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In The
Supreme Court of the United States

RUBEN FLORES-VILLAR, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

MARCIA D. GREENBERGER
EMILY J. MARTIN
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W.
Suite 800
Washington, DC 20036
emartin@nwlc.org
(202) 588-5180

Counsel for Amici Curiae

DEANNE E. MAYNARD
BRIAN R. MATSUI
Counsel of Record
SETH M. GALANTER
KAREN E. ESCALANTE
KLINTON S. MIYAO
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
bmatsui@mofo.com
(202) 887-8784

Counsel for National Women's Law Center

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BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

The National Women's Law Center and 22 other organizations that seek an end to all forms of discrimination respectfully submit this brief as amici curiae in support of petitioner.[1]

INTEREST OF AMICI CURIAE

The National Women's Law Center (NWLC) is a non-profit legal organization that has worked since 1972 to advance and protect women's legal rights. The NWLC focuses on major areas of importance to women and their families, including income security, employment, education, and reproductive rights and health, with special attention to the needs of low-income women. The NWLC has participated as counsel or amicus curiae in a range of cases before this Court to secure the equal treatment of women under the law.

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[1] Pursuant to Rule 37.3(a), a copy of a letter consenting to the filing of this brief by petitioner and a blanket letter from respondent consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The NWLC and other amici curiae have a strong interest in ensuring that all persons receive equal protection of the law under the Constitution and in protecting mothers, fathers, and children from the harm gender-stereotyped laws can inflict. The provisions at issue in this case use gender-based distinctions in order to determine who is a citizen of the United States without justification. As discussed below, these distinctions appear to be based on and perpetuate outdated stereotypes of fathers and mothers: namely, that unmarried fathers will not form lasting relationships with their children and that unmarried mothers will bear all responsibility for the care of their children.

A description of each of the amici is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

The issue in this case is whether a gender-based distinction in the Immigration and Nationality Act, 8 U.S.C. §§ 1401(a)(7) & 1409 (1974),[2] violates the equal protection component of the Fifth Amendment's due process clause. For an unmarried citizen father to transmit citizenship to a child born abroad, the father must have lived in the United States for ten years before the birth of the child, with at least five of those years occurring after the age of 14. Unmarried United States citizen mothers, however, need only satisfy a one-year residency requirement to convey citizenship to their children born abroad. This classification treats unmarried United States citizen mothers differently from unmarried United States citizen fathers. The government has offered no persuasive justification for this distinction, much less the exceedingly persuasive one that is required to withstand heightened scrutiny.

A. The issue raised by this case arises only after a United States citizen father, like petitioner's father here, has met the legitimacy and paternity requirements of 8 U.S.C. § 1409(a)(4) for conferring United States citizenship. Therefore, *Nguyen v. INS*, 533 U.S. 53 (2001)—which sustained these requirements on fathers but not mothers—does not control the outcome of this case, because this class of

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[2] These provisions, as amended, are now codified at 8 U.S.C. §§ 1401(g) and 1409(c).

unmarried citizen fathers is similarly situated to unmarried citizen mothers.

Moreover, unlike the requirements that *Nguyen* addressed, the residency requirement presents an insurmountable obstacle to certain unmarried citizen fathers. Indeed, for petitioner's father and other fathers who were under 19 when their children were born, the residency requirement flatly bars the conveyance of citizenship, even if they have lived their whole lives in the United States. While every father has the opportunity to comply with the legitimation and paternity requirements addressed in *Nguyen*, the residency requirement at issue here can never be met if it is not already satisfied at the moment of the child's birth.

B. The government's decision to impose a greater burden on unmarried fathers than unmarried mothers perpetuates the stereotype that unmarried fathers always have less meaningful relationships with their children than unmarried mothers. This Court has rejected the use of such stereotypes to justify gender-based distinctions, even if they have some basis in fact. *United States v. Virginia*, 518 U.S. 515 (1996). If the stereotype that unmarried fathers are always absent and uninvolved were ever true, it is not true today. And that stereotype cannot justify treating fathers who have taken steps to establish a relationship with their children differently from mothers.

The shifting cultural norms and attitudes about the relationship of marriage to parenting make the gender of the parent a very imprecise proxy for a parent's relationship with his or her child. Empirical research suggests that 40% of births today are nonmarital births. The majority of these births are to cohabiting couples. Even when fathers do not live with their children, the data suggest that today's unmarried fathers are more involved in their children's lives than ever before.

Nor does empirical evidence support the assumption that mothers will automatically assume all responsibility for raising and financially supporting their nonmarital children. Unmarried fathers have increasingly become custodial parents to their children, and recent data show that such custodial fathers are now owed over $4 billion in child support annually.

This Court and state laws have recognized that there is no basis for absolute, gender-based distinctions between unmarried fathers who have recognized their children and unmarried mothers. State laws now guarantee certain rights for "putative fathers" and impose obligations on such fathers. And all States offer unmarried fathers the opportunity to acknowledge the paternity of their children through putative father registries or filings of acknowledgment with certain state agencies or courts. In addition, all States have eliminated the presumption that a child's mother should necessarily have custody of a child.

C. The gender-based distinctions at issue in this case do nothing to further the government's purported objective of encouraging a relationship between parent and child. The residency requirements are only determinative for those citizen fathers who have met the other requirements for conveying citizenship and thus have taken steps to form a relationship with their child.

In some instances, moreover, the residency requirement will actually have the perverse effect of discouraging an unmarried father from establishing paternity and acknowledging a nonmarital child. For example, in many Middle Eastern countries, where nationality is based on the father unless the father is not known or chooses not to establish paternity, an unmarried American citizen father's decision to recognize his child can leave that child stateless. This may lead fathers not to establish paternity.

Nor are the gender-based distinctions substantially related to preventing statelessness. In countries where citizenship is expected to flow from the father, the requirements will actually have the effect of rendering stateless the children of those unmarried fathers who cannot meet the requirements. Because the distinctions are not substantially, or even rationally, related to the government's purported objectives, they are unconstitutional.

ARGUMENT

THE GENDER-BASED DIFFERENCES IN RESIDENCY REQUIREMENTS FOR CONVEYING CITIZENSHIP TO CHILDREN VIOLATE EQUAL PROTECTION

The statutes at issue create a classification that facially discriminates on the basis of gender: they favor unmarried citizen mothers over unmarried citizen fathers, requiring fathers to have spent more time in the United States to convey citizenship to children born outside the territorial United States. This gender-based classification must be subjected to heightened scrutiny. To defend it, the government must demonstrate "'an exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quotation marks omitted). The government has the burden of showing "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 533 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). In so doing, the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid*. Because the government cannot sustain this burden, the classification is unconstitutional.

A. *Nguyen v. INS* Does Not Dictate The Outcome In This Case

In sustaining the differential residency requirements at issue in this case, the court below evoked the reasoning of this Court in *Nguyen v. INS*, 533 U.S. 53 (2001). J.A. 170a. However, *Nguyen* is not controlling.

1. In contrast to *Nguyen*, the unmarried fathers and unmarried mothers at issue here are similarly situated in their relation to their children.

In *Nguyen*, the Court sustained a requirement, imposed only on unmarried citizen fathers, that requires them to legitimate, or formally establish or acknowledge paternity, before the child reaches the age of 18 in order to convey citizenship. *See* 8 U.S.C. § 1409(a)(4). The Court found the challenged requirements substantially related to the government's interest in ensuring that citizenship will pass from unmarried parent to foreign-born child only when "the child and the citizen parent have some demonstrated opportunity or potential to develop * * * a relationship * * * that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Nguyen*, 533 U.S. at 64-65. The Court determined that this opportunity necessarily occurred at birth for mothers. Because fathers have a different relationship to the moment of birth, the Court further concluded that for unmarried fathers it was appropriate to condition conveyance of citizenship on

some formal demonstration that the father was aware of the child and had acknowledged him or her.

The residency requirements challenged here are relevant only for those fathers who have met the other statutory requirements for conveying citizenship, including those upheld in *Nguyen*: they are aware of their child, have agreed to support their child, have a demonstrated blood relationship with their child, and have formally established a relationship with their child before the child reaches 18. *See* 8 U.S.C. § 1409(a)(4).[3]

As a class, these fathers are similarly situated to unmarried mothers in their relationship to their child. Over thirty years ago, this Court recognized that "maternal and paternal roles are not invariably different in importance." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979). Accordingly, the Court found an unmarried father who admitted paternity and established a relationship with his child to be similarly situated to an unmarried mother. *Id.* at 394. On this basis, the Court struck down an "undifferentiated distinction between unwed mothers and unwed fathers" as an overbroad generalization on the basis of gender in violation of the Equal Protection Clause. *Ibid.*; *see also Stanley v. Illinois*, 405 U.S.

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[3] Section 1409(a) now imposes additional requirements on a father that are not applicable to this case. Petitioner's father satisfied the then-operative legitimation and paternity requirements of Section 1409(a).

645 (1972) (holding that a presumption that an unmarried father was an unfit parent violates the Due Process Clause). Whether or not the Constitution is otherwise offended by gender-based distinctions between unmarried mothers and fathers, when unmarried fathers take steps of the sort affirmed in *Nguyen* and create a legal bond with their child, fulfill their financial obligations, and develop the opportunity to establish a meaningful relationship, the Constitution does not permit distinctions between parents based solely on gender. *See, e.g.*, *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (classifications must rest on some difference having a substantial relationship to the object of the legislation, so that persons similarly situated are treated alike). The fathers affected by the residency requirement have taken these steps.

2. The governmental objective accepted by the Court in *Nguyen* does not support the gender-based residency requirements at issue in this case.

The residency requirement at issue prohibits children like the petitioner from ever inheriting their father's citizenship, regardless of the form, duration, or content of their relationship with their father. Thus, it cannot be said to promote the development of a "sufficiently recognized or formal relationship" between a child and his citizen father or to foster "the real, everyday ties" that bind parent and child. *Nguyen*, 533 U.S. at 79, 65. Indeed, the inability to transfer citizenship to one's children would appear repugnant to those goals.

Moreover, the disparate treatment of similarly situated unmarried citizen mothers and fathers cannot be claimed to encourage a connection between parent, child, and country. In the 70 years over which the provisions at issue have been enacted and amended, the government has never set forth any basis for concluding that, while unmarried fathers must reside in the United States for ten years (with five of those being after the age of 14), to form a sufficient connection to the country to pass on United States citizenship, unmarried mothers are capable of forming the same connection to the United States by residing here for one year at any time in their lives. There is no rational basis for such a conclusion. Pet. Br. 7-10.

3. Further, unlike in *Nguyen*, the gender-based classification in this case is, for some citizen fathers, an absolute bar to conveying citizenship to their children. In particular, a child born to an unmarried citizen father under the age of 19, or to one who spent less than 10 years in the United States before the child's birth, cannot under any circumstances inherit the citizenship of his father. This absolute prohibition presented by Sections 1401(a)(7) and 1409 stands in stark contrast to the provision analyzed in *Nguyen*, with which every citizen father has the power to comply. Indeed, the Court upheld the legitimating requirement in part because "the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is

minimal." *Nguyen*, 533 U.S. at 70-71 (emphasis added).

B. There Is No Legitimate Basis For Gender-Based Distinctions Between Unmarried Mothers And Those Unmarried Fathers Who Have Acknowledged And Undertaken Responsibility For Their Children

In cases such as this, the nonmarital child would have acquired United States citizenship at birth, but for the gender of the citizen parent. Petitioner's father, and similarly situated unmarried citizen fathers, are statutorily unable to convey their citizenship to their children, even when they assume the responsibility of raising, caring for, and financially supporting them, simply because they are not mothers. Conversely, an unmarried citizen mother who has lived one year in the United States at any point during her life will always be able to pass on citizenship, regardless of whether she supports, raises, or indeed forms any meaningful relationship with her child.

The challenged provisions at issue in this case thus appear to perpetuate the stereotype that even when an unmarried father has fully assumed his obligations to his child and created a meaningful relationship with that child, his parental connection will always be lesser than that of an unmarried

mother. This stereotype should find no comfort in this Court's jurisprudence.[4]

Whether or not that stereotype was ever accurate, it is not today. Indeed, due to shifting cultural norms and attitudes both about the relationship of marriage to parenting and about the roles of fathers and mothers in their children's lives, the gender of an unmarried parent serves as a very imprecise proxy for a parent's relationship with his or her child. *Cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (even a generalization as to gender roles with some empirical support cannot justify burdening those who depart from the norm); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (striking down gender classification because of "weak congruence" between gender and the characteristic that gender purported to represent). There is no reason to believe that this shift does not apply with equal force to United States citizens when they are outside the Nation's territorial borders.

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[4] It is of no moment that the statutes at issue may, in some instances, serve to benefit unmarried mothers. *Mississippi Univ. for Women*, 458 U.S. at 723-724. This Court has consistently shown no tolerance for classifications that are based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" regardless of whether they are targeted at men or women. *Virginia*, 518 U.S. at 533. While sex classifications may be used in certain circumstances to compensate women for discrimination they have suffered, *ibid.,* there is no evidence of such discrimination here. *See,* Section C, *infra.*

1. Recent empirical research has captured the shift in the relationships of unmarried fathers with their nonmarital children, which has coincided with nonmarital parenting becoming more common.

Since the latter half of the past century, there has been a documented upward trend in unmarried childbearing, both in the United States and in other countries, with levels doubling, tripling, and in some countries increasing by many multiples. Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, 18 Nat'l Center for Health Statistics Data Brief 5 (May 2009).[5] In the United States, for instance, the level of nonmarital births between 1980 and 2007 more than doubled, rising from 18% to 40% of all births. *Ibid.; see also* Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, 57 Nat'l Vital Statistics Reps. 13 (Mar. 18, 2009), *available at* http://tinyurl.com/NVSR-Mar2009 (last visited June 24, 2010). More than half of nonmarital children in the United States are now

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[5] *Available at* http://tinyurl.com/Ventura-NCHS-May2009 (last visited June 24, 2010); *see also* Marcia Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461 (May 2008); Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 30 Fragile Families Research Brief (Feb. 2005), *available at* http://tinyurl.com/FFR-Feb-2005 (last visited June 24, 2010); Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, 57 Nat'l Vital Statistics Reps. 3 (Mar. 18, 2009), *available at* http://tinyurl.com/NVSR-Mar2009 (last visited June 24, 2010).

born to unmarried but cohabiting parents. Nat'l Center for Health Statistics, U.S. Dep't of Health & Hum. Servs., *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth*, 23(28) Vital & Health Stats. 4 (Feb. 2010), *available at* http://tinyurl.com/CDC-Feb2010 (last visited June 24, 2010). These data indicate that most children born out-of-wedlock are now born to established couples that live together and simply have not married. They also demonstrate the falsity of popular stereotypes that most nonmarital children are born to parents involved in only casual relationships or that unwed fathers are typically unaware of or have no relationship with their nonmarital children. *See* Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *Parents' Relationship Status Five Years After a Non-Marital Birth*, 39 Fragile Families Research Brief (June 2007), *available at* http://tinyurl.com/FFR-Feb2007 (last visited June 24, 2010).

Moreover, in 2009, 15% of single parents with primary physical custody of their children were men, and of those 29% (approximately 510,000 fathers) had never been married. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *America's Families & Living Arrangements: 2009 Table FG6*, *available at* http://tinyurl.com/census-TableFG6 (last visited June 24, 2010). Recent data show that custodial fathers were due $4.3 billion in child support in 2007 from their children's mothers. Timothy S. Grall, *Custodial*

Mothers and Fathers and Their Child Support: 2007, Current Population Reports 2 (Nov. 2009), *available at* http://tinyurl.com/Grall-Nov2009 (last visited June 24, 2010).

Even when the father does not have custody of his child and is not cohabiting with the mother, an increasing number of unmarried fathers since the 1970's have assumed obligations to their nonmarital children and are involved in their nonmarital children's lives. Paul R. Amato, Catherine E. Meyers & Robert E. Emery, *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 Fam. Rel. 41, 49 (Feb. 2009). Fathers' levels of involvement and contact with their nonresident children have increased, even when they are no longer romantically involved with their nonmarital children's mothers. *Ibid.*; *see also* Marcia Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461, 472 (May 2008) (reciting statistics on number of nonresident fathers who maintain contact with their child at years 1, 3, and 5).

In a large study of births to unmarried parents in major cities across the United States, virtually all of the fathers interviewed reported that they wanted to be involved in raising their children in the coming years. Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *Dispelling Myths about Unmarried Fathers*, 1 Fragile Families Research Brief (May 2000), *available at* http://tinyurl.com/FFR-May2000 (last visited June 24, 2010). Two-thirds of

the unmarried fathers in the study had seen their children in the month before follow-up interviews conducted at the five-year mark. *Parents' Relationship Status Five Years After a Non-Marital Birth*, *supra*, at 2. And 2002 data from the National Center for Health Statistics show that about three in four nonresident fathers are in contact with their children. Nat'l Responsible Fatherhood Clearinghouse Quick Statistics: Nonresident Fathers (2008), *available at* http://tinyurl.com/nonresident-fathers2008 (last visited June 24, 2010).

In addition, recent statistical data based on a national sampling of unmarried mothers demonstrate that the paternity establishment rate for nonmarital children born between 1998 and 2000 was 70%. Even when the father was "not residing with the mother at the time their child was born * * * a majority of these men (58%) had [voluntarily] established paternity by the time the child was one year old." Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 30 Fragile Families Research Brief at 2 (Feb. 2005), *available at* http://tinyurl.com/FFR-Feb-2005 (last visited June 24, 2010).

2. The converse assumption that unmarried mothers will invariably assume all responsibility for raising and financially supporting their nonmarital children is also not valid. To state the obvious, when children are in the primary physical custody of their father, as is the case for the approximately 510,000

never married fathers discussed above, they are not in the primary physical custody of their mother.

In addition, some estimates indicate that approximately 14,000 children were voluntarily relinquished by unmarried mothers in 2003. Administration for Children & Families, U.S. Dep't of Health & Hum. Servs., *Voluntary Relinquishment for Adoption* (Mar. 2005), *available at* http://tinyurl.com/voluntary-adoption (last visited June 24, 2010); *see also* Nat'l Center for Health Statistics, U.S. Dep't of Health & Hum. Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, 23(27) Vital & Health Statistics 2 (Aug. 2008), *available at* http://tinyurl.com/CDC-Aug2008 (last visited June 24, 2010). The fact that some children are relinquished by their unmarried mothers further demonstrates that not all unmarried mothers will support, raise, or even form a relationship with their nonmarital children.

3. The law reflects this shift away from the gender-based stereotype that mothers necessarily bear sole responsibility for nonmarital children, while unmarried fathers have neither obligations toward nor rights in regard to their children. As noted above, this Court has rejected gender-based distinctions between similarly situated unmarried fathers and unmarried mothers. *Caban*, 441 U.S. at 394. Whether male or female, "those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional

obligations." *Pierce v. Society of the Sisters,* 268 U.S. 510, 535 (1925); *cf. Weinberger*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when the parent is male than when the parent is female.").

Over the past 60 years, state laws have also imposed certain minimum obligations on and recognized certain rights for unwed fathers. These laws are consistent with this Court's seminal decisions in *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). By requiring States to protect a putative father's "opportunity" to form a parental relationship, and once formed to protect it fully, this Court's decisions supported other contemporaneous changes in state family law practice and ushered in an era of expanded rights for the unwed father. Simultaneously, this Court's decisions in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), and cases following *Weber*, established that nonmarital children had legal claims to benefits and inheritance through their father, thus overturning the legal tradition that held fathers free from obligation to their nonmarital children.

Perhaps most significantly, since 1960, States have been eliminating the presumption that a child's mother should have custody of a child. The final State eliminated the last vestige of this gender-based stereotype over a decade ago, in 1997. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Dispute—1920, 1960, 1990 and 1995*, 31

Fam. L.Q. 215, 220 & n.32 (1997-1998). Indeed, historical data shows that the number of male family households (as opposed to female family households, or married couple family households) has increased from approximately 2.7% to 6.7% since 1960, a faster rate of increase than female family households. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *America's Families & Living Arrangements: 2009 Table HH-1*, http://tinyurl.com/census-TableHH1 (last visited June 24, 2010).

Recognizing the increasing role that unmarried fathers can and should play in the lives of their children, all States have also created mechanisms by which a child's paternity can be voluntarily recognized before that child reaches the age of 18.[6] Approximately twenty-four States have "putative father" registries,[7] and thirteen States and the District of Columbia have provisions for voluntary acknowledgement of paternity through State agencies,

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[6] Nat'l Conference of State Legislatures, *State Legislation: Putative Father Registries* (Nov. 2009), *available at* http://tinyurl.com/putative-father-registries (last visited June 24, 2010).

[7] Putative father registries "allow fathers to register with the state and claim that they are, or even suspect that they are, the father of a child. * * * [R]egistration grants a father standing in an adoption proceeding, * * * allowing him to argue for what he thinks is in the child's best interest." Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws That Currently Deny Adequate Protection*, 13 Mich. J. Gender & L. 39, 48-49 (2006-2007).

including registrars of vital statistics. A father's "[a]cknowledgement of paternity provides [him] with the right to receive notice of court proceedings regarding the child, including petitions for adoption or actions to terminate parental rights." Administration for Children & Families, U.S. Dep't of Health & Hum. Servs., *The Rights of Presumed (Putative) Fathers* (Oct. 2007), *available at* http://tinyurl.com/putative-fathers (last visited June 24, 2010). And in twenty-one States, a person may claim paternity by filing an affidavit or acknowledgement of paternity with a court.[8] Moreover, in all States, "most unwed fathers can expect to have the full financial obligations of parenthood imposed upon them." Ruth-Arlene W. Howe, *Legal Rights and Obligations: An Uneven Evolution*, *in* YOUNG UNWED FATHERS; CHANGING ROLES AND EMERGING POLICIES 141, 164 (Robert I. Lerman & Theodora Ooms eds. 1993) (emphasis omitted).

The different residency requirements that immigration statutes impose on unwed citizen mothers and unwed citizen fathers are thus grounded on outdated and overbroad generalizations about the parenting roles of unwed mothers and fathers.

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[8] *Putative Father Registries, supra*; *The Rights of Presumed (Putative) Fathers*, *supra*.

C. There Is No Justification For The Gender-Based Residency Requirement Other Than Out-Dated Stereotypes About The Roles Of Unmarried Men And Women In Caring For Their Children.

1. The discriminatory means do not further the government's objective of encouraging familial ties

As discussed above, the preferential treatment of unmarried mothers cannot be supported by any interest in assuring a connection between parent, child, and country given that the fathers affected have established relationships with their children. Indeed, the disparate treatment of mothers and fathers is in direct conflict with any government interest in encouraging a relationship between parent and child. In some instances, the residency requirement imposed on fathers creates a powerful disincentive to establishing paternity and acknowledging the nonmarital child.

This is so because, as petitioner and other amici have shown, various countries where citizenship is customarily inherited through the father make an exception to this rule in certain circumstances. They permit an unmarried mother to pass her citizenship to the child, but do so only if the child's father is unknown, has not acknowledged the child, or has not legitimated the child. Thus, in countries including Bahrain, Burundi, Cote d'Ivoire, Jordan, Kuwait,

Swaziland, Tunisia, Yemen, and others,[9] a father who establishes paternity or who legitimates a child will deprive the child of the citizenship derived through the mother. If the father cannot offer his own citizenship in exchange, then he would be forced to make his child stateless to establish a relationship with him or her.

In 1940, when the discriminatory residency requirements at issue were adopted, an even larger swath of countries did not permit an unmarried mother to convey her citizenship once the father acknowledged the nonmarital child. For example, in Germany, Romania, and China, citizenship of the child was based on the nationality of the father *unless* the mother was unmarried *and* the father was unknown or paternity had not been established. *See, e.g.*, Br. of Scholars on Statelessness; Richard W. Flournoy, Jr., A COLLECTION OF NATIONALITY LAWS 177 (1930).

If, as in this case, the citizen father does not meet the statutory residency requirement and is thus prevented from passing United States citizenship to his child, the residency requirements in these countries will discourage establishing paternity because doing so would render the child stateless. The residency differential thus not only reflects but actually tends to *perpetuate* the gender stereotype that an unmarried father will not acknowledge or

[9] *See* Appendix to Br. of Scholars on Statelessness.

support his children. It creates a significant disincentive to establish paternity and, in so doing, threatens harm to mothers, fathers, and children. In this way, the residency differential works in opposition to the asserted objective of encouraging a tie between parent, child, and state. As a result it is not substantially, or even rationally, related to that objective.

2. The discriminatory means do not further the government's objective of preventing statelessness

As petitioner and other amici have shown, the interest in avoiding stateless children also cannot sustain the gender-based classification. Even if the interest in avoiding statelessness among foreign-born children of United States citizens was the actual reason (and not merely a *post hoc* rationalization) for the different residency requirements, the classification is so under-inclusive it lacks any "fit" with the ends it purports to serve, and is certainly not substantially related to those ends.

An unmarried mother's ability to convey citizenship does not turn on whether her child would otherwise be stateless, but simply on whether she has previously lived in the United States for a year. In contrast, the residency requirements fail to address the real risk of statelessness for children of unmarried citizen fathers. In multiple countries today (and even more in 1940 when the law was passed) the non-marital children of United States

citizen fathers are also at significant risk of statelessness. In many middle-Eastern and some African countries, these children are barred from inheriting their mothers' citizenship, or are permitted to inherit their mothers' citizenship only in certain circumstances, such as when the identity of the father is unknown or when the father has not established paternity.

The challenged provisions actually aggravate the statelessness problem in these countries by imposing a substantial obstacle on a United States citizen father's ability to convey citizenship to the child he has acknowledged. Indeed, they prohibit an unmarried citizen father under the age of 19 from ever conveying his citizenship, even to a legitimated child. Thus, in countries, such as Jordan, Qatar, or Sudan, where the child takes the citizenship only of the father, a child born to an unmarried mother and United States citizen father under the age of 19 would necessarily be rendered stateless. Br. of Scholars on Statelessness.

A gender-based classification cannot be substantially related to an actual and important state interest when it serves to undermine that interest. *Virginia*, 518 U.S. at 533; *Orr v. Orr*, 440 U.S. 268, 282 (1979) (striking down gender classification that created "perverse results" in conflict with statutory objective). Indeed, because the differential will lead to statelessness in some circumstances, the statutes at issue cannot even be said to be rationally related to

preventing the result they were purportedly enacted to prevent.

If statelessness were the government's genuine concern, a gender-neutral method would address the problem far more effectively. Given the government's representation below that it is impractical to convey citizenship based on an individualized determination that statelessness would otherwise result (C.A. Appellee Br. 21), the better response would be to apply the same one-year residency requirement to all unmarried citizen parents, thus protecting against statelessness for children of citizen mothers *and* citizen fathers. The existence of comparable or superior gender-neutral alternatives has previously led this Court to reject gender-based classifications. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr*, 440 U.S. at 281; *Weinberger*, 420 U.S. at 653. That same result should occur here.

CONCLUSION

For the reasons set forth above and in the petitioner's brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

MARCIA D. GREENBERGER
EMILY J. MARTIN
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W.
Suite 800
Washington, DC 20036
emartin@nwlc.org
(202) 588-5180

Counsel for Amici Curiae

DEANNE E. MAYNARD
BRIAN R. MATSUI
Counsel of Record
SETH M. GALANTER
KAREN E. ESCALANTE
KLINTON S. MIYAO
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
bmatsui@mofo.com
(202) 887-8784

Counsel for National Women's Law Center

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APPENDIX A

The **Asian American Legal Defense and Education Fund** (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The provision at issue in this case discriminates on the basis of sex and acts to deny citizenship to many children.

The **California Women's Law Center** (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women.

Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. *Flores-Villar v. United States* raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in the *Flores-Villar* case.

The **Center for Family Policy and Practice** (CFFPP) was established in 1995. It is a nationally-focused, nonprofit, public policy organization that focuses on the impact of national and state welfare,

fatherhood, and child support policy on parents and their children who navigate the family law and social welfare systems without legal representation. Because of the limited advocacy and policy analysis with regard to these issues from the perspective of very low-income men of color, our mission has been to concentrate on that perspective, and to provide public education and information as to the concerns on these individuals and their families. CFFPP has tax-exempt status under federal and state laws.

The **Center on Children and Families** (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The **Clearinghouse on Women's Issues** (CWI) presents expert speakers on current topics which impact the lives of women, particularly public policies that affect women economically, educationally, medically

and legally. We also cooperate and exchange information with other organizations that work to improve the status of women, nationally and internationally.

The **Feminist Majority Foundation** (FMF), founded in 1987, is the nation's largest feminist research and action organization dedicated to women's equality, reproductive rights and health, nonviolence and equal educational opportunities. Our programs focus on advancing the legal, social and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and cultivation programs. It is important to our goal of equality between women and men that sex stereotypes not be used as a basis for decisions regarding the citizenship of a child whose father is a U.S. citizen.

Legal Momentum (formerly NOW Legal Defense and Education Fund), is the nation's oldest women's legal rights organization. Throughout its 40-year history, Legal Momentum has advocated in the courts and with federal, state, and local policymakers, as well as with schools, unions and private business, to secure equality and justice for women across the country. Legal Momentum has appeared before the Court in numerous equal protection cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in

Nguyen v. INS, 533 U.S. 53 (2001), and *Miller v. Albright,* 523 U.S. 420 (1998), and as amicus curiae in *United States v. Virginia,* 518 U.S. 515 (1996), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

Legal Voice (formerly the Northwest Women's Law Center) is a nonprofit organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and securing equal rights for women and their families. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases advancing fair and equitable treatment of diverse families and establishing women's and girls' rights to equal protection under the law. Legal Voice continues to serve as a regional expert and leading advocate in litigation and in legislative efforts on a variety of gender-related issues.

Founded in 1980, the mission of the **National Association of Nurse Practitioners in Women's Heath** (NPWH) is to assure the provision of quality health care to women of all ages by nurse practitioners.

NPWH defines quality health care to be inclusive of an individual's physical, emotional, and spiritual needs. NPWH recognizes and respects women as

decision-makers for their health care. NPWH's mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

NPWH's interest in this case concerns our acknowledgment of the diversity of family units. That, in fact, many family units and parent and child relationships are not always based on a traditionally married couple. Further, that stereotypes should not be used as standards to judge a family unit or a relationship between a child and his or her parents.

The **National Congress of Black Women** represents thousands of Black women around the country. We have an interest in the outcome of this case (*Flores-Villar v. United States*) so that we can properly represent women who might find themselves in the position of being discriminated against based upon their gender.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work for "comprehensive, humane, and equitable immigration and naturalization laws, policies and practices that

facilitate and expedite legal status for more individuals" and our Principles state that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with our Principles and Resolutions, NCJW joins this brief.

The **National Council of Women's Organizations** is a nonprofit, nonpartisan coalition of more than 230 progressive women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to health and insurance challenges. Among our many member organizations that fight for and count on Title IX are the American Association of University Women, National Women's Law Center, Center for Women Policy Studies, Black Women United for Action, Digital Sisters, Inc., Feminist Majority Foundation, Girls Incorporated, National Women's Studies Association, Public Leadership Education Network, Women in Government, Women's Sports Foundation, Women's Edge Coalition, and Wider Opportunities for Women.

The **National Latino Fatherhood and Family Institute** (NLFFI) is a registered 501(c)(3) whose goals are to address the multifaceted needs of Latino men and fathers, foster a positive approach to working with Latino families, and build on the strengths of familiar and cultural traditions. In doing so, NLFFI believes that our children and nation will prosper and come closer to reaching its fullest potential. Inherent in these goals is a desire for equal and equitable treatment of both mothers and fathers so that families can remain strong and children can enjoy the benefits of two engaged, present, and loving parents.

The **National Organization for Women (NOW) Foundation** is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with hundreds of thousands of members and contributing supporters in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included advocating for immigration rights and legal equality for both women and men regardless of marital status, among many other issues.

The **National Partnership for Women & Families** is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership

has a longstanding commitment to equal protection for women under the law. The National Partnership has devoted significant resources to combating sex discrimination and has filed numerous amicus curiae briefs in the federal circuit courts of appeals to ensure that gender-based distinctions are held to a heightened standard of scrutiny.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to ensure equal protection of the laws, particularly the due process clause of the Fifth Amendment.

The **Sargent Shriver National Center on Poverty Law** (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. The Shriver Center has a strong interest in the fair and equal application of our nation's laws and policies, including those related to immigration and citizenship; and the eradication of unfair and unjust interpretations that are based on gender stereotypes.

The **Southwest Women's Law Center** is a non-profit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a nonprofit civil rights organization established to eradicate discrimination by enforcing federal and local civil rights laws. In the Committee's 40-year history, its attorneys have represented thousands of individuals discriminated against on the basis of gender, race, national origin, religion, disability and other protected categories, and in cases alleging discrimination in public accommodations, education, employment, housing and prisons. The Committee's cases range in size from individual cases to nationwide pattern and practice cases. From its extensive civil rights litigation history, the Committee has amassed expertise in the issues of law and procedure raised in the present matter.

The **Women & Politics Institute** at American University strives to close the gender gap in political leadership. We provide young women with academic

and practical training that encourages them to become involved in the political process and facilitate research that enhances our understanding of the challenges women face in the political arena. We strongly believe in working to discourage gender discrimination, promote gender equality, and level the playing field for women in all facets of society.

The **Women's Law Center of Maryland, Inc.** is a nonprofit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding family law, domestic violence, reproductive rights and employment law. Through its direct services, including the Multi-Ethnic Domestic Violence Project that provides legal representation for foreign-born victims of domestic violence, the Women's Law Center provides legal representation and advice that protects the safety and economic independence of women. The Women's Law Center's advocacy efforts promote policies that discourage discrimination and promote gender equality.

The **Women's Law Project (WLP)** is a private nonprofit law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP works to advance the legal and economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by the U.S. Constitution and civil

rights laws. Discrimination on the basis of gender stereotypes is unlawful and perpetuates discriminatory acts that harm families and society.