No. 22-10300

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KELVIN OSVALDO SILVA

Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Review of an Agency Order
Board of Immigration Appeals
Executive Office of Immigration Review
File No. A 041 421 501

PETITIONER'S OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Circuit Rule 28-1(c), Petitioner requests oral argument because this appeal raises novel constitutional issues, and the oral presentation of those issues would facilitate the Court's decision-making.

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. Factual Background 5

C. Procedural History 6

1. *Silva v. U.S. Att'y Gen.*, No. 20-13916 7

2. This Appeal (No. 22-10300) 8

SUMMARY OF ARGUMENT 8

STANDARD OF REVIEW 9

A. Gender Discrimination 10

B. Race Discrimination 11

ARGUMENT 12

I. THE SECOND CLAUSE IN § 1432(a)(3) UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF GENDER 12

A. Section 1432(a)(3) Is Based On Gender Stereotypes About The Role Of Mothers And Fathers, And Does Not Serve Any Important Governmental Objective 13

B. The Purported Justifications For The Gender Classification In § 1432(a)(3) Do Not Withstand Heightened Scrutiny 16

1. JUSTIFICATION #1: ensuring the noncitizen parent is out of the picture 17

2. JUSTIFICATION #2: ensuring a biological and actual relationship between the naturalized parent and child 20

3. JUSTIFICATION #3: the law does not improperly discriminate because foreign-born nonmarital children of naturalizing fathers may derive citizenship under other INA provisions 25

4. JUSTIFICATION #4: Congress has discretion to choose what aspects of a problem to address in a given statute 27

II. THE SECOND CLAUSE IN § 1432(a)(3) UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF RACE 29

A. The Historical Background, The Sequence Of Events Leading To Its Passage, And Contemporaneous Statements Show § 1432(a)(3) Was Enacted With A Racially Discriminatory Purpose 29

1. Historical background 29

2. Sequence of events leading to § 1432(a)(3)'s passage 34

3. Contemporaneous statements 37

B. Section 1432(a)(3) Had A Foreseeable Disparate Impact On Black Immigrants 41

III. THIS COURT SHOULD REMEDY THE UNCONSTITUTIONAL DISCRIMINATION IN THE SECOND CLAUSE OF § 1432(a)(3) BY HOLDING SILVA DERIVED CITIZENSHIP THROUGH HIS NATURALIZED FATHER 47

A. Extension Of Benefits Aligns With Congressional Intent 49

B. Extension Of Benefits Generates The Least Disruption To The Statutory Scheme 51

C. Extension Of Benefits Can Be Accomplished In Two Ways 53

1. This Court may rule that Silva derived citizenship from his father 53

2. This Court may determine what a valid § 1432(a)(3) would say 54

CONCLUSION 57

CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS 58

CERTIFICATE OF SERVICE 59

TABLE OF CITATIONS

Federal Cases

Ayton v. Holder, 686 F.3d 331
(5th Cir. 2012) 17, 20, 27

Barthelemy v. Ashcroft,
329 F.3d 1062 (9th Cir. 2003) 18, 20

Breyer v. Meissner,
214 F.3d 416 (3d Cir. 2000) 53

Bustamante-Barrera v. Gonzales,
447 F.3d 388 (5th Cir. 2006) 55-56

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443 U.S. 76 (1979) 47, 56

City of S. Miami v. DeSantis,
508 F. Supp. 3d 1209 (S.D. Fla. 2020) 41

Clark v. Jeter,
486 U.S. 456 (1988) 10

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245 F. App'x 904 (11th Cir. 2007) 1

Cole v. U.S. Att'y Gen.,
712 F.3d 517 (11th Cir. 2013) 9

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260 F. Supp. 2d 1258 (N.D. Ga. 2003) 41

Dale v. Barr,
967 F.3d 133 (2d Cir. 2020) 20

Dent v. Sessions,
900 F.3d 1075 (9th Cir. 2018) 10, 54

Duarte-Ceri v. Holder,
630 F.3d 83 (2d Cir. 2010) 49

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152 F. Supp. 829 (N.D. Cal. 1957) 35

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992 F.3d 1299 (11th Cir. 2021)..12

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526 U.S. 541 (1999) 12

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6 F. 256 (C.C.D. Or. 1880) 30

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647 F.3d 120 (4th Cir. 2011)..18, 26, 27, 56

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560 U.S. 413 (2010) 49

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882 F.3d 1364 (11th Cir. 2018)...*passim*

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481 F.3d 125 (2d Cir. 2007)..18, 26

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401 F.3d 1069 (9th Cir. 2005)..50

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576 U.S. 644 (2015) 11

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960 F.3d 1175 (9th Cir. 2020)....................23

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937 F.3d 200 (3d Cir. 2019)....................53

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430 U.S. 762 (1977)....................26

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518 U.S. 515 (1996)....................11, 13, 21

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426 U.S. 229 (1976)....................9, 10

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215 F.3d 795 (7th Cir. 2000)....................18, 26, 56

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420 U.S. 636 (1975)....................11

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446 U.S. 142 (1980)....................11, 16

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398 U.S. 333 (1970)....................50

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Guyer v. Smith,
22 Md. 239 (Md. 1864) 35, 36, 37

In re Po,
28 N.Y.S. 383 (City Ct. 1894) 30

In re Rodriguez-Tejedor,
23 I&N Dec. 153 (BIA 2001) 2

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8 U.S.C. § 1101(a)(47)(B)(i) 1

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8 U.S.C. § 1252(a)(2)(D) 1, 9

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8 U.S.C. § 1401 ....23, 47, 48, 51

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Pub. L. No. 106-395, 114 STAT. 1631, 106th Cong. 5, 9, 48

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§ 273 (1915) 35

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Ltr. from Sec'y of State (1906) 35

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USCIS Policy Manual 5

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 28(a)(4), Kelvin Osvaldo Silva ("Silva") seeks review of an order of the Board of Immigration Appeals ("BIA") dismissing his appeal of the Immigration Judge's ("IJ") order of removal based on lack of agency jurisdiction to review Silva's constitutional challenges to 8 U.S.C. § 1432(a)(3). *See* 3/3/22 Certified Administrative Record ("AR") 1-4. The BIA had jurisdiction under 8 C.F.R. § 1003.1(b). The IJ's March 6, 2020 removal order (AR 46-50) became final upon entry of the BIA's January 19, 2022 decision dismissing Silva's appeal. 8 U.S.C. § 1101(a)(47)(B)(i); AR 1-4. Silva timely petitioned this Court for review on January 28, 2022. Dkt. 1; 8 U.S.C. § 1252(b)(1).

This Court's jurisdiction to review a final order of removal is governed by 8 U.S.C. § 1252. *Claver v. U.S. Att'y Gen.*, 245 F. App'x 904, 905 (11th Cir. 2007); 8 U.S.C. §§ 1252(a)(2)(D) (court of appeals has jurisdiction to review "constitutional claims or questions of law raised upon a petition for review"), 1252(b)(5)(A) (court of appeals "shall" decide a nationality claim where there is no genuine issue of material fact). This Court accordingly has jurisdiction to review Silva's constitutional claims that § 1432(a) violates the Fifth Amendment's guarantee of equal protection under the law.

STATEMENT OF THE ISSUES

1. Whether 8 U.S.C. § 1432(a)(3) discriminates on the basis of gender in violation of the Fifth Amendment's equal protection guarantee.

2. Whether 8 U.S.C. § 1432(a)(3) discriminates on the basis of race in violation of the Fifth Amendment's equal protection guarantee.

3. Whether the proper remedy for the unconstitutional discrimination in 8 U.S.C. § 1432(a)(3) is to extend United States citizenship to Silva.

STATEMENT OF THE CASE

A. Statutory Background

There are three primary paths to United States citizenship: (1) birth in the United States; (2) naturalization; and (3) derivative citizenship from a United States citizen parent, either at birth or for minor children upon naturalization of their parent ("automatic naturalization"). Automatic naturalization is determined under "the law in effect when the last material condition was met." *Levy v. U.S. Att'y Gen.*, 882 F.3d 1364, 1366 n.1 (11th Cir. 2018) (citing *In re Rodriguez-Tejedor*, 23 I&N Dec. 153, 163 (BIA 2001)).

8 U.S.C. § 1101(c)(1) defines "child" for purposes of former 8 U.S.C. § 1432(a)(3), and provides:

> (c) As used in subchapter III of this chapter –
>
> (1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated

> under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, . . . if such legitimation . . . takes place before the child reaches the age of sixteen years, and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation . . . .

8 U.S.C. § 1101(c)(1) (1988).

Former 8 U.S.C. § 1432(a)[1] provides, in relevant part:

> (a) A child born outside of the United States of alien parents . . . 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*; and if . . . .
>
> [undisputed requirements omitted].

8 U.S.C. § 1432(a) (1985).[2]

---

[1] Because 8 U.S.C. § 1432(a) was in effect in 1988—when Silva was admitted as a lawful permanent resident and his father became a naturalized citizen—that version of the statute applies, even though it was superseded in 2000. *Levy*, 882 F.3d at 1366 n.1.

[2] All emphasis in brief added unless otherwise noted.

Section 1432(a)(3) discriminates on the basis of gender, because a naturalizing father can *never* confer citizenship on his "out of wedlock" (*i.e.*, nonmarital) child under that section, while a naturalized mother automatically confers citizenship on her nonmarital child in the absence of paternal legitimation of the child.

In the Nationality Act of 1940 ("1940 Act"), Congress expressly addressed the circumstances under which a child could derive citizenship from a single naturalizing parent. The statute required that, to automatically derive citizenship, the child's naturalizing parent: (1) was widowed; or (2) had custody of the child after a legal separation from the other parent. Nationality Act of 1940, H.R. 9980, 54 STAT. 1137, 76th Cong. 3d Sess. at 11-45-46 (Oct. 14, 1940) ("1940 Act"). Nonmarital children were not contemplated.

Then, Congress passed the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 STAT. 163, 82d Cong. 2d Sess. (Jun. 27, 1952) ("INA"), which, among other things, amended the 1940 Act to address the situation of a nonmarital child, who under the 1940 Act, could not "derive citizenship through the [unmarried] mother even though for other purposes of laws she is the sole parent." S. REP. NO. 81-1515, at 708 (1950). In doing so, however, Congress failed to address the fact that the same issue exists for *fathers* of nonmarital children. This omission resulted from legislators' outdated and stereotypical belief that mothers

would invariably bear sole responsibility for a nonmarital child. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1691 (2017) (During this era, a "habitual, but now untenable, assumption[] pervaded our Nation's citizenship laws": the "unwed mother is the natural and sole guardian of a nonmarital child.").

Section 1432(a)(3) also discriminates on the basis of race, because it was enacted with a discriminatory purpose and disparately impacted children of color.

In 2000, the Child Citizenship Act, Pub. L. No. 106-395, 114 STAT. 1631, 106th Cong. ("CCA") was enacted to replace former § 1432(a).[3] The CCA provides that a child born outside the United States automatically becomes a citizen when at least one parent of the child is a citizen, the child is under 18 years of age, and is in the legal and physical custody of the citizen parent. 8 U.S.C. § 1431(a)(1)-(3).

B. Factual Background

Silva was born in the Dominican Republic in 1976. AR 90. His father, Salomon, and mother, Petra, were not married, and their relationship ended before Silva was born. AR 118 ¶ 2. As Petra explained:

> I was eighteen years old when I had Kelvin. My mother was racist and did not approve of my relationship with

[3] Because the CCA is not retroactive, the law has been applied to those children who were under 18 years of age as of February 27, 2001. *See* USCIS Policy Manual, https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-4, at section D. Thus, former § 1432 of the INA applies to Silva, who was over 18 on February 27, 2001. *Id*.

> Kelvin's father or the fact that we had a child together, because Kelvin's father was dark-skinned. For this reason, I gave Kelvin to his father shortly after his birth, and Kelvin went to live with his father and his father's family.

AR 118 ¶ 3. Salomon was Silva's sole custodial parent throughout Silva's childhood. AR 114 ¶¶ 2-4.

Salomon relocated to the United States in the 1980s. AR 105. Salomon made arrangements for Silva to remain in the Dominican Republic with Salomon's parents and continued to fully support Silva. AR 122. Salomon became a U.S. citizen on January 5, 1988. AR 107. On April 13, 1988, when Silva was 11 years old, he was admitted to the United States as a lawful permanent resident. AR 50. Silva lived with his father and paternal half-siblings in New Jersey, and remained in the United States until his removal. AR 114 ¶¶ 3-4. Petra, who by that time had lived in the United States for many years with her husband and other children, became a United States citizen in 1998. AR 118 ¶¶ 3-4; AR 408.

Salomon died in an accident in 1993, when Silva was 17 years old. AR 110. Salomon's death was "very hard" on Silva, who "lost the only parent who cared or provided for him." AR 114 ¶ 5.

C. Procedural History

The Government initiated removal proceedings against Silva in 2019, following his 2013 conviction for drug offenses. AR 336-37. Silva filed a motion to terminate the removal proceedings, asserting he derived U.S. citizenship through

his father pursuant to § 1432(a)(3) and therefore was not subject to removal. AR 338. On March 6, 2020, the IJ denied Silva's motion and ordered his removal to the Dominican Republic. AR 336-40. The IJ found that Silva was born out of wedlock on October 16, 1976; that his father naturalized on January 5, 1988; that Silva was admitted to the United States at age 11 on April 13, 1988; and that he was in his father's custody when he was admitted. AR 338. However, the IJ ruled that because Silva's parents never legally married, they did not have a "legal separation" and, as a result, Silva did not derive U.S. citizenship through his father under § 1432(a)(3). *Id.*

Silva appealed the IJ's decision and, on September 30, 2020, the BIA affirmed. AR 293-94.

1. *Silva v. U.S. Att'y Gen.*, No. 20-13916 (11th Cir. filed Oct. 19, 2020)

On October 19, 2020, Silva filed a petition in this Court seeking review of the BIA's decision.

On June 3, 2021, this Court granted the Government's unopposed motion to remand to the BIA based on deficiencies in the Administrative Record, vacated the BIA's September 30, 2020 decision, and remanded the action to the BIA for further proceedings. AR 283.

On January 19, 2022, the BIA again dismissed Silva's appeal. AR 3-4. In doing so, the BIA noted it lacked the authority to decide Silva's constitutional claims. *See* AR 4 ("The respondent's constitutional challenges to former section 321(a)(3) of the Act are not within the Board's authority to adjudicate.") (citations omitted).

2. This Appeal (No. 22-10300)

On January 28, 2022, Silva timely petitioned this Court for review of the BIA's January 19, 2022 decision. *See* 8 U.S.C. § 1252(b)(1).

On February 11, 2022, this Court denied Silva's motion for a stay of his removal. On February 15, 2022, Silva was removed to the Dominican Republic.

SUMMARY OF ARGUMENT

Silva lived in the United States for over 30 years before being removed in 2022. What prevented him from being a U.S. citizen are the unconstitutional classifications in the now-superseded 8 U.S.C. § 1432(a)(3).

The second clause in § 1432(a)(3) unconstitutionally discriminates on the basis of gender because it creates a path to automatic citizenship for a nonmarital child through the child's naturalizing mother, but does not provide a similar path for a nonmarital child through the child's naturalizing father. This gender-based classification relies on the outdated stereotype that mothers have closer bonds with their nonmarital children than fathers, as discussed in *Morales-Santana*, 137 S. Ct.

at 1691, 1693. Because these anachronistic notions were the basis for § 1432(a)(3)—and because that law does not serve any valid, much less "exceedingly persuasive" governmental interest—it fails heightened scrutiny.

Section 1432(a)(3)'s disparate treatment of unwed fathers also unconstitutionally discriminates on the basis of race. The statute was enacted with a racially discriminatory purpose and had a disparate impact on children of color.

Finally, to remedy the unconstitutional discrimination in § 1432(a)(3), that statute should be extended so naturalized fathers can confer citizenship on their foreign-born nonmarital children and Silva should be deemed a U.S. citizen under § 1432(a)(3). This remedy is consistent with Congress's general intent to provide a path to derivative citizenship for children who are in the custody of their American parent, as reflected in the CCA, 8 U.S.C. § 1431.

STANDARD OF REVIEW

This Court reviews legal and constitutional challenges to the INA *de novo*. 8 U.S.C. § 1252(a)(2)(D); *see Levy*, 882 F.3d at 1366-67; *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 523 (11th Cir. 2013), *abrogated on other grounds by Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020).

"[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229,

239 (1976) (citations omitted)). An equal protection violation need not appear on the face of the statute; rather, a litigant may show the challenged law was enacted with "an invidious discriminatory purpose [which] may often be inferred from the totality of the relevant facts." *Id.* at 241-42. In considering whether a statutory classification violates equal protection, courts apply different levels of scrutiny to different types of classifications. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

A. Gender Discrimination

Heightened scrutiny applies when the law prescribes "one rule for mothers, another for fathers." *Morales-Santana*, 137 S. Ct. at 1690; *Dent v. Sessions*, 900 F.3d 1075, 1081 (9th Cir. 2018) ("[T]he Supreme Court clarified in *Morales-Santana* that, when the petitioner presents a claim of *citizenship*, the proper standard for a gender discrimination claim is heightened scrutiny, just as it would be in the non-immigration context.") (emphasis in original, citation omitted).

A party who seeks to defend a statute that classifies individuals on the basis of gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Morales-Santana*, 137 S. Ct. at 1690 (citations omitted). The defender of the classification meets this burden "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)

(quoting *Wengler v. Druggists Mut. Ins. Co*., 446 U.S. 142, 150 (1980)). Under heightened scrutiny, "[t]he burden of justification is demanding and it rests entirely on [the party defending the classification]." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Further, a justification that sustains a gender-based classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). And because "new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged," *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015), the classification "must substantially serve an important governmental interest *today*." *Morales-Santana*, 137 S. Ct. at 1690.

B. Race Discrimination

Claims alleging race discrimination are guided by an eight-factor test—the first five of which come from the Supreme Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), and the remaining three from Eleventh Circuit caselaw. The *Arlington Heights* factors are: "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and

substantive departures; and (5) the contemporary statements and actions of key legislators." *Greater Birmingham Ministries v. Sec'y of State for Al.*, 992 F.3d 1299, 1322 (11th Cir. 2021) ("*GBM*"); *see also Arlington Heights*, 429 U.S. at 266-68. The Eleventh Circuit has added the following considerations: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact[;] and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1322.

Absent proof of a discriminatory purpose, courts apply a rational basis standard of review. *See Arlington Heights*, 429 U.S. at 265-66. But if a race discriminatory purpose is found to be a motivating factor for the government's decision, a court must apply strict scrutiny. *See Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).

ARGUMENT

I. THE SECOND CLAUSE IN § 1432(a)(3) UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF GENDER.

Section 1432(a)(3) discriminates on the basis of gender by automatically naturalizing the nonmarital child of a naturalizing mother, but not of a naturalizing father. The statute provides, subject to additional conditions undisputed here, that a child born outside of the United States automatically becomes a citizen upon "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." 8 U.S.C. § 1432(a)(3). No similar provision allows for automatic derivative citizenship upon the nonmarital

child based on the naturalization of the *father*. What this means is that naturalizing mothers of nonmarital children have superior rights under § 1432(a)(3) than naturalizing fathers of nonmarital children. Those fathers have no rights at all.

Section 1432(a)(3) does not survive heightened scrutiny. The anachronistic stereotypes underlying the gender-based classification in § 1432(a)(3) are untenable today. *See Morales-Santana*, 137 S. Ct. at 1690-91. Even if Congress was motivated by other interests in enacting the provision, that gender classification is not "substantially related" to serving those interests. *Virginia*, 518 U.S. at 533 (internal citations omitted).

A. Section 1432(a)(3) Is Based On Gender Stereotypes About The Role Of Mothers And Fathers, And Does Not Serve Any Important Governmental Objective.

The party defending legislation that differentiates on the basis of gender must show "that the [challenged] classification serves important governmental objectives." *Virginia*, 518 U.S. at 533 (internal citations omitted). Unlike rational basis review, the proffered objective must be the *actual* purpose behind the statute, not a *post hoc* justification. *Id.* at 536. Courts typically conduct a "searching analysis" to uncover that actual purpose, examining both recent and earlier history, *id.* at 536-37, including contemporaneous documentation and statements made by officials. *See Arlington Heights*, 429 U.S. at 268.

Here, the actual reason behind the challenged classification was the improper and invidious stereotype that mothers are invariably the sole caretakers of nonmarital children. However, that reason is not an "important" or "exceedingly persuasive" governmental justification. It is an impermissible one.

While the legislative history of the challenged portion of § 1432(a)(3) is sparse, commentary by legislators and executive branch officials regarding the 1940 and 1952 statutes, as well as proposed amendments in the 1970s, confirm gender stereotypes underpin Clause 2 of § 1432(a)(3). First, at the time of the INA's enactment, government officials believed unmarried mothers were the "natural guardians" of their nonmarital children. *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L. J. 2134, 2201 (2014) ("Collins"); *Morales-Santana*, 137 S. Ct. at 1690-91, 1692 (in "nearly uniform view" of U.S. officials, "almost invariably," the mother alone "concern[ed] herself with [a nonmarital] child") (internal quotation marks, citation omitted).

As the Supreme Court has explained, in the 1940 Act,

> Congress . . . codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration . . . explained: "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian." [Hearings on H.R. 6127 before the House Committee on Immigration and Naturalization,

> 76th Cong., 1st Sess., 43, 431 (1940) ("1940 Hearings"]
> (internal quotation marks omitted).

Morales-Santana, 137 S. Ct. at 1692.

In 1952, legislators added the second clause in § 1432(a)(3) to bestow derivative citizenship upon what Congress assumed to be the entire class of nonmarital children based on a parent's gender—*i.e.*, nonmarital children of mothers. *See* H.R. REP. NO. 82-1365 at 4 (1952).[4] In short, in 1952, Congress repurposed the gender-discriminatory formulation of derivative citizenship it introduced to U.S. citizenship law in the 1940 Act.

Thus, the legislative record surrounding the second clause of § 1432(a)(3) reveals that Congress's failure to create a path for unmarried fathers to transmit citizenship to their children stems from outdated stereotypes—namely, that unmarried mothers are the natural guardians of nonmarital children, and that unmarried men do not establish any connection with their nonmarital children.

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[4] These stereotypes were again articulated during the 1976 hearings on whether to grant fathers the same immigration preferences as mothers. At those hearings, the State Department's Leonard Walentynowicz promoted the view that "there is frequently no unity of family between the illegitimate child and its natural father . . . [and] the separation of the child from its natural father would not be violative of the unification of family principles." *Review of Immig. Problems: Hearings Before the Subcomm. on Immig. Citizenship, and Int'l Law of the Comm. on the Judiciary, H.R. 10993*, 94th Cong. 1st Sess., 134 (Jul. 28, 1976) ("1976 Hearings") (App'x 13).

Thus, the gender classification in the second clause of § 1432(a)(3) fails heightened scrutiny review.

B. The Purported Justifications For The Gender Classification In § 1432(a)(3) Do Not Withstand Heightened Scrutiny.

In other cases, courts have cited the following justifications in upholding laws like § 1432(a)(3):

1. the law protects the noncitizen parent's rights by ensuring the noncitizen parent is no longer in the child's life;
2. the law ensures a biological and actual relationship between the naturalized parent and child;
3. the law does not improperly discriminate because nonmarital children of naturalizing fathers may acquire citizenship under other INA provisions; and
4. Congress does not have to address all aspects of a problem in a given statute or provide an avenue for relief to all claimants.

As explained below, none of these justifications, either alone or taken together, passes heightened scrutiny. *See, e.g.*, *Wengler*, 446 U.S. at 150-52. That § 1432(a)(3) so poorly fits these purported goals underscores that its actual roots are based on outdated and discriminatory gender stereotypes.

1. JUSTIFICATION #1: ensuring the noncitizen parent is out of the picture

In *Levy*, a panel of this Court—in *dicta*[5]—described the congressional purpose underlying the second clause of § 1432(a)(3) as follows:

> Congress limited single parent derivative citizenship to instances where it is fair to assume the alien parent was out of the picture. *See Pierre*, 738 F.3d at 53; *Catwell v. U.S. Att'y Gen.*, 623 F.3d 199, 211 (3d Cir. 2010). That rationale is reflected most clearly in § 1432(a)(2), where the non-naturalizing parent is deceased. But it also animates § 1432(a)(3), both clauses of which safeguard an alien parent's rights. The first clause, which applies to married parents, permits the naturalizing parent's rights to trump the alien parent's only when the couple is legally separated and the naturalizing parent has legal custody. 8 U.S.C. § 1432(a)(3). *The second clause, involving parents who never married, permits a naturalizing mother's rights to trump an alien father's rights only when paternity is not established. Id. In both situations, it is fair to assume that the alien parent has a lesser interest in the child's citizenship.*
>
> . . . For those reasons, we agree with our sister circuits that § 1432(a) is substantially related to protecting parental rights. *See*, *e.g*., *Pierre*, 738 F.3d at 53; *Ayton*, 686 F.3d at 339.

Levy, 882 F.3d at 1368-69 (parallel citations omitted); *see also Pierre v. Holder*, 738 F.3d 39, 52 (2d Cir. 2013) ("Congress, in enacting § 1432(a), intended to

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[5] The petitioner in *Levy* argued the first clause of § 1432(a)(3), which required a "legal separation of the parents," unconstitutionally discriminated on the basis of gender and legitimacy. *Levy*, 882 F.3d at 1367. Thus, the *Levy* court's discussion of the second clause of § 1432(a)(3) is *dicta*.

assure, both as to children of married parents and children out of wedlock, that the interests of a known alien parent not invariably be trumped by those of the naturalizing parent."); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003) ("If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien[] parent[']s rights could be effectively extinguished."), *overruled in part on other grounds, as recognized in United States v. Mayea-Pulido*, 946 F.3d 1055, 1062 (9th Cir. 2020); *Lewis v. Gonzales*, 481 F.3d 125, 131 (2d Cir. 2007); *Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000).

This rationale cannot justify or explain Congress's failure to provide a path to derivative citizenship for nonmarital children of naturalized fathers, while doing so for nonmarital children of naturalized mothers. There is no non-discriminatory reason to believe fathers of nonmarital children are more likely to be "out of the picture" than mothers. The physiological fact that mothers give birth to children is not a reason to believe mothers are more likely to assume a custodial role or to be "in the picture" in their child's life. Indeed, the Supreme Court has rejected this specific gender stereotype. *See Morales-Santana*, 137 S. Ct. at 1692-93 ("describing this and related gender stereotypes others as "obsolescing," "constraining," and creating a "self-fulfilling cycle of discrimination"); *see also Johnson v. Whitehead*, 647 F.3d 120, 135 (4th Cir. 2011) (Gregory, J., dissenting)

("Congress could have made custody or support the relevant criterion for unmarried fathers, in the same way it did for unmarried mothers . . . in § 1432(a). Instead, 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.").

Section 1432(a)(3) is based on the "once habitual, now untenable" assumption that the "unwed mother is the sole and natural guardian of the nonmarital child." *See Morales-Santana*, 137 S. Ct. at 1690-91. Because § 1432(a)(3)'s objective is "to exclude or protect members of one gender in reliance on fixed notions concerning that gender's roles and abilities, the objective itself is illegitimate." *Id.* at 1692 (internal quotation marks, brackets omitted). No important governmental interest is served by laws grounded "*in the obsolescing view that unwed fathers are invariably less qualified and entitled than mothers to take responsibility for nonmarital children*." *Id.* (internal quotation marks, citation, brackets omitted). Laws based on such "[s]tereotypes about women's domestic roles" disserve both women and "*men who exercise responsibility for raising their children*." *Id*. at 1693. Accordingly, this justification is insufficient to allow the second clause of § 1432(a)(3) to pass heightened scrutiny.

2. JUSTIFICATION #2: ensuring a biological and actual relationship between the naturalized parent and child

Although this Court (in *Levy*) and other circuit courts have cited to *Nguyen v. INS*, 533 U.S. 53 (2001), in rejecting equal protection challenges to § 1432(a)(3),[6] *Nguyen* in fact supports Silva's position.

In *Nguyen*, the Supreme Court addressed 8 U.S.C. § 1409(a) & (c), which governs the "acquisition of United States citizenship" at birth by children born outside the United States to unmarried parents where only one of the parents was a United States citizen. 533 U.S. at 59-60. The law in question "impose[d] different requirements for the child's acquisition of citizenship depending upon whether the citizen parent [was] the mother or the father." *Id*. at 56-57. In the former instance—where the mother was a citizen—the statute provided the mother's foreign-born child was a citizen at birth if the mother had previously been physically present in the United States for a period of one year. *Id.* at 60. However, in the latter instance—where the father was a citizen—the statute required, for citizenship to be transmitted, "one of three" additional and "affirmative steps to be

[6] *See Levy*, 882 F.3d at 1368-69; *Dale v. Barr*, 967 F.3d 133, 143-45 (2d Cir. 2020) (discussing *Pierre*'s reliance on *Nguyen*); *Pierre*, 738 F.3d at 56-58 ("In light of *Nguyen*, the gender classification in § 1432(a) was justified."); *Ayton v. Holder*, 686 F.3d 331, 338 (5th Cir. 2012) (Section 1432(a)(3) survives heightened scrutiny and "is analogous to a similar immigration statute that survived a gender-based equal protection claim in *Nguyen*[.]"); *Barthelemy*, 329 F.3d at 1068 ("Unfortunately for Barthelemy, the Supreme Court extinguished this equal protection argument in *Nguyen*.").

taken" before the child turned eighteen: "legitimation; a declaration of paternity under oath by the father; or a court order of paternity." *Id.* at 62.

For this type of "gender-based classification to withstand equal protection scrutiny," the Court said, the government was required to establish, at a minimum, that the classification "serve[d] 'important government objectives.'" *Id.* at 60 (quoting *Virginia*, 518 U.S. at 533).

The Court determined the § 1409(a) & (c) gender classification was "justified by two important governmental objectives." *Id.* at 62. First, the statutory methods of demonstrating the existence of a father-child relationship helped "assur[e]" the "exist[ence]" of a "biological parent-child relationship." *Id.* "Fathers and mothers," the Court wrote, "are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. In light of the fact that mothers give birth to children and fathers "need not be present" at the event of birth, the fact that the statute "impos[ed] . . . a different set of rules for making [a] legal determination with respect to fathers and mothers [was] neither surprising nor troublesome from a constitutional perspective." *Id.* at 63.

Second, the gender classification at issue in *Nguyen* was warranted because it helped perform the "critical[ly] importan[t]" task of "ensuring some opportunity for a tie between citizen father and foreign[-]born child" that could serve as "a reasonable substitute for the opportunity manifest between mother and child at the

time of birth." *Id.* at 66. That statute was thus constitutional even though it imposed requirements on the unmarried American father of a foreign-born child, which were not imposed on the unmarried American mother of a foreign-born child, in order for the citizenship to pass from parent to child.

But, here is the key point: in the law at issue in *Nguyen*, 8 U.S.C. § 1409(a) & (c), Congress provided paths for citizenship for nonmarital children born to *both* mothers *and* fathers (albeit with different requirements). By contrast, in the second clause of § 1432(a)(3), Congress provided a path for derivative citizenship *only* for nonmarital children of naturalized mothers, with no corresponding path for nonmarital children of naturalized fathers.

If Congress had done in § 1432(a)(3) what it did in § 1409(a)—and required naturalized fathers to establish "legitimation; a declaration of paternity under oath by the father; or a court order of paternity[,]" *Nguyen*, 533 U.S. at 62, as a predicate for bestowing derivative citizenship on their children—then *Nguyen* would provide at least some support for the government's argument in this case. *See id.* at 70 (noting additional requirements for fathers in § 1409(a) were "minimal").

But the reasoning in *Nguyen* highlights Congress's constitutional error in enacting the second clause of § 1432(a)(3): Congress failed to address nonmarital children of naturalized fathers *at all*. There is no substantial interest served by

Congress's decision to create a path for citizenship for the foreign-born nonmarital children of *citizen* fathers in § 1409(a)—as upheld in *Nguyen*—but to fail to create a path for citizenship for the foreign-born nonmarital children of *naturalized citizen* fathers in the second clause in § 1432(a)(3).[7] That omission cannot be defended based on biological differences between women and men or the desire to ensure an actual familial bond between a father and child.[8]

Morales-Santana provides further support for Silva's position. In that case, the Court reviewed the provisions in 8 U.S.C. §§ 1401 and 1409(a) & (c), which required unmarried U.S.-citizen fathers to satisfy a multi-year period of physical

[7] Under § 1409(a), citizen fathers can be naturalized or born in the United States, so long as the father becomes a citizen prior to the child's birth; by contrast, fathers under Clause 2 of § 1432(a)(3) are all naturalized fathers who become citizens after a child is born.

[8] In *Roy v. Barr*, 960 F.3d 1175, 1181-83 (9th Cir. 2020), the Ninth Circuit rejected a gender-based challenge to § 1432(a)(3). However, in doing so, the *Roy* court failed to account for the Supreme Court's reasoning in *Nguyen*. Specifically, the *Roy* court posited the gender-based omission in § 1432(a)(3) was Congress's failure to address the "unlikely," but "not impossible" scenario: "upon the naturalization of the *father* if the child was born out of wedlock and the child's *maternity* has not been established by legitimation." *Id.* at 1181-82 (emphasis in original). However, as explained in *Nguyen*, because a mother's relationship to her child "is verifiable from the birth itself," as a "mother's status is documented in most instances by the birth certificate or hospital records," *Nguyen*, 533 U.S. at 62, Congress could adopt "a different set of rules" for fathers and mothers to account for the biological distinction that the father "need not be present" at birth and, even then, "that circumstance [alone] is not incontrovertible proof of fatherhood." *Id.* at 62-63. But what Congress cannot do is to omit nonmarital children of naturalized fathers from § 1432(a)(3) altogether based on the outdated stereotype that the mother would be the only custodian of such children.

presence in the United States prior to the foreign-born child's birth, but required unmarried U.S.-citizen mothers to have lived in the United States for just one year prior to the child's birth to transmit citizenship to the child. *Morales-Santana*, 137 S. Ct. at 1686.

The Court struck down this gender-based physical presence classification, which was rooted in the "now untenable" and "stunningly anachronistic" assumption that an "unwed mother is the natural and sole guardian of a nonmarital child." *Id.* at 1691, 1693. In doing so, the Court rejected the Government's arguments that the classification ensured a connection between the child to become a citizen and the United States. *See id*. at 1695-96 ("One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny.").

The statute at issue here, § 1432(a)(3), is *weaker* from a constitutional perspective than the law struck down in *Morales-Santana*. In § 1409(a) & (c), Congress provided paths to derivative citizenship for the foreign-born nonmarital children of *both* citizen mothers *and* citizen fathers, albeit with constitutionally indefensible physical presence requirements that significantly favored mothers over fathers. *Id.* at 1693. By contrast, in § 1432(a)(3), Congress provided *no path* to derivative citizenship for the foreign- born nonmarital children of naturalized fathers, and instead deemed that only the foreign-born nonmarital children of

naturalized mothers were entitled to derivative citizenship. And, just as the disparity in physical presence requirements in § 1409(a) & (c) "cannot fairly be described as 'minimal[,]'" *id.* at 1694, the absence of any path to derivative citizenship for the nonmarital children of naturalized fathers in § 1432(a)(3) is not minimal. That omission is discriminatory on its face, and rests on the same "now untenable" and "stunningly anachronistic" legislative assumption that an unmarried mother "is the natural and sole guardian of a nonmarital child." *See id.* at 1691, 1693.

In sum, § 1432(a)(3) discriminates against nonmarital fathers not to further any substantial governmental purpose, but simply because Congress assumed that fathers would never have custody of their nonmarital children. Thus, § 1432(a)(3) violates the Fifth Amendment's equal protection guarantee and cannot be justified based on the need to ensure a biological connection between nonmarital parents and their foreign-born children.

3. JUSTIFICATION #3: the law does not improperly discriminate because foreign-born nonmarital children of naturalizing fathers may derive citizenship under other INA provisions

An unconstitutional law cannot be defended based on the existence of other sections of the INA, under which a nonmarital child of an American father could theoretically derive citizenship. Some courts have incorrectly ruled that alternate routes to naturalization render facially discriminatory provisions of the INA

constitutional. *See Pierre*, 738 F.3d at 54-55; *Johnson*, 647 F.3d at 126; *Lewis*, 481 F.3d at 132; *Wedderburn*, 215 F.3d at 800, 802.

Trimble v. Gordon, 430 U.S. 762 (1977), illustrates the fatal flaw in this reasoning. In *Trimble*, the Supreme Court held that the Illinois Probate Act violated the equal protection clause of the Fourteenth Amendment. *Id.* at 776. The Probate Act allowed nonmarital children to inherit by intestate succession only from their mothers, whereas marital children could inherit by intestate succession from both their mothers and fathers, violated equal protection. *Id*. In rejecting the argument that there may have been other ways for the nonmarital child to have inherited, the Supreme Court explained that "equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. *If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances*." *Id.* at 773-74. "By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, *the analysis loses sight of the essential question*: the constitutionality of [the challenged] discrimination . . . ." *Id*.

Likewise, the possibility that Silva or other similarly situated children could have eventually acquired citizenship via other provisions of the INA "loses sight of the essential question": the unconstitutional gender-based classification in the

second clause of § 1432(a)(3). Thus, the existence of alternative paths to naturalization is insufficient to survive heightened scrutiny analysis. *See Johnson*, 647 F.3d at 135 (Gregory, J., dissenting) (placing "more onerous burdens . . . on the children of unmarried fathers" is not justified by alternate means for those fathers to pass citizenship to their children).[9]

4. JUSTIFICATION #4: Congress has discretion to choose what aspects of a problem to address in a given statute

Some courts have noted that the equal protection clause does not require Congress to create a path to derivative citizenship to address every claimant's position, and that Congress can choose to address issues incrementally or not at all. *See*, *e.g.*, *Pierre*, 738 F.3d at 53-54 (The fact "that Congress either did not spot, or spotted but did not act to close, this hole in the statutory framework did not make § 1432(a)(3) unconstitutional."); *Levy,* 882 F.3d at 1368-69 (the statute withstands heightened scrutiny even though it did not "provide an avenue for derivative citizenship for children . . . whose paternity was established, whose unmarried parents lived separately, and whose non-custodial alien parent was out of the picture") (citing *Pierre*, 738 F.3d at 53; *Ayton*, 686 F.3d at 339).

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[9] In this case, Silva could not naturalize under 8 U.S.C. § 1433. Silva's father died in 1993, when Silva was 17 years old. AR 110. Until 2002, § 1433 allowed only a citizen parent to petition for their child's naturalization. Thus, Silva could not naturalize under § 1433 after his father's death because no citizen parent was alive to petition for him prior to him turning 18.

There are two problems with this justification. First, it begs the question: was the basis for the "hole" left in the statutory framework constitutionally permissible? For example, under this justification, Congress's failure to address the derivative citizenship of nonmarital children in the 1940 Act does not create an equal protection problem because Congress can act incrementally to address issues as it becomes aware of them. However, having decided in the 1952 INA to address the issue of automatic citizenship for nonmarital children in the second clause of § 1432(a)(3), Congress must have a substantial non-discriminatory reason for providing a path only for nonmarital children of naturalized mothers, and not for nonmarital children of naturalized fathers. And, as explained above, there is none. *See Morales-Santana*, 137 S. Ct. at 1693 n.12 ("[L]aws treating fathers and mothers differently 'may not be constitutionally applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child.'").

The second problem with this justification is that it has no limiting principle. Stating the obvious, *any* time Congress enacts a statute, it is addressing *some* aspect of an issue. Thus, *any* statute could be defended based on this justification. For example, a statute that provided derivative citizenship for nonmarital children born to "parents with blue eyes or blond hair" could be defended on the ground that it addressed one aspect of the issue of nonmarital children of naturalized

parents, and Congress could take up the issue of children of "parents with brown eyes or black hair" at a later date. Given how clearly unconstitutional such a statute would be, the same is true of § 1432(a)(3), which omitted a path for citizenship for nonmarital children through their fathers based on stereotypes regarding gender roles, which permeated the 1940 Act and the INA.

II. THE SECOND CLAUSE IN § 1432(a)(3) UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF RACE.

The historical record contains evidence that § 1432(a)(3)'s disparate treatment of unmarried fathers was enacted with the discriminatory purpose of limiting the number of children of color who could derive U.S. citizenship, and it has had a disparate impact on children of color in immigrant families.

A. The Historical Background, The Sequence Of Events Leading To Its Passage, And Contemporaneous Statements Show § 1432(a)(3) Was Enacted With A Racially Discriminatory Purpose.

1. Historical background

From the nation's inception, citizenship was identified with whiteness; thus, early citizenship laws advanced a vision of the United States as a nation of white citizenry upheld by an exploited laboring class comprised of non-whites. *See* Martha S. Jones, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 128 (2018). Beginning in 1790, citizenship by naturalization was restricted by statute to "free white persons." Naturalization Act of 1790, H.R. 40, 1 STAT. 103, 1st Cong. 2d Sess. (Mar. 26, 1790). Black people

remained ineligible for naturalized citizenship until 1870, when Congress extended eligibility to people of African descent. Naturalization Act of 1870, H.R. 2201, 16 STAT. 254, 41st Cong. 2d Sess. (Jul. 14, 1870). Nevertheless, throughout the late 19th and early 20th century, judges and lawmakers fueled by deep and pervasive racist sentiments lamented the fact that Black people were racially eligible to naturalize, even though "intermediate and much-better-qualified red and yellow races" were not. *See*, *e.g.*, *In re Camille*, 6 F. 256, 257–58 (C.C.D. Or. 1880); *In re Po*, 28 N.Y.S. 383, 384 (City Ct. 1894); *Debates on Regulation of Immig., H.R. 6060*, 63d Cong. 3d. Sess., 52 Cong. Rec. 805 (1914) ("1914 Debates") (App'x 26).

In 1870, no one thought immigration of Black people would become common, *see Camille*, 6 F. at 258, but that began to change at the turn of the century as people from the Caribbean began immigrating to the United States in higher numbers. *See* Angela M. Banks, *Respectability and the Quest for Citizenship*, 83 BROOKLYN L. REV. 1, 16, n.74, 77 (2017). Legislative efforts were made to reinstate restrictions on Black people's access to citizenship, particularly as lawmakers considered both growing demand for Black immigrant labor and apprehension about rising rates of Black immigration. *See* Lara Putnam, *The Ties Allowed to Bind: Kinship Legalities and Migration Restriction in the Interwar Americas*, 83 INT'L LABOR & WORKING-CLASS HISTORY 191, 195 (2013) ("Putnam

2013"). Many of these apprehensions were undergirded by concerns about miscegenation, particularly between Black men and white women. Reflecting those concerns, in 1914, the Senate passed an amendment to an immigration bill that would have excluded "[a]ll members of the African or black race" from admission to the United States, prompted by "very undesirable immigration of the African race from the West Indies" where "the races intermarry." 1914 Debates (App'x 26). According to the senator who introduced the amendment, "every West Indian negro who comes to the South comes with that idea in his mind." *Id.* Such deeply prejudiced views persisted throughout the first half of the 20th Century.

In 1924, the Johnson-Reed Act established an immigration quota system[10] based on the racial composition at that time of "inhabitants in [the] continental United States," which categorically excluded the "descendants of slave immigrants," "[r]eflecting the views of some legislators that black immigrants would not respect segregation and antimiscegenation statutes[.]" Hiroshi Motomura, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 128 (2006). The following year, a report published by the House Committee on Immigration and Naturalization focused on the prevalence of "race mixture" and of nonmarital family arrangements among

[10] The racially discriminatory national origins quota system was not fully eliminated until 1965. *See* Lyndon B. Johnson, Remarks on Signing the Immigration Act of 1965 (Oct. 3, 1965).

Black and Indigenous peoples in the Caribbean and Latin America, warning that the economic argument for immigration to the U.S. "has always been dangerous" and emphasizing that "[n]o man is a worker alone. He is also a citizen and must further be viewed as the father of more citizens also." *See* Robert F. Foerster, *The Racial Problems Involved in Immig. from Latin Am. and the West Indies to the U.S.*, in *Hearings of the Comm. on Immig. and Naturalization*, *House of Reps.,* 68th Cong. 2d Sess. 303, 326, 329-30, 334 (Mar. 3, 1925) (App'x 29-73).

In 1930, lawmakers and witnesses repeatedly emphasized concerns about intermarriage between white women and immigrant men of color, particularly Black immigrant men. *See Hearings Before the Comm. on Immig. and Naturalization, House of Reps., on the Bills, H.R. 8523, H.R. 8530, H.R. 8702, to Limit the Immig. of Aliens to the U.S., and for Other Purposes*, 71st Cong. 2d Sess. at 69, 74-75, 94, 221-23, 281, 424-29 (1930) (App'x 74-88).

Concerns about the growth of the Black population in the U.S. through immigration, intermarriage and naturalization persisted throughout the 1940s and 1950s. Discrimination and mistreatment of Black immigrants during these years was rampant; between 1943 and 1947, tens of thousands of Black Caribbean temporary workers were transported under intergovernmental service agreements with the United States to work in deplorable conditions with very few protections. *See Farm Worker Program*, Encyclopedia of African Am. History and Culture,

Encyclopedia.com, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/farm-worker-program (last accessed Jun. 22, 2022). At the same time, Black American soldiers returning home from war were met with discrimination and violence upon their return to the U.S. *See* Alexis Clark, *Returning From War, Returning to Racism*, N.Y. TIMES MAG. (Jul. 30, 2020), https://www.nytimes.com/2020/07/30/magazine/black-soldiers-wwii-racism.html. Undergirding this mistreatment of Black migrants and Black soldiers alike was the belief that equitable treatment would increase the chances they would intermingle with white women; in the 1940s, interracial marriages, particularly those between Black and white partners, were illegal in approximately 30 U.S. states. *See* Collins at 2183.

In 1952, decades of efforts to restrict Black immigration culminated in the McCarren-Walter Act, also known as the Immigration and Nationality Act of 1952. For several years leading up to 1952, approximately 1,000 U.S. visas were issued annually to people from Jamaica and other Caribbean colonies. *Hearings Before the President's Comm'n on Immig. and Naturalization* at 249 (1952) ("1952 Hearings") (App'x 93). The INA "drastically curtail[ed]" Black immigration by reducing those numbers to 100 per country. *Id.* at 1113 (App'x 111). Multiple groups objected to the new quota restrictions because they amounted to racial discrimination against Black migrants. *Id.* at 246-52 (App'x 90-96); Alec Jones,

McCarran Anti-Negro Law Bars West Indian Migration, 3 FREEDOM 1 (Jan. 1953) (App'x 131) ("For West Indians the McCarran law means [an] insignificant quota within a quota—practical exclusion from the United States!"). Other groups supported the INA's restriction on Black immigration. *Id.* at 969-73 (App'x 97-101) ("[M]any of their leaders, as well as many Negroes themselves, seek a solution to their racial inferiority through a gradual amalgamation of the white race . . . . We need no modification or change in the McCarran-Walter Immigration Act unless it be to tighten even further the protective walls against Negroid and oriental immigration.").

2. Sequence of events leading to § 1432(a)(3)'s passage

Prior to 1940, there was no legislative prohibition against nonmarital children deriving U.S. citizenship through their fathers. However, that changed starting with the enactment of § 314 of the 1940 Act, the predecessor to § 1432(a)(3), which did not allow nonmarital children born abroad to derive U.S. citizenship through their single custodial parent. "Illegitimacy" has long been used to deny equal protection to people of color, and to Black people in particular. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. R. 1277, 1285-1286 (2015) ("[P]roposals for punitive anti-illegitimacy laws—denial of public assistance, institutionalization of nonmarital children sterilization, and imprisonment—were widely understood as part of the backlash

against civil rights."); Edwin M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD § 273, at 612 (1915) ("[I]t seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens."). In 1952, Congress moved the "legal separation" requirement to 8 U.S.C. § 1432(a)(3), and added a second clause, as discussed in Section I *supra*. *See Espindola v. Barber*, 152 F. Supp. 829, 832 & nn. 1-2 (N.D. Cal. 1957) (comparing language of 1940 Act and INA).

The 1940 Act's exclusion of single-parent transmission of citizenship to nonmarital children, and the INA's extension in 1952 of that right to mothers, but not fathers, originated in a Civil War era Maryland case, *Guyer v. Smith*.[11] In *Guyer*, the Court of Appeals of Maryland ruled that two brothers born to an unmarried U.S.-citizen father and non-citizen mother in St. Barthelémy (formerly "St. Bartholomew"), an island in the Caribbean, were not U.S. citizens. 22 Md. at 244. The brothers' father was white, and their mother was "partly of African blood or descent." *Id.* at 246. The citizenship statute in effect in 1864 recognized as

[11] Richard Flournoy, a member of the committee that drafted the 1940 Act, wrote that the committee relied on a 1906 congressional report in drafting the act. *See* Richard W. Flournoy, *Proposed Codification of Our Chaotic Nationality Laws*, 20 AM. BAR ASS'N J. 780, 783 (1934) ("Flournoy 1934") (App'x 120). The 1906 report cited to *Guyer v. Smith*, 22 Md. 239 (Md. 1864) for the proposition that "an illegitimate child becomes a citizen by the naturalization of his reputed father, *who had before naturalization married his mother*." *See* Citizenship of the U.S., Expatriation, and Protection Abroad, Ltr. from Sec'y of State 35 (1906) ("1906 Report") (App'x 122).

citizens foreign-born "children of persons who are . . . citizens of the United States," *id.* at 248-49, and thus by its plain language supported the brothers' position that they were U.S. citizens. Nevertheless, the *Guyer* court ruled that because the brothers were "not born in lawful wedlock," they were "illegitimate" and "clearly therefore not within the provisions of the [statute]" and thus not U.S. citizens. *Id.* at 249. As Collins explained, *Guyer*

> silently incorporated into citizenship law a set of domestic relations law principles that had been instrumental to the maintenance of slavery and the denial of citizenship for persons of African descent: laws that recognized the unmarried mother as the source of status for her children, including slave status.

Collins at 2141. Collins further explained:

> *Guyer* established the centrality of marriage as a requirement for patrilineal citizenship transmission [in American law]. But the *Guyer* case was also about racial limitations on father-child citizenship transmission. The *Guyer* opinion—written during the Civil War by judges sitting in Maryland, the "middle ground" of slavery—incorporated a set of gendered and racialized domestic relations law principles concerning the status of nonmarital children. The *Guyer* opinion then served as an important and long-lasting resource for jurists, administrators, and lawmakers who interpreted, enforced, and enacted America's racially nativist nationality laws.

Id. at 2145. Thus, in codifying *Guyer*, Congress legislatively enshrined *Guyer*'s racially discriminatory logic, preventing naturalized fathers from bestowing U.S. citizenship on their nonmarital children of color[12] for decades.

The marriage requirement in § 1432(a)(3) is more than a proof-of-parentage requirement; it also incorporated a *separate* legitimation requirement within the applicable definition of "child." *See* 1940 Act, § 102(h); 8 U.S.C. § 1101(c)(1). The *additional* requirement of parental marriage serves § 1432(a)(3)'s racist purpose by preventing naturalized U.S.-citizen fathers from transmitting their citizenship status to nonmarital children, even when the father established parentage by legitimation or other means. As explained below, this has had a disproportionate effect on people from majority Black countries.

3. Contemporaneous statements

Testimony during hearings on the 1940 Act confirm that Section 314, insofar as it limited automatic transmission of citizenship to situations where *both* parents naturalized, unless there was a legal separation between the parents, was

[12] Under § 1432(a)(3), naturalized U.S. citizen parents who were racially barred from marrying their children's other parent would be unable to transmit citizenship to their children under the statute.

meant to be "much stricter than existing law[13]." 1940 Hearings at 90-91 (App'x 125-26). No explanation was given for why nonmarital children should be treated any differently from marital children whose parents had separated. But there have always been efforts to restrict derivative citizenship along racial lines. *See* Collins at 2138. For example, drafting committee member Richard Flournoy testified before Congress that the 1940 Act's *jus sanguinis*[14] provision "improved" the law by introducing a significant parental residency requirement, addressing lawmakers' concerns "that American citizens of Chinese or Mexican descent would leave the United States, return to China or Mexico, and have children who 'are born citizens of the United States'—not only spreading citizenship too thin, but giving it to *the wrong sort of people*." *Id.* at 2195. And lawmakers' statements during hearings on the 1940 Act demonstrate that they considered pathways to citizenship for Black immigrants to be "some trouble," notwithstanding the fact that Black immigrants were already racially eligible to naturalize. *See* 1940 Hearings at 66, 304 (App'x 124, 127).

[13] Prior to the 1940 Act, a child born abroad to non-citizen parents would become a citizen if *either* parent naturalized and the child lived in the U.S. for five years. 1940 Hearings at 90-91.

[14] *Jus sanguinis* is the rule that a child's citizenship is determined by the parents' citizenship. BLACK'S LAW DICTIONARY (11th ed. 2019).

Statements by members of the 1940 Act's drafting committee reveal their personal racial animus toward Black people. In 1937, Fluornoy wrote that it was "an absurdity to leave the doors wide open to the admission of negroes, one of the most backward races in the world, while keeping them closed to prevent the admission of a few Chinese and Japanese who might enter under the quotas." Patrick D. Lukens, A QUIET VICTORY FOR LATINO RIGHTS: FDR AND THE CONTROVERSY OVER "WHITENESS" 156 (2017) (quoting 1937 Flournoy Memo) (App'x 129).

Concerns about the citizenship status of nonmarital children born abroad to American fathers remained prominent in lawmakers' minds in 1952. *See* 1952 Hearings at 1746-48 (1952) (App'x 113-15) (asking why the U.S. should be charged with "illegitimate" children born abroad to American soldiers during World War II, including "3,093 Negro half-castes" in Germany). Allowing fathers to confer citizenship status upon their nonmarital, foreign-born children would have caused potentially many more children of color to eventually derive citizenship, *see id.*, but the same was not necessarily seen to be the case when Congress extended the right to mothers.[15] And, as witness testimony reflects,

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[15] In hearings on a 1934 bill allowing children born abroad to U.S.-citizen mothers to acquire their mothers' citizenship at birth, an attorney for the National Women's Party testified, based on U.S. Department of Labor statistics, that the change would not lead to a significant increase in immigration. Natalia Molina, HOW RACE IS

opposition to U.S. citizenship for immigrants of color continued to factor into policy decisions in 1952. As the former secretary to the Commission on Migratory Labor testified in a hearing about the INA, community interests "[did not] particularly think of the Mexican alien or the Jamaican or Bahamian as a person who should come and stay and be citizens" and that "that was one of the principal advantages of alien labor: That you had him when you wanted him and when you didn't want him any more you didn't have to have him around nor his family either." 1952 Hearings at 1061-62 (App'x 105-06).

Prior to § 1432(a)(3)'s most recent renewal in 1986, lawmakers blocked legislation that would have mitigated its racially discriminatory impact. In 1976, administrators opposed a bill that would have extended immigration preferences to "illegitimate" children of U.S.-citizen fathers because it might allow large numbers of people from countries with large Black populations to immigrate to the United States. *See* 1976 Hearings at 142-44 (App'x 21-23). At the hearing on the bill, the Administrator of the State Department's Bureau of Security and Consular Affairs, Leonard Walentynowicz, stated:

> The movement of people in the *Virgin Islands area* is substantial. I am not trying to pick on any one particular group of people or any one country, but the fact of the matter is that *the reports I get* show that it is not unusual in *certain countries* for the *male person to be the father of*

MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS 77 (2014).

> *a number of different illegitimate children through various spouses. It is a real thing.*

Id. at 143 (App'x 22). Walentynowicz also testified he saw "a problem" with "the number of illegitimate children" fathers may seek to have admitted, specifically mentioning the high numbers of children that men from the Dominican Republic may "sire[] . . . through various women." *Id.* at 145 (App'x 24). These comments reflect deeply racist tropes about Black fathers, further confirming that restrictions on patrilineal citizenship transmission to nonmarital children were far from race-neutral.

B. Section 1432(a)(3) Had A Foreseeable Disparate Impact On Black Immigrants.

Section 1432(a)(3) had a foreseeable disparate impact on Black immigrants. *See City of S. Miami v. DeSantis*, 508 F. Supp. 3d 1209, 1231 (S.D. Fla. 2020) (citing *Cooper v. S. Co.*, 260 F. Supp. 2d 1258, 1267 (N.D. Ga. 2003), *aff'd*, 390 F.3d 695 (11th Cir. 2004)).

The Johnson-Reed Act of 1924 placed the "non-self-governing" colonies of the Americas (*e.g.*, the British West Indies but not British Canada) under the racially restrictive immigration quota system. *See* Lara Putnam, *Sentiment and the Restrictionist State: Evidence from the British Caribbean Experience, c.a. 1925*, 35 J. OF AM. ETHNIC HISTORY 5, 15 (2016) ("Putnam 2016"). In 1925, the State

Department allotted only three hundred of the 34,000 annual British immigration quota spots to the British West Indies. *Id.*

> Suddenly, marital kinship ties had enormous weight in regulating entry . . . . Consensual partners and illegitimate children could not [enter as non-quota migrants], nor could siblings or parents of citizens, whether or not those ties were formalized and documented.

Putnam 2013 at 191. Thus, the fact that legal marriage "was rare and class-specific" within British Caribbean societies suddenly carried "portentous consequences." Putnam 2016 at 15. U.S. consular files from the 1920s onward contain "many hundreds" of letters "from people [in the Caribbean] whose relied-upon mobility-dependent kin strategies had just come crashing into a barrier they had not imagined might exist." Putnam 2013 at 204.

In majority Black Caribbean countries, nonmarital unions were the dominant and legally recognized form of familial arrangement. In the Dominican Republic and Jamaica, such unions are commonplace:

Table 2.2 Percent cohabiting among all persons in a union (married + cohabiting), 25–34, by sex and census round, Latin America and the Caribbean, 1970–2010

	25–29					30–34				
	1970	1980	1990	2000	2010	1970	1980	1990	2000	2010
Men										
Argentina	13.1	14.9	25.9	48.7	72.2	10.9	12.2	20.9	33.2	54.6
Belize	–	–	–	44.9	–	–	–	–	36.9	–
Bolivia	–	–	–	41.1	–	–	–	–	28.6	–
Brazil	7.2	13.3	25.2	45.5	57.3	6.5	11.3	19.5	35.4	47.3
Chile	4.4	6.2	12.1	29.3	–	4.2	5.8	9.6	20.4	-
Colombia	20.3	36.4	54.8	73.0	–	18.6	30.5	46.1	62.1	-
Costa Rica	17.0	20.1	–	38.1	56.0	15.3	18.0	-	29.8	42.4
Cuba	–	–	–	62.1	–	–	–	–	54.6	-
Dominican Rep.	–	64.5	–	73.1	83.3	–	60.5	–	66.3	76.4
Ecuador	27.2	29.9	31.3	41.5	52.9	24.8	27.6	28.6	36.4	44.5
El Salvador	–	–	57.7	–	60.8	–	–	50.3	–	49.5
Guatemala	–	–	39.1	39.3	–	–	–	36.1	34.4	–
Guyana	–	–	–	50.8	–	–	–	–	46.3	–
Honduras	–	–	–	60.7	–	–	–	–	53.4	–
Jamaica	–	–	–	69.9		–	–	–	58.4	–
Mexico	16.6	–	16.2	25.0	41.7	14.6	–	12.6	19.6	30.8
Nicaragua	44.8	–	60.1	61.0	–	39.3	–	51.8	52.4	–
Panama	58.4	54.9	58.8	70.2	79.7	57.5	52.4	50.5	58.3	68.2
Paraguay	–	28.7	31.1	47.4	–	–	21.7	25.85	39.59	–
Peru	–	32.7	50.7	–	76.6	–	23.2	37.5	–	62.7
Puerto Rico	8.1	6.2	13.5	–	–	8.0	5.1	11.0	–	–
Trinidad & Tob.	–	–	–	–	–	–	–	–	–	–
Uruguay	10.0	14.7	–	27.7	77.1	9.0	13.4	–	20.7	61.2
Venezuela	30.6	34.1	38.7	56.4	–	30.6	32.8	35.3	47.7	–
Women										
Argentina	11.1	13.0	22.5	41.3	65.5	10.1	11.5	19.5	28.7	48.1
Belize	–	–	–	41.1	–	–	–	–	35.4	–
Bolivia	–	–	–	34.7	–	–	–	–	23.4	–
Brazil	7.6	13.0	22.2	39.3	51.1	7.1	11.7	19.0	31.6	43.5
Chile	4.6	6.7	11.4	24.6	–	4.6	6.5	11.0	18.3	–
Colombia	19.7	33.2	49.2	65.6	–	18.2	28.4	42.4	56.6	–
Costa Rica	16.8	19.4	–	32.6	48.5	16.1	17.3	–	26.3	37.7
Cuba	–	–	–	55.8	–	–	–	–	50.0	–
Dominican Rep	–	60.8	–	67.6	78.4	–	55.2	–	61.1	71.3
Ecuador	27.0	29.4	30.1	37.4	47.4	25.3	26.8	27.5	32.5	40.1
El Salvador	–	–	53.1	–	53.7	–	–	48.1	–	44.4

(continued)

Table 2.2 (continued)

	25–29					30–34				
	1970	1980	1990	2000	2010	1970	1980	1990	2000	2010
Guatemala	–	–	37.2	37.1	–	–	–	35.3	33.4	–
Guyana	–	–	–	47.23	–	–	–	–	42.92	–
Honduras	–	–	–	55.5	–	–	–	–	49.7	–
Jamaica	–	–	–	61.3	–	–	–	–	51.8	–
Mexico	15.3	–	15.2	22.7	37.1	14.2	–	12.5	18.6	28.1
Nicaragua	42.8	–	54.9	55.5	–	36.0	–	49.6	49.4	–
Panama	58.9	52.3	53.2	62.5	73.9	53.8	51.0	49.3	54.1	62.6
Paraguay	–	20.6	27.5	36.5	–	–	19.4	23.3	31.0	–
Peru	–	29.2	43.1	–	69.8	–	21.9	31.9	–	56.1
Puerto Rico	8.5	5.3	12.0	–	–	6.6	4.7	10.1	–	–
Trinidad & Tob.	–	–	24.9	31.9	37.6	–	–	22.4	25.4	27.8
Uruguay	9.6	14.1	–	23.6	70.7	7.8	13.3	–	18.8	53.7
Venezuela	30.8	32.6	36.9	51.6	–	31.2	32.6	34.9	45.2	–

A. Esteve et al., *The Rise of Cohabitation in Latin America, 1970-2011*, in COHABITATION AND MARRIAGE IN THE AMERICAS: GEO-HISTORICAL LEGACIES AND NEW TRENDS 25, 34-35 (Table 2.2) (2016) (AR 201-02).

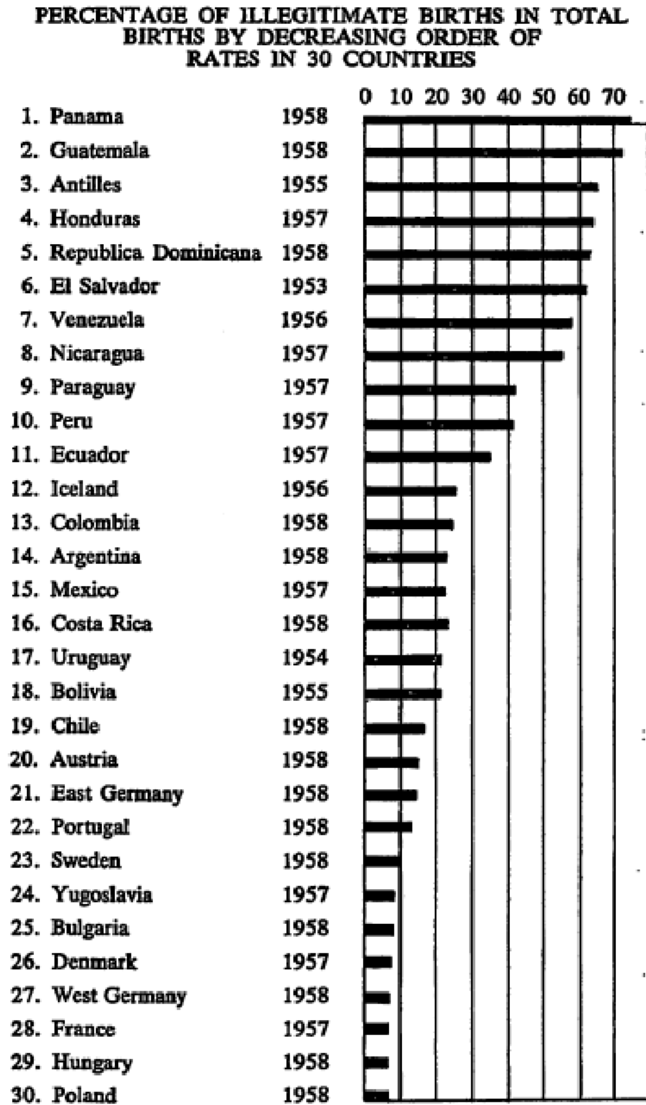
In many majority Black countries, nonmarital children constituted the majority of children born during the mid-twentieth century:

TABLE 1. ILLEGITIMACY RATES IN SELECTED CARIBBEAN POLITICAL UNITS [6]

Political Unit	Year	Per Cent
British Guiana	1955	35
French Guiana	1956	65
Surinam (excluding Bush Negroes and aborigines)	1953	34
Barbados	1957	70
Bermuda	1957	30
Dominican Republic	1957	61
Guadeloupe	1956	42
Jamaica	1954	72
Antigua	1957	65
Martinique	1956	48
Trinidad and Tobago	1956	47
Grenada	1957	71
Puerto Rico	1955	28
Haiti	——	67–85

W. William J. Goode, *Illegitimacy in the Caribbean Social Structure*, 25 AM.

SOCIOLOGICAL R. 21, Table 1 (Feb. 1960) (AR 240, 249). And, as the chart below shows, children were born to unmarried parents in the Dominican Republic and other majority Black countries considerably more than they were in Europe and South America:



Jose E. Arraros, *Concubinage in Latin America*, 3 J. FAM L. 330, 332 (1963) (AR 240, 252).

A survey of relevant cases reveals a disproportionate effect on people born outside of marriage in majority Black countries. A Westlaw search of federal circuit court cases that cite § 1432(a)(3) identifies 31 decisions in which a circuit court denied or dismissed a petition challenging a removal decision based on a nonmarital child's inability to derive citizenship through their father under § 1432(a)(3). As Table 1 below shows, *over 70 percent* of those cases came from petitioners from *only five* countries with majority Black populations.

TABLE 1 CIRCUIT COURT DECISIONS - DENIAL OF RELIEF UNDER § 1432(a)(3) (n = 31)		
Region	% of Total	Country (n)
Caribbean (22)	71%	Jamaica (12), Dominican Republic (4), Guyana (2), Haiti (3), Bahamas (1)
Asia (3)	10%	Philippines (2), Fiji (1)
Africa (1)	3%	Nigeria (1)
Central America (2)	6%	El Salvador (1), Nicaragua (1)
South America (1)	3%	Peru (1)
Europe (1)	3%	France (1)
North America (1)	3%	Mexico (1)

See **Exhibit 1** (annotating Table 1 with case citations). In circuit courts, petitioners from Jamaica and the Dominican Republic alone represent *52%* (16/31) of those who were denied relief under § 1432(a)(3). *See id.*

III. THIS COURT SHOULD REMEDY THE UNCONSTITUTIONAL DISCRIMINATION IN THE SECOND CLAUSE OF § 1432(a)(3) BY HOLDING SILVA DERIVED CITIZENSHIP THROUGH HIS NATURALIZED FATHER.

When a statute impermissibly benefits one class and excludes another from the benefit, "a court may either declare [the statute] 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." *Morales-Santana*, 137 S. Ct. at 1698 (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)). For example, in *Westcott*, the Supreme Court equalized a discriminatory section of the Social Security Act by extending the statute to cover families where either parent was unemployed, instead of only families where the father was unemployed. 443 U.S. at 92. Likewise, "in a series of cases involving federal financial assistance benefits, the Court struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended." *Morales-Santana*, 137 S. Ct. at 1699 (listing cases).

Morales-Santana involved a gender equal protection challenge to the statute governing derivative citizenship for children born abroad to an American parent. 8 U.S.C. §§ 1401 & 1409. Those statutes required nonmarital fathers to have been present in the United States for 10 years prior to the foreign-born child's birth, while requiring unmarried mothers to be present in the United States for only one year. 137 S. Ct. at 1686. In that case, the petitioner asked the Court to extend the

benefit of the shorter physical-presence requirement in 8 U.S.C. § 1401 to the unmarried fathers that the statute reserved for unmarried mothers. *Id.* at 1698. The Court recognized that it had the authority to provide that remedy or to nullify the benefit reserved for the unmarried mothers so that both classes of parents would need to satisfy the longer physical presence requirement. *Id.* After observing that, ordinarily, "extension, rather than nullification, is the proper course," the Court chose nullification because extension would have disrupted the statutory scheme. *Id.* at 1699-1700, 1701 n.29.

By contrast, in § 1432(a)(3), unmarried fathers are set apart from unmarried mothers and *all other classes of American parents* (*i.e*., married mothers and married fathers). Therefore, this Court should follow the "preferred rule," *Morales-Santana*, 137 S. Ct. at 1701, and bring the children of unmarried fathers in line with the children of *all other classes of American parents*. First, extension best aligns with Congress's overarching goal to preserve the family unit and ensure that children raised by citizen parents become citizens themselves, as evidenced by the CCA. Second, extension would be easily implemented by providing new benefits to a discrete group of recipients, while the alternative remedy of "levelling down" would dismantle the existing derivative citizenship scheme and deprive nonmarital children of naturalized parents of any path to obtain citizenship at all.

A. Extension Of Benefits Aligns With Congressional Intent.

"[T]he touchstone for any decision about remedy is legislative intent," *Morales-Santana*, 137 S. Ct. at 1699, and Silva's remedy reflects the intent behind the INA and § 1432(a). Because § 1432(a)(3) discriminates on the basis of gender and race, this Court may "implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.* at 1699 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)).

Extension of benefits is the proper remedy here because it best aligns with Congress's intent. A review of both the general intent behind the INA, and the specific intent behind § 1432(a)(3), reveals that Congress intended for families to remain together, and this included a desire to ensure that children could derive citizenship from their custodial naturalized parent. *All children except those of nonmarital fathers* can acquire citizenship through § 1432(a)(3).

The INA was enacted with "the underlying intention of . . . preservation of the family unit." H.R. Rep. No. 82-1365 at 29 (1952). Courts have recognized that this legislative purpose compels interpretations of the INA and the development of remedies that facilitate family preservation. *See. e.g.*, *Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013) (explaining that Congress's intent to preserve the family unit cautioned against reading a legal permanent residency requirement into INA § 321(a)(5)); *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) (interpreting

ambiguity in the INA's derivative citizenship statues in favor of the petitioner because "[i]t is consistent with Congress's remedial purposes . . . to interpret the statute's ambiguity with leniency, and we should interpret the statute here in a manner that will keep families intact"); *Minasyan v. Gonzales*, 401 F.3d 1069, 1079 (9th Cir. 2005) (noting Congress's intention to preserve family unity and explaining Congress's goal that "those alien children whose 'real interests' were located in the United States with their custodial parent, and not abroad, should be automatically naturalized").

The history of the era further clarifies that government officials were concerned about the "practical problem of who would take responsibility for those children" who were born outside of the United States to unmarried parents. Collins at 2202. For example, with respect to derivative citizenship at birth, government officials held a "nearly uniform view that it was only practical to keep mothers and their nonmarital children together, as mothers were the presumed caretakers of such children." *Id*. Indeed, as one official noted, "exclusion of [such] children is not only harsh, but largely impracticable." *Id*. at 2205 (citation omitted).

Given Congress's express intentions to issue immigration and citizenship laws that supported family unity as well as legislators' specific recognition of the need to provide derivative citizenship for children of custodial parents, only extension of § 1432(a)(3) would maintain the statutory provision that "Congress

plainly did intend" to enact. *Welsh v. U.S.*, 398 U.S. 333, 355-56 (1970) (Harlan, J., concurring).

Despite Congress's intention to preserve family unity, it unconstitutionally limited Clause 2 in § 1432(a)(3) to exclude nonmarital children whose fathers are the custodial parent because of race and the outdated gender stereotype that such children would always be the responsibility of their mothers. Thus, extension of the benefits under Clause 2 of § 1432(a) would be consistent with congressional intent to keep families together.

B. Extension Of Benefits Generates The Least Disruption To The Statutory Scheme.

Extension of Clause 2 of § 1432(a)(3)'s benefit to nonmarital children born to naturalized fathers would also cause the least disruption to the statutory regime. The alternative—striking down Clause 2 altogether—would recreate the gap that existed prior to 1952, *i.e.*, no path for nonmarital children of naturalizing parents to acquire derivative citizenship upon the naturalization of *either* parent. Extension would merely provide children of unmarried custodial fathers the same rights that children of unmarried custodial mothers already possess.

In this respect, § 1432 differs in important ways from 8 U.S.C. §§ 1401 and 1409, the statutes at issue in *Morales-Santana*. With §§ 1401 and 1409, "the discriminatory exception consist[ed] of *favorable* treatment for a discrete group"; it provided unmarried mothers—the discrete group—a shorter, more favorable

residency requirement as compared to all other parents. 137 S. Ct. at 1699. This fact underlies the Supreme Court's nullification remedy in *Morales-Santana*. Because a discrete group (unmarried citizen mothers) received favorable treatment (*i.e*., a shorter residency requirement), extension of this favorable treatment to those with the usual residency requirement (all parents except U.S. citizen mothers) would have usurped the general policy. *Id*. at 1701. This meant that the "potential for disruption of the statutory scheme . . . [was] large" if the *Morales-Santana* Court elected extension as the remedial course. *Id*. at 1700.

The opposite is true here. Extension of the general policy under Clause 2 of § 1432(a)(3)—allowing fathers who naturalize to provide derivative citizenship to their nonmarital children—would provide nonmarital fathers the same rights provided to nonmarital mothers (and all other naturalizing parents). Given the number of people that Congress already provided the right to confer derivative citizenship,[16] "the intensity of [the legislature's] commitment to the residual policy" seems clear. *Morales-Santana*, 137 S. Ct. at 1700.

Given the dramatic impact that nullification of Clause 2 of § 1432(a)(3) would have on nonmarital children of naturalizing parents, Congress would not

[16] About 600,000 people derived citizenship under § 1432 between 1973 and 2002. *See* Nancy F. Rytina, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population and Population Eligible to Naturalize in 2002*, at 3 (Table 1) (2004) (App'x 143).

have chosen nullification "had it been apprised of the constitutional infirmity." *Morales-Santana*, 137 S. Ct. at 1699 (citation omitted).

C. Extension Of Benefits Can Be Accomplished In Two Ways.

The remedy in this case may take two forms:

(1) granting Silva relief on an as-applied basis by recognizing that he derived U.S. citizenship through his father; or

(2) implementing what Congress would have done in § 1432(a)(3) if it had been apprised that the language in Clause 2 violates the equal protection component of the Fifth Amendment's due process clause.

1. This Court may rule that Silva derived citizenship from his citizen father.

A number of courts have ruled that, in the face of an equal protection violation, extension of the benefit may take the form of an order deeming the petitioner a U.S. citizen, as if the challenged statute had been written in a non-discriminatory way. *See Tineo v. U.S. Att'y Gen.*, 937 F.3d 200, 218 (3d Cir. 2019) ("[E]xtending Felipe Tineo the same treatment that § 1432(a)(3) affords to similarly situated mothers would not disrupt the statutory scheme in any significant way, nor will it result in ascribing a discriminatory intent to Congress. So we will: . . . Tineo became a U.S. citizen when his father naturalized and he was 'under the age of eighteen years' and 'residing in the United States pursuant to a lawful admission for permanent residence . . . .'"); *Breyer v. Meissner*, 214 F.3d 416, 429 (3d Cir. 2000) (finding an equal protection violation in a derivative citizenship

statute, and providing that, pursuant to additional findings by the district court, the petitioner would "be entitled to American citizenship relating back to the time of his birth"); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1412, 1418 (9th Cir. 1993) (district court could remedy a citizenship statute's gender-based discrimination, which allowed citizen fathers, but not citizen mothers, the right to pass on their citizenship to their foreign-born children, "by extending to citizen mothers the same rights as those possessed by citizen fathers to transmit their citizenship to their children," and district court properly declared plaintiffs citizens of the United States.), *overruled on other grounds, as recognized in Dent*, 900 F.3d at 1081.

2. This Court may determine what a valid § 1432(a)(3) would say.

The discriminatory classification in Clause 2 of § 1432(a)(3) may be cured with no revision to any other section of the INA. Specifically, this Court can neutralize the gender-based classification and race discrimination in Clause 2 and allow fathers to bestow derivative citizenship on their nonmarital children, by implementing the following underlined clause at the end of § 1432(a)(3):

> a) 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: . . .

> 3) . . . [Clause 2] the naturalization of the mother if the child was born out of wedlock and paternity of the child has not been established by legitimation <u>or the naturalization of the father if the child was born out of wedlock and the child is in the legal custody of the father.</u>

This proposed remedy has three salient features. First, the phrase "naturalization of the father if the child was born out of wedlock" mirrors the opening phrase in Clause 2 of § 1432(a)(3), which requires the "naturalization of the mother if the child was born out of wedlock[.]"

Second, because the definition of "child" in 8 U.S.C. § 1101(c)(1) requires the legitimation of the child by the legitimating parent prior to the child turning 16 years old, the incorporation of the definition of "child" into § 1432 (including the proposed remedy underlined above) ensures that the naturalizing father has legitimated the child.

Third, just as the Clause 2 requirement that "paternity of the child has not been established by legitimation" was Congress's way to assess whether the father was out of the picture (in cases where the child seeks derivative citizenship through the naturalized mother), the proposed requirement that the child must be in "<u>the legal custody of the father</u>" is a way to assess whether the mother is out of the picture (in cases where the child seeks derivative citizenship through the naturalized father). Congress already used the term "legal custody" in Clause 1 of § 1432(a)(3), and courts have interpreted that term to mean "sole custody."

Bustamante-Barrera v. Gonzales, 447 F.3d 388, 397 (5th Cir. 2006) ("[O]nly sole custody will suffice."); *see also United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012); *Johnson*, 647 F.3d at 126; *Wedderburn*, 215 F.3d at 800. A parent with "sole custody" has "full control and sole decision-making responsibility" for the child, "to the exclusion of the other parent." *Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, because the sole-custodian father would have the authority to make all decisions involving the child without the input of the mother, there are no parental rights of the mother at issue the Government needs to protect.

In sum, both of the proposed remedies have the "virtue of simplicity," *Westcott*, 443 U.S. at 92, and are consistent with the legislative intent that a child should gain citizenship from their custodial parent. Allowing Silva to obtain citizenship through his father—who was Silva's sole custodial parent—is what the Constitution requires.

CONCLUSION

This Court should vacate the removal order and recognize Silva as a United States citizen.

Dated this 16th day of August, 2022.

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Dated: August 16, 2022

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I hereby certify that on August 16, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in this processing are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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