

**FIFTH AMENDMENT – EQUAL PROTECTION - FEDERAL STATUTE REQUIRING DIFFERENT AFFIRMATIVE REQUIREMENTS TO CONFER CITIZENSHIP TO A CHILD BORN OUT OF WEDLOCK DEPENDING ON WHETHER THE CITIZEN PARENT IS THE MOTHER OR THE FATHER, DID NOT VIOLATE THE CONSTITUTION’S EQUAL PROTECTION GUARANTEE BECAUSE THE REQUIREMENTS SERVED AN IMPORTANT GOVERNMENTAL INTEREST AND WERE SUBSTANTIALLY RELATED TO THAT INTEREST – *Nguyen v. Immigration and Naturalization Service*, 121 S. Ct. 2053 (2001).**

The Supreme Court recently held that the gender distinction embedded in 8 U.S.C. § 1409 was not in violation of the equal protection guarantee of the Fifth Amendment. *Nguyen v. Immigration and Naturalization Service*, 121 S. Ct. 2053, 2058 (2001). The Court held the affirmative requirements imposed on a citizen father but not a citizen mother in order to grant citizenship of a child born outside of the United States when the parents are unmarried and only one parent is a United States citizen was constitutional. *Id.* The Court found these requirements survived the scrutiny applied to gender-based classifications and therefore did not violate the equal protection guarantee. *Id.* The holding represents an exception to the strict standards that have normally applied to previous gender-based classifications.

This decision arose from the deportation proceedings of petitioner Tuan Ahn Nguyen (“Nguyen”). *Id.* at 2057. The petitioner was born in Saigon, Vietnam on September 11, 1969, to his co-petitioner and father, Joseph Boulais, a United States citizen and to his mother, a Vietnamese citizen. Nguyen’s parents never married and in June 1975, Nguyen moved to the United States with his father. Nguyen was raised in Texas where he became a lawful permanent resident. In 1992, at age 22, Nguyen pleaded guilty to two counts of sexual assault on a child and was sentenced to 16 years in prison. The United States Immigration and Naturalization Service (“INS”) began deportation proceedings three years later under 8 U.S.C. §§ 1227(a)(2)(A)(ii) and (iii)(1994), which allows deportation of an alien convicted of crimes. At the deportation hearing, Nguyen testified that he was a Vietnamese citizen, but later argued he was a United States citizen. The Judge, however, concluded that Nguyen was deportable.

In 1998, Nguyen appealed to the Board of Immigration of Appeals. *Id.* While the appeal was pending, Nguyen’s father, using DNA testing, acquired an order of parentage from the state court. At this point, Nguyen was already 28 years old and the Board rejected his appeal based on his failure to meet all of the requirements of §1409(a). The requirements of §1409(a) are as follows:

a blood relationship between the person and the father is established by clear and convincing evidence,

the father had the nationality of the United States at the time of the person's birth,

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

while the person is under the age of 18 years –

the person is legitimated under the law of the person's residence or domicile,

the father acknowledges paternity of the person in writing under oath, or

the paternity of the person is established by adjudication of a competent court.

*Id.* at 2058.

The petitioners appealed to the Court of Appeals for the Fifth Circuit arguing the requirements that a citizen father must meet under §1409(a) violated equal protection because the same requirements did not apply to a citizen mother. *Id.* The Fifth Circuit rejected the argument and upheld the statute. *Id.*

The United States Supreme Court granted *certiorari* to resolve the issue. *Id.* The Court held that the gender-based classification in §1409 was constitutional because it served an important governmental interest and the distinction was substantially related to that interest. *Id.* at 2055-56. The Court, therefore, held the statute was not in violation of the Equal Protection Clause. *Id.* at 2058.

Justice Kennedy wrote the opinion of the Court in which Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas joined. *Id.* at 2057. The Court began by noting that the constitutionality of a classification between unwed fathers and mothers was discussed in *Miller v. Albright*, 523 U.S. 420 (1998), but that the majority of the Court had not settled the issue and that the appellate courts were split due to this dissettlement. *Id.* at 2058.

Justice Kennedy commenced the opinion by clarifying the judicial standard that applies to gender-based classifications. *Id.* at 2059. The Justice stressed that in order to survive equal protection scrutiny, the classification must serve an important governmental objective and that the means to achieve that objective must be substantially related. *Id.* The Court noted that since §1409 met that standard, the Court would not have to determine whether to use a lesser standard

that provided deference to Congress due to its immigration and naturalization power. *Id.* (citing *Miller*, 523 U.S. at 434, n. 11).

Before reviewing the governmental interests asserted for the statute, the Court initially found it important to note that §1409(a)(4)'s requirements did not impose limitations on acquiring citizenship but merely required "certain conduct to occur" before the child reached age 18. *Id.* at 2059-60. In essence, Justice Kennedy held the treatment of citizenship was equal and that the affirmative acts required for a father were based upon the notable differences between a father and mother's relationship with the child beginning at birth. *Id.* at 2060.

The first interest Justice Kennedy discussed was the government's need to guarantee that a biological relationship existed between a parent and child. *Id.* The Court assumed the ability of verifying a mother's status at a child's birth was much simpler compared to that of a father's status. *Id.* The Court strictly looked at biological factors and that a father's presence at birth is not proof of parenthood. *Id.* The Justice found that §1409(a)(4)'s affirmative requirements provided three avenues for a father to establish an "acceptable documentation of paternity," thereby guaranteeing a biological relationship. *Id.*

Justice Kennedy quickly disregarded petitioner's argument that a DNA test was enough to establish paternity for §1409(a)(1). *Id.* The Justice stated that the Constitution did not compel Congress to choose one particular method and §1409(a)(4) consisted of reasonable options to establish the biological tie between a father and child. *Id.* at 2061. Further, the Court found that a facially neutral rule would only result in a "hollow neutrality" because a father will always have to take additional steps to show paternity whereas a mother's biological connection to the child is self-evident at the child's birth. *Id.* Additionally, the Justice stressed that the gender specific terms arose from a justifiable biological difference between a mother and father and that, "just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction." *Id.*

The second interest that Justice Kennedy discussed was the government's need to enable a potential relationship between the parent and child so that it is recognized not only by law but by "everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Id.* (citing *Miller*, 523 U.S. at 438-40). Justice Kennedy reasoned that birth alone automatically created an opportunity for a mother and child relationship and that same opportunity did not automatically occur between a father and child. *Id.*

The Justice posited that the nine-month interval between conception and birth gave way to the likely possibility that a father would not know of the child and the mother might not even know the father's identity. *Id.* In the instant case, the Court believed that the two factors of the birth being overseas and that the parents were not married, made this lack of knowledge of the father's parentage, more problematic. *Id.* The Court furthered by explaining this lack of paternal knowledge of a child by presenting a statistical analysis of American overseas

travel. *Id.* at 2062. Justice Kennedy first discussed that large numbers of men in the Armed Forces were on active duty overseas around the time of petitioner's birth and that large amounts of military still are today. *Id.* Further, the Justice found that today's "ease of travel" for Americans apparently made the statutory distinction even more justifiable because it would be foreseeable a father would not know about the conception. *Id.* The Court found ease of travel caused concern for granting citizenship to a child based solely on the "father's previous length of residence in this country," as this would frustrate Congress' intent to ensure a relationship between father and child. *Id.*

Justice Kennedy found that the Equal Protection Clause allowed Congress to acknowledge and act on these issues. *Id.* The Court reasoned that §1409 equalized the opportunity for developing a relationship between a parent and child because the requirements created the potential for the same "initial point of contact" to occur between a father and child that naturally occurred between a mother when giving birth to the child. *Id.* The Court agreed that a DNA test alone does not ensure contact and that Congress had the right to ensure that a relationship existed before this "country embrac[ed] a child as a citizen entitled. . . to the full protection of the United States. . . ." *Id.*

The Court continued by rejecting petitioner's argument that the statute was based solely on a gender-based stereotype. *Id.* at 2063. Justice Kennedy again affirmed that the statute pertained to the critical moment of birth where distinct biological differences exist between a man and woman. *Id.* The Court reiterated that proof of parentage was not guaranteed at birth for an unwed father and the statute was therefore not based on a stereotype. *Id.*

Once the Court held the governmental interests sound, the Court scrutinized whether the means of §1409 substantially related to those interests. *Id.* The Court found that imposing the affirmative paternal requirements by the time the child was 18 was justified because it ensured a child's tie to the United States while he was a minor. *Id.* Moreover, the Court acknowledged the same age requirement existed in other statutes pertaining to citizenship and naturalization. *Id.*

Further, Justice Kennedy addressed petitioner's argument that §1409(a)(4) was ineffective because maternal knowledge alone does not guarantee that a relationship will exist between the mother and child. *Id.* The Court did not sustain petitioner's complaint that the additional requirements for a father exacerbated the stereotype that women more often than men will form a relationship with their child, based on maternal knowledge of birth. *Id.* The Justice turned this argument around by finding that Congress could have in fact advanced its interest by either compelling a relationship in every case or dismissing the requirements once an actual relationship was proved. *Id.* at 2064. The Court held that Congress did not want to be too intrusive and, consequently, "enacted an easily administered scheme" to ensure a potential bond between a father and child. *Id.* The Court stated that the petitioner "confuse[d] the means and ends of the equal

protection inquiry.” *Id.* As long as the statute is “substantially related to the achievement of the governmental objective,” the Court concluded the statute was constitutional. *Id.* The Court asserted that gender-based equal protection cases do not compel that the statute at issue always achieves its goal in every situation. *Id.* The Court then quickly stated that the statute satisfied the “exceedingly persuasive justification.” *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

In concluding the discussion of the means employed in §1409(a)(4), the Court determined that Congress “ha[d] not erected inordinate and unnecessary hurdles” in order to grant citizenship. *Id.* Further, the Court noted that only one of the three requirements must be met and that the father had eighteen years to satisfy it. *Id.* Also in the alternative, the Court stated that an individual could obtain citizenship on his own. *Id.* at 2065 (citing 8 U.S.C. §§ 1423, 1427).

Justice Kennedy concluded the opinion by addressing the Court’s potential inability to issue a remedy even if it had ruled that §1409 was unconstitutional because the Court did not have the power to grant citizenship. *Id.* at 2065. The Court held that even if it removed §1409(a)(4), citizenship would be subject to other statutes that pertain to citizenship. *Id.* Nevertheless, since there was no equal protection violation, the Court did not have to consider that argument. *Id.* The Court’s closing statements suggested that a facially neutral rule in this instance would fail to “acknowledge even our most basic biological differences. . .[and] risks making the guarantee of equal protection superficial.” *Id.* at 2066. The Court held that the statutory distinction was without prejudice and it merely recognized a real biological difference that did not violate equal protection. *Id.*

In the concurring opinion, Justice Scalia, in which Justice Thomas joined, affirmed the view that the Court only had the ability to confer citizenship by the rules that Congress had specified. *Id.* (Scalia, J., concurring). The Justice further noted that it was correct to look at the petitioner’s claim and was in agreement with the Court’s opinion. *Id.*

Justice O’Connor authored the dissenting opinion in which Justices Souter, Ginsberg, and Breyer joined. *Id.* (O’Connor, J., dissenting). The Justice’s strong dissent criticized the majority’s conclusion largely because of the way it applied the heightened scrutiny consistently used to analyze gender-based classifications. *Id.*

Relying on the long history of prior gender-based classification cases, Justice O’Connor presented the sharp contrast between the burden that needed to be met in gender-based classification cases and those classification cases that fit under rational-basis review. *Id.* at 2067 (O’Connor, J., dissenting). Quoting *Virginia*, Justice O’Connor affirmed that “[t]he burden of justification [for sex-based classifications] is demanding and it rests entirely on [the party defending the classification].” *Id.* (quoting *Virginia*, 518 U.S. at 533). The Justice noted under rational-basis review the burden falls on the one opposing a classification who

must show there is no rational basis for it. *Id.*

Further, Justice O'Connor illustrated that the justifications for gender-based classifications must be genuine and conceived in furtherance of the purpose for the classification and not "in response to litigation." *Id.* (quoting *Virginia*, 518 U.S. at 533). Moreover, the dissent argued that overbroad generalizations regarding gender differences will usually not hold up when compared to generalizations used in rational-basis cases. *Id.* In sum, the Justice argued that the Court must look to see if the justifications are "exceedingly persuasive" and that "heightened scrutiny limits the realm of justification to demonstrable reality." *Id.* at 2068 (O'Connor, J., dissenting).

Also, the Justice stated that the governmental interest must be important and that the discriminatory means must be substantially related to that interest. *Id.* The dissent asserted that while available alternative means do not matter under rational-basis review, the availability of alternative, neutral means to sex-based classifications undermine the validity of a sex-based classification. *Id.*

Based on this strict standard, Justice O'Connor found that the INS failed to meet its burden and that the majority failed to use a careful application of heightened scrutiny. *Id.* at 2069 (O'Connor, J., dissenting). The Justice found this failure in the majority's analysis of the first governmental interest that regarded the importance of guaranteeing a biological relationship between the parent and child. *Id.* The dissent argued that the majority did not explain why the interest was important or reveal that it was §1409(a)(4)'s actual purpose. *Id.* Relying on the INS's brief, the dissent found that the interest the majority asserted was not exactly what the INS argued. *Id.*

Justice O'Connor further declared that the means and ends fit for §1409(a)(4) was tenuous at best. *Id.* The Justice noted that §1409(c) did not impose a burden of biological proof on the mother. *Id.* The dissent compared §1409(a)(1) and (a)(4) and argued that (a)(1)'s requirement that "a blood relationship between the person and the father [be] established by clear and convincing evidence" was sufficient to meet the governmental interest. *Id.* The dissent found the requirements in (a)(4) that call for either a "legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of 18" did not accomplish anything that (a)(1) did not accomplish on its own. *Id.* Further, the dissent could not understand how the age limitation would further the interest of establishing a blood relationship and that modern DNA tests challenged the need for the time limit. *Id.* at 2070 (O'Connor, J., dissenting). Since §1409(a)(1) was sufficient without the additional requirements of §1409(a)(4), the dissent felt that (a)(4) did not "substantially further an important governmental interest." *Id.* (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

Justice O'Connor also questioned the majority's dismissal of sex-neutral alternatives largely because in past cases, the availability of neutral alternatives was the basis of rejecting sex-based classifications. *Id.* The dissent attacked the

majority's characterization that a neutral law in this instance would be "hollow," and strongly maintained that "the avoidance of gratuitous sex-based distinctions is the hallmark of equal protection." *Id.* Justice O'Connor dismissed the majority's discussion that a facially neutral law here would result in a disparate impact on the father as insignificant because that issue did not require the heightened scrutiny that applied to laws that specifically permit discriminatory treatment. *Id.* at 2071 (O'Connor, J., dissenting).

The dissent also rejected the validity of the second governmental interest of ensuring an opportunity for a potential relationship to be developed between the parent and child. *Id.* Again, Justice O'Connor asserted that the majority did not reveal that this was Congress' actual purpose and its focus "appear[ed] to be the type of hypothesized rationale that is insufficient under heightened scrutiny." *Id.* The dissent claimed that the INS's concern was an actual relationship while the majority broadened this to an "opportunity or potential to develop a relationship." *Id.* at 2072 (O'Connor, J., dissenting). The dissent observed that this made it easier to meet the means-ends fit, but as a result, it weakened the interest. *Id.* Justice O'Connor reflected that an opportunity for a relationship as opposed to an actual relationship would be irrelevant when conferring citizenship because the actual relationship is what would grant citizenship. *Id.*

Unlike the majority, the dissent was unable to justify a link between the "opportunity" interest and §1409(a)(4). *Id.* The dissent found that requiring proof of an opportunity to acknowledge or legitimize paternity before the child is 18 did not substantially further the governmental interest. *Id.* Justice O'Connor used this case as an example to show that an opportunity for and an actual relationship, prior to reaching majority age, could exist even though proof was not obtained. *Id.* Further, the child could possibly "obtain an adjudication of paternity. . . perhaps even over [the father's] express objection" on his own, which the dissent argued weakened the means-end relationship asserted by the majority. *Id.* (quoting *Miller*, 523 U.S. at 486 (Breyer, J., dissenting)).

Justice O'Connor reiterated that there were sex-neutral alternatives that would meet the desired interest. *Id.* The dissent stated that Congress' interest was to ensure an opportunity for a relationship between a father and child that was equal to the opportunity for a mother and child at birth, and this could easily be accomplished by requiring a parent's presence at the birth or knowledge of the birth. *Id.* at 2073 (O'Connor, J., dissenting). Justice O'Connor argued that both parents are similarly situated in respect for such an opportunity and the only difference is that a father has to choose to be present at birth. *Id.* The Justice summarized that the differential treatment was only based on gender, therefore, it was a violation of the Constitution's equal protection guarantee. *Id.* Moreover, the dissent believed that assuming it was more likely that a mother will form a relationship with her child merely because she had to be present at the child's birth can only be based on a stereotype that cannot justify §1409(a)(4). *Id.*

Justice O'Connor also criticized the majority's failure to look at the past his-

tory of gender-based discrimination in laws relating to conferring citizenship. *Id.* at 2075 (O'Connor, J., dissenting). Justice O'Connor discussed that §1409 was first passed as §205 of the Nationality Act of 1940. *Id.* The dissent noted that the rationale for the sex-based classification in this law stemmed from the belief that women were left with the responsibility to care for illegitimate children and men were exempt from the burden. *Id.* The dissent reasoned that since this belief was unfounded, the result of the majority's failure to challenge this stereotype ended in "quietly condon[ing]" it. *Id.* at 2076 (O'Connor, J., dissenting). The dissent also believed that the majority's discussion of overseas travel, though informative, was unrelated to determining whether the gender-based distinction in this case was justified. *Id.* Justice O'Connor concluded that this discussion only reinforced the unwarranted stereotype that men are irresponsible, which could do little to validate the classification. *Id.* at 2077 (O'Connor, J., dissenting).

The dissent also addressed the two barriers with which the Court was concerned. *Id.* The first barrier, regarding the inability to grant a remedy to the petitioner, was quickly solved by the dissent. *Id.* The dissent argued that severing §1409(a)(4) was valid under the general severability clause of the Immigration and Nationality Act and that the statute could operate free from the discriminatory element. *Id.* at 2077-78 (O'Connor, J., dissenting). The second barrier of concern was whether the Court had to provide deference to Congress. *Id.* at 2078 (O'Connor, J., dissenting). The dissent concluded that the deference to Congress granted in prior cases involved the issue of admission of aliens, which was distinguishable from conferral of citizenship at birth. *Id.* The dissent viewed that the ordinary scrutiny of equal protection should apply to conferral of citizenship. *Id.*

Justice O'Connor's powerful dissent concluded that this decision did not fall in line with previous sex-based classification cases. *Id.* The Justice believed that this case would not change the strict scrutiny typically applied, and should be labeled as an "aberration." *Id.* at 2078-79 (O'Connor, J., dissenting).

### ANALYSIS

The history of gender discrimination in this country is both overwhelming and intolerable. Fortunately, present gender-based distinctions generally are not held valid unless they can withstand the rigorous scrutiny that the Court has designed to apply to gender-based equal protection claims. Though there are obvious biological differences between men and women, the Court in its precedent has shown that these biological differences will not be a shield to prevent rendering gender discrimination unlawful. However, this case is proof that heightened scrutiny will not always shield society from that same discrimination.

While the majority is correct that these requirements are not overly burdensome, they still stem from stereotypes that simply cannot justify the statutory



provisions no matter how minimal the burdens are. Equal protection was devised to smoke out unfounded beliefs that exist in laws. The issue that should be weighed is not how burdensome the classification is, but why the classification exists in the first place. If a gender distinction is issued because of an uninformed generalization, then the distinction should be invalid no matter how harmless it may be.

One of the most compelling reasons that §1409(a)(4) was in violation of equal protection was simply the availability of sex-neutral alternatives. Proof of parenthood can be easily regulated under a neutral rule that would be free of equal protection claims. The majority blindly focused on the biological differences of men and women at the single moment of birth to justify the classification but also sought to justify the classification based on examples of overseas travel and opportunities for parent-child relationships. However, these examples have little relevance to the biological differences between men and women at a child's birth and therefore have little value in justifying the requirements.

The dissent's criticism was valid in that the majority simply did not back up their holding with the same intense reasoning that was used in prior gender-based classification cases. The dissent was concerned that a weak application of equal protection scrutiny would abate precedent regarding gender-based distinctions. However, as the dissent articulated, this case should remain an "aberration" because its holding represents that someone who has lived here from six years of age will not be a citizen partially because his father was a citizen and his mother was not.

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