect.[13]

Section 1409 is a naturalization statute for purposes of constitutional law. As the Court explained in *Wong Kim Ark*, *supra*, "citizenship by birth is established by the * * * fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." 169 U.S. at 702; see U.S. Const. Amend XIV, § 1. Petitioner Nguyen was born in Vietnam, not the United States, and thus is not eligible for citizenship by birth under the Fourteenth Amendment. He "can only become a citizen by being natu-

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[13] A law review article on which petitioners rely (Br. 14, 15) concedes that "it is difficult to construct a persuasive case" for the distinction petitioners seek to draw. Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller *v.* Albright, 1998 S. Ct. Rev. 1, 48. Professors Pillard and Aleinikoff note that citizenship statutes involve "membership decisions * * * that arguably call for the greatest degree of institutional deference." *Id.* at 51. Professors Pillard and Aleinikoff thus argue, not that Section 1409(a) could logically be subjected to a higher standard of scrutiny than other immigration and naturalization laws, but that the Court should cease deferring to the political Branches in the immigration and naturalization contexts generally. *Id.* at 49-63. We do not understand petitioners or their amici to be making that radical argument.

ralized." 169 U.S. at 702; see *Bellei*, 401 U.S. at 830 ("acquisition of citizenship by being born abroad of an American parent" is not constitutionally guaranteed citizenship, and "was necessarily left to proper congressional action"); *Miller*, 523 U.S. at 434 n.11 (opinion of Stevens, J.) ("Though petitioner claims to be a citizen from birth, * * * citizenship does not pass by descent. Thus she must still meet the statutory requirements set by Congress for citizenship.").

Like Section 1409(a), the earliest citizenship statutes, including the statutes of 1790, 1795, 1802, and 1855, provided that qualifying children born abroad would be treated as citizens from the day of their birth—yet these laws clearly were naturalization statutes. See *Bellei*, 401 U.S. at 823 & n.3 (discussing statutes); *Wong Kim Ark*, 169 U.S. at 672-674 (same). Section 1409 lies squarely within Congress's textually committed authority over naturalization, where the reviewing power of the courts is most limited. See generally *Bellei*, 401 U.S. at 827-836 (reviewing for reasonableness the residency requirements in a denaturalization statute).[14]

Petitioners also err in attaching significance (Br. 25) to the fact that Congress defined the term "naturalization"—"[a]s used in" the INA—to mean "the conferring of nationality * * * after birth." 8 U.S.C. 1101(a) and (a)(23). The drafters of the 1940 Act expressly noted that their definition of "naturalization"—which survives today in the INA—was "narrower" than the "broad[]" constitutional meaning of "naturalization" that had been suggested by the decisions of

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[14] Petitioners' counterintuitive assertion (Br. 27-28) that the Court's application of rational basis review to the denaturalization statute in *Bellei* actually supports application of heightened scrutiny to Section 1409(a) is unfounded. The Court's review of denaturalization laws, even under the rational-basis standard, has always been tempered by a recognition of Congress's foreign affairs powers. *Perez* v. *Brownell*, 356 U.S. 44, 57-62 (1958). The Court in *Bellei* had no occasion to decide whether rationality review might be too onerous, because the law satisfied rationality review.

this Court. *1940 Hearings* 413-414. In the 1940 Act, the drafters used the term "naturalization" as a way of describing those grants of citizenship that are accomplished through the processes of administrative naturalization, as opposed to statutory grants of citizenship. *Ibid.*; see 8 U.S.C. 1421-1458 (1994 & Supp. IV 1998) (current naturalization provisions of INA). That drafting decision does not alter the fact that for *constitutional* purposes, there are only two categories of citizens: those who meet the Fourteenth Amendment's criteria for citizenship at birth, and those who are made citizens pursuant to Act of Congress (or, in the case of territorial annexation, by treaty). *Wong Kim Ark*, 169 U.S. at 702-703; *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874) (Mem.) (same).

In any event, petitioners are incorrect (Br. 25) that an award of citizenship would merely "recognize[]" Nguyen's "existing status" as a United States citizen. Under the law that Congress enacted, it could not be clearer that Nguyen has no "existing status" as a citizen. Section 1409(a), moreover, establishes prerequisites for citizenship that can *only* be satisfied after the birth of the child. See 8 U.S.C. 1409(a)(1) (establishment of blood relationship by clear and convincing evidence); 8 U.S.C. 1409(a)(4) (legitimation, adjudication, or acknowledgment of paternity); see also 8 U.S.C. 1409(a)(3) (written agreement to support child). Nguyen is concededly unable to meet all the prerequisites for naturalized citizenship under Section 1409(a). Pet. Br. 5. Thus, he has always been, and remains today, an alien.

Nguyen's Vietnamese citizenship highlights the fallacy of petitioners' final argument (Br. 29), that statutes such as Section 1409(a) "ha[ve] little relevance to Congress's foreign relations power." If Nguyen were entitled to United States citizenship at birth as petitioners claim, he would (subject to Vietnamese law) be a citizen of both the United States and Vietnam. Dual citizenship "creates problems for the govern-

ments involved," stemming from the citizen's dual allegiance to two sovereigns. *Bellei*, 401 U.S. at 832. "[T]hese difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations," as can occur when the dual citizen participates in the political or governmental affairs of his or her other country or is compelled by foreign law to act against the interests of the United States as a soldier or otherwise. *Perez* v. *Brownell*, 356 U.S. 44, 59 (1958); *Kawakita* v. *United States*, 343 U.S. 717, 734-736 (1952). The dangers associated with dual citizenship in fact figured prominently in Congress's drafting of the citizenship provisions of the 1940 Act. *Bellei*, 401 U.S. at 823-836; see S. Rep. No. 2150, *supra*, at 4 (discussing the "considerable trouble" caused by requests for protection from dual citizens living abroad).

"The importance and extreme delicacy" of dual citizenship "demand that Congress be permitted ample scope" to limit its occurrence. *Perez*, 356 U.S. at 60; see also *id.* at 62 (to overturn congressional judgments regarding denaturalization of dual citizens "would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard"). In addition, as when this Court considers whether United States law applies to events occurring in foreign countries, the fact that Section 1409 affects the status of persons born abroad and subject to foreign laws makes restraint particularly appropriate, in order to respect Congress's efforts to avoid "unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). For these additional reasons, Congress's restrictions on conveyance of United States citizenship to foreign-born persons warrant deference.

C. Section 1409 Effectively Serves Congress's Valid Objectives

1. The issues presented for decision in this case are far narrower than petitioners suggest. In attempting to expand the scope of their as-applied challenge, petitioners ignore both the controlling effect of *Miller* and the limitations placed upon their challenge by the record below and the facts of this case.

a. Petitioner Nguyen relies upon the asserted right of petitioner Boulais, as a citizen of the United States, "to be free of discrimination in transmitting statutory 'citizenship at birth.'" Br. 24. Six Justices in *Miller* rejected an analogous third-party challenge to Section 1409(a) by the child of an unwed United States citizen father. Like the petitioner in *Miller*, Nguyen may not assert the rights of his father because there is no "hindrance to the [father]'s ability to protect his or her own interests." 523 U.S. at 447 (O'Connor, J., concurring in the judgment) (quoting *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991)). The father, Boulais, is a petitioner here, and he is actively asserting his own alleged rights. Nguyen's own claim is essentially the same as the claim rejected in the opinions of Justices Stevens, O'Connor, and Scalia (collectively representing the views of six Justices) in *Miller*, and it should be rejected on that basis. The only remaining claim is that of petitioner Boulais, who asserts that Section 1409(a) discriminates against him as a male citizen.

b. Petitioners do not challenge some of Section 1409(a)'s conditions on the conferral of United States citizenship. They do not challenge the requirement, set forth in Section 1409(a)(1), that a child seeking citizenship through his or her unwed father establish paternity by clear and convincing evidence. See Pet. Br. 21. As noted above (pp. 20-21, *supra*), that requirement is appropriate "[t]o deter fraudulent claims" of entitlement to derivative citizenship. *1986 Hear-*

ing 150; see also 523 U.S. at 485 (Breyer, J., dissenting) ("I believe that biological differences between men and women would justify [applying Section 1409(a)(1)] where paternity is at issue."). Petitioners also do not challenge the physical-presence requirements applicable to unwed citizen fathers under Section 1401, which are incorporated by reference in the first sentence of Section 1409(a). As this Court recognized in *Bellei* (401 U.S. at 834), those requirements reflect "the importance of residence in this country as the talisman of dedicated attachment" to the Nation. See Pet. Br. 20, 35 n.13.

Petitioners do challenge the requirement, set forth in Section 1409(a)(3), that an unwed citizen father, if living, must agree to support his child who seeks citizenship until the child reaches the age of 18. Yet that paternal support requirement is not properly at issue, either. In the first place, Nguyen was free to elect to come under the pre-1986 version of Section 1409(a), which did not contain a support requirement.[15] Moreover, petitioners challenge Section 1409(a) as part of their effort to overturn the deportation order against Nguyen. Pet. Br. 7; Pet. App. 4a-6a; see 8 U.S.C. 1105a(a)(5). The statutory requirement that the father commit to support his child until age 18 was not at issue in the deportation proceeding, because Nguyen did not claim an entitlement to United States citizenship until he was 28 years of age. Pet. App. 2a, 3a, 13a. The court of appeals held only that Nguyen failed to establish citizenship

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[15] Nguyen falls within a transition rule that allowed him to select application of Section 1409(a) either as amended in 1986 or as it stood before the amendment (when the law required that paternity be "established while such child is under the age of twenty-one years by legitimation," 8 U.S.C. 1409(a) (1982)). See Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, as added by ITCA § 8(r), 102 Stat. 2618-2619. Nguyen did not make an election (Pet. Br. 6 n.1), and he failed to satisfy either the old or the new rules. We discuss the new provision, which is of more general interest.

under Section 1409(a) because of Boulais's failure to legitimate Nguyen or otherwise establish paternity before age 18. *Id.* at 8a. The constitutionality of Section 1409(a)(3)'s support requirement therefore has no bearing on the lawfulness of the deportation order in this case, or on the correctness of the court of appeals' judgment. Accordingly, there is no reason to consider that question. Cf. *Miller*, 523 U.S. at 432 (opinion of Stevens, J.).[16]

2. Only 8 U.S.C. 1409(a)(4)—the requirement that, before the child reaches age 18, the citizen father legitimate the child, acknowledge the child under oath, or be adjudicated the father—is genuinely at issue in this case. As explained above, that requirement serves to ensure that an unwed citizen father whose child is to be made a citizen under Section 1409(a) has attained the same legal relation to the child, at some point while the child is still a minor, as both a married citizen father and a married citizen mother have *at*

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[16] In any event, Section 1409(a)(3) is a reasonable means of "lessen[ing] the chance that" a child who secures citizenship through the acknowledgment option added in 1986 will "become a financial burden to the states" after gaining citizenship. *1986 Hearings* 150. Where the father has legitimated the child, or been adjudicated as the father, a support obligation already exists (as it does from birth in the case of the mother), and Section 1409(a)(3) imposes no additional obligation on the father. See generally *Gomez* v. *Perez*, 409 U.S. 535, 536-537 (1973) (per curiam) (discussing absence of obligation to support illegitimate children under Texas law); *Rivera* v. *Minnich*, 483 U.S. 574, 580 (1987) (noting financial obligation "that flow[s] from a court order that establishes paternity"). Section 1409(a)(3) therefore serves to put fathers who take advantage of the less-burdensome formal-acknowledgment option on a more equal footing, insofar as their legal relationship with their children is concerned, with mothers and other fathers whose children may become citizens under Section 1409. Section 1409(a)(3) does not guarantee actual support (see National Women's Law Center Amicus Br. 28), just as the legal obligation of the mother of an illegitimate child, or of a father who legitimates a child or is adjudicated the father in a paternity suit, does not itself guarantee that financial support will be forthcoming (see *id.* at 26-27). A commitment to support the child is, however, a reasonable way of increasing the likelihood that support will be provided.

birth to a child who is made a citizen under Section 1401, or as an unwed citizen mother has at birth to a child who is made a citizen under Section 1409(c). While an unwed mother need not provide proof of a recognized and formal relationship with her child, that relationship is almost invariably established by the fact of maternity. See p. 17, *supra*; see also *Lehr* v. *Robertson*, 463 U.S. at 260 n.16 ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.") (quoting *Caban* v. *Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). Moreover, Congress minimized the burdens on unwed mothers who seek citizenship for their children under Section 1409(c) in order to advance its important interest in avoiding statelessness.

Neither of those two bases for treating unwed citizen fathers differently than unwed citizen mothers relies upon outdated "stereotypes about the roles and capacities of mothers and fathers of out-of-wedlock children." National Women's Law Center Amicus Br. 12. To the contrary, Congress sought expressly to eliminate gender-based distinctions from what are now Sections 1401 and 1409, whenever Congress concluded it was practicable to do so. That effort began with the 1934 revision that, as Justice Ginsburg stated in *Miller*, "[t]erminated the discrimination against United States citizen mothers" by conferring United States citizenship on children who are born abroad to a married United States citizen mother. *Miller*, 523 U.S. at 465-466; see p. 12, *supra*.

The effort continued in 1940. The Roosevelt Administration recognized that the 1934 Act had "place[d] American fathers and mothers on an equal plane with regard to transmission of citizenship" and intended that its Proposed Code would "carry out the principle of equality between men and women in the matter of nationality." *1940 Hearings* 421,

422. The 1940 Act accordingly established a gender-neutral approach to conferring citizenship on legitimate children (see 54 Stat. 1138-1139), which survives today in 8 U.S.C. 1401. Congress also for the first time provided by statute for children born out of wedlock to obtain United States citizenship on the basis of the citizenship of their mother as well as their father. But the drafters of the 1940 Act recognized that, in the special context of children born out of wedlock, provisions designed to promote parity between men and women should be accompanied by provisions that address the problem of statelessness and by requirements that protect Congress's "patently reasonable" interest in ensuring that children who obtain citizenship have a substantial connection to the United States. See *1940 Hearings* 421-423.

In 1952, the drafters of the INA again sought to "[e]liminate[] discrimination between the sexes" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 28 (1952)) and accordingly deleted the provision of what is now Section 1409(c) that had made conferral of citizenship on an illegitimate child born abroad to a United States citizen mother contingent upon the absence of paternal legitimation or an adjudication of paternity. Compare App., *infra*, 6a (1940 Act) with *id.* at 5a-6a (INA). And again in 1986, Congress took steps to address a perceived comparative disadvantage to unwed fathers, by loosening the requirements for establishing a legally cognizable paternal relationship. See *1986 Hearing* 118, 150.

Just as it cannot reasonably be argued that each of those Congresses lacked sensitivity to gender discrimination, it cannot be said that Congress's reasons for treating unwed mothers differently from unwed fathers have recently become obsolete. Those reasons arise in part from the treatment of unwed parents and their children under the laws of other nations. And it remains the case that children born out of wedlock generally are recognized to have the citizenship of their mother unless and until legitimated or formally ac-

knowledged by the father.[17] We have been informed by the Department of State that, in connection with this case, it has consulted with consular officers in six nations in which the United States has or has had a significant military presence and which account for a large proportion of citizenship claims by children born abroad out of wedlock. The Department reports that all six nations (Germany, Great Britain, the Philippines, South Korea, Thailand, and Vietnam) require that the father's name must appear on the child's birth certificate, or that the father must take some other formal act to acknowledge paternity, in order for the father's citizenship to pass to the child by descent.[18] The danger of statelessness in the event that the father does not acknowledge the child remains a concern under the laws of at least three of those six nations (Germany, South Korea, and Vietnam), and is a practical concern in a fourth (Thailand) due to non-compliance with the legal obligation of unwed Thai fathers to legitimate and support their children.

Americans living abroad also have recognized the continuing problem of statelessness. During hearings on the 1986 Act, several groups representing expatriate Americans submitted testimony expressing concern—not that Section 1409(a) was insufficiently generous to United States citizen *fathers*, as petitioners assert—but that some unwed citizen

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[17] Analogously, in this country, the States and courts continue to apply the traditional rule that an illegitimate child takes the mother's domicile, at least absent legitimation by the father or adjudicated paternity. See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48-49 (1989).

[18] See § 1 para. 4 Staatsangehoerigkeitsgesetz (German citizenship statute); British Nationality Act, 1981, §§ 47, 50(9); Philippine Const. Art. IV, §§ 1-4 (1987) (citizenship) and Philippine Family Code tit. VI (effective Aug. 3, 1998) (establishment of paternity and filiation); New Nationality Law, July 1998, art. 4531 (effective June 14, 1998) (South Korea); Thai Nationality Act of 1992 (as amended), §§ 7(1), 10; Nationality Law of Vietnam, May 20, 1998, art. 17 and 83/1998/ND-CP Decree of the Government on Civil Registration arts. 19, 47 (Oct. 10, 1998).

mothers might not have been physically present in the United States for one year as required by Section 1409(c), making their children stateless at birth unless the birth country granted *jus soli* citizenship. *1986 Hearing* 328.

This Court's decisions further confirm the continued permissibility of a requirement in the INA that the father of a child born out of wedlock must, while the child is still a minor, take some affirmative step—not required of an unwed mother—to establish a formally recognized legal relationship with his child in order to have conferred on that child the formally recognized legal status of being a United States citizen. In *Lehr* v. *Robertson*, *supra*, the putative natural father of a child born out of wedlock challenged the State's failure to give him prior notice of an adoption proceeding, which was not provided because the father failed to take the simple step of registering in a "putative father registry." The Court rejected the father's claim that equal protection guaranteed him prior notice of adoption proceedings, in order to safeguard his "inchoate relationship" with the child. *Id.* at 249-250. The Court quoted with approval Justice Stewart's observation in his dissenting opinion in *Caban*, 441 U.S. at 397, that "[p]arental rights do not spring full-blown from the biological connection between parent and child," but "require relationships more enduring." 463 U.S. at 260. The Court accordingly held that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion." *Id.* at 266. In a case in which "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." *Id.* at 266-267 (footnote omitted).[19]

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[19] Contrary to Justice Breyer's dissent in *Miller* (523 U.S. at 487-488), the issue is not simply whether the unwed father will in fact be a "Caretaker Parent" following legitimation, an adjudication of paternity, or

Lehr confirms that Congress is not constitutionally required to ignore real differences in the situations of unwed citizen mothers and fathers when it frames rules for the conferral of citizenship at birth. See also *Parham* v. *Hughes*, 441 U.S. 347, 354-357 (1979) (opinion of Stewart, J.) (state law making father's right to sue for the wrongful death of an illegitimate child contingent upon prior legitimation of the child, but granting mothers the right to sue, "is realistically based upon the differences in [the mother's and father's] situations"). Also as in *Lehr*, the scheme Congress enacted here is not "likely to omit many responsible fathers" (463 U.S. at 264), because Section 1409(a) provides the citizen father a full 18 years to take simple steps to substantiate his paternal relationship and, in so doing, to render his child eligible for United States citizenship. Cf. *Clark* v. *Jeter*, 486 U.S. 456, 462, 465 (1988) (finding a 6-year statute of limitations too short "to present a reasonable opportunity" to assert child-support claims on behalf of illegitimate children, but suggesting that 18 years would satisfy equal protection requirements under heightened scrutiny); 42 U.S.C. 666(a)(5) (Supp. IV 1998), discussed at p. 45, *infra*.

Congress has made a reasonable judgment that where a citizen father has not formalized his relationship with his child at any time during the child's minority, the child is not so likely to develop family ties to the United States that an automatic grant of citizenship is warranted on the basis of biological paternity alone. Cf. *Lehr*, 463 U.S. at 259-268. And, as we have said, the enduring relationship between the United States and its citizens is itself a formal and legally recognized one and carries with it reciprocal rights and

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formal acknowledgment of the child. Any parent, whether an unwed father, an unwed mother, or a married parent, *might* cease to care for his or her child after that child becomes a citizen under Section 1401 or 1409. Section 1409(a)(4) instead serves to ensure that, in the case of an unwed father, there is an approximation of the formal and legal relationship that exists between a married parent or an unwed mother and the child.

responsibilities, which provides an independent reason to insist, as a condition of conferring citizenship on the child, that the relationship between a citizen parent and a child born out of wedlock have comparable attributes during the child's minority. Particularly in the context of determining eligibility for citizenship, then, the "legislative policy distinction[]" (*Fiallo*, 430 U.S. at 798) petitioners challenge is entirely permissible. In short, "the different treatment of men and women [in Section 1409(a)(4)] reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female [unwed citizen parents] are *not* similarly situated with respect to" their child's claim to United States citizenship. *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975) (emphasis added) (upholding gender-based distinctions in eligibility for military promotions).

It must be stressed that Section 1409(a)(4) places a minimal burden on the father. As noted above, a father who has not already established a formal legal relationship with the child under the law of the child's residence or domicile may take the simple step, independent of the local laws, of making the sworn acknowledgment Congress provided for in 1986 (Section 1409(a)(4)(B)). That minimal burden is all the more justifiable in light of other avenues to citizenship that Congress has made available. Under current law, a foreign-born child may gain citizenship by virtue of a parent's naturalization as a United States citizen. See 8 U.S.C. 1431-1432.[20] And a foreign-born child who does not secure citizen-

[20] In addition, in new Section 320 of the INA, Congress recently provided citizenship to foreign-born minor children of citizen parents, if the child is a permanent resident of the United States and is "in the legal and physical custody of the citizen parent." Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000); see also *ibid.* (INA § 322) (eligibility for minor children who reside outside the United States in the custody of a United States citizen parent, but are temporarily present in the United States). Section 320 allows citizen mothers and citizen fathers (including

ship by virtue of ties established by his or her parents during the child's minority, but nevertheless develops substantial connections to the United States through marriage or permanent residence in the United States, may become a naturalized citizen on his or her own account by satisfying Congress's requirements. See 8 U.S.C. 1423-1424, 1430; 8 U.S.C. 1427 (1994 & Supp. IV 1998). Those offers of citizenship to foreign-born children who are likely to be "an asset" to the United States (H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940)) by virtue of their connections to the Nation, further confirm the reasonableness of Congress's comprehensive naturalization scheme.

The factual contrast between this case and *Miller* bears out the fallacy of petitioners' argument (Br. 22) that Section 1409(a)(4) is just another way of "ensuring a blood tie" between American father and foreign-born child. In this case, Boulais raised Nguyen in the United States from 1975 until Nguyen became an adult. *Id.* at 5. Having decided to establish a paternal relationship with his minor son, Boulais readily could have secured United States citizenship for Nguyen under Section 1409(a) at any time until Nguyen became an adult in 1987. Thereafter, Nguyen, as a permanent resident alien since 1975 (*ibid.*), was free to pursue citizenship on his own account under 8 U.S.C. 1427 (1994 & Supp. IV 1998). The record does not explain petitioners' failure to seek citizenship for Nguyen until it was too late, but Congress cannot be faulted if petitioners did not take advantage of the benefit it extended. Compare *Lehr*, 463 U.S. at 264 ("The possibility that [the putative father] may have failed [to place his name in the putative father registry] because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.").

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fathers who have legitimated their children) to obtain, on a gender-neutral basis, citizenship for children who settle with them in the United States.

In sharp contrast to Nguyen's situation, the petitioner in *Miller* was born and raised by her Filipino mother in the Philippines, while her American father lived in the United States and apparently never visited his daughter. There was no evidence of any formal or recognized legal relationship between Miller and her American father (or indeed any relationship at all) until the father filed a petition to establish paternity 22 years after his daughter's birth. Miller did not live in the United States prior to age 21. 523 U.S. at 424-425.[21] Congress could—and did—permissibly determine that children such as Nguyen should be eligible for citizenship if the father takes appropriate steps while the child is still a minor to establish a formal or legal relationship with the child, whereas children such as Miller, whose relationship with their American father throughout their childhood is only biological, are not likely to have developed significant ties to this country and should not have the same entitlement to citizenship. Petitioner would have the Court strike down the very provisions that draw that distinction, and rewrite Section 1409 so as to expand greatly Congress's grant of citizenship. Pet. Br. 20, 33.[22]

Petitioners also err in suggesting (Br. 20) that the lack of a maternal acknowledgment requirement in Section 1409(c) establishes that Congress has no genuine interest in enforcing Section 1409(a)(4). As already discussed, unwed

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[21] As in *Miller*, the child seeking United States citizenship in the pending case of *United States* v. *Ahumada-Aguilar*, No. 99-1872, had no relationship with his American father. See 189 F.3d at 1122-1123. The child seeking citizenship in *Lake* v. *Reno*, No. 00-963, had only "intermittent contact" with his citizen father. 226 F.3d at 143.

[22] As discussed in Part II, *infra*, retroactive application of the remedy petitioners seek would open the door to claims of United States citizenship by untold numbers of persons. If the remedy were extended in subsequent litigation to claims governed by the 1940 and 1952 Acts, rather than just the 1986 amendments to Section 1409(a), the number of new citizens admitted without congressional authorization would be even greater.

mothers, unlike unwed fathers, are almost universally recognized as having a legal relationship with the child by virtue of the birth alone and to have custody of the child at birth. See p. 17, *supra*. And Congress's efforts to combat statelessness support the more permissive rule of Section 1409(c). The foreign-born child of an unwed American mother is at much greater risk of losing his or her "status in organized society" (*Trop*, 356 U.S. at 101 (opinion of Warren, C.J.)) than the foreign-born child of an unwed American father. Congress's decision to address that compelling problem by making citizenship more readily available through Section 1409(c) does not nullify Congress's general concern —reflected in the provisions of Section 1401 as well as 1409 —that foreign-born children should be granted citizenship only if they have some ongoing tie to their American parent.

It might be argued that Congress could have tailored Section 1409(c) by excepting unwed citizen mothers from the requirements of Section 1409(a) if, and only if, applying such requirements would render their child stateless. Such an attack on Congress's policy decision would ignore this Court's judgment that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' * * * as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (internal quotation omitted). A narrowly targeted approach to avoiding statelessness also would create serious policy and administrative problems. As a policy matter, it would discourage non-citizen fathers in *jus sanguinis* nations from legitimating their children at birth, because the act of legitimation would trigger a grant of foreign citizenship to the child, thus precluding United States citizenship under this approach. See *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943) ("By many [American citizenship] is regarded as the highest hope of civilized men."). The United States would in effect be intervening in the parental decision whether a foreign-born child

should be legitimated, and weighting the scales *against* legitimation. See generally *Lehr*, 463 U.S. at 266 n.25 ("It has long been accepted that illegitimate children whose parents never marry are 'at risk' economically, medically, emotionally, and educationally.").

As an administrative matter, requiring government officials to attempt to determine whether a foreign-born child would be stateless but for the availability of American citizenship would create problems of proof and complicate approval or denial of applications for citizenship under the INA. The State Department estimates that there are approximately 3 million United States citizens living abroad, and Congress was particularly concerned with easing the administrative burden associated with processing requests by these citizens and by persons seeking to enter the United States when it adopted the 1986 amendments. See S. Rep. No. 916, 99th Cong., 2d Sess. 2 (1986).

It is similarly unclear how the government could efficiently administer a law of the sort suggested by the dissenters in *Miller*, who noted that Congress could confer citizenship "only on children who have at least minimal contact with citizen parents during their early and formative years." 523 U.S. at 470 (Ginsburg, J., dissenting) (internal quotation omitted). As already explained, moreover, the decisions of this Court have repeatedly confirmed that legislatures may attach significance to an unwed father's formal recognition of a child born out of wedlock, and may make such a formal recognition a prerequisite for claiming a status equal to that of the child's mother. *Lehr*, 463 U.S. at 261-268 (enrollment in putative father registry); *Parham*, 441 U.S. at 355-356 (opinion of Stewart, J.) (legitimation a prerequisite to father's suit for wrongful death of child born out of wedlock); see also *Quilloin*, 434 U.S. at 256 (same); *Lalli* v.

Lalli, 439 U.S. 259 (1978) (illegitimate child must obtain order of filiation to inherit from father).[23]

Finally, we note the potentially far-reaching implications of the constitutional rule sought by petitioners. If this Court were to find that Congress may not treat the parental relationship of unwed citizen fathers differently than the parental relationship of unwed citizen mothers in the context of immigration and naturalization, where the legislature has particularly broad discretion, there surely would be a flood

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[23] For the reasons stated here, the distinctions drawn in Section 1409 would be constitutional even if, contrary to our submission, they were subject to the scrutiny ordinarily given to statutes in the domestic context. This Court's decisions in *Lehr*, *supra*, and *Parham*, *supra*, establish that the different legal situations of unwed fathers and unwed mothers make it permissible to require those fathers, when they invoke Section 1409(a), to establish a formal and legally recognized paternal relationship with their child while the child is still a minor, notwithstanding that unwed mothers are not required to do so under Section 1409(a). See generally pp. 37-42, *supra*. Also as discussed above, Congress's decision to afford unwed mothers, through Section 1409(c), the benefit of a residency requirement that is in some cases more generous than the residency requirement that applies to fathers and married mothers under Sections 1401 and 1409(a), is "substantially related to the achievement of" the "important governmental objective[]" of avoiding statelessness. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). Neither petitioners, nor their amici, nor the dissenting Justices in *Miller*, have suggested how Congress's concern for lessening the incidence of statelessness could be addressed without extending more generous terms for citizenship to the children of unwed mothers, except perhaps by overriding the generally applicable parental residence requirements that this Court approved in *Bellei*, 401 U.S. at 834-835. Finally, even under heightened scrutiny, in the unique context of the naturalization of a child born abroad—which implicates foreign relations, birth on foreign soil, and (here) one parent who is a citizen of a foreign country—particular weight should be given to Congress's assessment of the legal and factual context abroad, and its judgment concerning the importance of the governmental objectives to be pursued and the particular considerations underlying the means it has chosen to achieve those objectives. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 64-68 (1981) (discussing deference due to legislative judgments regarding military affairs).

of litigation contending that the States must revise their laws—including adoption, inheritance, wrongful death, and residency laws—that similarly distinguish between these two categories of relationships.[24] See also 42 U.S.C. 666(a)(5) (Supp. IV 1998) (requiring States, as a condition of receiving federal child-support enforcement funds, to permit establishment of paternity at any time before the child reaches age 18 and to establish other procedures for acknowledging or proving paternity); *Blessing* v. *Freestone*, 520 U.S. 329, 333 (1997) (noting that to receive federal funds, a State must "establish a comprehensive system to establish paternity"). The fact that petitioners' arguments would apply to myriad state-law counterparts of Section 1409 is additional reason to proceed with caution in this case.

II. EVEN IF THE DISTINCTIONS DRAWN BY SECTION 1409 WERE UNCONSTITUTIONAL, NGUYEN WOULD NOT BE ELIGIBLE FOR CITIZENSHIP

Even if this Court were to determine that the distinctions between unwed fathers and unwed mothers drawn in Sec-

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[24] For example, the laws of a number of States provide that for purposes of intestate succession, a child born out of wedlock is the child of the natural mother in all cases, but is the child of the natural father only if some formal relationship between the father and the child (such as legitimation, a judicial determination of paternity, or an open acceptance of the child) was established during the father's lifetime. See, *e.g.*, Ala. Code §§ 26-11-2 (1992), 43-8-48 (1991); Ark. Code Ann. § 28-9-209 (Michie 1987); Conn. Gen. Stat. Ann. § 45a-438b (West 1993 & Supp. 2000); Del. Code Ann. tit. 12, § 508 (1995), tit. 13 §§ 1301, 1304 (1999); Idaho Code § 15-2-109 (1979); La. Rev. Stat. Ann. 9:392 (West 2000); Me. Rev. Stat. Ann. tit. 18-A, § 2-109 (West 1998); Miss. Code Ann. § 91-1-15 (1999); Mo. Ann. Stat. § 474.060 (West 1992); Neb. Rev. Stat. § 30-2309 (1995); S.C. Code Ann. § 62-2-109 (Law. Co-op. 1987 & Supp. 1999); Tenn. Code Ann. § 31-2-105 (1984 & Supp. 1999); Va. Code Ann. § 64.1-5.1 (Michie 1999). Some of the state statutes bar only a father's inheritance from the unrecognized child. In other States, the bar applies as well to inheritance by the child, from the father.

tion 1409 are unconstitutional, petitioners still cannot prevail. As Justice Scalia explained in *Miller*, the relief petitioners seek—a judicial declaration that Nguyen is a citizen of the United States—would not be an appropriate exercise of this Court's remedial powers. See 523 U.S. at 452-459 (Scalia, J., concurring in the judgment); see also *id.* at 451 (O'Connor, J., concurring in the judgment) (noting "the potential problems with fashioning a remedy for [Miller's] injury"); *id.* at 445 n.26 (opinion of Stevens, J.) (not reaching the remedy issue). For that additional and independent reason, the judgment below should be affirmed.

Petitioners argue (Br. 33) that Section 1409(a)(3) and (4) should be severed from the remainder of Section 1409, so that Section 1409(a) would impose essentially no restrictions on eligibility for citizenship beyond those required for the child of a married citizen parent to become a citizen. Petitioners rely primarily upon the INA's general severability clause. See Br. 32-33. Even in a case that does not implicate Congress's naturalization power, such a provision "is an aid merely; not an inexorable command." *Reno* v. *ACLU*, 521 U.S. 844, 885 n.49 (1997) (internal quotation marks omitted). The question is, "What was the intent of the lawmakers?," *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936), and the answer "will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). The remedy proposed by petitioners here would "confer[] upon the statute a positive operation beyond the legislative intent, and beyond what any one can say [Congress] would have enacted" if it had known that Section 1409 contained a constitutional defect. *Spraigue* v. *Thompson*, 118 U.S. 90, 95 (1886).

Congress has never expressed an intent to convey statutory citizenship to foreign-born children of unwed citizen fathers on the same terms as to children born to married parents outside the United States. To the contrary, since

1940, when Congress first addressed the issue, it has *always* imposed the additional requirement of a formal paternal relationship during minority upon the former group of children. The lawfulness of Congress's distinction between fathering a legitimate child and fathering a child out of wedlock is undisputed in this case. Cf. *Quilloin*, 434 U.S. at 256 ("Under any standard of review," a State may take into consideration that an unwed father has "never exercised actual or legal custody over his child."). Allowing children of unwed citizen fathers to obtain statutory citizenship on substantively the same terms as legitimate children, as petitioners propose, would obliterate Congress's clearly articulated distinction between the two classes.

Petitioners' proposed remedy, moreover, would not cure the equal protection problem they purport to identify. If Section 1409(a)(3) and (4) were excised, unwed citizen fathers still would have to show that they were physically present in the United States for five years before the child's birth, in accordance with Section 1401(g) (as incorporated by Section 1409(a)). Unwed citizen mothers, however, could secure citizenship for their children under Section 1409(c) by showing that they were in the United States for one year. To remedy the allegedly unconstitutional preference for unwed citizen mothers, the Court would need to: (1) strike Section 1409 entirely (thus removing the provision that allows children born abroad out of wedlock to claim citizenship at birth and leaving resolution of the issue to Congress, as was the case in 1940); (2) make the children of both unwed citizen mothers and unwed citizen fathers subject to the full requirements of Section 1409(a) (which, like the first option, would not benefit petitioners); or (3) hold the children of both unwed citizen mothers and unwed citizen fathers to the lesser requirements of Section 1409(c). See *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (court sustaining an equal protection challenge should remove the challenged disparity

or extend it to disfavored class). In the context of a statute conferring citizenship, the third remedy (like the remedy proposed by petitioners) would be inappropriate, meaning that petitioners would not be entitled to relief under any circumstances.

First, as we have discussed, the area of statutory citizenship is one in which congressional power is at its peak, and judicial authority severely circumscribed. Because "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with" (*Ginsberg*, 243 U.S. at 475), courts should be particularly reluctant to supply remedial solutions that go beyond what Congress has expressly authorized. Consistent with that principle, *INS* v. *Pangilinan*, 486 U.S. 875 (1988), established that a federal court has no equitable power to confer citizenship on a litigant as a remedy for a governmental violation of a statute under which he or she might otherwise have qualified for naturalization. *Id.* at 882-885. The Court explained that when Congress has set specific statutory limits on a naturalization provision, "[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." *Id.* at 885.

Second, striking "burdens" imposed by Section 1409(a) would confer citizenship (presumably retroactively) on thousands of foreign-born children who have no connection to this country other than a blood relationship to a citizen father they have never known or even seen. See *Heckler*, 465 U.S. at 739 n.5 (court should "consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation"). Applying Section 1409(c) to unwed citizen fathers would enable children who have no actual or legally recognized relationship with any United States citizen to obtain citizenship. Nonsensically, those children could obtain citizenship more easily than

children who are born in wedlock to citizen fathers and their non-citizen spouses, to whom the requirements of Section 1401(g) apply. Indeed, a child born out of wedlock to a citizen father and non-citizen mother could obtain citizenship under circumstances that would not permit the foreign-born child of two American citizens to be a citizen at birth. Compare 8 U.S.C. 1401(c) (imposing residency requirement on one citizen parent) with 8 U.S.C. 1409(c) (requiring only physical presence in the United States). Such consequences plainly would do violence to congressional intent.[25]

Finally, a remedial expansion of eligibility for citizenship would be extraordinary because of questions concerning its irreversibility. Congress could at least override, through constitutionally valid legislation, a judicial remedy that equalized unwed citizen fathers and unwed citizen mothers by prospectively eliminating the preferential terms of Section 1409(c) or by eliminating Section 1409 altogether. But a different question would arise concerning the citizenship of persons who might lay claim to it as a result of this Court's decisions. Once properly conferred, citizenship may not normally be rescinded by legislative action. See *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). The potential inability of Congress to effectuate its intent in the face of inconsistent remedial action by this Court, and particularly remedial action that had retroactive application to persons born under the Act of 1952 or even 1940, is an additional reason to prefer narrowing Section 1409 to expanding it.

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[25] Although it is the more permissible remedy, nullifying the challenged benefits of Section 1409(c) also would be an unsatisfactory result. It would subject the children of unwed citizen mothers to a substantially enhanced parental residency requirement, with a concomitant increase in the risk of statelessness, and would give rise to perplexing administrative questions of what action a citizen mother should have taken by the time her child turns 18 in order to satisfy the legitimation or acknowledgment requirement of Section 1409(a)(4).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

3. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

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4. Section 301 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 235, as amended and presently in force, 8 U.S.C. 1401, provides:

Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

> (a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical 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 five years, at least two of which were after attaining the age of fourteen years; *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

5. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238, as amended and presently in force, 8 U.S.C. 1409, provides in pertinent part:

> **Children born out of wedlock**
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—
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> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
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> (2) the father had the nationality of the United States at the time of the person's birth,
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> (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
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> (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,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
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> (C) the paternity of the person is established by adjudication of a competent court.

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(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, 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.

6. Section 309 of the INA, ch. 477, 66 Stat. 238, 8 U.S.C. 1409 (1952), provided in pertinent part:

Children born out of wedlock

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408 of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, 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.

7. Section 205 of the Nationality Act of 1940, ch. 876, 54 Stat. 1139-1140, provides:

The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.