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IN THE SUPREME COURT OF THE UNITED STATES

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LORETTA E. LYNCH, :  
ATTORNEY GENERAL, :

Petitioner : No. 15-1191

v. :

LUIS RAMON MORALES-SANTANA, :  
Respondent. :

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Washington, D.C.

Wednesday, November 9, 2016

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:01 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of the Petitioner.

STEPHEN A. BROOME, ESQ., Los Angeles, Cal.; on behalf  
of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case No. 15-1191, Loretta Lynch, Attorney General, v. Morales-Santana.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The United States Constitution does not confer U.S. citizenship on anyone born outside the United States. Rather, pursuant to its plenary authority under Article I of the Constitution, it is for Congress to determine which categories of such persons should be granted U.S. citizenship by statute.

In doing so, Congress has always required that the persons involved have a demonstrated and sufficient connection to the United States, either in themselves or through their parents, to warrant the conferral of citizenship, because citizenship carries with it attendant duties and rights on the part of the individual, and important duties of protection and obligation on the part of the United States government.

This case concerns the framework under the

1 Immigration and Nationality Act of 1952 as originally  
2 enacted for granting citizenship to persons outside the  
3 United States as of the date of their birth.

4 Other provisions deal with the granting of  
5 citizenship later in life. Those were open to  
6 Respondent or his father in this case, but were not  
7 taken advantage of.

8 In particular, this case concerns the  
9 granting of citizenship to children born out of wedlock  
10 abroad, a situation in which this Court's -- this  
11 Court's cases made clear that mothers and fathers are  
12 not typically similarly situated with respect to their  
13 legal status concerning the child at the moment of  
14 birth.

15 The general rules for citizenship at birth  
16 are set out in 8 U.S.C. 1401. And I'm referring to the  
17 Act as originally enacted; it was revised in 1986. If  
18 both parents were U.S. citizens, then a child born  
19 outside the United States would be a citizen of the  
20 United States as long as one of the parents had resided  
21 in the United States for any period of time. Congress  
22 did not deem that to be a sufficient connection to the  
23 United States, given that both parents are citizens.

24 On the other hand, if one parent was a U.S.  
25 citizen and one parent was an alien, Congress had a

1 markedly different approach. The U.S.-citizen parent  
2 had to -- had to have resided in the United States for  
3 ten years, five of which were after reaching the age of  
4 14. Congress evidently determined that because such a  
5 child would have competing claims of allegiance, that a  
6 greater residency was -- was required for the parent to  
7 establish the connection to the United States.

8 CHIEF JUSTICE ROBERTS: Is that an argument  
9 we heard much about in the Flores-Villar case?

10 MR. KNEEDLER: It was -- it was made at the  
11 oral argument in -- in Flores-Villar, and -- but we  
12 think it's also evident from the face of the statute.  
13 As this Court said in Nguyen with respect to another  
14 argument that the -- that the Court addressed there,  
15 it's important for the Court itself to look at the -- at  
16 the structure, text, and operation of the statute to see  
17 that the --

18 JUSTICE KENNEDY: I thought, in Villar,  
19 the -- the government spent most of its argument talking  
20 about the differential treatment primarily on the  
21 grounds of statelessness.

22 MR. KNEEDLER: Right.

23 JUSTICE KENNEDY: And -- and here your  
24 argument is -- the thrust of your argument is -- is  
25 somewhat a different need to ensure sufficient ties.

1                   MR. KNEEDLER: What -- we're making both  
2 arguments. And -- and we did -- we did argue in  
3 Flores-Villar that there should be a connection to the  
4 United States and that the statutory framework is set up  
5 that way.

6                   It's true that our emphasis was on  
7 statelessness, but we are now arguing -- and, again, we  
8 think it's -- it's entirely evident from the face of the  
9 statute -- that what -- what these provisions are after  
10 is connection to the United States.

11                  JUSTICE GINSBURG: Why aren't men and women  
12 who are parents similarly situated with respect to their  
13 affiliation, their attachment to U.S. values? I mean,  
14 there's no reason to think a man is less -- has less of  
15 a sense of U.S. belonging than a woman?

16                  MR. KNEEDLER: Right. And we're -- and  
17 we're making no such argument. The -- the point is that  
18 where you have -- where you have -- at the -- at the  
19 moment of birth, the mother, as -- as this Court  
20 recognized in the -- in the Nguyen case and has  
21 recognized in cases like Lehr v. Robertson in the  
22 domestic context, the mother is the only legally  
23 recognized parent.

24                  JUSTICE GINSBURG: There are many cases,  
25 especially generations back when this law was on the

1 books, where the mother -- the birth certificate came  
2 sometime after the child was born, and both the father's  
3 name and the mother's name might be on it.

4 So it is -- it is not -- the moment of birth  
5 doesn't necessarily tell you who is the mother if she --  
6 if there is no birth certificate, and then the child,  
7 when they get the birth certificate, both names are on  
8 it.

9 MR. KNEEDLER: But I -- I think this Court's  
10 decision in *Nguyen* and the -- and the State statutes  
11 that we identify in a footnote in our brief are premised  
12 on -- on the proposition that the identity of the mother  
13 and her relationship to the child will be known by  
14 virtue of the birth alone, or at least will be known in  
15 the overwhelming majority of cases.

16 In that situation there is only one parent.  
17 There is not a competing claim of citizenship to -- a  
18 competing claim of allegiance to another country through  
19 another parent.

20 On the other hand, when the father  
21 legitimates, at that point you have two parents, and  
22 it -- in the situation where they are of different  
23 nationalities, then you are put in the situation where  
24 there are competing claims --

25 JUSTICE KAGAN: But why do we look,

1 Mr. Kneedler, to the moment of birth? Why shouldn't we  
2 look to the moment when citizenship is sought?

3 MR. KNEEDLER: Because this -- this  
4 statutory provision specifically deals with citizenship  
5 at birth, and the -- the statute that that's its  
6 caption, of 1409(a), with respect to the situation where  
7 the father legitimates, says the child shall be a  
8 citizen as of birth, and it's important to understand  
9 exactly what is operating here.

10 At -- at the moment of birth, again, the  
11 child only has one -- one parent. When the father  
12 legitimates, what Congress has done generously, one  
13 could say, but at least sensibly, is to say we will  
14 treat the couple as if they were married at the moment  
15 of birth. They are giving retroactive application to  
16 the legitimation so that the -- so that the children --  
17 the child is treated as the child of married parents at  
18 that point.

19 If the -- if the legitimating father is a  
20 U.S. citizen, in that situation you would have two  
21 U.S.-citizen parents, and the very generous rule for  
22 U.S.-citizen parents would apply in that -- in that  
23 situation.

24 JUSTICE KENNEDY: But Nguyen -- Nguyen was  
25 more a matter of -- of proof, whereas this case, as

1 Justice Ginsburg indicates, is a question of which --  
2 does the child have sufficient ties to the country.  
3 It's quite a different -- quite a different proposition  
4 that the two address, it seems to me.

5 MR. KNEEDLER: Two -- two things about that.  
6 This Court's decision in Nguyen had two -- had  
7 identified two separate interests. One was the proof of  
8 paternity, and -- but the other was recognizing the  
9 connection to the United States.

10 The connection to the United States in a  
11 situation like this has two steps: What is the  
12 relationship of the child to the parent? And Nguyen was  
13 concerned about establishing that relationship, that  
14 in -- in some formal sense and also underlying it, a  
15 real sense of establishing that relationship.

16 This case deals with the relationship of the  
17 parent to the United States.

18 JUSTICE SOTOMAYOR: The problem is with the  
19 exception that's been created for unwed-citizen mothers,  
20 the first prong, the interest of the connection to the  
21 United States doesn't exist, because the statute doesn't  
22 require any connection to the United States except  
23 U.S. citizenship. She could have been born, lived here  
24 a day, and moved somewhere else, and she would  
25 automatically confer.

1                   MR. KNEEDLER: No, not under the 1952 Act.  
2 Under the -- that was true under the 1940 Act. Under  
3 the 1952 Act, it's continuous presence for one year, but  
4 Congress deemed that to be basically somewhere in  
5 between the two U.S.-citizen parents situation in which  
6 any period of residency was okay and the mixed -- the  
7 mixed nationality situation where Congress said it had  
8 to be ten and five. Congress chose a -- a period  
9 somewhere in between.

10                   JUSTICE SOTOMAYOR: So why should it be  
11 different for an unwed father who has legitimized the  
12 child?

13                   MR. KNEEDLER: Because in that situation  
14 there are two parents. The argument is not that the  
15 father's ties are less. It's that there are competing  
16 ties, and Congress wanted to make sure that the -- that  
17 the strength of the U.S. citizen's ties were sufficient  
18 that they would outweigh or at least counteract where  
19 Congress could be sufficiently confident of the tie to  
20 the United States to grant citizenship in that -- in  
21 that situation. And again --

22                   JUSTICE KAGAN: Why couldn't that have been  
23 done, Mr. Kneedler? Why couldn't these objectives have  
24 been served through entirely gender neutral language?  
25 For example, I know that there was a proposal that the

1 Secretary of State made earlier than this statute was  
2 passed in the 1930s, which talked just about legal  
3 parents, which didn't refer to mothers and fathers at  
4 all.

5 MR. KNEEDLER: Right. Several things about  
6 that. I don't think there is a claim in this case that  
7 Respondent would benefit from reading the statute in  
8 that manner, because I -- I don't think there's any  
9 question that he had citizenship and a legal parent when  
10 he was born.

11 But beyond -- beyond that --

12 JUSTICE KAGAN: That would get rid of the  
13 gender inequality that is at the heart of his complaint.  
14 Whether or not he in the end benefits from it, the  
15 question here is whether the statute makes --  
16 constitutes a violation of equal protection.

17 One question we ask when we think about a  
18 question like that is, could Congress have written the  
19 statute? Could Congress have served its objectives in  
20 an entirely gender neutral way? And it seems as though  
21 here we have the -- the Secretary of State presented a  
22 statute to Congress that actually did that.

23 MR. KNEEDLER: Yes. But it -- but as was  
24 pointed out at the time, as we point out in our brief,  
25 while that statute on its face looked gender neutral, in

1 fact, it would have operated in exactly the same way as  
2 the statute that Congress enacted operated, because --  
3 and no one has really taken serious issue with the  
4 proposition we have in our brief that at the moment of  
5 birth, it was the overwhelming rule that the mother was  
6 the only legally recognized parent.

7 So in that -- this -- it would have operated  
8 in essentially the same way.

9 And let me -- let me come at this in a  
10 slightly different direction. If, when you have one  
11 parent, the -- the mother in -- in this case, she gets  
12 to make all of the pertinent decisions about the child.  
13 Where they will live, where they will be domiciled,  
14 situations like that.

15 When a father legitimates, he does not -- he  
16 does not then acquire the right to make -- the sole  
17 right to make all the decisions for the child. There  
18 are then two parents. He gets to --

19 JUSTICE BREYER: There's a lot of  
20 complicated things, but the question I think is, think  
21 of the child. The child is born out of wedlock. Now,  
22 if his mother was an American, he becomes an American if  
23 she's lived here for one year. If it's his father who's  
24 an American, she becomes an American only if he's lived  
25 here for like eight years or ten years. Now, that's the

1 difference, and why does that make a difference? What  
2 justifies the gender discrimination?

3 MR. KNEEDLER: But that's the same rule that  
4 applies if the parents are married, which is --

5 JUSTICE BREYER: Two -- two wrongs don't  
6 make a right.

7 MR. KNEEDLER: Well, but -- I don't think  
8 it -- no one is challenging --

9 JUSTICE BREYER: Perhaps. Yeah, yeah, I  
10 accept that no one is challenging, but I'm not asking  
11 that question.

12 I'm asking the question of what it is -- I  
13 would repeat the question, which you heard, which I  
14 think is the equal protection question at the heart of  
15 the case.

16 MR. KNEEDLER: Well --

17 JUSTICE BREYER: And the answer that you  
18 give in your brief was some endlessly -- I mean, it was  
19 very well-written and brilliant --

20 (Laughter.)

21 JUSTICE BREYER: -- and -- and -- but it  
22 went into this thing about statelessness persons, and --  
23 and then we have, like, 17 briefs that say, no, no, that  
24 wasn't what the situation was with statelessness  
25 persons. And so I guess the question would be there:

1 Was it enough of a statelessness person justification to  
2 warrant this gender discrimination?

3 There is no point in you repeating that. I  
4 think I've taken in that argument. I'll have to make up  
5 my mind about it.

6 Is there anything else?

7 MR. KNEEDLER: Well, the -- the first  
8 argument we're making, again, is -- is the point of  
9 connection to the United States, and that's where the  
10 married couple comes in. Because no one is challenging  
11 the proposition that Congress can impose a residency  
12 requirement.

13 JUSTICE BREYER: Wrong -- wrong residency  
14 requirement. I did have Justice Kagan's question in  
15 mind when they read it.

16 Why don't they ask the child if it would  
17 like, when it reaches the age of 21, to be connected to  
18 the United States and see if the child votes in American  
19 elections and lives there a while? Why are they so  
20 worried about the child's parents?

21 MR. KNEEDLER: Well --

22 JUSTICE BREYER: I mean, in any case, you  
23 don't have to answer that.

24 MR. KNEEDLER: No, no. The Act provides for  
25 the acquisition of citizenship at a date after birth,

1 and then --

2 JUSTICE BREYER: Lived here for 14 years and  
3 so forth. All kinds of stuff. But --

4 MR. KNEEDLER: No.

5 JUSTICE BREYER: I don't want to argue with  
6 you on this point. I want to know if I've got the  
7 reason for saying the mother, if she's the U.S. citizen  
8 and he is born out of wedlock, he only lived here for a  
9 year, but the father has to live here for, like, ten  
10 years or eight years or something like that, the real  
11 justification for that you've been able to find and the  
12 only one you've been able to find has to do with this  
13 thing about statelessness?

14 MR. KNEEDLER: No. We have two -- we have  
15 two reasons. The first one is the connection to the  
16 United States, which is evident on the face of -- of the  
17 statute. When the father legitimates, what -- what the  
18 statute does is treat the couple as if they were  
19 married. In fact, in this case, the child was  
20 legitimated by marriage, and what the statute basically  
21 did was make the marriage retroactive to the date of  
22 birth.

23 JUSTICE BREYER: I'm going to make an  
24 example where they never married.

25 MR. KNEEDLER: Well --

1 JUSTICE BREYER: They -- they like living  
2 together without being married. Now what's the  
3 justification?

4 MR. KNEEDLER: Well, under the 1986  
5 amendments, it's -- it is easier for the father to  
6 acknowledge the child. But in that situation, again,  
7 there are two -- there are two parents. And in that  
8 situation, the father does not get to make unilateral  
9 decisions about the child. He gets to be a parent too.  
10 He doesn't get to be the only parent the way the mother  
11 is the only parent before legitimation.

12 And this is true in *Lehr v. Robertson* and --  
13 and the cases this Court has had in -- in the domestic  
14 context.

15 JUSTICE GINSBURG: Mr. Kneedler, you're --  
16 you are giving a sophisticated rationale, but we're  
17 talking about legislation from 1940 and 1952.

18 At that time, the statute books were just  
19 shot through with distinctions between children born out  
20 of wedlock and affiliation with the mother and the  
21 father. So this was a piece with all that legislation.  
22 And it wasn't until when *Ms. Trimble* again scored a  
23 typical. And the Illinois Probate Code said a child  
24 born out of wedlock can inherent to an intestate  
25 succession from the mother only, not the father. The

1 laws just put mothers and children not born of the  
2 marriage together and separated fathers from their  
3 children.

4 MR. KNEEDLER: Well --

5 JUSTICE GINSBURG: And nobody thought until  
6 the 1970s that that was a violation of equal protection.  
7 But in a whole series of cases in the '70s, the Court  
8 recognized that, indeed, there was a violation of equal  
9 protection.

10 MR. KNEEDLER: Well, insofar as -- I mean,  
11 there are two equal protection arguments that have been  
12 made in cases like that. One of them has to do with  
13 equal protection on the basis of illegitimacy. That --  
14 that claim is not raised here with good reason, because  
15 the -- because Respondent, as -- as an alien outside the  
16 United -- person outside the United States and an alien  
17 by statute, did not have constitutional rights. So it's  
18 the --

19 JUSTICE GINSBURG: My point was that the  
20 laws that existed put mothers and children born out of  
21 wedlock together and separated fathers from their  
22 children --

23 MR. KNEEDLER: Right.

24 JUSTICE GINSBURG: -- out of what the  
25 reality of their life was.

1           MR. KNEEDLER: And in this Court's decision  
2 in Fiallo in the immigration context, that was exactly  
3 the situation, and the Court rejected equal protection  
4 claims based both on -- on sex discrimination and on  
5 illegitimacy.

6           JUSTICE GINSBURG: That was not a claim of  
7 citizenship.

8           MR. KNEEDLER: It wasn't, but we -- but we  
9 think -- we think, if anything, it follows *Ofar Sharar*,  
10 because citizenship is -- is entering into the citizenry  
11 or the membership of our society on a permanent basis  
12 with rights to come and go with all the rights and  
13 obligations.

14           But I -- but I also wanted to address  
15 your -- your question with respect to the domestic  
16 context. This Court's decision in *Lehr v. Robertson*  
17 sustained a situation where you -- where a child was  
18 going to be put up for adoption. The mother would  
19 ordinarily have the sole right to decide that, but the  
20 situation was, what -- what about the father? Well, the  
21 father had to take some affirmative steps to put himself  
22 in a position where he could have a role, essentially a  
23 veto power over --

24           JUSTICE GINSBURG: And the father did --  
25 this father -- didn't the couple marry?

1 MR. KNEEDLER: Yes, they did. But, again,  
2 at that point, he is -- he is not similarly situated to  
3 the mother, either at the time of birth or at the time  
4 he legitimates.

5 JUSTICE ALITO: Mr. Kneedler, can I ask you  
6 this question: If the Court thinks that this statute  
7 violates the Equal Protection Clause, does it  
8 necessarily follow that the Petitioner is entitled to  
9 the relief that was awarded to him by the Second  
10 Circuit; in other words, the granting of citizenship?

11 MR. KNEEDLER: No, it by no means follows.  
12 And I --

13 JUSTICE ALITO: Well, could you address  
14 that? We -- we had a similar issue a few terms ago in  
15 the Flores-Villar case, but that was a criminal --  
16 there, what was at issue was a criminal conviction.  
17 Here, criminal convictions are not at issue. The  
18 criminal convictions had nothing to do with alienage; is  
19 that correct?

20 MR. KNEEDLER: Right.

21 JUSTICE ALITO: The underlying criminal  
22 convictions.

23 MR. KNEEDLER: Right, right. No. They --  
24 they were -- they were regular state law convictions.

25 JUSTICE KENNEDY: I take it that the thrust

1 of Justice Alito's question is, what -- what is the  
2 remedy if we -- if we level up, then it's easier for  
3 both? If we level down, then -- then it's harder for  
4 both?

5 MR. KNEEDLER: We -- we think that -- we  
6 think the Court clearly should not apply to the  
7 U.S.-citizen fathers the one-year limitation. The  
8 general rule -- 1409(c) is an exception to a general  
9 rule that governs -- governs the vast majority -- or the  
10 three categories of cases: married fathers, married  
11 mothers, and unmarried fathers. There is no reason to  
12 think that Congress would have wanted unmarried fathers  
13 to have a more --

14 JUSTICE KENNEDY: Well, are --

15 JUSTICE BREYER: One I could think of -- one  
16 I could think of, possibly, but I'd like your opinion  
17 about it: How many, do you think, unmarried fathers  
18 there were in 1952 who couldn't qualify under the long  
19 period of time -- eight years, you know -- and that's  
20 not so hard to do, if you're in the Army, because all  
21 your active duty counts. But they would have qualified  
22 under the one year. Now, I use the numbers in your  
23 brief, which were brilliant of you to try to find. I  
24 don't know how you found those.

25 But I -- I -- that 4,000 number kept coming

1 back. I thought maybe there were a couple of thousand a  
2 year. But do we know that there are more than a couple  
3 of thousand a year?

4 JUSTICE KENNEDY: You know, I thought -- I  
5 thought you said there were untold numbers.

6 JUSTICE BREYER: Well, and there were the  
7 untold numbers, but that's -- that's true, they're  
8 untold numbers, and then that's not told. I'm trying to  
9 find the --

10 (Laughter.)

11 JUSTICE BREYER: I'm trying to find how  
12 close we could come to a guess.

13 MR. KNEEDLER: It's -- it's -- it's very  
14 hard -- it's very hard to estimate. But -- but this  
15 Court's decision in -- in Nguyen identified the number  
16 of -- of people who travel abroad, and the numbers are a  
17 little bit higher even now.

18 JUSTICE BREYER: Well, let's go back to '52.

19 MR. KNEEDLER: It was like 70 million that  
20 take trips abroad.

21 JUSTICE BREYER: Let's go back to '52, and  
22 the couple is unmarried and it's a father who, in fact,  
23 would qualify if he only had to live here for a year,  
24 but he wouldn't qualify if he had to live here for eight  
25 years before the baby's born. Never marries the baby --

1 never marries the mother. Okay.

2 So I'm thinking, who could those people have  
3 been? They would have been -- they would have been  
4 people maybe working for American businesses or  
5 something, and there weren't that many at that time. So  
6 I -- I used your 4,000.

7 MR. KNEEDLER: I -- I --

8 JUSTICE BREYER: That perhaps was not right.

9 MR. KNEEDLER: We have -- we have wondered  
10 the same thing.

11 JUSTICE BREYER: Yeah. What if the --

12 MR. KNEEDLER: The -- the only thing we were  
13 able to identify -- and this -- this is really not very  
14 closely on point, but the State Department told us that  
15 today, they -- they grant approximately, I think, 8,000  
16 certificates of birth abroad. And of those, I think  
17 around 3,000 are under 1409(c), which means that those  
18 are the ones granted to U.S.-citizen mothers abroad.  
19 That doesn't -- the number of fathers who might benefit  
20 could be far larger than --

21 JUSTICE KAGAN: Could I -- I'm sorry. Were  
22 you finished?

23 MR. KNEEDLER: Yes.

24 JUSTICE KAGAN: Could I -- I mean, we  
25 generally have a rule that when we find an equal

1 protection violation, we level up rather than level  
2 down. That's been the Court's consistent practice.  
3 Wouldn't you agree?

4 MR. KNEEDLER: That's been its practice,  
5 yes. But that -- that -- the Court has made clear that  
6 that is not constitutionally compelled. And there --  
7 there are compelling reasons here not to do that.

8 JUSTICE KAGAN: Well, I find one compelling  
9 reason to do it -- and I just thought I'd offer this up  
10 to you and see what you have to say -- is that in this  
11 case, unlike in some cases, there really isn't a choice  
12 between leveling up and leveling down in one sense,  
13 because if you level down, this party gets no relief.

14 In other words, you say, well, you level --  
15 you just apply it prospectively. But then this party  
16 gets absolutely no relief. And so isn't that a problem?  
17 Isn't it the kind of the same problem as Justice Harlan  
18 recognized in -- in Welsh when he was dealing with a  
19 criminal matter? He said, you know, you can't level  
20 down because you can't give everybody the exact same  
21 benefit.

22 So how do we deal with that?

23 MR. KNEEDLER: Well, several things.

24 In this context in particular, there are  
25 serious questions about whether the Court can, but, at

1 the very least, substantial reasons why the Court should  
2 not grant citizenship to someone -- effectively grant  
3 citizenship to someone to whom Congress itself has not  
4 granted it.

5 JUSTICE GINSBURG: It's not -- it's not  
6 citizenship. It's excising the unconstitutional part of  
7 the statute.

8 MR. KNEEDLER: But if it -- it -- it would  
9 have -- it would have that effect. And -- and in a  
10 situation like this, we think the only proper remedy,  
11 given Congress' plenary authority, is to apply the  
12 ten-year rule to everyone and let Congress step in and  
13 -- and address the problem.

14 JUSTICE ALITO: If Petitioner's parents had  
15 been married, would he be entitled to relief?

16 MR. KNEEDLER: No. And -- and that's --  
17 that's the point.

18 And -- and another point is there are other  
19 situations in which the Court finds a constitutional  
20 violation but does not grant relief. The qualified  
21 immunity context or the exclusionary rule. The Court  
22 might adjudicate a violation --

23 JUSTICE ALITO: If we were to -- if we were  
24 to level up, we would --

25 JUSTICE KENNEDY: Go ahead.

1 JUSTICE ALITO: If we were to level up, the  
2 effect would be that Petitioner would be given  
3 preference over someone who was similarly situated  
4 except for the fact that that person's parents were  
5 married.

6 MR. KNEEDLER: Yes.

7 JUSTICE ALITO: And if such a person were to  
8 then bring a suit, they would have a strong equal  
9 protection claim, would they not?

10 MR. KNEEDLER: I -- I hesitate to say what  
11 they --

12 (Laughter.)

13 JUSTICE GINSBURG: The claim -- the claim --

14 MR. KNEEDLER: It illustrates the problems  
15 of the remedy --

16 JUSTICE GINSBURG: Mr. Kneedler, the claim  
17 is gender discrimination. And married parents, they  
18 both have been -- mother and father have been treated  
19 equally badly. But when they are unwed, the mother is  
20 given the preference and the father is not. So we're --  
21 we're talking about equal protection, not qualified  
22 immunity. You have two people, similarly situated.  
23 They have to be treated equally. The unwed father is  
24 equal to the unwed mother. The married mother, equal to  
25 the married father. So --

1                   MR. KNEEDLER: My only point was that there  
2 are situations in which the Court has found a  
3 constitutional violation but not granted relief.

4                   And -- and --

5                   JUSTICE KAGAN: But not really a situation  
6 like this. Not a situation where we say, uh, there is  
7 an equal protection violation, and if we extend the  
8 benefit to everybody, we can take care of that equal  
9 protection violation, we can remedy the problem. But if  
10 we do not, if we try to level down, the effect of that  
11 is that the -- the party before us who has proved an  
12 equal protection violation gets absolutely no relief at  
13 all.

14                  MR. KNEEDLER: I -- I would like to answer  
15 that quickly and then reserve the balance of my time  
16 of -- of -- for rebuttal.

17                  I think it's also relevant, in taking into  
18 account the remedy, that this is not Respondent's own  
19 constitutional right. It's a third-party claim.  
20 There's no automatic right to raise the rights of third  
21 parties; in this case, the father. So I think that  
22 would properly be taken into account in deciding whether  
23 a remedy at all is feasible and what it would be.

24                  CHIEF JUSTICE ROBERTS: Thank you, counsel.

25                  Mr. Broome.

1 ORAL ARGUMENT OF STEPHEN A. BROOME

2 ON BEHALF OF THE RESPONDENT

3 MR. BROOME: Mr. Chief Justice, and may it  
4 please the Court:

5 Respondent's father was a citizen of the  
6 United States. Holding other things constant, had he  
7 been the mother instead of the father, there would be no  
8 question that he transmitted citizenship to Respondent  
9 under Section 1409.

10 But the statute bars him from doing so on  
11 the same terms of the mother is not based on any innate  
12 or biological difference between men and women or  
13 mothers and fathers, nor does it ensure an interest in  
14 reducing statelessness, or -- nor does it serve an  
15 interest in reducing statelessness or ensuring that --  
16 that citizenship by descent pass only to those children  
17 who are likely to learn American values. Both of the  
18 government's justifications for the gender differential  
19 at here therefore fail.

20 I would like to begin by addressing the  
21 standard of review. There is no dispute here that  
22 Respondent has third-party standing to assert the equal  
23 protection claim of his father. That claim plainly is  
24 subject to intermediate scrutiny.

25 In *Fiallo v. Bell*, this Court applied

1 rational basis review to the claims of aliens who were  
2 seeking Visas based on their relationship to a  
3 U.S.-citizen relative. It is true, as the government  
4 points out, that the Fiallo plaintiffs included a  
5 U.S.-citizen father, but the Court in Fiallo disagreed  
6 that -- with -- with the dissenting justices and with  
7 the plaintiffs that his equal protection rights were at  
8 stake. And there was never any question that the aliens  
9 in that case were not U.S. citizens.

10 Here the -- the dispute is one of -- the  
11 dispute centers on a -- on a right of Respondent's  
12 father to be treated equally to transmit his citizenship  
13 on the same terms that a mother could transmit  
14 citizenship under Section 1409.

15 JUSTICE BREYER: On this, but -- I would say  
16 at some point, the problem that worries me the most is,  
17 assuming this is unconstitutional, do you put the 14  
18 years or whatever it is, ten years, on both, or the one  
19 year on both?

20 And I -- I want to -- because he does have a  
21 point. You put the one year on both and then you have,  
22 when the parents are married, it's the ten years, and  
23 when it's the -- they're not married, it's the one year,  
24 and that really doesn't make much sense. But the --  
25 the -- so I'm -- I'm -- hope you'll get to that.

1           And in the course of that, I read an amicus  
2 brief that bothered me a lot, and it said, actually, the  
3 one-year requirement is tougher. And the reason it's  
4 tougher, it says that the State Department administers  
5 it. How they do this, I don't know, and I want to know  
6 if that's really true.

7           But they administer it to say that if you  
8 are living in the United States you have to live here  
9 for one year. And if you set one foot across the board  
10 to get a drink of water at -- at Niagara Falls, you  
11 don't qualify. And, moreover, you have to prove that  
12 you never did set one foot to get a drink of water.  
13 Well, nobody could prove such a thing. So -- so I'm  
14 interested in that word "continuous" and how it is  
15 actually administered.

16           Those are the two things that are worrying  
17 me in respect to remedy.

18           MR. BROOME: Justice Breyer, let me address  
19 the last question first.

20           The word "continuous," I do not think,  
21 would -- is going to -- as a practical matter, it can't  
22 be applied in a way that somebody would have to come  
23 forward and prove that they were in the United States  
24 for 365 days. They would not have to show proof that  
25 they were actually in the United States on each of those

1 days.

2 JUSTICE BREYER: All right. So I -- I --  
3 that question. That is your answer. And maybe, if the  
4 Solicitor General has time, he could simply confirm that  
5 answer by saying yes.

6 MR. BROOME: Well, let me tell you how it  
7 was -- how it was applied in this case.

8 So this case, when we were in the court of  
9 appeals, the court was -- the court remanded the case to  
10 the Western District of New York for a determination on  
11 that very question.

12 Whether or not -- if -- if the -- in order  
13 to decide whether the court should address the  
14 constitutional issue, the court first asked whether  
15 Respondent's father would have satisfied the one  
16 continuous year rule.

17 So we went to the Western District of  
18 New York, and we were not -- the government ultimately  
19 stipulated that, yes, because we have evidence of  
20 Respondent's father being in the United States, or in  
21 this case an outlying possession, from his birth in 1900  
22 until the date of his departure for the Dominican  
23 Republic in 1919, we will -- we will presume that there  
24 was at least some period in there where he was in the  
25 United States for one continuous year. And I think that

1 that presumption would apply in most cases. It  
2 certainly was applied in this case that we would not  
3 have to come forward and show proof on -- that he was in  
4 the United States on every single day.

5 But I think if the Court were troubled that  
6 perhaps that -- that rule could be harder for some  
7 fathers or some -- or people to follow, but an  
8 alternative remedy could be to leave both options on the  
9 table.

10 JUSTICE KENNEDY: If we leveled down and  
11 made it harder, would that affect the status of people  
12 who have obtained citizenship under the more lenient  
13 provision applicable to the mother?

14 MR. BROOME: Justice Kennedy, if this Court  
15 applied the leveling down remedy in a way that -- in a  
16 way that would actually equalize the -- the two  
17 similarly-situated classes here, it would have to --  
18 yes, it would impact people dramatically because it  
19 would take citizenship away from people who already have  
20 it.

21 And the Court has held --

22 JUSTICE KENNEDY: Well, it's not  
23 necessary -- I assume it could be prospective because  
24 once you have citizenship, it's -- we -- we have cases  
25 that say it can't be taken away.

1                   MR. BROOME: Right. And you can't -- I  
2 would submit --

3                   JUSTICE KENNEDY: So it would just be  
4 prospective by reason of that doctrine.

5                   MR. BROOME: You could not apply a  
6 prospective remedy in this case, Justice Kennedy,  
7 because it would not affect anybody whose citizenship  
8 was governed by the 1952 Act. It would not affect  
9 Respondent -- it would not affect Respondent's father,  
10 anyone who was born between 1952 and 1986. If the --  
11 to --

12                  JUSTICE KAGAN: I mean, the problem, isn't  
13 it, Mr. Broome, that the very inequality that you are  
14 complaining of would remain, because it's impossible to  
15 claw back everybody else's citizenship, so it's really  
16 impossible to level down. And the very inequality that  
17 we've just found would remain.

18                  MR. BROOME: That's right, Justice Kagan.  
19 The government's proposal, the prospective remedy is no  
20 remedy. It would not affect -- it would not -- it would  
21 not -- it would leave in place all of the gender  
22 discriminatory effects caused by this statute.

23                  JUSTICE KAGAN: But it's not just that it  
24 doesn't give you citizenship, it's that it doesn't cure  
25 the inequality at all.

1 MR. BROOME: But --

2 JUSTICE KAGAN: Either by leveling down or  
3 by leveling up.

4 MR. BROOME: That's right. That's right,  
5 Justice Kagan. And -- and -- the government -- I would  
6 submit that the government's position would have to be  
7 the same if this was a case of race discrimination. The  
8 government would have to say that, yes, if the  
9 citizenship -- that the citizenship statute  
10 discriminated on the basis of race, this Court would be  
11 powerless to correct the residual effects of that  
12 racially-discriminatory statute.

13 The Court -- we're not aware of any case in  
14 which this Court has said it is powerless to correct a  
15 case of race discrimination or gender discrimination or  
16 any equal protection violation.

17 JUSTICE GINSBURG: What about the argument  
18 that in most of the cases where a benefit was extended,  
19 the -- the group that -- to which the benefit was  
20 extended was a smaller group than the group that already  
21 got the benefit, and here, if you add in married  
22 parents, then most people are under the more difficult  
23 rule, ten years or whatever it is, and it's the smaller  
24 group that gets the benefit.

25 MR. BROOME: Right.

1 JUSTICE GINSBURG: So you would be extending  
2 a benefit enjoyed by a smaller group to a larger group.

3 MR. BROOME: Well, we're not -- we're not  
4 asking for -- the remedy we would propose, Justice  
5 Ginsburg, would not affect marital couples, and the  
6 government has pointed out --

7 JUSTICE GINSBURG: But wouldn't you have an  
8 anomaly, then, that parents who are not married are  
9 preferred to parents who are married?

10 MR. BROOME: It -- it does appear at first  
11 that there is an anomaly there, but that anomaly is  
12 built into the statute as we see it today.

13 The -- if you take the case of the unmarried  
14 mother, if she marries the father the day -- the day  
15 before the child is born, the ten-year requirement  
16 applies. If she marries the father the day after the  
17 child is born, the one-year applies.

18 JUSTICE ALITO: Well, that is true, but  
19 isn't it something else when we devise a remedy that  
20 deepens and extends an equal protection violation? Have  
21 we ever done that?

22 MR. BROOME: Well, I don't think the Court  
23 would be extending the -- the equal protection  
24 violation. I think that the --

25 JUSTICE GINSBURG: Whatever it is, it

1 wouldn't be gender discrimination.

2 MR. BROOME: It wouldn't be -- it could  
3 possibly be a legitimacy discrimination, but I think  
4 that that --

5 JUSTICE ALITO: Well, it would be a  
6 legitimacy discrimination. The -- the laws that are --  
7 what are they subject to, and the case -- the past cases  
8 have involved discrimination against the children of  
9 unwed parents. And what has -- what is the standard of  
10 review there?

11 MR. BROOME: It's also intermediate  
12 scrutiny.

13 JUSTICE ALITO: And have we ever said there  
14 would be a different level of scrutiny if the  
15 discrimination was against children who were born to  
16 married parents? Would you make that argument?

17 MR. BROOME: No, I wouldn't make that  
18 argument, but I -- I think that that claim, that  
19 legitimacy claim could be brought by people today,  
20 people who are born to unmarried United States-citizen  
21 mothers.

22 JUSTICE ALITO: Yeah. But to children who  
23 are born to unmarried mothers, but not to children who  
24 are born to unmarried fathers, and you would extend the  
25 problem. You would have this Court extend the problem.

1           MR. BROOME: Well, it -- it would -- that  
2 same claim could be brought today. The only difference  
3 is whether or not it could be brought by the -- the  
4 child of a mother or a father. But I think if you go to  
5 the heart of the equal protection violation -- violation  
6 here, the fact that there may also be a legitimacy  
7 discrimination going on does not eradicate the equal  
8 protection violation.

9           I think the two similarly situated classes  
10 here are unmarried United States-citizen fathers and  
11 unmarried United States-citizen mothers, and it quite --  
12 it could be, Justice Alito, that Congress had good  
13 reasons for treating nonmarital children more leniently  
14 than -- at least in the case of mothers -- than marital  
15 children, because historically nonmarital children were  
16 a much more vulnerable class. They were the bastards.  
17 They were illegitimate. And they didn't have the same  
18 kind of rights, and, until 1940, in fact, they didn't  
19 have a statutory right to citizenship. So it could --  
20 quite -- there could be logical reasons for --

21           JUSTICE ALITO: And you think that was  
22 Congress' intent in 1952?

23           MR. BROOME: I think in 1940 when -- when  
24 this --

25           JUSTICE ALITO: In 1940 you think that was

1 Congress' intent.

2 MR. BROOME: I think that in Congress'  
3 intent, what we've seen from the historical record,  
4 Justice Alito, is that in 1940, when Congress passed the  
5 statute, it -- it was concerned about nonmarital  
6 children being separated at the borders from their --  
7 from their guardian parents.

8 The problem is that Congress assumed or  
9 the -- the administrative officials who enact -- or  
10 drafted the statute assumed that the -- the guardian  
11 parent was always going to be the mother.

12 JUSTICE ALITO: I mean, you can conceive  
13 the -- the possibility of members of Congress in 1940 or  
14 1952 taking the floor and arguing, you know, we need to  
15 discriminate against the children of married parents,  
16 and in favor of the children of unmarried parents.

17 MR. BROOME: No, I -- I don't think that's  
18 what was going on at all.

19 JUSTICE GINSBURG: They were giving -- they  
20 were -- the one thing I think is they were giving a  
21 benefit to the unmarried mother.

22 MR. BROOME: That's correct,  
23 Justice Ginsburg, and the --

24 JUSTICE GINSBURG: Because they thought she  
25 was different from the unmarried father.

1                   MR. BROOME: They -- they presumed that she  
2 would be -- that's a reflexive assumption that the  
3 mother -- at that time, it was a reflexive assumption --  
4 I don't think it's as true today -- but that the mother  
5 was going to be the guardian parent, and they wanted to  
6 make sure that -- that the physical presence  
7 requirements that -- that Congress was passing were not  
8 going to have the impact of separating that nonmarital  
9 child from who they presumed to be the parent.

10                   JUSTICE KENNEDY: Suppose -- suppose there  
11 were some statistics that would indicate that over  
12 100,000 new citizens would qualify or new persons  
13 would -- would qualify for citizenship if -- if we  
14 adopted leveling up. Would that affect our -- should  
15 that affect our decision?

16                   MR. BROOME: I don't think it -- I don't  
17 think it should, because at the end of the -- at the --

18                   JUSTICE KENNEDY: And outside would gain  
19 200,000.

20                   MR. BROOME: Ultimately, I think the Court  
21 has to decide whether or not there is an equal  
22 protection violation here, whether or not --

23                   JUSTICE KENNEDY: Don't we have to consider  
24 what the Congress likely would have intended?

25                   MR. BROOME: Yes, and -- and I think what

1 the record shows is that given Congress' purpose here --  
2 in fact, if you take either the purpose that -- that we  
3 have argued was the purpose of Section 1409, and the  
4 purpose that the government has argued, the  
5 statelessness purpose, both of those purposes are served  
6 by the remedy we -- we propose, by extending the  
7 benefits to unmarried -- unmarried fathers.

8 JUSTICE KAGAN: Mr. Kneeder --

9 JUSTICE SOTOMAYOR: I'm sorry. If we  
10 leveled up, how would that affect children who were born  
11 to an -- to a citizen father, who were previously denied  
12 citizenship, could they come in and claim citizenship  
13 now?

14 MR. BROOME: If -- only if they satisfied  
15 all -- all -- all the other statutory requirements.

16 JUSTICE SOTOMAYOR: Which means? The answer  
17 is yes?

18 MR. BROOME: Yes, yes, if they satisfied the  
19 other statutory requirements.

20 JUSTICE SOTOMAYOR: The continuous one year.

21 MR. BROOME: And the legitimation  
22 requirements.

23 JUSTICE GINSBURG: And the legitimacy.

24 MR. BROOME: Yes.

25 JUSTICE GINSBURG: More than that, I think

1 it would be -- at first the father would have had to  
2 have sired this child abroad, would have had to  
3 recognized the child, would have had to support the  
4 child.

5 MR. BROOME: That's correct, yes.

6 JUSTICE GINSBURG: So I don't think that --

7 MR. BROOME: We're talking about a fairly  
8 limited class, I think here, Justice Ginsburg, and I --  
9 I would like to turn to the government's arguments about  
10 the U.S.-connection interest.

11 JUSTICE KAGAN: But before you -- before you  
12 do that, Mr. Broome, just on the remedy question, very  
13 occasionally this Court has faced a situation when the  
14 natural remedy of something that it is holding. We were  
15 concerned a little bit about how -- whether Congress  
16 would prefer a different remedy.

17 So, for example, in the Northern Pipeline  
18 case, what we did in a situation like that was we stayed  
19 our judgment for a period of time and allowed Congress  
20 essentially to do it a different way if it wanted to.  
21 And I'm wondering whether you had considered that  
22 possibility here, that we could order a kind of  
23 leveling-up judgment but stay it for some period of time  
24 so that Congress could decide whether it instead  
25 preferred some other way of dealing with the problem,

1 whether that would be appropriate?

2 MR. BROOME: I -- I think, Justice Kagan,  
3 first and foremost, the Court needs to remedy the equal  
4 protection violation suffered by the parties. So if --  
5 if that -- if the Court were to level up and make  
6 Respondent -- Respondent a citizen, and then stay the  
7 judgment thereafter, I -- you know, I think potentially  
8 that could work, but certainly --

9 JUSTICE GINSBURG: What relief -- the relief  
10 would have been granted to this person. This is not  
11 some kind of class action.

12 MR. BROOME: Right. Ultimately, the Court  
13 has to decide -- has to remedy the equal protection  
14 violation before it and -- and not be thinking about --  
15 well, it is not trying to remedy an equal protection  
16 violation only in the future. And I think that the  
17 fundamental problem with the government's remedy is that  
18 it could only apply to unborn children and future  
19 parents, and it would have no impact on anybody who is  
20 affected by the statute at issue before the Court today.

21 JUSTICE KENNEDY: Justice Kagan's  
22 suggestion, Congress apparently should -- should have  
23 been aware of this after our Flores-Villar, but they  
24 were soporific.

25 (Laughter.)

1                   MR. BROOME: But what we have seen, Justice  
2 Kennedy is that since the date that this discriminatory  
3 provision was first enacted in 1940, it has  
4 consistently -- Congress has consistently reduced the  
5 burden on -- on fathers. So I think if -- if the  
6 question is, what would Congress do today, well,  
7 Congress has shown that it is continually reducing the  
8 physical presence requirements and the age calibration  
9 component of it to -- so that it has -- precludes the  
10 transfer of citizenship --

11                   CHIEF JUSTICE ROBERTS: Well, but, I mean,  
12 that argument seems to me that, in other words, they  
13 have considered the issue several times, and at no point  
14 did they take the step of eliminating it.

15                   MR. BROOME: That's -- that's correct,  
16 Mr. Chief Justice, but they also haven't been confronted  
17 with a -- the last time that Congress considered the  
18 statute was in 1986, and it -- and it -- an equal  
19 protection challenge to these physical presence  
20 requirements was not -- was not made until the  
21 Flores-Villar case. And that was --

22                   JUSTICE BREYER: Why -- why -- why did you  
23 use the word "today"? I thought what we were supposed  
24 to do is go back and figure out if they had known that  
25 it was unconstitutional to give the unmarried woman a

1 year requirement to live in the United States, but to  
2 give the unmarried man where he is a citizen eight  
3 years' requirement, suppose they had known that was  
4 unconstitutional then, what would they have done then?  
5 Is it then or is it now?

6 MR. BROOME: Well, I think it's --

7 JUSTICE BREYER: It's a lot easier for you  
8 if it is now, I think.

9 MR. BROOME: I think it is now.

10 JUSTICE BREYER: But -- but -- but which is  
11 it -- is there anything -- I mean, you know, you are not  
12 going to help me if you just say that because that's in  
13 your interest to say. Is there anything that -- that  
14 you could -- you could point to that would say it's now  
15 and not then?

16 MR. BROOME: Well, as -- as a practical  
17 matter, I think that if this -- if the question is how  
18 would Congress remedy the statute, it -- it can only be  
19 remedied by the Congress sitting today.

20 CHIEF JUSTICE ROBERTS: Well, but that's not  
21 the question. The question is what did the Congress  
22 that passed this statute intend.

23 MR. BROOME: And I think the answer to  
24 that -- well, the question is what -- is how the  
25 Congress would pass the -- if the question is how did

1 the Congress that passed this statute, how would they  
2 remedy it today, then I think the answer --

3 THE COURT: Not how they would remedy --

4 MR. BROOME: Sorry. How -- how would they  
5 remedy that -- that -- that statute if that --

6 CHIEF JUSTICE ROBERTS: What would their  
7 understanding have been about the appropriate remedy  
8 when they passed the statute?

9 MR. BROOME: I -- I think -- I think the  
10 answer to that, Mr. Chief Justice, is that they --  
11 they -- they were -- they were -- were concerned that  
12 the physical presence requirements would create a  
13 significant burden on -- on marital children, and that  
14 is why they lowered the requirements for the mother,  
15 because they presumed the mother was going to be the  
16 guardian and that -- and they -- and they presumed that  
17 the child should stay with mother. And they didn't want  
18 the physical presence requirements to create further  
19 burden on that child -- that -- that relationship.

20 JUSTICE GINSBURG: What the Court -- the  
21 Congress in '40 or '52 would do is strange in this  
22 context, because the Court -- the Congress sitting then  
23 took gender-based lines for granted.

24 MR. BROOME: That's right. And I think that  
25 the -- if I could just sort of finish the Chief

1 Justice's question, the -- it is not clear at all that  
2 that -- that the 1940 Congress would have chosen to just  
3 sever the 1409(c) entirely. And I think it would be  
4 just as destructive of Congress' intent to withdraw a  
5 benefit that Congress plainly intended to confer than it  
6 would be to extend the benefit that perhaps Congress did  
7 not --

8 CHIEF JUSTICE ROBERTS: So do -- do I  
9 understand you to agree that when we approach these  
10 questions, severance and remedy, that we do look at what  
11 the Congress at the time when they passed the law would  
12 have done?

13 MR. BROOME: I'm not sure if there is a  
14 clear answer to that, Mr. Chief Justice. I think  
15 the Court could look at what Congress would do today and  
16 what Congress has done in the decades since.

17 JUSTICE BREYER: Did you find any case which  
18 supports that?

19 MR. BROOME: No, I haven't.

20 JUSTICE BREYER: Did you find any case  
21 against it?

22 MR. BROOME: No case for it or against it,  
23 Justice Breyer.

24 CHIEF JUSTICE ROBERTS: We're going to find  
25 lots of cases when we address this question that talks

1 about the intent of the Congress that passed the  
2 statute.

3 MR. BROOME: Certainly -- certainly there  
4 are plenty of cases on -- on that, Mr. Chief Justice.  
5 But the --

6 CHIEF JUSTICE ROBERTS: And I don't think  
7 there are any, but -- you haven't found one, and I don't  
8 think anyone could find one.

9 MR. BROOME: But --

10 CHIEF JUSTICE ROBERTS: But let's say, when  
11 we're looking at a question of congressional intent and  
12 a question of this, we look at what a Congress 60 years  
13 later would have thought.

14 MR. BROOME: But if -- as -- if we are  
15 looking at --

16 JUSTICE GINSBURG: Is that true -- is that  
17 true of, say, Westcott when they -- the category was  
18 unemployed father and -- and it was enlarged to include  
19 unemployed mothers? Is it true of Goldfarb, the Social  
20 Security cases when -- what Congress did when it did it  
21 was just a piece with everything where the man was the  
22 dominant person in the family and the woman was the  
23 subordinate person.

24 So to say we want to go back to a Congress  
25 that had that mindset and ask what they would have done

1 is a little hard.

2 MR. BROOME: It is difficult, and -- and --

3 CHIEF JUSTICE ROBERTS: Well, then don't  
4 pretend that you're implementing Congress' intent when  
5 you say we're going to -- we're going to put in place  
6 when we're talking about a remedy, not in terms of  
7 finding a violation. Don't pretend that you're  
8 implementing Congress' intent when you look at what  
9 Congress -- a Congress 60 years later would do.

10 MR. BROOME: Well, Mr. Chief Justice, when  
11 you are remedying a gender-discriminatory statute by  
12 leveling up or leveling down, you are never implementing  
13 Congress' intent. You're trying --

14 JUSTICE BREYER: That's true. But you can  
15 ask, what would they have wanted if they knew they  
16 couldn't make this discrimination? That's why I  
17 thought, well, if you have to go back to '52, they're  
18 going to either have to take the benefit away from the  
19 woman or give it to the man. And the two principles  
20 that support you is Congress hates taking away a benefit  
21 they give anybody. They get into a lot of trouble when  
22 they take benefits away.

23 (Laughter.)

24 JUSTICE BREYER: So that would move them in  
25 one direction. And it would also move them in the same

1 direction if there are just a handful of them who might  
2 really benefit. That's why I asked that question. But  
3 nobody -- but if there were millions of men who might  
4 benefit, then they might get a little worried about what  
5 they're doing, particularly since they're discriminating  
6 even more, you know, the other way against the married  
7 couple.

8 So that's why I was interested in those  
9 questions. But I take it you have said pretty much what  
10 you can say on that.

11 MR. BROOME: As to Congress' intent, yes,  
12 Justice Breyer.

13 JUSTICE GINSBURG: As to the number --  
14 number of people, all you can say is they would have to  
15 meet a lot of requirements that you would have -- the  
16 U.S. citizen sired a child abroad, recognize that child,  
17 supported that child, and --

18 MR. BROOME: Right. You're -- we are  
19 talking about, I think, a fairly limited class. These  
20 are -- this is just children who were born outside of  
21 the United States to unmarried United States-citizen  
22 fathers who cannot satisfy the ten-year requirement, but  
23 they can satisfy the one-year requirement, so they're  
24 somewhere in that nine-year period. I think that --

25 JUSTICE SOTOMAYOR: Perhaps you're assuming

1 Justice Ginsburg's point that the father still has to  
2 have legitimized the child without marriage. Because  
3 if they married the mother, they would end up having to  
4 fulfill the five-year. So it would have to be -- are  
5 you accepting her proposition that the father has to  
6 legitimize the child?

7 MR. BROOME: We're not -- we're certainly  
8 not challenging the legitimation requirement.

9 JUSTICE GINSBURG: Is that -- that's  
10 statutory and also the support requirement. Now, they  
11 may be independently challengeable, but they are --

12 MR. BROOME: And I think in this case they  
13 could be, because this is -- this is a different  
14 requirement than -- than what was at issue in the Nguyen  
15 case. In Nguyen, the Court addressed a paternal  
16 acknowledgement requirement and said, well, that is a  
17 minimal burden for the five-year satisfied. He can --  
18 he is not similarly situated as -- with respect to  
19 biological proof of his relationship with the child.  
20 But the requirement that he then come forward and take  
21 some affirmative step to demonstrate that by  
22 acknowledging the child, that -- that is -- that  
23 satisfies intermediate scrutiny.

24 But here we're talking about a legitimation  
25 requirement. And if, as the Historians have pointed

1 out -- the -- the Historian amicus brief points out,  
2 that legitimation really meant marriage, then that is a  
3 much more significant burden placed on the father  
4 because the father may not be able to -- may not be able  
5 to satisfy that requirement at all. For example, if the  
6 mother is not around -- is not available, if she doesn't  
7 want to marry the father, or if she is dead.

8 JUSTICE GINSBURG: Or if she is already  
9 married.

10 MR. BROOME: Or if she is already married.

11 JUSTICE BREYER: Where is the legitimation  
12 requirement? I see 8 U.S.C. 1409(c). It doesn't say a  
13 word about legitimation.

14 MR. BROOME: It's in 1409(a).

15 JUSTICE BREYER: Well, 1409(a) doesn't  
16 apply. It says "notwithstanding subsection A."

17 MR. BROOME: Right. And so the --

18 JUSTICE BREYER: It says: "Notwithstanding  
19 subsection (a), somebody who is born outside the U.S.  
20 out of wedlock shall be held to have acquired at birth  
21 the nationality status of his mother if the mother is a  
22 U.S. citizen and had been physically in the United  
23 States for one year."

24 So I don't see anything that says they have  
25 to be legitimized for the mother to get that.

1 MR. BROOME: In 1409(a), it applies only  
2 after -- after there's been --

3 JUSTICE BREYER: In 1409(a). And what the  
4 first words of (c) are, "notwithstanding the provision  
5 of subsection A." Anyway, I guess I could figure it out  
6 later.

7 MR. BROOME: Well, no.

8 (Laughter.)

9 MR. BROOME: Let me see if I can try and  
10 help you, Justice Breyer.

11 The remedy imposed by the Court of Appeals  
12 is to -- as 1401(a)(7), which the -- the  
13 physical-presence requirement, the ten- and five-year  
14 physical-presence requirement, the Court of Appeals --  
15 that -- that applies through 1409(a). 1409(a) is the  
16 provision that applies to fathers.

17 So the -- the remedy would be to apply the  
18 one-continuous-year rule in 1401(a)(7) -- and I grant  
19 you this is complicated -- 1401(a)(7) as it -- as it  
20 applies through 1409(a). And that would put mothers and  
21 fathers on equal footing with respect to the  
22 physical-presence requirements. And then the  
23 legitimation requirement still applies to fathers.

24 But if I could address the -- the  
25 government's U.S.-connection interest in my time

1 remaining.

2           The statute here absolutely bars a  
3 U.S.-citizen father under the age of 19 from  
4 transmitting citizenship to his foreign-born child, even  
5 if the father spent his entire life in the United States  
6 up until the day the child is born, and even if the  
7 father legitimates the child and seeks to raise the  
8 child in the United States.

9           By contrast, the statute automatically  
10 confers citizenship on a child whose U.S.-citizen mother  
11 spent only a year of her life at any point in her  
12 time -- any point in her life, even during infancy, and  
13 even if the -- even if the mother marries the alien  
14 father, and then -- and then the child is raised by the  
15 mother and the alien father.

16           It is impossible to view a statute that  
17 permits these results as related to a U.S.-connection  
18 interest. And I would submit, Your Honor, that the  
19 statelessness interest does not justify the  
20 discrimination either.

21           There is no dispute here that the statute  
22 creates a risk of statelessness for children born abroad  
23 to unmarried United States-citizen fathers who  
24 legitimate their children but who cannot satisfy the  
25 ten -- ten- and five-year physical-presence requirement.

1 And the statute -- the -- the statute confers  
2 citizenship on a child born abroad to an unmarried  
3 United States-citizen mother, even if that child  
4 faces -- even if her child faces no risk of  
5 statelessness at all because she is born -- the child is  
6 born in a country that assigns citizenship by virtue of  
7 being born there.

8 JUSTICE SOTOMAYOR: Well, we aren't leaving  
9 children uncovered whose mothers have not had a  
10 continuous one-year residency in the United States, even  
11 though that mother may be an American citizen.

12 MR. BROOME: That's -- that's right. My  
13 point is that her child may have no risk -- face no  
14 risk -- risk of statelessness at all, and -- and yet,  
15 the statute still confers citizenship --

16 JUSTICE SOTOMAYOR: I just said they do.  
17 Because the mother can only pass on citizenship if she's  
18 been in the United States continuously for one year  
19 prior to the birth of the child, correct?

20 MR. BROOME: That's correct.

21 JUSTICE SOTOMAYOR: So what happens to a  
22 citizen mother who can't meet that one-year requirement?  
23 What happens to her child?

24 MR. BROOME: That -- that child could be  
25 stateless. That child is not --

1 JUSTICE SOTOMAYOR: So there is a risk of  
2 statelessness no matter what?

3 MR. BROOME: There is a risk of  
4 statelessness, but that risk of statelessness is created  
5 by these physical-presence requirements that Congress  
6 chose to impose, whether it's the mother or the father.  
7 The risk is greater with respect to the fathers. It is  
8 lesser with respect to the mothers. But it is these  
9 physical-presence requirements that create the risk of  
10 statelessness, and therefore, this scheme cannot be  
11 justified as seeking to reduce a risk of statelessness.

12 If the Court has no further questions, thank  
13 you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Three minutes, Mr. Kneedler.

16 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

17 ON BEHALF OF THE PETITIONER

18 MR. KNEEDLER: Thank you, Mr. Chief Justice.

19 First, on the merits. The provision here  
20 furnished two substantial governmental interests. At  
21 the time the child is born, and there is only the mother  
22 that as a recognized parent, it is uncertain whether the  
23 child will ever be legitimated.

24 Congress has a substantial interest in  
25 conferring citizenship on that child at birth if it

1 concludes that there is a sufficient connection to the  
2 United States.

3 Congress also has a substantial interest in  
4 not divesting that child of citizenship if the child is  
5 later legitimated by an alien father. So there are two  
6 substantial interests that are furthered, and it is  
7 precisely tailored to take care of those two interests.

8 JUSTICE GINSBURG: But if you're concerned  
9 about the stateless children in the world, then -- if --  
10 if you have a problem with the father who can't transmit  
11 his citizenship in a country where women citizenship  
12 goes by who is the father.

13 MR. KNEEDLER: Well, it -- it -- if the --  
14 if the father later legitimates, he's put in the same  
15 position as if the -- if they were married at the time  
16 the child was born. And we know from 1401 that that --  
17 that that is a -- that that is a --

18 JUSTICE BREYER: But today there are --  
19 today there are lots of fathers who do look after their  
20 children. I don't say they do it perfectly, but they  
21 try.

22 MR. KNEEDLER: No, but all --

23 JUSTICE BREYER: Now, suppose just the words  
24 you said, take the same words, just put in "father"  
25 instead of "mother," and today why is it any different?

1 MR. KNEEDLER: Well, it -- it isn't  
2 different. I -- I just want to repeat again. When the  
3 father legitimates, there are two parents. In *Lehr v.*  
4 *Robertson* --

5 JUSTICE BREYER: I'm not talking about  
6 legitimacy. I'm talking about the ones -- a surprising  
7 number of people, unfortunately, never get married. And  
8 a lot of them do live abroad, and they do have children.

9 MR. KNEEDLER: Well, certainly --

10 JUSTICE BREYER: So that's one focus. And  
11 certainly your words applied where it is the mother.  
12 And all my question is, couldn't you take those same  
13 words and apply it where it is the father?

14 MR. KNEEDLER: No. I -- I think it's a  
15 critical importance in citizenship laws to have a legal  
16 occurrence in order to pass citizenship, and that's  
17 legitimation. Your suggestion that you could -- that  
18 the father could pass on citizenship without even  
19 legitimation, which this Court basically sustained on  
20 the --

21 JUSTICE BREYER: Doesn't (c) say that?  
22 Doesn't (c) say that?

23 MR. KNEEDLER: Yes. But -- but this is a  
24 question of remedy. And -- and to -- to -- but -- and  
25 also *Lehr v. Robertson*, if the father filed -- filed a

1 notice and -- or filed a document and got notice of the  
2 proceeding, he didn't get the veto power that the mother  
3 had before legitimation. He just got to be a parent  
4 too. And that's exactly what happens here when the  
5 father legitimates. He's not put in the same position  
6 as the mother because of two parents; it's a two-parent  
7 family.

8           With respect to remedy, let me point out at  
9 page 38 of our brief where the statelessness is  
10 addressed. It's clear the interests that I identify,  
11 that Congress wanted to ensure that the child would have  
12 citizenship at birth and not be divested.

13           CHIEF JUSTICE ROBERTS: Thank you, counsel.

14           The case is submitted.

15           (Whereupon, at 11:01 a.m., the case in the  
16 above-entitled matter was submitted.)

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