

## IN THE SUPREME COURT OF THE UNITED STATES

MEL KAHN, etc.,

Appellants,

v.

No. 73-78

ROBERT L. SHEVIN, et al.,

Appellees.

Washington, D. C.,

Tuesday, February 26, 1974.

The above-entitled matter was resumed for argument  
at 10:08 o'clock, a.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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in No. 73-78, Mr. McKenzie.

ORAL ARGUMENT OF SYDNEY H. MCKENZIE, III, ESQ.,  
ON BEHALF OF THE APPELLEES.

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

Because of part of the argument yesterday, I feel that it's necessary at this time to clarify some of the facts in this case.

This is a claim by a widower that he has been denied equal protection of the law, both by a mandatory self-executing provision of the Florida Constitution and by a statute, providing exemption from ad valorem taxation of property to the value of \$500 yearly for widows, but not for widowers.

Now, that's important for two reasons: one, first of all, counsel in argument yesterday stated that this was a deduction from taxation. In fact, it's not a deduction, it's an exemption to the amount of \$500, which, in dollar terms, translated through the assessment laws of Florida, comes out to about a \$15 dollar amount.

Secondly, --

QUESTION: What difference does that make?

MR. MCKENZIE: We don't make a de minimis argument.

I simply wanted to clarify the fact that it is not a \$500 deduction from tax, but --

QUESTION: I thought you were making a distinction between a deduction and an exemption.

MR. MCKENZIE: That's right. That's right.

QUESTION: Now I ask: Is there a difference?

MR. MCKENZIE: Yes, there is a difference. The exemption --

QUESTION: Well, there's a difference, but is there --

MR. MCKENZIE: The exemption is from the ad valorem value of the property. In other words, if property is worth ten thousand --

QUESTION: I know what it is. But I'm asking: what difference does it make?

MR. MCKENZIE: It makes a difference --

QUESTION: It makes a difference of about \$485. Isn't that right?

MR. MCKENZIE: Yes, that's right, Your Honor.

QUESTION: But what legal difference does it make, is what I'm trying to get at.

MR. MCKENZIE: No -- no legal difference, as far as this particular case. I merely wanted to clarify the fact, Your Honor.

Secondly, --

QUESTION: Actually --

QUESTION: A \$15 benefit on that, is all it is.

MR. McKENZIE: It's a \$15 benefit. I was merely trying to put it in perspective.

QUESTION: Actually, if the \$500 were actually deductible from the tax bill, you'd refer to it as a tax credit, wouldn't you?

MR. McKENZIE: Yes.

QUESTION: Well, yesterday we had another case involving all kinds of millions of claims of three to ten dollars. But the case was here just as well.

MR. McKENZIE: Yes, Your Honor. And we're not making an argument that the case should not be here.

The other question --

QUESTION: I'm sure you'd rather that it weren't.

MR. McKENZIE: Yes, sir, Your Honor.

The other question, though, is of more significance. And that's the fact that we are dealing with, as I say, not simply a statute but a provision of the Florida Constitution. And this is significant, in that, as we noted in our brief, we know of no case providing for this Court or the Florida Court to expand a provision of the Constitution, to include members of a class who were not included in the class, where there is no ambiguity.

And I think that's important in the discussion

yesterday of whether it could be sent back to the Florida Supreme Court for the purpose of expanding the class in the statute. It isn't simply a statute, it's a Florida constitutional provision that we're dealing with.

QUESTION: Well, as I understand it, the ultimate conclusion was that Mrs. Ginsburg, I think, acknowledged that that wasn't for us to do, that the limit of our function here was to uphold the provision of the Florida Constitution and statute, or to invalidate it and if it's invalidated it would be remanded to the Florida Supreme Court to do with our decision what it will.

MR. MCKENZIE: Very good. They've made a strong argument in their brief --

QUESTION: As to what the Florida Supreme Court ought to do, but that's not for us.

MR. MCKENZIE: Right.

Basically, the State of Florida has two positions: first of all, that the compelling interest test of the Frontiero plurality should not be applied to sex classification; and, secondly, that the classification of widows, to the exclusion of widowers, in view of the purpose and the factual realities of this situation, does not, as applied to the appellant here, violate the equal protection either -- whether tested by Frontiero in the plurality or by the standard in Reed, if, in fact, that's different from



traditional standards, or by traditional tax classification in sex standards.

And I would address myself first to the traditional test, because I feel that under that test it's clear that the distinction here meets the test.

First of all, the classification we have is the classification of widows and widowers. And the question is: what is the purpose of that classification?

The State of Florida, as noted by the Florida Supreme Court, recognizes by this classification that women, and especially widows, are an economically disadvantaged class in our society. This is not in line with past cases, where stereotypes were developed for the purpose of so-called protective legislation for denying women something on the basis of a stereotype that wasn't backed up by facts but was backed up by beliefs that people had, by mythology, really.

It's not -- it's not based --

QUESTION: You say that women who are economically disadvantaged?

QUESTION: Widows.

MR. MCKENZIE: Widows. I say that widows, as --

QUESTION: I thought the statistics were all to the contrary.

MR. MCKENZIE: The statistics are the contrary -- that widows are to the contrary? That widows are economically

disadvantaged?

QUESTION: Anything but. Anything but an economically disadvantaged.

QUESTION: Well, I think what my brother Brennan is referring to is the fact that widows own a great deal of the property in the country, but that is because there are many, many more widows than there are widowers.

MR. MCKENZIE: That's right. I would agree with that.

But I --

QUESTION: Some widows -- some widows are -- don't have any money and others do.

MR. MCKENZIE: Well, I think -- I think the --

QUESTION: Like widowers.

MR. MCKENZIE: I think that basically the fact is that, taking a widow and a widower, the general facts are that a widow has a likelihood, if she must transfer into the job market, of not being able to earn as much as the widower simply, if for no other reason, that the fact is that women in general can only earn -- are only earning sixty percent of what men are earning.

QUESTION: You mean they're discriminated against.

MR. MCKENZIE: They're discriminated against.

And I think it's a recognition of that fact. The Florida statute merely -- and constitutional provision merely recognizes

that women, not because of any inherent problem with women, but with an inherent problem with our society that hasn't been corrected yet, are in fact discriminated against.

QUESTION: Does Florida give any other provision and benefit of women in their taxation, other than this?

MR. McKENZIE: Other than this particular --

QUESTION: Yes, sir.

MR. McKENZIE: -- provision? I'm not --

QUESTION: Of course I would assume that the widow, before she becomes a widow, if what you say is true, she suffers a lot, too.

Does Florida recognize that in its taxing scheme?

MR. McKENZIE: Women other than widowers? [sic]

QUESTION: Unh-hunh.

MR. McKENZIE: I'm not familiar with any provisions that --

QUESTION: Well, why single out the widows?

MR. McKENZIE: Well, it was the will of the people in adopting the Constitution of Florida.

QUESTION: Well, are the facts, as when the Constitution was adopted, the same as they are today?

MR. McKENZIE: Pardon, Your Honor?

QUESTION: Were women allowed to make contracts when this Constitution was first adopted?

MR. McKENZIE: This Constitution was adopted in



1968, Your Honor.

QUESTION: Wasn't there a provision in before then, in the old Constitution?

MR. McKENZIE: Yes.

QUESTION: And it was just carried over. I'm talking about when it was --

MR. McKENZIE: It was --

QUESTION: When was it originally in the Constitution?

MR. McKENZIE: 1885, Your Honor.

QUESTION: Well, aren't women a little dispositioned now than they were in 1885, a little?

MR. McKENZIE: In a better position now than they were in 1885?

QUESTION: Yes.

MR. McKENZIE: Yes, Your Honor. But -- but clearly they're not, by any means, have been given economic equality in the society. And I think this is a recognition of that.

QUESTION: But how can you put them in a class? I would assume that there are some widows in the Palm Beach area that are a little better off than some widowers in the upper part of Florida.

MR. McKENZIE: Well, I think the law has always recognized that no class is going to be perfect. Even if we took a \$4,000 limit and said anyone who earns \$4,000 or less

should get a \$500 exemption. You'd still have --

QUESTION: That's especially true in taxation, I assume that's what you said.

MR. McKENZIE: Yes, Your Honor. We'd still have the problem of saying that there are people who earn \$4,000 who have no dependents, and there are people who earn \$4,001 who have ten dependents, and they are much more needy.

Obviously, for the purpose of taxation, States have never been called on to treat every case on an individual basis. And I think that --

QUESTION: Well, of course.

MR. McKENZIE: -- the Court would recognize that that's not a practical possibility.

QUESTION: Of course I recognize that. I'm just trying to get the reason for this singling out. You agree this is solely on sex?

MR. McKENZIE: I would -- I would say it's sex as tied to economic reality.

In other words, the class is not simply, actually --

QUESTION: It's strictly -- well --

MR. McKENZIE: Except the class isn't --

QUESTION: -- what's the difference between a widow and a widower, other than sex?

MR. McKENZIE: Other than sex?

QUESTION: Yeah.

MR. McKENZIE: One, the fact that a widow -- widower, being a man, is recognized as having greater earning potential in our society.

QUESTION: Is there any way for a widower to become a widow?

MR. McKENZIE: Pardon?

QUESTION: There's no way for a widower to become a widow.

MR. McKENZIE: No, there's no way --

QUESTION: So it's sex. What's wrong with admitting it, that it's based on sex?

MR. McKENZIE: It -- it's based -- but, see, to say that it's based on sex is accurate, but it's based on sex plus an underlying recognition of factual difference between the sexes, and not simply a stereotype difference between men and women.

QUESTION: Does this -- the same Constitution also prevented women from serving on juries, didn't it?

MR. McKENZIE: Yes, it did, Your Honor.

The law of Florida prevented women from serving on juries.

QUESTION: And now they do.

MR. McKENZIE: It didn't prevent women from serving on juries, it --

QUESTION: Now they've been persuaded to let women

serve on juries, haven't they?

MR. McKENZIE: Women were not prevented from serving on juries, they had to take affirmative action to indicate that they desired to serve on juries.

QUESTION: Back in the Nineteenth Century?

In the original --

MR. McKENZIE: At the time of the Hoyt case, Your Honor.

QUESTION: At the time of the original Constitution?

MR. McKENZIE: At the time of the original Constitution of Florida, I'm not prepared to say, Your Honor.

QUESTION: Mr. McKenzie, are you suggesting that this is based on economic need?

MR. McKENZIE: Yes, Your Honor, I'm suggesting that this case is very little different than Gruenwald vs. Gardner, which was --

QUESTION: Well, if it's based on economic need, why doesn't it say so, instead of putting it on widowhood?

MR. McKENZIE: Well, because I think it recognizes the underlying rationale. The class is not simply widows. The class is widows, the blind, and the totally and permanently disabled.

I think that all of those have the same line of reasoning running through them for different reasons. But if we're able to -- all are economically disabled.

QUESTION: It works to benefit the wealthy widow in Palm Beach.

MR. McKENZIE: It works to benefit the wealthy --?

QUESTION: Widow.

MR. McKENZIE: A blind person, also.

QUESTION: The wealthy widow in Palm Beach, and to disadvantage the poor spinster in Tallahassee.

MR. McKENZIE: Right. But the -- the fact is that, as a general abjective analysis, women are not, in the sense -- women and widowers -- and widows are not in the same economic classification as are widowers. They don't have the same opportunities.

First of all, a woman who is a widow is either one of two possibilities: one, she's the head of the household, the same as a widower, and in that case the distinction is exactly as I have said, that she has to -- she does not have, as a general rule, the job opportunity that the male does.

The other case is where she had been -- she's not been the head of the household, and the widow -- and the husband is the one that dies; and in that case she not only has to move over into the job market, but she has to get someone to replace her and take over the duties that she had, which is really a double burden, compared to the man whose wife dies, who simply has to replace the functions that his wife had in the family unit. She has to do both that and move



-- move over into the job market.

QUESTION: And if she moves over into the job market for the first time at age 55, I suppose her lower earnings, compared to a widower who may have been in the market for thirty years, aren't necessarily attributable to discrimination, she simply hasn't been in the market.

MR. McKENZIE: She hasn't -- well, they -- I would agree that they aren't -- that that's true. But they're even compounded by discrimination, in that the job opportunities not only to an elderly person but to her particularly are greatly lessened, both by her age and by her sex.

Now, as to the general classification, the traditional test, first of all, if the Court is to use that test -- and we would submit that it would be appropriate -- in all the tax cases, where there are tax classifications, there's a presumption of constitutionality, a heavy burden on one challenging the classification to show no conceivable permissible basis. And it's been recognized that the classification need not be exact or have mathematical nicety.

Clearly, if the no conceivable, rational purpose test is to be used, I'd submit that the appellant here has not met that burden. Not only is there a conceivable rational purpose, I submit, but the purpose that we've offered to the Court is in accordance with tax -- a proper tax purpose: concern for the economically disadvantaged groups of society.



And that that's a valid social concern.

Secondly, under Reed vs. Reed, it's possible that that court -- that that case could be read to say that there is an additional burden that the court is going to place on the State where it makes a classification, and that's the burden of justifying a rational classification.

And I submit again that we have not relied on stereotypes that women are either physically not capable of doing the work that men are capable of doing, or that women are in some way, because they're the creator of children, that they should stay at home. We're not saying that.

We believe that women have all the rights that men have, but that the facts of our society are that women have not yet been given those economic rights; and that until they do, it's appropriate for the State of Florida to have legislation which recognizes that and gives them an affirmative chance to pull themselves -- to attain equality.

QUESTION: On fifteen dollars?

MR. MCKENZIE: Well, Your Honor, the fact that it's a small amount is true, but to argue that the State of Florida should give more, that the determination of the people of Florida was that it was an appropriate --

QUESTION: Gesture.

MR. MCKENZIE: -- gesture. And it was a gesture --

QUESTION: That might allow her to retain the

ownership of the property rather than to --

MR. McKENZIE: And it may, and the fact is that someone at a low --

QUESTION: -- make a distress sale of it?

MR. McKENZIE: -- kind of low level of income, fifteen dollars --

QUESTION: Well, fifteen dollars annually --

MR. McKENZIE: -- annually --

QUESTION: -- is on the real estate.

MR. McKENZIE: -- may enable them to retain property, which they would otherwise not be able to --

QUESTION: To sell.

MR. McKENZIE: -- retain.

QUESTION: Right.

MR. McKENZIE: While we submit that the plurality opinion in Frontiero should not be applied, I would submit that based on that decision the classification that we've established is sufficient. That case specifically, in the footnote, refers to -- in footnote 22, I believe it is; states it should be noted that these statutes -- and those are the statutes in Frontiero -- are not in any sense denied -- designed to rectify the effects of past discrimination against women. Citing Gruenwald vs. Gardner and Jones vs. Maher, and South Carolina vs. Katzenbach.

And, on the contrary, these statutes sieze upon a

group, women, who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economical disadvantages.

That isn't the case that we have here. There's no -- there is a -- I mean, the second is not the case that we have here. There is no purpose nor result of heaping additional economic disadvantages on women. There is a purpose of taking affirmative action, if indeed women are determined to be a suspect classification, to reduce the results of past historic discrimination.

So that even under Frontiero, I would submit that it would be appropriate to approve this classification.

However, I think it's well to point out to the Court that -- and we submit that this Court has, in general, limited suspect classifications to groups which have been described since Caroline Products as discreet and insular minorities.

And I would submit that a classification based on sex does not have within it a discreet and insular minority.

Whether -- be it the plaintiff here, who is a male, seeking to have the statute applied to him, or else struck down altogether; clearly the male is not a minority in a group where men and women are equal. And if women are anything -- and it would be, I guess, a philosophical minority,

in that they've been discriminated against. But I know of no case where the Court has found that a philosophical minority qualifies for strict scrutiny. And I think it's proper. Because any group that is a -- that is a interest group is a minority, and it may not get everything it wants out of the judicial process.

And it's not for the Court, every time some group other than a racial classification or an easily identifiable classification like that comes before the Court, to give strict scrutiny to something that doesn't -- to a statute that doesn't give that interest group what it wants.

And on those grounds, Your Honor, I would submit that this classification should be upheld.

QUESTION: Mr. McKenzie.

MR. MCKENZIE: Yes?

QUESTION: As a property tax, is this tax imposed on both real and personal property, as well as mixed, or is this just a real property tax we're talking about?

MR. MCKENZIE: This is a -- no, it's a tax on both real and personal property. It's on any ad valorem taxation, which an ad valorem tax in Florida are both on real and personal property.

QUESTION: Real and personal property. Then how is it -- how is property appraised down there? What's the assessed valuation? How close to realistic market value?

MR. McKENZIE: It's assessed a hundred -- it's by Constitution, it's to be assessed at full market value: 100 percent.

QUESTION: Well, what's the practice? We all know about those constitutional provisions.

MR. McKENZIE: Well, that's in the courts now, as to whether in fact it is assessed at 100 percent of market value. In fact, it's, I would say, assessed between 80 and 100 percent of market value.

QUESTION: Unh-hunh.

Does it vary by counties?

MR. McKENZIE: It varies by counties, that's right.

QUESTION: Usually does.

MR. McKENZIE: Assessors in the counties do the assessing.

QUESTION: So this wouldn't --

MR. McKENZIE: However, to add to that, all assessments are reviewed for the purpose of equalization by the Department of Revenues of the State of Florida.

QUESTION: Unh-hunh.

MR. McKENZIE: So that theoretically it's -- when they approve it, it's a determination that that county is at 100 percent of assessed value.

QUESTION: The reason for my question is, I was wondering whether this exemption could validly be supported



as a provision that might enable a widow to keep her family home after her widowhood, rather than having to sell it at a distress sale, if she -- if this were real relief from the real estate taxes on that home.

But it hardly is enough, is it, for that?

MR. MCKENZIE: Well, it's -- you know, the question is, where do you draw the limit? It might be enough for one widow --

QUESTION: Well, I know, but --

MR. MCKENZIE: -- but it might not be enough for another.

QUESTION: -- \$500 is -- and that's the reason I asked how close to realistic market prices are your actual appraisal assessments.

MR. MCKENZIE: It is directed at 100 percent of assessed value, Your Honor.

QUESTION: What's your typical tax rate on real property, say in Dade County?

MR. MCKENZIE: The rate would generally be thirty mills, which would translate into a -- the thirty mills would translate into a fifteen-dollar exemption under this.

QUESTION: Well, on a house assessed at twenty thousand dollars, what tax -- what property tax would you pay in Dade County --

MR. MCKENZIE: That's right. Six hundred dollars.



QUESTION: Six hundred dollars.

QUESTION: How much?

MR. McKENZIE: Six hundred dollars.

QUESTION: At thirty mills, that's six hundred dollars.

MR. McKENZIE: That's right, Your Honor.

QUESTION: Mr. McKenzie, in your brief you point out, relying on Bureau of the Census figures, that 35.8 percent of the families in Florida, in which a female is the head of the family, are below the poverty level; whereas, I think it was about --

MR. McKENZIE: Seven percent.

QUESTION: -- nine percent of the men who head families that are --

MR. McKENZIE: That's right, Your Honor.

QUESTION: -- below poverty level.

MR. McKENZIE: That's right, and I think that's --

QUESTION: Are those figures unique to Florida, or how would they compare with national figures?

MR. McKENZIE: I would imagine they would -- I really can't answer that, Your Honor. Those figures were drawn out because we were especially concerned with the Florida situation. I imagine that they would probably be typical. I know of no situation in Florida that would make them atypical on a national basis. But I can't represent that to the Court.

QUESTION: Well, you don't have many of those owning homes, do you?

MR. MCKENZIE: Pardon?

QUESTION: You don't have many of those owning homes.

MR. MCKENZIE: The ones below the poverty level, Your Honor?

QUESTION: Yes. They're mostly renters, aren't they?

MR. MCKENZIE: Not necessarily in Florida, Your Honor, because you have a lot of very poor people that are in -- that own property, in that they own mobile homes. That's the typical situation in Florida. Much more so than in any other State. I'd say a much larger percentage of those than in the typical State would be in a position where they were in property ownership.

QUESTION: They wouldn't be true up in the turpentine area.

MR. MCKENZIE: I'm sorry?

QUESTION: Up in the turpentine area, up near the Georgia border, they don't own anything up there.

MR. MCKENZIE: Well, I live in a turpentine area, as you call it, Your Honor, and it's -- it's no so much as the rest of the State, but certainly it's a mobile home area, the same as any other part of the State. Although it's not so much

of the elderly living there.

So that's part of the problem.

QUESTION: But it still -- it rates from the lower person to the highest, anywhere you go; you admit that, don't you?

MR. McKENZIE: Yes, Your Honor.

QUESTION: You say that's normal for taxation, and in some areas it is; it's just a question of whether it's normal here, where you draw the line on sex.

Isn't that the real problem?

MR. McKENZIE: Yes, Your Honor, we submit that -- we submit that this statute is a recognition -- this statute and constitutional provision are a recognition of the economic realities of the State of Florida.

Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. McKenzie.

Mrs. Ginsburg, do you have anything further?

MRS. GINSBURG: Yes, thank you.

MR. CHIEF JUSTICE BURGER: You have about two minutes remaining.

REBUTTAL ARGUMENT OF MRS. RUTH BADER GINSBURG,

ON BEHALF OF THE APPELLANTS

MRS. GINSBURG: I just thought I'd like to qualify that mobile homes are not subject to the ad valorem property tax, Article 7, Section 1, of the Constitution exempts, along

with motor vehicles, mobile homes.

That in --

QUESTION: Of course, not -- this probably isn't very important, but I know in many States there's an argument about what is a mobile home, after it comes to rest --

MRS. GINSBURG: Yes.

QUESTION: -- and the wheels come off it, is it still a mobile home.

MRS. GINSBURG: Also I would like to qualify the statement made that this tax is subject -- real property and personal property are subject to this tax. That's true in the constitutional description, but a statute exempts all households goods and all personal effects for all persons, whether or not they're heads of families; and that's Florida Statute 196.181. In fact, the Legislature has twice extended this constitutional provision that we're talking about by ordinary statute.

And then finally with respect to a point that came up yesterday: recent models for the disposition that appellant seeks in this case include per curiam opinion last term in New Jersey Welfare Rights Organization v. Cahill. Earlier, Mr. Justice Blackmun's opinion in Graham v. Richardson. Both of those opinions dealt with constitutional under-inclusive state rather than federal benefit statutes. And

both are cited at page 27 of our main brief, and in the footnote at page 8 of our reply brief.

QUESTION: Mrs. Ginsburg, could I ask a question: You're familiar with the DeFunis case to be argued this afternoon?

MRS. GINSBURG: Yes.

QUESTION: This perhaps is an unfair question, but does your position in this case, with respect to the Florida classifications, bear in any way on the issues in DeFunis?

MRS. GINSBURG: Not at all.

The DeFunis case raises a very different issue. DeFunis is a program of a law school that is designed to open doors to equal opportunity, to assure a law student body, with diverse backgrounds, an experience, and to rectify the conspicuous absence of minority groups from the profession. It is not a welfare dole, based on the assumed inferior capabilities of any population group, no rigid race line is presented, as we have here a rigid sex line, race is merely one of many characteristics assessed in that case.

But most significantly, DeFunis involves no general law classification. It's a measure addressed to very special selection problem that law schools have. Law schools have the very hard task of choosing some from among many applicants that are equipped to pursue their educational program.

By contrast, here we're dealing with a law of



general application, a law with respect to property owners, where there can be no justification for the true device of labeling any group, racial, ethnic or sexual, as needy persons.

An income test is readily available to a Legislature that wishes to distinguish on the basis of need, and an immutable birth characteristic should be irrelevant for general law purposes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Ginsburg.

Thank you.

The case is submitted.

[Whereupon, at 10:37 o'clock, a.m., the case in the above-entitled matter was submitted.]

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