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A POSTSCRIPT TO *STRUCK BY STEREOTYPE*

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Reading the account of Captain Susan Struck's case, vibrantly told by Neil S. Siegel and Reva B. Siegel, brought me back to the summer of 1972. ACLU Legal Office staff counsel Joel M. Gora and I spent many hours in June and July of that year preparing a petition for certiorari, one we hoped would engage the Court's attention. In the preceding year, the ACLU had taken on, along with *Struck*, several other cases challenging the rule, then maintained by all the Armed Forces, requiring pregnant service members to choose between abortion and ouster from the military. But Captain Struck's case was our frontrunner. We aimed to present the issue of reproductive choice through her eyes and experience. Captain Struck chose birth, but her Government made that choice a mandatory ground for discharge. We filed the petition on July 31, 1972 and were elated that fall, when the Court, on October 24, granted certiorari.

From the end of October until December 4, when we filed our brief on the merits, the full presentation of Captain Struck's case was my principal project. But as if synchronized, the Air Force waived Captain Struck's discharge on the eve of our submission. It was the right decision for the Air Force, and good news for Captain Struck and other service members caught in the same bind. But an ideal case to argue the sex equality dimension of laws and regulations governing pregnancy and childbirth had slipped from our grasp.

Perhaps it is indulgence in wishful thinking, but I remain of this view: Had the Court considered Captain Struck's case, with the benefit of full briefing and oral argument, a dreadful mistake might have been avoided. After homing in on Captain Struck's plight, what rational jurist could have declared adverse discrimination based on pregnancy not sex-based discrimination at all![1]

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1. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

Great constitutional law scholar Paul Freund observed that "judges . . . should not be[] influenced by the weather of the day, but they are necessarily influenced by the climate of the age."[2] An apt example is the case featured in the concluding portion of Struck *by Stereotype—Nevada Department of Human Resources v. Hibbs*,[3] in which Chief Justice Rehnquist led the Court in upholding against heavy assault the family-care leave provision of the Family and Medical Leave Act of 1993.

I appreciate beyond measure the intelligence and caring evident in every page of Struck *by Stereotype*. The authors have captured just what was on my mind and in my heart while composing the plea that will no longer rest, unnoticed, in the Supreme Court Library's collection of briefs.

2. A Colloquy, Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit (May 24, 1988), *in* 124 F.R.D. 241, 338 (1989).

3. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).