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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOINT REPLY BRIEF OF APPELLANTS AND AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

A.

The quality of genuine rationality review has been misconceived by appellees.

1. Asserting that the statutory exclusions here at issue, because they exclude women from "economic benefits," must be upheld "if any state of facts reasonably may be conceived

to justify [them]" (Br. Appellees 7), appellees look to this Court for minimal judicial scrutiny and seek to avoid more vigorous rationality review. Observing that "legislative history sheds little light on the reasons for the different treatment of male and female members of the service" (Br. Appellees 7), appellees invite the Court to speculate with them upon a possible rational basis for withholding from servicewomen fringe benefits accorded similarly situated servicemen. The minimal review urged by appellees finds support in decisions of this Court conspicuous during a period in which "property" interests were relegated to a hands-off area. *See, e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), and the enlightening discussion in Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 37-41 (1972). However, reformulation developed most notably during the 1971 term points decidedly toward more genuine judicial inquiry into the rational basis of legislative classifications. As Professor Gunther points out in his scholarly analysis, this Court appropriately regards the equal protection principle as a constitutional safeguard "with considerable bite." *Id.* at 12. Reasonableness is to be gauged on the basis of materials offered to the Court by the defenders of discrimination; it is not to be founded upon data hypothesized by the Court (or by appellees). *Id.* at 21, 47.

Appellees concede the obscurity of evidence of legislative purpose in excluding married servicewomen from fringe benefits granted married servicemen, but hypothesize an "obvious" or "apparent" congressional judgment: the husband is the breadwinner; the wife is dependent. (Br. Appellees 8, 11-12.) Concededly, no empirical inquiry informed the supposed judgment that "exceptions where the wife of

a serviceman has an independent source of income" are only "occasional." (Br. Appellees 11.)[1] Rather, the "judgment" parallels the one attributed to the Idaho legislature in *Reed* v. *Reed:*

> The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women. . . . While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970).

Both "judgments" derive from the same stereotype: breadwinning and the experience it brings are part of man's world; dependency and shelter from worldly experience are characteristic of woman's place. The "presumptions of dependency" hypothesized by appellees are no more "reasonable," no more "in accord with the realities of American life" (Br. Appellees 10), than were the presumptions as to spheres of experience of men and women proffered in *Reed.*[2] This Court swiftly rejected the hypothesized "ra-

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[1] For fact dispelling the myth that income earning wives are only "occasional," *see* Br. Amicus Curiae 24-27. *Cf.* Davids, New Family Norms, 8 Trial 14 (1972): "The premises [he works . . . she stays at home] may be less and less true, but until very recently, they were not challenged as an image of the 'typical' marriage and a definition of its 'normal' form. More and more people are realizing that these premises are not true, and perhaps not worth making true after the fact."

[2] The asserted "dependency presumptions" are far less "rational," far less firmly rooted in "the realities of life," than the presumption overturned by this Court in *Stanley* v. *Illinois,* 405 U.S. 645 (1972). *Cf.* United Nations Declaration on Elimination of Discrimination Against Women, adopted by the General Assembly on November 7, 1967, article 10 (declaring as fundamental the right of women to receive family allowances on equal terms with men).

tional basis" in *Reed.* 404 U.S. 71 (1971). Similarly, any meaningful judicial inquiry must result in rejection of the rationality of the legislative exclusion in the instant case.

2. Startling to any attentive reader of this Court's opinions in *Reed* and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), appellees assert that absent a "fundamental right" or a classification declared "inherently suspect," "administrative considerations" suffice to justify discriminatory classifications. In *Reed,* no "fundamental right" was at stake, and the sex-as-a-suspect-classification issue was not reached. This Court found "some legitimacy" in the "administrative considerations" urged in support of the legislation. Nonetheless, the Court concluded that the means adopted, differential treatment of the sexes based on assumptions about the qualifications of most men and most women, failed to survive scrutiny under the rationality formula. As to *Shapiro* v. *Thompson,* appellees simply ignore the Court's assertion that the challenged provision did not even meet minimum scrutiny standards. 394 U.S. at 638.

3. Equally startling in light of *Reed* is the suggestion that congressional movement toward equalizing fringe benefits for married military personnel, regardless of sex, counsels more deferential review. (Br. Appellees 12-13, 20.) The question before this Court is of course the constitutionality, not the "wisdom" of the challenged statutes. But the quality of the Court's review is not determined by the presence or absence of stirrings in Congress. In contrast to the statutes at issue in the instant case, which have not been amended to equalize the treatment of men and women, the provision challenged in *Reed* had been eliminated by the Idaho legislature, apparently without retrospective effect,

several months before this Court's decision. 404 U.S. at 74-75 n.4. *See also Moritz* v. *Commissioner,* —— F.2d ——, 41 U.S.L.W. 2293 (10th Cir., Nov. 22, 1972) (provision of Internal Revenue Code held to deny equal protection to never-married men had been prospectively eliminated by Congress eleven months prior to Court of Appeals decision).

Nor have appellees perceived the significance of *Reed* to the relevance of "sociological changes" and "changes in the legislative climate." (Br. Appellees 12, 13.) The Idaho provision challenged in *Reed* was originally enacted in 1864, a time when most adult women still labored under legal restrictions imposed on the female member of a marital unit. *See* L. Kanowitz, Women and the Law: The Unfinished Revolution 40-69 (1969). A legislature blind to the basic inequity of denying full contract and property rights to married women might well find it reasonable to prefer males for appointments that frequently require the consummation of commercial transactions. What appeared reasonable to men of the law in earlier years was declared by a unanimous Court unreasonable in 1971. For "time ha[d] eroded the foundation of the [legislative] judgment" (Br. Appellees 12), and this Court recognized that reexamination was its responsibility.

In sum, appellees' strained effort to supply a rational basis for the challenged statutes, "reasonably related to a proper legislative objective," cannot survive genuine rationality review. Neither the stereotypical description of breadwinning men and dependent women, nor the asserted leeway for "administrative considerations" can, consistent with *Reed,* impart rationality to the differential treatment of similarly situated men and women. And it is far too late

in the day to suggest that vigorous constitutional review of an existing controversy can be avoided or blunted on the speculation that change for the future may be forthcoming from the legislature.

B.

Legislative judgments about social roles solely on the basis of sex invoke a suspect criterion.

1. This Court has never to date recognized sex as a "suspect" criterion for legislative distinctions[3] and, according to appellees, it never should. Restrained review is advocated unless and until the Equal Rights Amendment is ratified, in which event, appellees indicate, an abrupt change from minimal to strictest scrutiny may well be warranted. (Br. Appellees 19-20.) It is doubtful that Congress envisioned the abrupt change suggested by appellees. Principal proponents of the Amendment in the House and Senate believed that appropriate interpretation of the fifth and fourteenth amendments by this Court would secure to men and women equal treatment under the law. *See* Br. Amicus Curiae 19-20. Even those who counseled against the Amendment anticipated that "a few significant decisions of the Supreme Court in well-chosen cases under the fourteenth amendment would have a highly salutary effect." Freund, *The Equal Rights Amendment Is Not the Way,* 6 Harv. Civ. Rts. Civ. Libs. L. Rev. 234, 242 (1971).

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[3] It has been suggested, however, that the Court may be moving in that direction:

> It is difficult to understand [the *Reed*] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means from the [suspect classification] area can the result be made entirely persuasive. Gunther, *supra,* 86 Harv. L. Rev. at 34.

In urging declaration of the sex criterion as suspect in the instant case, appellants merely reiterate what was plain to those who, a decade ago, adverted to the pervasive social, economic and political effects of sex discrimination in American society: "Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land." President's Commission on the Status of Women, *American Women* 44-45 (1963) (statement indicating expectation that this Court would provide "imperative" clarification to remove "ambiguities with respect to the constitutional protection of women's rights").

2. Appellees concede that a prime ingredient eliciting strict scrutiny is inherent in the sex criterion: "sex, like race and national origin,[4] is a visible and immutable biological characteristic that bears no necessary relation to ability." (Br. Appellees 15.) On the other hand, appellees note that "racial distinctions, unlike sex distinctions, have an especially disfavored status in constitutional history." (Br. Appellees 16.) This proposition is beyond debate. The paramount concern of Congress in the period during which the post-Civil War Amendments were adopted surely did not relate to women, but neither did it relate to newcomers to our shores. Yet the principle of equal protection, from the start, reflected the fundamental notion that legislative distinctions should not be made on the basis of characteristics that bear no necessary relationship to ability and over which persons have no control. In

[4] While sex, like race, is a most visible and immutable biological characteristic, national origin, a "suspect" category, fits less comfortably within the definition.

accordance with this notion, in 1971 this Court formally enshrined alienage among the suspect categories. *Graham* v. *Richardson,* 403 U.S. 365 (1971).[5]

3. Appellees urge, however, that although the sex criterion "bears no necessary relationship to ability," it cannot rank as suspect because women constitute a numerical majority that has not been excluded from the political process. Skipped over is the fact that through most of our nation's history, total political silence was imposed on this numerical majority. *See* E. Flexner, *Century of Struggle* (1959); *Up from the Pedestal* (A. S. Kraditor ed. 1968); Br. Amicus Curiae 11-18. Even today, in many states, women do not share with men full rights and responsibilities with respect to jury service. *See* Br. Amicus Curiae 41-42. In educational institutions, on the job market and, most conspicuously, in the political arena, women continue to occupy second-place status.[6] Suggestive of the value that

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[5] *Cf. Hernandez* v. *Texas,* 347 U.S. 475, 478 (1954) (rejecting a "two-class" theory of equal protection); *Faruki* v. *Rogers,* 349 F. Supp. 723 (D.D.C. 1972).

[6] *See generally* K. Amundsen, The Silenced Majority: Women and American Democracy (1971); H. Hacker, Women as a Minority Group, Social Forces, no. 3 (1951); A. S. Rossi, Inequality Between the Sexes, in R. J. Lifton ed., The Women in America 106 (1964).

Sex discrimination charges represent the second largest category of complaints filed with the Equal Employment Opportunity Commission; in local EEOC offices, sex discrimination charges have run as high as 60 percent of total complaints. Pressman, Federal Remedial Sanctions: Focus on Title VII, 5 Valp. L. Rev. 374, 379 nn. 31-33 (1971). Despite legislation promising equal opportunity and equal pay, the earnings gap between men and women has been widening. *See* U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap (rev. ed. Dec. 1971). So has the gap in upward mobility. *See, e.g.,* Hoyle, Who Shall Be Principal, A Man or a Woman?, The National Elementary School Principal 23-25 (January 1969) (in 1928, 55 percent of elementary school principals

should be assigned to appellees' head count, former Secretary of Labor Hodgson observed in 1970 that discrimination against women in the labor market is "more subtle and more pervasive than against any other minority group." [7]

Women's "political influence" could be characterized as "substantial" (Br. Appellees 16) only by substituting fancy for fact. Not a single woman sits in the United States Senate; only 14 women hold seats in the House of Representatives. Over the past twenty years only one woman has chaired a House committee;[8] no woman has ever chaired a Senate committee. Less than 3 percent of positions in the federal government at and above GS-16 rank are held by women.[9] As of October 31, 1972 women comprised almost one-quarter of the foreign service, but less than 3 percent of the chiefs of missions.[10] At the state level, no woman serves as governor, and less than 6 percent of state legislators are women.[11]

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were women; in 1968 only 12 percent of elementary school teachers, but 78 percent of elementary school principals were men); Schiller, The Widening Sex Gap, Library Journal 1097-1101 (March 15, 1969) (in 1930, women were chief librarians in 19 of 74 large colleges and universities; in 1968, only 4 of these posts were occupied by women).

[7] Quoted in the San Francisco Chronicle, July 26, 1970, Magazine section, p. 7.

[8] Congresswoman Lenore Sullivan chairs the House Merchant Marine and Fishery Committee.

[9] Interview with Helen Markoss, Director, Federal Women's Program, Dept. of H.E.W., in Washington, D.C., Jan. 8, 1973.

[10] Interview with Gladys P. Rogers, Special Assistant to Deputy Under Secretary for Management for Women's Affairs, Dept. of State, in Washington, D.C., Jan. 8, 1973.

[11] State legislators number over 7700; women hold only 424 of these offices. Interview with Ruth Mandel, Eagleton Center for the

4. Closely related to appellees' head count argument, and as their final reason for denying that the sex criterion is suspect, appellees assert that sex distinctions "do not express an implied legislative judgment of female inferiority." (Br. Appellees 17-19.) No such judgment, according to appellees, is embodied in a statute declaring women unfit for bartending (*Goesaert* v. *Cleary,* 335 U.S. 464 (1948)); a statute establishing a women's college to equip females to serve as secretaries and homemakers and in other occupations "suitable to their sex" (the state's men's college, by contrast, was established as a military school offering a full range of liberal arts and engineering degrees) (*Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.,* 401 U.S. 951 (1971)); a statute presuming that women are preoccupied with home and children and therefore should be spared the bother of serving on juries (*Hoyt* v. *Florida,* 368 U.S. 57 (1961)); and a statute that has become a major roadblock to women seeking equal opportunities for remuneration and promotions in blue-collar employment (*Muller* v. *Oregon,* 208 U.S. 412 (1908)).[12]

Legal scholars who have assessed these legislative judgments less perfunctorily than appellees view the matter differently. Each judgment supposed by appellees to imply no "stigma of inferiority" has been exposed as resting upon

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American Woman & Politics, Rutgers University, in Newark, N.J., Jan. 8, 1973.

While a person need not be a member of a group by birth, religion or class affiliation to represent that group fairly and in a manner rseponsive to its interests, the chances of effective representation are unquestionably enhanced when group members occupy decision-making posts.

[12] With the evidence of women's weakness offered at the turn of the century in *Muller, compare* A. Montagu, The Natural Superiority of Women (rev. ed. 1968).

"unjustified (or at least unsupported) assumptions about individual capacities, interests, goals and social roles solely on the basis of sex." Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. Rev. 675, 676, 682-92 (bartending), 697-702 ("protective" labor legislation), 708-21 (jury service), 721-26 (public education) (1971). *See* Br. Amicus Curiae 34-44.

Legislative judgments "protecting" women from full participation in economic, political and social life have been labelled "benign" by persons who regard them as marking off for women a "separate but equal" role. Most men and women claim they value qualities traditionally associated with the mother-wife, *e.g.,* selflessness, sensitivity, passivity, non-assertiveness. But investigations of social scientists leave no doubt that traits associated with the male breadwinner, *e.g.,* assertiveness, aggressiveness, independence, are valued more. Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, *Sex-Role Stereotypes: A Current Appraisal,* 28 J. Social Issues 59 (1972). *See also* Dinitz, Dynes & Clarke, *Preference for Male or Female Children: Traditional or Affectional,* 16 Marriage & Family Living 128 (1954); Fernberger, *Persistence of Stereotypes Concerning Sex Differences,* 43 J. Abnormal & Social Psychology 97 (1948); Kitay, *A Comparison of the Sexes in Their Attitudes and Beliefs on Women,* 34 Sociometry 399 (1940); Lynn, *A Note on Sex Differences in the Development of Masculine and Feminine Identification,* 66 Psychological Rev. 126 (1959); McKee & Sherriffs, *The Differential Evaluation of Males and Females,* 25 J. Personality 356 (1957); McKee & Sherriffs, *Men's and Women's Beliefs, Ideas, and Self-Concepts,* 64 Am. J. Sociology 356 (1959); Rosenkrantz, Vogel, Bee, Broverman & Broverman, *Sex-Role Stereotypes and Self-Concepts in College Students,* 32

J. Consulting & Clinical Psychology 287 (1968); Sherriffs & Jarrett, *Sex Difference in Attitudes About Sex Differences,* 35 J. Psychology 161 (1953); Sherriffs & McKee, *Qualitative Aspects of Beliefs About Men and Women,* 25 J. Personality 451 (1957); Smith, *Age and Sex Differences in Children's Opinions Concerning Sex Differences,* 54 J. Genetic Psychology 17 (1939); L. White, Jr., *Educating Our Daughters* (1950).

Evidence abounds that the "submissive majority" perceives the real judgment underlying "benign" classifications and the "separate but equal" euphemism. Growing up in a society in which virtually all positions of influence and power are held by men, women believe that they belong to the inferior sex. Women's lack of self-esteem and their own belief, shared by men, that it is better to be male than female is reflected, for example, in the fact that male babies are preferred over female babies by both parents.[13] As Matina Horner observed, "It has taken . . . a long time to become aware of the extent to which [the stereotypical] image of woman has actually been internalized, thus acquiring the capacity to exert psychological pressures on [women's] behavior of which [women themselves] are frequently unaware . . . . [S]ocial and, even more importantly, internal psychological barriers rooted in this image really limit the opportunities to men." Horner, *Toward an Understanding of Achievement-Related Conflicts in Women,* 28 J. Social Issues 157, 158 (1972).[14]

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[13] *See* K. Amundsen, *supra* at 122.

[14] *See also* Horner, Why Women Fail, Psychology Today, November 1969. Even women lawyers, a more self-assured group than most, exhibit anxiety about success lest it brand them "unfeminine." *See* Glancy, Women in Law: The Dependable Ones, 21 Harv. Law School Bulletin 22, 30-31 (June 1970).

The originator of the suspect classification doctrine might recognize today the extent of the prejudice, often unconscious but

5. Women who seek to break out of the traditional pattern face all of the prejudice and hostility encountered by members of a minority group. Worse than being "discrete and insular," [15] which for other minority groups at least has the advantage of fostering political organizing, women are separated from each other and therefore remain far distant from the political potential appellees ascribe to them. For women who want to exercise options that do not fit within stereotypical notions of what is proper for a female, women who do not want to be "protected" but do want to develop their individual potential without artificial constraints, classifications reinforcing traditional male-female roles are hardly "benign." Where, as in the instant case, a wife and husband deviate from the norm—the wife is the family breadwinner, the husband "dependent" in the sense that the wife supplies more than half the support for

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theless devastating, encountered by women who want more than a place in a man's world. *See* C. F. Epstein, Women and Professional Careers: The Case of the Woman Lawyer 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University):

> [A] 1922 Barnard graduate recalled:
>
> > At the time I was ready to enter law school, women were looked upon as people who should not be in law schools. . . . I wanted very much to go to Columbia, but I couldn't get in. I went over to see Harlan Stone, Dean Stone, who was later Chief Justice, and asked him to open the law school [to women] and he said no. . . . I asked why . . . and he said "We don't because we don't." That was final.
>
> (From tape of author's conversation with Frances Marlatt, Attorney, Mount Vernon, New York.)

[15] As appellees acknowledge, women in the armed forces constitute a very small minority; living apart from men and working at jobs that are normally sex-segregated, they are a more "discrete and insular" group than non-white men who live and work alongside white men in the uniformed services. *See* Phillips, On Location with the WACS, Ms. Mag. 53 (Nov. 1972).

the marital unit[16]—"benign" legislative judgments serve as constant reminders that, in the view of predominantly or all-male decision-making bodies, life should not be arranged this way.

CONCLUSION

In sum, appellants submit that designation of the sex criterion as suspect is overdue, provides the only wholly satisfactory standard for dealing with the claim in this case, and should be the starting point for assessing that claim.

Respectfully submitted,

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[16] Appellees incorrectly characterize appellants' "concession." (Br. Appellees 3.) It is conceded that the benefit statutes challenged here exclude Joseph Frontiero as a dependent. However, Sharron Frontiero, the family's sole breadwinner, supplied over one-third of her husband's support and all of her own.

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