In the

Supreme Court of the United States

EDWIN EDWARDS, GOVERNOR OF LOUISIANA, et al.,

Appellants,

v.

MARSHA B. HEALY, et al.,

Appellees.

No. 73-759

Washington, D. C.
October 16, 1974

Pages 1 thru 37

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v.	:	No. 73-759
MARSHA B. HEALY, et al., Appellees.	:	

Washington, D. C.,

Wednesday, October 16, 1974.

The above-entitled matter came on for argument at 10:51 o'clock, a.m.

BEFORE:

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

APPEARANCES:

KENDALL L. VICK, ESQ., Assistant Attorney General of Louisiana, 7th Floor, 2-3-4 Loyola Building, 234 Loyola Avenue, New Orleans, Louisiana 70112; for the Appellants.

MS. RUTH BADER BINSBURG, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-759, Edwards against Healy.

Mr. Vick, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENDALL L. VICK, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I am Kendall Vick, Assistant Attorney General of the State of Louisiana, for Governor Edwards and others.

This case was brought by Ms. Healy and others to challenge the Lousiana Constitution and statutes exempting women from service on juries unless they filed a written declaration of desire to serve.

This matter was heard before a three-judge panel in the Eastern District of Louisiana, comprised of Judge Wisdom from the Fifth Circuit, Judges Rubin and Blake West from the Eastern District of Louisiana.

They found Hoyt vs. Florida, decided by this Court in 1961, a sterile precedent, no longer binding, and held that the constitution and statutory provisions of Louisiana unconstitutional, as a denial of due process.

After appeal in this case had been perfected, the people of the State of Louisiana adopted a new Constitution, which, the Attorney General believes, will moot the issue

presently before the Court, on January 1st, 1975.

We filed a Supplemental Memorandum, typewritten, and a Supplemental Brief, printed, reflecting those changes.

Article V, Section 33(A) of the new Constitution of Louisiana makes every citizen who has attained majority eligible to serve on a jury. And 33(b) of Article V of the new Constitution of Louisiana leaves exemptions to the Supreme Court of Louisiana.

In the Supplemental Brief that I have supplied to the Court, suggesting mootness, Exhibit 1, starting on page 5 of the Supplemental Brief, which is a verbatim transcript of the Convention's proceedings on the Thirty-sixth Day, August 24, 1973, which deals with this particular section of the new Constitution, clearly evidences the overwhelming intention of that body, made up of 132 citizens of the State of Louisiana, that women be called for jury duty on the same basis as men.

Exhibit 2 in the Supplemental Brief, to be found starting on page 25, is a Draft Order of the Supreme Court of the State of Louisiana implementing the intention of the Convention.

QUESTION: Mr. Vick, what is the status of that Draft Order? Does the word "draft" mean it hasn't really been promulgated yet?

MR. VICK: I dare say, if it please the Court, it's very much like a draft opinion that you would circulate to your

brethren. I checked with the Director of the Judicial Council and also with Justice Tate, who is the author of this Order, on Friday, and he said it was still being circularized to his brothers.

I might add, in further answer to your question, Your Honor, I was a Delegate to the Constitutional Convention, Justice Tate, Associate Justice of the Supreme Court of Louisiana, was a Delegate to the Convention, he is the author of this Draft Order, and I have no doubt in my mind that this Order will be, in substantial form, the way it appears here.

Furthermore, on Friday, --

QUESTION: How in the world can you speak for the Supreme Court of Louisiana?

MR. VICK: I don't presume to do so, Your Honor.

QUESTION: Well, I thought you said --

MR. VICK: I don't presume to do so. I was only reflecting --

QUESTION: Well, I thought you were saying --

MR. VICK: I was only --

QUESTION: -- the facts are that one man has drafted an Order, one member of the Court, and has circulated, period.

Is that the facts?

MR. VICK: That is a fact.

QUESTION: Do we have anything more than that?

MR. VICK: As of Friday, I have nothing more, Your Honor.

QUESTION: Well, as of today?

MR. VICK: As of today, nothing more.

This morning --

QUESTION: Well, do you have an opinio- as to what's going to happen?

MR. VICK: Yes, Your Honor, I do.

I was about to say that on Friday the Attorney General issued an opinion to all clerks of court in the State of Louisiana, directing them to put women in the wheel, in anticipation of January 1.

I do not, obviously, have a -- did not have time to --

QUESTION: What's the selection from, a voters list or something?

MR. VICK: Yes, Your Honor.

QUESTION: Primarily, or --

MR. VICK: Yes, Your Honor.

This morning I was served with a reply to our brief suggesting mootness, and I would like, if the Court please, to reject those portions that Ms. Ginsburg has raised out of hand, because she has said: While the volunteers only provision for female jury service is not retained in the text of the new Constitution, nothing therein precludes continuation of the same exemption.

I direct the Court's attention to the intention of the Convention. And, furthermore, it directs the Louisiana Supreme Court to provide by rule for exemption of jurors, no provision to become operative at midnight on December 31st, 1974, requires change in the existing system.

I disagree. I think it most certainly does. And the Attorney General has already taken steps in that direction, as, indeed, the Supreme Court of the State of Louisiana.

Then, on page 2, she says: Louisiana Supreme Court has held time and again that exemption, at issue in the instant case, is neither irrational or discriminatory.

May it please the Court, the Supreme Court of Louisiana was following the guidelines set down in Hoyt; and I don't think they could do any more, or any less.

QUESTION: General Vick, what's the practical importance of the question of whether or not this case is moot? You're going to be arguing the next case, which involves a conviction --

MR. VICK: Well, that's --

QUESTION: -- where the same question arise, and where no question of mootness could possibly exist. So what is the practical importance?

MR. VICK: The practical importance is to bring the Court -- to the Court's attention, pursuant to the rules of this Court, any change.

QUESTION: Which I appreciate, of course. But I just wondered what --

MR. VICK: No, our position is whatever the Court does, of course, is a matter for the Court.

QUESTION: Let's say that we agree, that this particular case was moot. But the same issue exists in the next case, where there can be no question of mootness. Isn't that right, or am I mistaken?

MR. VICK: That's correct, but of course the appellants in that case are seeking reversal of a conviction.

QUESTION: Right.

QUESTION: But don't you think -- don't you think that the defendant in the next case could lose that case and excluded potential women jurors could win this case? As an equal protection matter.

MR. VICK: Sure.

QUESTION: Apart from mootness, you mean?

QUESTION: Apart from mootness.

MR. VICK: That's always a possibility.

QUESTION: Well, I mean, just legally and logically, it could happen, I take it.

MR. VICK: Sure.

QUESTION: So it does make some difference as to whether this case is moot or not.

MR. VICK: The only problem --

QUESTION: Because the other case may not determine this one.

MR. VICK: Indeed. The only problem I have with that, Your Honor, is that when this man was tried, Hoyt was good law. And I assume it still is good law.

Now, that's the only problem the State of Louisiana would have.

QUESTION: What ground do you think the -- in this case, didn't the Court finally settle down on the -- on potential litigants as the ones with standing?

MR. VICK: In the District Court?

QUESTION: Yes.

MR. VICK: Yes, Your Honor.

QUESTION: And wasn't the rationale of the Court that there was such an opportunity for bias, for biased jurors, that the exclusion of women was unconstitutional?

MR. VICK: Indeed, they did.

QUESTION: Isn't that a due process matter?

MR. VICK: It is, indeed.

QUESTION: Don't most -- aren't most due process decisions retroactive?

MR. VICK: Well, they have been from time to time.

Conversely, Your Honor, the facts surrounding the conviction in the other case, I think might lend itself to a cry of passion or prejudice, if indeed there were women on the

jury. But I suppose we'll get into that then.

QUESTION: But that's -- that could be a Sixth Amendment decision, couldn't it?

MR. VICK: It could, indeed.

QUESTION: Not a due process decision.

MR. VICK: Yes, sir.

QUESTION: Well, I mean, it could be a Sixth Amendment through the due process decision.

MR. VICK: Yes, Your Honor.

QUESTION: Which may be different than the due process decision that was entered by the three-judge District Court here.

MR. VICK: Yes, Your Honor.

QUESTION: Yes.

QUESTION: Well, there could be a question of standing in the appeal from the criminal conviction, could there not, as to whether a man has standing to raise this claim?

MR. VICK: Well, Your Honor, I was almost prepared to concede that, on the basis of some decisions that have been handed down by this Court recently. However, it is an arguable point.

That concludes --

QUESTION: In Louisiana, could the Legislature give exemptions? With the present --

MR. VICK: Not --

QUESTION: With the present Constitution, they couldn't touch it, could they?

MR. VICK: Not under the present Constitution.

May it please Your Honor, if you will read -- that is the entire purpose of taking it out of the Legislature's hands.

Mr. Ambrose Landry, who introduced the resolution, making it reflecting what it does now in the present, in the new Constitution, was the president of the Clerks of Court Association. He said, unequivocally, that he wanted to take it out of the hands of the Legislature and put it in the hands of the Supreme Court.

QUESTION: I mean, on the language itself, doesn't it preclude the Legislature?

MR. VICK: Unequivocally.

QUESTION: Yes, that's what I thought.

MR. VICK: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Ms. Ginsburg.

ORAL ARGUMENT OF MS. RUTH BADER GINSBURG,

ON BEHALF OF THE APPELLEES

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

I will address, first, appellants' mootness suggestion.

In a judgment entered in September 1973, Louisiana Constitution, Article VII, Section 41, and legislation enacted pursuant to it, were declared unconstitutional by the federal District Court for the Eastern District of Louisiana, sitting as a three-judge court.

Article VII, Section 41, precludes jury service by women who do not file with the Clerk of the Court a written declaration of their desire to serve.

On April 20th, 1974, while this appeal was pending, Louisiana adopted a new Constitution, to become effective at the start of 1975.

On the basis of that development, appellants suggest that this controversy, although not now moot, will become moot on January 1st, 1975.

The new Constitution, as Appellants point out, provides that all citizens who have reached the age of majority are eligible for jury service. It authorizes the Legislature to provide additional qualifications. The Legislature has not yet had its session, to implement the

constitutional provisions; and it directs the Louisiana Supreme Court to provide by rule for exemption.

The Draft Order on exemptions under the new Constitution, annexed to appellants' memorandum suggesting mootness, is at this stage merely a proposal. It's interesting to note that it was drafted by Justice Tate, who has been a consistent dissenter from the Louisiana Supreme Court opinions upholding the jury service exemption for women.

The volunteers only scheme remains fully operative until that system is discarded and replaced by a system that renders women and men equally amenable to jury service --

QUESTION: Would that be true after January 1st?

MS. GINSBURG: There's no way of knowing --

QUESTION: Is that the -- the volunteers only, would that continue after January 1st, until there was a Supreme Court rule?

MS. GINSBURG: Unless and until something comes from the Supreme Court or from the Legislature, there is nothing on which to base a change. There is just a constitutional provision -- an absence of a constitutional provisions where there was one before.

In Hoyt v. Florida, there was no constitutional provision involved, there was a statute.

QUESTION: What does -- what will the new Constitution say about jury service, Ms. Ginsburg?

MS. GINSBURG: It will say simply -- and this is practically verbatim from the text: All citizens who have reached the age of majority are eligible for jury service. Well, women are now eligible for jury service. And then it authorizes the Legislature to provide, and the expression is, additional qualifications, and it directs the Louisiana Supreme Court to provide by rule for exemptions.

QUESTION: What if neither of those bodies act, and you simply have the constitutional provision and nothing else, what's the clerk of a typical District Court --

MS. GINSBURG: Likely still to follow the statute, Louisiana Code of Criminal Procedure 402, which says that you don't put women on the list unless they register. That statute would still be in force, unless the Legislature acts to --

QUESTION: Well, wouldn't it be inconsistent with the constitutional provision that says all persons are eligible?

MS. GINSBURG: All persons are eligible for jury service -- well, all citizens are eligible for jury service in Louisiana now. It isn't a question of women's ineligibility. The question is whether they ought to be accorded an exemption under which they are not put on the list unless they affirmatively come in and volunteer for service.

Appellees, and the class they represent, are female

citizens of Louisiana, engaged in State court litigation in which trial by jury is sought.

They maintain that the Louisiana jury selection system, which effectively excludes more than half the population eligible for jury service, impacts adversely upon the State's adjudicatory system and denies all litigants jury trials consistent with representative government and a democratic society composed of men and women. More particularly, they assert that the Louisiana jury selection system denies them the equal protection of the laws and due process of law, because the system precludes any possibility that their cases will be tried by a jury drawn from a representative cross-section of the community.

Rather, the system assures that their peers, members of their sex, 53 percent of the population eligible for service are almost totally absent from the jury pool.

Appellees' standing to challenge the absence of members of their class is evident. Women are surely a cognizable group within the community. They are a readily identifiable class, singularly constant in membership.

As litigants, women are no less entitled to maintain a challenge of this kind than are members of a racial, national origin or religious group.

QUESTION: And the class was what, the plaintiffs' class?

MS. GINSBURG: There were three classes in the action, as instituted in the District Court. Judge Rubin left open the question of the standing of two of those classes. He declared that the class of women litigants had standing, and therefore it was unnecessary to decide whether the class of women as potential jurors, or of men as potential jurors, had standing.

QUESTION: So that he allowed the class of women litigants or potential women litigants?

MS. GINSBURG: Yes.

QUESTION: Only potential? Just potential, none of them are actually litigants?

MS. GINSBURG: Oh, yes, they were. In fact, Judge Rubin points specifically to Jenny Lee Smith Baggett, one of the named representatives of the class of litigants. She had filed a civil damage action.

QUESTION: Civil and/or criminal litigants?

MS. GINSBURG: That presented a certain problem. The difficulty of joining women who were enmeshed in the criminal process in a civil litigation before a three-judge court. So our named representatives are all civil litigants, not criminal litigants.

However, they assert the interest of women litigants generally in both proceedings.

This Court noted in Ballard v. United States, --

QUESTION: And the claim is that they -- what is their claimed damage? What is their claimed injury?

MS. GINSBURG: Well, two claims. One, that they are denied equal protection, as any other well-defined group would be, by the total absence of their peers from the jury.

QUESTION: Well, I thought the new theory was that there's very little difference between men and women, and so wouldn't men jurors be their peers?

MS. GINSBURG: Well, I'm not aware of that new theory. I subscribe, and I think most people do, to the theory announced by one of the Justices some years ago, in Ballard v. United States, that the two sexes are not fungible; that the absence of either may make the jury even less representative of the community than it would be if an economic or racial group were excluded.

QUESTION: What was the other injury? You said one was denial of equal protection to actual and potential --

MS. GINSBURG: And the other is denial of due process, the right of every litigant, who is subject to jury trial, to a jury that is drawn from a representative cross-section of the community. That is a right of all litigants, male or female, to that jury composed of a representative cross-section.

The difficulty for the three-judge court was this Court's 1961 --

QUESTION: What is the source of that?

QUESTION: Yes.

MS. GINSBURG: What is the source of that?

QUESTION: What provision of the Constitution do you rely on?

QUESTION: Due process clause.

MS. GINSBURG: Well, due process, yes.

QUESTION: What decisions?

MS. GINSBURG: This Court has expressed in, for example, Thiel v. Southern Pacific Co., 328 U.S. --

QUESTION: That was a federal court case, wasn't it?

MS. GINSBURG: Yes. But the proposition expressed there went beyond supervision of the federal judicial system. The Court said that the "American tradition of trial by jury, in criminal or civil cases, necessarily contemplates an impartial jury drawn from a cross-section of the community."

QUESTION: Well, but the State could try these civil cases without any jury at all, as far as any decision in this Court is concerned, I suppose?

MS. GINSBURG: Yes, there is -- well, at least, I should put it, even if there is no Seventh Amendment right to jury trial in a State court, once the State does provide a jury trial, just as once the State does provide a grand jury, though it's not required, then its selection and procedures

become subject to equal protection and due process scrutiny, as does any other State action.

On the merits, Hoyt v. Florida upheld the statute virtually identical to the scheme at issue here, and, indeed, this Court has not yet explicitly reconsidered its 1880 dictum in Strater v. West Virginia, 100 U.S. at 310, that a State may constitutionally confine jury duty to males. After Strater but before Hoyt in 1947, in Fahy v. New York, 332 U.S. --

QUESTION: That's the blue ribbon.

MS. GINSBURG: -- the blue-ribbon jury was contested, but also New York's automatic exemption of women, the Court upheld that women only exemption, and in the process indicated that women might be beyond the pale of the Fourteenth Amendment.

The majority opinion in Fahy asserts that though there may be no logical reason for differential treatment of men and women for jury service purposes, the States are constitutionally compelled to acknowledge only one aspect of women's full membership in the political community, her Nineteenth Amendment right to vote.

The Fahy Court was relying exclusively on the fact that well into the Twentieth Century it was the virtually universal practice in the United States to allow only men to sit on juries.

Appellants have asserted in their Jurisdictional Statement, and appellees agree, that this case presents an appropriate occasion for the Court to articulate guidelines and standards with respect to the equal amenability of women and men to jury service, because this Court's own past pronouncements have operated not merely to sanction women only jury service exemptions, dubious from the start, but to impede change, long overdue, though a majority of States now treat jury service as a basic civil right as well as a fundamental civic responsibility.

QUESTION: Is Louisiana -- Louisiana is unique, as I understand it from the brief, is it not?

MS. GINSBURG: In the registration system. There are six other States that have one slight variant on that. Women are placed in the jury pool, but they are exempt simply because they are women. And then there are several other States that have a range of women only exemptions.

And these exemptions persist well into the 1970's, and challenges to them are rejected summarily by both federal and State courts.

QUESTION: On the basis of Hoyt, I suppose?

MS. GINSBURG: Yes, and Hoyt is precedent.

QUESTION: Yes. What's the present status, Ms. Ginsburg, of the proposed equal rights amendment to the Constitution of the United States? Do you happen to know?

MS. GINSBURG: The proposed amendment has been ratified by 33 States. The period in which ratification is open runs until 1979.

QUESTION: '79?

MS. GINSBURG: Yes.

QUESTION: And it requires how many States?

MS. GINSBURG: Thirty-eight.

QUESTION: Thirty-eight. And it's been ratified by --?

MS. GINSBURG: Thirty-three.

QUESTION: Thirty-three.

QUESTION: That includes the two withdrawals --

MS. GINSBURG: No, no, that's a question not appropriate to go into at this point. But two have purported to withdraw their ratification.

QUESTION: And you're including those two in the thirty-three?

MS. GINSBURG: No, I am not. It would be thirty-one if those withdrawals were effected.

QUESTION: So you are including those two in the thirty-three.

MS. GINSBURG: I'm including them, yes.

QUESTION: Yes. Yes.

MS. GINSBURG: That's correct. Yes, I am.

QUESTION: So there are at least five to go,

between now and 1979.

MS. GINSBURG: At least five; if you accept the argument that withdrawal is effective, then seven.

QUESTION: Yes. How many have affirmatively rejected it?

MS. GINSBURG: I don't know what the count is on that. A number of States have rejected it, but that doesn't -- that's not binding. A State that once rejects, I think that's --

QUESTION: Can later approve.

MS. GINSBURG: Yes.

QUESTION: So long as it's done before 1979.

MS. GINSBURG: Yes. Yes.

QUESTION: Or by the date in 1979.

MS. GINSBURG: Yes. And of course, as would be expected, the States that have already ratified were States in which the ratification campaigns were easier than the remaining States.

QUESTION: Yes. I ask that because I'm reminded that there was some discussion of that proposed amendment in the Frontiero opinion, and it has some relevance in --

MS. GINSBURG: Yes. Yes. The progress has been slow since the Frontiero opinion on ratification.

QUESTION: "Since" or "because of"?

MS. GINSBURG: I think it's unrelated.

QUESTION: You think what?

MS. GINSBURG: Unrelated.

QUESTION: Oh.

MS. GINSBURG: Well, I might say that with respect to the Strater dictum, and without regard to any bold dynamic developments, that dictum is totally understandable in its historic context.

The common law jury was composed of free and lawful men, not women. And Blackstone had explained, in the Third Volume of his Commentaries, that though the Latin word "homo" referred to members of both sexes, the female was of course excluded from jury service because of the defects of her sex, and that pattern was accepted in the Nineteenth Century, even early Twentieth Century United States: Why should the women serve on juries when they couldn't vote or hold office, when many of them, married women, were subject to a range of legal disabilities that drastically curtailed their scope of activity.

Hoyt, decided just thirteen years ago, is not susceptible to the same kind of historical interpretation, but it may be explained on the basis of an assumption, apparently indulged by the Court, that the volunteers only system might yet yield substantial female participation. The system had been in effect in Florida only some ten years at the time Hoyt was tried.

Until 1949, Florida limited jury service exclusvely to men. The three concurring Justices were unable to say, based on the Hoyt record, that Florida failed to make an effort to have women perform jury duty, and the majority opinion suggests that appellant Hoyt had not ruled out other circumstances or chance as one of the reasons for the paucity of women jurors.

But in the instant case, it is not disputed that the Lousiana selection system and only that system, not other circumstances not chance, produces jury lists that rarely include any women's names.

Based on the stipulated facts, the court below found that Louisiana's benign dispensation, not chance, yields jury panels that never include more than five percent women and frequently less.

Significantly, Mr. Justice Douglas, who concurred in Hoyt, later acknowledged that inevitably a volunteers only system results in almost as total an exclusion as would obtain if women were not permitted to serve at all. For, as --

QUESTION: Is there any variation among the counties, or parishes, I guess you call them in Louisiana?

MS. GINSBURG: I have not made a survey, but I think that the -- the stipulation was generous, that not more than ten percent, and I think, I suppose --

QUESTION: Anywhere within the State.

MS. GINSBURG: Within the State, yes.

QUESTION: Let's assume that by the time this case is decided there's a new rule in Louisiana that does not exclude women, women and men are treated exactly alike with respect to jury duty, would this case be moot or not?

MS. GINSBURG: By the time this case is decided, in other words, if an exemption similar to the one attached to the memorandum is adopted and if the Legislature doesn't put on additional qualifications, if the list -- that's an important thing, the implementation of it --

QUESTION: Well, just answer my question, though: let's assume that women and men are treated exactly alike, under whatever new rule is adopted.

MS. GINSBURG: Yes. Then there is the difficulty in my case that is not present in Taylor, that is, in showing injury. If you're --

QUESTION: All the women would -- all your women plaintiffs would be eligible for -- will be treated just like men --

MS. GINSBURG: Yes. And they're not claiming damages for the past --

QUESTION: -- and your litigants and your civil litigants would have a right -- your potential litigants and litigants who haven't had their cases tried would --

MS. GINSBURG: That's right.

QUESTION: -- would have --

MS. GINSBURG: That's right.

QUESTION: So your case would be pretty -- pretty empty, wouldn't it?

MS. GINSBURG: If that happens. We don't -- it's your speculation whether it will happen.

QUESTION: Well, I understand that.

MS. GINSBURG: Yes. It would be certainly difficult --

QUESTION: Well, have you any idea, Ms. Ginsburg, what the State plans in that regard? Is the plan to have the circulated Supreme Court document, and whatever the Legislature is going to do, all accomplished before the 1st of January?

MS. GINSBURG: It should be accomplished before the 1st of January, because that's when the new Constitution goes into effect. Whether it will be, I don't know. I was told that the call --

QUESTION: But the plan is to have it by then, is that it?

MS. GINSBURG: Yes, I think that that is right. That is the plan.

QUESTION: And is it true that the rule that is circulating is what's represented would be circulating in

the courts?

MS. GINSBURG: Yes. That is a draft rule, drafted by Justice Tate, that is now circulating. What --

QUESTION: Assume that rule becomes law.

MS. GINSBURG: That rule, I must say, is a model for jury exemptions. It makes no distinction whatever between men and women. It permits for excuses based on individualized circumstances. And so that, in fact, is the rule that appellees wish Louisiana had.

QUESTION: Have any of your actual women litigants had their cases tried yet?

MS. GINSBURG: No, not -- not at this time.

QUESTION: And you don't ask us to pass on the standing of any other group here? You --

MS. GINSBURG: The standing of the other groups --

QUESTION: You're supporting the decision below?

MS. GINSBURG: Well, the decision below was to recognize clearly the standing of one group. The standing of another group, I think women as potential jurors, is also clear in Judge Rubin's opinion, at page 1114, he does find unequivocally that women as jurors are denied equal protection. He says, the system conspicuously fails to meet the equal protection requirements for women as potential jurors.

Since he made that finding on the merits, it's difficult to understand why he left open the standing question

and, indeed, appellants --

QUESTION: Well, it's not difficult, if he says -- if he says a potential -- a woman who wants to serve on the jury, claiming she's denied equal protection of the law, all she has to do is go ask.

MS. GINSBURG: That was not -- that was not his position, and I suppose it wasn't because that's -- we could make an analogy to voting: suppose there was a requirement that, while all women were eligible to vote, but they must come in and register, while the men are automatically added to the list when they reach the age of eighteen.

I suppose that would also be something the women could do if they wanted to, but that additional burden, I think, would be --

QUESTION: But he did pass up their standing, the standing of --

MS. GINSBURG: On the basis of the size of the class, not on the basis that they could register for service.

QUESTION: What difference does it make if you've got one class and you win, will you be satisfied?

MS. GINSBURG: Yes, of course, I'd be delighted.

QUESTION: I thought so.

MS. GINSBURG: Finally, I'd like to deal with the purported justifications for Hoyt that are heard in Louisiana, and in federal and State courts, passing on similar though

slightly less extreme exemptions.

Two points are made. One is that it's administratively convenient to exclude the women as a class; and the other is we must be concerned with family stability.

As far as the administrative convenience of a lump exemption over individual hardship excuse is concerned, this Court's decisions in Reed v. Reed, 404 U.S., and Frontiero v. Richardson, 411 U.S.,should be dispositive, administrative ease is not sufficient to justify legislative resort to a gender criterion.

With respect to insuring the care of dependents, particularly small children, the women only exemption is appallingly overbroad and stereotypically under-inclusive. Overbroad because it includes the childless woman, the woman whose children are grown, the woman who can provide, without hardship, for the care consistent with her family's needs while she's away from home.

And under-inclusive, because it does not encompass men, among them widowed fathers, husbands with incapicitated wives, whose presence at home may be essential to the family's well-being.

But the total irrationality of the Louisiana classification is demonstrated by Census data and labor market statistics.

Focusing on the statistics for Louisiana, set out

at pages 18 and 19 of our brief, in 1970, 59 percent of Louisiana's total adult female population had no children under eighteen, and of the 41 percent with children under eighteen, 37 percent were in the labor force.

Thus, for nearly three-quarters of the population covered by this benign dispensation, child care is not a factor determining involvement in civic responsibilities or in employment outside the home.

National statistics are similar.

QUESTION: Ms. Ginsburg, Hoyt v. Florida was decided a little less than thirteen years ago.

MS. GINSBURG: Yes.

QUESTION: And it was a unanimous Court.

MS. GINSBURG: Yes.

QUESTION: You seem to treat it fairly cavalierly, talking about its purported justification and so on.

MS. GINSBURG: Well, I think that there are two reasons I did not intend to be cavalier.

There was the point that -- two points: one, there was no assurance at that time that this system would in fact produce no women. The three concurring Justices indicated that. That maybe if Florida makes a good-faith effort to try to get women, women will serve. Later, I think it's been acknowledged that, as a practical matter, a volunteers

only system, whether it's offered to men or women, will lead to virtual absence of that group from the jury people, simply do not -- most people do not volunteer for what they might regard as a burdensome civic responsibility.

That was one aspect of it.

The other aspect of it was that the statistics in Hoyt, not the same as those presented here, in addition to the tremendous increase, even in this short period of time, women's participation in the labor force, but the Hoyt Court never adverted to all the unemployed women who do not have child care responsibilities. That was another factor.

And a third factor was the concentration in Hoyt on the woman as potential juror. This was a benign dispensation of favor to her, she could serve if she wanted to, but she had no responsibility to serve.

QUESTION: In that respect it was somewhat like Shevin v. Kahn, wasn't it?

MS. GINSBURG: Well, if I may take a cue from Mr. Justice Brennan on that, his remark yesterday, Kahn v. Shevin was a tax case, and the dominant theme of that opinion is the large leeway for line-drawing permitted to the States in making tax classifications.

But what -- the focus on women jurors caused the Court to lose sight of what should have been the principal focus. That action -- in that action, the defendant's crime

was committed after an altercation, in which she claimed her husband has insulted and humiliated her to the breaking point, convicted of second-degree murder by an all-male jury, she believed that women jurors might better understand her state of mind when she picked up a baseball bat and administered the blow that led to the litigation.

The Court did not focus on denials of equal protection and due process to Mrs. Hoyt, the focus was on the benign nature of the classification to women as jurors rather than the unfairness to the litigant. And that, viewed in that light, the overriding consideration really should not be the burden or the benefit of jury service to prospective jurors, but the fairness of the system to litigants.

QUESTION: Well, Louisiana has age limits, I guess, doesn't it?

MS. GINSBURG: No. It provides, I think it --

QUESTION: Can a two-year-old child serve --

MS. GINSBURG: Oh, I'm sorry. I thought you meant upper age limit. Yes, it certainly does. Eighteen is the age limit.

QUESTION: And under the draft proposal I think it says seventy, over seventy?

MS. GINSBURG: Seventy would be the basis for an exemption, I think. I don't --

QUESTION: Yes.

MS. GINSBURG: -- think that people are off the list.

QUESTION: In other words, if a 75-year-old man is a litigant, does he have a lawsuit? That he doesn't get a jury of his peers.

MS. GINSBURG: A 75-year-old -- no, because there is a tremendous difference between age, which is something that happens to all of us.

QUESTION: Say a 75-year-old man or a woman.

MS. GINSBURG: And sex, which is immutable and doesn't change. And that's why age classifications should not properly be considered in the same light as classification based on a factor like race or sex or national origin, something that is not going to happen to everybody. You're put in that status at birth, and you can't get out of it.

QUESTION: Well, with some few exceptions.

MS. GINSBURG: With some very few exceptions, yes.

[Laughter.]

QUESTION: Like you read about in the papers sometimes.

MS. GINSBURG: Yes.

QUESTION: Well, at least Hoyt put to rest any claims at that time, anyway, that there was something biased about juries without women on them.

MS. GINSBURG: I don't think that it put --

QUESTION: And in that respect, in that respect Hoyt can hardly be squared, can it, with this three-judge court decision?

MS. GINSBURG: Though Hoyt cannot be squared with this three-judge court decision, this three-judge court said that Hoyt was --

QUESTION: And you can talk about --

MS. GINSBURG: -- sterile precedent and --

QUESTION: I mean there are other reasons talked about in Hoyt and other jury cases, where you focus on the equal protection ramifications of excluding some potential jurors from serving on the jury, without reference to who the defendant is, or what the consequences to the defendant might be.

MS. GINSBURG: Yes.

QUESTION: But Hoyt involved a woman defendant in a criminal trial.

MS. GINSBURG: Yes, and I think that the --

QUESTION: And the question was, one of the questions was: whether exclusion of women meant that there was an unfair jury, not whether there's some other --

MS. GINSBURG: Well, that, after all, women are like men, so that a representative cross-section can be achieved by having men represent women.

QUESTION: I know, but the judgment you're defending

is that excluding women means that there are unfair, biased juries.

MS. GINSBURG: Now, this --

QUESTION: Now, what's happened since Hoyt?

MS. GINSBURG: This Court has acknowledged that --

QUESTION: To convince you that juries without women on them are more unfair today than they were fifteen years ago?

MS. GINSBURG: If it were necessary to prove the unfairness in any particular case, that would be a virtually impossible standard.

QUESTION: Well, what's happened -- what's happened to, say, that in -- in enough cases that it happens, that you ought to have a general rule about it?

MS. GINSBURG: Well, there is a general rule, I believe, stemming not only from Thiel but from, oh, Williams against --

QUESTION: Well, there wasn't in Hoyt.

MS. GINSBURG: No, there certainly wasn't in Hoyt, but there have been a lot of jury cases in this Court, Carter v. Jury Commission, Williams v. Florida, talking about the essential attributes of a jury trial, and one of the critical attributes is that it be drawn from a representative cross-section of the community, something that cannot be achieves if women are absent.

QUESTION: But I suggest to you that the representative cross-section requirement is more related -- more related to equal protection than due process, in the sense of unfairness. Equal protection in the sense of protecting members of the community from exclusion from jury service.

MS. GINSBURG: Well, I think that it has come up in at least three contexts: equal protection, due process, and then, specifically in the context of the Sixth Amendment --

QUESTION: Well, do you know of a case that says because of their -- because of the lack of a fair cross-section, just generally a fair cross-section, that you conclude that there is an unfairness in the jury in the sense that it's biased or that it would be an unreliable result?

MS. GINSBURG: A case in this Court? There are several District Court decisions.

QUESTION: You have a lot of them -- all of them that say you have to have a fair cross-section, but --

MS. GINSBURG: Yes.

QUESTION: -- it's a question of what interest you're talking about, that that requirement furthers.

Now, this District Judge didn't say that the problem here was a cross-section problem, it was a problem of excluding women, and that it was that a jury without women on it, trying a woman defendant, would be unfair.

MS. GINSBURG: The Court, I think, said that in its due process discussion, in the context of the cross-section requirement. What it did say was that the absence of women makes impossible this cross-section. The cross-section is essential to the integrity of the jury system, is inherent in due process of law, and therefore is a safeguard for all litigants.

That was the determination of the court below. Similar to the position taken by Justice Marshall in Peters v. Kiff.

I think I have used up my time.

MR. CHIEF JUSTICE BURGER: I am not sure you need any defense, Ms. Ginsburg, but your brief and argument was much less cavalier toward Hoyt than the three judges of the Fifth Circuit.

Mr. Vick, do you have anything further?

MR. VICK: No, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: All right. The case is submitted.

[Whereupon, at 11:36 a.m., the case in the above-entitled matter was submitted.]