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Discretion or Discrimination: Whether the Equal Protection Clause of the Fifth Amendment Requires Fathers and Mothers to be Treated Equally in Satisfying the Physical Presence and Legitimization Clause of Title 8 U.S.C. § 1409

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**DISCRETION OR DISCRIMINATION: WHETHER THE EQUAL
PROTECTION CLAUSE OF THE FIFTH AMENDMENT
REQUIRES FATHERS AND MOTHERS TO BE TREATED
EQUALLY IN SATISFYING THE PHYSICAL PRESENCE AND
LEGITIMIZATION CLAUSE OF TITLE 8 U.S.C. § 1409**

**THE UNITED STATES COURT OF APPEALS SECOND
CIRCUIT**

Morales-Santana v. Lynch¹
(decided July 8, 2015)

I. INTRODUCTION

President Barack Obama believes immigration reform can be achieved lawfully through the courts.² However, despite President Obama's optimism, Congress has complete discretion in creating legislation that excludes aliens from legally entering the country.³ Congress also has the discretion to determine when and how unwed United States citizen parents can transfer citizenship to their foreign-born children.⁴ Generally, when a statute limits the rights of citizens on the basis of gender, Congress must demonstrate these distinctions do not violate the Equal Protection Clause of the Fifth and Fourteenth Amendment.⁵ Thus, the distinctions made between fathers and mothers will not violate the Equal Protection Clause if said distinctions are based on, and actually serve an important governmental objective.⁶

¹ 804 F.3d 520 (2d Cir. 2015).

² John H. Adler, *President 'Frustrated' with Court Decision on Immigration Reforms*, THE WASHINGTON POST (Jun. 8, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/08/president-frustrated-with-court-decision-on-immigration-reforms/>.

³ *Morales-Santana*, 792 F.3d at 527 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

⁴ *Miller v. Albright*, 523 U.S. 420, 424 (1998).

⁵ Ryan James & Jane Zara, *Equal Protection*, 3 GEO. J. GENDER & L. 1, 15 (2002) [hereinafter *Equal Protection*].

⁶ *Id.* at 3-4.

For this reason, the Second Circuit in *Morales-Santana v. Lynch*⁷ correctly held that 8 U.S.C. section 1409 (a) was unconstitutional because, in comparison to a citizen mother, a citizen father should not be required to satisfy a longer physical presence requirement in the United States or its territories in order to transfer American citizenship to his foreign-born child.⁸ Such a distinction does not serve an important governmental objective.⁹

First, this Note will discuss the fundamental differences between the physical presence provision under review in *Morales-Santana* and the legitimization provision under review in *Nguyen v. INS*.¹⁰ Drawing a distinction among the provisions will demonstrate that fathers and mothers are not similarly situated in their ability to satisfy the legitimization provision but are similarly situated in their ability to establish legitimization of a child under the physical presence provision.¹¹ Second, this Note will analogize the reasoning in *Morales-Santana* to the New York Court of Appeals case in the *Matter of Raquel Marie X*¹² to demonstrate that each provision within a statute cannot purport to serve an interest already addressed by other provisions nor impose burdens too attenuated to the governmental objectives.¹³

II. *MORALES-SANTANA V. LYNCH*

A. 8 U.S.C. § 1409

Title 8 U.S.C. section 1409 governs how unmarried United States citizen parents can transfer American citizenship to their for-

⁷ 804 F.3d 520 (2d Cir. 2015).

⁸ *Id.* at 535. (“[F]or these reasons, the gender-based distinction at the heart of the 1952 Act’s physical presence requirements is not substantially related to the achievement of a permissible, non-stereotype-based objective.”). See *Villegas-Sarabia v. Johnson*, No. 5:15-CV-122-DAE, 2015 WL 4887462 (W.D. Tex. Aug. 17, 2015); see also Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 64 (2001) (distinguishing *Nguyen v. I.N.S.* from *Morales-Santana* to hold that the legitimization clause of 8 U.S.C. section 1409 did not violate a father’s right to equal protection under the law).

⁹ *Id.*

¹⁰ See *infra* note 14 at 2.

¹¹ *Morales-Santana*, 804 F.3d at 531.

¹² 559 N.E.2d 418 (N.Y. 1990).

¹³ *Id.* at 419.

eign-born children.¹⁴ However, fathers must satisfy different requirements than mothers under section 1409.¹⁵

First, fathers and mothers must satisfy the requirements of the physical presence provision.¹⁶ A citizen mother must be physically present in the United States for a continuous period of one year prior to the birth of the child.¹⁷ In contrast, a citizen father must be physically present in the United States for a continuous period of *ten years* prior to the birth of the child.¹⁸ In addition, five of those years must be completed after the father's fourteenth birthday.¹⁹

Second, fathers and mothers must also establish they are biologically related to the foreign-born child.²⁰ A mother satisfies this provision at the birth of the child.²¹ However, a father must satisfy the requirements of two provisions before the child reaches eighteen years of age: 1) establish paternity by clear and convincing evidence; and 2) agree in writing to economically support the child until the child reaches eighteen years of age.²²

Lastly, a father must satisfy the requirements of the legitimization provision.²³ Only citizen fathers must satisfy this provision.²⁴

¹⁴ 8 U.S.C. § 1409 (1952).

¹⁵ *Id.* See 8 U.S.C. § 1409(c) (1952); *see also* 8 U.S.C. § 1409(a) (1952).

¹⁶ *See* 8 U.S.C. § 1409(c) (1952).

¹⁷ *Id.*

¹⁸ *See Morales-Santana*, 804 F.3d at 523; *see also* 8 U.S.C. § 1409 (1952) (emphasis added).

¹⁹ *Morales-Santana*, 804 F.3d at 523.

²⁰ Kristin Collins, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 *YALE L.J.* 1669, 1698 (2000) ("In 1986, Congress increased the number of criteria for fathers of foreign-born non-marital children, requiring production of 'clear and convincing evidence' of paternity, legitimation of the child before she turned eighteen, and a promise to support the child until she turned eighteen.") [hereinafter *Father's Rights Are Mother's Duties*].

²¹ 8 U.S.C. § 1409(c) (1952) (omitting the paternity requirement and only mentioning the mother's requirement for citizenship before the child's birth and the physical presence requirement).

²² *See* 8 U.S.C. § 1409(a)(1-3) (1952) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if (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. *Id.*; *see also* 8 U.S.C. § 1409(a)(1) (1952) ("[A] blood relationship between the person and the father is established by clear and convincing evidence"); *see also* 8 U.S.C. § 1409(a)(3) (1952).

²³ 8 U.S.C. § 1409(a)(4) (1952):

[W]hile 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

A father must comply with one of the three statutory options in order to legitimize his child: 1) legitimize pursuant to the laws of the child's residence or domicile; 2) acknowledge his paternity under oath; or 3) obtain adjudication of a court.²⁵

On its face, 8 U.S.C. section 1409 imposes greater restrictions on fathers in their desire to transfer citizenship to their foreign children born out of wedlock.²⁶ However, historically, Congress intended a father's right to be limited.²⁷ Proposed amendments to the 1952 Immigration and Nationality Act demonstrated that Congress believed unwed fathers were not as connected to their illegitimate children as mothers.²⁸ In addition, Congress was suspicious of fathers who sought to establish paternity of their illegitimate children for the sole purpose of transferring citizenship.²⁹

However, recent Congressional reports have been more critical of the distinct criteria required of fathers and mothers under the physical presence provision.³⁰ These reports have outlined the inequitable treatment of American citizens living abroad.³¹ Subsequent to the Immigration and Nationality Act of 1952, Congress proposed to return to the simplistic requirements of 1790, when Congress first encountered the issue of foreign-born children of citizen parents.³² However, since the codification of the 1986 Act in what is today recognized as 8 U.S.C section 1409, Congress has not changed the physical presence provision, despite recommendations from President Re-

acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court.

Id.

²⁴ 8 U.S.C § 1409(c) (1952).

²⁵ 8 U.S.C § 1409(a)(4) (1952).

²⁶ *Father's Rights Are Mother's Duties*, *supra* note 20, at 1673 (arguing that it is evident mothers carry the greater responsibility for the child while fathers have a choice as to whether to care for the child).

²⁷ Oscar M. Trelles II & James F. Bailey III, *Immigration Nationality Acts. Legislative Histories and Related 1950-1978 i 1950-1978* at 134 [hereinafter *Legislative Histories*].

²⁸ *Id.* ("However, in the case of a child born out of wedlock, a family unity is normally maintained between the child and [his or her] natural mother but not necessarily between the child and [his or her] natural father.").

²⁹ *Id.*

³⁰ Igor I. Kavass & Bernard D. Reams, Jr., *The Immigration Act of 1990: A Legislative History of Pub. L. No. 101-649 43* (1997) [hereinafter *The Immigration Act*].

³¹ *Id.* at 330.

³² *Id.* at 329.

gan and committee members.³³

B. Factual and Procedural History

The defendant's father, Jose Dolores Morales, was born in Puerto Rico on March 19, 1900 and became a United States citizen in 1917 pursuant to the Jones Act.³⁴ On February 27, 1919, just twenty days shy of his nineteenth birthday, the defendant's father left his home and traveled to the Dominican Republic to work for the South Porto Rico Sugar Company.³⁵ In 1962, the defendant was born out of wedlock in the Dominican Republic to his U.S. citizen father and Dominican mother.³⁶ The defendant was subsequently legitimized when his father and Dominican mother married in 1970.³⁷

Prior to his father passing away in 1976, the defendant entered the United States as a lawful permanent resident.³⁸ In 2000, after being convicted of a felony, the government commenced removal proceedings.³⁹ The defendant applied to withhold the removal on the basis that he derived American citizenship through his father pursuant to the physical presence provision in 8 U.S.C. section 1409(c).⁴⁰ However, the defendant's father was not present in Puerto Rico for a continuous period of ten years, where five of those years were before the age of fourteen.⁴¹ Therefore, the immigration judge denied the

³³ See Melissa Fernandez, *Title 8 U.S.C. § 1409 of the United States Immigration and Nationality Act-Children Born Out of Wedlock: Undermining Fathers' Rights and Perpetuating Gendered Parenthood in Citizenship Law*, 54 FLA. L. REV. 949, 958 (2002) [hereinafter *Undermining Fathers' Rights*]; see also *The Immigration Act*, *supra* note 30, at 330.

³⁴ *Morales-Santana*, 804 F.3d at 524; see Jones Act of Puerto Rico, codified in 8 U.S.C. § 1402 (West 2015):

All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

Id.

³⁵ *Id.* at 524.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Morales-Santana*, 804 F.3d at 524.

³⁹ *Id.*

⁴⁰ *Id.* at 524; see also 8 U.S.C. § 1409 (1952).

⁴¹ *Morales-Santana*, 804 F.3d at 524; see also 8 U.S.C. § 1409 (1952).

application.⁴²

The defendant filed a motion to reopen his removal proceedings on equal protection grounds and newly obtained evidence regarding his father.⁴³ The Board of Immigration Appeals (“BIA”) denied his motion.⁴⁴ The defendant appealed to the Second Circuit Court of Appeals arguing that since section 1409(c) only required a mother to be continually present in the United States or one of its territories for a period of one year prior to the child’s birth, the statute as applied to the defendant’s father violated the defendant’s right to equal protection under the law.⁴⁵ In other words, if the requirements for a mother to confer citizenship were applied to the facts of his case, the defendant would be eligible to derive citizenship.⁴⁶

C. The Second Circuit’s Reasoning

In *Morales-Santana*, the court reviewed the physical presence requirement codified in 8 U.S.C. section 1409(a) and held that it violated the defendant’s Fifth Amendment guarantee of equal protection of the law.⁴⁷ First, the court determined that intermediate scrutiny should be applied in the evaluation of the physical presence provision of the statute because fathers and mothers are treated differently based on gender.⁴⁸ Under intermediate scrutiny, gender-based distinctions must serve important governmental objectives.⁴⁹ Additionally, those gender-based distinctions must substantially relate to the governmental objective.⁵⁰

The court reasoned that there was an important governmental interest in establishing the physical presence provision to ensure that a foreign-born child has significant ties to the state.⁵¹ However, the court rejected the government’s first assertion that the physical pres-

⁴² *Morales-Santana*, 804 F.3d at 525.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 527; *See* 8 U.S.C. § 1409(c) (1952) (“[I]f the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.”).

⁴⁶ *Morales-Santana*, 804 F.3d at 527; *see* U.S.C § 1409(c) (1952).

⁴⁷ *Morales-Santana*, 804 F.3d at 528.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 530.

ence provision in practice actually furthered the goal of ensuring a foreign-born child has ties to the United States.⁵² The government could not identify any persuasive reason justifying the distinction between fathers and mothers to satisfy the requirements of the physical presence provision.⁵³

The court distinguished the issues in *Morales-Santana* from the United States Supreme Court's decision in *Nguyen v. INS* to further reject the government's claim that gender-based distinctions serve to ensure a foreign-born child has ties to the United States.⁵⁴ In *Nguyen*, the Court identified two important governmental interests that gender distinctions served.⁵⁵ The first interest concerned ensuring the foreign-born child had sufficient ties to the citizen parent.⁵⁶ The second interest was guaranteeing the foreign-born child and citizen father actually had a "real, meaningful relationship."⁵⁷

Additionally, the court in *Morales-Santana* rejected the government's second assertion that the physical presence provision served to legitimize the child because legitimization was not a point at issue in this case.⁵⁸ The court determined that the legitimization provision under section 1409(a)(4) encompassed all the requisite tests to ensure that the child and father have the opportunity to foster a real relationship.⁵⁹ Therefore, the court concluded that gender-based distinctions were not related to the government's objective of ensuring that a foreign-born child to an unwed citizen father had sufficient ties to the United States.⁶⁰

Moreover, although the court acknowledged that the prevention of statelessness is an important governmental interest, the gender-based distinctions were not substantially related to that interest.⁶¹ An example of statelessness is when "a child born out of wedlock . . . is born inside a country that does not confer citizenship based on place of birth and neither of the child's parents conferred derivative

⁵² *Morales-Santana*, 804 F.3d at 530.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Morales-Santana*, 804 F.3d at 531 (quoting *Nguyen*, 533 U.S. at 65).

⁵⁸ *Morales-Santana*, 804 F.3d at 531.

⁵⁹ *Id.*; see *Father's Rights Are Mother's Duties*, *supra* note 20.

⁶⁰ *Morales-Santana*, 804 F.3d at 531.

⁶¹ *Id.*

citizenship on him.”⁶² The court denied that Congress intended for the physical presence provision to address statelessness, much less address the need for gender-based distinctions.⁶³

To support the finding that gender-based distinctions were not substantially related to the prevention of statelessness, the court reviewed Congress’s purpose for establishing gender-based distinctions under the 1952 Act.⁶⁴ In section 205 of the 1940 Act, Congress stated that both citizen fathers and married citizen mothers had to comply with the ten-year physical presence provision.⁶⁵ Nonetheless, unwed mothers could confer citizenship on their children if they maintained residence in the United States at any point before the child’s birth.⁶⁶ The 1952 Act subsequently added another provision requiring unwed mothers to continuously reside in the United States for one-year prior to the birth of the child.⁶⁷ However, upon reviewing the Executive Branch’s explanatory comments and the congressional hearings for the 1940 and 1952 Act, the court did not find substantial evidence that statelessness was ever a concern in establishing the physical presence provision.⁶⁸

Furthermore, the court determined that even if the physical presence provision was drafted for the prevention of statelessness, gender-based distinctions do not operate to prevent it.⁶⁹ The court reasoned that where gender-neutral alternatives are available to further governmental interests, no distinctions based on gender could survive intermediate scrutiny.⁷⁰

One example of a gender-neutral alternative can be found in 1933 when Secretary of State Cordell Hull proposed to the Chairman of the House Committee on Immigration and Naturalization, that both fathers and mothers should have the ability to equally transfer citizenship to their foreign-born child if they are American and reside in the United States or one of its territories.⁷¹ At that time, the court de-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 532.

⁶⁵ *Morales-Santana*, 804 F.3d at 532.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 534.

⁷⁰ *Morales-Santana*, 804 F.3d at 534.

⁷¹ *Id.* (“remov[ing] ... discrimination between’ mothers and fathers ‘with regard to the transmission of citizenship to children born abroad.’ ”).

terminated that the physical presence provision created a “minimal burden on unwed citizen fathers.”⁷² However, where the legitimization provision could be satisfied by a father’s simple acknowledgment of paternity under oath, the satisfaction of the physical presence provision unduly burdens fathers.⁷³

In finding that the gender-based distinctions in the physical presence requirement of 8 U.S.C section 1409(a) were not sufficiently related to the governmental interests in establishing that a foreign-born child has ties to the United States or avoiding statelessness, the court held that the provision violated the defendant’s right to equal protection of the law.⁷⁴ Therefore, the court determined that the appropriate remedy was to strike section 1409(a) for its unconstitutionality and extend section 1409(c) to unwed citizen fathers.⁷⁵ Under section 1409(c), the Second Circuit determined that the defendant was a citizen of the United States at the time of his birth.⁷⁶

II. THE FEDERAL APPROACH

A. The Fifth Amendment

The Fifth Amendment of the United States Constitution offers individuals the right to equal protection under the law.⁷⁷ An individual, who is part of a distinct and recognizable class, may face a potential Fifth Amendment violation if he or she is treated differently as a result of that membership under the written and applied law.⁷⁸ Congress cannot draft statutes that treat men and women who are “similarly situated” differently.⁷⁹ An individual seeking to assert equal protection violations must prove that there are no actual differences that the government bases their treatment on.⁸⁰

⁷² *Id.* at 535.

⁷³ *Id.* (“It adds to the legitimization requirement ten years of physical presence in the United States, five of which must be after the age of fourteen. In our view, this burden on a citizen father’s right to confer citizenship on his foreign-born child is substantial.”).

⁷⁴ *Id.*

⁷⁵ *Morales-Santana*, 804 F.3d at 537.

⁷⁶ *Id.* at 538.

⁷⁷ U.S. CONST. amend. V (“[N]or be deprived of life, liberty, or property, without due process of law.”).

⁷⁸ *United States v. Scott*, 919 F. Supp. 2d. 423, 431 (S.D.N.Y. 2013).

⁷⁹ *See Morales-Santana*, 804 F.3d at 531.

⁸⁰ *See Equal Protection*, *supra* note 5, at 3-5.

In the event Congress passes a law that treats individuals differently as a result of their membership in a particular group, the court will apply strict scrutiny, heightened scrutiny, or rational basis review.⁸¹ For gender classifications, heightened scrutiny applies where the statute must both, “serve important governmental objectives” and “be substantially related to those objectives.”⁸² The first-prong of the heightened scrutiny test gives rise to the question: whether the governmental objective is important.⁸³ However, governmental objectives that further stereotypical gender roles are not considered “important” for equal protection purposes and do not survive heightened scrutiny, such as where men are considered the head of the household or women are considered homemakers.⁸⁴

The second prong of the test gives rise to the question: whether the gender classification is substantially related to the objectives sought.⁸⁵ Even though the substantial relationship test is always considered, some courts will not inquire into it when considering whether men and women are similarly situated.⁸⁶ Sometimes federal courts determine substantial relationship by using empirical data that shows that gender-based distinctions do in fact further the objective.⁸⁷

B. *Nguyen v. INS*

The United States Supreme Court’s decision in *Nguyen* provides the key reasoning as to why fathers and mothers are similarly situated when it comes to the requirements of the physical presence provision under review in *Morales-Santana*, but are not similarly situated under the legitimization provision.⁸⁸ In *Nguyen*, the court reviewed the legitimization provision set forth in 8 U.S.C. section

⁸¹ See *id.* at 5; see also *id.* at 5-6. Strict scrutiny applies to classifications based on race or national origin. *Id.* at 14. A law is upheld under strict scrutiny if the classification serves a compelling governmental interest that is narrowly tailored to further that interest. *Id.* at 6. Rational basis review applies to classifications not affecting race or gender. *Equal Protection*, *supra* note 5, at 10. A law is upheld under rational basis review if a legitimate governmental interest is rationally related to the classification. *Id.*

⁸² *Id.* at 9.

⁸³ *Id.*

⁸⁴ See *Equal Protection*, *supra* note 5, at 9; see also *id.* at 15-16.

⁸⁵ See *id.* at 18.

⁸⁶ See *id.* at 17.

⁸⁷ See *id.* at 18.

⁸⁸ See *Morales-Santana*, 804 F.3d at 531.

1409(a)(4)(A-C).⁸⁹ Only citizen fathers are required to satisfy the legitimization provision by one of the three statutory options: 1) pursuant to the laws of the child's residence or domicile; 2) acknowledging his paternity under oath; or 3) an adjudication of a court.⁹⁰

In this case, the defendant was born out of wedlock in Vietnam to an American father and a Vietnamese mother, and was attempting to derive citizenship from his father.⁹¹ The defendant became a lawful permanent resident of the United States at the age of six.⁹² However, at the age of twenty-two, the Immigration and Naturalization Service ("INS") initiated deportation proceedings against the defendant after he pleaded guilty on two counts of sexual assault.⁹³ Pursuant to 8 U.S.C. section 1409, the defendant's father did not satisfy the requirements to transfer citizenship to the defendant, since the father obtained an order of paternity when the defendant was 28 years old.⁹⁴ However, the Court held that 8 U.S.C. section 1409 did not violate the equal protection clause of the Fifth Amendment.⁹⁵

Justice Kennedy made three points as to why fathers and mothers are not similarly situated under the legitimization provision.⁹⁶ First, a mother, as opposed to a father, can choose to give birth to a child on United States soil.⁹⁷ Therefore, a mother's choice to transfer citizenship should simply be an extension of her innate right.⁹⁸ Second, the legitimization provision is flexible because a fa-

⁸⁹ 8 U.S.C. §1409(a)(4)(A-C) (1952).

⁹⁰ 8 U.S.C. §1409(a)(4) (1952).

⁹¹ *Nguyen*, 533 U.S. at 57.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 57-58; *see also* 8 U.S.C. § 1409 (1952):

(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.

Nguyen, 533 U.S. at 57-58.

⁹⁵ *Id.* at 73.

⁹⁶ *Id.* at 61.

⁹⁷ *Id.*

⁹⁸ *Id.* It is important to note that a mother's preferred status does not guarantee her a less restrictive physical presence requirement. *See* Brief for Petitioner at 5, *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (No.99-2071).

State laws regarding out-of-wedlock fathers' parental status have

ther can perform any of the three statutory acts before the child reaches eighteen years of age.⁹⁹

As to Justice Kennedy's third point, the gender-based distinctions in the legitimization provisions serve to ensure that the foreign-born child and the father had an opportunity to develop a true connection based on day-to-day interactions.¹⁰⁰ These interactions will in turn secure that the foreign-born child sustains sufficient connections to the United States.¹⁰¹ The Court based its reasoning on the fact that mothers and fathers establish paternity to their child at different times.¹⁰² As a result, a father must demonstrate by legitimization that he has maintained a connection to the child.¹⁰³ Fathers, by the process of legitimization, can also ensure that the child has a connection to the United States.¹⁰⁴ Moreover, the Court justified the legitimization provision due to the concern that fathers could conceive children all over the world and never establish ties with them.¹⁰⁵ Without first establishing that the father and foreign-born child have ties to each other, the foreign-born child cannot develop sufficient ties to the United States.¹⁰⁶

The first two points that Justice Kennedy presented provide some evidence as to why men and women are similarly situated in terms of the physical presence provision, but not in the legitimization provision.¹⁰⁷ The physical presence provision stems from Congressional action and is not an innate right of the mother.¹⁰⁸ Further, the physical presence provision can only be satisfied prior to the birth of the child.¹⁰⁹ To this end, the physical presence provision is more

changed dramatically in the past six decades. The decided trend has been to recognize the importance of fathers' responsibilities to their non-marital children, and to develop laws that ensure that children receive the benefits of parentage from their fathers rather than leaving it up to the father to take affirmative actions to establish his legal responsibility.

Id.

⁹⁹ *Nguyen*, 533 U.S. at 68-69; see 8 U.S.C. § 1409 (1952).

¹⁰⁰ *Nguyen*, 533 U.S. at 64.

¹⁰¹ *Id.* at 66-67.

¹⁰² *Id.* at 66.

¹⁰³ *Id.* at 66.

¹⁰⁴ *Id.* at 68.

¹⁰⁵ *Nguyen*, 533 U.S. at 66.

¹⁰⁶ *Id.* at 68-69.

¹⁰⁷ *Id.* at 62.

¹⁰⁸ *Immigration Act*, *supra* note 30, at 9.

¹⁰⁹ 8 U.S.C § 1409 (1952).

burdensome to the father in comparison to the legitimization provision, since compliance rests on a narrow set of occurrences.¹¹⁰

Additionally, both provisions provide stronger evidence that men and women are similarly situated with regard to the physical presence provision because the legitimization provision ensures that a biological parent-child relationship exists.¹¹¹ Mothers establish biological ties to the child at birth.¹¹² A father, on the other hand, does not establish paternity without DNA testing.¹¹³ However, even if the father establishes biological paternity, he does not establish ties to the child through paternity.¹¹⁴ The Court determined that a father may be biologically connected to the child but legitimization is still necessary to establish a father has sufficient ties to the child.¹¹⁵ Therefore, if the life of a parent is viewed on a timeline, issues affecting how a father connects to the child and establishes paternity arise when the child is born, not before.¹¹⁶

Further, the legitimization provision addresses post-birth concerns by responding to the fundamental differences between men and women.¹¹⁷ In contrast, satisfaction of the physical presence provision is dependent on events that occur pre-birth of the child.¹¹⁸ Pre-birth, neither unmarried mothers nor unmarried fathers are affected by their connection with the child, and therefore the physical presence provision is unresponsive to the governmental concern.¹¹⁹

¹¹⁰ *Morales-Santana*, 804 F.3d. at 535.

And unlike the legitimation requirement at issue in *Nguyen*, which could be satisfied by, for example, ‘a written acknowledgment of paternity under oath,’ the physical presence requirement that *Morales-Santana* challenges imposes more than a ‘minimal’ burden on unwed citizen fathers. It adds to the legitimation requirement ten years of physical presence in the United States, five of which must be after the age of fourteen.

Id.

¹¹¹ *Id.* at 62.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Morales-Santana*, 804 F.3d. at 63.

¹¹⁵ *Nguyen*, 533 U.S. at 62 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)) (“The validity of the father’s parental claims must be gauged by other measures.”).

¹¹⁶ *Id.* at 66.

¹¹⁷ *Id.* at 69.

¹¹⁸ *Morales-Santana*, 804 F.3d. at 531 (“But unwed mothers and fathers *are* similarly situated with respect to *how long* they should be present in the United States or an outlying possession prior to the child’s birth in order to have assimilated citizenship-related values to transmit to the child.”).

¹¹⁹ See *United States v. Virginia*, 518 U.S. 515, 533 (1993) (holding “ ‘[i]nherent differ-

The Fifth Amendment of the United States Constitution offers individuals who are part of a distinct and recognizable class equal protection of the law.¹²⁰ A statute or regulation is unconstitutional when an individual is treated differently as a result of that membership.¹²¹ All laws that treat men and women who are similarly situated differently face intermediate scrutiny.¹²² This means that the gender-based distinction must serve important governmental objectives and be substantially related to those objectives.¹²³ The court in *Nguyen* outlined how the legitimization provision addressed the important governmental objective that unwed citizen fathers establish ties to their children and the importance that a child develop ties to the United States by way of that connection.¹²⁴ However, the holding in *Nguyen* highlighted that the legitimization provision, not the physical presence provision, addressed the concerns of a parent bonding with the foreign-born child or establishing that the foreign-born child had sufficient ties to the United States.¹²⁵ The legitimization provision addressed postpartum concerns by making postpartum demands on the father.¹²⁶ The physical presence provision makes pre-birth demands that are unresponsive to the governmental interests and, therefore, deny United States citizen fathers equal protection of the law.¹²⁷

III. THE NEW YORK STATE APPROACH

A. The New York State Constitution and Equal Protection

Article 1, section 11 of the New York State Constitution provides that no person should be deprived of equal protection under the

ences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.").

¹²⁰ U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law."); see U.S. CONST. amend. XIV ("[N]or deny to any person within its jurisdiction the equal protection of the laws.").

¹²¹ *United States v. Scott*, 919 F. Supp. 2d. 423, 431 (S.D.N.Y. 2013).

¹²² See *Equal Protection*, *supra* note 5, at 5.

¹²³ See *id.* at 9.

¹²⁴ *Nguyen*, 533 U.S. at 65.

¹²⁵ *Morales-Santana*, 804 F.3d. at 531.

¹²⁶ 8 U.S.C § 1409 (1952).

¹²⁷ *Morales-Santana*, 804 F.3d. at 538.

laws of the state.¹²⁸ Similar to the intermediate heightened scrutiny test applied for gender-based distinctions under the Equal Protection Clause of the federal constitution, a state statute must further a “powerful countervailing State interest” and there must be a close connection between the means used and the governmental objective sought under the Equal Protection Clause of the New York State Constitution.¹²⁹

B. *In the Matter of Raquel Marie X*

The New York Court of Appeals reviewed the constitutionality of a gender-based distinction in an adoption statute, Domestic Relations Law (“DRL”) section 111(1).¹³⁰ The statute required an unwed mother’s consent before placing a less than six-month-old child for adoption.¹³¹ However, an unwed father had to live with the child or the mother for six continuous months for his consent to be required before placing a child for adoption.¹³² This statute was examined under the similar facts of two distinct adoption proceedings involving children born out-of-wedlock.¹³³

In the first case, Baby Girl S was born to Regina on April 24, 1988.¹³⁴ On April 27, 1988, Regina placed Baby Girl S for adoption.¹³⁵ Regina and Baby Girl S’s father, Gustavo, did not live together before the child was placed up for adoption for the relevant six-month period.¹³⁶ Regina and Gustavo were estranged during this period.¹³⁷ However, following the adoption, Gustavo and Regina

¹²⁸ N.Y. CONST. art. I, § 11 (McKinney 2015) (“No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”).

¹²⁹ *Matter of Raquel Marie X*, 559 N.E.2d 418, 425 (1990):

Where a fundamental interest of this nature is at issue, any legislation limiting or burdening it at the very least must meet two tests: the statute must further a powerful countervailing State interest, and there must be a close fit between the governmental objective sought and the means chosen to achieve it.

Id.

¹³⁰ *Id.* at 419.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Raquel Marie X*, 559 N.E.2d at 419.

¹³⁴ *Id.* at 420.

¹³⁵ *Id.* at 419-20.

¹³⁶ *Id.* at 420.

¹³⁷ *Id.*

reconciled and Regina supported Gustavo's efforts to gain custody of Baby Girl S.¹³⁸

After Gustavo applied for custody, the New York Surrogate's Court denied the prospective adoptive parents' petition to adopt Baby Girl S, holding that the adoptive parents' fraudulent conduct¹³⁹ prevented Gustavo from knowing of Regina's pregnancy or his paternity.¹⁴⁰ On appeal, the Appellate Division for the First Department found that the conduct made Gustavo's efforts to comply with the statute impossible.¹⁴¹ It affirmed the Surrogate's Court's decision and rejected the adoption of Baby Girl S.¹⁴² The court ordered the transfer of Baby Girl S from the prospective adoptive parents to Gustavo.¹⁴³ However, the prospective adoptive parents were granted the motion for leave to appeal to the Court of Appeals of New York.¹⁴⁴

In the second case, Raquel Marie was born to Louis on May 26, 1988.¹⁴⁵ Similar to the first case, Louis was estranged from Raquel Marie's father, Miguel, when Raquel Marie was placed in adoption proceedings on July 22, 1988.¹⁴⁶ However, on November 4, 1988, Louis and Miguel married.¹⁴⁷ At that time, Raquel Marie was adopted when she was just a few days old and living in New Hampshire with her adoptive parents.¹⁴⁸ After his marriage to Louis, Miguel sought custody of Raquel Marie.¹⁴⁹

The trial court ruled, pursuant to DRL section 111(1)(e), that Miguel and Louis had a continuous relationship that satisfied the "living together" provision of the statute.¹⁵⁰ However, the Appellate Division for the Second Department reversed, finding that Miguel did not satisfy the "living together" provision or the remaining requirements set forth in the statute.¹⁵¹ Miguel appealed the Appellate Divi-

¹³⁸ *Raquel Marie X.*, 559 N.E.2d at 420. Baby Girl S was adopted prior to Gustavo's filing for custody. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Raquel Marie X.*, 559 N.E.2d at 420.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 420.

¹⁴⁶ *Id.*

¹⁴⁷ *Raquel Marie X.*, 559 N.E.2d at 420.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

sion's decision.¹⁵²

The New York Court of Appeals granted the appeals in both Baby Girl S and Raquel Marie's case.¹⁵³ The issue raised on appeal was whether the provision requiring a father to live with the mother continuously for six months immediately preceding the adoption renders the statute unconstitutional.¹⁵⁴ The court provided the judicial history of unwed fathers' rights concerning the adoption of their children.¹⁵⁵

Prior to 1970, an unwed father did not have legal rights to his children.¹⁵⁶ Upon the death of the child's mother, the child became a ward of the state.¹⁵⁷ In *Stanley v. Illinois*,¹⁵⁸ the United States Supreme Court established that if the father raised and was biologically connected to the child, he had legal rights to the child.¹⁵⁹ Thereafter, in the 1976 DRL 111(a), the New York legislature acknowledged that fathers had the right to notice of adoption proceedings where they could present evidence of what was in the "best interest of the child."¹⁶⁰ However, at this time, the father did not yet have vetoing rights to the adoption.¹⁶¹

In 1978, although the United State Supreme Court determined in *Quilloin v. Walcott*¹⁶² that an unwed father's equal protection challenge to New York DRL section 111 could only be sustained when a father takes responsibility for that child, the statute was held unconstitutional as applied to fathers one year later.¹⁶³ In *Caban v. Mo-*

While the court explicitly premised its holding on Miguel's failure to meet the 'living together' requirement, it additionally observed that there was little evidence of Miguel's compliance with the remaining two requirements of Domestic Relations Law § 111(1)(e), or of any effort on his part to manifest substantial parental responsibility.

Raquel Marie X., 559 N.E.2d at 420.

¹⁵² *Id.* at 420.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 421.

¹⁵⁶ *Raquel Marie X.*, 559 N.E.2d at 421.

¹⁵⁷ *Id.*

¹⁵⁸ 405 U.S. 645 (1972).

¹⁵⁹ *Id.* at 651.

¹⁶⁰ *Raquel Marie X.*, 559 N.E.2d at 421.

¹⁶¹ *Id.*

¹⁶² 435 U.S. 246 (1978).

¹⁶³ *Id.* at 256; *Raquel Marie X.*, 559 N.E.2d at 422.

hammed,¹⁶⁴ the Court reasoned that fathers who had custody of their children were on equal footing with mothers in terms of caring for the child, and therefore, should be afforded the same opportunity to veto an adoption.¹⁶⁵

As a result, the New York legislature revised DRL section 111 to comport with the holding in *Caban*, granting a father veto rights where he “objectively and unambiguously manifested that, through his efforts, there was a substantial, continuous, meaningful family relationship available to the child.”¹⁶⁶ The New York legislature also proposed a distinct test to determine whether a father had established a relationship with his biological children less than 6 months of age and/or children over 6 months of age.¹⁶⁷ Where a child is over 6 months of age, the father must have communicated with the child, financially supported, and visited the child to have the right to veto an adoption.¹⁶⁸ The test for a child under 6 months old requires an unwed father to live with the child or the mother for six continuous months before the child is placed in adoption proceedings.¹⁶⁹

As a result of the legislative and judicial history of the DRL and an unwed father’s right to veto adoptions, the court recognized several important state objectives.¹⁷⁰ The first state objective is the protection of a father’s legal rights to his children, provided the father is biologically connected to the child and assumes parental responsibility for the child.¹⁷¹ The second state objective is the protection of a child’s well-being and stability.¹⁷² The last state objective is the importance of maintaining the integrity of the adoption system.¹⁷³

However, despite the legislative history, the Court of Appeals reasoned that the “living together” provision did not further the state interest of protecting a father’s legal right to his child when the father assumes responsibility of the child.¹⁷⁴ First, the “living together” provision in practice serves as a barrier for unwed fathers to deny the

¹⁶⁴ 441 U.S. 380 (1978).

¹⁶⁵ *Id.* at 396.

¹⁶⁶ *Id.*; *Raquel Marie X.*, 559 N.E.2d at 422.

¹⁶⁷ *Raquel Marie X.*, 559 N.E.2d at 423.

¹⁶⁸ *Id.* at 423.

¹⁶⁹ *Id.* at 425.

¹⁷⁰ *Id.* at 424.

¹⁷¹ *Id.*

¹⁷² *Raquel Marie X.*, 559 N.E.2d at 424.

¹⁷³ *Id.* at 425.

¹⁷⁴ *Id.* at 426.

adoption of his children.¹⁷⁵ Specifically, to satisfy section 111(1), a father must either live with the child or the mother for a continuous period of six months prior to the child's placement in adoption proceedings.¹⁷⁶ This means that a father could only satisfy this provision by living with the mother prior to the child's birth and for most of the child's life.¹⁷⁷

It is improbable that an issue of consent would arise where the father lived with the mother right before the child is put up for adoption.¹⁷⁸ The court determined that if a father both "openly acknowledged his paternity during such period and paid reasonable pregnancy and birth expenses,"¹⁷⁹ this was sufficient to prove that the father had taken care of the child and had a biological nexus.¹⁸⁰ Thus, the "living together" provision does not ensure a father has shouldered responsibility for the child in comparison to the acknowledgment and birth expenses provisions.¹⁸¹ Additionally, the court held that the "living together" provision does not further the state interest of providing a stable two-parent home for the child since single parent adoption is acceptable.¹⁸²

Lastly, the court rejected the argument that the "living together" provision furthers the state interest of preserving the integrity of the adoption system.¹⁸³ The integrity of the adoption system is preserved by the fact that fathers that veto adoption must also be willing to take custody of the child.¹⁸⁴ Therefore, the court held that the "living together" provision was unconstitutional because it did not further any important state interest.¹⁸⁵

In the case of Baby Girl S, the father was granted custody because he consistently sought to assume responsibility for the child once he was made aware of her existence.¹⁸⁶ In the case of Raquel Marie, the court reversed and remitted the case for further proceed-

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 426.

¹⁷⁷ *Raquel Marie X.*, 559 N.E.2d at 426.

¹⁷⁸ *Id.* at 426.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Raquel Marie X.*, 559 N.E.2d at 427.

¹⁸³ *Id.* at 428.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 427.

¹⁸⁶ *Id.* at 428.

ings on the issue of the father's compliance with the birth and pregnancy expenses of the mother.¹⁸⁷

IV. FEDERAL AND STATE APPROACH COMPARISON

The United States and New York State Constitutions each contain an Equal Protection Clause.¹⁸⁸ Both Equal Protection Clauses implement intermediate "heightened scrutiny" to evaluate if the gender classifications violate an individual's right to equal protection of the law.¹⁸⁹ The tests seek to find the nexus between the preservation of the important governmental interest and the means to preserve the interest.¹⁹⁰

Just as there are similarities between the federal and New York State Constitutions, there are also similarities between the New York DRL section 111(1) and 8 U.S.C. section 1409. First, according to section 111(1), a father must satisfy more requirements than a mother to gain veto rights when a child is placed in adoption proceedings.¹⁹¹ As in the federal statute, burdens imposed by the state statute are based on gender classifications.¹⁹² Second, the criteria for a father to gain adoption veto rights arise from a specific point in time of the father-child relationship, which is similar to the federal statute where a father has to comply with the physical presence requirement prior to the child's birth.¹⁹³ Lastly, the physical presence provision in *Morales-Santana* focuses on the activity of the father pre-birth, while section 111(1) also focuses on the father's activity pre-birth as well as post-birth.¹⁹⁴

¹⁸⁷ *Raquel Marie X.*, 559 N.E.2d at 428.

¹⁸⁸ See N.Y. CONST. art. I, § 11 (McKinney 2015) ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof."); see also U.S. CONST. amend. V ("...nor be deprived of life, liberty, or property, without due process of law).

¹⁸⁹ See *Raquel Marie X.*, 559 N.E.2d at 425.

Where a fundamental interest of this nature is at issue, any legislation limiting or burdening it at the very least must meet two tests: the statute must further a powerful countervailing State interest, and there must be a close fit between the governmental objective sought and the means chosen to achieve it.

Id. See also *Equal Protection*, *supra* note 5, at 15.

¹⁹⁰ *Raquel Marie X.*, 559 N.E.2d at 425.

¹⁹¹ *Id.* at 419.

¹⁹² 8 U.S.C § 1409 (1952); see *Raquel Marie X.*, 559 N.E.2d at 419.

¹⁹³ *Raquel Marie X.*, 559 N.E.2d at 419; see 8 U.S.C § 1409 (1952).

¹⁹⁴ *Id.*

Furthermore, the interests that New York State seeks to further with the gender-based distinction in section 111(1) is similar to that of the federal government's interest in *Morales-Santana*. In *Raquel Marie X*, New York State had a legitimate state interest in ensuring that the father had more than a biological connection to a child less than six months of age, before having the right to object to the adoption.¹⁹⁵ The New York Court of Appeals emphasized fathers' having a constitutional right to be afforded the opportunity to connect with the child.¹⁹⁶ Like the Second Circuit, New York State courts try to balance the governmental interest with the gender-based distinction.¹⁹⁷ In this case, protecting a father's opportunity to connect with the infant and ensuring a father earned his vetoing rights were not in accord with creating more limitations on the father.¹⁹⁸

Both the New York Court of Appeals and Second Circuit proved that the gender-based distinctions did not further the objectives sought by the government based on two facts.¹⁹⁹ First, the New York Court of Appeals detailed how the "living together" provision continued to impede fathers from exercising vetoing rights despite publically acknowledging paternity and paying for reasonable birth and pregnancy expenses of a child under six months old.²⁰⁰ The Second Circuit in *Morales-Santana* similarly identified how the requirements of the legitimization provision satisfied the government's concerns with fathers establishing ties to their foreign-born children, by accepting paternity under oath, adjudication by competent court, or under the laws of the foreign-born child's domicile or residence.²⁰¹

Second, the New York Court of Appeals questioned the effectiveness of the provision in ensuring that a father takes responsibility for a child by measuring the amount of time the father spent with the mother prior to the child's birth.²⁰² Even though the Second Circuit does not explicitly inquire into the effectiveness of the physical presence provision in accomplishing the task of ensuring the child has ties to the father, and in turn the state, the court did distinguish it

¹⁹⁵ *Raquel Marie X*, 559 N.E.2d at 424.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 426.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 426; see *Morales-Santana*, 804 F.3d at 531.

²⁰⁰ *Raquel Marie X*, 559 N.E.2d at 426.

²⁰¹ *Morales-Santana*, 804 F.3d at 531.

²⁰² *Raquel Marie X*, 559 N.E.2d at 426.

from the legitimization provision.²⁰³ From this comparison, it can be inferred that a child's ties to the father should not hinge on factors that could never affect governmental interests.²⁰⁴ In the same way, measuring the amount of time a father spends with a mother prior to a child's birth cannot ensure the father connected with the child post-birth. Furthermore, a father living in the state longer than a mother should not increase the likelihood a foreign-born child will have ties to the father once born.²⁰⁵

V. CONCLUSION

The Second Circuit in *Morales-Santana* appropriately held that the physical presence provision as applied to fathers was unconstitutional under federal application.²⁰⁶ The physical presence provision under review in *Morales-Santana* and the legitimization provision under review in *Nguyen* demonstrated the fundamental differences between the provisions in that fathers and mothers are not similarly situated in their ability to satisfy the legitimization provision but are similarly situated in their ability to satisfy the physical presence provision.²⁰⁷ Similar to the federal approach, the New York State approach to equal protection in *Raquel Marie X* emphasized that a provision that creates a gender-based distinction can never serve an important state interest, where another provision in the statute addresses the interest.²⁰⁸ Further, any governmental or state interest cannot relate to the gender classification, where the interest does not arise from the circumstances under which the burden is imposed.²⁰⁹

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²⁰³ *Morales-Santana*, 804 F.3d. at 531.

²⁰⁴ *Id.*

²⁰⁵ *See id.* at 531; *see also Raquel Marie X.*, 559 N.E.2d at 426.

²⁰⁶ *Morales-Santana*, 804 F.3d. at 538.

²⁰⁷ *Id.* at 531.

²⁰⁸ *Raquel Marie X.*, 559 N.E.2d at 426.

²⁰⁹ *Morales-Santana*, 804 F.3d. at 531.

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