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 REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Circuit Rule 28-1(b), I certify that the following persons may have an interest in the outcome of this case:

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INTRODUCTION

Kelvin Silva's petition should be granted, and he should be granted U.S. citizenship.

With respect to Silva's gender-based equal protection claim, the Government gives short shrift to the Supreme Court's decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), and ignores the import of its findings regarding the habitual and now untenable stereotype—that an unwed mother is the sole and natural guardian of a nonmarital child—which permeated the Nation's immigration laws in the mid-20th Century. The Government's reliance on *Levy v. United States Attorney General*, 882 F.3d 1364 (11th Cir. 2018), and *Nguyen v. INS*, 533 U.S. 53 (2001), also is misplaced. Because the second clause in § 1432(a)(3) fails heightened scrutiny, it is unconstitutional.

With respect to Silva's race-based equal protection claim, the Government disregards the direct and circumstantial evidence that show that the second clause of § 1432(a)(3) was enacted with a discriminatory purpose and had a disparate impact on majority-Black countries.

ARGUMENT

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

A. The Government's Treatment Of *Levy*, *Morales-Santana* and *Nguyen* Is Unpersuasive.

1. *Levy*

The Government's reliance on *Levy* is misplaced for two reasons. First, in that case, the petitioner (Levy) raised a *different* gender-based challenge than the one that Silva raises here. As this Court explained:

> Levy argues that § 1432(a) unconstitutionally discriminates based on gender. According to him, *if his mother instead of his father had been a United States citizen, he would derive citizenship*. Levy misreads the statute. As a legitimated child, Levy could derive citizenship under § 1432(a) only if: both parents are naturalized, *id*. § 1432(a)(1); the surviving parent is naturalized, *id*. § 1432(a)(2); or both parents legally separate and the one having legal custody is naturalized, *id*. [first clause in] § 1432(a)(3). *None of those conditions turns on gender*. Had the situation been reversed—if Levy's mother had become a lawful permanent resident, was naturalized, and raised him in the United States while his father remained in Jamaica—Levy still would not have derived citizenship because *his parents never legally separated*. As a result, § 1432(a) does not discriminate based on gender.

Levy, 882 F.3d at 1367.[1]

By contrast, in this case, Silva's gender discrimination claim is to the second clause in § 1432(a)(3), which provides a path to citizenship for children born to unmarried mothers, but does not provide a path to citizenship for children born to unmarried fathers. Thus, unlike § 1432(a)(1), § 1432(a)(2) and the first clause in

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

§ 1432(a)(3), the condition in the second clause of § 1432(a)(3) *does* "turn[]" on gender."[2] *Id*. To paraphrase the Supreme Court's statement that heightened scrutiny applies when a law prescribes "one rule for mothers, another for fathers," *Morales-Santana*, 137 S. Ct. at 1690, the constitutional problem with the second clause of § 1432(a)(3) is that it prescribes "one rule for mothers, [no rule] for fathers." *Id.* This challenge was not decided in *Levy* because the petitioner did not raise it.

Second, *Levy*, which was decided in 2018, does not take *Morales-Santana*, decided in 2017, into account at all.[3] In *Morales-Santana*, the Supreme Court explained that, during the era in which the 1940 Act was enacted, a "habitual, but now untenable, assumption[] pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: . . . unwed mother is the natural and sole guardian of a nonmarital child." *Morales-Santana*, 137 S. Ct. at 1690-91.

> For unwed parents, the father-controls tradition never held sway. Instead, *the mother was regarded as the child's natural and sole guardian*. At common law, the mother,

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[2] The first and second clauses in § 1432(a)(3) address different subjects, which is why the two clauses are separated by the word "or." The first clause relates to children of married parents, and addresses the situation where a naturalized parent (*gender-neutral*) has custody of a child and is legally separated from their former spouse. The second clause relates to children of unmarried parents, and addresses the situation where a naturalized mother (*not gender-neutral*) of a child born out of wedlock can confer citizenship on the child if paternity has not been established by legitimation.

[3] In *Levy*, the only reference to *Morales-Santana* is a footnote noting that petitioner had moved to file a supplemental brief on potential remedies in view of *Morales-Santana*, which was denied as moot. *Levy*, 882 F.3d at 1369 n.3.

> and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice.
>
> In the 1940 Act, Congress . . . *codified the mother-as-sole-guardian perception regarding unmarried parents*. The Roosevelt administration, which proposed § 1409, 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."

Morales-Santana, 137 S. Ct. at 1691-92 (internal citations omitted, brackets in original).

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). In short, in 1952, Congress repurposed the gender-discriminatory formulation of derivative citizenship it introduced to U.S. citizenship law in the 1940 Act.

The Government also cites the following excerpt from *Levy*:

> Subsections 1432(a)(2) and (3) provide for single parent derivative naturalization. Because derivative naturalization automatically changes a child's citizenship and can effectively extinguish an alien's parental rights, Congress limited single parent derivative citizenship to instances where it is fair to assume the alien parent was out of the picture. 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*.

Levy, 882 F.3d at 1368 (internal citations omitted); Resp. Br. 22, 24-25. This is a cogent explanation for the Congressional purpose underlying the condition in the first clause in § 1432(a)(3), and also the condition in the second clause in § 1432(a)(3) as it relates to the rights of naturalizing mothers, insofar as it goes. But what it utterly does not explain is why the second clause in § 1432(a)(3) does not address the situation where a naturalizing father's rights relating to his nonmarital child are allowed to trump a noncitizen mother's rights. The insight from *Morales-Santana*, 137 S. Ct. at 1692, is that this omission in the statute was—to use the *Levy* court's term—"animate[d]" by Congress' pervasive discriminatory view that mothers were the sole guardian of nonmarital children and would *never* "ha[ve] a lesser interest in the child's citizenship" than the father. *Levy*, 882 F.3d at 1368. In other words, because Congress did not think that fathers would ever be the sole guardian of nonmarital children, it did not need to address that situation in the second clause of § 1432(a)(3). *See Morales-Santana*, 137 S. Ct.

at 1692 ("[A]ccording to the familiar stereotype, [fathers] would care little about, and have scant contact with, their nonmarital children."). Because the objective in the second clause of § 1432(a)(3) 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." *Morales-Santana*, 137 S. Ct. at 1692 (internal quotation marks, brackets omitted).

Finally, the Government asserts that *Morales-Santana* is distinguishable because it dealt with different provisions in the 1940 Act, specifically, the gender-based residency rules in 8 U.S.C. §§ 1409(a) & (c). Resp. Br. 28-30. To the contrary, the Supreme Court's discussion in *Morales-Santana* of the gender-based stereotypes relating to nonmarital children that permeated the Nation's citizenship laws applies with equal force to the second clause in § 1432(a)(3), as does the Supreme Court's finding that laws grounded in such stereotypes fail heightened scrutiny. Moreover, the fact that the Supreme Court held that the gender-based residency rules at issue in *Morales-Santana* were unconstitutional supports Silva's position because—unlike section 1409(a) & (c), which at least included different physical presence requirements for unwed fathers and unwed mothers—the second clause in § 1432(a)(3) does not take unwed fathers into account at all. Thus, from a constitutional perspective, the second clause in § 1432(a)(3) is weaker than the statute that was found unconstitutional in *Morales-Santana*.

Given the clarity of the legislative history, as explained in *Morales-Santana*, and the absence of any legitimate justification explaining why Congress created gender-neutral conditions in § 1432(a)(1), § 1432(a)(2) and the first clause in § 1432(a)(3), but chose to adopt a gender discriminatory condition in the second clause in § 1432(a)(3)—*i.e*., "one rule for mothers, [no rule] for fathers"—the latter clause fails heightened scrutiny and is unconstitutional. *See Morales-Santana*, 137 S. Ct. at 1692 ("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*.") (internal quotation marks, citation, brackets omitted).

2. *Nguyen*

The Government misunderstands the significance of *Nguyen v. INS*, 533 U.S. 53 (2001), to this action.

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 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.[4]

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.* 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

[4] The citizen mothers and fathers of nonmarital children also were subject to drastically different U.S. presence requirements, but those were not at issue in *Nguyen*. The Supreme Court held those gender-differentiated parental presence requirements unconstitutional in *Morales-Santana.*

reasonable substitute for the opportunity manifest between mother and child at the time of birth." *Id.* at 66.

In its brief, the Government repeatedly asserts that the legitimation requirement applicable to unmarried fathers that was upheld in *Nguyen* supports the constitutionality of the legitimation requirement in the second clause of § 1432(a)(3). Resp. Br. 24, 26-27 n.4, 27, 29. However, the Government misunderstands the different role that legitimation plays in the statute at issue in *Nguyen*, 8 U.S.C. § 1409(a)(4), and in § 1432(a)(3). Specifically, in § 1409(a)(4)(A), legitimacy is one of three affirmative ways that a father can establish paternity of a nonmarital child. In other words, legitimacy as used in § 1409(a)(4)(A) is a *ticket* to citizenship for a nonmarital child. By contrast, in § 1432(a)(3), legitimacy is used as a way to *exclude* a nonmarital child of a naturalized mother from obtaining citizenship, in cases where paternal legitimation has occurred. Thus, *Nguyen* does not support the Government's position. In § 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. Thus, the Government is incorrect when it asserts that § 1432(a)(3) "does not incorporate

any sex-based distinctions apart from paternity requirements that are similar to those approved . . . in *Nguyen*." Resp. Br. 27. Unlike *Nguyen*, the "sex-based distinction[]" in the second clause of § 1432(a)(3) is Congress' decision to provide a route to automatic naturalization for the children of unmarried mothers, but none for those of unmarried fathers.

Finally, the Government argues that the following discussion in *Levy*—which cited to *Nguyen*—"squarely forecloses" Silva's claim:

> We cannot fault Congress for conditioning single parent derivative naturalization on the naturalizing parent having legal custody of the child and legally separating from the alien parent. Legal separation is a bright line marking the disunion of a married couple, and no analogous legal event marks the disunion of an unmarried couple. *Perhaps Congress could have drafted § 1432(a) to provide an avenue for derivative citizenship for children like Levy—whose paternity was established, whose unmarried parents lived separately, and whose non-custodial alien parent was out of the picture. But the Equal Protection Clause did not obligate Congress to create that avenue.*

Levy, 882 F.3d at 1368-69 (citing *Nguyen*, 533 U.S. at 70); Resp. Br. 24-25. Setting aside the fact that the above observation is *dicta*, and the fact that, as a general matter, Congress is not required to act in a specific way to address a specific issue in any statute, once Congress decided to address derivative citizenship of nonmarital children in the second clause of § 1432(a)(3), it was constitutionally impermissible for Congress to create a path only for nonmarital children of unwed mothers, and to create no path for nonmarital children of unwed

fathers, even with different requirements (as was done in § 1409(a) & (c)). Nothing in *Morales-Santana* or *Nguyen* supports that gender-discriminatory classification.

B. Silva Has Standing To Challenge The Gender-Specific Classification In The Second Clause Of § 1432(a)(3).

The Government argues that Silva lacks standing to challenge the constitutionality of the second clause of § 1432(a)(3) because "his mother could not have transmitted citizenship to him under that statute if his parents' roles were reversed." Resp. Br. 21-23. However, this observation does not mean that Silva is not "personally adversely affected by the statute." Resp. Br. 21 (citing *Clements v. Fashing*, 457 U.S. 957, 966 n.3 (1982)). He is personally adversely affected by the statute because Congress—acting based on habitual and now untenable stereotype that an unwed mother would be the sole guardian for a nonmarital child—failed to create a path for his unwed father to confer derivative citizenship to him, and only created such a path for unwed mothers. Just as Morales-Santana had standing to challenge the constitutionality of § 1409, Silva has standing to challenge the constitutionality of § 1432(a)(3). *See Morales-Santana*, 137 S. Ct. at 1688-89 ("Morales-Santana . . . complains . . . of gender-based discrimination against his father, who was unwed at the time of Morales-Santana's birth and was not accorded the right an unwed U.S.-citizen mother would have to transmit citizenship to her child. . . . Morales-Santana is . . . the 'obvious claimant,' the

'best available proponent, of his father's right to equal protection.") (citations omitted).

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. Section 1432(a)(3) Was Enacted With A Racially Discriminatory Purpose.

In defending former 8 U.S.C. 1432(a)(3), the Government attempts to undermine the weight of the evidence, focusing largely on the circumstantial nature of connections between lawmakers' racial animus against immigrants of color and § 1432(a)(3)'s exclusion of unwed fathers. However, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), which may include "circumstantial evidence[.]" *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 266 (1977); *see also Underwood v. Hunter*, 730 F.2d 614, 618 (11th Cir. 1984). The evidence should be considered as a whole, as "[a]ny individual piece of evidence can seem innocuous when viewed alone, but

gains an entirely different meaning when viewed in context." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

The Government's efforts to downplay the racial animus in policymakers' statements about the 1952 Act are ineffectual. In particular, the assertion that Secretary Fuller did not invoke racial discrimination by stating the community did not regard "the Mexican alien or the Jamaican or Bahamian. . . [or] *his family*" as worthy of citizenship is especially dubious. *See* Resp. Br. 38. The notion that Fuller's comments were merely about "keeping farm labor transient" (assuming that goal can even be separated from its obvious racial implications) is, at best, willfully blind to the prevalence in the mid-twentieth century of the belief that a racially integrated society would be undesirable. *See* 9/21/22 Pet'r's Amended Appendix ("App'x") (Dkt. No. 42) at 99. Moreover, it ignores the overarching context of an immigration framework that was, at that time, intentionally configured to preserve a majority-white racial status quo. As the Government admits, the immigration quotas that remained in effect until 1965 demonstrate Congress' "wished to . . . place greater burdens" on nationals of some countries than it placed on others, Resp. Br. 41, overwhelmingly those whose majority populations were not considered white. App'x 112. Considered in this context, the Government's position that Fuller's clearly racist statements were not *really* racist strains credulity.

To the contrary, the historical record clearly demonstrates that desires for migrant farmworkers to be "returned" were not merely about holding down wages. Rather, such desires were influenced by fears that migrant Black and Latino farmworkers—including groups referred to in legislative histories as "negroes . . . from the West Indies", App'x 83, "Porto Rican yellow negro[es]", App'x 75, and "mongrel Mexican[s] . . . [of] some white, some African and more Indian descent", App'x 77, and denigrated as "scum of the earth", App'x 80, "the worst cancer", *id.*, and a "menace to [our] women", App'x 81—would "amalgamate", App'x 75, "crossbreed[]", *id.*, and "intermarry like the [American] negro with white people", *id.*, thus "creat[ing] the most insidious and general mixture of white, Indian, and negro blood strains ever produced in America." App'x 77.

Under *Arlington Heights*, a claimant "need not necessarily prove that racial discrimination was the sole motivating factor in order to prevail." *Underwood*, 730 F.2d at 617 n.7. Thus, any interest in keeping farm labor cheap would not negate evidence suggesting that Congress wished to prevent migrant Black and Latino farmworkers from marrying American women and then conferring their newly-found citizenship status on their foreign-born children, just as the existence of white children born abroad to American GI fathers would not render statements about the "racial problem" posed by "negro half-castes" fathered by Black American GIs any less racist. *See* App'x 115.

Similarly, the Government's assertion that racially discriminatory sentiments expressed during Congressional hearings on the 1940 Act "did not carry the day" misses the point. Both Rep. Lesinski's comment about the "trouble" with "[t]hese Negroes" from "South America and the West Indies" and Rep. Van Zandt's lamentation that "Negroes of African nativity or descent [in the Canal Zone] can come over here and be eligible to citizenship" show that some legislators thought Black migrants' access to citizenship should be limited, notwithstanding their *racial* eligibility. *See* App'x 127. Notably, Mr. Hazard, one of the legislation's drafters, explained that "the number who might be naturalized [as a result of the Act's provision extending naturalization eligibility to races indigenous to the Western Hemisphere[5]] was felt to be very small," App'x 124, implicitly acknowledging that overt racial bars were only one factor or mechanism that might limit a particular racial group's access to citizenship.[6]

Finally, the Government's assertion that Walentynowicz's statements are irrelevant to whether 8 U.S.C. § 1432(a)(3) was enacted with discriminatory

[5] Mr. Hazard specified that "races Indigenous to the Western Hemisphere" meant "principally Indians." App'x 124.

[6] In contrast with Western Hemisphere *colonies* (such as Jamaica), independent countries of the Western Hemisphere were not (and never were) subject to the immigration quotas, which suggests Mr. Hazard believed some other circumstance (or combination of circumstances) would limit the number of people belonging to races Indigenous to the Western Hemisphere who might ultimately naturalize.

purpose is incorrect. While *Arlington Heights* expressly contemplates contemporaneous statements as potential proof of discriminatory intent, the factors articulated in *Arlington Heights* are not exhaustive. 429 U.S. at 268. Accordingly, although Walentynowicz's statements were made some years after the 1952 INA's enactment, they nevertheless shed light on the persistence of the "promiscuous Black male" trope that surfaces again and again, decade after decade, in records of immigration and nationality legislation considered by Congress throughout the course of the twentieth century.[7] Moreover, they embody the very same sort of racially discriminatory logic that defeated the Guyer brothers' claim to citizenship in 1864, thereafter affecting fathers' ability to automatically bestow citizenship on their foreign born, nonmarital children for decades – including within the context of automatic acquisition of citizenship *after* birth. *See Guyer v. Smith*, 22 Md. 239, 240 (Md. 1864).

B. Section 1432(a)(3) Had A Racially Discriminatory Impact.

In asserting that § 1432(a)(3)'s exclusion of unwed fathers does not disproportionately impact immigrants from majority-Black countries, the

[7] Although Walentynowicz's testimony concerned requirements for child visa petitions, he fails to acknowledge that naturalized fathers' inability to petition for U.S. residency on behalf of their nonmarital children necessarily meant they could not satisfy one of the key prerequisites for automatic citizenship transmission after birth.

Government notes that, in the 17 District Court cases involving a denied citizenship claim under § 1432(a)(3) based on the father, 41 percent were brought by claimants from majority-Black countries. Resp. Br. 44. While the representation of claimants from majority-Black countries appears to be lower in District Courts than in Circuit Courts (where citizenship claims under § 1432(a)(3) generally arise within the context of a petition for review from an agency order of removal),[8] the Government's argument actually *supports* Silva's position. Notwithstanding the discrepancy, which could be attributed to the different contexts within which § 1432(a)(3) claims might arise, the proportion of claimants from majority-Black countries in District Courts still vastly exceeds the proportion of U.S. immigrants who identify as Black.[9]

The Government also points out that failed claims in District Courts based on the mothers' naturalization arose from majority-Black countries at a similar rate to failed claims based on the fathers' naturalization. This fact does not undermine

[8] In the 31 Circuit Court cases involving a denied citizenship claim under § 1432(a)(3) based on the father, over 70 percent were brought by claimants from majority-Black countries. Pet. Br. 46.

[9] In 2019, 10 percent of immigrants reported their race as Black, as compared to 45 percent who reported their race as single-race White. Migration Policy Institute, Frequently Requested Statistics on Immigrants and Immigration in the United States (Mar. 17, 2022), *available at* https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states.

Silva's race discrimination claim because the reasons that mothers' claims fail are distinct from the reason that fathers' claims fail. Unlike mothers, a father cannot under *any* circumstances bestow citizenship unilaterally on his nonmarital child unless he first marries, then divorces his child's mother.

The Government asserts that § 1432(a)(3)'s disparate impact was not foreseeable because majority rates of nonmarital cohabitation and birth in majority-Black countries were comparable to rates in other countries of Latin America. However, it is recognized that discriminatory policies may cause injury to those outside of the targeted class. *See*, *e.g.*, *Angelino v. N.Y. Times Co.*, 200 F.3d 73, 92 (3d Cir. 1999) (men had standing to assert sex discrimination claims because they were injured by discriminatory seniority policy intended to prevent women from being promoted). The Government further contends that disparate impact was not foreseeable because consular files were not readily available to § 1432(a)(3)'s drafters and because the tables that Silva provides do not begin until 1958. But such data merely corroborate information compiled by the Department of Labor and published in the Congressional record by the House Committee on Immigration and Naturalization as early as 1925. App'x 34-55.

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.

In the opening brief, Silva explained that the benefit of citizenship should be extended to him in one of two ways, in view of the unconstitutional discrimination in the second clause in § 1432(a)(3). Pet. Br. 53. Namely, the Court should either grant Silva relief on an as-applied basis by recognizing that he derived U.S. citizenship through his father, or it should implement what Congress would have done in § 1432(a)(3) had it been apprised of Clause 2's constitutional infirmity. Pet. Br. 53. This may be accomplished by adding that a child becomes a citizen through "the naturalization of the father if the child was born out of wedlock and the child is in the legal custody of the father." Pet. Br. 54.

The Government contends it does not have sufficient information to take a position on remedy. Resp. Br. 50. With respect to the Government's claim that it is "unclear which provisions of former . . . § 1432(a)(3) are being challenged," Silva's gender claim and his race claim both challenge the constitutionality of § 1432(a)(3)'s second clause. *See* Resp. Br. 50.

CONCLUSION

The exclusion of fathers in former § 1432(a)(3)'s second clause was based on anachronistic gender stereotypes and had a racially discriminatory purpose. This Court can and should remedy these "largely meaningless vestiges of a bygone era" by holding that Silva derived citizenship through his father. *See Tineo v. U.S. Att'y Gen.*, 937 F.3d 200, 213 (3d Cir. 2019).

Dated this 6th day of January, 2023.

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1. This brief complies with the length limits permitted by Fed. R. App. P. 32(a)(7) because it contains 4,551 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: January 6, 2023

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I hereby certify that on January 6, 2023, 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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