



# Would it Violate Equal Protection to Prohibit Naturalized “Dreamers” from Sponsoring their Parents for Immigrant Visas?

**Ben Harrington**

Legislative Attorney

February 12, 2018

Much of the recent immigration reform debate has focused on legislative options to address the situation of non-U.S. nationals (aliens) who were brought to the country as children and who do not have lawful immigration status. Such aliens are colloquially referred to as “Dreamers” by many observers because they are largely the same population that the various Development, Relief, and Education for Alien Minors (DREAM) bills [introduced over the years](#) have sought to address. Some [current legislative proposals](#) would provide Dreamers with an avenue to obtain [lawful permanent resident \(LPR\)](#) status and, eventually, U.S. citizenship. These proposals, in turn, have generated policy [discussions](#) about whether Dreamers who obtain citizenship through [naturalization](#) should be able to help the parents who brought them to the country obtain LPR status by sponsoring them for [immigrant visas](#). Under [current law](#), adult U.S. citizens may sponsor their parents for immigrant visas in the advantageous “[immediate relative](#)” category, which is not subject to numerical limitation and accordingly does not trigger a long waiting period for available visas. The policy debate has [considered](#) whether naturalized Dreamers should have the same parent-sponsorship ability.

This policy debate about Dreamers’ parents has given rise to a fundamental legal question: does Congress have the constitutional authority to craft a pathway to citizenship for Dreamers that includes unique restrictions on family sponsorship? Suppose, for instance, that Congress enacts a statute that (i) grants Dreamers a pathway to citizenship, but (ii) restricts Dreamers’ ability, after they naturalize, to sponsor their parents for immigrant visas. Would this parent-sponsorship restriction violate naturalized Dreamers’ constitutional right to [equal protection of the laws](#) by drawing a line between them and other similarly situated U.S. citizens?

It’s too early to answer that question definitively. Indeed, a dispositive Supreme Court decision in the

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

LSB10075

“Travel Ban” litigation (which the Supreme Court is scheduled to hear [this spring](#)) could impact the constitutional analysis depending upon how the Court characterizes the scope of the federal government’s [immigration power](#). Current case law, however, provides strong guidance. The Supreme Court has never held unconstitutional a federal statute regulating the categories of aliens that qualify for admission to the United States. Rather, in recognizing that Congress has “plenary power” to regulate immigration, the Court has applied the lowest level of constitutional scrutiny to [uphold](#) even those federal laws that limit the admission of aliens in ways that arguably burden the constitutional rights of U.S. citizens. If a federal court were to strike down a parent-sponsorship restriction on naturalized Dreamers, the decision (if it were to [stand](#)) would be unique in U.S. immigration law.

Under [equal protection doctrine](#), reviewing courts typically apply heightened constitutional scrutiny to statutes that create “suspect classifications” based on race or gender, among other factors, and also to statutes that create classifications that burden a fundamental right, such as the right to vote. Heightened constitutional scrutiny subjects statutes to an exacting analytical test that they seldom pass. This equal protection framework [does not apply](#), however, to federal statutes that regulate the admission of aliens. To assess the constitutionality of such statutes—even [those](#) that include classifications that would trigger heightened scrutiny outside of the immigration context—courts long have applied “rational basis review,” the lowest level of constitutional scrutiny. Rational basis review requires only that the statute be “[rationally related to a legitimate government purpose](#).” Absent indications of “[a bare desire to harm a politically unpopular group](#),” statutes usually satisfy this deferential level of review.

The Supreme Court established its current doctrine on judicial review of federal immigration statutes in the 1977 case *Fiallo v. Bell*. There, the Court applied a forgiving version of rational basis review to uphold a federal statute that used classifications based on legitimacy (i.e., the marital status of a person’s parents at birth) and gender to restrict the ability of some U.S. citizens and LPRs to sponsor their fathers and children for immigrant visas. The statute, in short, singled out the relationship between illegitimate children and their fathers (but not between illegitimate children and their mothers) for unfavorable treatment under the immigration laws. Although the statute appeared to employ what challengers described as “[double-barreled discrimination](#)” based on gender and legitimacy, the Court sustained the statute as a valid exercise of Congress’s “exceptionally broad power to determine which classes of aliens may lawfully enter the country.” Notably, the Court did not apply heightened scrutiny, even though it had done so in [earlier cases](#) concerning laws involving gender discrimination outside the immigration context. “[D]espite the impact of [immigration] classifications on the interests of those already within our borders,” the *Fiallo* Court reasoned, “congressional determinations such as this one [concerning family sponsorship limitations] are subject only to limited judicial review.” [Some scholars](#) have criticized *Fiallo* for showing “[undue deference to Congress](#)” in immigration matters; [a few have](#) also argued that cases concerning related subjects, such as transmission of [citizenship at birth](#), suggest that the Supreme Court may be prepared to reconsider *Fiallo* in the near future. The Supreme Court itself, however, has never disavowed *Fiallo* and has cited it with approval in [recent years](#). (The Travel Ban litigation, in which several courts have ruled that entry restrictions imposed by executive action on travelers from certain countries were likely unconstitutional, does not directly implicate *Fiallo*’s holding: that litigation centers not upon the constitutionality of federal immigration statutes, but upon the lawfulness of the Executive’s discretionary application of such statutes.)

A parent-sponsorship restriction on the Dreamers would create a different classification than the *Fiallo* statute: instead of differentiating people based on gender and legitimacy, it would differentiate them based on their particular route to U.S. citizenship. Nonetheless, under *Fiallo*, the parent-sponsorship restriction would almost certainly draw rational basis review. To be sure, the Supreme Court has declared that the “[rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive](#),” and the Court has applied that principle to strike down a statute that drew a line between naturalized and native-born citizens. That case, however, concerned expatriation: the statute that the Court struck down as impermissibly discriminatory provided that naturalized citizens (but not native-born

citizens) would lose their U.S. citizenship by engaging in particular conduct. The Court has not extended that holding to the immigration context—that is, the Court has not held that a statute becomes constitutionally suspect (and thus subject to heightened scrutiny) if it limits family sponsorship according to someone’s means of obtaining citizenship. To reach such a holding, the Supreme Court would either have to hold that pathway-to-citizenship classifications are more constitutionally suspect than gender and legitimacy classifications, or overrule *Fiallo*. In a similar vein, although some lower court precedent [suggests](#) that U.S. citizens may have a fundamental right to reunite with family members, the argument that the parent-sponsorship provision impermissibly burdens this right would have limited constitutional force under existing precedent. *Fiallo* [rejected](#) the same argument and established that a law regulating the admission of aliens does not trigger heightened scrutiny even if it burdens family reunification.

Would a parent-sponsorship restriction on the Dreamers survive rational basis review? Most statutes [do](#). And, as already noted, the Supreme Court has never held a federal statute regulating the admission of aliens unconstitutional on substantive grounds. To some extent, the legislative record concerning the purpose of the restriction might influence the litigation outcome. In particular, indications of [animus](#)—of a discriminatory intent not linked to any legitimate policy objective—could undermine a statute that otherwise might facially appear valid. In 2014, a federal appellate [court](#) saw indications of discriminatory animus in an Arizona policy that singled out [Deferred Action for Childhood Arrivals](#) (DACA) recipients as ineligible for driver’s licenses; the court applied rational basis review, but still held that the policy was likely unconstitutional. (That case, however, concerned state-law classifications based on immigration status, which [do not receive](#) the same level of judicial deference as federal classifications.) Absent indications of such animus, however, and barring a change in Supreme Court doctrine, any legitimate policy purpose would likely suffice to sustain a parent-sponsorship restriction under the “limited judicial review” that applies to federal statutes regulating the admission of aliens under *Fiallo*.