ORIGINAL

In the

Supreme Court of the United States

F. David Mathews, Secretary Of Health, Education, And Welfare,

Appellant.

v.

Helen DeCastro,

Appellee.

No. 75-1197

Washington, D. C.
November 8, 1976

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F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Appellant,	:	
v.	:	No. 75-1197
HELEN DeCASTRO, Appellee.	:	

Washington, D. C.,

Monday, November 8, 1976.

The above-entitled matter came on for argument at 1:38 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

REX E. LEE, ESQ., Assistant Attorney General of the United States, Department of Justice, Washington, D. C.; on behalf of the Appellant.

MARVIN A. BRUSMAN, ESQ., 7 So. Dearborn Street, Chicago, Illinois 60603; on behalf of the Appellee.

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C O N T E N T S

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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 HEW v. DeCastro, No. 75-1197.

Mr. Lee, I think you may begin whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. LEE: Thank you, Mr. Chief Justice, and may it please the Court:

In separate enactments over the period from 1939 to 1958, Congress had graduatly expanded the Social Security entitlements of wage-earners' wives. So that as of 1958, the wife of a wage-earner with an entitled child in her care may obtain benefits without regard to her age when the wage-earner becomes entitled to primary benefits on his own account.

Also over time, but for quite different reasons, Congress has expanded and has extended secondary benefits to certain categories of divorced wives, including the provision that is involved in this case, in 1965, that divorced wives -- defined as those who are married to their husbands for a period of twenty years or more prior to the divorce -- are entitled to secondary benefits at the time that the wage-earner becomes entitled to the primary benefits, provided that they have reached age 62.

So that prior to age 62, wives, but not divorced

wives, are entitled to receive secondary benefits on the basis of entitled children in their care.

QUESTION: Is there any possibility under those regulations that the wife could collect benefits from more than one husband, a way for a former wife?

MR. LEE: I think not, at least --

QUESTION: What about divorced persons?

MR. LEE: -- she would have to be fairly old, she would have to have been married to two of them for a period of twenty years and, as I read the legislative history, that was the purpose of that twenty-year requirement. I suppose it would be conceivably possible, just as the wives being plus 21 years results in the possibilities of the fertile octogenarian, but that would be rare.

The appellee in this case, Helen DeCastro, was divorced from Albert DeCastro in February of 1968, after more than twenty years of marriage. The divorce decree did not award her alimony. Some three years later, after her ex-husband became eligible for primary benefits, Mrs. DeCastro applied for wife's benefits on Mr. DeCastro's account. She was then 56 years old and had in her care a 22-year-old disabled daughter. The daughter was entitled to and continues to receive child's insurance benefits because of Mr. DeCastro's social security earnings record.

At the conclusion of the administrative process, the

Secretary determined that Mrs. DeCastro was not entitled to benefits; she thereupon brought suit contending that section 202(b)(1)(B) of the Act unconstitutionally discriminates against divorced wives. The three-judge court ruled in her favor and this appeal followed.

The key to the disposition of this case we submit is contained in two interrelated considerations. The first is the history of the statutory provisions in which Congress over a period of some three decades has gradually but continually expanded the secondary insurance benefits available to wives and divorced wives, each with its separate rationale, with a single over-arching rationale in the case of wives to benefit the family, but with subsidiary rationales applicable to most of the individual ones.

The second dispositive consideration is the constitutional standard to which Congress has held in performing its policymaking function of allocating scarce social insurance resources. I would like to address each of these separately, but first the history of the relevant statutory provisions.

The controlling feature of the legislative history is that the secondary benefits to which wives and divorced wives are entitled did not result from a single legislative enactment but, rather, over a period of some thirty years. Congress has incrementally expanded these benefits with the history of each addition clearly disclosing a proper objective, but in no

case did the rationale for the particular enlargement of secondary insurance benefits to the wife equally embrace the class of divorced wives to which the appellee belongs.

When originally enacted in 1935, the Social Security Act provided only primary benefits to the wage-earner himself. The first expansion of secondary benefits occurred in 1939. It was a general expansion. It had a general purpose, and that purpose was very clearly set forth in the legislative history and was cited by this Court as dispositive of the issue in Weinberger v. Wiesenfeld, and it was to afford more adequate protection to the family as a unit.

In addition and relevant to this case, the 1939 amendments contained the first instance of extension of benefits on an account of an entitled child in the care of either a wife or ex-wife. It was a narrow extension. It was made only to widows who had reached either age 65 or had an entitled child in their care. And once again, there was a precise rationale for this particular extension, in addition to the general family protection that was applicable to the entire package of 1939 secondary benefits. Again, this was quoted in the Wiesenfeld opinion, and it was that Congress wanted to give the child deprived of one parent, in this case through death, the opportunity for the personal attention of the other.

From 1939 to 1950, there was no change in the eligibility provisions for wives or widows. In 1950, Congress

extended the entitled child eligibility to the wife or a retired, whereas prior to that time it had only been deceased wage-earner. The rationale was not the same as it was in 1939, because the wife, unlike the widow, is not faced with the choice of either foregoing income or leaving the child unattended altogether because her husband isn't dead. But retirement in the usual case means income reduction, and extension of this benefit reduced the need for major adjustments in the family patterns, in the normal family unit, coming at a time late in the wage-earner's life.

Eight years later, in 1958, benefits were extended to the wife of a disabled wage-earner with an entitled child in her care. So that as of 1958, we have all of the grounds covered -- deceased, disabled or retired. Once again, the rationale for extension to the disabled or to the wife of a disabled wage-earner with an entitled child in her care was tailored to the particular extension. As the House committee report observes, the child of a disabled wage-earner will usually be younger than the child of a retired wage-earner, with correspondingly greater need to permit the mother to remain at home. And the House committee report further observes that a person receiving liability insurance benefits -- excuse me, disability insurance benefits, frequently has high medical expenses, with attendant diminution on the family income.

Each of these extensions of secondary benefits to

wives or widows on account of entitled children in their care was bottomed on a distinct but very proper rationale. There is one unifying feature to the three, and it is that each rationale promoted in some way more adequate protection to the family as a unit. Neither this general objective of affording protection to the family as a unit, nor the more precisely identified objectives of the 1939, 1950 and 1958 amendments has any relevance to divorced wives.

In the normal case, divorce works a fundamental and enduring change not only on family relationships but also on the financial dependence of one divorced spouse on the other. The kinds of impact --

QUESTION: Are we bound by that observation?

MR. LEE: Well, I assume not, Mr. Justice White, but it is the kind of thing certainly that under the broad discretion that this Court has afforded to Congress in its recent decisions is the kind of thing that Congress could have taken into account.

QUESTION: Well, it could have, but do you know whether it did or not?

MR. LEE: We certainly know this, at a minimum, that in 1939, when the initial extension was made, that the thing that Congress was attempting to do was to afford more adequate protection for the family as a unit. We know that in 1958 they had family internal, on-going family relationships in mind,

because of the observation that family income would be reduced because of disability --

QUESTION: A lot of divorced wives are still dependent upon their ex-husbands for their support.

MR. LEE: That is correct.

QUESTION: Well, on what basis do you say that Congress determined or that generally it is true that more divorced wives than not are not dependent on their --

MR. LEE: Well, the figures, the best figures that we have are those that are set forth in our brief, and they indicate that only about 14 percent of divorced wives are entitled to alimony by virtue of the decree, and that about 45 percent of those 14 percent actually receive it, so we are down to around 6.5 percent. The significance of that fact, of course, is this --

QUESTION: Was any of that before Congress, or do you know?

MR. LEE: I really don't know. There is nothing in the reports so to indicate. But the point is, what you really come down to then is a question of how much leeway do we give to Congress in making these kinds of judgments. You do have the problem with the 6.5 percent of the over-inclusiveness or the under-inclusivenss, the same kind of problem that this Court faced in Salfi, the same kind of problem that this Court faced just six months ago in the Lucas case. And in Dandridge

v. Williams, the Court said that Congress is entitled to face these problems one at a time.

And manifestly, when you have a program that is designed to handle the problems of tens of millions of people, with desperate requirements and desperate circumstances, there are going to be some ragged edges. As Mr. Justice Stewart observed in his separate opinion in Cramer v. Union Free School District, that kind of imperfection is part of the inevitable consequences of line-drawing, you always have some instances in which Congress does not and indeed cannot exactly tailor its program to avoid any possibility of anomaly or inequity. And if there is any message that comes out of Salfi and Lucas and Dandridge v. Williams, it is that so long as there is a rational basis which Congress could have taken into account, that that is proper, and --

QUESTION: Would it be so much trouble to identify needy divorced wives? Is that the only trouble that Congress is avoiding by this rule?

MR. LEE: No, the problem Congress is avoiding by this approach, Mr. Justice White, is that Congress' bag of funds is limited and it can solve only one problem at a time. I might disagree. In fact, by the time you take into account the number of variables with which Congress has to deal -- divorce status as opposed to non-divorce status, age, dependency, and you could go on for about five or six -- and

then you consider all of the different combinations that can enter in, there is no circumstance in which someone cannot take Congress has done and say you made a mistake, that you should have allocated more money in this instance rather than in --

QUESTION: You haven't suggested to me yet any basis for distinguishing between the needy divorced wife and the needy married -- and the widow, except that it would cost some money, and maybe it would cost too much. I am not saying that would be a bad reason. But is there any other reason than the fact that it would just cost some money to identify the needy divorced wives?

MR. LEE: Yes, there is. If you concentrated on that question -- and, incidentally, that is the question that the lower court concentrated on, and I think that was the root error of the lower court--and you ask only the question are divorced wives more needy or less needy than wives, then I think you might make a fairly good case for the proposition that divorced wives in fact are as needy as a group as are --

QUESTION: I am just talking about a needy divorced wife, and you agree that there would be needy divorced wives.

MR. LEE: Indeed, I do, but that does not render the statute unconstitutional, because probably the neediest of all in our society are probably not divorced wives nor wives but probably orphans who have no parents at all to take care of

them. But the point is that Congress, so long as it acts on a reasonable basis, so long as it --

QUESTION: You mean a money-saving basis. Now, I am not saying that is a bad reason, but that is what it is doing, isn't it, is saving money by not identifying the needy wives?

MR. LEE: By going, as this Court said that they were entitled to proceed, one step at a time.

QUESTION: Maybe another way to put that would be that they are able, having a single pie, to give more money to other disabled categories, to children, to wives as distinguished from divorced wives, by drawing that line?

MR. LEE: That is correct. There are at least three differences between wives in this context and divorced wives, all of which fall within the broad aegis of protection of the family as a unit and some of which very specifically were identified by Congress as constituting part of its basis which Congress could rationally take into account in making the decision that it did in this case./

The first is that the death, retirement or disability of the wage-earner has an effect on the family income in the usual case. In the usual divorce situation this is not true. In 6.5 percent of the cases it is. But as I mentioned a moment ago, Lucas held that Congress may make distinctions based on the relative likelihood of dependency. In that case, it was legitimates versus illegitimates. Here, it is wives'

dependency versus divorced wives' dependency.

The second difference is that there is a living benefit to the wage-earner in that secondary insurance to members of his family increases the family income and does so at the time that there is a reduction in the overall family income.

And finally the payment of benefits to the wife minimizes the extent to which the family's normal routine must be disrupted by the wage-earner's termination of his employment, which was the precise factor that Congress mentioned at the time that it enacted the 1958 addition.

The problems of divorced wives, Mr. Justice White, are not to be denied. But the disadvantages under which they labor are created by the fact of divorce and not by the social security program. The aspects of impact on the family from death, retirement or disability with which Congress was attempting to deal in this incremental program which it enacted are simply lacking in the divorce context.

The fact that her ex-husband has reached retirement has no effect on the extent of Mrs. DeCastro's need. Therefore, unlike Wiesenfeld, for example, this is not a case where the event that triggered the particular benefit to one class but not another is an event that is accompanied by some hardship on the non-receiving class.

Now, the final observation that I would like to make

-- and then I will reserve some time -- is that even if the legislative history in this case were not as clear as it is, and while Congress did not cover all the bases, we submit that for reasons that Justice Garsden has set forth in our brief, they did a pretty good job, that under the consistent rulings of this Court on clarity as to whether Congress has chosen a proper purpose or an improper purpose, works to the benefit rather than to the detriment of the statute, because under the consistent rulings of this Court the purpose of statutory interpretation is to save and not to destroy.

It would, we submit, be a gross distortion of this principle to ascribe to Congress a purpose that it did not have but that would raise serious constitutional questions, especially when both Congress and this Court have made it so clear that the focus of these provisions is the protection of the family.

It is, as Mr. Justice Powell observed in his concurring opinion in Wiesenfeld, social security is designed certainly in this context for the protection of the family. That was the overriding consideration at the time that Congress first got into the business of extending secondary insurance benefits in 1939, it has been the single overarching purpose since that time, and every subsidiary rationale is consistent with it.

Now, one item that remains for discussion in the

course of this legislative history is the history of the one provision in 1965 that extended secondary benefits to the divorced wife whose husband or whose wage-earner ex-husband is not deceased.

Here again, the legislative history is very precise and it reveals that Congress intended to handle or to take care of one problem and one problem only. It might be said or one purpose might have been generally to provide for needy divorced wives of to provide for the children of needy divorced wives. That was not the purpose of the 1965 amendment. The legislative history on this matter is very precise, and I quote: "It is not uncommon for a marriage to end in divorce after many years when the wife is too old to build up a social security earnings record even if she can find a job." That is a very narrow problem, and that is the narrow problem with which Congress dealt, and that is the reason -- that is one of the two reasons, Mr. Chief Justice, for the twenty-year requirement. One was an attempt to avoid the multiple claimant situation, and the other was to take care of the situation in which a couple are married for many years and at the conclusion of that marriage the wife is simply too old, even if she could find a job, to get back into the market and build up a social security earnings record on her own account. Consequently, it was the wife, the older divorced wife who was the focus of the 1965 amendment and not the child.

I would like to reserve some time.

QUESTION: Mr. Lee, before you sit down, am I correct in understanding that 1965 is the first time when any divorced wives got any benefits at all?

MR. LEE: Yes, a divorced wife whose wage-earner was still living.

QUESTION: But was there a divorced wife death benefit before that?

MR. LEE: Yes, in 1950 it was extended to what they called mothers' benefits in the case of a divorced wife whose wage-earner ex-husband was dead and there were three requirements. One was that she have an entitled child in her care; the second was that the wage-earner be dead; and the third was that she show a certain measure of dependency.

QUESTION: That was what was involved in Weinberger, wasn't it?

MR. LEE: Yes, Mr. Justice Stewart, that was.

QUESTION: Yes. And before 1950, no provisions were in the --

MR. LEE: None.

MR. CHIEF JUSTICE BURGER: Mr. Brusman.

ORAL ARGUMENT OF MARVIN A. BRUSMAN, ESQ.,

ON BEHALF OF THE APPELLEE

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

The issue in this case revolves around the constitutionality of section 202(b)(1)(B) of the Social Security Act. That section creates two classes of women. The first class is composed of wives under age 62 with dependent children in their care to whom benefits are granted. The second class is composed of wives who have secured divorces after at least twenty years of marriage, who are also under age 62 and who also have dependent children of the marriage in their care. To this group, no social security benefits are granted.

The question that arises is whether this different treatment of married wives and divorced wives with dependent children in their care under age 62 is justified. Does the line that Congress has drawn between married wives and divorced wives with entitled children bear some rational relationship to a legitimate legislative purpose. And so it seems to me to become very important for this Court to determine what the purpose of this provision of section 202(b)(1)(B) is.

I submit that the purpose of that provision is to facilitate parental care for dependent children by enabling mothers to remain at home and care for those children. I think this purpose is clear when you examine section 202(b)(1)(B).

It provides, first of all, benefits to wives and divorced wives upon attaining age 62, regardless of whether or not they have children in their care. But a young wife under

age 62 is given benefits only if she has a dependent child in her care. The young wife who doesn't have a dependent child in her care receives no benefits until she attains age 62, and it seems to me that if Congress were concerned solely for the welfare of the wife, there would be no necessity to condition her eligibility for benefits upon the presence of a child in her care. Evidently Congress was concerned not with the welfare of the wife herself but for the child that she bore responsibility for.

Moreover, if you look at the provisions that terminate the benefits that are paid to a wife with a child in her care, you see that the benefits cease when the benefits that are paid to a child cease. In other words, the wife's benefits are linked to the child's benefits and are paid only so long as it was realistic to think that the child would need his mother's care.

QUESTION: Mr. Brusman, in order to prevail on your argument, as I understand your position, you have to first pick out a purpose to identify that Congress was shooting at and then in effect conclude that it missed. Is that right?

MR. BRUSMAN: Well, the standard for testing the constitutionality of congressional legislation, as I understand it, is that the classification drawn by Congress has to bear a relationship to a legitimate legislative purpose.

QUESTION: Yes.

MR. BRUSMAN: And I think it is important to identify that purpose and to see whether the classification drawn relates to it.

QUESTION: In identifying the purpose, you necessarily have to take the position that Congress had a purpose in mind but somehow misfired somewhere between adopting that purpose and getting the law passed?

MR. BRUSMAN: Not really, because, you see, in 1939 benefits were first provided to wives as a class, and then in 1950 they were provided to wives with children in their care. And it seems that the history is the problem. The benefits that were finally accorded to divorced wives didn't begin until 1965. I think the purpose of providing benefits to a wife with a child in her care was enacted or thought of back in 1950 when benefits were first accorded to wives with children.

QUESTION: But do you say we must conclude that each time Congress amended the Act, it had the same purpose in mind?

MR. BRUSMAN: Well, that purpose hasn't changed. There hasn't been any change in that section, of section 202(b)(1)(B).

QUESTION: Mr. Brusman, in your brief, you don't cite Mathews v. Lucas decided last June. I take it you feel that has no bearing on this case?

MR. BRUSMAN: I do.

QUESTION: It take it your opposition thinks otherwise,

because they cite it.

MR. BRUSMAN: Apparently.

QUESTION: Mr. Brusman, do you think that before 1950, when there was a scheme of benefits for wives and no scheme of benefits at all for divorced wives, was the scheme unconstitutional?

MR. BRUSMAN: No, I don't think it was. But once Congress recognized that divorced wives had the same need for benefits and are perhaps just as dependent upon their former husbands as the wives are concerned, once they make that recognition, then it seems to me that the provisions such as we have here are unconstitutional.

QUESTION: Does that not assume that divorced wives as a general proposition are dependent upon their husbands?

MR. BRUSMAN: That is --

QUESTION: You start with that assumption, don't you?

MR. BRUSMAN: I say that they are at least equally dependent upon their former husbands as wives are on their husbands.

QUESTION: And from what do you draw that, common human experience or what?

MR. BRUSMAN: I would draw that from common sense, yes, and --

QUESTION: Well, common sense. I said common human experience. Is that the generality of experience and does it --

MR. BRUSMAN: Well, it seems to me that a woman --

QUESTION: Is it not a matter of which we could take judicial notice, that the majority of women who get divorced get remarried?

MR. BRUSMAN: Well, one of the conditions for eligibility under section 202(b)(1)(B) is that she not be remarried.

QUESTION: Yes, I know, but I am speaking of the generality of experience now. You are making a general -- you postulated a general proposition that divorced wives as a class were dependent upon their husbands, the husband from whom they were first divorced.

MR. BRUSMAN: Well, based on my experience, it is not really a divorced wife that we are talking about here. We are talking about a divorced wife who is married at least twenty years prior to her divorce and who has children of that marriage in her care.

QUESTION: And who has not remarried?

MR. BRUSMAN: And who has not remarried. ANd it is that person that is just as likely to be dependent upon her husband as the wife.

QUESTION: If she can find him.

MR. BRUSMAN: If she can find him, and that was one of the problems in this case.

QUESTION: What are you going to do with the government's figures about those that you don't find?

MR. BRUSMAN: It still doesn't change the degree of dependence.

QUESTION: Well, I don't understand what you mean by dependence. You mean a wife whose husband is not paying her any alimony at all is dependent on him?

MR. BRUSMAN: Well, dependence --

QUESTION: Well, is she?

MR. BRUSMAN: I think dependence exists, if she can't find the husband, she has to find some other source of income to survive.

QUESTION: So she automatically, just by getting married, she becomes eligible?

MR. BRUSMAN: Well, if she remarries, she becomes ineligible for benefits under this section.

QUESTION: If she marries a man and lives with him twenty years, it makes no difference whether she is divorced or not, that is your theory?

MR. BRUSMAN: I am not quite sure I follow what you are pointing out.

QUESTION: That the divorced wife is entitled to the same as the undivorced wife.

MR. BRUSMAN: As long as she has a child in her care, yes.

QUESTION: As long as she has the child, she is qualified, there is no way she can lose it.

MR. BRUSMAN: Well, she can lose it if she remarries. If the child become ineligible for benefits, then she loses it as well.

From an examination of the structure of section 202 (b)(1)(B) of the Social Security Act, I submit respectfully that the purpose of that section is to allow a mother to remain at home and care for her child. And given that purpose, the question then becomes what justification exists for excluding divorced wives and their children from the statute's coverage. Why should a divorced wife who was married at least twenty years prior to her divorce be denied benefits in preference to a wife who has not been divorced? Why should a wife who is separated from her husband be granted benefits and a divorced wife not? And why should children of divorced parents not have the same opportunity for their parent's full time and attention that is afforded the children of married parents?

A married mother --

QUESTION: Mr. Brusman, couldn't you ask all of those same questions with respect to a divorced wife with children 63 years old who had only been married nineteen and a half years?

MR. BRUSMAN: True, but we are not --

QUESTION: There is a whole variety of things that are going to be unconstitutional if we hold this particular category unconstitutional.

MR. BRUSMAN: But the question in this case isn't the constitutionality of --

QUESTION: Your same argument would apply to that hypothetical case, wouldn't it?

MR. BRUSMAN: I would believe so, yes, Your Honor.

A mother is afforded the opportunity of staying home with her child; a divorced mother must forego that opportunity. Benefits that Congress thought were essential for the proper care and supervision of the children of wage-earners are denied simply because of the mother's marital status. And what difference does it make whether the mother is married, separated or divorced? I submit it doesn't make any difference, and that is why this exclusion of divorced wives from the statute's coverage is irrational.

The Secretary has argued that there is a rational basis for this statute. He argued, first of all, that wives as a class are substantially more likely to be dependent upon their husbands than divorced wives and are thus likely to suffer loss of support when the husband becomes disabled or retires. The basis for that statement are two surgeys, a 1925 survey and a 1975 survey that he cites in his brief, and the citations state that only 14 percent of divorced women receive alimony.

It is important I think to reflect upon what we are not told by those statistics. We don't know the percentage of

divorced women with children who receive alimony. We don't know the percentage of divorced women who have been married at least twenty years prior to their divorce and who have children in their care who receive alimony. We don't know the percentage of divorced women who perhaps don't receive support in the form of alimony but do receive it in the form of child support. And it seems to me that there will be a much higher percentage of women receiving -- divorced women receiving alimony among those women who were divorced after twenty years of marriage with dependent children in their care.

And so the conclusion that the Secretary draws that wive are more dependent than divorced wives upon the wage-earner really has no foundation, because both groups are going to be equally dependent.

I have no figures to cite to you. The only figures the Secretary has are two from a 1925 and a 1975 survey.

QUESTION: But what if we agree with those figures or what if we think we cannot ignore them, that we must rely on them, what then?

MR. BRUSMAN: It seems to me that Congress couldn't have relied on those figures in enacting this legislation. A 1925 survey was many years prior to the time this came into law, and the 1975 survey occurred after this had already been passed.

QUESTION: Yes, but I ask you again, what if we -- do

you think the facts are relevant? Do you think the question is relevant as to the proportion of divorced wives that are or are not dependent?

MR. BRUSMAN: I think the relevant inquiry is the percentage of divorced wives with children in their care that receive alimony as opposed --

QUESTION: You think though that is a relevant inquiry?

MR. BRUSMAN: Yes.

QUESTION: And how do we find that out, what the answer is?

MR. BRUSMAN: I think that you can, you know, base -- you can make some assumptions based on personal experience.

QUESTION: Well, what if we agree with the Secretary as to what that percentage is?

MR. BRUSMAN: Pardon me?

QUESTION: What if we agree with the Secretary as to what that percentage is?

MR. BRUSMAN: Well, again, I just don't think that figure is the relevant figure.

QUESTION: Well, I will put it to you, what if we decided, what if we thought from the best information we could find that 10 percent of them were dependent no more?

MR. BRUSMAN: Ten percent of what, divorced women?

QUESTION: No, 10 percent of divorced women with dependent children are receiving alimony but no more?

MR. BRUSMAN: And if the same percentage of married wives with children were dependent upon their husbands, then I think the statistic would be relevant. We don't know the percentage of married wives with children that are dependent upon their husbands. In fact, this Court, in the Fronteral decision, noted in a footnote that 41.5 percent of all married women were employed, and you commented that the presumption of dependency of wives upon their wage-earners doesn't bear any relationship to present-day reality.

And so it seems to me you just can't presume that one group is dependent and then cite statistics that show that another group isn't. They have to make presumptions in both cases or have statistics in both cases.

QUESTION: Assuming that that figure you cited from the footnote in Fronteral is valid, what inference should be drawn with respect than to people who are no longer -- women who are no longer the wives of the principal social security account?

MR. BRUSMAN: I don't understand the question, Your Honor.

QUESTION: Well, I don't know how I could make it any clearer. 41 percent, you said,the footnote describes as being employed and not dependent, of married women.

MR. BRUSMAN: Whether or not they are dependent, we don't know. All we know is the percentage that is employed.

QUESTION: That is employed, yes. So would it not be reasonable for Congress to infer from that that they were not dependent?

MR. BRUSMAN: They could infer from that.

QUESTION: Well, then move from the married woman to the divorced woman, on what basis would you assume that there is a dependency of the divorced wife?

MR. BRUSMAN: Well, again, I have no figures to cite to you. But you have to understand that we deal here with the woman divorced, after twenty years of marriage, who has a dependent child in her care, and it seems to me that it is the child in her care that is going to determine whether or not she is employed or whether or not she is dependent. The assumption is that a woman with a child or children in her care is going to be at home taking care of that child.

QUESTION: Where do you get that assumption?

MR. BRUSMAN: Based on what the normal role of the wife has been in our society for many years, although it is changing now.

QUESTION: Precisely the contrary argument about working mothers, we have had that dozens of times here.

MR. BRUSMAN: I realize that, but this legislation was drawn at a time when the wife was traditionally the parent who remained at home and took care of the child.

QUESTION: Well, you are making your claim though today,

not as of 1965, aren't you?

MR. BRUSMAN: That's true, but you still have to, it seems to me, go back and look at what the purpose was in giving benefits to wives with children, and if that takes her back before 1965, sobeit.

The problem dealt with by this portion of the statute again I submit is the needs of dependent children. Those needs exist regardless of whether the child's mother is married, separated or divorced. The need of children of divorced parents is no less than the need of children of married parents, and the need in each case is the same and should be satisfied for all.

By affording benefits --

QUESTION: Now, for a dependent child or a divorced wife in this case?

MR. BRUSMAN: The benefits are paid to the wife, but the ultimate beneficiary, it seems to me, is the child that she is taking care of. They are paid to her so that she can remain at home and give that child the care that Congress apparently felt was very necessary. And having recognized a need among young and disabled children for their --

QUESTION: Well, there is an allowance for the child, isn't there?

MR. BRUSMAN: There is, and there is an allowance for the child if the mother is married -- there is no

distinction as far as that is concerned. Having recognized a need among young and disabled children for maternal care and having determined to fulfill that need by granting benefits to wives who can provide that care, it is entirely irrational for Congress then to exclude divorced wives and their children from the statute's coverage. The divorce of the mother doesn't change the need for benefits.

QUESTION: Mr. Brusman, one other question. Your client could qualify if she were a wife or if she were over 62, as I understand it?

MR. BRUSMAN: If she were a wife, she would be eligible for benefits now and upon attaining age 62 she also becomes eligible.

QUESTION: Even though she retains her status as a divorced wife.

MR. BRUSMAN: Yes.

QUESTION: Do you challenge the age bracket of 62?

MR. BRUSMAN: As far as this case is concerned, we are only dealing with wives with children in their care and divorced wives with children in their care under age 62.

The Social Security Act is designed to pay benefits in accordance with the probable needs of the beneficiaries. To sustain this legislation, it seems to me, this Court has to conclude that the needs of children of divorced parents are less than the needs of children of other parents.

QUESTION: What would be the needs of a divorced woman married twenty years with a dependent child who is only 52 years of age? Would they not be substantially the same as the woman 62?

MR. BRUSMAN: I think the needs would be the same.

QUESTION: That is part of your case, isn't it, because your client when she attains 62 will get these benefits?

MR. BRUSMAN: She will be getting these benefits. The relevant point that I am trying to make is that under age 62 wives with children in their care receive benefits. The divorced wives in the same situation don't receive any benefits, and yet the needs are exactly the same, although I don't have any statistics to give the Court. Married and divorced mothers with children that have similar needs are treated differently by this section, without any rational justification, and absent rational justification for the different treatment I submit that this section violates the equal protection guarantees implicit in the Fifth Amendment due process clause, and accordingly I urge that the judgment of the District Court be affirmed.

Thank you.

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

Do you have anything further, Mr. Lee?

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANT -- RESBUTTAL

MR. LEE: If I may, just very briefly, Mr. Chief Justice.

First of all, with regard to Mathews v. Lucas, I can understand the appellee's reluctance to discuss this case. We submit that it is dispositive for at least two reasons. One is that its bare holding amounts to nothing less than the proposition that Congress is entitled to make distinctions based upon the relative likelihood of dependency. In that case, legitimacy versus illegitimacy; in this case, wives who are dependent on their wage-earner husbands as opposed to divorced wives for whom the alimony picture is rather revealing as it has been set forth in the statistics.

The second significance perhaps is to an even more fundamental point, and it is that, as I read Lucas, it contains a reaffirmation of the principle that if there is unclarity in the statute and its history as to what the purpose of the statute is you don't ascribe to, that unclarity works to the benefit of the statute and not to its detriment, that it does not result in ascribing to the statute a purpose which will declare it unconstitutional.

And specially, in Mathews v. Lucas, the root error of the lower court was the same as the root error in this Court, and that is that that court concluded that the Act was not intended to merely replace actual support for the child lost but also obligations of support or potential support.

Here we have the lower court grounding its decision on an error that, with all due respect, my opponent has consistently repeated here this afternoon, and that is the assumption that our social insurance program is based on need, and it simply is need, and that was not the purpose of this statute, and indeed it isn't the purpose of the overall program of social insurance that the --

QUESTION: Mr. Lee, if we happen to conclude -- erroneously, I am sure you would say -- that the divorced wives and the married wives with dependent children in terms of need are in exactly the same position, you would be making your present argument?

MR. LEE: That is exactly right. That is exactly right.

QUESTION: So that your figures about the relative need of these two groups you don't think are necessary for the case?

MR. LEE: Oh, no. They enter into the rationality of what Congress did in acting in the interest of the family.

QUESTION: But those just sort of measure need.

MR. LEE: But they do it in the particular context of --

QUESTION: Of loss of earnings.

MR. LEE: That's right, and that impact on the family, because bear in mind, Mr. Justice White, what we are talking

about is a program of social insurance -- insurance. It is a substitute for insurance.

QUESTION: It is a substitute for earnings.

MR. LEE: That's right, and certainly --

QUESTION: It is an insurance that is a substitute for earnings.

MR. LEE: It is a --

QUESTION: It is not measured by need but it is measured by loss of earnings.

MR. LEE: That's right, and certainly one of the things that Congress could take into account is what the wage-earner, the kind of insurance that he would buy if he were, rather than having this money taken out of his paycheck and having insurance bought for him, the kind of insurance that he would buy for himself, and certainly he would provide in the usual case for his family rather than non-members of the family, and --

QUESTION: Well, what do the figures with respect to alimony have to do with loss of earnings?

MR. LEES: Loss of dependence on the wage-earner and a --

QUESTION: Well, that is another story.

MR. LEE: -- and a different basis that is applicable to the family unit because of the loss of dependence on the wage-earner which does not exist in the non-family context. And

that brings me to the proposition that I alluded to only tangentially earlier, and the point I think that Mr. Justice Stevens was making, and that is that here, unlike Wiesenfeld, you have really a list of possible interrelating considerations that could enter into Congress' deliberations -- age, widowhood or survivorship, the relationship to the wage-earner, dependency, the time the marriage endured, and whether there were entitled children in their care.

Now, every one of those is a variable, and if you make your determination rest solely upon need, then virtually the entire statutory scheme has to fall, because, as my opponent has conceded and indeed he must concede, the need of one who has been married 19 years by hypothesis will be just as great as the one who has been married for twenty years and one month.

The need of Mrs. DeCastro does not increase the day that she turns 62 and, similarly, again the relevance, Mr. Justice White, of the support figures, in all but 6.5 percent of the cases, the need does not increase when the husband dies.

So that if the focus is just on, number one, an assumed purpose; and, number two, a purpose that is not in fact the purpose that Congress had in mind, then the attack on the statute will reach all across many, many of its aspects.

QUESTION: Mr. Lee, another example -- and just correct me if I am wrong on this -- if the husband should remarry, does the divorced wife stop being a statutory divorced

wife?

MR. LEE: She does not.

QUESTION: She does not?

MR. LEE: So long as she satisfies the twenty-year requirement, all of which leads to the proposition that the only legal issue that is involved in this case is the same legal issue that the Court first considered in Nebia v. New York, that it has thankfully reaffirmed in Williamson v. Lee Optical, in Salfi, and in Mathews v. Lucas, that in the area of allocation of scarce social insurance resources, as in the area of economic regulation.

So as long as Congress cannot be clearly identified to have relied on an improper purpose, as it did in Wiesenfeld, and so long as it has not discriminated, as it has not done in this case, then those policy judgments in allocating scarce resources for social insurance rest within the sound discretion of Congress. Under thst atandard, it is very clear, we submit, that the judgment of the lower court must be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:29 o'clock p.m., the case in the above-entitled matter was submitted.]

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