

1 wouldn't be gender discrimination.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE ALITO: In 1940 you think that was

1 Congress' intent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE KAGAN: Mr. Kneeder --

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

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

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

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

20 JUSTICE SOTOMAYOR: The continuous one year.

21 MR. BROOME: And the legitimation
22 requirements.

23 JUSTICE GINSBURG: And the legitimacy.

24 MR. BROOME: Yes.

25 JUSTICE GINSBURG: More than that, I think

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

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

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

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

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

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

1 whether that would be appropriate?

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

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

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

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

25 (Laughter.)

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

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

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

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

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

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

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

9 MR. BROOME: I think it is now.

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

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

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

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

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

3 THE COURT: Not how they would remedy --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. BROOME: But --

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

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

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

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

1 is a little hard.

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

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

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

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

23 (Laughter.)

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Perhaps you're assuming

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. BROOME: Well, no.

8 (Laughter.)

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

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

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

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

1 remaining.

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

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

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

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

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

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

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

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

20 MR. BROOME: That's correct.

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

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

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

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

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

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

16 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

17 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

22 MR. KNEEDLER: No, but all --

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

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

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

9 MR. KNEEDLER: Well, certainly --

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

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

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