No. 11-378

IN THE SUPREME COURT OF THE UNITED STATES

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

REPLY BRIEF FOR PETITIONER

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I. The Lower Courts Require Guidance as to the Appropriate Level of Scrutiny and Constitutionality of § 1432(a)(3).

Respondents mislead this Court by arguing that there is no Circuit split relevant to the constitutionality of 8 U.S.C. § 1432(a)(3). Resp'ts' Opp'n 11-12. Respondents concede, however, that at least one Circuit court has called into question the constitutionality of § 1432(a)(3). *Id.* (citing *Grant v. DHS,* 534 F.3d 102, 106-07 (2d Cir. 2008)). In addition, Respondents concede that the appropriate level of scrutiny for distinctions based on illegitimacy and sex in § 1432(a)(3) remains unresolved. Resp'ts' Opp'n 22 n.9. Resolution of this standard is fundamental to assessing the constitutionality of § 1432(a)(3) and will dictate whether reliance on prior appellate decisions remains appropriate.

While contending that "[Mr. Johnson] cites no court of appeals case that has held that the distinctions drawn in Section 1432 must survive heightened scrutiny," Respondents in the very next sentence cite a Third Circuit decision applying intermediate scrutiny to § 1432(a)(3). Resp'ts' Opp'n 22 (citing *Van Riel v. Att'y Gen.*, 190 F. App'x 163, 165 (3d Cir. 2006)). Contrary to Respondents' assertion, Mr. Johnson cited not only this Court's decision in *Nguyen v. INS*, 533 U.S. 53, 61 (2001) (applying intermediate scrutiny to an analogous statute), but also numerous appellate decisions similarly applying intermediate scrutiny. Pet. Cert.

16-17 (citing Second, Fifth, and Ninth Circuit decisions). To the extent these decisions apply intermediate scrutiny without deciding expressly if such review applies, this Court's clarification of the appropriate level of scrutiny is even more necessary. Clarification that intermediate scrutiny applies will instruct lower courts to probe the important governmental objective justifying the classifications in § 1432(a)(3), altering not only Respondents' ability to rely on reasons advanced under rational basis review, but also casting into doubt lower courts' analyses of the constitutionality of § 1432(a)(3).

In addition, although Respondents concede that intermediate scrutiny applies to classifications based on illegitimacy and sex, they seek to weaken this Court's Equal Protection framework with a context-specific exception for immigration and naturalization cases. Resp'ts' Opp'n 22 n.9; *see also* Brief for the United States in Opposition at 11, *United States v. Flores-Villar*, 131 S. Ct. 2312 (2011) (No. 09-5801) ("Although gender-based classifications are generally subject to an intermediate form of equal-protection scrutiny, . . . it is an open question whether a more lenient form of scrutiny should apply when a statute implicates Congress's immigration and naturalization power."). This Court has rebuffed attempts to carve out exceptions to its Equal Protection jurisprudence. Pet. Cert. 19 (citing *Johnson v. California*, 543 U.S. 499, 509 (2005)). Respondents' reliance on *Fiallo v. Bell*, 430 U.S. 787 (1977), to support a context-specific exception is misplaced: this Court decided

Fiallo over two decades before *Nguyen*, 533 U.S. at 61, where this Court rejected the invitation to carve out an exception to Equal Protection claims in the immigration and naturalization context. This Court should provide guidance to the lower courts as to whether such an exception exists in the immigration and naturalization context.

II. Section 1432(a)(3) Violates Equal Protection Under Intermediate Scrutiny.

A. Legislative History Shows That the Actual Purpose of § 1432(a)(3) is Rooted in Stereotypes, Not in Protecting Parental Rights.

Respondents argue that § 1432(a)(3) passes constitutional muster under intermediate scrutiny because it advances the purported governmental interest of protecting the rights of both parents. Resp'ts' Opp'n 13-14. Respondents derive this governmental interest from a handful of appellate decisions, all of which cite each other and speculate a congressional purpose without providing any foundation for this purported legislative purpose. *See* Resp'ts' Opp'n 14 (citing *Lewis v. Gonzales*, 481 F.3d 125, 131 (2d Cir. 2007), *Barthelemy v. Ashcroft,* 329 F.3d 1062, 1066 (9th Cir. 2003), *Nehme v. INS*, 252 F.3d 415, 425 (5th Cir. 2001), and *Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000), which alternatively cite *Barthelemy*, *Brissett v. Ashcroft*, 363 F.3d 130 (2d Cir. 2004), *Fierro v. Reno,* 217 F.3d 1 (1st Cir.

2000), and *Wedderburn*). Because "justification [for a discriminatory statute] must be genuine, not hypothesized or invented *post hoc* in response to litigation," Respondents' reliance on shallow—though oft-repeated—analysis of governmental purpose is insufficient. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Legislative history shows that the original purpose behind the "legal separation" requirement was not to protect "*both* parents' legal rights," Resp'ts' Opp'n 16, but rather to make whole an American-born woman whose citizenship was extinguished as a penalty for marrying a foreigner. *See* Pet. Cert. 20-21. Significantly, Respondents confirm that, historically, American women *resumed* citizenship upon divorce. Resp'ts' Opp'n 13-14 n.6 (conceding that "a woman who had lost her U.S. citizenship by marrying a foreign citizen was already entitled to *resume* her citizenship, and to have citizenship conferred on any minor children in her custody [prior to enactment of § 1432(a)(3)'s predecessor]") (emphasis added). This process of "resuming" citizenship turned on legal separation, i.e., determining whether an American woman was "totally divorced" from her foreign husband. *In re Lazarus*, 24 F.2d 243, 244 (N.D. Ga. 1928). Because history conflicts with the government's purported justification for a discriminatory classification, a reviewing court must "skeptical[ly] examin[e]" the relevant statutory provision. *Miller v. Albright*, 523 U.S. 420, 468 (Ginsburg, J., dissenting).

B. Legitimation Does Not Cure the Sex-based Discrimination in § 1432(a)(3).

Respondents incorrectly argue that an unwed father's ability to legitimate his child under § 1432(a)(3) proves that there is "no sex-based distinction" in the statute. Resp'ts' Opp'n 16. An unwed father's legitimation of his child merely prevents that child from automatically deriving citizenship from his naturalized mother. Under § 1432(a)(3), the *only* way a child born to unwed parents automatically derives citizenship is through his mother's naturalization. Therefore, even if Mr. Johnson's father legitimated Mr. Johnson, § 1432(a)(3) would still preclude Mr. Johnson from automatic derivative citizenship because his parents never married. As long as "legal separation" presupposes a marriage, an unwed father's legitimation of his child does not eliminate the institutionalized stigma of birth out of wedlock or the stereotypical assumption that an illegitimate child will be cared for by his mother.

Respondents disingenuously argue that Congress is entitled to avoid a "fact-intensive inquiry" into the relationship between an illegitimate child and his unwed father, even if Congress deprives the child of automatic derivative citizenship. Resp'ts' Opp'n 15. This Court has expressly held in *Reed v. Reed*, however, that employing a sex-based distinction simply to an ease administrative burden is improper. 404 U.S. 71, 75-76 (1971). Further, as Respondents fail to note,

courts are capable of conducting a factual inquiry into whether an alien mother abandoned her child at infancy or otherwise relinquished her parental rights. Such an inquiry would be indistinguishable from the inquiry courts already perform to determine whether legitimation has occurred.

III. This Case is an Ideal Vehicle For Supreme Court Review.

A. Mr. Johnson Raised the Constitutionality of § 1432 Before the Lower Courts and Has Standing.

Contrary to Respondents' assertion, Resp'ts' Opp'n 11, Mr. Johnson did not waive his sex-based discrimination argument because he has consistently challenged the constitutionality of § 1432. *E.g.*, Brief in Support of Notice Appeal from Decision of Immigration Judge at 11-14, *In re Johnson*, Decision of the BIA (Apr. 20, 2010) (No. A 030-171-936) (raising the constitutionality of § 1432(a)(3)); Amended Brief of Appellant, at 23-29, *Johnson v. Whitehead*, 647 F.3d 120 (4th Cir. 2011) (No. 09-1981) (same); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). In addition, Judge Gregory addressed the constitutionality of the sex-based distinction in his dissent, making it ripe for discussion before this Court. Pet. App. 30a-31a (Gregory, J., dissenting);

see also Schad v. Arizona, 501 U.S. 624, 630 n.2 (1991) (plurality) (noting that lower court preserved for Supreme Court review an argument not raised by petitioner).

Respondents attempt to construe Mr. Johnson as raising a claim on behalf of a third party, his father, but Mr. Johnson's illegitimacy[1] and sex claims are inextricably intertwined. Mr. Johnson suffered harm only as a result of his illegitimacy *and* his father's sex: had Mr. Johnson sought derivative citizenship through his unwed mother, he would have suffered no such harm. *See* Pet. App. 30a (Gregory, J., dissenting) (stating that § 1432 "unconstitutionally places more onerous burdens . . . on the children of unmarried fathers"). Mr. Johnson's claim and injury exist only by virtue of his status as the illegitimate child of an unwed citizen father. *See Wedderburn*, 215 F.3d at 802 (acknowledging that "an illegitimate child who has never been legitimated would have a claim" that § 1432 discriminates on the basis of sex). Moreover, Mr. Johnson is the party best situated to bring this claim, as it is his precious right of citizenship that is at issue. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80-81 (1979) (noting that the requirements for standing are generally satisfied when an injured party "champions his own rights").

[1] Respondents concede that Mr. Johnson has standing to bring his illegitimacy claim. Resp'ts' Opp'n 19 n.8.

For standing purposes, claims based on discrimination suffered by "illegitimate children of men versus those of women" are distinct from claims based on discrimination suffered by unwed fathers versus unwed mothers: the former confers standing on children while the latter does not. *Miller v. Christopher*, 96 F.3d 1467, 1470-71 (D.C. Cir. 1996), *aff'd sub nom. Miller v. Albright*, 523 U.S. 420 (1998). Justice Breyer analogized discrimination against an illegitimate child to discrimination based on ancestry rooted in the religion or racial makeup of a grandparent—characteristics outside the control of the descendant. *See Miller v. Albright*, 523 U.S. at 476 (Breyer, J., dissenting). A claim of discrimination based on ancestry is similar to a claim of discrimination based on a parent's marital status because the right asserted is that of the child and not that of the parent, even though the parent's sex is at issue. *Id.*

Even if this Court concludes that Mr. Johnson's claim regarding the sex-based distinction is a third-party claim, Mr. Johnson satisfies the criteria for third-party standing. *Powers v. Ohio,* 499 U.S. 400, 411 (1991); *see Craig v. Boren,* 429 U.S. 190, 194 (1976) (recognizing standing where the statute "inflicted 'injury in fact' . . . [that is] sufficient to guarantee [ ] 'concrete adverseness'") (citation omitted). First, Mr. Johnson suffered an injury in fact as a result of the statute's sex-based classification and has a "sufficiently concrete interest" in the outcome of the dispute. *Powers*, 499 U.S. at 411 (quoting *Singleton v. Wulff*, 428 U.S.

106, 112 (1976)). Second, Mr. Johnson has a close relation to the third party—his father. Third, Mr. Johnson's father is unable to challenge the sex-based discrimination because he cannot assert a right to his child's citizenship.[2]

B. This Court Has the Power to Provide Mr. Johnson a Remedy.

Respondents rely on *INS v. Pangilinan*, 486 U.S. 875 (1988), to argue that even if § 1432 is unconstitutional, this Court is powerless to provide Mr. Johnson a remedy. Resp'ts' Opp'n 21. Respondents misconstrue both the holding of that case and the remedy Mr. Johnson seeks. While federal courts may not confer citizenship in the first instance, *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898), this Court has broad power to remedy constitutional violations. *See Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress. . . . Where are we to look for it but in that court which the constitution and laws have made supreme . . . ?").

Respondents' reliance on *Pangilinan* is misplaced because that case did not involve a constitutional violation. *See Pangilinan*, 486 U.S. at 884 (refusing to grant citizenship by estoppel to

[2] For this reason, it is internally inconsistent to apply third-party standing where a child seeks a remedy for an injury suffered as the result of his illegitimacy and the sex of his parent, and where the parent suffers no injury.

veterans who applied to naturalize forty years after the relevant statute expired); *see also Ortega v. United States*, 861 F.2d 600, 603 (9th Cir. 1988) (relying on *Pangilinan* to deny a petition for naturalization because, "[a]bsent a showing of . . . a constitutional violation, [a] district court ha[s] no authority to . . . grant [a] naturalization petition pursuant to its powers of equity"). While Justice Scalia rightfully acknowledged that this Court cannot usurp Congress's authority to *make* someone a citizen, *Pangilinan*, 486 U.S. at 884, Congress does not have the power, "in the naturalization context or elsewhere, to pass laws that violate other substantive provisions of the Constitution." *Aguayo v. Christopher*, 865 F. Supp. 479, 486 (N.D. Ill. 1994).

This Court has established that "when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment." *Heckler v. Mathews*, 465 U.S. 728, 740, (1984) (citation and quotation marks omitted). As a result of this directive, various Circuit courts have retroactively recognized derivative citizenship where citizenship was denied in violation of the Constitution. *See, e.g., Breyer v. Meissner*, 214 F.3d 416, 429 (3d Cir. 2000) (including petitioner in the class of persons who were automatically afforded citizenship at birth); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1418 (9th Cir. 1993) (upholding a district court decision to "redress Section 1993's impermissible gender-based

discrimination" by recognizing the plaintiffs as U.S. citizens).

C. The Issues Raised in this Case are Far-Reaching.

Contrary to Respondents' assertion that the constitutionality of § 1432 has limited significance, Resp'ts' Opp'n 17, the Circuit and district courts would benefit from guidance regarding the appropriate level of scrutiny for discrimination based on sex and illegitimacy arising in the naturalization context. Cases pending before the Circuit and district courts raise issues identical to this case. *See, e.g.*, Brief of Petitioner-Appellant at 10, *Pierre v. Holder*, No. 10-2131 (2d Cir. Oct. 20, 2010) (arguing that § 1432(a)(3) violates Equal Protection by denying automatic derivative citizenship to the children of unwed naturalized fathers). In addition, courts continue to encounter cases implicating § 1432(a)(3) more broadly.[3] Thus, not only is this

[3] Since January 2009, federal courts have ruled on approximately 39 cases involving such claims. *See, e.g., Henry v. Quarantillo*, 414 F. App'x 363, 365 (2d Cir. 2011) (analyzing a claim to citizenship under § 1432(a) based on unwed father's naturalization); *Tavares v. Att'y Gen.*, 398 F. App'x 773, 776-77 (3d Cir. 2010) (terminating removal proceedings after recognizing that Petitioner had automatically derived citizenship under § 1432 upon his unwed mother's naturalization); *Frontera v. United States*, No. 05-CV-0423S, 2009 WL 909700, at *5 (W.D.N.Y. Mar. 31, 2009) (evaluating the FTCA claim of a plaintiff who, despite deriving citizenship under § 1432 after his widower father naturalized, was held in immigration detention for five years and wrongfully deported).

issue significant, but resolution of the appropriate level of scrutiny for the sex and illegitimacy distinctions in § 1432(a)(3) may alter the outcome of pending and future cases where individuals claim citizenship under this statute.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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