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In the

Supreme Court of the United States

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Appellants,

v.

CONCETTA SALFI, et al.,

Appellees.

No. 74-214

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v. No. 74-214

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Appellees.

Washington, D. C.,

Wednesday, March 19, 1975

The above-entitled matter came on for argument at 1:26 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:

MRS. HARRIET S. SHAPIRO, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellants.

DON B. KATES, JR., ESQ., Legal Aid Society of San Mateo County, 2221 Broadway, Redwood City, California 94063; on behalf of the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-214, Weinberger against Salfi.

Mrs. Shapiro.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO,

ON BEHALF OF THE APPELLANTS

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

This case is here on direct appeal by the government from a decision of a three-judge district court in the Northern District of California.

In this class action, the court struck down the nine-month duration of marriage requirement for entitlement to mothers and stepchild benefits imposed by section 416(c) and 416(e) of the Social Security Act.

That Act provides benefits for surviving minor children of the wage earner and for the mothers of those children and, as the Court said this morning, the fathers, so that they need not work outside of the home.

But 416(e) of the Act defines a child of a deceased wage earner to exclude short-term stepchildren. That is, ones whose natural parent had married the wage earner less than nine months before his death.

And of course the mothers of such ineligible children are not entitled to mother's benefits, to permit them

to stay home to take care of the ineligible children.

QUESTION: Mrs. Shapiro, do you know the reason for the nine months? Why is it nine rather than ten or twelve or --

MRS. SHAPIRO: Well, the indication is that Congress felt that nine months was long enough to deter marriages designed to obtain benefits. There is also apparently some idea that, for in some short period there isn't the kind of dependency developed which needs to be recognized by social security payments when the expectation is disappointed.

QUESTION: Is it related to the period of gestation?

MRS. SHAPIRO: Not so far as I know.

QUESTION: Why not?

MRS. SHAPIRO: The court below found that the nine-month eligibility requirement was unconstitutional, because it thought that it established a conclusive presumption that shorter marriages are undertaken to secure benefits.

It concluded that claimants, like Mrs. Salfi and her daughter, Doreen Kalnins, are constitutionally entitled to disprove that presumption.

The district court was wrong. The duration of marriage requirement is a substantive limitation on eligibility. It reflects a legislative policy decision that marriage alone is not a sufficient qualification for benefits. And that it's the stepfather's obligation to support his stepchild which

generally matures over time.

Still less is it as --

QUESTION: Does that depend, to some extent, on a State-by-State analysis?

MRS. SHAPIRO: No, it --

QUESTION: Are there some States in which the step-father has no obligation at all?

MRS. SHAPIRO: The Social Security Act requires --

QUESTION: No, I'm speaking of State law, though.

MRS. SHAPIRO: Yes, but the Social Security law doesn't make the eligibility turn on the State law require-ments.

QUESTION: Mrs. Shapiro, if what you just said is so, why is there the exception in the statute for death by accident?

MRS. SHAPIRO: Well, this reflects one of the important factors in the Social Security Act that the -- each specific provision reflects the interrelation and the resultant effect of many different policies; that the general policy may have an exception because of other policies which impinge.

The accident section was added in 1967; it was a part of -- there were two exceptions put in at that time. One was for the survivors of servicemen, who die on active duty. And that, fairly obviously, was designed to recognize the particular special responsibility, federal responsibility,

for people who are killed in the federal service.

And Congress may have thought that people who die in accidents are in some sense similar. They, too, are likely to be young, and the Act has always had particular concern for people, the survivors of wage earners who die before they have a chance to build up financial security for their families, in leaving young families.

QUESTION: So that in your view, then, a distinction between a death by accident and one by a surprising heart attack is a policy decision?

MRS. SHAPIRO: Yes.

QUESTION: Even though the wage earner might be 33.

MRS. SHAPIRO: Well, the other basic -- well, the Congress, in the duration-of-marriage requirements, was looking at the problems of the question of motivations for entering into valid marriages. They didn't want to pay benefits to those who married simply to get benefits, who thought of marriage as a condition of eligibility for government subsidy.

But the provision is not a kind of a rough evidentiary tool to identify those marriages which were entered into out of a desire to obtain benefits. Instead, it is designed to serve as a deterrent or, more precisely, to make sure that the Act doesn't become an incentive to marriage. Congress thought that few people would marry for benefits which they couldn't get for many months after marriage.

And that's why wives of retired workers are not entitled to benefits unless they've been married for a year. It's also why widows and their children, in appellees' class, are not entitled to benefits on the basis of a marriage which ended in death in less than nine months.

If the duration-of-marriage requirements were simply evidentiary presumptions, the waiting period for wives would make no sense, because all wives are entitled, after a year.

So that that provision has no evidentiary purpose in identifying marriages motivated by a desire for benefits.

The fact that there is this waiting period, for wives as well as for widows, demonstrates the deterrent purpose of all the duration-of-marriage requirements.

They are substantive conditions of eligibility, and they are designed primarily to avoid any incentive the Act might otherwise provide for marriage.

The fact that, as Mr. Justice Blackmun mentions, there is a small group of survivors that Congress has excused from these duration-of-marriage requirements doesn't indicate any general exception to the provisions of the Act requiring duration-of-marriage.

QUESTION: Mrs. Shapiro, is the United States satisfied there was jurisdiction in the district court here?

MRS. SHAPIRO: We are not satisfied that there was

jurisdiction to the extent that it imposed a -- identified a class and required retroactive payments to all members of the class.

QUESTION: What about the jurisdictional amount?

MRS. SHAPIRO: Well, --

QUESTION: The United States made a motion, I gather, to dismiss.

MRS. SHAPIRO: Yes.

QUESTION: Based on that.

MRS. SHAPIRO: Well, it's --

QUESTION: Well, is it possible that the plaintiff, each plaintiff could recover more than $10,000?

MRS. SHAPIRO: It's possible. They're right on the line. The child is -- was currently fourteen. She would ordinarily be entitled to benefits until she's eighteen, or, if she goes to college, until she's twenty-two. And if she's entitled for five years, or about five years, she'll make it. But --

QUESTION: Yes.

MRS. SHAPIRO: The payment of benefits to the survivors of accident victims, without -- immediately, doesn't undercut the deterrent purpose of the statute, since when death is by accident it's by definition unanticipated. And so payment of benefits in accident cases can be no incentive to people who might be contemplating marriage to obtain benefits.

Of course, death from natural causes can also be unanticipated.

QUESTION: Well, suppose you have a problem as to whether it is by accident?

MRS. SHAPIRO: Well --

QUESTION: Then what does the Department do?

MRS. SHAPIRO: Ordinarily, I think that the fact that it was by accident would appear on the death certificate; that in the vast majority of these cases the fact of an accidental death is pretty much self-evident.

QUESTION: Is suicide excluded?

That's what they usually get into a fight over in an insurance case: whether it was an accident or whether it was suicide.

MRS. SHAPIRO: I am not sure whether suicide is excluded.

QUESTION: Or whether after an automobile collision the victim has a heart attack and dies.

MRS. SHAPIRO: Well, the definition --

QUESTION: Is it death by accident?

MRS. SHAPIRO: -- the definition of accident in the Act says that it has to be solely by external causes. The Act --

QUESTION: Always the same definition and always the same litigation.

MRS. SHAPIRO: But unexpected death from natural causes is far more difficult to identify. A claim could be made in any case where death occurred within nine months of the marriage. The Secretary would then have to make a judgment as to life expectancy at the time of marriage.

And that judgment is, by its nature, speculative, and the possibility of error is evident to any who might be tempted to marry for benefits.

There are, thus, rational reasons for Congress to have decided to waive the duration-of-marriage condition for survivors of accident victims.

QUESTION: Mrs. Shapiro, let me interrupt you once again. There was a time in the Federal Estate Tax law when a gift made within three years of death was deemed to be made in contemplation of death. Isn't this statute rather reminescent of that?

And that was held invalid, as I recall.

Until it was changed.

MRS. SHAPIRO: Well, the function of this provision in this Act is to deter the entering into marriages in order to obtain benefits.

I believe it's the deterrent purpose of this statute that distinguishes in.

Congress has usually moved step by step in revising the Social Security Act, and extending the benefits to

particular classes, as particular problems are identified.

One of the things Congress considers in deciding whether to extend the benefit is the effect on the fund created by the Social Security -- the fund which is created from the taxes, out of which the benefits are paid.

Social Security System is supposed to be basically an insurance program. And so the actuarial soundness of the fund is a matter of great concern to Congress.

A decision that the fund can afford the obligation to pay benefits to survivors of accident victims doesn't mean that it can also afford payment to survivors of other short-term marriages, or that it could afford to eliminate the duration-of-marriage requirement altogether.

The sufficiency of the fund is basic to the effectiveness of the insurance system. And so in this area it is particularly important to permit Congress to move step by step in expanding the obligations chargable against the fund.

So long as there is a rational basis for distinguishing the categories that Congress defines, this Court should not interfere, particularly when, as here, there's no classification involved which requires any kind of higher than normal judicial scrutiny.

On the retroactivity question, we rely primarily on the discussion in our brief.

I would like to address briefly the appellees'

statement that our sovereign immunity argument is only a claim that they failed to exhaust administrative remedies.

We discuss in our brief the reason why we believe that 42 USC 405(g) is the only possible jurisdictional basis for this suit. And that section has two important limitations on the waiver of sovereign immunity.

First is the requirement that the administrative remedies must be exhausted.

But, second --

QUESTION: I gather there's no stipulation here, as there was in Wiesenfeld this morning.

MRS. SHAPIRO: That's right.

QUESTION: And that it would be futile to exhaust those --

MRS. SHAPIRO: No, there is no stipulation in this case. But --

QUESTION: That would make a difference, wouldn't it?

MRS. SHAPIRO: Well, it would make a difference as to the --

QUESTION: Well, you didn't argue this -- you didn't argue sovereign immunity in Wiesenfeld.

MRS. SHAPIRO: No, we didn't.

QUESTION: I wondered why.

Because of the stipulation?

MRS. SHAPIRO: Partly because Wisenfeld wasn't a class action. What we're concerned about in this --

QUESTION: No, but there was a -- there was a provision of the order we affirmed this morning requiring backpayment of those benefits.

MRS. SHAPIRO: Well, that's the problem that we're addressing --

QUESTION: Well, I'm just wondering why you didn't raise it, you didn't in Wisenfeld. I wondered if the stipulation, that it would have been futile in the case of the issue there involved, to exhaust it; was that the reason it was not --

MRS. SHAPIRO: No, the --

QUESTION: You didn't think of it.

MRS. SHAPIRO; Pardon?

QUESTION: Maybe you didn't think of it.

MRS. SHAPIRO: The problem that we see --

QUESTION: As a matter, I'm inclined -- maybe I'm wrong, but I think our provision as to retractive benefits apply to more than just Wisenfeld.

MRS. SHAPIRO: I didn't notice the provision for retractive payments in --

QUESTION: Oh, yes, it's there. It's in the order we affirmed this morning.

QUESTION: You don't want us to reverse ourselves

the same day, do you?

[Laughter.]

MRS. SHAPIRO: I just don't want you to order retractive payments here.

The other provision in section 405(g) is that the claim must be filed within sixty days of the final administrative decision.

So even if the exhaustion requirement can be ignored in cases raising constitutional claims, the time limit must still be respected. Because once a claim has been denied, and sixty days have passed, that denial is final. And the finality is important to the actuarial assumptions on which the Social Security System is based.

It protects the fund out of which the benefits are paid from any possibility that large contingent liabilities will be built up.

Individual appellees here filed promptly. But the class recognized by the district court includes all those previously denied benefits because of the nine-month rule. It thus includes claimants whose denials became final more than sixty days before this suit.

And as to those claimants, there has been no waiver of sovereign immunity. And payment of the benefits to them imposes just the kind of liability on the fund that 405(g) is designed to avoid. There's about $35 million in this case,

which is serious enough.

But a decision that class actions can be used to avoid the finality provisions of 405(g) is even more serious, because that would mean that any denial of benefits, based on a statutory requirement, later declared invalid, could be reopened at any time in a class action. And the contingent liability of the fund is then enormous and totally unpredictable.

And that's the kind of actuarial nightmare that 405(g) is designed to prevent.

I would like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Kates.

ORAL ARGUMENT OF DON B. KATES, JR., ESQ.,

ON BEHALF OF THE APPELLEES

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

I'm Don Kates, counsel for appellees in this matter.

Before I go into my prepared argument, I'd like to respond to a question which Mr. Justice Rehnquist asked. I'm informed by my co-counsel that there's a specific regulation relating to suicide.

If it is found as a matter of fact that the suicide was so overly ill that he didn't know the consequences of his act, it is accidental; otherwise the suicide is considered

a -- is considered to come under the nine-month conclusive presumption.

I would also like to respond just briefly to the allegations here that a justification may be offered for the nine-month rule in terms either of deterrence or of proving dependency of the stepchild and the widow upon the husband.

As to deterrence -- I mean, this is covered in our brief -- but as to deterrence, there's no deterrent factor of this rule at all, because there's no penalty in this rule. If a man terminally illis induced to enter into one of these sham marriages, and manages to hang on for nine months after the marriage, then the widow and any children she has are entitled to benefits.

If he doesn't manage to hang on, nobody has lost anything. There's no deterrence at all.

Mr. Justice Blackmun, I believe, referred to the case of Heiner vs. Donnan, in which we had a two or three-year conclusive presumption of a donor's intent to give a gift in expectation of death. There was equal deterrence in that case, if deterrence consists merely in the fact that if they catch you out you don't succeed.

Deterrence, in our view, if I may give the example of a bank robbery situation, the United States has not merely passed a law saying that if the FBI catches up with a bank robber he has to give back the money; the bank robber also

goes to jail. That's deterrence. That's a cost which occurs in excess of any benefit that you may have gotten through the fraudulent or other illegal conduct.

QUESTION: Has there been much doubt in the past as to whether they could get the money back?

MR. KATES: I beg your pardon, sir?

QUESTION: Has there been much doubt in the past that they could get the money back, in your hypothetical, or your illustration?

MR. KATES: There certainly has been some doubt, although I understand that the law applies equally, Your Honor, whether they get the money back or not. Perhaps the bank robber gets a little off his sentence for that, but he certainly doesn't go scot-free, as would occur in our case.

QUESTION: In your case of the terminal illness of a person, you say that nobody loses anything; but if the purpose of the thing is to deter that kind of marriage just for the benefit, I would presume that the spouse who is going to marry the terminally ill person would be a little less likely to do it if she knew that he had to last nine months.

MR. KATES: She might be a little less likely to do it, Your Honor, but if the marriage is a sham, which is what this rule is directed at, I don't see why she really would. She doesn't have to live with him. She doesn't have

to do anything at all except marry him, and if he lives nine months, she's automatically a widow.

QUESTION: Well, but some consequences certainly attach to marriage, other than getting Social Security benefits.

MR. KATES: Yes, Your Honor, but I don't see that any of the deleterious consequences would apply, such as they may be -- speaking as a bachelor --

[Laughter.]

-- that I don't see how any of those deleterious consequences would apply to a sham marriage of this kind.

The facts in this case, Your Honors, typify what's happened in thousands of cases, because of this nine-month rule.

The deceased wage earner, Londo Salfi, was an active and healthy man of 52 years at the time of the marriage, with a life expectancy of 21 years.

Routine medical examinations demanded by his employer, including one within a year of the marriage, showed that he had no heart problem or any disease or debilitation whatever as far as physicians could determine.

Indeed, the possibility of a heart ailment was so far from his mind that, like all too many other people, he dismissed the first heart attack, which began about a month after the marriage, as acute indigestion; and a physician was

only called after the symptoms persisted.

After his death, Mrs. Salfi applied for survivorship benefits for herself and the child by a former marriage, only to meet an absolute bar of the nine-month rule.

She offered medical and other evidence to show that the marriage was genuine and not contracted in contemplation of death, but none of this could be or was considered by the Social Security Administration, because of the statutory conclusive presumption that where a marriage is entered into in contemplation -- is entered into and the man dies of natural causes, non-accidental causes, within nine months, the marriage is conclusively presumed to have been a sham entered into in contemplation of death.

Mr. Salfi's unexpected death in this manner is by no means an isolated, extraordinary or unusual kind of event. On the contrary, every year thousands of people are struck down by heart attacks or other ailments in the prime of life.

What is unusual, however, is a conclusive presumption that, where this occurs within nine months of marriage, the marriage was a sham entered into with expectation of death.

We wish very strongly to emphasize that the Social Security Administration has submitted absolutely no evidence whatever that such fraudulent applications -- or that such fraudulent marriages, to result in fraudulent applications,

are now or ever have been any kind of a problem for them.

QUESTION: Well, I suppose Congress made a judgment that it was enough of a chance that they should take some precautions against it.

MR. KATES: Yes, Your Honor. We can agree that that is what Congress did. However, the lack of any evidence as to the prevalence of the matter goes to the gravity of the evil, goes directly to that issue and undercuts any attempt to justify the nine-month rule --

QUESTION: Well, let's assume -- let's assume there was evidence of a substantial incidence of fraudulent claims. Would that make a difference to you?

MR. KATES: It would not make a difference to our conclusive presumption argument, Your Honor, but it would make a difference --

QUESTION: Then why are you arguing it?

MR. KATES: Pardon?

QUESTION: Why are you arguing it?

MR. KATES: We also rest this case on an equal protection argument, Your Honor, and we feel that a classification is, per se, unreasonable where it is so overbroad -- well, to give an example: A classification --

QUESTION: You're suggesting Congress, in a law, may not classify -- may not treat a group as a class, unless every single member of the group --

MR. KATES: Absolutely --

QUESTION: -- shares the -- shares the same characteristic?

MR. KATES: Absolutely not, Your Honor. But we think that a classification is fatally overbroad if it tosses out 99 innocent people to catch one malefactor.

QUESTION: What if it were the other way around?

MR. KATES: If it were the other way around, we think that it might well be acceptable.

QUESTION: Well, on what? On both equal protection and conclusive presumption?

MR. KATES: No, Your Honor, only upon equal protection grounds.

QUESTION: Well, what about conclusive presumption in that case?

MR. KATES: A conclusive presumption, Your Honor, is unconstitutional, unless --

QUESTION: Then you are saying Congress cannot classify in this way unless every single member of the class shares the trait.

MR. KATES: For the purposes of the conclusive presumption doctrine, Your Honor, a conclusive presumption must be universally true.

QUESTION: You're relying on Stanley v. Illinois in this, aren't you?

MR. KATES: I certainly do, Your Honor, as well as upon Vlandis and upon LaFleur.

QUESTION: Stanley v. Illinois, and those cases, had some -- not Vlandis, but Stanley v. Illinois specifically said that there was a kind of a special relationship that required some kind of special scrutiny.

MR. KATES: Well, Your Honor, I --

QUESTION: And what is it here?

MR. KATES: I do not --

QUESTION: Marriage.

MR. KATES: Well, Your Honor, there is, as your colleague --

QUESTION: Well, I'd like to know what your answer is to Justice Stewart's question, besides Mr. Justice Stewart's answer.

[Laughter.]

MR. KATES: I always attempt to rely upon Mr. Justice Stewart whenever I can, Your Honor.

QUESTION: Well, and any other Justice whenever you can.

[Laughter.]

MR. KATES: Absolutely, Your Honor!

QUESTION: Yes.

So what is your answer?

MR. KATES: We do not believe that other than

marriage there is a special relationship.

However, that would not distinguish this case from Vlandis or United States Department of Agriculture vs. Murry or Heiner vs. Donnan, or Schlesinger vs. Wisconsin. All of them conclusive presumption cases, without any special relationship.

QUESTION: I take it, in your answer to Justice White, you're really reaching for unattainable perfection, aren't you?

MR. KATES: No, Your Honor, all that we seek in terms of the equal protection clause -- in terms of the conclusive presumption matter, we believe that, as this Court has repeatedly held, a person is entitled to prove the facts of his or her entitlement. And that Congress may not arbitrarily decide that an evidentiary conclusive presumption -- a presumption in this case of a falsehood -- can be substituted for the person's right to prove the actual facts.

In Mrs. Salfi's case, and in thousands of others, there was no marriage in contemplation of death, there was no lack of genuineness. These are all conceded facts, Your Honor.

Mrs. Salfi was turned away without any examination of the facts of her case. However, when this case was filed, the United States, or rather the Social Security Administration had no hesitation whatever in entering into a stipulation

that all the facts we have relied upon here were absolutely true.

That stipulation, incidentally, will be found -- since there's some suggestion in the brief of the appellants in this matter that they did not stipulate to the allegations of the complaint, I refer you to Appendix page 29, paragraph 2:

"There are no genuine issues" -- this is the stipulation --

"There are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision ... and that this three-judge panel may finally determine the constitutionality of said challenged provisions on the basis of the facts set out in the complaint and affidavits heretofore filed."

To return, if I may, to the issue of equal protection, just very briefly, a classification, in our view, would be fatally overbroad if it classified 99 innocent persons with one malefactor, and punished them all.

Here we have a classification which excludes thousands of innocent persons right now for the sake of dealing with the purely hypothetical danger that a fraudulent application may some day come along. For there is no evidence in the record, no attempt to produce any evidence that this conclusive presumption refers to anything which has ever been

a problem.

QUESTION: Would it be fatally overbroad if Congress eliminated the benefits entirely on the theory that they didn't want to get into deciding how many people, of the total number, were malefactors, as you put it?

MR. KATES: You mean -- if you're asking, Your Honor, whether Congress could eliminate benefits to widows entirely, it certainly could, yes.

QUESTION: In these circumstances.

MR. KATES: In these circumstances?

QUESTION: Yes.

MR. KATES: You mean --

QUESTION: Just simply say no benefits at all; no question that they can do that, is there?

MR. KATES: I'm a little uncertain. You mean whenever a person died or --

QUESTION: No. No. Independent of the remarriage, just eliminate the benefits to solve the problem.

MR. KATES: Well, Congress definitely could eliminate all widow's benefits.

QUESTION: That's very definitely overbreadth, isn't it?

MR. KATES: Well, at that point, Your Honor, I think that Congress would have made a substantive decision that it didn't want to have widow's benefits.

QUESTION: What you say is that they can't make one -- they can't try to slice it as thin as they've sliced it here, when the knife cuts some innocent people?

MR. KATES: Yes, Your Honor, I think that when the knife -- they've sliced it thin on their side, but very thick on our side, Your Honor.

QUESTION: Well, what -- do you think Congress could have made a judgment that a person, a widow, a wife who has been married for nine months or a year or two years is more entitled to benefits than one who has only been married for a day or a week. And might need them more.

MR. KATES: Congress might have made that judgment, Your Honor, but Congress didn't make that judgment.

QUESTION: Well, what if they didn't but they could have?

MR. KATES: That doesn't have anything to do with our case, Your Honor.

QUESTION: Well, it doesn't -- in classic equal protection terms, you could dream up a good reason for a law you -- a good reason for a discrimination you --

MR. KATES: Well, Your Honor, --

QUESTION: -- and you saved the law with it.

MR. KATES: -- I can only say with regard to that, that that would, as to the children's benefits, make this statute a redundancy. A stepchild must prove by actual

evidence that he has been supported by the stepfather. That's a requirement under the Social Security Act. A widow, on the other hand, has never been required to prove dependency. That's simply not required by the Act.

And --

QUESTION: Well, I would suppose, arguably, Congress could have decided that wives who have only been married a short time are more competent to take care of themselves if their husband dies than if they had been married longer.

MR. KATES: Well, Your Honor, if it had, that would itself have been a conclusive presumption that would have raised certain problems.

I would point out that with regard to dependency -- this is in our brief -- a woman becomes dependent not nine months after the marriage but at the time of marriage --

QUESTION: Well, that's legally, yes.

MR. KATES: Not just legally, Your Honor; factually. If she's going to give up her job, that normally occurs before the marriage and honeymoon. Certainly if she loses alimony or welfare or pension benefits from a past marriage, she loses them on the date of the marriage, not nine months thereafter.

QUESTION: But if she quits her job at the time she's married and tries to go back to that or a similar job a month afterward, she's going to have an easier time than if she's

been off the market for a year, wouldn't she?

MR. KATES: Marginally, Your Honor, yes. But --

QUESTION: Well, isn't Congress entitled to take into consideration these kind of things that you say are marginal, when it's drafting anything that is as much of a tapestry as the Social Security Act?

MR. KATES: Well, Your Honor, I would concede that Congress would be entitled to take these things into consideration. Our argument is that in the light of the statute, as it exists, in its position, vis-a-vis the other provisions of the statute, Congress didn't and could not have been considered to be considering those factors.

If it had, it wouldn't have bothered imposing this nine-month requirement for stepchildren at all, because that's already being tested directly by the Act.

You don't need a wide overreaching conclusive presumption when you've already tested the matter directly, and if Congress had desired to test the matter as to widows, it would simply have required widows to prove that they had become dependent upon their husbands.

I will pass now, if I may, to the issue of sovereign immunity, as raised by the United States.

Before undertaking a discussion of the technical aspects of that doctrine, however, I'd like to make one general consideration clear.

This case is very different from those previously dealt with by this Court, which have dealt -- have concerned attempted to enforce contracts against the Treasury or attempts to require or prevent the disposition of unquestionably sovereign property.

The Social Security trust fund is not only entirely separate from the general Treasury, it receives no funds from the general Treasury. The Social Security trust fund is stocked purely by contributors, contributions from wage earners and their employees -- employers, I'm sorry.

The federal government collects, invests, and distributes these funds, but it does not make any contributions on its own.

QUESTION: So far.

MR. KATES: So far. Yes, Your Honor.

In other words, it acts conceptually as no more than a trustee.

To hold that the government has sovereign immunity from a suit by wage earners to a fund which they've contributed to and the government has not would be to go far out of our way to extend the doctrine of sovereign immunity, a doctrine which is almost universally deplored by modern thinkers as a grotesque anachronism from the Middle Ages.

There is yet another prefatory comment I'd like to make before going into the general discussion of sovereign

immunity, and that is -- well, first of all, let me make one thing very clear. We're concerned here not with sovereign immunity from this suit as such, but only with sovereign immunity as to benefits back -- benefits for the class back to the date of original entitlement.

Now, there's an important issue in that regard which may have been lost sight of completely, since SSA has studiously ignored it.

This is that there's an SSA regulation which requires exactly what we got in this case: retroactive benefits.

Whenever an application has been found to have been improperly denied, that regulation is 20 CFR 404.957, and it is quoted in our brief, in a footnote.

QUESTION: Is this an argument that is made as a waiver of sovereign immunity?

MR. KATES: No, Your Honor -- well, whether it is a --

QUESTION: Tantamount to it, or what?

MR. KATES: -- whether it is a waiver or not, we believe that the Court was entitled to an order -- to order, and its order is entitled to be affirmed, in so far as it simply requires the Social Security Administration to treat the members of the Salfi class the way it would treat anyone else who came in and showed that they had erroneously been denied benefits.

QUESTION: Because, I gather, you say here if SSA had admitted it had made a mistake in this case, then the operation of that regulation would have paid these benefits back to the date of Mr. Salfi's death?

MR. KATES: Yes, Your Honor, it would pay back to four years, and that would of course handle the Salfis, it would handle an appreciable number of the class, although it would not handle all the class, which is six years back.

QUESTION: Are there any members of this class who have not -- would not have been in compliance with section 402(j)(1), the one that limits it to a one year before the application?

MR. KATES: I would imagine that there -- according to the estimate of SSA, which we accept, because we have no facts on the matter, although I don't know how they came about theirs; there are 20,000 members of the class, approximately, over a six-year period. Presumably a substantial number of those class members are before that six-year period.

However, most of those members would be covered by this four-year period of the SSA regulation.

Now, let me, for a moment, consider that SSA's estimate that paying benefits back to the date of entitlement for the class would cost $35 million. We do not agree to that estimate at all. We note that it's based on an unverified assertion in an affidavit, which utterly fails to specify how

these figures were arrived at, except in so far as it's obvious that they were arrived at by pure speculation, because no one can know this matter.

Noe one actually knows how many of these applications were put in at all.

Moreover, the affidavit assumes what is totally false, which is that everybody who has been turned down in this group of 20,000, even if notified, is going to reapply. Some of these people are dead. Others may, for various reasons, not want to apply.

Moreover, it also assumes that all of these people will be entitled to benefits. Some of them will not be entitled to benefits, for a large number of reasons, including the fact that they're not, as Mrs. Salfi is, 50 years of age and disabled, or that they're not less than 60 years of age; or they may be entitled -- Mrs. Salfi, for instance, because she's on disability, gets a certain amount of Social Security benefits anyway. So her entitlement is not to a full survivorship benefit but to a survivorship benefit discounted by the amount of her Social Security disability.

The same would apply to anyone who is on Old Age or Retirement benefits.

SSA has naturally seized upon this figure of $35 million as representing an exorbitant award to the class, which will menace the liquidity of the Social Security System.

QUESTION: Wouldn't there be a reduction in benefits if Mrs. Salfi were working and earning --

MR. KATES: I believe there would be, YourHonor.

QUESTION: -- as the same that we had in Wiesenfeld, a dollar for every two dollars earned?

MR. KATES: Yes, Your Honor. Of course, if she were able to work, if she weren't completely disabled, she wouldn't be on disability and she wouldn't be eligible at all.

QUESTION: Well, in this class there may be many who had to go to work, that haven't been getting any benefits.

MR. KATES: Yes, Your Honor, that's probably true. And their lack of benefits might even have some relationship to my comment that some of them may no longer be around.

In fact, however, even if it's accurate, this $35 million figure does not represent an exorbitant return for the class, it represents $1750 average for each class member. $1750 to which these people were entitled and would have received, had they not been deprived by an unconstitutional law.

More important, the restitution of this amount does not in any manner threaten the Social Security System, which has a total trust fund, permanent trust fund, of $46 billion. Indeed, the amount which was denied the class over a six-year period represents only a little more than one-

twentieth of one percent of the amount which was paid out by SSA last year alone, and last year SSA actually increased the trust fund because Social Security taxes exceeded benefit payments by $1.5 billion.

It had been my intention to discuss in some detail the question of whether, since Congress has, as SSA concedes, waived sovereign immunity in a 405(g) case, we are allowed to bring an action under -- or our award below is authorized by 405(g).

SSA says that we can't rely on that, because we failed to exhaust the administrative remedy provided in that section.

This Court just today in the Wiesenfeld case, page 5, note 8, has cited and relied upon previous cases which assume or hold that it is unnecessary to exhaust this or any other administrative remedy where the sole issues are constitutional, or where the administrative remedy which the --

QUESTION: Well, I wonder if that's the whole story, Mr. Kates. After all, there was a stipulation. I tried to get, and couldn't, from Mrs. Shapiro whether they relied on that as the reason they never raised this sovereign immunity question in Wiesenfeld.

MR. KATES: Well, Your Honor, the stipulation --

QUESTION: Well, the fact is they did, and you don't have a similar stipulation here, do you?

MR. KATES: They stipulated that they had no jurisdiction to decide constitutional issues.

QUESTION: That the administrative agency has no jurisdiction.

MR. KATES: Right. They have no more authority in this case.

QUESTION: I know, but the stipulation in Wiesenfeld, I thought went beyond that; didn't it?

It was that you don't have to exhaust your remedies in Wiesenfeld, because it would be futile to do so.

MR. KATES: Well, they stipulated that it would be futile, yes, Your Honor. It would be equally futile here.

QUESTION: Yes.

MR. KATES: Let me -- we did not exhaust the administrative remedies. But, as a matter of --

QUESTION: Well, may I ask this: Do you read 405(g) as waiving sovereign immunity, whatever its effect may be, conditionally upon the exhaustion of remedies?

MR. KATES: No, Your Honor, we do not. Not at all.

QUESTION: Unh-hunh.

MR. KATES: But let me just a moment talk about what happened in this case.

We didn't exhaust the administrative remedy, but somebody else did. Somebody in our class took our pleadings, put them into an administrative -- our pleadings in the

district court, put them into the administrative hearing officer; the administrative hearing officer said: You're talking about the constitutionality of a statute; we have no authority to decide that matter.

And the Secretary of HEW affirmed that decision. That is right in the record in this case.

So, as far as we can tell, there is no question that the exhaustion was --

QUESTION: Well, to the extent that you're asking for back payments, you regard the suit you brought as a suit under 405(g)?

MR. KATES: Yes, Your Honor, we believe that it is justifiable under 405(g).

QUESTION: Because 405(h) says that -- because they've got it misstated, when they talk about, what is it, section 71 of 42 US -- but that there's no other avenue for this kind of recovery, except the 405(g) avenue?

MR. KATES: No, we believe that, as in Wiesenfeld, we were entitled to bring it under 1331 or under a number of other statutes upon which we rely. We believe that it can be affirmed under any of a number of statutes.

QUESTION: Well, I'm limiting -- the question I asked, of course, was limited to these back benefits.

MR. KATES: These back benefits, we believe, --

QUESTION: Is that still 1331?

MR. KATES: The waiver of sovereign immunity in our -- our position, Your Honor, is that it is either of two things: either, one, the waiver of sovereign immunity allows us to bring a suit under 1331 or any other source of jurisdiction, limited to the Social Security Act; or, two, the waiver of sovereign immunity allows us to bring a suit under 405(g) and --

QUESTION: Well, what bothers me on your first argument is, in this -- to the extent you're going for back benefits, is the provision of 405(h), which says that no proceeding shall be brought under -- I've forgotten the exact language -- section 71 of 28 or 42 USC, I've forgotten which it was -- 28, I guess. Which, apparently from history, 71 is all of the --

MR. KATES: Well, that would include 1331, Your Honor, and --

QUESTION: That's right. That's right.

MR. KATES: -- that's what Wiesenfeld was brought under. And that would be jurisdictional. So as it is considered in the opinion of this Court, this Court didn't there consider it as a jurisdictional --

QUESTION: Well, fortunately, because the government didn't raise it, we didn't have to wrestle with it in Wiesenfeld, but I suppose we do in this case, don't we?

MR. KATES: You may very well, Your Honor.

Now, there's been a suggestion here that somehow the sixty-day statute of limitations in 405(g) would apply to our class, and that somehow the members of the class avoided this, or tried to avoid the sixty-day statute of limitations.

Well, I note my time is up, Your Honor. I shall attempt briefly to summarize, if I may.

MR. CHIEF JUSTICE BURGER: Have you covered this in your brief?

MR. KATES: No, we have not covered this point in ourbrief.

MR. CHIEF JUSTICE BURGER: Well, we'll give you a minute to do it very briefly. We're running thirty minutes behind today.

MR. KATES: Thank you, Your Honor.

The sixty-day statute of limitations is tied very strictly to the exhaustion requirement. That's what it grows out of.

If the exhaustion requirement is inapplicable, the sixty-day statute of limitations is inapplicable.

The application of that sixty-day statute of limitations works a very substantial injustice to our class as well. These class members are ordinary citizens, who rely upon SSA for eligibility information, information which is its duty to provide to them.

When these people, the vast majority of whom are not

constitutional lawyers, are told that they are flatly ineligible because of this statute, they're not going to rush off and file a suit in the United States District Court. They just assume, in justifiable reliance upon the information they've been given, that they're ineligible.

Having been misled by SSA -- misled in good faith, but misled nonetheless -- the statute of limitations should be considered tolled until sixty days after these people have now been notified of their entitlement.

Thank you very much.

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

Mrs. Shapiro, do you have anything further?

REBUTTAL ARGUMENT OF MRS. HARRIET S. SHAPIRO,
ON BEHALF OF THE APPELLANTS

MRS. SHAPIRO: The stipulation in the district court was to the facts, it was not to the jurisdiction. We contested the jurisdiction in the district court, as we did here.

The regulation which my opponent refers to, concerning retroactive benefits -- retroactive payments for four years after benefits are denied, is designed to recognize that in individual cases in which errors in adjudication are noted, the administration can go back and correct those errors on an individual basis. That doesn't open up the possibility of a whole-scale reconsideration that would be

the case here.

The other point is that if there were jurisdiction under 1331, which, as we pointed out in our brief, we don't believe there is, the members of the class, by my opponent's arithmetic, who would be entitled to an average of $1,750, couldn't meet the $10,000 jurisdictional amount.

QUESTION: Well, averages of course don't make jurisdiction, do they?

MRS. SHAPIRO: No, they don't, but this indicates that sweeping a whole bunch of people in under the class action may mean that you have very serious problems about the individual eligibility of each person.

QUESTION: Well, didn't Stanley last year hold that each member of the class had to meet the $10,000 --

MRS. SHAPIRO: That's right, it did. And it's very hard to know whether any of these, or which ones of these members of this class -- and of course the other thing that the class retroactivity problem involves is it's going to mean that the Social Security Administration will have to determine whether, if you go back for four years you're going to have to look at month-by-month earnings to determine whether the individual people were entitled. And resurrecting those accounts could be exceedingly difficult.

I believe that's all I have.

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

The case is submitted.

[Whereupon, at 2:18 o'clock, p.m., the case in the above-entitled matter was submitted.]

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