

O'CONNOR, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 96–1060

LORELYN PENERO MILLER, PETITIONER
v. MADELEINE K. ALBRIGHT,
SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 22, 1998]

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins,
concurring in the judgment.

This Court has long applied a presumption against third-party standing as a prudential limitation on the exercise of federal jurisdiction. Federal courts, we have held, “must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.” *Singleton v. Wulff*, 428 U. S. 106, 113 (1976); see also *Warth v. Seldin*, 422 U. S. 490, 499 (1975). Contrary to this prudential rule, the Court recognizes that petitioner has standing to raise an equal protection challenge to 8 U. S. C. §1409. The statute, however, accords differential treatment to fathers and mothers, not to sons and daughters. Thus, although petitioner is clearly injured by the fact that she has been denied citizenship, the *discriminatory* impact of the provision falls on petitioner’s father, Charlie Miller, who is no longer a party to this suit. Consequently, I do not believe that we should consider petitioner’s gender discrimination claim.

The Court recognizes that petitioner’s claim turns on “the proposition that her citizen father should have the same right to transmit citizenship as would a citizen

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mother” and resolves to “evaluate the alleged discrimination against [petitioner’s father] as well as its impact on [petitioner].” *Ante*, at 11. But even when “the very same allegedly illegal act that affects the litigant also affects a third party,” a plaintiff “cannot rest his claim to relief on the legal rights or interests of [the] third part[y].” *Department of Labor v. Triplett*, 494 U. S. 715, 720 (1990) (internal quotation marks omitted). A party raising a constitutional challenge to a statute must demonstrate not only “that the alleged unconstitutional feature [of the statute] injures him” but also that “he is within the class of persons with respect to whom the act is unconstitutional.” *Heald v. District of Columbia*, 259 U. S. 114, 123 (1922). This requirement arises from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that “third parties themselves usually will be the best proponents of their rights.” *Singleton, supra*, at 113–114; see also *Holden v. Hardy*, 169 U. S. 366, 397 (1898).

In support of the decision to consider Charlie Miller’s claim, both JUSTICE STEVENS, writing for the Court, and JUSTICE BREYER, in dissent, cite *Craig v. Boren*, 429 U. S. 190 (1976). In that case, we allowed a vendor to challenge a state law that permitted sales of 3.2% beer to females who had reached the age of 18 but prohibited such sales to males until they turned 21. Because the law proscribed the sale rather than the consumption of beer, the Court determined that a vendor was the “least awkward challenger” to the gender-based distinction. *Id.*, at 197. We reasoned that prudential objectives would not be served by rejecting third-party standing because “the lower court already ha[d] entertained the relevant constitutional challenge.” *Id.*, at 193. Here, however, the court below expressly did *not* take account of Charlie Miller’s equal protection rights, instead reviewing petitioner’s challenge as a first-party claim of gender discrimination against the

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children of citizen fathers as opposed to the children of citizen mothers. See 96 F. 3d 1467, 1470 (CA DC 1996).

More importantly, since this Court decided *Craig*, we have articulated the contours of the third-party standing inquiry in greater detail. In *Powers v. Ohio*, 499 U. S. 400 (1991), we stated that a litigant seeking to assert the rights of another party must satisfy three interrelated criteria: “The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Id.*, at 411 (internal quotation marks and citations omitted); see also *Campbell v. Louisiana*, ____ U. S. ____ (1998) (slip op., at 4). While it seems clear that petitioner has a significant stake in challenging the statute and a close relationship with her father, she has not demonstrated a substantial hindrance to her father’s ability to assert his own rights. *Powers* and our earlier precedents suggest that the absence of such an obstacle precludes third-party standing. See 499 U. S., at 411 (explaining that “[all] three important criteria [must be] satisfied,” *i.e.*, that there “must exist some hindrance to the third party’s ability to protect his or her own interests” before the presumption is rebutted); see also *Singleton*, *supra*, at 116 (“Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply”).

Petitioner has not demonstrated that Charlie Miller confronted a “genuine obstacle” to the assertion of his own rights that rises to the level of a hindrance. 428 U. S., at 116; see also *Barrows v. Jackson*, 346 U. S. 249, 257 (1953) (third-party standing accorded because it “would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court”). In fact, Charlie Miller originally filed suit and asserted his own

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rights but then opted not to pursue his claim throughout this litigation. It is true that he was wrongly dismissed from the action by the Eastern District of Texas, and that the Government made the misguided argument before that court that “[t]he rights, if any, which have been injured are those of Lorelyn PENERO Miller, the true plaintiff in this action.” See Motion to Dismiss Plaintiff’s First Amended Complaint or, in the Alternative, Transfer Venue 4. But because he failed to appeal the erroneous dismissal of his claim, any hindrance to the vindication of Charlie Miller’s constitutional rights is ultimately self imposed.

I am reluctant to accept that the Government’s litigation strategy, or an unfavorable ruling in the lower courts, could be a sufficiently severe obstacle to the assertion of a litigant’s own rights to warrant an exception to our prudential standing requirements. Those requirements were adopted to serve the institutional interests of the federal courts, not the convenience of the litigants. See *FW/PBS, Inc. v. Dallas*, 493 U. S. 215, 231 (1990); *Bender v. Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986). JUSTICE BREYER asserts that appeals take time and money, and that a change of venue left Charlie Miller uncertain where to appeal. See *post*, at 4. But the only obstacle was the inconvenience caused by the normal course of litigation, which often involves a transfer of venue. Charlie Miller never indicated any intent to challenge his dismissal from the suit, and there is no suggestion that he faced any unusual practical or legal barriers to filing a notice of appeal. Instituting a suit is itself burdensome—arguably as burdensome as filing an appeal from the denial of a claim—and to conclude that the course of events that transpired in this case constituted a hindrance to Charlie Miller’s ability to assert his rights would be a step toward eliminating the hindrance prong altogether.

Thus far, we have permitted third-party standing only where more “daunting” barriers deterred the rightholder.

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Powers, supra, at 414. To take an extreme example, in *Hodel v. Irving*, 481 U. S. 704 (1987), we concluded that plaintiffs had third-party standing to assert the rights of their deceased parents. *Id.*, at 711–712. And in *Powers*, we noted that potential jurors are not parties to the proceeding, cannot easily obtain declaratory or injunctive relief from a prosecutor's exercise of peremptory challenges, would find it difficult to demonstrate a likelihood that discrimination against them would recur, and have economic disincentives to filing suit. 499 U. S., at 414–415. Privacy concerns may also provide a compelling explanation for a third party's absence from the litigation. In *Carey v. Population Services Int'l*, 431 U. S. 678 (1977), we determined that a vendor could challenge the law prohibiting the distribution of contraceptives to minors because the desire to avoid publicity would deter potential purchasers from defending their own rights. *Id.*, at 684, n. 4; see also *Eisenstadt v. Baird*, 405 U. S. 438, 446 (1972). Likewise, in *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449 (1958), the Court held that an organization could raise the privacy rights of its members because litigation initiated by those members would disclose their identity and destroy the very privacy they sought to protect. *Id.*, at 459. Where insurmountable procedural obstacles preclude a rightholder's own suit, the Court has also accorded third-party standing. In *Singleton*, we concluded that physicians could assert the rights of indigent women denied funding for abortion because imminent mootness prevented the women from bringing their claims. See 428 U. S., at 108. Similarly, *Barrows* involved the constitutional rights of the prospective victims of a racially restrictive real estate covenant, who were unidentified and thus not before the Court. See 346 U. S., at 254. And in *Craig*, the case from which the Court garners its sole support for according third-party standing here, the named plaintiff turned 21 during the course of the litigation, which mooted his challenge to the beer-sale re-

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striction. See 429 U. S., at 192.

Where legitimate obstacles such as these exist, which lie beyond the control of the rightholder, that party's absence from a suit more likely stems from disability than from disinterest. A hindrance signals that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so. See *Singleton, supra*, at 116 ("If there is some genuine obstacle . . . the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent"). Furthermore, where a hindrance impedes the assertion of a claim, the right likely will not be asserted— and thus the relevant law will not be enforced— unless the Court recognizes third-party standing. In *Barrows*, for example, the Court permitted third-party standing because "the reasons which underlie [the] rule denying standing to raise another's rights" were "outweighed by the need to protect the fundamental rights" which would otherwise have been denied. 346 U. S., at 257.

Moreover, in contrast to this case, the white property owner contesting the racially restrictive covenant in *Barrows* was its "only effective adversary" because she was "the one in whose charge and keeping repose[d] the power to continue to use her property to discriminate or to discontinue such use." *Id.*, at 259. Here, although we have an injured party before us, the party actually discriminated against is both best suited to challenging the statute and available to undertake that task. See *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91, 100 (1979) (prudential barriers seek "to limit access to the federal courts to those litigants best suited to assert a particular claim"). In light of petitioner's uncertain constitutional status and the potential problems with fashioning a remedy for her injury, see *post*, at 1–5 (SCALIA, J., concurring in judg-

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ment), allowing her to assert Charlie Miller's claim will likely dilute rather than protect his constitutional rights.

Although petitioner cannot raise her father's rights, she may raise her own. While it is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States, see *Johnson v. Eisentrager*, 339 U. S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U. S. 259 (1990), I will assume that petitioner may challenge the constitutionality of §1409. Her challenge, however, triggers only rational basis scrutiny. As pointed out above, see *supra*, at 1, §1409 does not draw a distinction based on the gender of the child, so petitioner cannot claim that she has been injured by gender discrimination. See *Allen v. Wright*, 468 U. S. 737, 755 (1984) (an injury arising from discrimination "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct") (internal quotation marks omitted). Moreover, the grant of certiorari was limited to the question whether §1409 discriminates "between illegitimate' children of United States citizen mothers and illegitimate' children of United States citizen fathers," so any claim of discrimination based on differential treatment of illegitimate versus legitimate children is not presented. See 520 U. S. ____ (1997).

Given that petitioner cannot raise a claim of discrimination triggering heightened scrutiny, she can argue only that §1409 irrationally discriminates between illegitimate children of citizen fathers and citizen mothers. Although I do not share JUSTICE STEVENS' assessment that the provision withstands heightened scrutiny, *ante*, at 11–23, I believe it passes rational scrutiny for the reasons he gives for sustaining it under the higher standard. It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on

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generalized classifications unsupported by empirical evidence. See *Heller v. Doe*, 509 U. S. 312, 320 (1993) (“[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification”) (internal quotation marks and citations omitted). This is particularly true when the classification is adopted with reference to immigration, an area where Congress frequently must base its decisions on generalizations about groups of people.

* * *

We adopted the presumption against third-party standing to preserve the court’s “properly limited” role, *Warth*, 422 U. S., at 498, and we have identified a particular set of circumstances that will rebut that presumption. I believe that we should treat those considerations, in particular the hindrance prong, as meaningful criteria. Consequently, I would not accord petitioner standing to raise her father’s claim of gender discrimination. Petitioner’s own constitutional challenge triggers only rational basis scrutiny, and §1409 is sustainable under that standard. Accordingly, I concur in the judgment affirming the Court of Appeals’ decision.