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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.

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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

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 reinstated 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 than 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

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?

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 -- from 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 than what's set out in this statute. They

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

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

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

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

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

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

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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