No. 00-963

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

FREDERICK A. LAKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Section 309(a) of the Immigration and Nationality Act, 8 U.S.C. 1409(a), a child born abroad out of wedlock to a father who is a citizen of the United States and a mother who is not a citizen of the United States becomes a citizen of the United States, as of his or her date of birth, only if, among other things, paternity is formally established by legitimation, written acknowledgment, or court decree while the child is under the age of 18, and the father agrees in writing to provide financial support for the child during the child's minority. Although Congress amended Section 1409(a) in 1986, and the amendments do not apply to respondent in this case, the provisions of the earlier version of the statute, 8 U.S.C. 1409(a) (1952), were substantially similar. The questions presented are:

1. Whether respondent has third-party standing to assert the equal protection rights of his deceased American father, where there was no showing that the father would have raised the challenge on his own.

2. Whether the requirements for transmission of citizenship imposed by Section 1409(a) violate the equal protection component of the Due Process Clause.

3. Whether the court of appeals had the power to declare respondent a citizen of the United States, in the absence of a statute conferring citizenship.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 226 F.3d 141. The opinion of the Board of Immigration Appeals (App., *infra*, 20a-24a) is unreported. The order and opinion of the immigration judge (App., *infra*, 25a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2000. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

3. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

* * * * *

4. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238, as amended and presently in force, 8 U.S.C. 1409, provides in pertinent part:

> **Children born out of wedlock**
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply

as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in

the United States or one of its outlying possessions for a continuous period of one year.

5. Section 309 of the INA, ch. 477, 66 Stat. 238, 8 U.S.C. 1409 (1952), provided in pertinent part:

> **Children born out of wedlock**
>
> (a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408 of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.
>
> * * * * *
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

STATEMENT

1. Article I of the Constitution assigns Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute.

Section 309(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1409(a), permits a child born outside the United States to unmarried parents to claim United States citizenship on the basis of the child's relation to a father who is a United States citizen. Such a child is deemed a citizen if, but only if: the father meets a residency requirement imposed under Section 1401(c), (d), (e), or (g); there is clear and convincing evidence of a blood relationship between the child and the father, 8 U.S.C. 1409(a)(1); the father had United States nationality at the time of the child's birth, 8 U.S.C. 1409(a)(2);[1] the father (if living) agrees in writing to provide financial support for the child until the child is 18 years old, 8 U.S.C. 1409(a)(3); and, before the child turns 18, the child is legitimated under the law of his or her domicile, the father acknowledges paternity of the child in writing under oath, or the paternity of the child is established by a court of competent jurisdiction, 8 U.S.C. 1409(a)(4).

Section 1409(c) allows a child born abroad out of wedlock to claim citizenship based upon the mother's United States citizenship. In order for a child to become a United States citizen under Section 1409(c), the mother must have been a citizen of the United States at the time of the child's birth, and the mother must have been physically present in the United States (or a United States possession), before the child's birth, for a continuous period of at least one year. 8 U.S.C. 1409(c).

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[1] The statutory distinction between "nationality" and "citizenship" "has little practical impact today" because there are few nationals of the United States who are not citizens. *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

2. In *Miller* v. *Albright*, 523 U.S. 420 (1998), this Court considered, but failed definitively to resolve, the question whether Section 1409(a)'s prerequisites for a child born out of wedlock to claim citizenship on the basis of the United States citizenship of his or her father are consistent with the equal protection component of the Due Process Clause of the Fifth Amendment. In *Miller*, a Filipino national, who was born in the Philippines to a Filipino mother and United States citizen father who were not married, challenged the State Department's denial of her application for registration as a United States citizen. See *id.* at 424-426.

Two Members of the Court concluded that the citizenship requirements of Section 1409(a), which the petitioner did not satisfy, do not violate the equal protection rights of either the child or the citizen father. See 523 U.S. at 429-445 (opinion of Stevens, J.). Those Justices noted that "[d]eference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization,'" but held that the requirements of Section 1409(a) are, in any event, "substantially related to important governmental objectives." *Id.* at 434-435 n.11 (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 82 (1976)). Two other Justices agreed that Section 1409(a) does not violate the child's equal protection rights. *Id.* at 451-452 (O'Connor, J., concurring in the judgment). Those concurring Justices declined to consider whether the statute unconstitutionally discriminates against citizen fathers, because the petitioner's father had abandoned his own equal protection claim and was not a party before this Court, and the child did not, in the view of those Justices, have third-party standing to raise the father's equal protection rights. *Id.* at 445-451. Two Justices declined to address

the constitutional claim of either the father or the child, on the ground that the Court would lack power to confer citizenship on the child as a remedy even if Section 1409 were held unconstitutional. *Id.* at 452-459 (Scalia, J., concurring in the judgment). Three Justices would have held that Section 1409 draws an unconstitutional distinction between unwed fathers and unwed mothers, and thus denies unwed citizen fathers equal protection. *Id.* at 460-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting).

3. Respondent's father, Joseph Lake, was born in the United States Virgin Islands and was a United States citizen. App., *infra*, 2a, 21a. Respondent's mother, Edith White, was a citizen of Jamaica. *Id.* at 2a. Respondent was born in Jamaica on March 31, 1953. *Id.* at 21a. Respondent's father and mother never married. *Id.* at 2a. Respondent "had intermittent contact with" his father during respondent's childhood in Jamaica. *Ibid.*

In 1987, at the age of 33, respondent came to the United States as a lawful permanent resident. App., *infra*, 2a. In 1991, respondent was convicted of armed robbery in New York state court, and was sentenced to a minimum term of six years' imprisonment. *Id.* at 2a-3a. Petitioner was released from prison on parole in 1997, when he was 44 years old. His father died that same year. *Id.* at 3a.

4. In March 1998, the Immigration and Naturalization Service (INS) instituted removal proceedings against respondent, charging him with being deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) for having been convicted of an aggravated felony. See App., *infra*, 3a, 28a. Respondent moved to terminate the removal proceedings based on a claim that he is a United States citizen because his father was a citizen.

Id. at 3a. Petitioner also denied the armed robbery conviction that formed the basis for the charges. See *id.* at 28a. The immigration judge (IJ) found that respondent had been convicted of the robbery. *Id.* at 28a-29a, 34a. With regard to respondent's claim to United States citizenship, the IJ found that respondent had failed to satisfy the requirement in Section 1409(a)(4) that, before his eighteenth birthday, he was legitimated by his father under the laws of Jamaica, his father had executed a sworn acknowledgment of paternity, or a court had adjudicated paternity. *Id.* at 29a-31a; see 8 U.S.C. 1409(a). The IJ held in the alternative that petitioner's father had failed to satisfy the requirement of paternal legitimation by the time respondent reached age 21, as required by Section 1409(a) as in effect before its amendment in 1986. App., *infra*, 31a-32a. Finally, the IJ rejected respondent's reliance on *Miller* v. *Albright* for the proposition that Section 1409(a) is unconstitutional. The IJ questioned whether respondent had standing to assert his father's equal protection rights, and concluded in any event that this Court had not invalidated Section 1409(a) and that the import for this case of the separate opinions in *Miller* discussing the constitutional issue was unclear. *Id.* at 32a-33a.

The Board of Immigration Appeals (Board) affirmed. App., *infra*, at 20a-24a. The Board concluded that the relevant statutory provision for determining respondent's citizenship was the version of Section 1409(a) enacted in 1952, prior to the 1986 amendments. And it agreed with the immigration judge that respondent failed to satisfy the legitimation requirement of the 1952 law. *Id.* at 21a-23a & n.2. The Board declined to address respondent's equal protection challenge to Section 1409(a), holding that it lacked jurisdiction to

consider the constitutionality of a provision of the INA. *Id.* at 23a-24a.

5. The court of appeals granted respondent's petition for review and reversed. App., *infra*, 1a-19a. Although the parties agreed that the version of Section 1409 that applies to respondent is the version enacted in 1952, not the 1986 version considered by this Court in *Miller*, the court of appeals found that the 1952 version and the amended version "are indistinguishable" for purposes of equal protection analysis "because both place greater burdens on the citizen father than on the citizen mother." *Id.* at 5a-6a. The court then proceeded to address the same three questions that occupied this Court in *Miller*: "standing, the merits, and remedy." *Id.* at 11a.

"[D]issect[ing]" the opinions in *Miller*, the court of appeals concluded that, if the citizen father in *Miller* had not been alive, a majority of this Court would have found that the petitioner had third-party standing to assert her father's rights. App., *infra*, 5a, 11a-12a. On that basis, the court of appeals concluded that respondent in this case possesses third-party standing to assert an equal protection claim on behalf of his deceased father, without regard to whether respondent's father sought to assert such a claim before his death. *Id.* at 12a-13a.

On the merits, the court of appeals believed on the basis of its reading of the opinions in *Miller* "that had the petitioner in *Miller* had standing to press the claims of her citizen father, five justices of the Court—the three dissenters plus Justices O'Connor and Kennedy—would have" applied heightened equal protection scrutiny and held Section 1409(a) "unconstitutional on equal protection grounds." App., *infra*, 13a. The court of appeals then held that the appropriate remedy was to

sever Section 1409(a) from the INA, thereby exempting respondent from Section 1409(a)'s special conditions on the acquisition of citizenship by children born out of wedlock and instead making him eligible for citizenship under 8 U.S.C. 1401(g), on the same terms as a child whose parents were married. Accordingly, because respondent's father met the physical-presence requirements set out in the 1952 version of Section 1401 for a married United States citizen parent, the court declared that respondent has been a United States citizen since birth. App., *infra*, 16a-18a. In so doing, the court of appeals disagreed with Justice Scalia's concurring opinion in *Miller*, which concluded that courts have no authority to confer citizenship upon persons, such as respondent, who are not made eligible for citizenship by Congress. *Id.* at 16a; see 523 U.S. at 452-459 (Scalia, J., concurring in the judgment).

DISCUSSION

1. This case presents the question whether 8 U.S.C. 1409(a), as enacted in 1952, violates the equal protection component of the Due Process Clause by requiring legitimation during minority as a condition of conferring citizenship on a child who is born out of wedlock abroad and whose father (but not mother) is a United States citizen. The same question, under the slightly different requirements of Section 1409(a) as it was amended in 1986, is pending before the Court in *Nguyen* v. *INS*, No. 99-2071 (to be argued Jan. 9, 2000). *Nguyen* also presents a further question presented in this case: whether a court may properly declare an alien to be a United States citizen where Congress has not so provided, by severing the special conditions in 8 U.S.C. 1409(a) for children born out of wedlock outside the United States to become United States

citizens, and providing instead that such persons are subject to the more lenient standards applicable under 8 U.S.C. 1401(g) to a child whose parents were married at the time of the child's birth. The Court therefore should hold the petition in this case pending the decision in *Nguyen*.

2. The questions whether Section 1409(a) violates the equal protection rights of citizen fathers, and whether a court may declare an alien to be a citizen as a remedy for an equal protection violation, are also pending before the Court in *United States* v. *Ahumada-Aguilar*, No. 99-1872 (filed June 22, 2000). That case, like this one, also presents a threshold question of the standing of the respondent to raise the equal protection rights of his deceased United States citizen father.

For the reasons stated in our certiorari petition (at 10-15) and reply brief (at 2-8) in *Ahumada-Aguilar*, the court of appeals in this case erred in holding that respondent could assert the equal protection rights of his deceased father, since there is no basis for concluding that there was any hindrance to the father's asserting his own constitutional rights during his lifetime.[2] As further stated in our reply brief in *Ahumada-Aguilar* (at 8-9), however, we do not believe that the third-party standing issue is itself of sufficient importance to warrant plenary review by this Court, although in the certiorari petition (at 16, 22, 23) and reply brief (at 10) in that case we did suggest that summary reversal on the third-party standing issue would be appropriate. Accordingly, if the Court's decision in *Nguyen* fails to resolve the merits of the constitutional issue in a manner that controls the

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[2] We are furnishing respondent's counsel copies of the government's certiorari petition and reply brief in *Ahumada-Aguilar*.

decision of the constitutional issue in this case and *Ahumada-Aguilar*, then here, as we suggest in *Ahumada-Aguilar*, the Court may wish to grant the petition for a writ of certiorari and summarily reverse the judgment of the court of appeals on third-party standing grounds.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Nguyen* v. *INS*, No. 99-2071, and then disposed of as appropriate in light of the Court's decision in that case. At that time, subject to the decision in *Nguyen*, the Court may wish to grant the petition for a writ of certiorari and summarily reverse the judgment of the court of appeals on third-party standing grounds.

Respectfully submitted.

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DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 99-4125

FREDERICK A. LAKE, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

Argued: March 31, 2000
Decided: Sept. 12, 2000

Before: OAKES, WALKER, and KEITH,* Circuit Judges.

[CORRECTED OPINION]

JOHN M. WALKER, JR., Circuit Judge:

Petitioner Frederick A. Lake appeals from an order of the Board of Immigration Appeals ("BIA"), affirming the decision by the Immigration Judge ("IJ") that denied Lake's request for termination of removal proceedings and ordered his removal. Lake, who was born abroad and out of wedlock to an American father and an alien mother, claimed United States citizenship from

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* The Hon. Damon J. Keith, of the Sixth Circuit Court of Appeals, sitting by designation.

birth under section 301(7) of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1401(7) (1952), on the basis that his father was a United States citizen at the time of Lake's birth, and had met the residency requirements of the statute. Under section 309(a) of the INA, 8 U.S.C. § 1409(a) (1952), in order to confer citizenship upon an illegitimate child born abroad, a citizen father must establish his child's paternity by legitimation before the child reaches the age of 21. This requirement is not imposed upon citizen mothers. Lake, on behalf of his father, challenged section 309(a) as violative of the equal protection component of the Fifth Amendment's Due Process Clause because it burdened United States citizen fathers but not United States citizen mothers in establishing American citizenship for their foreign-born offspring. The BIA held that it lacked jurisdiction to consider this claim. We hold, first, that Lake has standing to raise his father's equal protection challenge, and, second, that section 309(a), as it applies to Lake's father, violates the constitutional requirement of equal protection of the laws. We therefore reverse the judgment of the BIA.

BACKGROUND

Lake was born in Jamaica in 1953 to Joseph Lake, a United States citizen, and Edith White, a Jamaican citizen. Although his parents never married, Lake's father had intermittent contact with him as a child, referred to Lake as his son to his other children, and listed him as one of his children in the family Bible. When Lake was 33 years old, in 1987, Lake moved to the United States as a lawful permanent resident married to a United States citizen. In 1991, he was convicted of armed robbery in New York state court,

and sentenced to a minimum of six years' imprisonment. Lake was released on parole in 1997, the same year his father died.

In April 1998, the Immigration and Naturalization Service ("INS") began removal proceedings against Lake under 8 U.S.C. § 1227(a)(2)(A)(iii) (1999), as an alien convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (1999). At a hearing before the IJ, Lake denied that he was a deportable alien, claiming United States citizenship through his father. The government did not dispute that Joseph Lake was a United States citizen or that he was Lake's father. The IJ determined that, while there were indications that Lake's father had acknowledged paternity as to Lake, Lake's father had failed to do so in writing under oath as required by INA section 309(a). Thus, the IJ concluded that Lake was subject to removal because he had failed to show that his father had met the statutory requirement of establishing Lake's paternity by legitimation. The IJ also rejected Lake's equal protection challenge. On appeal, the BIA found that, assuming that Lake had established paternity, he had no claim to citizenship because he had not satisfied the conditions of section 309(a). The BIA rejected, as beyond its jurisdiction, Lake's two constitutional challenges: the unequal treatment of illegitimate children claiming citizenship through their fathers, and the unavailability of a waiver provision for lawful permanent residents under section 212(h) of the INA.

DISCUSSION

On appeal, Lake renews his argument that section 309(a) of the INA violates the constitutional guarantee of equal protection. In the alternative, Lake argues

that if his citizenship claim is rejected, he should be granted relief on the basis that the application of section 212(h) of the INA, 8 U.S.C. § 1182(h) (1999), denies equal protection to lawful permanent residents. Because we reverse on the first ground, we do not need to consider the second.

Section 309 of the INA, which we will examine in some detail momentarily, provides that, subject only to a one-year continuous residency requirement applicable to the citizen mother, conferral of citizenship by a citizen mother is automatic at birth. *See* 8 U.S.C. § 1409(c) (1952). However, conferral of citizenship by a citizen father occurs only if the father takes the affirmative step of establishing paternity by legitimation before his child's 21st birthday. *See id.* § 1409(a). Thus, if Lake's mother had been the citizen instead of his father, Lake would automatically be a United States citizen and not subject to deportation. Because this is so, Lake argues, the statute establishes a facially discriminatory classification based on gender that cannot withstand heightened scrutiny under *United States v. Virginia*, 518 U.S. 515, 532-34, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

In opposition, the government asserts that (1) Lake has no standing to raise the equal protection rights of his father; (2) even if Lake has standing, section 309(a) passes constitutional muster: (a) easily under the deference to Congress accorded to immigration statutes under *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977), or (b) even under the heightened standard applicable to gender discrimination cases in the non-immigration context; and (3) regardless of the constitutionality of section 309(a), no remedy is

available because only Congress and not the courts can confer citizenship. We examine each of these contentions in turn.

Like the proverbial 800-pound gorilla, a Supreme Court decision sits squarely in the middle of this case. In *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L.Ed.2d 575 (1998), the Supreme Court faced a nearly identical challenge to the current version of section 309. The Court fragmented, with the justices writing five separate opinions. Six justices accepted arguments of the government, but not the same arguments. Three justices held section 309 to be unconstitutional and two more said they would agree with those three, but that the plaintiff did not have standing to make the relevant constitutional challenge under the circumstances of that case. The precise arguments advanced by the parties here were made in *Miller*. On the facts of *Miller*, the Court did not hold section 309 unconstitutional; however, after analyzing and parsing the opinions of the justices in *Miller* as the law of our circuit suggests we should, we are convinced that the Court would have reached a different result had this case been before it. But before we dissect *Miller*, we turn to the relevant statutory provisions.

The Relevant Statutory Provisions

The parties agree that the version of the INA that applies to Lake is the one that was in effect in 1953, the year of his birth. *See Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990) ("The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth."). For equal protection purposes, the earlier and current versions of the statute are

indistinguishable, because both place greater burdens on the citizen father than on the citizen mother. Section 301 sets forth which persons shall be nationals and citizens of the United States at birth. Such persons include:

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

8 U.S.C § 1401(a)(7) (1952).[1]

The statutory provision that is attacked in this case, section 309(a), applies specifically to children who are born out of wedlock to citizen fathers and non-citizen mothers. Enacted in 1952, it states in relevant part:

> The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title . . . shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such

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[1] The statute was amended effective 1986. *See* Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657 (Nov. 14, 1986). The current version of section 301 tracks essentially the same language, but imposes a shorter residency requirement, whereby the citizen parent must have been "physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years" prior to the birth of their child. 8 U.S.C. 1401(g) (1999).

> child is under the age of twenty-one years by legitimation.

8 U.S.C. § 1409(a) (1952).[2] In contrast, section 309(c), which applies to citizen mothers whose children are born abroad to non-citizen fathers, provides that:

> a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the

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[2] The current version of section 309(a) provides that:

> The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title . . . shall apply as of the date of birth to a person born out of wedlock if—
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—
>
> > (A) the person is legitimated under the law of the person's residence or domicile,
> >
> > (B) the father acknowledges paternity of the person in writing under oath, or
> >
> > (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (1999).

> United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1409(c) (1952).[3] It is the disparity of the requirements for recognizing citizenship at birth between sections 309(a) and 309(c) that is at the heart of this appeal.[4]

Miller v. Albright

Although no conclusive majority reasoning resulted from the judgment in *Miller*, the case's various opinions provide a valuable guide to the resolution of this case. "It is unfortunate that we must rely on nose-count jurisprudence but, in the absence of an authoritative majority opinion from the Supreme Court, we must seek our guidance from the available expressions of the various views of its members." *In re Application of the Herald Co.*, 734 F.2d 93, 98 n. 3 (2d Cir. 1984); *see also TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1296-97 (11th Cir. 1998) (noting that plurality opinions of the Supreme Court are not binding); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 654-55 (9th Cir. 1993) (analyzing the various opinions of the Supreme Court in a plurality decision).

In *Miller*, the daughter born abroad of an American citizen father and an alien mother who were not married brought an equal protection challenge to the current version of section 309(a). Initially, Miller's

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[3] The current version of section 309(c) is in all material respects identical. *See* 8 U.S.C. § 1409(c) (1999).

[4] Unless otherwise indicated, all subsequent citations to 8 U.S.C. will refer to the Immigration and Naturalization Act of 1952.

father, who was alive at all times throughout the litigation, had been added to her complaint as co-plaintiff to assert his own rights, but his claim was dismissed by the district court. *See Miller v. Christopher*, 870 F. Supp. 1, 2 (D.D.C.1994) (giving procedural history). Therefore, the daughter alone sought to assert before the Supreme Court a violation of her father's equal protection rights.

Justice Stevens, writing for the Court in an opinion joined by the Chief Justice, found that the petitioner had standing to raise the equal protection rights of her father, a United States citizen, *see Miller*, 523 U.S. at 432-33, 118 S. Ct. 1428, and thus that heightened scrutiny might apply to the statute, *see id.* at 434 n. 11, 118 S. Ct. 1428. Justice Stevens then determined that heightened scrutiny was satisfied, and thus upheld the statute, because the different requirements imposed on citizen fathers were well tailored to support important government interests, which he identified as (1) preventing spurious claims of citizenship, (2) ensuring reliable proof of paternity, (3) guaranteeing that the citizen father is actually aware of the child's existence, and (4) fostering ties between the child and its father and between the child and the United States. *See id.* at 435-38, 118 S. Ct. 1428. Justice O'Connor concurred in the judgment, but for quite different reasons. She wrote a separate opinion, joined by Justice Kennedy, explaining that she did not believe the petitioner had standing to raise her father's constitutional rights because she had "not demonstrated a substantial hindrance to her father's ability to assert his own rights." *Id.* at 447, 118 S. Ct. 1428 (O'Connor, J., concurring). As the statute did not classify the petitioner herself based

on her gender, Justice O'Connor reviewed the statute under rational basis scrutiny and found that the government easily met this lower burden of justification. *See id.* at 451-52, 118 S. Ct. 1428 (O'Connor, J., concurring). She made clear, however, that she did not believe that the statute would pass muster if the petitioner had standing to assert her father's claim: "I do not share Justice Stevens' assessment that the provision withstands heightened scrutiny. . . . It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny." *Id.* (O'Connor, J., concurring). Justice Scalia also concurred in the judgment, in an opinion joined by Justice Thomas, for yet another reason. He would assume petitioner's standing, but still not reach the merits of the equal protection claim because he did not believe the Court had the "power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress." *Id.* at 453, 118 S. Ct. 1428 (Scalia, J., concurring). Justice Breyer, joined by Justices Ginsburg and Souter, dissented, finding that (1) petitioner had standing to raise her father's rights, (2) heightened scrutiny was the proper standard of review, and (3) the statutory requirements imposed on citizen fathers violated equal protection standards. *See id.* at 473, 481-82, 118 S. Ct. 1428 (Breyer, J., dissenting). Justice Ginsburg, joined by Justices Breyer and Souter, wrote a separate dissenting opinion, reviewing the history of the treatment of children born abroad to United States citizen parents, and agreeing with the conclusions of Justice Breyer. *See id.* at 460, 118 S. Ct. 1428 (Ginsburg, J., dissenting) ("As Justice Breyer convincingly demonstrates, 8 U.S.C. § 1409 classifies unconstitutionally on the basis of gender. . . .").

We now turn to the three questions that occupied the Court's attention in *Miller* as they pertain to this case: standing, the merits, and remedy.

Standing

A litigant seeking to assert the rights of another person must satisfy three elements: (1) injury in fact, (2) a close relation with the third party, and (3) some hindrance to the third party's ability to protect his or her own interests. *See Campbell v. Louisiana*, 523 U.S. 392, 397, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991)). While there is no dispute that Lake has satisfied the first two elements, the government argues that Lake has not satisfied the hindrance element because, although Joseph Lake is now unquestionably hindered from pressing his own claim because he is dead, there is no showing that he was hindered during his lifetime from asserting a claim of citizenship on his son's behalf. The government cites no authority for the proposition that a litigant seeking third-party standing must affirmatively demonstrate that the deceased holder of a right desired during his or her lifetime to vindicate that right and was hindered in doing so. We decline to read such a requirement into the law. We observe only that in *Miller*, seven of the nine justices did not appear to have any difficulty with petitioner's standing in that case, where the citizen father was still alive but had been dismissed from the suit. And the two that found no standing believed that, if the petitioner's father had been deceased, there would have been standing, precisely the situation here.

As discussed above, the plurality opinion of the Court, as well as the dissent, explicitly found that

Miller had standing to press her father's equal protection claim. *See Miller*, 523 U.S. at 433, 118 S. Ct. 1428; *id.* at 473, 118 S. Ct. 1428 (Breyer, J., dissenting). The concurrence by Justice Scalia, joined by Justice Thomas, assumed she had standing. *See id.* 455 n. 1, 118 S. Ct. 1428 (Scalia, J., concurring) ("I accept petitioner's third-party standing"). Justice O'Connor's concurrence alone found that Miller, the daughter of a living United States citizen, lacked standing. *See id.* at 447, 118 S. Ct. 1428 (O'Connor, J., concurring). But while Justice O'Connor noted that "[a] hindrance signals that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so," *id.* at 450, 118 S. Ct. 1428 (O'Connor, J., concurring), she concluded that death was "an extreme example" of the kind of "daunting barriers deterr[ing] the rightholder" that permit third-party standing, *id.* at 449, 118 S. Ct. 1428 (O'Connor, J., concurring) (citing *Hodel v. Irving*, 481 U.S. 704, 711-12, 107 S. Ct. 2076, 95 L.Ed.2d 668 (1987)) (internal quotation marks omitted). Therefore, it is plain that the Court, and likely a unanimous Court, would have found standing if Miller's father had not been alive and therefore would find standing in this case.

Joseph Lake died before the INS commenced removal proceedings against his son. At the time that the necessity for Lake's constitutional challenge became apparent, Joseph Lake was irrevocably and finally hindered from vindicating his own rights, and we will not speculate as to his earlier intentions. We therefore hold that Lake possesses third-party standing to assert his father's equal protection claim. *Accord United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122-23, 1126 (9th Cir. 1999) (finding petitioner had standing

where citizen father was dead, even though father had no contact with his son his whole life and may not even have known of his existence).

Equal Protection

Having determined that Lake has standing to assert the rights of his father, we find the merits of this case to be dictated by *Miller*. It is clear to us that had the petitioner in *Miller* had standing to press the claims of her citizen father, five justices of the Court—the three dissenters plus Justices O'Connor and Kennedy—would have held section 309(a) unconstitutional on equal protection grounds. As dissenter Justice Breyer observed, "[L]ike Justice O'Connor, I 'do not share,' and thus I believe a Court majority does not share, 'Justice Stevens' assessment that the provision withstands heightened scrutiny.'" *Miller*, 523 U.S. at 476, 118 S. Ct. 1428 (Breyer, J., dissenting). *See id.* at 452, 118 S. Ct. 1428 (O'Connor, J., concurring) ("It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny. . . .").

The government contends that heightened scrutiny does not apply to section 309(a) because, like other immigration statutes, it was enacted pursuant to Congress' plenary authority over immigration and naturalization, *see* U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . . ."), and that the correct standard to apply is the highly deferential one of *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977). Under *Fiallo*, Congress may enact a discriminatory rule regarding immigration or naturalization so long as it has a "facially legitimate and bona fide reason" for

doing so. *Id.* at 794, 97 S. Ct. 1473 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972)).

The same argument was made by the government to the Court in *Miller*, with no discernable success. The plurality declined to reach the issue. *See Miller*, 523 U.S. at 429, 118 S. Ct. 1428 ("[W]e need not decide whether *Fiallo v. Bell* dictates the outcome of this case, because [*Fiallo*] involved the claims of several aliens to a special immigration preference, whereas here the petitioner claims that she is, and for years has been, an American citizen."). Neither of the concurrences mentioned *Fiallo*, while the dissent expressly rejected application of that standard. *See id.* at 478, 118 S. Ct. 1428 (Breyer, J., dissenting) (arguing that the more lenient standard of review of *Fiallo* does not apply to a petitioner claiming to have been a citizen from birth).

Fiallo itself made clear that the reduced threshold of justification for governmental action that applied to immigrants did not apply to citizens. The *Fiallo* Court had before it a section of the INA that granted a preferred immigration status to those who qualified as "children" or "parents" of United States citizens or lawful permanent residents. The statute was challenged by several unwed natural fathers and their out-of-wedlock children, who did not qualify for preferred status under the terms of the statute. The Court concluded that the "decision not to accord preferential status to this particular class of aliens" was one solely for Congress, *Fiallo*, 430 U.S. at 799, 97 S. Ct. 1473, but pointed out that "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to

citizens," *id.* at 792, 97 S. Ct. 1473 (internal quotation marks omitted). As a United States citizen, Joseph Lake's claim of equal protection, which his son has standing to raise here, is not governed by the standards applied to equal protection claims of aliens, and we have found no case holding otherwise. *See Breyer v. Meissner*, 214 F.3d 416, 424 (3d Cir. 2000) ("Because [the statute] created a gender classification with respect to Breyer's mother's ability to pass her citizenship to her foreign-born child at his birth, the section is subject to heightened scrutiny. Thus, this action is distinguishable from cases in which courts have considered the equal protection rights of naturalized persons themselves and found heightened scrutiny inapplicable.").

In *Miller*, the two justices in plurality and the three justices in dissent found that heightened scrutiny was the appropriate standard. They would have been joined in that conclusion by Justices O'Connor and Kennedy had they believed that the standing hurdle had been overcome. As seven justices in *Miller* would have applied heightened scrutiny in these circumstances, and five of the justices would have found the government's justification for the statute insufficient to satisfy that standard, as discussed above, we hold that section 309(a) violates the equal protection rights of citizen fathers as guaranteed by the Fifth Amendment.

5. Remedy

We discuss one more issue in the interest of completeness. The government's final argument is that, even if the court finds section 309(a) to be unconstitutional, Lake can be accorded no relief because the court has no authority to grant citizenship. The government

rests this claim on *INS v. Pangilinan*, 486 U.S. 875, 108 S. Ct. 2210, 100 L.Ed.2d 882 (1988), which held that a court could not naturalize aliens who had not timely filed naturalization petitions. We find that case to be inapposite. In *Pangilinan*, aliens who had served honorably in the United States armed forces, but were no longer statutorily eligible to be naturalized, petitioned for naturalization as an equitable remedy. *See id.* at 882-83, 108 S. Ct. 2210. The Supreme Court held that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." *Id.* at 883-84, 108 S. Ct. 2210.

While it is axiomatic that courts do not have the power to confer "citizenship on a basis other than that prescribed by Congress," *Miller* at 453, 118 S. Ct. 1428 (Scalia, J., concurring), Lake is not an alien who seeks naturalization as an equitable remedy. The INA plainly defines naturalization as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." 8 U.S.C. § 1101(23) (1952). It is Lake's claim that Congress conferred citizenship upon him at birth, and he merely asks the court to recognize his status, not to confer citizenship. Therefore, he contends, the provisions of the INA relating to naturalization do not apply to him. We agree.

Congress provides for a blanket grant of citizenship at birth to children born abroad of one United States citizen parent under INA section 301(a)(7), subject only to the citizen parent's cumulative presence requirement of ten years prior to the child's birth, at least five of which must be after the parent turns 14. *See* 8 U.S.C.

§ 1401(a)(7) (1952). That provision is not challenged here. On top of this straightforward grant, Congress has overlaid the requirements of section 309, applicable specifically to children born abroad out of wedlock. If section 309(a) is unconstitutional, under the separability provision of the INA, it may be severed, leaving the remainder of the INA intact. *See* Immigration and Naturalization Act of 1952, Pub. L. No. 414, § 406, 66 Stat. 281 ("If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby."). Therefore, in accordance with section 406's plain meaning, the unconstitutional section 309(a) may be severed, and the remainder of the INA, including section 301(a)(7), applied to Lake. We note that with section 309(a) severed, under section 309(c), citizen mothers would remain subject to a one-year continuous residency requirement from which citizen fathers would be exempt. This problem could be resolved in one of two ways: either by applying the one-year continuous residency requirement to both mothers and fathers, or by removing it entirely. No choice between the two is required in this case, however, because it is undisputed that Lake's father has met the one-year continuous residency requirement.

To summarize our conclusion, in the absence of section 309(a), Lake's status as a citizen at birth is incontrovertible. As "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States," Lake's status is governed by section 301(a)(7), 8 U.S.C. § 1401(a)(7) (1952). Under section 301(a)(7), so long as his father, prior to Lake's birth, "was physically present in the

United States . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years," *id.*, Lake is within the class of persons who "shall be nationals and citizens of the United States at birth," *id.* § 1401(a). As there is no genuine issue of material fact as to Lake's paternity or Joseph Lake's residence in the United States, we simply recognize that, pursuant to congressional enactment, Lake has been a United States citizen since birth.

Nothing in *Miller* compels a different conclusion. Apart from the concurrence of Justice Scalia, joined by Justice Thomas, which agreed with the government's position here that Miller could be granted no relief, *see Miller*, 523 U.S. at 456, 459, 118 S. Ct. 1428 (Scalia, J., concurring), there is no indication in *Miller* that the other Justices would hold that view. Because it found no constitutional violation, the plurality opinion expressed no opinion on the subject of remedy, *see id.* at 445 n. 26, 118 S. Ct. 1428, while noting in its discussion on standing that if the petitioner were to prevail, "the judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess," *id.* at 432, 118 S. Ct. 1428. Justice O'Connor's concurrence noted "potential problems with fashioning a remedy," *id.* at 451, 118 S. Ct. 1428 (O'Connor, J., concurring), without further elaboration, while the dissenting justices found that there was no intrusion upon Congressional power, *see id.* at 489, 118 S. Ct. 1428 (Breyer, J., dissenting) ("[T]he Court need not grant citizenship. The statute itself grants citizenship automatically, and 'at birth.' And this Court need only declare that that is so."). We therefore believe

that there is no impediment to our simple recognition of Congress's grant of citizenship.

CONCLUSION

Interpreting Supreme Court precedent as authorized by our own precedent, we find that the gender-based distinction mandated by section 309(a) of the INA violates the right to equal protection secured by the Due Process Clause of the Fifth Amendment. We therefore conclude that petitioner Lake holds United States citizenship from birth under section 301(a)(7). The decision of the BIA is reversed.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A41 308 138 – New York Date: [July 23, 1999]

In re: FREDERICK ALFONSO LAKE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

John D.B. Lewis, Esquire
99 Hudson Street
New York, New York 10013

ON BEHALF OF SERVICE:

Timothy Maguire
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Termination

ORDER:

PER CURIAM. In a decision dated December 12, 1998, the Immigration Judge denied the respondent's request for termination of the removal proceedings which was based on the respondent's claim that he acquired United States citizenship at birth under

section 301(g) of the Immigration and Nationality Act, 8 U.S.C. 1401(g), found the respondent subject to removal as charged, and ordered him removed. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent was born in Jamaica on March 31, 1953. The record reflects that his alleged father was born in United States Virgin Islands on March 23, 1915, and that his parents were never married. He claimed that he acquired United States citizenship at birth under section 301(g) of the Act, which provides that a person born abroad to an alien parent and a United States parent acquires United States citizenship at birth if the citizen parent at the time of the person's birth has been physically present in the United States for a period totaling 10 years, at least 5 years of which were after age 14 years.[1]

In removal proceedings, it is well-established that the burden is upon the Service to prove alienage; when there is a claim of citizenship, however, one born abroad is presumed to be an alien and must go forward to establish his claim to citizenship by a preponderance of the evidence. *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). *Matter of A-M-*, 7 I&N Dec. 332 (BIA 1956).

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[1] Sec. 12, Act of Nov. 14, 1986, Pub. L. 99-653, 100 Stat. 3655, 3657, shortened the required period of United States presence for the citizen parent, from the previous ten/five years to five/two years. Sec. 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. 100-525, 102 Stat. 2609, through the addition of a Sec. 23 to the Nov. 14, 1986 Act (the Immigration and Nationality Act Amendments of 1986), provided that the shorter period applies only to persons born on or after Nov. 14, 1986.

In support of his citizenship claim, the respondent submitted his father's birth certificate and United States passport which reflect his birth in the United States. The respondent also presented the testimony of his brothers and sisters who testified that the respondent was the child of his claimed father. In his assessment, the Immigration Judge determined that the respondent did not establish his claim to citizenship. On appeal the respondent challenges this determination.

In our determination, we find that, even if we assume that the respondent had established paternity, he has not established his claim to citizenship. This is so because the version of section 309(a) of the Act applicable in the respondent's case required in the case of a child born out-of-wedlock, that the person must show that paternity be established by legitimation while the child was under 21 years.[2] In *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981), it was held that a child within the scope of the Jamaican Status of Children Act of 1976 is included within the definition of a legitimate or legitimated child as set forth in section 101(b)(1) of the Act as long as the requisite family ties are established and the status arose within the relevant time requirements.

In our review we note that the definition of child in section 101(b)(1) of the Act is somewhat different than the definition of child under section 101(c)(1) of the Act

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[2] This requirement was amended by section 13, Act of Nov. 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655, 3657, but the amendment is applicable to those, unlike the respondent, who had not attained age 18 years as of November 14, 1986. Sec. 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609.

which defines that term for the nationality provisions in Title III of the Act. In *Matter of Varian*, 15 I&N Dec. 341, 345 (BIA 1975), we applied decisions involving legitimation under section 101(b)(1)(c) to section 309(a) of the Act. We note too that courts which have considered the issue have recognized that persons born in countries which have eliminated all distinctions between legitimate and illegitimate children may derive or be eligible for United States citizenship as legitimated children under the applicable nationality provisions. *Petition for Naturalization of Carlos Antonio Fraga*, 429 F. Supp. 549 (D.C. Puerto Rico 1974); *see also Peignand v. INS*, 440 F.2d 757 (1st Cir. 1971).

We therefore conclude that *Matter of Clahar* is applicable to the respondent's case and also that the respondent has not been legitimated for section 309(a) purposes. The respondent was 23 years old at the time of passage of the Jamaican Act. As section 309(a) requires legitimation by age 21 years, he has not satisfied the statutory conditions. In this regard we note that the respondent claims that the Jamaican Status of Children Act of 1976 should be applied retroactively to include persons such as himself who were overage at the time of its enactment. Such argument was considered and rejected in *Matter of Clahar*, *supra*, at p.3. We therefore find that the respondent has not met his burden on the citizenship issue.

On appeal the respondent also raises a constitutional challenge concerning the unequal treatment of illegitimate children claiming citizenship through fathers and those claiming through mothers. He also questions the constitutionality of section 212(h) of the Act which provides that such waiver provision is unavailable to those previously accorded lawful permanent resident

status. It is well-established however, that the Board cannot consider the constitutionality of statutes it administers. *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982).

As we find no error in the proceedings, the appeal is dismissed.

/s/ LORI SCILABBA
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 Varick Street, Room 1140, New York, New York 1140

In the Matter of

LAKE, FREDERICK ALFONSO File No. A 41-308-138
Respondent in Removal Proceedings

ORDER OF THE IMMIGRATION JUDGE

This summary of the Oral Decision of the Immigration Judge, issued on the date shown below, is provided for the convenience of the parties. If the case is appealed the full oral decision will be transcribed as the official text of the Court's opinion.

✓ Respondent was ordered removed from the United States to Jamaica or in the alternative to _____.

__ Respondent, an arriving alien, was ordered removed from the United States. The country of removal is determined by § 241(b)(1) of the I.N.A.

__ Respondent's application for voluntary departure was denied.

__ Respondent was granted voluntary departure until on or before _____. The grant of voluntary departure is conditioned upon

____ (1) Respondent posting a voluntary departure bond of $ ____.

____ (2) Respondent providing a travel document for inspection by I.N.S. on or before _____.

If and when Respondent fails to comply with either condition, or if Respondent fails to depart when and as required, the order would automatically become an order for his removal and deportation to _____.

__ Respondent's application for asylum was [ ] granted [ ] denied [ ] other.

__ Respondent's application for withholding of removal as to _____ was [ ] granted [ ] denied [ ] other.

__ Respondent's application for _____ under § _____ of the I.N.A. was [ ] granted [ ] denied [ ] other.

__ Proceedings were terminated.

__ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

✓ Other: Motion to terminate based on claim of citizenship was denied.

Date: 12-7-98 /s/ ALAN VOMACKA
ALAN VOMACKA,
Immigration Judge

Appeal: [Reserved by A Due by 1-6-99]

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REIVEW
IMMIGRATION COURT
New York, New York

File No. A 41 308 138

IN THE MATTER OF FREDERICK ALFONSO LAKE,
RESPONDENT

December 12, 1998

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration Act - an alien convicted of an aggravated felony, specifically as defined in Section 101(a)(43)(F) of the Immigration Act.

APPLICATION: Termination.

ON BEHALF OF RESPONDENT:

John D.B. Lewis, Esquire

ON BEHALF OF SERVICE:

Timothy Maguire, Esquire
Trial Attorney

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent was placed in removal proceedings through the Notice to Appear, Exhibit 1 in this case, issued with the date of March 16, 1998, served on him approximately two weeks later, served on the Immigration Court after that in April 1998.

This Notice to Appear alleges that the respondent is a native and citizen of Jamaica, who arrived in the United States as a permanent resident in January 1987 and was convicted on April 19, 1991, for the offense of robbery in the first degree under New York law, receiving for that conviction a sentence with a minimum of six years in prison and a maximum of 18 years in prison.

The respondent admitted certain allegations in the Notice to Appear through his counsel, but denied other allegations. Specifically, he admitted allegations five and six, which state that he is a native and citizen of Jamaica, and arrived here as a resident in 1987. He denied the alleged conviction. The Service presented evidence I will discuss in a moment to establish that. The respondent also denied that he was not a citizen or national of the United States and did, in fact, aver or assert that he had become a citizen of the United States through his father.

As to the respondent's conviction, the record includes Exhibit 3, which is a conviction record for the crime mentioned in the Notice to Appear. It also includes Exhibit 4, a rap sheet, which the Court gives little weight to. And it finally includes Exhibit 5, record showing that the conviction was appealed

unsuccessfully through the two levels of appellate review under New York State law.

Based on the conviction records and the appellate decision, the Court is satisfied that the respondent does have a final conviction for the crime as alleged in the Notice to Appear.

I also note that without regard to the pleadings of respondent's counsel, Exhibit 2, the face sheet of the immigrant visa, would establish that the respondent was born in Jamaica and entered the United States as a lawful permanent resident January 25, 1987, when he was about 33 years of age.

As to the derivative citizenship claim, the record on this point is fairly voluminous, fairly well developed, includes many documents relating to the respondent's father, his immigrant status and citizenship in the United States. It also includes affidavits from close relatives, including siblings of the respondent, who heard from their mutual father that this respondent existed and was their brother or half brother born in Jamaica. It includes many indications of the respondent's father's interest in having this respondent come to the United States, meet his siblings in the United States and have legal status here. And certainly, leaving aside the other documents, I would say that Exhibit 10, which is an inscription in a bible, certainly includes a clear indication that the respondent's father considered this person to be his son by blood although born out of wedlock and, further, considered him as a part of the family whom he hoped the other members of the family would meet. The evidence also shows that after the respondent did arrive in the United States as an immigrant, the father

made efforts to have him meet or be reunited with some of his siblings in the United States.

The derivative citizenship claim, through a mutual misunderstanding as far as the Court can see, concerning the provisions of law applicable to it, proceeded for quite some time on the Court's docket to be developed with the evidence I've mentioned. At that time, the parties, I believe, shared a misunderstanding as to the applicable law. They believed that the current text or more or less the current text of Section 309 of the Immigration Act, in particular Section 309(a), would apply to the respondent as it currently appears in the immigration statutes.

The respondent presented quite a bit of evidence in an attempt to meet the standard set out in Section 309(a) as it currently appears. The weakness of the respondent's case on that point, in the view of the Court, is in reference to Section 309(a)(4) setting out three alternative provisions, any one of which, if satisfied, would help to meet the requirement for derivative citizenship through the birth abroad in Jamaica of the respondent to a person who was already a citizen of the United States.

The parties had the opportunity to litigate the subdivision A of that provision, which refers to a person who is legitimated under the law of the person's residence or domicile. And the Court doesn't consider that any evidence was presented during those proceedings to show that the respondent had been "legitimated" under the law of Jamaica. The provision in subpart C concerning adjudication of paternity by a competent court also does not appear to apply to this case. There is nothing to indicate that there was ever

any type of paternity proceeding involving this respondent. The remaining possibility under subpart B is "the father acknowledges paternity of the person in writing under oath" and this would have to be while the respondent was under the age of 18 years. I would say that there are indications that the father acknowledged paternity of the respondent. However, I do not see that these constitute a writing under oath. So the Court at the present time would not be satisfied that the respondent has met the requirements in Section 309(a) of the Act as it now appears.

However, as the case proceeded, the Court had reason to do some independent legal research on this point and reached the conclusion, as explained in the previous hearing, that the text of the statute that the parties were applying to the evidence presented did not appear to be the provision or version of the statute that actually applied to this respondent. The reason, as summarized by the Immigration Service in its recent memorandum, is that the current text of Section 309(a) applies to persons who had not attained the age of 18 years before enactment of the current version on November 15, 1986, and this is noted in the footnote which the Court referred the parties to in the Court's edition of the Immigration Act. And that limitation has not been challenged by respondent's counsel in terms of its existence or its application.

Under the version of the Immigration Act that applies to this respondent, given his relatively long ago birth, the requirement was that the person would benefit from citizenship "if paternity is established while the person is under the age of 21 years by legitimation." In other words, as opposed to the current three methods

of meeting this requirement or this part of the statute, there was, as far as the respondent is concerned, only one possible way to meet this requirement, through legitimation under the age of 21.

As mentioned previously, the Court doesn't see that there is any evidence that the parties have presented to indicate that this respondent was legitimated while under the age of 21.

For this reason, the Court concludes the respondent cannot establish citizenship through his father under Section 309(a) of the Act.

Respondent's counsel, in his memorandum submitted in December, has pointed [to] a relatively recent decision of the Supreme Court, *Miller v. Albright*, decided April 22, 1998. In that case, the Supreme Court issued a split decision and respondent's counsel correctly analyzes these split opinions of the Supreme Court at least to indicate that if the respondent's father were seeking to challenge the constitutionality of Section 309 of the Act, the father might have standing and might be successful in having the statute struck down or reformed in some way by the court based on the analysis of the Supreme Court justices in their two separate opinions.

The difficulty with this is not limited to the fact that the respondent's father passed away recently and, therefore, is not available to make such a challenge to the Act and that some of the members of the Supreme Court found that the child did not have standing to raise such a challenge to the Nationality Act.

The other difficulty with the Court applying the *Miller v. Albright* analysis to the present case is that because of the split decisions, it is only through analysis and vote counting that a person can reach the conclusion that the Supreme Court might in fact strike down or reform Section 309(a) in some way that might be beneficial to this respondent. There is not a clear decision from the Supreme Court exactly on point with this situation holding that the statute is unconstitutional. It is one thing for an Immigration Judge to apply a clear cut decision from a higher court, especially the Supreme Court. It's another thing for the Court to strike down an Immigration Act that has been on the books for 11 or 12 years because the Court believes that an analysis of a Supreme Court decision leads to a conclusion that that law might be unconstitutional. There is a difference in terms of clarity and finality in the Supreme Court decision *Miller v. Albright* compared to what the respondent might need to benefit from.

Based on this, the Court doesn't believe it can apply *Miller v. Albright* to find either that the Immigration Act is unconstitutional, which it's normally clear Immigration Judges cannot do, much less to hold that the Supreme Court has somehow made such a finding or struck down the law, which this Court believes the Supreme Court has not in fact done.

Considering the application of the statute under the previous provision, which still applies to the respondent in view of his date of birth in 1953, and considering all the evidence presented on the issue of citizenship, the Court concludes that the respondent is not a citizen of the United States through his father or in any other way, that he is only a native and citizen of Jamaica.

For this reason, the Court does conclude that the respondent is subject to removal as charged, based on the conviction for an aggravated felony.

As to the relief issue, respondent's counsel has asked for a further continuance to consider any form of relief that might be available to the respondent. The Court feels that given the resolution of the citizenship claim against the respondent and given the clear, convincing and unequivocal evidence that the respondent has been convicted of an aggravated felony with a sentence of six years minimum, that there is in fact no form of relief that the respondent would appear to benefit from or be eligible for. As briefly mentioned on the record just before this oral decision was issued, respondent's conviction and the sentence for the conviction makes the respondent ineligible for either form of cancellation of removal under Section 240A of the Immigration Act, makes him ineligible for asylum since he's been convicted of an aggravated felony, makes him ineligible for withholding of removal since he's been convicted of an aggravated felony with a sentence of at least five years, which constitutes a "particularly serious crime" and, as far as the Court is concerned, makes him ineligible for adjustment of status because he cannot be granted a waiver under Section 212(h) of the Immigration Act even if there was an approved, currently available visa petition on his behalf.

Because I don't find any form of relief for which the respondent might be eligible, I do order that the respondent be removed and deported from the United States to Jamaica based on the charge in the Notice to Appear.

/s/ ALAN A. VOMACKA
ALAN A. VOMACKA
Immigration Judge