

No. 09-1981 / 10-1488

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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DAVID LIVINGSTON JOHNSON,

*Petitioner-Appellant,*

v.

J.D. WHITEHEAD, *et al.*,

*Respondents-Appellees.*

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On Appeal from the United States District Court  
for the District of Maryland and the  
Board of Immigration Appeals

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**AMENDED BRIEF OF APPELLANT**

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## CORPORATE DISCLOSURE STATEMENT

No. 09-1981/ 10-488 Caption: David Livingston Johnson v. J.D. Whitehead, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1, the appellant, David Livingston Johnson, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?  
 YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  
 YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

/s/ Ali A. Beydoun  
Dated: July 1, 2010

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## **JURISDICTIONAL STATEMENT**

The U.S. District Court of Maryland had jurisdiction over Mr. Johnson's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241. On May 14, 2009, the District Court dismissed Mr. Johnson's petition. On August 27, 2009, Mr. Johnson filed a timely appeal to this Court, which has held the case in abeyance pending a decision from the Board of Immigration Appeals ("BIA"). This Court has jurisdiction under 28 U.S.C. § 1291.

On May 20, 2010, the BIA dismissed Mr. Johnson's appeal. Mr. Johnson timely filed a Petition for Review to this Court on April 29, 2010, pursuant to 8 U.S.C. § 1252 (b)(1). This Court has jurisdiction under 8 U.S.C. § 1252 (a)(1), (b)(9). Venue is proper under 8 U.S.C. § 1252 (b)(2).

## **STATEMENT OF THE ISSUES**

1. Whether issue and claim preclusion bar Department of Homeland Security from relitigating the issue of Mr. Johnson's citizenship and the claim of removability where an Immigration Judge previously determined that Mr. Johnson is a U.S. citizen and terminated removal proceedings.

2. Whether an interpretation of § 321 of the Immigration and Nationality Act (recodified at 8 U.S.C. § 1432) violates the Equal Protection Clause where it denies derivative citizenship to children born out of wedlock.

## STATEMENT OF THE CASE

### I. Removal Proceedings

David L. Johnson is a derivative U.S. citizen who the government has repeatedly, and unsuccessfully, attempted to remove over the last eighteen years. This case arises out of the third set of removal proceedings that immigration authorities have initiated against Mr. Johnson. In 1992, Immigration and Naturalization Service (“INS”) first charged Mr. Johnson as a removable alien based on Mr. Johnson’s criminal convictions. The Immigration Court in Oakdale, Louisiana, terminated the removal proceedings on October 6, 1992. JA11.

INS initiated removal proceedings for a second time in 1996, and Mr. Johnson filed a motion to terminate the proceedings on December 15, 1997, asserting derivative U.S. citizenship under § 321 of the Immigration and Nationality Act (“INA”) (recodified at 8 U.S.C. § 1432). JA15. On January 2, 1998, INS indicated that it opposed the motion. JA19. At the removal hearing, INS maintained its opposition to Mr. Johnson’s motion to terminate. JA25.

On February 9, 1998, Immigration Judge Benton of the Immigration Court in Huntsville, Texas, terminated the proceedings. JA26. At the hearing, Judge Benton determined that Mr. Johnson had derived U.S. citizenship when his father naturalized. JA25. Judge Benton held that Mr. Johnson is a derivative U.S. citizen, stating, “The Respondent in this case indicates that his father did

naturalized [*sic*] as a United States citizen on the conditions in which will allow the Respondent to be a United States citizen.” *Id.* INS informed the court that it would not appeal the decision. *Id.* Judge Benton entered an order terminating the proceedings in which he reiterated the basis for termination, namely, Mr. Johnson’s derivative citizenship, and noted that INS had waived an appeal. JA31.

Thereafter, Mr. Johnson completed his sentence and was released from custody. Ten years later, the Department of Homeland Security (“DHS”)<sup>1</sup> initiated a third set of removal proceedings against Mr. Johnson on June 18, 2008, after a subsequent conviction. JA55. Mr. Johnson filed a motion to terminate proceedings with the Immigration Court in Baltimore, Maryland, on March 5, 2009. JA65. Immigration Judge Dufresne denied Mr. Johnson’s motion on March 5, 2009, and issued an opinion on May 21, 2009. JA129. Mr. Johnson appealed the Immigration Court decision to the BIA on June 25, 2009. JA149.

## **II. Habeas Corpus**

Mr. Johnson filed a petition for a writ of habeas corpus with the U.S. District Court for the District of Maryland on July 18, 2008. JA35. The District Court of Maryland dismissed the petition on May 14, 2009, for lack of subject matter jurisdiction. JA117. Mr. Johnson appealed the dismissal to this Court, which has

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<sup>1</sup> On March 1, 2003, the INS ceased to exist and its interior enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement within DHS.

held the case in abeyance pending a decision from the BIA. JA255.

On April 20, 2010, the BIA dismissed Mr. Johnson's appeal. JA260. Mr. Johnson timely filed a petition for review on April 29, 2010. JA267. This Court granted a motion for consolidation on May 12, 2010, and a motion for a stay of removal on May 24, 2010.

### **STATEMENT OF FACTS**

David Johnson lawfully entered the United States on October 1, 1972, as a legal permanent resident with his father, Ronald Johnson. JA57. His mother, Joan Francis, ceded complete custodial rights to Ronald Johnson shortly after Mr. Johnson was born on January 23, 1965, in Kingston, Jamaica. JA289; JA285. Ms. Francis signed a child welfare document permitting Mr. Johnson to leave Jamaica with his father in 1972. JA289. His mother and father never married. Upon entering the United States, Mr. Johnson has had no contact with his mother, and Mr. Johnson's father was his legal custodian until adulthood.

On December 26, 1973, Ronald Johnson became a naturalized U.S. citizen. JA293. Mr. Johnson was eight years old upon his father's naturalization and within his father's sole legal custody. Mr. Johnson has permanently resided in the United States since he entered the United States in 1972. Mr. Johnson has never returned to Jamaica, nor does he have close family members who reside there.

## SUMMARY OF THE ARGUMENT

The government has sought to deport Mr. Johnson for nearly half of the thirty-seven years that he has permanently resided in the United States. The government has taken these actions despite Mr. Johnson's lawful entry into this country and derivation of U.S. citizenship. This Court must reject DHS' refusal to honor Judge Benton's conclusion that Mr. Johnson is U.S. citizen under 8 U.S.C. § 1432 based on the doctrines of issue and claim preclusion. Further, this Court must recognize that reading a marriage requirement into the statute violates equal protection and punishes Mr. Johnson for being the child of unmarried parents.

The doctrines of issue and claim preclusion bar the government from continually initiating removal proceedings to relitigate the issue of Mr. Johnson's citizenship and the claim of removability. DHS is precluded from relitigating the issue of citizenship because this identical issue was actually determined and critical to Judge Benton's judgment in the 1998 proceedings. In addition, DHS' predecessor agency, INS, had a full and fair opportunity to litigate the issue. DHS is also precluded from relitigating the claim of removability because the 1998 judgment was a final judgment on the merits, and INS is in privity with its successor agency, DHS.

The venerable doctrines of issue and claim preclusion are necessary to conserve judicial resources, promote finality for litigants, and prevent vexatious

litigation. In addition, preclusion is necessary to prevent disparate decisions on the same issue or claim. In promoting these policies, issue and claim preclusion uphold the integrity of judicial and administrative decisions, and promote reliance on those decisions. Here, DHS' disregard for Judge Benton's decision has resulted in judicial inefficiency and vexatious litigation. The government has pursued three removal proceedings on the identical issue of Mr. Johnson's citizenship. The government has thereby robbed Mr. Johnson of the peace of mind that preclusion promotes by preventing burdensome relitigation.

A constitutional interpretation of 8 U.S.C. § 1432 provides that Mr. Johnson has derived U.S. citizenship. Section 1432 confers automatic citizenship where, as here, a parent with legal custody over a child has naturalized before the child reaches 18 years of age, the child resides in the United States as a legal permanent resident, and the parents of the child have legally separated. The BIA erred in holding that the phrase "legal separation" presupposes a marriage requirement. This interpretation violates the Equal Protection Clause here because it unconstitutionally discriminates against Mr. Johnson, whose parents never married. A marriage requirement cannot withstand intermediate scrutiny because the governmental interests at issue cannot be advanced by the distinction between children of married and unmarried parents.

Mr. Johnson's mother explicitly relinquished custodial rights and permitted

Mr. Johnson to immigrate to the United States. Any important governmental interest, such as protection of the non-naturalizing parent's custodial rights, is satisfied in this case through actual and uncontested custody. Further, the marriage requirement is overbroad, benefiting children who are legitimated and penalizing those who are not. A constitutional interpretation of the statute, which does not require a marriage, upholds equal protection under the law and does not punish Mr. Johnson for his parent's non-marital relationship.

This Court should hold that DHS is barred from relitigating the issue of Mr. Johnson's citizenship and reinitiating a claim of removability. In addition, this Court must apply a constitutional interpretation of 8 U.S.C. § 1432 that does not require marriage to find a "legal separation," which would prevent unfair treatment of a child whose parents never married. Accordingly, this Court should reverse the BIA decision and vacate the removal order, enjoining DHS from reinitiating removal proceedings.

### **STANDARD OF REVIEW**

This Court reviews determinations by the BIA regarding questions of law, such as claim and issue preclusion, *de novo*. *Marynenka v. Holder*, 592 F.3d 594, 600 (4th Cir. 2010). This Court also reviews issues of constitutional law *de novo*. *Li Fang Lin v. Mukasey*, 517 F.3d 685, 691 (4th Cir. 2008). Additionally, this court reviews *de novo* questions of statutory interpretation. *Rowzie v. Allstate Ins.*

Co., 556 F.3d 165, 167 (4th Cir. 2009).

## ARGUMENT

### **I. Issue And Claim Preclusion Bar DHS From Relitigating Mr. Johnson's Citizenship And Removability.**

Issue and claim preclusion prohibit relitigation of the same issue or claim between two parties where a prior adjudication resolved the dispute. *Montana v. United States*, 440 U.S. 147, 153 (1979). These doctrines bar DHS from relitigating the issue of Mr. Johnson's citizenship and the claim of removability. Judge Benton determined that Mr. Johnson is a derivative U.S. citizen in the 1998 removal proceedings, where the issue was fully and fairly litigated and formed the basis of the order terminating proceedings. Similarly, the claim of removability was the subject of the 1998 proceedings, which Judge Benton decided on the merits against DHS' predecessor agency, INS.

Issue and claim preclusion are well-established doctrines of constitutional importance<sup>2</sup> that promote judicial efficiency and protect the rights of litigants. *See Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917) (emphasizing that res judicata is "a rule of fundamental and substantial justice"); *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 77 (4th Cir. 1967) (asserting that res judicata

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<sup>2</sup> Issue and claim preclusion are of constitutional importance; both are rooted in the Full Faith and Credit Clause of Article IV, § 1 of the Constitution. *See San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 336 (2005) (noting that 28 U.S.C. § 1738, which codifies the Full Faith and Credit Clause, encompasses the doctrines of issue and claim preclusion).

limits the “wasted use of judicial machinery”). Preclusion prevents fundamental unfairness toward litigants by embodying the principle of repose. *Brown v. Felson*, 422 U.S. 127, 131-32 (1979) (explaining that the policy of repose underlying res judicata “bars vexatious litigation”). Absent these preclusive doctrines, a non-prevailing party could subject the other party to perpetual litigation in the hope that future proceedings would produce a favorable outcome. A litigant’s interest in finality is heightened where the stakes are dire: relitigation of a matter that could result in a severe deprivation of liberty, such as unwarranted deportation, makes relitigation particularly vexatious.

The preclusion doctrines apply to the present action even though it involves an administrative proceeding because the Immigration Court and the BIA act in a judicial capacity. *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *Rosenfeld v. Dep’t of Army*, 769 F.2d 237, 240 (4th Cir. 1985). Congress is presumed to require adherence to preclusive doctrines when establishing an agency’s adjudicatory power. *Duvall v. Attorney General*, 436 F.3d 382, 387 (3d Cir. 2006). This Court has applied preclusion in the context of removal proceedings where the requisite elements are satisfied. *See, e.g., Ramsay v. INS*, 14 F.3d 206, 211 (4th Cir. 1994) (applying issue preclusion against a respondent in removal proceedings where the issue of border inspection was previously decided in district court); *Medina v. INS*, 993 F.2d 499, 504 (5th Cir.

1993) (applying claim preclusion against INS where prior removal proceedings were terminated); *Kairys v. INS*, 981 F.2d 937 (7th Cir. 1992) (holding that a respondent in removal proceedings is precluded from relitigating an issue when that issue was decided in denaturalization proceedings).

**A. Issue Preclusion Bars DHS From Relitigating The Issue Of Mr. Johnson's Citizenship.**

Issue preclusion bars the relitigation of issues where a party establishes five elements: “(1) that ‘the issue sought to be precluded is identical to one previously litigated’ (‘element one’); (2) that the issue was actually determined in the prior proceeding (‘element two’); (3) that the issue’s determination was a ‘critical and necessary part of the decision in the prior proceeding’ (‘element three’); (4) that the prior judgment is final and valid (‘element four’); and (5) that the party against whom collateral estoppel is asserted ‘had a full and fair opportunity to litigate the issue in the previous forum’ (‘element five’).” *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218 (4th Cir. 2006) (citation omitted).

Here, all of the elements of issue preclusion are satisfied, and DHS was precluded from relitigating the issue of Mr. Johnson’s citizenship in 2009 before the Immigration Court, as well as in all subsequent appeals. First, in the 1998 proceedings, the identical issue of citizenship was litigated under the government’s claim of removability. In both the 1998 and the 2009 proceedings, Mr. Johnson filed a motion to terminate asserting citizenship under former 8 U.S.C. § 1432

(1988).

Second, Judge Benton actually determined Mr. Johnson's citizenship, as evidenced by the transcript of the 1998 proceedings and the resulting termination order. During the removal proceedings, Judge Benton asserted that he would:

terminate the matter nonetheless over the objection of the Service *because the documents of the record submitted by the Respondent.* The Respondent in this case indicates that his father did naturalized [*sic*] as a United States citizen on the conditions in which will allow the Respondent to be a United States citizen.

JA25 (emphasis added). Further, the termination order states that Mr. Johnson "appears to be a US citizen by father's [naturalization]." JA31. Both the transcript of the proceeding and Judge Benton's order demonstrate that Judge Benton conclusively determined that Mr. Johnson is a derivative U.S. citizen and terminated the proceedings by virtue of his citizenship.

Third, Mr. Johnson's derivative citizenship was the critical and necessary reason for termination of the 1998 proceedings. In fact, citizenship was the sole reason for termination, as indicated in the transcript of the proceedings and Judge Benton's termination order. JA25; JA31.

Fourth, the order is a final and valid judgment because the government expressly waived appeal of the decision. The INS stated, "Judge, I'm not going to appeal," and the termination order indicates waiver of appeal. JA25; JA31. As noted in the applicable regulation, "Except when certified to the Board, *the*

*decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.”* 8 C.F.R. § 1003.39 (2010) (emphasis added).

Fifth, the government had a full and fair opportunity to litigate the issue of Mr. Johnson’s citizenship. The government availed itself of this opportunity by opposing Mr. Johnson’s motion to terminate. JA19; JA25 (“The Immigration Service’s written submission is a motion opposing termination.”).

DHS is precluded from relitigating Mr. Johnson’s citizenship because Judge Benton determined this identical issue and the determination was critical to the judgment in the 1998 proceedings. The government had a full and fair opportunity to litigate the issue of Mr. Johnson’s citizenship and chose not to pursue an appeal. Issue preclusion bars the government from relitigating the same issue that was fairly decided in 1998. *See Ramsay v. INS*, 14 F.3d 206, 211 (4th Cir. 1994) (applying issue preclusion against a respondent in removal proceedings where all of the elements of issue preclusion were satisfied).

**B. Claim Preclusion Bars DHS From Relitigating The Claim of Removability.**

Claim preclusion bars relitigation of the government’s third claim of removability against Mr. Johnson. A party is barred from relitigating a claim where “(1) the judgment in the prior action was final and on the merits; (2) the parties in the two actions are identical or in privity; and (3) the claims in the two

actions are identical.” *Bouchat v. Bon-Ton Dep’t Stores, Inc.*, 506 F.3d 315, 326-27 (4th Cir. 2007).

All of these elements are satisfied, and claim preclusion bars relitigation of the claim of removability against Mr. Johnson. First, the 1998 judgment was final because INS waived appeal. 8 C.F.R. § 1003.39; JA31. For the reasons noted above, the 1998 judgment was decided on the merits. Judge Benton clearly terminated the proceedings on the merits of Mr. Johnson’s citizenship claim.

Second, INS and DHS are in privity because they are successor agencies whose interests are closely aligned. *See Jones v. SEC*, 115 F.3d 1173, 1180-81 (4th Cir. 1997) (asserting that parties are in privity under res judicata where their interests are aligned regarding the same subject matter in both suits). Although the party opponent in 1998 was the INS, its successor agency, DHS, maintains all of INS’ power to charge an individual as a removable alien and litigate the issue of citizenship. The mutual interest of INS and DHS in this case—to exile Mr. Johnson from this country—is identical. In addition, courts have applied claim preclusion against DHS where INS originally initiated removal proceedings. *E.g.*, *Bravo-Pedroza*, 475 F.3d 1358, 1360 (9th Cir. 2007).

Third, the government brought the same claim of removability against Mr. Johnson in both proceedings, alleging that Mr. Johnson is a removable alien. Therefore, claim preclusion bars DHS from relitigating Mr. Johnson’s removability

because the 1998 judgment was a final judgment on the merits, and INS is in privity with its predecessor agency, which brought the initial actions against Mr. Johnson. Under the doctrines of issue and claim preclusion, DHS must honor Judge Benton's determination that Mr. Johnson is a derivative U.S. citizen.

**C. The Policies Underlying Preclusion Support Its Application In This Case.**

For the last eighteen years, Mr. Johnson has been under the perpetual threat of deportation while the government has repeatedly attempted, and repeatedly failed, to remove him. The government has deprived Mr. Johnson of the "private peace" that the principle of repose imparts by precluding subsequent vexatious litigation. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991) (noting that failure to ensure repose would "impose unjustifiably upon those who have already shouldered their burdens"); *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294 (1917) (stating that res judicata is a rule of "public policy and private peace"). The reinitiation of removal proceedings and relitigation of citizenship is particularly burdensome here because the proceedings effectively determine Mr. Johnson's future: should the government succeed in its third attempt to remove Mr. Johnson, he will be exiled to a country he has had no real connection to in thirty-eight years. Preclusion requires the termination of this perpetual litigation and the continual anxiety it breeds.

Further, the government has undermined the goal of judicial efficiency that

preclusion promotes. *See Solimino*, 501 U.S. at 108 (asserting that relitigation absent preclusion would “drain the resources of an adjudicatory system with disputes resisting resolution”). It has brought the same claim of removability against Mr. Johnson three times in the last eighteen years. These actions needlessly burden the administrative bodies and the federal courts, which have seen a sharp increase in immigration cases.<sup>3</sup>

Preclusion not only promotes repose and judicial efficiency, but also prevents disparate determinations on the same claim or issues. Here, two Immigration Judges reached opposite conclusions regarding the application of one statute: 8 U.S.C. § 1432. Such inconsistency is one of the evils that preclusion seeks to avoid to promote reliable judgments and to uphold the integrity of the adjudicatory scheme that Congress established through the INA.<sup>4</sup> *See Nevada v.*

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<sup>3</sup> From 1996 to 2006, there was a 970 percent increase in the number of federal court cases reviewing orders of removal. Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 37, 39 (2006). At the Immigration Court level, the number of immigration cases increased by 24 percent from 1998 to 2008. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1655 (2010).

<sup>4</sup> Permitting the government to continually charge removability, or relitigate citizenship, runs contrary to the INA. The INA requires that the government prove removability by clear and convincing evidence. 8 U.S.C. § 1229a (c)(3)(A) (2006). Congress explicitly placed this burden of proof on the government; this burden is rendered meaningless if perpetual relitigation is permitted because the government could continue to litigate in different forums, or before different

*United States*, 463 U.S. 110, 129 (1983) (emphasizing that claim preclusion is essential to maintain social order because individuals would not seek recourse through tribunals if judgments are not final). As evident in this case, a party cannot rely on a prior determination where the other party is permitted to re-prosecute its action and relitigate critical issues. *See Montana v. United States*, 440 U.S. 147, 153 (1979) (affirming the importance of preclusion in fostering reliance in judicial determinations).

**II. The BIA Erred In Concluding That DHS Is Not Precluded From Relitigating Mr. Johnson's Citizenship Under The Same Claim Of Removability.**

The BIA's dismissal was erroneous because it relied on case law that is materially different from the case at bar. Further, it incorrectly allowed DHS to bypass regulations governing review of an Immigration Court decision. Consequently, the BIA erroneously permitted DHS to collaterally attack the 1998 decision in violation of binding regulations.

**A. The BIA Relied On Inapposite Case Law.**

The BIA erroneously held that preclusion is inapplicable here based on the Third Circuit's holding in *Duvall v. Attorney General*, 436 F.3d 382 (3d Cir. 2006). *Duvall* is inapplicable to the case at bar because its holding does not extend to Mr. Johnson's situation and the facts are materially different.

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judges, to obtain the result it seeks. *Duvall v. Attorney General*, 436 F.3d 382, 388 (3d Cir. 2006).

In *Duvall*, INS violated local rules of procedure by not introducing evidence of foreign citizenship ten days prior to a hearing on removability. *Duvall*, 436 F.3d at 384. The *Duvall* court noted that the Immigration Judge terminated proceedings by virtue of a “simple litigation error” rather than by virtue of the petitioner’s citizenship. *Id.* at 392. Further, the Immigration Judge had no doubt that *Duvall* was a removable alien. *Id.*

*Duvall* limits application of issue preclusion only where (1) the issue of citizenship was not actually determined, nor fully and fairly litigated, because of a procedural litigation error, *and* (2) an alien is subsequently convicted of criminal offenses. *Id.* at 392 (holding that issue preclusion does not apply where “an undoubtedly deportable” alien remains in the United States by virtue of a “simple litigation error” and is subsequently convicted of further offenses).<sup>5</sup>

Here, on the other hand, no procedural error prevented INS from fully and fairly litigating the issue of Mr. Johnson’s citizenship in the 1998 proceedings. INS opposed Mr. Johnson’s motion to dismiss, and Judge Benton terminated the proceedings based on his determination of substantive law, not a litigation error as in *Duvall*. Unlike the Immigration Judge in *Duvall*’s proceedings, Judge Benton

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<sup>5</sup> The *Duvall* court need not have reached the issue of subsequent convictions because issue preclusion is not applicable where the issue in question was not actually determined, or fully and fairly litigated, by virtue of a procedural litigation error.

did not believe that Mr. Johnson was a foreign citizen. To the contrary, Judge Benton held that Mr. Johnson is a derivative U.S. citizen and terminated proceedings on that ground.

*Duvall* is inapposite here because the first prong of its dual-prong holding is not satisfied; Mr. Johnson's citizenship was actually determined through full and fair litigation in 1998. Therefore, *Duvall*'s second prong regarding subsequent convictions is inapplicable. Where, as here, an Immigration Judge rules that an individual has derived U.S. citizenship, that individual's subsequent convictions are irrelevant to the issue of citizenship and any claim of removability. U.S. citizens are generally not subject to removal, and the government cannot initiate new attempts to deport a U.S. citizen. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (declaring that the executive has no jurisdiction to deport U.S. citizens).<sup>6</sup>

An alleged alien's criminal convictions after the termination of removal proceedings do not authorize the government to violate the doctrines of preclusion. In *Bravo-Pedroza v. Gonzales*, the Ninth Circuit held that the government was barred from reinitiating removal proceedings where it could have brought

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<sup>6</sup> Because U.S. citizens are generally not removable, the BIA gravely erred in claiming that even if Mr. Johnson "was initially found in 1998 on the merits to be a citizen, he thereafter committed and was convicted of serious offenses that render him removable as presently charged . . . ." JA229. *See* INA § 240 (recodified at 8 U.S.C. § 1229 (2006) (authorizing initiation of removal proceedings against *aliens*).

additional charges of removability pursuant to regulation. 475 F.3d 1358, 1360 (9th Cir. 2007). Following two convictions for crimes of moral turpitude, the Immigration Court found that the petitioner was a deportable alien, but granted discretionary relief under INA § 212(c) (recodified at 8 U.S.C. § 1282 (c)), which was available to certain legal permanent residents. *Id.* at 1359. After the termination of this removal proceeding, the petitioner was convicted of two additional crimes and DHS reinitiated removal proceedings. *Id.*

The Ninth Circuit recognized that Congress legislates under the doctrine of preclusion, unless Congressional intent to the contrary is evident. *Id.* (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). On review of the relevant statutes, the court found nothing “making res judicata inapplicable,” despite the petitioner’s subsequent convictions. *Id.* The court applied claim preclusion in part because all of the elements of preclusion were satisfied. *See id.* at 1360 (applying claim preclusion to prevent DHS from bypassing the regulation governing its authority to issue new removal charges and the regulation controlling motions to reopen).

Similarly, preclusion must apply in this case despite Mr. Johnson’s subsequent conviction. As in *Bravo-Pedroza*, Mr. Johnson’s later conviction is irrelevant for purposes of preclusion because there is no evidence of Congressional intent that preclusion should not apply. To the contrary, Congress is presumed to

mandate agency adherence to the doctrines of preclusion. *Duvall*, 436 F.3d at 387 (citation omitted).

The BIA's reliance on *Duvall* is erroneous. Here, there was no litigation error and Judge Benton did not believe that Mr. Johnson is an undoubtedly deportable alien. Further, Congress is presumed to mandate adherence to the doctrines of preclusion; therefore, courts cannot consider repeated claims of deportability against individuals previously and conclusively determined to be derivative U.S. citizens.

**B. The BIA Erred In Permitting The Government To Violate The Laws Governing Review Of An Immigration Court Decision And By Collaterally Reviewing The 1998 Termination Order.**

The Code of Federal Regulations governs appellate procedure and other mechanisms a non-prevailing party may utilize if it seeks review of an Immigration Court decision. The non-prevailing party has the right to appeal to the BIA within 30 days of the Immigration Court decision. 8 C.F.R. § 1240.15 (2010); *see also* 8 C.F.R. § 1003.1(b)(2) (2010) (vesting the BIA with appellate jurisdiction over Immigration Judges' decisions in removal proceedings). If the non-prevailing party waives an appeal or fails to appeal within the time limit, the Immigration Court's order becomes the final order in the case. 8 C.F.R. § 1003.39 (stating that "the decision of the Immigration Judge becomes final upon waiver of appeal"). When the order is rendered final, the non-prevailing party may file a motion to

reopen the case with the same Immigration Court provided that additional evidence is “material and was not available and could not have been discovered or presented at the former hearing.” 8 C.F.R. § 1003.23(b)(3) (2010).

In *Bravo-Pedroza*, the Ninth Circuit asserted that the government cannot “bypass its own regulations” by reinitiating removal proceedings. *Id.* at 1360 (citing *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1461 (9th Cir. 1988)). The reinitiation of removal proceedings in *Bravo-Pedroza* was impermissible because it violated 8 C.F.R. § 3.30, which requires additional charges of removability to be issued during the pendency of removal proceedings. *Id.* Importantly, the court noted that the government did not avail itself of the opportunity to appeal the initial Immigration Court decision, nor did it file a motion to reopen. *Id.*

Here, like in *Bravo-Pedroza*, the government waived appeal and did not file a motion to reopen, but rather reinitiated removal proceedings. In so doing, the government has violated the regulations that govern review of an Immigration Court decision, nullifying a final judgment. The regulations do not authorize the government to waive appeal and collaterally attack an Immigration Judge’s decision by reinitiating removal proceedings in a different forum. Preclusion must apply where the government did not appeal or file a motion to reopen; to hold otherwise would permit the government to violate the law governing review of an Immigration Court decision. *See id.* at 1360. Regrettably, the BIA permitted these

violations, which led to impermissible collateral review of Judge Benton's decision.

The BIA referenced "mistaken adjudication," claimed that Congressional policy regarding citizenship "should not be defeated by an Immigration Judge's error," and asserted that preclusion is inapplicable where a respondent is later "correctly" found to be an alien. JA262-63. These criticisms constitute collateral review of Judge Benton's determination. Collateral review is the unfortunate product of the non-application of preclusion, and violates the law governing *direct review* of an Immigration Court decision by permitting DHS to collaterally attack an Immigration Court decision that it dislikes. *See Federated Dep't Stores, Inc. v. Motie*, 452 U.S. 394, 398 (1981) (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action.]").

Whether a prior determination is erroneous is irrelevant for purposes of preclusion. *See id.* ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong . . . ."); *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 77 (4th Cir. 1967) (holding that "a former judgment will be binding even though it may have been

erroneous”). Preclusion applies in removal proceedings irrespective of whether the prior determination was based on incorrect factual findings or legal holdings. *Medina v. INS*, 993 F.2d 499, 504 (5th Cir. 1993).

The government has circumvented the law governing review of an Immigration Court decision through unlawful collateral attack. If the government disagreed with Judge Benton’s order, it should have filed a direct appeal with the BIA in 1998 or a motion consistent with immigration regulations. Because it did not do so, preclusion must bar its third attempt to remove Mr. Johnson. The doctrines of preclusion cannot yield to permit the government to evade its own regulations.

### **III. Mr. Johnson Has Derived U.S. Citizenship Under A Constitutional Interpretation of 8 U.S.C. § 1432.**

The BIA erred in “find[ing] no merit in [Mr. Johnson’s] contention that reading a marriage requirement into . . . the Act violates equal protection because it discriminates against children born out-of-wedlock.” JA263. Section 1432 states that a child of alien parents who resides in the United States as a lawful permanent resident derives citizenship “upon the naturalization of the parent having legal custody when there has been a legal separation of the parents” when such naturalization occurs before the child turns eighteen years old.

Mr. Johnson’s father naturalized on December 26, 1973, when Mr. Johnson was seven years old, a legal permanent resident, and in the legal custody of his

father. Further, Mr. Johnson's parents were legally separated because his mother relinquished her custodial rights and severed familial ties. Therefore, under a constitutional reading of § 1432, Mr. Johnson is a derivative U.S. citizen.

Neither the statute nor its legislative history defines "legal separation,"<sup>7</sup> and a recent revision to the statute expressly dispenses with a legal separation requirement. 8 U.S.C. § 1431 (2010).<sup>8</sup> Reading a marriage requirement into § 1432 does not withstand intermediate scrutiny under the Equal Protection Clause and violates the canon of constitutional avoidance. U.S. Const. amend. V.

**A. Interpreting § 1432 To Require A Marriage Fails Intermediate Scrutiny Because Marriage Is Not Substantially Related To An Important Governmental Interest.**

A law that discriminates against non-marital children violates the Equal Protection Clause and must be examined under intermediate scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (establishing intermediate scrutiny as the appropriate test for statutes that discriminate between marital and non-marital children). The Supreme Court has invalidated classifications that punish children

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<sup>7</sup> Although in *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006), this Court stated that a legal separation implies a marriage, it did so in deciding whether a voluntary separation of an already married couple met the legal separation requirement in § 1432 and not in the context of an Equal Protection challenge, as in Mr. Johnson's case.

<sup>8</sup> This revision demonstrates that no substantial relationship currently exists between former legal separation requirement in § 1432 and any purported governmental interest.

for the actions of their parents because of the inherent unfairness in penalizing an individual who had no control over his parents' actions. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (“Imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”); *see also Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (rejecting the argument that “a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationship”).

To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. *Clark*, 486 U.S. at 461; *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (“[T]he reviewing court must determine whether the proffered justification [for the classification] is ‘exceedingly persuasive.’”). Further, the substantial relationship between the classification and the governmental objective must be “genuine and not hypothesized.” *See Virginia*, 518 U.S. at 533 (explaining that the government’s justification in a statute that classified people based on gender “must not rely on overbroad generalizations about the different talents [or] capacities”). Under this standard, a classification must ensure that “all persons similarly circumstanced [are] treated alike.” *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146, 150 (5th Cir. 1981) (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)). The

government bears the demanding burden of justification. *Virginia*, 518 U.S. at 533.

Courts have recognized the important governmental interest that 8 U.S.C. § 1432 (a)(3) serves. Congress intended that the legal separation requirement would “promote marital and family harmony and prevent the child from being separated from an alien parent who has a legal right to custody.” *Nehme v. INS*, 252 F.3d 415, 425 (5th Cir. 2001) (citing *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000)). Further, in requiring that the parents of an alien child legally separate, Congress sought to ensure that the U.S. government was not unnecessarily required to protect individuals whose “real interests” ally with their native country. *See id.* Without this requirement, foreigners could easily obtain dual citizenships, reside in their native countries, and also claim the protections of the United States. *Id.*

In Mr. Johnson’s case, however, reading a marriage requirement into § 1432 is more extensive than necessary to serve the important governmental interests of marital and family harmony, and of the child having “real interests” in the United States. Here, Mr. Johnson’s mother relinquished all of her parental rights in a signed, notarized letter, rejecting any possibility of a familial relationship with Mr. Johnson and Mr. Johnson’s father. JA289. Because Mr. Johnson’s mother relinquished all of her parental rights and willingly ended a familial relationship with her son and his father, there is no governmental interest of family harmony to

protect in this case.

Additionally, Mr. Johnson's "real interests" are and have always been in the United States. After Mr. Johnson's mother renounced all custodial rights to her son, Mr. Johnson's father brought Mr. Johnson to the United States at age seven. Mr. Johnson has lived in the United States for thirty-five years, and the majority of his family live in the United States. Because Mr. Johnson has not lived in Jamaica since he moved to the United States, there is no danger that Mr. Johnson's "real interests" ally with any country other than the United States.

Here, reading a marriage requirement into 8 U.S.C. § 1432 does not implicate the important governmental interest noted above. In Mr. Johnson's case, there is no "logical connection" between the governmental interests and the legal separation of his parents. *Hutchins v. District of Columbia*, 188 F.3d 531, 542 (D.C. Cir. 1999) (defining "the logical connection the remedy has to [the classification]" as an element to determine "the closeness of the relationship between the means chosen . . . and the government's interest"). Rather, the legal custody requirement of the statute, which Mr. Johnson clearly meets through his mother's formal relinquishment of her parental rights to his father, serves all of the governmental interests embodied in the statute. *See Bagot v. Ashcroft*, 398 F.3d 252, 267 (3d Cir. 2005) (holding that legal custody for purposes of derivative citizenship must be actual and uncontested).

Denying Mr. Johnson derivative citizenship under 8 U.S.C. § 1432 based on his parents' non-marital relationship is overinclusive and unfairly discriminates against Mr. Johnson as the child of parents who chose not to marry. *See Mathews v. Lucas*, 427 U.S. 495, 517 n.1 (1976) (concluding that a statutory definition was overinclusive because it “benefit[ed] some children who are legitimated” and not others). A classification that fails to treat all persons similarly circumstanced alike, *Seoane*, 660 F.2d at 150 (quoting *Reed*, 404 U.S. at 76), is “markedly overinclusive” and cannot withstand intermediate scrutiny. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.19 (1985). By penalizing the children of unmarried parents solely based on their parents' independent decision not to marry, 8 U.S.C § 1432(a)(3) is overinclusive and therefore cannot be substantially related to the important governmental interests.

**B. The Canon Of Constitutional Avoidance Requires This Court To Avoid Reading § 1432 To Contain A Marriage Requirement.**

As applied to Mr. Johnson, reading a marriage requirement into § 1432 is unconstitutional. *See Clark v. Martinez*, 543 U.S. 371, 384 (2005) (stressing the importance of as-applied constitutional challenges in the interpretation of statutes in the immigration context). Interpreting legal separation to mean an alteration of legal rights conforms with the constitutional right of equal protection. When Mr. Johnson's mother formally relinquished her parental rights, her actions constituted an alteration of legal rights, and thus a legal separation. *But see Afeta v. Gonzales*,

467 F.3d 402 (4th Cir. 2006) (holding that a legal separation requires a judicially recognized marital separation).<sup>9</sup>

This Court must apply the canon of constitutional avoidance to interpret § 1432 in a manner that does not threaten Mr. Johnson’s constitutional rights. Where there are two possible interpretations of a statute, and one interpretation raises constitutional concerns, courts must apply the canon of constitutional avoidance. *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see also INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (applying the canon of constitutional avoidance to the Illegal Immigration Reform and Immigrant Responsibility Act to hold that the Act did not deprive the court of jurisdiction to review an alien’s habeas corpus petition).

Reading a marriage requirement into the statute unconstitutionally penalizes Mr. Johnson for his parents’ decision not to marry. On the other hand, interpreting “legal separation” as complete relinquishment of custodial rights serves the important governmental interests at stake here. Mr. Johnson’s father’s uncontested custody and his mother’s relinquishment of her parental rights prevent the naturalization of a child without the consent of a non-naturalizing parent and ensure that the child’s real interests ally with the United States. Therefore, this Court should employ the canon of constitutional avoidance to interpret § 1432 in a manner that protects Mr. Johnson’s right to equal protection under the law.

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<sup>9</sup> This case should not control here because it was not decided in the context of constitutional concerns. *See supra* note 7.

## CONCLUSION

For the foregoing reasons, this Court should reverse the Board of Immigration Appeals decision, vacate the removal order, and declare Mr. Johnson a derivative U.S. citizen. Further, this Court should enjoin DHS from ever reinitiating removal proceedings against Mr. Johnson.

Respectfully Submitted,

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/s/ Ali A. Beydoun  
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### **CERTIFICATE OF SERVICE**

I hereby certify that, on this 1st day of July 2010, a true and accurate copy of the foregoing Amended Brief of Appellant was served via the CM/ECF system, and two copies via first class mail upon consent to:

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