No. 00-895

In the Supreme Court of the United States

KEVIN WEDDERBURN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1432(a), a child born abroad to parents who are not United States citizens becomes a citizen of the United States, upon satisfaction of a residency requirement, if both parents are naturalized as United States citizens while the child is under the age of 18. Section 1432(a) also provides, however, for exceptions to the requirement that both parents be naturalized for situations in which: one parent is deceased and the surviving parent is naturalized; the parents are legally separated and the parent having legal custody is naturalized; or the child was born out of wedlock, paternity has not been established by legitimation, and the mother is naturalized. The question presented is:

Whether Section 1432(a) violates the equal protection component of the Due Process Clause of the Fifth Amendment insofar as it does not confer United States citizenship on a legitimate child when only one of the child's two living parents, who are not legally separated, becomes a naturalized United States citizen.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 215 F.3d 795. The opinion of the Board of Immigration Appeals (Pet. App. 15a-20a) is unreported. The opinion of the immigration judge (Pet. App. 21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2000. A petition for rehearing was denied on August 31, 2000 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 29, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute.

The statute at issue here, 8 U.S.C. 1432, provides that children who are born outside of the United States, and whose parents both were aliens, become citizens of the United States upon naturalization of their parents, if certain requirements are satisfied. Under that statute, the child acquires citizenship as a result of (1) the naturalization of both parents before the child's eighteenth birthday, and (2) the child's lawful residence in the United States while the child is under age 18. See 8 U.S.C. 1432(a)(1), (4) and (5). Under limited circumstances, however, the first requirement can be satisfied through the naturalization of only one parent. If one parent is deceased, naturalization of the surviving parent while the child is under age 18 satisfies the parental naturalization requirement. 8 U.S.C. 1432(a)(2). Likewise, if the child's parents are legally separated, naturalization of the parent having legal custody suffices. 8 U.S.C. 1432(a)(3). And, if the child was born out of wedlock and paternity has not been established by legitimation, naturalization of the mother before the child reaches age 18 meets the parental naturalization requirement. *Ibid.*

2. Petitioner was born in Jamaica on October 30, 1975. Both of his parents were citizens of Jamaica at the time of his birth. Although petitioner's parents never married, petitioner's father added his name to peti-

tioner's birth certificate in 1986, thereby legitimating petitioner under Jamaican law. That same year, petitioner's father moved to the United States and married a woman who later became a United States citizen. Pet. App. 3a.

In 1987, petitioner was admitted to the United States as a permanent resident alien based on the citizenship of his father's wife. Pet. App. 3a-4a, 17a. Three years later, petitioner went to live with his paternal grandmother. *Id.* at 4a. In 1993, when petitioner was 17 years old, his father became a naturalized United States citizen. *Id.* at 3a, 17a. Petitioner's mother has never acquired United States citizenship. *Id.* at 5a.

In 1995, petitioner was convicted of aggravated criminal sexual assault of a boy under nine years of age. He was sentenced to six years' imprisonment. Pet. App. 3a.

3. The Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner based on the sexual assault conviction. Pet. App. 17a-18a; see 8 U.S.C. 1227(a)(2)(A)(ii) and (iii) (Supp. V 1999) (formerly codified at 8 U.S.C. 1251(a)(2)(A)(ii) and (iii) (1994)). Petitioner contended that he was not subject to deportation, claiming United States citizenship under Section 1432(a) based on his father's naturalization. Pet. App. 17a. The immigration judge continued the deportation hearing to allow petitioner to make a formal application for United States citizenship. *Ibid.* Petitioner's application for citizenship was denied, *id.* at 27a-30a, and the immigration judge in the deportation case then ordered petitioner deported to Jamaica, *id.* at 21a.

The Board of Immigration Appeals (Board) affirmed. Pet. App. 15a-20a. It held that petitioner has no valid claim to citizenship under any of the provisions of

Section 1432(a) because only his father has been naturalized. The Board also rejected petitioner's argument that, to avoid alleged constitutional problems, Section 1432(a) should be construed to allow petitioner to secure citizenship. In particular, the Board rejected petitioner's reliance on *Miller* v. *Albright*, 523 U.S. 420 (1998), which involved a different citizenship provision (8 U.S.C. 1409) and which, in any event, rejected the equal protection challenge to that provision. The Board further noted that it lacked authority to rule on a constitutional challenge to Section 1432(a). Pet. App. 20a.

4. The court of appeals affirmed. Pet. App. 2a-14a. The court first held that petitioner is not a citizen under the plain language of Section 1432(a). *Id.* at 4a-5a. Petitioner is not a citizen under Section 1432(a)(1) or (2), the court explained, because his mother has not become a naturalized citizen of the United States, and she is still alive. See *id.* at 4a. The court further held that Section 1432(a)(3) does not apply to petitioner because his parents never married and thus are not legally separated, and because his paternity has been established by legitimation under Jamaican law. *Id.* at 4a-5a.

After rejecting several proposed constructions of Section 1432(a) that would have brought petitioner within its scope (see Pet. App. 5a-9a), but which petitioner does not re-argue here, the court of appeals addressed petitioner's constitutional challenges to Section 1432(a). As in the proceedings before the Board, petitioner relied primarily upon *Miller* v. *Albright*, in which this Court considered, but failed definitively to resolve, the question whether Section 1409(a)'s prerequisites for claiming citizenship at birth through an unmarried United States citizen father discriminate on the basis of gender in violation of the Fifth Amendment. The court of appeals rejected petitioner's argu-

ment that *Miller* establishes a constitutional defect in Section 1432(a)(3).

First, proceeding on the assumption that the relevant provisions in Section 1432(a)(3) draw a gender-based distinction analogous to the one at issue in *Miller*, the court of appeals concluded that the six Justices who rejected the equal protection challenge to Section 1409 in *Miller* would likewise reject the equal protection challenge to Section 1432(a)(3) made by petitioner in this case. Pet. App. 10a-12a. Indeed, the court of appeals concluded that even the three dissenters who would have found an equal protection violation in *Miller* might find that petitioner lacks standing to assert an equal protection challenge on behalf of his father in this case: whereas Miller's citizen-father had sought unsuccessfully to participate in that case, petitioner's father in this case made no effort to assert an equal protection claim on his own behalf, and, accordingly, petitioner could not assert the rights of his father. *Id.* at 12a.

The court of appeals next concluded that petitioner's reliance upon *Miller* was misplaced for the more fundamental reason that Section 1432(a)(3), unlike the law at issue in *Miller*, does not draw a sex-based distinction that affects petitioner. Pet. App. 13a. Because petitioner was legitimated under Jamaican law, the court held that there was no basis for petitioner to challenge Section 1432(a)(3)'s provision allowing children who have *not* been legitimated to obtain citizenship by virtue of their mother's (but not their father's) naturalization. The other provision in Section 1432(a)(3) allows a child to obtain citizenship based on the naturalization of the parent having legal custody of the child after a legal separation, and does not draw any gender-based distinction. *Ibid.* Accordingly, "a legiti-

mated child such as [petitioner] has no sex-discrimination claim at all." *Ibid.*

Finally, the court of appeals determined that when Congress provided a special avenue to citizenship for children of parents who were married but are legally separated—by granting citizenship upon naturalization of the parent having legal custody of the child—it was not constitutionally required to apply the same "custodial parent" rule to the situation of legitimated children whose parents never married. Pet. App. 14a. The court also noted that petitioner's father, once he became a citizen and assumed legal custody of petitioner, could have applied to have petitioner granted citizenship under 8 U.S.C. 1433, which furnishes an alternative avenue for conferral of citizenship on children born abroad who have a United States citizen parent. Petitioner, moreover, could have applied for citizenship on his own behalf under 8 U.S.C. 1427 (1994 & Supp. V 1999) after he became an adult permanent resident alien. Pet. App. 14a.

ARGUMENT

This case dos not present the issue that is before the Court in *Nguyen* v. *INS*, No. 99-2071 (argued Jan. 9, 2001). *Nguyen*, like *Miller* v. *Albright*, 523 U.S. 420 (1998), involves an equal protection challenge to gender-based distinctions in a different provision of the Immigration and Nationality Act, 8 U.S.C. 1409. The provision at issue in this case, 8 U.S.C. 1432(a)(3), does not make any gender distinction with respect to children, such as petitioner, who either are born in wedlock, or are born out of wedlock but legitimated before their eighteenth birthday. The decision of the court of appeals sustaining Section 1432(a)(3) is correct, and it does not conflict with *Miller* or any other decision

of this Court, or with any decision of another court of appeals. Further review therefore is not warranted.

1. Contrary to petitioner's principal argument (Pet. 9-13), this case does not present the issue raised in *Miller* and *Nguyen*. Those cases involve the constitutionality of 8 U.S.C. 1409(a). Under Section 1409(a), a child born outside the United States to an unmarried father who is a United States citizen is a United States citizen at birth on the same terms as if the father had been married to the mother, if: 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) has agreed 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 residence or domicile, the father acknowledges paternity of the child in writing under oath, or the paternity of the child is established by adjudication by a court of competent jurisdiction, 8 U.S.C. 1409(a)(4). Section 1409(c), by contrast, provides that a child born abroad out of wedlock to a United States citizen mother is a United States citizen if the mother was physically present in the United States, before the child's birth, for a continuous period of at least one year. 8 U.S.C. 1409(c).

In *Miller*, a woman who was born in the Philippines to a Filipino mother and American father, out of wedlock, challenged the denial of her application for regi-

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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*, 523 U.S. at 467 n.2 (Ginsburg, J., dissenting).

stration as a United States citizen. See 523 U.S. at 424-426. Two Members of the Court concluded that the citizenship requirements of Section 1409(a) do not violate the equal protection rights of either the child or the citizen father. See *id.* 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 *Matthews* 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 Section 1409(a) unconstitutionally discriminates against citizen fathers, because the petitioner's father had abandoned his equal protection claim and was not a party before the 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 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).

Unlike both *Miller* and *Nguyen* (which presents substantially the same question as *Miller*), this case

involves no distinction based on the gender of the parent. As the court of appeals explained (Pet. App. 13a), the only provision in Section 1432(a) that distinguishes between a citizen mother and a citizen father is the portion of Section 1432(a)(3) that applies to children who were born out of wedlock and who have not been legitimated by means authorized under applicable law (such as marriage of the father to the mother, formal acknowledgment by the father, or an adjudication of paternity). Such a child lacks a legally recognized parent-child relationship with the father—not just for purposes of the naturalization laws, as petitioner seems to believe (see Pet. 10-12, 15)—but typically in the domestic context as well. See, *e.g.*, National Conference of Comm'rs on Uniform State Laws, *Uniform Parentage Act* § 201 (2000) ("Establishment of Parent-Child Relationship"); cf. Pet. 17-18. It therefore is the mother's acquisition of United States citizenship before the child turns 18 that determines the child's eligibility for citizenship. That provision of Section 1432(a)(3) addressing the situation of children who have not been legitimated is inapplicable to petitioner, however, because petitioner was legitimated when he was 10 years old. See Pet. App. 3a. Petitioner would have been equally ineligible for citizenship under that provision if it had been his mother, rather than his father, who was naturalized when petitioner was under 18.

Miller and *Nguyen* also are distinguishable because they involve a claim to citizenship at birth. See Pet. App. 12a. Justice Breyer, writing for all the Justices who would have found an equal protection violation in *Miller*, was of the view that the "unusually lenient constitutional standard of review" that applies in the immigration and naturalization contexts under cases such as *Fiallo* v. *Bell*, 430 U.S. 787, 792-796 (1977),

should govern only when challenge is made to statutes "that confer citizenship on those who originally owed loyalty to a different nation." 523 U.S. at 481 (Breyer, J., dissenting). Petitioner in this case was born a Jamaican citizen and claims that he became a United States citizen as a teenager, as a derivative consequence of his father's naturalization. See Pet. 4, 6. Even under the view of the dissenting Justices in *Miller*, therefore, an equal protection challenge to any gender-based distinction in Section 1432(a) should be rejected if there is "a facially legitimate and bona fide reason" for Congress's policy choice. *Fiallo*, 430 U.S. at 794. Nothing in any of the opinions in *Miller* suggests that, where the father has not legitimated the child, allowing the child to rely solely upon the mother's citizenship would fail that highly deferential test.

Finally, even if the litigation under Section 1409(a) were relevant to this case—which it is not—there still would be no basis for holding this case pending the Court's decision in *Nguyen*. The petitioner in this case is the child seeking citizenship. Unlike *Nguyen*, the United States citizen father is not asserting his own rights. Cf. Pet. Br. at 24, *Nguyen*, No. 99-2071 (father in *Nguyen* asserts his right "to be free of discrimination in transmitting statutory 'citizenship at birth.'"). And, unlike *Miller*, the citizen father "did not attempt to join in his son's appeal." Pet. 12 n.3. Five Justices suggested in *Miller* that in circumstances such as those presented in this case, where it appears that petitioner's citizen father has never made any effort to assert a claim to United States citizenship on behalf of his son, the child would lack third-party standing to assert the rights of his father. See Pet. App. 12a; *Miller*, 523 U.S. at 447-451 (O'Connor, J., concurring in the judgment) (child may not assert equal protection

claim on behalf of citizen father where father failed to appeal dismissal of his claim); *id.* at 473-474 (Breyer, J., dissenting) (dismissal of father from case on motion of government afforded child third-party standing to assert father's rights).[2]

Two additional Justices concluded in *Miller* that a party in petitioner's position would not be entitled to citizenship even if he were to prevail on the merits, see 523 U.S. at 452-459 (Scalia, J., concurring in the judgment), bringing to seven the number of Justices who apparently would have rejected petitioner's claim in this case without regard to the merits of a gender-based equal protection argument.[3] Thus, if *Miller* were relevant here, the relevance would be that petitioner's arguments are foreclosed without regard to the Court's

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[2] Petitioner asserts (Pet. 12-13 & n.3) that his father might have thought it futile to attempt to intervene in this case. As petitioner himself acknowledges, however, the father in *Nguyen* did successfully intervene in his son's case. See Pet. 12 n.3. More importantly, it was clear after *Miller*, and therefore by the time of the Board and court of appeals proceedings in this case, that an attempt to intervene, even if unsuccessful, might have enabled petitioner to assert an equal protection claim on behalf of his father. See *Miller*, 523 U.S. at 474 (Breyer, J., dissenting) ("The Government's successful dismissal motion thus had practical consequences that 'hindered' [the father's assertion of his claim] at least as much as those we have elsewhere said create 'hindrances' sufficient to satisfy this portion of the 'third-party standing' test."). In that regard, we note that petitioner was represented by counsel before the Board (see Pet. App. 16a) and before the court of appeals (see *id.* at 2a).

[3] Justice Stevens and Justice O'Connor noted the remedial issue discussed in Justice Scalia's opinion but did not address it in light of their concurrence in the disposition on other grounds. See 523 U.S. at 445 n.26 (opinion of Stevens, J.); *id.* at 451 (O'Connor, J., concurring in the judgment).

consideration of the gender-discrimination claim in *Nguyen*.

2. Petitioner's other challenge to Section 1432 concerns what he terms Section 1432(a)(3)'s "legitimacy-related distinctions." Pet. 14. As an initial matter, petitioner errs in relying (Pet. 16, 17) on *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977), and its progeny for the proposition that any distinctions drawn in Section 1432(a) based on legitimacy would be subject to heightened scrutiny. On the same day on which the Court decided *Trimble* v. *Gordon*, it held in *Fiallo*, 430 U.S. at 792-795, that in the immigration and naturalization context, distinctions based on the legitimacy of a child are subject only to the scrutiny provided for under *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972): whether the challenged classification is based on a "facially legitimate and bona fide reason."

In any event, the relevant statutory provision in this case does not draw a distinction based on legitimacy. Petitioner's basic argument is that Section 1432(a)(3) is under-inclusive because it allows only a child whose parents were married but are legally separated to acquire citizenship if the parent who has legal custody of the child is naturalized, and that Congress additionally should have waived the default rule of Section 1432(a)(1) (*i.e.*, that *both* parents must be naturalized[4]) for legitimated children whose parents were never married in the first place. See Pet. 15, 17. The relevant

[4] As the court of appeals pointed out (Pet. App. 10a), both the child and a parent who is not a United States citizen may have reasons to prefer the child's original citizenship to United States citizenship, and Congress could reasonably decide not to confer United States citizenship automatically upon the naturalization of just one of two parents where there are two legally recognized parents.

statutory distinction for purposes of that argument, however, is not between legitimate and illegitimate children, but rather between legitimate children whose parents never married, and legitimate children whose parents did marry but are legally separated. Such a distinction implicates no suspect classification. Even in the context of a purely domestic statute, it would trigger only rational basis review. See Pet. App. 9a. Here, the more deferential standard of review described in *Fiallo* v. *Bell* and *Kleindienst* v. *Mandel* applies.[5]

As the court of appeals held, Congress can at most be charged with failing expressly to address "a small

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[5] Congress distinguished between illegitimate and legitimate children only insofar as it allowed children who have two living parents, but who have not been legitimated by their father, to become citizens after the naturalization of their mother. 8 U.S.C. 1432(a)(3). That provision directly serves Congress's purpose of allowing children to gain citizenship after the naturalization of one parent in specified, recurring situations (death, legal separation, and illegitimacy) when only that United States citizen parent has an ongoing legal relationship with the child. Congress reasonably determined that the situation presented here—a child who has a legal relationship with *both* his father and his mother, but only one of those parents is a United States citizen—does not fall within that category. See note 4, *supra*.

In any event, the constitutionality of that provision is immaterial here. If the Court were to sustain petitioner's equal protection challenge, it would either remove the challenged disparity or extend it to the disfavored class of legitimate children. See generally *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984). If the Court removed the provision that assists children who have not been legitimated, petitioner would not be affected because he is a legitimate child. On the other hand, if the Court extended that special provision to legitimate children, petitioner would not acquire citizenship because his mother has never been a naturalized United States citizen.

subset" of cases involving children of parents who (1) might be thought, as a practical matter, to be similarly situated to formerly married parents who are legally separated, but (2) are unable to obtain a legal declaration of that assertedly similar status because they were never married to begin with. Pet. App. 10a. Regardless of whether this case is within that "small subset," Congress's failure to address such extraordinary situations does not render the statutory scheme of Section 1432(a) irrational. See *id.* at 9a-10a, 14a.

3. Finally, petitioner notes (Pet. 19-20) that Section 1432 will be repealed as of February 27, 2001, in favor of new provisions to be codified at 8 U.S.C. 1431 and 1433. See Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 101, 102, 114 Stat. 1631-1633. Far from supporting petitioner's request for review by this Court, that repeal lessens the prospective significance of petitioner's constitutional challenge and further confirms that certiorari is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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