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, ET AL.

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

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from a decision of a three-judge district court sustaining the constitutionality of certain federal statutes relating to housing and medical benefits for the dependent spouse of a member of the armed forces. Under 37 U.S.C. 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters." Under 10 U.S.C. 1076 and 1077 a member's dependents are

provided medical and dental care. "Dependent" is defined by 37 U.S.C. 401 and 10 U.S.C. 1072 to include (a) the wife of any male member and (b) the husband of any female member if the husband is in fact dependent on the member for more than one-half of his support.[1] The effect of these statutes is that male members of the armed forces automatically obtain these benefits for their spouses, but female members obtain them only if they contribute more than one-half of their spouse's support.

Pursuant to these statutes, appellant Sharron Frontiero, a lieutenant in the United States Air Force, was denied medical and housing benefits for her husband, appellant Joseph Frontiero, on the ground that her application showed that her husband was not dependent upon her for more than one-half of his support.[2] Appellants brought this suit in the district court challenging the constitutionality of these statutes. Although conceding that Lieutenant Frontiero's husband was not dependent upon her (J.S. App. 3a), appellants argued that these statutes, insofar as they require a female member to demonstrate her spouse's dependency while imposing no such burden upon a male member, unreasonably discriminate on the basis

[1] The pertinent statutes and regulations are set forth in the appendix to the Jurisdictional Statement (hereinafter "J.S. App.") pp. 23a–30a.

[2] The regulations promulgated by the Department of Defense (J.S. App. 30a), to which appellants advert (J.S. 4), are thus not at issue in this case, because Lt. Frontiero's application was denied on the statutory ground that her husband was not dependent on her for more than one-half of his support.

of sex, in violation of the Fifth Amendment. Appellants sought a permanent injunction against the enforcement of these statutes and an order directing the appellees to give Lieutenant Frontiero the same housing and medical benefits for her spouse as a male would have received for his spouse.

A three-judge court was convened pursuant to 28 U.S.C. 2282 and 2284. The court (with one judge dissenting) sustained the constitutionality of the statutes (J.S. App. 1a–21a).

ARGUMENT

1. In statutes dealing with economic benefits, a legislative classification must be upheld " 'if any state of facts reasonably may be conceived to justify it'." *Dandridge* v. *Williams,* 397 U.S. 471, 485; *McGowan* v. *Maryland*, 336 U.S. 420, 426. Such a classification is constitutionally infirm only if it is "patently arbitrary" and bears no rational relationship to the objective sought to be advanced by the statute. *Flemming* v. *Nestor,* 363 U.S. 603, 611; *Reed* v. *Reed,* 404 U.S. 71, 76.

Under these criteria, the statutes involved here are constitutional. The challenged classification reasonably implements the legitimate interest of Congress in the effective administration of the dependency benefits program. The legislative scheme, which extends automatic dependency benefits only to male members of the service, obviously reflects the congressional judgment that most wives are dependent upon their husbands. In view of the large number of married male members

of the armed forces [3] and the likelihood that most of their wives are dependent upon them, Congress was justified in concluding that the statutory objectives would best be served by granting benefits to all married male personnel, notwithstanding that a small proportion of servicemen whose wives are not dependent would receive a windfall in the form of unneeded benefits.

In the case of female married members of the Armed Forces, it was not unreasonable for Congress to have concluded that most of their husbands are not dependent and that the federal interest in economical administration of the program would therefore be promoted by examining individually the much smaller number of claims involved. Thus, while female members whose husbands are in fact dependent on them are entitled to benefits, the relatively large percentage whose husbands are not dependent receive no windfall.

Although female members whose spouses are not dependent are treated differently from males whose spouses are not dependent, the classification is a rational one, reasonably related to the legislative objective.[4] The court below properly so held.

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[3] There are some 1,200,000 married male members of the uniformed services (see J.S. App. 10a).

[4] Cf. *Wells* v. *Civil Service Commission*, 423 Pa. 602, 225 A.2d 554, certiorari denied, 386 U.S. 1035, where the court upheld a requirement that female but not male members of a police force undergo an oral examination for promotion to sergeant, partly on the practical ground that the large number of male applicants made it impossible to subject each to an oral examination.

2. The appellants argue, however, that legislative classifications relating in any way to sex must be subjected to rigid scrutiny and can be sustained only if necessary to the accomplishment of compelling governmental interests. As they acknowledge, however, this strict standard of review has been limited to classifications that either affect sensitive and fundamental personal rights or are inherently suspect (J.S. 8).

Appellants properly refrain from suggesting that the interests here at issue—which are wholly economic—qualify as fundamental rights. See, *e.g.*, *Dandridge* v. *Williams*, *supra*, 397 U.S. at 484.[5] Rather, they argue that, like race and national origin, sex is a "suspect" basis for classification and therefore requires the stricter standard. See, *e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184; *Korematsu* v. *United States*, 323 U.S. 214.

This Court has never treated classifications based upon sex as inherently suspect.[6] This is because sex,

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[5] Among the interests that have been identified as fundamental are voting (*Harper* v. *Virginia Board of Elections*, 383 U.S. 663); procreation (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541); interstate travel (*Shapiro* v. *Thompson*, 394 U.S. 618); and marriage (*Loving* v. *Virginia*, 388 U.S. 1).

[6] See, *e.g.*, *Muller* v. *Oregon*, 208 U.S. 412 (upholding statute that limited women's working hours); *Radice* v. *New York*, 264 U.S. 292 (upholding statute forbidding night work by women in restaurants); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (upholding statute that fixed minimum wages for women but not for men); *Goesaert* v. *Cleary*, 335 U.S. 464 (sustaining statute that forbade the employment of some women as bartenders); *Hoyt* v. *Florida*, 368 U.S. 57 (upholding statute that relieved women of jury duty unless they volunteered); *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134

though it shares some of the characteristics that make race and national origin suspect as the basis of classifications,[7] also differs from race and lineage in several important respects. Whereas racial or ethnic classifications demark a minority of the population and are commonly perceived as implying assumed inferiority or opprobrium, women comprise a numerical majority and sex classifications are usually founded on physiological or sociological differences, not on social contempt for women.[8] See generally, *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1124–1127.

Whatever may be the contemporary validity of these theories, the Congress and the States, which are in a better position than the courts to weigh the broad sociological ramifications of a constitutional rule forbidding sex discrimination, have already embarked upon the task. The Equal Rights Amendment to the Constitution was approved by Congress on March 22,

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(D.S.C.) (permitting state university to provide separate branches for male and female students). See also *Reed* v. *Reed*, *supra*, where the Court struck down a statutory preference for men as administrators of estates but stated the test in traditional terms as "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced" (404 U.S. at 76).

[7] Each is an immutable and visible characteristic bearing no necessary relation to ability.

[8] The classification here is based not upon an outmoded view of woman's abilities or qualifications but on economic facts and the pertinent administrative and cost considerations. The classification does not represent a mark of implied inferiority or opprobrium.

1972, and has already been ratified by some 20 state legislatures. If that Amendment is adopted, the issue in this case would be in a quite different legal posture. At the present time, however, the district court's application here of familiar constitutional principles does not warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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