ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-52

TITLE ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, ETC., ET AL., Petitioners v. NATHALIE NORRIS, ETC.

PLACE Washington, D. C.

DATE March 28, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONA GOVERNING COMMITTEE FOR :
TAX DEFERRED ANNUITY AND :
DEFERRED COMPENSATION PLANS, :
ET., ET AL., :
Petitioners, :
v. : No. 82-52
NATHALIE NORRIS, ETC. :

- -x

Washington, D.C.

Monday, March 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:52 a.m.

APPEARANCES:

JOHN L. ENDICOTT, ESQ., Los Angeles, California; on behalf of the Petitioners.

AMY JO GITTLER, ESQ., Phoenix, Arizona; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans against Nathalie Norris.

Mr. Endicott, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN L. ENDICOTT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ENDICOTT: Mr. Chief Justice, and may it please the Court, this case presents some of the questions that we believe were left unresolved by this Court's decision in the Manhart case.

In Manhart, this Court was concerned with a mandatory employer-operated pension fund which required the women make larger contributions than men. The result was that a woman's take-home pay was smaller than a man's. This Court held that such a plan violated Title 7, and we make no contention today that such holding was erroneous.

But the Arizona Deferred Compensation Plan is different in a number of respects. In the Arizona plan, independent insurance companies issue the life annuities that are involved in this case. They, not Arizona, are the ones who determine the appropriate monthly payment

to be made based on the amount accumulated by the employee and the age and the sex of that employee.

It is the insurance companies which developed and use the sex-based actuarial tables which are in issue here. Arizona did not create or control or use such tables, but nevertheless has been held responsible for their use.

Arizona's only intent was to make available to its employees participating in its deferred compensation plan the widest possible selection of payout methods, including life annuities. Arizona did not treat or intend to treat its female employees less favorably than its male employees. The Arizona plan --

QUESTION: Mr. Endicott, there is some indication that Arizona at least solicited bids on the basis of the sex-based tables --

MR. ENDICOTT: Yes, Justice --

QUESTION: -- that it assumed that is what it wanted and went out to get what in fact it got.

MR. ENDICOTT: Justice O'Connor, it solicited bids, and in the solicitation it asked for quotes on males and females, but there was nothing to prevent anybody from giving the same quote if there had been a unisex table available and if the bidder had chosen to do it.

QUESTION: And in any event, Arizona didn't ask for it.

MR. ENDICOTT: No, Your Honor, but as Your Honor may have observed from the various amici briefs filed, nobody was offering it. It didn't ask for it because it didn't want it or didn't intend it. It never thought of it, I think, is the answer.

QUESTION: Yes, probably so.

QUESTION: Who has the burden of proof on that?

MR. ENDICOTT: The burden of proof on what -- on precisely what, Justice Blackmun?

QUESTION: On whether unisex tables are available or were available.

MR. ENDICOTT: It is our position that the burden of proof is upon the respondent, that it would have been upon the plaintiffs in the lawsuit to prove, because if the contention is that Arizona discriminated by not seeking the use of unisex annuity tables, the question would be Arizona discriminated because it didn't ask for or take unisex annuity tables, I think, just as in the other Title 7 cases where an employee who contends he or she was discriminated against by not being given a job, you must show that the job was available.

Therefore, I think the burden, Your Honor, is

on the -- on the plaintiff to prove that it was available and Arizona deliberately did not take it.

QUESTION: I take it your opposition disagrees with that.

MR. ENDICOTT: I believe so. The Arizona plan, again unlike Manhart, is a voluntary plan. No one has to join. No one has to contribute. The employee under the Arizona plan can take home his or her entire wage or compensation if he or she so elects. In fact, the employee can do what he or she chooses with his or her money, and it is our position that permitting someone to do something is not discriminating against someone.

In the Arizona plan, again, unlike Manhart, the contributions are equal, equal in the sense that the employee is free to make whatever contribution he or she chooses. There are minimum and maximum limits, but any male employee can contribute the same amount as any female employee. Again, therefore, there is no difference in the take-home pay that a male or a female employe receives.

In the Arizona plan, another distinction is, there is no contribution by the employer. The plan is funded entirely by contributions by the employee, and as a matter of fact, under the statute which created the

plan, the employer, the state, cannot make a contribution. The -- Only the employee funds are involved, and similarly situated employees receive the same compensation.

Now, there is a difference between the Arizona deferred compensation plan and the Arizona retirement plan. That plan is funded by employer contributions, and in that plan, where the plan is underwritten by the employer, the payments are the same for male and female employees.

Another distinction from Manhart under the Arizona plan is that the Arizona plan offers various options to the employees. They have choices available to them both in the form of the investment that is made with their money while they are putting their money into the plan, and in the form in which they take their money out.

One option, as suggested by this Court in Manhart, is a lump sum payment. The employee's funds are invested over the working career of the employee. Those funds earn interest. When the employee reaches the proper age under the plan, there is a given finite amount accumulated for that employee. That employee is free to take that entire amount out in cash.

QUESTION: But the problem there is the tax

result.

MR. ENDICOTT: There is a tax problem, Justice Blackmun, no matter how you take your money out. This is a tax avoidance, a deferred tax plan, and Internal Revenue gets you sooner or later, but Your Honor is right if you are suggesting that if you take it out in a lump, they get you somewhat sooner.

QUESTION: I suppose your position is that if you do not prevail in this lawsuit, that in effect the plaintiffs have driven out of the picture the third option.

MR. ENDICOTT: Yes, Your Honor. The state has already removed that option from the plan, based upon the decision of the District Court, which enjoined it from continuing with sex-based actuarial tables.

QUESTION: Sometimes we overlitigate, don't we?

MR. ENDICOTT: I think so, Your Honor. I really -- I really think the result in this case proves the error of the decision, because I think the result is the worst possible result.

As I was saying, one of the choices of the lump sum, and as Your Honor points out, there is a tax consequence, there is a second choice, which is an annuity for a fixed term. You can say to the insurance

company, I want my money paid back to me over ten years, fifteen years, twenty years, and again, in that example, the male and the female are treated the same, because you have removed the one risk that is involved in the life annuity, which is the life expectancy.

So, under the lump sum option --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Endicott, you may continue.

ORAL ARGUMENT OF JOHN L. ENDICOTT, ESQ.,
ON BEHALF OF THE PETITIONERS - CONTINUED

MR. ENDICOTT: Mr. Chief Justice, and may it please the Court, at the luncheon recess I was discussing the options which are available under the Arizona deferred compensation plan; and I had mentioned the fact that the employees can select the lump sum payment, a fixed term annuity, and the third option which is available is the life annuity.

In that one, in the lump sum and the fixed term, the treatment of males and females is equal. They both get the same lump sum payment or the same monthly payment. In the life annuity, the actuarial values of the payments are equal, but the monthly payments are different. The woman gets a lower monthly payment, and it is that aspect of the annuity and the program which has brought us here today.

But nothing is available -- nothing was available at the times here involved on the open market which was more favorable to women in the form of life annuities. I think it is fair to state that the plan offerings truly reflect the open market, and the

decisions of this Court in General Electric versus Gilbert, Harris versus McRae, and indeed in Manhart itself, all hold that the employer is not responsible for the fact that the open market may treat women differently than it treats men.

Nothing makes it illegal for insurance companies as opposed to employers, but nothing makes it illegal for insurance companies to recognize the different risks presented by men and women, and to treat women according to the risks they present.

I sumbit also that this case is a misuse of Title 7. The plaintiffs' complaint in this case is not really with anything that Arizona has done as an employer, but is with the insurance industry practice of giving economic effect to the fact that women live longer than men.

The plaintiffs are using Title 7 in this case to punish the employer for what the insurance industry has done, third party insurers, and this Court in Footnote 33 in Manhart said that Title 7 does not govern the relations between employees and third parties. It governs relations between employers and employees, but not with third parties.

The Manhart opinion suggested that if a corporate shell was used, that was a different case, but

there is no evidence in this case that there is a corporate shell. The insurance companies are independent and long-standing life insurance companies, third parties. The insurance companies are not the agents of Arizona.

This Court held in General Building Contractors fairly recently that one of the elements of agency is the ability to control, and there is no showing that Arizona had the ability to control the insurers in this case.

QUESTION: Mr. Endicott, would your position be the same if the insurance companies used tables based on race rather than sex?

MR. ENDICOTT: I have to answer your question by going a little further, Justice Blackmun. Race historically has been treated differently by the Congress of this country, by this Supreme Court. It is treated differently in the insurance industry by the State Insurance Commissioners, who have -- or the states, rather, who have regulated insurance, have said, you cannot consider race in insurance.

I am not aware of any actuarial data that would give you a statistical basis or support for treating people differently on the basis of race.

QUESTION: Well, there are diseases that are

suffered more by persons of one race than another. The classic example is sickle cell anemia, of course. Comfetis is another. And I suppose there would be just as much justification for an insurance company to set up tables on the basis of race because of the presence of those special risks.

MR. ENDICOTT: In a health insurance plan, a medical benefits plan, that could come up. As I say, it really can't in our context because of the state laws that preclude it, and again, because there are no actuarial studies that I am aware of that indicate one race lives longer than the other --

QUESTION: Well, if you go back about two decades, you will find a whole slew of actuarial tables based on race, promoted by two of the biggest insurance companies in this country.

MR. ENDICOTT: But I think in recent times, Justice Marshall, that those statistics are changing for the better.

QUESTION: I thought you said there weren't any. I don't know whether they are still there or not.

MR. ENDICOTT: I don't know that anybody keeps track of it any more, Justice Marshall. Certainly there is none involved in this case. The tables in this case make no such distinction, and I do not think there is

any question raised by anybody that women do in fact live longer than men.

QUESTION: Would it be allowable under Title 7, though, I think, is the question.

MR. ENDICOTT: I think the answer to that, Justice O'Connor, is who was making the distinction. If in this case it were a third party independent insurance company --

QUESTION: If it were an insurance company, as we have here.

MR. ENDICOTT: And that was what was --

QUESTION: On the basis of race.

MR. ENDICOTT: And that was what was available and offered on the open market? I don't think that's the employer's responsibility. I think under the decisions of this Court in GE-Gilbert, Harris-McRae, Manhart, if that problem exists, that is in my opinion a social, political problem that needs to be corrected by either the Congress or the states who have historically regulated the insurance industry. I don't think you should use Title 7 for it.

QUESTION: May I ask you another question or two while you are interrupted? The record shows, I believe, that by August of '78, four women had retired on a lifetime annuity under the Arizona plan.

MR. ENDICOTT: Yes, Your Honor.

QUESTION: Have any other women in the plaintiff class retired and selected that annuity?

MR. ENDICOTT: They can't select the life annuity because --

QUESTION: It is now terminated, and so we are dealing with four women.

MR. ENDICOTT: And the future male and female who would like to retire and get a life annuity.

QUESTION: If the plan were reinstituted.

MR. ENDICOTT: Yes, Your Honor.

QUESTION: If the Court were to affirm the court below, and you had to discuss prospective remedies, what would your position be on the remedy question?

MR. ENDICOTT: I am very troubled by the retroactive aspect of the relief that was ordered in this case, and by other aspects, such as ordering the state to pay money when the state plan says that this is an employee plan only, but the retroactive aspect is troublesome because plans not so much like Arizona, where no funds are put up by the employer, but plans that have been funded such as are described in the Florida amicus brief in this case, they have funded a plan on certain actuarial assumptions.

They were at one time $4 billion in debt. They have got their plan actuarially sound now. They recognize the difference between men and women. And if you fashion relief which says that as of the date of this decision or the trial court's decision you now have to pay those people an amount you never funded and reserved for, I think you may bankrupt and render insolvent a lot of employer-funded plans.

As I say, it isn't so critical in Arizona, because of, as Your Honor points out, the small number of people involved, and really the small dollars involved, but it again is why I think that if there is to be a change ordered in the practices of the insurance companies, and that is what your question really assumes, it should be done by a legislative body who holds hearings, takes evidence, studies the facts, and determines what they can do without bankrupting the pension and insurance industry in this country.

And I don't think the record before this Court is adequate for that purpose.

QUESTION: Putting aside the retroactive relief for the moment, do you know if unisex insurance is available? Could they buy insurance, a different kind of a policy, a different kind of an annuity?

MR. ENDICOTT: Could Arizona, Your Honor?

QUESTION: Are there such annuities available on the market?

MR. ENDICOTT: There are unisex annuities being offered presently, as I understand some of the statements made in the amicus brief, and as I understand Chinnerly, but, Your Honor, you have to define what unisex means. Unisex is a word that everybody throws around as though it had a fixed and certain meaning, and I don't think it really does. The statements that you are seeing, and one of them was made in one of the briefs, was that, for example, Lincoln National Life said, we will write a unisex annuity if it is a large enough group and they take into consideration the makeup, the sexual makeup of the group.

You start with the fact women do live longer than men. Therefore, when you reserve, you have got to assume you are going to pay more money to women than you are to men. Therefore, you've got to fund your plan that way. So, when they talk about unisex annuities, you've got to define the group of people you're insuring, know the sexual and age makeup of it, and do it.

QUESTION: Yes.

MR. ENDICOTT: Under the Arizona plan, Your Honor, it could not be done, because it is a voluntary

plan. People can opt in or out, and they can withdraw a lump sum. You can't fund that kind of plan, because what will happen is, presumably, all the men will opt out and go buy a sex-based annuity on the open market, where they get a better return, all the women will stay in, and the unisex rate in the plan will be the female rate because they are insuring 100 percent female.

QUESTION: Well, assume that the insurance companies had such an annuity available, and the employer didn't buy that one, he bought the one that's in Option 3. What about the employer then?

MR. ENDICOTT: If the unisex annuity that was offered was better than the sex segregated rate --

QUESTION: Well, but that, of course --

MR. ENDICOTT: No, if it offered to pay the woman more money per month than the sex-based table. That's how I define better. If she would get more money per month under the sex-based -- under the unisex annuity, then I think you would have an inference that the employer discriminated or made a discriminatory judgment in not picking that plan or not at least offering that plan.

But I think the charge here -- we would still be here today, Your Honor, if that had happened and existed, because what we are being charged with is not

-- not offering a unisex annuity, but having offered a sex-based annuity. So, I don't know that that would resolve the problem before us.

The problems involved in making a change, as posed by Justice O'Connor's question, if you make a change, are very complex. I think the financial implications are staggering, and I don't think, as I said, that Title 7 is the proper way to get at it. I don't think you should get an employer who has picked what is a available in the open market, offered it to his employees, and then said, because what they are doing on the open market we don't like, we are going to punish you under Title 7. I just think that's the wrong way to get at the question.

QUESTION: There is no life insurance as such in this case, separate and apart from the program?

MR. ENDICOTT: Life insurance?

QUESTION: Yes.

MR. ENDICOTT: My recollection is, one of the choices under the plan is life insurance.

QUESTION: Now, do the life insurance companies charge less premiums for insuring women of the same age as men?

MR. ENDICOTT: They always do. Yes, Your Honor.

QUESTION: Now, the reason for that is that is a corollary of the annuity proposition, isn't it?

MR. ENDICOTT: It's the other side of the coin.

QUESTION: It is the women who are going to live longer and pay premiums longer, on an average.

MR. ENDICOTT: You need to collect less per year or per month. It really is a function of how long you are going to live and how much money you've got, and you really divide life expectancy into the available amount of money, forgetting the interest calculations and complications, and that tells you how long you do it. That is why when they pay a fixed term annuity they treat male and female alike. If you know you are going to pay it for 20 years, 480 months, you divide 480 into $48,000, and you know you pay out $1,000 a month.

QUESTION: Now, do the mortality tables that are used by the insurers make any division except as between men and women? Are there any other categories?

MR. ENDICOTT: Age, Your Honor.

QUESTION: Well, men and women --

MR. ENDICOTT: And age.

QUESTION: Age, obviously.

MR. ENDICOTT: Yes.

QUESTION: On a mortality --

MR. ENDICOTT: But those are the two --

QUESTION: They don't include whether they are foreign-born or any other factors?

MR. ENDICOTT: No, Your Honor, not generally, and not basically, they don't. It is age and sex that are the two stable -- my understanding of risk classificaion, which is what insurance is primarily involved with, is that in classifying risks, you have got to have factors that are stable, permanent, and practical, and you can look at smoking, you can look at eating, you can look at the person's weight, you can look at drinking, and there are some plans on the market today that make some reflection of that, but the two basic unchanging factors are sex and age.

QUESTION: The insurance companies can take care of that by not insuring heavy drinkers and heavy smokers, can they not?

MR. ENDICOTT: If they can identify them. Yes, Your Honor.

QUESTION: Well, and they try to identify them, don't they?

MR. ENDICOTT: Yes.

QUESTION: By their examinations.

MR. ENDICOTT: And as Your Honor probably knows, they rate people. If you do certain things, you

pay a higher premium than other people who don't.

QUESTION: But in the group policy context, all this is less significant.

MR. ENDICOTT: I believe in the group policy context, to the extent I am aware of it, Your Honor, it makes no difference, and the whole purpose of group is to underwrite a large group of people cheaply, usually without medical examinations, usually without much medical history. If they work in the group, the law of large numbers works, and you treat the people according to the fact that they are an element of the group. It gives you a problem with treating people individually, but you treat them as a unit of the group.

QUESTION: Of course, in this plan there is no medical examination at all, is there?

MR. ENDICOTT: Not that I am aware of.

QUESTION: Of course, there really wouldn't be, because poor health is a benefit to the insurance company.

MR. ENDICOTT: Justice Stevens, you know, the funny thing is that in annuities, you get a self-selection working whereby all your poor life risks don't opt for a life annuity. The person who knows they are going to -- they come from a short-lived family and are in bad health, they want the lump sum. They want to

spend it while they are still here.

QUESTION: Right.

MR. ENDICOTT: So you get a self --

QUESTION: Or the -- or the specific term annuity, if I may call it that. I am always concerned about this lump sum, because you run immediately into everything being taxed in one year.

MR. ENDICOTT: Yes, but you can pick a ten-year certain, or a fifteen-year -- if you want to take the risk of estimating how long you are going to live, you pick a fixed term policy and do it that way.

QUESTION: Certainly if someone at retirement knows he has terminal cancer, he isn't going to take a life annuity.

MR. ENDICOTT: I think that is a reasonable assumption.

QUESTION: Of course, I suppose in selecting, doing their calculation, the insurance company could take into account the fact that there is this self-selection element in the group. The individuals who tend to eliminate those who are identifiably a short-term risk.

MR. ENDICOTT: Identifiably. There are some who are going to be unexpectedly short-term.

QUESTION: Of course.

MR. ENDICOTT: And that is what makes your statistics. I mean, some people are going to get more out than they put in because they live longer. Some people are going to get just about out what they put in. Some people are going to get much less out. But they have all had the same chance going in to recover what they invested, and they have all opted to have an insurance company take the risk of how long they are going to live.

QUESTION: Does the record tell us anything about whether the projections for different kinds of industries or professions are somewhat different? In other words, you might have a different projection for a group of lawyers than you would have for a group of workers in a different occupation?

MR. ENDICOTT: I am not aware of anything in this record that would reflect on that. This plan, Your Honor, covered the employees of the state of Arizona, so it covered a very wide group --

QUESTION: Right, a pretty wide group.

MR. ENDICOTT: -- of occupations.

QUESTION: How long have these statistics been kept, Mr. Endicott? How far back does the mortality table go?

MR. ENDICOTT: Justice Marshall suggested to

me earlier that it went back 100 or more years. They have kept tables for many years, Your Honor. I don't know. They keep updating the table.

QUESTION: It is more than 100 years since they began it, isn't it?

MR. ENDICOTT: Oh, I would believe that it goes back probably into the 1600's or 1700's, but the tables keep being changed. I mean, they still aren't using tables from three centuries ago. I think the last one I saw referred to in one of the briefs was either 1980 or 1978.

QUESTION: Mr. Endicott, are there many other states that have systems comparable to Arizona?

MR. ENDICOTT: Deferred compensation plans, Your Honor.

QUESTION: Yes.

MR. ENDICOTT: I believe there are a number. Arizona was one of the first to do it, but there are a number that have it, and almost all states have retirement or pension plans, of course.

As I said much earlier in answer to a question, I think the best evidence of the error of this decision is the result. Before the decision by the trial court in this case, the employees in Arizona had a choice of what they could buy with their money, and one

of those choices was a life annuity, and those people who thought they would live long enough to make that profitable were free to make that choice.

Now, as a result of the decision in this case, the only result has been, we have removed the choice from the plan, and we were enjoined to do, and the employees of the state of Arizona have less choices than they had before.

QUESTION: But does it necessarily follow that that has to be a permanent solution? I suppose it is at least theoretically possible -- maybe you won't do it -- that you could in the future adopt a unisex program.

MR. ENDICOTT: Under our -- under the Arizona plan, where people have a choice of options, Justice Stevens, and where they don't need to make a decision until they're 65 and retire, the odds are, as I said earlier, that I think you would end up with a female table being used to create the unisex rate because the insurer would have to assume the worst possible case, and that is that he is going to have 100 percent female life annuitants, and he is going to use the female rate.

So, you haven't, I don't think, accomplished much in that way.

In conclusion, then, I would like to say that

I think it is clear that Arizona -- Arizona did not discriminate against its women employees by offering them the opportunity to purchase a life annuity through the deferred compensation plan, and the judgment should be reversed.

And, Mr. Chief Justice, I would like to reserve whatever time I have.

CHIEF JUSTICE BURGER: Very well.

Ms. Gittler.

ORAL ARGUMENT OF AMY JO GITTLER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MS. GITTLER: Mr. Chief Justice, and may it please the Court, in City of Los Angeles Department of Water and Power versus Manhart, this Court held that an employer's use of gender-based actuarial tables in computing payments into a pension plan was unlawful under Title 7. The holding in that case is not challenged today.

Rather, Your Honors, the issue in this case is whether an employer can be absolved of liability under Title 7 because it contracts out with a third party to provide a life annuity benefit to employees or because there are alternative non-discriminatory options available. The answer to that question is unequivocally no.

Your Honors, the employer in this case is not so dissimilar from the employer in Manhart. Manhart did present a self-insured program, and this program does include third party insurance companies. But, Your Honors, in this case the employer created the plan. The employer solicited bids, and it is the employer that withholds money month to month from the employees' paychecks.

Significantly, it is the employer that has chosen the insurance companies with which the employee can participate in this plan.

QUESTION: Let me ask you about the employer withholding money. Doesn't the money go to the insurance company?

MS. GITTLER: It is my understanding, Justice Blackmun, that it does, but it is the employer that withholds the money from the paychecks.

QUESTION: But the employer, as I think your statement inferred, is not sitting there with the money in his hot little hand and making money off it.

MS. GITTLER: Your Honor, it is the state which does hold title to the moneys until they are dispersed to the employee. It is also the employer that contracts directly with the insurance companies, and each contract on its face contains explicit sex-based

actuarial tables.

QUESTION: Well, Ms. Gittler, in your answer to Justice Blackmun's question, I would infer that the employer is kind of a self-insurer. You say that the employer hangs onto the money until it is ultimately paid out to the employees?

MS. GITTLER: The physical possession of the money, Your Honor, may well transfer to the insurance companies, but the title remains with the state of Arizona until it is dispersed to the --

QUESTION: I wasn't aware that one ordinarily separated the concept of the title to money and the physical possession of money. Is there some significance in this case between those two?

MS. GITTLER: Well, I think, Your Honor, the significance is with respect to the employer's involvement in this plan, and that the legal title remains with the employer.

QUESTION: The legal title to the money, which is -- the possession of which passes to the insurance company?

MS. GITTLER: Again, Your Honor, that's my understanding. That's correct.

QUESTION: That seems like a strange basis to hang your argument on. I understood that the money is

money otherwise due the employee, that the employee directs the employer state to pay over to the insurance company, in effect, for the premiums, and the state is simply a pass-through for convenience. Isn't that the case?

MS. GITTLER: Certainly, Justice O'Connor, that is what the employer would like us to believe today, but the employer's involvement is far more extensive than that. The employer is the one that determines where the money will in fact go, and although the employee can indicate a preference as to how the money should be invested, it is the employer which ultimately has the discretion to accept or reject that preference.

QUESTION: Yes, but that has nothing to do with title to the money. I mean, that is a different sort of an argument, is it not?

MS. GITTLER: Justice O'Connor, it is, but the point is, it is one of the many indicia of the control that the employer exercises in this plan.

QUESTION: Who has the burden of proof, as Justice Blackmun asked earlier, that unisex tables were in fact available?

MS. GITTLER: Your Honor, the issue of the burden of proof in this case is really a bogus issue,

because in this case we are dealing, Justice O'Connor, with an explicit sex-based classification, and the burden of proof with respect to the existence or non-existence of unisex tables is irrelevant for these purposes, because once we have shown that there is an explicit sex-based classification, that is all that we need to show. Manhart teaches us --

QUESTION: But you do concede that you have the burden, the respondents as plaintiffs had the burden of proof initially, right?

MS. GITTLER: That's correct, Your Honor, and our burden in this case was met when we established that in fact there was an explicit sex-based classification, and Manhart teaches us that once there is an explicit sex-based classification based upon actuarial tables, as in this case, that the employer is liable under Title 7, and none of the bases upon which the employer now seeks to absolve itself of liability are sufficient to allow it to remove the mandate and the prohibitions established by Congress under Title 7.

The nexus between the employer and the employee is here. It is the employer which has created the plan, and it is the employer that has provided the employee with the fringe benefit, and once the employer undertakes to provide an employee with a fringe benefit,

Title 7 states that it must provide it in a non-discriminatory fashion.

QUESTION: Are they compelled to participate? Are the employees compelled to participate in this plan?

MS. GITTLER: No, Chief Justice Burger. This is a voluntary plan. But that factor does not in any way mitigate against the employer's liability. Title 7 does not draw lines between voluntary and involuntary, and numerous facets of the employment setting are voluntary, but that fact alone does not in any way bear upon an employer's liability or obligation to provide non-discriminatory benefits.

QUESTION: What was the explicit sex classification here?

MS. GITTLER: It was explicit gender-based classification between men and women, and the parties --

QUESTION: How was that evidenced? Can you read that anywhere in the plan?

MS. GITTLER: You can read it, Your Honor, in the very contracts that have been signed. The parties have stipulated in the Joint Appendix that the payments that women receive and men receive are based upon sex-based actuarial tables.

QUESTION: But the employer didn't mandate that. Nowhere in the state's plan, deferred

compensation plan, can you read anything like that. So it isn't explicit. It is the result of the insurance industry selling sex-based or gender-based annuities.

MS. GITTLER: It is as a result of the contracts that the state has entered into with the insurance companies that creates this discrimination, but the mere fact that they have contracted with these insurance companies is not sufficient to eliminate the liability.

QUESTION: The employer didn't ask insurance companies to bid based on gender-based annuity. They didn't put out a specification, please bid on the basis of distinguishing between men and women.

MS. GITTLER: Your Honor, as we establish or argue in our brief, Exhibit H to the first set of interrogatories in fact suggests that there was an actual overt solicitation for bids broken down by men and women, and even so, regardless of whether there was an overt solicitation, the employer was not compelled to provide this kind of discrimination. There is some argument of compulsion in this case, but, Your Honors, the employer had an option in this case. It could decide not to provide the non-discriminatory option, or it could self-insure, and either of those options were viable options. It was not obligated to provide this

discriminatory option which on its face discriminates month to month against women.

QUESTION: Well, Ms. Gittler, what if the employer had self-insured in this case. Is your idea that in that context, the employer could have made no allowance for the difference in longevity between men and women?

MS. GITTLER: That's correct, Justice Rehnquist. As this Court held in Manhart, which was a self-insured, program, that the employer was precluded from basing the benefits or, in Manhart, the contributions, in this case the benefits on the basis of sex-segegrated actuarial tables.

QUESTION: Wouldn't the result, if the employer had done that, be very much as Mr. Endicott predicted in the unisex policies, that there would be no men applicants for this particular self-insurance policy that you are mentioning, and that the only applicants would be women, and they would end up paying the female rate?

MS. GITTLER: That is not correct, Justice Rehnquist, because under this particular plan in particular, it is an attractive plan to employees because of the significant tax benefits. Employees --

QUESTION: Well, but presumably an employee

who has an option of joining the employer's unisex plan, which you say he must have, or taking the money that it would cost to pay premiums in that and go to an insurance company which does rate on the basis of gender, the men are going to go to an insurance company that rates on the basis of gender. So you are not going to have any employee applicants who are male, I would think.

MS. GITTLER: Justice Rehnquist, we think that is not an accurate assumption to make in reviewing this case. Because of the substantial tax benefits an employee who opted, a male employee, for instance, who opted to choose the money, to obtain the money from his paycheck and have it -- receive it rather than investing it would pay the tax consequence at the time it is received, and that would eliminate the significance of this kind of a benefit program.

In addition, as the actuaries who have filed a brief in support of our position indicate, rarely are decisions such as this made upon expectancies of -- men's or women's expectancies, life expectancies. The issues or considerations that are taken into account by people when they opt into these kinds of plans are the tax benefits and the investment made to return, and the tax benefits in this case are outstanding.

In addition, Justice Rehnquist, if an employee chose to go out into the open market, a male employee, for instance, not only would he have the money that has already been taxed, but he would also have to then obtain an individual policy, and would not be able to take advantage of the group policy that is in existence under this particular plan.

QUESTION: Would it be unlawful for an insurance company to charge lower rates for women for life insurance than for men?

MS. GITTLER: Your Honor --

QUESTION: Would that be illegal discrimination?

MS. GITTLER: Chief Justice Burger, if it was done in the context of an employer providing the fringe benefit, and that is what we are talking about today, an insurance company in the abstract out in the market is not susceptible to Title 7 in this conext, but if an employer undertakes to provide life insurance, for example, to an employee, then again Manhart teaches us that the amounts that are paid in or the amounts that are paid out could not be based upon aggregates, cannot be based upon sex-segregated actuarial tables.

QUESTION: Ms. Gittler, may I ask you a question about burden of proof? Your opponent suggests

that if we talk in terms of a unisex table, that there would be a natural selection that would drive the market to select the female rate. You have responded, as I understand you, by saying, well, even a female rate might be better for the male because of the tax consequences of the lump sum payment plus the group purchasing power.

Now, we don't really know whether that is true or not. Who has the burden of proof on that question? Do you understand what I am asking you? As to whether or not you are correct in saying in substance the unisex plan would be more favorable to both men and women, whereas he is saying, no, no, we can just think it through and it would inevitably be a female, an all-female plan.

MS. GITTLER: Justice Stevens, I don't think that that's an issue that either party needs to necessarily prove one way or the other, because once they have undertaken to provide a sex-discriminatory plan, whether or not there might be some adverse consequeces of this Court holds that Title 7 applies is not really relevant to the issue of liability under Title 7.

QUESTION: In other words, you are saying that if there is a violation of law, even if establishing the

violation hurts women generally, that is just an unfortunate consequence of the statute.

MS. GITTLER: Your Honor, there are always going to be consequences of this Court's decisions, and if in fact -- for instance, Mr. Endicott suggested that the consequence if this Court were to uphold the Ninth Circuit, he has suggested that the effect would be to completely eliminate the plan.

QUESTION: Correct.

MS. GITTLER: That is always a risk that is taken, Your Honor. An employer can evade responsibility and avoid liability under Title 7 by having no employees. But that is not a sufficient basis for this Court to find that there is no liability or that Section 703(a) does not apply to this employer and prohibit the particular practice that is involved in this case.

Now, there is also some discussion, Your Honors, about the options, and as Justice Blackmun pointed out, the lump sum option does come with significant tax consequences. For Nathalie Norris and millions of other employees and retirees throughout the country, the only feasible option under this plan is the annuity option.

In addition, the sum certain for a definite period of time, the alternative option, does not give

Ms. Norris nor anyone else the kind of protection that they want for their entire retirement life. Even more significantly, Your Honors, there is no legal precedent or basis for absolving an employer under Title 7 because there are non-discriminatory options available. And in fact --

QUESTION: The irony of affirming if a state is to continue, though, to provide an annuity plan after an affirmance is that in order to avoid disparate treatment of women by mandating unisex tables, it will have a disparate impact on men to achieve it. Do you want to comment on that?

MS. GITTLER: Yes, Justice O'Connor. The Court in Manhart specifically addressed that issue in a footnote in which the Court observed that not every disparate impact creates a violation of Title 7, and indeed -- the issue was raised with respect to the potential unfairness, and incorporated into that in Manhart was the issue of the potential illegality, but Manhart teaches us that not every disparate impact is going to create -- under the Griggs analysis is going to create a violation of Title 7.

Unfairness was one of the arguments that was raised over and over again in Manhart and was explicitly rejected, not only on policy but also on the legal

bases. In addition, this Court has held, last term, under Connecticut versus Teal, that an employer is not justified in discriminating in one aspect solely because it does not discriminate in another aspect, and this argument made by the employer today sounds very similar to the argument that was rejected by this Court in Connecticut versus Teal.

In addition, in Mississippi versus Hogan, this Court held that an explicit sex-based classification under -- could not be justified under the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment solely because there happened to be other non-discriminatory options available.

Thus, Your Honors, not only is there a question of policy in terms of the feasibility of the alternative options that are available, but there is simply no legal basis for absolving this employer of liability solely because there are alternative non-discriminatory options available.

QUESTION: If your position is the correct one, what should inform the Court's selection of remedies, Ms. Gittler? Can it be prospective only, or what should inform the Court's decision on remedial action?

MS. GITTLER: Justice O'Connor, although Mr.

Endicott has characterized the relief that was ordered in this case as retroactive, there was nothing retroactive about the relief that was ordered in this case. In fact, Your Honor, we specifically requested reimbursements for the disparate amounts that had been paid to men -- to women less than men, and the Court rejected that in the motion for summary judgment. We then moved to amend the judgment, and it was again denied by the Court.

So, we have purely prospective relief, and that is --

QUESTION: Are you satisfied with that?

MS. GITTLER: Yes, Your Honor, we have not appealed the decision of the court, the denial of the retroactive benefits. We are satisfied with the equalization of the benefits prospectively, and that is exactly what the court has ordered. Mr. Endicott has --

QUESTION: And yet women in the long run will get more.

MS. GITTLER: Justice Blackmun, women as a class, in the aggregate, may get more, but individual women, individuals will not get any more than a similarly situated man. Let me give you an example. If Nathalie Norris were to retire at age 65, and had the $53,000 of her money accumulated, and a similarly

situated man retired with the same $53,000, and both of them lived to be 85 years old, month to month Ms. Norris would receive $33.95 less per month than the similarly situated man, and upon their death Nathalie Norris will have received $8,000 less than the similarly situated man.

QUESTION: But your assumption is contrary to the experience of the American Experience Table of Mortality. You are assuming that they would -- they are the same age, and they go in at the same time, and die at the same time. That may be true about the specific individuals, but can a pension plan, an organized situation like this be based on what happens in a particular individual case, or must it be based on the law of averages?

MS. GITTLER: Chief Justice Burger, Manhart teaches us, and the holding in Teal teaches us that it cannot be based on group statistics, that we must under 703(a) look to the individuals, and Title 7 requires us to treat individuals as individuals and not as group statistics, and that is the significant holding that we can derive from Manhart, and it is equally applicable in this case.

Mr. Endicott has essentially --

QUESTION: Well, you are driving the option

away, aren't you?

MS. GITTLER: Justice Blackmun, you suggested earlier that the result may be that the option is suspended, and --

QUESTION: Is that what you really want?

MS. GITTLER: Your Honor, we want the state to comply with Title 7. We want the employer in this case to provide the same benefits to women as it does to men.

QUESTION: Even though it drives the option away?

MS. GITTLER: Your Honor, an employer can always absolve itself of liability by not having employees, by not having an employment setting. That may be the effect.

QUESTION: Well, the state of Arizona needs employees, and that is not a very good illustration.

QUESTION: Yes, you have said that several times. Is an employer an employer after he gets rid of his employees?

MS. GITTLER: No, Your Honor, he is not, and at that point he has no obligations in --

QUESTION: You are talking about something that is utterly unrealistic, aren't you?

MS. GITTLER: Chief Justice Burger, the point

is that Congress has spoken, and we are dealing here with the statute, and I think that is important to emphasize, the statutory prohibitions, and the statute prohibits treating individuals as members of a class, and that's what this Court has held in interpreting Title 7.

Now, in terms of the remedy which was raised by Justice O'Connor, Mr. Endicott has also -- has essentially conceded that in this particular case there is really a minimal amount that is involved, and there is really -- there are only four employees that have retired under the stipulated facts.

As Mr. Endicott stated, the amount that may be involved is de minimis, and in fact, Your Honors, the state in this case never obtained a stay of the order of the District Court, and so clearly experience must indicate that in fact the state has been able to comply with the order.

QUESTION: Yes, but you are not suggesting this is an unimportant case.

MS. GITTLER: No, Your Honor, we are not in any way suggesting that this is an unimportant case. What we are suggesting, Your Honor, is that this Court must look at the facts of this case, and in this case there are four women who have retired.

QUESTION: Well, but it affects a large number of plans and a large number of people, does it not?

MS. GITTLER: Yes, Justice Stevens, it does affect a number of employers, and Mr. Endicott would argue here today for all of those employers that are out there, and that is something that we cannot do. We can point out, Your Honor --

QUESTION: You are not arguing for all the women employees who are out there? It seems to me you are, and I think you properly are doing so.

MS. GITTLER: That's correct, Your Honor, but we cannot address the possible -- all the possible issues that might be raised by other employers. We must deal with the record that was involved in this case, and we would point out to the Court that a lot of the arguments that have been raised by other employers, there is tremendous dispute with respect to the amounts that it might take in order to come into compliance with this order, and the actuaries that have filed a brief --

QUESTION: Well, is it part of the record that Arizona has terminated Option 3? Or is it -- there is no dispute that that has happened?

MS. GITTLER: Justice White, I have no personal knowledge that it has, except for the fact that it has avowed to this Court that it has suspended that

third option.

QUESTION: Is that a matter of public notice, is it, or are we permitted to take notice of that, that Arizona is complying in this manner? You don't say that it's not in compliance with Title 7 now, do you?

MS. GITTLER: Your Honor, I have no -- no, the -- if the employer does not provide the non-discriminatory option, there may, Your Honor, be other issues with respect to contract or other problems with respect to the suspension of the option, but if an employer responds by not providing this particular fringe benefit, that in itself is not a violation except as it may bear on employees who are already participating in the plan or who have already retired.

Chief Justice Burger, you asked with respect to live insurance under this plan. There is no life insurance under this plan, and there is no provision under this plan which charges women less because they are women in the payment of life insurance. Now, the life insurance may be part of another plan, but I know of no particular provision under this which allows for charging women less because they are women.

QUESTION: Well, my hypothetical question was, if you had a plan which charged women less for life insurance, and the state might well include life

insurance in its program, then would that be discrimination against the men?

MS. GITTLER: Your Honor, again, that would be discrimination, but I was responding more to Mr. Endicott's suggestion that there was a life insurance program under this particular plan which charged women less, and I know of no such separate provision unless it is included in one of the other options.

QUESTION: Do you think the illegality would be cured if they added a fourth option which was a life insurance policy that gave precisely the same economic benefit to women as a class as this one gives to men as a class?

MS. GITTLER: Absolutely not, Justice Stevens. That would in no way affect the outcome in this case or the determination of whether or not there was a violation of Title 7.

In addition, there is an argument that is made by the petitioners of the actuarial equivalents, and that in fact women are receiving the same in the aggregate as men in the aggregate, and Your Honors, that is the very heart of the argument that was rejected by this Court in Manhart, and cannot be relitigated before this Court again.

Nathalie Norris will receive less month to

month than a similarly situated man, and that is what Manhart proscribes.

In addition, there was a suggestion made by Mr. Endicott that this merely reflects the open market, and that this somehow falls within the term open market that this Court referred to in Manhart, but there, this Court held that an employer can give an employee a lump sum amount and go out and buy whatever he or she can on the open market. That is not this case. This case involves an employer who has itself provided the benefits to the employees, and has not suggested that the employer -- that the employee go out into the open market simply with a dollar amount in its hand.

The issue, Your Honors, in this case is one of statutory construction. Congress has determined the scope, the applicability of Title 7, and its prohibitions, and in this case the employer has violated Title 7 by providing a discriminatory fringe benefit to its employees. Neither the involvement of the insurance companies or the presence of the options in this case are sufficient to overcome the statutory prohibition of Title 7.

For those reasons, Your Honor, we respectfully request that the Ninth Circuit opinion decision be upheld.

CHIEF JUSTICE BURGER: Very well.

Mr. Endicott, do you have anything further?

ORAL ARGUMENT OF JOHN L. ENDICOTT, ESQ.,

ON BEHALF OF THE PETITIIONERS - REBUTTAL

MR. ENDICOTT: Mr. Chief Justice, and may it please the Court, just one or two points.

There were questions early in Ms. Gittler's argument about who holds title to the money and where the money goes. Now, as the Court knows, this is a deferred compensation plan. Internal Revenue takes the position that if the employee receives the money, it is taxable at the time of receipt. So the law is structured so that the employee does not actually receive or constructively receive the money. But the money is actually put with the insurance company, the savings bank, the mutual fund, or wherever the employee directs it. The promise by the state to return that money is an unequivocal promise. The only way the state could not do it is to breach its promise.

QUESTION: Mr. Endicott, may I ask you one question? It is the burden of proof question I asked your opponent. In response to your suggestion that only the female rate would be available if you tried to have a unisex table, she responded in two ways, as I understood her, saying, one, the group policy may get a

better rate than an individual, and secondly, that because of the tax benefit that you just described, the individual couldn't buy as favorable a policy even as the female rate would produce.

Is there anything in the record to answer that question? And if not, who has the burden of proof on that point? Which one of you should we accept?

MR. ENDICOTT: Two answers to your questions, Your Honor. First, there is nothing in the record on the subject. It was not discussed. It isn't revealed by the record. Number Two, we are all speculating as to what men would do, what women would do, what insurance companies would do. It is why I suggested much earlier that I think this presents a much broader social, political question than can be resolved in a Title 7 context --

QUESTION: Has Congress addressed this problem at all since the Manhart decision?

MR. ENDICOTT: Congress is presently considering legislation, as I understand it, Your Honor, right now quite actively. There are one or more bills pending in the House, at least, dealing with the question of should there be sex segregation in insurance, casualty insurance, life insurance, pensions, annuities. The whole thing is before Congress. Yes,

Your Honor.

One final point, if I may. The statement was made that Manhart solves this case, and I submit Manhart does not. Manhart dealt with a situation in which the woman took home less money. It confined itself to that situation. Here is a case where the woman takes home the same pay throughout her life. It is only after her employment status has ceased, she has retired, she is getting money from an insurance company, that she gets less per month.

And the assumption that because she gets less per month she is being discriminated against is one that again raises more questions than just simple mathematics. If I promise to pay you $50 a month for 20 months, and I promise to pay someone else $100 a month for ten months, clearly $50 a month is less than $100 a month, but it doesn't mean the person who gets $50 a month is being discriminated against. They are going to get it longer. They will net out the same.

And the assumption of the actuarial tables is, you take the money the employee has set aside, divide it by their life expectancy, and they recoup their money, and it is their money they are concerned with. The argument that Arizona could have self-insured is contrary to the Arizona statute that created the

deferred compensation plan, which said that Arizona was not to contribute money to the plan.

Once you self-insure, you are taking the risk of insurance, and insurance companies do pay money out, sometimes more than they take.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 1:48 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, ETC., ET AL., Petitioners vs.

NATHALIE NORRIS, ETC. #82-52

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pixie Hammond

(REPORTER)