June 28, 2018

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: David Johnson, Petition No. P-1307-12
Response to Petition

Dear Dr. Abrão:

The United States Government has the honor of addressing the Inter-American Commission on Human Rights ("Commission") with regard to the above-referenced matter. The United States acknowledges receipt of the letter from your office dated September 5, 2017 and transmitted on September 11, 2017, in which your office forwarded the Petition in the above-referenced matter and asked for a U.S. response. Please find our response attached.

Please accept renewed assurances of my highest consideration.

Sincerely,

Kevin K. Sullivan
Deputy Permanent Representative

PETITION NO. P-1307-12, DAVID JOHNSON
RESPONSE OF THE UNITED STATES OF AMERICA

The Government of the United States appreciates the opportunity to submit these observations on the July 9, 2012 Petition regarding David Johnson ("Petitioner" or "Mr. Johnson"), forwarded to the United States by the Inter-American Commission on Human Rights ("Commission" or "IACHR") on September 5, 2017 as Petition No. P-1307-12. Petitioner is a citizen of Jamaica who was removed from the United States after committing four separate criminal felonies between 1989 and 2002. In relevant part, he alleges that by denying him derivative citizenship and ordering him removed from the United States, the United States violated his "human rights under Article II (Right to Equal Protection), Article V (Right to Protection of Private and Family Life), Article VIII (Right to Residence), and Article XIX (Right to Nationality) of the American Declaration" of the Rights and Duties of Man ("American Declaration" or "Declaration").

As a preliminary matter, the United States respectfully reaffirms its longstanding position that the Declaration is a statement of political commitments on the part of the Member States of the Organization of American States ("OAS"), and that it does not create legally binding obligations.[1] Because this nonbinding instrument does not itself create rights or impose duties on the United States, the United States construes any assertion that it has "violated" any of its provisions as an assertion that the United States has failed to live up to its nonbinding political commitments expressed in the Declaration.

[1] U.S. courts of appeals have independently held that the Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.*, Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001); *accord*, *e.g.*, Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493-94 (3rd Cir. 2011); In re Hicks, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the reference to the Convention in the OAS Charter shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states." *Garza*, 253 F.3d at 925; *accord* Commission Statute, arts. 18, 20 (setting forth various powers of the Commission). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988 ("U.S. Observations on Normative Status of American Declaration"), *available at* http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html.

We urge the Commission to find this matter inadmissible and to dismiss the Petition. This submission focuses on one ground of inadmissibility: the Petition does not state facts that tend to establish a violation of any provision of the Declaration, and is thus inadmissible under Article 34(a) of the Rules of Procedure ("Rules"). Should the Commission nevertheless declare the Petition admissible and examine its merits, it should dismiss the Petition as meritless for the reasons set forth below.

I. FACTUAL AND PROCEDURAL HISTORY[2]

Petitioner David Johnson, a native and citizen of Jamaica, was born in 1965. Neither of his parents was a United States citizen at the time. His parents were not and never subsequently were married to each other. Shortly after his birth, according to the Petition, Mr. Johnson's mother "surrendered him into [his father's] sole custody and control" and she has not been present in his life since. When he was seven years old, in October 1972, Mr. Johnson was admitted to the United States at New York, New York, as a lawful permanent resident. He was accompanied by his father, who naturalized as a United States citizen a little over a year after their arrival. Mr. Johnson never applied for United States citizenship on his own behalf prior to 1996. Nor did Mr. Johnson's father ever apply for United States citizenship on his son's behalf.

Since 1989, Mr. Johnson has committed a series of serious, independent felonies, violating the terms of his admission status in the United States. In January 1989, he was convicted in federal court in Texas on one count of carrying a firearm during and in relation to a drug trafficking crime, for which he was sentenced to five years incarceration. In May 1989, Mr. Johnson was convicted in state court in Texas of unlawful possession of a controlled substance (cocaine) and aggravated assault, and was sentenced to ten years' imprisonment.

On account of these convictions, the U.S. Immigration and Naturalization Service ("INS") in June 1996 moved to deport Mr. Johnson. In an apparent effort to contest his removal, Mr. Johnson, by then 31 years old, in December 1996 filed

[2] The facts and procedural history in this section are drawn from the Petition at 2–9; Johnson v. Whitehead, 647 F.3d 120, 123–24 (4th Cir. 2011); and Johnson v. Whitehead, No. 11-378, Brief for the Respondents in Opposition to Petition for Certiorari in the Supreme Court of the United States, 2011 WL 6046207, at 3–9.

an application for a citizenship certificate, claiming that he had derived United States citizenship automatically upon his father's naturalization in the 1970s. In February 1998, an immigration judge—without making any formal findings or issuing an order related to the citizenship claim—terminated the deportation proceedings, leaving it to the INS to complete its adjudication of the citizenship application.[3] In April 2000, the INS denied Mr. Johnson's application, concluding that he was not eligible to have automatically derived citizenship by virtue of his father's naturalization. The law in effect at the time for children born outside the United States to two non-citizen parents disfavored derivation through just one naturalized parent. Mr. Johnson did not qualify for one of the narrow exceptions for a single parent having legal custody because his parents, never having been married, had therefore never met the statutory, and judicially confirmed, "legal separation" requirement. Mr. Johnson did not appeal this denial.

In January 2002, Mr. Johnson was again convicted, this time by a federal court in New York, of unlawful possession of a firearm by a convicted felon, and was sentenced to 108 months' incarceration. In 2008, the Department of Homeland Security ("DHS"), which had assumed the functions of the former INS, initiated removal proceedings against Mr. Johnson on grounds of his multiple separate felony convictions. In May 2009, an immigration judge denied Mr. Johnson's motion to terminate the proceedings, found him removable as charged, and ordered him removed from the United States. The judge agreed that the Government had not conceded the issue of Mr. Johnson's citizenship when the 1998 deportation proceedings were terminated. Further, the judge found the removal proceedings justified given Mr. Johnson's additional criminal behavior in the interim, which once again rendered him removable.

Mr. Johnson appealed the decision to remove him to the Board of Immigration Appeals within the U.S. Department of Justice, which in April 2010 upheld the removal order.[4] He then took his case to the U.S. Court of Appeals for

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[3] The INA bars administrative adjudication of naturalization applications while removal proceedings are pending, 8 U.S.C. § 1429, so the regulations at that time authorized an immigration judge to terminate proceedings to permit adjudication by the agency. 8 C.F.R. § 239.2(f) (1998). The statute specifically provides that such a termination of removal proceedings "shall not be deemed binding in any way upon the Attorney General with respect to the question of whether such person has established his eligibility for naturalization." 8 U.S.C. § 1429.

[4] *See* In the Matter of David Livingston Johnson, No. A030 171 936 (B.I.A. Apr. 20, 2010).

the Fourth Circuit, which in May 2011 rejected Mr. Johnson's claim that he qualified for citizenship by satisfying the "legal separation" requirement in Section 321(a)(3) of the INA, and also rejected his challenge that Section 321(a)(3) discriminated on the basis of illegitimacy.[5] Mr. Johnson's subsequent petition for writ of *certiorari* to the U.S. Supreme Court, in which he raised his gender-discrimination argument for the first time, was declined on January 6, 2012.[6] As the Petition states, Mr. Johnson has effectively exhausted all available domestic remedies.

II. LEGAL CONTEXT IN THE UNITED STATES

A. Statutory and Constitutional

Article I of the United States Constitution assigns to Congress the power to "establish a[] uniform Rule of Naturalization throughout the United States."[7] Pursuant to that constitutional authority, Congress, through various provisions in the Immigration and Nationality Act (INA), has elected to provide for United States citizenship by way of naturalization for certain persons born outside the United States. Among other things, the longstanding U.S. statutory scheme has aimed to achieve "the preservation of the family unit" and the "[e]liminat[ion of] discrimination between sexes" in the immigration system.[8]

The statutory provision that is at the heart of Mr. Johnson's complaints before U.S. courts and the IACHR, *former* Section 321(a) of the INA,[9] reflects the

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5 *Johnson*, 647 F.3d at 125–27.

6 Johnson v. Whitehead, 132 S. Ct. 1005 (2012) (cert. denied).

7 U.S. CONST. Art. I, § 8, C1. 4.

8 These objectives are stated in, e.g., legislative reports from the United States House of Representatives and Senate in 1952. H.R. REP. NO. 1365, at 28–29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680; S. REP. NO. 82-1137, at 3 (1952). For example, the INA ensured a uniform preference for "alien spouses (wife or husband) of aliens admitted for permanent residence, while the [pre]existing law discriminate[d] between men and women in granting such preferential status." H.R. REP. NO. 1365, at 29 (citing § 203(a)(3)). Likewise, the revised law accorded alien husbands of citizen spouses "the same treatment as alien wives of United States citizens, whereas under [pre]existing law such husbands [were] entitled to nonquota status only if the marriage occurred prior to January 1, 1948." H.R. REP. NO. 1365, at 40.

9 This statutory provision was repealed almost 20 years ago by the Child Citizenship Act of 2000 ("CCA"), which among other things eliminated the legitimation provision at issue in Mr. Johnson's claim and eliminated any reference to gender. By repealing former Section 321, codified at the time at 8 U.S.C. § 1432, and enacting the CCA, Pub. L. 106-395, 114 Stat. 1631, 1632, Congress continued its efforts to significantly broaden the class of children eligible for citizenship. Congressional reports show that the CCA aimed to "modif[y] the provisions of the [INA] governing acquisition of United States citizenship by certain children born outside of

commitment the United States has had, consistent with the aforementioned aims, to affording appropriate avenues for children to obtain U.S. citizenship even if they had no ties to the country at the time of birth because they were born abroad to two foreign nationals. Specifically, former Section 321(a) provided for automatic conferral of derivative citizenship in certain circumstances for unmarried children under the age of 18 who were residing in the United States pursuant to a lawful admission for permanent residence. The general rule, set out in subsection (a)(1), was that both parents had to become naturalized U.S. citizens in order for their child to automatically obtain citizenship. As explained further in Section III.A.1 below, this rule served to advance the government's interests in protecting the rights of both parents in relation to the citizenship status of their child. But the statute also provided exceptions permitting a child to obtain citizenship if only one parent naturalized: if the naturalized parent was the surviving parent and the other parent was deceased (subsection (a)(2)); if "there ha[d] been a legal separation of the parents" and the naturalizing parent had legal custody of the child (subsection (a)(3), first clause); or 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" (subsection (a)(3), second clause).[10]

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the United States, principally by providing citizenship automatically to such children." H.R. REP. NO. 106-852, at 3 (2000). In enacting the CCA, Congress sought to "ensure that children are not deprived of U.S. citizenship because their parents did not realize they had to go through the certificate of citizenship process after bringing the children to the United States." *Id.* at 4–5. But because the statute does not apply to individuals who were 18 years of age or older when the law became effective on February 27, 2001, former Section 321 continues to govern the citizenship claim of individuals such as Mr. Johnson who were born before February 27, 1983.

[10] In full, the statutory text reads:

(a) A child born outside of the United States of alien parents … becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

Because Mr. Johnson's mother never naturalized, and neither of his parents was deceased while Mr. Johnson was a minor, it is subsection (a)(3) that is at issue in Mr. Johnson's situation.

B. Judicial and Constitutional

Statutes enacted by Congress are subject to review by U.S. courts to ensure, among other things, conformity with the constitutional guarantee of "equal protection of the laws" embedded in the Fifth Amendment to the U.S. Constitution via its Due Process Clause.[11] Under the jurisprudence of the U.S. Supreme Court, statutory distinctions based on sex are generally subject to heightened scrutiny and must be "substantially related to an important governmental objective" in order to comport with the guarantee of equal protection. In the immigration context, statutes are subject to ordinary scrutiny under a rational-basis standard of review. There must be "facially legitimate and bona fide" reasons for a classification, and they cannot be based on stereotypical or archaic notions about illegitimate children or men and women's relative roles and abilities.[12] U.S. courts have often analyzed a questioned statute under both levels of scrutiny, without a difference in result.[13]

Exercising its judicial review role, the U.S. Supreme Court from time to time hears cases where an individual contends that a statute governing the acquisition of citizenship is discriminatory. In 2017, in *Sessions v. Morales-Santana*, the Court found a constitutional violation of equal protection in a provision requiring fathers to have spent a far longer time in the United States than mothers in order to transmit U.S. citizenship to a child born abroad out of wedlock.[14] In a case with

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[11] As this case involves federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amendment's Due Process Clause. *See* Weinberger v. Wiesenfeld, 420 U. S. 636, 638, n. 2 (1975) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment" (citations and internal quotation marks omitted; alteration in original)).

[12] Fiallo v. Bell, 430 U.S. 787, 792 (1977); *see also* United States v. Virginia, 518 U.S. 515, 533 (1996).

[13] In addition to constitutional protections, the United States has enacted a vast array of statutes to prohibit gender-based discrimination in nearly all sectors of life, including employment, education, public accommodations, and government benefits. *See generally* 28 C.F.R. § 0.50, *available at* https://www.justice.gov/crt/page/file/924211/download.

[14] Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017). The Court had accepted a challenge to the same statutory provision in the 2011 case *Flores-Villar v. United States*, but the case resulted in an equally divided court. Flores-Villar v. United States, 564 U.S. 210 (2011). In 2012, the Court declined to accept Mr. Johnson's petition for writ of *certiorari*. *See supra* note 6 and accompanying text.

much closer correspondence to Mr. Johnson's factual circumstances and legal arguments, however, the Court in 2001 ruled that sex-based classifications that account for physical differences between men and women do not violate equal protection principles, upholding a provision that required a U.S. citizen father, but not a U.S. citizen mother, to act to legitimate a child born abroad out of wedlock in order to transmit U.S. citizenship to that child: "There is nothing irrational or improper," the Court said in *Nguyen v. Immigration and Naturalization Service*, "in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."[15] A sex-based distinction in the statute in question is permissible when it addresses the "undeniable difference in the circumstance of the parents at the time a child is born."[16] The provision assessed in *Nguyen* aimed to ensure that legal parentage was established, recognizing that unwed mothers and fathers are not similarly situated when it comes to proof of biological parentage.[17] Appellate courts and trial courts throughout the United States have since applied the *Nguyen* rationale to a wide number of cases involving former Section 321(a)(3), holding that the provision does not violate equal protection guarantees.[18] The Supreme Court reconfirmed the holding of *Nguyen* in its recent *Morales-Santana* ruling.

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15 Nguyen v. INS, 533 U.S. 53, 68 (2001).

16 *Id*.

17 *Id*. at 54. The statute, 8 U.S.C. § 1409(a)(4), allowed this requirement to be satisfied in one of three ways: legitimation under the law of the child's residence or domicile, or by the father acknowledging paternity in writing under oath, or through a court finding of paternity.

18 Every U.S. Court of Appeals to consider the issue has held that Section 321(a)(3) does not discriminate on the basis of sex or illegitimacy. Marquez-Morales v. Holder, 377 Fed. Appx. 361, 365 (5th Cir. 2010) ("Congress is entitled to prescribe rules for citizenship that reflect differences in the way unmarried parents establish a biological tie to the alien child."); Barthelemy v. Ashcroft, 329 F.3d 1062, 1066 (9th Cir. 2003) ("Congress has nearly plenary power to establish the qualifications for citizenship."); Van Riel v. Attorney Gen. of the U.S., 190 Fed. Appx. 163, 165 (3d Cir. 2006); Wedderburn v. INS, 215 F.3d 795, 802 (7th Cir. 2000) ("321(a)(3) does not discriminate against illegitimate children; instead it gives them an extra route to citizenship, one not enjoyed by legitimate (or legitimated) offspring."); Grant v. U.S. Dept' of Homeland Security, 534 F.3d 102, 107–08 (2d Cir. 2008) ("we cannot say that Section 1432(a) [former Section 321(a)] imposes a significantly more onerous burden than Section 1409(a) with regard to legitimation, and we therefore believe that Tuan Anh Nguyen requires us to deny review of Grant's claim"); *see also* Barton v. Ashcroft, 171 F. Supp. 2d 86, 89–90 (D. Conn. 2001); Charles v. Reno, 117 F. Supp. 2d 412, 421 (D.N.J. 2000) ("[W]here paternity is established and there has been no legal separation of the parents, there can be no derivative citizenship for the child through the naturalization of just one parent, be it the mother or the father.").

In circumstances where the judiciary does find a discriminatory violation, U.S. courts cannot as a remedy simply confer automatic citizenship to a category of people not chosen for citizenship by Congress. Federal courts have extremely limited power to provide a prospective remedy by "declaring petitioner to be a citizen or ordering the State Department to approve [their] application for citizenship."[19]

III. DISCUSSION

A. Admissibility

Article 34(a) of the Rules provides that the Commission shall declare any petition or case inadmissible when the petition does not state facts that tend to establish a violation of the rights set out in the American Declaration. For the reasons set forth below, Mr. Johnson has failed to state facts that tend to establish a violation of his right to equal protection under the law, protection of his private and family life, his right to residence, or his right to nationality, under Articles II, V, VIII, and XIX of the Declaration.

1. Right of Equality Before the Law—Article II

Petitioner claims that former Section 321(a)(3) of the INA contains impermissible distinctions based on gender, illegitimacy, and family composition that are contrary to Article II's provision that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."[20] Yet the IACHR, rightly, does not construe the wording of Article II to prohibit all differences in treatment:[21] Although judgments of the Inter-American Court of Human Rights construing the American Convention on Human Rights do not govern U.S. commitments under the American Declaration, it is noteworthy that the Court has also recognized the validity of "distinctions" as opposed to "discriminations," in that only the latter

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[19] Miller v. Albright, 523 U.S. 420, 455 (1998) (Scalia, J., concurring).

[20] It bears mention that Petitioner's argument is predicated on the statute's alleged discriminatory nature with respect to his father, not himself; i.e., the distinction in the statute turns on the child's legal relationship to the father and mother, not the sex of the child. Under U.S. law, there is a serious question whether petitioner has standing to bring such a claim, at least absent showings regarding his father that he has not made.

[21] *See, e.g.*, J.S.C.H. & M.G.S. v. Mexico, Case No. 12.689, Report No. 80/15, Merits (Publication), Oct. 28, 2015, para. 87.

constitute arbitrary differences that violate human dignity.[22] The Court has opined that "[d]istinctions" that are "reasonable, proportionate and objective" are compatible with the American Convention on Human Rights.[23]

(a) The statute served important government interest in protecting parental rights.

As noted in Section II.A, above, the statutory scheme embodied in former Section 321 is substantially related to the United States' important objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens. Congress looked to ensure that under the INA the interests of the naturalized parent would not crowd out the rights of the noncitizen parent,[24] both for children of married parents and those born out of wedlock. Congress sought to protect the parental rights of the noncitizen parent, whose "parental rights could be effectively extinguished" when only one parent was naturalized.[25] The baseline standard articulated in 321(a)(1), that *both* parents must naturalize in order to confer automatic citizenship on a child, "recognizes that either parent—naturalized or noncitizen—may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard."[26] The statute protected both parents' rights by preventing the automatic acquisition of U.S. citizenship by a child of a parent who had chosen not to naturalize. This mechanism reflected the fact that naturalization is a "significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship."[27]

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22 Castañeda Gutman v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 184, para. 211 (Aug. 6, 2008), citing Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion, Inter-Am. Ct. H.R. OC-18/03 (Ser. A) No. 18, para. 84 (Sept. 17, 2003).

23 *Id.* The standard for evaluating these equal protection violations only arose in the context of the American Convention on Human Rights ("Convention"). "Unlike the American Convention, however, [the Declaration] was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions" such as the level of scrutiny to evaluate equal protection violations. U.S. Observations on Normative Status of American Declaration, *supra* note 1, at 12. But even if jurisprudence construing the Convention applied, Section 321(a)(3) would satisfy equal protection under any level of scrutiny for the reasons set forth here.

24 The INA uses the term "alien" as a legal term and defines it as "any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). This response uses "noncitizens" to denote the legal term "alien."

25 *Barthelemy*, 329 F.3d at 1066.

26 Lewis v. Gonzales, 481 F.3d 125, 131 (2d Cir. 2007).

27 *Id.*; *see also Wedderburn*, 215 F.3d at 800 (noting that citizenship "may affect obligations such as military service and taxation").

(b) Exceptions to two-parent baseline were well-grounded.

Beyond the baseline standard, however, Congress recognized that there were situations where a child would not have two confirmed and living parents in a position to naturalize. In paragraphs (a)(2) and (a)(3) of former Section 321, Congress set forth governing rules for such situations that could still afford such children a path to U.S. citizenship. Significantly, eligibility for each of the statutory categories delineated in those paragraphs was determined, along with the threshold requirement of the naturalization of one parent, by the existence of a precise, objective, legally defined relationship or circumstance: death ((a)(2)); legal custody and legal separation ((a)(3), first clause); or lack of legitimation by the father ((a)(3), second clause).

None of these criteria corresponds to Mr. Johnson's situation. Mr. Johnson's mother never naturalized—so (a)(1) is not applicable. Mr. Johnson's mother was alive throughout his period of minority until after he turned 18 in 1993—so (a)(2) is not applicable. Mr. Johnson's father had legal custody of his child, but had never been married to Mr. Johnson's mother and hence there had been no legal separation[28]—so the first clause of (a)(3) is not applicable. Last, again, Mr. Johnson's mother never naturalized—so the second clause of (a)(3) is not applicable.

Presumably in recognition that Mr. Johnson does not satisfy the statutory criteria, the Petition challenges the criteria themselves, calling them "arbitrary and discriminatory distinctions based on illegitimacy and sex."[29] This contention is without merit. As explained in Section II.B above, the (a)(3) provision is based on what the U.S. Supreme Court termed in *Nguyen* the "undeniable difference in the circumstance of the parents at the time a child is born."[30] When a child is born out of wedlock, the child's legal relationship—and biological connection—to his mother is typically established by virtue of the birth itself.[31] A child's father,

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[28] Every U.S. appellate court to consider the question has found there to be a marriage requirement. *Johnson*, 647 F.3d at 125 (citing cases). *See also* Ayton v. Holder, 686 F.3d 331, 337–38 (5th Cir. 2012) ("The language of § 321(a)(3) is clear and unambiguous. It requires *legal* separation and *legal* custody. … The children of parents who did not or were unable to obtain a judicial separation cannot claim derivative citizenship under that clause of § 321(a)(3)" (emphasis in original; citations omitted)).

[29] Petition at 12.

[30] *Nguyen*, 533 U.S. at 68.

[31] *See id.* at 62–63.

however, must take some step to legally formalize his relationship to the child through legitimation. When an unwed father did so, naturalization of the child's mother would not automatically trigger naturalization of the child under Section 321(a). In other words, if the unwed father took steps to put himself on the same footing as the mother with respect to being recognized as a parent as a legal matter through legitimation, the scheme in Section 321(a) made no sex-based distinction between a child's mother and father.

Accordingly, the language of (a)(3) is cast as permitting naturalization of a mother to suffice only when "the child was born out of wedlock"—when the presumption that a child born to a married couple is their mutual offspring is not operative—and "the paternity of the child has not been established by legitimation." That language could not be turned around and cast in terms of "the naturalization of the father … when the maternity of the child has not been established by legitimation," because, as a legal and biological matter, maternity is established by the birth itself, whereas paternity outside marriage is established by legitimation. Once a child is legitimated, the parents of each sex are on the same footing.

Similarly, the statute's requirement in paragraph (a)(2) of a "legal separation" did not treat children born in wedlock differently than children born out of wedlock based on stereotypes or animus towards the latter. Section 321 treats children of informally separated parents the same as it treats married parents—they automatically derive citizenship only if *both* parents naturalize, because parents who have informally separated without altering their relationship through legal means "are legally indistinguishable from married parents who live together."[32] If a child's parents were married and then separated informally, the child would have been treated the same under Section 321(a) as the child of legally recognized parents who were apart but had never legally formalized their relationship through marriage: the children only automatically derive citizenship if both parents naturalize.

In sum, the statutory scheme embodied in former section 321(a) is substantially related to the important U.S. governmental objective of safeguarding parental rights, and is reasonable, proportionate, and objective in nature. A key

[32] Brissett v. Ashcroft, 363 F.3d 130, 134 (2d Cir. 2004).

characteristic is the requirement for "formal, legal *acts* indicating either that both parents wish to raise the child as a U.S. citizen or that one parent has ceded control."[33] It is true that the emphasis on this characteristic left situations, such as Mr. Johnson's, in which a child was not eligible to automatically naturalize upon the naturalization of one parent even though the non-naturalizing parent did not have significant ties to the child. It is the prerogative of the legislature, however, to set forth clear rules that can be uniformly administered without a fact-intensive inquiry into the nature and extent of a child's relationship (or lack thereof) with an noncitizen parent who will typically not be a party to immigration or naturalization proceedings in the United States. Moreover, as explained immediately below, the fact that *this* provision did not afford Mr. Johnson a path to citizenship did not mean he had no path at all.

(c) Mr. Johnson's alternative path to naturalization was never pursued.

From the time of Mr. Johnson's father's naturalization in 1973 until the time Mr. Johnson turned 18 in 1983, Mr. Johnson's father could have sought a certificate of U.S. citizenship for his son pursuant to former Section 322 of the INA (codified then at 8 U.S.C. § 1433). That provision provided that a child born abroad would be a citizen upon petition of the child's parent if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18, and the child resided permanently in the United States pursuant to a lawful admission for permanent residence. Whether or not there had been a "legal separation" of Mr. Johnson's parents would have been immaterial.[34] Mr. Johnson offers no explanation for why his father failed to secure his citizenship under Section 1433 other than an assertion that his father believed his son would automatically derive U.S. citizenship.[35] But the validity of a statute is not called into question merely because an individual's misreading of the law and consequent inaction deprived his son of the readily available benefit of citizenship.

Moreover, a foreign-born child who develops substantial connections to the United States through marriage or permanent residence in the United States may apply to become a naturalized citizen upon reaching age 18 by meeting standard

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[33] *Lewis*, 481 F.3d at 131.

[34] *Id.* at 130.

[35] *See* Petition at 3.

naturalization requirements.[36] That Petitioner did not seek to take advantage of these options does not mean in consequence that the United States or its Congress can or should be deemed to have disregarded his right to equal protection under the law.

(d) Mr. Johnson's arguments continue to be unavailing.

Mr. Johnson had the opportunity to present his arguments to no fewer than five U.S. administrative and judicial forums—the immigration agency, two quasi-judicial review bodies at the Department of Justice, a court of appeals, and ultimately the U.S. Supreme Court. None accepted his claims as meritorious. The substantive decisions were reached in reliance upon the U.S. Constitution's well-established equal protection principles, consistently with Article II of the Declaration. So too here, regardless of what level of review the Commission might apply to the statute, Section 321(a)(3) did not violate Mr. Johnson's rights.[37]

For these reasons as well, the Commission should dismiss the Petition in light of the "fourth instance formula" because it does not have the competence to second-guess the legal and evidentiary judgment calls of domestic courts unless there is "unequivocal evidence … that guarantees of due process have been violated."[38]

2. Right to Family Life—Article V

(a) This case does not fall within the ambit of Article V, which was intended to ensure that families are not subject to direct violence by the state.

Petitioner claims that by removing him without considering his family and community ties, the United States violated Article V of the American Declaration. Article V refers to the right to be free from abusive attacks on one's honor,

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[36] *See* 8 U.S.C. §§ 1423, 1427, 1445(b) (covering language, residence, character, administrative, and associated requirements).

[37] *See generally* Levy v. U.S. Attorney Gen., No. 16-14726, 2017 WL 1005063 (11th Cir. Feb. 22, 2018) (upholding previous court rulings against a challenge brought by a native and citizen of Jamaica, whose father had custody and became a naturalized U.S. citizen in 1985 but never married the petitioner's late mother, rejecting arguments that former Section 321(a) unconstitutionally discriminated on the basis of gender, legitimacy or "right to maintain a family unit").

[38] Granados v. Honduras, Report No. 66/14, Petition No. 1180-03, Inadmissibility, July 25, 2014, para. 36.

personal reputation, and private and family life. Petitioner's claims must fail because the right related to family and private life established by Article V was not intended to apply his situation. Rather, the language of Article V makes clear that it is intended to ensure that families are not subject to direct violence by the state.

Specifically, the text of Article V and much of the Commission's own jurisprudence demonstrate that Article V is intended to apply only to direct state action that affects family life. The words "abusive attacks upon ... private and family life" in Article V clearly imply something more than incidental interference. Rather, they imply some degree of state action directly aimed at harming family life.

The Commission's jurisprudence bears out this textually supported interpretation of Article V and related rights. In a case regarding the persecution of the Ache people in Paraguay, the Commission noted that the sale of children constitutes a "very serious" violation of the right to a family.[39] In the case of the Gelman family in Uruguay, the Commission found the petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter.[40]

Here, there is no such direct state action. As detailed above, removal proceedings—which form the basis of the Petitioner's complaint—are merely the civil consequence of the Petitioner's decision to commit serious crimes while residing in the United States, and his resulting failure to comply with the terms and conditions bearing upon his residence in the country. As a secondary consequence of the permissible exercise of the sovereign right of states to expel foreign nationals who commit serious crimes within their territory, removal proceedings are not the type of direct state action that Article V sought to target. Indeed, any expansion of Article V to cover the secondary consequences of lawful and reasonable state action, as in this case, would have the effect of seriously disrupting the state's ability to make the many critical determinations necessary to provide for security and promote the general welfare.

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[39] Ache Tribe v. Paraguay, Case No. 1.802, Merits, May 27, 1977, para. 2.

[40] Gelman et al. v. Uruguay, Petition No. 438-06, Report No. 30/07, Admissibility, Mar. 9, 2007, para. 5. Recent Commission jurisprudence, which appears to go beyond the *Ache* and *Gelman* cases on this point, does not explain how the plain text of Article V reaches beyond direct state action. *See, e.g.,* Smith & Armendariz v. United States, Case Nos. 12.561 & 12.562, Report No. 81/10, Merits, July 12, 2010 ("*Smith & Armendariz* Merits Report"), paras. 47–60.

(b) Article V is not implicated by a state's lawful removal of a noncitizen who has committed serious crimes in violation of its immigration laws.

Even if Article V could extend its reach beyond direct state action to the secondary consequences of state action, which the United States maintains it cannot, and a balancing of state interests in removal of a noncitizen against the noncitizen's family and community ties were appropriate, the Commission still could not find a violation of Article V in a case such as this involving a noncitizen who has committed multiple felonies, including drug trafficking and crimes of violence, in violation of his host state's immigration law. As made clear in the American Declaration, the state may limit the enjoyment of private and family rights by taking lawful actions that provide for the general welfare and protect the security of all.[41] In no case is that standard more clearly met than in the case of a criminal noncitizen like Mr. Johnson, whose presence in the United States, following multiple criminal convictions for serious crimes, could harm public order and threaten the well-being of U.S. citizens and lawful noncitizen residents.

While not required to do so as a matter of international law, the United States, through its immigration laws, does routinely take into account a noncitizen's family ties both inside and outside the United States as relevant factors in determining a noncitizen's eligibility for discretionary immigration relief.[42] Similarly, U.S. immigration authorities often give due consideration to family life in the exercise of prosecutorial discretion on a case-by-case basis.[43] Yet consideration of family unity does not always outweigh other factors. As in this case, the United States will remove noncitizens who have committed an aggravated felony in the United States regardless of their family ties. While an expulsion of a noncitizen unlawfully present in the country will by its very nature have unfortunate consequences for that individual's family, the removal of such noncitizen on the basis of his criminal violations and in conformity with a carefully

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41 American Declaration, art. XXVIII. *See also Smith & Armendariz* Merits Report, *supra* note 40, para. 49 ("[T]he individual right protected under the American Declaration may be limited in the interest of 'the security of all, and by the just demands of the general welfare and the advancement of democracy.'").

42 *See* 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal), 1182(h) (waiver of inadmissibility), 1255 (adjustment of status to lawful permanent residence).

43 *See, e.g.*, Payne-Barahona v. Gonzales, 474 F.3d 1 (1st Cir. 2007); Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005).

conceived set of rules of general application designed to protect a nation's welfare and security, which it is free to pursue as an incidence of its sovereignty, constitutes action that fully complies with international law.[44] For these reasons, the United States maintains that the American Declaration is not violated by removal under these circumstances.

(c) Article V is not implicated by U.S. nationality laws intended to protect parental rights.

Petitioner further argues that the United States violated Article V by virtue of Section 321(a) of the INA, on the grounds that this provision discriminates on the basis of family composition. However, as set forth at length above, this statutory scheme is not discriminatory, but rather, reflects the state's rational interest in limiting automatic changes to a child's citizenship status, to situations where either (1) both parents are part of the decision regarding a family's naturalization; or (2) there is only one custodial parent. This approach serves the important objective of protecting the rights of both parents of a foreign-born child when one or both parents become naturalized U.S. citizens, ensuring that the interests of the naturalized parent would not crowd out the parental rights of the noncitizen parent without his or her knowledge or consent. As a result, and in direct contradiction to Petitioner's argument, the naturalization provisions that Petitioner challenges in this case were intended to safeguard the very privacy and family interests he contends he was deprived of.

[44] That restricting the release into the community of aliens convicted of certain crimes is a legitimate act of state authority consistent with its sovereign right and violates no international obligations is consistent with findings by international bodies, including in cases cited in Petitioner's brief. *See, e.g.*, Bouchelkia v. France, App. No. 23078/93, 25 Eur. H.R. Rep. 686 (1997) (approving a state's removal of an alien convicted of one count of rape with a weapon); El Boujaidi v. France, App. No. 25613/94, 30 Eur. H.R. Rep. 223 (1997) (approving a state's removal of an alien who has consumed and trafficked illegal drugs). That expulsion in such circumstances is lawful has also been upheld as a matter of U.S. constitutional law, despite incidental familial separation. *See, e.g.,* Payne-Barahona, 474 F.3d at 2–3 ("The circuits that have addressed the constitutional issue (under varying incarnations of the immigration laws and in varying procedural postures) have uniformly held that a parent's otherwise valid deportation does not violate a child's constitutional right … . [D]eportations of parents are routine and do not of themselves dictate family separation. If there were such a right, it is difficult to see why children would not also have a constitutional right to object to their parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service.").

3. Right to Residence—Article VIII

(a) The United States did not violate Mr. Johnson's right to residence under Article VIII by removing him from the country of which he is not a national.

Petitioner argues that the United States violated his "right to residence" in the United States under Article VIII of the American Declaration by permanently removing him from the state in which he lived the majority of his life. However, there is no "right" to reside in a country other than one's own. Article VII of the American Declaration, which provides that "[e]very person has a right to fix his residence within the territory of the state *of which he is a national*," is, by its terms, inapplicable given that Mr. Johnson is not a national of the United States, and his longtime residence in this country does not change that fact.[45]

Not only is Article VII by its terms inapplicable to Mr. Johnson's circumstances given that he lacks U.S. citizenship, but any other reading would be inconsistent with the universally recognized sovereign right of States under international law to regulate the entry and residence of noncitizens in their territory, and to expel noncitizens, consistent with international obligations. A nation's legitimate interests in controlling the admission of noncitizens, their departure, and their conditions and duration of stay within the country has been universally recognized from the earliest times[46] and reaffirmed through treaty law. For example, Article 1 of the Convention on the Status of Aliens ("Havana Convention") provides that "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory."[47] Article 6 further provides that "[f]or reasons of public order or safety, states may

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[45] In this regard, the American Declaration is in line with human rights treaties. *See, e.g.*, International Covenant on Civil and Political Rights, art. 12(4), Dec. 9, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 ("No one shall be arbitrarily deprived of the right to enter *his own country*" (emphasis added)).

[46] *See* HERSCH LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 675–76 (8th ed., 1955).

[47] Convention on the Status of Aliens, Feb. 20, 1928, 132 L.N.T.S. 301, T.S. 815, 46 Stat. 2753, 2 Bevans 710, 4 Malloy 4722 ("Havana Covention"). The United States became a party to the Havana Convention on May 21, 1930. *See also* De Souza Ribeiro v. France, App. No. 22689/07, 2012 Eur. Ct. H.R. para. 77 (2012) ("In cases concerning immigration laws the Court has consistently affirmed that, as a matter of well-established international law and subject to their treaty obligations, the States have the right to control the entry, residence and expulsion of aliens. The [European Convention for the Protection of Human Rights and Fundamental Freedoms] does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences.")

expel foreigners domiciled, *resident*, or merely in transit through their territory."[48] Limited exceptions do apply to a state's lawful ability to remove noncitizens from its territory, and states must exercise their sovereign prerogative with due regard to the obligations they have assumed under international human rights law and refugee law. However, no human rights conventions or treaties to which the United States is a party (nor, even though it is not applicable here and the United States is not a party, the American Convention), provide criminal noncitizens like Mr. Johnson, who did not acquire an entitlement to international protection, any substantive right to remain in the United States, regardless of the duration of their residency. Mr. Johnson's longtime residence in the United States does not undermine the sovereign rights of the United States in this regard.

Finally, the United States wishes to emphasize that Mr. Johnson could have avoided being removed from the United States if he had chosen not to commit serious criminal acts while in the United States, or if his father had petitioned for U.S. citizenship on his behalf, or potentially if he himself had applied for U.S. citizenship.[49] None of these circumstances being the case, Mr. Johnson remained subject to the immigration laws that he now challenges before the Commission.

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[48] Havana Convention, *supra* note 47, art. 6 (emphasis added). The courts of the United States have also long recognized the federal government's sovereign powers under international law to regulate the admission, exclusion, and expulsion of aliens. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belong to the government of the United States … , the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."); Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a national to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) ("In accord with ancient principles of international law of nation-states, … the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers … ." (quotation marks omitted)).

[49] On the latter point, the UN Human Rights Committee noted as follows: "Countries like Canada, which enable immigrants to become nationals … have a right to expect that such immigrants will in due course acquire all of the rights and assume all the obligations that nationality entails. Individuals who have not taken advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences." Stewart v. Canada, Comm. No. 538/1993, CCPR/C/58/D/538/1993 (Dec. 16, 1996), para. 12.8.

4. Right to Nationality—Article XIX

The United States did not violate Mr. Johnson's right to nationality under Article XIX by denying him automatic derivative citizenship.

Petitioner next argues that the United States violated his "right to nationality" under Article XIX of the American Declaration by denying him automatic derivative citizenship. Petitioner's position is once again inconsistent with the textual right he invokes. Article XIX provides that "[e]very person has the right to the nationality *to which he is entitled by law*" (emphasis added). Inherent in the articulation of this right is the sovereign right of countries to establish their own standards and procedures for determining who is (and who is not) its citizen or national—in other words, the "law" from which any entitlement to nationality derives is the domestic law of the particular state.[50] While the United States is in agreement with the petitioner that under international law a state must not arbitrarily deprive a national of his or her nationality, Mr. Johnson, a Jamaican citizen, does not have and never has had a U.S. nationality to which he is entitled or of which he could have been deprived.

In this regard the *Case of the Yean and Bosico Children v. Dominican Republic* is clearly distinguishable from the present facts.[51] The petitioners in *Yean and Bosico*, having been born in the Dominican Republic, were entitled to Dominican citizenship as a matter of its domestic law, but were unable to obtain the birth certificates that would have allowed them to prove it or otherwise have their citizenship acknowledged so as to avail themselves of that citizenship. In contrast, Mr. Johnson was never entitled to citizenship under U.S. law. For the reason stated, he was not eligible for automatic derivative citizenship under former Section 321 of the INA. As the child of a U.S. national father, the law provided an avenue for Mr. Johnson to *pursue* U.S. citizenship,[52] but Mr. Johnson never applied for U.S. citizenship on his own behalf and Mr. Johnson's father also failed

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50 *See* Havana Convention, *supra* note 47, art. 1; LAUTERPACHT, *supra* note 46, at 643 ("It is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject."); PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 65 (1979) ("Nationality is one of the subjects which are considered as falling within the domestic jurisdiction, within the internal legislative competence, of the individual State. That rule is recognized by both customary and conventional international law.").

51 Yean & Bosico Children v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 130 (Sept. 8, 2005), paras. 3, 110–74.

52 8 U.S.C. § 1433 (1973); 8 U.S.C. §§ 1423, 1427, 1445(b) (1983); *see also Lewis*, 481 F.3d at 130.

to use the procedure Congress created to apply for U.S. citizenship on his son's behalf. Because Mr. Johnson never became a U.S. citizen, Article XIX is not implicated in this case.

B. Merits

For the reasons set forth above, the Commission should not reach the merits of the Petition because it is inadmissible in its entirety under Article 34(a) of the Rules. Should the Commission nevertheless declare the Petition admissible, the United States urges it to find the Petition lacking in merit. Petitioner has not provided sufficient evidence that the United States discriminated against him on the basis of sex or illegitimacy in violation of equal protection under the law. Petitioner has also failed to show that the United States violated his right to family life, residence, or nationality. While the United States reserves the right to provide further views on the merits should the Commission declare the Petition admissible, we reiterate that international law recognizes the right of states to regulate the exclusion and admission of noncitizens, subject to the states' international obligations.

IV. CONCLUSION

In sum, the instant matter presents no basis for consideration by the Commission under the American Declaration. As such, the Commission must reject the Petition on admissibility grounds. Should it nonetheless reach the merits, the United States urges the Commission to find the case lacking in merit and deny the requested relief.

Drafted: NKarasov & JWeinberg (L/CA), AMelamud (L/HRR), Apr. 2018

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