

# VIOLATING EQUAL PROTECTION: *LYNCH V. MORALES-SANTANA* AND THE INA'S SEX DISCRIMINATORY PHYSICAL PRESENCE REQUIREMENT

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## INTRODUCTION

The Constitution's equal protection guarantee prevents legislatures from drawing distinctions solely on the basis of sex.<sup>1</sup> Nevertheless, "our Nation has had a long and unfortunate history of sex discrimination."<sup>2</sup> The Court first invalidated a statute for discriminating on the basis of sex in 1971.<sup>3</sup> Since then, the Court has applied intermediate scrutiny to laws that discriminate against both men and women on the basis of their gender.<sup>4</sup> Laws cannot be based on "overbroad generalizations about the different talents, capacities, or preferences of male and females."<sup>5</sup>

The laws regarding when an unwed parent's citizenship can be passed on to a child born abroad have played a role in this country's history of sex discrimination.<sup>6</sup> For example, under the statutes at issue in *Lynch v. Morales-Santana*,<sup>7</sup> an unwed U.S. citizen father cannot convey citizenship at-birth to his child unless he has been physically present in the United States for ten years prior to the child's birth,

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1. See U.S. CONST. amend. XIV § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the law.").

2. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1977).

3. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

4. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

5. *Virginia*, 518 U.S. at 533.

6. Brief Amici Curiae of Professors of History, Political Science, and Law in Support of Respondent at 2, *Lynch v. Morales-Santana*, No. 15-1191 (U.S. Oct. 4, 2016).

7. 8 U.S.C. §§ 1401(a)(7) and 1409(c) (1952).

while an unwed U.S. citizen mother need only be present for one continuous year. By invalidating this statutory scheme the Court can take a step towards removing sex-discrimination from derivative citizenship laws.

This commentary argues that the Supreme Court should apply intermediate scrutiny to invalidate the scheme set forth by §§ 1401 and 1409 of the Immigration and Nationality Act (“INA”) because it discriminates on the basis of a parent’s gender. Further, the Court should remedy this equal protection violation by applying the shorter physical presence requirement, which currently applies only to mothers, to both genders.

### FACTS

Luis Ramon Morales-Santana was born in the Dominican Republic in 1962 to unmarried parents.<sup>8</sup> Morales-Santana’s mother was a citizen of the Dominican Republic.<sup>9</sup> His father was born in Puerto Rico and became a United States citizen in 1917 through the Jones Act.<sup>10</sup> He was physically present in Puerto Rico until he left to work for a U.S. company in the Dominican Republic, just twenty days short of his nineteenth birthday.<sup>11</sup>

In 1970, Morales-Santana’s parents married, which legitimated him in accordance with § 1409(a).<sup>12</sup> At the age of thirteen, he moved to the United States where he continued to live for more than forty years.<sup>13</sup>

In 2000, after several felony convictions, Morales-Santana was placed into removal proceedings.<sup>14</sup> Morales-Santana claimed he should not be removed because he had obtained derivative citizenship at birth from his father.<sup>15</sup> The immigration judge denied his application.<sup>16</sup> Morales-Santana filed a motion to reopen, claiming that the statutes governing derivative citizenship violated his father’s right

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8. *Morales-Santana v. Lynch*, 804 F.3d 521, 524 (2d Cir. 2015), *cert. granted*, 135 S. Ct. 2545 (2016).

9. *Id.*

10. *Id.*

11. Brief for Respondent at 10, *Lynch v. Morales-Santana*, NO. 15-1191 (U.S. Sept. 26, 2016) [hereinafter Brief for Respondent].

12. *Morales-Santana*, 804 F.3d at 524.

13. Brief for Respondent, *supra* note 11, at 10.

14. *Morales-Santana*, 804 F.3d at 524.

15. *Id.*

16. *Id.*

to equal protection under the Fifth Amendment.<sup>17</sup> His derivative citizenship claim was again rejected and the Bureau of Immigration Appeals (BIA) denied his motion to reopen.<sup>18</sup>

Under the INA of 1952, the statute in effect at the time of Morales-Santana's birth, an unwed citizen mother could provide citizenship at birth to her child, born abroad with a non-citizen father, as long as the mother was "physically present in the United States or one of its outlying possessions for a continuous period of one year" at any point prior to the child's birth.<sup>19</sup> In contrast, an unwed citizen father could not provide derivative citizenship to a child born abroad to a non-citizen mother unless he was "physically present in the United States or one of its outlying possessions for a period or period totaling not less than ten years, at least five of which were after attaining the age of fourteen years" prior to the child's birth.<sup>20</sup>

Having left Puerto Rico just twenty days before his nineteenth birthday, Morales-Santana's father was unable to satisfy the statutory requirement to provide derivative citizenship at birth to his son.<sup>21</sup> He did, however, satisfy the requirement that applies to unwed citizen mothers.<sup>22</sup>

Morales-Santana asked the United States Court of Appeals for the Second Circuit to review the BIA's decision to deny his motion for citizenship. He argued that the gender-based difference in the physical presence requirements imposed under §§ 1409(c) and 1401(a)(7) that places a more onerous burden on unwed fathers, violates the Fifth Amendment's guarantee of equal protection.<sup>23</sup> The Second Circuit agreed with Morales-Santana and held that he had acquired derivative citizenship at birth from his father.<sup>24</sup> The Government petitioned for a writ of certiorari from the Supreme Court of the United States, which was granted on June 28, 2016.<sup>25</sup>

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17. *Id.* at 524–25.

18. *Id.* at 525.

19. 8 U.S.C. § 1409(c) (1952).

20. § 1401(a)(7) (1952). The disparate treatment of unwed citizen mothers and fathers remains in the current version of the statutes. *See* 8 U.S.C. §§ 1409 (a) and (c) (2012) (requiring that unwed citizen fathers be physically present for five years with at least two of those years being after the age of fourteen, while unwed citizen mothers are still subject to the same one-year continuous presence requirement).

21. *Morales-Santana*, 804 F.3d at 523.

22. *Id.*

23. *Id.* at 523–24.

24. *Id.*

25. *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016).

## II. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>26</sup> The Supreme Court has held that this right applies to the federal government through the Due Process Clause of the Fifth Amendment.<sup>27</sup>

Laws that discriminate on the basis of gender are reviewed under intermediate scrutiny.<sup>28</sup> To survive intermediate scrutiny, the government must have an “exceedingly persuasive” justification for using the gender classification.<sup>29</sup> The government is required to show “at least that the [challenged] classification serves ‘important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”<sup>30</sup> The justification must be “genuine, not hypothesized or invented *post hoc*.”<sup>31</sup> Furthermore, the justification may not “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>32</sup> The burden of proving that a gender classification satisfies intermediate scrutiny is “demanding and it rests entirely on the State.”<sup>33</sup>

The Court’s decision in *Fiallo v. Bell*<sup>34</sup> has made how or whether intermediate scrutiny should be applied in the context of immigration, citizenship, and naturalization murky. In *Fiallo*, the Court considered a challenge by a group of alien fathers and children to an Immigration and Naturalization Service provision that provided a special immigration preference based on a relationship to a citizen mother, but not a father.<sup>35</sup> In deference to Congress’s plenary powers of immigration and naturalization, the Court declined to apply heightened scrutiny.<sup>36</sup>

In *Tuan Anh Nguyen v. INS*,<sup>37</sup> the Court reviewed the equal protection implications of § 1409(a), which requires that unwed

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26. U.S. CONST. amend. XIV § 1.

27. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

28. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

29. *Id.*

30. *Id.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

31. *Id.*

32. *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975)).

33. *Id.* (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

34. 430 U.S. 787 (1977).

35. *Id.* at 788.

36. *Id.* at 799.

37. 533 U.S. 53 (2001).

citizen fathers, but not mothers, legitimate their children born abroad in order to provide citizenship at birth.<sup>38</sup> The Court held that the gender classification was substantially related to ensuring “that a biological parent-child relationship exists”<sup>39</sup> and to ensuring that there would be “real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”<sup>40</sup> In reaching this holding, the Court relied on the fact that women but not men are biologically required to be present at a child’s birth.<sup>41</sup> Because the Court found that the classification withstood intermediate scrutiny, it did not have to decide whether a lesser form of scrutiny should apply in deference to Congress’s plenary powers.<sup>42</sup>

In 2008, the Ninth Circuit reviewed the physical presence requirements at issue here, assuming, without deciding, that heightened scrutiny applied.<sup>43</sup> The court upheld the differing physical presence requirements, recognizing the Government’s interests in preventing statelessness and ensuring children born abroad would have sufficient ties to the United States.<sup>44</sup> The Ninth Circuit held that the fit between the gender classification and asserted interests was “sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship.”<sup>45</sup> The Supreme Court affirmed the Ninth Circuit’s decision by an equally divided court.<sup>46</sup>

### III. HOLDING

In *Morales-Santana*, the Second Circuit reversed the BIA’s decision, holding that the gender-based difference in the physical presence requirement scheme imposed by §§ 1409(c) and 1401(a)(7) is an equal protection violation.<sup>47</sup> The court determined the proper remedy was to apply the shorter physical presence requirement, which applies to unwed citizen mothers, to unwed citizen fathers as well and

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38. *Id.* at 59–60.

39. *Id.* at 62.

40. *Id.* at 64–65.

41. *Id.* at 62.

42. *Id.*

43. *United States v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008), *aff’d*, 564 U.S. 210 (2011).

44. *Id.*

45. *Id.*

46. *Flores-Villar v. United States*, 564 U.S. 210, 210 (2011).

47. *Morales-Santana v. Lynch*, 804 F.3d 521, 524 (2d Cir. 2015), *cert. granted*, 135 S. Ct. 2545 (2016).

that accordingly, Morales-Santana had obtained derivative citizenship at birth from his father.<sup>48</sup>

After quickly rejecting Morales-Santana's arguments that his father had satisfied the physical presence requirement,<sup>49</sup> the Second Circuit determined that intermediate scrutiny should be applied.<sup>50</sup> The Government urged the court to apply rational basis review in accordance with *Fiallo v. Bell*.<sup>51</sup> The Second Circuit distinguished *Fiallo* because, unlike the plaintiffs in *Fiallo* who were aliens seeking admission to the United States, Morales-Santana claimed to have "pre-existing citizenship at birth."<sup>52</sup> Morales-Santana's equal protection claim therefore did not "implicate Congress's 'power to admit or exclude foreigners.'"<sup>53</sup> The court also noted that the Supreme Court had the opportunity to apply *Fiallo* to gender-based distinctions in § 1409 in *Miller, Nguyen, and Flores-Villar*, but did not do so.<sup>54</sup>

The court then applied intermediate scrutiny to the Government's asserted interests.<sup>55</sup> With respect to the Government's first interest, "ensur[ing] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship," the court could find no explanation for why "unwed fathers need more time than unwed mothers . . . to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad."<sup>56</sup> The court did not find the Government's reliance on *Nguyen* convincing because Morales-Santana's father legitimated him, thereby ensuring that a biological tie and opportunity to have a meaningful relationship existed.<sup>57</sup> The court noted that although "unwed mothers and father are *not* similarly situated" when it comes to the biologically-based ties in *Nguyen*, they "*are* similarly situated with respect to *how long* they should be present . . . in order to have assimilated citizenship-related values to transmit to the child."<sup>58</sup> Requiring a longer physical presence

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48. *Id.*

49. *Id.* at 527.

50. *Id.* at 529.

51. *Id.* at 528.

52. *Id.*

53. *Id.*

54. *Id.* at 528–29.

55. *Id.* at 530.

56. *Id.* (citations omitted).

57. *Id.* at 530–31.

58. *Id.* at 531 (emphasis in original).

requirement for unwed citizen fathers is therefore “not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States.”<sup>59</sup>

The Government’s second asserted interest was preventing statelessness.<sup>60</sup> The court examined the congressional hearings and reports relating to the 1940 and 1952 versions of the Act and could find no evidence that statelessness was actually an underlying concern.<sup>61</sup> Furthermore, even if preventing statelessness was a motivating factor, it did not satisfy intermediate scrutiny because an effective gender-neutral alternative was available.<sup>62</sup>

Having found that basing different physical presence requirements on gender violates equal protection, the court turned to determining the appropriate remedy. The court held that the one-year continuous presence requirement should apply to children born abroad to both unwed citizen fathers and mothers, and thereby recognized that Morales-Santana had obtained derivative citizenship at birth from his father.<sup>63</sup> Neither the text of the statute nor the legislative history were conclusive with regard to the proper remedy, so the court looked to binding precedent which “cautions [the court] to extend rather than contract benefits.”<sup>64</sup> In response to the Government’s argument that this remedy grants citizenship, which the court lacks the power to give, the Second Circuit asserted that it was not creating citizenship, but rather recognizing Morales-Santana’s pre-existing citizenship by remedying a constitutional defect.<sup>65</sup>

#### IV. ARGUMENTS

*Lynch v. Morales-Santana* involves two main issues. First, whether the scheme established by §§ 1401 and 1409, which requires unwed citizen fathers to fulfill a substantially longer physical presence requirement than unwed citizen mothers in order to transmit derivative citizenship to their foreign-born children, violates the Fifth Amendment’s guarantee of equal protection. Second, whether the Second Circuit provided the appropriate remedy.

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59. *Id.*

60. *Id.*

61. *Id.* at 532–33.

62. *Id.* at 534.

63. *Id.* at 524.

64. *Id.* at 537.

65. *Id.*

### A. *The Government's Arguments*

The Government argues that the Court should apply rational basis review, because it should defer to Congress's plenary power over naturalization.<sup>66</sup> Therefore, the Second Circuit erred by declining to follow *Fiallo*.<sup>67</sup> Deciding whether or not children born abroad should be citizens falls within Congress's exclusive authority.<sup>68</sup> Courts are not "well-positioned to second-guess Congress's complex judgments" in this area.<sup>69</sup>

Next, the Government argues that the gender-based physical presence scheme is constitutional even under heightened scrutiny.<sup>70</sup> The Government first asserts that the differing physical presence requirements are substantially related to ensuring that citizenship is only extended to children born abroad who have "sufficiently robust connection[s]" to the United States.<sup>71</sup> When only one parent of a child born abroad is a U.S. citizen, that child is "subject to competing claims of national allegiance," which therefore requires a "stronger connection to the United States."<sup>72</sup>

The Government further argues that while § 1409 does use the terms "mother" and "father," it is not doing so because of gender, but out of recognition that at the time of birth an unwed mother has a legal relationship to her child, while an unwed father does not.<sup>73</sup> The risk of competing national allegiances is reduced when the only legally recognized parent is a U.S. citizen.<sup>74</sup> Therefore, Congress decided that unwed mothers could fulfill a shorter physical presence requirement, more similar to what is required of two married U.S. citizen parents of a child born abroad.<sup>75</sup> The Government also relies on *Nguyen*, and the proposition that "unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect" at the time of a child's birth.<sup>76</sup>

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66. Brief for Petitioner at 8–9, *Lynch v. Morales-Santana*, NO. 15-1191 (U.S. Aug. 19, 2016) [hereinafter Brief for Petitioner].

67. *Id.* at 17.

68. *Id.* at 14.

69. *Id.* at 16.

70. *Id.* at 9.

71. *Id.* at 18.

72. *Id.*

73. *Id.* at 10.

74. *Id.* at 9.

75. *Id.* at 10.

76. *Id.* at 39.



Additionally, the Government argues that §§ 1401 and 1409 are substantially related to reducing statelessness.<sup>77</sup> The shorter physical presence requirement for unwed citizen mothers reflects Congress's finding that the risk of statelessness was greater for children born abroad to unwed citizen mothers.<sup>78</sup>

Finally, the Government argues that the Second Circuit did not apply the appropriate remedy.<sup>79</sup> Only Congress has the authority to confer citizenship, but the Second Circuit's remedy extends citizenship to Morales-Santana and "an untold number of individuals" whose parents did not meet the statutory requirements set by Congress.<sup>80</sup> Furthermore, it "could not be more clear that Congress intended . . . to impose substantial physical-presence requirements in order for the children born abroad of one U.S.-citizen parent and one alien parent to acquire U.S. citizenship from birth."<sup>81</sup> Therefore, if §§ 1401 and 1409 do violate equal protection, the proper remedy is to apply the longer physical presence requirement to children born abroad to both unwed citizen mothers and fathers.<sup>82</sup>

### *B. Morales-Santana's Arguments*

Morales-Santana argues that the Second Circuit correctly held that the physical presence requirements in §§ 1401 and 1409 unconstitutionally discriminate on the basis of gender.<sup>83</sup> Sections 1401 and 1409 facially discriminate on the basis of sex and therefore must be subject to heightened scrutiny.<sup>84</sup> *Fiallo* should not be relied upon to apply a more deferential standard of review.<sup>85</sup> Unlike the petitioners in *Fiallo*, Morales-Santana claims that a U.S. citizen, his father, is being subjected to sex discrimination.<sup>86</sup> Also, Morales-Santana "does not claim . . . any new immigration status, but instead claims *preexisting* citizenship at birth."<sup>87</sup>

Additionally, Morales-Santana argues that the gender-based physical presence requirement scheme is not substantially related to

77. *Id.* at 33.

78. *Id.*

79. *Id.* at 49.

80. *Id.* at 49–50.

81. *Id.* at 53.

82. *Id.* at 12.

83. Brief for Respondent, *supra* note 11, at 15.

84. *Id.* at 11.

85. *Id.* at 17.

86. *Id.*

87. *Id.* (emphasis in original).

either of the Government's asserted interests, but instead reflects "archaic and overbroad gender stereotypes."<sup>88</sup> Morales-Santana notes that there is no evidence that Congress enacted this scheme to ensure foreign-born children have strong ties to the United States<sup>89</sup> and that, in fact, it serves to reduce the likelihood that children born abroad to U.S. citizen mothers will have these ties.<sup>90</sup> Even if Congress's purpose were to ensure a child born abroad would have a strong connection to the United States, the physical presence scheme is overbroad because it allows a U.S. citizen mother who only spent the first year of her life in the United States to pass on citizenship to her child.<sup>91</sup>

In response to the Government's argument that the term "mother" is simply used to denote the only legally recognized parent at birth, Morales-Santana contends that "'the moment of birth' is not dispositive, for the statute permits at-birth citizenship to be conferred retroactively upon the legitimation of the child" by his father.<sup>92</sup> *Nguyen* also does not support the constitutionality of this scheme because the "discriminatory physical presence requirements at issue here do *not* account for *biological* differences" of mothers and fathers.<sup>93</sup> Once an unwed citizen father legitimates his child, he is similarly situated to an unwed citizen mother with respect to how long he needs to have been present in the United States in order to pass on strong national allegiance to his child.<sup>94</sup>

Morales-Santana also contends that physical presence requirements do not reduce the risk of statelessness.<sup>95</sup> There is no evidence that Congress was actually concerned about statelessness when enacting §§ 1401 and 1409,<sup>96</sup> and the historical record undermines the Government's argument that the risk of statelessness was greater for children born to unwed citizen mothers.<sup>97</sup> Furthermore, the ten-year physical presence requirement actually

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88. *Id.* at 19.

89. *Id.* at 20.

90. *Id.*

91. *Id.* at 27–28.

92. *Id.* at 12.

93. *Id.* at 27 (emphasis in original).

94. *See id.* (observing that "there is no reason to suppose 'that unwed fathers need more time than unwed mothers in the United States . . . to assimilate the values the statute seeks to ensure are passed on to citizen children born abroad.'").

95. *Id.* at 30.

96. *Id.*

97. *Id.* at 13.

increases the risk of statelessness for children born abroad to unwed citizen fathers.<sup>98</sup>

In addition, Morales-Santana argues that the poor fit between the gender-based physical presence requirements and the Government's asserted interests demonstrates that the distinction between mothers and fathers is actually based on "archaic and overbroad stereotypes reflecting 'fixed notions concerning the roles and abilities of males and females.'"<sup>99</sup> The administrative and legislative history confirms that Congress required unwed citizen mothers to fulfill a shorter physical presence requirement because "mothers, not fathers, are the 'natural guardians' and primary caretakers of nonmarital children."<sup>100</sup>

Finally, Morales-Santana argues the Second Circuit applied the correct remedy by extending the shorter physical presence requirement to unwed citizen fathers.<sup>101</sup> The court did not exceed its authority in holding that Morales-Santana is a citizen because it did not grant a new right of citizenship to him, but rather confirmed his pre-existing citizenship that was evident once the constitutional defect in the statute was corrected.<sup>102</sup>

#### IV. ANALYSIS

The Court should affirm the Second Circuit's decision and hold that §§ 1401 and 1409's physical presence requirements violate the equal protection guarantee of the Fifth Amendment. The Court previously considered the equal protection implications of this gender-based, physical presence requirement scheme in *Flores-Villar* and split 4-4, with Justice Kagan recusing herself.<sup>103</sup> *Lynch v. Morales-Santana* will also be decided by eight justices, but this time Justice Kagan could provide the fifth vote needed to break the tie.

##### *A. The Court Should Apply Intermediate Scrutiny*

The scheme established by §§ 1401 and 1409 is facially sex discriminatory because it applies a longer physical presence

98. *Id.* at 39.

99. *Id.* at 41 (citation omitted).

100. *Id.* at 41-42.

101. *See id.* at 48 ("[S]uch a remedy neither exceeds judicial authority nor violates congressional intent.").

102. *See id.* at 50 ("Curing the statute of its constitutional defect would 'confirm [respondent's] pre-existing citizenship rather than grant [him] rights that [he] does not now possess.'").

103. *Flores-Villar v. United States*, 131 S. Ct. 2312, 2313 (2011).

requirement to unwed citizen fathers than it does to unwed citizen mothers. The Court has repeatedly established that laws drawing distinctions on the basis of gender must be reviewed under intermediate scrutiny.<sup>104</sup>

The Court should reject the Government’s argument to apply a more deferential standard of review because Congress’s plenary power over naturalization and immigration is not implicated in this case.<sup>105</sup> Here, Morales-Santana is claiming to have pre-existing citizenship at birth.<sup>106</sup> This is distinct from deciding which foreigners to admit or exclude, which forms the heart of Congress’s immigration powers.<sup>107</sup> Congress has also defined the term “naturalization” in a way that plainly excludes at-birth citizenship.<sup>108</sup> Furthermore, the Court has never used a lower standard of review in deference to Congress’s plenary power to determine the constitutionality of statutes concerning citizenship at birth.<sup>109</sup> *Fiallo v. Bell* is distinguishable in that the petitioners in *Fiallo* sought a special immigration benefit, which implicated Congress’s immigration powers, whereas Morales-Santana is claiming pre-existing citizenship, which does not.<sup>110</sup>

### *B. The Gender-Based Physical Presence Requirement Scheme Violates Equal Protection*

For a discriminatory gender-based classification to survive intermediate scrutiny it must be “substantially related” to the achievement of an important governmental interest.<sup>111</sup> The

104. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); *United States v. Virginia*, 518 U.S. 515, 555 (1996); *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).

105. See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 97 (2001) (O’Connor, J., dissenting) (citing *Miller v. Albright*, 523 U.S. 420, 480–81 (1998) (Breyer, J., dissenting)) (“Because §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply.”).

106. *Morales-Santana v. Lynch*, 804 F.3d 521, 528 (2d Cir. 2015), *cert. granted*, 135 S. Ct. 2545 (2016).

107. See *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (“We are dealing here with an exercise of the Nation’s sovereign power to admit or exclude foreigners . . .”).

108. See 8 U.S.C. § 1101(a)(23) (2012) (“The term ‘naturalization’ means the conferring of nationality of a state upon a person *after* birth, by any means whatsoever.”) (emphasis added).

109. See *Miller*, 523 U.S. at 480 (Breyer, J., dissenting) (“The Court to my knowledge has never said, or held, or reasoned that statutes automatically conferring citizenship ‘at birth’ . . . receive a more lenient standard of review.”).

110. See *Nguyen*, 533 U.S. at 96 (O’Connor, J., dissenting) (“*Fiallo* . . . is readily distinguished. *Fiallo* involved constitutional challenges to various statutory distinctions . . . that determined the availability of a special immigration preference . . .”).

111. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citation omitted).

justification for the classification cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of male and females.”<sup>112</sup> “The burden of justification is demanding and it rests entirely on the State.”<sup>113</sup> Here, the Government has failed to meet that burden.

The gender-based physical presence requirement scheme is not substantially related to ensuring children born abroad have strong ties to the United States. The Government argues that “mother” is used as a neutral term signifying a child born out of wedlock’s only legally recognized parent at birth, so those children are less likely to be subjected to competing national influences.<sup>114</sup> This argument only makes sense if one assumes that the unwed father will not be involved in the child’s life.<sup>115</sup> This type of assumption is not permissible<sup>116</sup> and reflects “a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.”<sup>117</sup> It also ignores the reality that today many fathers are raising their children as single parents,<sup>118</sup> many non-marital births take place in cohabiting households,<sup>119</sup> and that many fathers acknowledge paternity for their non-marital children in the hospital at the time of the child’s birth.<sup>120</sup>

What really undercuts the legitimacy of this interest is the poor fit between the differing gender-based physical presence requirements and the Government’s purported justification. The physical presence requirement scheme allows an unwed citizen mother to transmit citizenship to her child, even if she only spent the first year of her life

112. *Id.*

113. *Id.* (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

114. Brief for Petitioner, *supra* note 66, at 9.

115. Brief for Respondent, *supra* note 11, at 20–21.

116. See *Virginia*, 518 U.S. at 533 (stating that justifications for gender classifications “must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females”).

117. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 92 (2001) (O’Connor, J., dissenting).

118. See Gretchen Livingston, Pew Research Center, *The Rise of Single Fathers* (July 2, 2013), <http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers> (stating that in 2013 single fathers accounted for 24% of single parent households).

119. See Carl Haub, *Rising Trend of Births Outside Marriage*, POPULATION REFERENCE BUREAU (Apr. 2013), <http://www.prb.org/publications/articles/2013/nonmarital-births.aspx> (finding that from 2006 to 2010 42% of nonmarital births in the United States occurred in cohabiting households).

120. See Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 623 (2005) (finding that paternity is established for 70% of nonmarital children with six of seven paternities established through “voluntary in-hospital programs”).

in the United States and has no plans to return.<sup>121</sup> In contrast, an unwed citizen father who spent the first eighteen years of his life in the United States before leaving cannot pass on U.S. citizenship at birth to his child.<sup>122</sup> It is not logical to think that a mother who has not been in the United States since infancy is better equipped to pass on strong ties to the United States than a father who lived there for eighteen years.

The Government's purported interest in reducing statelessness is no more convincing. Scholars concur that gender discrimination in citizenship laws "is a major cause of statelessness" and the Office of the United Nations High Commissioner for Refugees has made removing gender discrimination from such laws an integral part of its plan to eliminate statelessness.<sup>123</sup>

In 1958 and still today, there is a substantial risk that children born abroad to unmarried U.S. citizen fathers will be stateless.<sup>124</sup> In at least thirty countries an unwed mother either could not or currently cannot provide her citizenship to her non-marital child.<sup>125</sup> By placing a substantial burden, that is sometimes impossible to satisfy, on unwed U.S. citizen fathers, § 1401(a)(7) exacerbates the risk that children born in these countries will be stateless.<sup>126</sup> Because the gender-based physical presence scheme actually increases the problem the Government alleges Congress was trying to solve, it is not substantially related to this interest.

### *C. The Second Circuit Applied the Correct Remedy*

The Court should affirm the Second Circuit's decision to extend the benefit of the shorter, one-year, continuous presence requirement to unwed citizen fathers. The goal of remedying equal protection violations is to "place persons unconstitutionally denied an

121. See 8 U.S.C. § 1409(c) (1952) (stating that a child born abroad to an unwed citizen mother gains U.S. citizenship at birth "if the mother had previously been physically present in the United States or one of its outlying possession for a continuous period of one year").

122. See § 1401(a)(7) (requiring that unwed citizen fathers be physically present in the United States "for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years").

123. Brief of *Amici Curiae* Scholars on Statelessness in Support of Respondent at 12, *Lynch v. Morales-Santana*, No. 15-1191 (U.S. Oct. 3, 2016).

124. *Id.* at 9-10.

125. *Id.* at 14.

126. Note that because § 1401(a)(7) required that an unwed father be present in the U.S. for at least five years after the age of fourteen prior to his child's birth, it is impossible for a father under the age of nineteen to provide citizenship to his child under this statute.

opportunity or advantage in ‘the position they would have occupied in the absence of [discrimination].’”<sup>127</sup> Applying the ten-year physical presence requirement to both genders moving forward would not achieve this goal. Citizenship has already been granted under the statute to children of unwed citizen mothers and once citizenship has been conferred it cannot be retracted.<sup>128</sup> This means that even though mothers and fathers would be treated equally moving forward, equality has not been restored because an unwed U.S. citizen mother who has already provided citizenship at birth to her child gets to retain that benefit, while an unwed citizen father, like Morales-Santana’s, still has not had that same opportunity.

Additionally, when deciding on a remedy, the Court looks to Congress’s intent when enacting the statute.<sup>129</sup> Unless there is clear congressional intent otherwise, “ordinarily ‘extension, rather than nullification is the proper course.’”<sup>130</sup> For example, in *Califano v. Westcott*, the Court remedied an unconstitutional gender classification in the Social Security Act, which provided benefits to families with dependent children when a father but not a mother became unemployed, by replacing “father” with “its gender-neutral equivalent.”<sup>131</sup> This had the effect of ensuring that benefits would be “paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father.”<sup>132</sup> The Court noted that extension of benefits conformed with Congress’s intent in drafting the statute because withdrawing benefits would “impose hardship on beneficiaries whom Congress plainly meant to protect.”<sup>133</sup> Similarly, withdrawing the benefit of the one-year continuous presence requirement would contradict Congress’s intent to provide at birth citizenship to mothers meeting this requirement.

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127. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (alteration in original) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

128. *See Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that every citizen has “a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship”).

129. *See Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 292 n.31 (1987) (“[T]he Court must look to the intent of the . . . legislature to determine whether to extend benefits or nullify the statute.”).

130. *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)).

131. 443 U.S. at 91–93.

132. *Id.* at 92.

133. *Id.* at 90.

Furthermore, the Second Circuit has not exceeded its authority by holding that Morales-Santana obtained U.S. citizenship at birth from his father. Morales-Santana claims to have pre-existing citizenship at birth. The Second Circuit merely confirmed his pre-existing citizenship by excising the constitutional defect in the statute which does not contravene Congress's plenary power over naturalization.<sup>134</sup>

#### CONCLUSION

Sections 1401 and 1409 facially discriminate against unwed citizen fathers and reflect stereotypical views that women, not men, are children's natural caretakers. The Court should find that the different physical presence requirements violate the Fifth Amendment's equal protection guarantee and should remedy this violation by extending the shorter physical presence requirement to both unwed citizen mothers and fathers.

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134. See *Miller v. Albright*, 523 U.S. 420, 432 (1998) (plurality opinion) (“[J]udgment in [plaintiff’s] favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess.”); see also *id.* at 488–89 (Breyer, J., dissenting) (citation omitted) (“Whatever limitations there may be upon a Court’s powers to grant citizenship, those limitations are not applicable here . . . . The statute itself grants citizenship automatically, and ‘at birth.’ And this Court need only declare that that is so.”).