1   IN THE SUPREME COURT OF THE UNITED STATES

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3   RUBEN FLORES-VILLAR,   :

4   Petitioner   :

5   v.   :   No. 09-5801

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, November 10, 2010

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:06 a.m.

14   APPEARANCES:

15   STEVEN F. HUBACHEK, ESQ., San Diego, California; on

16   behalf of Petitioner.

17   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf of

19   Respondent.

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1   C O N T E N T S

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 1                P R O C E E D I N G S

 2                                    (11:06 a.m.)

 3           CHIEF JUSTICE ROBERTS:  We will hear

 4  argument next this morning in Case 09-5801,

 5  Flores-Villar v. United States.

 6               Mr. Hubachek.

 7           ORAL ARGUMENT OF STEVEN F. HUBACHEK

 8               ON BEHALF OF THE PETITIONER

 9               MR. HUBACHEK:  Mr. Chief Justice, and may it

10  please the Court:

11               In Nguyen, the Court approved the imposition

12  of legitimation requirement only upon fathers of

13  non-marital children born abroad.  That was based on

14  biological differences between men and women.  It

15  provided proof of parentage and proof of an opportunity

16  to make a relationship with the child that adhered in

17  birth as to the mother.

18               But here, the residential requirements that

19  are at issue here have no biological basis.  They set up

20  barriers to the transmission of citizenship by younger

21  fathers, but not younger mothers, and they are based

22  upon gender stereotypes that women, not men, would

23  care -- would care for non-marital children.

24               That scheme has been -- the Solicitor

25  General has attempted to justify that scheme by claiming
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 1   that Congress was concerned about statelessness, but the

 2   record doesn't support that claim. Both the 1935 Law

 3   Review article --

 4   JUSTICE SCALIA: What separates a stereotype

 5   from a reality? Do you say it is not true that if there

 6   is a legitimate -- illegitimate child, it is much more

 7   likely that the woman will end up caring for it than

 8   that the father would?

 9   MR. HUBACHEK: What I was saying --

10   JUSTICE SCALIA: That's not true?

11   MR. HUBACHEK: I think it is more likely,

12   but I think that empirical evidence has not carried the

13   day in gender discrimination cases.

14   JUSTICE GINSBURG: In all cases, it is true

15   in general, but there are people who don't fit the mold.

16   So a stereotype is true for maybe the majority of cases.

17   It just means that you say: This is the way women are,

18   this is the way men are.

19   MR. HUBACHEK: Absolutely, and this is

20   actually beyond just an empirical stereotype. The -- at

21   congressional hearings, it was said that the woman is

22   the sole legal parent of this child, totally excluding

23   the man, which basically dates back to the notion of

24   coverture where men were completely out of the picture

25   and women were the ones who were responsible.

1   So in addition to the fact that -- the

2   empirical portion of it, there is also just the notion

3   that the legal parent was the woman. And that was

4   specifically --

5   JUSTICE ALITO: Wasn't that said in relation

6   to the principle that only -- that where paternity was

7   not established, the child would be regarded as having

8   the citizenship of the mother under the law of virtually

9   every country, if not every country, at that time?

10   MR. HUBACHEK: Well, the law of many

11   countries was that citizenship did go through the

12   mother. But with respect to legitimation and this

13   statute, Congress drew a distinction between all -- all

14   parents of -- excuse me, all fathers of non-marital

15   children and those who are legitimate. This statute

16   applies only to those who are legitimate.

17   The very Law Review article that Congress

18   relied upon, according to the Solicitor General, says

19   that in the case of legitimation, citizenship goes

20   through the father. So the bottom line is that the

21   very -- the very article they relied upon said that in

22   one instance it goes through the mother, but in the

23   instance of the people who are actually affected through

24   this statute, those who legitimate, it goes through the

25   father.

1   And there are also a number of situations

2   under which mothers --

3   JUSTICE ALITO: Until there is legitimation,

4   it goes through the mother. It went through the mother

5   under the law in virtually every country, right?

6   MR. HUBACHEK: I respectfully disagree. At

7   the time, in 1940, when this statute was passed, there

8   were a number of situations where it wouldn't go through

9   the mother. In China and Japan, if the father was

10   merely known it would not go through the mother.

11   There were three dozen countries at this

12   time, including the English countries and those who

13   followed its law, in which if their female citizen gave

14   birth to a child somewhere other than in their country,

15   citizenship would not travel through that mother because

16   of the laws of those particular countries. There are

17   also stateless women.

18   So in all those situations, the citizenship

19   would not go through the mother. It would have to go

20   through the father, and this statutory scheme doesn't in

21   any way provide for that.

22   The scheme also creates severe risks of

23   statelessness, as is set out in the Statelessness

24   Scholar's brief, for married fathers. If a married

25   father who is married to an alien, the -- in those

1 situations, there are a number of countries that would

2 not allow the woman to transmit citizenship. So if the

3 father was precluded by laws such as they were in the

4 United States, that child would end up stateless as

5 well. So there is substantial risk of statelessness and

6 it continues today.

7   There are numerous countries that have

8 basically reinstituted that rule, that if the father is

9 merely known, citizenship would not transmit through the

10 mother. And those are primarily in the Middle East and

11 some of them in Africa, and those are detailed in the

12 Statelessness Scholars' brief.

13   JUSTICE GINSBURG: Mr. Hubachek, how do you

14 deal with the argument that, really, this is a

15 classification where the unmarried woman is being

16 favored, because the unmarried father is being bracketed

17 with the married couple? So it's kind of like

18 Matthews v. Heckler: The woman is getting a special

19 favor and the unwed father is treated like most people

20 who married -- couples who have children.

21   MR. HUBACHEK: This is not a case where

22 Congress was seeking to remedy any sort of past

23 discrimination against women, as was the case, say, in

24 Schlesinger v. Ballard. There was no discrimination

25 against women. Up until very shortly before this

1   statute was passed, it was clear under the State

2   Department practices that the non-marital children of

3   women did get women's citizenship, and it was also true

4   as to men. So there was no discrimination that was

5   being remedied in that situation.

6   JUSTICE SOTOMAYOR: But that doesn't answer,

7   I don't think, Justice Ginsberg's question, which is:

8   This appears to be an exception to a generalized

9   non-gender based requirement. Couples, male or female,

10 and fathers, unmarried fathers, are subject to five

11 years. Only unmarried mothers get the largesse of one

12 year. Why isn't -- why shouldn't everybody just be put

13 to the broader category rather than extending a largesse

14 to a greater number of people?

15   MR. HUBACHEK: The reason is, Justice

16 Sotomayor, is that we are not talking about an exception

17 here, the treatment that the non-marital mothers were

18 getting. That was the standard prior to the 1940

19 litigation -- 1940 legislation. There was no

20 significance residence requirement.

21   Then Congress imposed new residence

22 requirements because it was concerned about the foreign

23 influence in mixed marriages, meaning someone who was

24 married to an alien. In those situations, Congress

25 specifically said in the record that they were concerned

 1   that when those children were born abroad, that they

 2   would have foreign influence, that they would be more

 3   foreign then they were American. That's not --

 4   JUSTICE SOTOMAYOR: So doesn't the 5-year

 5   residency requirement address that? If we apply it

 6   generally, wouldn't the 5-year residency requirement

 7   honor Congress's concern about there being a substantial

 8   tie to the States?

 9   MR. HUBACHEK: Absolutely, it would. And

10   that -- for -- that concern is not applicable when you

11   are talking about two U.S. citizen parents to whom the

12   extended residence requirement didn't apply.

13   Non-marital mothers were assumed to be the ones who were

14   going to be raising the children without the influence

15   of an alien father.

16   The non-marital fathers are in the same

17   category as those, too. Those non-marital fathers who

18   raise their children on their own, as Petitioner's

19   father did in this case, are not subject to that type of

20   foreign influence, so they should be grouped together

21   with the women and with the two-citizen families,

22   because they have the lack of foreign influence.

23   So it's only as to the mixed-marriage

24   couples who are married where there is a foreign

25   influence problem, and they're the ones to whom the

1   expanded residence required -- was applied.

2   Now, with respect to the -- the Solicitor

3   General has raised concerns about the plenary power

4   doctrine. And I would argue that that doesn't apply

5   here for a couple of reasons.

6   First is, we are not talking about the

7   admission of aliens.

8   Second is that the Court in Chadha Zadvydas

9   said -- made clear that even when exercising that power,

10   that congressional -- excuse me -- Congress's power is

11   limited by constitutional limitations.

12   Now, with respect to the entry of aliens,

13   Congress made it very clear in passing this very statute

14   that they considered those people who gained citizenship

15   as of birth to be differently situated than aliens.

16   That was a tradition that dated back to 1350. In 1790,

17   Congress passed a statute saying that children born

18   abroad to citizens --

19   JUSTICE KENNEDY: Is -- is this your -- are

20   you taking this in the direction of an argument that

21   Congress gets less deference in determining nationality

22   than it does with admission to aliens?

23   MR. HUBACHEK: What I'm saying, Your Honor,

24   is that we are talking about the ability of a United

25   States citizen, Petitioner's father, to transmit

                              10

1   citizenship, and that that is a traditional interest.

2   Citizenship is extremely important and it's a tradition

3   that citizens have been able to do for years.

4   So yes, constitutional limitations should

5   apply when the -- when Congress is drawing distinctions

6   between men and women --

7   JUSTICE KENNEDY: But you -- you want us to

8   write an opinion that says Congress has less deference

9   when it considering -- when it determines who should be

10   a national of this country than it -- than when it

11   determines who should be admitted as an alien?

12   MR. HUBACHEK: Well, there is no tradition

13   dating back to 1350 for the admission of aliens.

14   It's -- it's --

15   JUSTICE KENNEDY: Are you asking us to write

16   that formulation in an opinion?

17   MR. HUBACHEK: Your Honor, what I'm saying

18   is that the -- that the due process guarantee of equal

19   protection is applicable in this context because the

20   citizens of the United States --

21   JUSTICE KENNEDY: If I -- if I take that as

22   a "yes" answer, what is your authority for that answer?

23   It seems to me that it ought to be just the other way

24   around.

25   MR. HUBACHEK: Well, Your Honor, my

1   authority for that answer is the tradition that I have

2   been discussing. Congress itself, in 1940, considered

3   people who gained citizenship by birth abroad as being

4   differently situated from aliens, aliens who naturalize.

5   In fact, they said that that was universally --

6   JUSTICE KENNEDY: Of course, but it was

7   Congress that made the distinction. But you are asking

8   us to say that Congress has less authority over this

9   essential issue as to who should be nationals in the

10 United States.

11   MR. HUBACHEK: Well, I think -- that's --

12 that's a --

13   JUSTICE KENNEDY: Maybe there is some

14 authority for that. Do you have any authority? Is

15 there something I can read that tells me that?

16   MR. HUBACHEK: Chadha Zadvydas says that

17 even though Congress has plenary power over the

18 immigration power. When it exercises that power, it has

19 to apply with constitutional limitations. This is the

20 first one of the Court's cases where --

21   JUSTICE KENNEDY: That was an alien

22 admissions case. You are talking about nationality.

23   MR. HUBACHEK: I'm talking about citizenship

24 being transmitted by a United States citizen. What we

25 are saying is that Petitioner's father, as a United

1   States citizen, has equal protection -- Equal Protection

2   Clause, protection against the discrimination, here

3   because a similarly-situated woman would be able to

4   transmit citizenship.

5   JUSTICE BREYER: Well -- I'm sorry. Go

6   ahead. Finish.

7   Are you finished?

8   MR. HUBACHEK: Yes, Your Honor.

9   JUSTICE BREYER: I didn't quite follow this.

10   As I understand it, on what -- say: On what remedy will

11   there be if you're right? This is what I don't

12   understand.

13   A child is born abroad. One parent is

14   American; the other is foreign. If the two are married,

15   that child is American only if the father or the

16   mother -- one or the other -- has lived in the United

17   States for now at least 2 years. It used to be more.

18   Okay? Now it's 5 years after the age of 16.

19   Now suppose they are not married, and

20   suppose the American is the father. Same rule.

21   Now suppose they are not married and the

22   American is the mother. Now it's not 5 years or 2

23   years; you only have to have lived here for one year.

24   Suppose I agree with you. I just don't see any sense to

25   that whatsoever. I can't figure it out. They made a

1   mistake about the immigration laws. Suppose I agree

2   with you.

3   Then why isn't the remedy, say: Okay,

4   whether it is the father or the mother, the general rule

5   applies. They have to have lived in the United States

6   for 5 years or for 2 years? Now 2 years.

7   MR. HUBACHEK: There are a couple of reasons

8   at least for that, Your Honor. First is that there is a

9   structural limitation here to imposing a levelling-down

10   type remedy, because citizenship cannot be taken away

11   once it's granted. So the Court can't remedy the

12   problem here --

13   JUSTICE BREYER: Some people were lucky, and

14   they are already citizens under this, and there we are,

15   because their mother lived in the United States for one

16   year. Those already are citizens. Nobody is going to

17   take that away. We are just looking at a statute.

18   And in the first part of the statute, they

19   have in section (g) of 1401, the first rule I told you

20   about. In 1409(a), the second rule, and in 1409(c), the

21   third rule.

22   Okay. If you are right about this, and it's

23   totally unfair and there is no good reason whatsoever

24   for distinguishing on the basis of gender, we strike

25   (g). Okay?

14

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1   Now, that would seem to be normal, but that

2   isn't going to help your client. So how do you get to

3   some other thing that instead of striking (g)? What we

4   do is strike all of (a) and strike the whole thing

5   before, and shove them all into (g), which isn't so easy

6   to do with this language. How do you get there?

7   MR. HUBACHEK: Well, the first thing is, is

8   that this statute contains a severability clause. Very

9   similar to --

10   JUSTICE BREYER: Fine. So we strike (g).

11   What I'm worried about is, you want me to strike (a) --

12   sorry, we strike (c). And you want me to strike 1409(a)

13   and 1401(g), and shove the people who are there into

14   (g), which is a little tough to do in the English

15   language. But I want to know how you get there.

16   MR. HUBACHEK: By -- by extension, Your

17   Honor. And --

18   JUSTICE GINSBURG: First, can we be clear

19   about what you're saying? I thought your argument was,

20   you are not touching married couples.

21   MR. HUBACHEK: That's correct.

22   JUSTICE GINSBURG: So that you are talking

23   about equating the unmarried father to the unmarried

24   mother. Do you have -- is there any notion of how many

25   people we're talking about?

1   I mean, in these extensions versus the

2   normalization, where the Court generally extends when

3   there is a small class to be covered, a small class was

4   left out, and in a large class is already covered. And

5   the reasoning has been: Well, my goodness, Congress

6   wanted to take care of that larger class; it would be

7   most destructive of the legislative will if we said you

8   can't cover that larger class.

9   So as a group of unmarried mothers as

10   against unmarried fathers, do -- do you have any notion

11   of what the numbers would be?

12   MR. HUBACHEK: Justice Ginsberg, I don't

13   have any statistics to provide the Court.

14   CHIEF JUSTICE ROBERTS: Maybe this is --

15   maybe you would like to answer Justice Breyer's

16   question.

17   MR. HUBACHEK: Yes, Justice Breyer. Anyway,

18   the remedy we are requesting is extension. In Westcott

19   and in Heckler, the Court looked at language in the

20   severability clause that was similar to this, and also

21   in Justice Harlan's concurring opinion in Welsh, and

22   said that type of language in a severability clause

23   gives courts power to grant an extension remedy.

24   So that's what we are requesting. We're

25   requesting --

1   JUSTICE BREYER: Now, there's another slight

2   problem with that, I would think. Reading this

3   carefully, which I hope I have done, it seems to me it

4   may also discriminate against fathers. And that's

5   because (c) says that the woman has to have been

6   physically present for a continuous period of one year.

7   I read at least one article that says that word,

8   "continuous," doesn't appear with the fathers, and that

9   they really mean it. That is, if somebody is living

10   down in Texas and they happen to go visit on Christmas

11   their father, who is -- or their grandmother or cousin

12   or something who is across the border for 5 minutes,

13   that they cannot take advantage of this clause (c).

14   Is that true?

15   MR. HUBACHEK: I don't know the answer to

16   that, Justice Breyer.

17   JUSTICE BREYER: I will ask the (g) that,

18   but if it is true -- if it is true, then -- then I would

19   think that the fathers are really worse off. I don't

20   know if that helps you. And maybe it could turn out

21   that that's really a problem.

22   If it is really a problem, then the fathers

23   are worse off. Does that help you with the remedy?

24   MR. HUBACHEK: Traditionally in immigration

25   law when you have continuous requirements, if it's a

1   short trip, casual trip, you know, then those -- that

2   requirement is not considered to have been violated.

3   If the -- if -- I have to admit I'm having a

4   hard time following the question.

5   JUSTICE BREYER: The question is: I'm

6   looking for a way -- I'm trying to be helpful in my

7   question. I'm looking for a way that you can get to

8   your result. Now I'm not saying I would do it, but I

9   just want to know what the best way is of getting to

10   that result, where you shove everyone into (c) instead

11   of just cutting (c).

12   MR. HUBACHEK: Well, the -- the best way is

13   to follow the Court's tradition in the benefits cases

14   such as Wengler and Wiesenfeld, where the Court granted

15   an extension remedy and basically treated --

16   JUSTICE BREYER: That would help you. Is

17   there a reason for doing that?

18   MR. HUBACHEK: Well, the reason for doing

19   that is, is that the language that's contained in the

20   severability clause is similar to what the Court has

21   already said allows an extension remedy. And the other

22   problem is, is that if the Court doesn't grant an

23   extension remedy, it leaves Petitioner basically without

24   a remedy, that there will be individuals who have been

25   able to have a --

1   CHIEF JUSTICE ROBERTS: No, he would have a

2 remedy. The remedy for an equal protection violation is

3 to treat everybody the same. You can do that either by

4 lowering the people who are given a benefit or by

5 increasing the people who aren't. So he has a remedy.

6   His objection is, we're not being -- my

7 father and my mother are not being treated the same.

8 That's all of the relief he is entitled to.

9   MR. HUBACHEK: You are absolutely right,

10 that that is -- that is the state of the law. And my

11 point is that structurally, that remedy is unavailable

12 here, because you can't take away the citizenship from

13 the people who have already gotten it.

14   And the notion that you can grant us

15 prospective relief as discussed in the Solicitor

16 General's brief doesn't make any sense, either, because

17 number one, this statute, the one we are talking about

18 today, doesn't apply past people who were born before

19 1986.

20   But the thing is that if somebody were to

21 come into court after an opinion that said just that

22 were issued -- someone were to come into court and say,

23 I want to claim citizenship through my mother, that

24 person would still be entitled to citizenship because

25 it's as of the day of birth. So this is a retroactive

1   provision.

2   So the prospective relief notion really

3   doesn't makes any sense in this context, because the

4   equal protection violations have basically all already

5   occurred at the time that the person who would make a

6   citizenship claim was born, and we would still be left

7   in a situation where Petitioner's father would say that

8   I was unable to transmit citizenship to my son and a

9   woman who was similarly situated was able to. So that

10   type of remedy is unavailable.

11   In the Court's decision in Iowa v. Bennett,

12   the bank case, they actually ordered a refund of the

13   taxes that were collected in a discriminatory manner

14   dating back in time. So if you could factor out -- if

15   you could make a relief that would take away the benefit

16   that others had received, then I would agree that that

17   is available, but that's not possible in this situation.

18   JUSTICE GINSBURG: Mr. Hubachek, I think the

19   Chief asked you: If it's an equal protection violation,

20   then the Court just says it violates equal protection,

21   but whether it goes up or down, the Court has to give a

22   temporary solution, because the legislature can't be

23   convened on the spot. And the Court actually did go

24   through that exercise, extension versus invalidation,

25   most conspicuously in Califano -- Westcott, in the

1   Westcott case. It says, yes, that's what we have been

2   doing in all these cases.

3   In Sarah Frontiero's case, we didn't say:

4   You've been discriminated against; Congress, you fix it.

5   We said: You get the quarters' allowance that up until

6   now has been available only in male officers. And in

7   Wiesenthal, the father got the same child and care

8   benefits as the mother. So the Court was making a

9   decision for extension; it recognized it had to do that.

10   MR. HUBACHEK: Absolutely. And in many of

11   the benefits cases, the same -- the same analysis was

12   available and that's the analysis that we are asking

13   that the Court apply here. But we're also making --

14   JUSTICE SCALIA: Mr. Hubacheck, you are

15   asking, I think, that the Court pronounce your client to

16   be a United States citizen. Isn't that the only

17   pronouncement from -- form the Court that is going to do

18   your client any good?

19   MR. HUBACHEK: Well, Justice Scalia --

20   JUSTICE SCALIA: Unless he's a United States

21   citizen.

22   MR. HUBACHEK: This is a criminal case, so

23   technically what we are asking is for a reversal of the

24   judgment and opportunity to present this --

25   JUSTICE SCALIA: A reversal of the judgment

1   on the grounds that your client is a United States

2   citizen, right?

3   MR. HUBACHEK: That it would be possible for

4   him, on these facts, to become a United States citizen,

5   yes.

6   JUSTICE GINSBURG: That he is a United

7   States citizen.

8   JUSTICE SCALIA: That he is, not that --

9   that he is. That he is. Do you have any other case

10   where a Court has conferred citizenship on someone who,

11   under the statutes as written, does not have it?

12   MR. HUBACHEK: Well, that was one of the

13   issues that was debated, of course, in the Nguyen and

14   Miller cases, and the Court has not said that yet but it

15   can in this case.

16   JUSTICE SCALIA: Never done.

17   MR. HUBACHEK: That's correct. That's

18   correct, but it can in this case, for a number of

19   reasons. Number one is the fact that this severability

20   clause is applicable to this claim. Congress actually

21   passed a statute, 1421(d), in this same statutory

22   scheme, that said when we are talking about

23   naturalization -- the naturalization of aliens, then you

24   cannot get naturalization under those circumstances any

25   other way then what's set out in this statute. They

22

1   didn't say that as to claims of citizenship as of birth.

2   So there is a negative implication,

3   basically, that they -- that they were not precluding

4   this type of remedy as to a citizenship claim where we

5   are claiming an equal protection violation.

6   The second point is that if the Court is

7   unable to grant that remedy, that would leave an equal

8   protection violation in place, and as Justice Harlan

9   made clear in Welsh --

10   JUSTICE SCALIA: Unless -- unless we -- we

11   solve the violation the other way, by saying that the

12   father gets the shorter period that the -- than the

13   mother has.

14   MR. HUBACHEK: Well, again --

15   JUSTICE SCALIA: I'm sorry, that the mother

16   gets the longer period than the father has.

17   MR. HUBACHEK: Right. And I think if the

18   Court --

19   JUSTICE SCALIA: You say we can't apply that

20   retroactively. Well, okay; we don't apply it

21   retroactively. The people that have citizenship cannot

22   constitutionally be deprived of it, but for everybody

23   else, it's okay.

24   MR. HUBACHEK: Even -- even prospectively,

25   Your Honor, because this statute says you have

1 citizenship as of birth. So even if the Court were to

2 render that decision and someone were to make a claim,

3 they could still say: I had citizenship of as of birth;

4 i.e., whenever I was born, which is before the Court's

5 decision. So there really -- that would be no remedy at

6 all. It's a remedy --

7   JUSTICE KENNEDY: But any of -- of the

8 remedies that you are discussing with Justice Scalia

9 involves this Court in a highly intrusive exercise of

10 the congressional power.

11   Let me just ask you this as an analytic

12 matter, or as matter of logical priorities. We usually

13 talk about substance first, remedy second. Do you think

14 it's permissible, logically, for us to say that because

15 the remedies here are so intrusive, that bears on our

16 choice of whether we or not we use intermediate or

17 rational basis scrutiny, and because the remedies are so

18 difficult, we are going to use rational basis scrutiny?

19 Is that a logical way to proceed?

20   MR. HUBACHEK: I don't think so. I think

21 the Court has traditionally has said that the -- the

22 questions of a right and whether or not there exists an

23 opportunity to make a claim and the remedy for it are

24 analytically distinct. So I don't believe --

25   JUSTICE GINSBURG: And it also said that the

1   remedy can't be complicated, because courts are not set

2   up to do that. I mean, that's what Westcott said. The

3   court can go one way or another way; it can't do any

4   fine-tuning, because it's there as a temporary

5   legislature. The ball goes back to Congress to do what

6   it will, but it's just, in the interim, we need a

7   solution.

8   MR. HUBACHEK: That's correct, and certainly

9   Congress could do that. And the Solicitor General's

10   brief makes clear that what was being balanced here was

11   concerns about -- according to them, anyway -- concerns

12   about statelessness on the one hand and connection to

13   the United States on the other.

14   If Congress hadn't assumed based on gender

15   stereotypes that men weren't caring for children, then

16   it would have -- it would have been able to put them in

17   the same category as women, because they would

18   understand that both of them would be caring for

19   children.

20   And it's not just the -- the situation in

21   1940. As time has gone on, I believe in the National

22   Women's Center brief it points out that the number of

23   men who are raising children in single-parent families

24   is increasing over time. So the problem, if anything,

25   is getting worse.

1   JUSTICE GINSBURG: But Congress did make at

2   least some change, right? It -- this is -- it's no

3   longer five years; it's only two years, right?

4   MR. HUBACHEK: The current system is five

5   years, two years after the -- the age of 16 -- I'm

6   sorry, after the age of 14. And of course, that age

7   requirement here completely precluded

8   Mr. Flores-Villar's father from being able to transmit

9   citizenship because of his age. That kind of complete

10   preclusion would never apply to a woman who is similarly

11   situated.

12   If the Court doesn't have any questions, I

13   will reserve my time.

14   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15   Mr. Kneedler.

16   ORAL ARGUMENT OF EDWIN S. KNEEDLER

17   ON BEHALF OF THE RESPONDENT

18   MR. KNEEDLER: Mr. Chief Justice, and may it

19   please the Court:

20   Congress in deciding who among the various

21   people born abroad should be made citizens of the United

22   States has to take into account myriad factors that may

23   bear on that question and its judgment. They include

24   importantly Congress's prediction in the case of

25   conferring citizenship at birth, what would be that

1   person's likely connection to the United States.

2   Congress also has to consider the interaction with the

3   laws of other countries where these people may be born.

4   It may take into account equities, potential

5   statelessness or dual nationality. These are

6   complicated questions to which the courts should defer.

7   Now, in the particular --

8   JUSTICE SOTOMAYOR: Intermediate scrutiny

9   and -- is not without some deference.

10   MR. KNEEDLER: Excuse me.

11   JUSTICE SOTOMAYOR: Unless we apply strict

12 scrutiny, which no one is arguing for, the question is,

13 is it rational basis deference or is it some

14 intermediate scrutiny, correct?

15   MR. KNEEDLER: Yes. And we believe that

16 under this Court's decisions, particularly in Fiallo v.

17 Bell and the cases discussed in that case, that it

18 should be rational basis for --

19   JUSTICE SOTOMAYOR: Well, but you can't

20 really mean that because we can put up a hypothetical

21 that is very simple and then you'll explain to me why a

22 U.S. citizen should be burdened in this way and the

23 hypothetical is, let's assume Congress determines that

24 there are too many foreign-born children of U.S.

25 citizens coming into the United States, and that those

27

1 foreign-born children, those born of women are placing a

2 greater burden on our economic system. They need more

3 care for reasons that Congress determines analytically

4 or statistically. They are spending more money -- more

5 government money. And Congress passes a rule that says,

6 only the foreign-born children of men can come into the

7 country, not of women. Wouldn't that be a rational

8 basis?

9   MR. KNEEDLER: I think the answer to that

10 question lies in the Court's formulation of the test

11 that is applied in this particular context, and that is

12 the formulation drawn from Kleindienst v. Mandel that

13 was articulated in Fiallo v. Bell, and that is that

14 there has to be a facially legitimate and bona fide

15 reason.

16   JUSTICE SOTOMAYOR: There is a facially

17 legitimate bona fide reason.

18   MR. KNEEDLER: I think the Court could have

19 no trouble concluding that an arbitrary choice between

20 men and women --

21   JUSTICE SOTOMAYOR: What's arbitrary about a

22 government saying, I want to spend less money on a new

23 citizen?

24   MR. KNEEDLER: The -- the ultimate reason

25 may be legitimate, but I think the facial legitimate

28

1   test also encompasses means not just end, and if

2   Congress is just arbitrarily choosing between men and

3   women or people of a different race, I think given this

4   Court's tradition it could conclude that those would be

5   impermissible bases under the well-established test, but

6   for the reasons we say in our brief we don't --

7   JUSTICE GINSBURG: What well established

8   test?

9   MR. KNEEDLER: Fiallo v. Bell for -- and the

10   cases underlying it and we also think --

11   JUSTICE SOTOMAYOR: Is that the rational

12   basis plus test you are talking about?

13   MR. KNEEDLER: You could call it that or you

14   could call it a facially legitimate --

15   JUSTICE SOTOMAYOR: So now we're going to

16   just continue sort of tweaking the definitions and

17   creating more variations on our review standard?

18   MR. KNEEDLER: I think it is -- it is a test

19   that this Court has articulated in Fiallo v. Bell and

20   Kleindienst v. Mandel to address this very situation,

21   including a situation where asserted constitutional

22   rights of U.S. citizens in this country are being

23   claimed. And we agree with Justice Kennedy that the

24   standard should not be more demanding, but rather if

25   anything it should be less demanding where the question

1   is whether someone should be made a citizen.

2   JUSTICE SOTOMAYOR: It's hard here because

3   both the father -- this father, but many fathers and

4   mothers are actually U.S. citizens who want to bring

5   their children over as U.S. citizens. So, if the father

6   was making the claim here, you would still argue it was

7   a rational basis test even though he's a U.S. citizen

8   and entitled to all the protections of the Constitution?

9   MR. KNEEDLER: We would argue for the

10   facially legitimate -- and that was the case in Fiallo,

11   in which the plaintiffs included U.S. citizens, children

12   and fathers, claiming that, in a very parallel situation

13   claiming that that special privileges for illegitimate

14   children to reunite with the mother worked an

15   unconstitutional discrimination against the fathers of

16   such children. And it was U.S. citizen fathers and

17   children who were among the plaintiffs and the Court

18   nonetheless said that this is -- there is no

19   constitutional right to pass citizenship, this is a

20   question of Congress's judgment about who it believes

21   should be made citizens. And one of the important

22   factors Congress has looked at is connection to a U.S.

23   citizen that is in turn a proxy for what the likely

24   connection to the United States will be.

25   JUSTICE BREYER: I understand that, but what

1   you are doing is applying a lesser standard to gender

2   discrimination than is ordinarily applied to gender

3   discrimination. Now, is there any reason to do that? I

4   think that was the thrust of the question.

5   MR. KNEEDLER: Well, that was the issue.

6   JUSTICE BREYER: All right. Now fine.

7   JUSTICE SCALIA: In Fiallo v. Bell.

8   JUSTICE BREYER: If it's the government's

9   position you do, does the same thing apply to racial

10   discrimination? Do you also apply a lesser standard to

11   racial discrimination?

12   MR. KNEEDLER: I think the facially

13   legitimate standard in Fiallo v. Bell would render a

14   reliance on race.

15   JUSTICE BREYER: This is suddenly is cutting

16   a big hole in the Fourteenth Amendment.

17   MR. KNEEDLER: No, I don't think so because

18   I think that same principle would be given effect in the

19   way --

20   JUSTICE GINSBURG: First, in Fiallo we were

21   dealing not with citizens, this is someone, a

22   resident -- could be a resident alien wanting to bring

23   in a parent or a child. So it wasn't -- that case

24   wasn't about who was the citizen at birth.

25   MR. KNEEDLER: It wasn't, but in the eyes of

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 1   the Constitution, anyone born abroad is an alien unless

 2   and until Congress has passed a statute making them a

 3   citizen. So analytically, doctrinally it is the same

 4   question.

 5   JUSTICE GINSBURG: Congress has passed --

 6   has passed a statute making certain people citizens and

 7   the question is, has it done so in a way that is

 8   compatible with equal protection. But remind me too,

 9   because it's not in the front of my head, I thought that

10   classification that was dealt with in Fiallo, wasn't it

11   unwed parentage rather than gender?

12   MR. KNEEDLER: But there were claims based

13   on both illegitimacy and gender and there were equal

14   protection claims based on both. But if I could move on

15   to the way that the statute operates because we think it

16   satisfies either standard of review in this case. And

17   if I could just step back for a moment. As I mentioned,

18   there are a number of factors that Congress takes into

19   account in crafting a statute like this. 1401 deals

20   with married couples and where both parents are

21   citizens, all that is required is that one of the

22   parents have resided in the United States prior to the

23   birth.

24   Where you have mixed parentage, the

25   background of the enactment of this in 1940 and

1   reenactment in 1952 and continued up to this present day

2   is Congress was concerned that such a child may not have

3   the requisite connection to the United States. They

4   have a connection to the parent, but may not have a

5   connection to the United States such that Congress

6   wanted to grant citizenship to that person. So what

7   Congress did in the mixed citizenship situation was to

8   require prior residency of the parent as a talisman, as

9   the Court said in Rogers v. Bellei, for a connection to

10   the United States of ten years, five years after the age

11   of 14. Congress has liberalized that, but that was the

12   basic thought. Where you have unwed parents, in 1409(a)

13   what Congress did was to follow general principles of

14   the law of illegitimacy or children born out of wedlock,

15   if a father legitimates a child then it's as if the

16   child was born in a marriage, and the rule in 1401 with

17   respect to marriage applies. That is true whether both

18   parents are citizens or in a mixed marriage situation.

19   If a father legitimates a child and both parents are

20   citizens, then not the one, then the child benefits from

21   the rule that if either parent was present in the United

22   States before birth he's a citizen, doesn't have to

23   satisfy the one year unbroken residency requirement

24   under 1409(c). If it's mixed parentage, and the father

25   legitimates, then the rule applicable to married mixed

1   citizen and parents applies as if the child had been

2   married at the outset. It's a perfectly sensible and

3   provision or approach and consistent with the way this

4   has been done. What Congress did with respect to the

5   mother of the child born out of wedlock where there has

6   not have been legitimation is to confer citizenship on

7   the basis of a one year residency. Now, as counsel for

8   the Petitioner explains, a mother in that situation who

9   at the moment of birth, as this Court understood in

10 Nguyen, that mother may be the only either legal parent

11 or the only parent at the moment of birth with the

12 requisite connection to the child to have an opportunity

13 for this sort of connection at birth. So the mother in

14 that circumstance is very much like the two citizen

15 parent family, the only parents are parents with a

16 connection to the United States.

17   JUSTICE GINSBURG: Mr. Kneedler, if -- if

18 the classification then were that we want to encourage,

19 because it's good for society, father/child

20 relationships, so we are going to give that advantage,

21 that is 1 year for fathers, and we're going to put the

22 mothers together with the married couples, would that be

23 compatible with equal protection?

24   MR. KNEEDLER: Well, I think that would

25 be -- that would depend upon a -- a -- a different

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1   rationale. I mean here what Congress --

2   JUSTICE GINSBURG: I told you what the

3   rationale was. The rationale was that we have lots of

4   statutes like the Family Medical and Leave Act that

5   attempt to encourage fathers to have a relationship with

6   their children, to be a legal parent, so that's the

7   rationale of this classification. They want to

8   encourage the father/child relationship, therefore, they

9   gave this 1 year is enough for the -- for the father.

10 And everything else is the same, except it's the father

11 who gets the 1 year, and the mother who gets the -- what

12 is it, 10 years --

13   MR. KNEEDLER: I think that would be a more

14 difficult question, because Congress would be -- would

15 be responding based on the -- on the expected behaviors

16 and talents maybe of men and women. What's different

17 here is that's not what it's -- that's not the basis for

18 this classification. This --

19   JUSTICE GINSBURG: Well, it would you, in

20 fact, acting on the basis of what hasn't been the

21 general pattern but what is becoming the new pattern.

22   MR. KNEEDLER: Right. And in that

23 situation, Congress I think could be expected and maybe

24 should be required to do that in a gender-neutral basis

25 because it is premising it on the behavior, but -- but

1   what --

2   JUSTICE GINSBURG: So there is, even though

3   we are still dealing with citizenship, you recognize

4   that there are categorizations that would run afoul of

5   equal protection?

6   MR. KNEEDLER: Well, that -- and -- and the

7   question would be whether that's a facially legitimate

8   rationale. And -- and I would want to know -- I think I

9   would want to know more about what the record for such a

10   justification would be, et cetera. But I -- but I would

11   like to --

12   JUSTICE GINSBURG: The same as in the Family

13   Medical Leave Act, we are making it a parental leave

14   instead as if it had been historically a maternity.

15   MR. KNEEDLER: Right. And in -- in that

16   situation, I think it would be expanding on a

17   gender-neutral basis rather than singling out one parent

18   or the other. But I -- but I would like to finish the

19   description, I have because it's incomplete and there is

20   a critical piece left out, and that is that counsel for

21   Petitioner says that if -- if a father legitimates an

22   out-of-wedlock child, he is in the same position or that

23   child is in the same position as a child in an

24   out-of-wedlock mother, and that is not likely to be so,

25   and it's not likely to be so at birth. And this is the

1   reason why, is when a child is legitimated, there are

2   two parents who have the strong connection that was

3   described in this Court's decision in Nguyen to that

4   child, the U.S. citizen father, but also the mother, the

5   alien mother in that country. So you have two parents

6   whose interests have to be taken into account.

7   Whereas in the situation Congress was

8   addressing in 1409(c), the situation of a child born out

9   of wedlock where there was no -- at the moment of birth,

10   likely to be no recognized father, have you only the

11   mother. If we -- if we think of this in -- in parallel

12   to the illegitimacy -- the cases involving illegitimates

13   that this Court has had in a domestic context, I think

14   that is instructive. In a case like Lehr, where the

15   question was whether the father of a child born out of

16   wedlock should have received notice of a prospective

17   adoption, the Court explained in that case that the

18   father had not taken the steps necessary to form the

19   relationship with the child, and therefore, be -- be a

20   father in the eyes of the law, then the mother alone --

21   JUSTICE BREYER: You have -- we have the

22   briefs that are filled with, you know, pros and cons

23   about the statelessness business and whether it was

24   real, and I've read those and I would like your comment

25   on those, but I want to comment, too, on this very --

1   what may be a very minor thing, but I did notice,

2   prodded by an article, I have to say, that -- that for

3   the women there is a sense in which its tougher --

4   MR. KNEEDLER: Yes.

5   JUSTICE BREYER: -- and that's because of

6   the continuous period.

7   Now, I guess it depends on how that is

8   enforced, but there could be a class of people, say,

9   living in the border, near Canada or near Mexico where

10   they step across the border on Christmas day to say

11   hello to my cousin, and -- and does that stop them from

12   taking advantage of that? Is it -- in other words, how

13   is this enforced? Is it enforced with that rigidity?

14   MR. KNEEDLER: It does have to be continuous

15   residency, you're correct --

16   JUSTICE BREYER: Which means that you can't

17   stop with across the border? You can't --

18   MR. KNEEDLER: There might be minor

19   exceptions where you go across the border in Christmas

20   Eve. That I can't be --

21   JUSTICE BREYER: Is there -- is there --

22   well, is there or isn't there, to your knowledge? Is

23   this enforced with total rigidity or is it enforced that

24   maybe you could go once a month or you could go on your

25   birthday, or what is the answer?

1   MR. KNEEDLER: I think in that situation,

2   no. And the example that I was --

3   JUSTICE BREYER: In that situation you

4   cannot go across the border?

5   MR. KNEEDLER: The example I was given when

6   I asked this question was, if you have somebody who's

7   on -- who lives in Mexico and commutes to the United

8   States, you know, 5 days a week, you can under -- under

9   -- under 1401, you can add up each day, and get to a

10   total of 5 or 10 years of continuous -- excuse me -- of

11   actual physical presence, that would not satisfy the

12   continuous --

13   JUSTICE BREYER: All right. So, if it's

14   tough then and really is meant to be tough, then there

15   is a -- what is the rationale for treating women in this

16   respect worse than treating men?

17   MR. KNEEDLER: Congress -- the 1-year

18   provision.

19   JUSTICE BREYER: The 1 year, I grant you,

20   the time 1 year is treating them better than the time 5

21   years. But the word "continuous," it's really tough is

22   what your answer leads me to believe, and they really

23   mean it. I mean, then that's treating them worse than

24   treating the men. And I would like to know what is the

25   rationale for treating them worse?

1   MR. KNEEDLER: Congress -- Congress

2   selected, because while I said the mothers are like the

3   two-citizen family or two-citizen parents in the sense

4   that only U.S. citizens are the parent and you have some

5   connection, Congress was balancing the duration of that

6   connection or taking into account the duration of that

7   connection and it chose to make it a little bit tougher.

8   And I -- I think that is perfectly legitimate, because

9   Congress -- because you only have one parent and

10   Congress was deciding, well if somebody has been here

11   for a continuous period of 1 year, then there -- then

12   there is probably a greater likelihood that that person

13   will -- will have roots here then, for example, the

14   other situation where if you had a child born abroad and

15   came home in the summers, that child may not think of

16   himself or may not be regarded as an American in the

17   same way.

18   So, what Congress was focusing on a -- on a

19   period of longer duration, which in its judgment

20   could -- could give rise to, Congress believed, a

21   greater connection to the United States.

22   CHIEF JUSTICE ROBERTS: Counsel, what if --

23   if the Court were to determine that this does violate

24   the Equal Protection Clause, and the court were also to

25   determine that this is not a case that should be the

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1   first one in history in which it grants naturalization,

2   what do you think the Court ought to do?

3   MR. KNEEDLER: I -- I think the Court ought

4   to strike the eligibility of -- of anyone to get

5   citizenship on the basis of 1 year. I think it could --

6   should constrict the -- the class to those specifically

7   governed by 1401 --

8   CHIEF JUSTICE ROBERTS: On the ground that

9   it violates equal protection.

10   MR. KNEEDLER: And it is a solution -- it's

11   a remedy --

12   CHIEF JUSTICE ROBERTS: What about your

13   friend's point that that retroactively deprives people

14   of citizenship that we would be saying they should have

15   gotten if the Equal Protection Clause had been enforced.

16   MR. KNEEDLER: I -- I -- I think this Court

17   could legitimately take into account the -- the

18   conferral of citizenship and the reliance on that. I

19   think it's parallel to -- to Heckler v. Matthews, where

20   the Court upheld a statute in which Congress took

21   account of reliance interest that had built up on

22   your --

23   CHIEF JUSTICE ROBERTS: Right. But here, of

24   course, under my scenario we don't have a situation

25   where Congress has addressed -- addressed the problem.

1   So what do we do? If somebody under the theory that we

2   say this person should not have been denied citizenship

3   because of the unequal protection in the law, and he

4   comes in and it's the same situation, he's going to be

5   deported for not being an American citizen and he says

6   I'm an American citizen.

7   MR. KNEEDLER: I think -- I think.

8   CHIEF JUSTICE ROBERTS: Does he get the

9   benefit of that or not?

10   MR. KNEEDLER: No, I think he does not. I

11   think -- I think the answer is that the -- and -- and

12   partly for the reasons that you alluded to and

13   Justice Scalia mentioned, we do not think that a court

14   can properly grant U.S. citizenship, and that that

15   should enforce -- excuse me -- inform the remedy, and

16   it -- but for the people who have been granted

17   citizenship, I think the solution would be to invalidate

18   the 1-year residency requirement.

19   JUSTICE SCALIA: But why -- why would we

20   grant that remedy when it doesn't do this Petitioner any

21   good whatever. It's -- it's a remedy that doesn't

22   remedy.

23   MR. KNEEDLER: Well, I suppose -- I

24   suppose --

25   JUSTICE SCALIA: We are -- we aren't

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1   granting relief that doesn't provide relief.

2   MR. KNEEDLER: I suppose -- I suppose the

3   Court could -- could decide that at the outset, that it

4   would not be appropriate to grant that relief and not

5   go -- and not go any further.

6   CHIEF JUSTICE ROBERTS: The reason it

7   doesn't grant that relief is somewhat unusual in this

8   case. It only doesn't grant him relief because of the

9   third-party standing. He doesn't care whether he's

10   treated equally or not; he just wants to be -- claim the

11   benefit of citizenship.

12   The person where he would get relief is if

13   it were the father, because the relief that he is

14   entitled to is to be treated equally. That's it.

15   The relief this person is asking for is not

16   to be deported. And so the problem of the relief being

17   granted is really complicated by the fact that it's a

18   case of third-party standing.

19   MR. KNEEDLER: Right. I -- I agree with

20   that as well, which I think is all the more reason for

21   the Court to be cautious about -- about entering into

22   this. I think that --

23   JUSTICE GINSBURG: Mr. Kneedler, in

24   answering the question that way, I know you are familiar

25   with the Wiesenfeld, case, and the question was, this

 1   was a father who was denied benefits to take care of a

 2   -- a child whose mother died at childbirth. And the

 3   Court came out a unanimous judgment but split three ways

 4   on why. And one of the members of the Court said, this

 5   is discrimination against the child, even though the

 6   classification was -- it's called a mother's benefit --

 7   it's discrimination against the child because it should

 8   make no difference at all whether the missing parent is

 9   female or male, that that was utterly irrational.

10   That was the Chief -- that was then Justice

11   Rehnquist's concurring opinion in Wiesenfeld. So he

12   seemed to think that the discrimination was against the

13   child and that that counted for equal protection

14   purposes.

15   MR. KNEEDLER: Well, here the only claim

16   that has been raised is an equal protection violation of

17   the parent's asserted rights.

18   JUSTICE GINSBURG: Well, that's what --

19   Steven Wiesenfeld, the father was the plaintiff, but the

20   Court -- at least one justice's rationale was that the

21   discrimination is really against the child, but the

22   father can raise him --

23   MR. KNEEDLER: Well, insofar as any claim of

24   discrimination by the child, I think, since it's not

25   based on the child's gender, I think that would clearly

1   be a rational basis or facially legitimate standard; and

2   Justice O'Connor's opinion in Miller v. Albright

3   addressed the rational basis there.

4   And here, this is not just based on the

5   gender of the parent, it's based on the -- on the

6   complexities in the legal history with respect to

7   illegitimacy, and -- and how children born out of

8   wedlock are dealt with, which again turns not on -- on

9   stereotypes of behavior or talents, but on longstanding

10   legal regimes not just in this country but in -- in

11   other countries, that until the father does something to

12   have a meaningful relationship, the mother is the -- is

13   the only legal parent, or in the terminology of this

14   Court's decision in Nguyen, the parent who is likely to

15   have the meaningful relationship.

16   Once the father comes forward in a case like

17   Lehr, the result is not that the father gets a veto

18   power or that that only the father's interests are taken

19   into account; the answer is that you have two parents

20   whose interests are taken into --

21   JUSTICE GINSBURG: That's a case where

22   mother versus father. But here it's a single parent.

23   This is not a case where the father is doing something

24   that the mother regards as disadvantageous. That was in

25   the Lehr case.

1   MR. KNEEDLER: No --

2   JUSTICE GINSBURG: And you said something

3   about -- this has nothing to do with stereotypes, this

4   is the way the law was? But wasn't the law shaped

5   because of the vision of the world of being divided into

6   married couples, where the father is what counted, and

7   unwed mothers, where she was -- they say both father and

8   mother, because the law didn't regard him as having any

9   kind of obligation?

10   MR. KNEEDLER: Well, again, I think this is

11   the issue the Court addressed in Nguyen, in which the

12   Court -- the Court said that there is -- there is a

13   difference at the moment of birth in the potential and

14   therefore the likelihood of a -- of a connection of

15   child to parent at the moment of birth that justified

16   the requirement that -- that the father take a step to

17   legitimate the child, in order to be able to -- to be on

18   an equal footing with the mother with respect to -- to

19   the rights.

20   And here the residency requirement is what

21   measures the connection of the parent to the United

22   States, not the child to the parent; but we think the

23   same point obtains, that at the moment of birth in

24   another country, for example, another country might take

25   a view that this Court did in Nguyen and Lehr and cases

1   like that, that the father doesn't have a meaningful

2   connection to the child in the sense that one would

3   predict citizenship on the basis of, until there had

4   been some formal steps which would happen after birth to

5   establish the relationship with the child. If it was

6   constitutional for Congress to do that in Nguyen, it is

7   constitutional for Congress to take into account that

8   other countries might do the very same thing.

9   JUSTICE GINSBURG: In Nguyen, I thought that

10   this Court relied on the biological factor, which is not

11   so here. I mean, here there is no question that this is

12   the -- the natural parent of the child.

13   MR. KNEEDLER: Well, yes, but in Nguyen the

14   Court did not look at the circumstances of the

15   particular case. It looked -- it looked generally to

16   what would have justified Congress's acting

17   categorically as we think Congress has to have the

18   flexibility to do. And -- and I think the questions in

19   these statutory provisions show that there are numerous

20   competing equities and considerations that have to be

21   taken into -- into account.

22   And that -- that is what -- that is what

23   Congress did here with respect to establishing a -- to

24   requiring a close nexus to the United States. And if --

25   if in another country a father has -- has legitimated or

1   done those steps, then you have a U.S. citizen mother

2   and a father in another country that is directly

3   parallel to the married mixed -- mixed parent marriage;

4   and Congress was concerned about whether that child was

5   going to be sufficiently affiliated with the United

6   States to justify a conferral of citizenship.

7   CHIEF JUSTICE ROBERTS: Counsel, if we

8   determine that the only remedy we can impose is to

9   equalize up -- in other words, add to the burden on the

10   mother rather than relieving the father of it, do you

11   have authority for the proposition that we can address

12   that issue hypothetically? In other words, without

13   making a decision on the equal protection question on

14   the merits?

15   MR. KNEEDLER: Um --

16   CHIEF JUSTICE ROBERTS: In other words, look

17   ahead and if you say, look, the only remedy that we are

18   going to be able to give this person is a remedy that

19   isn't going to benefit him regardless of how the merits

20   are decided, therefore we don't reach the merits.

21   MR. KNEEDLER: I don't have -- I don't have

22   authority from -- from a decision of this Court. I may

23   -- I may be not recalling something, I don't.

24   But I do believe in the special context --

25   context of citizenship, that there might a justification

1 for the -- for Court's doing that.

2   JUSTICE SCALIA: Well, that would be in

3 effect saying that we have no jurisdiction, because

4 there is no standing. Because there -- there is no

5 remediation that the Court can make.

6   MR. KNEEDLER: I -- I suppose that would be

7 one way of looking at it. I mean the Court

8 traditionally has looked at -- at questions of

9 severability as -- as a question of remedy, and not --

10 and not at the outset. But this is to be sure a very

11 peculiar situation. And I should also point out --

12   JUSTICE GINSBURG: Mr. Kneedler, in answer

13 to the Chief's question, you know -- I mean, there have

14 been a number of cases raising this extension versus

15 nullification, and in every one of them the Court did

16 make a choice. It didn't say well, we can't make any

17 choice. Even in the one, which is

18 Matthews v. Heckler --

19   MR. KNEEDLER: Yes.

20   JUSTICE GINSBURG: -- the Court did make a

21 choice then. It was the rare case where the Court

22 equalized down. But I don't know any one of them --

23   MR. KNEEDLER: No, I think that is

24 ordinarily the case. But I -- but this is -- this is a

25 difficult context, and just to go back with a

1   complication from the remedial approach that the Chief

2   Justice suggested. If the Court declared an expansion

3   of citizenship, and if that was held to apply to

4   everybody similarly situated, rather than just the

5   Petitioner in this case, it would raise questions about

6   whether Congress would have the freedom after such a

7   declaration of a perhaps dramatic expansion of

8   citizenship under the prior law, to remedy that with

9   respect to people who for the -- following this Court's

10   decision, at least the logic of the Court's decision

11   would suggest that they were citizens, too.

12   JUSTICE BREYER: Is there -- is there

13   anything that rings a bell in this in your mind, of -- I

14   mean, the thing that goes the other way is the right of

15   an American citizen to pass his American citizenship on

16   to his children. And when we talk about -- when we talk

17   about Congress's power over naturalization, is there

18   anything that's drawn a distinction between the general

19   power, which are people who are not citizens to become

20   citizens, but what it seems to me intuitively is a

21   different situation, of the right to pass your

22   citizenship on? Does that ring any bell at all?

23   MR. KNEEDLER: There is no such right.

24   And Wong Kim Ark --

25   JUSTICE BREYER: I'm not saying there is

1   such a right. I just wonder if it rings any bell at all

2   that this has ever been discussed in anything you've

3   come across.

4   MR. KNEEDLER: Well, the Court's

5   decision in -- in -- the dissenters in -- in Nguyen

6   discussed this. But we think it's clear that under

7   this -- under Wong Kim Ark and Rogers v. Bellei that --

8   that that is equally an exercise of Congress's

9   naturalization power which is subject to the same

10   plenary standards --

11   JUSTICE BREYER: All right. Just looking --

12   in trying to get your memory -- well, does something

13   come to mind the opposite way that -- where the Court

14   did go into a long exegesis about the law, including

15   constitutional law, and then says at the end, well, but

16   you are not entitled to memory -- to a remedy because of

17   some other --

18   MR. KNEEDLER: If this is going back to

19   remedy, I don't specifically.

20   CHIEF JUSTICE ROBERTS: Thank you, counsel.

21   Mr. Hubachek, you have 4 minutes remaining.

22   REBUTTAL ARGUMENT OF STEVEN F. HUBACHEK

23   ON BEHALF OF THE PETITIONER

24   MR. HUBACHEK: Thank you, Mr. Chief Justice.

25   The rationale that the Solicitor General's

1 office offers today is that further assumptions can be

2 made that even after men do the things that the Court

3 said were legitimately required of them, that they

4 legitimate, that they have an opportunity to form a

5 relationship with their child, that further gender-based

6 assumptions should be put into place and say that, well,

7 but you are not going to be the real father or you're

8 not going to be the real parent. Whereas in the case of

9 women we are going to assume that when they had have the

10 nonmarital child they are going to be in charge and that

11 when a father legitimates and does whatever is required

12 wherever the child is born, we are going to assume that

13 the mother is involved still. But the very facts of

14 this case demonstrate that that's not the case. That in

15 this case Petitioner's father raised him and

16 Petitioner's mother was not involved in his growing up

17 and he brought him to the United States -- I'm sorry, if

18 I was getting a question. So it's basically piling

19 further gender-related inferences on top of the ones

20 that are already in place in order to serve to justify

21 this distinction.

22   Now, with respect to the Fiallo case, there

23 is a tradition of allowing citizens to transmit

24 citizenship. Fiallo involved getting aliens into the

25 United States. There is no tradition that dates back to

 1   1350 where citizens enjoyed rights to bring aliens into

 2   the United States, but it does date back to 1350 that

 3   you've been able to confer citizenship on your

 4   foreign-born children. So it is differently situated

 5   and it is differently situated in the very structure of

 6   the statute that we are talking about today. Congress

 7   very specifically eliminated the ability of courts to

 8   change the rules of naturalization of aliens. It

 9   basically used language very similar to the courts

10   decision in Ginsberg and said that you can be

11   naturalized under this provision and no other way. It

12   didn't say that as to citizens as of birth. Citizens as

13   of birth are treated differently. There is a

14   severability clause in the statute, so that would apply

15   to them and that brings into play all the various

16   remedies that the Court has granted with the respect to

17   extension over the years.

18   CHIEF JUSTICE ROBERTS: You referred -- I'm

19   sorry, you refer to the tradition of passing -- do you

20   agree with Mr. Kneedler that there is no such right?

21   MR. HUBACHEK: I agree that the Constitution

22   doesn't guarantee that right. Our point is that it's a

23   traditional right and that Congress has always provided

24   for it even in the period between 1802 and 1855 where

25   the statute was strangely drafted and didn't provide for

1   it. This Court made clear in Montana v. Kennedy that

2   when Congress remedied that situation it made that

3   remedy retroactive. So basically we have an unbroken

4   tradition dating back to 1350, that's why I think that

5   this right should be treated differently than the

6   questions of admissions of aliens in Fiallo. And,

7   again, there is also Chadha Zadvydas that made clear

8   that the Constitution limits the Congress's power even

9   in the context of naturalization. And then with respect

10   to the third-party standing issue, the Court has granted

11   third-party standing to criminal defendants whose are

12   raising third-party constitutional issues in their

13   criminal cases, and the same analysis should apply here.

14   We can still look at the right from the perspective of

15   the Petitioner's father and if the Court grants a

16   levelling down remedy, that would not remedy the

17   situation the Petitioner's father would be in because

18   both before and after the Court's decision the children

19   of women, similarly situated women, would be citizens

20   and Petitioner's father's son would not.

21   JUSTICE GINSBURG: What were the criminal

22   cases where there was -- where the defendant was

23   permitted to raise --

24   MR. HUBACHEK: Campbell & Powers. Those are

25   both cases where the criminal defendant asserted rights

1   of -- in one case it's a petit juror and another in the

2   other case it was a grand juror, and there were

3   discriminatory preemptory challenges in those cases, and

4   the court allowed those criminal defendants to assert

5   those constitutional rights.

6   Several members of the court also found

7   there was standing in Miller. Kowalski pointed out in

8   Craig v. Boren that there is a very forgiving standard

9   when third-party rights are at issue in the case.

10   CHIEF JUSTICE ROBERTS: Thank you, counsel.

11   Counsel, the case submitted.

12   (Whereupon, at 12:06 p.m., the case in the

13   above-entitled matter was submitted.)

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