No. 11-1252

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS RAMON MORALES-SANTANA (AKA LUIS MORALES),

Petitioner,

v.

LORETTA E. LYNCH, U. S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS
Agency Case No. A034-200-190

RESPONDENT'S PETITION FOR REHEARING EN BANC

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

DONALD E. KEENER
Deputy Director
Office of Immigration Litigation

ANDREW C. MACLACHLAN
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: 202-514-9718
Email: Andrew.MacLachlan@usdoj.gov
ATTORNEYS FOR RESPONDENT

INTRODUCTION

This case involves the extraordinarily important question of defining who is a citizen of the United States. *En banc* review is necessary here because the panel decision creates a conflict among the circuits – establishing divergent rules of citizenship. The panel has done something no Court (including the Supreme Court) has done before – invalidate a citizenship statute written by Congress and rewrite the statutory provision at issue in a way that affirmatively grants United States citizenship to a class of individuals to which Congress did not.

STATEMENT

Petitioner was born out of wedlock in the Dominican Republic in 1962 and legitimated upon the marriage of his parents in 1970. Certified Administrative Record (AR) 34. His mother was Dominican, and his father was a U.S. citizen who moved to the Dominican Republic prior to the father's nineteenth birthday. Petitioner was admitted to the United States as a lawful permanent resident in 1975, and his father died in 1976. AR 95. Petitioner was later convicted of various crimes, including attempted murder. *See* AR 392-410. He then admitted that he is subject to removal based on his convictions. AR 246. Petitioner moved to reopen, arguing that he acquired U.S. citizenship at birth from his father under former 8 U.S.C. §§ 1401(a)(7) and 1409(a) (1958).[1] AR 32-54.

---

[1] Those statutory provisions were enacted in Sections 301 and 309 of the

A panel of this Court rejected statutory arguments by petitioner for derivative citizenship under 8 U.S.C. § 1401. Slip op. 9-13. The panel, however, ruled that the statutory scheme violated the Fifth Amendment's guarantee of equal protection. Section 1401(a)(7) provided that where one parent of a child born abroad was a U.S. citizen, and the other parent was not, the child would be a citizen at birth if the citizen-parent had ten years physical presence in the United States. However, if the mother was an unmarried U.S. citizen or national, under Section 1409(c), the child would acquire at birth the nationality of the mother if the mother had one year continuous physical presence in the United States.

The panel declined to apply rational basis review, and instead applied intermediate scrutiny to assess the asserted government interests in (1) ensuring a sufficient connection between citizen children and the United States, and (2) avoiding statelessness. Slip op. 15-20. The panel concluded that there was no evidence that Congress had these purposes in mind when enacting the statute, *id.* at 26-32, but that in any event the statute's gender-based physical presence requirements violated equal protection because gender-neutral alternatives were available. *Id.* at 24-26, 32-34. The panel acknowledged that its ruling conflicts with *United States v. Flores-Villar*, 536 F.3d 990, 997 (9th Cir. 2008), *aff'd by an equally divided Court*, 131 S. Ct. 2312 (2011). Slip op. 21-22, 34 n. 17.

Immigration and Nationality Act of 1952, Pub L. No. 82-414, 66 Stat. 163. This petition will cite those sections as codified in the 1958 United States Code.

To remedy the perceived violation, the panel, rather than sever the "gender-based" exception, "replac[ed] the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)." Slip op. 40. Under the rewritten statute, the panel declared petitioner a citizen at birth. *Id.* at 41. Under the panel's reasoning, other aliens born abroad to unmarried fathers under the 1952 statutory scheme are equally entitled to citizenship, despite Congress's judgment not to confer such citizenship except in accordance with the ten-year physical presence requirement.

ARGUMENT

The Panel Decision Warrants *En Banc* Review

Rehearing *en banc* is warranted because the panel erred, the issues are exceptionally important, and the opinion is inconsistent with Supreme Court precedent and creates a conflict among the circuits. The panel's decision makes it impossible for the Departments of State and Homeland Security to administer the citizenship scheme according to uniform, consistent rules.

I. The Panel's Equal Protection Ruling Applied the Wrong Standard of Review, Misinterpreted the Statute and Its Legislative History, and Created a Conflict with *Flores-Villar*

Pursuant to its exclusive and plenary authority under Article I of the Constitution, Congress has enacted comprehensive rules governing immigration and naturalization, including the acquisition of citizenship by children born abroad

to U.S. citizen parents. The panel committed a series of errors when it held aspects of the statutory scheme unconstitutional.

A. The panel erred when it failed to apply rational basis review to petitioner's constitutional challenge. Citizenship for children who are born abroad of U.S. citizen parents is available "only upon terms and conditions specified by Congress." *Miller v. Albright*, 523 U.S. 420, 456 (1998) (O'Connor, J., concurring in the judgment) (quotation marks omitted). Deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo v. Bell*, 430 U.S. 787, 792, 793 n. 4 (1977). Indeed, the Supreme Court has held that Congress's judgments regarding requirements for citizenship of a person born abroad are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" supporting those judgments. *Id.* at 794.

The panel erred in declining to follow *Fiallo* and instead applying heightened scrutiny. The Supreme Court's decision in *Fiallo* rested its deferential standard of review on Congress's "broad power over immigration <u>and naturalization</u>." 430 U.S. at 792 (emphasis added). The power to confer citizenship is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is an aspect of the same power. *See Miller*, 523

U.S. at 453 (Scalia, J., concurring in the judgment). Moreover, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational basis review should not apply because the statutory provision at issue implicated "constitutional interests of U.S. citizens and permanent residents." *Id.* at 794. If rational basis review applied to the constitutional claims of citizens in *Fiallo*, it should apply to petitioner's constitutional claim as well.

B. The panel also erred in rejecting the government's argument that the statutory scheme is justified by the goal of ensuring a sufficient connection between the child and the United States. Throughout the Act, Congress generally made it easier for U.S. citizens to transmit citizenship to children born abroad in circumstances where the child's only legal parent or parents were U.S. citizens or nationals. It carefully distinguished that circumstance from situations in which the child had two legal parents, one of whom was a U.S. citizen and the other of whom was an alien.[2] That distinction reflects Congress's reasonable view that under such circumstances, the child would be subject to influences of the alien parent and would therefore be less closely connected to the United States.

Section 1409(c) implements this approach by allowing an unmarried U.S.

[2] *See, e.g.*, 8 U.S.C. §§ 1401(a)(3) (requiring a parent to have "had a residence" in United States when both parents are U.S. citizens), 1401(a)(4) (one-year continuous physical presence requirement when one parent is U.S. citizen and other parent is U.S. national), 1401(a)(7) (ten-year physical presence requirement when one parent is U.S. citizen and other parent is alien).

citizen mother to transmit citizenship to her child at birth subject to a one-year continuous physical presence requirement, instead of the ten-year physical presence requirement in Section 1401(a)(7). As Congress was aware, at the exact moment of birth "there is only one . . . legal parent," *i.e.*, the mother. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 62 (1940) (1940 Hearings). In the absence of any competing parental influence, it was reasonable for Congress to treat that differently than it would treat a child born to a married couple consisting of one U.S. citizen and one alien. In doing so, Section 1409(c) helps to ensure a connection between U.S. citizen children and the United States.

C. The panel also erred in concluding that Congress did not enact Section 1409(c) for the concededly-legitimate purpose of avoiding statelessness. Slip op. 21, 25, 32. Most importantly, the panel discounted the clearest statement of Congress's actual purpose with respect to that provision. The Senate Report expressly declared that "[t]his provision [Section 1409(c)] establishing the child's nationality as that of the [citizen] mother regardless of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*" S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphasis added). The panel's holding that Section 1409(c) was not actually

motivated by preventing statelessness at birth is thus directly at odds with the express statement of the enacting Congress.

In a lengthy footnote, the panel attempted to distinguish the unambiguous legislative history by asserting that it addressed only that Section 1409 "had eliminated a provision in the 1940 [Nationality] Act that had conditioned a citizen mother's ability to transmit nationality to her child on the father's failure to legitimate the child prior to the child's eighteenth birthday." Slip op. 28-29 n.10 (citing and quoting Nationality Act of 1940, § 205, 54 Stat. 1137, 1139-1140). The panel concluded that the statement in the legislative history thus "does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal." *Ibid.*

That analysis is flawed. It makes sense only on the assumption that Section 205 contained the same "gender-based" distinction now at issue in this case. But if the panel is correct that the 1940 Act did not allow unmarried mothers to transmit U.S. nationality to their children in circumstances where the alien father legitimated the child before he or she gained majority, slip. op. 28-29 n.10, then the 1940 Act did *not* in fact contain the same "gender-based" distinction at issue here. On the panel's view of the 1940 Act, in circumstances where (1) a child was born abroad, out of wedlock, to a U.S. citizen and an alien, and (2) the child was subsequently legitimated by the father, the child could obtain U.S. citizenship only

if the U.S. citizen mother or father could satisfy the ten-year physical presence requirement set forth in Section 201(g) of the 1940 Act. In other words, on the panel's understanding of the 1940 Act, Section 205 treated unmarried U.S. citizen mothers and fathers equally.

If that is true, however, then Congress must have the introduced "gender-based" disparity at issue in this case only in 1952, through Section 1409(c)'s "eliminat[ion] of a provision in the 1940 [Nationality] Act that had conditioned a citizen mother's ability to transmit nationality to her child on the father's failure to legitimate the child prior to the child's eighteenth birthday." Slip op. 28-29 n.10. But as the panel acknowledged, the Senate Report confirms that Section 1409(c)'s elimination of that provision was intended to "insure[] that the child shall have a nationality at birth." 1952 Senate Report 39. The panel's own analysis of the 1940 Act thus supports the conclusion that Congress's actual purpose when enacting the gender disparity at issue here was to avoid statelessness.

D. The panel also erred in suggesting that Section 1409(c)'s gender distinction reflected "gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Slip op. 31 (citing sources). The panel's support for that proposition involved government statements about the greater likelihood of maternal responsibility for a child who had not subsequently been legitimated by the father. In those circumstances, however, Congress

recognized the mother is the "only . . . legal parent." 1940 Hearings 62.

It was not unreasonable or discriminatory for Congress to assume that the only legal parent would be responsible for the child's upbringing. Nor was it unreasonable or discriminatory for Congress to want to ensure that a child whose only legal parent at birth was a U.S. national mother should acquire nationality through the mother instead of running a risk of statelessness. The fact that the scheme ultimately provided a different standard for mothers to transmit their nationality than fathers in certain circumstances did not reflect impermissible gender bias or stereotypes, but rather the practical reality that unmarried mothers and unmarried fathers are differently situated with respect to their children at the moment of birth. *See generally Nguyen v. INS*, 533 U.S. 53, 64-68 (2001).

E. The panel also erred when it ruled that the disparate treatment of unmarried fathers and mothers did not bear a substantial relationship to the objective of preventing statelessness. Slip op. 32-34. The panel based this conclusion on its identification of a gender-neutral alternative, a 1933 proposal introduced by then-Secretary of State Cordell Hull. That proposal read as follows:

> A child hereafter born out of wedlock [outside the United States] to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Slip op. 33 (quoting proposal).

The panel erred in assuming that the Hull proposal was meaningfully

different from Section 1409(c) of the 1952 Act. To be sure, that proposal was *facially* gender-neutral insofar as it stated that a child born out of wedlock "to an American parent . . . , there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent." Slip op. 33. In practice, however, the proposal would seem to apply only to the illegitimate children of American mothers, insofar as it was limited to circumstances where the child was born out of wedlock and there was "no other legal parent under the law of the place of birth." *Ibid.* This was clear to observers at the time. *See Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality*, 73d Cong., 1st Sess. 56 (1933) (noting that "[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have the idea that it would just apply to women.").

Moreover, the fact that the Hull proposal was neutral on its face, whereas Section 1409(c) includes the gendered term "mothers," makes no constitutional difference. As the Supreme Court explained in *Nguyen*:

> [t]he issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64. In short, Congress's decision not to enact the Hull proposal – and instead to enact Section 1409(c), which is not meaningfully different from that proposal – is not a valid basis for concluding that Section 1409(c) is unrelated to the goal of reducing statelessness at birth.

F. The flaws in the panel's analysis of Section 1409(c) would warrant *en banc* review in any event, but such review is especially justified because the panel decision creates a direct circuit conflict with the Ninth Circuit's decision in *Flores-Villar*, 536 F.3d at 997. The panel's errors are exceptionally important because they invalidated a statute on constitutional grounds, conflict with Ninth Circuit, and establish an unmanageable, divergent rule of citizenship contrary to the constitutional mandate for a uniform nationwide rule. *See* Fed. R. App. P. 35.

II. The Panel Erred in Conferring Citizenship to Petitioner and in Its Revision of the Statutory Scheme

To remedy the perceived constitutional violation, the panel conducted a severability analysis and ultimately ruled that petitioner is entitled to U.S. citizenship. The panel began by asserting that it had chosen to "sever[] the ten-year requirement in [Sections] 1409(a) and 1401(a)(7) and [to] require[] every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship." Slip op. 36. The panel then implemented that conclusion by literally rewriting Section 1401(a)(7) as follows:

> [The following shall be nationals and citizens of the United at birth:] a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a continuous period of one year * * *.

Slip op. 40 n. 19 (emphasis in original).

The panel rejected the government's argument that – even if Section 1409(c) is constitutionally flawed – the proper remedy is to apply Section 1401(a)(7)'s ten-year physical presence requirement, on an equal basis, to any children born abroad, out of wedlock, to a U.S. citizen and an alien. *See* Br. for the United States, *Flores-Villar v. United States* (No. 09-5801), 2010 WL 3392008 at *45-*52 (explaining severability analysis in detail). The panel's severability analysis is flawed in a number of fundamental ways, two of which are emphasized here.

A. The panel's severability analysis is ambiguous in at least two significant respects, both of which are likely to create confusion in its implementation. First, that analysis fails to appreciate that Section 1401(a)(7) is a broad provision that covers not only children born to unmarried parents (when one parent is a U.S. citizen and the other is an alien) but also children born to *married* parents (when one is a citizen and the other is an alien). It is not clear whether the panel intends its rewritten version of Section 1401(a)(7) to apply (1) only to *unmarried* parents, with parents married to aliens remaining subject to the ten-year physical presence requirement appearing in the version of Section 1401(a)(7) actually enacted by

Congress; or (2) to unmarried parents *as well as* parents married to aliens, as the literal text of its revision suggests, even though the statute as drafted by Congress is not unconstitutional as applied to parents married to aliens. Both of these approaches violate the "Separability" provision, Section 406 of the 1952 Act, which states that if "any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." 8 U.S.C. § 1101 note (1958).

The panel's analysis also fails to appreciate the important difference between a "physical presence" requirement (which Congress included in Section 1401(a)(7)) and a "continuous" physical presence requirement (which Congress included in Section 1409(c)). It is conceivable that some U.S. citizen parents are capable of satisfying the ten-year "physical presence" requirement set forth in Congress's Section 1401(a)(7), but not the one-year "continuous" physical presence requirement that Congress included in Section 1409(c) (and that the panel has now incorporated into its revised version of Section 1401(a)(7)). *See* 7 Foreign Affairs Manual (FAM) § 1133.4-3(a) (1998). The panel's revision of Section 1401(a)(7) therefore arguably deprives at least some individuals of the U.S. citizenship to which they were entitled under the version of Section 1401(a)(7)

enacted by Congress. It seems unlikely that the panel intended such a result, despite the plain language of its revision of Section 1401(a)(7).

B. The panel's decision to rewrite Section 1401(a)(7) also violates 8 U.S.C. § 1421(d) (1958). That provision states that "[a] person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the 1952 Act], and not otherwise." *Id.* In *Nguyen*, the Supreme Court made clear that transmission of citizenship under Section 1409(a) constitutes a "naturalization" for purposes of Section 1421(d), at least where the statutory conditions set forth in that provision are satisfied *after* the child is born. *Nguyen*, 533 U.S. at 72; *see* 8 U.S.C. § 1101(a)(23) (1958) (defining "naturalization" for the Act); *but see* Dept. of State, 7 FAM § 1131.6-3 (2013). Here, the panel decision allows children of unmarried citizen-fathers to acquire citizenship under conditions contrary to those prescribed by statute. That conclusion violates Section 1421(d).[3]

C. For these reasons – as well as those stated in the government's briefs submitted to the panel in this case, and to the Supreme Court in *Flores*-Villar – the only proper way to cure the equal protection violation identified by the panel would be to apply the ten-year physical presence requirement in Section

[3] Nothing in the 1952 Act's "Separability" provision authorizes a remedy that is inconsistent with the express terms of Section 1421(d). Indeed, the "Separability" provision makes clear that if a provision of the Act is invalidated, "the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." 8 U.S.C. § 1101 note (1958).

1401(a)(7), on a prospective basis, to unmarried citizen mothers. Such a ruling would comply with Section 1421(d) of the 1952 Act, respect Congress's authority over who may acquire U.S. citizenship, and allow Congress to decide whether or how to extend citizenship to children of unmarried U.S. citizen fathers and mothers who do not meet the physical presence requirement in Section 1401(a)(7).[4]

CONCLUSION

For the foregoing reasons, the Court should grant rehearing *en banc*.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

DONALD E. KEENER
Deputy Director
Office of Immigration Litigation

/s/ *Andrew C. MacLachlan*
ANDREW C. MACLACHLAN
Senior Litigation Counsel
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: 202-514-9718

September 21, 2015

[4] Notably, if the *en banc* court of appeals agrees with the government's severability analysis, then petitioner remains subject to the ten-year physical presence requirement and he is not entitled to U.S. citizenship. In such circumstances, there would be no need for the court to rule on the merits of the constitutional issue. *See Miller*, 523 U.S. at 459 (Scalia, J., concurring in the judgment); *Flores-Villar* Oral Arg. Tr. 48-49 (suggestion that if the proper severability analysis would not provide a benefit to petitioner, his claim would not be redressable, he would lack standing, and the Court would lack jurisdiction).

CERTIFICATE OF COMPLIANCE

I certify that the attached petition for rehearing *en banc* is in compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Andrew C. MacLachlan
ANDREW C. MACLACHLAN
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: 202-514-9718

Slip Opinion

Morales-Santana v. Lynch, No. 11-1252 (July 8, 2015)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 1, 2013 Final Submission: November 14, 2014
Decided: July 8, 2015)

Docket No. 11-1252-ag

- -X

LUIS RAMON MORALES-SANTANA, AKA LUIS MORALES,

Petitioner,

v.

LORETTA E. LYNCH, UNITED STATES ATTORNEY GENERAL,*

Respondent.

- X

Before: LOHIER, CARNEY, *Circuit Judges*, and RAKOFF, *District Judge*.**

Petitioner Luis Ramon Morales-Santana seeks review of a Board of Immigration Appeals ("BIA") decision denying his motion to reopen his

---

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Loretta E. Lynch is automatically substituted for former Attorney General Eric H. Holder, Jr. as Respondent.

** The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

removal proceedings to evaluate his claim of derivative citizenship. Under the statute in effect when Morales-Santana was born, Immigration and Nationality Act of 1952, §§ 301(a)(7), 309(a), (c) (codified at 8 U.S.C. §§ 1401(a)(7), 1409(a), (c) (1952)), Morales-Santana's father satisfied the physical presence requirements for transmitting citizenship applicable to unwed citizen mothers but not the more stringent requirements applicable to unwed citizen fathers. On appeal, Morales-Santana argues principally that this statutory scheme violates the Fifth Amendment's guarantee of equal protection, and that the proper remedy is to extend to unwed fathers the benefits unwed mothers receive under the statute. We agree and hold that Morales-Santana derived citizenship at birth through his father. We accordingly REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

STEPHEN A. BROOME (Ellyde Roko and Jacob Waldman, *on the brief*), Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY, *for* Petitioner.

IMRAN R. ZAIDI, Attorney, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, DC (Stuart Delery, Acting Assistant Attorney General, Stephen J. Flynn, Assistant Director, Office of Immigration Litigation, Civil Division, Kathryn M. McKinney, Attorney, Office of Immigration Litigation, Civil Division, *on the brief*), *for* Respondent.

LOHIER, *Circuit Judge*:

Luis Ramon Morales-Santana asks us to review a March 3, 2011 decision of the Board of Immigration Appeals ("BIA") denying his motion to

reopen his removal proceedings relating to his claim of derivative citizenship. Under the statute in effect when Morales-Santana was born – the Immigration and Nationality Act of 1952 (the "1952 Act") – a child born abroad to an unwed citizen mother and non-citizen father has citizenship at birth so long as the mother was present in the United States or one of its outlying possessions for a continuous period of at least one year at some point prior to the child's birth. See 1952 Act, § 309(c), 66 Stat. 163, 238-39 (codified at 8 U.S.C. § 1409(c) (1952)).[1] By contrast, a child born abroad to an unwed citizen father and non-citizen mother has citizenship at birth only if the father was present in the United States or one of its outlying possessions prior to the child's birth for a period or periods totaling at least ten years, with at least five of those years occurring after the age of fourteen. See id. § 309(a) (codified at 8 U.S.C. § 1409(a) (1952)); see also id. § 301(a)(7) (codified at 8 U.S.C. § 1401(a)(7) (1952)).[2] Morales-Santana's father satisfied the

---

[1] Unless otherwise noted, references to §§ 1401 and 1409 are to those sections as they appear in the 1952 Act, and references to other statutory provisions are to those sections as they appear in the current codification.

[2] Section 1401(a)(7) provided:

> The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United

1 requirements for transmitting citizenship applicable to unwed mothers but
2 not the more stringent requirements applicable to unwed fathers. On appeal,
3 Morales-Santana argues principally that this gender-based difference violates
4 the Fifth Amendment's guarantee of equal protection and that the proper
5 remedy is to extend to unwed fathers the benefits unwed mothers receive
6 under § 1409(c). We agree and hold that Morales-Santana derived citizenship
7 at birth through his father. We accordingly REVERSE the BIA's decision and
8 REMAND for further proceedings consistent with this opinion.

> States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . .

Section 1409(a) provided that § 1401(a)(7) "shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act," provided that paternity is established "by legitimation" before the child turns 21. Section 1409(c) provided:

> Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

BACKGROUND

I. Facts

The following undisputed facts are drawn from the record on appeal. Morales-Santana's father, Jose Dolores Morales, was born in Puerto Rico on March 19, 1900 and acquired United States citizenship in 1917 pursuant to the Jones Act. See Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. § 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, 20 days before his nineteenth birthday, when he left Puerto Rico to work in the Dominican Republic for the South Porto Rico Sugar Company.

In 1962 Morales-Santana was born in the Dominican Republic to his father and his Dominican mother. Morales-Santana was what is statutorily described as "legitimat[ed]" by his father upon his parents' marriage in 1970 and admitted to the United States as a lawful permanent resident in 1975. 8 U.S.C. § 1409(a). Morales-Santana's father died in 1976.

II. Statutory Framework

Unlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all. See 8 U.S.C. § 1409(a), (c); cf. id. § 1101(a)(23). The law in effect at the time of birth governs whether a child obtained derivative

1 citizenship as of his or her birth. See Ashton v. Gonzales, 431 F.3d 95, 97 (2d
2 Cir. 2005). Accordingly, the 1952 Act provides the statutory framework
3 applicable to Morales-Santana's nationality claim.

4 As noted, the 1952 Act limits the ability of an unwed citizen father to
5 confer citizenship on his child born abroad – where the child's mother is not a
6 citizen at the time of the child's birth – more stringently than it limits the
7 ability of a similarly situated unwed citizen mother to do the same. Compare
8 8 U.S.C. § 1401(a)(7), with id. § 1409(c).[3] We note that this difference in
9 treatment of unwed citizen fathers and unwed citizen mothers, though
10 diminished, persists in the current statute. Compare 8 U.S.C. § 1409(a) (2012)
11 (applying to unwed citizen fathers § 1401(g), which requires five years of
12 physical presence, two of which must be after age fourteen), with id. § 1409(c)
13 (maintaining the 1952 Act's conferral of derivative citizenship based on an

[3] In addition to satisfying the requirements of § 1401(a)(7), the father must establish his paternity through legitimation of the child before the child turns 21. See 8 U.S.C. § 1409(a). As both parties agree, Morales-Santana's father legitimated his son in 1970. Morales-Santana does not contest the statute's legitimation requirement, and that requirement is not at issue on appeal. See Nguyen v. INS, 533 U.S. 53 (2001) (upholding as constitutional the similar legitimation requirement found in the current version of the statute, 8 U.S.C. § 1409(a)(4) (2000)).

unwed mother's continuous physical presence for one year at any time prior to the child's birth).

III. Procedural History

In 2000 Morales-Santana was placed in removal proceedings after having been convicted of various felonies. He applied for withholding of removal on the basis of derivative citizenship obtained through his father. An immigration judge denied the application. In 2010 Morales-Santana filed a motion to reopen based on a violation of equal protection and newly obtained evidence relating to his father. The BIA rejected Morales-Santana's arguments for derivative citizenship and denied his motion to reopen.

DISCUSSION

Morales-Santana makes four arguments for derivative citizenship: (1) that his father's physical absence from the United States during the 20 days directly prior to his father's nineteenth birthday constituted a de minimis "gap" in physical presence, and that such gaps should not count against a finding of physical presence for purposes of § 1401(a)(7); (2) that the South Porto Rico Sugar Company, which employed his father after his father moved to the Dominican Republic, was a multi-national United States-owned

company and therefore effectively part of the United States government or an international organization as defined in 22 U.S.C. § 288, see 1966 Act to Amend the Immigration and Nationality Act (the "1966 Act"), 80 Stat. 1322 (codified at 8 U.S.C. § 1401(a)(7) (1966)) (counting periods of employment for certain organizations toward the statute's physical presence requirements); (3) that at the time his father moved to the Dominican Republic it was an "outlying possession" of the United States; and (4) as noted, that the different physical presence requirements applicable to unwed fathers and unwed mothers under the 1952 Act violate equal protection.

Consistent with our obligation to avoid constitutional questions if possible, we first address Morales-Santana's three statutory arguments for derivative citizenship. See Escambia Cnty., Fla. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam).

As to both his statutory and constitutional arguments, we review de novo the question of Morales-Santana's derivative citizenship. See Phong Thanh Nguyen v. Chertoff, 501 F.3d 107, 111 (2d Cir. 2007). "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about

the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. § 1252(b)(5)(A). No material facts are disputed.

I. Statutory Arguments

Morales-Santana contends that his father's absence from the United States during the 20 days prior to his father's nineteenth birthday constitutes a de minimis "gap" in his father's physical presence and that such gaps should not be held against someone who claims to have satisfied the 1952 Act's physical presence requirement. In support, Morales-Santana points to continuous physical presence requirements under the immigration laws that explicitly excuse de minimis absences. See, e.g., id. § 1229b(b)(1)(A), (d)(2) (2012) (absences of 90 continuous days or fewer do not break "continuity" of physical presence for purposes of cancellation of removal for a lawful permanent resident.); id. §§ 1255(l)(3), 1255a(a)(3)(B). By its plain terms, § 1401(a)(7) had no similar exception. In any event, because Morales-Santana's father left the United States and its outlying possessions 20 days prior to his nineteenth birthday and never returned, there was no "gap" in his father's physical presence that bridged two periods of physical presence. So even if we recognized an exception to the physical presence requirement in

§ 1401 for de minimis "gaps," we would reject Morales-Santana's claim on this basis.

Relying on the 1966 Act, Morales-Santana next argues that his father's employment with the South Porto Rico Sugar Company in the Dominican Republic immediately after leaving Puerto Rico satisfied the statute's physical presence requirement by effectively continuing his physical presence through the requisite period. It is true that the 1966 Act provided that employment with the United States Government or with an international organization, as defined in 22 U.S.C. § 288, satisfied the physical presence requirement. See 8 U.S.C. § 1401(a)(7) (1966). But Morales-Santana's argument lacks merit because his father's employment with the South Porto Rico Sugar Company, a multinational company, did not constitute employment with the United States Government. See Drozd v. INS, 155 F.3d 81, 86 (2d Cir. 1998). Nor did it constitute employment with an international organization as defined in 22 U.S.C. § 288, since the South Porto Rico Sugar Company was neither "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress

1 authorizing such participation or making an appropriation for such
2 participation," nor "designated by the President" as such. 22 U.S.C. § 288.
3 As his final statutory argument, Morales-Santana contends that the
4 Dominican Republic was an "outlying possession" of the United States for
5 purposes of the 1952 Act when Morales-Santana's father was there in 1919.
6 Two factors convince us that Congress did not intend to include the
7 Dominican Republic within the scope of the term "outlying possession" in
8 § 1401.[4]
9 First, there is no treaty or lease pursuant to which the Dominican
10 Republic was acquired. This stands in contrast to the Philippines, Guam,
11 Puerto Rico, and the U.S. Virgin Islands, all of which were acquired by the
12 United States by treaty, see Treaty of Peace between the United States and the
13 Kingdom of Spain, 30 Stat. 1754 (1899); Convention between the United States
14 and Denmark, 39 Stat. 1706 (1917), and all of which were outlying possessions
15 when the United States exercised sovereignty over them, see Matter of V-, 9 I.

[4] Congress did not define "outlying possessions" until the Nationality Act of 1940, which defined "outlying possessions" as "all territory . . . over which the United States exercises rights of sovereignty, except the Canal Zone." See § 101(e), 54 Stat. 1137 (codified at 8 U.S.C. § 501(e) (1940)). The 1952 Act defined the term to include only "American Samoa and Swains Island." 101(a)(29), 66 Stat. 170 (codified at 8 U.S.C. § 1101(a)(29) (1952)).

& N. Dec. 558, 561 (1962); Matter of Y-----, 7 I. & N. Dec. 667, 668 (1958). The case of Guantanamo Bay, Cuba is a little different in that it involves both a lease and a treaty, but it yields the same result vis-à-vis the Dominican Republic. In Boumediene v. Bush, 553 U.S. 723 (2008), the Supreme Court determined that the "complete jurisdiction and control" by the United States over Guantanamo Bay constituted "de facto" sovereignty over it. Id. at 753-55 (quotation marks omitted). The Court added, though, that in a 1903 Lease Agreement between Cuba and the United States, the former granted the latter "complete jurisdiction and control" over Guantanamo Bay and that "[u]nder the terms of [a] 1934 [t]reaty, . . . Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons" Guantanamo Bay. Id. at 753. By contrast, there is no lease or treaty that conferred to the United States de facto or de jure sovereignty over the Dominican Republic.

Second, we acknowledge the historical fact that the United States exercised significant control during its military occupation of the Dominican Republic from 1916 to 1924. See Ingenio Porvenir C. Por A. v. United States, 70 Ct. Cl. 735, 738 (1930). But that control did not extinguish the sovereignty

of the Dominican Republic. Indeed, the Proclamation of the Military Occupation of Santo Domingo by the United States specifically declared that the purpose of the temporary military occupation was "to give aid to [the Dominican Republic] in returning to a condition of internal order" without "destroying the sovereignty of" the Dominican Republic. 11 Supp. Am. J. Int'l L. 94, 94-96 (1917) (Nov. 29, 1916 Proclamation); see also Bruce J. Calder, The Impact of Intervention: The Dominican Republic During the U.S. Occupation of 1916-1924 xxvii, 17, 205 (2d ed. 2006).

Having rejected Morales-Santana's statutory arguments for derivative citizenship, we now consider his constitutional equal protection argument.

II. Equal Protection

Morales-Santana argues principally that the 1952 Act's treatment of derivative citizenship conferral rights violates the Fifth Amendment's guarantee of equal protection.[5] As we have explained, under the 1952 Act, an

[5] Morales-Santana has standing to assert this equal protection claim on behalf of his father since Morales-Santana alleges that his father suffered an injury in fact, that his father bears a close relation to him, and that his father's ability to assert his own interests is hindered because his father is deceased. See Campbell v. Louisiana, 523 U.S. 392, 397 (1998) (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)); see also Miller v. Albright, 523 U.S. 420, 433 (1998)

unwed citizen mother confers her citizenship on her child (born abroad to a non-citizen biological father) so long as she has satisfied the one-year continuous presence requirement prior to the child's birth. The single year of presence by the mother can occur at any time prior to the child's birth – including, for example, from the mother's first birthday until her second birthday. An unwed citizen father, by contrast, faces much more stringent requirements under 8 U.S.C. §1409(a), which incorporates § 1401(a)(7). He is prevented from transmitting his citizenship (to his child born abroad to a non-citizen mother) unless he was physically present in the United States or an outlying possession prior to the child's birth for a total of at least ten years.[6] Because five of those years must follow the father's fourteenth birthday, an unwed citizen father cannot transmit his citizenship to his child born abroad to a non-citizen mother before the father's nineteenth birthday. Eighteen-year-old citizen fathers and their children are out of luck.

(opinion of Stevens, J.); id. at 449-50 (O'Connor, J., concurring); id. at 454 n.1 (Scalia, J., concurring); id. at 473 (Breyer, J., dissenting).

[6] As noted, the father must also satisfy a legitimation requirement. See 8 U.S.C. § 1409(a).

As both parties agree, had Morales-Santana's mother, rather than his father, been a citizen continuously present in Puerto Rico until 20 days prior to her nineteenth birthday, she would have satisfied the requirements to confer derivative citizenship on her child. It is this gender-based difference in treatment that Morales-Santana claims violated his father's right to equal protection.

The Government asserts that the difference is justified by two interests: (1) ensuring a sufficient connection between citizen children and the United States, and (2) avoiding statelessness. In what follows, we apply intermediate scrutiny to assess these asserted interests, and we conclude that neither interest is advanced by the statute's gender-based physical presence requirements. After determining that these physical presence requirements violate equal protection, we apply the statute's severance clause and determine that Morales-Santana, under the statute stripped of its constitutional defect, has citizenship as of his birth.

A. Level of Scrutiny

We apply intermediate, "heightened" scrutiny to laws that discriminate on the basis of gender. United States v. Virginia, 518 U.S. 515, 531-33 (1996).

Under intermediate scrutiny, the government classification must serve actual and important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives. Nguyen v. INS, 533 U.S. 53, 68 (2001); Virginia, 518 U.S. at 533. Furthermore, the justification for the challenged classification "must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Virginia, 518 U.S. at 533.

In urging us to apply rational basis scrutiny instead, the Government relies on Fiallo v. Bell, 430 U.S. 787 (1977). In Fiallo, the Supreme Court applied rational basis scrutiny to a section of the 1952 Act that gave special preference for admission into the United States to non-citizens born out of wedlock seeking entry by virtue of a relationship with their citizen mothers, but not to similarly situated non-citizens seeking entry by virtue of a relationship with their citizen fathers. See id. at 798. The Court reasoned that rational basis scrutiny was warranted because "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens," and "[o]ur cases have long recognized the power to expel or

exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments." Id. at 792 (emphases added) (quotation marks omitted); see also Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (Congress has "plenary power" to make rules for the admission and exclusion of non-citizens. (quotation marks omitted)).

But Fiallo is distinguishable. In Fiallo, the children's alienage implicated Congress's "exceptionally broad power" to admit or remove non-citizens. Fiallo, 430 U.S. at 794. Here, by contrast, there is no similar issue of alienage that would trigger special deference. Because Morales-Santana instead claims pre-existing citizenship at birth, his challenge does not implicate Congress's "power to admit or exclude foreigners," id. at 795 n.6, and therefore is not governed by Fiallo.

Our view of Fiallo's limited scope is grounded in Supreme Court and circuit caselaw. As an initial matter, we note that the Supreme Court has never applied the deferential Fiallo standard to issues of gender discrimination under § 1409, despite being asked to do so on at least three occasions. See Miller v. Albright, 523 U.S. 420 (1998) (declining to apply Fiallo); Nguyen v. INS, 533 U.S. 53 (2001) (applying heightened scrutiny);

United States v. Flores-Villar, 131 S. Ct. 2312 (2011) (per curiam) (affirming without opinion by divided 4-4 vote). Justice Stevens' opinion in Miller succinctly described Fiallo's limitation: "It is of significance that the petitioner in this case, unlike the petitioners in Fiallo, . . . is not challenging the denial of an application for special [immigration] status. She is contesting the Government's refusal to . . . treat her as a citizen. If she were to prevail, the judgment . . . would confirm her pre-existing citizenship." Miller, 523 U.S. at 432 (plurality opinion); see also id. at 429 ("Fiallo . . . involved the claims of . . . aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen.").

Although no opinion in Miller received a majority of votes, we observed in Lake v. Reno that "seven justices in Miller would have applied heightened scrutiny . . . [to INA] section 309(a)." 226 F.3d 141, 148 (2d Cir. 2000), vacated sub nom. Ashcroft v. Lake, 533 U.S. 913 (2001) (citing Nguyen), abrogated on other grounds by Lake v. Ashcroft, 43 F. App'x 417, 418 (2d Cir. 2002). Later, in Lewis v. Thompson, we explained Lake's holding in a way that makes it clear that heightened scrutiny, rather than Fiallo's more deferential standard of review, should apply to Morales-Santana's claim:

1 "[W]e have already held in Lake, drawing an inference from the various
2 opinions of the Justices in Miller, that citizen claimants with an equal
3 protection claim deserving of heightened scrutiny do not lose that favorable
4 form of review simply because the case arises in the context of immigration."
5 252 F.3d 567, 591 (2d Cir. 2001); see also id. at 590 ("As we recognized in Lake,
6 Fiallo itself made clear that the reduced threshold of justification for
7 governmental action that applied to immigrants did not apply to citizens."
8 (emphasis added) (quotation marks omitted)). Our sister circuits that have
9 considered Fiallo's application to claims similar to Morales-Santana's are in
10 accord. See Nguyen v. INS, 208 F.3d 528, 535 (5th Cir. 2000) (noting that "the
11 statute in Fiallo dealt with the claims of aliens for special immigration
12 preferences for aliens, whereas the petitioner's claim in this case is that he is a
13 citizen"), aff'd, 533 U.S. 53 (2001); Breyer v. Meissner, 214 F.3d 416, 425 (3d
14 Cir. 2000) (applying heightened scrutiny to § 1993 of the Revised Statutes of
15 1874, a predecessor to § 1409, because it "created a gender classification with
16 respect to [petitioner's] mother's ability to pass her citizenship to her foreign-
17 born child at his birth"); United States v. Ahumada-Aguilar, 189 F.3d 1121,
18 1126 (9th Cir. 1999) (applying Miller to "f[i]nd § 1409(a)(4) unconstitutional by

applying heightened scrutiny"), vacated, 533 U.S. 913 (2001) (citing Nguyen), abrogated on other grounds by 295 F.3d 943 (9th Cir. 2002); cf. United States v. Flores-Villar, 536 F.3d 990, 996 n.2 (9th Cir. 2008) ("Like the Supreme Court in Nguyen, we will assume that intermediate scrutiny applies."), aff'd by an equally divided Court, 131 S. Ct. 2312.

For these reasons, we conclude that the gender-based scheme in §§ 1401 and 1409 can be upheld only if the Government shows that it is substantially related to an actual and important governmental objective. See Virginia, 518 U.S. at 531, 533, 535-36; Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). In assessing the validity of the gender-based classification, moreover, we consider the existence of gender-neutral alternatives to the classification. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); Orr v. Orr, 440 U.S. 268, 281 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).

B. Governmental Interests and Tailoring

Having determined that intermediate scrutiny applies, we examine the two interests that the Government claims support the statute's gender-based distinction.

1. Ensuring a Sufficient Connection Between the Child and the United States

The Government asserts that Congress passed the 1952 Act's physical presence requirements in order to "ensur[e] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship." Respondent's Br. 38-39. As both parties agree, this interest is important, and Congress actually had it in mind when requiring some period of physical presence before a citizen parent could confer citizenship on his or her child born abroad. See Petitioner's Br. 35 n.17 (citing Weedin v. Chin Bow, 274 U.S. 657, 666-67 (1927)).

The Government invokes this important interest but fails to justify the 1952 Act's different treatment of mothers and fathers by reference to it. It offers no reason, and we see no reason, that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad.

We recognize that our determination conflicts with the decision of the Ninth Circuit in Flores-Villar, 536 F.3d 990, which addressed the same statutory provisions and discussed the same governmental interest in

ensuring a connection between child and country. The Ninth Circuit concluded that in addition to preventing or reducing statelessness – an objective we address below – "[t]he residence differential . . . furthers the objective of developing a tie between the child, his or her father, and this country." Flores-Villar, 536 F.3d at 997. The Ninth Circuit provided no explanation for its conclusion, and the Government provides none here.

Instead, the Government relies on Nguyen to explain why the different physical presence requirements for unwed men and women reflect a concern with ensuring an adequate connection between the child and the United States. We are not persuaded. In Nguyen, the Court upheld the Immigration and Nationality Act's requirement that a citizen father seeking to confer derivative citizenship on his foreign-born child take the affirmative step of either legitimating the child, declaring paternity under oath, or obtaining a court order of paternity.[7] See Nguyen, 533 U.S. at 62; 8 U.S.C. § 1409(a)(4) (2000). The Nguyen Court determined that two interests supported the legitimation requirement for citizen fathers of children born abroad.

---

[7] For brevity, we refer to these as constituting a "legitimation requirement," though legitimation is just one of three ways of satisfying the statutory provision.

The first interest, "assuring that a biological parent-child relationship exists," Nguyen, 533 U.S. at 62; see Miller, 523 U.S. at 435-36, is irrelevant to the 1952 Act's physical presence requirements because derivative citizenship separately requires unwed citizen fathers to have legitimated their foreign-born children. Here, Morales-Santana's father established his biological tie to Morales-Santana by legitimating him. His physical presence in Puerto Rico for ten years as opposed to one year prior to Morales-Santana's birth would have provided no additional assurance that a biological tie existed.

The Nguyen Court identified a second interest in ensuring "that the child and the citizen parent have some demonstrated opportunity or potential to develop" a "real, meaningful relationship." Nguyen, 533 U.S. at 64-65. The Court explained that a biological mother, by virtue of giving birth to the child, "knows that the child is in being and is hers," but that an unwed biological father might in some cases not even "know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity." Id. at 65. Rather than requiring a case-by-case analysis of whether a father or a mother has a "real, meaningful relationship" with a child born abroad, "Congress enacted an easily administered scheme to promote the different

1 but still substantial interest of ensuring at least an opportunity for a parent-
2 child relationship to develop." Id. at 69. This interest in ensuring the
3 "opportunity for a real, meaningful relationship" between parent and child is
4 likewise not relevant to the 1952 Act's physical presence requirements. By
5 legitimating his son, Morales-Santana's father took the affirmative step of
6 demonstrating that an opportunity for a meaningful relationship existed.
7 And again, requiring that Morales-Santana's father be physically present in
8 Puerto Rico prior to Morales-Santana's birth for ten years instead of one year
9 would have done nothing to further ensure that an opportunity for such a
10 relationship existed.

11 So we agree that unwed mothers and fathers are not similarly situated
12 with respect to the two types of parent-to-child "ties" justifying the
13 legitimation requirement at issue in Nguyen. But unwed mothers and fathers
14 are similarly situated with respect to how long they should be present in the
15 United States or an outlying possession prior to the child's birth in order to
16 have assimilated citizenship-related values to transmit to the child.
17 Therefore, the statute's gender-based distinction is not substantially related to

the goal of ensuring a sufficient connection between citizen children and the United States.

2. Preventing Statelessness

Having concluded that the Government's interest in establishing a connection between the foreign-born child and the United States does not explain or justify the gender-based distinction in the 1952 Act's physical presence requirements, we now turn to the Government's other asserted interest. The Government argues that Congress enacted different physical presence requirements in § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) to reduce the level of statelessness among newborns. For example, a child born out of wedlock abroad may be stateless if he is born inside a country that does not confer citizenship based on place of birth and neither of the child's parents conferred derivative citizenship on him.

The avoidance of statelessness is clearly an important governmental interest. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160-61 (1963); Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion). Contrary to the Government's claim, though, avoidance of statelessness does not appear to have been Congress's actual purpose in establishing the physical presence

requirements in the 1952 Act, see Virginia, 518 U.S. at 533, and in any event the gender-based distinctions in the 1952 Act's physical presence requirements are not substantially related to that objective.

a. Actual Purpose

Some historical background is useful to understand Congress's purpose in establishing the 1952 Act's gender-based physical presence requirements. Until 1940, a citizen father whose child was born abroad transmitted his citizenship to that child if the father had resided in the United States for any period of time prior to the child's birth. See Rogers v. Bellei, 401 U.S. 815, 823-25 (1971) (discussing the Act of March 26, 1790, 1 Stat. 103, and successive statutes); Act of May 24, 1934, ch. 344, 48 Stat. 797; Nationality Act of 1940 (the "1940 Act"), ch. 876, § 201(g), 54 Stat. 1137, 1139. Consistent with common law notions of coverture, and with the notion that the husband determined the political and cultural character of his dependents (wife and children included), prior to 1934 married women had no statutory right to confer their own citizenship.[8] See Brief [of] Amici Curiae of Professors of History,

[8] In 1934 Congress granted citizen mothers, whether married or unmarried, the right to confer citizenship on their children born abroad if the mother

Political Science, and Law in Support of Petitioner at 9, Flores-Villar v. United States, 131 S. Ct. 2312 (2010), 2010 WL 2602009; Candice Lewis Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 84 (1998). But for unmarried citizen mothers, the State Department's practice since at least 1912 was to grant citizenship to their foreign-born children on the theory that an unmarried mother "stands in the place of the father" and is in any event "bound to maintain [the child] as its natural guardian." To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the H. Comm. on Immigration and Naturalization, 76th Cong. 431 (1945) (quotation marks omitted).

In 1940 Congress for the first time explicitly addressed the situation of children born out of wedlock. It enacted Section 205 of the 1940 Act, 54 Stat. at 1139-40, which provided that citizen fathers and married citizen mothers could transmit citizenship to their child born abroad only after satisfying an age-calibrated ten-year physical presence requirement, but that unmarried citizen mothers could confer citizenship if they had resided in the United

---

satisfied the same minimal residency requirement applicable to citizen fathers. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.

States at any point prior to the child's birth. The 1952 Act retained this basic statutory structure, though it imposed a somewhat more stringent requirement that unmarried mothers have been physically present in the United States for a continuous period of one year in order to confer citizenship. 8 U.S.C. § 1409(c).

Neither the congressional hearings nor the relevant congressional reports concerning the 1940 Act contain any reference to the problem of statelessness for children born abroad.[9] The congressional hearings concerning the 1952 Act are similarly silent about statelessness as a driving concern.[10] Notwithstanding the absence of relevant discussion concerning the

---

[9] Cf. Kristin A. Collins, Illegitimate Borders: *Jus Sanguinis* Citizenship and the Legal Construction of Family, Race, and Nation, 123 Yale L.J. 2134, 2205 n.283 (2014) ("[I]n the many hundreds of pre-1940 administrative memos I have read that defend or explain recognition of the nonmarital foreign-born children of American mothers as citizens, I have identified exactly one memo by a U.S. official that mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern." (citing Memorandum from Green Hackworth, Office of the Solicitor, U.S. Dep't of State, to Richard Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (on file with National Archives and Records Administration, Relevant Group 59, Central Decimal File 131))).

[10] The Government does cite one congressional report in which statelessness was mentioned in conjunction with the 1952 Act. A Senate Report dated January 29, 1952 mentions the problem of statelessness in explaining why the

1 problem of statelessness for children born abroad in the legislative history,

2 the Government points to the Executive Branch's explanatory comments to

3 Section 204 of the proposed nationality code that Congress would ultimately

4 enact as the 1940 Act. See 76th Cong. 431. These comments refer to a 1935

5 law review article entitled A Comparative Study of Laws Relating to

6 Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248 (1935), by

7 Durward V. Sandifer.[11] According to the article, in 1935 approximately thirty

---

1952 Act eliminated a provision in the 1940 Act that had conditioned a citizen mother's ability to transmit nationality to her child on the father's failure to legitimate the child prior to the child's eighteenth birthday. See 1940 Act, § 205, 54 Stat. at 1140 ("In the absence of . . . legitimation or adjudication [during the child's minority], . . . the child" born abroad to an unmarried citizen mother "shall be held to have acquired at birth [the mother's] nationality status." (emphases added)). The 1952 Act eliminated this provision, allowing the mother to transmit citizenship independent of the father's actions. S. Rep. No. 1137, at 39 (1952) ("This provision establishing the child's nationality as that of the [citizen] mother regardless of legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth." (emphasis added)).

Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal.

[11] Contrary to the Government's assertion, the Sandifer article does not indicate that it was "conducted by the State Department." Rather, Sandifer, who worked at the State Department at the time he wrote the article, explains at the outset that he decided to write it at the suggestion of a colleague, not

1 countries had statutes assigning children born out of wedlock the citizenship
2 of their mother. Id. at 258. From the comments and the article, the
3 Government urges us to infer that "Congress was aware" there existed "a
4 substantial risk that a child born to an unwed U.S. citizen mother in a country
5 employing [laws determining citizenship based on lineage, rather than place
6 of birth] would be stateless at birth unless the mother could pass her
7 citizenship to her child," and that this risk was "unique" to the children of
8 unwed citizen mothers. Respondent's May 8, 2013 Supp. Br. 2, 6-7.[12]
9 Based on our review of the Executive Branch's explanatory comments
10 and the Sandifer article, we decline the Government's invitation. The
11 explanatory comments do not mention statelessness and do not refer to the
12 Sandifer article's discussion of statelessness. In any event, the Sandifer article
13 itself does not support the Government's argument that the children of

---

pursuant to an official directive. See Sandifer, Comparative Study, 29 Am. J. Int'l L. at 248.

[12] In response to our order requesting supplemental briefing on the issue, the Government was unable to furnish any other evidence that Congress enacted or the Executive encouraged the 1940 Act's or the 1952 Act's gender-based physical presence requirements due to concerns about statelessness.

1 unwed citizen mothers faced a greater risk of statelessness than the children
2 of unwed citizen fathers.

3 While the Executive Branch's comments ignore the problem of
4 statelessness, they arguably reflect gender-based generalizations concerning
5 who would care for and be associated with a child born out of wedlock.[13]
6 Other contemporary administrative memoranda similarly ignore the risk of
7 statelessness for children born out of wedlock abroad to citizen mothers.[14]

8 In sum, we discern no evidence (1) that Congress enacted the 1952 Act's
9 gender-based physical presence requirements out of a concern for
10 statelessness, (2) that the problem of statelessness was in fact greater for

---

[13] The comments reflect the view that the mother "is bound to maintain" "custody and control of . . . a child [born out of wedlock] as against the putative father" as its "natural guardian" and that "[t]he mother, as guardian by nurture, has the right to the custody and control of her bastard child." 76th Cong. 431 (quotation marks omitted); see also Collins, 123 Yale L.J. at 2205 ("[T]he historical record reveals that the pronounced gender asymmetry of the [1940] Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child – and the father's lack of such a relationship."); id. at 2203 (quoting as representative of contemporary views an internal letter to a State Department official stating that "as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the nonmarital] child").

[14] See Collins, 123 Yale L.J. at 2205 n.283.

children of unwed citizen mothers than for children of unwed citizen fathers, or (3) that Congress believed that the problem of statelessness was greater for children of unwed citizen mothers than for children of unwed citizen fathers. We conclude that neither reason nor history supports the Government's contention that the 1952 Act's gender-based physical presence requirements were motivated by a concern for statelessness, as opposed to impermissible stereotyping.

b. Substantial Relationship Between Ends and Means

Even assuming for the sake of argument that preventing statelessness was Congress's actual motivating concern when it enacted the physical presence requirements, we are persuaded by the availability of effective gender-neutral alternatives that the gender-based distinction between § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) cannot survive intermediate scrutiny. See Wengler, 446 U.S. at 151 (invalidating a gender-based classification where a gender-neutral approach would serve the needs of both classes); Orr, 440 U.S. at 282-83 ("A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.").

As far back as 1933, Secretary of State Cordell Hull proposed just such a gender-neutral alternative in a letter to the Chairman of the House Committee on Immigration and Naturalization. Secretary Hull suggested that the immigration laws be revised "to obtain the objective of parity between the sexes in nationality matters" by "remov[ing] . . . discrimination between" mothers and fathers "with regard to the transmission of citizenship to children born abroad." Hull proposed the following language:

> PROPOSED AMENDMENT . . .
>
> (d) A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Letter from Sec'y Hull to Chairman Dickstein (Mar. 27, 1933) (Respondent's May 8, 2013 Supp. Br. Ex. B).[15]

And unlike the legitimation requirement at issue in Nguyen, which could be satisfied by, for example, "a written acknowledgment of paternity

---

[15] In 1936, an Executive Branch official who participated in drafting the 1940 Act recognized that "Section 204 [of the 1940 Act] as drawn up by the Committee slightly discriminates in favor of women." Letter from John J. Scanlon to Ruth B. Shipley, U.S. Dep't of State (Mar. 7, 1936) (Petitioner's Nov. 14, 2014 Supp. Br. Ex. 4); see also Collins, 123 Yale L.J. at 2235.

1 under oath," the physical presence requirement that Morales-Santana

2 challenges imposes more than a "minimal" burden on unwed citizen fathers.

3 See Nguyen, 533 U.S. at 70-71. It adds to the legitimation requirement ten

4 years of physical presence in the United States, five of which must be after the

5 age of fourteen. In our view, this burden on a citizen father's right to confer

6 citizenship on his foreign-born child is substantial.[16]

7 For these reasons, the gender-based distinction at the heart of the 1952

8 Act's physical presence requirements is not substantially related to the

9 achievement of a permissible, non-stereotype-based objective.[17]

---

[16] As we have already noted, the burden is actually impossible for eighteen-year-old unwed citizen fathers to satisfy.

[17] We note once more that our conclusion differs from that of the Ninth Circuit in Flores-Villar. There the Ninth Circuit assumed, sub silentio, that Congress's enactment of the physical presence requirements was actually motivated by concern for reduction in the risk of statelessness. It also nominally assumed, without deciding, that intermediate scrutiny applied. See 536 F.3d at 996 & n.2. We disagree with the Ninth Circuit that the Government has carried its burden of showing an "exceedingly persuasive justification" for the statute's gender-based classification as a means of addressing the problem of statelessness. See Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). The Government has not shown that the problem arose – or was perceived to arise – more often with citizen mothers than with citizen fathers of children born out of wedlock abroad. See, e.g., Sandifer, Comparative Study, 29 Am. J. Int'l L. at 254; Brief of Amici Curiae Scholars on

1 3. Remedy

2 We now turn to the most vexing problem in this case. Here, two
3 statutory provisions – § 1409(c) and (a)[18] – combine to violate equal
4 protection. What is the remedy for this violation of equal protection, where
5 citizenship is at stake? Ordinarily, "when the 'right invoked is that to equal
6 treatment,' the appropriate remedy is a mandate of equal treatment, a result
7 that can be accomplished by withdrawal of benefits from the favored class as
8 well as by extension of benefits to the excluded class." Heckler v. Mathews,
9 465 U.S. 728, 740 (1984) (emphasis omitted) (quoting Iowa-Des Moines Nat'l
10 Bank v. Bennett, 284 U.S. 239, 247 (1931)); accord Califano v. Westcott, 443
11 U.S. 76, 89 (1979).

12 As we see it, "equal treatment" might be achieved in any one of three
13 ways: (1) striking both § 1409(c) and (a) entirely; (2) severing the one-year
14 continuous presence provision in § 1409(c) and requiring every unwed citizen
15 parent to satisfy the more onerous ten-year requirement if the other parent

---

Statelessness in Support of Petitioner, Flores-Villar v. United States, 131 S. Ct. 2312 (2010), 2010 WL 2569160.

[18] Recall that § 1409(a) incorporates the physical presence requirement from § 1401(a)(7), which applies to married parents of mixed citizenship.

lacks citizenship; or (3) severing the ten-year requirement in §§ 1409(a) and 1401(a)(7) and requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship. In selecting among these three options, we look to the intent of Congress in enacting the 1952 Act. See Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292 n.31 (1987) ("[T]he Court must look to the intent of the . . . legislature to determine whether to extend benefits or nullify the statute."). For reasons we explain below, we conclude that the third option is most consistent with congressional intent.

We eliminate the first option with ease. The 1952 Act contains a severance clause that provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby." 1952 Act § 406; cf. Nguyen, 533 U.S. at 72 ("[S]everance is based on the assumption that Congress would have intended the result."). The clause makes clear that only one of the provisions in § 1409, rather than both, should be severed as constitutionally infirm.

We reject the second option – contracting, as opposed to extending, the right to derivative citizenship – with more circumspection. The Government urges us to adopt this option, arguing that the alternative allows the exception for unwed mothers to swallow the rule, thereby inflicting more damage to the statute's language and structure and reflecting a more radical change than the 1952 Congress intended. This argument fails for two reasons. First, the argument misunderstands our task, which is not to devise the "cleanest" way to alter the wording and structure of the statute, but to determine what result Congress intended in the event the combined statutory provisions were deemed unconstitutional. Second, the Government's argument neglects the historical background against which Congress enacted the relevant provisions. Although a close call, history does not convince us that the members of Congress passing the 1952 Act would have viewed the extension of the one-year requirement as a more radical change than the alternative, in which all unwed citizen parents must satisfy the ten-year age-calibrated requirement if the other parent lacks citizenship. To the contrary, the ten-year requirement for fathers and married mothers imposed by Congress in 1940 appears to have represented a significant departure from

long-established historical practice. See Rogers, 401 U.S. at 823-26 (reviewing the history of derivative citizenship statutes from the Act of March 26, 1790, 1 Stat. 103, through the 1952 Act and concluding that "for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child"). From 1934 until the enactment of the 1940 Act, for example, women had the statutory right to confer citizenship on their foreign-born children and were required merely to have resided in the United States for any duration prior to the child's birth. The same bare-minimum requirement applied to men for the vast majority of the time since the founding, from 1790 until 1940. See id.; Weedin, 274 U.S. at 664-67; Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797; 1940 Act. Moreover, the 1952 Act's addition of a one-year continuous physical presence requirement for unmarried citizen mothers represented a relatively minor change in the baseline minimal residency requirement applicable to all men and women prior to 1940. On the other hand, of course, we recognize that the 1952 Congress, presumably with the benefit of this long history, nevertheless decided to retain the ten-year residency requirement. Whether this related to the emergence of the United States as a world power

after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors, we cannot tell with confidence.

Neither the text nor the legislative history of the 1952 Act is especially helpful or clear on this point, and ultimately what tips the balance for us is the binding precedent that cautions us to extend rather than contract benefits in the face of ambiguous congressional intent. See, e.g., Westcott, 443 U.S. at 89 ("In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." (citing Jimenez v. Weinberger, 417 U.S. 628, 637-38 (1974), and Frontiero v. Richardson, 411 U.S. 677, 691 n.25 (1973) (plurality opinion))); Heckler, 465 U.S. at 738, 739 n.5; Weinberger, 420 U.S. at 641-42, 653; Soto-Lopez v. N.Y.C. Civil Serv. Comm'n, 755 F.2d 266, 280-81 (2d Cir. 1985). Indeed, we are unaware of a single case in which the Supreme Court has contracted, rather than extended, benefits when curing an equal protection violation through severance.

Lastly, the Government contends that, in giving Morales-Santana the relief he seeks, we are granting citizenship, which we lack the power to do.

1 This argument rests on a mistaken premise. Although courts have no power
2 to confer "citizenship on a basis other than that prescribed by Congress,"
3 Miller, 523 U.S. at 453 (Scalia, J., concurring), Morales-Santana has not asked
4 us to confer citizenship, and we do not do so. Instead, Morales-Santana asks
5 that we exercise our traditional remedial powers "so that the statute, free of
6 its constitutional defect, can operate to determine whether citizenship was
7 transmitted at birth." Nguyen, 533 U.S. at 95-96 (O'Connor, J., dissenting)
8 (citing Miller, 523 U.S. at 488-89 (Breyer, J., dissenting)); cf. id. at 73-74 (Scalia,
9 J., concurring). In other words, if Morales-Santana "were to prevail, the
10 judgment in [his] favor would confirm [his] pre-existing citizenship rather
11 than grant [him] rights that [he] does not now possess." Miller, 523 U.S. at
12 432 (opinion of Stevens, J.). Correcting the constitutional defect here would at
13 a minimum entail replacing the ten-year physical presence requirement in §
14 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous
15 presence requirement in § 1409(c).[19] The alternative remedy suggested by the

---

[19] As modified, § 1401(a)(7) would read:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the

Government – that all unwed parents be subject to the more onerous ten-year requirement – would prove no less controversial: we have no more power to strip citizenship conferred by Congress than to confer it. Nor, finally, has Congress authorized us to avoid the question. See 8 U.S.C. § 1252(b)(5)(A) ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." (emphasis added)). Conforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection, we conclude that Morales-Santana is a citizen as of his birth.

CONCLUSION

For the foregoing reasons, we REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

> United States or its outlying possessions for a continuous period of one year: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(first emphasis added to reflect change).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 21, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Andrew C. MacLachlan
ANDREW C. MACLACHLAN
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
202-514-9718