

Supreme Court of the United States

OCTOBER TERM, 1969

LIBRARY
Supreme Court, U. S.
MAY 18 1970

In the Matter of:

.....
GEORGE K. WYMAN, et al.
Appellants,
vs.
EDNA ROTHSTEIN, et al.
Appellees.
.....

Docket No. 896

pt. 1

RECEIVED
SUPREME COURT, U.S.
MARSHALL'S OFFICE
MAY 18 2 31 PM '70

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Place Washington, D. C.
Date April 27, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

441-032
21
27

MB

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
Philip Weinberg, on behalf of Appellants	3
Edward V. Sparer, on behalf of Appellees	32
Peter L. Strauss, on behalf of the United States	57

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1969

3 -----:
4 GEORGE K. WYMAN, ET AL., :

5 Appellants, :

6 vs. :

No. 896

7 EDNA ROTHSTEIN, ET AL., :

8 Appellees. :

9 -----:

10 Washington, D. C.,
11 Monday, April 27, 1970.

12 The above-entitled matter came on for argument at
13 1:45 o'clock p.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARIAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

21 PHILIP WEINBERG, ESQ.,
22 State of New York
80 Centre Street
23 New York, New York 10013
Counsel for Appellants.

24 EDWARD V. SPARER, ESQ.,
25 3400 Chestnut Street,
Philadelphia, Pennsylvania
Counsel for Appellees.

1 APPEARANCES (Continued):

2 PETER L. STRAUSS, ESQ.,
3 Assistant to the Solicitor General
4 Department of Justice
5 Washington, D. C.
6 Counsel for the United States, as Amicus Curiae

7 - - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: No. 896, Wyman vs. Rothstein. Mr. Weinberg, you may proceed whenever you're ready.

ARGUMENT OF PHILIP WEINBERG

ON BEHALF OF APPELLANTS

MR. WEINBERG: Thank you, Your Honor. May it please the Court:

This appeal raises the question whether, in a time when urban problems are recognized by virtually every thoughtful person and every social commentator examining American life to be of the most serious proportions, the State of New York may not employ its concededly limited resources in the field of social welfare in such a way as to address itself to these problems with slightly greater emphasis.

§ 131-a of the Social Services Law of New York, which is the statute this case is all about, provides levels of welfare allowances for welfare recipients in the State of New York. It was enacted by the 1969 Legislature and, as I am sure the Court knows, it was the same statute that was involved in Rosado vs. Wyman, which this Court decided on April 6.

Section 131-a establishes levels at one rate to welfare recipients within New York City, and at a slightly lower rate, approximately \$5 a person, for welfare recipients living outside New York City. It then goes on to give the Appellant, Commissioner Wyman, the State Commissioner of Social Services,

1 discretion under an amendment which was passed prior to the
2 effective date of 131-a, which was July 1, 1969, discretion to
3 increase the payments in any county upon the request of that
4 county or indeed without the request of that county, if the
5 facts warrant, and prior to the effective date of the statute
6 Commissioner Wyman did indeed exercise that discretion and he
7 halved the differential between the New York City welfare pay-
8 ments and the welfare payments in the suburban counties, in-
9 cluding Westchester and Nassau Counties, which are adjacent
10 to New York, essentially suburban counties, and which are the
11 two counties in which the plaintiffs here reside.

12 It has to be presumed, as the Court has stated on
13 many occasions, that the State Legislature acted within the
14 knowledge of local conditions and indeed the Assemblymen and
15 State Senators who passed this section of the Social Services
16 Law are elected from very small districts. They are about as
17 close to their local constituencies as any elected representa-
18 tive can be. Their districts are much smaller and they repre-
19 sent less people than a Congressman, and they have to be pre-
20 sumed to be aware of local conditions.

21 Indeed, it is noteworthy that the Assemblymen from
22 Nassau and Westchester Counties predominantly voted for this
23 bill. Now --

24 Q You are speaking now of the bill which estab-
25 lished the differentials, to recognize the higher cost of

1 living in New York City?

2 A Yes, sir, which differential was, as I have
3 indicated, halved by the administrative action of Appellant
4 Commissioner Wyman before the bill took effect.

5 Q Halved-- h-a-l-v-e-d?

6 A Yes, sir.

7 Q And what is the present case?

8 A The 1970 Legislature reenacted section 131-a
9 with increased levels, but they maintained the differential so
10 that the cast isn't moot. The differential still exists, ex-
11 cept that, as a result of the very sweeping preliminary injunc-
12 tions issued by the three-judge district court in this case,
13 the state is now paying the identical payments to welfare re-
14 cipients in the counties involved in this case, but that is
15 only because of the injunction. But the 1970 legislation, a
16 copy of which is next to our reply brief, which was then
17 superseded by a slightly different statute, copies of which we
18 mailed to the court last week when it was enacted, still
19 maintains the differential, only the figures are slightly
20 different, they are higher, but the differential still exists,
21 except insofar as the preliminary injunction has eliminated it
22 for the purposes of this case.

23 Q The differentials are between New York City, on
24 the one hand, and all of the rest of the state, on the other?

25 A Yes, sir.

1 Q Is that right?

2 A Yes, sir.

3 Q And all the rest of the state is now treated
4 equally by statute, subject only, as I understand it, to the
5 discretion to increase it up to a maximum of what New York City
6 pays?

7 A That's correct, Your Honor, except --

8 Q It used to be three areas in New York, as I
9 understand it --

10 A That's right.

11 Q -- before this present legislation?

12 A That's right, Your Honor.

13 Q And it was done by legislation?

14 A Exactly.

15 Q Now there are two under the statute, New York
16 City and the rest of the state, those two?

17 A Except for the Commissioner's discretion which
18 he has exercised in eliminating the differential.

19 Q That I understand.

20 A And the Commissioner, by regulation in 1969,
21 returned in effect to three districts, or really four districts,
22 because New York City gets the statutory rate --

23 Q Right.

24 A -- the suburban counties which were previously
25 locked in with New York City now get an amount slightly lower

1 than New York City, and the two other up-state districts are
2 administratively established at a slightly lower rate than the
3 suburban counties ringing New York City and also a couple of
4 up-state counties which were traditionally thrown in with the
5 suburban counties. So now, in effect, there are four rates,
6 subject only to the injunctions which have thrown the suburban
7 counties in with New York City.

8 Q Does the question still remain, as it was be-
9 fore, whether this is a reasonable classification on the part
10 of the Commissioner?

11 A That is precisely the question, Mr. Chief
12 Justice.

13 Q Whether it changes because you have fewer
14 classifications, the fundamental question hasn't changed, in
15 your view?

16 A No, sir, under the Equal Protection Clause, it
17 is still a question of whether there is any rational basis for
18 the differential. And, as we will show, there is more than an
19 adequate basis for that differential, for the reasons which we
20 deduced before the three-judge court and which I would like to
21 expound on here.

22 It should be noted, before we turn to that, that
23 these payments don't include rent or fuel for heating, and the
24 record shows that the actual payments received by welfare
25 recipients in New York City for rent, which are paid over and

1 above these statutory or administratively set allowances are
2 considerably higher in the suburban counties than they are in
3 New York City. Indeed, as the record shows here, the average
4 rent received by welfare family of four in New York City is
5 \$84 a month. The plaintiffs here, who are single women, just
6 one person, are getting \$105 or \$108 a month, if my memory
7 serves, over \$100, in any event, and in Nassau County the
8 record indicates that the maximum permissible payment for a
9 family of four is \$155 or \$160 a month, depending on whether
10 it is an apartment or a private house. But that is almost
11 double the average that is received in New York City. This is
12 due to rent control and, I suppose, to the larger amount of
13 apartments available in New York City and the general squeeze
14 in housing in the suburban counties which have grown so
15 rapidly over the past years. But, in any event, whatever the
16 reasons, when discussing the actual benefits or allowances
17 received by welfare recipients, of which shelter is obviously
18 one of the basic components, you have got to look not only at
19 the welfare allowance, which doesn't include shelter, but also
20 at the cost of shelter, which is also paid by the Commissioner.
21 And since the costs of rental are so much less in New York
22 City, it averages out so that in fact these plaintiffs and
23 others similarly situated in Nassau and Westchester Counties,
24 are actually receiving as much money or perhaps more than
25 people in New York City.

1 Unfortunately, the record doesn't --

2 Q What is the amount allowed for fuel oil or
3 heating oil, or whatever heat they use?

4 A Well, I am lumping that in with shelter. Fuel
5 for heating is paid separately, but in many cases there is no
6 separate item for that. For example, typically a welfare re-
7 cipient lives in an apartment where there is central heating
8 and so that wouldn't come up. Or even if a welfare recipient
9 rented a house, there might well -- or an apartment in a house
10 or something like that, there might well be central heat.

11 Q But not necessarily?

12 A Not necessarily.

13 Q It is shelter and heat, isn't it, that is paid
14 separately?

15 A Yes, sir. Yes, sir. But the heat is a
16 diminimus item, it doesn't exist in most cases. In any event --
17 well, we unfortunately don't have in the record full statistics
18 on the total aggregate amount of rental money and fuel for
19 heating paid in New York City vis-a-vis what is paid in the
20 suburban counties. The record does indicate that the average
21 rental for welfare recipients in New York City is so much
22 lower than these plaintiffs in particular received, or that the
23 maximum permitted in Nassau County and Westchester County is
24 -- the record indicates plainly that far from being discrimi-
25 ated against or receiving less money when shelter is

1 considered, as it certainly should be, they are coming out just
2 as well as a person in New York City.

3 But, over and above that, the claim here is of a
4 violation of the Equal Protection Clause and also of the Social
5 Security Act and regulations thereunder. And the court below,
6 we submit improperly, and certainly improperly in the light of
7 this court's opinion in Danbridge, bypassed completely the
8 Social Security Act and regulation claim, and instead of
9 veering away from the constitutional issue, as the court is
10 supposed to, it in effect veered toward it and it went out of
11 its way to determine the constitutional question adversely to
12 the state, as it happens, and we submit that reversal is re-
13 quired on that ground alone, over and above everything else.

14 This statute has to be viewed, whether we talk of
15 equal protection or the statute and regulations, in the context
16 of a statutory scheme in New York State which traditionally
17 treats New York City as sui generis, and indeed New York City
18 is a special case. It is the urban megalopolis par excellence,
19 it comprises half the people in New York State and indeed more
20 than half of the welfare recipients, three-quarters, as the
21 record states, and throughout the statutes in New York we see
22 special treatment given New York City far in excess, I am
23 sure, of the special treatment given Chicago or Baltimore or
24 Philadelphia in the statutes of those states.

25 Indeed, this Court itself, in Salsburg vs. Maryland,

1 remarked, quoting an earlier case, Missouri vs. Lewis, a 19th
2 Century case, that it would be permissible under the Equal
3 Protection Clause for New York State to apply the civil code,
4 the civil law to New York City, and the common law to the rest
5 of the state if it wanted to.

6 Now, that sounds like hyperbole, but this Court said
7 it, and it quoted it in Salsburg vs. Maryland, which is a case
8 from the 1950's. The fact is that New York City is different,
9 it is unique, and the Legislature has to be presumed to be
10 aware of that. There are briefer bounds and specific examples.

11 For example, the multiple dwelling law, which pre-
12 scribes all kinds of requirements for apartment houses, only
13 applies to New York City. There is a multiple residence law,
14 which is entirely different, which applies to apartment houses
15 outside New York City. As this Court knows well from the
16 Baldwin case, which is before it, the entire structure of the
17 penal law, the Code of Criminal Procedure, is different in New
18 York City, and indeed this Court has before it the question of
19 whether New York State can permissibly within the Equal
20 Protection Clause give jury trials to misdemeanors outside
21 the city and not have them in New York City.

22 Now, whatever the rights and wrongs are there, it is
23 again illustrative of the fact that the New York Legislature
24 has traditionally treated New York City as a very, very dif-
25 ferent thing from the rest of the state. Now, when we look

1 at section 131-a, we don't see the enormous difference that we
2 find in these areas, where you are talking about giving jury
3 trials in one place and not somewhere else, or having stringent
4 requirements for multiple dwellings in New York City and not
5 having them in the other counties of the State.

6 We are talking here about a very slight \$5 a person
7 differential, which the Legislature, as I have said, has to be
8 presumed to be aware of the specific local conditions, saw fit
9 to provide as a benefit to compensate for the higher social
10 cost of urban living, which the New York City welfare recipi-
11 ents have to endure.

12 The question here, as this Court said, is whether the
13 grounds adopted by the Legislature are wholly irrelevant to the
14 state's objective. And unless the court can say that they are
15 so wholly irrelevant, then it plainly has to reverse, it
16 appears.

17 Now, let's look at the grounds. These grounds are
18 specific and factual. They are not policy grounds, and yet in
19 Dandridge this court saw fit to declare that the maximum family
20 rule in Maryland, which created a real difference, a sizable
21 difference in the amount of welfare benefits received by indi-
22 viduals, depending on whether or not they were in a large
23 family, it held that that was a permissible exercise of
24 Maryland's legislative discretion, based solely on Maryland's
25 policy grounds. Now, here we don't have policy, we have

1 actual factual material.

2 For example, we have the rent control and the actual
3 lower rent within New York City, which I have already alluded
4 to. In addition, as the record shows, and a study on housing
5 in New York City shows, because of rent control and because of
6 the antiquity of much of the housing in areas where welfare
7 recipients live, there has been an enormous deterioration in
8 the quality of that housing, and realistically the Legislature
9 was entitled to find that this entails the purchase of items
10 necessary to maintain this deteriorated housing, which might
11 not exist in a suburban area.

12 In addition, you have the crime rate within New York
13 City. Now, the statistics again are in the record and are
14 set forth within our brief, show that the amount of crime and
15 the amount of violent crime specifically are far higher within
16 New York City per capita. And, once again, the Legislature
17 has to be presumed to be aware of these factors, and it has to
18 be presumed to be aware that the higher crime rate, which
19 unfortunately strikes people the hardest who live in the areas,
20 the ghetto areas and low-income neighborhoods, where the wel-
21 fare recipients for the most part are obliged to reside. This
22 necessitates taking a taxicab at night home, it necessitates
23 buying locks, replacing stolen goods, replacing stolen monies,
24 replacing stolen welfare checks. It is true that New York
25 City does permit stolen welfare checks to be replaced, if they

1 are reported, but certainly not every stolen welfare check is
2 reported, and stolen goods and monies undoubtedly are not
3 reported in the majority of cases. Window gates and bars and
4 other devices that are necessitated by the high crime rate
5 are simply a fact of life to a New York City slum dweller, and
6 it is no doubt debateable whether the Legislature should give
7 more money within its standard of need to compensate the New
8 York City welfare recipient for these problems. But once we
9 concede that it is debatable, then the Equal Protection Clause
10 doesn't apply and it simply becomes a matter of what the three-
11 judge court below did, in our judgment, in substituting its
12 views on policy for the Legislature's discretion in coping with
13 the realistic problem before it, what this Court characterized
14 in Dandridge as the -- I am paraphrasing the Court, but the
15 extraordinary difficult problem of apportioning or parceling
16 out to welfare recipients all of whom obviously need whatever
17 the state can afford to give them, precisely how much the
18 state can give this one and that one. And here we repeat that
19 the differential was extremely slight, compared to the family
20 maximum which this Court sustained in Dandridge.

21 Another factor which the Legislature, since it
22 enacted this act, had to be aware of is the sales tax, and New
23 York City has a 6 percent sales tax, 3 percent state, and an
24 additional 3 percent imposed by the city. The 3 percent state
25 sales tax applies to the state law, of course, but in Nassau

1 County, the county tax is only 2 percent. In Westchester
2 County, except for one city, the City of Yonkers, there is no
3 county tax at all. This means -- and in the other suburban
4 counties there is no county tax or city tax at all -- this
5 means that, on items other than food which the welfare re-
6 cipient has to buy, clothing and household appliances and the
7 like, for the expense that this additional 3 percent vis-a-vis
8 a Westchester County resident, or 1 percent vis-a-vis a Nassau
9 County resident sales tax applies, that in and of itself makes
10 a difference.

11 In refer the Court in our brief to the fact that the
12 Internal Revenue Service, in its tax forms for the year 1969,
13 saw fit to recognize that for a family with an income of be-
14 tween \$4,000 a year, which is the income of the family of
15 four on welfare in New York, the sales tax allowable under the
16 suggested permissible allowances for its sales tax deduction
17 on income tax is \$92 for New York City for a family of four
18 with that income level, and only \$46 in Westchester County.
19 Now, right there you have got a \$4 a month differential, and
20 we are suggesting that this is necessarily binding on the
21 Legislature or that they have to abide by that, but once we
22 concede that it is a debatable point, then we have left the
23 Equal Protection Clause far behind in the area of legislative
24 discretion.

25 Q Let's assume, Mr. Weinberg, that you are quite

1 right and that, based on the factors that you have been dis-
2 cussing and others, that we have left the Equal Protection
3 Clause far behind, in light of the Court's recent decision in
4 the Dandridge case. Still that doesn't get you out of the
5 woods in this case, does it?

6 A No, sir, because we have the statute --

7 Q You have the statute and you have the amicus
8 brief filed here by the Secretary of H.E.W., telling us that
9 the statutory ground is a good ground.

10 A Well, I would like to get to that --

11 Q I trust you are, but --

12 A I certainly will. It is interesting to learn
13 of an administrative policy when you pick up a brief that is
14 filed in this court.

15 Q Yes.

16 A We weren't aware of this administrative policy.
17 The letter said by the Regional Commissioner of H.E.W., Mr.
18 Callison, to Commissioner Wyman back in November, said that
19 while there was a differential, and they questioned that dif-
20 ferential, they said that to the extent that it could be
21 demonstrated that costs were different between New York City
22 and the other counties, that differential would be all right.

23 Now, Commissioner Wyman didn't reply to the letter
24 from the Regional Commissioner, because of the pendency of
25 this law suit. The Commissioner invited Commissioner Wyman to

1 indicate what the factual bases were for the slight differen-
2 tial in favor of New York City welfare recipients. And, as I
3 have said, because of the pendency of this litigation,
4 Commissioner Wyman didn't reply and that was where the matter
5 lay until last week when I got the government's brief and I
6 was interested to learn that they have a consistent adminis-
7 trative policy in this area. This was fascinating because, not
8 only has New York City paid a different amount over the years,
9 long before the adoption of this section, they had, as we
10 have indicated, three separate areas within the state, but as
11 I learned in the Dandridge case, the City of Baltimore pays
12 \$10 a month more than the rest of Maryland -- I should say the
13 State of Maryland pays people in Baltimore \$10 a month more --
14 and, as we discovered in our research and set forth in our
15 brief, the State of California has a whole crazy quilt of
16 amounts paid that varies with the contribution that the
17 county wants to make, and there are enormous differences. And,
18 of course, once we look beyond state borders and we start
19 looking at what happens between one state and another state,
20 then the differences become enormous, and without even discuss-
21 ing the differences in welfare rate between the states like
22 New York and the southern states, right on the northeastern
23 states the standard of living is about the same as the states
24 you pass through, taking the train from New York to Washington,
25 you will see that the level of payment in Wilmington, Delaware,

1 where the standard of living can't be very different from New
2 York City or Philadelphia, the welfare payment is about half
3 of what it is in New York City. And in Philadelphia, it is a
4 lot lower than it is in New York City.

5 So since the federal government is specifically --
6 the Department of Health, Education, and Welfare, the agency
7 that is supposed to administer all of this and try to make it
8 a semblance of order, it appears to us that they are straining
9 when they get all excited about \$5 a month between New York
10 City and the suburbs around it and they are perfectly willing
11 to let all the rest of this go by.

12 Q Well, you don't understand, do you, that the
13 Department of Health, Education, and Welfare is claiming it to
14 it to be a denial of equal protection to have different rates
15 in all of the thousands of counties in the United States?

16 A Well, H.E.W., Mr. Justice Black, resisted the
17 urge to talk about equal protection and they confined them-
18 selves to the statute and the regulation, although they said
19 quite astonishingly, I think, that the regulation went further
20 than the Equal Protection Clause, and that struck me as odd,
21 and I think it would strike anyone as odd who looks at it.
22 The regulation simply says there has to be a statewide standard
23 of need, which New York concededly has, and is admitted by
24 H.E.W.

25 Q You are not arguing now -- you ought to know,

1 as a matter of personal knowledge, that a man can live just as
2 cheap in one part of the United States or one part of any state
3 as he can in any other. They are not claiming that, are they?

4 A Mr. Justice Black, they appear to be saying
5 that the use of the words "objective" and "equitable" in their
6 regulations require the state to pay the precise mathematical
7 same figure in every part of the state unless they can come
8 forward and show that there is a demonstrable difference. Now,
9 we maintain that we are doing that. We are showing that there
10 is a demonstrable difference.

11 Q You say in some states, you said, what about
12 all the states?

13 A Well, that is precisely why I say they are
14 straining here.

15 Q They defend the difference between the cost of
16 living in one state and another?

17 A Well, I can't speak for them, Mr. Justice Black.
18 They don't say anything about that in their brief. All they
19 say is that they want New York State to pay the precise same
20 dollar amount throughout the state, otherwise they are violat-
21 ing the regulation which talks about an objective and equit-
22 able standard.

23 Q All over the same?

24 A Unless it can be demonstrated that there is an
25 objective difference. Even that, which their own regional

1 commissioner, Callison, said they appear to be backing away
2 from, because when you read their brief, they seem to require
3 a mathematical precision in payments throughout the state.

4 Q But the statute says a statewide standard,
5 doesn't it?

6 A Yes, sir. There is a statewide standard of
7 need, but that doesn't mean that the dollar amount paid through-
8 out the state has to be identical.

9 Q Well, that is where you apparently are getting
10 into an argument with H.E.W.

11 A Yes, sir, the regional commissioner conceded, in
12 his letter of November 10, 1969, which is appended to their
13 brief, and it is in the appendix and it is appended to the
14 plaintiff's brief as well, they said in there that there is a
15 demonstrable difference, then we are not violating that regu-
16 lation or the statute. And throughout the years we've had
17 three different standards, varying between New York City and
18 the suburban counties, which used to be lumped together until
19 1969, then a batch of upstate counties and then another group
20 of upstate counties. Now, apparently that was allright with
21 H.E.W. Maryland giving people in Baltimore \$10 a month is
22 allright with H.E.W. The variations as between the states,
23 which are paid for half by federal money are all right --

24 Q I read the whole thing differently. Perhaps
25 I am wrong. The statute requires a standard, a statewide

1 standard, and you can show in every case the existence of actual
2 needs that will permit a variation from a standard, so I don't
3 think there is anything inconsistent necessarily between --

4 Q Well, H.E.W. doesn't insist that the dollar
5 amount paid has to be the same in every county.

6 A Well, the regional commissioner didn't insist
7 on it. As I read their brief, I am a little unclear as to
8 whether --

9 Q I read it as indicating that there must be a
10 statewide standard as to what the need is, but you can show
11 to satisfy the need the cost of living in one county and
12 another that there could be differences in money amounts paid.

13 A Well, I would like to read their brief that
14 way, Mr. Justice White, and if we can read it that way, then I
15 think with all due respect that New York is home free, because
16 we have shown that there is that demonstrable standard, at least
17 it is debatable and, once it is debatable, that regulation
18 certainly can't impose any greater requirements on New York
19 than the Equal Protection Clause. It gives us words like
20 "objective" and "equitable" and that can't mean anything more
21 than the Equal Protection Clause means.

22 Q I know, but I suppose H.E.W. could say to you,
23 well, it sounds like you have got a statewide standard, but
24 somehow or other you have different amounts and you haven't
25 got any evidence that there is difference in costs, so there

1 must be a difference in the standards.

2 A That appears to be what they are saying. When
3 you look at the reasons for the slight differential in favor
4 of New York City, we see that the Legislature in fact had
5 valid reasons. It had the deterioration of housing, the higher
6 crime rate, the higher sales tax, and one which was testified
7 to by the commissioner, which I didn't get to yet, and namely
8 the fact that the vast bulk, the overwhelming preponderance of
9 welfare money is paid under the AFDC program, and that means
10 that most welfare recipients in New York, as in other states,
11 have children. And where the social cost of urban living hits
12 home is to the child on AFDC living typically in New York City,
13 unfortunately in a tenement in areas remote from the park.
14 As our brief indicates, there are huge areas in Bronx County
15 particularly which have a high number of welfare recipients,
16 where there are simply no park around for miles, this neces-
17 sitates the parents taking the child on public transportation
18 and bringing him to a park or to the zoos and museums and
19 aquariums and other facilities, features which are available
20 in New York City, and which are part of urban living.

21 Now, in the suburbs we are not about to suggest that
22 life in the suburbs where the AFDC child lives is rosy, but
23 there is no room around and the Legislature had a right to
24 find that a child on welfare in Nassau or Westchester County
25 is a lot more apt to have some kind of vacant lot around than

1 a child in a tenement and haul them over to South Bronx, and
2 also the zoos and beaches and so on, which exist in New York
3 City, are simply inaccessible in Nassau County, so this is
4 another item which the Legislature in its discretion had a
5 right to consider.

6 We are not saying that every Member of this Court,
7 or indeed any Member of this Court has to necessarily agree
8 with what the Legislature said in every one of these instances,
9 or any of these instances. But there has to be an ambit or a
10 scope of legislative discretion, and these are factual things
11 here. They are not policy things, such as Maryland advanced
12 successfully in the Dandridge case. These are factual things
13 which the legislature and the commissioner who has the
14 expertise and the corps of civil service people, the staff to
15 administer this program, have to be presumed to be aware of.

16 Now, the Commissioner --

17 Q Now, you're back on the constitutional argument.

18 A I think they meld or dovetail, Mr. Justice
19 Douglas. The standard and the regulation is objective and
20 equitable, and when one reads that together with the statute,
21 which speaks of the statewide standard of need, I think we are
22 roughly in the same territory as the Equal Protection Clause
23 which says that there has to be a rational standard for the
24 legislature.

25 Q I don't know if the equal protection was held

1 in that and, furthermore, the fact that you're roughly equival-
2 ent doesn't mean that you are there.

3 A Sir, I agree, but I think that where the
4 legislature has the demonstrable standard, the very language
5 that the regional commissioner of H.E.W. talked about, that
6 both under the equal protection and the test under the regu-
7 lation is objective and equitable, there exists an adequate
8 ground for the differential. But we note that the three-judge
9 court didn't look at it that way at all. They bypassed the
10 statutory and regulatory grounds and, as we have indicated,
11 they veered toward the constitutional grounds, so right off
12 the bat it would appear that the sweeping injunctions granted
13 below have to be reversed, but we submit that a remand for
14 the purpose of considering the statutory and regulatory ground
15 wouldn't serve any useful purpose here, because the scope or
16 the ambit of discretion within which the state legislature
17 is allowed under that test seems to be about the same as the
18 government in effect says in its brief, as under the equal
19 protection clause, and as their commissioner has said, to the
20 extent that there are demonstrable differences, the differen-
21 tial will be justified, as indeed they have justified differ-
22 entials in New York, Maryland, California and, for all I know,
23 in other states over the years.

24 Q What does the government mean by "discretion"
25 and "presents," whether the New York State plan for public

1 assistance improperly favors residents of New York City over
2 residents of other areas of the state?

3 A They appear to be saying, sir, that there were
4 no objective standards under which the Legislature pays a dif-
5 ferential to people in New York City who are on welfare.

6 Q What do they mean by "improperly favors"?

7 A Well, they are suggesting that it is discrimin-
8 atory or that it is invidious.

9 Q Over New York City residents and in other parts
10 of the state. Why do they say it does?

11 A I am not sure I follow you, Your Honor.

12 Q They say on the question presented, one of
13 them is that New York State improperly favors residents of New
14 York City over residents of other parts of the state. What is
15 the basis for that question presented?

16 A The statute which says that there has to be a
17 statewide standard of need and the H.E.W. regulation which says
18 that the standard of need and the amounts paid have to be
19 objective and equitable throughout the state.

20 Q It seems to me, from what you say, they are
21 claiming that it shouldn't be just one rate for New York City
22 and one state for any other part of the state. Is that right?

23 A I think they are saying that to the extent that
24 we can demonstrate that there is a valid reason to pay people
25 in New York City more, then we don't violate the statute or

1 the regulation. To the extent that we do show valid reason,
2 then we do violate their statute and their regulation. But
3 the --

4 Q You are saying on this record that you have shown
5 that there is a valid basis for a difference, from the cost of
6 living and inflation.

7 A Exactly, sir. And, over and above that, we
8 point out that the injunctions granted below are not granted
9 on the statutory ground, which the three-judge court saw fit to
10 ignore. They were granted on the constitutional grounds and
11 the way they phrased their order, they are broader than what
12 this court permits. They permitted under the Rosado case, for
13 example, in issuing an injunction where the only ground is
14 statutory and not constitutional. The most this Court did in
15 Rosado, where there was a violation found of an act of Congress,
16 was to remand the case back to the district court to give New
17 York State the choice of letting federal funds go or of re-
18 drafting their statute. And we submit that the three-judge
19 court below didn't do anything like that, for the good reason,
20 or at least for the reason that they didn't take the statutory
21 route; they took the constitutional route. And for this reason
22 I think this Court can pass on both the constitutional ground
23 and the statutory ground and find that, as this Court said in
24 Dandridge, that there isn't anything special about welfare
25 statutes which requires a more rigorous constitutional standard

1 to be employed, as in cases involving racial discrimination,
2 the right to vote or the right of freedom of speech. Dandridge
3 certainly laid that argument to rest and that is the keystone
4 of the whole argument adopted by the three-judge court, and I
5 think once we remove that keystone there is not much left to
6 support those injunctions. The statute and regulation they
7 never even considered, so at the very least the remand is re-
8 quired, but we go further than that and we say that the
9 complaint should be simply dismissed and the summary judgment
10 should be granted in our favor because the requisite demon-
11 strable differences have been shown to exist. And whether we
12 are talking about equal protection or the statute or the regu-
13 lation, New York State has demonstrated that it had a demon-
14 strable reason, a rational basis for the determination that
15 the Legislature made, and I should add the determination that
16 the commissioner made in which he reduced the size of the dis-
17 parity to approximately half.

18 Q We are dealing here with injunction, aren't we?

19 A Yes, sir, we are.

20 Q And if it should be -- if we should think you
21 are mistaken and that the preliminary injunction should remain
22 in effect, then that would be followed by a preliminary hearing
23 and the purpose of which would be to decide whether or not
24 there ought to be a permanent injunction or no injunction at
25 all. Would that be true?

1 A That's correct, of course. But we submit that
2 the facts are basically before this Court and this isn't the
3 kind of a disputed issue or fact that lends itself to a trial,
4 although if the Court orders a trial, we would have one, I
5 suppose.

6 Q How do these facts get in? Is there an affi-
7 davit or a deposition?

8 A There was a deposition of the commissioner.
9 There was an affidavit of one of the men on his staff, and the
10 rest of the facts, which I think the Court can take judicial
11 notice of, such as the existence of rent control, the higher
12 crime rate, the sales taxes, and things of that nature. The
13 ones that the Court can't take judicial notice of, such as the
14 higher cost of living to the child on AFDC in the city, testi-
15 fied to by Commissioner Wyman and set forth in the affidavit
16 of Mr. Murphy, a member of Commissioner Wyman's staff --

17 Q Is the injunction directed at New York that it
18 not pay more to the residents of New York on the grounds that
19 it is more expensive to live in New York, as another part of
20 the thing?

21 A Well, it said that, Mr. Justice Black, and then
22 added the words -- and I am paraphrasing it -- "unless
23 objective criteria can be demonstrated," or something like that.
24 But, nevertheless, the injunction is in effect. And while the
25 injunction was issued by the three-judge court on a finding

1 that these plaintiffs weren't people on AFDC and therefore our
2 whole argument about children on AFDC didn't apply to these
3 disabled ladies who presumably don't want to go to the park
4 or the zoo and so on, they nonetheless permitted intervention
5 by people on AFDC, so that now the injunction applies to every-
6 one on welfare within those states.

7 Q Precisely what does the injunction order New
8 York to do which you object to?

9 A It orders New York to pay the same amount of
10 money to people in the suburban counties as to those in New
11 York City.

12 Q All over the state?

13 A No, in the suburban counties around New York
14 City, Nassau, Westchester and six other counties which the --

15 Q It names the counties?

16 A Pardon me?

17 Q It names the counties?

18 A Yes, it names the counties. Unless we can show
19 that objective criteria exists other than in accordance with
20 objective criteria.

21 Q Are you telling us in the whole framework your
22 argument, if you have that opportunity, you can't show any more
23 objective evidence than the record has already made?

24 A Well, if we have the opportunity we will try to,
25 Mr. Chief Justice, but we think that we have shown enough here

1 to set aside the preliminary injunction and to grant summary
2 judgment in our favor.

3 I would like to reserve the remaining time for re-
4 buttal, if I may, in hopes that we won't impose on the Court
5 tomorrow.

6 Q Would you mind telling me just summarily what
7 evidence did they offer to refute your affidavits?

8 A They showed that the actual cost of living of
9 individual items, a loaf of bread and a bottle of milk, were
10 -- and I suppose a pair of trousers and so on, that people
11 have to buy -- were the same in New York City as they are in
12 Nassau County, and that is not in dispute, they are.

13 Q How do you combat that proof?

14 A Well, we combat that, sir, by suggesting that
15 that is not the only thing that a welfare department has to
16 concern itself with in paying these allowances.

17 Q Does it include rent?

18 A Well, rent is separate, and we have indicated
19 that rent is higher in the suburban counties because of rent
20 control and because there is more housing available in New York
21 City. So rent is entirely different, but of the factors out-
22 side of shelter, the essence of their proof is that bread and
23 milk and so on, clothing, specific items, a toaster, cost the
24 same in New York City as they do in Nassau County, and we have
25 no quarrel with that, because we don't think that that

1 resolves the case. We certainly don't think that in and of it-
2 self demonstrates that the Legislature was so irrational in
3 seeing fit to give these people in New York City \$5 a month
4 per person more.

5 Q How do you think that either one can prove with
6 precise definiteness the difference in cost of one family
7 living in one of those places, living in one place or the
8 other?

9 A I don't think a group of elements like that
10 lends itself, a whole configuration of factors lends itself to
11 a precise computation. I think this is like, let's say, a
12 negligence case or a case where you have to appraise the value
13 of a piece of property. The Legislature has a right at its
14 discretion to consider a lot of factors, some of which aren't
15 very tangible and some of which are very difficult to put a
16 dollar and cents sign on.

17 Q Are you raising the question that the court is
18 not the proper one to consider, to try to make a final and
19 definite judgment on those differences?

20 A The court would give the proper -- the court
21 would be the proper forum if we transgress the equal protection
22 clause. For example, if we pay people of one race more than
23 people of another race, or if we did something that was so
24 totally out of line that there was just no way to justify it,
25 like paying people in New York City three times what we paid

1 people on Long Island. But so long as we are in the area of
2 the slight differential, and so long as we have come forward
3 with cogent reasons for what we did, we say that the Equal
4 Protection Clause is satisfied, and these standards set forth
5 in the regulations are satisfied. Consequently, the injunction
6 should be set aside and this complaint should be dismissed.

7 I haven't touched on the unrichness of this case as
8 set forth in our brief, and I will refer to it on my rebuttal
9 time, if I may.

10 Thank you very much for the opportunity.

11 MR. CHIEF JUSTICE BURGER: Mr. Sparer?

12 ARGUMENT OF EDWARD SPARER

13 ON BEHALF OF APPELLEES

14 MR. SPARER: Mr. Chief Justice, may it please the
15 Court:

16 In the briefs and in the argument just made this
17 moment, the appellants have engaged in various reasoning,
18 various speculations as to possible differentials between the
19 cost of living in New York City and the cost of living in the
20 surrounding counties.

21 I hope to examine those speculations in as much de-
22 tail as time permits in the latter half of my argument.

23 Q Do you think that -- to pursue Justice Black's
24 question -- do you think that these factors, taken as a whole,
25 are susceptible of precise mathematical proof?

1 A Yes, Your Honor, it is susceptible to precise
2 mathematical proof as to what the cost of living of the items
3 and the basic needs schedules of New York State or of New York
4 City and the surrounding counties, and to demonstrate that --

5 Q You are saying, then, in effect, that it is
6 inevitably the same?

7 A We are saying that, in fact, it is the same,
8 not inevitably the same, not at all. It could be different.
9 And if the proof were, and there are cost of living studies
10 conducted all of the time by the Bureau of Labor Statistics,
11 which was introduced below, by the New York State Welfare
12 Department, which study was introduced below by the various
13 local social service agencies, such as the New York City
14 Social Service Department, the Nassau Social Service Department,
15 and the Westchester Social Service Department --

16 Q Do they agree?

17 A They all agree.

18 Q They all agree?

19 A They all agree that the cost of the basic
20 items, the food, clothing, furnishings -- I will withdraw that
21 furnishings -- the schedules of the local social service
22 agencies show that household furnishings are slightly more
23 expensive in the suburban counties than they are in New York
24 City. But there is a conclusion on this subject which the
25 appellants have made, and which is very, very pertinent to

1 the question. Your Honor is raising with me and was raised by
2 Mr. Justice Black a moment ago. Unfortunately, this conclusion
3 was published too late for citation in our brief. It was
4 published in the 103rd Annual Report of the New York Social
5 Service Department, and the New York State Board of Social
6 Welfare and Appellant Wyman on April 9, 1970, and I quote from
7 page four of the appendix to that brief, which is a report
8 dated November 21, but which was not made publicly available,
9 at least to us, until the time this was released, after our
10 brief was written, and it says this, and I think it is right
11 at the heart of the statutory issue in this case --

12 Q Are you going to supply that to us?

13 A Yes, I would like to do that very much, Your
14 Honor. I will quote the relevant two sentences: "We have
15 considered evidence concerning the cost of living" -- these
16 are the appellants speaking in their 103rd Report -- "We have
17 considered evidence concerning the cost of living in different
18 regions of the state and recommend that there be one statewide
19 schedule of monthly allowance for all basic items of need,
20 exclusive of shelter costs. The evidence presented to us in-
21 dicates that the major source of differentials in the cost of
22 living is shelter cost, which is not included in the flat
23 grant, and the effective variation in other items of basic
24 need for different regions results in approximately the same
25 total cost of living for households comprised of the same

1 number of persons in all such regions." This goes considerably
2 beyond our case. We are simply talking about the suburban
3 counties.

4 Q What has the Legislature itself provided with
5 reference to the differences in different studies?

6 A The Legislature, so far as we can determine,
7 Your Honor, has considered no cost of living studies whatsoever.
8 The Legislature has simply cited, in the second amended version
9 of 131-a, that is the version presently in effect, not the
10 version which was in effect when the case began, and not the
11 version which will be in effect on June 1, when the Rosado
12 attempt at compliance will go into effect. The Legislature
13 has found and stated in its findings that it finds as a fact
14 that the cost of living in urban areas is greater due to the
15 higher social complexity of living in those areas due to the
16 higher complexity of utilizing programs, services and facilities.
17 ties.

18 This was the reason -- the reason given by appellant
19 Wyman to the court below, a reason I would like to examine in
20 some detail because I think --

21 Q This according to you does not make such a
22 difference?

23 A Oh, I misunderstood Your Honor's question.
24 The Legislature fixed a statutory scale which reflects a cer-
25 tain difference between New York City and the rest of the

1 regions, and then it instructed the commissioner, appellant
2 Wyman, to adjust the scale for the other regions if he finds
3 that the cost of the items which comprise the basic needs in
4 the other regions differs, is more or less. And appellant
5 Wyman, in the one opportunity he had to act prior to the
6 injunction in this case did so act, did narrow the differen-
7 tial set initially in the legislative maximum, as he was per-
8 mitted by the Legislature, but did not narrow it sufficiently.
9 He leaves a 7 to 16 percent gap in the total amount of the
10 differential, which we consider is not slight at all but of a
11 very, very serious consequence to welfare recipients.

12 Q That is quite a job, isn't it?

13 A That is quite a job. It is quite a job, and
14 it is a very difficult job, and the evidence indicates that
15 the cost is the same. There have been, since the inception of
16 this case, two issues, the constitutional issue and the
17 statutory issue.

18 The appellants just before made what I consider the
19 rather surprising statement that we were unaware of the admin-
20 istrative policy which led H.E.W. to the conclusion that it
21 stated in its brief -- I think that this case can be decided
22 on the probabilities that is the issue before the Court,
23 whether the preliminary injunction can be affirmed, should be
24 affirmed, can be decided on the probabilities of success of
25 plaintiffs in the statutory argument, and I think the reason

1 for surprise on the part of appellant surprises me. There are
2 several outstanding features of this case with regard to the
3 statutory argument.

4 First, there are three courses of action -- four
5 courses of action set forth in the complaint of this case. The
6 first three deal purely with the statutory grant. Secondly,
7 of two briefs submitted to the lower court by the appellees on
8 the substantive issues, one dealt almost exclusively with the
9 statutory issue. We were, in fact -- it dealt with it at some
10 length, at greater length than our brief deals with it before
11 this Court, as we were quite wordy then.

12 Third, the court below, there are only two pages of
13 its opinion to the statutory issue, which didn't conclude on
14 the statutory issue but believes its duty was to defer to
15 H.E.W. But it devoted two pages in what is an obviously
16 sympathetic consideration of plaintiff's position.

17 Q Was the court wrong on that?

18 A I would conclude, on the basis of the majority
19 opinion in Rosado, that the lower court was wrong, Your Honor.

20 Q Well, what should it have done?

21 A Considered the statutory argument, invited
22 H.E.W. to submit an amicus brief and its views and attempted to
23 see if the --

24 Q And not reached the constitutional issue if
25 there was a conflict?

1 A Absolutely, Your Honor. And I urge that this
2 Court decide whether or not the preliminary injunction should
3 be affirmed on the basis of whether or not the statutory issue
4 can be evaluated at this stage, and we think it can.

5 Q You mean on this record we can evaluate it?

6 A Oh, I think it is clear, Your Honor. I think,
7 in addition to the facts I have already cited, you don't --

8 Q You don't think the disposition of Rosado is
9 indicated here?

10 A Excuse me, Your Honor?

11 Q The disposition we made in Rosado you think is
12 not indicated for this case, on the statutory grounds?

13 A I am not sure I properly understand Your Honor's
14 question.

15 Q Well, we sent it back for a remand, didn't we,
16 in Rosado?

17 A You sent it back for a remand after you con-
18 cluded that the New York State standard of need as adjusted by
19 131-a violated section 402823, reached the same conclusion
20 here with regard to the difference in the use of the differen-
21 tials, there is the proper basis for affirming the preliminary
22 injunction, which is what is before the Court.

23 Q You don't think, even if we finally resolve the
24 statutory issue, just say that there is enough likelihood of
25 success on it to justify the preliminary injunction?

1 A I think that in light of what the appellant's
2 argument is, they have nothing further to say on the statutory
3 issue, you could finally resolve but I don't think you have to.
4 I think you can simply state that there is enough probability
5 there to reach a conclusion.

6 I note that the appellants have stated both in their
7 reply brief and before the Court just a moment ago that the
8 statutory issue is the same as the constitutional issue on
9 equal protection --

10 Q Not quite. Not quite. He said, as I understood
11 him, that there was a certain amount of overlap.

12 A Well, Your Honor, as I understand their posi-
13 tion, which I may have misinterpreted his oral statement, but
14 their brief is quite clear, plus whether --

15 Q What are you reading?

16 A I am quoting from page 13 of the reply brief --
17 plus whether the Constitution, the Social Security Act or the
18 H.E.W. regulations be considered, the touchstone is in any
19 case whether the differentials are arbitrary. If they meet
20 the test of rationality under the equal protection clause, they
21 cannot reasonably be held violative of anything in the Act or
22 regulations. That is their argument. I think that is in error.
23 I think it is quite clear, as we consider the H.E.W. regula-
24 tions, that one can arguably meet the test of minimum ration-
25 ality under the equal protection clause and not meet the

1 requirements of the regulation. I think that is very clear.
2 And with your permission I would like to move on to the con-
3 sideration of the regulation.

4 The regulation embodies four related requirements,
5 which are best understood when considered together. First,
6 the regulation and the H.E.W. material require that the stand-
7 ard of need, the standard of need, which is composed of both
8 items of need and a money assessment of those items of need,
9 that the standard of need be statewide. That is, if the state
10 is going to recognize clothing needs in one part of the state
11 for recipients, it is going to recognize clothing needs in any
12 other part of the state where people need clothing. It must
13 be statewide, number one.

14 Number two, the standard -- the money amount estab-
15 lished by the standard must be set on the basis of objective
16 facts. That is an important part of the regulatory require-
17 ments.

18 Number three, the standard must be uniformly ap-
19 plied throughout the state unless objective facts show that
20 there is actually a variation in the cost of living, in the
21 cost of the items throughout the state; and, number four, if
22 the state can't afford to meet the full cost of the standard
23 of need, because of maximums, because of insufficient funds,
24 any reduction in meeting that full standard must be applied
25 uniformly.

1 The idea, as H.E.W. expresses it in its handbook, is
2 that recipients with similar needs, wherever they live in the
3 state, with similar resources, will get equal benefits.

4 Q New York City, it now immediately, by whatever
5 administrative process -- if New York City cuts back the level
6 to the level of these other areas, then you wouldn't be here?

7 A That is correct. That is correct. Neither
8 the court injunction or our argument requires that the stand-
9 ard go up for the recipients of New York City could come down,
10 but I call Your Honor's attention to the very consideration
11 this Court placed forward in the Rosado case. That is there
12 is a point, this Court argued, to an articulation of the
13 standard of need which reflects social realities and cost re-
14 alities throughout the state. There is a point, because if
15 that is going to be cut back, at least the people of the state,
16 the legislature of the state, should know how much cutback is
17 actually going on and how far short the state is falling.
18 That was the purpose of 402823.

19 I suggest to you that the state is free to cut New
20 York City back or move the suburban counties up, but it must do
21 so on the basis of a frankly recognized standard of need which
22 is in common to both of these places, and one which is also
23 effective by the --

24 Q Wouldn't they have to make some new objective
25 findings, or could they just take your brief and say, well, we

1 surrender and we cut New York City back?

2 A Well, Your Honor, the objective findings have
3 already been made by the appellant commissioner in his report,
4 and they have been made again, a gain and again, and they have
5 been made for years, that the cost of these items are the same.
6 They don't have to meet those costs, they can cut back, they
7 can pay a lesser percentage. But unless they come up with
8 some kind of objective showing, some kind of study, some kind
9 of consideration of the actual cost of these items, which shows
10 that the items vary in one region or another or are more or
11 less than one figure or another, they simply can't state that
12 New York City shall receive this amount and Nassau shall receive
13 some other amount.

14 I think what has taken place in this case is that
15 what the appellants have done, and done clearly in terms of
16 their argument, is establish a different standard of need, not
17 a different cost, but a different standard of need for New
18 York City than for the suburban counties. And if one examines
19 any one of the arguments that they put forth, that becomes
20 quite clear.

21 For example, the primary argument cited in the find-
22 ing by the Legislature relied on by appellant below is that
23 there is a higher cost of social living in New York City which
24 requires transportation to daycare centers, to welfare centers,
25 to beaches, museums, to clinics, and so forth.

1 Well, there was an examination of appellant Wyman on
2 this requested, and the results of that examination made quite
3 clear what took place. Let me cite two of these issues.

4 Question: Do recipients to your knowledge have a
5 need for transportation to the welfare centers in Nassau
6 County?

7 Answer of Appellant Wyman: I should imagine so, on
8 occasion.

9 Question: Approximately the same as recipients in
10 New York City?

11 Answer of Appellant Wyman: I don't know.

12 Question: No reason to believe otherwise?

13 Answer: No reason to believe otherwise.

14 Question: Are you aware of the daycare centers for
15 children in Nassau County?

16 Answer: Yes.

17 Question: There are?

18 Answer: There are some.

19 Question: And there are daycare centers for children
20 in Westchester County?

21 Answer: Yes.

22 Question: For those people who need to use them,
23 there are transportation costs involved?

24 Answer: Yes.

25 Question: To the extent that the transportation

1 systems cost more than New York City, the cost is more?

2 The evidence has already shown that the transporta-
3 tion costs more in Nassau.

4 Answer: That is correct.

5 What took place in this case and what is taking place
6 in this case is that the Legislature has seen fit to declare a
7 different standard of need to provide a differential which
8 allows the transportation costs to the welfare center, to day-
9 care centers, to beaches in New York City and not to do that
10 in Nassau, not to do that in Yonkers, not to do that in
11 Poughkeepsie.

12 We would assert on the equal protection issue, as a
13 basis of minimal rationality, and I note to this Court that
14 the court below decided not simply on the special scrutiny
15 standard, which was rejected in Dandridge, but on the basis of
16 the minimum rationality test as well, the traditional equal
17 standard protection test as well.

18 I would assert that it just doesn't make sense on the
19 basis of any common relation to experience to assert that the
20 mother in Yonkers or the mother in Nassau who has to pay more
21 to get her kids to a beach or to get to the welfare center
22 itself, or to get to a daycare center, should receive nothing,
23 while an allowance is provided for the mothers in New York
24 City, doesn't make sense. But the point --

25 Q Didn't the New York Legislature make a little

1 bit more about that, maybe not than you do, but than most of
2 us do?

3 A Well, Your Honor, this Court noted in Rosado
4 that speculation is the mode that is to be shunned, and I
5 would not engage in speculation as the motive, but I would cite
6 the brief for appellants on this issue, and I would call your
7 attention to page 38 of --

8 Q What page?

9 A -- page 38 --

10 Q Of what?

11 A Of the brief of appellants.

12 Q Thank you.

13 A What appellants argue at that point is that the
14 system created under section 131-a is kind of analogous to an
15 action grant program since welfare county officials are
16 empowered to make application for increased amounts on the
17 approval of the appropriate legislative body. They go on to
18 state this, which is really at the heart of the problem in this
19 case. They go on to state that this demonstrates the state
20 legislature's concern for their ability to pay of the various
21 welfare districts since they would be required to pay one-
22 quarter of any increase over the established levels.

23 I think that is what is going on in this case, Your
24 Honor. I think they are right in what they say there, that
25 the legislature was concerned with the ability of upstate

1 localities to pay their one-quarter of the welfare share. If
2 one looks into the H.E.W. regulations and the H.E.W. materials,
3 that problem is exactly the problem which the uniformity regu-
4 lations are aimed at, and were aimed at from 1935 on. It is a
5 very old regulation we are talking about here. And the reason
6 they were aimed at this problem from 1935 on is that the
7 general characteristic of public welfare in the United States,
8 far into the Social Security Act's passage in 1935, was that
9 each local county throughout the state paid exactly what they
10 pleased, whether they paid full need, half need, no need, the
11 variation was absolutely enormous. This was one of the major
12 problems. The reason the variation was enormous was that
13 welfare standards were dependent upon the locality's willingness
14 to raise the taxes, in many localities a great problem, as
15 H.E.W. properly interpreted the requirement that the states
16 financially participate in each locality throughout the state.
17 That requirement means that the state must financially partici-
18 pate to the extent necessary to relieve a locality of any
19 problem it has in meeting a uniform schedule. The state must
20 put in enough money to make sure that a uniform schedule is met.

21 Now, if New York State is permitted to retreat on
22 this issue, would allow localities to have a lower standard,
23 because of the problems they have in raising taxes, and New
24 York has decided that they are going to pay one-quarter of the
25 total share, we are taking a very long step back to the pre-

1 1935 situation. This is what motivated the H.E.W. regulation.
2 This is the real interest of welfare recipients in this case
3 throughout the country. And I would argue, in answer to Mr.
4 Justice Stewart, to your question, don't you think the legis-
5 lature knows better than we -- the legislature may or may not
6 know the local conditions better than anyone else. I don't
7 think this case raises that issue. I think this case raises
8 the issue of whether or not the legislature has in fact created
9 a disparate standard of need for these localities, because of
10 their financial problems, and that is what has taken place.
11 It is exactly what has taken place.

12 Q The local county has to raise what percentage?

13 A 25.

14 Q 25 percent?

15 A 25 percent.

16 Q And the state the other three-quarters?

17 A The state another 25 percent and the federal
18 government about 50 percent. Those are the approximate figures.
19 25 percent is a considerable figure. That is not the way the
20 system works around the United States, but in those states
21 where the localities have to pay a large share of the local
22 welfare burden, welfare is a very hot and difficult political
23 issue. It just follows as day follows night, and night follows
24 day.

25 The same problem, Your Honor, with regard to the

1 creation of a different standard of need as seen when we con-
2 sider any of the other arguments asserted by appellants. For
3 example, rent control arguments, what do they say here? They
4 say that there is rent control in New York City and not in
5 some of the other counties, but of course there is. But let's
6 assume that that is accurate. Therefore, there is lower rent
7 in New York City than in some of the other counties; therefore,
8 the amount of money given to the special rent grants in New
9 York City to the welfare recipients is less than that given to
10 welfare recipients in the other counties; therefore, it is
11 proper for the legislature to make this up to New York City
12 recipients to some extent so that they can buy some other
13 things, by giving them a little extra money. This is said
14 right on the button in their brief. They make no bones about
15 it in their reply brief. Initially, it seems we misunderstood
16 their argument and in their reply brief they come right back
17 and say we misunderstood what they are saying; thus lower
18 rents within the New York City area --

19 Q What do you mean --

20 A -- paid to --

21 Q Where is that?

22 A Of appellants' reply brief, at the very top.

23 Thus lower rents within the New York City area
24 directly result in a lower standard of need and high rents
25 outside the city and a higher standard of need compensating

1 for the slightly higher allowance within the city for com-
2 ponents of the standard of need other than rents. They start
3 with the fact that rents are paid specially according to
4 actual need and are not part of the basic need requirements,
5 which is what is at issue in this case. Then they state that
6 we give more rent because the people upstate have more rent
7 need, so they give more money which goes into rent and then
8 they state we will give some extra to New York City so that
9 they can buy some other things. Well, that is establishing
10 another standard of need for --

11 Q Well, do you think it is a denial of equal pro-
12 tection to give more rent to the urban -- to the suburban people
13 than to the urban people?

14 A No, Your Honor, not in the way you phrased the
15 question.

16 Q Well, that is what the question is.

17 A I would phrase the question --

18 Q I was telling you the way it is. I was taking
19 your statements of facts.

20 A Well, taking my statement of facts, Your Honor,
21 I would rephrase the question this way. I would say that
22 what New York State has done is average out costs of rents
23 throughout the state, average out the costs of all these other
24 basic need items, and presented it as one average sum for the
25 people of New York State. That does not deny equal protection,

1 even though some benefited more and some benefited less. But
2 I would state that when New York State decides that it is going
3 to pay rent especially so that everybody has their full rent
4 needs paid, and then it is going to take another sum and meet
5 other basic needs, and then it is going to pay up to 16 percent
6 more to people in New York City, because they don't have as
7 much money to pay rent which they don't need to pay rent, then
8 there is something irrational about that.

9 Q Well, I understand that as the advocate's argu-
10 ment, but let's just stay on the rent for a moment. Do you
11 think there is a rational basis for a differential rental allow-
12 ance in New York City and other places?

13 A Yes, the rational basis --

14 Q How did they -- is it any more precise than the
15 differences that the commissioner is relying on in the other
16 areas?

17 A Oh, yes. Well, it is not any more precise, it
18 is precise. The commissioner has averaged figures for what they
19 pay for rent for welfare recipients in New York City and else-
20 where, which they have referred to, if they want to pay those
21 average figures, that would be fine. They have chosen not to,
22 and that is fine, too. They chose to pay the exact amount of
23 rent, and that is fine. That doesn't raise any equal protec-
24 tion questions.

25 All we argue is that, having chosen one method or the

1 other to pay rent, to then state to the people upstate that,
2 because you have a higher rent cost than people in New York
3 City have, we are going to give the people in New York City
4 16 percent more to buy things which we are not allowing you to
5 buy since we are not giving you any money to buy with, doesn't
6 make any sense at all.

7 Now, I argue, Your Honor, this Court need not reach
8 that question in terms of equal protection. That is a question
9 of judgment as to rationality and whether -- how much deference
10 is going to be given to the legislative judgment on this. In
11 terms of the statutory requirement of statewideness, the
12 violation is clear. It is clear. The problem, I think, on
13 appellant's part occurs because they confuse the standard of
14 minimum rationality for equal protection and the standard under
15 the H.E.W. requirements of uniformity and they confuse them
16 badly and, therefore, don't address in reality the standard of
17 uniformity.

18 I would conclude, Your Honor, that we could engage in
19 the same process as we have in our briefs with regard to every
20 one of the arguments raised by appellants, but I would conclude
21 that --

22 Q Do you think the federal act requires equal
23 money amounts statewide in each county?

24 A Statewide, yes, unless there is a variation in
25 the costs.

1 Q In the costs, yes.

2 A In the costs.

3 Q And if there is, there could still be a state-
4 wide uniform standard and variations in money amounts without
5 violating the federal law?

6 A Yes.

7 Q Now, what is the objection here to -- what do
8 you understand the United States' position to be, that there is
9 not a uniform state standard or that he just hasn't shown that
10 there is variation in cost?

11 A As I understand it, the United States' position,
12 which will be stated by the United States shortly, is this:
13 First, they have established a different standard for New York
14 City, since they are allowing for different kinds --

15 Q Is that your position, too?

16 A That is our position.

17 Q And what is the different standard?

18 A The different standard is that they are allow-
19 ing, by their own language, monies for transportation to day-
20 care centers, social welfare centers and so forth for the
21 people of New York City, which they are not allowing elsewhere,
22 even though by their own testimony the people elsewhere have
23 those very same needs.

24 Q Well, in the standard of need is there some
25 miscellaneous category or is every item listed?

1 A Well, the principle of standard of need allows,
2 as H.E.W. sets forth, in simplified methods, allows the state
3 to combine a wide variety of items. In the past, New York did
4 not combine and listed individually.

5 Q But it is now?

6 A Now it combines. But those combined items
7 reflect particular matters. They give one overall sum for that.

8 Q How would it -- let's assume that laundry costs
9 the same in New York City as in Nassau County per person, or
10 however -- each shirt costs the same. Another thing is that
11 shirts get dirtier in New York City. Now, how would that be
12 reflected in this? You could still pay the New York City, I
13 suppose, more for laundry.

14 A You could increase the standard by showing that
15 shirts get dirtier in New York City.

16 Q Increase the standard, is that --

17 A You could increase the standard for New York
18 City, yes -- the standard, by the amount reflected --

19 Q You have got to pay them for laundry --

20 A Oh, you could create a special need allowance
21 for laundry, which is allowed under the H.E.W. regulations and
22 which pretty much used to be the case in New York City. The
23 only point which is relevant about that that I see to this case
24 is that if you create a special allowance for laundry, let's
25 say \$10 a month maximum, dependent upon how much need you

1 actually have for shirts all month long, you have to apply that
2 statewide so that people who live in Buffalo and work near or
3 live near a steel mill in Buffalo who also happen to have that
4 same need can also get the shirts washed.

5 Q Yes, but what if you don't have it in Nassau
6 County?

7 A If you don't have it in Nassau County, unless
8 it can be shown --

9 Q Then we are not going to listen to the argument
10 much here, are we?

11 A Pardon me?

12 Q We wouldn't listen very long about it here,
13 would we, on an equal protection basis -- we might on a
14 statutory basis --

15 A Well, I know you are not interested in laundry
16 costs in particular --

17 Q I am not interested in -- can you argue some-
18 body else's rights under these --

19 A I think welfare recipients can and ought to be
20 in a position to argue that when their grants are cut back, as
21 they were cut back under section 131-a, to below what New York
22 State had prescribed previously as the absolute minimum and
23 necessary for survival, and then welfare recipients in one part
24 of the state are further cut back up to 16 percent more, up to
25 16 percent more, then recipients in another part of the state,

1 welfare recipients have something very vital at issue. Now,
2 that vital matter may not result in the need for a special
3 standard of local protection, as this Court noted in Dandridge,
4 but it does require some sort of attention to the rationality
5 of the procedure, and I think that issue is there. The lower
6 court concluded that it violated minimum rationality as well
7 as special scrutiny, but it certainly violates the statute.
8 That is what is at issue here.

9 Q Suppose the State of New York Legislature made
10 a legislative judgment that helped relieve the congestion in
11 the cities, that they would have equal rates all over the state,
12 the same in Poughkeepsie and whatever your northern most towns
13 are, the small towns, that is in New York City, even though
14 they acknowledge the differential in cost, but they did this
15 deliberately to get people to move out of the cities as a
16 matter of public policy? Do you think that would be permissible?

17 A Yes. I think -- perhaps I misunderstood part
18 of Justice White's question. I think these questions are re-
19 lated, and I will try to answer it more fully now. There are
20 two contrasting situations. Contrasting situation number one,
21 which is what we allege took place here, is the creation of
22 two separate standards for two parts of the state; one part
23 put on a lower basis, without any relation to actual costs in
24 another part.

25 Situation number two, which may also raise a

1 uniformity question, would arise where one uniform standard is
2 created throughout the state, even though it is quite clear
3 that in one part of the state that uniform standard is totally
4 insufficient to meet the cost of the items of basic need,
5 which it does need, because of the actual cost situation in
6 another part of the state.

7 We suggest that it is consistent with the principle
8 of uniformity to average costs and apply a uniform standard
9 statewide. H.E.W. has said, out of its experience, that costs
10 outside of rent just don't basically differ within most states
11 and therefore some objective showing ought to be made. But if
12 an objective showing is made, the costs really differ and
13 differ in a very significant extent, and the uniform state
14 standard is not arrived at by an averaging principle but simply
15 by taking the lower place as the standard and subjecting the
16 people who live in the very high cost place to that, then I
17 think there would be a uniformity issue raised.

18 Now, Your Honor, in terms of the soundness of legis-
19 lative policy involved, I think that is an issue in the first
20 instance for the United States Congress. And it seems to me
21 that with thirty-five years of a Social Security Act, which is
22 administered by H.E.W., has followed the uniformity principle,
23 the United States Congress may be said also to follow this
24 uniformity principle, and this principle is critical. It is
25 critical and important for public assistance administration.

1 MR. CHIEF JUSTICE BURGER: Mr. Strauss, you can get
2 underway for a little while today.

3 ARGUMENT OF PETER L. STRAUSS

4 ON BEHALF OF THE UNITED STATES

5 MR. STRAUSS: Mr. Chief Justice and may it please the
6 Court:

7 I gather we will be going over until tomorrow, so for
8 now I just want to say a few things rather briefly to get down
9 what seems to me, seems to the United States to be the central
10 feature of this case.

11 First, I think it is by now clear that the only issue
12 in this case is the preliminary injunction, a preliminary in-
13 junction whose effect, I think, has been dramatically over-
14 characterized by appellants here. It is not a requirement for
15 the state to appropriate funds. It is not an injunction for
16 the state to pay. The injunction tells the State of New York,
17 strictly in the terms of Mr. Justice Harlan's opinion for the
18 Court in Rosada, if the state wishes to continue receiving
19 federal funds, then it must order its needs standards in such
20 a way that it is done on an objective, rational basis, which,
21 our submission, is the requirement of federal law and no more.

22 Second, I think again to clear up a point which has
23 been raised here, it is fundamentally our belief -- and I will
24 put it in the probability terms, which are all that are re-
25 quired here on preliminary injunction -- that the appellants

1 have shown that in all probability New York State is applying
2 two different standards of need, one for New York City, which
3 includes the social costs of living in a city and transporta-
4 tion and visits to museums and beaches, and possibly laundry
5 costs and lock costs, and a number of other items, and another
6 standard of need for the rest of the state, in which residents
7 of the rest of the state cannot obtain those items -- or I
8 should put it more directly -- because welfare recipients may
9 spend the money they receive however they wish, have no allow-
10 ance for those items, no matter how badly they need them, even
11 if they live in a ghetto in Yonkers or in Buffalo, there is
12 simply no allowance for them for these items. And it is the
13 position of H.E.W. that the standard of need is a standard of
14 services, not a standard of money necessarily, and the obliga-
15 tion of the state is to determine for itself, and they have
16 great latitude in doing so, what services are required as a
17 minimum for living in that state. When they determine what
18 services are required, then they may cost those services, and
19 they may do so, as Mr. Sparer has suggested, on one of two
20 bases: They may do so throughout the state, they can take an
21 average of those costs throughout the state or they may do so
22 on a regional basis. It may very well be that the average ex-
23 pense, the locks in New York are considerably greater than the
24 average expense in Buffalo, or certainly than the average ex-
25 pense in Malone, and the state would be entitled to take that

1 into account in deciding how much to pay in those regions.

2 But it must make provision, if it is going to provide
3 that these things are available, it must make provisions for
4 their availability on a statewide basis. And I think, Mr.
5 Chief Justice, that really provides the answer to your rent
6 question. New York has made the judgment -- I, for myself,
7 would think it is a wise judgment, although not a necessary one
8 -- that the costs of rent are so variable in different parts of
9 the state that it would be unfair to treat them as an average
10 and, therefore, they treat them on an individual basis.

11 But in terms of the standard of need, what is import-
12 ant is that every one in New York State has the right to rent.
13 It doesn't matter whether you live in Buffalo or New York City
14 or Nassau County, you have a right to rent. You could have it
15 on an average basis, you could have it on an individual cost
16 basis, but you have the right to that service.

17 What New York City is doing in this case, we submit,
18 is to say that only people who live in New York City have a
19 right to go to the beach, and only people who live in New York
20 City have the right to an allowance for transportation, and
21 only people who live in New York City have the right to an
22 allowance to provide them some security or repair their di-
23 lapidated premises. Those are the only rationales that we have
24 hear, and those rationales do not meet federal requirements of
25 uniformity.

1 Q Do you think that this is the final argument
2 here?

3 A I think the --

4 Q Do you think it would require a preliminary in-
5 junction here?

6 A -- I think the Court might, but all that is
7 necessary is to affirm the preliminary injunction and leave
8 the further proceedings below.

9 Q Because you don't -- I think the United States
10 has taken a final position, though, in terms of conflict with
11 the federal statute or --

12 A I think one of the features that the Court might
13 wish to have in mind in deciding what to do is that there is
14 this new statute. Commissioner Wyman is under very explicit
15 instructions from the State of New York about meeting the
16 federal standards. He knows there can be no question what our
17 position is now.

18 Let me read you this. This is from section 1, the
19 enacting part of this new statute of April 16:

20 The Legislature hereby declares its intent --

21 MR. CHIEF JUSTICE BURGER: I think we will defer until
22 morning on that, Mr. Strauss. I think we will suspend for the
23 day. It will take you more time than you have left.

24 (Whereupon, at 3:30 o'clock p.m., the hearing in the
25 above-entitled matter was recessed, to reconvene on Tuesday,
April 28, 1970, at 10:00 o'clock a.m.)