OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1050

TITLE MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. ROBERT H. MATHEWS, ET AL.

PLACE Washington, D. C.

DATE December 5, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner

v. No. 82-1050

ROBERT H. MATHEWS, ET AL

Washington, D.C.

Monday, December 5, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

MARK I. LEVY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellant.

JOHN R. BENN, ESQ., Florence, Alabama; on behalf of the Appellees.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Levy, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.

ON BEHALF OF THE APPELLANT

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

This case is here on direct appeal to the United States District Court for the Northern District of Alabama. It involves the government pension offset section in the Social Security Amendments of 1977 and in particular the exception and severability provisions in the offset section.

The District Court, after certifying a nationwide class action, invalidated both the exception and the severability provisions. Based on those rulings, the District Court extended spousal benefits or expanded the exception to Appellee and the nationwide class of non-dependent men he represents, and as a result, it entitled those non-dependent men to the receipt of both government pension and Social Security spousal benefits.

The Social Security provides spousal benefits --

QUESTION: Was that judgment stayed?

MR. LEVY: The judgment was stayed pending appeal to this Court and it remains stayed.

QUESTION: Yes.

MR. LEVY: The Social Security Act provides spousal benefits based on the earnings record of the applicant's spouse. The provisions for wives' and widows' benefits were enacted in 1939, the provisions for husbands' and widowers' benefits in 1950.

From the time spousal benefits were first established, the Act has contained a Social Security offset provision. That provision requires that were an applicant is entitled to more than one benefit under the Social Security Act, those benefits will be offset against each other so that in net effect the recipient or the applicant will receive only the higher of the two benefits.

For example, if an applicant is entitled to spousal benefits and also to retirement benefits based on his own work account, the spousal benefits will be reduced by the amount of the direct benefit to which the applicant is entitled.

Until the statute at issue in this case, the Act contained no comparable provision for people, primarily government employees, who worked in employment that was not covered by the Social Security system.

In March 1977, this Court decided the Goldfarb case and invalidated the gender-based eligibility standard

in the Social Security Act that required men, but not women, to prove dependency in order to be eligible for spousal benefits.

As a result of Goldfarb, spousal benefits, therefore, were extended to non-dependent men.

In practice, this did not --

QUESTION: Who extended it?

MR. LEVY: I don't believe that the issue of extension versus nullification was ever directly litigated in this Court.

QUESTION: Who extended it, the Secretary or --

MR. LEVY: Believing that that to be the result that follows from the decision of this Court, the benefits were extended.

That, in practice, did not prove to be a problem for the Social Security Trust Fund with respect to non-dependent men who worked in employment covered by Social Security. Those men usually were entitled to higher benefits on their own work account than on the account of their spouse.

Because the Social Security Act has an eligibility requirement providing that a spousal applicant must have no or only minimal benefits in his own account and because of the offset, the Social Security offset provision that already existed in the Act, in fact, no

spousal payments were generally made to this group of non-dependent men.

It was a far different situation, however, for non-dependent men who worked in employment that was not covered by Social Security. As to this group, spousal benefits, in fact, were payable, and because they were not subject to the existing Social Security offsets, since they weren't employed in work covered by Social Security, those spousal payments were the full, unreduced amount and were not adjusted in any way to reflect their government pension.

This caused a windfall for this group of non-dependent men. Because they did not meet the eligibility standards set out by Congress in the Social Security Act, they did not expect to receive spousal benefits and they could not have planned their retirements in reliance on the receipt of such benefits.

The Goldfarb decision threatened to impose a very serious financial drain on the Social Security Trust Fund. Congress responded to this problem by enacting the government offset pension provision that is now before the Court. In this provision, parallel to the Social Security offset that was already in the Act for covered employment, this provision provides that the spousal benefits, that the level of spousal benefits will be reduced by the

amount of the government pension to which the applicant is entitled and receives payment based on his own work record.

The offset provision, the government pension offset provision at issue here applies to spousal benefits that are payable based on valid applications filed on or after December 1, 1977, which was the effective date of the new offset provision for government pensions.

Now, the government pension offset provision was a reasonable and a permissible solution to the financial problems confronting the Social Security Trust Fund following Goldfarb. But, in enacting this provision, Congress became concerned about a different problem. Congress became concerned that the elimination or reduction of dual benefits that would be caused by applying the new government offset provision to people who had planned -- Well, to people who had retired or were close to retirement and who had planned a retirement in accordance with pre-Goldfarb law that allowed for unreduced spousal payments. Congress felt that the application of the offset to these people would have imposed a hardship on them and been unfair to them.

So, to allay this concern, Congress enacted a specific exception to the government pension offset. The exception provides -- The exception applies to people who

are retired or are eligible for retirement from government service in the five-year period between December 1977, when the Act was passed, and November 1982, and who could meet the requirements of the Social Security Act in effect and being administered in January of 1977.

The offset and the exception clause also contain a severability provision. This provides that if the exception is held to be invalid in any respect, the offset itself will remain in effect and that the exception will be eliminated in its entirety rather than extended to new people.

The severability clause reflects Congress' overriding concern with the financial health of the Social Security Trust Fund and its intention to subordinate retirees' reliance interests to that end if it turned out that the exception as drafted proved to be invalid.

Appellee in this case retired from the United States Postal Service in November 1977. He receives a government pension. In December 1977, he submitted an application for spousal benefits based on the work record of his wife who had been employed in a covered job; that is it was covered by the Social Security system, and who was insured under the Social Security program.

Appellee's application was considered to be filed as a valid application as of January 1978 when he

reached the age of 62 and, thus, first became eligible spousal benefits.

The Social Security Administration found that Appellee was eligible for spousal benefits.

QUESTION: Was he dependent or what?

MR. LEVY: He was not dependent. Because he filed his application after the effective date of the offset provision, he was subject to the offset and because, and it is undispute, he was not dependent on his wife, he was not within the protection of the exception clause. Therefore, in the end, the offset applied to him, and because the amount of his government pension exceeded the amount of his spousal benefits the offset required that there were no net spousal benefits payable to him.

After Appellee exhausted his administrative remedies, he brought this action under Section 405(g) of the Social Security Act. The District Court struck down both the exception provision and also the severability clause.

The Court found that the exception provision incorporated the gender-based dependency test that existed in the Social Security Act in Janury 1977 prior to this Court's decision in Goldfarb.

QUESTION: The Court was right about that, wasn't it?

MR. LEVY: Excuse me?

QUESTION: The Court was right about that, wasn't it?

MR. LEVY: That the Act did incorporate, absolutely. Appellee has raised an issue of statutory construction here and it is addressed fully in our brief. I don't propose to discuss it unless the Court has specific questions about it.

But, there are two important constitutional issues. The first, as I say, is that the District Court struck down the exception clause because it incorporated the gender-based dependency standard.

In addition, the Court also struck down the severability clause because the severability clause required that the offset remain in effect without qualification, and, therefore, a plaintiff who successfully challenged the exception clause would not receive any monetary relief in the form of unreduced spousal benefits.

Let me turn first to the issue of the exception clause. As Justice White points out, and as we discuss in our brief, we think it is clear that the exception does incorporate the gender-based dependency test that existed prior to Goldfarb. But, a gender-based test is not necessarily invalid, rather, as this Court's decisions

have recognized, it is permissible if it serves an important governmental objective and if it is substantially related to the achievement of that objective. We think that the exception clause in this case meets both of those criteria.

QUESTION: Is it quite correct to say that is entirely a gender-based clause? It does include -- The exception clause hits both -- rather preserves the benefit for both the retired female government employees and also for dependent spouses for female employees.

MR. LEVY: Well, that is correct, and it actually is somewhat more complicated than that. Before I get into the details, let me say that in the end it does include a gender differentiation.

QUESTION: And the burden of proof.

MR. LEVY: On the burden of dependency, that is right.

QUESTION: But, as far as whose money is involved, if you get all the facts on the table, there are both men and women who are benefited by it.

MR. LEVY: There are both men and women who are benefited. At the same time, there are men who are not benefited, would be benefited if they were women. And, for that reason, and because the intent of Congress is so clea argue that it is not subject to review as a gender-based

standard.

But, to follow up on your observation, Justice Stevens, there are both men and women who are eligible under the pre-Goldfarb law and their reliance interests are protected. Similarly, because of the effective date provision of the Act, any non-dependent men made eligible as a result of Goldfarb, who filed a valid application for benefits prior to December 1977, are also protected. In other words, they are not subject to the offset by virtue of the effective date provision. Both of those classes are protected.

On the other side of the line, there is one group of women who are not eligible for benefits under pre-Goldfarb law but are now eligible for such benefits. That is the group of divorced wives and surviving divorced wives who were married more than ten but less than twenty years. Because they were not eligible under pre-Goldfarb law, they do not come within the exception, and, therefore, are subject to the offset.

In addition, non-dependent men after Goldfarb who make no claim of reliance on that decision, who were unaware of it or admit that it did not enter into their thinking at all, are also subject to the offset. They had no reliance interests to be protected.

So, there are men and women on both sides of the

line of the offset and the distinguishing characteristic between them is the reliance interests of the category in which they fall.

The protection of reliance interests as those lines suggest was the very purpose that Congress had in mind in enacting the exception provision. Congress was concerned in particular about the reliance interests of retirees who had planned their retirements in accordance with the long-standing provisions of the Social Security Act that Congress had passed and that had been on the books since 1939.

The legislative record makes clear that this is the purpose that Congress actually had in its collective mind in enacting the exception.

There was no sexist animus or motivation on the part of Congress here. Congress did not indulge in archaic or sterotypical assumptions about the role of women in our society and did not adopt the exception based on reflexive or uncritical habit. In this case, Congress knew full well what it was doing and it based the exception on the historical fact of reliance pre-Goldfarb law.

QUESTION: Mr. Levy, do you think it would make any difference if instead of a five-year period, that Congress had extended it to cover up to the year 2010 or

something?

MR. LEVY: Well, it might make a difference. It would depend in part on why Congress did it and what the expansion was. But, we think, if anything, the five-year period was on the short rather than the long side of the permissible spectrum given the nature of retirement earnings. Someone who is six years from retirement might well be hard pressed in that relatively short period of time to make up the reliance that has been bashed as a result of the offset.

But, Congress felt that five years was appropriate and there is certainly nothing to suggest that that determination was impermissible in any way. It is a line-drawn problem inherent in the situation. It is not itself a gender issue.

Now, the protection of these reliance interests that motivated Congress, we submit, is a legitimate and important governmental interest. We think that proposition is sound and self-evident on its face, especially given the nature of the Social Security system and the nature of the retirement planning process.

I also think that this Court's decisions in a wide range of areas have recognized reliance interests of much the same sort.

It was not improper for Congress to be concerned

about the hardship and distruption that would have been caused if the new offset provision were applied to people who were retired or close to retirement and who had planned their retirement in accordance with pre-Goldfarb law.

In addition to that purpose being important and legitimate, we also submit that the exception clause is substantially related to the achievement of that purpose and it rests on a reasoned analysis of the statutory classification.

Indeed, by incorporating the pre-Goldfarb law in the exception provision, the exception is precisely suited to the protection of that reliance interest.

In addition, as Justice O'Connor pointed out, the exception is limited to a transitional five-year period which Congress determined was a reasonable time to protect people against the disruption of their retirement plans.

We also would point out that when the exception clause expired by its own terms in December of 1982, and, thus, the pre-Goldfarb reliance interests had then been satisfied, Congress twice reconsidered the offset provision and on both occasions it enacted an gender-neutral provision. We think that confirms what was evident in the initial Act, that Congress limited the

gender-based classification to what was necessary to protect the pre-Goldfarb reliance interest.

Finally, in enacting the exception and offset in 1977, Congress considered other alternatives, but it rejected them as less desirable. The legislative record makes it clear that Congress adopted the offset and exception provisions as a deliberate policy choice in preference to other approaches they might have taken.

Now, Appellee seeks to upset Congress' policy choice and makes two arguments that the exception is unconstitutional.

First, he argues that the protection of the pre-Goldfarb reliance interest was not a legitimate and important governmental objective.

As Congress recognized though, and we think it quite plain, we don't -- The reliance interests of people under the prior law, in accorance with the provisions passed by Congress and in effect since 1939, cannot be so easily dismissed. Such reliance is not discredited in any way by the fact that this Court in Goldfarb ultimately held the statute to violate equal protection.

As in cases such as Lemon versus Kurtzman and the Manhart and the Norris decisions, reliance on a prior state of the law, even if that law turned out eventually to be improper or unconstitutional, does not make that

reliance illegitimate and does not detract from the importance of protecting the reliance interests that arose under prior law.

Appellee also makes a second argument that the statutory classification here is underinclusive because it doesn't protect the asserted reliance interests of non-dependent men who claim to have relied on Goldfarb between the time it was announced in March of 1977, and the enactment of the offset provisions in December 1977, and who did not file a valid application for spousal benefits prior to the effective date of the offset, December 1, 1977.

We don't think that Congress was required, however, to recognize this short-lived and new-found reliance interests of men that was based on the extension of benefits following Goldfarb.

Congress could conclude, in the context of the pressing need for the offset itself -- and it is important to remember that the offset is the principal provision here to which the exception is a specific exemption -- in that context Congress could concluded that the reliance interest advanced by Appellee was less substantial and less deserving of protection than the long-standing reliance interest under the statute passed by Congress prior to Goldfarb.

As Justice Stevens and I discussed before, there are men and women on both sides of the line.

The interest that Appellee asserts was based on the Goldfarb decision. Let me come at it this way. That was a very recent decision at the time and Congress could reasonably have concluded that it was unlikely to have lead to widespread and significant reliance.

In addition, it was possible, as in fact turned out to be the case, that Congress would pass a statute in response to the Goldfarb decision and that statute would affect the newly recognized claims of non-dependent men such as Appellee. Neither of those considerations applies to the reliance interests of the pre-Goldfarb retirees. And, for that reason, we think the statute is perfectly constitutional to distinguish between those groups and does not raise any constitutional difficulties because it is limited to the interest that Congress found to be more substantial and more worthy of protection.

I should go on to say that even if Congress was required to accommodate the interest in some way that Appellee asserts, its failure to do so does not establish that the exception clause as it exists is not substantially related to the protection of reliance interests.

Justice Stevens and I discussed before the

somewhat complicated application of this statute, the four different groups, the validity of which Appellee doesn't challenge. The only group that Appellee raises is this narrow group of men who relied between Goldfarb and the enactment of the offset provision.

Even though that limited group was not taken into account, we think it is clear that there still is a substantial fit between the exception clause and the protection of reliance interests.

And, in assessing the substantiality of the fit, it is important again to note that even if Appellees reliance interest had to be included at all, they are still less substantial than the groups that are now protected under the statute, less substantial than the long-standing reliance interest under pre-Goldfarb law and they are less substantial than the interest of non-dependent men who submitted a valid application and were receiving or were entitled to receive spousal benefits between March and December of 1977.

Appellee's standard is also one based on a subjective reliance interest. Such a category under the statute would constitute a marked departure from the easily determined objective criteria now in the exception and the offset provisions and would be extremely difficult and burdensome for the government to administer in

practice.

For all of these reasons, we think the exception clause itself is constitutional.

In the event the Court disagrees with that submission, however, it must then address the constitutionality of the severability clause, which, as I mentioned before, provides that if the exception is invalid in any respect, the offset will remain in effect without qualification and the exception to the offset will be eliminated in its entirety rather than extended to people whom Congress did not intend to be within it.

The District Court held that the severability clause was unconstitutional because it was a usurpation of judicial authority and, therefore, invalid under Article III.

We think the severability clause is plainly constitutional. It is a substantive rule of law governing the distribution of Social Security benefits. It is a rule of law that is to be applied in the event that the exception clause, as Congress drafted it, is held to be invalid.

The severability clause reflects Congress' overriding concern with the fiscal integrity of the Social Security Trust Fund is threatened by the decision in Goldfarb and it indicates Congress' intention to

subordinate retirees' reliance interests to that paramount end, that the balance struck by Congress in the exception was impermissible.

QUESTION: Of course, it did go further than the usual severability clause, didn't it?

MR. LEVY: Well, this is a severability clause in the usual sense in two ways. First, it provides that the offset will be severed in its entirety and remain in effect. It also discusses the severability of the exception provision and provides that any remaining valid portions of the exception will not be severed. The severability clause does not always have to be in favor of severability we don't believe. It can just as well, and as Congress found here, be in favor of non-severability.

It was a perfectly reasonable goal for Congress to try to protect the Social Security Trust Fund from great liability if it turned out that it could not limit the exception to the group of people that it considered to be most worthy of special consideration.

Now, severability is a question of legislative intent. In essence, it is a statement by Congress of the statute it would have enacted, what it would have done, if it had known at the outset that the statute as drafted was unconstitutional.

Here, Congress explicitly and clearly defined

the scope of the statute it was enacting and we think it acted well within its legislative powers in so doing.

In addition, the severability clause is also supported by the decisions of this Court indicating that an underinclusive statute can be remedied either by extension or by nullification of its benefits. Either approach is constitutionally adequate and the choice between those remedial alternatives is a question of legislative intent and that Congress indicated its intent clearly here does not render the severability clause suspect or invalid.

I would only note in closing that the District Court felt that there was an Article III standing problem in the severability clause. The severability clause is a rule of law and does not purport to effect the Article III power or jurisdiction of the federal courts. In addition, it doesn't go to the standing of Appellee or any other plaintiff. Appellee has standing because he was subject to the offset and not within the exception.

In any event, there is no rule of law that says a plaintiff has to be entitled to monetary relief in order to have standing. On the contrary, we think Appellee unquestionably had standing, notwithstanding the severability clause, to pursue his right to equal treatment.

I will reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Benn?

ORAL STATEMENT OF JOHN R. BENN, ESQ.

ON BEHALF OF THE APPELLEES

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

Before I address Mr. Mathews' arguments on the issues in this case, I would like to preface my remarks with a characterization that has been made on the exception clause. The exception clause has been characterized by the Solicitor as being a transitional device. It is not that. It is a lifetime exemption for everyone who qualifies. Those individuals, those females, those non-dependent females, and those dependent men who get into this window that is created by the exception clause will remain within that window or within that class throughout their lifetime. So, this is not a device that beginning in 1983, this year, will entitle Mr. Mathews to benefits.

Please, that characterization is going to be important when you compare the Social Security contributions of the spouses and see the inequality that is achieved under the statute as designed.

The fundamental question before this Court is if the exception clause is interpreted in one fashion whether

or not there has been a perpetuation of the unconstitutional sex discrimination that occurred in Goldfarb.

The statute is important, both to classes of men, as indicated by Mr. Robert Mathews, but perhaps more importantly from a constitutional standpoint from that of Mary Mathews, because it depreciates her Social Security contributions while at the same time provides less financial resources for her family unit than what is provided to a similarly situated male applicant. That is important as far as the focus of this particular case.

The fundamental question is divided into three areas. First of all, a statutory interpretation issue, whether or not the exception clause incorporates a gender-based dependency test.

The second issue is whether or not there has been a denial of equal protection to Mary Mathews; and, third, whether this Court should extend or nullify the exception clause as stated in the legislation.

Directing my attention first of all to the statutory argument, in essence, it is Mr. Mathews' position that there is a statutory basis for affirmance in this case.

The Solicitor asked the Court in brief to focus on two items. First of all, the language of the statute,

which he said is clear and unambiguous and, second of all, its legislative history.

Focusing on the first of those, the language of the statute itself, if the Court will review Section 334(g), there is nothing in that statute indicating that dependency is required. It does not per se require dependency.

Now, please keep in mind the framework under which that clause was passed. That clause was passed after Congress had known how the Court was going to interpret Section 402(c) of the Social Security Act. In essence, reading out gender-based dependency as being a requirement for spousal benefits.

Now, on the other hand --

QUESTION: Did you make this argument, Mr. Benn, in the District Court?

MR. BENN: No, Your Honor, we did not offer it in District Court, and if I could, perhaps give an explanation. It was not until after we got involved in the case on appeal that we discovered two District Court decisions that were previously not reported and wherein the issue was accepted by the District Courts, and since we had undertaken the appeal or I had undertaken the appeal, we have also had the Ninth Circuit opinion which indicated that the exception clause, by statutory

construction, would not --

QUESTION: Counsel for your client didn't raise it in this case in the District Court.

MR. BENN: That is correct, Your Honor. We do feel though that it is basis on which the case can be affirmed based upon the statutory construction.

QUESTION: Mr. Benn, that interpretation though of this statute is just flatly inconsistent with the congressional intent and under those circumstances this Court doesn't apply that canon of construction that you are suggesting.

MR. BENN: Your Honor, I think it would be a fair characterization to make that there has been an unfair mixture made in the presentation before this Court of the legislative history. You must separate, please, the history of the pension offset provision. That is not an issue in this case. And, the legislative history of that provision is not an issue.

What is an issue will be the legislative history of the exception clause. That has almost no legislative history. At best, it could be characterized as statements by Senator Long and Representative Oldman on the floor of Congress saying this was supposedly going to be the intent. For the minority people in Congress, that may have been the intent.

The legislative documents that were produced after passage, the committee reports and the summaries, indicate a more generalization. The exception clause was designed to protect the reliance interests of people. They refer repeatedly, and Footnote 12 of our brief highlights this, to terminology that is non-gender specific and that is the approach that we are taking; that you can give meaning to the statute in this particular case without ever reaching the constitutional issue. And, the is important from the precepts of this Court that constitutional issues should be avoided if there can be a fair alternate construction of the statute. And, although not binding upon this Court --

QUESTION: Mr. Benn, is there really much left to the offset clause if you win on this argument?

MR. BENN: No, Your Honor. If you recall, Mr. Levy indicated to you at least four classes of beneficiaries that would still be affected by the pension offset provision. The only class that would not be affected by the offset provision by this interpretation is going to be Mr. Mathews or the class represented by Mr. Mathews for spousal benefits. That is husbands.

But, there are, indeed, four classes that still will be affected by the pension offset provision.

QUESTION: Aren't husbands the main people they

are interested in in the offset provision?

MR. BENN: Your Honor, I don't believe it is just simply the husbands concerned. We have the situation about the difference in length of divorces as to entitlement and we do have three classes --

QUESTION: Well, am I not right that the main group they wanted the offset to apply to was husbands who had supported themselves?

MR. BENN: Certainly from the aspect of --

QUESTION: That is where most of the money is in the case.

MR. BENN: Yes, Your Honor.

QUESTION: And, you would reverse the congressional decision as that major group covered by the offset provision.

MR. BENN: Your Honor, I think --

QUESTION: Isn't that right?

MR. BENN: Yes, Your Honor, that is the approach we are taking. However, that would still be an unfair characterization of the legislative intent. The pension offset provision and the effect of the exception clause only effects about five percent of the savings that were intended to be made by the '77 legislation. So, it was not -- It cannot be characterized as the primary purpose of the statute as such.

Now, on the other hand, if we interpret -- go beyond the text of the statute, and we go to the legislative history -- I have discussed the legislative is, in essence, non-gender specific with the exception of two remarks made on the floor of Congress. Beyond that the language of the statute itself uses terminology as it affects and being administered in January of 1977.

Peculiarly, there is not anything in the legislative history indicating why the date of January 1977 was selected. There is nothing indicating that that date has particular importance as opposed to December 1976 or February 1977, and until that keystone of construction is reached, there is not necessarily the meaning asked by the Solictor to be given to the statute.

As being administered, that particular portion of the phrase of the statute is also important because the Secretary at that particular time in January of 1977 was not administering the statute to preclude benefits because of dependency. They were administering the statute by simply taking a potfull of applications and holding them in abeyance until the Court made its decision in Goldfarb.

Ostensibly, after the Goldfarb opinion was announced, all of those applications for benefits, be they in January of 1977 or for six months prior, were given full force and effect. Those benefits were paid.

The second issue in this case deals with an equal protection issue and applies to the case of Mary Mathews.

The Solicitor has stated that the standards be applied by this Court, and one which we accept, is that the exception clause must serve an important governmental interest and at the same time the means selected by Congress must be substantially related to the achievement of that important governmental objective.

Now, a remark that the Solicitor does not make that is, however, important that when you attempt to analyze the situation, is who must bear the burden of proving that particular standard.

The Court has indicated that the burden of proving that the discrimination, if it is there, serves an important governmental purpose and is substantially related, rests upon the Secretary in this instance. It is not a burden that Mr. Mathews has to bear.

I will ask the Court then to focus in on the interests and the means selected by Congress. It is our firm contention that reliance interests within the context of this particular case is not an important governmental objective. And, I make that statement with two things in mind.

First of all, if you accept that reliance

interest is important, then in any case where there has been an equal protection violation most probably there will be a class of people who relied upon that statute.

Stated otherwise, there cannot be reliance upon an unconstitutional statute, and that is in essence what --

QUESTION: There are a lot of cases against you on that point. Chico County Drainage District, some of the doctrine of Chevron Oil. There are lots of people who do rely on unconstitutional statute, and this Court in different cases has upheld that reliance.

MR. BENN: Yes, Justice Rehnquist, however --

QUESTION: So why do you say there cannot be reliance on an unconstitutional statute? Were you making a statement of fact?

MR. BENN: No, Your Honor. I am making the statement for purposes of analysis and perhaps I could explain it this way. This case is in a different context. This case attempts to protect a reliance interest that was already held unconstitutional by the Court.

QUESTION: So was Chico Drainage District.

MR. BENN: Your Honor, I am not familiar with that particular case.

QUESTION: Well, it was a municipal bankruptcy statute that held unconstitutional by this Court and then

later reliance interests were asserted and the this Court in a subsequent case said, sure, it was unconstitutional, but that doesn't mean people don't do things in reliance.

MR. BENN: Okay. Your Honor, that would be true, however, this case could be characterized differently, and perhaps from what I am reading from what you told me about that case, that was the judicial acceptance of a reliance interest.

In this particular case, we have an attempt by Congress to impose their own interpretation of what reliance interest is upon the Court.

QUESTION: Why shouldn't this Court recognize Congress' choice as well as trying to make on of its own?

MR. BENN: Your Honor, if there is an analysis by Congress indicating that they have studied the issue and have determined that reliance interest is present, perhaps it could be accepted in that situation.

However, please look at this particular case and look at it in light of some principles that the Court has announced. There is nothing in the legislative history indicating that there are such things as reliance interests.

Even the Solicitor in brief or the Secretary in brief has had a problem in characterizing those interests.

QUESTION: Why was there even an exception then?

MR. BENN: Okay. The exception was simply, by our perception, something that Congress utilized in order to buy additional time to study the issue of providing universal coverage under Social Security.

QUESTION: Whom were they attempting to benefit by this exception?

MR. BENN: Okay. They were attempting to --

QUESTION: They must have had somebody in mind.

MR. BENN: Yes, Your Honor, anyone who had a legitimate reliance interest. And, of course, in the case of Mr. Mathews, he has actual reliance interests. That is -- What I am attempting to indicate to the Court is to try to distinguish between an expectation interest and a reliance interest.

QUESTION: Mr. Benn, may I ask, you mentioned Mr. Mathews' reliance interest. Earlier I thought you suggested the statute was discriminatory against his wife. Which is it, discrimination against males or females?

MR. BENN: Okay. The statute is discriminatory against females because it provides less for their Social Security contributions in terms of spousal benefits. However, if you go beyond the equal protection analysis and get into the specifics of what is being offered as the justification for the statute, you are left only with the protection of reliance interests.

And, it is our firm contention that there is no such thing as a reliance interest upon, first of all, an unconstitutional law, and, second of all, upon the proposition that I am arguing at this point. That is a pre-Goldfarb state of the law. We have attempted to indicate that. A person who retires and is eligible for this exception clause must do their retirement after December 1, 1977.

The Secretary attempts to characterize that after that time period a person who retires is relying upon a state of the law that antedates that decision by as much as ten months or more. At most at that time the people had an expectation --

QUESTION: Of course, the argument is you make retirement plans and even employment plans some years in advance and it made a big difference whether you worked for the government or you didn't work for the government. There are a lot of decisions that might be affected over the long run, I suppose.

MR. BENN: Yes, Your Honor. However, it attempts to demean the actual protection.

Then, in the second issue that I am going to raise and that is the issue of whether or not the statute is substantially related. If you accept for a minute your proposition that there is such things as reliance

interest, then in that situation you have a failure of the statute to be sufficiently tailored to protect those reliance interests. And, that is the situation of Mr. Mathews. Mr. Mathews, at the time he first --

QUESTION: But, if one distinguishes between an act of Congress on the one hand and reliance on a decision by this Court on the other hand, he is just not on the reliance of the act of Congress class.

MR. BENN: Your Honor, he is not in the situation --

QUESTION: He is in a different reliance class.

MR. BENN: Yes, Your Honor, but he is in the reliance of the state of the law at the time he made his retirement decision. He made his retirement -- He first considered making his retirement decision in September of 1977. At that time, the state of the law would entitle him to spousal benefits if he submitted an application and otherwise qualified. He forewent three years of continued employment with the Post Office based upon the statements from the local Social Security office that he would receive benefits. And, for that reason he cannot now go back -- with a change in legislative approach to the question of exception claus -- he cannot now go back and attempt to change that decision and be rehired by the Post Office in order to gain additional three years of

employment that he has suffered through.

Perhaps more importantly to the overall issue of equal protection is our third argument that we have argued which is the challenge that it presents to the judicial authority of this Court in the area of equal protection analysis.

If the Court will allow the Secretary in this instance or allow Congress in this instance to pass legislation to protect reliance interests, then it can perhaps thwart equal protection review because, as we have pointed out and as we have argued, in each and every instance there probably will be some individuals who would have relied upon the ostensible unconstitutional law and could be protected.

For example, in the area of desegregation, this similar approach could be analogized to the approach taken in the exception clause by Congress or the states in particular cases indicating that rather follow the Court's decision in Brown, instead, what we are going to attempt to do is we are going to allow protective reliance interests of everyone who bought homes in particular neighborhoods, reliance on the fact that they could send their children to segregated schools, and continue the effect of an unlawful statute and unconstitutional statutes for many years in the future.

The third issue that is perhaps the important one that really threatens the Court's authority is in the area of the inverse severability clause. Let me pause for a moment to characterize that clause. It is not the traditional severability clause that the Court has considered. This is an inverse severability clause. It attempts to impose upon this Court a rule of decision in this particular case, not simply to save a remaining portion of the statute.

There are three problems that Mr. Matthews can identify with that particular clause. The first deals with the threat to the judiciary and to the process of judicial review. If, on the surface, the clause is accepted as valid, then there is no means for judicial review for what is considered an equal protection violation within this context. Mr. Mathews must go entirely remediless in this particular context of this case.

QUESTION: Do you claim -- Do you disagree with the Solicitor General that he lacks -- The Solicitor General says Mr. Mathews would not lack standing to make the challenge he made here however the severability clause is construed. Do you disagree with that?

MR. BENN: Your Honor, I disagree with that to the extent that it goes to the issue of remedy. If the

inverse severability clause is accepted, then there would be no remedy for Mr. Mathews, albeit there is an unconstitutional violation to him. This brings us to the aspect of whether or not there must be a sufficient remedy for an unconstitutional violation. And, of course, the Court must, in the first instance, examine the legislative history of the statute and we would not argue to the contrary.

However, the Court must go a step further. After they have examined the legislative history --

QUESTION: Why do you need to get to the legislative history at all in the severability clause? It is perfectly clear that it is applicable, isn't it?

MR. BENN: Okay. There is no question --

QUESTION: Don't say "okay." Can you answer me yes or no?

MR. BENN: Yes, Your Honor.

QUESTION: Then let me read you a sentence from the District Judge's opinion and ask you whether you agree with it. On page 8a of the jurisdiction statement, the District Judge says, "The Court is convinced therefore that the severability clause is not an expression of the true congressional intent." Do you agree with that?

MR. BENN: Your Honor, I think the argument can be made that --

QUESTION: Would you agree with the argument if it were made?

MR. BENN: Pardon?

QUESTION: Would you agree with the argument if it were made?

MR. BENN: Yes, Your Honor, as to the majority of Congress at the time. I certainly would.

QUESTION: You don't think the language of the statute then is governing in this case?

MR. BENN: Your Honor, I think that when you look at the legilsative history -- And I don't consider the language itself is the inexorable command upon the Court. I view the statute as simply being an indication of legislative intent. To that extent, I think it is an unreliable indication when you consider the majority of Congress.

And, if you carry it a step further, which is what I am arguing --

QUESTION: Well, didn't the majority have to vote for it to pass it?

MR. BENN: Your Honor, they did, but at the time that they voted to pass it please keep in mind that they had no written report before them. They didn't have the text of the statute before them. They waived all of those rules in order to pass the particular statute.

This is, as best our research can determine, the first instance in which Congress has interposed an inverse severability clause on a piece of legislation. Obviously, in light of the Goldfarb decision, there is some question to the viability of the equal protection basis for the statute.

Now, to the extent that we look to the sufficiency of the remedy, it is Mr. Mathews' contention that the remedy in this particular case to him is entirely inadequate.

We had a very similar situation that came up in the District Court in the Rosofsky decision based upon the same exception clause, based upon the same principles. In that particular case, the District Court applied the inverse severability clause and in essence required Mr. Rosofsky to go remediless. He had no remedy although there was, in fact, found a constitutional violation. There is no mechanism within the statute, the inverse severability clause, in which Congress explored how they wanted the inverse severability clause to be applied.

We have a second problem here and that deals with retroactive benefits. Now, on the one hand, if you accept the principle of the inverse severability clause, it is in direct conflict with Congress' enactment of Section 204(b) of the Social Security Act which says that

benefits that are paid in good faith will not be recouped.

So, in this particular situation, from 1977 or from the date of the order in this case, December 1979, up until the date of this Court's decision, unless the Court awards relief to Mr. Mathews, all benefits will have been paid to his opposing class in direct conflict with the intent of the inverse severability clause.

So, it would seem apparent that the Court must, at the very least, award the class represented by Mr. Mathews retroactive benefits back to the time of his application and only apply perspective nullification of the statute.

We would argue in the contrary that the best approach to take at this particular point would be for the Court to simply not nullify the statute, but extent the benefits. At that time they could leave a reasoned decision and analysis to Congress as to how Congress would apply the situation in the future, but award the class the back benefits for the time that they were discriminated against.

In summary, there are in essence three issues before the Court. There is, first of all, a statutory interpretation issue which, if accepted based upon the principles that the District Court of the Ninth Circuit have announced, would allow a means in which this Court

could avoid a constitutional issue, yet at the same time give some meaning to the statute and give some meaning to the fact that the Court did have the Goldfarb decision which was known by Congress at that time they passed the exception clause.

The second aspect requiring affirmance in this situation deals with the violation of equal protection. The violation occurs to Mary Mathews because it provides less benefits for her and her family unit than what it provided to a similarly situated male.

On the surface, reliance interest does not seem to be in this context of this case after there has been a decision of unconstitutionality to be an important governmental interest. The statute surely is not narrowly tailored because the class, as indicated by Mr. Mathews, certainly are not offered protection for their legitimate reliance interests that have occurred.

The last aspect requiring affirmance is in the area of the inverse severability clause. That is an attempt to thwart judicial review in this case. It would require Mr. Robert Mathews to go remediless, albeit there is an unconstitutional violation of his rights and the rights of Mary Mathews. Unless this Court provides some mechanism which in this case goes back to the Court's initial reasoning in the Westcott decision that the most

appropriate remedy in this case must be extension of the benefits. Allow Congress to act after the Court's decision, but until that time, extend the benefits.

If there are no further questions, we would ask the District Court's decision be affirmed.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Levy?

MR. LEVY: I have nothing further, Mr. Chief Justice.

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

(Whereupon, at 11:55 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1050 - MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. ROBERT H. MATHEWS, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)