INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*) is not reported.

JURISDICTION

The order of the three-judge district court (App. B, *infra*), declaring 42 U.S.C. 402(g) unconstitu-

tional, and enjoining the refusal to pay benefits thereunder to widowers, was entered on January 28, 1974. A notice of appeal to this Court (App. C, *infra*) was filed on February 25, 1974. The time for the docketing of the appeal was extended by order of Mr. Justice Brennan to June 25, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether 42 U.S.C. 402(g), which provides social security benefits to widows with minor children in their care, but not to widowers with minor children in their care, violates the Fifth Amendment to the U.S. Constitution.

STATUTE INVOLVED

42 U.S.C. 402(g) provides:

> (1) The widow and every surviving divorced mother * * * of an individual who dies a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for

the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, * * * shall * * * be entitled to a mother's insurance benefit * * *.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

STATEMENT

The appellee, Stephen C. Wiesenfeld, married Paula Wiesenfeld in November, 1970. Mrs. Wiesenfeld died on June 5, 1972, while giving birth to their child. (App. A, *infra*, p. 3a)

For the seven years preceding her death, Mrs. Wiesenfeld had been employed as a school teacher and deductions had been made from her salary at the maximum level established by the Social Security Administration. Throughout their marriage, both Mr. and Mrs. Wiesenfeld were employed, but Mrs. Wiesenfeld's earnings exceeded those of her husband.[1]

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[1] For the two and one-half years of their marriage, Mrs. Wiesenfeld's annual earnings were approximately $10,000, while Mr. Wiesenfeld earned approximately $3,000 a year. (He earned $2,475 in 1972, the year his wife died). However, subsequent to his wife's death and his application for the benefits at issue here, Mr. Wiesenfeld was employed as a technical consultant by an engineering firm at a salary of $18,000 a year. He was discharged from this position after seven months, and was unemployed at the time of the decision of the court below. (App. A, *infra*, pp. 3a-4a).

In June, 1972, after his wife's death, Mr. Wiesenfeld applied for social security benefits at the New Brunswick, New Jersey, Social Security office. He obtained child's benefits for his son,[2] but was advised that he was not entitled to widow's insurance benefits pursuant to 42 U.S.C. 402(g), because such benefits are payable only to women (App. A, *infra*, p. 4a). Under that statute, social security benefits are provided to widows with minor children in their care based on their deceased husbands' earnings record.[3] The Act does not provide for similar payments to widowers with children in their care.

In February, 1973, Mr. Wiesenfeld commenced this action in the district court against the Secretary of Health, Education, and Welfare, contending that Section 402(g), insofar as it affords benefits solely to women, discriminates on the basis of gender, in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

A three-judge court, convened pursuant to 28 U.S.C. 2282, declared Section 402(g) unconstitutional. The court first held that the statutory clas-

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[2] 42 U.S.C. 402(d) provides child's insurance benefits equal to three-fourths of the primary insurance amount of the deceased parent.

[3] The amount payable to widows with minor children in their care is set forth in the statutory formula which affords benefits equal to three-fourths of the primary insurance amount of the deceased husband (42 U.S.C. 402(g)). Benefits payable to the widows are reduced in proportion to the amount earned by the widow in excess of $2100. Thus, for every two dollars she earns above $2100, one dollar is deducted from the benefits she can receive (20 C.F.R. 404.432).

sification limiting benefits to widows satisfied the "reasonable basis" test of the Fifth Amendment. In so holding, the court observed that women continue to be unable to earn incomes comparable to men, and that the statute is, therefore, reasonably designed to rectify the effects of past and present discrimination against women (App. A, *infra*, p. 18a). The court, however, further held that statutory classifications based upon sex were "inherently suspect", and could thus be sustained only if supported by a "compelling governmental interest" (App. A, *infra*, pp. 19a-21a). The court found no such compelling interest here, because Section 402(g), while designed to relieve the effects of economic discrimination against women, in operation, invidiously "discriminates against some of the group which it is designed to protect" (App. A, *infra*, p. 20a). This is so, the court ruled, because the statute renders a female wage-earner's social security insurance of lesser value than that of a male wage-earner, since the surviving spouse of a woman wage-earner is not entitled to the benefits received by the surviving spouse of a male wage-earner. Accordingly, the court declared Section 402 (g) unconstitutional, and enjoined the Secretary from denying benefits under the statute to otherwise qualified widowers. The court's order has been stayed pending this Court's disposition of the Secretary's appeal.

THE QUESTION IS SUBSTANTIAL

This appeal presents important questions regarding the constitutionality of 42 U.S.C. 402(g), a

statutory provision calculated to offset the economic disadvantages of women.[4] The relief the district court ordered, *i.e.*, extending benefits under Section 402 (g) to men, will impose a severe burden upon the Social Security trust fund of millions of dollars each year.[5]

Review by this Court is also warranted because the decision below is in conflict with the Court's decision in *Kahn* v. *Shevin*, No. 73-78, decided April 24, 1974, sustaining the constitutionality of a Florida statute providing a property tax exemption for widows. There, as in the instant case, a widower challenged the statute on equal protection grounds, contending that the statutory restriction of benefits to women insidiously discriminated on the basis of sex. The Court upheld the classification because it was reasonably designed to reduce the "disparity between the economic capabilities of a man and a woman" (slip op. p. 2).[6] Since, as the district court

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[4] It is one of several recent cases challenging various classifications in the Social Security Act as involving denials of equal protection. See, *e.g.*, *Jimenez* v. *Weinberger*, No. 72-6609, argued April 18, 1974 (benefits to illegitimate children); *Weinberger* v. *Diaz*, No. 73-1046, certiorari granted May 13, 1974 (benefits to aliens). *Salfi* v. *Weinberger*, N.D. Calif., No. C-73 1863 ACW, decided April 16, 1974 (3 judge court), notice of direct appeal filed, May 15, 1974 (benefits to widows and stepchildren where marriage occurred shortly before death).

[5] The Social Security Administration has estimated that, for fiscal year 1974 alone, the cost of father's benefits would be $20 million.

[6] The Court noted that: "Whether from overt discrimination or from the socialization process of a male dominated

held, Section 402(g) is reasonably calculated to attain the same objective, *Kahn* is dispositive of the issue presented here, and warrants summary reversal of the decision below.

1. The court below incorrectly held that legislative distinctions based upon sex are "inherently suspect" and hence that such distinctions may be sustained only if supported by a compelling governmental interest. This Court's decision in *Kahn* v. *Shevin*, *supra*, squarely holds that the traditional "reasonable basis" test is to be used to determine the constitutionality of statutes like the one at issue here, which are designed to rectify the inferior economic status of women.[7] For as the Court stated in *Kahn*, the sole inquiry required by the Constitution is whether the challenged statute " 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation' *Reed* v. *Reed*, 404 U.S. 71, 76, quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415" (slip op. p. 4). This, of course, is the traditional "reasonable basis" analysis, and the district court, therefore, plainly erred in requiring a compelling governmental interest to sustain the statute.

Nor can there be any doubt that Section 402(g) is supported by a reasonable basis. As the district

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culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs" (slip op. p. 2).

[7] Indeed, *Kahn* strongly indicates that the usual "reasonable basis" showing is constitutionally sufficient in all cases involving classifications based on gender (see slip op. pp. 4-5).

court held, the challenged statute is reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace.[8] This is the identical ground upon

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[8] The antecedent of Section 402(g) was the Social Security Amendments of 1939, which established monthly benefits for classes of survivors who could be presumed to be dependent on the insured worker. Social Security Amendments of 1939, H. Rep. No. 728, 76th Cong., 1st Sess., p. 11. In determining the classes of eligible beneficiaries, Congress acted upon the premise that "[u]nder a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiaries * * *. Social Security Amendments of 1939, House Report, *supra*, at p. 7. It concluded that the "probable need is greatest" in the case of aged widows, orphans, dependent parents over 65, and widows with minor children (*id.* at 11), and enacted, *inter alia*, Section 202(e) of the Social Security Act, 53 Stat. 1365 (August 10, 1939), the antecedent of the existing widow's benefits provision.

A second purpose in the enactment of widow's benefits was to permit widowed mothers to remain at home to care for their minor children. Final Report of the Advisory Council on Social Security 31 (1938); Report of the 1971 Advisory Council on Social Security, H. Doc. No. 92-80, 92d Cong., 1st Sess., p. 23.

The district court, stating that "the legislative history is subject to different interpretations and demonstrates that perhaps Congress had more than one purpose in creating this statute," held that the statute must be sustained if "rationally related to *some* valid public purpose" (App. A, *infra*, p. 18a). The court found such a purpose in the effort of Congress to ameliorate the economic hardships confronting widows with children. The two purposes are not entirely separable. It may be more desirable for a widow to remain home, since a widow is less likely than a widower to be able to earn enough to provide for competent substitute child care.

which this Court sustained the Florida's widows' tax exemption in *Kahn*. For here, as in *Kahn*, the statutory classification is fully justified in view of the fact that the economic difficulties "confronting the lone woman * * * exceed those facing the man," and the "disparity is likely to be exacerbated for the widow" (*Kahn*, slip op. pp. 2-3).[9]

Moreover, it follows, *a fortiori*, from the Court's decision in *Kahn* that the statutory provisions in issue here are constitutional. For unlike the Florida property tax exemption sustained in *Kahn*, which afforded benefits to all widows, Section 402(g) is more precisely drafted to further restrict the class of eligible beneficiaries to widows *with children in their care*. It requires no documentary evidence to conclude that the severe employment difficulties which confront a widow are further compounded if she is also responsible for the care of minor children. In such a case, the Constitution plainly does not forbid Congress from legislating to ameliorate, in some de-

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[9] The Court's opinion in *Kahn* amply documents this unfortunate situation (slip op. pp. 2-4), and we therefore do not reiterate those findings here. It should be pointed out, however, that the Court's observations in this respect are amply borne out by the facts of this case. As the district court's opinion demonstrates, Mrs. Wiesenfeld's salary, throughout her working life, never exceeded $10,000 a year. The appellee, however, who had obtained three advanced university degrees, in 1973 was employed as a technical consultant to an engineering firm at an annual salary of more than $18,000 a year. He was dismissed from that position after seven months, and, at last report, had opened a bicycle and hobby shop in New Jersey (N.Y. Times, December 18, 1973, p. 87, col. 4).

gree, the harsh financial condition of this limited class of citizens. There can, therefore, be no question that Congress had a reasonable basis for enacting Section 402(g); in view of *Kahn*, the Section is accordingly consistent with the Constitution.

2. The district court, however, while recognizing the validity of the legislative objective underlying Section 402(g), nonetheless struck down the statute on the ground that it discriminated against a female wage-earner by providing her family, after her decease, with lesser benefits than those received by the family of a deceased male wage-earner. But the district court was incorrect in focusing on the wage earner, whose entitlement to benefits on her own behalf is not in issue. Rather, we deal here with the allocation of public benefits among surviving beneficiaries in accordance with their probable need—a function in which Congress necessarily has the broadest possible latitude. *Richardson* v. *Belcher*, 404 U.S. 78; *Jefferson* v. *Hackney*, 406 U.S. 535.[10] Accordingly, once it is determined, as it must be here, that the statutory allocation of benefits under Section 402 (g) is founded upon a reasonable basis, the statute must be sustained.

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[10] This Court does not sit "to second-guess * * * officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. 471, 487. "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney, supra*, 406 U.S. at 546.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, and because this Court's decision in *Kahn* v. *Shevin*, *supra*, is dispositive of the issue presented, the judgment of the district court should be summarily reversed.

Respectfully submitted.

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JUNE 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 268-73

[Original Filed Dec. 11, 1973,
Angelo W. Locascio, Clerk]

STEPHEN CHARLES WIESENFELD
individually and on behalf of all other persons
similarly situated, PLAINTIFF

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
DEFENDANT

OPINION

APPEARANCES:

JANE C. LIFSET, ESQUIRE,
RUTH BADER GINSBURG, (N.Y. BAR)
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HERBERT J. STERN, ESQUIRE,
United States Attorney,
By: Bernard S. Davis,
Asst. U.S. Attorney;
T. SCOTT JOHNSTONE, ESQUIRE,
Department of Justice,
Washington, D.C.
For the Defendant

BEFORE: HUNTER, Circuit Judge
WHIPPLE and FISHER, District Judges

FISHER, District Judge

In this action plaintiff alleges that a federal statute, 42 U.S.C. Section 402(g),[1] denies him equal protection because only widows and not widowers may collect social security benefits under this section. Plaintiff seeks declaratory and injunctive relief. This three-judge court has been convened pursuant to 28 U.S.C. Section 2282 and 2284 to decide whether Section 402(g) creates sexual discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.[2]

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[1] 42 U.S.C. Section 402(g) provides:

Mother's Insurance Benefits

(1) The widow and every surviving divorced mother . . . of an individual who dies a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit.

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, . . . shall . . . be entitled to a mother's insurance benefit . . . .

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such individual . . .

[2] "(W)hile the Fifth Amendment contains no equal protection clause it does forbid discrimination that is 'so un-

Plaintiff moved for this suit to proceed as a class action pursuant to F.R.Civ.P. 23. Defendant moved to dissolve the court. Both parties have moved for summary judgment which seems appropriate because the material facts are not disputed.[3]

I

Plaintiff Stephen C. Wiesenfeld and Paula Wiesenfeld were married on November 15, 1970. Paula died in childbirth on June 5, 1972 leaving plaintiff with the responsibility for the care of his infant son, Jason.

During the seven years immediately preceding her death, Paula Wiesenfeld was employed as a school teacher in Ann Arbor, Michigan, White Plains, New York and Edison, New Jersey. At all times during her employment, maximum contributions were deducted from her salary and paid to Social Security. During their marriage, Paula Wiesenfeld's earnings exceeded that of her husband. In 1970, Paula earned $9808; Stephen earned $3100. In 1971 Paula earned $10,686; Stephen $2188. In 1972 Paula earned $6836; Stephen $2475. From January, 1969 until October 31, 1972 Stephen was employed by Eval-u-

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justifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *see also Frontiero* v. *Richardson*, 411 U.S. 677, 680 n.5 (1973); *U.S. Dept. of Agriculture* v. *Moreno*, —— U.S. ——, —— n. 5 (June 25, 1973); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642 (1969) *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[3] Transcript of Oral Argument, June 20, 1973 at 45.

metrics, a consulting firm for computer services and industrial engineering. From February 5, 1973 until September 14, 1973 plaintiff was employed by Cyphernetics in Springfield, New Jersey as a technical consultant at a monthly salary of $1,500. On September 14, 1973 plaintiff was dismissed from this position and is unemployed at this time.[4] Plaintiff has obtained a Bachelor and a Master of Science degree in mathematics as well as a Master's degree in Business Administration.

In June, 1972 after his wife's death, plaintiff went to the Social Security Office in New Brunswick, New Jersey to apply for benefits. He obtained child's insurance benefits for his son under 42 U.S.C. Section 402(d). He was informed that he would not be entitled to any benefits under Section 402(g) because such benefits were payable only to women.[5] From June to September 1972, plaintiff received $206.90 per month on behalf of his son as child's insurance benefits. From October, 1972 to the present, these benefits have been $248.30 per month. Plaintiff did not seek any further relief from the Social Security Administrators. Indeed, as the defendant has stipu-

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[4] Affidavit of plaintiff filed on October 2, 1973 at 1, paragraph 2.

[5] Defendant has supplied an affidavit to the effect that the Social Security Officials in New Brunswick have no written records nor recollection of plaintiff's request for benefits under Section 402(g). Defendant does not now dispute plaintiff's allegations that the application for such benefits was made orally and denied orally.

lated,[6] it would have been futile for plaintiff to pursue any administrative remedy because Section 402(g) on its face granted benefits only to widows, thereby excluding men. Plaintiff then filed this suit on February 24, 1973.

II

Even though defendant has stipulated that appeal through the administrative process would be futile, which eliminates 42 U.S.C. Section 405(h)[7] as a bar to this action, the defendant contends that no jurisdictional basis has been established by plaintiff. Plaintiff suggests two jurisdictional alternatives, 28 U.S.C. Section 1331 and 42 U.S.C. Section 405(g).

Section 1331 requires an amount of at least $10,000 to be in controversy. Defendant contends that

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[6] Transcript of Oral Argument, June 20, 1973 at 16-17.

[7] 42 U.S.C. Section 405(h) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of Title 28 to recover on any claim arising under this subchapter.

Even if the defendant had not stipulated Section 405(h) would not bar plaintiff's action. *Gainville* v. *Richardson*, 319 F.Supp. 16, 18 (D.Mass. 1970); *Williams* v. *Richardson*, 347 F.Supp. 544 (W.D.N.C. 1972); *see also Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam); *Griffin* v. *Richardson*, 346 F.Supp. 1226, 1230 (D.Md. 1972), *aff'd*, 409 U.S. 1069 (1972).

plaintiff's claim fails to meet this jurisdictional amount. The burden is upon the plaintiff to establish by a preponderance of the evidence that his claims exceed $10,000. *Kvos, Inc.* v. *Associated Press*, 299 U.S. 269, 277-278 (1936); *Davis* v. *Shultz*, 453 F.2d 497, 501 (3d Cir. 1971); *Opelika Nursing Home, Inc.* v. *Richardson*, 448 F.2d 658, 666 (5th Cir. 1971). If it appears to a legal certainty that plaintiff cannot recover the jurisdictional amount, the case must be dismissed. Plaintiff must prove that the legal impossibility of recovering $10,000 is not so certain as to negative his good faith in asserting the claim. *Davis, supra* at 501 and cases cited therein. The amount in controversy is measured as of the time when the action was filed. *Smith* v. *Maryland Casualty Co.*, 292 F.Supp. 358, 359 (E.D.La. 1968). Events which occur subsequent to filing which reduce the amount recoverable below the statutory limit do not oust jurisdiction. *St. Paul Indemnity Co.* v. *Red Cab Company*, 303 U.S. 283, 288-290 (1939); *Wade* v. *Rogala*, 270 F.2d 280, 284 (3d Cir. 1959).

The complaint in this suit was filed on February 24, 1973. According to plaintiff's testimony at his deposition, he began employment at Cyphernetics on February 5, 1973 at a salary of $1,500 per month. Plaintiff, then, even if the statute in question permitted men to receive benefits, would have been precluded from receiving *any* benefits by virtue of his employment under the other applicable statutes regulating the amounts of payments.[8] It is also evident

[8] 42 U.S.C. Section 403(b) and (f).

that any possible benefits for the period from June 5, 1972 to February 5, 1973 would not even approach $10,000.[9]

If restricted to an analysis as of the day when this complaint was filed, defendant raises a strong argument for dismissal. Plaintiff suggests that it cannot be shown to a legal certainty that his claim is not worth $10,000 because he could have chosen to remain at home or he could have lost his job. Defendant replies that these options are mere speculation which cannot support federal question jurisdiction because a determination of the value of plaintiff's rights at the time of suit may not be based upon future or contingent events which are possible but not probable.[10]

It would be a futile act for us to dismiss the complaint for lack of jurisdiction on the ground that the possibility of plaintiff losing his job was too speculative when apparently he is now unemployed.[11] Even if this Court were to accept defendant's arguments to dismiss the complaint based upon a consideration

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[9] The amount would be $2058.00 based upon a period of eight months at $275.25 per month.

[10] *Cf. Ammex Warehouse Co.* v. *Dept. of Alcoholic Bev. Control,* 224 F.Supp. 546, 551 (S.D.Cal. 1963), *aff'd.* 378 U.S. 124 (1964); *Cardinal Sporting Goods Company* v. *Eagleton,* 213 F.Supp. 207,212 (E.D.Mo. 1963), vacated as moot, 374 U.S. 496 (1963); *Kheel* v. *Port of New York Authority,* 457 F.2d 46, 49 (2d Cir. 1972), *cert. denied,* 409 U.S. 983 (1972).

[11] Affidavit of plaintiff filed on October 2, 1973 at 1, paragraph 2.

of the probabilities on February 24, such a dismissal might not prevent plaintiff from immediately filing another suit presenting the same claims. Given these circumstances dismissal upon these grounds would be no more than an empty formality which we decline to pursue.

Jurisdiction may be established under Section 1331 if the value of the right which plaintiff seeks to protect exceeds $10,000. *See generally*, C. Wright, Law of the Federal Courts, Sec. 34 (2d ed. 1970); 1. J. Moore, Federal Practice, Para. 0.96 (2d ed. 1964). The allegation that a Congressional statute which provides certain monetary benefits to some classes of persons and not others in violation of the Fifth Amendment has been found sufficient to satisfy the requirements of Section 1331 even in the Social Security context. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Williams* v. *Richardson*, 347 F.Supp. 544, 548 (W.D.N.C. 1972). Both *Frontiero* and *Williams* imply that plaintiff need not wait until enough months have passed so that the total amount of the monthly benefits which might be received if plaintiff successfully demonstrates that he has been unconstitutionally excluded exceeds $10,000. *cf. White* v. *Bloomberg*, 345 F.Supp. 133, 141 (D.Md. 1972). Accordingly, we are satisfied that the amount in controversy exceeds $10,000 and jurisdiction is properly established under Section 1331.

Because we find jurisdiction under Section 1331, we need not and do not pass upon the applicability

of 42 U.S.C. Section 405(g) which plaintiff suggests as a jurisdictional alternative.[12]

Plaintiff has also moved for this suit to proceed as a class action on behalf of all widowers who have in their care a child of an insured individual entitled to federal social security child benefits and who are excluded from benefits for themselves solely because they are men. However, plaintiff admits that this request is merely a safeguard against mootness so that if, for some reason, this plaintiff were unable to continue the suit, the constitutional attack on Section 402(g) could still be litigated.[13] We find this reason as insufficient to sustain this litigation as a class action, and therefore plaintiff's motion for this matter to proceed as a class action is denied.

III

The threshold issue is what constitutional standard of review should be applied to test the validity of Section 402(g) which denies benefits on the basis of sex. The Supreme Court has utilized two equal protection tests. If a statute is based upon an "in-

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[12] In addition to finding Section 1331 jurisdiction the court also relies upon Section 405(g) for jurisdiction to review a constitutional challenge on equal protection grounds to 42 U.S.C. Secs. 403(a) and 416(h)(3) in *Williams* v. *Richardson,* 347 F.Supp. 544, 548 (W.D.N.C. 1972). In *Jimenez* v. *Richardson,* 353 F.Supp. 1356, 1358 (N.D.Ill. 1973) the court considered a constitutional attack upon sections of the Social Security Act under Section 405(g), but without any discussion of the jurisdictional issue.

[13] Transcript of Oral Argument, June 20, 1973 at 41-42.

herently suspect" classification such as race,[14] alienage,[15] or national origin,[16] or it concerns a "fundamental interest" such as the right to vote,[17] the right to appeal a criminal conviction,[18] or the right to interstate travel,[19] it is subject to strict or "close judicial scrutiny" and will be held invalid in the absence of a countervailing "compelling" governmental interest. In all other circumstances, under the "traditional" equal protection standard a legislative classification must be upheld unless it is "patently arbitrary" and bears no "rational relationship" to a legitimate governmental interest. *See*, *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *See generally* Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065 (1969).

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[14] *See Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-192 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

[15] *See Graham* v. *Richardson*, 403 U.S. 365, 372 (1971); *Sugarman* v. *Dougall*, 41 U.S.L.W. 5138 (U.S. June 25, 1973) (No. 71-1222); *In re Griffiths* 41 U.S.L.W. 5143 (U.S. June 25, 1973) (No. 71-1336).

[16] *See Oyama* v. *California*, 332 U.S. 633, 644-646 (1948); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

[17] *See Dunn* v. *Blumstein*, 405 U.S. 330, 336-337 (1972).

[18] *See Griffin* v. *Illinois*, 351 U.S. 12 (1956).

[19] *See Shapiro* v. *Thompson*, 394 U.S. 618, 629-630 (1969).

When confronted with legislative classifications based upon sex, the majority of the Supreme Court has declined to add sex to the list of inherently suspect classifications even though some courts [20] and commentators [21] have concluded otherwise. *Frontiero, supra; Reed* v. *Reed*, 404 U.S. 71 (1971).

In *Frontiero* the Supreme Court declared unconstitutional certain federal statutes which provided, solely for administrative convenience, that spouses of male members of the armed services are dependents for the purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not considered dependents unless they are dependent for more than one-half of their support. Mr. Justice Brennan, joined by Justices Douglas, White and Marshall, concluded that because sex is an inherently suspect classification, these statutes could not be valid under "close judicial scrutiny". Mr. Justice Powell, joined by the Chief Justice and Justice Blackmun, found these statutes unconstitutional in light of *Reed*, but specifically noted that it would be inappropriate to decide whether sex is a suspect classification because the Equal Rights Amendment has been submitted to

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[20] *E.g., United States ex rel. Robinson* v. *York*, 281 F. Supp. 8, 14 (D.Conn. 1968); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 339-341, 485 P.2d 529, 539-541 (1971).

[21] *E.g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment? 84 Harv. L. Rev. 1499, 1507-1508 (1971); Note, 1972 Wisc. L. Rev. 626, 632-633; Note, 86 Harv. L. Rev. 568, 583-88 (1973).

the States for ratification. 411 U.S. at 691-692, Mr. Justice Stewart determined that these statutes worked an invidious discrimination in violation of constitutional principles established in *Reed*. 411 U.S. at 691.

While a decision by a divided Court is final on all issues of the case as a decision by a unanimous court [22] the reasoning employed by a plurality does not become law. *Frontiero* demonstrates that a majority of the Supreme Court has not yet classified sex as "inherently suspect".

Subsequent to *Frontiero* and *Reed*,[23] some courts and commentators have interpreted these two cases as creating an "intermediate test" for legislative discrimination based upon sex. *Eslinger* v. *Thomas*, 476 F.2d 225, 231 (4th Cir. 1972); *Wark* v. *Robbins*, 485 F.2d 1295, 1297 n. 4 (1st Cir. 1972) (dictum); *see generally* Gunther, The Supreme Court. 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court, 86 Harv. L. Rev. 1 (1972); Getman, The Emerging Constitutional Principle of Sexual Equality, The Supreme Court Review 157 (1972). Others view this "new test" as a "slightly altered" rational basis standard or as "general shift" from the traditional test to a "slightly, but percep-

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[22] *Kaku Nagano* v. *Brownwell*, 212 F.2d 262, 264 (7th Cir. 1954).

[23] In *Reed* the Supreme Court found a mandatory provision of the Idaho probate code giving preference to men over women when persons of the same entitlement class apply for appointment as an administrator of a decedent's estate violative of the Equal Protection Clause of the Fourteenth Amendment. 404 U.S. at 76-77.

tibly, more rigorous" standard. *Green* v. *Waterford Board of Education*, 473 F.2d 629, 633 (2d Cir. 1973); *Aiello* v. *Hansen*, 359 F.Supp. 792, 796 (N.D. Cal. 1973); *Brenden* v. *Independent School District 742*, 477 F.2d 1292, 1300 (8th Cir. 1973).

Apparently this "new test" developed from the language of Chief Justice Burger in *Reed* when, for a unanimous Court, he quoted *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920) that

> "(a) classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "
>
> 404 U.S. at 76.

Royster Guano Co. can hardly be considered as a strong foundation for a "new" equal protection standard. In that case a successful attack was made upon a Virginia statute which taxed all income of local corporations derived from business done outside Virginia and business done within it, while exempting entirely the income derived from outside Virginia by local corporations which do no local business. It is evident that *Royster Guano Co.* depended upon the "traditional" equal protection standard which evolved during that era of the Supreme Court's history when governmental economic regulations were constantly challenged on equal protection grounds.

In *Reed* and *Frontiero* we do not discern a "general shift" of standards nor the establishment of a

"new intermediate" equal protection test, and we reject those cases which adopt such standards. We do, however, perceive an expression of deep concern by the Supreme Court to analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian age. At best, all that can be gleaned from *Reed* and *Frontiero* is that until the Supreme Court is faced squarely with the problem of extending *Reed* in a case where a sexual classification could be validly upheld under the "traditional" test but not under "close judicial scrutiny", we cannot be absolutely certain how statutory sex discrimination fits within equal protection doctrine. Up to this time only four members of the Court have been willing to hold that sex is a suspect classification.

The obvious reluctance of the Supreme Court to decide whether or not to categorize sex as "inherently suspect" apparently originates from an unwillingness to intrude into that area while the Equal Rights Amendment is pending ratification by the States. It also arises from the principle that if a statute violates equal protection doctrine under a lesser standard, there is no need to examine that classification by "close judicial scrutiny". *Aiello*, *supra* at 796; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n.7. (1972). Consequently, we must first proceed to an analysis of whether Section 402(g) is rationally related to some valid public purpose.

IV

Both plaintiff and defendant raise compelling arguments in support of their positions under the "traditional" equal protection standard.

Plaintiff argues that Section 402(g) was enacted in 1939 as Section 202(e) of the Social Security Act "to provide a systematic program of protection against economic and social hazards". Plaintiff contends that these 1939 amendments were "designed to afford more adequate protection to the family as a unit". H.R.Rep. No. 728, 76th Cong., 1st Sess. 7 (1939); *see* S.Rep. No. 734, 76th Cong. 1st Sess. 8-9 (1939); Speech of Rep. Cooper, 84 Cong. Rec. 6896 (1939). Section 402(g), although paying benefits directly to a widow, was primarily intended for the protection of the children of a deceased wage earner. The widowed mother received the benefits not because she was female, but because it was assumed that she would prefer to remain at home to care for the children.[24] Because the congressional purpose of Section 402(g) was to provide for the *families* of deceased wage earners, plaintiff argues that the arbitrary congressional choice of the female as the conduit for such benefits to the family violates equal protection as did the choice by the Idaho legislature to prefer men as administrators of estates.

Plaintiff adds that not only does this arbitrary choice deny men equal protection, but it also denies

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[24] Final Report of the Advisory Council on Social Security 31 (1938).

equal protection to female wage earners such as Paula Wiesenfeld who are the principal breadwinners for their families.[25] Plaintiff argues that Section 402(g) invidiously discriminates against women wage earners when tragic events remove them from their families. In circumstances such as those in the instant case, this statute may deprive a surviving child of full time care by his only remaining natural parent. Thus, because of the manner in which Section 402(g) arbitrarily operates to discriminate against men, women wage earners and children who have lost their mothers, plaintiff concludes that this statutory provision of Congress violates equal protection under the "traditional" standard.

Defendant responds that Section 402(g) is rationally related to a valid public purpose which is to rectify the effects of past discrimination against women. Because of finite limits on the public treasury, Congress must pick and choose among competing classes of persons who shall receive benefits under social welfare programs. So long as that choice is rationally related to a valid public purpose, congressional wisdom will not be disturbed in allocating the nation's financial resources in pursuit of its social welfare goals. *cf. Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Richardson* v. *Belcher*, 404 U.S. 78 (1971).

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[25] It is evident that the doctrine of *jus tertii* should not prevent plaintiff Stephen from asserting the constitutional rights of his wife Paula because no other plaintiff could present a claim similar to hers in a case ripe for adjudication under Section 402(g).

Even though Congress has clearly expressed that discrimination based upon sex shall be unlawful,[26] women have been and continue to be unable to earn incomes comparable to those of men.[27] Consequently, according to defendant, there is no constitutional defect in the decision to provide only women with benefits because it has been and continues to be more difficult for families who suffer the loss of their husband-father to replace the loss of the income which he provided. *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir. 1968), *cert. denied*, 393 U.S. 982 (1968); *McEvoy* v. *Weinberger*, —— F.Supp. —— (S.D.Fla. No. 72-1727 Civ. JE, August 28, 1973); compare *Shevin* v. *Kohn*, 273 So. 2d 72 (Fla. 1972), *cert. granted*, 42 U.S.L.W. 3235 (U.S. Oct. 23, 1973)

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[26] *See, e.g.*, 42 U.S.C. Secs. 2000e-2(a), (b), (c); *see generally*, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); *See, e.g.*, 29 U.S.C. Sec. 206(d); *see generally*, Murphy, Female Wage Discrimination: A study of the Equal Pay Act 1963-1970, 39 U.Ctn. L. Rev. 615 (1970); *see also*, H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972); 5 U.S.C. Sec. 2108, as amended, 85 Stat. 644; 5 U.S.C. Sec. 7152, as amended 85 Stat. 644; 5 U.S.C. Sec. 8341, as amended, 84 Stat. 1961; 38 U.S.C. Sec. 102(b), as amended, 86 Stat. 1092.

[27] In 1971 the median husband's earnings were $8,858 while only $3,325 for wives. Bureau of Census, Current Population Reports, Series P-60 No. 85, "Money Income in 1971 of Families and Persons in the United States", Table 31. In 1970 the median annual earnings of all female workers with taxable earnings was $2,734 while $6,133 for men. U.S. Dept. of H.E.W., Social Security Bull., Annual Statistical Supp., 1970, Table 34 at 50.

(No. 73-78). (Florida statute providing a $500 property tax exemption to widows only held not violative of equal protection). Defendant also points out that *Gruenwald* is cited with apparent approval in the opinion of Mr. Justice Brennan in *Frontiero*,[28] and therefore remains valid precedent in support of defendant's claim that because Section 402(g) is designed to rectify the effects of discrimination against women, it does not violate equal protection standards.

It is often difficult for courts to determine the specific purpose behind congressional legislation especially where, as here, the legislative history is subject to different interpretations and demonstrates that perhaps Congress had more than one purpose in creating this statute. However, under the "traditional" test, we need only find that the statute in question is rationally related to *some* valid public purpose.

When this standard is applied to Section 402(g), we find that this measure is a rational attempt by Congress to protect women and families who have lost the male head of the household. This choice by Congress is not arbitrary because it is very evident that women have been and continue to be unable to earn income equal to that of men even though Congress has clearly indicated that job discrimination on the basis of sex shall be unlawful.

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[28] 411 U.S. at 689 n.22.

V

Having determined that Section 402(g) satisfies the "traditional" equal protection standard, we must determine whether the test of "close judicial scrutiny" should be applied and whether sex should be declared as "inherently suspect". We are persuaded by the opinion of Mr. Justice Brennan in *Frontiero* that sex is "inherently suspect". When the higher standard is applied to Section 402(g), that section violates the equal protection component of the Fifth Amendment.

We agree that

> "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to the ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 411 U.S. at 686-687.

When Section 402(g) is applied to the facts of this case and viewed under "close judicial scrutiny", even though Congress may have intended that this

section rectify the effects of past and present discrimination against women, it operates to "heap on" additional economic disadvantages to women wage earners such as Paula Wiesenfeld. *Frontiero, supra* at 689 n.22. During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

While affirmative legislative or executive action may satisfy a compelling governmental interest to undo the past discrimination against such suspect groups as racial minorities,[29] such action cannot meet the higher equal protection standard if it discriminates against some of the group which it is designed to protect. Because Section 402(g) discriminates against women such as Paula Wiesenfeld who have successfully gained employment as well as against

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[29] *See, e.g., Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159, 176-177 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971); *Joyce* v. *McCrane,* 320 F.Supp. 1284, 1291-1293 (D.N.J. 1970); *Carter* v. *Gallagher,* 452 F.2d 315, (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972); *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984 (1971); *United States* v. *Wood, Wire & Metal Lathers Int. U., L.U.,* 341 F.Supp. 694, 699 (S.D.N.Y. 1972), *aff'd.* 471 F.2d 408, 413 (2d Cir. 1973), *cert. denied,* 412 U.S. 939 (1973); *Southern Illinois Builders Association* v. *Ogilvie,* 471 F.2d 680, 685-686 (7th Cir. 1972); *United States* v. *Local Union No. 212,* 472 F.2d 634, 636 (6th Cir. 1973).

men and children who have lost their wives and mothers, we find this section violates the Fifth Amendment.

For these reasons we grant summary judgment for the plaintiff. Counsel, with notice, shall submit an order in accordance with this opinion declaring Section 402(g) unconstitutional insofar as it discriminates against widowers on the basis of sex, enjoining defendant from denying benefits under Section 402(g) to widowers solely on the basis of sex and directing the defendant to make payments to the plaintiff for such periods during which he would have been qualified to receive benefits but for Section 402(g) herein held unconstitutional. *Cf. Griffin* v. *Richardson*, 346 F.Supp. 1226, 1237 (D.Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Davis* v. *Richardson*, 342 F.Supp. 588, 593 (D.Conn. 1972), *aff'd.* U.S. 1069 (1972). Such order shall be stayed for ninety days to allow an appeal by either party.

The foregoing opinion shall constitute the court's findings of fact and conclusions of law under F.R. Civ.P. 52(a).

Dated: December 11, 1973.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 268-73

STEPHEN CHARLES WIESENFELD
individually and on behalf of all other persons
similarly situated, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
DEFENDANT

ORDER

This matter having been opened to the Court by Jane Z. Lifset, counsel for plaintiff (Ruth Bader Ginsburg, Esquire of counsel) in the presence of Herbert J. Stern, United States Attorney, counsel for defendant (Bernard S. Davis, Esquire and T. Scott Johnstone, Esquire appearing) on plaintiff's motion for summary judgment, and upon defendant's motion to dismiss or in the alternative for summary judgment; and the Court having read and considered the moving and opposing papers filed by the respective parties and having heard and considered the argument of counsel, and good cause appearing;

IT IS on this 28th day of January, 1974,

ORDERED as follows:

1. That 42 U.S.C. Section 402(g) is unconstitutional insofar as it discriminates against widowers on the basis of sex.

2. That the defendant Secretary of Health, Education and Welfare be and hereby is enjoined from denying benefits under Section 402(g) to widowers solely on the basis of sex.

3. That the defendant Secretary of Health, Education and Welfare be and hereby is directed to make payments to the plaintiff Stephen Wiesenfeld for such periods during which he would have been qualified to receive benefits but for the discrimination against widowers based upon sex contained in Section 402(g) herein held unconstitutional.

IT IS FURTHER ORDERED that this Order shall be stayed for 90 days from the date of its entry to allow an appeal by either party.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
U.S.D.J.

/s/ Lawrence A. Whipple
LAWRENCE A. WHIPPLE
U.S.D.J.

/s/ James Hunter III
JAMES HUNTER III
U.S.C.J.

I hereby consent to the form of the foregoing order.

HEBERT J. STERN, ESQUIRE
United States Attorney
Attorney for Defendant

BY: /s/ Bernard S. Davis
BERNARD S. DAVIS
Assistant U.S. Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 268-73

STEPHEN CHARLES WIESENFELD
individually and on behalf of all other persons similarly situated, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

TO: Jane Z. Lifset, Esquire
185 Watsessing Avenue
Bloomfield, New Jersey 07003

Notice is hereby given that the United States of America, the defendant in the above-named matter, hereby appeals to the Supreme Court of the United States from the final order entered on the docket herein on January 29, 1974, granting plaintiff's motion for summary judgment.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

JONATHAN L. GOLDSTEIN
United States Attorney

/s/ Bernard S. Davis
By: BERNARD S. DAVIS
Assistant U.S. Attorney

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