No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO DUFFY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether the decision below conflicts with the Court's instruction in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 n.24 (2017), that a defendant may assail his conviction when it rests on the unconstitutional provisions defining who is a citizen.

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IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO DUFFY,
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- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Eduardo Duffy respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Mr. Duffy immediately recognized the significance of *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), for people—like himself—charged with crimes that statutorily require proof of being "not a citizen." Because the citizenship laws in place at the time of his birth violate equal protection, he could assail his conviction.

In *Morales-Santana*, the Court held that certain statutes defining who is a citizen at birth created an unconstitutional exception for unwed mothers, and that this preferential treatment violated equal protection under the Fifth Amendment's Due Process Clause. *See id.* at 1686, 1700-01 (holding 8 U.S.C. §§ 1401(a)(7) and 1409(a) and (c) violate equal protection). These statutes could "not withstand

inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens." *Id.* at 1698.

In choosing a remedy for the equal protection violation, however, the Court was "not equipped" to retroactively extend the benefit of citizenship. *Id.* Instead, the Court believed that if "put to the choice," Congress would have eliminated the preferential exception for unwed mothers. Accordingly, the Court did nothing to alter the unequal treatment of the statutes to those born before the decision, but held that the same longer residency "requirement should apply, prospectively" to all unwed parents. *Id.* at 1700-01.

But the Court explained the remedy is different for criminal prosecutions. The Court declared that a "defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." *Id.* at 1699 n.24.

Mr. Duffy was convicted under a law that classifies on the impermissible basis identified in *Morales-Santana*. By statute, Mr. Duffy's illegal reentry offense under 8 U.S.C. § 1326 requires proof that he is "not a citizen." *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "not a citizen"). Phrasing the element in the negative necessarily requires a determination of whether Mr. Duffy is a "citizen" under the provisions of the citizenship laws that the Court held violate equal protection. Thus, Ninth Circuit's affirmance of Mr. Duffy's conviction conflicts with *Morales-Santana*'s command that a "defendant convicted under a law classifying on an impermissible basis may assail his conviction." 137 S. Ct. at 1699 n.24.

Now is the time to correct the Ninth Circuit. In the two years since the *Morales-Santana* decision, the government has prosecuted well over 100,000 people for being "not a citizen." And during this time Congress has refused to rewrite the citizen statutes to provide equal treatment. By now, it's clear these flawed prosecutions will continue without intervention by the Court.

OPINION BELOW

The Ninth Circuit denied Mr. Duffy's equal protection challenge to his illegal reentry conviction in an amended memorandum disposition. *See United States v. Duffy,* 773 F. App'x 947 (9th Cir. 2019) (attached here as Appendix A).

JURISDICTION

On July 19, 2019, the Ninth Circuit affirmed Mr. Duffy's conviction in an amended memorandum, *see* Appendix A, and denied his petition for rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Appendix C contains the following relevant provisions: U.S. Const. amend. V, 8 U.S.C. § 1101(a)(3), 8 U.S.C. § 1326(a), 8 U.S.C. § 1401 (1958 ed.), and 8 U.S.C. § 1409 (1958 ed.).

STATEMENT OF THE CASE

On September 16, 2016, Mr. Duffy tried to pass through the San Ysidro, California Port of Entry claiming to be a United States citizen. But records checks revealed that he had been previously removed as a non-citizen and did not receive permission to return to the United States.

The Government filed an information charging Mr. Duffy with violating 8 U.S.C. § 1326. The information alleged that Mr. Duffy was "an alien," who "knowingly and intentionally attempted to enter the United States of America," after "having been previously excluded, deported and removed from the United States to Mexico," and did not "obtain express consent" from the Attorney General or designee to reapply for admission. The district court had original jurisdiction under 18 U.S.C. § 3231.

Mr. Duffy moved to dismiss the information based on *Morales-Santana*. Mr. Duffy relied on *Morales-Santana*'s holding that certain statutes defining who is a citizen at birth, 8 U.S.C. §§ 1401(a)(7) and 1409(a) and (c) (1958 ed), violate equal protection even after the Court's chosen prospective remedy. *See* 137 S. Ct. at 1700-01. Mr. Duffy also pointed to the Court's instruction that "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." *Id.* at 1699 n.24. Mr. Duffy argued that because § 1326 requires proof that he was an "alien," which is further defined as a "person not a citizen," 8 U.S.C. § 1101(a)(3), he could not be convicted of the charged offense. The district court denied Mr. Duffy's motion. Mr. Duffy proceeded to trial and a jury found him guilty of the offense.

Mr. Duffy raised his equal protection claim again on appeal. The Ninth Circuit affirmed his conviction in an amended unpublished Memorandum. The panel relied on a severability clause in the Immigration and Nationality Act (INA).

According to the panel, the severability clause "dictates that the remainder of 8 U.S.C. §§ 1401 and 1409 was not affected by *Morales-Santana*." Pet.App. A at 3. Thus, "Duffy was properly convicted under 8 U.S.C. § 1326, which incorporates definitions of 'alien' and 'citizen' that were not affected by *Morales-Santana*." *Id.* at 4. As such, "Duffy was not 'convicted under a law classifying on an impermissible basis.'" *Id.* at 4 (quoting *Morales-Santana*, 137 S. Ct. at 1699 n.24). The Ninth Circuit also denied Mr. Duffy's petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

Morales-Santana determined that provisions defining who is a citizen violate equal protection. The decision also reaffirmed the long-standing rule that a defendant convicted under a law classifying on an impermissible basis may assail his conviction regardless of any prospective remedy. The statute of Mr. Duffy's conviction, 8 U.S.C. § 1326, classifies on an impermissible basis because it requires proof of being "not a citizen," which necessarily involves consideration of the provisions that violate equal protection. But courts are refusing to follow *Morales-Santana*, resulting in a mountain of unconstitutional convictions for those born prior to the decision's prospective remedy. And without the Court's intervention, it appears Congress will not act to remove the stain of unequal treatment from the citizenship statutes.

I.

Mr. Duffy's conviction for being "not a citizen" conflicts with *Morales-Santana*.

A. The Court held in *Morales-Santana* that the laws defining who is a citizen violate equal protection and instructed that a defendant convicted under a law classifying on an impermissible basis may assail his conviction.

In *Morales-Santana*, the Court examined §§ 1401 and 1409 and found that a gender-based differential exists when a child born abroad has a U.S. citizen parent and a non-U.S. citizen parent. Pursuant to the versions of §§ 1401(a)(7) and 1409(a) and (c) in effect at the time of Morales-Santana's birth, unwed fathers faced a ten-year physical presence requirement to transmit citizenship, but unwed mothers faced only a one-year requirement. *Id.* at 1686. Thus, in order to transmit citizenship to a child born abroad, unwed U.S.-citizen fathers faced a more burdensome physical presence requirement than unwed U.S.-citizen mothers.

The Court held that "the gender line Congress drew is incompatible with the requirement that the Government accord to all persons 'the equal protection of the laws.'" *Id.* The "disparate criteria" within the citizenship statutes "cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens." *Id.* at 1698.

But having determined that the citizenship laws violated equal protection under the Fifth Amendment, the Court was "not equipped to grant the relief" sought—an extension of citizenship to Morales-Santana. *Id.* The Court explained that the choice between the "two remedial alternatives" of extending the benefit to

unwed fathers or withdrawal of benefit from unwed mothers is "governed by the legislature's intent." *Id.* at 1698-99. And the Court held that "[p]ut to the choice, Congress ... would have abrogated" the one-year physical presence exception for unwed mothers, "preferring preservation of the general rule" of longer physical presence requirements for all other parents—wed or unwed, mothers or fathers. *Id.* at 1700. Although the Court did not remedy the unequal treatment for those born prior to the decision, the Court held that the "now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers." *Id.* at 1701. So *Morales-Santana*'s civil remedy for the equal protection violation did not apply retroactively to people, like Mr. Duffy, who were born before it issued.

Although *Morales-Santana* examined "the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity,'" *id.* at 1701 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)), the Court expressly noted that the same analysis does not apply to criminal prosecutions. Unlike someone seeking a civil remedy, "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." *Id.* at 1699 n.24. In other words, when a statute underlying a criminal conviction is at issue, the potential remedies are irrelevant—the court simply considers "'the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted.'" *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 107 n.2 (1972)) (alterations in original).

The Court's instruction reaffirmed the decades-old decision in *Grayned v. City of Rockford*. The ordinance in *Grayned* generally prohibited picketing near schools within school hours but had an exception for "the peaceful picketing of any school involved in a labor dispute." 408 U.S. at 107. The Court held that the labor dispute exception violated "the Equal Protection Clause of the Fourteenth Amendment"[1] and that "Appellant's conviction under this invalid ordinance must be reversed." *Id.*

In *Grayned* it did not matter what conduct Grayned engaged in or how the legislature would have chosen to remedy the ordinance. The Court explained that since the "sole claim" was that Grayned was "convicted under facially unconstitutional ordinances," there was "no occasion" to evaluate whether "appellant himself actually engaged in conduct within the terms of the ordinances." *Id.* at 106 n.1. And the fact that the legislature later remedied the equal protection problem by deleting the labor dispute exception had "no effect on Appellant's personal situation," because the Court "must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted." *Id.* at 107 n.2; *see also Morales-Santana*, 137 S. Ct. at 1699 n.24 ("It was irrelevant to the [*Grayned*] decision whether the legislature likely would have cured the constitutional infirmity by excising the labor-dispute exemption."). As such, if a

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[1] The approach to equal protection claims is "'precisely the same'" whether based on the Fourteenth Amendment's explicit Equal Protection Clause or implicit in the Fifth Amendment's Due Process Clause. *Morales-Santana*, 137 S. Ct. at 1686 n.1 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

criminal statute as written violates equal protection, a conviction under that statute cannot stand.

Morales-Santana's holding that the citizenship laws violate equal protection, and its reaffirming of *Grayned*, means Mr. Duffy's conviction cannot stand if his conviction rested on application of the unconstitutional citizenship laws. *Accord Welsh v. United States*, 398 U.S. 333, 361-64 (1970) (Harlan, J., concurring in result) (conviction stemming from unequal treatment "must be reversed" regardless of how Congress would cure the unequal treatment).

B. The illegal reentry offense under 8 U.S.C. § 1326 classifies on an impermissible basis because it statutorily requires proof that the individual is "not a citizen."

Title 8, chapter 12, section 1326 makes it a crime for "[a]ny alien" to return to the United States after removal. 8 U.S.C. § 1326(a). "As used in" chapter 12, "[t]he term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Sections 1401 through 1409 of chapter 12 codify various circumstances of who is, and who is not, a "citizen" or "national" "at birth." This means that to obtain a conviction under § 1326, the government is statutorily required to prove that the individual was "not a citizen or national" under §§ 1401-1409.

Because § 1326 statutorily requires proof of a negative—that Mr. Duffy is "not a citizen"—all of the unconstitutional provisions of §§ 1401 and 1409 must be examined. It's simply impossible to say Mr. Duffy is "not a citizen" without considering all the ways he could be a citizen. This means the "not a citizen" inquiry

necessarily requires a determination of whether the individual is a citizen under the citizenship provisions—§§ 1401(a)(7) and 1409(a) and (c)—that the Court has held violate equal protection and only corrected prospectively. And in these circumstances, where Mr. Duffy has been "convicted under a law classifying on an impermissible basis," *Morales-Santana* commands that he "may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." 137 S. Ct. at 1699 n.24. The Court should grant the writ because the Ninth Circuit and its district courts are not following the Court's commands.

II.

Mr. Duffy's case provides the perfect vehicle for the Court to address this important issue and further encourage Congress to pass citizenship laws that provide equal protection.

Mr. Duffy's case provides an ideal vehicle to address this equal protection challenge. He timely raised the issue in district court and fully litigated it in the Court of Appeals. Moreover, the issue is a pure question of law: Does the statute of conviction classify on an impermissible basis?

The Court should not wait to decide the issue. Although the Court made clear that "the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination," *Morales-Santana*, 137 S. Ct. at 1686, prosecutions based on being "not a citizen" are extremely prevalent in federal courts. The United States Sentencing Commission received reports of 18,241 illegal reentry cases in fiscal year 2018. *See* United States Sentencing Commission, *Quick*

Facts Illegal Reenty Offenses, Fiscal Year 2018. This represents over 26% of total federal cases reported. *Id.* Moreover, the number of § 1326 prosecutions appears to be growing. Illegal reentry cases increased 14.8% in fiscal year 2018. *Id.* And data from the Justice Department show that during the first eleven months of fiscal year 2019 the government obtained 30,132 new convictions.[2]

The same "not a citizen" element is also embedded in prosecutions for improper entry under 8 U.S.C. § 1325. The number of suspect convictions triples under this statute. In April 2018, the Attorney General directed "a zero-tolerance policy for all offenses referred for prosecution under section 1325(a)" along the Southwest Border.[3] As a result, data from the Justice Department show that during the first eleven months of fiscal year 2019 the government obtained 64,675 convictions.[4] Without intervention by the Court, these constitutionally defective convictions will continue to grow, because the civil remedy of *Morales-Santana* did nothing to alter unequal treatment of those born prior to the decision.

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[2] *See* https://trac.syr.edu/cgi-secure/product/login.pl?p_month=jul&p_year=19&p_series=annual&month=aug&fy=2019&p_stat=gui&p_trac_leadcharge=08%20:00001326&_SERVICE=express9&_PROGRAM=interp.annualreport.sas&_DEBUG=0.

[3] *See* Memorandum for Federal Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a), https://www.justice.gov/opa/press-release/file/1049751/download.

[4] *See* https://trac.syr.edu/cgi-secure/product/login.pl?p_month=jul&p_year=19&p_series=annual&month=aug&fy=2019&p_stat=gui&p_trac_leadcharge=08%20:00001325&_SERVICE=express9&_PROGRAM=interp.annualreport.sas&_DEBUG=0.

Congressional inaction provides another reason to grant the writ. The *Morales-Santana* decision clearly "apprised [Congress] of the constitutional infirmity" of the citizenship laws. 137 S. Ct. at 1701. The Court even suggested, "Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender." *Id.* But in the two years since *Morales-Santana*, Congress has failed to choose a physical-presence requirement "uniformly applicable to all children born abroad with one U.S.-citizen and one alien parent, wed or unwed." *Id.* at 1686. Even in the abstract, Congress' inactivity is problematic because the Court has "'repeatedly emphasized, discrimination itself ... perpetuat[es] archaic and stereotypic notions' incompatible with the equal treatment guaranteed by the Constitution." *Id.* at 1698 n.21 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (bracket in original, quotations omitted). But inactivity in the criminal context is even more intolerable, because the discrimination that still exists to those born prior to *Morales-Santana* results in unconstitutional convictions. As such, it is time for the Court to intervene.

III.

The Ninth Circuit misapplied a severability clause to conclude Mr. Duffy's offense did not classify on an impermissible basis.

The Ninth Circuit affirmed Mr. Duffy's conviction based on a note to 8 U.S.C. § 1101 that states: "If any provision of this title ... is held invalid, the remainder of the title ... shall not be affected thereby." From this, the Ninth Circuit declared that "the remainder of §§ 1401 and 1409 was not affected by *Morales-Santana*." Pet.

App. A at 3. Without further reasoning other than a conclusory statement that § 1326 "incorporates definitions of 'alien' and 'citizen' that were not affected by *Morales-Santana*," the Ninth Circuit panel concludes: "Thus, Duffy was not 'convicted under a law classifying on an impermissible basis.'" *Id.* at 4 (quoting *Morales-Santana*, 137 S. Ct. at 1699 n.24). The Ninth Circuit misunderstands how severability clauses work and when they are properly applied.

A severability "clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). But "a severability clause is an aid merely; not an inexorable command." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884–885, n.49 (1997) (quotations omitted). The inclusion of a severability clause merely "express[es] the enacting legislature's preference for a narrow judicial remedy." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318-19 (2016). As such, the clause does not apply to Mr. Duffy's claim because *Morales-Santana* commands that he "may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." 137 S. Ct. 1699 n.24. Thus, it is "irrelevant to the Court's decision" how "the legislature likely would have cured" the problem. *Id. See also Welsh*, 398 U.S. at 361-64 (Harlan, J., concurring) (not considering an act's severability clause when declaring conviction unconstitutional).

Regardless, the enforcement of severability clauses has limitations. This "statutory aid to construction in no way alters the rule that in order to hold one part

of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936). In other words, use of a "severability clause requires textual provisions that can be severed." *Reno*, 521 U.S. at 882. In sum, a severability clause demonstrates a Congressional preference to save provisions of a statute unrelated to those that violate the Constitution, but does not save provisions that are necessarily dependent on the unconstitutional part of the statute.

An example of how severability works is shown by the Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *Dimaya* involved the INA's definition of "aggravated felony," which renders a non-citizen deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) and ineligible for cancellation of removal under §§ 1229b(a)(3), (b)(1)(C). *Id.* at 1210. The INA provides a long list of such aggravated felonies at 8 U.S.C. § 1101(a)(43), including the "crime of violence" aggravated felony at issue in *Dimaya*. 8 U.S.C. § 1101(a)(43)(F). This "crime of violence" definition cross-references 18 U.S.C. § 16 and contains two alternatives: an "elements" clause in § 16(a) and a "residual" clause in § 16(b). *Dimaya* held the § 16(b) "residual" clause unconstitutionally vague. 138 S. Ct. at 1210.

But holding § 16(b) unconstitutional still left in place § 16(a) and all other crimes listed as aggravated felonies in § 1101(a)(43). *See Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring) ("Our ruling today does not touch this list."). The other aggravated felonies were not "mutually dependent upon one another," *Carter*, 298

U.S. at 313, and were "textual provisions that can be severed." *Reno*, 521 U.S. at 882.

Even with the severability clause, the unconstitutional aggravated felony of § 1101(a)(43)(F) could not somehow still function within other provisions of the INA. After *Dimaya*, a §16(b) offense could not be the basis of deportability under § 1227(a)(2)(A)(iii). Nor could it render an individual ineligible for relief in the form of cancellation of removal under §§ 1229b(a)(3) or (b)(1)(C). Nor could it subject an individual to higher penalties for illegal reentry under § 1326(b).

Although not a perfect match, severability works similarly here. It is true that the holding in *Morales-Santana*—that §§ 1401(a)(7) and 1409(a) and (c) violate equal protection—"does not touch" any of the other ways of acquiring citizenship at birth in §§ 1401 and 1409. But the severability clause cannot save provisions that are dependent on those declared unconstitutional by *Morales-Santana*. Because § 1326 requires proof of a negative—that Mr. Duffy is "not a citizen"—it is "mutually dependent" on the invalid parts of §§ 1401 and 1409 which remain in effect for all individuals born before *Morales-Santana*. In other words, one of the ways Mr. Duffy could be a citizen contains the impermissible exception that favors unwed mothers. Thus, contrary to the conclusion of the Ninth Circuit, Mr. Duffy was "convicted under a law classifying on an impermissible basis," and the Court should grant the writ. *Morales-Santana*, 137 S. Ct. at 1699 n.24.

CONCLUSION

The Court should grant the petition for a writ of certiorari, because Mr. Duffy's conviction rests on a law classifying on an impermissible basis and the Ninth Circuit, the Government and Congress are not following the instructions of *Morales-Santana*.

Respectfully submitted,

Date: October 17, 2019

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APPENDIX A

NOT FOR PUBLICATION

FILED

JUL 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDUARDO DUFFY, Defendant-Appellant.	No. 17-50414 D.C. No. 3:16-cr-02358-MMA-1 AMENDED MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDUARDO DUFFY, AKA Eduardo Duffy-Carrasco, Defendant-Appellant.	No. 17-50415 D.C. No. 3:12-cr-03690-MMA-1

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Submitted February 12, 2019**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Pasadena, California

Before: D.W. NELSON and CALLAHAN, Circuit Judges, and KORMAN,*** District Judge.

Eduardo Duffy, a citizen of Mexico, appeals his conviction, following a jury trial, for illegal reentry after deportation in violation of 8 U.S.C. § 1326 and the revocation of his supervised release based on the illegal reentry conviction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Duffy argues that his underlying removal order based on his California Penal Code (CPC) § 211 conviction was invalid because CPC § 211 is not an aggravated felony under 8 U.S.C. § 1101(a)(43). This argument is foreclosed by our recent decision in *United States v. Martinez-Hernandez*, 912 F.3d 1207 (9th Cir. 2019), which held that CPC § 211 is an aggravated felony because it qualifies as a categorical generic theft offense under 8 U.S.C. § 1101(a)(43)(G).

II

Duffy argues that his illegal reentry conviction was invalid because, following *Morales-Santana*, he was "convicted under a law classifying on an impermissible basis." *Sessions v. Morales-Santana*, — U.S. — , 137 S. Ct. 1678, 1699 n.24 (2017). Duffy does not argue that the provisions declared

*** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

unconstitutional in *Morales-Santana* apply to him; rather, he sets forth a facial equal protection challenge to 8 U.S.C. § 1326 under the Fifth Amendment's Due Process Clause.

"We review questions regarding the constitutionality of a statute de novo." *See United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003).

In *Morales-Santana*, the Supreme Court held that "[t]he gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c) . . . violates the equal protection principle" implicit in the Fifth Amendment's Due Process Clause. *Morales-Santana*, 137 S. Ct. at 1700–01. Rather than striking the entire statute, the Supreme Court struck down only the one-year physical-presence exception for unwed U.S.-citizen mothers and held that, going forward, 8 U.S.C. § 1401(a)(7)'s five-year requirement for unwed U.S.-citizen fathers "should apply, prospectively, to children born to unwed U.S.-citizen mothers." *Id.* at 1701. Duffy's facial equal protection challenge rests upon the gender-based distinction in §§ 1401(a)(7) and 1409(a) and (c) held invalid by *Morales-Santana*.

The severability clause in the Immigration and Nationality Act ("INA") dictates that the remainder of 8 U.S.C. §§ 1401 and 1409 was not affected by *Morales-Santana*. *See* 8 U.S.C. § 1101 note ("If any provision of this title . . . is held invalid, the remainder of the title . . . shall not be affected thereby."); *see also I.N.S. v. Chadha*, 462 U.S. 919, 931–32 (1993) (declaring the veto clause of 8

U.S.C. § 1254(c)(2) unconstitutional, but holding that the severability clause in 8 U.S.C. § 1101 "plainly authorized the presumption" that the remainder of the INA stands. Duffy was properly convicted under 8 U.S.C. § 1326, which incorporates definitions of "alien" and "citizen" that were not affected by *Morales-Santana*. Thus, Duffy was not "convicted under a law classifying on an impermissible basis." *Cf. Morales-Santana*, 137 S. Ct. at 1699 n.24.

III

Duffy, who was born out of wedlock, argues that § 1409(a)'s requirement that he show a blood relationship with his father violates the equal protection principle because the same requirement is not imposed upon children who were born in wedlock. 8 U.S.C. § 1409(a) (1952); *United States v. Marguet-Pillado*, 560 F.3d 1078, 1082 (9th Cir. 2009).

When evaluating the constitutionality of citizenship definitions that discriminate on the basis of parents' marital status, we apply intermediate scrutiny to determine whether the distinctions are "substantially related" to "an important governmental objective." *Morales-Santana*, 137 S. Ct. at 1690, 1700 n.25. We are bound by *Tuan Ahn Ngyuen* to reject Duffy's challenge. *Tuan Ahn Ngyuen v. I.N.S.*, 533 U.S. 53 (2001). In *Tuan Ahn Ngyuen*, the Supreme Court held that the requirements that the current version of § 1409 imposes on a child born out of wedlock, which include the requirement to establish a blood relationship with her

father, do not violate the equal protection principle because the requirements serve two important governmental interests: 1) to ensure that a biological parent-child relationship exists and 2) to ensure that the child and the citizen parent have an opportunity to develop a relationship with each other and to the United States. *Tuan Anh Nguyen*, 533 U.S. at 62–66; *see also Miller v. Albright*, 523 U.S. 420, 436–38 (1998); *Fiallo v. Bell*, 430 U.S. 787, 799 (1977). The Supreme Court then concluded that the means employed by Congress were "substantially related to the achievement of" the important governmental objectives. *Tuan Anh Ngyuen*, 533 U.S at 70.

We affirm Duffy's illegal reentry conviction and the subsequent revocation of supervised release.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FILED

JUL 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDUARDO DUFFY, Defendant-Appellant.	No. 17-50414, 17-50415 D.C. No. 3:16-cr-02358-MMA-1 3:12-cr-03690-MMA-1 Southern District of California, San Diego ORDER AMENDING MEMORANDUM AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: D.W. NELSON and CALLAHAN, Circuit Judges, and KORMAN,* District Judge.

The unpublished memorandum disposition filed on February 14, 2019 and available at *United States v. Duffy*, 752 F. App'x 532 (9th Cir. 2019) is amended. The superseding amended memorandum disposition will be filed concurrently with this order.

With the memorandum disposition so amended, the panel has voted to deny appellant's petition for panel rehearing. Judge Callahan voted to deny the petition for rehearing en banc and Judges Nelson and Korman so recommended.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are **DENIED**. No further petitions for rehearing by the panel or en banc will be entertained.

APPENDIX C

U.S. CONSTITUTION AMEND V

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

8 U.S.C. § 1101 (a)(3)

(a) As used in this chapter –

(3) The term "alien" means any person not a citizen or national of the United States.

8 U.S.C. § 1326

(a) In general

Subject to subsection (b) of this section, any alien who –

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application or admission for foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

Shall be fined under Title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1401 (1958) provided:

Nationals and citizens of United States at birth.

(a) The following shall be nationals and citizens of the United States at Birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possession of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be

continuously physically present in the United State[1] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.
(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

8 U.S.C. § 1409 (1958) provided:

Children born out of wedlock.

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.
(a) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(a)(7) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this chapter, as of the date of birth, if the paternity of such child is established before or after the effective date of this chapter and while such child is under the age of twenty-one years by legitimation.
(b) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother; if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

[1] So in original. Probably should read "United States."