IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-437

JOSEPH A. CALIFANO, Secretary of Health, Education and Welfare, *Appellant,*

—v.—

CINDY WESTCOTT, *et al.,* *Appellees.*

No. 78-689

ALEXANDER SHARP, II, Commissioner of the Massachusetts Department of Public Welfare, *Appellant,*

—v.—

CINDY WESTCOTT, *et al.,* *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

of American Civil Liberties Union, Center for Women Policy Studies, Federally Employed Women, Federation of Organizations for Professional Women, League of Women Voters of the United States, National Association of Black Women Attorneys, Inc., National Organization for Women, National Women's Health Network, NOW Legal Defense and Education Fund, Rural American Women, Women's Legal Defense Fund and Women's Lobby.

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The American Civil Liberties Union, the Center for Women Policy Studies, Federally Employed Women, the Federation of Organizations for Professional Women, the League of Women Voters of the United States, the National Association of Black Women Attorneys, Inc., the National Organization for Women, the National Women's Health Network, the NOW Legal Defense and Education Fund, Rural American Women, the Women's Legal Defense Fund and Women's Lobby respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief amici curiae in Sharp v. Westcott, et al. Counsel for the appellees have consented to the filing of this brief; counsel for appellant Sharp has refused comment.

This brief is also filed on behalf of the above-listed organizations in Califano v. Westcott, with the written

consent of the parties as provided in Rule 42 of this Court's Rules.

These organizations share a conviction that individuals must be free to participate in all facets of American life without discrimination on the basis of gender. Such discrimination is particularly intolerable when, as in the statute challenged in this case, its devastating impact falls upon women who are poor and their families. These organizations believe that such gender based discrimination casts the weight of the state on the side of traditional notions about male/female behavior, shores up artificial barriers to the attainment by women and men of their full human potential and retards society's progress toward equal opportunity. Because of these organiza-

tions' long-standing work towards the elimination of gender discrimination, they believe their brief will be of substantial assistance to the Court in the resolution of the issues raised by these cases.

Respectfully submitted,

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INTEREST OF AMICI

The interest of amici appears from the foregoing motion.

QUESTIONS PRESENTED

I. Whether Section 407 of the Social Security Act, by authorizing payment of benefits for needy children of two-parent families when the children are deprived of parental support or care because of the father's unemployment, but not for identically situated children of families deprived because of the mother's unemployment, violates the equal protection component of the due process clause of the fifth amendment.

II. Whether the appropriate judicial remedy in this case is to extend the AFDC-U program to families in which either parent is unemployed, or to completely restructure the program through the addition of a principal wage earner test.

STATEMENT OF THE CASE

This is a class action commenced to declare unconstitutional and enjoin the enforcement of the gender classification established in Section 407 of the Social

Security Act, 42 U.S.C. §607 (hereafter Section 407), and the implementing Massachusetts welfare regulations, 6 CHSR III, Subch. A, Pt. 301, §301.03; Pt. 303 Subpt. A. §§303.01-303.04. Title IV of the Social Security Act, of which Section 407 is a part, creates the Aid to Families with Dependent Children Program (hereafter AFDC), 42 U.S.C §601 et seq. Under this program, states with an approved plan receive federal matching funds for cash assistance paid to families with a "dependent child." 1/

Section 406(a) of the Act defines dependent child as a needy child deprived of parental support or care by reason of the death, absence or incapacity of a

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1/ The amount of benefits is determined by each participating state, see Rosado v. Wyman, 397 U.S. 397(1970), and as of July, 1978, the average payment per family ranged from a low of $817 a year in Mississippi to a high of $4707 a year in Hawaii. See 42 Soc. Sec. Bull. 77, Table M-35 (Jan. 1979).

parent. 42 U.S.C. §606(a). Section 407(a), held unconstitutional by the court below, further defines the term "dependent child" to include a "needy child ... who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father...." 42 U.S.C. §607(a). Eligibility for subsistence benefits under this Aid to Families with Dependent Children-Unemployed Fathers program (hereafter AFDC-U) depends on meeting rigorous financial and categorical criteria designed to ensure that the recipient family is needy and that the unemployed father has a recent attachment to the work force and a willingness to accept employment. 42 U.S.C. §607; 45 C.F.R. §233.100(1977).

State participation in the AFDC-U program

established under Section 407 is optional.[2] However, states electing to participate must comply with the requirements of the Act and implementing federal regulations. See 42 U.S.C. §602. Since a dependent child is defined as one deprived because of a father's unemployment, federal matching funds may not be provided for AFDC-U benefits to children deprived because of their mother's unemployment.

Families who receive AFDC-U benefits (or, at state option, who are eligible but who have not applied for cash assistance) are also entitled to medical assistance benefits under the federal-state Medicaid pro-

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2/ Twenty-six states, the District of Columbia and Guam participate in the AFDC-U program. 42 Soc. Sec. Bull. 78 (Jan. 1979).

gram. 42 U.S.C. §1396a(10).[3] As with AFDC-U, the Social Security Act does not permit federal matching funds to be provided for Medicaid benefits to needy children deprived of support or care because of the unemployment of their mother.

Massachusetts has exercised its option under Section 407 to make AFDC-U payments and to provide Medicaid coverage to families with children deprived of parental support or care because of the father's unemployment and receives fifty percent of the cost of its AFDC-U and Medicaid payments from the federal govern-

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3/ Medicaid benefits are provided in the form of direct payments to providers of medical services. Participation in the Medicaid program is also optional with the states, but all states that participate in the AFDC-U program also participate in Medicaid. Compare 42 Soc. Sec. Bull. 78 (Jan. 1979)(states participating in the AFDC-U program) with HEW, Health Care Financing Admin., Office of Research, Medicaid Statistics April 1978 i (Nov. 1978)(states participating in the Medicaid program).

ment.[4] Because federal funds are not available, the state does not provide AFDC-U or Medicaid benefits to families with children deprived of support or care because of the mother's unemployment.

Appellees Cindy and John Westcott and Susan and John Westwood are married couples who reside in Massachusetts. Both are parents of a son.

On November 26, 1976, the Westcotts' application for AFDC-U benefits was denied because William Westcott did not have sufficient quarters of work to satisfy Section 407's definition of an unemployed father. See note 7 infra. Cindy Westcott's potential ability to qualify her family for AFDC-U was not considered because of Section 407's gender limitation. According

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4/ See 6 CHSR III, Subch. A, Pt. 301, §301.03; Pt. 303, subpt. A, §303.01, §303.04.

to an affidavit of Cindy and William Westcott, their landlord, who was seeking overdue payment of their rent, suggested that they separate so that Cindy Westcott and her then unborn child would be eligible to receive AFDC benefits. J.S. of Appellant Califano, App. 27A.

On March 2, 1977, Susan and John Westwood's application for Medicaid benefits was denied because John Westwood had insufficient work history to meet the definition of an unemployed father. J.S. of Appellant Califano, App. 10A. Susan Westwood's potential ability to qualify her family for Medicaid was not considered because of Section 407's gender limitation.

Pursuant to a stipulation for the purposes of this litigation between the attorneys for the Westcotts and the Westwoods and the attorneys for Massachusetts, the

Westcotts' and Westwoods' eligibility under Section 407 was redetermined. Based on their work histories, Cindy Westcott and Susan Westwood were found to meet the definition of "unemployed," but for the gender requirement. Pursuant to the stipulation, the Westcotts were granted AFDC-U benefits and the Westwoods were granted Medicaid benefits. J.S. of Appellant Califano, App. 9A-10A.

On April 20, 1978, the district court held that the gender classification created by Section 407 violated the equal protection component of the due process clause of the fifth amendment. It applied the review standard enunciated in Craig v. Boren, 429 U.S. 190, 197 (1977), that to withstand constitutional measurement "classifications by gender must serve important governmental objectives and must be substantially related

to the achievement of those objectives." J.S. of Appellant Califano, App. 21A-29A. The court first identified the governmental objectives of Section 407: the protection and care of needy children in families without a wage earner's support and the maintenance of family structure and stability. J.S. of Appellant Califano, App. 27A. It then determined that the Section 407 sex-based classification failed to further either interest. More than that, the court concluded the male/female distinction in this context was irrational and, indeed, thwarted the objective of family stability. J.S. of Appellant Califano, App. 27A. Additionally, the district court reasoned that the sex classification was impermissible because it was rooted in an archaic and overbroad generalization about the role of women in society. J.S. of

Appellant Califano, App. 29A-30A. Finally, the court ruled that the proper judicial remedy was extension of the AFDC-U program to all families with needy children in which either parent is unemployed within the meaning of the Act and implementing regulations. J.S. of Appellant Califano, App. 36A-37A.[5/]

The federal appellant, Secretary Califano, has appealed only the holding that Section 407 violates the due process clause of the fifth amendment. The

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5/ In accord in all respects are Stevens v. Califano, 448 F. Supp. 1313 (N.D. Ohio 1978), appeal held in abeyance, No. 78-449 (U.S. Dec. 11, 1978); Browne v. Califano, Civ. Action No. 77-1249 (E.D. Pa. June 9, 1978), appeal held in abeyance, No. 78-603 (U.S. Dec. 11, 1978). To date no jurist has reached a contrary conclusion

Massachusetts appellant, Commissioner Sharp, although initially arguing in favor of the extension remedy, later reversed his position.[6] He appeals only the remedy ordered by the district court.

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6 /Massachusetts, in its original argument supporting extension in the event the gender line was held unconstitutional, did not suggest that the AFDC-U program should be restructured to include a principal wage earner limitation. Appellees' Motion to Affirm 5. After the district court's April 20, 1978 order and opinion, Massachusetts moved for amendment or clarification to permit the state to redesign its AFDC-U program to incorporate a principal wage earner test. On August 9, 1978, the court denied the motion on the grounds that it was up to Congress to restructure the AFDC-U program, beyond the court's remedy. App. 43-48.

SUMMARY OF THE ARGUMENT

The court below held that Section 407 of the Social Security Act, by authorizing payments to needy two-parent families with children deprived of parental support or care because of the father's unemployment, but not to identically situated families deprived because of the mother's unemployment, violated the equal protection component of the due process clause of the fifth amendment. It ordered that the AFDC-U program, established by Section 407, be extended to all families with needy children in which either the mother or the father is unemployed within the meaning of the Act and implementing regulations. Its decision, supported in all respects by this Court's precedents, legislative history and the congressional policies underlying the AFDC-U program, warrants swift and secure affirmation.

I.

This Court has made clear that laws based on archaic and overbroad generalizations about women's role in society, even when supported by empirical evidence, are inevitably biased and therefore intolerable. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). The legislative history of Section 407 reveals that it is predicated upon such a generalization. Congress assumed that mothers were not wage earners and that even when they engaged in paid work, their employment would not be significant to their families. This legislative stereotyping is invidious not only because it shapes official policy but also because that policy then reinforces the accuracy of the stereotype. In spite of this, however, statistics both now and at the time

Congress enacted Section 407 indicate that women's work is significant to many families.

Although the Solicitor General concedes that Section 407 is gender based, he then argues that it is not gender biased. His reasoning -- that in every case the family unit affected by the grant or denial of aid consists of one man, one woman and children of both sexes -- cannot withstand even cursory analysis. The classification is indistinguishable on any sensible ground from the classifications declared unconstitutional in Frontiero, Wiesenfeld and Goldfarb, in which the disfavored units were also families. Indeed, the discrimination is more pernicious here because gender operates not merely to disadvantage but totally to disqualify, and the disqualification is from a program offering only subsistence benefits.

In Craig v. Boren, 429 U.S. 190 (1977), the Court made explicit the elevated review standard for sex-based classifications evolving from its precedents since Reed v. Reed, 404 U.S. 71 (1971). It made clear that "[t]o withstand constitutional challenge ... classifications by sex must serve important governmental objectives and must be substantially related to those objectives." 429 U.S. at 197. It has unequivocally reaffirmed this standard in Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979).

The legislative history of the AFDC-U program demonstrates that its objective was to alleviate the harsh financial and social effects of parental unemployment upon the family. It was proposed by President Kennedy in 1961 along with a plan to extend the duration of unemployment compensation. Its declared purpose was to "make assistance available to needy families in which the breadwinner is unemployed." H.R. 3865, 87th

Cong., 1st Sess., §2 (1961). Although the original statute was gender neutral, the congressional hearings reveal that Congress assumed that the families in need would be those who had been financially supported by the father. The 1968 amendment, changing the word "parent" to "father", sought to assure that AFDC-U would operate as intended -- as a program responsive to the unemployment of one who had in fact earned wages for the family. Congress viewed the change as a means to correct the abuse of the program by some states in which aid had been provided to full-time homemakers with no recent attachment to the labor force. In lieu of a gender-neutral method of determining eligibility, Congress sex-typed the members of the family and enacted the current Section 407.

Section 407 is not fairly related to the objective of aiding families in need due to parental unemployment. For the purposes of a child benefit program, family units faced with identical needs resulting from unemployment should receive identical benefits. Using the sex of a parent as a test for inclusion or exclusion is irrational.

Deterring father desertion, a purpose attributed to AFDC-U by the Solicitor General, was seen by Congress as an effect rather than a purpose of the program at its inception. Moreover, the 1968 gender line curtailed the original program's desertion-preventing effect. By limiting eligibility to families in which the father was unemployed, Congress once again gave fathers incentive to leave when need was caused by the mother's unemployment. It also gave unemployed mothers incentive to desert not present in the earlier

law.

II.

Because the decision to remedy a constitutionally defective statute requires a court to change a legislative provision, the courts have generally limited themselves to changes that can be accomplished in the simplest fashion possible. The choice of remedy presented has accordingly been restricted to whether the statute should be extended to bring in the individuals excluded by the legislature, or invalidated. Welsh v. United States, 398 U.S. 333, 361 (1970)(Harlan, J.,concurring). When faced with this choice in gender discrimination caees, especially those involving public benefits, this Court has consistently extended the coverage of the infirm statute. See, e.g., Califano v. Goldfarb, 430 U.S. 199; Jablon v. Secretary of HEW 430 U.S.

924 (1977), aff'g 399 F. Supp. 1118 (D. Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636 ; Frontiero v. Richardson, 411 U.S. 677.

The test to determine whether extension or invalidation is the appropriate remedy for a constitutionally infirm statute is "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it ... to render what Congress plainly did intend, constitutional." Welsh v. United States, 398 U.S. at 355-56. In determining the remedy that Congress would prefer, the presence or absence of a severability clause in the statute, the extent of Congress' commitment to the underlying policy of the statute, the amount of disruption to the statutory scheme that might accompany extension or invalidation, and the degree

to which the remedy selected might impair legislative goals beyond those recognized by the statute itself are all relevant. An analysis of each of these factors ineluctably supports the remedy ordered by the district court in this case -- extension of the AFDC-U program to families with unemployed mothers.

Massachusetts argues that the proper remedy in this case is neither extension nor invalidation, but rather judicial restructuring of the program to include a principal wage earner limitation. Judicial redesign of this character is unprecedented. Indeed, the issue of the appropriate remedy for unconstitutionally underinclusive statutes has been limited to whether a court should extend or invalidate the statute precisely to avoid the difficult policy questions that are raised if the court is forced to sit as a legislature and evaluate all other possible remedies that might be available.

The kinds of policy decisions in which the court would have to become embroiled in order to restructure the AFDC-U program to include a principal wage earner limitation illustrate why any such restructuring should be left to Congress. First, the Court would have to arrive at a definition of principal wage earner, for there is nothing inherently obvious in Massachusetts' definition and, indeed, it is not even internally consistent. Second, the Court would have to decide whether families currently receiving AFDC-U should have their benefits terminated by judicial decree, for this would be the result in all those families in which the father is not the principal wage earner -- possibly as many as twenty-nine percent of families currently eligible. Third, the Court would have to determine whether the cost savings attributed to the principal wage earner test by

Massachusetts are sufficient to justify the imposition of such a test. This is an almost impossible task, given the way in which Massachusetts calculated those estimates. Fourth, the Court must consider whether the disparate impact that the principal wage earner test has on women should counsel against its adoption. All of these policy considerations are better resolved by Congress.

Consideration of remedies beyond extension or invalidation of the statute should be left to Congress for the further reason that it is difficult to predict the remedy that Congress would select. Moreover, if any prediction can be made, it is that Congress would favor simple extension without a principal wage earner limitation. The language and structure of the current AFDC program are inconsistent with a principal wage earner

limitation. Nothing in the legislative history that Massachusetts advances supports the limitation. Further, although bills have been introduced in Congress to amend the AFDC-U program to render it gender-neutral, noen of the proposals would impose a principal wage earner limitation such as that Massachusetts suggests.

Whether this Court decides to extend or invalidate Section 407, its decision is of course only a form of tentative adjudication, not a definitive response to any issues raised by the sex classification's unconstitutionality. The ultimate responsibility for the structure of the AFDC-U program rests with Congress. Should Congress decide upon restructuring more complex than extension, it is well-equipped to redesign the program expeditiously.

In short, the district court's conclusion that Section 407's sex classification is based on an archaic and overbroad generalization about women and that it does not fairly advance the purpose for which it was enacted warrants this Court's firm approbation. Its extension of the AFDC-U program to families in which either parent is unemployed merits similar affirmance.

ARGUMENT

I

SECTION 407, BY AUTHORIZING PAYMENT OF BENEFITS TO NEEDY TWO-PARENT FAMILIES WITH CHILDREN DEPRIVED OF PARENTAL SUPPORT OR CARE BECAUSE OF THE FATHER'S UNEMPLOYMENT, BUT NOT TO IDENTICALLY SITUATED FAMILIES DEPRIVED BECAUSE OF THE MOTHER'S UNEMPLOYMENT, VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. Section 407 Invidiously Discriminates On The Basis of Gender.

1. Section 407 creates a sex-based classification resting on archaic and stereotypical assumptions about women.

Section 407 plainly draws a distinction on the basis of gender. The challenged law distinguishes between a female wage earner in a needy two-parent family and a similarly situated male wage earner. Although the family of the former is ineligible for AFDC-U benefits, the family of the latter qualifies for these sub-

sistence payments. The legislative message is inescapable: the only wage earner who counts is male. The female wage earner, regardless of her demonstrated earning capability, [7] does not even come in second; she

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7/ In addition to the gender criteria, eligibility for AFDC-U benefits depends on meeting certain financial and categorical criteria. Each family is required to show need under a state-established standard. 45 C.F.R. §233.100(a)(1) (1977). Further, the applying parent must (1) meet the federal definition of unemployment, i.e., be employed less than 100 hours per month, 45 C.F.R. §233.100 (a) (1) (iii) (1977); 42 U.S.C.607(a); (2) demonstrate a recent prior attachment to the work force, i.e., either have earned fifty dollars or more in each of six quarters within any thirteen-quarter period ending within one year of the application for benefits, or have received or qualified for unemployment compensation within that one year period, 42 U.S.C. §607(b)(1)(C); (3) neither have worked nor refused a bona fide job offer without good cause for 30 days prior to receipt of AFDC-U benefits, 42 U.S.C. §§607(b)(1)(A),(B); and (4) meet certain work registration requirements. 42 U.S.C. §607(b)(2)(C).

does not count at all. Nor is she seen as helping to keep the two-parent family intact. If she is out of work, it is assumed that she, unlike her husband, will remain with the family. The gender classification of Section 407, predicated upon this congressional assumption about women's role in the family, cannot pass constitutional muster.

The guiding principle emerging in the current decade from this Court's resolution of constitutional challenges to official classification by gender is evident: governmental action based on archaic and overbroad generalizations about women's role in society is inevitably biased and therefore intolerable. As stated by the Solicitor General, "no law may be based on sexual stereotypes." Brief for Appellant Califano at 26. Ineluctably,therefore, the Section 407 gender classification must fall, unless the Court casts off its previous decisions to

embrace the misconception underpinning the Solicitor General's argument. Stereotype, as he would now have it, means "unsupported belief," an assumption not backed up by "solid-statistical evidence." Id. at 33. But stereotype is not a synonym for myth or false impression. It identifies the average. Thus most of the sexual stereotypes this Court has rejected as a basis for legislative line-drawing have abundant empirical support; "solid statistical evidence " has backed them up.

For example, although it can be documented that men are generally more active than women in business affairs, the Court did not tolerate the statutory preference of men over women in the appointment of estate administrators. Reed v. Reed, 404 U.S. 71 (1971). The Court also invalidated a dependency test in the Social Security Act,

applicable to widowers but not widows, in spite of "solid statistical evidence" that 78.5 percent of all married women, and 88.5 percent of those over fifty-five, are dependent on their husbands. Califano v. Goldfarb, 430 U.S. 199, 238 n. 7(1977) (Rehnquist, J., dissenting). See also Weinberger v. Wiesenfeld, 420 U.S. 636, 643(1975); Frontiero v. Richardson, 411 U.S. 677, 681-682(197

The insidious practice this Court has consistently condemned is the lawmakers' habit of treating men and women who do not fit the generalization -- the stereotype -- as if they did. Patterning official policy in this manner is intolerable, not because it is without empirical support, but because it relies on a stereotype accurate for some -- even many -- families and applies it to all, with the result that the stereotype continues

to be accurate.[8] As stated most recently by this Court, "[l]egislative classifications ... on the basis of gender carry the inherent risk or reinforcing stereotypes about the proper place of women..." Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979), slip op. at 14. In short, the "solid-statistical evidence" argument, although advanced time and again by the Solicitor General, merits no more weight on this occasion than it has carried in the past.[9]

The legislative history of Section 407 reveals that the provision is predicated upon a conventional image -- a stereotype --

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8/ See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 725-26 (1971).

9/ This Court has been receptive to the argument only when the classification was perceived as preferential to women. Kahn v. Shevin, 416 U.S. 351 (1974). There has never been a claim that Section 407 can be viewed as preferential to women.

identical to those condemned in this Court's prior cases. See Goldfarb, Wiesenfeld and Frontiero. Congress regarded "breadwinner" and "father" as synonyms. Mothers as "breadwinners" never entered the lawmakers' calculus. Throughout the Committee hearings and floor debates the terms "wage earner," "breadwinner" and "father" were used interchangeably. 10/ Congress apparently assumed that genuine need would occur only when the family was deprived of the father's wages. That Congress was operating under the traditional assumption of the father's preeminent economic role in the family unit, to the virtual exclusion of the mother's, has been the firm conclusion of the district courts which, to date, have considered the issue. See

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10/ See, e.g., 107 Cong. Rec. 1795, 3761, 3766 (1961) (remarks of Rep. Mills); 107 Cong. Rec. 3769 (1961) (remarks of Rep. Cohelan); 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane); 107 Cong. Rec. 6401 (1961) (remarks of Sen. McCarthy); 108 Cong. Rec. 14139 (1962) (remarks of Rep. Mills); 108 Cong. Rec. 4272 (1962) (remarks of Rep. Keogh); 108 Cong. Rec. 13879 (1962) (remarks of Sen. Byrd); H.R. Rep. No. 1414, 87th Cong., 2d Sess. 9 (1962).

Stevens v. Califano, 448 F. Supp. 1313;

Browne v. Califano, No. 77-1249.

In spite of legislation such as Section 407 reflecting and reinforcing traditional notions, the trend in today's labor market runs in the opposite direction. Women's work does count in many families. Today, the dual wage earner family represents "the typical American pattern."[11/] In 1975, wives contributed approximately twenty-six percent of their families' income and of

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11/ Bell, Working Wives and Family Income, in Economic Independence for Women 239, 254, 258 (Chapman, ed. 1976). In 1975, nearly half of all husband-wife families had two workers or more and about two-fifths of all children under eighteen were in such families. Hayghe, Families and the Rise of Working Wives -- An Overview, U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 12 (May 1976)

these, approximately twelve percent contributed fifty percent or more.[12]

Moreover, statistics contemporaneous with the enactment and amendment to Section 407 demonstrate that women's employment at that time was significant to their families. From 1960 to 1970, the median proportion of family income contributed by gainfully employed wives approximated twenty-seven percent.[13] This contribution rose to thirty-nine percent for wives who worked full time.[14]

12/ See Marital and Family Characteristics of the Labor Force in March 1976, BLS Special Labor Force Report 206, Table L, at A-41. In March 1975, 72 percent of gainfully employed wives were working full time. About 27 percent of mothers with preschool age children worked full time in 1974. This figure rises to 41 percent of mothers of school age children. Hayghe, Families and the Rise of Working Wives - An Overview, supra, at 16 n. 11.

13/ U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 8 (April 1972).

14/ Id.

Had the old notion that men are wage earners and women their dependents been less deeply ingrained, the 90th Congress might have noticed that women's employment is often crucial to their families' well being and thus that women's unemployment, too, can have a devastating impact. Instead, Section 407 reflects the habitual legislative disregard of women workers, their status, and the reality of family economic interdependence. The classification diminishes the value of women's contributions to family income, aggrandizes the value of men's contributions and places an official imprimatur on categorization of women as second-class workers.

2. Section 407 discriminates against women and their families by depriving them of benefits granted to identically situated men and their families.

Although the Solicitor General concedes that Section 407 "unquestionably entails a

distinction on the basis of gender," Brief for Appellant Califano at 7, he then argues that its application is not "gender biased." Id. at 8. His reasoning -- that "in every case the grant or denial of aid to the entire family affects, to an equal degree, one man, one woman, and children of both sexes" -- cannot withstand even cursory analysis. Id. The classification is indistinguishable on any sensible ground from the classifications declared unconstitutional in Frontiero, Wiesenfeld and Goldfarb. Those decisions ineluctably establish that Section 407 invidiously discriminates against both the woman and her family.

In Frontiero, the Court invalidated a dependency test for male but not female military spouses. Only the servicewoman was required to prove her spouse's dependency in order to receive a housing allowance for the

couple and medical and dental benefits for the spouse. No such requirement was imposed upon servicemen. Since the benefits in question were designed only for family units, every benefited unit, and correspondingly, every disfavored unit, consisted of a man and a woman. Nonetheless, the Court ruled that the denial of a housing allowance and medical and dental benefits to Sharron and Joseph Frontiero was indeed gender based and gender biased.

In Weinberger v. Wiesenfeld, and Califano v. Goldfarb, in which the Court held gender-based distinctions in the Social Security Act invalid, the disparity in family benefit eligibility when the covered wage earner was female was also at

issue.[15/] For example, in Wiesenfeld, the Court found the "gender-based distinction... entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent." 420 U.S. at 651. In Goldfarb, requiring widowers but not widows to prove dependency on a covered wage earner was held impermissible because "Social Security is designed ... for the protection of the family and the section discriminates against one particular category of family -- that in which the female spouse is a wage earner covered by social security." 430 U.S. at 209.

15/ In addition to the Court's multiple findings of unconstitutional gender discrimination in the Social Security Act, commentators have repeatedly criticized the discriminatory, stereotypical assumptions upon which many of the Act's benefit programs are predicated. See, e.g., Randolph, Sex Discrimination in the Family Benefits Section of the Social Security Act, 8 Clearinghouse Rev. 535 (Dec. 1974); Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534, 543 (1974).

The statute in this case is as gender based in origin and as gender biased in result as the statutory provisions invalidated in Frontiero, Wiesenfeld and Goldfarb. Indeed, in stunning contrast to the Solicitor General's outlandish "no gender bias" argument, the Department of Justice's own Task Force on Sex Discrimination has described Section 407 as "overtly and substantively discriminat[ing] against women."[16/] Moreover, the discrimination here is, if anything, even more blatant and more harmful than that in Frontiero, Wiesenfeld, or Goldfarb. First, Frontiero and Goldfarb involved presumptions that could be rebutted. In those cases, spouses of female wage earners who could prove dependency, albeit under a stringent

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16/ Task Force on Sex Discrimination, Civil Rights Division, U.S. Department of Justice, Interim Report to the President 156 (Oct. 3, 1978).

income proportion test, could qualify for benefits. Here, gender operates not merely to disadvantage but totally to disqualify. Under no circumstances could Cindy Westcott or Susan Westwood establish eligibility for their respective families, because it was they, rather than their husbands, who met the employment-related criteria of Section 407.

Second, as the court below observed, the discrimination and deprivation of monetary benefits is more harmful to the families here than in Wiesenfeld or Goldfarb because "[t]he Social Security benefits denied in Wiesenfeld and Goldfarb were not subsistence or medical care payments designed to meet the basic needs of the plaintiffs as are the benefits denied the plaintiffs in the instant case." J.S. of Appellant Califano, App. 33A. cf. Mathews v. Eldridge, 424 U.S. 319(1976).

In sum, Section 407 creates a classification that is both gender based and gender biased. This has been the conclusion of the lower courts, the Department of Justice Task Force on Sex Discrimination and, apparently, even the Attorney General of Massachusetts, who has not appealed the district court's holding on this issue. The Court's precedents in Frontiero, Wiesenfeld and Goldfarb lead unavoidably to a determination that the instant classification invidiously discriminates on the basis of gender.[17/]

17/ The Solicitor General's attempt to distinguish Frontiero, Wiesenfeld and Goldfarb from the instant case because the former involved benefits distributed as compensation for work or in relation to the contributions of covered employees simply ignores the Court's precedents. Brief for Appellant Califano at 25-26. Although it is true that Congress has wide latitude to create classifications that allocate non-contractual benefits under a social welfare program, Weinberger v Salfi, 422 U.S. 749, 776-777 (1975), these must fall within constitutional

(Footnote continued on next page)

B. The Section 407 Gender-Based Classification Is Not Substantially Related to any Important Governmental Objective.

1. The proper standard of review for the Section 407 gender-based classification is set forth in Craig v. Boren.

In Craig v. Boren, 429 U.S. 190 (1977), this Court set forth the standard for testing the constitutional validity of gender-based classifications. The Court announced: "To withstand constitutional challenge,

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limits. Califano v. Goldfarb, 430 U.S. at 210-211.

It is now plain that in cases involving social welfare legislation generally, male/female classifications are impermissible, although classifications drawn on other bases can withstand constitutional review. Compare Weinberger v. Wiesenfeld, 420 U.S. 636, and Califano v. Goldfarb, 430 U.S. 199, with Mathews v. Lucas 427 U.S. 495 (1976), Mathews v. DeCastro, 429 U.S. 181 (1976) and Califano v. Jobst, 434 U.S. 47 (1977). Surely the explicit male/female classification in the social welfare legislation at issue in this case ranks with Wiesenfeld and Goldfarb, not with Lucas, DeCastro and Jobst.

previous cases establish that classifications by sex must serve important governmental objectives and must be substantially related to those objectives." Id. at 197. Although the Solicitor General has raised a question of the Court's consistent adherence to this heightened scrutiny standard, see Brief for Appellant Califano at 24-27, thoughtful analysis of the Court's gender-based discrimination decisions since Reed v. Reed, 404 U.S. 71 (1971), leaves no doubt that the standard is firmly established. Indeed, the Solicitor General's invitation to the Court to retreat to a lesser standard is inexplicable in light of the position tendered by his predecessor, that it "is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the

Fifth) does not tolerate discrimination on the basis of sex." Memorandum for the United States as Amicus Curiae at 8, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

From the start, the Court plainly indicated that the objective of a gender-based classification had to be more than merely "legitimate." In Reed v. Reed, 404 U.S. 71, the Court held that the "legitimate" objectives of reducing the workload of probate courts and avoiding familial controversy --both recognized as "legitimate" -- were not sufficiently important to justify resort to a sex-based criterion in the appointment of estate administrators.[18] Similarly, in Frontiero

18/ Professor Gunther discerned from the Court's opinion in Reed that "some special sensitivity to sex as a classifying factor [had] entered into the analysis." Gunther, The Supreme Court 1971 Term, Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972).

v. Richardson, 411 U.S. 677, the Court held administrative convenience insufficiently important to justify automatic labeling of the wife, but not the husband, of a service member as "dependent."

Explicit statement in Craig v. Boren, of an elevated review standard for gender-based classifications simply confirmed the Court's evolving precedents. See also Stanton v. Stanton, 421 U.S. 7, 17 (1975). Since Craig, the Court has utilized the standard without reservation. In Califano v. Goldfarb, 430 U.S. at 210-211, Justice Brennan, speaking for a plurality, reiterated the Craig formulation. The per curiam opinion in Califano v. Webster, 430 U.S. 313, 316-17 (1977), expressly applies the test. And most recently, Justice Brennan, speaking for six members of the Court,

confirmed the elevated review standard of Craig for sex-based classifications. Orr v. Orr, No. 77-1119 (U.S. Mar. 5,1979).

In sum, sex-based classifications have been given heightened scrutiny since Reed v. Reed. The reason for close review was well-stated by the court in Mathews v. Lucas, 427 U.S. 495, 506 (1976): sex, like race, is an "obvious badge" contributing to "the historic legal and political discrimination against women" that has been severe and pervasive. Absent the check of close review, the risk is high that legislation distinguishing between men and women based on "habit, rather than analysis or actual reflection" will arbitrarily restrict the options and activities of individuals. Id. at 520. See Craig v. Boren, 429 U.S at 213 n. 5; Califano v. Goldfarb, 430 U.S. at 222 (Stevens, J.,concurring in both).

2. Section 407 does not fairly advance the objective it was enacted to serve.

(a) Legislative history demonstrates that the governmental objective of Section 407 was to alleviate the harsh financial and social effects of parental unemployment upon needy families.

The paramount concern of the AFDC program, originally proposed by President Roosevelt to counter the effects of the Depression, is the welfare of the child.[19] The child entitled to aid was defined as one who was needy and deprived of parental support or care by reason of the death, absence or incapacity of a parent.[20]

19/ S. Rep. No. 628, 74th Cong., 1st Sess. 16-17 (1935), quoting Message of the President Recommending Legislation on Economic Security, House Doc. No. 81, 74th Cong.,1st Sess. 17 (1935).

20/ Children from two-parent households, disadvantaged only by parental unemployment, were presumed by the legislators to be benefited through "the work relief program and still more through the revival of private industry." S. Rep. 628, 74th Cong., 1st Sess. 18 (1935).

In 1961, in response to the nation's economic recession and the concomitant impact of increased unemployment, President Kennedy proposed two programs. The first extended the duration of unemployment compensation to postpone the devastating impact on the family when those benefits ran out.[21] The second authorized the Aid to Families with Dependent Children - Unemployed Parent (AFDC-U) program and was heralded as "an interim amendment to the aid to dependent children program to include the children of the needy unemployed."[22] The declared purpose of the AFDC-U program was "to make assistance... available to needy families in which the breadwinner is unemployed."[23]

21/ H.R. 3864, 87th Cong., 1st Sess. (1961).

22/ President's Message on Economic Recovery and Growth, Feb. 2, 1961, H.R. Doc. 81, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. and Admin. News 1028, 1033.

23/ H.R. 3865, 87th Cong., 1st Sess. §2 (1961).

While the animating purpose of the AFDC-U program is clear, hearings on the 1961 bill and on the 1962 bill to extend the program for five years display the stereotypical notions Congress entertained about the family an unemployed parent provision would aid. Representative Wilbur Mills, the sponsor of the 1961 bill, repeatedly referred to the "needy child...whose father is unemployed."[24] The terms "wage earner," "breadwinner" and "father" were used interchangeably throughout hearings in 1961 and again in 1962.[25] In spite of the use of these terms, however, the original AFDC-U program and the five-year extension were gender neutral.

24/ Temporary Unemployment Compensation and Aid to Dependent Children of Unemployed Parents: Hearings on H.R. 3864 and H.R. 3865 Before the House Committee on Ways and Means, 87th Cong., 1st Sess. 103-104 (1961)(emphasis added).

25/ See note 10 supra.

The 1968 amendments to AFDC-U gave the Department of Health, Education and Welfare the authority to define unemployment, required a prior attachment to the labor force, made the program permanent and expressly conditioned benefits on the unemployment of the father instead of a parent. 26/

These amendments were designed to correct the flaw in the prior law under which the states had the authority to define unemployment. The result had been that "[in] some instances the definitions [were] very narrow so that only a few people were helped. In other states, the definitions [went] beyond anything that Congress originally envisioned." 27/ The 1968 amendments were designed to provide a uniform definition of unemploy-

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26/ 42 U.S.C. §607.

27/ H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967).

ment.

As part of this effort, Congress redefined the needy child as one deprived of parental support by reason of the unemployment of the father. The change was described by the House and Senate Reports as follows:

> "This program was originally conceived as one to provide aid for children of unemployed fathers. However, some States make families in which the father is working but the mother unemployed eligible. This bill would not allow such situations.28/

By changing the term parent to father, Congress sought to assure that AFDC-U would operate as intended from the start -- as a program responsive to the deprivation caused by unemployment of a family wage earner.29/

28/ H. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967), reprinted in 1967 U.S. Code Cong. and Admin. News 2834, 2997.

29/ See H.R. 3865, 87th Cong., 1st Sess. §2 (1961). See also Collins, Social Welfare - Effect of Eligibility for Unemployment

[Footnote continued on next page.]

It viewed the change as a means to correct the abuse of the program by some states in which aid had been provided to full-time homemakers with no recent attachment to the labor force. As the court observed in Stevens v. Califano:

> The problem with the program ... was that the language chosen in the original enactment only required one parent to be unemployed. Inasmuch as the AFDC-U program added two parent families, said language permitted needy families in which the "breadwinner" was fully employed to receive benefits based upon the unemployment of the "non-breadwinner." This problem was aggravated by the fact that before 1968, no prior connection to the work force was requisite to receipt of benefits. The purpose of the amendment to Section 407, therefore, was to eliminate benefits to families in which the breadwinner was fully employed. 448 F. Supp. at 1321.

Compensation on AFDC-U Benefits, 78 W.Va.L. Rev. 268, 268-269 n. 6 (1976); Guberman, Sex Discrimination in Welfare Legislation, 12 Urban L. Ann. 125, 147 (1976). See also Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534 (1974).

In lieu of designing a gender-neutral method of determining eligibility, however, Congress sex-typed the characters in the family, denominating fathers as financial providers whose unemployment would hurt the family and mothers as perennial homemakers whose unemployment was irrelevant. By drawing this sex line, Congress demonstrated the very brand of narrow, sex-role thinking this Court has consistently rejected as invidiously assigning second-class status to women.

> (b) Section 407's gender classification does not fairly advance the legislative objective of protecting families rendered needy by the unemployment of a parent.

Despite the Westcott family's dire need and despite Cindy Westcott's ability to satisfy the employment-related criteria of Section 407, her family was ineligible for AFDC-U benefits. The sole reason was that, under the statute, Cindy belonged to the wrong sex.

This gender-based exclusion is not fairly related to the objective of aiding children in families rendered needy by parental unemployment. For the purposes of a child-benefit program, family units faced with identical needs resulting from unemployment should receive identical benefits. Using the sex of a parent as a test for inclusion or exclusion is entirely irrational;[30/] it fails as a "legitimate, accurate proxy" for determining these needs. Craig v. Boren, 429 U.S. at 204.

As the district court in this case pointed out:

> [I]n denying assistance when the female working parent becomes unemployed, many families with needy children, the targets of the A DC program, go unaided.... Section 407 creates two groups

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30/ See also Guberman, Sex Discrimination in Welfare Legislation, 12 Urban L. Ann. 125,150 (1976).

> of two parent families with needy children who are without support because the wage earner is unemployed: one group where the wage earner is male, and the second where the wage earner is female. The first group may receive AFDC-U and Medicaid, but the second may not. J.S. of Appellant Califano, App. 27A.

In terms of familial need because of parental unemployment, the two are identical. In terms of furthering the goal of alleviating this type of familial need, the gender-based distinction is not rational. In short, the state does not govern impartially when benefits are allocated unevenly and arbitrarily solely along sex lines. See Craig v. Boren, 429 U.S. at 211 (Stevens J.,concurring).

> 3. Prevention of paternal desertion was not the objective of the Section 407 gender classification. In any event, the sex classification does not fairly serve the need of deterring paternal desertion.

Although ameliorating the devastating economic effects of parental unemployment upon the family was the legislative objective Congress pursued in the AFDC-U legislation, the Solicitor General posits another purpose for the program generally and the gender classification in particular: preventing father desertion. However, at the inception of the program, deterring father desertion was seen by Congress as an effect rather than a purpose. Moreover, the gender line later drawn substantially detracts from the program's desertion-preventing effect.

President Kennedy, in his 1961 message to Congress, emphasized that "under the aid to dependent children program, children are eligible for assistance if their fathers are deceased, disabled or family deserters. In logic and humanity, a child should also be eligible if his father is a needy unemployed

worker."[31] Although President Kennedy spoke of father desertion as an undesirable effect of the AFDC program,[32] he saw the alleviation of family hardship occasioned by unemployment as the core purpose of the AFDC-U program, as did then-Secretary of Health, Education and Welfare Ribicoff. Thus, in 1961 testimony Secretary Ribicoff explained the purpose of twin administration bills introduced that year -- one the AFDC-U proposal and the other an extension of the duration of unemployment compensation. That purpose was to "provide

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31/ President's Message on Economic Recovery and Growth, Feb. 2, 1961, H.R. Doc. 81, 87 Cong. 1 Sess. 2(1961). Ironically, although both the AFDC program and the proposed AFDC-U program were gender neutral, President Kennedy's message reflected the pervasive habit of thought that fathers are wage earners and mothers are homemakers by its use of the word "father" as the only parent whose inability to provide would adversely affect the family.

32/ A number of legislators expressed similar views. See, e.g., 107 Cong. Rec. 3769 (1961) (remarks of Representative Ryan); 107 Cong. Rec. 3765 (1961)(remarks of Representative Baldwin); 107 Cong. Rec. 6401 (1961)(remarks of Senator McCarthy).

a temporary program ... under which States could provide financial assistance to families in need because of unemployment." [33] The design, as the Secretary put it, was "to help the States provide income maintenance to needy families of the unemployed as part of the administration's program to stimulate the national economy and relieve unemployment and hardships resulting therefrom."[34]

The Administration's view that one of the effects of the original AFDC-U program would be to deter paternal desertion may well have been accurate, for when either parent's unemployment can qualify the family for aid, neither has an incentive to leave home to enable the family to qualify for AFDC based on his or her absence. But by

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33/ Hearings on H.R. 3864 and 3865 Before House Comm. on Ways and Means, 87th Cong., 1st Sess. 94 (1961).

34/ Id.

drawing the 1968 gender line, Congress drastically curtailed any incentive to remain with the family it had earlier fostered.[35] By limiting eligibility to families in which the father was unemployed, Congress once again gave fathers the incentive to desert every home in which need was caused by the

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35/ The statistics on desertion cited by the Solicitor General do not aid his case. He asserts they show that the rate of father desertion in AFDC families decreased in those states which adopted the AFDC-U program. However, all of the data are from the period 1961-1967, when the AFDC-U program was gender neutral. While the 1961-1967 gender-neutral statute may have had a beneficial effect on the problem of father desertion, that is not germane to the Solicitor's argument. Beyond question, 1961-1967 statistics fail to demonstrate that the gender line first introduced in the 1968 law in any way furthers the hypothesized legislative objective.

mother's unemployment.[36] It also gave unemployed mothers an incentive to desert not present in the earlier law. In short, Congress' only concern for even-handedness was between fathers who, but for monetary incentive, would desert their families and those who out of "conscience and love," would remain.[37]

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[36] The weakness in the Solicitor General's argument attributing to the gender line a purpose to deter desertion is further indicated in the legislative history surrounding the 1968 amendment. For example, in the Senate debate on whether the AFDC-U program should be mandatory rather than permissive for all states, although Senators Harris and Kennedy acknowledged the program's desirable side effect of preventing paternal desertion, no mention was made of accomplishing such an effect by drawing the gender line. See 113 Cong. Rec. 33193 (1967) (remarks of Senator Harris); 113 Cong. Rec. 33194 (1967) (remarks of Senator Kennedy). See also Stevens v. Califano, 448 F. Supp. at 1322.

[37] See President's Message on Economic Recovery and Growth, supra note 31 .

The Westcotts' situation exemplifies the way in which the alteration in the AFDC-U formula, replacing "parent" with "father", actually increased any incentive to desert. But for her sex, Cindy Westcott could have qualified her family for AFDC-U benefits. Her husband, William, because of insufficient work history, could not. The only route to AFDC eligibility for the Westcotts was one parent's abandonment of the home. This incentive to desert, inherent in the gender-based distinction, did not pass unnoticed by the Westcotts -- or their landlord. In fact, the landlord suggested that William Westcott leave home so his family could qualify. See J.S. of Appellant Califano, App. 27A, n. 16.

In sum, the Solicitor General's attempt to elevate the acknowledged effect of the original Section 407 into the purpose of

the 1968 gender line must fail. It is not supported by the legislative history nor by the statistics he cites. Indeed, common sense analysis demonstrates unequivocally that the gender line reinserted into the AFDC-U program incentives to desert eliminated under the original program.[38/]

38/ The Solicitor General has suggested no other governmental objectives to be served by the gender classification of Section 407. The Solicitor General has abandoned the argument, suggested for the first and only time in his Jurisdictional Statement, that Congress instituted the gender line in Section 407 to save money. J.S. of Appellant Califano, App. 7, n. 6. Furthermore, this Court's precedents make clear that fiscal policy considerations cannot justify otherwise invidious discrimination. See e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Califano v. Goldfarb, 430 U.S. at 204-205, 217. Nor can "administrative convenience" serve as a cover for legislative resort to sex-stereotyping. Reed v. Reed, 404 U.S. 71; Frontiero v. Richardson, 411 U.S. 678. Exclusion of families with unemployed mothers from the AFDC-U program does not qualify as a reasonable, economy-minded substitute for a sex-neutral, functional classification.

C. Conclusion

Congress was confronted with the problem of providing for the many families rendered needy by unemployment during the economic recession of the early 1960's. Instead of designing a sex-neutral, functional classification for determining eligibility for its new program, Congress applied the archaic and over-broad generalization that women do not significantly contribute to their families' financial support and, therefore, that their unemployment will not have a significant impact on their families' well being. The sex classification does not fairly address the problem Congress faced. Based on this Court's secure line of decisions from Reed through Goldfarb, the district court concluded that invalidation of the gender line was the only resolution consistent with the fifth amend-

ment's command that government rule impartially. See also Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979). That conclusion warrants this Court's firm approbation.

II

THE APPROPRIATE JUDICIAL REMEDY IN THIS CASE IS TO EXTEND THE AFDC-U PROGRAM TO FAMILIES IN WHICH EITHER PARENT IS UNEMPLOYED, NOT TO COMPLETELY RESTRUCTURE THE PROGRAM THROUGH THE ADDITION OF A PRINCIPAL WAGE EARNER TEST.

A. Introduction

The district court decided that repair rather than invalidation of the AFDC-U program was the appropriate remedy for the constitutional defect of Section 407. The proper repair, the court held, was simply to extend AFDC-U benefits to needy families with unemployed mothers under the same conditions that now apply to unemployed fathers. In short, if either parent satisfies the employment-related criteria of Section 407, and the family is needy, eligibility for both AFDC-U and categorically-related Medicaid benefits is

established. See note 7 supra.

Massachusetts, however, abandoning its original argument for simple extension, see note 6 supra, would further limit eligibility for AFDC-U by requiring that the parent who meets the employment-related criteria of Section 407 also be the family's "principal wage earner." Under the state's definition of principal wage earner, only the parent who received greater earnings or unemployment compensation benefits during the six months prior to application would be able to establish the family's eligibility for AFDC-U. J.S. of Appellant Sharp at 8a.

Repair of the constitutional infirmity of Section 407 through simple extension of the statute is clearly preferable to invalidation or radical restructuring of the AFDC-U program. The extension remedy is consistent with the

prior decisions of this Court and the congressional policies underlying the AFDC-U program, and is administratively simple to effectuate within the framework of the current AFDC and AFDC-U programs. It also avoids the difficult policy questions that this Court would have to resolve in order to impose a principal wage earner limitation on the AFDC-U program, questions that are appropriately resolved by Congress. For all these reasons, this Court should affirm the decision of the district court to extend AFDC-U benefits to families whose deprivation is the result of the unemployment of either parent, without a principal wage earner limitation.

B. Extension, Not Invalidation, Is The Appropriate Remedy.

Because the decision to remedy a con-

stitutionally defective statute by its very nature requires a court to change a legislative provision, the courts have generally limited themselves to changes that can be executed in the simplest fashion possible. The choice of remedy has accordingly been restricted to whether the statute should be extended to bring in the individuals excluded by the legislature, or invalidated. Welsh v. United State 398 U.S. 333, 361(1970)(Harlan, J., concurring). Cf. Orr v. Orr, No. 77-1119 (U.S. Mar. 5,1979), slip op. at 3. When faced with this choice in gender discrimination cases, especially those involving public benefits, this Court has consistently extended the coverage of the infirm statute, usually by effectively substituting one word for another in the defective statute or inserting words into the statute that would expand the class of

individuals to whom it applies. See, e.g., Califano v. Goldfarb, 430 U.S. 199(1977); Jablon v. Secretary of HEW, 430 U.S. 924 (1977), aff'g 399 F. Supp. 118 (D. Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636(1975); Frontiero v. Richardson, 411 U.S. 677 (1973).[39]

39/ Extension has similarly been ordered in other equal protection cases involving government benefit programs. See, e.g., Jiminez v. Weinberger, 417 U.S. 628(1974) (extending disability benefits to illegitimate children born after onset of the parent's disability); Memorial Hospital v. Maricopa County, 415 U.S. 250(1974)(extending health care benefits to indigents without regard to length of residency); United States Dep't of Agriculture v. Moreno, 413 U.S. 528(1973)(extending food stamp benefits to households composed of unrelated individuals); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619(1973) (extending state aid to the working poor to families with illegitimate children); Richardson v. Davis, 409 U.S. 1069, aff'g mem., 342 F. Supp. 588 (D. Conn. 1972) (extending Social Security death benefits to illegitimate children); Graham v. Richardson, 403 U.S. 365(1971)(extending categorical assistance benefits to resident aliens).

The test to determine whether extension or invalidation is the proper remedy for a constitutionally infirm statute was most clearly enunciated by Mr. Justice Harlan in Welsh v. United States, 298 U.S. 333(1970) (concurring opinion). That test, stated briefly, is for the court "to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it...to render what Congress plainly did intend, constitutional." Id. at 355-56. In determining which of these remedies Congress would prefer, several factors are relevant. They include the presence or absence of a severability clause in the statute, the extent of Congress' commitment to the underlying policy of the statute, the amount of disruption to the statutory scheme that might accompany extension or invalidation, and the degree to which the remedy selected might

impair legislative goals beyond those recognized by the statute itself. Id. at 365-66.[40] An analysis of these factors in-

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40/ The extension question has been squarely considered by several lower court cases in which the Welsh test has been applied, and extension generally been ordered. See, e.g., Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973) (extending benefits of a tax deduction statute to never-married males); Vaccarella v. Fusari, 365 F. Supp. 1164 (D. Conn. 1973) (extending benefits of supplemental state unemployment compensation to all workers standing in loco parentis to dependent minors). See also Demiragh v. DeVos, 476 F.2d 403 (2d Cir. 1973); Bowen v. Hackett, 361 F.Supp. 854 (D. R. I. 1973); Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972). Extension was also the remedy ordered by the district courts in the two other cases challenging Section 407 on the grounds of gender discrimination. See Stevens v. Califano, 448 F. Supp. at 1323; Browne v. Califano, No. 77-1249, slip op. at 7.

eluctably supports the remedy ordered by the district court in this case -- extension of the AFDC-U program to families with unemployed mothers.

1. The presence of a severability clause in the Social Security Act supports extension.

The severability clause contained in the Social Security Act is evidence that Congress would prefer that an infirm provision of that statute be repaired rather than invalidated. That clause, which governs Section 407, provides:

> If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be

affected thereby. 42 U.S.C. §1303.

In order to protect "the application" of the "invalid" provision, Section 407, to "other persons," unemployed fathers, extension rather than invalidation of the AFDC-U program should be ordered.[41]

2. The congressional commitment to the AFDC-U program supports extension.

As Amici have already demonstrated, the congressional objective in enacting the AFDC-U program was to alleviate the harsh financial and social effects of parental unemployment upon needy families. The legislative history of the program evidences a strong

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41/ Such relief is also consistent with the remedy selected in Califano v. Goldfarb, 430 U.S. 199, Jablon v. Secretary of HEW, 430 U.S. 924, and Weinberger v. Wiesenfeld, 420 U.S. 636, involving the same severability clause. See also Moritz v. Commissioner, 469 F.2d at 470.

commitment to assisting such families because their deprivation was determined to be as harsh as that suffered by other families eligible for AFDC because of parental death, absence or incapacity. See discussion supra pp. 50-52.

The congressional changes made in the AFDC-U program in 1968, including the change at issue in this case from eligibility based on either parent's unemployment to eligibility based on the father's unemployment only, do not suggest any deviation from the program's original objective. The legislative history demonstrates that the primary focus of the 1968 amendments was on correcting abuses by the states in defining "unemployment," through federalizing the definition of that term. See, e.g., H.R. Rep. No. 544, 90th Cong., 1st Sess. 108(1967), dis-

cussed supra pp. 53-55. The change from "parent" to "father" received little attention, and seems to have been based simply on Congress' sex-stereotypical view that mothers are perennial homemakers and fathers are financial providers. See discussion supra pp.54-56. Clearly, therefore, the change was not such a vital part of the AFDC-U program that Congress would prefer abrogation of that program to a return to the gender-neutral eligibility standard that existed prior to 1968.[42]

3. Extension can easily be accomplished within the administrative framework of the statute.

Extension of AFDC-U benefits to families of unemployed mothers under the same

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42/ Some members of Congress also thought the AFDC-U program would have a positive effect on family stability through the prevention of parental desertion. See discussion supra pp. 59-61. Any such effect would also only be served by extension.

conditions that benefits are now afforded families of unemployed fathers requires minimal judicial tampering with Congress' wording of the statute. Remedying the state's unconstitutional exclusion of unemployed mothers involves but one change in the text of the AFDC-U provision: substitution of the term "parent" for the term "father". With this minor alteration of language, Section 407 would once again confer benefits on "a needy child... deprived of parental support or care by reason of the unemployment ... of a parent." See Pub. L. No. 87-31, 75 Stat. 75(1961).[43] Indeed, such a change also renders the AFDC-U program consistent with the gender-neutral nature of the rest of the AFDC

43/ Extension through similar word substitutions has also been the means reflected in this Court's decisions involving unconstitutionally underinclusive statutes. See discussion supra pp.70-72, and accompanying citations.

program, in which eligibility for assistance is based on the death, absence or incapacity of either parent. See 42 U.S.C. §606(a) (emphasis added).[44/]

Administering such an extended AFDC-U program would be no more difficult than administering the AFDC-U program in its unconstitutionally underinclusive form. AFDC-U eligibility would be determined in precisely the same manner whether based on the mother's or the father's unemployment, for each would have to satisfy the same categorical and financial requirements.[45/] Moreover, although

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44/ The Task Force on Sex Discrimination has recommended that Section 407's infirmity be cured by amending the statute "to permit families...to qualify for benefits on the basis of the unemployment of either parent." Task Force on Sex Discrimination, Civil Rights Division, U.S. Dep't of Justice, Interim Report to the President 157 (Oct. 3, 1978).

45/ See 42 U.S.C. §607 and 45 C.F.R. §233.100 (a)(1)(1977), described in note 7 supra.

some increase in staff hours spent in determining eligibility might be necessary because of the increase in caseload resulting from extension of the AFDC-U program to unemployed mothers, it would be relatively small, for the number of new eligibles is small in comparison to the current AFDC caseload.[46]

Nor should the incremental costs of extending benefits to unemployed mothers impede

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46/ Massachusetts' estimate of 8000 new families per year, Affidavit of Jenny Netzer, App. at 54, represents only six percent of the current Massachusetts AFDC caseload of about 125,000 families, 42 Soc. Sec. Bull. 77, Table M-35 (Jan. 1979). Although estimates of the numbers of families that might be added to the AFDC-U rolls in other states are not available, there is no reason to believe they would constitute a larger percentage of the current AFDC caseload in those states than they do in Massachusetts.

extension. Although the marginal costs of extending benefits to unemployed mothers are difficult to estimate, even accepting calculations made by Appellants Massachusetts and the Department of Health, Education and Welfare (HEW), it is clear that the additional costs that would flow from an expanded AFDC-U program are comparatively minor. 47/

47/ The costs of extension are difficult to predict because of the presence of several critical variables in a cost estimate formula: 1) the number of new eligibles, 2) the percentage of those eligibles that will actually participate in the program, and 3) the average expenditure for each recipient. Moreover, there is ample reason to question both HEW's and Massachusetts' estimates. First, the wide discrepancy between the two sets of figures undermines the credibility of both. Second, empirical data from the state of Pennsylvania indicate that Appellant Califano's cost estimates for gender-neutral extension of Pennsylvania's AFDC-U program are triple the actual costs. Opposition of Amicus Curiae, Commonwealth of Pennsylvania, to Appellant Califano's Application for a Stay Pending Appeal at 5, Califano v. Westcott, No. 78-437 (Jan. 2, 1979). This overestimation would in itself inflate HEW's national cost figures. Further, given HEW's failure to explain its methodology, there is no reason
[Footnote continued on next page.]

Massachusetts estimates that extension of AFDC-U benefits to unemployed mothers in that state will result in an additional $21.5 million [48] in total annual AFDC costs, Affidavit of Jenny Netzer, App. at 54, while HEW predicts a total increase of $15.9 million, Application for Stay...of Appellant Califano, No. 78-437 (Dec. 1978), Affidavit

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to believe that its cost figures for the remaining states, including Massachusetts, are any more accurate. For discussion of the accuracy of Appellant Sharp's estimates, see pp. 100-108 infra.

48/ Massachusetts considers the cost of extension to be $23 million. Brief of Appellant Sharp at 35. But against this figure must be set off savings to the wholly state-funded general assistance program of $1.5 million annually for families covered by the extended AFDC-U program who formerly received general assistance benefits. Affidavit of Jenny Netzer, App. at 54. Thus, Massachusetts' estimate of $23 million has been reduced to $21.5 million throughout the discussion here.

of Gilbert C. Fisher, App. B at 1.[49/] Although Massachusetts emphasizes that a $21.5 million increase in costs in the AFDC-U program would significantly enlarge the current figure of $30 million, Brief for Appellant Sharp at 36, any increase must be seen in the context of the entire AFDC program. A comparison of the state's estimate of the increased costs of extension to current AFDC costs in Massachusetts, $480 million annually, 42 Soc. Sec. Bull. 77, Table M-35 (Jan. 1979), reveals that there will be an overall increase of no more than four per-cent in the costs of the Massachusetts AFDC program.

49/ This cost comparison does not take into account Medicaid expenditures, for Mass-achusetts has not included projections for such expenditures in its calculations.

Nationally, HEW estimates the costs of extension to unemployed mothers at $283.2 million. J.S. of Appellant Califano at 7 n. 6. Current annual costs of AFDC and AFDC-U nationally are $10.7 billion and $515.2 million respectively, 42 Soc. Sec. Bull. 77-78, Tables M-35 and M-36 (Jan. 1979). Thus, although the increase in costs of the AFDC-U program itself might be substantial when compared to the costs of the entire AFDC program nationally, extended AFDC-U would result in an overall increase in costs of less than three percent.

Moreover, this Court has approved extensions which resulted in comparable expenditures. See, e.g., Califano v. Goldfarb, 430 U.S. 199; Jablon v. Secretary of HEW, 430 U.S. 924. In Goldfarb, the Solicitor General estimated additional outlays of

$447 million in new or increased benefits to 520,000 aged husbands or widowers previously excluded from certain Social Security benefits. Brief for Appellant Califano at 39, Califano v. Goldfarb. The estimated cost increase in Goldfarb was small in comparison to the expenditures for the entire Social Security program, 41 Soc. Sec. Bull. 40, Table M-1 (May 1978), as are the predicted increments in this case small relative to the costs of the entire AFDC program. The cost increase in Goldfarb, comparable to the largest estimate in the present case, was not sufficient to outweigh the policies favoring extension. Surely then, the comparable predicted increase here in both actual dollar and relative costs should not prevent extension of the AFDC-U statute in the limited way ordered

by the district court.[50]

The devastating detrimental effect on current AFDC-U recipients of invalidation of the program must also be weighed against any cost considerations. As of July 1978, 24,881 persons in Massachusetts and 510,627 persons in twenty-six states, the District of Columbia, and Guam were receiving AFDC-U benefits. 42 Soc. Sec. Bull. 78, Table M-36 (Jan. 1979). Even more were receiving Medicaid on the basis of their AFDC-U eligibility. Invalidation would result in the severe disruption of the lives of these individuals and of the administration of public assistance in the states in which they reside. Extension would enable these

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50/ The cost increases here will also be borne by the entire public through the AFDC-U program's open-ended appropriation, not by a public trust fund or private individuals, so that no significant costs will accrue to any single party or group.

individuals, and those rendered newly eligible, to meet the financial and social deprivation occasioned by unemployment, whether that deprivation is attributable to unemployment of the father or the mother.[51/]

A final consideration in evaluating whether extension can be easily accomplished within the administrative framework of the AFDC-U program is that the program is optional with the states. See 42 U.S.C. §607. A state which does not wish to extend benefits to families with unemployed mothers may therefore elect to withdraw from the AFDC-U program without jeopardizing its participation in the basic AFDC program in which benefits are based on the death, absence or incapacity

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51/ Extension of course also affords the Westcotts and the Westwoods the relief requested in their complaints, while invalidation places them in the anomalous position of having won their lawsuits but been denied any relief.

of a parent. See 42 U.S.C. §606(a). Invalidation of the AFDC-U program, however, would prevent states from exercising the option to cover any families whose deprivation is the result of parental unemployment, significantly changing the structure of the program envisioned by Congress.[52/]

Against these considerations, Massachusetts argues that extension of AFDC-U benefits to families in which either parent is unemployed "would work a fundamental change in the nation's system of public assistance [by providing] a guaranteed annual income to all needy families, including the

52/Moreover, invalidation might well also encourage desertion, for it would result in reversion to the pre-1961 program under which two-parent families could qualify for assistance only when one was incapacited.

so-called working poor...." Brief for Appellant Sharp at 15. This change in administrative framework of the program is said to result from a simple extension of AFDC-U because "the unemployment of either parent [could] trigger assistance regardless of the other parent's employment status." Id. The state reasons that "[i]n this guise, the AFDC-U program would no longer serve just to tide families over the temporary need occasioned by the breadwinner's unemployment. It would instead furnish an indefinite -- perhaps permanent -- supplement to the low wages earned by a family's principal wage earner." Moreover, this supplement would be provided to families whose incomes, the state concludes, render them "not needy by conventional standards." Id.

But the state's concerns in this area

are not related to adoption of the extension remedy. First there is nothing in a gender-neutral AFDC-U program that "guarantees" the provision of assistance to "the so-called working poor." Under both the current AFDC-U program and a simply extended program the parent applying for assistance must satisfy a series of complex employment-related requirements. See note 7 supra. If these requirements cannot be met, the family will not qualify for assistance even if otherwise "poor."

Second, Massachusetts' hypothesis that "an indefinite . . . supplement to the low wages earned by a family's principal wage earner" might be provided to AFDC-U families, even if true, is irrelevant. It, too, is not the result of an expanded gender-neutral program. Rather, the very

nature of the AFDC program is such that families are entitled to receive aid for as long as they meet the eligibility criteria, be it a few days or a few years. 42 U.S.C. §602(a)(10); 45 C.F.R. §206.10(a)(5)(1977). This would be unchanged by extension of the program.

The state's last concern, that AFDC-U would be provided to families who are "not needy by conventional standards, is also not related to any decision to extend the program. It is the result of the inter-relationship between Massachusetts' standard of need and the federally-mandated income disregards, see 42 U.S.C §602(a)(8), neither of which would be affected by the remedy advocated here.

In sum, the simplicity with which extension can be ordered, the ease with which an extended AFDC-U program can be admin-

istered, the relatively small marginal costs of extension, the desirability of continuing aid to current eligibles, and the ability of states to opt out of the AFDC-U program if dissatisfied, all demonstrate that the AFDC-U program can be readily extended within the framework of the current law. Moreover, none of the concerns that Massachusetts has raised in objection to simple extension of the program is apposite to that remedy. Under these circumstances, it is clear that the AFDC-U program should be extended to include needy families with children deprived of support or care because of the unemployment of either parent.

C. Any Restructuring of the AFDC-U Program To Include A Principal Wage Earner Limitation Should Be Accomplished By Congress, Not This Court.

1. Difficult policy questions would have to be resolved by the Court in

order to accept Massachusetts' principal wage earner limitation.

Massachusetts' argument that the proper remedy in this case is neither extension nor invalidation of the AFDC-U program, but rather judicial restructuring of the program to include a principal wage earner limitation, is unprecedented.[53/] Indeed, the issue of the appropriate remedy for unconstitutionally underinclusive statutes has been limited to whether a court should extend or invalidate the statute precisely

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53/ In the two other cases challenging the constitutionality of Section 407 on the grounds of gender discrimination, this novel scheme was neither advocated by the defendant states of Pennsylvania or Ohio nor ordered by the district courts. In Browne v. Califano, No. 77-1249 at 7, the parties stipulated that simple extension of the AFDC-U program to unemployed mothers was the appropriate remedy. In Stevens v. Califano, 448 F. Supp. at 1323, the state defendant argued for invalidation. In both cases the federal defendant supported extension, the remedy ordered by the district courts.

to avoid the difficult policy questions that are raised if the court is forced to sit as a legislature and evaluate all other possible remedies that might be available. See discussion supra pp. 70-75.

The kinds of policy decisions in which this Court would have to become embroiled in order to restructure the AFDC-U program to include a principal wage earner limitation illustrate why any such restructuring should be left to Congress. First, the Court would have to arrive at an appropriate definition of "principal wage earner." Although Massachusett proposes acceptance of its definition of the principal wage earner as the parent whose earnings or unemployment compensation benefits were greater during the six months preceding the month of application, reapplication or redetermination of eligibility, the state offers no rationale for this definition.

Why, for example, include any unearned income in the calculation, and if any, why not other unearned income such as workers' compensation, or Social Security benefits? Why is income for the past six months, rather than the past year, or the past three months, or any other time period the relevant income? Why, indeed, is income the only determinant of the principal wage earner, rather than, for example, the number of hours worked? Unless the Court is willing to resolve these questions, it should be reluctant to restructure the AFDC-U program to include a principal wage earner limitation.

A second policy consideration that would have to be weighed by the Court is whether families currently receiving AFDC-U should have their benefits terminated by judicial

decree. Moreover, as Amici have already demonstrated, the termination of eligible individuals involves not only policy considerations but legal ones as well because it would violate the Social Security Act's severability clause, 42 U.S.C. §1303. See discussion supra pp. 75-76.[54/]

Massachusetts acknowledges that Section 407 of the Social Security Act, with its current limitation of AFDC-U to families with unemployed fathers, has never been interpreted to require that the father be not only unemployed but also the family's principal wage earner. The state has afforded aid to such families regardless of whether the father was the principal wage

54/ Termination of current recipients is also inconsistent with Congress' more specific concern in the AFDC-U and AFDC programs that aid be furnished "to all eligible individuals," 42 U.S.C. §602(a)(10). See, e.g., Philbrook v. Glodgett, 420 U.S. 707 (1975); Townsend v. Swank, 404 U.S. 282, 286 (1971).

earner and HEW, pursuant to federal regulations, has provided federal matching payments on the same basis. See 45 C.F.R. §233.100(1977). Only now, to counter a threatened extension of aid to families with unemployed mothers, does the state suggest that the unemployed parent should additionally be required to establish that he or she is the family's principal wage earner.

The result is that some families in Massachusetts who are currently eligible for and receiving AFDC-U because of the unemployment of the father will lose their eligibility for assistance. This could happen in as many as twenty-nine percent of the currently eligible families, because according to the Census Bureau figures that the state itself relies on, in twenty-nine percent of two-wage earner families the woman is the

principal wage earner.[55] If that woman cannot satisfy the existing employment-related requirements of Section 407, the family will lose its assistance benefits despite the father's clear ability to satisfy those requirements. This Court should not permit a principal wage earner test unless it is also prepared to resolve the question of whether currently eligible families should lose their

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55/ To compare the impact of simple extension of AFDC-U benefits to families in which either parent is unemployed with the impact of the principal wage earner test, Massachusetts relies in part on 1974 Census Bureau data indicating that women earn over fifty percent of the income in twenty-nine percent of two-wage earner families earning less than $7,000 a year. Affidavit of Jenny Netzer, App. at 54. See discussion infra pp. 110-113. If statistics about families with annual incomes of less than $7,000 are accurate for making predictions about potential new AFDC-U recipients, they should also be accurate for predictions about current AFDC-U recipients.

assistance benefits.

Another policy issue that must be considered is whether the cost savings attributed to the principal wage earner test by Massachusetts are sufficient to justify its imposition Moreover, before this issue can be resolved, the accuracy of the state's cost estimates must be assessed, an almost impossible task.[56/]

Massachusetts estimates that the total additional cost of an AFDC-U program in which either parent's unemployment would qualify the family for assistance would be $21.5 million per year. See discussion supra, pp. 83-84. The state estimates the additional cost of an

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56/ Some evaluation of costs is, of course, necessary in choosing between extension and invalidation. See discussion supra pp. 81-87. Cost considerations and, more importantly, the accuracy of cost estimates are even more critical, however, when a novel remedy beyond extension or invalidation is proposed, as in this case.

AFDC-U program with a principal wage earner test at $3.3 million per year. Affidavit of Jenny Netzer, App. at 55.[57/] The remedy of simple extension, according to these calculations, would cost the state $18.2 million more per year than a restructuring of the AFDC-U program to include a principal wage earner test. Yet Massachusetts' calculations are based largely on several assumptions not established by evidence in the record, casting doubt on the accuracy of the state's estimates.

Most open to challenge is the assumption that the participation rate of eligible families in a simply extended AFDC-U program would be fifty percent. Id. at 52. In deriving this figure, the state first cites

57/ Massachusetts does not include an estimate for Medicaid costs in either of these calculations.

HEW studies indicating that twenty-five percent of eligible families participate in the AFDC-U program, but then doubles that number. In support of this multiple the state merely speculates that "the AFDC-U program had operated largely to provide a short-term, last-resort source of financial support when a father was between jobs" but would now become a "long-term income supplement for many families." Id.[58/] The state analogizes this supposed "long-term" nature

58/ The seeming basis for this conclusion is Massachusetts' assertion that two-parent families would maintain AFDC-U eligibility by entering and leaving the labor force at opportune times. Brief for Appellant Sharp at 28. Although families might be rendered eligible by the unemployment of first one and then the other parent, the probability of this occurring very often is unlikely because an individual's "unemployment" is just one of the rather complex categorical requirements for receipt of AFDC-U benefits. See note 7 supra.

of the expanded AFDC-U program to the basic AFDC program, see 42 U.S.C. §606(a), in which the participation rate is ninety-five percent of those eligible, according to an HEW estimate. Affidavit of Jenny Netzer, App. at 52. In almost mystical fashion, defying understanding, the ninety-five percent participation rate for basic AFDC is then reconciled with the twenty-five percent participation rate for AFDC-U, and the fifty percent figure emerges. Id. at 53.

The impact on cost estimates of Massachusetts' assumption about participation rates in an expanded AFDC-U program is obvious. By estimating that fifty percent of eligibles will participate, Massachusetts doubles the predicted costs that would result from extension if the participation rate estimated by HEW were used in the calculat:

Also subject to serious question are

Massachusetts' estimates of the costs attributable to an AFDC-U program with a principal wage earner restriction. The basis for these cost estimates involves, again, unsupported assumptions about the number of participants in such a program. Massachusetts arrives at its estimate of 700 newly eligible families by attempting to reduce the universe of potential new eligibles[59] to account for those assumed to be

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59/ Because only families with unemployed mothers would be added to the AFDC-U rolls by either the simple extension or the principal wage earner remedy, and under the latter remedy only families in which the mother is the principal wage earner, Massachusetts begins its cost evaluation of the principal wage earner test with an examination of the number of two-parent families in which women earn more than fifty percent of the family's income. The state then assumes that the new recipient population under an AFDC-U program with a principal wage earner test would bear the same proportional relationship to the AFDC-U program's population prior to the decision in this case as families in which the mother is the principal wage earner, bear to families in which the father is the principal wage earner, i.e., twenty-nine to
[Footnote continued on next page.]

already receiving AFDC and AFDC-U benefits. Id. at 54-55. This factoring-out of families already receiving benefits,[60] while not incorrect conceptually, is based on the questionable assumption that the number of families currently receiving aid and newly eligible under a principal wage earner test is equivalent to the number of families receiving AFDC benefits who have earned income (fifteen percent). Id. at 55. No evidence is cited as support for the validity or accuracy of this measure.

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seventy-one percent of all two-parent families with an annual income of less than $7,000. The resulting figure for the new recipient AFDC-U population under a principal wage earner test, the state estimates, is 2,380.

60/ The families "already receiving" benefits are deemed to be those in which "the father is unemployed or incapacitated, although the mother is working." Id. at 55.

Yet Massachusetts' estimates of the costs of a principal wage earner AFDC-U program are determined largely on the basis of this unsupported figure. Because fifteen percent of AFDC families have earned income, the same proportion of Massachusetts' incapacity and AFDC-U cases are assumed to be currently on the AFDC rolls. Therefore, Massachusetts argues, these families are not rendered newly eligible by an expanded AFDC-U program with a principal wage earner test. Id. As a result, out of a universe of 2,380 potential newly eligible families, Massachusetts posits that the actual number of such families is only 700. Id. The validity of the fifteen percent figure in predicting the number of current eligibles and costs is thus critical. Without evidence of both its validity and its accuracy as a measure of the number of families with unemployed or incapacitated

fathers now on the rolls, the state's conclusion that only 700 new families would be added should not be relied upon by the Court as a basis for predicting the cost benefits of a principal wage earner limitation.

Additionally, the state fails to consider the increased administrative costs that would accompany either extension or implementation of a principal wage earner test.[61] Although administration of a principal wage earner test would undoubtedly be more costly than simple extension because it would require examination of the work histories of

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61/ The importance of an evaluation of administrative costs is illustrated by Jablon v. Secretary of HEW, 399 F. Supp. at 132, in which the administrative costs attendant to implementation of the remedy urged by the defendant were found to be twice the cost savings realized by that remedy.

both parents for the first time,[62] the absence of any estimate of administrative costs clearly renders Massachusetts' calculations invalid.[63]

62/ For discussion of the costs attendant to extension, see pp. 81-87 supra.

63/ HEW's cost estimates for extension, for example, include a calculation for administrative costs. See J.S. of Appellant Califano at 7 n. 6.

Several other components of Massachusetts' methodology in estimating the comparative costs of the AFDC-U program simply extended and of the AFDC-U program with a principal wage earner limitation are also susceptible to criticism. For example, to the district court, certification of the class was initially "the most difficult hurdle for plaintiff to surmount"; the likely size of the class was no more than 346 families. J.S. of Appellant Califano, App. at 12A, 14A-15A. The state offers no explanation as to why its estimate of the class of new eligibles is more than twenty times as large as the district court estimated the class to be. Massachusetts also makes an allowance for the addition to the AFDC-U rolls of families whose income falls between initial and continuing eligibility limits when con-

[Footnote continued on next page.]

From these examples, the difficulties in assessing the accuracy of the state's comparative cost calculations are apparent. In light of these difficulties it is virtually impossible for this Court to determine what the cost savings attributable to the Massachusetts principal wage earner test would be. Congress, not this Court, is plainly the forum appropriate to consider the proposal Massachusetts now presses. 64/

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sidering the costs of simple extension, Affidavit of Jenny Netzer, App. at 53, but not when estimating the costs of Massachusetts novel principal wage earner scheme. This unjustified omission skews the relative numbers of participants under the two schemes, creating a discrepancy in costs larger than if the methodology were applied consistently.

64/ Even if the state's characterization of the cost savings attributable to the principal wage earner test is accepted, those savings are not sufficient to justify imposition of the test. As Amici have
[Footnote continued on next page.]

A fourth policy consideration incidental to adoption of a principal wage earner limitation is the disparate impact that the limitation would have on women, which is substantial.

Massachusetts defines the needy family's principal wage earner as the parent who received greater earnings or unemployment compensation benefits during the six months prior to application for assistance. Although this test is gender-neutral on its face, because

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noted, simple extension at a cost of $21.5 million per year represents an increase in total annual AFDC costs in Massachusetts of only four percent. See discussion supra pp. 83-84. Imposition of a principal wage earner test, costing an estimated $3.3 million annually, represents a cost increase of about one percent to the Massachusetts AFDC program. Thus, the difference between the two remedies, although arguably significant in dollar terms, represents only three percent of the state's total AFDC costs. Cost savings of this relatively small magnitude should not be relied on to justify imposition of a complex principal wage earner test.

the father has greater earnings in the vast majority of two-wage earner families both in Massachusetts and nationwide,[65] the effect of the test is to perpetuate the same kind of gender discrimination that this case was brought to redress.

The 1974 Census Bureau data that Massachusetts uses to compare the impact of simple extension of AFDC-U benefits with the impact of the principal wage earner test indicate that women are principal wage earners in only twenty-nine percent of two-wage earner families earning less than $7,000 a year. Affidavit of Jenny Netzer,

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65/ Although data do not seem to be available, because unemployment compensation benefits are related to earnings, women are also likely to have lesser amounts of unemployment compensation than men.

App. at 54. See note 59 supra. Massachusetts thereby acknowledges that the impact of the principal wage earner test falls much more heavily on families in which the mother otherwise satisfies the employment-related criteria of Section 407 than it does on families in which the father satisfies those criteria. The result is that seventy-one percent of the families that would have been rendered eligible for AFDC-U by the extension remedy could be excluded from such eligibility by the addition of the principal wage earner restriction. 66/ Surely, an adverse impact

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66/ This is precisely the effect that the Massachusetts proposal would have on the Westcott family, for Cindy Westcott, although otherwise eligible for AFDC-U, has not been the family's principal wage earner. See Plaintiffs' Notice of Massachusetts Planned Action to Terminate the Westcotts' AFDC-U...5, Westcott v. Califano, 461 F.Supp. 737 (D. Mass.1978).

on women of this magnitude [1] suggests that any decision to add such a test to the AFDC-U program should be left to Congress.

2. The difficulty of predicting the remedy that Congress would select

Consideration of remedies beyond extension or invalidation of the statute should be left to Congress for the further reason that it is difficult to predict the remedy Congress would select. This is well

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[1] Indeed, a March 1976 Bureau of Labor Statistics report indicates that in 1975 women earned more than men in two-wage earner families in only twenty-seven percent of the families with annual incomes of under $7,000. See Marital and Family Characteristics of the Labor Force in March 1976, BLS Special Labor Force Report 206, Table L, at A-41. Under these figures, even more families - seventy-three percent - might be excluded from eligibility by a principal wage earner test.

illustrated by the congressional response to this Court's decision on extension in Califano v. Goldfarb, 430 U.S. 199. In Goldfarb the Court in effect extended the benefits of the Old Age, Survivors and Disability Insurance Program under the Social Security Act to widowers by eliminating the statutory proof of dependency requirement imposed on them but not on widows. Indeed, this remedy was selected over imposition of the dependency requirement on widows despite the Court's explicit recog-

nition that the general purpose of the

OASDI program is to protect the dependents of covered wage earners. 430 U.S. at 213. See also Abbott v. Mathews, No. 74-194 (N.D. Ohio, Feb. 12, 1976), aff'd sub nom. Califano v. Abbott, 430 U.S. 924 (1977); Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975), aff'd, 430 U.S. 924 (1977); Silbowitz v. Secretary of HEW, 397 F. Supp. 862 (D. Fla. 1975), aff'd sub nom. Califano v. Silbowitz, 430 U.S. 924 (1977).[68] Congress then reacted to the Court's decision not by imposing a dependency requirement,

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68/ In this regard, Massachusetts' reliance on Moss v. Secretary of HEW, 408 F. Supp. 403 (M.D. Fla. 1976), is misplaced, for it was effectively overruled by this Court's decision in Goldfarb. See Stipulation of Dismissal, No. 74-721 (M.D. Fla. July 28, 1977).

but rather by providing that a claimant's Title II benefits would be offset by the amount of any public pension benefit. See P.L. 95-216, §344; S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28. This selection by Congress of an entirely different way of remedying the statute's prior unconstitutionality makes clear that it is virtually impossible to predict what Congress might ultimately decide as to recasting the benefits at issue in this case.

3. If any prediction can be made about the remedy Congress would select, it is that Congress would favor simple extension without a principal wage earner limitation.

The language and structure of the current AFDC program suggest that Congress would favor simple extension of AFDC-U benefits to families with unemployed mothers without any principal wage earner limitation. In brief, the statute provides that AFDC

is to be afforded to families with dependent children "deprived of parental support or care by reason of the unemployment...of [their] father." 42 U.S.C. §607(a). Therefore, a needy family is eligible if the father is unemployed even if the mother is the principal wage earner. Thus the plain language of the statute, the starting point of any analysis, does not support a principal wage earner test.

Although Massachusetts argues that the legislative history of Section 407 demonstrates a congressional intent to impose a principal wage earner test when the statute was amended in 1968, close reading indicates only that Congress amended the statute without fully considering the implications of the change from "parent" to "father." As Amici have already demonstrated, the sparse legislative history that does exist indicates only that this language

change was a mere by-product of Congress' more urgent concern with redefinition of term "unemployment" in the statute. See discussion supra pp. 53-56. The change from "parent" to "father" that accompanied this redefinition reflects simply Congress' stereotypical assumption that mothers in two-parent families were not wage earners. Id.

Indeed, there is no evidence whatever that Congress actually considered the situation of two-parent families with two wage earners, much less decided that only the parent who was the principal wage earner could qualify the family for AFDC-U. The use of the term "breadwinner" in congressional discussions does not support Massachusetts' contention that Congress intended a principal wage earner test, for that word was employed indiscriminately both during Congress' consideration of the 1961 and 1962

AFDC-U legislation providing aid to children deprived because of the unemployment of a "parent," and in Congress' consideration of the 1968 legislation changing "parent" to "father." See discussion supra pp. 52-55. If Congress had intended to provide aid only to families whose principal wage earners were unemployed, surely it would have said so explicitly when it amended Section 407 in 1968.69/

69/ HEW, the federal agency charged with administering the statute, has never interpreted Section 407 or its legislative history to require a principal wage earner test. See 34 Fed. Reg. 1146 (Jan. 24, 1969), as amended by 36 Fed. Reg. 13604 (July 22, 1971), 37 Fed. Reg. 12202 (June 20, 1972), 38 Fed. Reg. 18549 (July 12, 1973), 38 Fed. Reg. 26608 (Sept. 24, 1973), 40 Fed. Reg. 50273 (Oct. 29, 1975). The agency also takes the position in this case that the simple extension of AFDC-U to families in which either parent is unemployed is the appropriate remedy. J.S. of Appellant Califano at 6 n.5.

The principal wage earner limitation is also inconsistent with the general structure of the AFDC program. AFDC has since 1935 provided aid to needy families whose deprivation is attributable to the absence, death, or incapacity of either parent. See 42 U.S.C. §606(a). Although the result is that benefits are usually provided to one-parent families, two-parent families have always been eligible for aid if their deprivation results from an inability to provide support or care by either parent. For example, only one parent is usually incapacitated, but the incapacity of either parent will qualify a family for assistance. Massachusetts' proposed remedy would be a departure from this structure, however, for it would provide that the unemployment of only one parent - the one who is the principal wage earner - could qualify

the family for assistance.

There is further direct evidence that if Congress were to explicitly consider reform of the AFDC-U program to render it gender-neutral it would not impose a principal wage earner limitation. For example, although various welfare bills have been recently introduced in Congress to amend the AFDC-U program to provide that the unemployment of either parent would qualify the family for assistance, none of these proposals would also impose a principal wage earner limitation such as Massachusetts proposes. See H.R. 10711, 95th Cong., 2d Sess. §205 (1978)(introduced by Rep. Ullman, Chairperson of the House Ways and Means Committee); S. 2777, 95th Cong., 2d Sess. §101 (1978).

4. Congress will act if it prefers a remedy more complex than straightforward extension.

Whether this Court decides to extend or invalidate Section 407, its decision is of course only a form of tentative adjudication, not a definitive response to any issues raised by the sex classification's unconstitutionality. The ultimate responsibility for the structure of the AFDC-U program, within constitutional boundaries, rests with Congress. Moreover, this is a responsibility that Congress has not hesitated to exercise when it disagrees with judicial interpretation of the statute. For example, in the year following the decision in Philbrook v. Glodgett, 420 U.S. 707 (1975), in which this Court interpreted the former Section 407(b)(2)(C)(ii), 81 Stat. 883, to provide unemployed fathers with the option to receive AFDC-U or unemployment compensation, Congress responded by adopting the present Section 407(b)(2)(C)(ii) which requires that unemployed fathers

both apply for and accept any unemployment benefits to which they may be entitled before eligibility for AFDC-U is determined. P.L. 94-566, §507, 90 Stat. 2688. The congressional response to this Court's decision in Califano v. Goldfarb, 430 U.S. 199, was similarly prompt. See discussion supra pp. 113-116. Finally, if proposals similar to those introduced in the 95th Congress are introduced in the 96th Congress to eliminate the gender-discrimination in the AFDC-U program, see p. 121 supra, Congress will have the direct opportunity to decide whether a principal wage earner limitation should also be added to Section 407.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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[Footnote continued on next page.]

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