## QUESTION PRESENTED

Whether the distinction in 8 U.S.C. § 1409 between out-of-wedlock children of United States citizen mothers and out-of-wedlock children of United States citizen fathers is a violation of the Fifth Amendment to the United States Constitution?

## LIST OF PARTIES

The parties to the proceeding below were the Petitioners Joseph Boulais and Tuan Anh Nguyen and the Respondent Immigration and Naturalization Service.

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## [CAPTION]

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Joseph Boulais and Tuan Anh Nguyen respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on _____.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 208 F.3d 528 (5th Cir. 2000) and is reproduced in the Appendix (App.) filed herewith. App. __. The opinion of the Board of Immigration Appeals is unreported and is

reproduced at App. __. The deportation order of the Immigration Judge is unreported and is reproduced at App. __.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on [April 17, 2000 – date of opinion]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Under the Immigration and Nationality Act, a United States citizen father can confer citizenship on his foreign-born child 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).[1]

Under the Immigration and Nationality Act, a United States citizen mother can confer citizenship on her foreign-born child born out of wedlock 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.

8 U.S.C. ə 1409(c).

The Equal Protection Clause of the United States Constitution states, in part, that no state shall:

> . . . deny to any person within its jurisdiction the equal protection of the laws.

Am. XIV., U.S. Const.

## STATEMENT OF THE CASE

### A. Factual Background

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[1] Before 1986, this section required paternity to be Aestablished by legitimation≅ before the child=s 21st birthday. Nguyen belongs to a class of children who may elect whether to have the Aold≅ or Anew≅ 1409(a) govern their cases. **Cite statutory authority.** Because no formal legitimation or recognition took place until after his 21st birthday, Nguyen is unable to comply with either requirement. As such, it is irrelevant which version of the law he elects to follow.

Petitioners Joseph Boulais and his son Tuan Anh Nguyen seek review of an order of the Fifth Circuit Court of Appeals which held that 8 U.S.C. э 1409(a), which imposes more restrictive requirements for transmission of citizenship by citizen fathers than by citizen mothers, is constitutional.

Tuan Anh Nguyen was born in Saigon, Vietnam on September 11, 1969, the natural son of Joseph Alfred Boulais, an American serviceman, and of Hung Thi Nguyen, a Vietnamese national. Boulais never married his son=s mother. Abandoned by his mother soon after his birth, Nguyen lived in Vietnam with his father, who stayed on in that country after being discharged from the military. Boulais eventually married another Vietnamese woman. When the government of Vietnam fell to communist forces in April 1975, Boulais and his wife were on a trip out of the country. Nguyen=s step-grandmother managed to flee with Nguyen on an American ship carrying refugees out of Saigon and Nguyen was paroled into the United States as a refugee. Boulais and his wife returned immediately to the United States and Nguyen became a lawful permanent resident of this country and was cared for and raised throughout his childhood by his father and step-mother. R. at 33.

Nguyen=s natural mother never made any attempt to obtain custody and in fact never communicated with her son or his father after abandoning the infant Nguyen. Boulais supported his son financially, provided him with a home and otherwise acted as a responsible parent, but never formally legitimated Nguyen. Id.

**B. Proceedings Below**

In 1992, Nguyen was convicted of sexual assault. R. at 151-156. In 1995 he was placed in deportation

proceedings by the Immigration and Naturalization Service. R. at 183-187. On January 3, 1997, he was ordered deported by an immigration judge. R. at 158. His appeal to the Board of Immigration Appeals was dismissed on June 2, 1998. R. at 62-62 ("BIA ruling"). Nguyen is now detained by the Immigration and Naturalization Service, subject to deportation to Vietnam. [**Nancy – is this accurate?**]

Prior to the BIA ruling, on February 3, 1998, Boulais obtained an AOrder of Parentage≅ from a Texas District Court, declaring him to be the father of Nguyen and holding that Athe parent-child relationship exists between the father and the child for all purposes.≅ R. at 26-29. DNA testing was conducted which confirmed to a 99.98% degree of certainty that Boulais is Nguyen=s biological father. R. at 23-24. The Board of Immigration Appeals considered this evidence, which was presented to them in a motion to reconsider, but ruled that, despite the fact that his father was born in the United States, Tuan Nguyen did not acquire citizenship at birth. App. __ . [**Nancy – I don't think we have this.**]

On June 30, 1998, Nguyen and Boulais filed a petition for review of the BIA ruling with the Fifth Circuit Court of Appeals. Nguyen and Boulais filed their petition for review of the Board of Immigration Appeals= decision pursuant to 8 U.S.C. э 1105a(5)(1994), which confers jurisdiction on the courts of appeals to hear appeals of deportation orders based on nonfrivolous claims to United States citizenship. They argued that § 1409(a) violates the Fifth Amendment of the United States Constitution, which guarantees equal protection of the law, because it makes it more difficult for citizen fathers to confer citizenship on their foreign-born children born out of wedlock than for citizen mothers.

On July 2, 1998, Nguyen and Boulais also jointly filed an action in the District Court for the Southern District of Texas. In this action, Nguyen petitioned for writ of habeas corpus seeking review of the Board=s order and Boulais requested declaratory relief, seeking a declaration that Nguyen has been a United States citizen since birth.[2]

On April 17, 2000, the Fifth Circuit entered its ruling on the petition for review, holding that ∋ 1409(a) is constitutional and that Nguyen therefore is not a United States citizen. The court began its analysis by noting that if Nguyen is found to be an alien, the court has no jurisdiction to review the BIA ruling upholding the deportation order. The court also found that, because a Texas court had entered an AOrder of Parentage≅ establishing Boulais to be Nguyen=s biological father, no Agenuine issue of material fact≅ existed and there was therefore no need to remand the case to the District Court for any factual determination. App. ___.

Turning to the equal protection argument, the court of appeals reviewed this Court's decision in *Miller v. Albright*, 523 U.S. 420 (1998). The court described Justice Stevens' plurality opinion as holding that heightened scrutiny applied and "that [§ 1409(a)] did not violate the equal protection clause." App. __. The court noted that Justice O'Connor, although concurring in the judgment, disagreed with the Court's application of the heightened scrutiny standard because she found that Miller lacked third party standing to present her father's interest. In the case at bar, the Fifth Circuit found that Boulais was a proper party to challenge the constitutionality of § 1409(a) because, unlike the father

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[2] The District Court has held that action in abeyance pending the outcome in the Circuit Court and action on this petition.

in *Miller*, Boulais "has made every effort to represent his own interests in the present suit." App. __.

The court then applied *Miller* in addressing the constitutionality of § 1409(a). Citing *Miller*, the Fifth Circuit rejected the Government=s argument that *Fiallo v. Bell*, 430 U.S. 787 (1977) controls, and as such, declined to adopt *Fiallo*'s "facially legitimate and bona fide reason" standard. App. ___. Addressing the argument that § 1409(a) is unconstitutional because it relies on outmoded stereotypes about fathers and mothers, the court followed the reasoning in Justice Stevens' plurality opinion in *Miller*. In particular, the court of appeals noted that the plurality opinion identified several important governmental objectives, including the need to ensure reliable proof of paternity, encourage healthy parent-child relationships and foster ties between a foreign-born child and the United States. App. __ (citing *Miller*, 523 U.S. at 438 (Stevens, J.)). The court also agreed with Justice Stevens that the statute is narrowly tailored to meet these objectives.

Having found § 1409(a) to be constitutional pursuant to *Miller*, the court concluded that Petitioners failed to meet the requirements of that provision, thus rendering Nguyen an alien. Because it found Nguyen to be an alien who has been convicted of an aggravated felony, the court concluded that it lacked jurisdiction over his petition[3] and granted the Government's motion to dismiss Nguyen's appeal. App. ___.

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[3] ə 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act (AIIRIRA≅) of 1996, Pub. L. 104-208, 110 Stat. 3009, Act of September 30, 1996, permits no federal court review in the case of an alien who is deportable as an aggravated felon.

## REASONS FOR GRANTING THE PETITION

### I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE CONSTITUTIONALITY OF § 1409(a)

Review by this Court is necessary to address the conflict in the circuits created by the lower court's decision upholding the relevant provisions of 8 U.S.C. § 1409(a). In affirming the law's constitutionality, the court below adopted the reasoning of the Court's plurality opinion in Miller, even though that opinion was joined only by Justice Stevens and Chief Justice Rehnquist. See, e.g., **[Nguyen, 208 F.3d at 535.] [Appendix cite].** The Ninth Circuit Court of Appeals held these same provisions to be unconstitutional in United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999).[4] Analyzing the various decisions in Miller, the Ninth Circuit struck down § 1409(a)(4), concluding that, had the plaintiff in Miller been accorded standing to raise the issue, "a majority of the Court would have found § 1409(a)(4) unconstitutional by applying heightened scrutiny." Id. at 1125. Finding "no reason to distinguish" § 1409(a)(3), the court likewise struck down that provision. Id. at 1126.

The Fifth and Ninth Circuits have now adopted diametrically opposed views on the constitutionality of § 1409. If Nguyen had resided in a state within the Ninth Circuit's jurisdiction, or was otherwise able to file an action

[4] The Government has filed a petition for certiorari in Ahumada-Aguilar, citing this split between the Fifth and Ninth Circuits as an important factor weighing in favor of this Court's consideration of § 1409(a)'s constitutionality. See Ahumada-Aguilar, 189 F.3d 1121 (9th Cir.), petition for cert. filed, (U.S. May 22, 2000) (No. ___ ), at pp. 20-22 [hereinafter Ahumada-Aguilar Petition].

there, he would have been accorded citizenship under the decision in Ahumada-Aguilar. Clearly, citizenship laws should be uniform across the nation. The existence of different citizenship criteria in the Fifth and Ninth Circuits creates confusion in administration of the law in those circuits as well as other jurisdictions. This is an intolerable situation necessitating this Court's intervention.

## II. THIS CASE IS AN APPROPRIATE VEHICLE FOR ADDRESSING THE CONSTITUTIONALITY OF § 1409(a)

In Miller, the Court granted certiorari to resolve the important constitutional question presented, yet was unable to render a definitive decision because of the views of two Justices that the petitioner in that case lacked standing. As shown by the sharply divergent opinions in the instant case and Ahumada-Aguilar, Miller has not provided clear guidance for the lower courts. See also Breyer v. Meissner, 2000 U.S. App. LEXIS 12453 (3d Cir., June 6, 2000) at * 21 (striking down gender-based classifications in an analogous immigration law provision, while noting that "the precedential value of Miller is unclear"). As explained below, the Court should grant certiorari in the present case because here -- unlike Miller and Ahumada-Aguilar – there can be little question that the requisite standing exists.

Much of the confusion engendered by Miller has arisen because the question of standing prevented this Court from reaching a majority holding on the merits. In Miller, only the alien daughter appeared before the Court; her father had been dismissed from the suit by the federal district court and failed to appeal the decision. 523 U.S. at 448 (Stevens, J.). While seven Justices would have granted third-party standing to the daughter to assert her father's constitutional rights, Miller, 523 U.S. at 433 (Stevens, J.); id. at 454 n.1

(Scalia, J., concurring in judgment); id. at 475 (Breyer, J., dissenting), two Justices opined that such standing was not appropriate under the circumstances. Id. at 451 (O'Connor, J., concurring in judgment). Had those two Justices reached the merits, a majority of this Court could well have united behind a single opinion, providing clear guidance to the lower courts. See Ahumada-Aguilar, 189 F.3d at 1125. Instead, the case foundered on the question of standing.

Standing has also been a linchpin issue in lower court cases following Miller. In Terrell v. INS, the Tenth Circuit Court of Appeals disallowed petitioner's challenge to § 1409(a) based on gender discrimination because "without her father's participation, Ms. Terrell's gender bias claim does not afford her the heightened scrutiny ordinarily applicable to such claims." 157 F.3d 806, 809 (10th Cir. 1998). Similarly, in the petition for certiorari currently pending in Ahumada-Aguilar, the Government vigorously asserts that the merits are beyond this Court's reach; according to the Government, because the citizen father in that case is deceased and had no prior contact with the child who now asserts the father's constitutional rights, no party to the suit has standing to raise the question of § 1409(a)'s constitutionality. Ahumada-Aguilar Petition, pp. 10-15. The Government's argument raises the prospect that, should Ahumada-Aguilar be heard, standing issues would once again frustrate this Court from issuing a definitive ruling on the merits. Indeed, in its petition in Ahumada-Aguilar, the Government does not even ask the Court, in the first instance, to hear the case on the merits; instead, it seeks a summary reversal on the threshold question of standing. Ahumada-Aguilar Petition, p. 16.

This case, by contrast, presents no serious impediment to consideration of the constitutional question presented because, as the court of appeals held below, there

is no substantial standing issue. Here, unlike Ahumada-Aguilar, the Court need not speculate concerning the desires of a deceased father or a father who is not a party to the action. Both father and son are before the Court, vigorously defending their rights. There can be no question that a citizen father has standing to raise his own equal protection rights in a challenge to § 1409. See Miller, 523 U.S. at 447 (O'Connor, J., concurring in judgment) (characterizing the Government's argument that the citizen father lacked standing as "misguided"); accord Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (holding that standing is proper where a party has suffered an "injury in fact"). [5]

Even in the unlikely event the Court were to conclude that Boulais is not a proper party to this case, under the standards applied by all members of the Court in Miller, Nguyen would have third-party standing to raise his father's rights. If Boulais is prevented from protecting his interests in this case, the requisite "hindrance" would exist to confer third-party standing on his son. Unlike the father in Miller, who failed to appeal his early dismissal from that case, Boulais has at all stages of this litigation vigorously asserted his own rights in an effort to combat his son's deportation. According third-party standing would be necessary to ensure that Boulais' constitutional rights are considered in the context of *this* proceeding, the outcome of which will have a significant, if not preclusive, impact on Boulais' interests. Moreover, this case easily meets the additional requirement for third-party standing that there be a "close relationship"

[5] Though the Government objected to Boulais' participation below, arguing that a non-deportee could not participate in a deportation action, that argument is insubstantial; the court of appeals correctly rejected it out of hand. **[Nguyen v. INS, 208 F.3d 528, 533 n.6 (noting that the challenged statute "directly implicates a father's rights to confer citizenship on his children")][Appendix cite].**

between Nguyen and his father, given that Boulais raised his son following the mother's abandonment. In Ahumada-Aguilar, the Government challenges the deceased father's standing on the ground that respondent's "only relationship with his father was genetic," and there is no indication that the father would have wished to pursue his own rights. Ahumada-Aguilar Petition, p. 14. Whatever the validity of that contention, no such obstacle to considering the merits exists in this case. Boulais has raised his son since infancy and is present before this Court asserting his own rights.

This Court is now faced with petitions for certiorari in two cases presenting the underlying constitutional question in Miller. Given the Court's scarce resources, and the confusion arising from the absence of a majority holding in Miller, this case is plainly the appropriate vehicle for resolving that question. Accordingly, the Court should grant certiorari in this case, and hold the petition in Ahumada-Aguilar for subsequent disposition following a decision on the merits in this case.

## III. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF § 1409(a)

In Miller, this Court accepted certiorari anticipating that, at the end of the day, the question of § 1409(a)'s constitutionality would be resolved. However, because of the fractured decision in Miller, the Court's resolution of that question remains unclear. The question is no less important now than it was when the Court granted certiorari to consider it in Miller. To the contrary, developments subsequent to Miller only underscore the need for the Court to more clearly address this issue.

First, the issue of § 1409(a)'s constitutionality is a recurring one. In the short time since Miller, at least four cases raising this issue have already made their way to the courts of appeal: Nguyen, Ahumada-Aguilar, Terrell, and Lake v. Reno, No. 98-7678 (2d Cir.) (argued March 31, 2000).

Second, additional guidance on this issue is clearly warranted. Of the two court of appeals cases reaching the merits of § 1409(a)'s constitutionality since Miller, Ahumada-Aguilar struck down the statute, while the Nguyen court upheld it. ."). Similarly, in applying strict scrutiny to strike down an analogous gender-based immigration law applicable to foreign born children of United States citizens born prior to 1934, the Third Circuit Court of Appeals specifically noted the lack of clear guidance from this Court. Breyer v. Meissner, 2000 U.S. App. LEXIS 12453 at * 20. Indeed, several members of this Court have acknowledged that, because of the range of opinions in Miller, additional guidance concerning the constitutionality of 8 U.S.C. § 1409(a) is needed. See, e.g., Rainey v. Chever, cert. denied, 119 S. Ct. 2411 (1999) (Thomas, J. dissenting) (noting that "the fractured decision in Miller may demonstrate the need for additional guidance as to the constitutionality of laws differentiating between fathers and mothers of out-of-wedlock children . . See also Richard G. Wood, "When a Majority Loses on the Merits: Miller v. Albright and the Problem of Splintered Judgments," 29 Seton Hall L. Rev. 816 (1998).

Finally, the question of § 1409(a)'s constitutionality presents a substantial question concerning laws based on gender stereotypes. In this regard, the Fifth Circuit's failure to follow the views of a majority of the Justices in Miller is particularly troubling. This Court has repeatedly made clear that sex-based stereotyping is an impermissible form of gender discrimination. See United States v. Virginia, 518

U.S. 515, 541-46 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Califano v. Goldfarb, 430 U.S. 199, 211 (1976) (plurality opinion); Weinberger v. Weisenfeld, 420 U.S. 636, 645 (1975). As noted by Justice O'Connor in Miller, "it is unlikely" that "gender classifications based on stereotypes case survive heightened scrutiny." 523 U.S. at 451-52. [6]

The stereotypes on which § 1409(a) is based are patently clear. As the Ninth Circuit found in Ahumada-Aguilar,

> [s]ection 1409(a)(3) relies on the generalization that mothers are more likely to have close ties to and care for their children than are fathers. By requiring a U.S. citizen father to agree in writing that he will provide financial support to the child until the child reaches the age of 18, (a)(3) presumes that a father will not care for and support his child unless required to do so.

189 F.3d at 1126-27.

Similarly, as Justice Breyer noted in Miller, § 1409(a) assumes that a paternity establishment requirement is needed to "mak[e] certain the father knows of the child's existence." 523 U.S. at 485 (Breyer, J., dissenting). However, as Justice Breyer points out (and as is illustrated in

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[6] A majority of this Court cited heightened scrutiny as the appropriate standard of review in Miller. 523 U.S. at 429 (Stevens, J.); id. at 478 (Breyer, J., dissenting). This issue is more fully addressed in the amicus brief of the ACLU, et al., filed in Miller v. Albright, LEXIS 1996 U.S. Briefs 1060. See also Cornelia T.L. Pillard & T. Alexander Aleinikoff, "Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright," 1998 Sup. Ct. Rev. 1, 18-32.

this case), "[a] father with strong ties to the child may, simply by lack of knowledge, fail to comply with the statute's formal requirements," while "[a] father with weak ties might readily comply." Id.

In United States v. Virginia, this Court reaffirmed in the strongest possible terms that gender-based classifications will pass muster under heightened scrutiny only if the government affirmatively advances an "exceedingly persuasive justification." 518 U.S. at 531, 555. The justifications offered by the Government, as set out in Miller and recited in the lower court opinion, are insufficient to support this suspect classification. While the Government argues that the requirements of § 1409(a) are essential to administration of citizenship laws, the absence of these requirements for mothers underscores that the criteria are simply based on sex stereotypes relating to men's and women's parenting roles. See Amicus Brief of ACLU, et al., Miller v. Albright, LEXIS 1996 U.S. Br. 1060, at pp. 6-12.

Thus, in light of the lower court's decision upholding § 1409, review by this Court is necessary to clarify that sex-based stereotypes have no place in our nation's laws, and that such discriminatory stereotypes may not be used to limit the rights of citizens.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel for Petitioner

June 16, 2000