IN THE SUPREME COURT OF THE UNITED STATES

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RUBEN FLORES-VILLAR, :

Petitioner :

v. : No. 09-5801

UNITED STATES :

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Washington, D.C.

Wednesday, November 10, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

STEVEN F. HUBACHEK, ESQ., San Diego, California; on behalf of Petitioner.

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

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-5801, Flores-Villar v. United States.

Mr. Hubachek.

ORAL ARGUMENT OF STEVEN F. HUBACHEK

ON BEHALF OF THE PETITIONER

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

In Nguyen, the Court approved the imposition of legitimation requirement only upon fathers of non-marital children born abroad. That was based on biological differences between men and women. It provided proof of parentage and proof of an opportunity to make a relationship with the child that adhered in birth as to the mother.

But here, the residential requirements that are at issue here have no biological basis. They set up barriers to the transmission of citizenship by younger fathers, but not younger mothers, and they are based upon gender stereotypes that women, not men, would care -- would care for non-marital children.

That scheme has been -- the Solicitor General has attempted to justify that scheme by claiming

that Congress was concerned about statelessness, but the record doesn't support that claim. Both the 1935 Law Review article --

JUSTICE SCALIA: What separates a stereotype from a reality? Do you say it is not true that if there is a legitimate -- illegitimate child, it is much more likely that the woman will end up caring for it than that the father would?

MR. HUBACHEK: What I was saying --

JUSTICE SCALIA: That's not true?

MR. HUBACHEK: I think it is more likely, but I think that empirical evidence has not carried the day in gender discrimination cases.

JUSTICE GINSBURG: In all cases, it is true in general, but there are people who don't fit the mold. So a stereotype is true for maybe the majority of cases. It just means that you say: This is the way women are, this is the way men are.

MR. HUBACHEK: Absolutely, and this is actually beyond just an empirical stereotype. The -- at congressional hearings, it was said that the woman is the sole legal parent of this child, totally excluding the man, which basically dates back to the notion of coverture where men were completely out of the picture and women were the ones who were responsible.

So in addition to the fact that -- the empirical portion of it, there is also just the notion that the legal parent was the woman. And that was specifically --

JUSTICE ALITO: Wasn't that said in relation to the principle that only -- that where paternity was not established, the child would be regarded as having the citizenship of the mother under the law of virtually every country, if not every country, at that time?

MR. HUBACHEK: Well, the law of many countries was that citizenship did go through the mother. But with respect to legitimation and this statute, Congress drew a distinction between all -- all parents of -- excuse me, all fathers of non-marital children and those who are legitimate. This statute applies only to those who are legitimate.

The very Law Review article that Congress relied upon, according to the Solicitor General, says that in the case of legitimation, citizenship goes through the father. So the bottom line is that the very -- the very article they relied upon said that in one instance it goes through the mother, but in the instance of the people who are actually affected through this statute, those who legitimate, it goes through the father.

And there are also a number of situations under which mothers --

JUSTICE ALITO: Until there is legitimation, it goes through the mother. It went through the mother under the law in virtually every country, right?

MR. HUBACHEK: I respectfully disagree. At the time, in 1940, when this statute was passed, there were a number of situations where it wouldn't go through the mother. In China and Japan, if the father was merely known it would not go through the mother.

There were three dozen countries at this time, including the English countries and those who followed its law, in which if their female citizen gave birth to a child somewhere other than in their country, citizenship would not travel through that mother because of the laws of those particular countries. There are also stateless women.

So in all those situations, the citizenship would not go through the mother. It would have to go through the father, and this statutory scheme doesn't in any way provide for that.

The scheme also creates severe risks of statelessness, as is set out in the Statelessness Scholar's brief, for married fathers. If a married father who is married to an alien, the -- in those

situations, there are a number of countries that would not allow the woman to transmit citizenship. So if the father was precluded by laws such as they were in the United States, that child would end up stateless as well. So there is substantial risk of statelessness and it continues today.

There are numerous countries that have basically reinstituted that rule, that if the father is merely known, citizenship would not transmit through the mother. And those are primarily in the Middle East and some of them in Africa, and those are detailed in the Statelessness Scholars' brief.

JUSTICE GINSBURG: Mr. Hubachek, how do you deal with the argument that, really, this is a classification where the unmarried woman is being favored, because the unmarried father is being bracketed with the married couple? So it's kind of like Matthews v. Heckler: The woman is getting a special favor and the unwed father is treated like most people who married -- couples who have children.

MR. HUBACHEK: This is not a case where Congress was seeking to remedy any sort of past discrimination against women, as was the case, say, in Schlesinger v. Ballard. There was no discrimination against women. Up until very shortly before this

statute was passed, it was clear under the State Department practices that the non-marital children of women did get women's citizenship, and it was also true as to men. So there was no discrimination that was being remedied in that situation.

JUSTICE SOTOMAYOR: But that doesn't answer, I don't think, Justice Ginsberg's question, which is: This appears to be an exception to a generalized non-gender based requirement. Couples, male or female, and fathers, unmarried fathers, are subject to five years. Only unmarried mothers get the largesse of one year. Why isn't -- why shouldn't everybody just be put to the broader category rather than extending a largesse to a greater number of people?

MR. HUBACHEK: The reason is, Justice Sotomayor, is that we are not talking about an exception here, the treatment that the non-marital mothers were getting. That was the standard prior to the 1940 litigation -- 1940 legislation. There was no significance residence requirement.

Then Congress imposed new residence requirements because it was concerned about the foreign influence in mixed marriages, meaning someone who was married to an alien. In those situations, Congress specifically said in the record that they were concerned

that when those children were born abroad, that they would have foreign influence, that they would be more foreign then they were American. That's not --

JUSTICE SOTOMAYOR: So doesn't the 5-year residency requirement address that? If we apply it generally, wouldn't the 5-year residency requirement honor Congress's concern about there being a substantial tie to the States?

MR. HUBACHEK: Absolutely, it would. And that -- for -- that concern is not applicable when you are talking about two U.S. citizen parents to whom the extended residence requirement didn't apply. Non-marital mothers were assumed to be the ones who were going to be raising the children without the influence of an alien father.

The non-marital fathers are in the same category as those, too. Those non-marital fathers who raise their children on their own, as Petitioner's father did in this case, are not subject to that type of foreign influence, so they should be grouped together with the women and with the two-citizen families, because they have the lack of foreign influence.

So it's only as to the mixed-marriage couples who are married where there is a foreign influence problem, and they're the ones to whom the

expanded residence required -- was applied.

Now, with respect to the -- the Solicitor General has raised concerns about the plenary power doctrine. And I would argue that that doesn't apply here for a couple of reasons.

First is, we are not talking about the admission of aliens.

Second is that the Court in Chadha Zadvydas said -- made clear that even when exercising that power, that congressional -- excuse me -- Congress's power is limited by constitutional limitations.

Now, with respect to the entry of aliens, Congress made it very clear in passing this very statute that they considered those people who gained citizenship as of birth to be differently situated than aliens. That was a tradition that dated back to 1350. In 1790, Congress passed a statute saying that children born abroad to citizens --

JUSTICE KENNEDY: Is -- is this your -- are you taking this in the direction of an argument that Congress gets less deference in determining nationality than it does with admission to aliens?

MR. HUBACHEK: What I'm saying, Your Honor, is that we are talking about the ability of a United States citizen, Petitioner's father, to transmit

citizenship, and that that is a traditional interest. Citizenship is extremely important and it's a tradition that citizens have been able to do for years.

So yes, constitutional limitations should apply when the -- when Congress is drawing distinctions between men and women --

JUSTICE KENNEDY: But you -- you want us to write an opinion that says Congress has less deference when it considering -- when it determines who should be a national of this country than it -- than when it determines who should be admitted as an alien?

MR. HUBACHEK: Well, there is no tradition dating back to 1350 for the admission of aliens. It's -- it's --

JUSTICE KENNEDY: Are you asking us to write that formulation in an opinion?

MR. HUBACHEK: Your Honor, what I'm saying is that the -- that the due process guarantee of equal protection is applicable in this context because the citizens of the United States --

JUSTICE KENNEDY: If I -- if I take that as a "yes" answer, what is your authority for that answer? It seems to me that it ought to be just the other way around.

MR. HUBACHEK: Well, Your Honor, my

authority for that answer is the tradition that I have been discussing. Congress itself, in 1940, considered people who gained citizenship by birth abroad as being differently situated from aliens, aliens who naturalize. In fact, they said that that was universally --

JUSTICE KENNEDY: Of course, but it was Congress that made the distinction. But you are asking us to say that Congress has less authority over this essential issue as to who should be nationals in the United States.

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

JUSTICE KENNEDY: Maybe there is some authority for that. Do you have any authority? Is there something I can read that tells me that?

MR. HUBACHEK: Chadha Zadvydas says that even though Congress has plenary power over the immigration power. When it exercises that power, it has to apply with constitutional limitations. This is the first one of the Court's cases where --

JUSTICE KENNEDY: That was an alien admissions case. You are talking about nationality.

MR. HUBACHEK: I'm talking about citizenship being transmitted by a United States citizen. What we are saying is that Petitioner's father, as a United

States citizen, has equal protection -- Equal Protection Clause, protection against the discrimination, here because a similarly-situated woman would be able to transmit citizenship.

JUSTICE BREYER: Well -- I'm sorry. Go ahead. Finish.

Are you finished?

MR. HUBACHEK: Yes, Your Honor.

JUSTICE BREYER: I didn't quite follow this. As I understand it, on what -- say: On what remedy will there be if you're right? This is what I don't understand.

A child is born abroad. One parent is American; the other is foreign. If the two are married, that child is American only if the father or the mother -- one or the other -- has lived in the United States for now at least 2 years. It used to be more. Okay? Now it's 5 years after the age of 16.

Now suppose they are not married, and suppose the American is the father. Same rule.

Now suppose they are not married and the American is the mother. Now it's not 5 years or 2 years; you only have to have lived here for one year. Suppose I agree with you. I just don't see any sense to that whatsoever. I can't figure it out. They made a

mistake about the immigration laws. Suppose I agree with you.

Then why isn't the remedy, say: Okay, whether it is the father or the mother, the general rule applies. They have to have lived in the United States for 5 years or for 2 years? Now 2 years.

MR. HUBACHEK: There are a couple of reasons at least for that, Your Honor. First is that there is a structural limitation here to imposing a levelling-down type remedy, because citizenship cannot be taken away once it's granted. So the Court can't remedy the problem here --

JUSTICE BREYER: Some people were lucky, and they are already citizens under this, and there we are, because their mother lived in the United States for one year. Those already are citizens. Nobody is going to take that away. We are just looking at a statute.

And in the first part of the statute, they have in section (g) of 1401, the first rule I told you about. In 1409(a), the second rule, and in 1409(c), the third rule.

Okay. If you are right about this, and it's totally unfair and there is no good reason whatsoever for distinguishing on the basis of gender, we strike (g). Okay?

Now, that would seem to be normal, but that isn't going to help your client. So how do you get to some other thing that instead of striking (g)? What we do is strike all of (a) and strike the whole thing before, and shove them all into (g), which isn't so easy to do with this language. How do you get there?

MR. HUBACHEK: Well, the first thing is, is that this statute contains a severability clause. Very similar to --

JUSTICE BREYER: Fine. So we strike (g). What I'm worried about is, you want me to strike (a) -- sorry, we strike (c). And you want me to strike 1409(a) and 1401(g), and shove the people who are there into (g), which is a little tough to do in the English language. But I want to know how you get there.

MR. HUBACHEK: By -- by extension, Your Honor. And --

JUSTICE GINSBURG: First, can we be clear about what you're saying? I thought your argument was, you are not touching married couples.

MR. HUBACHEK: That's correct.

JUSTICE GINSBURG: So that you are talking about equating the unmarried father to the unmarried mother. Do you have -- is there any notion of how many people we're talking about?

I mean, in these extensions versus the normalization, where the Court generally extends when there is a small class to be covered, a small class was left out, and in a large class is already covered. And the reasoning has been: Well, my goodness, Congress wanted to take care of that larger class; it would be most destructive of the legislative will if we said you can't cover that larger class.

So as a group of unmarried mothers as against unmarried fathers, do -- do you have any notion of what the numbers would be?

MR. HUBACHEK: Justice Ginsberg, I don't have any statistics to provide the Court.

CHIEF JUSTICE ROBERTS: Maybe this is -- maybe you would like to answer Justice Breyer's question.

MR. HUBACHEK: Yes, Justice Breyer. Anyway, the remedy we are requesting is extension. In Westcott and in Heckler, the Court looked at language in the severability clause that was similar to this, and also in Justice Harlan's concurring opinion in Welsh, and said that type of language in a severability clause gives courts power to grant an extension remedy.

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

JUSTICE BREYER: Now, there's another slight problem with that, I would think. Reading this carefully, which I hope I have done, it seems to me it may also discriminate against fathers. And that's because (c) says that the woman has to have been physically present for a continuous period of one year. I read at least one article that says that word, "continuous," doesn't appear with the fathers, and that they really mean it. That is, if somebody is living down in Texas and they happen to go visit on Christmas their father, who is -- or their grandmother or cousin or something who is across the border for 5 minutes, that they cannot take advantage of this clause (c).

Is that true?

MR. HUBACHEK: I don't know the answer to that, Justice Breyer.

JUSTICE BREYER: I will ask the (g) that, but if it is true -- if it is true, then -- then I would think that the fathers are really worse off. I don't know if that helps you. And maybe it could turn out that that's really a problem.

If it is really a problem, then the fathers are worse off. Does that help you with the remedy?

MR. HUBACHEK: Traditionally in immigration law when you have continuous requirements, if it's a

short trip, casual trip, you know, then those -- that requirement is not considered to have been violated.

If the -- if -- I have to admit I'm having a hard time following the question.

JUSTICE BREYER: The question is: I'm looking for a way -- I'm trying to be helpful in my question. I'm looking for a way that you can get to your result. Now I'm not saying I would do it, but I just want to know what the best way is of getting to that result, where you shove everyone into (c) instead of just cutting (c).

MR. HUBACHEK: Well, the -- the best way is to follow the Court's tradition in the benefits cases such as Wengler and Wiesenfeld, where the Court granted an extension remedy and basically treated --

JUSTICE BREYER: That would help you. Is there a reason for doing that?

MR. HUBACHEK: Well, the reason for doing that is, is that the language that's contained in the severability clause is similar to what the Court has already said allows an extension remedy. And the other problem is, is that if the Court doesn't grant an extension remedy, it leaves Petitioner basically without a remedy, that there will be individuals who have been able to have a --

CHIEF JUSTICE ROBERTS: No, he would have a remedy. The remedy for an equal protection violation is to treat everybody the same. You can do that either by lowering the people who are given a benefit or by increasing the people who aren't. So he has a remedy.

His objection is, we're not being -- my father and my mother are not being treated the same. That's all of the relief he is entitled to.

MR. HUBACHEK: You are absolutely right, that that is -- that is the state of the law. And my point is that structurally, that remedy is unavailable here, because you can't take away the citizenship from the people who have already gotten it.

And the notion that you can grant us prospective relief as discussed in the Solicitor General's brief doesn't make any sense, either, because number one, this statute, the one we are talking about today, doesn't apply past people who were born before 1986.

But the thing is that if somebody were to come into court after an opinion that said just that were issued -- someone were to come into court and say, I want to claim citizenship through my mother, that person would still be entitled to citizenship because it's as of the day of birth. So this is a retroactive

provision.

So the prospective relief notion really doesn't makes any sense in this context, because the equal protection violations have basically all already occurred at the time that the person who would make a citizenship claim was born, and we would still be left in a situation where Petitioner's father would say that I was unable to transmit citizenship to my son and a woman who was similarly situated was able to. So that type of remedy is unavailable.

In the Court's decision in Iowa v. Bennett, the bank case, they actually ordered a refund of the taxes that were collected in a discriminatory manner dating back in time. So if you could factor out -- if you could make a relief that would take away the benefit that others had received, then I would agree that that is available, but that's not possible in this situation.

JUSTICE GINSBURG: Mr. Hubachek, I think the Chief asked you: If it's an equal protection violation, then the Court just says it violates equal protection, but whether it goes up or down, the Court has to give a temporary solution, because the legislature can't be convened on the spot. And the Court actually did go through that exercise, extension versus invalidation, most conspicuously in Califano -- Westcott, in the

Westcott case. It says, yes, that's what we have been doing in all these cases.

In Sarah Frontiero's case, we didn't say: You've been discriminated against; Congress, you fix it. We said: You get the quarters' allowance that up until now has been available only in male officers. And in Wiesenthal, the father got the same child and care benefits as the mother. So the Court was making a decision for extension; it recognized it had to do that.

MR. HUBACHEK: Absolutely. And in many of the benefits cases, the same -- the same analysis was available and that's the analysis that we are asking that the Court apply here. But we're also making --

JUSTICE SCALIA: Mr. Hubacheck, you are asking, I think, that the Court pronounce your client to be a United States citizen. Isn't that the only pronouncement from -- form the Court that is going to do your client any good?

MR. HUBACHEK: Well, Justice Scalia --

JUSTICE SCALIA: Unless he's a United States citizen.

MR. HUBACHEK: This is a criminal case, so technically what we are asking is for a reversal of the judgment and opportunity to present this --

JUSTICE SCALIA: A reversal of the judgment

on the grounds that your client is a United States citizen, right?

MR. HUBACHEK: That it would be possible for him, on these facts, to become a United States citizen, yes.

JUSTICE GINSBURG: That he is a United States citizen.

JUSTICE SCALIA: That he is, not that -- that he is. That he is. Do you have any other case where a Court has conferred citizenship on someone who, under the statutes as written, does not have it?

MR. HUBACHEK: Well, that was one of the issues that was debated, of course, in the Nguyen and Miller cases, and the Court has not said that yet but it can in this case.

JUSTICE SCALIA: Never done.

MR. HUBACHEK: That's correct. That's correct, but it can in this case, for a number of reasons. Number one is the fact that this severability clause is applicable to this claim. Congress actually passed a statute, 1421(d), in this same statutory scheme, that said when we are talking about naturalization -- the naturalization of aliens, then you cannot get naturalization under those circumstances any other way then what's set out in this statute. They

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

So there is a negative implication, basically, that they -- that they were not precluding this type of remedy as to a citizenship claim where we are claiming an equal protection violation.

The second point is that if the Court is unable to grant that remedy, that would leave an equal protection violation in place, and as Justice Harlan made clear in Welsh --

JUSTICE SCALIA: Unless -- unless we -- we solve the violation the other way, by saying that the father gets the shorter period that the -- than the mother has.

MR. HUBACHEK: Well, again --

JUSTICE SCALIA: I'm sorry, that the mother gets the longer period than the father has.

MR. HUBACHEK: Right. And I think if the Court --

JUSTICE SCALIA: You say we can't apply that retroactively. Well, okay; we don't apply it retroactively. The people that have citizenship cannot constitutionally be deprived of it, but for everybody else, it's okay.

MR. HUBACHEK: Even -- even prospectively, Your Honor, because this statute says you have

citizenship as of birth. So even if the Court were to render that decision and someone were to make a claim, they could still say: I had citizenship of as of birth; i.e., whenever I was born, which is before the Court's decision. So there really -- that would be no remedy at all. It's a remedy --

JUSTICE KENNEDY: But any of -- of the remedies that you are discussing with Justice Scalia involves this Court in a highly intrusive exercise of the congressional power.

Let me just ask you this as an analytic matter, or as matter of logical priorities. We usually talk about substance first, remedy second. Do you think it's permissible, logically, for us to say that because the remedies here are so intrusive, that bears on our choice of whether we or not we use intermediate or rational basis scrutiny, and because the remedies are so difficult, we are going to use rational basis scrutiny? Is that a logical way to proceed?

MR. HUBACHEK: I don't think so. I think the Court has traditionally has said that the -- the questions of a right and whether or not there exists an opportunity to make a claim and the remedy for it are analytically distinct. So I don't believe --

JUSTICE GINSBURG: And it also said that the

remedy can't be complicated, because courts are not set up to do that. I mean, that's what Westcott said. The court can go one way or another way; it can't do any fine-tuning, because it's there as a temporary legislature. The ball goes back to Congress to do what it will, but it's just, in the interim, we need a solution.

MR. HUBACHEK: That's correct, and certainly Congress could do that. And the Solicitor General's brief makes clear that what was being balanced here was concerns about -- according to them, anyway -- concerns about statelessness on the one hand and connection to the United States on the other.

If Congress hadn't assumed based on gender stereotypes that men weren't caring for children, then it would have -- it would have been able to put them in the same category as women, because they would understand that both of them would be caring for children.

And it's not just the -- the situation in 1940. As time has gone on, I believe in the National Women's Center brief it points out that the number of men who are raising children in single-parent families is increasing over time. So the problem, if anything, is getting worse.

JUSTICE GINSBURG: But Congress did make at least some change, right? It -- this is -- it's no longer five years; it's only two years, right?

MR. HUBACHEK: The current system is five years, two years after the -- the age of 16 -- I'm sorry, after the age of 14. And of course, that age requirement here completely precluded Mr. Flores-Villar's father from being able to transmit citizenship because of his age. That kind of complete preclusion would never apply to a woman who is similarly situated.

If the Court doesn't have any questions, I will reserve my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE RESPONDENT

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

Congress in deciding who among the various people born abroad should be made citizens of the United States has to take into account myriad factors that may bear on that question and its judgment. They include importantly Congress's prediction in the case of conferring citizenship at birth, what would be that

person's likely connection to the United States. Congress also has to consider the interaction with the laws of other countries where these people may be born. It may take into account equities, potential statelessness or dual nationality. These are complicated questions to which the courts should defer. Now, in the particular --

JUSTICE SOTOMAYOR: Intermediate scrutiny and -- is not without some deference.

MR. KNEEDLER: Excuse me.

JUSTICE SOTOMAYOR: Unless we apply strict scrutiny, which no one is arguing for, the question is, is it rational basis deference or is it some intermediate scrutiny, correct?

MR. KNEEDLER: Yes. And we believe that under this Court's decisions, particularly in Fiallo v. Bell and the cases discussed in that case, that it should be rational basis for --

JUSTICE SOTOMAYOR: Well, but you can't really mean that because we can put up a hypothetical that is very simple and then you'll explain to me why a U.S. citizen should be burdened in this way and the hypothetical is, let's assume Congress determines that there are too many foreign-born children of U.S. citizens coming into the United States, and that those

foreign-born children, those born of women are placing a greater burden on our economic system. They need more care for reasons that Congress determines analytically or statistically. They are spending more money -- more government money. And Congress passes a rule that says, only the foreign-born children of men can come into the country, not of women. Wouldn't that be a rational basis?

MR. KNEEDLER: I think the answer to that question lies in the Court's formulation of the test that is applied in this particular context, and that is the formulation drawn from Kleindienst v. Mandel that was articulated in Fiallo v. Bell, and that is that there has to be a facially legitimate and bona fide reason.

JUSTICE SOTOMAYOR: There is a facially legitimate bona fide reason.

MR. KNEEDLER: I think the Court could have no trouble concluding that an arbitrary choice between men and women --

JUSTICE SOTOMAYOR: What's arbitrary about a government saying, I want to spend less money on a new citizen?

MR. KNEEDLER: The -- the ultimate reason may be legitimate, but I think the facial legitimate

test also encompasses means not just end, and if Congress is just arbitrarily choosing between men and women or people of a different race, I think given this Court's tradition it could conclude that those would be impermissible bases under the well-established test, but for the reasons we say in our brief we don't --

JUSTICE GINSBURG: What well established test?

MR. KNEEDLER: Fiallo v. Bell for -- and the cases underlying it and we also think --

JUSTICE SOTOMAYOR: Is that the rational basis plus test you are talking about?

MR. KNEEDLER: You could call it that or you could call it a facially legitimate --

JUSTICE SOTOMAYOR: So now we're going to just continue sort of tweaking the definitions and creating more variations on our review standard?

MR. KNEEDLER: I think it is -- it is a test that this Court has articulated in Fiallo v. Bell and Kleindienst v. Mandel to address this very situation, including a situation where asserted constitutional rights of U.S. citizens in this country are being claimed. And we agree with Justice Kennedy that the standard should not be more demanding, but rather if anything it should be less demanding where the question

is whether someone should be made a citizen.

JUSTICE SOTOMAYOR: It's hard here because both the father -- this father, but many fathers and mothers are actually U.S. citizens who want to bring their children over as U.S. citizens. So, if the father was making the claim here, you would still argue it was a rational basis test even though he's a U.S. citizen and entitled to all the protections of the Constitution?

MR. KNEEDLER: We would argue for the facially legitimate -- and that was the case in Fiallo, in which the plaintiffs included U.S. citizens, children and fathers, claiming that, in a very parallel situation claiming that that special privileges for illegitimate children to reunite with the mother worked an unconstitutional discrimination against the fathers of such children. And it was U.S. citizen fathers and children who were among the plaintiffs and the Court nonetheless said that this is -- there is no constitutional right to pass citizenship, this is a question of Congress's judgment about who it believes should be made citizens. And one of the important factors Congress has looked at is connection to a U.S. citizen that is in turn a proxy for what the likely connection to the United States will be.

JUSTICE BREYER: I understand that, but what

you are doing is applying a lesser standard to gender discrimination than is ordinarily applied to gender discrimination. Now, is there any reason to do that? I think that was the thrust of the question.

MR. KNEEDLER: Well, that was the issue.

JUSTICE BREYER: All right. Now fine.

JUSTICE SCALIA: In Fiallo v. Bell.

JUSTICE BREYER: If it's the government's position you do, does the same thing apply to racial discrimination? Do you also apply a lesser standard to racial discrimination?

MR. KNEEDLER: I think the facially legitimate standard in Fiallo v. Bell would render a reliance on race.

JUSTICE BREYER: This is suddenly is cutting a big hole in the Fourteenth Amendment.

MR. KNEEDLER: No, I don't think so because I think that same principle would be given effect in the way --

JUSTICE GINSBURG: First, in Fiallo we were dealing not with citizens, this is someone, a resident -- could be a resident alien wanting to bring in a parent or a child. So it wasn't -- that case wasn't about who was the citizen at birth.

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

the Constitution, anyone born abroad is an alien unless and until Congress has passed a statute making them a citizen. So analytically, doctrinally it is the same question.

JUSTICE GINSBURG: Congress has passed -- has passed a statute making certain people citizens and the question is, has it done so in a way that is compatible with equal protection. But remind me too, because it's not in the front of my head, I thought that classification that was dealt with in Fiallo, wasn't it unwed parentage rather than gender?

MR. KNEEDLER: But there were claims based on both illegitimacy and gender and there were equal protection claims based on both. But if I could move on to the way that the statute operates because we think it satisfies either standard of review in this case. And if I could just step back for a moment. As I mentioned, there are a number of factors that Congress takes into account in crafting a statute like this. 1401 deals with married couples and where both parents are citizens, all that is required is that one of the parents have resided in the United States prior to the birth.

Where you have mixed parentage, the background of the enactment of this in 1940 and

reenactment in 1952 and continued up to this present day is Congress was concerned that such a child may not have the requisite connection to the United States. They have a connection to the parent, but may not have a connection to the United States such that Congress wanted to grant citizenship to that person. So what Congress did in the mixed citizenship situation was to require prior residency of the parent as a talisman, as the Court said in Rogers v. Bellei, for a connection to the United States of ten years, five years after the age of 14. Congress has liberalized that, but that was the basic thought. Where you have unwed parents, in 1409(a) what Congress did was to follow general principles of the law of illegitimacy or children born out of wedlock, if a father legitimates a child then it's as if the child was born in a marriage, and the rule in 1401 with respect to marriage applies. That is true whether both parents are citizens or in a mixed marriage situation. If a father legitimates a child and both parents are citizens, then not the one, then the child benefits from the rule that if either parent was present in the United States before birth he's a citizen, doesn't have to satisfy the one year unbroken residency requirement under 1409(c). If it's mixed parentage, and the father legitimates, then the rule applicable to married mixed

citizen and parents applies as if the child had been married at the outset. It's a perfectly sensible and provision or approach and consistent with the way this has been done. What Congress did with respect to the mother of the child born out of wedlock where there has not have been legitimation is to confer citizenship on the basis of a one year residency. Now, as counsel for the Petitioner explains, a mother in that situation who at the moment of birth, as this Court understood in Nguyen, that mother may be the only either legal parent or the only parent at the moment of birth with the requisite connection to the child to have an opportunity for this sort of connection at birth. So the mother in that circumstance is very much like the two citizen parent family, the only parents are parents with a connection to the United States.

JUSTICE GINSBURG: Mr. Kneedler, if -- if the classification then were that we want to encourage, because it's good for society, father/child relationships, so we are going to give that advantage, that is 1 year for fathers, and we're going to put the mothers together with the married couples, would that be compatible with equal protection?

MR. KNEEDLER: Well, I think that would be -- that would depend upon a -- a -- a different

rationale. I mean here what Congress --

JUSTICE GINSBURG: I told you what the rationale was. The rationale was that we have lots of statutes like the Family Medical and Leave Act that attempt to encourage fathers to have a relationship with their children, to be a legal parent, so that's the rationale of this classification. They want to encourage the father/child relationship, therefore, they gave this 1 year is enough for the -- for the father. And everything else is the same, except it's the father who gets the 1 year, and the mother who gets the -- what is it, 10 years --

MR. KNEEDLER: I think that would be a more difficult question, because Congress would be -- would be responding based on the -- on the expected behaviors and talents maybe of men and women. What's different here is that's not what it's -- that's not the basis for this classification. This --

JUSTICE GINSBURG: Well, it would you, in fact, acting on the basis of what hasn't been the general pattern but what is becoming the new pattern.

MR. KNEEDLER: Right. And in that situation, Congress I think could be expected and maybe should be required to do that in a gender-neutral basis because it is premising it on the behavior, but -- but

what --

JUSTICE GINSBURG: So there is, even though we are still dealing with citizenship, you recognize that there are categorizations that would run afoul of equal protection?

MR. KNEEDLER: Well, that -- and -- and the question would be whether that's a facially legitimate rationale. And -- and I would want to know -- I think I would want to know more about what the record for such a justification would be, et cetera. But I -- but I would like to --

JUSTICE GINSBURG: The same as in the Family Medical Leave Act, we are making it a parental leave instead as if it had been historically a maternity.

MR. KNEEDLER: Right. And in -- in that situation, I think it would be expanding on a gender-neutral basis rather than singling out one parent or the other. But I -- but I would like to finish the description, I have because it's incomplete and there is a critical piece left out, and that is that counsel for Petitioner says that if -- if a father legitimates an out-of-wedlock child, he is in the same position or that child is in the same position as a child in an out-of-wedlock mother, and that is not likely to be so, and it's not likely to be so at birth. And this is the

reason why, is when a child is legitimated, there are two parents who have the strong connection that was described in this Court's decision in Nguyen to that child, the U.S. citizen father, but also the mother, the alien mother in that country. So you have two parents whose interests have to be taken into account.

Whereas in the situation Congress was addressing in 1409(c), the situation of a child born out of wedlock where there was no -- at the moment of birth, likely to be no recognized father, have you only the mother. If we -- if we think of this in -- in parallel to the illegitimacy -- the cases involving illegitimates that this Court has had in a domestic context, I think that is instructive. In a case like Lehr, where the question was whether the father of a child born out of wedlock should have received notice of a prospective adoption, the Court explained in that case that the father had not taken the steps necessary to form the relationship with the child, and therefore, be -- be a father in the eyes of the law, then the mother alone --

JUSTICE BREYER: You have -- we have the briefs that are filled with, you know, pros and cons about the statelessness business and whether it was real, and I've read those and I would like your comment on those, but I want to comment, too, on this very --

what may be a very minor thing, but I did notice, prodded by an article, I have to say, that -- that for the women there is a sense in which its tougher --

MR. KNEEDLER: Yes.

JUSTICE BREYER: -- and that's because of the continuous period.

Now, I guess it depends on how that is enforced, but there could be a class of people, say, living in the border, near Canada or near Mexico where they step across the border on Christmas day to say hello to my cousin, and -- and does that stop them from taking advantage of that? Is it -- in other words, how is this enforced? Is it enforced with that rigidity?

MR. KNEEDLER: It does have to be continuous residency, you're correct --

JUSTICE BREYER: Which means that you can't stop with across the border? You can't --

MR. KNEEDLER: There might be minor exceptions where you go across the border in Christmas Eve. That I can't be --

JUSTICE BREYER: Is there -- is there -- well, is there or isn't there, to your knowledge? Is this enforced with total rigidity or is it enforced that maybe you could go once a month or you could go on your birthday, or what is the answer?

MR. KNEEDLER: I think in that situation, no. And the example that I was --

JUSTICE BREYER: In that situation you cannot go across the border?

MR. KNEEDLER: The example I was given when I asked this question was, if you have somebody who's on -- who lives in Mexico and commutes to the United States, you know, 5 days a week, you can under -- under -- under 1401, you can add up each day, and get to a total of 5 or 10 years of continuous -- excuse me -- of actual physical presence, that would not satisfy the continuous --

JUSTICE BREYER: All right. So, if it's tough then and really is meant to be tough, then there is a -- what is the rationale for treating women in this respect worse than treating men?

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

JUSTICE BREYER: The 1 year, I grant you, the time 1 year is treating them better than the time 5 years. But the word "continuous," it's really tough is what your answer leads me to believe, and they really mean it. I mean, then that's treating them worse than treating the men. And I would like to know what is the rationale for treating them worse?

MR. KNEEDLER: Congress -- Congress selected, because while I said the mothers are like the two-citizen family or two-citizen parents in the sense that only U.S. citizens are the parent and you have some connection, Congress was balancing the duration of that connection or taking into account the duration of that connection and it chose to make it a little bit tougher. And I -- I think that is perfectly legitimate, because Congress -- because you only have one parent and Congress was deciding, well if somebody has been here for a continuous period of 1 year, then there -- then there is probably a greater likelihood that that person will -- will have roots here then, for example, the other situation where if you had a child born abroad and came home in the summers, that child may not think of himself or may not be regarded as an American in the same way.

So, what Congress was focusing on a -- on a period of longer duration, which in its judgment could -- could give rise to, Congress believed, a greater connection to the United States.

CHIEF JUSTICE ROBERTS: Counsel, what if -- if the Court were to determine that this does violate the Equal Protection Clause, and the court were also to determine that this is not a case that should be the

first one in history in which it grants naturalization, what do you think the Court ought to do?

MR. KNEEDLER: I -- I think the Court ought to strike the eligibility of -- of anyone to get citizenship on the basis of 1 year. I think it could -- should constrict the -- the class to those specifically governed by 1401 --

CHIEF JUSTICE ROBERTS: On the ground that it violates equal protection.

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

CHIEF JUSTICE ROBERTS: What about your friend's point that that retroactively deprives people of citizenship that we would be saying they should have gotten if the Equal Protection Clause had been enforced.

MR. KNEEDLER: I -- I -- I think this Court could legitimately take into account the -- the conferral of citizenship and the reliance on that. I think it's parallel to -- to Heckler v. Matthews, where the Court upheld a statute in which Congress took account of reliance interest that had built up on your --

CHIEF JUSTICE ROBERTS: Right. But here, of course, under my scenario we don't have a situation where Congress has addressed -- addressed the problem.

So what do we do? If somebody under the theory that we say this person should not have been denied citizenship because of the unequal protection in the law, and he comes in and it's the same situation, he's going to be deported for not being an American citizen and he says I'm an American citizen.

MR. KNEEDLER: I think -- I think.

CHIEF JUSTICE ROBERTS: Does he get the benefit of that or not?

MR. KNEEDLER: No, I think he does not. I think -- I think the answer is that the -- and -- and partly for the reasons that you alluded to and Justice Scalia mentioned, we do not think that a court can properly grant U.S. citizenship, and that that should enforce -- excuse me -- inform the remedy, and it -- but for the people who have been granted citizenship, I think the solution would be to invalidate the 1-year residency requirement.

JUSTICE SCALIA: But why -- why would we grant that remedy when it doesn't do this Petitioner any good whatever. It's -- it's a remedy that doesn't remedy.

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

JUSTICE SCALIA: We are -- we aren't

granting relief that doesn't provide relief.

MR. KNEEDLER: I suppose -- I suppose the Court could -- could decide that at the outset, that it would not be appropriate to grant that relief and not go -- and not go any further.

CHIEF JUSTICE ROBERTS: The reason it doesn't grant that relief is somewhat unusual in this case. It only doesn't grant him relief because of the third-party standing. He doesn't care whether he's treated equally or not; he just wants to be -- claim the benefit of citizenship.

The person where he would get relief is if it were the father, because the relief that he is entitled to is to be treated equally. That's it.

The relief this person is asking for is not to be deported. And so the problem of the relief being granted is really complicated by the fact that it's a case of third-party standing.

MR. KNEEDLER: Right. I -- I agree with that as well, which I think is all the more reason for the Court to be cautious about -- about entering into this. I think that --

JUSTICE GINSBURG: Mr. Kneedler, in answering the question that way, I know you are familiar with the Wiesenfeld, case, and the question was, this

was a father who was denied benefits to take care of a -- a child whose mother died at childbirth. And the Court came out a unanimous judgment but split three ways on why. And one of the members of the Court said, this is discrimination against the child, even though the classification was -- it's called a mother's benefit -- it's discrimination against the child because it should make no difference at all whether the missing parent is female or male, that that was utterly irrational.

That was the Chief -- that was then Justice Rehnquist's concurring opinion in Wiesenfeld. So he seemed to think that the discrimination was against the child and that that counted for equal protection purposes.

MR. KNEEDLER: Well, here the only claim that has been raised is an equal protection violation of the parent's asserted rights.

JUSTICE GINSBURG: Well, that's what -- Steven Wiesenfeld, the father was the plaintiff, but the Court -- at least one justice's rationale was that the discrimination is really against the child, but the father can raise him --

MR. KNEEDLER: Well, insofar as any claim of discrimination by the child, I think, since it's not based on the child's gender, I think that would clearly

be a rational basis or facially legitimate standard; and Justice O'Connor's opinion in Miller v. Albright addressed the rational basis there.

And here, this is not just based on the gender of the parent, it's based on the -- on the complexities in the legal history with respect to illegitimacy, and -- and how children born out of wedlock are dealt with, which again turns not on -- on stereotypes of behavior or talents, but on longstanding legal regimes not just in this country but in -- in other countries, that until the father does something to have a meaningful relationship, the mother is the -- is the only legal parent, or in the terminology of this Court's decision in Nguyen, the parent who is likely to have the meaningful relationship.

Once the father comes forward in a case like Lehr, the result is not that the father gets a veto power or that that only the father's interests are taken into account; the answer is that you have two parents whose interests are taken into --

JUSTICE GINSBURG: That's a case where mother versus father. But here it's a single parent. This is not a case where the father is doing something that the mother regards as disadvantageous. That was in the Lehr case.

MR. KNEEDLER: No --

JUSTICE GINSBURG: And you said something about -- this has nothing to do with stereotypes, this is the way the law was? But wasn't the law shaped because of the vision of the world of being divided into married couples, where the father is what counted, and unwed mothers, where she was -- they say both father and mother, because the law didn't regard him as having any kind of obligation?

MR. KNEEDLER: Well, again, I think this is the issue the Court addressed in Nguyen, in which the Court -- the Court said that there is -- there is a difference at the moment of birth in the potential and therefore the likelihood of a -- of a connection of child to parent at the moment of birth that justified the requirement that -- that the father take a step to legitimate the child, in order to be able to -- to be on an equal footing with the mother with respect to -- to the rights.

And here the residency requirement is what measures the connection of the parent to the United States, not the child to the parent; but we think the same point obtains, that at the moment of birth in another country, for example, another country might take a view that this Court did in Nguyen and Lehr and cases

like that, that the father doesn't have a meaningful connection to the child in the sense that one would predict citizenship on the basis of, until there had been some formal steps which would happen after birth to establish the relationship with the child. If it was constitutional for Congress to do that in Nguyen, it is constitutional for Congress to take into account that other countries might do the very same thing.

JUSTICE GINSBURG: In Nguyen, I thought that this Court relied on the biological factor, which is not so here. I mean, here there is no question that this is the -- the natural parent of the child.

MR. KNEEDLER: Well, yes, but in Nguyen the Court did not look at the circumstances of the particular case. It looked -- it looked generally to what would have justified Congress's acting categorically as we think Congress has to have the flexibility to do. And -- and I think the questions in these statutory provisions show that there are numerous competing equities and considerations that have to be taken into -- into account.

And that -- that is what -- that is what Congress did here with respect to establishing a -- to requiring a close nexus to the United States. And if -- if in another country a father has -- has legitimated or

done those steps, then you have a U.S. citizen mother and a father in another country that is directly parallel to the married mixed -- mixed parent marriage; and Congress was concerned about whether that child was going to be sufficiently affiliated with the United States to justify a conferral of citizenship.

CHIEF JUSTICE ROBERTS: Counsel, if we determine that the only remedy we can impose is to equalize up -- in other words, add to the burden on the mother rather than relieving the father of it, do you have authority for the proposition that we can address that issue hypothetically? In other words, without making a decision on the equal protection question on the merits?

MR. KNEEDLER: Um --

CHIEF JUSTICE ROBERTS: In other words, look ahead and if you say, look, the only remedy that we are going to be able to give this person is a remedy that isn't going to benefit him regardless of how the merits are decided, therefore we don't reach the merits.

MR. KNEEDLER: I don't have -- I don't have authority from -- from a decision of this Court. I may -- I may be not recalling something, I don't.

But I do believe in the special context -- context of citizenship, that there might a justification

for the -- for Court's doing that.

JUSTICE SCALIA: Well, that would be in effect saying that we have no jurisdiction, because there is no standing. Because there -- there is no remediation that the Court can make.

MR. KNEEDLER: I -- I suppose that would be one way of looking at it. I mean the Court traditionally has looked at -- at questions of severability as -- as a question of remedy, and not -- and not at the outset. But this is to be sure a very peculiar situation. And I should also point out --

JUSTICE GINSBURG: Mr. Kneedler, in answer to the Chief's question, you know -- I mean, there have been a number of cases raising this extension versus nullification, and in every one of them the Court did make a choice. It didn't say well, we can't make any choice. Even in the one, which is Matthews v. Heckler --

MR. KNEEDLER: Yes.

JUSTICE GINSBURG: -- the Court did make a choice then. It was the rare case where the Court equalized down. But I don't know any one of them --

MR. KNEEDLER: No, I think that is ordinarily the case. But I -- but this is -- this is a difficult context, and just to go back with a

complication from the remedial approach that the Chief Justice suggested. If the Court declared an expansion of citizenship, and if that was held to apply to everybody similarly situated, rather than just the Petitioner in this case, it would raise questions about whether Congress would have the freedom after such a declaration of a perhaps dramatic expansion of citizenship under the prior law, to remedy that with respect to people who for the -- following this Court's decision, at least the logic of the Court's decision would suggest that they were citizens, too.

JUSTICE BREYER: Is there -- is there anything that rings a bell in this in your mind, of -- I mean, the thing that goes the other way is the right of an American citizen to pass his American citizenship on to his children. And when we talk about -- when we talk about Congress's power over naturalization, is there anything that's drawn a distinction between the general power, which are people who are not citizens to become citizens, but what it seems to me intuitively is a different situation, of the right to pass your citizenship on? Does that ring any bell at all?

MR. KNEEDLER: There is no such right. And Wong Kim Ark --

JUSTICE BREYER: I'm not saying there is

such a right. I just wonder if it rings any bell at all that this has ever been discussed in anything you've come across.

MR. KNEEDLER: Well, the Court's decision in -- in -- the dissenters in -- in Nguyen discussed this. But we think it's clear that under this -- under Wong Kim Ark and Rogers v. Bellei that -- that that is equally an exercise of Congress's naturalization power which is subject to the same plenary standards --

JUSTICE BREYER: All right. Just looking -- in trying to get your memory -- well, does something come to mind the opposite way that -- where the Court did go into a long exegesis about the law, including constitutional law, and then says at the end, well, but you are not entitled to memory -- to a remedy because of some other --

MR. KNEEDLER: If this is going back to remedy, I don't specifically.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Hubachek, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF STEVEN F. HUBACHEK
ON BEHALF OF THE PETITIONER

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

The rationale that the Solicitor General's

office offers today is that further assumptions can be made that even after men do the things that the Court said were legitimately required of them, that they legitimate, that they have an opportunity to form a relationship with their child, that further gender-based assumptions should be put into place and say that, well, but you are not going to be the real father or you're not going to be the real parent. Whereas in the case of women we are going to assume that when they had have the nonmarital child they are going to be in charge and that when a father legitimates and does whatever is required wherever the child is born, we are going to assume that the mother is involved still. But the very facts of this case demonstrate that that's not the case. That in this case Petitioner's father raised him and Petitioner's mother was not involved in his growing up and he brought him to the United States -- I'm sorry, if I was getting a question. So it's basically piling further gender-related inferences on top of the ones that are already in place in order to serve to justify this distinction.

Now, with respect to the Fiallo case, there is a tradition of allowing citizens to transmit citizenship. Fiallo involved getting aliens into the United States. There is no tradition that dates back to

1350 where citizens enjoyed rights to bring aliens into the United States, but it does date back to 1350 that you've been able to confer citizenship on your foreign-born children. So it is differently situated and it is differently situated in the very structure of the statute that we are talking about today. Congress very specifically eliminated the ability of courts to change the rules of naturalization of aliens. It basically used language very similar to the courts decision in Ginsberg and said that you can be naturalized under this provision and no other way. It didn't say that as to citizens as of birth. Citizens as of birth are treated differently. There is a severability clause in the statute, so that would apply to them and that brings into play all the various remedies that the Court has granted with the respect to extension over the years.

CHIEF JUSTICE ROBERTS: You referred -- I'm sorry, you refer to the tradition of passing -- do you agree with Mr. Kneedler that there is no such right?

MR. HUBACHEK: I agree that the Constitution doesn't guarantee that right. Our point is that it's a traditional right and that Congress has always provided for it even in the period between 1802 and 1855 where the statute was strangely drafted and didn't provide for

it. This Court made clear in Montana v. Kennedy that when Congress remedied that situation it made that remedy retroactive. So basically we have an unbroken tradition dating back to 1350, that's why I think that this right should be treated differently than the questions of admissions of aliens in Fiallo. And, again, there is also Chadha Zadvydas that made clear that the Constitution limits the Congress's power even in the context of naturalization. And then with respect to the third-party standing issue, the Court has granted third-party standing to criminal defendants whose are raising third-party constitutional issues in their criminal cases, and the same analysis should apply here. We can still look at the right from the perspective of the Petitioner's father and if the Court grants a levelling down remedy, that would not remedy the situation the Petitioner's father would be in because both before and after the Court's decision the children of women, similarly situated women, would be citizens and Petitioner's father's son would not.

JUSTICE GINSBURG: What were the criminal cases where there was -- where the defendant was permitted to raise --

MR. HUBACHEK: Campbell & Powers. Those are both cases where the criminal defendant asserted rights

of -- in one case it's a petit juror and another in the other case it was a grand juror, and there were discriminatory preemptory challenges in those cases, and the court allowed those criminal defendants to assert those constitutional rights.

Several members of the court also found there was standing in Miller. Kowalski pointed out in Craig v. Boren that there is a very forgiving standard when third-party rights are at issue in the case.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Counsel, the case submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)