No. 09-5801

IN THE
Supreme Court of the United States

RUBEN FLORES-VILLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The National Immigrant Justice Center (NIJC) and the American Immigration Lawyers Association (AILA) are two immigration-focused organizations with substantial interest in this Court's resolution of this case.

NIJC is a non-profit organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2009, NIJC provided such legal services to more than 10,000 non-citizens. NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through advocacy for policy reform, impact litigation, and public education.

AILA is a national association with over 12,000 members throughout the United States, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws;

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[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

While this case comes to this Court in a criminal posture, it implicates fundamental questions about the ability of the federal courts to do justice in cases where United States citizenship laws are alleged to have been drawn in an unconstitutionally discriminatory manner. As two preeminent organizations in the immigration litigation field, NIJC and AILA share a unique perspective on these fundamental questions. Simply put, in the tradition dating back at least to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), constitutional rights must have remedies in the immigration context just as in any other context. Accordingly, if the Court finds that the derivative citizenship provisions of the Immigration and Naturalization Act (INA) at issue here violate the Equal Protection guarantee, it surely has the power to remedy the unconstitutionally discriminatory citizenship scheme for children born outside of the United States to unwed United States citizen parents.

SUMMARY OF THE ARGUMENT

Between 1952 and 1986, 8 U.S.C. § 1401(g) established a default rule for children born outside the United States to parents, one of whom was a United States citizen. For the child to be considered a United States citizen "at birth," the United States citizen parent had to have been physically present in the United States for at least 10 years, 5 of which had to be after attaining the age of 14. For children born out of wedlock, § 1409(c) modified that default rule based on the gender of the parent. An unwed

mother (but not an unwed father) could pass citizenship if she had continually resided in the United States for one year at any time before the birth of the child. Petitioner Ruben Flores-Villar, who was born outside the United States out of wedlock to a United States citizen father and an alien mother, challenges that distinction as unconstitutional.

NIJC and AILA submit this brief *amici curiae* to assuage any concerns the Court might have about its ability to do justice when a portion of a nationality statute is unconstitutional. In particular, while in prior cases questions have been raised about the competence of the federal courts to fashion a remedy for a person like Flores-Villar, and his standing to seek such a remedy, neither of these considerations should pose an obstacle here should the Court find a constitutional violation.

1. It is by now well-accepted that where a statute is unconstitutional because of underinclusion a court may either declare it a nullity or may extend its coverage to those aggrieved by exclusion. Unless Congress has manifested a contrary preference, the ordinary preference is for extension, even if it requires construing gender-based terms in a gender-neutral manner.

Here, all indications are that Congress would prefer the extension of the benefit in § 1409(c) to its nullification. The determination turns on the intensity of Congress's commitment to the residual policy embodied in the provision and the degree of potential disruption of the statutory scheme that would occur with extension as opposed to abrogation. Here, the presence of a broad severability clause suggests a broad discretion in the courts to perform

the remedial operation of extension. Extension is also more consistent with the Government's asserted justification for the gender-based classification in § 1409(c), preventing statelessness. And extending the benefit also minimizes the chances of upsetting the vested interests and settled expectations of individuals who are already citizens under § 1409(c), whose citizenship would be called into question if the Court were to choose nullification over extension, as well as any relatives who relied on that citizenship to themselves pursue various forms of immigration-related relief.

Nor are there any meaningful contrary indications. Because these statutes deal with "at birth" citizenship rather than naturalization, 8 U.S.C. § 1421(d)'s prescription against naturalization other than as provided for by the INA has no application here. Any statutory references to naturalization only concern the granting of citizenship after birth. While the Fourteenth Amendment makes all children born in the United States citizens at birth, it does not change Congress's power to create other kinds of "at-birth" citizens. And Congress has consistently understood the question of the citizenship of a child of a United States citizen born outside the United States to be an issue of at birth citizenship rather than naturalization. That is why extending the § 1409(c) benefit as remedy for its drawing unconstitutional sex-based lines does not run afoul of this Court's jurisprudence holding that courts lack the power to confer citizenship. This is not a case of conferring citizenship after birth as a remedy for a statutory violation. It is a case of remedying an unconstitutional withholding of at birth citizenship. To conclude that Congress preferred extension of the benefit to nullification is to obviate, in the case of a

constitutionally flawed grant of at birth citizenship, any objection to judicial competence to right the wrong.

2. Flores-Villar also has standing to pursue the remedy he seeks. It is beyond cavil that, having been convicted of a crime of which alienage is an element based solely on the sex-based distinction § 1409(c) draws, he has suffered an injury in fact. That injury is fairly traceable to the challenged action and, as set out above, is redressable by a favorable decision.

Flores-Villar also has third-party standing as a prudential matter to assert his father's Equal Protection rights. Again, Flores-Villar has suffered an injury in fact. He certainly shares a close relationship with his father, his biological parent with whom he lived from the age of 2 months into adulthood. And his father is hindered in vindicating his own rights, not just by the fact that this case arises as a criminal proceeding against Flores-Villar, but indeed, in that the entire set of procedures Congress has established for the review of contested citizenship questions demonstrates a clear preference against the resolution of such questions by means of a collateral attack. And besides, privacy concerns clearly chill a father from independently litigating these issues given the attention it would draw to his child.

In sum, Flores-Villar is easily the least awkward challenger to the sex-based classification drawn by § 1409(c). And, should the Court find a constitutional violation, it should remedy that violation by extending citizenship to Flores-Villar.

ARGUMENT

Citizenship, as this Court has recognized, is "a most precious right." *Kennedy v. Mendoza-Martinez*,

372 U.S. 144, 159 (1963); *see also Fedorenko v. United States*, 449 U.S. 490, 507 (1981) (citizenship is a "priceless treasure") (quotation marks omitted). While Congress certainly has the power to determine in the first instance who shall be deemed a citizen "at birth" (besides those persons born in the United States, who are automatically citizens by virtue of section 1 of the Fourteenth Amendment), it cannot bestow the right of citizenship in ways that violate other specific constitutional guarantees. Where Congress does that, in the immigration context as elsewhere, courts must have the power to set matters right. To admit otherwise would be to disavow the central tenet, which traces back to before the founding, "that every right when with-held must have a remedy, and every injury it's [sic] proper redress." 1 William Blackstone, Commentaries on the Laws of England 23.

In § 1409 citizenship cases before this Court, two kinds of threshold questions have interested various of its members. The first is a remedy question: whether, even if a petitioner can prove a constitutional violation, the Court is without power to redress the injury because only Congress can confer citizenship. The second is a standing question: whether a child petitioner lacks standing to vindicate citizenship wrongly denied him where statutory grants of citizenship at birth are dependent upon the status of the parent rather than the child.

Neither of these purported obstacles, however, prevents the Court in this case from reaching the constitutionality of the gender-based classification in 8 U.S.C. § 1409(c), or from affording Flores-Villar a remedy if it finds that the statute violates the Constitution's Equal Protection guarantee. When the

relevant statutory scheme and precedents are properly understood, Flores-Villar has standing to challenge the statute's gender-based classification. And this Court can remedy the Equal Protection violation in the same manner that it has traditionally addressed such inequities: by extending the benefit distributed discriminatorily—in this case, citizenship—to the disfavored class.

I. THE COURT CAN REMEDY THE CONSTITUTIONAL VIOLATION.

If the Court determines that the gender-based classification in § 1409 violates the Equal Protection component of the Fifth Amendment's Due Process Clause, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), the Court has the power to construe that provision to apply in a gender-neutral way. Whatever the appropriate deference owed to Congress in naturalization matters, it does not limit the Court's ability to extend the benefit of "at birth" citizenship equally to foreign-born children of both unwed citizen fathers and unwed citizen mothers—and thus, to hold that Flores-Villar is a citizen.

A. Extension Of Benefits Is The Normal Remedy For An Equal Protection Violation.

"Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring in result); *see also Heckler v. Mathews*, 465 U.S. 728, 738 & 739

n.5 (1984); *Califano v. Westcott*, 443 U.S. 76, 89 (1979).[2] So, if the Court concludes that the gender-based classification in § 1409 violates the Equal Protection guarantee, it can either (1) nullify § 1409(c) and withdraw the benefit from children born abroad to unwed citizen mothers, or (2) extend § 1409(c) to apply to both men and women, thereby extending the benefit to children born abroad to unwed citizen fathers.

Ordinarily, unless the Court believes that Congress would prefer otherwise, "extension, rather than nullification, is the proper course" for Equal Protection violations. *Westcott*, 443 U.S. at 89; *see*, *e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (extending benefit of admission to military academy to women to remedy Equal Protection violation); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (extending admission to nursing school to men); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)

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[2] Welsh, like Flores-Villar, was not the plaintiff in declaratory judgment action, but the target of a criminal prosecution. He was convicted of violating a draft statute that drew an impermissible distinction between religious and nonreligious beliefs in its conscientious objector exemption. 398 U.S. at 362. As Justice Harlan noted, at the very least, the Constitution mandated that his conviction be reversed. *Id.* ("Since [the exemption] created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless."). But Justice Harlan further explained that, even if Welsh had brought an action for a declaratory judgment, he would have found it appropriate to extend the statutory benefit to the disfavored class, even though it was "more analogous to a graft than amputation." *Id.* at 363-64.

(extending Social Security benefits to remedy Equal Protection violation); *Jiminez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (same); *Frontiero v. Richardson*, 411 U.S. 677, 691 & n.25 (1973) (plurality op.) (same); *Wauchope v. Dep't of State*, 985 F.2d 1407, 1416-17 (9th Cir. 1993) (holding pre-1934 version of INA violates Equal Protection and extending citizenship to foreign-born children of citizen mothers as well as citizen fathers); *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266 (2d Cir. 1985) (extending benefits afforded to in-state veterans to non-resident veterans); *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1980) (extending right to inherit from intestate father to both legitimate and illegitimate children); *Crist v. Pinkerton*, 632 F.2d 1226 (5th Cir. 1980) (extending benefit of non-dischargeability of alimony debts in bankruptcy to husbands as well as wives).

This presumption in favor of extending the benefit to the disfavored class applies even if it requires construing gender-based terms in a gender-neutral manner. Thus, in *Califano v. Westcott*, the Court held that the provision of the Aid to Families with Dependent Children statute authorizing assistance to children of unemployed fathers, but not unemployed mothers, violated the Equal Protection guarantee. 443 U.S. at 85-89. To remedy the constitutional violation, the Court ordered that the term "'father' be replaced by its gender-neutral equivalent" in the statute such that "benefits simply will be paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father." *Id.* at 92; *see also Welsh*, 398 U.S. at 363-64 (Harlan, J., concurring) (proper remedy was to extend draft exemption to cover non-religious conscientious objectors specifically excluded by statutory language

even though it was "tantamount to extending the statute" and "more analogous to a graft than amputation"). This type of statutory construction is done not as a matter of constitutional avoidance, but as a constitutional remedy. *See Welsh*, 398 U.S. at 345, 355, 366-67 (Harlan, J., concurring).

B. Congress Would Prefer The Extension, Rather Than Nullification, Of The More Lenient Residency Requirements Of § 1409(c).

In determining which remedial option to choose (extension or nullification), the Court must look to the "intent of the legislature," and should therefore "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Mathews*, 465 U.S. at 739 n.5 (quoting *Welsh*, 398 U.S. at 365 (Harlan, J., concurring)). Here, extension of the more lenient residency requirements for unmarried citizen mothers and their foreign-born children in § 1409(c) to unmarried citizen parents of both genders comports more closely with the legislative purposes underlying the citizenship provisions of the INA than would withdrawal of the benefit from unwed mothers.

1. All Objective Indications Suggest That Congress Would Prefer Extension To Nullification.

a. The presence of a severability clause can be an important indicator of congressional intent. As Justice Harlan explained in *Welsh* the presence of a "broad severability clause" in the statute was indicative of a legislative intent that the long-standing policy underlying the statute be salvaged, and it conferred on the Court "broad discretion" to

perform the "remedial operation" of extension to effect "the necessary statutory repairs." 398 U.S. at 364-66. And in *Califano v. Westcott*, the Court held that the "presence in the Social Security Act of a strong severability clause . . . likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." 443 U.S. at 90.[3]

By contrast, in *Heckler v. Mathews*, the Court found a very specific severability clause indicative of Congress's "preference for nullification, rather than extension," of the benefit in the case of constitutional infirmity. 465 U.S. at 739 n.5. Congress had inserted the severability clause considered in Mathews into the particular subsection of the Social Security Act temporarily exempting spousal benefits paid to wives, but not husbands, from a pension offset, which was aimed at protecting the reliance interests of women who had planned their retirements under the pre-1977 law this Court held invalid in *Califano v. Goldfarb*, 430 U.S. 199 (1977). *See Mathews*, 465 U.S.

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[3] The severability clause in the statute at issue in *Welsh* provided: "If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby." 65 Stat. 88; *see Welsh*, 398 U.S. at 364 (Harlan, J., concurring).

Similarly, the severability clause at issue in *Westcott* provided: "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. § 1303; *see Westcott*, 443 U.S. at 90 n.8.

at 731-34. Manifesting a clear intent to "avoid th[e] fiscal drain" that would accompany extension of the benefit, id. at 732, the severability clause provided that if any provision of the subsection containing the temporary gender-based exception was held invalid, "the application of *this subsection* to any other persons or circumstances *shall also be considered invalid*." *Id.* at 734 (quoting 1977 Amendments, § 334(g)(3), note following 42 U.S.C. § 402 (1976 ed., Supp. V)) (emphases added). Thus the Court had no trouble concluding that Congress had "clearly expressed its preference for nullification, rather than extension, of the pension offset exception in the event it is found invalid." *Id.* at 739 n.5. But the Court did not actually have to make the choice between extension and nullification in *Mathews* because it found no Equal Protection violation. *Id.* at 749-50.

The INA contains a severability clause nearly identical to those considered in *Westcott* and *Welsh*:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances, shall not be affected thereby.

INA § 406, 66 Stat. 281; *see* note following 8 U.S.C. § 1101 "Separability"; *compare* 42 U.S.C. § 1303 (discussed in *Westcott*, 443 U.S. at 90 & n.8) *and* 65 Stat. 88 (discussed in *Welsh*, 398 U.S. at 364 (Harlan,

J., concurring)).[4] The broad severability clause in the INA, which the Court has described as "unambiguous," *INS v. Chadha*, 462 U.S. 919, 932 (1983), stands in stark contrast to the one considered in *Mathews*, which made abundantly clear Congress's intent that the benefit be withdrawn in the case of constitutional infirmity. As in *Westcott* and *Welsh*, the presence of a broad severability clause evidences a congressional intent that the policy underlying the INA be given effect even if "particular provisions" are constitutionally invalid.

b. Extension of the benefit is also more consistent with the Government's asserted justification for the gender-based classification—preventing statelessness. *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008); *see also* Revision of Immigration and Nationality Laws, S. Rep. No. 82-1137, at 39 (1952) ("This provision [§ 1409(c)] establishing the child's nationality as that of the mother regardless of legitimation or establishment of paternity . . . insures that the child shall have a nationality at birth."). Indeed, extending § 1409(c) to unwed parents of both genders would go further toward preventing statelessness than even the current discriminatory statutory scheme. Some countries that follow the *jus sanguinis* rule assign the father's nationality to a child born out of wedlock rather than the mother's; extension would protect children born in those countries. Cert. Reply at 9-10 & n.4. If, on the other hand, the Court were to nullify the benefit extended

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[4] The INA's severability clause is described in the legislative history as "the usual separability clause." Immigration and Naturalization Systems of the United States, S. Rep No. 81-1515, at 810 (1950).

to children of unwed citizen mothers in § 1409(c)—by, for example, subjecting unwed mothers to the same lengthy residency requirements as unwed fathers or eliminating *jus sanguinis* United States citizenship for illegitimate children entirely—the Court would exacerbate the risk that children would be born stateless. Nullification of § 1409(c) would increase the risk that children born abroad to unwed United States-citizen mothers could acquire citizenship only in the country of birth (if it follows jus solis) or in the country of the father's nationality (if it recognizes such *jus sanguinis* transmission to illegitimate children). Such a regime would leave many more children stateless, and even those who acquire some citizenship at birth may become citizens of a country with which neither parent—let alone the child—has any meaningful contacts.

c. Finally, extending the § 1409(c) benefit also minimizes the chances of upsetting the vested interests and settled expectations of parties not represented in this litigation, which nullifying the more lenient provision for unwed citizen mothers could clearly bring about. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting). Nullification of § 1409(c) would create an entire class of persons who were considered citizens their entire lives, but were suddenly stripped of citizenship because their mothers did not meet the more stringent residency requirements of § 1401 before they were born.

This would, in turn, have ripple effects affecting an even larger class of individuals related to those persons by marriage or birth. United States citizens may file visa petitions for spouses, siblings, and children, allowing them to immigrate to this country.

8 U.S.C. § 1151(b)(2)(A)(i). Living in marital union with a United States citizen shortens the residency requirement for naturalization from 5 to 3 years. 8 U.S.C. § 1430(a). And hardship to United States citizens is considered for various forms of relief. *See* 8 U.S.C. §§ 1229b(b)(2); 1182(a)(9)(B)(v); 1182(h)(2). If the Court struck § 1409(c) in its entirety, it would not only strip citizenship from persons directly covered by § 1409(c), but would upend the cases of their family members, making them retroactively ineligible for permanent residency or naturalization. That could render these individuals subject to denaturalization, 8 U.S.C. § 1451(d), (e), or rescission of permanent resident status, 8 U.S.C. § 1256, which could cause a new set of ripples.

The Court should not presume that Congress intended such a drastic and inequitable result when the more typical and less disruptive remedy of extension is available.[5]

2. Neither This Court's Cases Dealing With Naturalization, Nor This Court's Deference To Congress In Immigration Matters, Requires A Different Result.

In contrast, nothing in the statute suggests that Congress would prefer eliminating the preferential

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[5] "Congress, of course, remains free to redesign the statute in a manner that comports with the Constitution," if the Court turns out to be wrong in assuming its preference for extending the benefit of § 1409(c). *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). And, in doing so, Congress can account for the settled expectations of persons who relied on the discriminatory benefits conferred by § 1409(c), whose interests are not represented in the instant litigation. *Cf. Mathews*, 465 U.S. at 750-51.

benefit afforded to children of unwed citizen mothers to extending it to children of unwed citizen fathers.

a. Because this case does not involve "naturalization," no contrary congressional intent is demonstrated by 8 U.S.C. § 1421(d), which states that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." Section 1421(d) applies only to "naturalization," which the INA defines as "the conferring of nationality of a state upon a person *after birth*, by any means whatsoever." 8 U.S.C. § 1101(a)(23) (defining "naturalization" "[a]s used in this chapter," of which chapter § 1421 is a part) (emphasis added). Sections 1401 and 1409, on the other hand, deal with the acquisition of citizenship *at birth*. "Congress does not believe that this kind of citizenship involves 'naturalization.'" *Miller v. Albright*, 523 U.S. 420, 480 (1998) (Breyer, J., dissenting); *see also id.* at 432 (opinion of Stevens, J.) ("[J]udgment in [petitioner's] favor would confirm her pre-existing citizenship rather than grant her rights she does not now possess."); *Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting).[6]

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[6] Whether it might be "naturalization" for constitutional purposes is irrelevant. *Compare United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898); *with Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964) (Unlike "naturalization," "acquisition of citizenship by being born abroad of an American parent" is "not covered by the Fourteenth Amendment" but is instead "left to proper Congressional action"). What matters here is whether Congress understood this to be "naturalization" as defined in the INA. The plain text precludes any reading of § 1421(d) which would constrain the Court in this case.

Moreover, the majority's dictum in *Nguyen*, 533 U.S. at 72, notwithstanding, this interpretation of § 1421(d) is correct as a matter of law. While Congress draws both its power to naturalize aliens and its power to treat children born abroad as citizens at birth from the Naturalization Clause, U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have the Power . . . To establish an uniform Rule of Naturalization"), beginning with the First Congress, it has always treated the naturalization of aliens, on one hand, and citizenship acquired at birth, on the other, as distinct concepts as a statutory matter. The first naturalization statute, passed in 1790, set forth requirements—including residency and character requirements—for the naturalization of aliens. But it explicitly 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*." Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (emphasis added); *see also Minor v. Happersett*, 88 U.S. 162, 167-68 (1874) (noting that the framers of the Constitution and the First Congress were familiar with the common-law meaning of "natural born citizen" as "distinguished from aliens or foreigners"). [7] Congress has maintained that conceptual distinction throughout

[7] By contrast, that Act provided that "the children of [a naturalized] person . . . dwelling within the United States and being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 103. Because citizenship in such cases was granted after birth, not at birth, children who automatically became citizens upon the naturalization of their parents were not treated as "natural born citizens" but as naturalized citizens.

the subsequent amendments to the immigration and naturalization laws. *See* Act of Jan. 29, 1795, § 3, 1 Stat. 414, 415; Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155; Act of Feb. 10, 1855, § 1, 10 Stat. 604; Rev. Stat. § 1993, § 1, 48 Stat. 797; Nationality Act of 1940, § 201(g), 54 Stat. 1137, 1139; Immigration and Nationality Act of 1952 §§ 301(a)(7), (b), 66 Stat. 235, 236 (codified as amended, 8 U.S.C. § 1401). *See generally Miller*, 523 U.S. at 477 (Breyer, J., dissenting).

Indeed, even though the words "natural born" were dropped from the 1934 version of the statute, Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797, Senator John McCain—who was born in 1936 to American parents in the Panama Canal Zone—was eligible to run for president in 2008 as a "natural born citizen." *Robinson v. Bowen*, No. C 08-03836 WHA, 2008 U.S. Dist. Lexis 82306 (N.D. Cal. Sept. 16, 2008); *see also Hollander v. McCain*, 566 F. Supp. 2d 63, 65-66 (D.N.H. 2008). Likewise, Franklin D. Roosevelt served four terms as President of the United States despite the fact that he was born in Canada to United States citizen parents. Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L. J. 881, 882 n.6 (1988). Under Article II, section 1 of the Constitution, neither would have been eligible for the Presidency if he had become a citizen through "naturalization."

Thus, § 1421(d) does not evidence a congressional intent to nullify, rather than extend, the benefits conferred by § 1409(c) as a remedy for an Equal Protection violation. Nor does it limit the INA's broad severability provision. And, perhaps most

importantly, it does not ameliorate the substantial disruption faced by those living as United States citizens whose rights would be affected by the nullification of the more lenient residency requirements for unwed mothers.

b. Relatedly, while some members of the Court have voiced concerns about the Court's ability to "confer citizenship in violation of statutory limitations," *Miller*, 523 U.S. at 456 (Scalia, J., concurring) (quoting *INS v. Pangilinan*, 486 U.S. 875, 885 (1988) (brackets omitted), those concerns do not prevent the Court from affording a constitutional remedy to Flores-Villar here.[8] In *INS v. Pangilinan*, the Court held that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-84. Thus the Court held that it lacked the equitable power to cure a *statutory* violation—the government's failure to provide a naturalization officer in the Philippines despite the requirements of the naturalization statute—by conferring citizenship in the face of explicit congressional intent not to extend citizenship to aliens who did not satisfy the statutory criteria. *Id.* at 884-85. *Pangilinan* did not, however, say that the Court lacked the power to review and remedy a

[8] Justice Scalia's position was rejected by a majority of the Justices in *Miller*. *See* 523 U.S. at 423 (opinion of Stevens, J., joined by Rehnquist, C.J.); *id.* at 460 (Ginsburg, J., dissenting, joined by Souter and Breyer, JJ.); *id.* at 471 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.); *see also Nguyen*, 533 U.S. at 73-74 (Scalia, J., concurring) (recognizing this fact and joining the majority on the merits).

constitutional violation in an "at birth" citizenship statute.[9]

That makes this case distinguishable for two reasons. *First*, the deference this Court has frequently shown Congress in immigration matters stems from the "sovereign" nature of the political branches' "power to expel or exclude aliens." *Fiallo v. Bell*, 430 U.S. 787, 792, 795 n.6 (1977). Thus, the Court has noted, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* at 792 (quotation marks omitted). In *Fiallo*, the Court rejected a challenge to a statutory scheme that afforded a "special preference immigration status" to certain aliens based on their relationships with United States citizens or lawful permanent residents. (The statute recognized the relationship between a natural mother and her illegitimate child, but not the relationship between a natural father and his illegitimate child.) In deferring to Congress's choice not to accord preferential status to a particular class of aliens, the Court acknowledged that such a rule "would be unacceptable if applied to citizens." *Id.* (quotation marks omitted).

But this case, by contrast, is not about the admission or exclusion of aliens. It concerns the logically antecedent question of who is an alien and who is a citizen. *See Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). The issue here is whether

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[9] Indeed, after holding that it was powerless to afford a remedy for the statutory violation, the Court in *Pangilinan* went on to consider the plaintiffs' constitutional claims on the merits. *Id.* at 875-76; *see also Wauchope*, 985 F.2d at 1418.

Flores-Villar was a citizen "at birth." *See Miller*, 523 U.S. at 432 (opinion of Stevens, J.) ("[U]nlike the petitioners in *Fiallo* . . . , [i]f [the petitioner here] were to prevail, the judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess."). Thus the deference the Court shows Congress in its sovereign capacity to regulate the admission or exclusion of aliens does not impede the Court from remedying a constitutional violation in the statute defining who is a citizen "at birth."

Second, although Congress has broad power in matters of "immigration and naturalization," *Fiallo*, 430 U.S. at 792—a power this Court has sometimes described as "plenary," *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972)—that power is still limited by the Constitution. As the Court explained in INS v. Chadha: "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), *so long as the exercise of that authority does not offend some other constitutional restriction*." 462 U.S. at 941 (emphasis added). The deference owed to Congress in matters of immigration and naturalization does not permit Congress to enact—or this Court to enforce—unconstitutional legislation.[10] Thus there is

[10] If the Constitution truly imposes no limits on this authority, Congress could enact even a race-based limitation to the acquisition of citizenship at birth, *cf. e.g.*, *Wong Kim Ark*, 169 U.S. at 701-02 (noting no naturalization authority for Chinese natives of the "Mongolian race"), notwithstanding the constitutional call for a rule of naturalization which is "uniform." U.S. Const. art. I, § 8, cl. 4. *See generally, Bindczyck v. Finucane*, 342 U.S. 76 (1951); *Nemetz v. INS*, 647 F.2d 432, 435 (4th Cir. 1981).

no question that the Court may exercise judicial review of the constitutionality of immigration and naturalization legislation. *See id.* at 940-43.

Here, Flores-Villar does not ask the Court to exercise its equitable power to confer citizenship on him where the statute does not. He seeks a constitutional remedy—that the Court cure the statute of its constitutional defect so that it may operate to determine whether citizenship was transmitted to him at birth. *See Nguyen*, 533 U.S. at 95-96 (O'Connor, J., dissenting). In such a case, to conclude (under normal principles applicable for remedying unconstitutional statutes) that Congress would have preferred the extension of § 1409(c) to its nullification dispatches any concern that such an extension would usurp the prerogatives of the Legislature.

c. Finally, it is no answer to say that the objective indicators are just not clear enough, such that Flores-Villar must lose. The Court, faced with a constitutional violation squarely presented in a case properly before it, has an obligation to afford a remedy. *See Marbury*, 5 U.S. (1 Cranch) at 177-80. If the Court cannot conclude that Congress, in the exercise of its "plenary" power, would have preferred to extend or nullify the benefit in § 1409(c) with sufficient certainty to sever or cure the unconstitutional portions of the statute and leave the remainder intact, *cf. Miller*, 523 U.S. at 457 (Scalia, J., concurring), the Court still cannot permit Flores-Villar to be criminally prosecuted based on unconstitutionally discriminatory classifications.

Like any other statute, if the INA conflicts with the Constitution, it is no law at all. *See* U.S. Const. Art. VI; *Marbury*, 5 U.S. (1 Cranch) at 177 ("[A]n act

of the legislature, repugnant to the constitution, is void."); *Chadha*, 462 U.S. at 940-41 (while Congress has broad authority in immigration maters, the issue of "whether Congress has chosen a constitutionally permissible means of implementing that power" is subject to judicial review.) Accordingly, if the Court were unable to divine Congress's preference between "eliminat[ing] its policy altogether or extend[ing] it in order to render what Congress plainly did intend, constitutional," *Welsh*, 398 U.S. at 356 (Harlan, J., concurring)—and if it were to conclude that, despite the INA's severability clause, it lacked the power to "sever[] an unconstitutional restriction upon the grant of immigration or citizenship," *Miller*, 523 U.S. at 457 (Scalia, J., concurring)—then the proper course would not be to let the constitutional violation go unremedied, but rather to hold the statute to be unconstitutional as applied to persons like Flores-Villar, and thus to prevent its criminal application to him here. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Nevada Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) ("When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional as applied to him.") (emphasis in original). For the criminal provision under which Flores-Villar was convicted, as well as the citizenship provisions in §§ 1401 and 1409, are all part of the INA.[11] Notwithstanding the scope and complexity of

[11] The Fifth Circuit was mistaken in this regard in *United States v. Cervantes-Nava*, 281 F.3d 501, 504-06 (5th Cir. 2002). There, the Fifth Circuit posited that the two potential remedies if §§ 1401 and 1409 were unconstitutional were to (1) "sever the more lenient residency requirement for citizen mothers of

the INA, the Court should not apply an unconstitutional statute to a criminal defendant simply because it is difficult to discern which remedial option Congress would have preferred.[12]

(continued…)

illegitimate children" or (2) "strike down the INA in its entirety," and because neither alternative would grant Cervantes-Nava citizenship, the government would still have met its burden of proving alienage in order to convict him of violating § 1326. *Id.* While the Fifth Circuit was correct that "strik[ing] down the INA in its entirety" (or at least holding it unconstitutional as applied) would not confer citizenship on Cervantes-Nava, it would also prevent the application of the criminal provision under which he was convicted (which is § 276 of the INA, codified at 8 U.S.C. § 1326), thereby invalidating his conviction and affording him a remedy.

[12] Thus, at the very least, Flores-Villar's conviction should be vacated. Even if the Court were to determine that it lacked the power to hold Flores-Villar a citizen, it surely has the power—indeed the duty—to vacate a criminal conviction based on an unconstitutionally discriminatory law. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reversing criminal conviction where miscegenation statute violated Equal Protection). A person cannot be subjected to criminal punishment except by a valid rule of law. *See* Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1331-33 (2000) ("[I]t is almost universally acknowledged that criminal defendants must be set free when the statutes under which they were convicted are held invalid."). If the gender-based classifications in §§ 1401 and 1409 violate the Equal Protection guarantee, they cannot serve as the basis to establish the alienage element of Flores-Villar's criminal conviction under § 1326.

II. FLORES-VILLAR HAS STANDING TO CHALLENGE THE CITIZENSHIP STATUTE ON EQUAL PROTECTION GROUNDS.

A. Flores-Villar Has First-Party Standing Because He Is Asserting His Own Rights.

Standing should not present a serious issue in this case. While 8 U.S.C. §§ 1401 and 1409 define citizenship of children born outside the United States to unwed parents in terms of certain qualifications that the parents must satisfy, what they ultimately establish is the *child's* citizenship, or lack thereof. Here, Flores-Villar contends that his entitlement to citizenship at birth is unconstitutionally affected by the irrational gender-based classification in those provisions. That the discrimination in this case was not based on Flores-Villar's gender, but rather on his father's, does not make the gender-based classification less suspect or the impact on Flores-Villar's rights less substantial. Accordingly, properly understood, Flores-Villar is asserting his *own* right to "equal protection of the laws," as embodied in the Constitution's Equal Protection guarantee.

In such circumstances, there can be no serious question that Flores-Villar satisfies the constitutional prerequisites for standing. Article III's case-or-controversy standing limitation requires three things: (1) injury in fact (2) fairly traceable to challenged action that is (3) redressable by favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Flores-Villar has undoubtedly suffered an injury in fact: Not only was he denied citizenship solely on the basis of his father's gender, but he was also subjected to criminal sanctions on that basis. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) ("[t]here can be no question"

that criminal defendant has Article III standing). Moreover, that injury is fairly traceable to the unconstitutional classification in 8 U.S.C. §§ 1401 and 1409. And, as discussed above, that injury can be redressed by extending him citizenship and vacating his conviction.

Thus Flores-Villar stands in the same position as the criminal defendant in *Strauder v. West Virginia*, whose right to a fair trial was affected by an unconstitutional race-based classification in a juror selection statute. 100 U.S. 303, 308-09 (1879) (allowing criminal defendant to challenge state statute providing only white men could serve as jurors), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975). And his position is no different from a doctor challenging an abortion statute, who need not rely on his patient's rights, but has standing to assert his own right to be free from criminal sanctions except pursuant to a constitutionally valid rule of law. *See, e.g.*, *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 62 (1976). As in both of those situations, Flores-Villar has standing to challenge the suspect classification in §§ 1401 and 1409 in his own right. See Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1359-62 (2000).

B. Flores-Villar Also Has Third-Party Standing To Assert His Father's Rights.

Flores-Villar also has standing to assert his father's right to Equal Protection under this Court's third-party standing doctrine. As a prudential matter, this Court has generally limited parties to asserting their own rights, *see Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 955 (1984), but the

Court has allowed litigants to assert the constitutional rights of others where (1) a litigant has suffered "an injury in fact," (2) the litigant has a "close relationship" to the other person, and (3) there was "some hindrance" to the other person "asserting" his "own rights." *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991)); *see also Craig v. Boren*, 429 U.S. 190, 194-97 (1976). All three of these requirements are easily met here.

1. There can be no serious dispute that Flores-Villar has suffered an injury in fact. Again, not only was he denied citizenship under §§ 1401 and 1409, but he has been criminally prosecuted and convicted. *See Powers*, 499 U.S. at 410-11 (criminal defendant suffered injury in fact); *Eisenstadt*, 405 U.S. at 443 (same). Indeed, in *Miller v. Albright*, all of the justices recognized that the denial of citizenship at birth to a child of a United States citizen constituted an injury in fact. 523 U.S. at 432 (opinion of Stevens, J.); *id.* at 447 (O'Connor, J., concurring in judgment); *id.* at 454 n.1 (Scalia, J., concurring in judgment); *id.* at 478 (Breyer, J., dissenting).

2. Flores-Villar also undoubtedly has a "close relationship" to his father. Beyond the blood relationship, which would itself be enough to demonstrate a sufficiently "close relationship" for the purposes of third-party standing, the record reflects that Flores-Villar lived with his father and his paternal grandmother in the United States from the age of two months through adulthood. *See* J.A. 31-32, 94-96 Every member of the Court in *Miller* (including Justice O'Connor, who wrote the only opinion denying standing), recognized that a child challenging a citizenship statute has a sufficiently

close relationship with his father for purposes of third-party standing, even where the child had not resided in the United States or with her citizen father before the age of 21. 523 U.S. at 432 (opinion of Stevens, J.); *id.* at 447 (O'Connor, J., concurring in judgment); *id.* at 454 n.1 (Scalia, J., concurring in judgment); *id.* at 478 (Breyer, J., dissenting).

3. Finally, Flores-Villar's father certainly faced at least "some hindrance" to his ability to assert his own right to be free from gender-based discrimination. As this Court has repeatedly explained, "practical barriers to suit" are important in determining third-party standing. *Powers*, 499 U.S. at 415. For example, in *Powers v. Ohio* and *Campbell v. Louisiana*, the Court held that the "economic burdens of litigation" and the "small financial stake involved" were sufficient "as a practical matter" to prevent racially excluded petit and grand jurors from bringing their own claims. 499 U.S. at 414-15; *see* 523 U.S. at 398, 400. Likewise, in *Craig v. Boren*, the Court recognized a beer vendor's standing to challenge a statute that discriminated against 18-20-year-old males where her co-plaintiff had lost the ability to sue when he turned 21. 429 U.S. at 192-97. Although there was "no barrier whatever" to other Oklahoma males between the ages of 18 and 20 asserting their equal protection claims, *id.* at 216 (Burger, C.J., dissenting), the Court explained that dismissing the claim would "foster repetitive and time-consuming litigation," and there was "little loss in terms of effective advocacy from allowing its assertion by the present jus tertii champion," *id.* at 194 (quotation marks omitted). *See Miller*, 523 U.S. at 454 n.1 (Scalia, J., concurring in judgment). Flores-Villar's father faced several significant barriers—far more substantial than those deemed

sufficient in *Campbell*, *Powers*, and *Craig*—to bringing his own suit asserting an Equal Protection violation.

First, unlike the father in *Miller v. Albright*, who was originally a party to the litigation, 523 U.S. at 426-27, Flores-Villar's father had no ability to intervene in his son's criminal prosecution. Thus, Flores-Villar's father had no opportunity to be heard at the critical time when his son's citizenship was being determined. *See Powers*, 499 U.S. at 414 (excluded jurors hindered because they had "no opportunity to be heard at the time of their exclusion"); *see also Miller*, 523 U.S. at 449 (O'Connor, J., concurring in judgment) (individual is hindered when he is "not part[y] to the proceeding"); *Eisenstadt*, 405 U.S at 446 ("[T]he case for according [doctors convicted of distributing contraceptives] standing to assert third-party rights is stronger . . . here than in *Griswold* [*v. Connecticut*, 381 U.S. 479, 481 (1965)] because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights."). This is one of the many reasons why this Court has routinely extended third-party standing to criminal defendants challenging their convictions under unconstitutional statutes or conditions.[13]

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[13] *See, e.g.*, *Campbell*, 523 U.S. at 397-400; (white criminal defendant has standing to challenge exclusion of blacks from grand jury); *Powers*, 499 U.S. at 410-11 (white criminal defendant has standing to challenge racially motivated peremptory strike of black juror); *Eisenstadt*, 405 U.S. at 444-45 (defendant convicted of distributing contraceptives had standing to raise equal protection rights of unmarried persons to access

Second, "privacy concerns" also "provide a compelling explanation" for hindrance here. *Miller*, 523 U.S. at 449 (O'Connor, J. concurring in judgment). A person in Flores-Villar's father's position could easily be deterred or "chilled" from asserting his right to convey citizenship to his children if it would draw attention to his children's immigration status and presence in the country. A citizen father may be understandably reluctant to take affirmative steps that may expose his children to removal proceedings or even criminal prosecution, even if he believes in good faith that he should prevail. *See, e.g.*, *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 n.4 (1977) (vendor could challenge law prohibiting distribution of contraceptives to minors because desire to avoid publicity would deter potential purchasers from asserting their own rights); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958) (organization could raise privacy rights of its members because litigation would disclose their identities).

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contraceptives); *Griswold*, 381 U.S. at 481 (physician convicted as accessory to use of contraception had standing to raise privacy rights of married couples); *Strauder*, 100 U.S. at 308-09 (allowing criminal defendant to challenge state statute providing only white men could serve as jurors); *cf. Dep't of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990) (attorney in disciplinary proceedings had standing to challenge fee restriction by asserting due process rights of client); *Craig*, 429 U.S. at 194-97 (beer vendor subject to sanctions and loss of license for selling beer in violation of statute that discriminated against 18-20-year-old men had standing to challenge statute).

Third, and perhaps most importantly, denying a child facing an enforcement action standing to assert his father's right to convey citizenship would "frustrate Congress's effort to channel" all challenges to removal through "the detailed procedure that Congress instituted for review of removal proceedings." *Ortega v. Holder*, 592 F.3d 738, 743-44 (7th Cir. 2010); *see also Rios-Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 393, 396-99 (5th Cir. 2007). Congress has demonstrated a clear preference that all questions of citizenship or nationality that first arise in an enforcement action involving the person whose citizenship is at stake, such as a removal proceeding, be resolved in that process and not in a separate declaratory judgment action. Under 8 U.S.C. § 1503(a), a person subject to removal proceedings cannot institute an action for a declaratory judgment that he is a citizen or national if the question was at issue in removal proceedings. He must, instead, seek review of the removal proceedings in the circuit courts under 8 U.S.C. § 1252, and, if the circuit court finds a genuine issue of material fact as to the petitioner's nationality, it will transfer the case to a district court for a declaratory judgment action to proceed. *Id.* § 1252(b)(5)(B); *see also Ortega*, 592 F.3d at 744. Limiting standing to the citizen-father, in contrast, would not only permit but would require the father to initiate a declaratory judgment action to establish his child's citizenship. It would thus not only authorize, but require, an end run around the restriction in § 1503(a) and the "detailed procedure" set up by Congress for the orderly administration of removal proceedings. *Id.*

Thus here, as in *Craig*, Flores-Villar "is the 'least awkward challenger,' since it is [his] right to

citizenship that is at stake." *Miller*, 523 U.S. at 454 n.1 (Scalia, J., concurring in judgment) (quoting *Craig*, 429 U.S. at 197). The prudential concerns underlying the limitations on third-party standing are not present in this case. *See Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (prudential concerns that third parties may not wish to assert rights and that third parties "usually will be the best proponents of their own rights" underlie limitation). Flores-Villar is well suited to assert the rights at stake in this case. *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (prudential barriers seek "to limit access to the federal courts to those litigants best suited to assert a particular claim"). He has a real interest in vindicating the rights at stake in the litigation—perhaps even stronger than his father's interest—and his interests are aligned with those of his father. Faced with criminal sanction and the loss of his entitlement to citizenship, there can be little question that Flores-Villar "is fully, or very nearly, as effective a proponent of the right" at stake as his father. *Singleton*, 428 U.S. at 115.

* * *

For any of these reasons, as the majority of the members of the Court recognized in *Miller*, a child has standing to invoke the jurisdiction of the federal courts to challenge a statute that unconstitutionally discriminates against his entitlement to citizenship at birth or his father's ability to transmit citizenship to him. 523 U.S. at 432 (opinion of Stevens, J., joined by Rehnquist, C.J.); *id.* at 454 n.1 (Scalia, J., concurring in judgment, joined by Thomas, J.); *id.* at 478 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.). Indeed, Flores-Villar's standing is even more apparent. Unlike the child in *Miller*,

Flores-Villar did not invoke the jurisdiction of the federal courts by affirmatively applying for citizenship and then filing a declaratory judgment action. *See id.* at 426. Rather, Flores-Villar found himself in court involuntarily as a criminal defendant. There can be little question that Flores-Villar has standing to challenge the constitutionality of the statute that both deprives him of citizenship and forms the basis for his criminal conviction.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to reverse the Ninth Circuit's decision.

Respectfully submitted.

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