In the

Supreme Court of the United States

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION and WELFARE,

Appellant,

vs.

STEPHEN CHARLES WIESENFELD, ETC.

No. 73-1892

Washington, D.C.
January 20, 1975

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v.	No. 73-1892
STEPHEN CHARLES WIESENFELD, ETC.	

Washington, D. C.

Monday, January 20, 1975

The above-entitled matter came on for argument at 1:13 o'clock p.m.

BEFORE:

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

APPEARANCES:

KEITH A. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530
For Appellant

MRS. RUTH BADER GINSBURG, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016
For Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1892, Weinberger against Wiesenfeld.

Mr. Jones, you may proceed whenever you are ready.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.

ON BEHALF OF APPELLANT

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

This cases involves a claim of sex discrimination under the Social Security Act.

Section 202(G) of that Act provides for the payments of benefits to certain widowed mothers. There is no comparable provision under the Act for payment of benefits under the Act to widowed fathers.

The Appellee in this case is a widowed father who claims that he is constitutionally entitled to payment of benefits on the same basis as if he were a widowed mother.

It is the Government's position, as I will elaborate on at some length later, that this statute, like the property tax exemption in favor of widows in Kahn against Shevin, serves the permissible legislative objective of ameliorating the harsh economic consequences of economic job discrimination against women and that it should be sustained on that basis.

A description of the operation of the Act is

essential to the understanding of this case.

The benefits payable under Section 202(G) are paid out on account of the Social Security account of the deceased wage earner. The widowed mother receives equal to three-quarters of the primary insurance benefit that the deceased husband would have received had he lived and retired, reduced 50 cents for each dollar that the widow earns in excess of $2,400 per year.

Payments are made to the widowed mother so long as she has a minor child in her care and remains unmarried.

Similar benefits are provided under the Act for the child of a deceased wage earner. The child receives benefits on the basis of the Social Security account of his or her deceased parent whether or not the parent is the father or the mother. It makes no difference.

But there is no provision under the Act for the payment of benefits to widowed fathers under the age of 60 on the basis of the account of their deceased wives.

The Appellee in this case is a young, unemployed widower. After the death of his wife, his child began receiving benefits based upon her Social Security account. He, however was not entitled to benefits. By "he" I mean the Appellee was not entitled to benefits himself under the Act.

In view of this, he brought present suit for

declaratory and injunctive relief, contending that he was constitutionally entitled to a distribution of benefits on the same basis as if he were a widow rather than a widower.

A three-judge court was convened. The court determined that all sex-based classifications are inherently suspect under this Court's two-tiered Equal Protection analysis that it has applied in recent years.

The court analyzed the statute, concluded that it did not serve a compelling governmental interest and, accordingly, the court held the statute unconstitutional and ordered the payment of benefits to the Appellee as if he were a widow.

The court stayed its order pending this appeal and the case is now here on the Government's direct appeal.

At the outset, I think it can be said that the District Court clearly erred in applying the compelling governmental interest standard of review.

It has become clear in this Court's decision in Kahn against Shevin and, last week, in Schlesinger against Ballard, that sex-based classifications are not inherently suspect. They are not subject to justification only on the basis of a so-called "governmental interest." They are not invalid per se.

This is not to suggest that the traditional permissive rational basis standard of review is fully

appropriate in all sex discrimination cases.

Sex-based classifications, we believe, do merit close judicial scrutiny and they have received it by this Court in the past.

In Frontiero against Richardson and Reed against Reed, this Court struck down sex classifications that merely served the purpose of administrative convenience. Thus the Court has applied a standard of review which involves close scrutiny, but scrutiny which is not so strict as to be inevitably fatal.

The rule that the Court seems to be applying is simply that sex-based classifications must rest on some substantial reasonable basis or, as Chief Justice Burger said in the Reed opinion, upon some ground of difference having a fair and substantial relation to the object of the legislation.

As I will now show, the statute here in question easily meets that test.

Appellee's principal attack on this statute is, curiously enough, not from the point of view of the widower who has been denied benefits, but rather from the point of view of the female wage earner who, it is alleged, is denied Social Security coverage for her spouse that would have been granted to a male wage earner.

The Appellee's argument proceeds syllogistically.

First, the Appellee analogizes the payment of Social Security taxes to the purchase of private insurance coverage. Then the Appellee contends that female wage earners are not granted the right to purchase the same insurance coverage that a male wage earner purchases for his spouse under the system and, Appellee concludes, that is discrepancy in treatment, is a discrepancy in insurance coverage, it is impermissible.

We believe there are two fatal flaws to this chain of reasoning. First, the analogy to private insurance schemes is itself fundamentally erroneous.

As this Court noted in Flemming against Nestor, the Social Security Act comprehends a scheme, not of private but of social insurance under which benefits are distributed and coverage provided, in large part, under the basis of probable need rather than on the basis of strict -- rather than strictly on the basis of the contributions that the insured wage earner has paid.

Even accepting, for the moment, the private insurer paradigm on which Appellee relies, we think it is nevertheless clear that the female wage earner is not entitled to any additional insurance coverage under the Act, that the female wage earner has not been disadvantaged in any way.

As we pointed out on pages 21 and 22 of our brief,

female wage earners, under the Social Security system, pay in only 28 percent of all Social Security taxes whereas 34 percent of the benefits paid out of the system are paid out on the basis of the Social Security account of female wage earners.

Now, I am not talking about the benefits that are paid to women. I am talking about the benefits that are paid out solely on the basis of the women's accounts as workers.

Now, this means that the Social Security system is already out of actuarial balance in favor of the female wage earner as against the male wage earner.

If my rough arithmetical calculations are correct, right now, the female wage earner receives 33 percent greater coverage under the Act in terms of dollars than does the male wage earner.

To grant the additional insurance coverage for which Appellee contends here would simply further tilt the scales in favor of the female wage earner as against her male counterpart.

QUESTION: How do you account for the existing disparity?

MR. JONES: I think, in large part, the disparity flows from the fact that women have longer life expectancies and that their retirement benefits are spread out over a

longer period of time.

It may also be attributal in part to the fact that lower wage earners are entitled to somewhat greater return under the Act than are higher wage earners and women, statistically, are lower wage earners.

I think for those two reasons, and I'm not sure which is more important, women do receive, on the basis of their accounts, far greater return than do men.

And our position with respect to this argument, this insurance coverage argument by the Appellee, is that to grant further coverage, to further tilt the scales in favor of women, obviously would not serve the purposes of the Equal Protection Clause and it therefore seems to us that Appellee's insurance coverage argument simply reduces to the complaint that Appellee's individual wife, as a wage earner, unlike the average female wage earner, has been somehow disadvantaged, that the payments made on the basis of her account are in some sense constitutionally insufficient.

Now, there is no merit to this argument, either legally or factually.

As a factual matter, I think that you can deduce from the record, and it is clear, that Appellee's son has already, or will soon have, received greater benefits under the Social Security Act, than his wife ever paid into the

system, that there is no ground for viewing her account as being somehow disadvantaged.

But, more fundamentally, as a legal matter, there is no basis for an argument that a Social Security contributor has a vested interest in his or her Social Security account.

That argument, which obviously is not a sex discrimination argument, was firmly rejected by this Court in Flemming against Nestor, in language which I think is equally appropriate here and I would like to quote:

"The Social Security system may be accurately described as a form of social insurance whereby persons gainfully employed and those who employ them are taxed for the payment of benefits to the retired and disabled and their dependents. The noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of a holder of an annuity whose right to benefits is bottomed on his contractual premium payments."

We therefore think it is clear that Appellee's wife, as a female wage earner, was not disadvantaged, either in her individual capacity or as a member of a class under the Act, that she was not the subject -- was not the victim of any cognizable discrimination under the Act.

For that reason, I now turn to the Appellee's alternative argument, which is based upon the contention that the denial of benefits to a widower constitutes a denial

of Equal Protection to men as an impermissible discrimination against men.

That argument, it seems to us, is foreclosed by this Court's decision in Kahn against Shevin. In that case, this Court upheld a special Florida property tax exemption that was granted only to widows and not to widowers.

The objective of that legislation, like that of the statute here, was to ameliorate in some degree the economic difficulties that uniquely confront the lone woman who has lost her husband.

The Court, in that opinion, recited statistics showing that the average female worker earned approximately 40 percent of the income of the average male worker and the Court noted that this disparity in the economic capabilities would be exascerbated in the case of a widow vis-a-vis a widower and that the difference in earning power between a widow and widower was probably even greater than that between women and men generally.

Mr. Justice Douglas, writing for the Court in that case, observed that while the widower can usually continue in his occupation, in many cases the widow will suddenly find herself forced into a job market with which she is unfamiliar and in which, because of her former economic dependency, she will have fewer skills to offer.

And it is also clear that the discrimination

inherent in such a statute between widows and widowers is not impermissible.

As Mr. Justice Brennan, who is dissenting on other grounds in that case, observed, it is permissible to distinguish between widows and widowers because only the former and not the latter are subject to discrimination as a class and, if I may quote again from the dissenting opinion, "Inclusion of needy widowers would not further the state's overriding interest in remedying the economic effects past sex discrimination for needy victims of that discrimination."

Well, doubtless some widowers are in financial need. No one suggests that such need results from sex discrimination.

On the basis of these considerations, the Court in this case, Kahn against Shevin, upheld the Florida statute as resting upon some ground of difference having a fair and substantial relation to the object of the legislation.

Well, precisely the same considerations govern this case.

Congress recognized that the probable need of widows is greater than that of widowers and it enacted Section 202(G) to provide for that need.

In doing so, Congress merely acted as it had also donein behalf of other persons, such as aged, dependent

parents who cannot be fairly expected to replace, by their own efforts in the job market, the loss of support that has been occasioned by the death of a family wage earner.

Moreover, this provision, Section 202(G), does not suffer from the vice of overinclusiveness that led two Justices of this Court to dissent from the ruling in Kahn.

The amount of the benefits payable under Section 202(G) is inversely correlated to the amount of the widow's earnings so that the woman who has, in fact, successfully surmounted sexual job discrimination is not provided benefits under this Act.

Similarly, benefits are provided only to the widow with a minor child in her care for whom the economic consequences of job discrimination are heightened by the fact that she must additionally provide competent child care during the working hours.

At the same time the benefits provided under this statute are considerably more substantial than those that were granted by the property tax exemption in Kahn.

Therefore, it seems clear to us that Section 202(G) serves the permissible legislative objective of ameliorating the economic consequences of employment discrimination that widows with children suffer with heightened severity and that it does so both more thoroughly and more carefully than did the statute in Kahn against Shevin.

I would add at this point only one final point:

At bottom, the Appellee's argument here is that benefits under the Social Security Act must be distributed without regard to sex, equally to men and women in all cases.

Although we realize that program costs cannot be determinative in a case such as this, we feel that it is nevertheless not without some significance that the cost of achieving this objective, of paying out all benefits without regard to sex, would be approximately $350 million additional per year. The statistics are set forth on page 15 of the Appendix.

This additional money would have to come from somewhere. The Social Security system is supposed to remain in actuarial balance. Therefore, to pay out these additional benefits, either Social Security taxes would have to be increased or some other benefit group -- or the benefits payable to some other group would have to be reduced.

It is in this context that we feel that this Court's statement in Dandridge against Williams is particularly appropriate. That is, that it does not sit to second-guess officials charged with the difficult responsibility of allocating scarce public welfare funds among the myriad of potential recipients.

Now, to apply a judicial restraint of this kind in a case like this is not, however, to place the Social Security

system in the iron grip of the status quo.

Congress has recently considered sex-based classifications under the Act and it has amended the statute to eliminate one of the major sex-based classifications by providing for the equalization of the method of computing retirement benefits for men and women and it may well act to further reduce or ultimately entirely eliminate all sex classifications under the Act.

But for the present, we feel that it is clear that the exclusion of widowers under Section 202(G) lies well within Congress' constitutional power to allocate welfare funds.

For these reasons, we respectfully submit that the judgment below should be reversed.

QUESTION: Mr. Jones.

MR. JONES: Yes.

QUESTION: Do there remain in the Act any differentials based upon gender as to age? I know the basic one was eliminated in 1972.

MR. JONES: That was the only one that I am aware of. I don't think that there are any more that remain.

Well, on age exclusively. Now, there are some provisions that discriminate between men and women on the basis of age. For example, a widower over age 60 may in some cases be entitled to benefits, whereas a widow might be

entitled to benefits at an earlier age.

QUESTION: Without regard to children.

MR. JONES: Without regard to children, that's right. But I don't think there are many significant age qualifications in the Act remaining.

QUESTION: Well, apart from widows and widowers, is there not a distinction that women beneficiaries, under the term, have theirs computed -- may retire at age 62 whereas on males it is age 65?

MR. JONES: This was --

QUESTION: That's eliminated.

MR. JONES: -- the difference that was eliminated in the 1972 Act, by Congress.

QUESTION: In the subject Act.

QUESTION: That is on page 15 of your Appendix, under the --

MR. JONES: That is correct, pages 14 through 16 discusses the --

QUESTION: Well, that may be, but haven't you brought a case here that we have pending cert?

MR. JONES: Well, we moved to affirm the judgment of the three-judge district court.

QUESTION: I know, but it's here -- there is such a case here, isn't there?

MR. JONES: That is correct. That is on the basis

of a claim of a man who retired earlier and the --

QUESTION: That's right and before the -- the '72 Amendments don't become effective until this year.

MR. JONES: They are not retroactive. That is correct.

QUESTION: Then they become effective in '75.

MR. JONES: I think they were phased in over a period of time.

I just read the petition this morning and what you tell us there is they become effective this year.

MR. JONES: I said --

QUESTION: Well, this new provision will become effective starting January, 1973 and will be fully effective in January, ;975.

MR. JONES: Yes, I think it is phased in over three years. It does become fully effective this year. That is correct.

QUESTION: Congress there elected to ignore the difference in longevity of women over men.

MR. JONES: Well, in fact, men were disfavored under the old law.

QUESTION: My point is, they ignored the fact that women, as a category, lived longer than them.

MR. JONES: That is correct.

QUESTION: That is within their legislative

discretion, I suppose you would say.

MR. JONES: Yes.

QUESTION: They can ignore it or they can act on it.

MR. JONES: That is right, Mr. Justice Burger. We don't think the Constitution places Congress in a strait-jacker with respect to the determination of distribution of these welfare benefits.

We think either alternative is acceptable under the Constitution.

QUESTION: Wasn't it seven years longer?

QUESTION: The old law was more commensurate with the idea that men live longer than women.

MR. JONES: Yes, an assumption which, if ever true, is no longer.

QUESTION: Well, that isn't supported by the American-experienced total mortality or never has been, has it?

MR. JONES: Not that I know of.

QUESTION: Well, wasn't the basis for their argument the distinction between '62 and '65 under the old laws? At least the favor -- compensated disfavored class?

MR. JONES: It did have the effect of providing women --

QUESTION: Wasn't that the Government's argument and personal theory?

MR. JONES: I'm not sure exactly what the Government's argument was in the motion to -- we are speaking of different cases.

The one I have in mind is called Kohr against Weinberger. It is there at --

QUESTION: I don't remember it by name.

MR. JONES: But, of course, Congress doesn't have to be locked into favoring disadvantaged classes.

If there are no further questions, I'd like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jones.

Mrs. Ginsburg.

ORAL ARGUMENT OF MRS. RUTH BADER GINSBURG

ON BEHALF OF APPELLEE

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

Stephen Wiesenfeld's case concerns the entitlement of a female wage earner -- a female wage earner's family to social insurance of the same quality as that accorded a family of a male wage earner.

Four prime facts of the Wiesenfeld family's life situation bear special emphasis.

Paula Wiesenfeld, the deceased insured worker, was gainfully employed at all times during the seven years immediately preceding her death. Throughout this period the

maximum contributions were deducted from her salary and paid to Social Security.

During Paula's marriage to Stephen Wiesenfeld, both were employed. Neither was attending school. And Paula was the family's principal income earner.

In 1972, Paula died giving birth to her son, Jason Paul, leaving the child's father, Stephen Wiesenfeld, with sole responsibility for the care of Jason Paul.

For the eight months immediately following his wife's death and all but a seven-month period thereafter, Stephen Wiesenfeld did not engage in substantial gainful employment. Instead, he devoted himself to the care of the infant, Jason Paul.

At issue, is the constitutionality of the gender line drawn by 42 USC 402(G), the child in care provision of the Social Security Act.

Congress established this child-in-care insurance in 1939 as part of that year's conversion of Social Security from a system that insured only the worker to a system that provided a family basis of coverage.

The specific purpose of 402(G) was to protect families of deceased insured workers by supplementing the child benefits provided in 42 USC 402(D).Where the deceased insured worker is male, the family is afforded the full measure of protection, a child's benefit under 402(D) and a

child in care benefit under 402(G).

Where the deceased worker is female, family protection is subject to a 50 percent discount. A child in care benefit for survivors of a female-insured worker is absolutely excluded, even though, as here, the deceased's mother was the family principal breadwinner.

This absolute exclusion, based on gender per se, operates to the disadvantage of female workers, their surviving spouses and their children. It denies the female worker social insurance family coverage of the same quality as the coverage available under the account of a male worker.

It denies the surviving spouse of a female worker the opportunity to care personally for his child, an opportunity afforded the surviving spouse of the male worker, and it denies the motherless child an opportunity for parental care afforded the fatherless child.

It is Appellee's position that this three-fold discrimination violates the constitutional rights of Paula, Stephen and Jason Paul Wiesenfeld to the Equal Protection of the laws guaranteed them with respect to federal legislation by the Fifth Amendment.

The care with which the judiciary should assess gender lines drawn by legislation is currently a matter of widespread uncertainty. The District of Columbia Court of

Appeals recently observed in Waldie v. Schlesinger, decided November 20th, 1974, "Precedent is still evolving"and existing decisions of this Court are variously interpreted by the lower courts.

Appellant has urged in his brief that it would be sufficient if any rationality can be conceived for the overt sex discrimination operating against the Wiesenfeld family.

But this Court acknowledged in Reed v. Reed 404 US that the legislative objective there in question, reducing probate court work loads, did not lack legitimacy.

Yet, in light of the differential based on gender per se, the Court required a more substantial relationship between legislative ends and means so that men and women similarly circumstanced would be treated alike.

Again, in the Court's eight-to-one judgment at Frontiero v. Richardson 411 U.S., requiring the same fringe benefits for married men and women in the military, the Court evidenced a concern to analyze gender classifications with a view to the modern world and to be wary of gross, archaic and overbroad generalizations.

As in the case at Bar, in Frontiero, the underlying assumption was, wives are typically dependent. Husbands are not. Hence, the statutory scheme in this case, as the scheme in Frontiero, favors one type of family unit over another and in both cases, the basis for the distinction is

that in the favored unit, the husband's employment attracts the benefit in question. Where the breadwinner is male, the family gets more and where the breadwinner is female, the family gets less.

Kahn v. Shevin 416 U.S. and Schlesinger v. Ballard, this Court's most recent expression, are viewed by some as reestablishing slack or cursory review standards at least when the defender of discrimination packages his argument with a protective or remedial label.

Kahn approved Florida's $15 real property tax saving for widows. The decision reflects this Court's consistent deference to state policy in areas of local concern, such as state tax systems, domestic relations, zoning, disposition of property within the state's borders.

By contrast, National Workers' Insurance and no issue of local concern is in question here.

The differential in Schlesinger v. Ballard, this Court pointed out, did not reflect archaic, overbroad generalizations of the kind involved in Frontiero or in the instant case.

Indeed, there might have been a certain irony to a ruling in Lieutenant Ballard's favor.

To this day, women seeking careers in the uniformed services, are barred by federal statute and regulations from enlistment, training and promotion opportunities open to men.

The Court's majority thought it a mismatch for federal law to mandate unequal treatment of women officers, denial to them of training and promotion opportunities open to men, a denial not challenged by Lieutenant Ballard, but to ignore that anterior discrimination for promotion and tenure purposes.

Perhaps most significantly, Kahn and Ballard are among the very few situations where a discriminatory advantage accorded some women is not readily perceived as a double-edged sword, a weapon that strikes directly against women who choose to be wives and mothers and at the same time, to participate as full and equal individuals in a work-centered world.

But there could not be a clearer case than this one of the double-edged sword in operation of differential treatment accorded similarly situated persons based grossly and solely on gender.

Paula Wiesenfeld, in fact the principal wage earner, is treated as though her years of work were of only secondary value to her family. Stephen Wiesenfeld, in fact the nurturing parent, is treated as though he did not perform that function. And Jason Paul, a motherless infant with a father able and willing to provide care for him personally, is treated as an infant not entitled to the personal care of his sole surviving parent.

The line drawn is absolute, not merely a more onerous test for one sex than the other, as in Frontiero and in Stanley v. Illinois 405 U.S. and the shut-out is more extreme than it was in Reed, where a woman could qualify as administrator if the man who opposed her were less closely related to the decedent.

This case, more than any other yet heard by this Court, illustrates the critical importance of careful judicial assessment of law-reinforced sex role pigeon-holing defended as a remedy. For on any degree of scrutiny that is more than cursory, 402 (G)'s conclusive presumption automatically and irrebuttably ranking husband principal breadwinner displays the pattern Justice Brennan identified in Frontiero.

In practical effect, laws of this quality help to keep women, not on a pedestal but in a cage. They reinforce, not remedy, women's inferior position in the labor force.

Appellant has pointed out that women do not earn as much as men and there is the 402(G) response to this condition by rectifying past and present economic discrimination against women.

This attempt to wrap a remedial rationale around a 1939 statute originating in and reinforcing traditional sex-based assumptions should attract strong suspicion.

In fact, Congress had in view male breadwinners, male heads of household and the women and children dependent upon them.

Its attention to the families of insured male workers, their wives and children, is expressed in a scheme that heaps further disadvantage on the woman worker.

Far from rectifying economic discrimination against women, this scheme conspicuously discriminates against women workers by discounting the value to their family of their gainful employment and it includes, on private decision-making in an area in which the law should maintain strict neutrality for when federal law provides a family benefit based on a husband's gainful employment but absolutely bars that benefit based on a wife's gainful employment, the impact is to encourage the traditional division of labor between man and woman.

To underscore twin assumptions first, that labor for pay including attendant benefits is the prerogative of men and, second, that women, but not men, appropriately reduce their contributions in the working life to care for children.

On another day, the pernicious impact of gender lines like the one drawn by 402(G) was precisely and accurately discerned by Appellant in common with every Government agency genuinely determined to break down

artificial barriers and hindrances to women's economic advancement.

Appellant has instructed that employers' fringe benefits and pension schemes must not presume, as 402(G) does, that husband is head of household or principal wage earner.

It is surely irrational to condemn this sex line as discriminating against women when it appears in an employer's pension scheme while asserting that it rectifies such discrimination when it appears in workers social insurance.

QUESTION: You said the Appellant has taken these inconsistent positions. I assume it wasn't just his idea, promulgating that for private pension schemes but that he was carrying out his understanding of a federal statute.

MRS. GINSBURG: He was carrying out inconsistent Congressional commands, guidelines that he issued pursuant to Title IX of the Education Amendments of 1972.

QUESTION: Right.

MRS. GINSBURG: But barred recipients of federal money from making distinctions of this kind.

In sum, the prime generator of discrimination encountered by women in the economic sector is the pervasive attitude now lacking functional justification that pairs women with children, men with work.

This attitude is shored up and reinforced by laws of the 402(G) variety, laws that tell a woman her employment is less valuable to and supportive of the family than the employment of a male worker.

Surely, Paula Wiesenfeld would find unfathomable this attempt to cast a compensatory cloak over the denial to her family of benefits available to the family of a male insured.

Nor does Appellant's rationalization for discrimination even attempt to explain why Jason Paul, child of a fully-insured deceased worker, can have the personal care of his sole surviving parent only if the deceased wage earning parent was male.

Appellant has asserted that providing child in care benefits under a female worker's account would involve fiscal considerations. The amount involved is considerably less than was indicated some moments ago.

He estimates the cost for this particular benefit to be .01 percent of taxable payroll in the Appendix at 16, and other differentials are not now before this Court.

At the same time, he maintains --

QUESTION: Are you familiar, Mrs. Ginsburg, with the little chart on top of page 15 of the Appendix?

MRS. GINSBURG: Yes, I am.

QUESTION: Could you tell us which one of these are

we talking about?

MRS. GINSBURG: We are talking about --

QUESTION: Which number?

MRS. GINSBURG: Let's see --

QUESTION: Three?

MRS. GINSBURG: We are talking about three. That's right. Number of persons affected, 15,000. Estimated benefit --

QUESTION: 20 million.

MRS. GINSBURG: -- 20 million, right. And that is the only one we are talking about in this case.

QUESTION: And the -- well, never mind.

MRS. GINSBURG: And, of course, there is a somewhat inconsistent argument made and that is that the bulk of widowed fathers would not qualify for child in care benefits in any event, according to Appellant, because unlike Stephen Wiesenfeld, they would not devote themselves to child care but, rather, to gainful employment.

Budgetary considerations --

QUESTION: Are you talking -- the children have to be under what, 18?

MRS. GINSBURG: Yes.

QUESTION: So long as -- a child has to be a child entitled to child's benefits under the Act.

QUESTION: Umn hmn. Which means, among other things,

that he is under 18.

MRS. GINSBURG: Yes. Budgetary considerations to justify invidious discriminations should fare no better in this case than such considerations fared in cases in which relatively larger cost savings were involved.

For example, New Jersey Welfare Rights Organization against Cahill 411 U.S. summarily reversing 349 Federal Supplement.

QUESTION: What is the justification for benefits for -- with respect to children -- persons under age 18 as distinguished from having the line at 21 or 24 or some other age?

MRS. GINSBURG: I don't know why the age line was set but it is for all benefit purposes under the Social Security Act. I think a decision is made if a child is attending school after 18 but I am not certain about it.

QUESTION: You don't need a babysitter for --

MRS. GINSBURG: No, you certainly don't.

QUESTION: -- 12, 14, 16, 18-year-old people, do you?

MRS. GINSBURG: That is right, and whether that -- Congress has gone too far in that direction is not of concern here. Certainly it has not gone too far when it considers that an infant, such as Jason Paul Wiesenfeld, might benefit from the personal care of a parent.

QUESTION: Well, is there any possibility that the reasoning for his claim depends somewhat on this age factor?

MRS. GINSBURG: The reasoning for --

QUESTION: The justification.

If the justification is not warranted, would that enter into it?

MRS. GINSBURG: Presumably the greatest need is for very young children, preschool children and in many cases, the sole surviving parent, male or female, may not avail herself, as the statute now stands, of this benefit once the child gets beyond preschool age or school age.

Remember that this is not a benefit that is paid automatically no matter what. There is an income limitation. Once you earn beyond -- well, it was $2,400 -- one dollar of benefit is removed for every two dollars earned.

So the parent who receives this benefit must be performing that function, must be performing the child care function.

QUESTION: I suppose we are not confronted with that age problem unless a 19-year-old makes an equal protection claim of some kind.

MRS. GINSBURG: Well, with 18 years as the voting age now, I think that is probably unlikely.

But in any event, comparing the cost analysis here

with the New Jersey Welfare Rights Organization case, that case involved a wholly state-funded program for aid to families of the working poor.

This Court declared unconstitutional limitation of b enefits under that program to families with wed parents.

Unlike New Jersey Welfare Rights Organization, the case at bar presents no issue of federal deference arguably due to state family law policy or any other local concern.

And, surely, leeway for cost-saving is no broader in Federal Workers' Insurance than it is a wholly state-financed and operated welfare program or program funded by general state revenues rather than by contributions of insured workers and their employers.

Budgetary policy, like administrative convenience, simply cannot provide a fair and substantial basis for a scheme that establishes two classes of insured workers, both subject to the same contribution rates:

Male workers whose families receive full protection and female workers whose families receive diminished protection.

Finally, the appropriate remedy is correctly specified in the judgment below. That judgment declares the gender line at issue unconstitutional because it discriminates in violation of the Fifth Amendment against gainfully

employed women such as Paula Wiesenfeld, as well as against men and children who have lost their wives and mothers.

The judgment enjoins enforcement of the statute insofar as it discriminates on the basis of sex.

Extension of child in care benefits under Paula Wiesenfeld's account is unquestionably the cost consistent with the dominant Congressional purpose to insure the family of deceased workers and the express Congressional concern to ameliorate the plight of the deceased worker's child by facilitating a close relationship with the sole surviving parent.

Unequal treatment of male and female workers surely is not a vital part of the Congressional plan. Withdrawal of benefits from female parents who now receive them would conflict with the primary statutory objectives to compensate the family unit for the loss of the insured individual and to facilitate parental care of the child.

Under the circumstances, extension of benefits to the surviving spouse of female insured workers to the father who devotes himself to childrearing is the only suitable remedy. It accords with the express remedial preference of Congress in all recent measures eliminating gender-based differentials. For example, 5 USC 7152 cited at pages 39 to 40 of our brief.

And with this Court's precedent in such cases as

U. S. Department of Agriculture v. Moreno 413 U.S., New Jersey Welfare Rights Organization against Cahill 411 U.S. and Frontiero v. Richardson 411 U. S.

I did want to comment very briefly on the point made with respect to women receiving Social Security benefits that exceed the amount of their contributions.

The reason for this, the prime reason, of course, is that women live longer than men. Most benefits are paid to retirement age beneficiaries and women happen to be 58 percent of the population of persons over 65. That increases in time.

They are about 54 and a half percent of the 65 year olds, 58 and a half percent of the 75 year olds, and about 64 and half percent of the 85 year olds.

But the critical point here is that payments to the elderly are based on the idividual's life span, not on his or her sex so that if a man should live to be 100, he will continue to receive benefits and he won't be told, too bad, you should have died earlier, only women receive payments for that length of time.

QUESTION: Only women are allowed to live that long.

MRS. GINSBURG: In sum, Appellee respectfully requests that the judgment below be affirmed, thereby establishing that under this nation's fundamental law, the Women Workers National Social Insurance is no less valuable

to her family than is the Social Insurance of the working man.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Ginsburg.

Do you have anything further, Mr. Jones?

REBUTTAL ARGUMENT OF KEITH A. JONES, ESQ.

MR. JONES: Yes, thank you, Mr. Chief Justice.

First, I would like to correct a typographical error on page 15 of the Appendix.

In Item number 2 it says, "Eliminate the dependency requirement of Section 202(d)." That should be "202(f)."

QUESTION: (f)?

MR. JONES: That is right.

I point out that the Appellee here has distinguished Kahn against Shevin on which we rely -- or tried to distinguish it only on two bases. One is by relying upon the private inusrance paradigm that a female wage earner is entitled to a certain amount of insurance coverage.

I discussed that at length in my opening argument.

The second is that Kahn in some sense represents deference towards state taxing policies that, Appellee claims, would not be due to federal welfare policies.

That I understand is an analytical matter by federal distribution of public welfare funds and should not be entitled to the same deference as state taxing policies.

Appellee also argues that the child here somehow has rights independent from that of either parent. I see no basis for that. The child has his own benefits under the Act. His only claim here is that one of his parents didn't get benefits.

That claim is derivative from the claim of the parent and cannot be analyzed separately from it.

QUESTION: Well, he is a third-party beneficiary, isn't he?

MR. JONES: That is right.

QUESTION: I mean, the purpose of giving benefits to the parent is so that he can stay home and take care of the child, right?

MR. JONES: Well, I don't think that this legislative history backs that up necessarily.

QUESTION: What is the purpose, then?

MR. JONES: Well, the legislative history shows that the purpose of the statute was to distribute benefits in accordance with the probable need of beneficiaries and it was made on an individual and not on a family basis and it simply represents the judgment that women who seek employment are less likely to find it than are men and that if they do find it, they are likely to earn less than do men.

QUESTION: Yes, but this doesn't -- if there are no children --

MR. JONES: If there were no children, there --

QUESTION: Those conditions, those presumptive conditions would still prevail, wouldn't they?

MR. JONES: If there are no children the problems of job discrimination at least would not be exascerbated by the need to provide child care during the working hours.

There is, I think, a justifiable difference between treatment of widows generally and the widows with minor children.

If there are no further questions --

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jones.

Thank you, Mrs. Ginsburg.

The case is submitted.

[Whereupon, at 2:05 o'clock p.m., the case was submitted.]