

ORIGINAL

In the

Supreme Court of the United States

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: PAUL J. WENGLER, :
: :
: Appellant :
: :
: v. : No. 79-381
: :
: DRUGGISTS MUTUAL INSURANCE :
: COMPANY, et al., :
: :
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Washington, D. C.
February 25, 1980

Pages 1 thru 29

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PAUL J. WENGLER, :

Appellant :

v. :

No. 79-381

DRUGGISTS MUTUAL INSURANCE :
COMPANY ET AL. :

Washington, D. C.

Monday, February 25, 1980

The above-entitled matter came on for oral argument
at 11:35 o'clock a.m.

BEFORE:

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

APPEARANCES:

JOHN W. REID, II, ESQ. Schnapp, Graham & Reid, 135
East Main Street, Fredericktown, Missouri 63645;
On behalf of the Appellant

RALPH C. KLEINSCHMIDT, ESQ., Evans & Dixon, 314
North Broadway, St. Louis, Missouri 63102; on
behalf of the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Wengler v. Druggists Mutual Insurance Company.

Mr. Reid, you may begin whenever you are ready.

ORAL ARGUMENT OF JOHN W. REID, II, ESQ.,

ON BEHALF OF THE APPELLANTS

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

The question presented in this particular case is whether the 1976 Revised Statutes of Missouri Section 287.240 which authorizes worker's compensation death benefits for the spouse of a male worker without regard to dependency but conditions benefits for the spouse of a female worker upon mental and physical incapacity or proof of dependency discriminates impermissibly on the basis of gender in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Question.

This case arose at the death of Ruth Wengler on February 11, 1977. Thereafter a workman compensation claim was filed by the claimant for the death of his wife. The referee and the Industrial Commission of the State of Missouri held that they did not have the authority to declare a Missouri statute provision on the death benefits unconstitutional and therefore disallowed the claim.

The claim was appealed to the Circuit Court of

Madison County where the Circuit Judge there held that due to the Missouri Constitution and the Federal Constitution the Equal Protection Clause, the death benefits to the workman compensation for Paul Wengler had been denied and therefore ruled in favor of the claimant and indicated that the benefits should be applied to Mr. Wengler for the death of his wife.

Thereafter Druggists Mutual appealed this decision to the Missouri Supreme Court and there in a divided opinion the Missouri Supreme Court reversed the Circuit Court of Madison County, holding that they would not apply the strict scrutiny test as it had been applied by members of this Court in appropriate sex discrimination cases but instead applied the other test that have been applied, the substantial relation test. And held that under the substantial relation test that Equal Protection Clause had not been violated by the Missouri workman compensation benefit statute.

But Justice Donnelly in a concurring opinion basically indicated that he was troubled because he didn't know what the supreme law of the land was and Justice Sieler in his opinion -- which was a dissenting opinion, the sole dissenting opinion -- pointed out that the majority opinion even though it applied the substantial relation test that the -- in his opinion that this Court would have found that the Missouri workman compensation death benefit violated the Equal Protection Clause of the Fourteenth Amendment of this

Constitution. And pointing out that members of this Court had applied the substantial relation test and therefore the substantial relations test and the strict scrutiny test both would not pass the Missouri workman compensation death benefit as it applied in the State of Missouri in the Wengler case. And the dissenting opinion was held in favor of the claimant.

After this case was accepted and briefs started being written, we received a telephone call from the Department of Justice and also the American Civil Liberties Union and they both filed amicus curiae briefs on behalf of the claimant. And I thought that this was very strange when I received the phone call from the Department of Justice, because the American Civil Liberties Union and the Department of Justice had been litigating these matters before this Court in the Social Security cases, Federal cases. And after obtaining the amicus curiae brief from the Department of Justice I found out that what happened after the Goldfarb cases, the Social Security case which was a 5-4 decision, that Congress thereafter instructed the Department of Justice to go through the Social Security laws and to advise Congress how the gender discrimination in the Social Security law could be corrected. And according to the brief of the Department of Justice they have complied with that public law which is on page 3 of the amicus curiae's brief and in February 1979 they had made a report back to Congress of how the gender-based discrimination

can be corrected by Congress.

So that I think this is an expression by Congress that they want to correct the gender-based discrimination that still is in the Social Security laws.

QUESTION: Did Congress do anything in response to that report?

MR. REID: Justice Rehnquist, I think that this report took place in February of 1979 and to my knowledge, and what I have is from the amicus curiae brief, Congress has not passed any law at this time.

I think that it is the claimant's position that the Missouri majority misread and misapplied the tests that have been applied by this Court. And to be quite fair with the Missouri Supreme Court, there were some cases that came down about the same time as the Missouri decision last term, this Court, the Orr case and also the Westcott case. And in those cases the plurality of the Court held that the alimony statute of the State of Alabama violated the Equal Protection Clause and also a portion of the Federal statute on aid to dependent children, also violated the Equal Protection Clause where it only applied benefits to the father who was unemployed and not to a mother that was unemployed.

I think the American Civil Liberties Union -- of course I have a client and not a cause -- the American Civil Liberties Union would like to see the Court adopt the

strict scrutiny test. Quite frankly I don't believe that the decisions of this Court in the last decade would have been any different if the strict scrutiny test which Justice Brennan has written about in many decisions in 1970 would have been applied by the Court. The Court has held in the Kahn case, the decision written by Justice Douglas, that in the area of taxation that the Constitution and this Court has given States great leeway and this is a particular area where they have done. And I think that under that particular decision that applying the strict scrutiny test that that decision would stand.

The Schlesinger v. Ballard case involved a decision involving up and out of the Armed Forces. A member of the Armed Forces who was an officer had to move up or be booted out of the service and this Court held, the plurality, that in that particular case that the Constitution gave to Congress the authority to man the services and that this was of germane purpose and that the Court would not use the Equal Protection Clause to take away that duty and that power that is delegated to Congress.

In Califano v. Webster which was a pro curiam decision of this Court and there was a provision of the Social Security Act which gave benefits to a woman by deducting three years off of her earnings requirements for benefits that this was a specific Act of Congress to do away with some

past discrimination that women had been shackled with over the many years.

QUESTION: Mr. Reid, do you think the Missouri statute discriminates against men or against women?

MR. REID: I think it discriminates against both, Justice Stevens. I think it discriminates against a working woman and I think perhaps a few decades ago it was the place for the woman to remain in the home and take care of the children. Today, with inflation, with our way of life, a number of women work outside the home and raise the family. And so by denying the workman compensation benefits it does discriminate against not only males but also females.

QUESTION: It doesn't deny any women the benefits in this case, does it?

MR. REID: It does deny her family benefits. In the event she would pass away, her family would be discriminated against; whereas if the husband passed away, she would be entitled to benefits for her and the children. But she, on the other foot, if the wife passes away -- the mother -- then the father has a void there.

QUESTION: We are talking members of the family other than the spouse, aren't they treated alike, aren't the children treated as dependents in both cases?

MR. REID: Yes.

QUESTION: There isn't any discrimination against

anybody except the opposite spouse, is there?

MR. REID: Other than the fact that the opposite spouse could use the money that would be entitled -- that he would be entitled to to help raise the family.

QUESTION: Do you have any difficulty at all with the claim that this system is unconstitutional because it discriminates against both men and women?

MR. REID: No, Your Honor.

QUESTION: I must say I do.

MR. REID: You mean it would have to discriminate --

QUESTION: I mean how could something discriminate against both, let us say aliens and non-aliens?

MR. REID: It would discriminate against -- in this case it would discriminate against the man, the male the way the statutes are written in this particular set of facts.

QUESTION: You mean in some cases it might discriminate against women and in other cases it might --

MR. REID: I see what Justice Stevens is saying, that in this case because the wife is the one that is deceased she is never going to receive --

QUESTION: The point is that in some cases discrimination might be against women and in other cases it might be against men.

Is that it?

MR. REID: It --

QUESTION: That is it's against women if you think of them as wage earners.

MR. REID: Right.

QUESTION: And against men if you think of them as beneficiaries.

MR. REID: Right.

QUESTION: Is that it?

MR. REID: Right.

QUESTION: So it would depend in each case upon whether the male or the female were the wage earner and which spouse was the beneficiary.

MR. REID: That is correct, Your Honor.

QUESTION: Does the wage earner in this case contribute to the fund that provides the benefit?

MR. REID: Your Honor, I think indirectly he does, or she does in this particular case. I realize that Druggist Mutual's brief correctly states what the law in Missouri is, that the employer is the one who pays the benefits on the workman compensation. But indirectly all wage earners pay into that fund.

QUESTION: But until there is an injury I take it there is no discriminations as between wage earners of different sexes. They both pay the same percentage; neither of them has any deduction from his salary and there is no difference.

MR. REID: No, Your Honor, there would be no deduction from the salary other than the fact I think when you think about the total amount of labor that the employer would take this into consideration, how much he is paying in for the workmen compensation benefits.

QUESTION: Well but he pays in the same amount for a female worker as he does a male worker.

MR. REID: That is correct, Your Honor.

QUESTION: And if the female and male workers are single and have no dependents at all, so they only would get benefits for disability, they are treated alike.

MR. REID: That is correct.

QUESTION: I don't see any discrimination against anybody except a male in this case. I don't understand the theory of discrimination against the female.

MR. REID: Well, it has been advanced I think in the American Civil Liberties brief and pointed out in some other cases that it does discriminate against against the working woman for her family. And that would be the discrimination. That theory has been advanced.

QUESTION: You mean because the husband is the wife of a woman -- is the spouse of a woman he is discriminated against, so that is a discrimination against the woman.

MR. REID: The woman would be discriminated because of her ability to support her family in the event that she

had passed away. That is the theory of the argument that is used.

QUESTION: That her employment is worth less than the man's.

MR. REID: That is correct, Your Honor. That is the theory that I get.

This Court has held that the following classifications violate the Equal Protection Clause. In the Reed case to eliminate hearings on appointment of administrators, Justice Burger in his opinion indicated that that was not a legitimate classification, giving preference to a male over a female. Also in the Reed case to avoid inner family controversy, that was not a valid classification. Administrative convenience in the decision by Justice Brennan in the Frontiero decision was not a valid reason for the classification. In the Wiesenfeld decision, Justice Brennan's opinion, the fact that the women were the -- the males were primary supporters, the fact that the women were given benefits in the event of a husband's death to take care of the children, which is very close to this case, that benefits should be paid to the male in the event of the wife's decease. And in the Craig case Justice Brennan points out that statistical data is not very helpful in deciding Equal Protection cases.

The accident of birth -- and that is what this is --

sexual classification, gender classification, it is an accident of birth.

And in the Goldfarb case, which is very similar to this one, a Social Security case.

And I would say that the dissenting opinion in those cases indicated that this was social legislation. The workmen compensation benefit cases are not social-type cases legislation that Justice Rehnquist was writing about in his dissent.

And finally, in the Westcott case Justice Blackburn indicated that the one-step test that was advanced in the dissenting opinion in Goldfarb no longer would be followed by the Court.

I would also point out to the Court that the strict scrutiny test is based upon race and that was an amendment to the Constitution by the Fifteenth Amendment. And some 50 years after that an amendment was passed, the Nineteenth Amendment, and that gave women the right to vote.

And in this classification I think that this could be a suspect classification, strict scrutiny should be applied to sexes as well as race because sex is an even broader term than race, alienage or national origin. All races have two sexes become extinct. This is a law of nature. Justice Powell indicated in a concurring opinion in the Craig decision that due to the fact that the Equal Rights Amendment is

pending the Court should not go ahead and apply the strict scrutiny test at this particular time.

I would point out that the race and the sex are both amendments to this Constitution and perhaps as the American Civil Liberties Union has stressed that it is time to apply the strict scrutiny test in these gender classification cases.

QUESTION: The scrutiny test, so-called, in every case simply is shorthand for saying you are going to invalidate the statute, isn't it?

MR. REID: I think that didn't happen in the --

QUESTION: I mean that is a way of telegraphing the result, isn't it?

MR. REID: Yes. In the Webster case that didn't happen. And also I think Justice Brennan in the Bott case held that he would not use a strict scrutiny standard to invalidate that. Of course that was a race case, it was not a sex case. But that is the stricter standard, that is correct.

QUESTION: Well, then isn't what I asked in my question basically correct?

MR. REID: Yes.

QUESTION: Do you know of a single case in which any court has ever applied the so-called strict scrutiny test that it has not ended up by invalidating the statute before it?

it.

MR. REID: I would say that the Webster case would be a close one, the pro curiam opinion of this Court.

QUESTION: Mr. Reid, you rely a good bit on the fact that the statute is an old one, it dates back to the year --

MR. REID: 1925, Your Honor.

QUESTION: Suppose there was a distinct legislative record to the effect that the legislature wanted to compensate widows for deprivations of the past. Would you be here today?

MR. REID: I think I would if the Court would apply the strict scrutiny standard; yes, Your Honor.

QUESTION: I repeat Mr. Justice Stewart's question: Doesn't the strict scrutiny standard really speak to the result. Once you take that standard the result is inevitable.

MR. REID: Yes, Your Honor, I would say that it would be.

QUESTION: It is like a compelling State interest. We have used that up here many times and every time we use it it indicates a result.

QUESTION: Well, we have -- a couple of voting cases a restriction has been sustained over that kind of a test and I suppose the origin in race cases was in the Japanese relocation case which was sustained.

QUESTION: Of course they did not involve the

Equal Protection Clause.

MR. REID: That involved the Fifth Amendment.

QUESTION: The Fifth Amendment and involved Federal action long before it had been perceived that the Due Process Clause of the Fifth Amendment contained some Equal Protection ingredient.

QUESTION: Mr. Reid, can I return for a minute to this case.

I take it there are alternate remedies that would be permissible if you prevail; either they could require proof of dependency from survivors of both sexes or eliminate proof of dependency.

Is that right?

MR. REID: That is correct.

QUESTION: And if they require proof of dependency from both sexes that wouldn't cause any harm to male applicants but it would cause a lot of female applicants to lose the benefits.

MR. REID: That is correct, Your Honor.

QUESTION: And if it took the converse it would give a lot of money to male applicants and take nothing away from female applicants.

MR. REID: That is correct, Your Honor.

QUESTION: So either way male applicants as a class will benefit, won't they, if you prevail?

MR. REID: If we prevail, yes; that is correct.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Reid.

Mr. Kleinschmidt.

ORAL ARGUMENT OF RALPH C. KLEINSCHMIDT, ESQ.,

ON BEHALF OF THE APPELLEES

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

I will try not to restate anything that appears in the briefs but I would like to make some points that I don't think have been emphasized by the briefs.

We are talking in this case about a Workmen's Compensation law, I think possibly the first time that this Court has had an industrial accident law in the context with gender discrimination.

Most of the cases in this area have arisen out of Social Security laws or Federal welfare laws of one type or another and they have not arisen out of Workmen's Compensation laws. There are differences between these laws and I think the difference may well influence the case. So I would like to go back and talk about the history and the origin and the philosophy that underlies a Workmen's Compensation law.

As you recall, these laws came into being in the early part of the century in Missouri in the 1920's and they

came into being because of a distinct need which had arisen in an industrialized society. People were getting hurt in the factories.

Unfortunately the remedy available to them, the common law remedy of master servant was not sufficient at the time. Statistically about 30 percent of these people received any recovery -- recoveries were received. It was an uneven handling of it, many received nothing at all because the common law defenses of master servant contributory negligence fellow servant rule barred claims from being made and the result created not only a terrible problem for the injured working person but for society itself because these people had to -- became wards or tended to become wards of society when people were hurt or killed in industry.

It was in response to that need that the Workmen's Compensation concept was worked out. The objective of the compensation concept was to pass on to industry, which is the area where people get hurt, the cost of these injuries. The notion was to get certain benefits and with prompt payment into the hands of the injured working people. The method that was used to achieve this result was a bargain method. That is important. All of these rights and duties and liabilities that appear in Workmen's Compensation laws and certainly in the laws of Missouri are bargained rights and liabilities. That is exactly how the law was put

together there. The trade associations, labor unions representing the working people on the one hand, various management organizations representing management through the public forum of the legislature, and everybody had to give up something to get something. The result in Missouri and elsewhere was a law that provided a brand new remedy wholly substitutional, an exclusive remedy before an administrative tribunal.

The benefits the law granted were limited to economic loss. This was the only thing to be paid under Workmen's Compensation and everything else was given up. One of the great things the employees had to give up in order to obtain liability without fault and reparation for economic loss was the opportunity to obtain the general damages, damages for anything other than economic loss. But the whole Workmen's Compensation concept is based upon reparation of economic loss to the employee or to the employee's dependents.

The workmen's Compensation scheme measures this economic loss by medical payments on the one hand, weekly benefits for temporary disabilities, amounts for permanent disabilities rated by weeks and in cases of death the formula used is based upon dependency.

The point of all of this is that in this kind of a law which incidentally the employee contributes nothing to it, specifically by statute is now allowed to in Missouri.

Of course I suppose you would call it a fringe benefit, it is a cost but the cost of this is borne by the employer.

The net effect of all of this is that the purpose of the Workmen's Compensation law is to pay for economic loss only, nothing else. And so if a death occurs, as in this unfortunate case here where there is no economic loss and it stipulated there is no economic loss, this law was never meant to provide Mr. Wengler --

QUESTION: If a man dies.

MR. KLEINSCHMIDT: Beg pardon?

QUESTION: If a man dies you don't have to show it, do you; you don't have to show economic loss, do you?

MR. KLEINSCHMIDT: No. That is a conclusive presumption that brings us here today.

QUESTION: Well, I mean suppose the man is making \$5,000 a year and his wife is making \$50,000, if he dies she collects.

MR. KLEINSCHMIDT: There is no question about that.

QUESTION: Mr. Kleinschmidt, I didn't understand that there was a stipulation that there was no economic loss. I thought there was a stipulation that the husband was not dependent on the wife.

MR. KLEINSCHMIDT: I equated the two because under the scheme --

QUESTION: They are not equivalent, are they?

MR. KLEINSCHMIDT: -- under the scheme in Missouri statute they are.

QUESTION: Well, let us assume we did not have a Missouri statute. Would it not be true that if you have two working spouses and both contributing to the household and you lose the income of one that there is an economic loss for the pair?

MR. KLEINSCHMIDT: Well economic losses would be the final balance sheet. Some expenses are going to be there either, so the balance sheet might end up equally. From an economic loss standpoint, a pure balance sheet standpoint, no there might not be any economic loss.

QUESTION: Do you think if a family is supported by both parents and one of them dies and that income is taken away from the family there is no economic loss suffered by the family, as a matter of tort law or any other --

MR. KLEINSCHMIDT: Certainly if we are going to extend this to a family I --

QUESTION: Well, just the two, do you think -- you don't think there is economic loss? You have mortgage payments to meet and all the rest and you depended on both incomes to meet them.

MRS. KLEINSCHMIDT: I think maybe this can be in the mind of the beholder and as I behold it, I visualize two people in a family making \$5,000 apiece, each of them have

to spend \$5,000 to live. One dies --

QUESTION: Well, in any event the stipulation is not that there is no economic loss. The stipulation is there is no dependency.

MR. KLEINSCHMIDT: You are certainly correct; yes, sir.

QUESTION: This action creates a conclusive presumption --

MR. KLEINSCHMIDT: Yes, sir.

QUESTION: -- so it precludes any inquiry under the economic realities.

MR. KLEINSCHMIDT: Yes, sir; it does indeed. Yet we feel comfortable with this statute in light of the decisional law of this Court, most of which has been made within the last decade. The cases we rely on primarily are Kahn v. Shevin, Schlesinger v. Ballard and Califano v. Webster. In this series of cases and in others every member of this Court has upon occasion agreed that there are some gender classifications which are constitutionally permissible. There has been agreement among all the members of the Court as to what the requirements are for that constitutional basis. It has been agreed by the members of the Court, as I understand it unanimously, that where there is a proper governmental purpose and the law is substantially related to the achievement of that purpose, it is constitutionally permissible. And this Court has agreed

that a proper governmental purpose is the reduction of past disparity to women caused by longstanding discrimination.

All of those things, all of those things fit into the Missouri scheme of Workmen's Compensation.

QUESTION: Why does it fit in to treat women in one way and men in another?

MR. KLEINSCHMIDT: Well, by designation if you are going to justify a gender classification on the basis of a legitimate governmental purpose in reducing past disparity, to that extent that you are reducing past disparity, then you are not treating by definition females equal with the males. But there is a permissible reason for --

QUESTION: I know but you are doing it by classification. Why don't you have individual determinations? If you had individual determinations every person who was entitled to it would be recognized, every person who was actually dependent.

MR. KLEINSCHMIDT: Another recognized governmental purpose is administrative convenience. By administrative convenience, I am not talking about the saving of court personnel time but I am talking about the certain of determination of the promptness of payment of benefits. And if we had individual determinations, we would lose that. And that is an important factor, Your Honor. Anybody that has ever walked into an Industrial Accident Board anywhere in this

country knows of the redtape and what occurs in the -- you have got to have a certainty of the payment of benefits and promptness of that payment. This is an administrative convenience. It justifies in part along with the reduction of past disparity the distinction of genders in this case.

QUESTION: Well, if you give one remedy rather than the other, if you didn't require proof of dependency for either sex, that would be administratively more efficient than the present scheme, wouldn't it?

MR. KLEINSCHMIDT: Yes, but as the Missouri Supreme Court pointed out there is a delicate balance in these Acts. It has cost money. The District of Columbia, I see in your local press this morning, is facing that right now.

Nobody was intended to get anything under the Missouri scheme except for economic loss. If Mr. Wengler in this case and all others situate similarly were to be paid, a large cost comes into these things. Each death case today takes a reserve in six figures now. That is from an insurance company standpoint. And there is a lot of money involved on that account for a purpose that was never the legislative purpose. If they would change the Act and, incidentally, the fact is there is a brand new Workmen's Compensation law pending today in the legislature in Missouri and if passed this problem would not arise. I don't know whether it is going to

pass or not but it changes a lot of things in the law. These things go on.

I am just saying that under this particular law certainly it was permissible --

QUESTION: Is increased cost to the employer something we can take into consideration?

MR. KLEINSCHMIDT: Beg pardon?

QUESTION: Is the increased cost to the employer something we can take into consideration, the fact that you would have to pay out more money if the statute is changed?

MR. KLEINSCHMIDT: Well, I was making it in response to a question here. Of course I think no, of course not; technically from a constitutionally standpoint, no.

QUESTION: Well, then I misunderstood you. I am sorry.

MR. KLEINSCHMIDT: No. I was simply trying to answer that question, Your Honor.

QUESTION: Just as a matter of curiosity Mr. Kleinschmidt, under the new bill will they require proof of dependency in all cases or in no cases?

MR. KLEINSCHMIDT: Under the new bill as I understand it -- I read it briefly on the airplane coming up -- apparently there is going to be a conclusive presumption for both genders.

QUESTION: I see. Yes, a presumption of dependency.

MR. KLEINSCHMIDT: Yes, yes.

There has been no attempt to make an argument in this case that I have heard that the classification used in this case was not a proper governmental purpose and was not substantially related to the achievement of the purpose. That is the test. That is the present law that this Court has announced.

The thing that bothers -- that is worrisome is that it is obvious that to reverse the Missouri decision it seems to me this Court will have to strictly scrutinize the law, which is a method of saying: I certainly agree that when you strictly scrutinize you are invalidating the law. Certainly that is what amicus the American Civil Liberties Union wants. They want this Court to issue that clarion call that all sex discrimination cases shall be inherently suspicious and in effect make absolute and inflexible standards out of these gender classifications.

QUESTION: What standard do you think Boren suggests?

MR. KLEINSCHMIDT: I am not prepared to respond.

QUESTION: Do you think there is some standard between -- in our cases between just rationality and strict scrutiny? It is hard to say, I --

MR. KLEINSCHMIDT: It is very difficult to say, Your Honor, it is in the mind of the beholder, really. The only thing that we in the field out there get is that we do talk

about classifications which are shorthand really sometimes meaning what the result will be. The only thing I can be certain of is that I know -- I know that this Court has accepted some classification. I know that some classifications make common sense. I believe in this classification, it doesn't harm anybody, this man has not been harmed and he sustains no loss.

Yet by putting this into the Act these widows are benefited. And the class of widows that are benefited I think --

QUESTION: Is there anything in the record to show that there was never a nickel put --

MR. KLEINSCHMIDT: It stipulated that there was just absolutely no dependency.

QUESTION: Yes.

MR. KLEINSCHMIDT: And that is the economic loss rule in Missouri.

QUESTION: And that is the harm.

MR. KLEINSCHMIDT: I haven't been talking in terms of harm, Your Honor. We could talk about that, of course we could say there is harm; you lose a wife, my golly, how could we say otherwise.

I am talking about the economic loss as measured by the Missouri scheme of --

QUESTION: I know you are talking about economic

loss. You are talking about what it cost the Government, I know that; I recognize that.

MR. KLEINSCHMIDT: Well, in any event it seems to us that if this Court were to reverse the Missouri court in this case it would be sending out a signal itself that it has been prepared to move, to sound this clarion call that ACLU looks for. And I think it is terribly unwise to do that at a time when the Equal Rights Amendment is pending in the legislatures of this land. This Court is going to be faced so soon inextricably with the questions of draft, registration, golly knows what else. It seems to me that the thing to do is to stand on this case and affirm this judgment right now and take up the cases of true importance as they come. That is my argument, Your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Reid?

MR. REID: Yes.

REBUTTAL ARGUMENT BY JOHN W. REID, II, ESQ.,

ON BEHALF OF THE APPELLANT

MR. REID: Just a couple of moments for rebuttal, Your Honor.

The statute that is pending before the Missouri legislature is a result of this case and a result of the editorial that was written by the two metropolitan papers in St. Louis and Kansas City. I would respond to that.

And Mr. Kleinschmidt is correct that under that proposal that both spouses would be presumed to be dependent.

And I would state in closing that irregardless of whether the substantial relationship test or the strict scrutiny test is used that under the decisions in the 'Seventies of this Court Mr. Wengler should prevail.

I thank you.

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

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