Supreme Court of the United States

October
~~NOVEMBER~~ TERM, 1969

In the Matter of:

Docket No. 540

JULIA ROSADO, etaal.

Petitioners,

vs.

GEORGE K. WYMAN, et al.

Respondents.

Place Washington, D. C.

Date November 19, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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October Term

JULIA ROSADO, et al., Petitioners,	:	
vs.	:	NO. 540
GEORGE K. WYMAN, et al., Respondents.	:	

Washington, D. C.
November 19, 1969

The above-entitled matter came on for argument at 12:38 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: No. 540, Rosado against Wyman and others.

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

ARGUMENT OF LEE A. ALBERT, ESQ.

ON BEHALF OF THE PETITIONERS

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

New York has continued to participate in the Federal aid to families with dependent children program under which Congress makes available to it the $400 million Federal a year imposes upon the receipt and use of those dollars Federal terms and conditions. This case arises on one of the most recently enacted of those conditions, Section 402(a)(23) or Condition 23 of the Social Security Act, whose meaning in this case is critically in issue. The case is now being appealed to this Court and other cases are pending in the lower Federal Courts.

The issues in this case, to be sure, are numerous and complex. In my limited time available we should like to take them up in the following order:

I should like to begin with the meaning of the Federal statute. We believe that meaning is clear on its face, upon its legislative evolution and then discuss the argument made against that meaning; and, third, turn to whether the United States District Court may so construe the statute and apply it in New York

and other states.

We begin with the obvious, but important, observation that it is a statute we are construing passed in our national legislative process in which the states are not in the minorities or unheard voices. This statute, like all others Acts of Congress, seeks to obviate some evil, has some aim, seeks to work some change in policy. It has, in other words, some intelligible meaning and some intelligible purpose.

We believe that the meaning urged by us in this case and adopted by the District Judge below is the only meaning consistent with the language, its history and consistent with any intelligible purpose. The numerous other meanings proffered to this statute by New York, by other states, by the Department of Health, Education, and Welfare reduce congressional rule to a meaningless exercise in futility.

The terms used in the statute are not unheard of or unfamiliar in public assistance administration. The amounts used to determine the needs of an individual is a comprehensive description of a state's needs standard, long established in public assistance, to determine how much aid an individual is entitled to.

The second refers to any maximums. Those are the devices used by states to reduce the amount of aid below that of state-recognized need. An adjustment to the first devise in any state that pays need in full, it doesn't impose any

maximum, but it automatically results in a cost-of-living increase to recipients. An adjust to the needs standard and any maximum results -- similarly results in a cost-of-living increase to states with maximums. That increase is proportionete to the extent the state met need in a given base period.

By looking to the amounts used and the time they were last established, we first see the state standard of need during some base period. That base period is at the time of enactment of this statute in January 1968.

The upshot of the exercise is that states are commanded to maintain their grant levels with one adjustment to keep pace with living costs by July of 1969. The accepting of states is equal insofar as the conditions the states meet standards and each state is accepted at the maximum it was paying during a given base period.

We think the legislative background of this statute concerns this meaning. It was treated -- it was developed in the Senate. It was then an Administration proposal that was quite a bit more far-reaching. That proposal required not only annual updating of the standard of need, but it also required that all states pay need in full, and there were at that time 33 states that did not pay need in full, many of which did not pay more than 50 percent of need and somewhat less.

Opposition to that statute in the House and Senate committees -- before the House and Senate committees centered

primarily on the effect of the full need requirement in those states that have long not met their standard of need, that effect being a very large change, not a modest updating but something much larger than that.

That Administration's estimate for the total cost of that bill, though, it is important to realize, was $90 million with paying full need for Federal sharing, that is, I am sorry -- and $95 million for annual updating of standards which were being paid in full, not the case after the statute was enacted.

The Senate Finance Committee modified that statute, dropping the full need requirement and adding in its stead that any maximum be proportionately adjusted. It was passed by the Senate committee on a party line vote, it was passed by the Senate and went to the Conference Committee, which amended it to drop just one part of it -- the annual repricing requirement. The wording of the language of the provision remains the same, however, from the time it emerged from the Senate Finance Committee to the time it was signed by the President on January 2, 1968.

Both committees reported the bill out -- I am sorry -- the Conference Committee and the Senate Finance Committee reported the bill out under a heading increasing income of recipients. The bill was considered alongside a companion proposal to require states to increase payments in the adult programs, by an average increase of $7.50, and the method chosen for that increase was

the adjustment of need standard and maximums.

It is, in short, we think history makes several things clear. One, the 402(a)(23) is a self-evident departure from tradition insofar as it requires a modest adjustment to state need and payment levels in AFDC, which is self-evident and quite obvious to the specialist committees dealing with that security legislation and certainly obvious to any Congressman who took the time to look at it.

Two, the evolution of the bill makes clear that it was a compromise. It was not to establish the floor of income in every state that would approach "adequacy" as the Administration had originally urged. Nothing of the kind. It, rather, was to see that each state paid what it was then paying, which was known for all states to be inadequate, and to make one adjustment to keep pace with living costs.

It should be added that the Administration reported to the committees that most states had updated it in 1966 and 1967. There was no great impact expected from the required updating by July 1, 1969, particularly once state maximums were accepted.

We think this legislative history also makes clear the -- that the companion proposal makes clear that Congress appreciates the effect of adjusting these mechanisms. The language chosen, the comprehensive term used to describe the need standard, plus the fact it goes to require adjustment to maximums leaves little room for nullification or evasion.

And, finally, we think that the fact that Congress made this a planned condition for continued participation in AFDC and gave the states one year and a half to make the required adjustments, I think, makes that Congress intended to compel the states to do what the statute says.

Q You mean to compel the states -- they would not be free to simply ignore the Federal provision and perhaps accept the loss of Federal assistance?

A Oh, I think -- the time and the conditions in the AFDC, Mr. Justice Brennan, certainly contemplate that the state may or may not participate in the program.

Q That's what troubles me about this case. I don't quite understand if the only sanction is simply to discontinue the Federal assistance, how the plaintiffs here have any constitutional claim they can make.

A Mr. Justice Brennan, this is not a constitutional -- well, this is a constitutional claim under this ---

Q Well, the Federal statute, I gather, would have to be controling upon the states, would it not?

A Controling only to the extent a state participates in the Federal program. Now you see ---

Q Well, suppose the state decided, "No, we want no part of the Federal assistance any longer." Then both your supremacy argument and then the other constitutional argument both fall on ---

A On this aspect of the case, most certainly. We are seeking to enforce one of the planned conditions that Congress has imposed on the receipt of Federal money, just as your alternative ground in King vs. Smith with the enforcement of another planned condition, "Condition No. 10(a) shall be furnished to all eligible individuals" was enforced by the petitioners -- was invoked by the petitioners in that case to support their case that Alabama's "substitute father" rule was invalid.

This Court said that Alabama had reached its federally imposed obligation and that any state law or regulation in conflict with the Social Security Act in a state that is participating, of course, is to that extent invalid.

Q What is the exhaustion problem here? Isn't there a provision that permits this kind of conflict to be resolved in the first instance? I have forgotten, was there a conference or a hearing or something before HEW?

A No, I think it has been characterized that Congress has given the Department of Health, Education, and Welfare the power to terminate Federal funds upon finding a conflict between the state plan requirement and ---

Q Isn't there an administrative procedure for resolving this, in the first instance?

A There is no administrative procedure or proceeding, Mr. Justice Brennan. There is this power in HEW which it may exercise. It has, in fact, exercised it not only here, but in

any other case that we know of, except for two when the Act was passed that the ---

Q I thought last spring we heard something about a contemplated hearing or a conference or something on this very question was to have been scheduled in this case.

A Well, no differently than any other. The Act contemplates that when a state makes a change in its ---

Q Well, was anything scheduled between HEW and the state officials on these issues?

A Not scheduled at all, no, Mr. Justice Brennan. I will explain what did happen.

The state made a change. That have to submit that to HEW.

Q They do?

A For some reason the state is permitted to implement it prior to HEW's approval and Federal funds continue to flow and then there is a series of discussions and negotiations which take place between the state and HEW over the change if it raises questions.

This provision was doomed to raise questions and HEW in somewhat uncharacteristic switch fashion replied to New York that Section 131-a, the statute which reduces grant, raised the question of conformity under the Social Security Act, "Would you provide us with information?"

That was in April. New York provided the regulations

and a brief description of what the statute does in June and nothing further has been heard between HEW and the State of New York, except for an event that we just learned about recently that took place on November 10, in which HEW wrote New York a letter questioning some other aspect of 131-a on the question of statewide uniformity under the Social Security Act.

Q Is this issue ripe for judicial decision and for that procedure?

A Mr. Justice Brennan, it is our view that the delegation to HEW of the power to cut off Federal funds does not preclude the remedy that this Court upheld in King against Smith. That remedy was a recipient most affected by state plan changes in the other program.

They invoked the Federal law so long as the state is participating and a Court has power to adjudicate that controversy. The only difference in this case and King against Smith is HEW had neither approved nor disapproved. It had a long history of negotiation.

We have a somewhat shorter history of negotiation here. But given the nature of the interests involved and also the fact that HEW's participation or expertise being relevant, is available to this Court or the court below. Indeed, HEW has very explicitly expressed its views in this case and those were before the District Court in its brief from another case and the regulation ---

Q Except that HEW hasn't addressed itself to one or two of the critical issues and doesn't purport to be answering them?

A It doesn't and HEW was invited to participate in this case at the beginning.

Q But it says in its brief in this Court that it doesn't purport to be telling us whether this is just a streamlining of the state standard or, on the other hand, whether it is forbidden as an impermissible reduction in the content of the standard. That is the critical issue, isn't it?

A That is one of the critical issues.

Q Well, they just advised us on that and apparently they haven't advised anything on that yet.

A That is quite often the case, Mr. Justice White. This really advised the Court, for example, it did not advise the Court or anyone else in King against Smith exactly what its position on "substitute father" rules were.

Q Maybe it isn't ready to do yet.

A Mr. Chief Justice, it certainly -- it is meandering along a protracted series of negotiations, of very indefinite negotiations, which is certainly a characteristic of that process. It is not an adversary process.

Recipients are not parties to it and states are not really adversaries except in the rare instance where HEW invokes its power of cutoff. And, as we have said, it is very rare that

it invokes that rule.

Q Are you suggesting that there is a burden upon the Court to act if the administrative function is delayed?

A Not all, Mr. Chief Justice.

Q Delayed or ---

A No, I'm sorry. I am saying that the power of HEW to order cutoff of Federal funds does not affect the right of recipients to come into Federal Court and adjudicate validity under the Federal act of a state law, regulation or statute that adversely affects them. And this one most adversely affects the petitioners in this case.

We are just saying, similar to Allen vs. Board of Elections, this Court's decision in the Board of Elections, the existence of an administrative remedy, however cut off, does not preclude adjudication. The United States itself has said so in regard to the Social Security Act. It has come into court and argued that HEW's power to terminate is not exclusive. The courts have power to adjudicate validity.

We think that power is critical and very important. We mention the nature of these negotiations only to show how critical and important that power is if the planned conditions that Congress impose are to be enforced. If in fact the protections, the few protections that Congress provide to individuals disadvantaged individuals, who fell under these programs, there are to be effectuated -- we stress the delay period only to

show that the fact that this Court has recognized, that is, that Congress intended these laws to be applicable to be enforced. It usually intends its policies to be carried out. If those policies are to be effectuated in this case and other cases, surely the answer given in King against Smith was correct. They can come into court and seek to adjudicate.

Q We will have to -- that issue that I have referred to a moment ago certainly has to be decided in this case if we get the merits. We will have to be deciding it without any views of those who might know more about updating some standard of these or ---

A Mr. Justice White, at bottom in this case, the ultimate issue in this case, we argue, is the construction of a Federal statute, which is a question of law obviously ultimately for this Court. We think in the light of the policy of this statute that ---

Q That may be so, so then you have to measure a state statute. The argument is that the state statute is consistent.

A Mr. Justice White, I am going to address myself to that certainly. I just want to make ---

Q We will have to decide that issue, wouldn't we?

A That is correct, Mr. Justice.

Q Without the HEW or the Government stating what it thought at all?

A For one reason or another the Government did

volunteer a brief in this Court very recently and gave a few hints of something right or wrong. It doesn't want to take a position on the merits for one reason or another.

HEW has also issued a state letter, by the way, which is not a regulation, of October 10th which rather begs this question. It says you may not -- at a minimum you must maintain your standard in accordance to basic need without providing us with a definition of "basic need" at all. Nor do I think does the Government brief in this case.

I should like, first, to return to the statute and turn to the argument against this statute, which is said to make our meaning inappropriate. The argument is that the statute is, as we construe is, renders it to be a measure working an enormous change in the Federal-state relationships, unprecedented in grant-in-aid programs at considerable compelled expenditures and without stormy opposition in Congress that such a measure should have resulted in.

We think the argument falls in each of those premises. The costs of this provision were before the Congress. It knew that the Administration's original provision, requiring a great deal more change, would cost overall $90 million in Federal funds for full payment of updated standards. That is, for updating and then paying for those in full.

Once that provision was dropped for need, the cost had to drop considerably excepting maximums in 33 states, many of

which don't pay 50 percent of need.

The Administration had also informed Congress that most states had updated it recently. The cost, in other words, were modest, to say the least in a program of $4 billion Federal expenditures a year. If one takes the national average of HEW of $44 a recipient a year and a 10 percent cost-of-living factor, the total cost would be about $30 million for both state and Federal expenditures.

This case appears to be a very big case in terms of cost and to foot the argument, not because of the cost-of-living adjustment. It estimated that the cost-of-living adjustment in the budget for this year would be $5 million a state share altogether.

It is because what New York has done, it has cut grants and cut grants very severely. That is not the thrust of what Congress was thinking about when it passed this statute. Any given violation of a Federal condition can be costly if one takes the condition in King against Smith, against a state, for example. New York tried to withdraw aid to all children whose parents had abandoned them and those petitioners invoked 402(a)(10).

The cost in that case was about $200 million. That was not the cost that Congress estimated for 402(a)(10).or had in mind, although it did pass that provision to deal with fiscal crises in the states.

My point is that the costs are, indeed, modest. Too,

this is not unprecedented in grand-in-aid programs. Our attention should not be geared to 402(a)(23) which compels the states to appropriate a certain amount of money for AFDC. It rather proposes a limit on one mechanism to be used to reduce expenditures, that mechanism being the reduction of grants.

The Medicaid program, passed two years before, also a Federal grant-in-aid program, with similar matching for 50 percent for New York and varying percentages for other stages, proposes very similar requirements but rather more. And those were passed without controversy. That Act requires not only that states may not divert funds from the Federal Assistance to operate Medicaid, but requires that the states at a minimum must provide aid to persons who would be eligible for public assistance to the most liberal money payment standard in the state during the last three years.

And it also provides that the state must at a minimum -- but a state must provide to all individuals at least five categories of services -- inpatient, outpatient, hospital, physician and the like. The sum total of those requirements -- and it also requires the states to expand -- to demonstrate their expanding efforts under Medicaid.

My point is that the sum total of those requirements is, indeed, to impose a limit on the ability of the state to participate and choose to spend what it wishes. Not a rigid limit, this is not a rigid limit either. This provision leaves the

states with a great deal of flexibility, not to reduce grants, it should be said, but in other areas to affect an AFDC budget or public welfare expenditures.

The states are free within very broad limits to determine eligibility, financial responsibility of relatives, implementation of the various programs, the work incentive program, certainly the amounts of local participation and the like. We think that this Court did refer in King against Smith to the state power to determine its resources through setting of standard of need.

But that is an example of flexibility. There were many other examples that can be adduced. Moreover, the departure in this provision, it does so by reflecting most of the various established patterns in AFDC. It accepts, as the Government has since 1935, the enormous variations among the various states in resources and the like, and accept the states' own standard of need. It also continues greater Federal responsibility for states with lesser wealth and lower grants. That is the tradition and the pattern in AFDC.

Even assuming for a moment that the decision should have been controversial, this is really legislation out of its legislative setting in 1967. After all, it was part of omnibus legislative amendments, also part of a compromise between the Senate and the House which disputed over many provisions. This was one of their compromises and this setting -- and it was also

passed on the floor under rules very restricted to date and no amendment in the House certainly and at the end no amendment in the Senate also.

In this setting there is silence. Even by those who should have opposed it, if there had been such persons, it would seem to me that is part of the legislative art of reaching a compromise and accord on no less than 300 different provisions that were embodied in the 1967 amendment.

We refer now to the New York statute and whether what it does is somehow consistent with the 402(a)(23). In our view the heart of 402(a)(23) is to guarantee an increase in income of recipients, as the committee said, based on cost-of-living changes. What New York has done is decrease the income of incipients by approximately 8 to 12 percent, depending on which recipient. I will talk about the changes in a moment.

And it has done this to reduce overall AFDC expenditures in New York by $100 million, a total of approximately $900 million That is one out of every nine dollars taken out of AFDC. How that can be said to comply with the statute, how the adjustment of-need-standard -- New York does not have maximums -- how the adjustment-of-need standard can be said, which reduces, as I say, one dollar out of nine, can be said to comply with a statute that requires that an adjustment be made for cost-of-living change, obviously going up, is itself a startling proposition.

Our view on -- Mr. Justice Brennan, your question is

streamlining. 402(a)(23) has nothing to do with streamlining. It is not the concern of the statute, its proponent or anyone else who discussed it never talked about streamlining. One should add that there is no Federal statute or regulation that defines what "streamlining" is either.

The states have, like New York, provided several methods of providing grants. One of those methods is to provide the grant as a supplement, as it does, for example, for rent today, and as it did for articles of home furnishings and clothing. We don't think that 402(a)(23) allows the states to eliminate whatever items it now deems unnecessary. And "unnecessary" has nothing whatsoever to do with "basic" at all.

I should to reserve the rest of my time.

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

Mr. Weinberg?

ARGUMENT OF PHILIP WEINBERG, ESQ.

ON BEHALF OF RESPONDENTS

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

Not only is this case unripe for determination by the Judiciary at this stage because we are still awaiting views of HEW, which is the agency which if it doesn't have primary jurisdiction here certainly is the one that has the expertise and the experience which should pass upon it. But it is an extraordinarily ironic case, in all event.

In effect, the petitioners are asking the Court to solve the problem of the adequacy of the welfare allowances in the various states, where Congress has so conspicuously failed to act, and they are relying not on the Constitution, but on a very narrow subsection passed by the 1967 Congress, which was simply never built to support the weight of the construction that these petitioners seek to place upon it. Which is, in effect what the Court of Appeals held, aside from ruling that there no jurisdiction, in the first place.

Over and above that, the case was clearly unripe for determination because HEW hasn't given us its views yet. And I would like to advert to that briefly and first, if I may.

This is a very different situation from King against Smith where the Alabama "substitute father" regulation was set aside and there was a long history of acquiescence by HEW in the regulations of that type which the various states had. On the contrary here, New York only passed the statute in its 1969 legislative session. It only went into effect on July first.

HEW has only had it before them for a couple of months and, as my colleague has said, it hasn't yet commented on whether or not the statute complies or doesn't comply with 602(a)(23), which is what the case is all about. And consequently there is nothing in King against Smith or any other case that the petitioners cited which would provide the slightest foothold for jurisdiction here prior to a decision on this thing by HEW.

Q Well, there wasn't a decision in King against Smith, was there?

A No, but there was a long history of acquiescence. This Court said it was tantamount to a decision in that it got HEW out of the way. In other words, if Alabama had that "substitute father" rule for 20 years ---

Q Well, the important thing in King against Smith is that it specifically said that there is correspondence going on and then it said, on page 326, that "Additional correspondence ensued with HEW which never approved the regulation."

A That's right, Justice White, but by letting it sit on the desk, so to speak, for 20 years and many other states -- not just Alabama had that provision. I believe more than half of the states had it.

The Court felt that enough time had passed certainly so that it was unreasonable to expect that HEW should suddenly wake up and do something about the alleged conflict which this Court held existed between the statute and the Alabama regulation.

Whereas he has got an entirely different situation where the New York situation appears to be unique and, in addition to that, HEW simply hasn't passed -- and it is not a matter of decades as it was in the Alabama situation, but just a matter of a couple of months.

Q I think that there has been correspondence going

on between New York and ---

A Yes, indeed.

Q And did Mr. Albert correctly describe what has happened so far?

A Yes, sir. There has been correspondence ---

Q Then let's assume HEW decided that what New York had done is quite consistent with that Section (23) or whatever it is. Would they say so or would they just be quiet?

A Well, I think ---

Q Would they write you a letter and say, "We approve it"?

A I am sure they would, because they have already questioned other aspects unrelated to this case of the New York statutes, and in the past they have given specific approval to the actions of New York and I assume the other states as well. So that I am confident that if they found no objection to 131-a they would say so.

On the other hand, should they not say so,after a reasonable period of time we would have the situation analogous to the one in King against Smith. But we don't have either one of those situations now.

What we have is that we know that HEW has the question before it and they haven't yet spoken, so we certainly have to, it appears to me, give them a chance to either say "yes," say "no," or not act after a reasonable period within I suppose the

case would be ripe, aside from the other jurisdictional defects which we say it has.

Q If they do say "yes," do they usually just say "yes" or do they say "yes, because"? And then say why they think it should be ---

A Oh, the latter, Mr. Justice White, quite definitely. The correspondence has been lengthy. Some of it it in the appendix, the November 10th letter, which was too late for us or our adversary to put in the appendix, is nevertheless annexed to the HEW brief, the amicus brief which HEW supplied here. So that is before the Court and I am sure it won't be a simple "yes." It will be a "yes, because" and then it will go into reasons because they have the expertise to do that and that is what they have done in every aspect of the New York legislation through the years.

Now although a great deal of reliance is placed on King against Smith, not only in the question of the unrightness of this case, but in general notwithstanding the superficial similarity in subject matter, this is a very, very different case than King against Smith.

The complete absence of a constitutional claim, such as existed in King againmst Smith, not only undercuts the Court's basis for jurisdiction, but it also demonstrates that on the merits the petitioners claim are simply untenable. Moreover, King against Smith and Thompson against Shapiro not only involved

constitutional issues, but also involved the eligibility of persons for welfare.

And this claim here is merely a claim regarding the amount, which is very, very substantial, for instance. Furthermore, in King against Smith and in Thompson against Shapiro, the residency case, there was no requirement that if the Court were to over-rule New York statutes would automatically, in effect, appropriation from the Legislature.

Those issues didn't exist in King against Smith or in Thompson against Shapiro, and consequently if the Eleventh Amendment doesn't act as a bar to such a situation, which we submit it does and in which the three-judge court in Williams against Dandridge, which is on appeal to this Court, held that the Federal Court had to stop short of simply categorically ordering the State Legislature to appropriate money for welfare. That is clearly what is involved in the relief that these petitioners seek, which, as I said, is entirely different from these two cases they rely on most heavily.

Now let's examine the statute on which the petitioners solely rely. And what it says is that the state shall adjust the amounts that are used to determine needs of individuals, or in the parlance of welfare officials, "standard of need." And any maximum imposed on the aid paid to families, which my colleage concedes New York doesn't have -- the maximum is a flat dollar amount, such as $200 per family. You just don't

have any more no matter how large the family is, which the Court in Williams against Dandrige and in the main, Westberry against Fisher, the three-judge court declared to be unconstitutional. That is definitely not involved in this case. New York never had a maximum of that sort and doesn't now.

In any event, 602(a)(23) said that the standard of need and any maximum, which New York doesn't have, have to be adjusted to reflect increases in the cost of living. That New York, as the Court of Appeals held, fully complied with the mandates of that statute. The level of actual allowances to welfare recipients in New York State in the highest in the country, as appears from the appendix to our brief. It is the highest of the 50 states and New York has always out-paced whatever Federal requirements existed.

Q But has New York been one of those states that it is always said that when it sets the standard of need, that is the actual payment?

A Yes, indeed.

Q It still is, isn't it?

A Yes. There is no family maximum, no percentage of payment of need such as many ---

Q So when you set a standard of need, you purport to fulfill it?

A Yes, indeed, no question about it.

Q 131 was then a change in the standard of need

as well as the actual payment?

A You mean 131-a, Your Honor? It wasn't a change in the standard of need. No, I will get to that in a moment, if I may. It was a streamlining of the standard of need and the elimination of certain things, such as special grants, which I will come to in a moment. But it was definitely not a reduction in the standard of need.

Q Do you have anything like that?

A New York pays 100 percent of the standard of need. It always has, in contrast to many states which don't, and shockingly I think some states have a higher standard of need than New York. For example, although New York pays an average of $278 per month to a family of four on welfare, and we pay the same whether it is AFDC or aid to the aged or blind, disabled or whatever.

In Missouri the standard of need is a substantially higher figure, $305, but the actual amount paid is only $124. Now New York simply doesn't do that. We have never indulged in that and we pay 100 of the standard of need.

Indeed Section 131 of our Social Services law, which is our statute which antedated 131-a, the one this case deals with, which is still on the books, says, "Insofar as funds are available for that purpose, New York is to provide adequately for those unable to maintain themselves." And that is precisely what New York has always lived up to.

We have repriced every year. The Social Services Department, the respondents here, takes its own cost-of-living surveys throughout the state. It also employs the Bureau of Labor Statistics figures and it repriced in May of 1968 and it adjusted the standard of need and the level of payment, because in New York they are tied together.

In August of 1968, prior to 131-a when the levels were set administratively -- and that was illustrated by the fact that for a family of four, exclusive of rent, because rent is paid additionally -- it is tacked onto the monthly allowance, the average went up from $173 a month to $191 a month for a family of four. And thereafter 131-a was passed, which used as its matrix the repricing which took place in 1968.

And the way that worked was this: The Legislature took an average of the age of the oldest child in order to eliminate the vast administrative paperwork and the time of Social Services officials which went to figuring out what the age of the oldest child was in any given family. When you are dealing with hundreds of thousands of families, the Court can appreciate the time-consuming nature of that job in addition to the readjustments; every time the oldest child in a family reached another year, that placed the family in another bracket. And if the family didn't get around to notifying the local official or if the official was lax and there was a detriment to that family, they didn't get the increase that they were entitled

to.

So what the Legislature did was it averaged these disparities based on the age of the oldest child, and it took a figure which was based on that average and now a family of whatever size, depending only on whether it is adults or children, gets a certain specific amount.

There was no cutback, and to characterize it as a cutback, as the petitioners repeatedly do, simply sheds heat and not light.

Now another change which was made was the elimination of the special grants, and this was done on the basis of the enlightened judgment of everybody in the field, every enlightened commentator including HEW itself, which as early as 1964 called on the states to eliminate the special grants.

What "special grants" means is as we have described them in our brief. And if there is any dispute about this, it is that the recipient of welfare has go hat in hand to the local official, asking for a special grant for a specific purpose. It is degrading, it is time-consuming. It again requires a good deal of administrative paperwork.

Q What special grants are put out?

A Special grants go to specific items such as moving expenses, Justice Brennan, a diet for somebody who is a diabetic, let us say -- who needs a specialdiet. Layettes, for instances, things of that nature.

Q Are these things which were eliminated, is that it, from the computation of the gross payments?

A They were eliminated, but they are still available to the welfare recipient personally because the figure of $25 per month was tacked on to the average in 1969 in order to compensation for the elimination of special grants, and also because many of these grants, such as moving and a security deposit for an apartment rental, where that is necessary, or is now available for the purchase of services which is above the allowance. In other words, where the local or state Social Services Department simply furnishes the service itself by purchasing it for a contractor or from the landlord, where that is applicable.

But while these special grants were always over and above the standard of need and the elimination, although it has been compensated for anyway, doesn't in any way detract or reduce the standard of need. Nonetheless, many of these items are, in fact, still available to welfare recipients.

Q Well, but I gather basically on the question of conflict with the Federal regulation you would say that there has been no change in the standard of need, because these special grants were an addition to the change?

A Yes, sir.

Q The standard of need.

A Yes, sir.

But the special grants, in addition, required

investigation and it required the counsellors to ---

Q Well, why is it you suppose that HEW tells us that they are not going to advise us whether you are right or wrong?

A Well, I guess they haven't looked into the question fully enough and exhaustively enough to make up their mind yet. I presume that they are going to do so promptly.

Q I wonder how much looking into it takes to discover that, in fact, these special services are still available in a different form? How much time does that take?

A Mr. Justice Brennan, I don't know how long that takes, but I would say this. The statute was only enacted in April. It was amended in May. They have only had it before them in final form really a couple of months and, in fact, it only went in effect ---

Q Has any of the correspondence between you and HEW touched this subject?

A Oh, yes, indeed. This is very ---

Q November 10 has nothing to do with those things?

A No, that particular order doesn't, but the very nub of the correspondence back and forth which appears in the appendix is just exactly that question.

Q In which appendix, yours or ---

A No, it is a joint appendix.

Q Oh, yes.

A There is a letter by a Mr. Calliston, who is the Regional Director, I believe his title is, He is the man who has got jurisdiction over this and there is constant correspondence back and forth dealing with these very questions.

Now the payments, as we have seen, are exclusive of rent, also fuel for heating which is a small item, of course. Rents have increased 13 percent in the last three years in New York City alone and it is the practice to pay whatever rent the recipient actually has, subject to maximum rentals, and even they can be waived in the various counties when necessary.

But there has been an over and above the cost of living adjustment which New York did in 1968 and did again in 1969, notwithstanding the passage of 131-a. There has been the increase in rent, which alone, it seems to me, constitute compliance with the statute or partial compliance. But the main point here is that there was full compliance by the May 1968 repricing.

Now the 131-a specifically requires repricing. Even if there weren't any 602(a)(23), we would be doing it anyway and, in fact, we have done it and the respondents have submitted to the Legislature the results of that repricing. It is too recent to be in the appendix, but they have asked the Legislature to provide sizable increases to 1970, which will increase the average for a family of four monthly payment, not including rent, from the present $185 to $208, depending on the locality, to a statewide $225 a month. And then as of May 1970 there is

$230 a month.

But there is no question but that New York fully complied with any interpretation of this statute.

Q What was the major purpose of 131-a? Was it to -- what is the basis for determining welfare payments for the individual case to general categories? Is that one of them?

A Well, Justice White, it was streamlining in the elimination of the ---

Q No, I know, but what does "streamlining" mean?

A It was basically two things. It was the elimination of special grants for the reasons that I have said, the administrative simplicity, taking the burden off of the back of the welfare recipients who go and apply for special grants, which benefits the more aggressive recipient at the expense of the meak, and also frees the counsellors, who don't have to fool around now with the investigation of each individual request for a special grant. They can now devote their time to counselling and finding jobs and everything else that a counsellor can do.

And the other thing was the averaging, which eliminates the paperwork and the delay and time-consuming aspects of paying a different amount for each child.

Q In short, you don't determine an individual need?

A Well, we still determine individual needs, but we do it under a formula which was simplified -- in no way

reduced, but simplified, so that how much a family of four gets now doesn't depend on whether the oldest child in that family is nine or eleven or thirteen. It is now a set amount for a family of four with a difference between New York City and the rest of the state, which isn't involved in this case. That was the portion of this case that was mooted out.

Q But it simplifies administration?

A Yes, sir.

Now when you look at 602(a)(23), as we have to in order to try to glean what Congress meant when it passed it, we see that, first of all, it is a very minor part of Section 602 of the Social Security Act and the supremacy clause, although my colleague here adverts to it clearly, isn't relevant to this case because Congress has simply never exercise any real authority over the levels of welfare allowances paid by the state.

Indeed, 601 of the Social Security Act, which is the basic statute, which provides the Federal grants-in-aid in the field of AFDC, says the states ought to furnish assistance as far as practicable under the conditions in each state. And what that means, in effect, is that we have seen that New York pays $278 a month, Missouri pays $124, Mississippi pays $55 a month and even the District of Columbia, where Congress itself sets the standard, pays $184 a month on the average, which is about two-thirds of what New York pays.

Now while imposing various other requirements as a

condition of receiving Federal grants, Congress has deliberately refrained from mandating levels. And indeed it even perpetuates to some extent the inequity between the states by scaling the ratio of the Federal contribution so as to give more money to the states that pay less, paradoxically enough.

And indeed in King against Smith, which was decided after 602(a)(23) was enacted by the '67 Congress, this Court said each state is free to determine the level of benefits by the amount of funds it devotes to the program.

The statute requires an increase in the standard of need. There is no question about that and New York complied by that by its repricing in 1968 and it has again repriced in 1969.

The bill when it was originally introduced by the Administration made significant changes which never took effect, because Congress didn't see it the way HEW saw it. The bill, as introduced, required each state to pay the full standard of need, which as we see will be a gigantic step forward in the whole administration of welfare. And many states -- 26 according to the count we took -- don't even pay their own acknowledged standard of need.

In effect, they say to a family, "We know you need $300 a month, or whatever it is, but we are not going to give you $300 a month."

The bill also required an annual adjustment standard

of need and since it required each state to pay the standard of need, it required an annual adjustment of the amount actually paid to every AFDC recipient.

This would have been a bill of an enormous impact, but the House turned it down and the Senate, while passing a portion of it, only passed the annual updating part. And so, in effect, when it finally got through, it was emasculated and then the House-Senate Conference Committee further emasculated it by eliminating the annual updating and leaving it as it is with a simple one-shot updating of the standard of neeed requirement and no requirement at all that a state increase the amount actually paid.

Q In effect, Congress was indicating that it would review from time to time the need for updating. Is that a fair analysis of that provision?

A Presumably they would, but they -- whatever they might be planning in the future. And of course since then, as the Court knows, there have been many proposals which will change the whole field of welfare. Whatever Congress might have been thinking of doing in the future, they didn't do very much in 1967.

It is significant that in the field of old-age assistance, not involved in this case, they raised the actual amount $84 a month. They appropriate money specifically for that purpose and they alluded to it in their committee reports and so

on, and the fact that there is no reference in the committee reports to any similar provision here and no cost appropriation made at all, it is evident that they had no such intent in passing 602(a)(23) to do anything analogous to that in the field of AFDC.

Q Did you say, Mr. Weinberg, that in New York they did the one-shot updating or they did not? Or it is already updated, which?

A No, we did it in 1968.

Q And in response to the '67 legislation?

A Well, we would have done it anyway. The statute requires that in any event.

Q What I am trying to get at, under the 131-a did you have to do the updating anyway of your own state law?

A Yes, sir.

Q You did?

A Yes, indeed.

Q So what you did, you did in compliance with your own state law and not necessarily in compliance with the Federal statute, is that it?

A No, sir, although unquestionably it did comply with what Congress said. As we have seen, the Conference Committee eliminated annual updating and the language of their report, which is cited in out brief, is significant.

It said it requires one adjustment of the standard of

need before July 1, 1969. And HEW, in characterizing this provision in the amicus brief, they put in Lampton against Bonin, the Louisiana case which is referred to continuously through this whole case. They use the phrase that Congress "could have hardly paid less attention" to it when they passed 602(a)(23), and yet the petitioners would have us believe that this bill is some sort of a Trojan horse ironically brought in by the opponents of welfare reform, as reflected by the way the Senate vote worked out, and opposed by the people who seek higher levels of welfare.

It is evident from the legislative history here, aside from the plain meaning of this little statute, that Congress rejected a provision to actually require the states to meet their standard of need, and it simply required that the standard be updated, which we have seen New York would have done anyway.

In the recent proposals of the President in the field of welfare, it is significant remarked that for the first time under the proposals now being enunciated, all dependent families with children would be assured of minimum standard payments. Now we have seen that New York has no maximum, such as was involved in Williams against Dandridge. That is conceded and so I don't think it merits any further discussion.

This brings us to a further and extremely difficult point. The fact is that this statute requires no more than a one-shot adjustment of the standard of need, and that inescapably

raises a question of fundamental jurisdiction over and above the question of rightness.

Suppose the petitioners' construction of this statute were correct. Then it would place the Judiciary in a position of having to categorically order the New York Legislature, assuming that this Court found we didn't comply, to disburse money from its treasury in the absence of any claim of any constitutional infirmity, such as was involved in King against Smith.

The Court of Appeals properly held that the Eleventh Amendment would forbid such an interpretation, and in Williams against Dandridge this Court reached the same conclusion.

What this is, in reality, a thinly veiled suit to compel the New York Legislature to appropriate ---

Q If that is necessary, what was the deal? Why would it be more than declaratory judgment and then it would be up to HEW to cut you off?

A Yes, that's all ---

Q --- if it's declaratory. If we were to say to the Congress that we declare more than that, we wouldn't order the New York Legislature to make good the money. I would suppose this would mean HEW then would either have to cut you off or, because of the Federal cutting you off, would bring your Legislature to keep providing money, wouldn't it?

A Well, sir, the petitioners ---

Q Why do we have to order it?

A The petitioners are asking for a great deal more than that. They are asking for an injunction.

Q They are asking for it, but they are not going to get it, but does it follow?

A I don't believe it does. I think an injunction, which is what this Court of Appeals said would be ---

Q I should think you can't argue if they are right, that they are entitled to no relief whatever.

A Well, it ---

Q You will still give them the declaratory judgment, I suppose. Then the framework of what they are asking for is ---

A No, but a declaratory judgment would still be in effect an order. It wouldn't be an injunction, but it would virtually be an order compelling the State Legislature to ---

Q Ah, that is more in the HEW alley. That is where it belongs anyway.

A That is what we have insisted throughout the litigation. There is no question about it. There is just no way to avoid that problem.

Assumming the state were violative of 602(a)(23), at the most that would mean we are ineligible to receive Federal funds.

Q Well, what if HEW had approved, actually approved

your present plan?

A Then that would eliminate the unrightness aspect of this case.

Q Then you are standing here. Let's assume right now that HEW had approved it. We would have to decide the case, wouldn't we?

A Well, there would still be the basic question of whether the Court had jurisdiction.

Q Well, I admit that. But assume jurisdiction.

A Assume jurisdiction not only on the unrightness, Justice White, but another question ---

Q I understand.

A But assuming jurisdiction, assuming it were right by HEW passing on it, that would bring -- and assuming you were prepared to rule that New York didn't comply, that would bring us up to the question I was just starting to address myself to: Could the Court order, in effect, whether by declaratory judgment or injunction -- could the Court order the New York Legislature to disburse additional money for welfare without violating the Eleventh Amendment and a whole volume of cases, though, which we have cited in our brief?

This wasn't involved in King against Smith.

Q No, I know it wasn't.

A Because in King against Smith and in the residency case as well there was a way for the state to comply by

simply shuffling around the amount of money that it was going to spend for welfare.

Q Well, you have got some other separate questions on some other points. You have just four minutes left.

A I will be finishing up in a moment.

When we turn to the question of jurisdiction, the reason the Court of Appeals found the District Court lacked jurisdiction here is that once the equal protection claim of the geographical differential between the City of New York and the rest of the state would moot it out, as it was, there remained only the statutory claim. And there was simply no authority to the Judiciary entertaining that claim.

The petitioners have tried to avoid that problem by saying that the pendent jurisdiction doctrine gets them over that hurdle, but it simply doesn't because, as this Court held in United Mineworkers against Gibbs, and as the lower Federal Courts have held on many occasions when the only constitutional issue in a case, the only issue where there is Federal jurisdiction is knocked out early in the case; then for the District Court to retain jurisdiction would amount to the nonjudicial tail wagging the judicial dog, as the Court very colorful put it in one of the cases.

And that is simply what we have here. So pending jurisdiction is of no assistance to the petitioners.

They rely on 1331, but it is clear that they don't

have $10,000 here to talk about, and as this Court held in Snyder against Harris, individual plaintiffs in a cross-suit can't aggregate their claims in order to try to reach the $10,000 requirement.

They also rely on 1343 and 42 USC 1968, the classic Civil Rights statute, but the fallacy there, as the Court of Appeals held, was that 402(a)(23) simply can't be construed as a statute designed to bring about civil rights. It doesn't. What it is is a statute which perpetuate really an inequity. To the extent that it has any effect at all, it locks the states into the extraordinarily inequitable amounts of welfare assistance that they pay.

This statute, as enacted, requires the states to adjust their standard of need. New York did so. It is a narrow statute and this is a narrow case.

There are many defects in the welfare system as we look at it throughout the whole country and there have been many proposals as to solutions. But Congress has itself maintained that, as we have seen, vest in these qualities by its refusal to act and equalize the payments in the various states.

To adopt the petitioners' view of this statute would not end these severe inequities. And to argue that New York contravened it, when it so plainly didn't, and that any non-conformity between the New York State statute and 602(a)(23) would void the entire state program -- in the absence of any

claim of unconstitutionality or discrimination, it simply argues the plain meaning of that statute and it is an invitation to just that sort of judicial consideration of questions of legislative policy of the states which this Court, since the cases in the 1930's, have resisted.

The order for appeal should be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Albert, you have three minutes left.

REBUTTAL ARGUMENT OF LEE A. ALBERT, ESQ.

ON BEHALF OF PETITIONERS

MR. ALBERT: Thank you.

Mr. Chief Justice, may it please the Court:

We know of no case requiring an exhaustion of the administering of remedies for primary jurisdiction in which the litigant being harmed by a statute has no access to that agency, may not initiate any proceeding and may not participate in any proceeding before it.

We think that that was obvious to this Court in King against Smith and in Damico against California and in Solomon against Shapiro. We don't think that that requires a reexamination. We don't think the rules should be any different in this case.

The result of a decree in this case is not necessarily greater or lesser than any other violation of the Social Security Act. After all, in King against Smith Alabama reduced its rolls

by 25 percent through a "substitute father" rule. That is a lot of people. Through its return to benefit levels that is a lot of money involved in King v. Smith.

The Louisiana suitable home rule is similar and involves a great many people. There is no intrinsic sacrosanct distinction between benefit levels and scope of eligibility. It very much depends on the case.

This Court is not called upon to decide whether New York has eliminated basic items or nonbasic items. Section 402 (a)(23) does talk, after all, of the items used to determine need.

In the context of this case, however, fine questions about an item of need no longer existing does not arise -- or fine questions about a state substituting oil for coal as a way for pursuing the need for fuel, those kinds of questions are not before this Court.

As the findings below amply support it make clear that overall streamlining, so to speak, to reduce AFDC welfare expenditures here in New York for one year by $100 million, as HEW makes clear, for July 1969 its average went from $71 per person to $62 per person. There is something more going on there than so-called "streamlining."

Moreover, if one looks to the two primary ways that New York accomplished this, it took the age differentiated schedules, giving a great deal more for older children, and

did away with the differentials for older children, not because they don't have greater requirements for food or social or educational necessities, but because it wanted to save money.

It justifies that as some sort of a convenience in administration by saying we would have to change that every two years otherwise. New York recertifies individuals every three months and makes countless adjustments to the grant every month for every dollar of resource or income received on any individual.

What they are saying is to look at two figures on a chart and to have to make an adjustment in an AFDC family grant every two years somehow is inefficiency just boggles the imagination.

The large other item eliminated is grants, supplementary grants for clothing and home furnishings. Those were administered in New York as a flat grant and not a special grant. No one applied for it. They got a check in the mail every quarter of $25 per person. There is no administrative efficiency in eliminating that whatsoever. There is cost saving and nothing more.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Albert. Thank you for your submission. Thank you, Mr. Weinberg. The case is submitted.

(Whereupon, at 1:36 p.m. the argument in the above-entitled matter was concluded.