No. ___________

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID JOHNSON,
Petitioner,

v.

J.D. WHITEHEAD, *ET AL.*,
Respondent.

____

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute that denies automatic derivative citizenship to the illegitimate child of a naturalized father is subject to intermediate scrutiny and violates Equal Protection when the statute perpetuates baseless stereotypes about illegitimate children and unwed fathers and is not substantially related to an important governmental purpose.

PARTIES TO THE PROCEEDING

David Johnson is the Petitioner in this case.

J.D. Whitehead, Calvin McCormick, James T. Hayes, Jr., Julie Myers, Michael Chertoff, Michael B. Mukasey, and Eric H. Holder, Jr., are the Respondents in this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Johnson respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit entered on May 24, 2011.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. A) is published at 647 F.3d 120. The opinion of the Board of Immigration

Appeals (Pet. App. B) is unpublished. The opinions of the Immigration Court (Pet. App. C-D) are unpublished.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued its decision on May 24, 2011. Pet. App. A. On August 10, 2011, the Chief Justice extended the time to file this petition to and including September 22, 2011. Appl. No. 11A180. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

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

Eight U.S.C. § 1432(a) (repealed 2000) provides:

> A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions: (1) The

> naturalization of both parents; or (2) The naturalization of the surviving parent if one of the parents is deceased; or (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation . . . .

STATEMENT OF THE CASE

I. Statutory Background

Eight U.S.C. § 1432 governs when a child born outside of the United States before February 27, 1983, to a naturalized U.S. citizen automatically derives citizenship.[1] Section 1432(a)(3) distinguishes between children who automatically derive citizenship through a naturalized parent on the basis of illegitimacy and sex.[2]

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[1] Congress repealed 8 U.S.C. § 1432 in 2000. *See* Child Citizenship Act of 2000, PL 106-395, 114 Stat. 1631 (2000). The Child Citizenship Act of 2000 does not apply to children who were 18 years of age or older on February 27, 2001, when Congress enacted the law. Consequently, 8 U.S.C. § 1432 continues to govern the derivative citizenship claim of any individual born on or before February 27, 1983.

[2] Although the terms "sex" and "gender" are often used interchangeably, this petition addresses classifications based on biological characteristics ("sex") and not masculinity

Section 1432(a)(3) requires that a child's parents obtain a "legal separation"—a phrase that courts have understood as presupposing a marriage—for the child to automatically derive citizenship through his naturalized father. If the child's parents never married, therefore, an illegitimate child can never automatically derive citizenship through his father's naturalization. By contrast, § 1432(a)(3) permits an illegitimate child to automatically derive citizenship through his mother's naturalization without requiring that his parents obtain a "legal separation."

The distinctions § 1432(a)(3) makes on the basis of illegitimacy and sex deny the benefit of automatic derivative citizenship to a discrete class of individuals: the illegitimate children of naturalized fathers.

II. Factual Background

Petitioner, Mr. Johnson, was born in Jamaica in 1965 to Ronald Johnson and Joan Francis. Pet. App. F at 65a. Ms. Francis was never involved in Mr. Johnson's life in *any* manner at *any* time. Pet. App. A at 9a; R. 48; R. 56 n.4.[3] The day Mr. Johnson was born, Ms. Francis surrendered him into Ronald Johnson's sole custody and care. Pet. App. F at 65a;

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or femininity ("gender"). *See J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

[3] Certified Administrative Record submitted to the U.S. Court of Appeals for the Fourth Circuit by Attorney General Holder on June 25, 2010 [hereinafter R.].

R. 48. In 1972, Ms. Francis reaffirmed that she had abandoned her parental rights when she consented in writing to Mr. Johnson's immigration to the United States with his father. Pet. App. F at 65a. Ms. Francis never indicated that she wished to be involved in Mr. Johnson's life. R. 48. When Ms. Francis died in 1998, she had only seen Mr. Johnson one time: the day he was born. R. 56 n.4.

On October 1, 1972, when he was seven years old, Mr. Johnson entered the United States as a legal permanent resident. Pet. App. A at 46a. Mr. Johnson was raised exclusively by his father in the United States. Pet. App. A at 9a. Ronald Johnson is the only parent that Mr. Johnson has ever known. Pet. App. A at 9a; R. 48. Ronald Johnson provided 100 percent of Mr. Johnson's parental, financial, and emotional support throughout his childhood and adolescence. R. 48. He cared for Mr. Johnson as a single father while Ms. Francis remained over a thousand miles away and offered no assistance. R. 56 n.4.

When Ronald Johnson naturalized on December 26, 1973, he believed that his minor son, over whom he had maintained custody since his birth, would automatically derive U.S. citizenship. Pet. App. A at 30a; R. 55. Similarly, Mr. Johnson has always believed he is a U.S. citizen, having lived continuously in the United States from the time he arrived at age seven until his removal in August 2011. R. 55. The United States is Mr. Johnson's home.

III. Procedural History and Charges

Immigration and Naturalization Service ("INS") initiated removal proceedings against Mr. Johnson on August 21, 1992, after the U.S. District Court for the Northern District of Texas convicted Mr. Johnson of carrying a firearm during and in relation to a drug trafficking crime and after the Dallas County Court convicted Mr. Johnson of unlawful possession of a controlled substance and aggravated assault. Pet. App. A at 4a. The Immigration Court terminated these removal proceedings on October 6, 1992. Pet. App. A at 4a. INS again initiated removal proceedings against Mr. Johnson on June 21, 1996. Pet. App. A at 4a. The Immigration Court terminated this second round of removal proceedings on February 9, 1998, noting in its termination order that Mr. Johnson appeared to have derived citizenship from his father's naturalization. Pet. App. A at 4a. INS waived appeal. Pet. App. A at 4a.

On December 16, 1996, Mr. Johnson filed a Form N-600, Application for Certificate of Citizenship. Pet. App. E at 62a. INS denied Mr. Johnson's application on April 5, 2000, reasoning that Mr. Johnson could not automatically derive citizenship from his father's naturalization because Mr. Johnson's parents never married and, therefore, could not legally separate as required by § 1432(a)(3). Pet. App. E at 62a-64a.

Immigration and Customs Enforcement ("ICE," formerly INS) initiated removal proceedings

against Mr. Johnson for a third time on June 18, 2008, after the U.S. District Court for the Southern District of New York convicted Mr. Johnson of unlawful possession of a firearm by a convicted felon on January 28, 2002. Pet. App. A at 5a. On May 28, 2009, the Immigration Court issued an order of removal, rejecting Mr. Johnson's claim to U.S. citizenship. Pet. App. D at 55a. The Immigration Judge stated that Mr. Johnson could only have fulfilled the conditions for automatic derivative citizenship under § 1432 if (1) his mother had naturalized; (2) his mother had died before he turned 18; or (3) his parents had obtained a "legal separation." Pet. App. C at 50a-51a. The Board of Immigration Appeals ("BIA") upheld the order of removal on April 20, 2010, rejecting Mr. Johnson's claim that requiring marriage and "legal separation" as a precondition to automatic derivative citizenship violated Equal Protection. Pet. App. B at 43a.

On May 24, 2011, the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") denied Mr. Johnson's petition for review, finding a marriage requirement in the term "legal separation." Pet. App. A at 9a. In addition, the Fourth Circuit, relying on Congress's plenary power over immigration, applied rational basis review to Mr. Johnson's Equal Protection claim and concluded that "Congress certainly had a rational basis in "protect[ing] parental rights." Pet. App. A at 11a-14a. Judge Gregory dissented, maintaining that the court should have evaluated Mr. Johnson's petition under intermediate scrutiny. Pet. App. A at 25a-27a (Gregory, J., dissenting). According to Judge

Gregory, the BIA's interpretation of "legal separation" violated Equal Protection by discriminating on the basis of illegitimacy and sex where the significant constitutional right to U.S. citizenship was involved. Pet. App. A at 26a-27a.

SUMMARY OF ARGUMENT

This case presents the ideal opportunity to correct the Circuit courts' misapplication of this Court's Equal Protection analysis for distinctions based on illegitimacy and sex. This Court has held without limitation that intermediate scrutiny applies to distinctions based on illegitimacy, *see, e.g.*, *Clark v. Jeter,* 486 U.S. 456, 461, 465 (1988), and sex, *see, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996). Confusion over the appropriate level of review for such distinctions permeates the Circuit courts, specifically related to § 1432(a)(3). *Compare Marquez-Morales v. Holder*, 377 F. App'x 361, 365 (5th Cir. 2010) (acknowledging that heightened scrutiny applies to a "true 'gender-based'" claim under § 1432(a)(3)) *with* Pet. App. A at 12a-13a (deciding rational basis review applies to Mr. Johnson's Equal Protection claim) *and Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065-66 (9th Cir. 2003) (applying rational basis review to an Equal Protection challenge to a distinction based on illegitimacy under § 1432(a)(3)). Adding to the confusion, some Circuit courts merely *assume* that intermediate scrutiny applies to illegitimacy and sex-based distinctions. *See, e.g.*, *Grant v. U.S. Dep't of Homeland Sec.*, 534 F.3d 102, 106-07 (2d Cir. 2008) (suggesting that intermediate scrutiny might

be appropriate for sex-based distinctions under § 1432(a)(3)).

Confusion over the appropriate level of scrutiny stems from some Circuit courts' attempts to create context-specific exceptions to this Court's Equal Protection framework. For example, the Fourth Circuit justified its decision to subject Mr. Johnson's claim to rational basis review by carving out an exception for cases that arise in the "immigration context," even if the statute discriminates based on illegitimacy or sex. Pet. App. A at 12a (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)) (stating that Congress has "complete" power over "the admission of aliens"). But, in its modern Equal Protection jurisprudence, not only has this Court rejected carve-out exceptions generally, *see, e.g.*, *Johnson v. California*, 543 U.S. 499, 509 (2005), it has distinguished *Fiallo*—a case related to immigrant visas—from cases where an individual claims the important right of U.S. citizenship. *See Miller v. Albright*, 523 U.S. 420, 429 (1998) (plurality) (distinguishing *Fiallo* "because that case involved the claims of several aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen"); *see also Nguyen v. INS*, 533 U.S. 53, 97 (2001) (O'Connor, J., dissenting) (distinguishing *Fiallo* and concluding that "[b]ecause [the statute] govern[s] the conferral of citizenship . . . and not the admission of aliens, the ordinary standards of equal protection review apply"). This Court declined to address the potential implications of Congress's plenary power over immigration and

naturalization in *Nguyen v. INS*, 533 U.S. 53, 61 (2001), and now has the opportunity to affirm that intermediate scrutiny applies uniformly to statutes that distinguish based on illegitimacy or sex, regardless of the context.

In addition, review by this Court is necessary because § 1432(a)(3) cannot withstand intermediate scrutiny and is, therefore, unconstitutional. Rather than provide an "exceedingly persuasive justification," *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982), for the distinctions based on illegitimacy and sex in § 1432(a)(3), as required under intermediate scrutiny, the government has proffered—and the Circuit courts have accepted—various hypothetical justifications for the statute's "legal separation" requirement, including protecting the alien parent, promoting derivative citizenship only for a child whose "real interests" are in the United States, and promoting marital and family harmony. Even accepting these hypothetical justifications as true, classifications based on illegitimacy and sex that are rooted in invidious "stereotypes can[not] survive heightened scrutiny." *Miller*, 523 U.S. at 452 (1998) (O'Connor, J., concurring). Here, the statutory sex-based distinction inculcates stereotypes about unwed fathers and bears no relation to the biological or actual relationship between a father and child, as "[Mr.] Johnson's father continually claimed paternity of, supported, and maintained custody over [Mr.] Johnson." Pet. App. A at 31a (Gregory, J., dissenting). This case, therefore, raises the recurring question of the constitutionality of sex-

based distinctions that lack biological basis—an issue this Court left unresolved in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011).

This case is the appropriate vehicle to resolve the level of scrutiny for statutory distinctions based on illegitimacy and sex where an individual claims U.S. citizenship, as well as to resolve the constitutionality of § 1432(a)(3), a statute that makes such distinctions. The Fourth Circuit squarely decided the level of scrutiny applicable to Mr. Johnson's claim and the constitutionality of § 1432(a)(3). If this Court were to grant certiorari and conclude that intermediate scrutiny applies, the statute would be unconstitutional and Mr. Johnson would prevail.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve the Confusion Among the Circuit Courts and the Conflict with this Court's Equal Protection Jurisprudence about Whether Intermediate Scrutiny Applies Uniformly to Classifications Based on Illegitimacy and Sex.

The Circuit courts disagree about whether intermediate scrutiny applies to distinctions based on illegitimacy and sex. This Court should grant certiorari to resolve the confusion related to this Court's modern Equal Protection jurisprudence

regarding whether intermediate scrutiny applies to distinctions based on illegitimacy and sex.

A. The Fourth Circuit's decision conflicts with the holdings of this Court and another Circuit court that classifications based on illegitimacy are subject to intermediate scrutiny.

Eight U.S.C. § 1432(a)(3) distinguishes between legitimate and illegitimate children when citizenship is derived through a naturalized father. Before a child born outside of the United States automatically derives citizenship through his naturalized father, there must be, among other conditions, "a legal separation of the parents." 8 U.S.C. § 1432(a)(3). Courts have interpreted "legal separation" to presuppose marriage. *See, e.g.*, *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (determining that individuals who never "joined" in marriage cannot legally separate). Section 1432(a)(3), therefore, wholly bars the illegitimate child of an unwed father from automatically deriving U.S. citizenship through his father's naturalization, while affording the legitimate child of a *married* father such opportunity.

In *Clark*, this Court determined that intermediate scrutiny is required for "discriminatory classifications" based on illegitimacy. 486 U.S. at 461. Although the Fourth Circuit conceded that intermediate scrutiny applies to classifications based on illegitimacy, it proceeded to carve out a special-

context exception to this Court's modern Equal Protection framework. *See* Pet. App. A at 11a-12a ("Legal classifications based on legitimacy are typically reviewed under intermediate scrutiny. But the immigration context is a special one.") (citation omitted). The Fourth Circuit—similar to other federal courts—ignored *Clark* and applied rational basis review. *See, e.g.*, *Barthelemy*, 329 F.3d 1062 (failing to consider *Clark's* holding on intermediate scrutiny); *Wedderburn*, 215 F.3d 795 (lacking any citation to *Clark*).

The Fourth Circuit's decision to apply rational basis review conflicts not only with *Clark* but also with Fifth Circuit case law, which has expressly applied intermediate scrutiny to distinctions based on illegitimacy. In *Prudential Insurance Co. of America v. Moorhead*, 916 F.2d 261 (5th Cir. 1990), the Fifth Circuit affirmed that it is "well settled" that intermediate scrutiny applies to statutes that distinguish on the basis of illegitimacy. *See id.* at 264 (evaluating the constitutionality of a military personnel life insurance policy that distinguished between child beneficiaries based on legitimacy).

This Court's application of intermediate scrutiny to classifications based on illegitimacy reflects the growing recognition that classifications that punish a discrete population of children for the "illicit relations of their parents . . . [are] 'illogical and unjust.'" *Clark*, 486 U.S. at 461 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972)); *see Weber,* 406 U.S. at 175 ("[I]mposing disabilities on the illegitimate child is contrary to the [notion] that

legal burdens should bear some relationship to individual responsibility . . . . [N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."); *see also Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.").

The stigma suffered by illegitimate children and their status as a "quasi-suspect" class provide compelling reasons to apply intermediate scrutiny. *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (observing that illegitimacy is a characteristic "beyond the individual's control" and is subject to heightened scrutiny); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (establishing "searching judicial inquiry" for "prejudice against discrete and insular minorities"); *Mitchell v. Comm'r of the Soc. Sec. Admin.*, 182 F.3d 272, 274 (4th Cir. 1999) (noting that "certain quasi-suspect classifications, such as gender and illegitimacy, are subject to an intermediate form of scrutiny"). As this Court has established, the time has long since passed where society's ancient discrimination against "bastards" is spared from judicial scrutiny.[4]

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[4] *Levy,* 391 U.S. at 72 n.6 ("We can say with Shakespeare: 'Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As

B. The Fourth Circuit's decision conflicts with the holdings of this Court and other Circuit courts that sex-based classifications are subject to intermediate scrutiny.

The Fourth Circuit's decision to apply rational basis review to Mr. Johnson's constitutional claim regarding § 1432(a)(3) departs from the Equal Protection jurisprudence of this Court and other Circuit courts requiring review of sex-based distinctions under intermediate scrutiny.

As Judge Gregory noted in his dissent, § 1432(a)(3) not only "places more onerous burdens on the illegitimate children of a naturalized parent," but "also permits sex discrimination" because it "rais[es] more hurdles to the naturalization of the children of unmarried fathers than for those of the children of unmarried mothers." Pet. App. A at 30a (Gregory, J., dissenting). Specifically, § 1432(a)(3) distinguishes on the basis of sex because it allows a child to automatically derive citizenship from an unmarried mother, while imposing a marriage and separation requirement for a child to automatically derive citizenship through a father.

In a long line of precedents, this Court has held that sex-based classifications must be subject to intermediate scrutiny. *See, e.g.*, *Virginia*, 518 U.S. at 533 (declaring that "the reviewing court must

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honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?' King Lear, Act I, Scene 2.").

determine whether the proffered justification is 'exceedingly persuasive'" for official classifications based on sex); *Hogan*, 458 U.S. at 724 (declaring that a sex-based classification must be substantially related to an important governmental objective); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality) (deciding that sex-based classifications "are inherently suspect" and subject to heightened scrutiny review).

More specifically, this Court has held that intermediate scrutiny applies to sex-based classifications between unmarried fathers and unmarried mothers. In *Caban v. Mohammed*, this Court evaluated under intermediate scrutiny the constitutionality of a state law that gave an unmarried mother the authority to block the adoption of her child by withholding consent, while denying such authority to an unmarried father. 441 U.S. 380, 388 (1979). This Court found that the "inflexible" and "undifferentiated distinction between unwed mothers and unwed fathers" was not substantially related to the state's claimed interest and, therefore, the statute violated unwed fathers' constitutional right to Equal Protection of the law. *Id.* at 392, 394.

Furthermore, in *Nguyen*, this Court applied intermediate scrutiny to analyze a statute that established different requirements for derivative citizenship based on the sex of the citizen parent. *See Nguyen*, 533 U.S. at 60-61. This Court indicated that Congress's plenary power over immigration and

naturalization did not affect the applicable level of scrutiny. *See id.* at 73 (stating that deference considerations "would have to be considered . . . were it determined that § 1409 did not withstand conventional equal protection scrutiny"). Adopting *Nguyen's* approach, the Second, Fifth, and Ninth Circuits have also indicated that intermediate scrutiny is appropriate for sex-based distinctions. *See Marquez-Morales*, 377 F. App'x at 365 (indicating that the requirement for heightened scrutiny is triggered where a "gender-based classification" arises); *Flores-Villar*, 536 F.3d at 993 ("assuming" that intermediate scrutiny applies to a sex-based distinction); *Grant*, 534 F.3d at 107 (suggesting intermediate scrutiny applies to sex-based distinctions by reference to this Court's test in *Nguyen*).

In direct conflict with the decisions of this Court and other Circuit courts, the Fourth Circuit applied rational basis review to a sex-based distinction. This conflict, coupled with the tentative application of intermediate scrutiny to sex-based distinctions by the Ninth Circuit, *see, e.g.*, *Flores-Villar*, 535 F.3d at 993 ("*[a]ssuming* . . . intermediate scrutiny applies") (emphasis added), reflects a great need for this Court to prevent discord in its modern Equal Protection jurisprudence by pronouncing whether intermediate scrutiny applies uniformly to all sex-based classifications.

C. As shown in *Nguyen* and *Flores-Villar*, intermediate scrutiny applies to classifications based on illegitimacy and sex, regardless of context.

Contrary to the Fourth Circuit's assertion that rational basis review applied to Mr. Johnson's Equal Protection claim, this Court has applied intermediate scrutiny to classifications that arise in the context of citizenship and naturalization. *See*, *e.g.*, *Nguyen,* 533 U.S. at 72-73 (employing intermediate scrutiny to analyze § 1409(a), while declining to "assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power").

The Fourth Circuit justified its application of rational basis review by relying on this Court's decision in *Fiallo*, a factually distinct case. Pet. App. A at 12a. Unlike the petitioner in *Fiallo*, who sought a visa to enter this country, Mr. Johnson claims U.S. citizenship. By equating Mr. Johnson's claim to U.S. citizenship with the claim to special immigration status in *Fiallo*, the Fourth Circuit trivialized the preciousness of citizenship. *See, e.g.*, *Miller*, 523 U.S. at 477 (Breyer, J., dissenting) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (recognizing that citizenship is a "most precious right"); *Y. T. v. Bell*, 478 F. Supp. 828, 832 (W.D. Pa. 1979) (suggesting that departure from *Fiallo* is appropriate where citizenship is at issue); *see also* *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting)

(emphasizing that the Court's "ordinary" Equal Protection framework governs review of statutes that confer citizenship). The grievous harm produced by incorrect decisions on citizenship requires a rigorous approach to analyzing the constitutionality of discriminatory naturalization laws. *Cf.* Tyche Hendricks, *Suits for Wrongful Deportation by ICE Rise*, S.F. Chron., July 28, 2009 (highlighting the devastating impact of wrongful deportations of U.S. citizens by ICE).

The Fourth Circuit's application of rational basis review departs radically from this Court's Equal Protection framework, which consists of two steps: first, examining the nature of the classification; and second, selecting and applying the appropriate level of scrutiny. The Fourth Circuit added a "special context" loophole to this analysis, even though this Court has rejected invitations to riddle its Equal Protection framework with context-specific exceptions. *See Johnson v. California*, 543 U.S. at 509 (declining the invitation "to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review . . . because its segregation policy applies only in the prison context"); *Nguyen*, 533 U.S. at 73 (indicating that deference in the immigration context is a separate argument that "would have to be considered" *only after* finding that a law violated Equal Protection). *See also Moorhead*, 916 F.2d at 264 n.3 (applying intermediate scrutiny without reaching the government's request for deference on military matters).

II. This Court Should Resolve the Important Question of the Constitutionality of § 1432(a)(3).

The Fourth Circuit and other Circuit courts have disregarded this Court's holdings by failing to examine the "actual purpose"—and not a purpose "hypothesized or invented *post hoc* in response to litigation"—of the "legal separation" requirement in § 1432(a)(3). *Virginia*, 518 U.S. at 533, 559; *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, n.16 (1975)) ("'[M]ere recitation of a benign [or] compensatory purpose does not block 'inquiry into the actual purposes' of government-maintained gender-based classifications."); *see also Nguyen*, 533 U.S. at 78-79 (O'Connor, J., dissenting) (stressing that the court itself must not hypothesize the state interest or "fail[] to inquire into the actual purposes" or "consider whether the sex-based classification is being used impermissibly as a 'proxy for other, more germane bases of classification'") (citation omitted).

Legislative history demonstrates that Congress's actual purpose in developing the "legal separation" requirement was to lift the penalty of expatriation imposed on an American-born woman who had married a foreign man and lost her U.S. citizenship as a consequence of that marriage. *See* House Comm. on Immigration & Naturalization, 76th Cong., Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments 30 (Comm. Print 1939) (proposing the original "legal separation" requirement based on an

opinion by the Attorney General and *In re Lazarus*, 24 F.2d 243 (N.D. Ga. 1928)); *see also* Citizenship of Minor Child of Native Am. Mother & Spanish Father-Divorce of Parents, 37 Op. Att'y Gen. 90 (1933) (explaining how an American-born woman could resume U.S. citizenship after divorcing her alien husband). The text of the statute reflects this actual purpose, demonstrating Congress's intent that § 1432 apply to a situation involving "*a citizen parent who has subsequently lost citizenship of the United States.*" § 1432(a) (emphasis added). As it necessitated a preliminary analysis of the parent's status, the "legal separation" requirement addressed only secondarily whether a foreign-born child of a divorced American woman could derive his mother's newly reinstated U.S. citizenship. The term "legal separation" was never conceived to apply to the child of a *foreign-born* naturalized *father*, such as Mr. Johnson's father. *See In re Lazarus*, 24 F.2d at 244 (explaining that "the 'parent resuming American citizenship' clearly means the mother" because (a) an American-born father would not lose citizenship by marrying a foreign woman and (b) a foreign-born father would not resume citizenship, but instead would naturalize).

The government has proffered various hypothesized justifications for the "legal separation" requirement in § 1432(a)(3). For example, the government has asserted—and Circuit courts have accepted—that the statute promotes an alien parent's rights, *see, e.g.*, Pet. App. A. at 9a; *Wedderburn*, 215 F.3d at 800, or alternatively that Congress enacted § 1432 because it "wanted" to grant

derivative citizenship only to children whose "real interests" are located in America with custodial parents. *Nehme v. INS*, 252 F.3d 415, 425 (5th Cir. 2001). One court has even accepted that Congress "could have . . . concluded" that the statute "was necessary to promote marital and family harmony." *Id.* Even assuming that the government's post hoc justifications for the "legal separation" requirement apply, this case demonstrates that the means employed are not logically connected to *any* of these objectives. First, because Ms. Francis completely abandoned her child the day he was born and later affirmed in writing that she had no interest in enforcing her parental rights, *see* Pet. App. F at 65a, there is "no governmental interest in or reasonable basis for protecting the illusory 'rights' of . . . [a parent who has willingly absolved herself of all parental rights]." Pet. App. A at 28a (Gregory, J., dissenting). Second, because Mr. Johnson lived in the United States since he was seven years old and was always under the exclusive care and control of his father, his "real interests" lie with the United States and with his U.S. citizen father. Finally, denying Mr. Johnson automatic derivative citizenship following his father's naturalization directly contravenes the purported interest of promoting familial harmony because it separates Mr. Johnson from the only parent he has ever known.

Rather than promoting an important governmental purpose, Congress, in enacting § 1432(a)(3), has promoted stereotypes about "bastard"

children[5] and unwed fathers,[6] impermissibly suggesting that both are less deserving of rights than their counterparts. *See* Pet. App. A at 32a (Gregory, J., dissenting) ("Congress appears to have relied wholly on the invidious sex stereotype that an unmarried father has less of an interest than an unmarried mother in conferring citizenship to his child."). As this Court has declared repeatedly, the law must not reinforce stereotypes. *See J.E.B.*, 511 U.S. at 128 (holding that Equal Protection includes the right to be "free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly,

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[5] *See Bennett v. Day*, 89 S.E.2d 674, 678-79 (Ga. App. 1955) (noting that at common law the status of a "bastard" was fixed and the rights of a "bastard" few); *Rowe v. Cullen*, 9 A.2d 585, 587 (Md. 1939) (noting that at common law a "bastard" was considered "filius nullius or filius popul . . . and was regarded as without parents or kindred"). *See generally* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345, 348 n. 15 (2011) (noting negative connotations of the terms "illegitimate," "out of wedlock," and "nonmarital").

[6] *See In re Brennan*, 134 N.W.2d 126, 131 (Minn. 1965) (describing the historical assumption that "the overwhelming percentage of fathers of out-of-wedlock children are not interested in their children, . . . in supporting them . . . or especially in seeking their custody"). *See generally* John R. Hamilton, Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 Ky. L. J. 949 n.9 (1987/1988) (noting the various justifications for negative treatment afforded to unwed fathers including allegations that they are "immoral, irresponsible and just plain bad") (citation omitted).

give them effect."); *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977) ("[P]enalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent.").

III. This Case is the Appropriate Vehicle to Resolve the Applicable Level of Scrutiny and the Constitutionality of § 1432(a)(3).

This case is the appropriate vehicle for this Court to resolve the constitutionality of 8 U.S.C. § 1432, which has been challenged repeatedly on Equal Protection grounds by illegitimate children of naturalized fathers. *See, e.g.*, *Marquez-Morales*, 377 F. App'x 361; *Grant*, 534 F.3d 102; *Barthelemy*, 329 F.3d 1062.

This case addresses issues left unresolved after this Court's recent decisions in *Nguyen* and *Flores-Villar*: namely, whether statutory distinctions governing derivative citizenship, as opposed to visa immigration status, that are based on illegitimacy and sex require review under intermediate scrutiny. Clarity is needed on whether this Court's modern Equal Protection jurisprudence, *see, e.g.*, *Clark*, 486 U.S. at 465, requires uniform application of intermediate scrutiny to statutory distinctions based on illegitimacy and sex, or whether the lower courts are free to carve out context-specific exceptions. This question was squarely raised below. Pet. App. A at 14a (applying rational basis review to uphold § 1432 against Mr. Johnson's Equal Protection challenge).

Furthermore, certiorari is warranted because this case is the appropriate vehicle to settle the question left unresolved in *Flores-Villar* about whether sex-based distinctions that promote stereotypes but are not based on biological differences violate Equal Protection under intermediate scrutiny.

These questions are outcome determinative in this case: if § 1432(a)(3) fails intermediate scrutiny, and there is no context-specific exception in evaluating an Equal Protection challenge, Mr. Johnson's right to Equal Protection has been violated, and he will have rightfully been a derivative U.S. citizen since his father naturalized nearly four decades ago.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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