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SUPREME COURT, U. S.

In the

# Supreme Court of the United States

MEL KAHN, etc.,

Appellants,

vs.

No. 73-78

ROBERT L. SHEVIN, et al.,

Appellees.

Washington, D. C.  
February 25, 1974  
February 26, 1974

Pages 1 thru 49

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Washington, D. C.,

Monday, February 25, 1974.

The above-entitled matter came on for argument at  
2:32 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. RUTH BADER GINSBURG, American Civil Liberties  
Union Foundation, 22 East 40th Street, New York,  
New York 10016; for the Appellants.

SYDNEY H. MCKENZIE, III, ESQ., Assistant Attorney  
General of Florida, the Capitol, Tallahassee,  
Florida 32304; for the Appellees.

C O N T E N T SORAL ARGUMENT OF:PAGE

Mrs. Ruth Bader Ginsburg,  
for the Appellants.

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In rebuttal

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Sydney H. McKenzie, III, Esq.,  
for the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-78, Kahn against Shevin.

Mrs. Ginsburg, you may proceed whenever you're ready.

If you'd like to lower the lectern, you are quite at liberty to do so.

ORAL ARGUMENT OF MRS. RUTH BADER GINSBURG,

ON BEHALF OF THE APPELLANTS

MRS. GINSBURG: Mr. Chief Justice, and may it please the Court:

Appellant Mel Kahn, a Florida resident, is a widower. In January 1971, based on his status as a surviving spouse, he applied to the Dade County Tax Assessor for a property tax exemption.

The statute under which widower Kahn sought exemption provided: A widow, along with disabled persons, is entitled to exempt \$500 yearly from her property tax.

Mel Kahn was denied the claimed exemption, solely on the ground of his sex. Requesting judicial review, he alleged that the statute under which he claimed exemption had been interpreted and applied in conflict with the equal protection guarantee of the Fourteenth Amendment.

QUESTION: Actually he didn't allege that in the trial, though; didn't he expressly say that he didn't want to

raise his federal question there?

MRS. GINSBURG: In the original complaint, he suggested that he might save out the federal question till a later time. But then the federal question was raised, and decided, with the agreement of all parties.

QUESTION: But he didn't simply say he "might save" it, but he said he wanted to save it; didn't he?

MRS. GINSBURG: Yes. But apparently, with the understanding of the court and the agreement of both sides, the federal question was heard and decided, both in the trial court and in the Florida Supreme Court.

Appellant sought a declaration that the exemption provision is unconstitutional in so far as it excludes widowers.

On cross motions for summary judgment, the court of first instance held that the statute according exemption to all widows and excluding all widowers discriminated arbitrarily between widowed persons and therefore violated the equal protection guarantees of the State and Federal Constitutions.

On appeal, the Florida Supreme Court reversed. The Florida Supreme Court held that the distinction between surviving spouses, though based solely on gender, did not deny to any person the equal protection of the laws.

It is appellant's position that the gender-based



distinction upheld by the Florida Supreme Court discriminates invidiously in two respects:

First, most obviously it discriminates against men who have lost their wives. More subtly but as surely it discounts the contribution made to the marital unit and the family economy by the female partner, for her death occasions no exemption for the surviving spouse.

By defining the exempt person as widow rather than surviving spouse, this provision now covering the blind and the totally disabled along with the widow, is kin to a classification delineated by the president of one of our nation's leading educational institutions.

Anticipating an increase in conscription not too many years ago, this distinguished educator complained: We shall be left with the blind, the lame, and the women.

This Court's decision in Reed v. Reed, 404 U.S., and its judgment in Frontiero v. Richardson, 411 U.S., indicate genuine concern to analyze sex classifications free from the generalizations of the Victorian Age.

Appellant maintains that the Reed standard is not met by a surviving spouse tax exemption that uses gender as the sole criterion for qualification. For, if need is the concern, then sex should not be a substitute for an income test. And if widowed state is the concern, then it is irrational to distinguish between taxpayers, based on their

sex.

Far from constituting a rational shorthand for distinguishing between taxpayers on the basis of need or life situation, a widow's only classification is a crude device that originated in, and today perpetuates, Victorian assumptions concerning the station of men and women.

To resolve this case, the Court need not go beyond the scrutiny employed in Reed and followed by the Tenth Circuit in Moritz v. Commissioner, 469 F. 2d.

The decision in Reed and the judgment in Frontiero indicate the Court's clear willingness to give sex classifications more than surface examination.

However, if the Court wants to consider application of a suspect classification doctrine, then it must face the fact that problems of race and sex discrimination are often different, and that neither women nor blacks are aided by lumping the two together for all purposes.

Thus far this Court has applied the label "suspect classification" only in opinions involving discrimination hostile to groups not dominant in society.

But whatever may be said for a one-way suspect classification doctrine in cases involving racial discrimination, a one-way approach in sex discrimination cases would be fraught with danger for women, because of the historic tendency of jurists to rationalize any special

treatment of women as benignly in their favor.

With respect to race, the effects of officially sanctioned segregation are still very much with us, but complex doctrines directed to the continuing impact of racial segregation are not necessarily applicable to sex discrimination.

The difference is perhaps best illustrated with respect to the educational experience. Most public education is co-educational, though females have been segregated and restricted in some areas, most notably vocational training and athletics.

But generally females participate with males in academic programs in elementary and high schools, and, in fact, tend to do better there than males. For many females this record of achievement continues into college and university.

For example, females outscore males on the law school admissions test.

The problem for women is that along the way an attitude is instilled insidiously. This attitude is described in a nutshell in graffiti etched on a college library carro in the early 1950's. The epigram reads: Study hard, get good grades, get your degree, get married, have three kids, die, and be buried.

From the first line, the sex of the writer is impossible to determine, from the second, her sex is impossible



to mistake.

To cure the problem felt so acutely by the young woman who wrote those words and so many others like her, the law must stop using sex as a shorthand for functional description. It must deal with the parent, not the mother; with the homemaker, not the housewife; and with the surviving spouse, not the widow.

To appreciate the character of the challenged classification, the widow's own exemption must be viewed in historical context. Exemption became part of Florida's law in 1885. At that time, indeed well into the Twentieth Century, Florida law routinely differentiated between the roles of men and women and particularly married men and married women.

Women could not vote, nor did they serve on juries, for example.

Well past the middle of the Twentieth Century, in fact up till 1968, a Florida married woman could not transfer even her own interest in real property without her husband's consent.

Not surprisingly, the married woman was deemed worthy of special solicitude on the death of the person the law regarded as her guardian, her superior; not her peer.

While the widow's only exemption was designed with the Nineteenth Century status of married women in mind, the Florida Supreme Court found contemporary justification for it

in this unquestionable fact: women workers, as a class, do not earn as much as men. This well-known and still wide earnings gap, according to the Florida Supreme Court, supplies a fair and substantial basis for the tax classification "widow" rather than "surviving spouse".

But, beyond doubt, a widow's only exemption has no impact whatever on the conditions responsible for the earnings gap.

QUESTION: Excuse me, I'm not too clear. You are arguing that sex ought not to be treated as a suspect classification?

MRS. GINSBURG: I am arguing that if, first, that it is not necessary to deal with that question in this case, but, second, that if sex is treated as a suspect classification, which I think properly it is, then the Court must be aware that the arguments that we give special scrutiny only to lines that appear to disfavor women, will be ultimately harmful to women, because the history has been --

QUESTION: So it's suspect plus?

MRS. GINSBURG: It is the classification, it is the criterion sex that is suspect, not female, but the criterion sex.

QUESTION: Generally, isn't it the fact that the Court has found classification to be suspect when it involves a discriminatory classification against a minority group?

MRS. GINSBURG: Yes.

QUESTION: Would that -- is that accurate?

MRS. GINSBURG: In this Court's precedent, the suspect label has been used --

QUESTION: So that the paradigm is race?

MRS. GINSBURG: Yes. And national origin --

QUESTION: The minority race -- the minority race.

MRS. GINSBURG: Yes. And what was looked at was only --

QUESTION: And alienage is another, presumably; right?

MRS. GINSBURG: Alienage, yes.

QUESTION: So the suspect classification can be found only with respect to discriminatory classification against a minority group; is that correct?

MRS. GINSBURG: That is how it has been used in this Court's precedent.

QUESTION: Traditionally up until now.

MRS. GINSBURG: Yes. Actually --

QUESTION: And your point, I gather, is that -- I don't know that you've mentioned it, but women, first of all, are not a minority group; and, secondly, since courts have been in the habit to view any classification of women as a beneficent --

MRS. GINSBURG: Yes.

QUESTION: -- provision, of course, should be on guard in not --.

MRS. GINSBURG: Yes. My point is that for women the -- what will aid women most is not looking to see whether a classification is benign or invidious.

QUESTION: Unh-hunh.

MRS. GINSBURG: But whether it is a sex criterion --

QUESTION: Right.

MRS. GINSBURG: -- as a shorthand for what should be a functional criterion.

QUESTION: Right.

QUESTION: In other words, you don't want it whether it helps -- even if it helps.

MRS. GINSBURG: My question is if it ever does help.

QUESTION: Ever does.

MRS. GINSBURG: Yes.

QUESTION: But, even if it does, you would assume, on that assumption that --

MRS. GINSBURG: But I have not yet found any such classification in the law that genuinely helps. From a very shortsighted viewpoint, perhaps, such as this one, yes. But long run -- no, I think that what women need is, first of all, a removal of exclusions and restrictive quotas. They are the only population group that today still faces outright exclusions and restrictive quotas.

And then what is necessary is a welcome sign, a notice that in professions, in trades and occupations, women are now as welcome as men.

But the notion that they need special favored treatment, because they are women, I think has been what has helped to keep women in a special place, and has kept them away from equal opportunity for so long.

In other words, take this exemption, it's not the purpose of this exemption to eliminate discrimination against women, it isn't the purpose to eliminate discrimination in pay or to equalize training study, job opportunities for them.

In stark contrast to this widow's exemption are measures that are realistically designed to promote equal opportunity, free from gender-based discrimination. Title 7 of the Civil Rights Act of 1964, for example.

These measure focus on eliminating sex typing of this very order as the essential task.

Nor can an exemption of this kind be regarded as a rational welfare measure to alleviate the effects of class discrimination against women. As a welfare measure, supposedly directed to the ability of women property owners to pay taxes, the exemption is incredibly designed, it encompasses the independently wealthy widow, and at the same time it excludes the woman who encounters, perhaps, the sharpest discrimination, the female head of household who never married.



In some the classification is obviously unrelated to any biological difference between men and women. It is not fairly and substantially related to the need or life situation of the individual man or woman, but it is very much related to underestimation of the woman's contribution to the family economy.

Significantly, the Florida Supreme Court on other days has demonstrated its understanding of the very real and substantial economic contribution made by the female partner, whether as homemaker, through gainful employment, or, as is increasingly the case, through productive effort both in and outside the home.

In --

QUESTION: Well, in so far as the statute does not differentiate among various widows, or various categories of widows, it's very typical of tax legislation generally, isn't it?

MRS. GINSBURG: Yes. The --

QUESTION: And certainly the federal income tax, which gives every taxpayer an exemption of \$750 for each dependent, regardless of his circumstances, or the dependent's circumstances if he's below a certain age, is certainly very -- a very blunt instrument. And in so far as this --

MRS. GINSBURG: Yes.

QUESTION: -- this legislation fails to discriminate

as among various categories of widows, you don't really attack it, do you?

MRS. GINSBURG: The classification "surviving spouse" is a well-known classification in both State and federal tax law. It does reflect the Legislature's recognition that loss of a spouse is a unique episode in a person's life, and I am not challenging the classification "surviving spouse".

QUESTION: No. My point was -- perhaps I didn't express it very well.

You, a few moments ago, spoke and said that the legislation is applicable whether the widow be --

MRS. GINSBURG: Yes.

QUESTION: -- a millionairess, or whether she be a poor working widow, and whether she have children or not have children, and so on.

I didn't really understand that your basic attack upon this legislation was premised upon that formation.

MRS. GINSBURG: That's right. I am not suggesting that the tax assessor call in each individual exempt person and see if that person really needs the exemption; not at all.

QUESTION: I didn't think so.

MRS. GINSBURG: What I am suggesting is that the sex criterion is invalid.

QUESTION: Mrs. Ginsburg, assuming I agree with

everything you said, how do you get any relief in this case?

MRS. GINSBURG: Well, --

QUESTION: Assuming that we declare the statute unconstitutional.

MRS. GINSBURG: Yes. Well, if this Court --

QUESTION: Who gets any relief then?

MRS. GINSBURG: Mel Kahn gets the tax exemption for the tax year in question --

QUESTION: How? How?

MRS. GINSBURG: First, --

QUESTION: I said if we declare the statute unconstitutional.

MRS. GINSBURG: In so far as it discriminates against widowers, I think that if you declare the gender line unconstitutional, which is the only thing that the Court has been requested to do, then the Florida Supreme Court should be free to consider whether total demolition of this exemption, or repairing it to fit the constitutional requirement is --

QUESTION: I'm assuming that -- assuming that they just end it. Then nobody gets anything.

MRS. GINSBURG: For the future. Widower concept, this exemption --

QUESTION: Well, there's a case in this Court which says that that's not for the courts to do.

The case of Cummings v. Board of Education in Georgia,

1914 or so.

MRS. GINSBURG: Yes? I'm sorry that I'm not familiar with that.

QUESTION: Well, it's a case where, just like this, you wanted to knock out --

MRS. GINSBURG: Yes?

QUESTION: -- and this Court said that if you do that, and nobody gets anything, that's not the proper place for an equity court to act.

MRS. GINSBURG: I'm asking this Court to take the same approach that was taken in Frontiero last semester. Where a group of service spouses, in that case husbands, did not qualify for the exemption because the statute excluded them. And all this Court held was that the statute was unconstitutional in so far as it excluded that class.

QUESTION: And this Court has plenary jurisdiction over the --

QUESTION: Federal jurisdiction.

QUESTION: -- federal jurisdiction over the federal Army --

MRS. GINSBURG: Yes. But ultimately --

QUESTION: -- and do not have it over the State of Florida.

MRS. GINSBURG: Ultimately, of course, that is a question for the Florida Supreme Court to answer. And it can

answer that question for itself. But it would need --

QUESTION: And you'd be perfectly satisfied if the end result to this case is that the widows get nothing?

MRS. GINSBURG: No. I do not think that that would be the reasonable approach for either the Florida Supreme Court or the Florida Legislature to take.

There is the further problem here that --

QUESTION: Well, of course, if everybody -- if the end result is that everybody gets an exemption, that's the same as nobody getting any exemption.

MRS. GINSBURG: That all widowed persons get the exemption. We are talking about a very small addition, since there are about four times as many widows in Florida --

QUESTION: Men are widowers, yes.

MRS. GINSBURG: -- as widowers, I suppose that a reasonable Legislature, looking at that larger class and wanting the exemption for that larger class, would extend it to this much more -- much smaller group, rather than --

QUESTION: As brother Marshall suggests --

MRS. GINSBURG: -- merging that together.

QUESTION: -- that is a question ultimately up to the Supreme Court and/or Legislature of Florida, isn't it?

MRS. GINSBURG: That's quite correct. All we ask of this Court --

QUESTION: It's unlike Frontiero in that respect.



MRS. GINSBURG: We ask this Court to declare the statute defective, in that it excludes widowers, and that the remaining relief would be an appropriate question for the Florida Supreme Court.

QUESTION: Mrs. Ginsburg, pursuing this discussion, do I understand you to say that the Florida Court would have not only authority, but I think on page 26 of your brief you said: if it's a responsible court, it would, in effect, rewrite this statute, contrary to what you concede to be its plain language and intent. That a court would do that rather than the Florida Legislature?

MRS. GINSBURG: The Court has two choices in that situation. It can either nullify the statute, in which case it is totally thwarting the Legislature's will; or it can modify the statute to meet the constitutional equal protection requirement.

If it guesses the wrong way, in either direction, the Legislature of course has the final word. But the Court, faced with the question: should we take this exemption away from the three-quarters of the population, the widow population, that now gets it, rather than extend it to the one-quarter that doesn't, in order to preserve what the Legislature did do, it seems to me it is eminently more destructive of the Legislature -- legislative will to say that we remove this exemption altogether; than to say We'll keep

what you wanted, and then add this much smaller group.

QUESTION: Did you --

QUESTION: I might agree with that -- excuse me, Mr. Chief Justice.

QUESTION: Go on.

QUESTION: I was going to say I could be persuaded, I think, to agree that it would be more constructive if you prevail here for the Legislature, in the end, to equalize it. But I was curious by your suggestion that the Court itself could rewrite a perfectly plain statute, conceded by you to be plain.

MRS. GINSBURG: A number of State courts have done just that. We cited Schmoll v. Creecy, for example.

QUESTION: We have gone quite far, but I didn't know we had gone that far.

MRS. GINSBURG: Hunh?

These were all cases where an exclusion -- where a statute was constitutionally infirm because of under-inclusion; a group had been left out. And then it was the Court's choice to determine whether it wanted to knock out the provision altogether or to do, well, as Mr. Justice Harlan once put it, the choice is between amputation and a skin graft.

QUESTION: That's what he suggested in Welsh, --

MRS. GINSBURG: Yes.

QUESTION: -- but the Court's never done that, has it?

QUESTION: That was just his point of view?

MRS. GINSBURG: That was his concurring opinion, yes.

QUESTION: Yes.

QUESTION: But that was the fifth vote in determining this.

MRS. GINSBURG: Yes.

QUESTION: But, incidentally, I gather you recognize -- your suggestion at page 25 of your brief, that if we agree the statute's unconstitutional, that we should remand for "consideration, whether consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners." We wouldn't do that, would we? All we would do, if we agree with you, would be simply remand for proceedings not inconsistent with --

MRS. GINSBURG: Exactly right, yes.

QUESTION: Without making any suggestion to the Florida Supreme Court.

MRS. GINSBURG: Quite so, yes.

What we seek in this Court is a declaration that the gender line is unconstitutional; that it is unconstitutional to exclude widowers, and, on a remand for further proceedings

not inconsistent with that opinion.

QUESTION: Is that the only way we could do it, or could we simply say the statute's invalid, period?

If we --

MRS. GINSBURG: I think that you would be clearer and provide more precise instruction to the Florida Supreme Court if you said that the statute was unconstitutional in so far as it excluded widowers.

QUESTION: Right.

QUESTION: You take the risk -- "you", I'm speaking in broad terms; a litigant takes the risk of destroying an entire statutory scheme when they attack it in this Court, as one of the risks; is that not so?

MRS. GINSBURG: Justice Brandeis once made the point that when a taxpayer is in this situation, that taxpayer cannot be expected to have his situation equalized by asking the taxpayer to increase the taxes of others similarly situated. So that when a taxpayer is subject to discriminatory tax, through favoring others, the only equalization possible is to grant that taxpayer the exemption afforded by the decision; and then a change for the future can be made, so that all persons similarly situated will either be included or excluded from the exemption.

QUESTION: But you don't -- you still agree we cannot do that?

MRS. GINSBURG: I think it is the province of the Florida Supreme Court to decide what should be done with that Florida statute.

QUESTION: But, do --- are we obliged to suggest to them what they should do, or can we do anything more than hold that statute unconstitutional?

Can we do anything more?

MRS. GINSBURG: Well, you can do what Justice Brandeis suggested in the Iowa-Des Moines case, 284 U.S., and that is to say that this -- this appellant must be granted the exemption because there is no other way that his claim of a denial of equal protection can be redressed.

QUESTION: Which is entirely different from this case?

The exemption in that case is entirely different.

MRS. GINSBURG: It was a different kind of exemption, but the same situation that --

QUESTION: Not as I remember it.

Well, wouldn't we be rewriting the statute?

MRS. GINSBURG: No, you wouldn't be rewriting the statute. You would be holding that the statute contains a constitutional defect. That the classification --

QUESTION: No. If we say that you must include the others, we wouldn't be rewriting the statute?

MRS. GINSBURG: You would not be rewriting the



