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TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

CASPER W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant,

—v.—

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

Appellee.

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

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves to affirm the judgment of the district court.

Opinion Below

The unanimous opinion of the three-judge court is reported at 367 F. Supp. 981 (D. N.J. 1973).

Statement

This is a direct appeal from a judgment of a three-judge district court (1) declaring 42 U.S.C. § 402(g) unconstitutional insofar as it discriminates against "women . . . who have successfully gained employment as well as against men and children who have lost their wives and mothers," and (2) enjoining defendant from denying benefits under 42 U.S.C. § 402(g) to the surviving spouses of female insured individuals solely on the basis of sex. *Wiesenfeld* v. *Secretary of Health, Education and Welfare,* 367 F. Supp. 981, 991 (D. N.J. 1973).

Appellee Stephen Charles Wiesenfeld and Paula Wiesenfeld were married from November 15, 1970 until June 5, 1972, when Paula Wiesenfeld died in childbirth, leaving appellee with sole responsibility for the care of their infant son, Jason. Appellee has not since remarried.

During the seven years immediately preceding her death, Paula Wiesenfeld was employed as a school teacher. At the time of her death, she was a fully insured individual under Social Security; 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 those of her husband. In 1970, Paula earned $9808; Stephen earned $3100. In 1971, Paula earned $10,686; Stephen $2188. In 1972, the year of her death, Paula earned $6836; Stephen $2475.

In June 1972, after Paula Wiesenfeld's death, appellee went to the Social Security office in New Brunswick, New Jersey to apply for benefits. He obtained child insurance

benefits for his infant son under 42 U.S.C. § 402(d), but was informed he was ineligible for benefits under 42 U.S.C. § 402(g) because that section, labelled "mother's insurance benefits," specifically authorizes payments to women only. Because 42 U.S.C. § 402(g) provides a benefit for a "mother" who "has in her care a child of [an] insured individual," but no benefit for a father who has in his care a child of an insured individual, Stephen and Jason Wiesenfeld, survivors of a female wage earner, receive half the amount that would be paid to similarly situated survivors of a male wage earner.*

Appellee did not seek further relief from the Social Security administrators for, as defendant has stipulated,** pursuit of any administrative remedy would have been futile: 42 U.S.C. § 402(g) on its face grants benefits only to "mothers," thereby excluding men. Accordingly, appellee commenced this action charging that 42 U.S.C. § 402(g) discriminates on the basis of gender in violation of the fifth amendment.

Question Presented

Whether 42 U.S.C. § 402(g), which excludes a female wage earner's surviving spouse from a social security benefit designed to enable the deceased wage earner's child to be cared for personally by the surviving parent, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

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* For the period in which appellee devoted himself exclusively to the care of his infant and was not gainfully employed, he would have received an additional $275.25 per month absent the gender line in 42 U.S.C. § 402(g). See 367 F. Supp. at 985 n. 9.

** Transcript of Oral Argument, June 20, 1973 at 16-17; 367 F. Supp. at 985 nn. 5, 6.

ARGUMENT

I.

This Court's determination in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), controlled the decision below in the instant case: employment related benefits distributed by the government must be allocated to male and female wage earners with an even hand; providing fewer benefits on the account of a female wage earner serves to perpetuate conditions that have so long kept women in a separate and unequal place in the labor force.

Frontiero declared inconsistent with the fifth amendment a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency, but authorized benefits for female members only if they provided more than one-half of their husband's support. 42 U.S.C. § 402(g) establishes a distinction more egregious than the one declared invidious in *Frontiero,* for here, the barrier is insurmountable: under no circumstances are benefits paid to a female insured person's surviving spouse with a child of the wage earner in his care* Cf. *Jimenez* v. *Weinberger,* 42 U.S.L.W. 4948 (June 19, 1974) (declaring unconstitutional "blanket and conclusive exclusion" from social security benefits of subclass of children born out of wedlock).

As in *Frontiero,* the statutory classification in this case is unrelated to family need. Identically situated persons

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* In this respect, the case is kin to *Reed* v. *Reed,* 404 U.S. 71 (1971), and *Moritz* v. *Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973). See Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 103, text at nn. 91-93 (West 1974).

are accorded different treatment solely on the basis of sex. Paula Wiesenfeld's social insurance is worth less to her spouse and child than the insurance of an identically situated male wage earner, just as Sharron Frontiero's efforts netted less for her family than the efforts of a male of similar rank and time in service. See Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181, 193 (1973).

With clear guidance provided by *Frontiero* and *Reed* v. *Reed,* 404 U.S. 71 (1971), the court below perceived the insidious impact on working women of the 42 U.S.C. § 402 (g) classification:

> [I]t operates to "heap on" additional economic disadvantages to women wage earners such as Paula Wiesenfeld . . . . 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. 367 F. Supp. at 991.

II.

The benefits sought by appellee were plainly designed to enable the child of a deceased wage earner to be cared for personally by the surviving parent. Final Report of the Advisory Council on Social Security 31 (1938). Mindful of this Court's firm instruction to it in *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973),* the

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* Summarily reversing 349 F. Supp. 491 (D. N.J. 1972). The Court struck down a limitation in New Jersey's program for assistance to families of the working poor that operated to deny

district court refused to countenance denying motherless children the opportunity for parental care afforded children who have lost their fathers.*

New Jersey Welfare Rights Organization v. *Cahill* involved a state-funded public assistance program where the "severe burden" of extending benefits was clear. By contrast, and contrary to appellant's suggestion (Jurisdictional Statement at 10 n. 10), plaintiff does not seek public assistance from general government revenue.** The Social Security system, funded by contributions from wage earners like Paula Wiesenfeld and their employers, derives much of its popular support from the idea expressed in the legislation that payments are not "welfare," but benefits due under the account of an "insured individual." In essence, 42 U.S.C. § 402 establishes two classes of "insured individuals," both subject to the same contribution rate: wage earners who are male, and therefore receive full protection for their families; wage earners who are female and therefor receive diminished family protection. Cf. Pechman, Aaron & Taussig, Social Security 81-82 (1968) (disadvan-

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benefits to illegitimate children. Significantly, the Court did not find it necessary to label the legislative classification "suspect" or the right involved "fundamental." Accord, *Jimenez* v. *Weinberger,* 42 U.S.L.W. 4948 (June 19, 1974); *U. S. Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973).

* See Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. 378 (1972) ("[I]f the society's aim is to further a socially desirable purpose, e.g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight.").

** But see *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Memorial Hospital* v. *Maricopa County,* 94 S. Ct. 1076 (1974) (public assistance extensions involving a fiscal burden hardly paralleled in the instant case).

tageous treatment of families with working wives is inconsistent with the objectives of Social Security). The instant case is a dramatic illustration of the invidiousness of that classification: 42 U.S.C. § 402(g) treats Paula Wiesenfeld as a secondary breadwinner, Stephen Wiesenfeld as an absentee parent, and the infant Jason as a child not entitled to the personal care of any parent.

III.

In *Kahn* v. *Shevin*, 94 S. Ct. 1734 (1974), this Court upheld a gender line regarded as operating solely to remedy past discrimination encountered by women in the economic sphere. In glaring contrast, it is inescapably clear that the classification embodied in 42 U.S.C. § 402(g) discriminates against women wage earners and reflects the very brand of "firmly entrenched practice" * that has operated to deny women equal opportunity and equal remuneration in the job market. Thus, when Congress genuinely determined to remedy overt discrimination against women and practices "inhospitable" to them in the economic sphere, it rejected the gender stereotype that underlies 42 U.S.C. § 402(g). In Title VII of the Civil Rights Act of 1964, as amended, and related legislation, Congress declared differentials based on that stereotype impermissible in both public and private employment. See 5 U.S.C. § 7152:

> [A] . . . law providing a benefit to a male Federal employee or his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

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* *Kahn* v. *Shevin*, 94 S. Ct. at 1736.

Similarly, Equal Employment Opportunity Commission Sex Discrimination Guidelines, issued pursuant to Title VII, provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . . (29 C.F.R. § 1604.9(d).)

It would be bitterly ironic if a differential prohibited by federal command for the express purpose of eradicating sex discrimination in employment opportunity were permitted to stand in federal social insurance. As the court below observed, affirmative legislation or executive action is permissible to undo past discrimination, but it would be perverse to characterize legislative action as "benign" or "affirmative" where, as here, "it discriminates against some of the group which it is designed to protect." 367 F. Supp. at 991.

In sum, interpretation of *Kahn* v. *Shevin* to permit relegation of a female wage earner to second class status for family social insurance pay-out purposes (although she must pay-in on a first class basis) would collide head-on with *Reed* and *Frontiero* and would turn back the clock to the day when sharp lines between the sexes drawn by the legislature were routinely approved by the judiciary.*

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* *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948); see Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U L. Rev. 675 (1971).

CONCLUSION

Because 42 U.S.C. § 402(g) "discriminates against women such as Paula Wiesenfeld who have successfully gained employment as well as against men and children who have lost their wives and mothers, . . . [the] section violates the Fifth Amendment." This determination of the district court, and the judgment based thereon should be summarily affirmed.

Respectfully submitted,

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