

# A FATHER'S PRESENCE: *FLORES-VILLAR v. UNITED STATES* AND EQUAL PROTECTION

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## I. INTRODUCTION

The constitutional guarantee of equal protection under the law stands as a bulwark against restrictions based solely on sex. The Fifth and the Fourteenth Amendments require the government to consider individuals, not gender stereotypes, when it legislates.<sup>1</sup> Nonetheless, both men and women have faced sex-based discrimination.<sup>2</sup> To safeguard the right to equal treatment under the law, courts apply intermediate scrutiny, a form of heightened judicial review, to laws that create classifications based on sex.<sup>3</sup> In *Flores-Villar v. United States*,<sup>4</sup> the Supreme Court has the opportunity to apply this heightened scrutiny to a statutory scheme<sup>5</sup> that makes it more difficult for fathers than mothers to transfer U.S. citizenship to their children. The outcome will depend largely on whether the Court's exercise of intermediate scrutiny is vigorous or lenient.

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1. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Inherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an *individual's* opportunity.”) (emphasis added).

2. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (striking down a state's discriminatory adoption statute because it rested on the impermissible stereotype that a father does not bear as close a relationship with his children as a mother does); *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) (upholding a state law prohibiting women from practicing law, reasoning that “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”) (Bradley, J., concurring).

3. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

4. *United States v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010).

5. 8 U.S.C.A. §§ 1401(g) and 1409(c) (West 2011).

The Supreme Court's application of intermediate scrutiny has been inconsistent. In *Mississippi University for Women v. Hogan*,<sup>6</sup> for example, the Court said that the government must show an "exceedingly persuasive justification" in order to successfully defend a statute that classifies individuals on the basis of sex.<sup>7</sup> In *Nguyen v. Immigration and Naturalization Service*,<sup>8</sup> however, the Court merely stated that "it must be established" that a statute does not violate equal protection,<sup>9</sup> seemingly ignoring the high burden of justification placed on the government in *Hogan*.<sup>10</sup> Additionally, the *Nguyen* Court dismissed the relevance of sex-neutral alternatives to a law that imposed requirements on fathers but not mothers,<sup>11</sup> even though in a prior case the Court found the question of sex-neutral alternatives very salient.<sup>12</sup>

In *Flores-Villar*, the Court may finally clarify what is required of the government under intermediate scrutiny. It could take a more stringent approach than it did in *Nguyen*, considering sex-neutral alternatives and requiring the Government to shoulder a heavy burden of justification. More likely, however, the Court will continue its lenient application of intermediate scrutiny and will accept the Government's rationale for the law. This outcome would call into question the Court's future commitment to heightened scrutiny in sex-discrimination cases.

## II. FACTS

Ruben Flores-Villar was born in Tijuana, Mexico, on October 7, 1974.<sup>13</sup> His father, Ruben Trinidad Floresvillar-Sandez, a United States

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6. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

7. *See id.* at 724 ("[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification." (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (quotation marks omitted))).

8. *Nguyen v. Immigration and Naturalization Services*, 533 U.S. 53 (2001).

9. *Id.* at 60.

10. *See id.* at 78 (O'Connor, J., dissenting) ("In the first sentence of its equal protection analysis, the majority glosses over the crucial matter of the burden of justification.").

11. *See id.* at 64 (majority opinion) ("[T]o require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality. . . . The issue is not the use of gender specific terms instead of neutral ones.").

12. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) (invalidating a sex-based classification where a sex-neutral approach would have achieved the same objectives).

13. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010).

citizen, was sixteen at the time Flores-Villar was born.<sup>14</sup> Floresvillar-Sandez is not listed on his son's birth certificate, but acknowledged his paternity with the Civil Registry in Mexico in 1985.<sup>15</sup> Flores-Villar's mother, Maria Mercedes Negrete, is a citizen and national of Mexico.<sup>16</sup> When he was two months old, Flores-Villar came to the United States with his father and paternal grandmother for medical treatment.<sup>17</sup> He remained in the United States and grew up in San Diego with his father, grandmother, and siblings, but had little contact with his Mexican mother.<sup>18</sup> Floresvillar-Sandez claimed Flores-Villar as a dependent on his tax returns for several years.<sup>19</sup>

In 1997, Flores-Villar was convicted of importing marijuana and subsequently was removed from the United States on several occasions between 1998 and 2005.<sup>20</sup> In 2006, after illegal entry, he was charged with "being a deported alien found in the United States after deportation."<sup>21</sup> Flores-Villar raised the defense that he was a citizen through his father, but this argument was rejected because his father did not meet the statutory requirement necessary for passing citizenship to his son.<sup>22</sup> Because Flores-Villar would have been a citizen if his mother, rather than his father, had been a U.S. citizen, the present case seeks to resolve whether the statutory requirement violates equal protection.

In determining whether a U.S. citizen transmits U.S. citizenship to a child born abroad, courts look to the relevant statute that was in effect at the time of the child's birth.<sup>23</sup> When Flores-Villar was born, § 1401(a)(7) of the Immigration and Nationality Act provided, in relevant part:

(a) The following shall be nationals and citizens of the United States at birth:

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14. *Id.*

15. *Id.*

16. *United States v. Flores-Villar*, 497 F.Supp.2d 1160, 1161 (S.D. Cal. 2007).

17. *Id.*

18. *Id.*

19. *Id.*

20. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010).

21. *Id.*

22. *Id.*

23. *Ablang v. Reno*, 52 F.3d 801, 803 (9th Cir. 1995) (citing *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990)).

(7) a person born outside the geographic limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was 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.<sup>24</sup>

Because Flores-Villar's father was only sixteen when Flores-Villar was born, he could not have been present in the United States for at least five years after turning fourteen.<sup>25</sup> With a father who failed this "physical presence" requirement, Flores-Villar was prevented from claiming paternally-derived citizenship.<sup>26</sup>

Accordingly, the Government filed a motion in limine in the Southern District of California seeking to exclude evidence regarding Flores-Villar's claim of derivative citizenship. The court granted the Government's request, concluding that "no reasonable juror could find that [the] Defendant could establish derivative citizenship through his citizen father. Therefore, any evidence of [the] Defendant's father's citizenship, residency, or legitimating acts is not relevant."<sup>27</sup> Following trial, the court found Flores-Villar guilty of "being a deported alien in the United States after deportation."<sup>28</sup>

On appeal, Flores-Villar argued that the Immigration and Nationality Act made "an impermissible classification on the basis of gender" in violation of the Fifth Amendment's guarantee of equal protection under the law.<sup>29</sup> Specifically, Flores-Villar argued that the lengthy physical-presence requirement, which applied to unwed fathers and not to unwed mothers, unconstitutionally discriminated against men. Section 1409(c), the provision applicable to mothers, states:

Notwithstanding the provision of [§ 1401(a)(7)], a person born . . . outside the United States and out of wedlock shall be held to have acquired *at birth the nationality status of his mother*, if the mother

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24. 8 U.S.C. § 1401(a)(7) (1974). The current law provides for a shorter physical presence requirement, allowing a citizen-parent to transfer citizenship to a child born outside the U.S. where that parent "was physically present in the United States or its outlying possessions for a period or periods totaling not less than *five* years, at least *two* of which were after attaining the age of fourteen years." 8 U.S.C.A. § 1401(g) (West 2010) (emphasis added).

25. *Flores-Villar*, 536 F.3d at 994.

26. *Id.*

27. *United States v. Flores-Villar*, 497 F.Supp.2d 1160, 1162 (S.D. Cal. 2007).

28. *Flores-Villar*, 536 F.3d at 994.

29. *Id.* at 995.

had the nationality of the United States . . . and if the mother had previously been *physically present in the United States* . . . for a continuous period of *one year*.<sup>30</sup>

A mother, then, can transfer U.S. citizenship to her child born abroad as long as she has been in the U.S. for one year at any time. By comparison, under the applicable 1974 statute, a father could only transfer his citizenship if he had been present in the U.S. for ten years.

### III. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>31</sup> While no similar constitutional provision explicitly applies to the federal government, the Supreme Court has held that the Clause applies implicitly through the Due Process Clause of the Fifth Amendment.<sup>32</sup>

“All equal protection cases pose the same basic question: Is the government’s classification justified by a sufficient purpose?”<sup>33</sup> That is, if the government distinguishes between two people for the purpose of treating them differently under the law, the government must show that its distinction is justified. All laws challenged under equal protection must at least meet the “rational-basis test,” which is the minimum level of judicial scrutiny.<sup>34</sup> The rational-basis test is satisfied if the government shows that its classification is “rationally related to a legitimate state interest.”<sup>35</sup> In effect, this test is very deferential to the government.<sup>36</sup>

Governmental classifications based on race and gender, however, must meet heightened judicial scrutiny. Laws that distinguish between persons on the basis of race face strict scrutiny: the government must show that the racial classification is narrowly tailored to further a

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30. 8 U.S.C.A. § 1409(c) (West 2010) (emphasis added).

31. U.S. CONST. amend. XIV.

32. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (extending the application of the Fourteenth Amendment’s Equal Protection Clause to the federal government via the Due Process Clause of the Fifth Amendment).

33. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669 (3d ed. 2006).

34. *Id.* at 677.

35. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

36. *See* *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (“[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”).

compelling governmental interest.<sup>37</sup> Laws that distinguish between persons on the basis of sex, as here, must meet intermediate scrutiny: the classifications “must serve important governmental objectives and must be substantially related to those objectives.”<sup>38</sup>

#### *A. Impermissible Sex Classifications Based on Stereotypes*

The majority of the Supreme Court's jurisprudence regarding sex discrimination involves laws that benefit women to the disadvantage of men.<sup>39</sup> Many of these cases deal with sex classifications based on stereotypes about a woman's role in the family and as a mother. In *Caban v. Mohammed*,<sup>40</sup> for example, a New York state statute allowed an unwed mother, but not an unwed father, to block the adoption of her child by withholding consent.<sup>41</sup> The Supreme Court struck down the statute, holding it to be an “overbroad generalization in gender-based classifications.”<sup>42</sup> The Court expressly rejected the state's claim that the distinction was justified by “a fundamental difference between maternal and paternal relations—that a natural mother . . . bears a closer relationship with her child . . . than a father does.”<sup>43</sup> While the Court recognized that the state had a strong interest in facilitating adoptions, the “undifferentiated distinction between unwed mothers and unwed fathers” did not bear a substantial relationship to that interest.<sup>44</sup> Instead, the statute “discriminate[d] against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child.”<sup>45</sup>

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37. *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

38. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

39. CHEMERINSKY, *supra* note 33, at 760; *see, e.g.*, *Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (state nursing school only admitted women); *Caban v. Mohammed*, 441 U.S. 380 (1979) (discriminatory adoption statute precluded fathers from withholding consent to an adoption); *Craig v. Boren*, 429 U.S. 190 (1976) (state liquor law disadvantaged men, but not women).

40. *Caban v. Mohammed*, 441 U.S. 380 (1979).

41. *Id.*

42. *Id.* at 394 ((quotation marks omitted) (citing *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977))).

43. *Id.* at 388 (quotation marks omitted) (citing Transcript of Oral at 41, *Caban v. Mohammed*, 441 U.S. 380 (1979) (No. 77-6431)).

44. *Id.* at 394.

45. *Id.*

*B. Permissible Sex Classifications Based on Biological Difference:  
Nguyen v. I.N.S. and Ambiguous Intermediate Scrutiny*

While classifications based on stereotypes generally will fail intermediate scrutiny, the Supreme Court has recognized that “physical differences between men and women . . . are enduring.”<sup>46</sup> In *Nguyen*, the Court relied on these differences in upholding § 1409(a) of the Immigration and Naturalization Act, which imposes a set of requirements on unwed fathers but not on unwed mothers for purposes of transferring U.S. citizenship to children born abroad.<sup>47</sup> In addition to the physical-presence requirement of § 1401, which was not at issue in *Nguyen*, § 1409(a) imposes the following requirements on unwed citizen fathers:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person’s birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years-
  - (A) the person is legitimated under the law of the person’s residence or domicile,
  - (B) the father acknowledges paternity of the person in writing under oath, or
  - (C) the paternity of the person is established by adjudication of a competent court.<sup>48</sup>

Unwed citizen–mothers, by contrast, only need to meet § 1409(c)’s one-year physical-presence requirement.<sup>49</sup>

To withstand intermediate scrutiny, the statutory sex classification must “serve important governmental objectives” and the “discriminatory means employed [must be] substantially related to

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46. *United States v. Virginia*, 518 U.S. 515, 534 (1996).

47. *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

48. 8 U.S.C.A. § 1409(a) (West 2010).

49. 8 U.S.C.A. § 1409(c) (West 2010).

the achievement of those objectives.”<sup>50</sup> In *Nguyen*, the Court posited that the government had two objectives. First, the government wanted assurance “that a biological parent–child relationship exists.”<sup>51</sup> Second, it wanted to ensure the existence of “real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”<sup>52</sup>

Given the number of Americans abroad, the Court noted that Congress could be concerned about the potential for burgeoning citizenship claims based solely on “male parentage subject to no condition save the father’s previous length of residence in this country.”<sup>53</sup> The dissent, however, claimed that the majority only hypothesized about the purposes of § 1409(a),<sup>54</sup> whereas heightened scrutiny requires the Court to “inquire into the *actual* purposes of the discrimination.”<sup>55</sup> The dissent also argued that the majority failed to explain the importance of these governmental interests as required by heightened scrutiny.<sup>56</sup>

The Court held that the discriminatory sections of the Immigration and Naturalization Act were substantially related to the government’s two interests.<sup>57</sup> First, by imposing a higher burden on fathers than on mothers, the statute provided assurance of a biological relationship because “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. . . . In the case of the mother, the relationship is verifiable from the birth itself[,]” but fathers need to take additional steps to verify their paternity.<sup>58</sup> Second, with regard to ensuring meaningful ties between the child, the parent, and the U.S., the Court relied on the fact that a mother must be present at the birth of her child, but not a father. This difference is important inasmuch as “the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth”

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50. *Nguyen*, 533 U.S. at 60 (quotation marks omitted) (citing *Virginia*, 518 U.S. at 553).

51. *Id.* at 62.

52. *Id.* at 64–65.

53. *Id.* at 66.

54. *Id.* at 78 (O’Connor, J., dissenting).

55. *Id.* at 76 (citing *United States v. Virginia*, 518 U.S. 515, 535–36 (1996)) (emphasis added).

56. *Id.* at 77–79.

57. *Id.* at 65 (majority opinion).

58. *Id.* at 62.



for the mother.<sup>59</sup> The father, by contrast, need not even know that the child was conceived.<sup>60</sup>

The dissent, however, claimed that the majority's substantial-relationship analysis failed to consider the "tight fit" required between the means and ends because it ignored the availability of sex-neutral alternatives.<sup>61</sup> The dissent queried, for example, why § 1409(a) could not simply require that the parent be present at birth or have knowledge of the birth in order to show the opportunity for a meaningful relationship.<sup>62</sup> This alternative would not draw a facial distinction between mothers and fathers.<sup>63</sup> Moreover, "[t]here is no reason, other than stereotype" why a mother's presence at birth gives assurance of an opportunity for relationship, but a father's does not.<sup>64</sup> Because the physical differences between men and women do not sufficiently justify the discriminatory classification, the dissent maintained that the majority misapplied intermediate scrutiny, which requires an "exceedingly persuasive" justification.<sup>65</sup>

### C. Congress's "Plenary Power" over Immigration: *Fiallo v. Bell*

The Supreme Court's decision in *Fiallo v. Bell*<sup>66</sup> further complicates the issue of what level of scrutiny to apply in the immigration and naturalization context. The Court underscored "the limited scope of judicial inquiry into immigration legislation"<sup>67</sup> by upholding an INS provision that recognizes a mother's relationship with her illegitimate child, but not a father's, for purposes of preferential immigration status.<sup>68</sup> Deferring to Congress's broad constitutional powers in immigration matters,<sup>69</sup> the Court declined to apply heightened scrutiny and instead maintained that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."<sup>70</sup>

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59. *Id.* at 65.

60. *Id.*

61. *Id.* at 78 (O'Connor, J., dissenting).

62. *Id.* at 86.

63. *Id.*

64. *Id.* at 87.

65. *Id.* at 76 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

66. *Fiallo v. Bell*, 430 U.S. 787 (1977).

67. *Id.* at 792.

68. *Id.* at 788–89.

69. See U.S. CONST. art. I, § 8 ("The Congress shall have Power To . . . establish an uniform Rule of Naturalization.").

70. *Id.* at 799.

#### IV. HOLDING

In *Flores-Villar*, the Ninth Circuit affirmed the district court's judgment and upheld the INS's disparate physical presence requirements, echoing much of the Supreme Court's reasoning in *Nguyen*.<sup>71</sup> The Ninth Circuit assumed, without deciding, that intermediate scrutiny applies to statutes within the scope of Congress's immigration and naturalization power.<sup>72</sup> It held that even though § 1401(a)(7) imposes an additional physical-presence requirement on unwed fathers—as distinct from the “paternal connection” requirements at issue in *Nguyen*—“the government's interests are no less important, and the particular means no less substantially related to those objectives, than in *Nguyen*.”<sup>73</sup>

First, the court theorized that one “obvious rational basis” for the disparate physical-presence requirement is ensuring that children are not “stateless” at birth.<sup>74</sup> Because many countries base citizenship on bloodline and not on place of birth, a child born to an unwed U.S. citizen–mother overseas might only be able to acquire citizenship at the time of birth through the mother. To the court, this policy “clearly demonstrates a ‘rational basis’ for Congress’ more lenient policy towards illegitimate children born abroad to U.S. citizen mothers.”<sup>75</sup>

Second, as in *Nguyen*, the court recognized the government's interest in assuring a link between the father, the U.S., and the child who is to be a citizen.<sup>76</sup> In response to *Flores-Villar*'s contention that a father's length of residence in the U.S. says nothing about the father–child relationship, the court referenced *Nguyen*'s discussion of Congress's substantial discretion to choose what interests to promote and what “easily administered” means it may use to further those interests.<sup>77</sup>

In effect, while the Ninth Circuit recognized that “the fit is not perfect” between the discriminatory means and the ends, it nonetheless concluded that those means are “sufficiently persuasive

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71. *United States v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010).

72. *Id.* at 995.

73. *Id.* at 996.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 997.

in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship.”<sup>78</sup>

## V. ARGUMENTS

### A. Flores-Villar’s (Petitioner’s) Arguments

Flores-Villar maintains that intermediate scrutiny should apply to because the statute creates a sex-based classification by having different requirements for unwed fathers than unwed mothers when transmitting citizenship to a foreign-born child.<sup>79</sup> His first argument concerns the proper application of intermediate scrutiny, which is unsurprising given the *Nguyen* majority’s ambiguous level of review and the Ninth Circuit’s perplexing use of rational basis language.<sup>80</sup>

Intermediate scrutiny requires courts to inquire into the actual purpose of the discriminatory residency requirements, instead of accepting the government’s *post hoc* rationale that the statute seeks to avoid statelessness.<sup>81</sup> Flores-Villar points to the hearings surrounding the adoption of the Nationality Act of 1940 (which is the precursor of the statute in question) as revealing the stereotypes behind the law.<sup>82</sup> During the hearings, a State Department representative claimed that a “non-marital child would, naturally, be raised by her mother, not her father: ‘If the child only has one legal parent, because it is illegitimate, if that parent, *the mother*, is a national, the child acquires nationality.’”<sup>83</sup> Flores-Villar claims that the concern about statelessness does not enter into the congressional hearings at all.<sup>84</sup> Thus, the government’s supposed interest in avoiding statelessness is far from the “exceedingly persuasive justification” required to pass intermediate scrutiny.<sup>85</sup>

Flores-Villar next argues that the government’s second asserted interest for the physical-presence requirement—that there be an opportunity for a meaningful relationship between the citizen–parent,

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78. *Id.* at 996.

79. *Id.*

80. Brief for Petitioner at 7, *Flores-Villar v. United States*, No. 09-5801 (U.S. June 18, 2010).

81. *Id.* at 4.

82. *Id.* at 13.

83. *Id.* (emphasis added).

84. *Id.* at 38.

85. *Id.* (quotation marks omitted) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982)).

the child, and the United States—likewise fails intermediate scrutiny, thus making *Nguyen* inapposite here.<sup>86</sup> In *Nguyen*, the Court justified the additional steps a father needs to take to demonstrate an opportunity for parental connection because of the biological differences between mothers and fathers; birth itself creates the opportunity for mothers, but not for fathers. Here, Flores-Villar argues that “[n]o biological difference between men and women suggests that women form stronger ties to the United States in shorter time periods than men.”<sup>87</sup> Without this biological justification, the fit between the statute’s discriminatory means and the government’s asserted interest falls wide of the narrow tailoring required to survive intermediate scrutiny.

Finally, Flores-Villar argues that the level of deference owed to Congress regarding the entry of aliens into the United States per *Fiallo* should not “carry over into determinations of who is a citizen as of birth.”<sup>88</sup> In essence, the question of citizenship at birth is different from questions of immigration and naturalization.<sup>89</sup> Moreover, the supremacy of the Constitution is abrogated if Congress is allowed to trump the constitutional guarantee of equal protection in the exercise of a “plenary power.”<sup>90</sup>

### *B. The Government’s (Respondent’s) Arguments*

The Government argues that rational-basis review should apply in deference to Congress’s constitutional authority over naturalization, which includes authority over citizenship matters.<sup>91</sup> It is not “the province of the Judiciary to determine which foreign-born persons should be permitted to become members of our society in the first place.”<sup>92</sup> To maintain this separation of powers, Congress’s determinations regarding statutory citizenship are entitled to deference by the reviewing court.<sup>93</sup>

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86. *Id.* at 8.

87. *Id.* at 9.

88. *Id.* at 15.

89. *Id.*

90. *See id.* at 18 (“Congressional power is limited by the Constitution itself . . . .”) (quotation marks omitted) (citing *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)).

91. Brief for the United States at 16, *Flores-Villar v. United States*, No. 09-5801 (Aug. 27, 2010).

92. *Id.* at 16–17.

93. *Id.* at 15.

Even under a heightened standard of review, the Government argues that Congress's choice to impose a lower physical-presence requirement on unwed mothers than on unwed fathers is "substantially related to the important government interest of reducing statelessness."<sup>94</sup> First, unwed mothers and unwed fathers are not similarly situated with regard to the potential for having stateless children:

[W]hen Congress enacted a new naturalization code in 1940, it understood that a majority of countries employed *jus sanguinis* laws [citizenship by blood] rather than *jus soli* laws [citizenship based on place of birth]. . . . In most of those countries, when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of birth usually was the mother. Although the child's father could subsequently obtain the status of a legal parent through legitimation . . . the establishment of such a relationship did not occur as a result of the birth alone. Thus, the only parent eligible to transmit citizenship *at the time of birth* . . . was the mother.<sup>95</sup>

To allow an unwed mother to transmit her U.S. citizenship more easily in this scenario, Congress chose to lessen the physical-presence requirement through § 1409(c). The physical presence required for all other persons to transfer citizenship—married men, married women, and unwed fathers—remained the § 1401(a)(7) standard.<sup>96</sup> In keeping with this reading of the statute, it is precisely because of the biological difference between men and women with respect to childbirth that Congress adopted a shorter physical-presence requirement for unwed mothers.

Accordingly, the Government contends that Congress was not motivated by impermissible stereotypes in enacting § 1409(c).<sup>97</sup> Contrary to Flores-Villar's claim, the Government maintains that Congress was explicitly motivated by the statelessness concern.<sup>98</sup> When Congress added § 1409(c) in 1952, the Senate Report "explained that the change was appropriate to further 'insure[] that the child shall have a nationality at birth.'"<sup>99</sup>

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94. *Id.* at 31.

95. *Id.* at 32–33 (citations omitted).

96. *Id.* at 32.

97. *Id.* at 39.

98. *Id.* at 30.

99. *Id.* (quoting S. REP. NO. 82-1137, at 39 (1952)).

With regard to the fit between the discriminatory means and the asserted objective of reducing statelessness, the Government argues that Congress did not need to tailor the law with “mathematical precision” in order to pass heightened scrutiny.<sup>100</sup> Rather, it could address the problem it found to be most pressing—here, the potential for statelessness. Congress’s decision to do so “on a categorical basis rather than based on a case-by-case . . . assessment . . . represents a legitimate accommodation of foreign policy, feasibility, and other interests.”<sup>101</sup>

## VI. ANALYSIS AND LIKELY DISPOSITION

Only eight justices will deliberate in *Flores-Villar*; Justice Kagan recused herself because of her position as the U.S. Solicitor General when the case was argued in the district court. This makes a tie or a 5-3 split in favor of the Government the most likely outcomes. Regardless, there are many options open to the Court, and most turn on whether and how it will apply intermediate scrutiny.

The Court, however, may not reach the merits for two reasons. First, *Flores-Villar* may lack standing to assert the equal-protection rights of his father.<sup>102</sup> As the Government points out, it is not *Flores-Villar* himself who has suffered the alleged sex-based discrimination, but rather his father.<sup>103</sup> This is problematic for standing because a party ordinarily cannot seek judicial relief by claiming the rights of a third party.<sup>104</sup> The second potential problem lies in providing *Flores-Villar* with a remedy. Even if the Court determined that there was an equal-protection violation, it would have to decide how to fix it: if the Court required that unwed mothers meet the higher physical-presence requirement of fathers, then *Flores-Villar*’s citizenship claim would still fail.<sup>105</sup> During oral arguments, Chief Justice Roberts hypothesized that the Court could “look ahead” and say that “the only remedy that we are going to be able to give [*Flores-Villar*] is a

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100. *Id.* at 41.

101. *Id.* at 42.

102. *Id.* at 10.

103. Brief for the United States, *supra* note 91, at 10–11.

104. *Id.* at 11 (citing *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984)).

105. *See id.* at 45 (“Even if this Court were to determine that Congress’s decision . . . violates equal protection principles, petitioner would not be entitled to the relief he seeks—a reversal of his criminal conviction based on a determination that he has been a U.S. citizen from birth. . . . [T]he proper way to cure any equal protection violation would be to apply the longer physical-presence requirements in Section 1401 . . . to unwed citizen mothers.”).

remedy that isn't going to benefit him regardless of how the merits are decided, therefore we don't reach the merits."<sup>106</sup> It seems more likely, however, that the Court will confront the equal-protection claim. As Justice Kennedy posited, the Court "usually talk[s] about substance first, remedy second," inferring that it would be illogical to conclude that "because the remedies are so difficult," the Court should abdicate its responsibility of scrutiny.<sup>107</sup>

In deciding on the proper level of review, the Court will need to grapple with the degree of deference owed to Congress in the immigration context.<sup>108</sup> If *Fiallo*'s deference only extends to congressional determinations about admitting aliens into the country, a lower standard of review is unwarranted here because this is a case about who is a citizen at birth.<sup>109</sup> But, as the Government points out, *Fiallo* also dealt with the constitutional interests of U.S. citizens, and "rejected the suggestion that more searching judicial scrutiny [of immigration statutes] is required when the constitutional rights of citizens are implicated."<sup>110</sup>

While this precedential question is sticky, the Court would be correct in concluding that constitutional protections are supreme over congressional enactments; after all, applying a lower level of scrutiny to constitutional violations in a particular arena of legislation amounts to an abrogation of the judicial role.<sup>111</sup> Nevertheless, the Court might sidestep the whole issue by taking a page from *Nguyen* and refusing to answer the *Fiallo* deference question, finding no equal-protection violation in the first place.<sup>112</sup>

If the Court proceeds to apply intermediate scrutiny it will need to determine its proper application. The majority in *Nguyen* provided little guidance, and this legacy of ambiguity can be seen in the Ninth Circuit's confusing use of "rational basis" language during its

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106. Transcript of Oral Argument at 48, *United States v. Flores-Villar*, No. 09-5801 (U.S. Nov. 10, 2010) [hereinafter *Transcript*].

107. *Id.* at 24.

108. *Fiallo v. Bell*, 430 U.S. 787 (1977).

109. See Brief for Petitioner, *supra* note 80, at 15 (claiming that *Fiallo* addresses the admission of aliens, but not citizenship by birth).

110. Brief for the United States, *supra* note 91, at 20.

111. See *Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance of the constitution*, have that rank.") (emphasis added).

112. See *Nguyen v. Immigration and Naturalization Services*, 533 U.S. 53, 72 (2001) (deciding not to assess the implications of *Fiallo*, as there was no equal protection violation).

ostensible intermediate scrutiny review.<sup>113</sup> During oral arguments, Justice Sotomayor expressed concern that if something like “rational basis plus” is used to resolve this case, the Court will continue “sort of tweaking the definitions and creating more variations on our review standard.”<sup>114</sup>

A stricter form of intermediate scrutiny would require the Government to show an “exceedingly persuasive” justification for its discriminatory classification,<sup>115</sup> and to demonstrate that the classification “substantially relates” to that interest.<sup>116</sup> Under this rubric, the Government would have a difficult time persuading the Court that a discriminatory physical-presence requirement is substantially related to reducing statelessness. A short physical-presence requirement may indeed reduce statelessness among illegitimate children, inasmuch as it makes it easier for a parent to transfer citizenship. But there is no reason why the requirement must *only* apply to mothers. That is, the presence requirement itself might relate to reducing statelessness; the discriminatory classification does not. This conclusion is underscored if the Court seriously considers the availability of sex-neutral alternatives to the law, which is generally quite important in heightened scrutiny contexts.<sup>117</sup> Here, it seems clear that Congress could have subjected *all* parents to the lower physical-presence requirement in pursuing its goal of reducing statelessness.

Scrutiny questions aside, the Court may hold that the physical-presence requirements violate equal protection based on *Nguyen* alone. Even under the *Nguyen* Court’s questionable level of scrutiny, it held that classifications will pass muster only if they are justified by the biological differences between the sexes.<sup>118</sup> Flores-Villar argues here that no biological differences justify a longer physical-presence requirement for fathers than for mothers.<sup>119</sup> The Government notes that Congress imposes physical-presence requirements primarily out

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113. See *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010) (inquiring into the “obvious rational basis” for the disparate physical-presence requirements).

114. *Transcript, supra* note 106, at 29.

115. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

116. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

117. *Nguyen*, 533 U.S. at 78 (O’Connor, J., dissenting).

118. See *id.* at 63 (majority opinion) (“Fathers and mothers are not similarly situated with regard to proof of biological parenthood. The imposition of different rules for each is neither surprising nor troublesome from a constitutional perspective.”).

119. Brief for Petitioner, *supra* note 80, at 9.



of “a legitimate desire to ensure some tie between this country and one who seeks citizenship.”<sup>120</sup> The asserted governmental interest served by the shorter presence requirement, however, is reducing statelessness<sup>121</sup>—an interest unrelated to that of assuring ties between parent, child, and country. The biological difference between men and women, then does not relate to the Government’s interest in physical-presence requirements.

However, if the Court chooses the *Nguyen* approach to intermediate scrutiny without adding rigor, it is likely to tolerate a looser fit between the means and the ends. This loose tailoring would permit a relatively tenuous biological argument to justify the discriminatory presence requirements. Such a “rational-basis plus” kind of review would also allow the Court to ignore the fact that sex-neutral alternatives are available. Furthermore, it would give credence to the Government’s pragmatic argument that “apply[ing] different physical presence rules on a categorical basis rather than based on a case-by-case . . . assessment” is perfectly acceptable in light of administrative and efficiency concerns.<sup>122</sup> After all, *Nguyen* seems to allow Congress to enact “an easily administered scheme” where a sex-neutral or case-by-case analysis would prove too onerous.<sup>123</sup>

## VII. CONCLUSION

Were the Court to take a lenient approach to intermediate scrutiny, it would be in danger of losing sight of the purpose behind the Equal Protection Clause. At the heart of the Constitution’s guarantee of equal protection is the promise that individuals will not face discrimination simply because they belong to a particular class; “[i]nherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>124</sup> Where a

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120. Brief for the United States, *supra* note 91, at 21 (quotation marks omitted) (citing *Nguyen*, 533 U.S. at 68).

121. *Id.*

122. *Id.* at 41–42.

123. See *Nguyen*, 533 U.S. at 69 (“Congress would of course be entitled to advance the interest of ensuring an actual, meaningful relationship in every case . . . . Or Congress could excuse compliance with the formal requirements when an actual father-child relationship is proved. It did neither here, perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie. Instead, Congress enacted an easily administered scheme . . .”).

124. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (emphasis added).

father who raises a child cannot transfer U.S. citizenship as easily as a mother, the spirit of equal protection is offended. Without an extremely persuasive justification for the offense, substance impermissibly gives way to stereotype.