

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 RESPONSE TO COURT'S APRIL 15, 2024 ORDER

Meredyth L. Yoon
ASIAN AMERICANS ADVANCING JUSTICE-
ATLANTA
5680 Oakbrook Parkway, Ste. 148
Norcross, GA 30093
T: 404-585-8446
F: 404-890-5690
myoon@advancingjustice-atlanta.org

Peter Isbister
Bacardi Jackson
Abel S. Delgado
SOUTHERN POVERTY LAW CENTER
150 East Ponce de Leon Ave., Ste. 340
Decatur, GA 30030
T: 404-447-1431 / 305-537-0578
F: 912-335-4997
peter.isbister@splcenter.org
bacardi.jackson@splcenter.org
abel.delgado@splcenter.org

Naikang Tsao
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703
T: 608-258-4250
F: 608-258-4258
ntsao@foley.com

Amber Qureshi
NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD
2201 Wisconsin Avenue NW, Ste. 200
Washington, DC 20007
T: 202-470-2082
F: 617-227-5495
amber@nipnlg.org

Counsel for Petitioner

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:

1. ALEXANDER, Gerald M., Office of Immigration Litigation, Civil Division, U.S. Department of Justice, *Counsel for Respondent*;

2. BOYNTON, Brian M., Acting Assistant Attorney General, Civil Division, U.S., Department of Justice, *Counsel for Respondent*;

3. BROWN, Denise G., Temporary Appellate Immigration Judge, Board of Immigration Appeals, Executive Office for Immigration Review;

4. CANTER, Nancy K., Office of Immigration Litigation, Civil Division, U.S. Department of Justice, *Counsel for Respondent*;

5. DELGADO, Abel S., Southern Poverty Law Center, *Counsel for Petitioner*;

6. DUNCAN, Randall W., Immigration Judge, Atlanta Immigration Court, Executive Office for Immigration Review;

7. ERVIN, Sean, Field Office Director, Atlanta Field Office, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security;

8. GARLAND, Merrick B., Attorney General of the United States, U.S. Department of Justice, *Respondent*;

9. ISBISTER, Peter, Southern Poverty Law Center, *Counsel for Petitioner*;

10. JACKSON, Bacardi, Southern Poverty Law Center, *Counsel for Petitioner*;

11. MAJORKAS, Alejandro N., Secretary, U.S. Department of Homeland Security;

13. QURESHI, Amber, National Immigration Project of the National Lawyers Guild, *Counsel for Petitioner*;

14. SILVA, Kelvin Osvaldo, *Petitioner*;

15. TSAO, Naikang, Foley & Lardner LLP. *Counsel for Petitioner*;

16. WALDROP, Ashley S., Assistant Chief Counsel, Office of the Principal Legal Advisor, U.S. Department of Homeland Security;

17. YOON, Meredyth L., Asian Americans Advancing Justice-Atlanta, *Counsel for Petitioner*.

Respectfully submitted,

/s/ Meredyth L. Yoon

Meredyth L. Yoon

ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA

5680 Oakbrook Parkway, Ste. 148

Norcross, GA 30093

myoon@advancingjustice-atlanta.org

TABLE OF CONTENTS

ARGUMENT 1

TABLE OF CITATIONS

Federal Cases

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 1

Lodge v. U.S. Att’y Gen.,
92 F.4th 1298 (11th Cir. 2024) 1, 2, 3

Ng Fung Ho v. White,
259 U.S. 276 (1922) 1

Roy v. Barr,
960 F.3d 1175 (9th Cir. 2020) 3

Schneider v. Rusk,
377 U.S. 163 (1964) 1

Sessions v. Morales-Santana,
582 U.S. 47 (2017) 1, 2, 4

Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,
429 U.S. 252 (1977) 2

Federal Statutes

8 U.S.C. § 1432 *passim*

The Court issued an order directing Petitioner Silva to show cause why his petition for review should not be denied pursuant to *Lodge v. U.S. Attorney General*, 92 F.4th 1298 (11th Cir. 2024). *Lodge* is not dispositive of Silva’s nationality claim. The Court should grant Silva’s petition for review.

Citizenship is a “most precious” right. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963); *Schneider v. Rusk*, 377 U.S. 163, 167 (1964). “To deport one who so claims to be a citizen obviously deprives him of liberty . . . property and life, or of all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Silva’s case is about his “most precious” right to citizenship, and is factually distinguishable from *Lodge*. Due process requires a full consideration of Silva’s claims. *Id.* at 284-5.

Pursuant to the Supreme Court’s decision in *Morales-Santana*, in an equal protection analysis, 1432(a)(3)’s exclusion of fathers must be viewed within the context in which the statute was enacted in 1952. Section 1432(a)(3) “date[s] from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are.” *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017). The formative influence of sex and race discrimination on the 1952 INA is well-documented. “[U]nwed citizen fathers . . . according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital

children The alien father, who might transmit foreign ways, was presumptively out of the picture.” *See id.* at 62.

Unlike petitioner Lodge, Silva does not argue that this Court may not adjudicate his race discrimination arguments. *See Lodge* at 1301. Here, the totality of circumstances in Silva’s case demonstrates that § 1432(a)(3)’s exclusion of fathers was enacted with a racially discriminatory purpose. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Silva’s case is further distinguishable from Lodge’s. In *Lodge*, this Court rejected the petitioner’s equal protection challenges to the sex classification in §1432(a)(3)’s second clause because Lodge “would not have derived citizenship from his father under a version of the second clause that treated mothers and fathers the same.” *Lodge* at 1303. The Court explained in *Lodge* that a sex-neutralized version of § 1432(a)(3) would have conferred citizenship 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 *or the naturalization of the father if the child was born out of wedlock and the maternity of the child has not been established.*” *Id.* Lodge would not have derived citizenship under this version of the statute because his mother’s maternity was established. *Id.*

Silva’s case is distinguishable because he *would* be a U.S. citizen under the “sex-neutralized” version of § 1432(a)(3) that this Court posited in *Lodge*. *See id.*

at 1305. “That a child’s maternity has not been established is, even if improbable, ‘not impossible.’” *Lodge* at 1305, citing *Roy v. Barr*, 960 F.3d 1175, 1182 (9th Cir. 2020). Specifically, “an unmarried mother could give birth at her home and then leave the baby on the father’s doorstep.” *Id.* This is precisely what happened to Mr. Silva—his mother gave him to his father shortly after his birth. AR 118 ¶ 3.

Given these facts, Silva should be able to derive citizenship under the sex-neutralized version of § 1432(a)(3) that this Court offered in *Lodge*; otherwise, the revised statute would not be “treat[ing] mothers and fathers the same.” See *Lodge* at 1303. As in Silva’s case, the example in *Lodge* about a mother who leaves their newborn baby on the father’s doorstep represents a situation where the mother is *out of the picture*. Indeed, in a hypothetical scenario where mothers and fathers are being treated the same, there must be some circumstance that would allow a single father to pass citizenship to a nonmarital child who in his full custody, other than when the *mother’s identity is unknown*—which would not be the same as a father’s *paternity not being established by legitimation*.

Real people have been harmed by § 1432(a)(3)’s exclusion of fathers, as the Court expressly acknowledged in *Lodge*. See *Lodge* at 1301. See also Response to Supplemental Authority, Doc. No. 61 at 9 (Brief of Amici Curiae). If the Court’s holding in *Lodge* were to defeat Silva’s race discrimination claim, which was not fully asserted in *Lodge*, as it is here, the impact would be profound. If such were

the case, the only claimant who could challenge the race discrimination in §1432(a)(3)'s second clause would be one who has not, as of yet, proven to exist—a claimant whose mother's identity is unknown. For a clearly discriminatory statute that is harming actual, real people to be allowed to stand because only a hypothetical person can challenge it would be cruel and nonsensical. Under such logic, if § 1432(a)(3) would have conferred citizenship upon “naturalization of the White Norwegian father if the child was born out of wedlock and the maternity of the child has not been established,” no child of a Black or Hispanic father who was harmed by the statute would be able to challenge it unless their mother's identity was unknown—allowing the law's racist purpose of excluding people of color to be realized.

Although not delivered by stork, Silva should be deemed a U.S. citizen through his father, and he should derive the same benefit that nonmarital children of naturalized citizen mothers received when Congress enacted § 1432(a)(3)'s second clause. “[T]he Court has held that 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.” *Morales-Santana*, 582 U.S. at 62-3. The Court should grant Silva's petition for review.

Dated this 29th day of April, 2024.

/s/ Meredyth L. Yoon

Meredyth L. Yoon

ASIAN AMERICANS ADVANCING JUSTICE-
ATLANTA

5680 Oakbrook Parkway, Ste 148

Norcross, GA 30093

T: 404-585-8446

F: 404-890-5690

myoon@advancingjustice-atlanta.org

Naikang Tsao

FOLEY & LARDNER LLP

150 East Gilman Street

Madison, WI 53703

T: 608-258-4250

F: 608-258-4258

ntsao@foley.com

Peter Isbister

Bacardi Jackson

Abel Delgado

SOUTHERN POVERTY LAW CENTER

150 East Ponce de Leon Ave., Ste. 340

Decatur, GA 30030

T: 404-447-1431 / 305-537-0578

F: 912-335-4997

peter.isbister@splcenter.org

bacardi.jackson@splcenter.org

abel.delgado@splcenter.org

Amber Qureshi

NATIONAL IMMIGRATION PROJECT OF

THE NATIONAL LAWYERS GUILD

2201 Wisconsin Avenue NW, Ste. 200

Washington, DC 20007

T: 202-470-2082

F: 617-227-5495

amber@nipnl.org

Counsel for Petitioner Kelvin Osvaldo Silva

**CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION,
TYPEFACE AND TYPE STYLE REQUIREMENTS**

1. This response complies with the length limits permitted by Fed. R. App. P. 27(d)(2) because it contains 987 words, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman size 14 font.

Dated: April 29, 2024

/s/ Meredyth L. Yoon
Meredyth L. Yoon
ASIAN AMERICANS ADVANCING JUSTICE-
ATLANTA
5680 Oakbrook Parkway, Ste. 148
Norcross, GA 30093
myoon@advancingjustice-atlanta.org

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, 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.

/s/ Meredyth L. Yoon

Meredyth L. Yoon

ASIAN AMERICANS ADVANCING JUSTICE-
ATLANTA

5680 Oakbrook Parkway, Ste. 148

Norcross, GA 30093

myoon@advancingjustice-atlanta.org