

No. _____

In the
Supreme Court of the United States

Michelle L. Sweat,
Petitioner

v.

State of Georgia,
Department of Human Resources,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In view of the facts established by undisturbed judicial findings of the Superior Court of Georgia for Atkinson County upon uncontradicted evidence, viz., that the child support guidelines imposed by Section 19-6-15 of the Official Code of Georgia Annotated do not assume an equal and shared duty of father and mother to pay the actual costs of providing the reasonable needs of their children in proportion to the income and resources available to each, but rather impose a duty solely upon the non-custodial obligor to pay child support which is calculated only in relation to his or her income or resources without any consideration of the income or resources of the other parent, and is wholly unrelated to and often far in excess of the actual costs of raising the child or children in question,

-- Are such guidelines null and void under the guarantee of equal protection of the laws in Amendment XIV to the United States Constitution, because they do not treat men and women equally and are thus inherently discriminatory on account of sex?

-- Are such guidelines null and void under the guarantee of family privacy in Amendment XIV, because they needlessly intrude upon the discretion of parents to raise their children as they see fit, once the reasonable needs of the children have been fairly met?

-- Are such guidelines, as statutory presumptions, null and void under the guarantee of due process in Amendment XIV of the United States Constitution, because there is no reasonable relationship between the basic facts and the facts which must be presumed for a proper award of child support?

TABLE OF CONTENTS

Question Presented For Review

Table of Authorities

Parties

Jurisdiction

Constitutional Provisions

Statement of the Case

Reasons Why The Writ Should Be Granted

Conclusion

Appendix A, Order of the Supreme Court of Georgia, June 2, 2003,
denying reconsideration and rehearing

Appendix B, Opinion of the Supreme Court of Georgia, April 29, 2003,
reversing the final judgment of the Superior Court

Appendix C, Findings and Order of the Superior Court of Georgia for
Atkinson County, February 25, 2002, declaring Georgia's child support
guidelines void and unconstitutional [economic exhibit adopted
as part of the findings not included here, as recommended by
administrative personnel of the United States Supreme Court]

Appendix D, Section 19-6-15 of the Official Code of Georgia Annotated

TABLE OF AUTHORITIES

Federal Cases:

Adkins v. Children's Hospital, 261 U. S. 525 (1923)
Frontiero v. Richardson, 411 U. S. 677 (1973)
Griswold v. Connecticut, 381 U. S. 479 (1965)
J. E. B. v. Alabama ex rel. T. B., 511 U. S. 127 (1994)
Keyes v. School District No. 1, 413 U. S. 189 (1973)
Leary v. United States, 395 U. S. 6 at 32-37 (1969);
Manley v. Georgia, 279 U. S. 1 (1929)
Mississippi University for Women v. Hogan, 458 U. S. 718 (1982)
Orr v. Orr, 440 U. S. 268 (1979)
Pierce v. Society of Sisters, 268 U. S. 510 (1925)
Powers v. Ohio, 499 U. S. 400 (1991)
Troxel v. Granville, 530 U. S. 57 (2000)
United States v. Virginia, 515 U. S. 518 (1996).
Vladnis v. Kline, 412 U. S. 441 (1973)
Western & Atlantic R. R. v. Henderson, 279 U. S. 629 (1929)
Wisconsin v. Yoder, 406 U. S. 205 (1972)

Cases from the State of Georgia:

Clark v. Wade, 273 Ga. 587, 544 S. E. 2d 99 (2001)
Ehlers v. Ehlers, 264 Ga. 668, 449 S. E. 2d 840 (1994)
Georgia Power Co. v. Harrison, 253 Ga. 212, 318 S. E. 2d 306 (1984)
Georgia Department of Human Resources v. Sweat, 276 Ga. 627, --- S. E. 2d --- (2003)
Hughes v. Cobb County, 264 Ga. 128, 441 S. E. 2d 406 (1994).

Cases from States other than Georgia:

Conway v. Dana, 318 Atl. 2d 324 (Pa. 1974).
Commonwealth ex rel. Spriggs v. Carlson,
368 Atl. 2d 635 (Pa. 1977)
Houston & Texas Central Ry. v.
Dallas, 84 S. W. 648 (Tex. 1905)

Melzer v. Witsberger, 480 Atl. 2d 991 (Pa. 1984)
Moylan v. Moylan, 384 N. W. 2d. 859 (Minn. 1986)
Parrett v. Parrett, 432 N. W. 2d 664 (Wisc. App. 1988)
Smith v. Smith, 626 P. 2d 342 (Ore. 1981)
State ex rel. Watts v. Watts,
350 N. Y. S. 2d 285 (N. Y. Fam. Ct. 1975)

Federal Statutes and Rules:

Federal Family Support Act of 1988 (42 United States Code, Sections 666-667,
implemented by 45 Code of Federal Regulations, Sections 302..55-302.56)
Rules of the United States Supreme Court, Rule 10
Rules of the United States Supreme Court, Rule 13
28 United States Code, Section 1257
28 United States Code, Section 2101

Provisions of the United States Constitution:

Amendment XIV, Section 1passim

Statutes enacted by the State of Georgia:

Section 19-6-15 of the Official Code of Georgia Annotated.....passim

Professional Literature:

William C. Akins, *Why Georgia's Child Support Guidelines Are Unconstitutional*, 6 Georgia Bar Journal, No. 2, pp. 8-14, 54-57 (October 2000).

Thomas W. Wexler, *Child Support Guidelines: Constitutional and Logical Infirmities*, 54 Hennepin Lawyer, No. 4, pp. 12-14, 26-28 (March-April 1985).

Technical Reports:

Development of Guidelines for Child Support Orders, Advisory Panel Recommendations and Final Report, Office of Child Support Enforcement, United States Department of Health and Human Services, 1987

Jacques van der Gaag, *On Measuring the Cost of Children*, Technical Papers, Vol. III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982.

Comes now your petitioner Michelle L. Sweat, and she shows this honorable Court the following particulars in support of her petition for writ of certiorari to the Supreme Court of Georgia, to wit:

PARTIES

Your petitioner seeks relief in her own right against the State of Georgia, Department of Human Resources as respondent, which, in proceedings described hereinafter, acted in lieu and as representative of Samuel E. Sweat Sr., and of Robin Kayla Sweat, Samuel E. Sweat Jr., and Cynthia M. Sweat, children born in wedlock of the said Mr. Sweat as their natural father and your petitioner as their natural mother.

JURISDICTION

Your petitioner seeks reversal of a judgment of the Supreme Court of Georgia in *Georgia Department of Human Resources v. Michelle L. Sweat*, Docket No. S03A179, as entered on April 29, 2003, the same reproduced in Appendix B hereof, accessible at 2003 Ga. LEXIS 360, and officially reported as 276 Ga. 627 (2003). A petition for rehearing, styled “motion for reconsideration” in keeping with local practice, was made before and denied by the Supreme Court of Georgia on June 2, 2003, by order whereof a copy has been reproduced in Appendix A hereof.

Jurisdiction to review this cause on writ of certiorari is premised on 28 United States Code, Section 1257, insofar as it permits this Court to review the final judgment of the highest court of a State in which a decision could be had, and in which the validity of a statute of a State has been drawn into question on grounds that such statute is repugnant to the United States Constitution, in this case guarantees of equal protection, family privacy, and due process in Amendment XIV. In this case, the statute so drawn into question is Section 19-6-15 of the Official Code of Georgia Annotated, which is reproduced in Appendix D hereof, and was declared unconstitutional by the Superior Court of Georgia for Atkinson County as reflected in Appendix C hereof, then upheld as constitutional by the Supreme Court of Georgia as reflected in Appendix B hereof.

Jurisdiction to review this cause on writ of certiorari is also premised on 28 United States Code, Section 2101(c), and Rule 13 of the Rules of the Supreme Court of the United States,

insofar as they permit such review on petition filed within 90 days of the order of the court of last resort in the State denying a petition for rehearing, in this case the order of the Supreme Court of Georgia, dated June 2, 2003, denying the “motion for reconsideration,” procedurally equivalent and amounting to a petition for rehearing in the State of Georgia, the same reproduced in Appendix A hereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on those clauses in Amendment XIV, Section 1 of the United States Constitution, insofar as it provides, “. . . nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction equal protection of the laws.” The statute which your petitioner contends is contrary to the foregoing provision is Section 19-6-15 of the Official Code of Georgia Annotated, which is lengthy and so is reproduced in Appendix D hereof.

STATEMENT OF THE CASE

The facts of this case are described in detail in the findings and decree of the Superior Court of Georgia in Atkinson County, dated February 25, 2002, declaring unconstitutional the child support guidelines set forth of Section 19-6-15 of the Official Code of Georgia Annotated, said findings and decree reproduced in Appendix C hereof. In due course that order was reduced to a final judgment, and a discretionary appeal was allowed and taken to the Supreme Court of Georgia which reversed the Superior Court, holding that the said guidelines are constitutional. A final judgment was rendered by the Supreme Court of Georgia on April 29, 2003, which has been reproduced in Appendix B, and thereafter rehearing was denied on June 2, 2003, as appears in Appendix A.

Stripped of unessential details, the former husband of your petitioner, Samuel E. Sweat Sr, and your petitioner were divorced in November 1998. Upon their agreement, Mr. Sweat retained custody of the three children, and your petitioner was to have substantial visitation rights or parenting time, but would not pay cash child support, since his income is far greater than the income of your petitioner. In July 2000, at Mr. Sweat’s request, the respondent Georgia Department of Human Resources intervened and, upon application of the child support guidelines imposed by Section 19-6-15 of the Official Code of Georgia Annotated, assessed

your petitioner with a substantial cash amount per month in child support as such, and a further cash amount per month for health insurance. The amounts so assessed were oppressive to your petitioner.

As brought out in testimony upon this record, these guidelines were originally developed by Dr. Jacques van der Gaag to deal with cases in which the mother was on welfare and earning no income, while the father was absent and earning an average gross income of \$12,000 in the year 1982 (\$21,426 adjusted to the year 2000). These guidelines are designed to be applied only after a reserve had been set aside to pay the basic living costs of the father. The amount awarded was limited by the amount needed to reimburse public authority for the amount of the welfare payment. And, in any event, these guidelines did not consider the cost of raising children outside the context of poverty where both parents earn incomes. Dr. van der Gaag's tract is entitled *On Measuring the Cost of Children*, Technical Papers, Vol. III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982.

Section 19-6-15 of the Official Code of Georgia Annotated applies these guidelines to all classes of child support cases, including families in which both father and mother have substantial income and resources far above the welfare level, and share parenting tasks and costs. They are applied rigorously in Georgia. See, e. g., *Ehlers v. Ehlers*, 264 Ga. 668, 449 S. E. 2d 840 (1994). The amount to be paid under the Georgia statute is determined solely by a certain percentage of the obligor's gross income depending on the number of children, and the proportionate share of net income to be paid increases as the obligor's gross income increases, without any consideration of a self-support reserve for the obligor.

Your petitioner objected to the amounts assessed against her by motion challenging the constitutionality of the guidelines under Amendment XIV, and filed on February 26, 2001, in the Superior Court of Georgia for Atkinson County. Hearings were held before the Superior Court on October 29, 2001, and January 28, 2002. Received and entertained was uncontradicted expert testimony from an economist who for many years had served the Federal Reserve Bank of Atlanta, and is an expert in the field of child support and the cost of raising children in the United States. The testimony of this expert was based upon standard sources of public data, elaborately described and professionally analyzed in the text, tables, and diagrams of a 73-page economic exhibit which was adopted by the court as part of its findings. This exhibit is of public record in this case, and copies thereof can be supplied by your petitioner on request.

Judge C. Dane Perkins made nineteen numbered findings of fact on February 25, 2002, these fully set forth in Appendix C hereof. These findings have never been disturbed on appeal, nor could they be revised on appeal under the circumstances of this case. See, e. g., *Georgia Power Co. v. Harrison*, 253 Ga. 212, 318 S. E. 2d 306 (1984), and *Hughes v. Cobb County*, 264 Ga. 128, 441 S. W. 2d 406 (1994). As appears in Appendix C hereof, Judge Perkins found that the child support guidelines imposed by Section 19-6-15 of the Official Code of Georgia Annotated

- create rebuttable presumptions of what child supports awards should be (finding 1);
- were designed only for welfare-recovery situations (finding 1);
- apply under the statute even to non-welfare cases which constitute the vast majority of child support cases generally, yet were not designed to deal with such situations (finding 1);
- require payments constituting an increasing proportion of net income and resources of the obligor as such income and resources increase, whereas all available economic data indicate that the cost of raising a child decreases as a percentage of net household income. The State of Georgia was unable to present any economic data suggesting that the cost of raising a child increases as a percentage of net household income (finding 2);
- include no baseline components or definitions which may be addressed in rebuttal (finding 3);
- do not consider significant tax-related offsets enjoyed by the custodial parent (findings 4 and 6);
- are not related to the actual costs of raising a child (finding 5);
- give the custodial parent a huge windfall in excess of the actual costs of raising a child (finding 5);
- do not allocate the burden of child support according to the ability of both the custodial and the non-custodial parent to pay (finding 6);
- typically dictate awards which are disproportionate to the ability of the non-custodial obligor to pay (finding 6);
- are based solely upon the non-custodial parent's income and resources (finding 6);
- dictate awards which often include hidden but tax-free alimony (finding 7);
- dictate hidden alimony which often exceeds customary standards of fairness even for alimony (finding 8);

-- by using a range of percentages within which an award may fall for similarly situated non-custodial obligors, can dictate awards which require individuals with the same income and resources to pay materially different amounts of child support for the same number of children (finding 9);

-- can require awards which will push lower-income obligors beneath the poverty standard of living (findings 10);

-- do not consider the custodial parent's income and resources (finding 11);

-- consider the child costs of the custodial parent when the child is with the custodial parent, but not the similar or identical child costs of the non-custodial parent when the child is with the non-custodial parent (finding 12);

-- make it possible for obligors similarly situated to pay or avoid medical costs above the presumed amount (finding 13);

-- provide no consistent and clear guidance or standard for deviation from the presumed amounts (finding 14);

-- bear no reasonable relationship to economically appropriate awards (finding 15);

-- do not assume an equal duty of both parents to support their children (finding 16);

-- assume the non-custodial parent to be an obligor even in circumstances which might dictate an opposite result (finding 17); and

-- interfere with the non-custodial parent's discretion to raise his or her child as he or she sees fit, once all reasonable needs of the child have been met (finding 18).

Additionally, Judge Perkins found that, as applied to the particular circumstances of your petitioner, the said guidelines dictate a result which, in light of bankruptcy obligations, would drive her below a poverty standard of living (finding 18). He found also that Mr. Sweat has significantly higher income than your petitioner, and that the application of these guidelines to her gives Mr. Sweat significant tax-free income, together with important tax advantages, not to mention the earnings of his new spouse. The application of these guidelines, Judge Perkins found, would "constitute a windfall" to Mr. Sweat and a "financial disaster" to your petitioner. Judge Perkins found more generally that any calculation of child support on the basis thereof "would be so far removed from any economically rational and appropriate award" as to constitute a "gross error well beyond mere imprecision" (finding 19).

Judge Perkins held that procreation is a joint act and a joint responsibility; that, by reason of the constitutional guarantee of equal protection of the laws, both father and mother have an equal duty, free of any preference for or against the father or the mother on account of sex, to pay child support on an ability-to-pay basis; and that, by reason of family privacy protected by constitutional principle, the amount of child support imposed by the State is constitutionally limited to insuring that the reasonable needs of the children supported are met, and may not extend to extravagances or luxuries; and that the child support guidelines imposed by Section 19-6-15 of the Official Code of Georgia Annotated, considered as statutory presumptions, deny due process of law, and are, therefore, null and void, because the basic facts, viz., the gross income of the non-custodial obligor and the percentage of the non-custodial obligor's gross income demanded, are not reasonably related to what the presumed facts must be, given the constitutional standard of child support, i. e., the actual costs of providing the reasonable needs the children apportioned according to an equal duty of father and mother to provide those needs on an ability-to-pay basis. Upon entry of a judgment declaring the child support guidelines imposed by Section 19-6-15 unconstitutional, Judge Perkins adjusted the child support burden of your petitioner to an affordable level, whereupon a final judgment was entered. A discretionary appeal by the attorney general to the Supreme Court of Georgia was allowed and taken in view of the constitutional issues raised in the case.

The Supreme Court of Georgia reversed the judgment of the Superior Court outright and without remand, holding essentially that the guidelines imposed by Section 19-6-15 must be upheld if only there is some "rational basis" to sustain them, since, in the view of the court, no fundamental right, or protected class, or invidious discrimination was involved; that the guidelines imposed by Section 19-6-15 have a rational basis, because the amount to be paid depends on income level and the guidelines, considered as statutory presumptions, can be rebutted; that, therefore, Section 19-6-15 has a reasonable basis and is constitutional; and (in footnote 6) that, in any event, your petitioner had no standing to raise the question of sex discrimination prohibited by the constitutional guarantee of equal protection because she had not shown she was treated differently on account of her sex than a similarly situated man would have been.

A writ of certiorari is sought to review the judgment of the Supreme Court of Georgia.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. General Impact: A writ of certiorari should be granted, because the Supreme Court of Georgia has decided this case in a way which conflicts with the relevant constitutional decisions of this Court, and the questions of federal law here involved are of enormous practical importance in assuring that child support be fairly ascertained and promptly paid across the land. See Rule 10(c) of the Rules of the Supreme Court of the United States.

The outpourings of demagogues aside, hard experience teaches that the main reason for delinquencies in the payment of child support is not “dead beat” dads or moms, but unshared and unaffordable burdens unrelated to the costs of raising children. Give non-custodial parents fair access to their children and oblige them to pay support upon fair distribution of the burden of supplying actual needs, and there will be few delinquencies. That is the unmistakable lesson from real life.

Under the Federal Family Support Act of 1988 (42 United States Code, Sections 666-667, implemented by 45 Code of Federal Regulations, Sections 302.55-302.56), every State must have child support guidelines framed as rebuttable presumptions in order to receive appropriations offered by Congress as incentives for child support collection, and every State has now accepted these incentives which total many billions of dollars annually. The guidelines of some States are more satisfactory than the guidelines of other States. As found by Judge Perkins, the guidelines adopted by the State of Georgia are particularly ill-suited to the interests of justice. Very significant constitutional questions are common to all States, and this case offers an excellent opportunity for this Court to provide necessary guidance on relevant constitutional principles. Again see Rule 10(c) of the Rules of the Supreme Court of the United States. Untold thousands of lives have been wrecked under the excessive and unrealistic burdens imposed by these guidelines in Georgia and similar guidelines in several other States.

2. The Child Support Guidelines in this Case: Grave legal doubts, based on impeccable authority, have long existed concerning Wisconsin-style obligor-only welfare-recovery guidelines as applied to all private divorces. It has been judicially recognized that such guidelines, when mechanically applied in non-welfare cases, often produce unfair and excessive awards of child support. See, e. g., *Smith v. Smith*, 626 P. 2d 342 at 345-346 (Ore. 1981), and

Parrett v. Parrett, 432 N. W. 2d 664 at 672 (Wisc. App. 1988). Cf. *Moylan v. Moylan*, 384 N. W. 2d. 859 at 861-862 (Minn. 1986). An insightful discussion of such guidelines can be found in William C. Akins, *Why Georgia's Child Support Guidelines Are Unconstitutional*, 6 Georgia Bar Journal, No. 2, pp. 8-14, 54-57 (October 2000). A similar article published some years ago in Minnesota is by Thomas W. Wexler, *Child Support Guidelines: Constitutional and Logical Infirmities*, 54 Hennepin Lawyer, No. 4, pp. 12-14, 26-28 (March-April 1985).

The undisturbed and penetrating findings of Judge Perkins and these thoughtful articles in and of themselves demonstrate how very serious are the constitutional questions here raised, and why a writ of certiorari should be granted to resolve them for the benefit of our country.

3. The Standard of Review: The central question in this case arises in that Judge Perkins applied a fairly rigorous standard of review, pretty much in the tradition of classic cases like *Houston & Texas Central Ry. v. Dallas*, 84 S. W. 648 at 653-654 (Tex. 1905), which held that, where an exercise of general legislative authority rests upon assumed facts, those facts may be judicially examined, and, if upon such inquiry, it becomes evident that the means chosen are disproportionate or unrelated to an otherwise legitimate end, the statute should be declared unconstitutional. The Georgia Supreme Court applied a very relaxed “rational basis” standard of review on the pretext that there was no invidious discrimination or fundamental right involved in this case. But the Georgia Supreme Court plainly enough understood that, if invidious discrimination or a fundamental right were involved, a heightened standard of scrutiny would be called for.

Your petitioner insists that both invidious discrimination and a fundamental right are involved in this case for reasons made clear in the findings and analysis of Judge Perkins, but that these reasons were completely overlooked by the Supreme Court of Georgia. Your petitioner has a constitutional right to enjoy and standing to demand the protections of a heightened standard of scrutiny as becomes clear from an examination of the judicial decisions of this Court, and courts across the country applying principles determined by this Court.

Discrimination on account of sex requires a heightened standard of scrutiny, because the right to vote cannot be denied on account of sex, because the right to vote is inclusive and protective of other rights, and equal protection of the laws is guaranteed. See especially the opinions of Justice Sutherland in *Adkins v. Children's Hospital*, 261 U. S. 525 at 552-553 (1923), and Justice Brennan in *Frontiero v. Richardson*, 411 U. S. 677 at 685 (1973). And it

has been definitively established by this Court that sex discrimination mandated by statute is subject to a “strong presumption” of unconstitutionality, which can be overcome only by an “extremely persuasive justification,” as appears especially in the opinion of Justice Ginsberg in *United States v. Virginia*, 515 U. S. 518 at 531-534 (1996).

The right to family privacy is also constitutionally protected as a fundamental right, as such subject to heightened scrutiny, as appears in cases such as *Griswold v. Connecticut*, 381 U. S. 479 (1965). This fundamental right has no less been recognized by the same court as ignored it in this case. See, e. g., *Clark v. Wade*, 273 Ga. 587 at 594, 544 S. E. 2d 99 (2001).

Your petitioner maintains, as did the Superior Court of Georgia for Atkinson County, that a proper standard of child support must stay within limits prescribed by constitutional principle, including the prohibition of sex discrimination and the protection of family privacy, and that, if such standard inevitably or necessarily departs from those limits, it imposes invidious discrimination, invades a fundamental right, is subject to a heightened standard of scrutiny, is per se unconstitutional unless legally justifiable, and may be attacked on that basis by anybody against whom the statute is about to be enforced, regardless of other considerations.

For it has been held by eminent tribunals that, if a standard of child custody fails to distribute rights between father and mother equally, such standard is flawed with sex discrimination, and is, therefore, per se unconstitutional. See, e. g., *State ex rel. Watts v. Watts*, 350 N. Y. S. 2d 285 (N. Y. Fam. Ct. 1975), and *Commonwealth ex rel. Spriggs v. Carlson*, 368 Atl. 2d 635 (Pa. 1977), which struck down the old presumption that the mother should be granted custody of children of tender years.

4. Underinclusive Statutes and Standing: A question of unlawful sex discrimination is usually raised by application of a statute denying rights to a man or woman on account of sex. Thus, in *Mississippi University for Women v. Hogan*, 458 U. S. 718 (1982), a statute allowed nurses’ training for women but excluded men from such education: the men applying for admission to nurses’ training were deemed to have standing to raise the question of sex discrimination, and the statute imposing such discrimination was declared unconstitutional. The case of your petitioner is not of that kind. On this basis the Supreme Court of Georgia held that she had no standing to raise the question of sex discrimination, and that, since no such discrimination was involved, a relaxed standard of review was sufficient.

But the Supreme Court of Georgia completely overlooked that another kind of sex discrimination is actionable. If a statute unjustifiably operates to distribute rights and duties differently between men or women, such a statute is per se unconstitutional on account of sex discrimination, and anybody against whom the statute is enforced may challenge the statute, whether or not he or she has actually suffered discrimination on account of sex in the application of the statute.

The leading case is *Orr v. Orr*, 440 U. S. 268 (1979), in which a statute allowed alimony to women but not to men, and so was unconstitutional because it failed to distribute rights and duties equally without regard to sex. Justice Brennan characterized the statute as inherently discriminatory on account of sex and thus unconstitutional because it was “underinclusive.” A man who never sought alimony was sued by his former wife to collect arrears in alimony. He was allowed to challenge the statute on grounds of equal protection, and the statute was declared unconstitutional. And in *Orr*, 440 U. S. at 273, Justice Brennan specifically noted that the same principle applies to child support. The vice of the statute was not necessarily the formal distinction drawn, but the operative effect of distributing rights and duties differently between men and women.

Lest doubt remain, other cases have held that a litigant does not have to be a member of a class discriminated against in order to attack a law or practice inherently discriminatory on account of race or sex. It so appears unmistakably from *Powers v. Ohio*, 499 U. S. 400 at 410-416 (1991), which concerns discrimination on account of race, but the principle was acknowledged applicable as well to discrimination on account of sex in *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127 at 128 and 138 (1994).

In this case, the statute is inherently discriminatory against men or women on account of sex. The vice of the statute is not in the formal distinction drawn between custodial and non-custodial parents, but in its operative effect, for it excludes sharing of a burden of supporting children on the basis of an equal duty of fathers and mothers in keeping with their respective means. Under the highest law of the land, this burden must be equally shared on an ability-to-pay basis by men and women who become parents. In keeping with *Powers* and *J. E. B.*, your petitioner is harmed in fact, because the burden of child support is not so shared. Again in keeping with *Powers* and *J. E. B.*, your petitioner has a concrete interest in assuring that both men and women be treated equally so that the burden will be shared. And, yet further in keeping

with *Powers* and *J. E. B.*, the former spouse of your petitioner is hindered by asserting equality of men and women, because, if he did so, he would lose the benefit of the guidelines in seeking to assess more from your petitioner. Therefore, your petitioner has standing, not only under *Orr*, but under *Powers* and *J. E. B.*, to demand that men and women be treated equally.

Orr, reinforced by *Powers*, and *J. E. B.*, is the controlling authority, was completely disregarded and never cited by the Supreme Court of Georgia, yet was conscientiously noted and applied by the Superior Court. This Court should intervene to assure the integrity of its established precedents, for these precedents have been openly flaunted by the Supreme Court of Georgia, and thereby a significant injustice has resulted not only to your petitioner, but to untold thousands of her fellow citizens in Georgia and other States where such guidelines have been adopted, then applied inflexibly and mechanically.

The Supreme Court of Georgia noted that Section 19-6-15 of the Official Code of Georgia Annotated formally distinguishes between, not men and women as such, but custodial and non-custodial parents. Your petitioner answers that parents of children are, after all, fathers and mothers, i. e., men and women, and the statute does not assume and impose an equal duty upon fathers and mothers alike. The statute, therefore, inevitably and necessarily departs from distributing rights and duties equally between men and women, which is why the statute is subject to heightened scrutiny. De facto discrimination is as unlawful as de jure discrimination, and discrimination inevitably resulting or necessarily implied is as unlawful as discrimination formal and express. See, e. g., *Keyes v. School District No. 1*, 413 U. S. 189 (1973). And not only does this statute necessarily and inevitably, and thus formally discriminate on account of sex, but in his discussion of the appropriate standard of scrutiny in Appendix C hereof Judge Perkins explicitly found that this case actually includes de facto discrimination on account of sex, for which additional reason heightened scrutiny is called for.

Under *Orr*, *Powers*, and *J. E. B.*, your petitioner may attack such discrimination, both de jure and de facto.

5. A Constitutional Standard of Child Support: There is, after all, a constitutional standard of child support which generally prohibits sex discrimination. Not only does this standard follow ineluctably from cases like *Frontiero* and *Orr*, but it has been expressly recognized by the Pennsylvania Supreme Court in *Conway v. Dana*, 318 Atl. 2d 324 (1974). See also *Melzer v. Witsberger*, 480 Atl. 2d 991 (Pa. 1984), and *Smith v. Smith*, 626 Pac. 2d 342 at

343-345 (Ore. 1981). The constitutional standard is that child support must be set in an amount which considers *the equal duty of both fathers and mothers, i. e., the equal duty of men and women*, to support their children on an ability-to-pay basis.

The constitutional standard of child support includes a *further element of family privacy*, which allows some regulation by government, but involves the fundamental right of parents to raise their children as they see fit, as brought out unmistakably in such as cases *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), which conceded the power of government to require education of youth, but left to parents the right to determine religious training by sending them to denominational schools; *Wisconsin v. Yoder*, 406 U. S. 205 (1972), which again acknowledged power of government to require education of youth, but allowed parents the right to keep children from public schools so long as they conscientiously and competently prepare their children for adulthood in their distinctive way of life; and *Troxel v. Granville*, 530 U. S. 57 (2000), which conceded some power of government to require a natural mother or father to allow visitation by extended family, yet upheld the right of such parent to impose reasonable limits on such visitation. Undoubtedly, a State may require payment of child support, but the public interest is limited to assuring that reasonable needs -- i. e., basic needs plus or minus whatever may be required by special circumstances -- are met, and can extend no further. See, e. g., *Moylan v. Moylan*, 384 N. W. 2d at 866.

Therefore, the guidelines imposed by Section 19-6-15 of the Official Code of Georgia Annotated, in order to meet constitutional muster, must not only impose an *equal duty* upon fathers and mothers to support their children, but must limit such support to the actual costs of supplying *reasonable needs*. Child support cannot be used as a false pretext to order tax-free alimony, or to redistribute wealth, or to engage in other such social engineering. Once reasonable needs have been fairly met, parents have a fundamental to raise their children as they see fit within the rubric of family privacy acknowledged by this Court.

It is precisely because, as found by Judge Perkins, these guidelines do not assume an equal duty of fathers and mothers, and often go far beyond the reasonable needs of the children, effectively granting hidden tax-free alimony, sometimes exceeding customary limits of reason even for alimony, that Section 19-6-15 of the Official Code of Georgia is unconstitutional.

There is a *further dimension of due process of law in this case*, because the guidelines imposed by Section 19-6-15 of the Official Code of Georgia Annotated are statutory

presumptions, a point artfully recognized by Judge Perkins, but wholly overlooked by the Supreme Court of Georgia.

The applicable principles of due process under Amendment XIV have been expounded by this Court on numerous occasions. See, e. g., *Manley v. Georgia*, 279 U. S. 1 at 6 (1929); *Western & Atlantic R. R. v. Henderson*, 279 U. S. 629 at 642-644 (1929); *Leary v. United States*, 395 U. S. 6 at 32-37 (1969); and *Vladnis v. Kline*, 412 U. S. 441 at 446-447 (1973). The law is that, in order to pass constitutional muster, legal presumptions of the kind imposed by Section 19-6-15 of the Official Code of Georgia, must have two characteristics: they must not be arbitrary, i. e., there must be a reasonable relationship between the basic facts and the presumed facts; *and, moreover*, they must be fairly rebuttable.

The thrust of Judge Perkins' findings of fact, based on uncontradicted evidence, and neither challenged nor disputable nor revised on this record, is that Georgia's guidelines are arbitrary in that there is no reasonable relationship between the basic facts and what must be the presumed facts, -- i. e., no reasonable relationship between these guidelines and the constitutional standard of child support, -- i. e., no reasonable relationship between whatever percentage of the non-custodial obligor's income is indicated by the guidelines and the equal duty of father and mother to provide the reasonable needs of their children.

6. General Conclusions: It follows that these guidelines are unconstitutional. They are unconstitutional, because they do not assume an equal duty of mother and father to support their children. They are unconstitutional, because they invade the discretion of parents to raise their children as they see fit, once the reasonable needs of their children have been met, and thus they intrude needlessly upon family privacy. And they are unconstitutional because, as statutory presumptions, they are arbitrary, i. e., there is no reasonable relationship between the basic facts and the what must be the presumed facts.

These guidelines are subject to heightened scrutiny as Judge Perkins properly observed, and as the Supreme Court of Georgia completely overlooked, because Section 19-6-15 of the Official Code of Georgia Annotated imposes invidious discrimination and invades a fundamental right.

And your petitioner goes further, insisting that, *even assuming a more relaxed standard of review*, Section 19-6-15 of the Official Code of Georgia Annotated cannot stand. For the Supreme Court of Georgia claimed a two-fold "rational basis" to sustain the statute. The

Supreme Court of Georgia first cited the rebuttable feature of these guidelines. But as Judge Perkins found, these guidelines are arbitrary because unfounded, having no relationship to the equal duty of both parents and the cost of raising a child, and, as is clear from *Manley, Henderson, Leary, and Vladnis*, a presumption not resting upon a reasonable connection between basic and presumed facts, cannot be salvaged merely by giving it a rebuttable feature. The Supreme Court of Georgia also pointed to the fact that the payments indicated by these guidelines are dependent on income level, and this feature was supposed to justify the statute with a reasonable basis. But that consideration cannot salvage this statute either. For in *Development of Guidelines for Child Support Orders, Advisory Panel Recommendations and Final Report*, Office of Child Support Enforcement, United States Department of Health and Human Services, 1987, Ch. II, p. 126, it is noted that Wisconsin-style, obligor-only, welfare-recovery guidelines, such as exist in Georgia, have “the effect of setting orders as an increasing percentage of net income, as obligor income rises.” But says the report, “This effect is contrary to the economic evidence on actual child-rearing expenditures.” And this fact was confirmed by Judge Perkins on the basis of all available empirical data (Appendix C, finding 2).

WHEREFORE, your petitioner respectfully prays for a writ of certiorari to the Supreme Court of Georgia that this injustice may be corrected.

Respectfully submitted,

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NOTE: Mr. Graham and Mr. LeCroy were respectively admitted to the Bar of the Supreme Court of the United States on August 5, 1971, and October 9, 1984.

