



C O N T E N T S

<u>1</u>	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
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<u>3</u>	of Appellants . . . . .	2
<u>4</u>	Raymond J. Cannon, Assistant Attorney General	
<u>5</u>	on behalf of Appellees . . . . .	20
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IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

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GLADYS BODDIE, ET AL.,	)	
	)	
Appellants	)	
vs	)	No. 265
	)	
CONNECTICUT, ET AL.,	)	
	)	
Appellees	)	

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Washington, D. C.  
December 8, 1969

The above-entitled matter came on for argument at 1:05 o'clock 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:

ARTHUR B. LA FRANCE, ESQ.  
 College of Law  
 Arizona State University  
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 Counsel for Appellant

RAYMOND J. CANNON  
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 30 Trinity Street  
 Hartford, Connecticut 06115  
 Counsel for Appellees

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: Number 265. Boddie against  
3 Connecticut.

4 Mr. La France, you may proceed whenever you are ready.

5 ORAL ARGUMENT BY ARTHUR B. LA FRANCE, ESQ.

6 ON BEHALF OF APPELLANTS

7 MR. LA FRANCE: Thank you, Mr. Chief Justice, and may  
8 it please the Court.

9 Mr. Padnos closed by saying that what he sought was the  
10 opportunity to get into court. I might begin by saying that  
11 that is precisely what the Appellants seek in this case.

12 The Appellants initiated this proceeding by bringing a  
13 civil rights action in the United States District Court for the  
14 District of Connecticut. They alleged in a complaint that  
15 they wished, intended to sue their husbands for a divorce in  
16 the Connecticut Superior Courts, but that as welfare recipients  
17 they could not afford to pay the court costs of approximately  
18 \$60 or more. As a consequence, they had sent the divorce  
19 papers to the Superior Court for New Haven County, with appli-  
20 cations, asking that court to waive the filing fees and to  
21 arrange service of process. These papers were all sent back  
22 by the Clerk of that Court.

23 Upon receipt of these papers Appellants then asked  
24 Superior Court Judge Longo, and after speaking with him, the  
25 State Supreme Court Administrator, Justice Cotter, reversed the

1 position which had been taken by the Superior Court Clerk,  
2 Edward Horwitz. They sustained that position and as a con-  
3 sequence, Appellants were effectively barred from access to  
4 the courts of the State of Connecticut.

5 They further alleged in their complaint in the District  
6 Court that this denied them constitutional rights involving  
7 due process and equal protection. The Appellees moved to dis-  
8 miss; their motion was sustained by -- granted by a three-  
9 judge panel and this, at direct appeal, was taken to this  
10 Court.

11 The question which is thus presented is: Has Connecti-  
12 cut, be erecting economic barriers to its courts, denied these  
13 Appellants the rights to due process and equal protection of  
14 laws guaranteed to them by the 14th Amendment of the United  
15 States Constitution.

16 If I may turn first to a due process contention, we  
17 find upon the right to petition for redress and grievance, a  
18 right which is expressed in the First Amendment to the United  
19 States Constitution, and which is incorporated into the 14th.

20 The decisions of this Court in N.A.A.C.P. versus  
21 Button, United Mine Workers versus the Brotherhood of Railway  
22 Engineers and the United Mine Workers -- I'm sorry. The United  
23 Mine Workers versus the Illinois Bar Association and the  
24 Brotherhood of Railway Trainmen versus Virginia. All of these  
25 cases are squarely precedent for this.

1           The Appellees may attempt to distinguish them on the  
2 ground that the litigation contemplated in Button was of a  
3 political nature, whereas the litigation Appellants contemplate  
4 is of a personal nature, but that distinction was rejected in  
5 the Mine Workers' case.

6           A second distinction may be that these cases involve  
7 the right of assembly, rather than the right to petition for  
8 redress of grievances, but we submit, the language of these  
9 three cases discusses these two rights independently and  
10 accords to them equal status. The right of assembly and the  
11 right to petition for redress of grievances, indeed in these  
12 cases there would hardly have been any point to assembly at  
13 all if it had not been to enable individuals as here, to bring  
14 suits on their own behalf. This is a fundamental right.

15           This Court has said that the right to sue and defend  
16 in the courts is the alternative of force. In an organized  
17 society it is the right conservative of all other rights and  
18 lies at the foundation of orderly government.

19           Turning to our equal protection contention, it is clear  
20 that the equal protection of the laws can be denied by  
21 economic discrimination as surely as racial discrimination.  
22 This Court recognized that in Edwards versus California in  
23 1941 and has reaffirmed it in many decisions since, most  
24 recently in McDonald versus Board of Elections.

25           Perhaps the most significant case here is Griffin versus

1 Illinois where this Court held that Appellate remedies could  
2 not be denied to a person convicted of crime simply because  
3 of his inability to purchase a transcript for appeal.

4 Appellee's brief at great length has attempted to distinguish  
5 Griffin from this case.

6 Appellees have said, first, that Griffin is a criminal  
7 case and that this is a civil case; the present proceeding.  
8 In point of fact, this is a distinction which is not recognized  
9 by the constitution, appears nowhere in the "Equal Protection  
10 Clause," and was not expressed by this Court in the decision  
11 in Griffin versus Illinois. That decision dealt not with  
12 criminal procedures, but with court procedure and it is court  
13 procedures which these Appellants seek to pursue.

14 A second distinction offered in their brief by  
15 Appellees is that in Griffin, liberty was involved, whereas  
16 these Appellants are at large to go about as they choose. But,  
17 a point of fact: the liberty of these Appellants is sub-  
18 stantially curbed by their inability to obtain divorces in the  
19 courts of Connecticut; and this Court has recognized that  
20 liberty consists of more than simply freedom from physical  
21 restraints.

22 A final point which Appellees have made in their brief  
23 is that Griffin should not govern here because in Griffin the  
24 State was the participating adversary. It was the State which  
25 had put Mr. Griffin in custody, whereas the divorce actions

1 contemplated by Appellants are private matters between husband  
2 and wife. This, however, is an illusory distinction. It is  
3 the State which has barred these Appellants from its courts.  
4 It is the State which has said to these Appellants that they  
5 may not settle their marital affairs out of court.

6 Thus, on the one hand the State has required these  
7 Appellants to go into court and at the same time has told them  
8 that they may not do so. We submit, then, that the State is  
9 fully as much an adversary in this proceeding as it was in  
10 Griffin versus Illinois.

11 MR. JUSTICE STEWART: Is that the basic difference, do  
12 you suppose, between your case and other civil litigation,  
13 generally, that parties are always free to compromise or  
14 settle other quarrels, whether in the form of litigation or  
15 not, but that a divorce matter, that is a civil case which can  
16 only be decided by a judicial decree and cannot be compromised,  
17 is that right?

18 MR. LA FRANCE: That is certainly one distinction,  
19 Your Honor.

20 MR. JUSTICE STEWART: Of course, I suppose there could be  
21 a compromise there, something short of divorce, here.

22 MR. LA FRANCE: I beg your pardon?

23 MR. JUSTICE STEWART: I suppose there could be a settle-  
24 ment here, by something short of divorce, just as -- like there  
25 can be if somebody is suing you for \$100,000, you settle for



1 something short of that.

2 MR. LA FRANCE: I don't know of any legal proceeding in  
3 Connecticut which would extend to these Appellants half a  
4 divorce or one-third of a divorce.

5 MR. JUSTICE STEWART: Well, they could agree to live  
6 apart.

7 MR. LA FRANCE: They could agree to live apart, if  
8 they were to agree to that, which in point of fact, most of  
9 them have done, what would happen is that they would be locked  
10 into marriages which were meaningless, barren, but they would  
11 also be cut off from some rather important rights: the right  
12 to remarry, the right to procreate, the right to form new  
13 families. And this Court has said that those rights are  
14 rights of considerable significance.

15 I might also note, as we have in our brief, that denial  
16 of access to divorce for the poor poses peculiar problems  
17 which may not be posed for other segments of society because  
18 denial of that access aggravates the economic circumstances  
19 under which the poor live. It may also weaken the family struc-  
20 ture patterns which sociologists indicate are prevalent among  
21 the poor.

22 Whether or not the peculiar problems for the poor are  
23 cognizable by this Court, it is at least clear that by  
24 Connecticut's law anybody who is cut off from divorce is cut  
25 off from remarriage and is cut off from procreation with anyone

1 other than her legal spouse. What we

2 What we are submitting is that since, in fact, these  
3 marriages have ceased to exist, in legal contemplation that  
4 fact ought to be recognized.

5 MR. JUSTICE BRENNAN: Mr. La France, the sums involved  
6 here, I gather, are a minimum of \$45 and a maximum of perhaps  
7 a hundred; is that right?

8 MR. LA FRANCE: The sums are accurate; I would not  
9 characterize them as minimal --

10 MR. JUSTICE BRENNAN: Well, I mean statutory -- didn't  
11 say \$45 to \$100? That's about the amount of money that needs  
12 to be put up in order to get into court.

13 MR. LA FRANCE: A routine case would cost approximately  
14 \$60, Your Honor.

15 MR. JUSTICE BRENNAN: Well, if you prevail in this  
16 case, how do we contain a decision to address divorce actions?

17 MR. LA FRANCE: I suppose --

18 MR. JUSTICE BRENNAN: Who would be involved in taking  
19 negligence action, any kind of civil actions -- contract  
20 actions.

21 MR. LA FRANCE: Well, we first say that this court  
22 could draw a distinction between this type of case and a case  
23 which involves purely personal, private issues -- a negligence  
24 suit, a contract suit, are examples of litigation which does  
25 not involve the state in the same fashion that criminal

1 prosecution does, or a divorce suit does.

2 MR. JUSTICE BRENNAN: How about a bastardy proceeding?

3 MR. LA FRANCE: In Connecticut, a bastardy proceeding  
4 involves the state rather extensively. I don't know about  
5 other states.

6 I would not urge this distinction upon the Court. The  
7 Court, of course, is free to adopt it. What I would urge upon  
8 the Court is simply this: that any time the State, whether it  
9 be the State of Connecticut, or any other state, creates a  
10 state remedy through its courts. I submit that that remedy  
11 must be available to the poor and wealthy alike, whether it  
12 involves negligence, divorce, bastardy, whatever.

13 I would not that there are some limitations on the  
14 reach of this reasoning. The Appellees have noted that this  
15 reasoning would carry over to dog license, road tolls and  
16 whatever. I contend that it does not.

17 The issue here is whether a constitutional right -- the  
18 access to the courts, may be denied by economic barriers.  
19 There is no constitutional right to a dog license, or I  
20 suppose --

21 MR. CHIEF JUSTICE BURGER: On equal protection?

22 MR. LA FRANCE: -- the passage through a toll road --

23 MR. JUSTICE WHITE: That's the right to travel; isn't  
24 it?

25 MR. LA FRANCE: If the right to travel were totally

1 barred by a state by toll stations, then I would submit that  
2 the person who is thus barred has a constitutional claim and  
3 Thompson versus Shapiro would be a good citation for that as  
4 any; so would Edwards versus California. But I did not under-  
5 stand that was the argument being made by the Appellees.

6 If there is no constitutional right involved, as there  
7 clearly is here, then perhaps this Court might distinguish  
8 future litigation from present litigation.

9 MR. JUSTICE DOUGLAS: Do these Appellants have lawyers?

10 MR. LA FRANCE: Do they have a lawyer?

11 MR. JUSTICE DOUGLAS: Do they have lawyers for the  
12 divorce action?

13 MR. LA FRANCE: Yes, they do.

14 MR. CHIEF JUSTICE BURGER: Must they have them?

15 MR. LA FRANCE: I'm sorry. No, I do not believe that  
16 they must.

17 MR. JUSTICE DOUGLAS: I'm just wondering depth to which  
18 this goes. If you require them to get in without payment of  
19 fee they couldn't get very far without the benefit of legal  
20 advice. Does this lead to the appointment of lawyers in civil  
21 cases?

22 MR. LA FRANCE: I submit that it does not. The right to  
23 access to the courts is clearly provided for in the constitu-  
24 tion by express provision. There is no similar provision for  
25 appointment of counsel in civil cases, or for appointment of

1 expert assistance. So, in constitutional contemplation there  
2 is a distinction between access to the courts and appointment  
3 of counsel.

4 In point of fact, also there is a distinction that once  
5 in court a litigant has an opportunity to obtain justice,  
6 given a reasonably compassionate judge and a reasonably good  
7 case and a fair amount of intelligence.

8 We have those in reasonable abundance in the State of  
9 Connecticut. But, if barred from court; if her papers are  
10 simply sent back by the Clerk of the Court, without any con-  
11 sideration, there is no opportunity to obtain justice at all.

12 MR. JUSTICE MARSHALL: What about appeal?

13 MR. LA FRANCE: I'm sorry, I don't understand the  
14 question.

15 MR. JUSTICE MARSHALL: Well, assuming that the very  
16 capable and heart-rending courts you have in Connecticut, go  
17 wrong and the Petitioner thinks he deserved a divorce and  
18 didn't get it. Does she have to pay for an appeal?

19 MR. LA FRANCE: I would submit that she does not have to  
20 pay the court costs incident to an appeal.

21 MR. JUSTICE MARSHALL: Or printing, or briefs or  
22 records, or any costs?

23 MR. LA FRANCE: She might have to retain her own coun-  
24 sel if she desired counsel.

25 MR. CHIEF JUSTICE BURGER: What if she cannot afford it?

1 MR. LA FRANCE: If she cannot afford it. I suppose that  
2 that one other factor which is worth noting and that is that  
3 the prevalence of legal services programs and the availability  
4 of legal service attorneys takes some of the urgency out of the  
5 the concern for the availability of counsel. It does not  
6 relieve the urgency which is behind the issues raised by  
7 Appellants in this case.

8 MR. CHIEF JUSTICE BURGER: Well, is that a factor which  
9 can be into consideration if this were cast in constitutional  
10 terms, the fact that there are Neighborhood Legal Services and  
11 Legal Aid. Either there is a constitutional right to counsel,  
12 or there isn't.

13 MR. LA FRANCE: That is true, Your Honor.

14 MR. JUSTICE DOUGLAS: I was thinking in terms of the  
15 Equal Protection Clause, the Constitution isn't very specific  
16 as respects equal protection. We have applied it in Griffin  
17 and Illinois to give the poor the record, free; and there is no  
18 reference to the right of appeal in the constitution.

19 MR. LA FRANCE: Well, that is correct, Your Honor, in  
20 terms of whether the absence of a reference to appeal by the  
21 constitution in the Griffin case, in terms of whether that,  
22 therefore, would require compelling the appointment of counsel  
23 in civil cases, I would only respond that the appointment of  
24 counsel is a matter which in criminal cases is specifically  
25 provided for and the absence of reference to civil cases could

1 justify this Court in inferring that the drafters of the con-  
2 stitution did not contemplate appointing counsel in civil  
3 cases.

4 Now, am somewhat handicapped in arguing a case which  
5 I'm not bringing, but I do submit that if that case is brought  
6 for the appointment of counsel in a civil case, this court  
7 might well be justified in distinguishing this case from the  
8 arguments which will be submitted at a later time.

9 MR. JUSTICE DOUGLAS: Oh, we might say that counsel  
10 should be appointed by indigents in all civil cases.

11 MR. LA FRANCE: You might well say that or you might  
12 say only in important civil cases, defining that in various  
13 ways. The problem here is not much different from the problem  
14 that this Court has coped with, for example, in Gideon versus  
15 Wainwright, in determining whether counsel must be appointed  
16 only in felony cases or in misdemeanor cases -- determining  
17 the limit of the appointment requirements of the constitution.

18 MR. CHIEF JUSTICE BURGER: I suppose if we accepted  
19 your argument that the right to divorce is of this absolute  
20 nature, it would follow that the right to go into the marriage  
21 state would be at least comparable in stature; would it not?

22 MR. LA FRANCE: Yes.

23 MR. CHIEF JUSTICE BURGER: What about two people that  
24 presented themselves for a \$10 marriage license and said they  
25 didn't have any money, but they wanted the license

1 MR. LA FRANCE: In this Court's ruling in Loving versus  
2 Virginia, Skinner versus Oklahoma, I would say that the State  
3 would be required to raise -- I am sorry -- waive that filing  
4 fee and application for marriage if the applicants established  
5 they could not pay the fee and if the state could not show a  
6 legitimate basis for imposing the fee.

7 Now, I say that with the important emphasis that what  
8 is involved is a fundamental right in marriage, according to  
9 this Court's decisions. And I would therefore, distinguish  
10 this from a dog license.

11 MR. JUSTICE WHITE: Or a hunting license.

12 MR. LA FRANCE: Or, perhaps, a hunting license.

13 MR. JUSTICE DOUGLAS: Well, I think they ought to have  
14 a dog-house license.

15 MR. LA FRANCE: With an automobile license the question  
16 then becomes the very difficult one of equal protection of the  
17 laws.

18 Presumably there is no constitutional --

19 MR. JUSTICE BRENNAN: I take it you also have the right  
20 to travel involved there.

21 MR. LA FRANCE: Yes.

22 MR. JUSTICE BRENNAN: And to work.

23 MR. LA FRANCE: The right to work would not raise the  
24 economic consideration which might lead to the conclusion that  
25 equal protection had been denied. The right to travel, in



1       itself, would be a constitutional consideration and protected  
2       by decisions of this Court.

3               MR. JUSTICE WHITE: What provision of the constitution  
4       do you claim affords the right to have access to the courts?

5               MR. LA FRANCE: The First Amendment as incorporated  
6       into the 14th. The First Amendment providing for the right of  
7       assembly and a right to petition the courts for redress.

8               MR. JUSTICE WHITE: The redress of grievances about  
9       whom?

10              About official action or about private action?

11              MR. LA FRANCE: As I read this Court's opinions in the  
12       Mine Workers' case and the Brotherhood of Railway Trainmen  
13       case, the right to petition for redress of grievances involves  
14       both private and official grievances.

15              MR. JUSTICE WHITE: But not the Button case?

16              MR. LA FRANCE: The Button case was primarily focused  
17       upon official grievances, in the sense that the group there was  
18       involved in advancing the political, social interests of a  
19       minority group which was being oppressed -- I mean discrimin-  
20       ated against.

21              MR. JUSTICE BRENNAN: Well, it was addressed to govern-  
22       ment officials who practiced the policy of segregation. This  
23       was addressed to public officials, wasn't it?

24              MR. LA FRANCE: In Button that is true, but in the Mine  
25       Workers' case and in the Brotherhood of Railway Trainmen, the

1 litigation contemplated was for private gain; for individual  
2 benefit.

3 MR. JUSTICE WHITE: You say that a state is constitu-  
4 tionally required to provide a forum for litigating any claim  
5 of one private person against another. It may not say that  
6 our courts are courts of limited jurisdiction and they have  
7 jurisdiction to hear some kinds of claims, but not others.  
8 There are just some kinds of things that we are going to leave  
9 to the private sector to work out the best they can.

10 MR. LA FRANCE: What I'm saying is -- under that first  
11 due process argument I am saying that you must afford the  
12 opportunity to come into court and raise a claim. The state  
13 may not provide redress for that claim, but it must at least  
14 provide an opportunity to petition for redress. Under our  
15 equal protection argument I am saying that where the state pro-  
16 vides a cause of action for a remedy, it must provide it equally.

17 Now, it happens that the State of Connecticut provides  
18 for a divorce. Given that, it seems to me that it cannot say  
19 to the Appellants that they may not come into court and ask for  
20 a divorce, nor may it say to the Appellants that divorce is  
21 available to everybody excepting the poor.

22 MR. JUSTICE WHITE: Well, that's just an equal protection  
23 argument; isn't it?

24 MR. LA FRANCE: The two arguments are quite close.

25 MR. JUSTICE WHITE: That's not saying that this is

1 just a burden on a constitutional right, unless you can say  
2 there is a constitutional right, I suppose.

3 MR. LA FRANCE: The significance of the right to petition  
4 for redress of grievances in this case, comes about because  
5 of this Court's decisions in such cases as Shapiro versus  
6 Thompson, in which the Court has said that in order to justify  
7 racial discrimination or economic discrimination as legitimate  
8 legislative policy, a state must show that there is a compelling  
9 necessity for that discrimination. It may not show simply that  
10 there is a rational basis for it, but there must be a compell-  
11 ing necessity. We, of course, in our brief that there is no  
12 such --

13 MR. JUSTICE WHITE: Well, I understand, but that's  
14 premised on their being a constitutional right that is being  
15 burdened, and you say the constitutional right here is the  
16 right to petition for redress of grievances by filing a suit  
17 in the courts?

18 MR. LA FRANCE: Yes.

19 MR. JUSTICE WHITE: And concededly, not because anybody's  
20 agreed that what the state's done to them, but because of their  
21 dissatisfaction of the conduct of a private person?

22 MR. LA FRANCE: I do not concede that. I maintain that  
23 the state has taken two entirely different types of action  
24 against these appellants. First, the procedural action of bar-  
25 ring them from the courts by imposing economic barriers.

1 Secondly, the antecedent substitute action of requiring that  
2 the Appellants go into court in order to settle their marital  
3 status.

4 MR. JUSTICE WHITE: Well, that might make sense if they  
5 were bringing a suit to -- how did this suit start out?

6 MR. LA FRANCE: The suit started out by our sending  
7 divorce papers --

8 MR. JUSTICE WHITE: Yes. But you didn't start a suit  
9 attacking these statutes which might have been a petition for  
10 redress of grievances devolving on you from the state?

11 MR. LA FRANCE: I suppose that what we did is tantamount  
12 is precisely that, because attached to our divorce papers we  
13 asked the State of Connecticut to waive the filing fees and  
14 arrange service of process for these papers. Now, prior to our  
15 doing that there was no ruling in the State of Connecticut which  
16 said that the courts lacked the power to do so. Once that  
17 ruling became apparent we then raised the issue by raising the  
18 constitutionality of the first actions with the Superior Court  
19 Judge, Judge Longo and the Supreme Court Administrator, Justice  
20 Cotter.

21 So, I suppose we have done precisely what you have  
22 suggested.

23 MR. JUSTICE MARSHALL: Mr. La France, do you have service  
24 of publication.

25 MR. LA FRANCE: Connecticut law provides for that; yes.

1 MR. JUSTICE MARSHALL: Well, on your argument, who will  
2 pay for that? The State?

3 MR. LA FRANCE: Yes.

4 MR. CHIEF JUSTICE BURGER: Or waive the publication.

5 MR. LA FRANCE: Or waive the publication, if that were  
6 consistent with due process requirements or provide for alter-  
7 native means of service or notice.

8 MR. CHIEF JUSTICE BURGER: What about a state that  
9 allows annulments, as many states do? Your claims would seem  
10 to encompass that, the right to dissolve a marriage by annul-  
11 ment, which would be a very important right to some people; is  
12 it not?

13 MR. LA FRANCE: Yes; I believe the answer is yes.

14 MR. CHIEF JUSTICE BURGER: A civil action, is it not?

15 MR. LA FRANCE: Yes. Quite frankly, I'm not --

16 MR. CHIEF JUSTICE BURGER: In some states I suppose it  
17 is an equitable action, but that wouldn't make any difference;  
18 but it would follow that if we agreed with you, annulment would  
19 --

20 MR. LA FRANCE: Well, I'm certainly not familiar with  
21 annulment procedure --

22 MR. CHIEF JUSTICE BURGER: Well, it's a termination of  
23 the marriage, or a declaration that a marriage never existed  
24 where it is legally thought to exist.

25 MR. LA FRANCE: Without -- I would assume that my

1 arguments would extend to that, as well as to divorce.

2 With the Court's permission I would like to reserve  
3 two or three minutes for rebuttal. Thank you.

4 MR. CHIEF JUSTICE BURGER: Very well, Mr. La France.  
5 Mr. Cannon.

6 ORAL ARGUMENT BY RAYMOND J. CANNON, ASSISTANT  
7 ATTORNEY GENERAL ON BEHALF OF APPELLEES

8 MR. CANNON: Mr. Chief Justice and may it please the  
9 Court: The statute that's under attack in this case, or that  
10 portion of it, 52-259, "There shall be paid to the Clerks of  
11 the Supreme Court or the Superior Courts for each civil cause,  
12 \$45." That is the entry fee.

13 Now, the problem in this case is not particularly the  
14 court costs; it's the manner in which cases start, at least  
15 in Connecticut. A person goes, usually to a lawyer; if a person  
16 has a case, a writ is drawn, the lawyer gives it to the Sheriff  
17 or other proper officer for service and service -- the officer  
18 makes a service and returns the writ to court.

19 Now, the fee payable to the sheriff is paid by the client  
20 or the lawyer. The state does not enter into that angle of the  
21 case at all. The case is returned to court after service.

22 Now, if they are nonresident defendants, the sheriff has  
23 to go over to the court with a representations affidavit made  
24 by the lawyer, showing the type of service which could most  
25 likely reach the attention of the defendant. Very often that

1 calls for publication and sometimes a series of publications;  
2 two or more.

3 So, it was on the basis of these features and many other  
4 features that we argued in the lower court that this is a  
5 matter of legislative action rather than judicial determina-  
6 tion. Every state in the Union, so far as I know, including  
7 the Federal Courts, have entry fees and court fees. They are  
8 waived in the Federal Courts by a forma pauperis statute.  
9 That is true, too, in some other states. They have forma  
10 pauperis statutes.

11 But, there are so many factors to be taken in considera-  
12 tion for forma pauperis statutes, that it would seem to me  
13 a proper domain for the legislature. In that regard we mention  
14 in the brief that in Connecticut right now, as of July 1, they  
15 started, through the welfare department, a pilot program, in-  
16 cluded in it is Legal Services and appropriations for it. And  
17 last week, before coming down, we checked on the progress of  
18 this program, which is funded by the welfare department. It's  
19 mentioned in our brief, then, as a schedule attached thereto,  
20 showing the appropriations available.

21 Now, in that case -- among other actions they have had  
22 through the Legal Assistance Program in Middlesex County. It's  
23 involved in three counties, smaller counties, to give it a test  
24 program, to promote and advocate legislation in the next term  
25 around.

1           They have six divorce cases pending since July 1. They  
2 are making or negotiating a contract with the Middlesex Bar  
3 Association to conduct this, because it's not only divorce  
4 cases; it's not only welfare cases that probably need access to  
5 courts, but many, many indigents probably can't afford litigation  
6 and some of their rights are waived.

7           The OEO or Legal Assistance in New Haven has paid for  
8 entry fees; they do have appropriations for entry fees. They  
9 could have well brought this case, it seems to me, in one  
10 situation, bring a declaratory judgment in a Connecticut Court  
11 and give the Connecticut Courts a proper way to pass on this  
12 issue in a judicial fashion.

13           The Federal Court has held in this and in other cases  
14 that the Clerk and the Judge who says, "You can't get into  
15 court unless you pay the entry fee. I have no power to waive  
16 the statute; I can't act in a judicial capacity; we are acting  
17 as administrators." And the Federal Court says exactly that.  
18 They are acting in an administrative capacity when they say they  
19 have no power to waive the court.

20           Now, whether the Connecticut courts would have done any-  
21 thing or not, I do not know. No one else. They did not have  
22 the opportunity to pass on it, as a group, in the Supreme Court.

23           The other issues here, if there is any constitutional  
24 problem in this case it is whether or not the entry fee statute  
25 provides equal protection. It seems necessary to have these



1 entry fees statutes, court costs, if they are reasonable in  
2 nature and do not impose undue burden and there are no unfair  
3 discriminations -- no invidious discriminations; they are not  
4 arbitrary or harsh, then they have always been allowed.

5 As you might know, this is a case of first impression.  
6 There is no other similar situation and this Court has not  
7 extended the Griffin doctrine to situations such as this, a  
8 civil suit which doesn't have, in and of itself, no state  
9 participation whatsoever. It is a dispute between two indivi-  
10 duals, and this case here, if a judgment was rendered on this  
11 case, this case is for a welfare recipient. There are hundreds  
12 of other people in Connecticut who are indigent and can't afford  
13 it, but they are not welfare recipients.

14 The judgment in this case could well revert in reverse  
15 discrimination. That's why we say it's a matter for the  
16 legislature.

17 In due process the parties have made the same claim in  
18 the Federal Court about their due process. The due process --  
19 this three-judge court didn't even consider the issue of due  
20 process. However, if due process is pertinent to cases of this  
21 type, they have a right to get into court. The only thing is  
22 the condition of getting in by --

23 Even the Federal statutes of 1915, incidentally, pro-  
24 vides that in a single case/forma pauperis, the court may  
25 request an attorney to represent any such person unable to

1 employ counsel. There are plenty of cases on that and they  
2 have been interpreted as being only that the Court may request;  
3 they cannot enter representation by counsel such as they do in  
4 all civil cases.

5 We, of course, in Connecticut, have numerous situations  
6 which by statute, under specific circumstances, allow people  
7 to get into court without paying any fees. Where Workmen's  
8 Compensation, uniform support, that's been waived, is a matter  
9 of policy with most states. And there are others that, at the  
10 moment, skip my mind.

11 MR. JUSTICE STEWART: Now, I notice in the appendix,  
12 Appendix A to the brief of the National Legal Aid and Defender  
13 Association, amicus brief, that Connecticut is listed here as  
14 -- the courts there as having the power to waive these fees.  
15 Is that correct?

16 MR. CANNON: Well, that's in the Uniform Reciprocal  
17 Enforcement and Support Act; yes, Your Honor. And they waived  
18 them as a matter of policy in all cases. That Uniform Recip-  
19 rocal Support Act provides that the state may waive the cost;  
20 that is where they collect from a wife in Connecticut and a  
21 husband in some other state, or vice versa; the wife can enforce  
22 support for herself and the children by having a proceedings in  
23 one state; orders in the other state.

24 MR. JUSTICE STEWART: I see. So, it's limited only to  
25 that kind of an action?

1 MR. CANNON: That's correct.

2 MR. JUSTICE STEWART: An action for maintenance and  
3 support.

4 MR. CANNON: That is correct, Your Honor. They have a  
5 notation, as I recall it --

6 MR. JUSTICE STEWART: I see it. I now see it.

7 MR. CANNON: But there is no \$60 fee in any court costs  
8 in Connecticut. It would be a combination of a \$45 entry fee  
9 and a \$15 fee which the client owes the sheriff and the court  
10 is not involved in this situation at all.

11 Before it closes, I would just like to --

12 MR. JUSTICE BLACK: \$15 fee for what; for service?

13 MR. CANNON: I beg your pardon, sir.

14 MR. JUSTICE BLACK: \$15 fee for what, service?

15 MR. CANNON: Service of process against the defendant,  
16 citing him in; served by leaving with him or at his usual place  
17 of abode if he is a resident of the state.

18 MR. JUSTICE BLACK: What are the other costs?

19 MR. CANNON: Well, in divorce -- probably out in others  
20 -- but there's witness fees, investigation -- ordinary cases,  
21 investigation fees and counsel, of course.

22 MR. JUSTICE BLACK: Investigation fees?

23 MR. CANNON: Not in divorce. I mean --

24 MR. JUSTICE BLACK: I didn't think so.

25 MR. CANNON: In divorce cases I would say they file

1 costs for sheriff's witnesses and publication.

2 MR. JUSTICE BLACK: Suppose the Plaintiff comes in and  
3 files a petition for divorce and the other spouse comes in and  
4 agrees to accept service, is there any cost for that?

5 MR. CANNON: I have never heard of that situation, Your  
6 Honor.

7 MR. JUSTICE BLACK: Of accepting service?

8 MR. CANNON: Well, the service has to be -- and then  
9 under Connecticut statute, by a written summons to appear in  
10 court.

11 Now, if it were in proper form and were signed by an  
12 attorney or ordered signed by a clerk or a judge, rather, then  
13 they could accept service.

14 MR. JUSTICE BLACK: They could accept. Can't they just  
15 come into the Court and file an answer without any summons of  
16 service?

17 MR. CANNON: Without actually making the summons -- making  
18 the actual service of the summons; yes. There is another  
19 statute which says, "In every civil action shall be a special  
20 form, with a rate, summons and complaint."

21 MR. JUSTICE BLACK: Can they consent for the case to be  
22 tried right away? I'm talking about some practices that I know  
23 exist.

24 MR. CANNON: No; there's a 90-day waiting period in  
25 Connecticut.

1 MR. JUSTICE BLACK: They have to wait 90 days?

2 MR. CANNON: They have to wait 90 days in any event,  
3 after the return date before it comes up for trial.

4 MR. JUSTICE BLACK: And you have to take evidence, of  
5 course.

6 MR. CANNON: They have to take evidence, and three are  
7 usually two or three supporting witnesses required.

8 MR. JUSTICE HARLAN: Mr. Cannon, how would you describe  
9 the state interests that is involved in the closing of the  
10 doors of its courts in circumstances of this kind. What do you  
11 think the real state interest is?

12 MR. CANNON: Well, I think this, Your Honor: I think  
13 the fees are reasonable and the only way it can be done, it  
14 seems to me, is by discretionary; by legislature.

15 MR. JUSTICE HARLAN: Well, what interest is the state  
16 serving, assuming for the moment that there is some kind of a  
17 screening process to prevent abusive resorts to the courts.  
18 What is the state interest?

19 MR. CANNON: I'm not sure --

20 MR. JUSTICE HARLAN: Not merely the legislature is the  
21 better body to do it, but what is the -- to make the change,  
22 what is the state interest?

23 MR. CANNON: The state interest is only, I presume, to  
24 prevent frivolous litigation.--

25 MR. JUSTICE HARLAN: Well, supposing it protected itself

1 by setting up procedures with a screening process of some kind  
2 that said, "No, we won't waive these fees; they are frivolous,  
3 untenable litigation." What interest is there in the state  
4 that requires an across-the-board application of the statute?

5 MR. CANNON: I don't think the state has a legitimate  
6 interest to waive all court fees, unless it's within the realm  
7 of the legislature to do it; they could do it, of course but  
8 they would have to provide tax measures also, because the entry  
9 fees do help to support the judiciary system.

10 But the -- as far as the disputes between the parties  
11 are concerned in a divorce case, the state is more or less  
12 standing on the sidelines. They are not a party to the action;  
13 they don't represent. The only place it is possible that the  
14 state would get interested in a divorce case is if there were  
15 minor children on welfare or in the hospitals or mentally-  
16 retarded institutions or something of that sort, from a welfare  
17 standpoint.

18 MR. CHIEF JUSTICE BURGER: Mr. Cannon, if a screening  
19 procedure were set up which required the people who could not  
20 pay the fees to go through screening in order to get a waiver  
21 of the filing fees and other costs, would that not be a denial  
22 of equal protection because rich people would not have to go  
23 through that screening process?

24 MR. CANNON: Well, I don't know how you could have a  
25 screening process work, in any event. If I intimated that, I

1 didn't mean it. I wouldn't think -- apart from even the con-  
2 stitutional question, which I would tend to agree with, would  
3 also seem to me to be very cumbersome and unorthodox.

4 MR. CHIEF JUSTICE BURGER: I'm not sure I have a posi-  
5 tion on it; I am just thinking of kind of arguments that would  
6 likely be tendered to this Court, to make the poor men go  
7 through a process which rich men don't have to go through.

8 MR. CANNON: Well, I think there ought to be a reason-  
9 able forma pauperis statute in every state, myself, but I don't  
10 know how it's going to be done. There are so many factors;  
11 there are so many situations that will come up.

12 I am sure that this Court will develop some good.  
13 There is a total of 119,000 -- I think it's more than that,  
14 though, I believe --

15 MR. JUSTICE BLACK: What is that?

16 MR. CANNON: It was a pilot program, Justice, which is  
17 being worked out through the welfare department in Hartford,  
18 in Connecticut. It's a special Legal Services Project; 119,000  
19 are being tried out in two smaller counties up there and the  
20 director --

21 MR. JUSTICE WHITE: \$119,000 or people?

22 MR. CANNON: Dollars. And they provide legal services  
23 and their purpose is, as set by the Acting Commissioner of  
24 Welfare, is to "enable us to make recommendations for program  
25 and policy changes in our statewide program.

1           When we get into these forma pauperis statutes, somebody  
2 has got to pay the sheriff and for publication in newspapers  
3 and thingslike that. There is another problem as to what  
4 appropriate state funds it's going to be charged to. We have  
5 statutes, of course, that no state officer can spend monies  
6 that are not appropriated; and another statute that he can only  
7 spend the money for the purposes for which it was appropriated,  
8 otherwise it is a personal liability on the officer and probably  
9 the other -- is exposed to other charges.

10           It's sort of a complex procedure and it seems to me that  
11 it's a matter, really, for the legislature and I think that the  
12 constitutional programs -- questions raised here are not too  
13 momentous in view of the fact that access and due process are  
14 in the picture, because access to the courts is not denied, it  
15 is hemmed in or conditioned by a reasonable charge which has  
16 prevails, so far as I know, in every State in the Union and in  
17 the Federal Government; the Federal Courts.

18           MR. JUSTICE BLACK: Suppose the state should decide to  
19 abolish its divorce laws. Do you think the Federal Constitution  
20 would permit it?

21           MR. CANNON: The old cases have said so, Your Honor.

22           MR. JUSTICE BLACK: What?

23           MR. CANNON: The old cases would seem to indicate that.  
24 It's not likely. They have enlarged and made it more readily  
25 available, because --



1 MR. JUSTICE BLACK: What provision of the Federal Con-  
2 stitution would it violate?

3 MR. CANNON: Would bar divorce?

4 MR. JUSTICE BLACK: If a state should bar divorce.

5 MR. CANNON: I think it's purely a state matter. The  
6 Court may bar divorces without being in --

7 MR. JUSTICE BLACK: Well, then, you wouldn't think it  
8 violated the Federal Constitution, for a state to abolish  
9 divorce entirely?

10 MR. CANNON: I would not think so. Nearly every state  
11 in the Union has different grounds and different conditions  
12 prevailing in divorce cases. As far as Connecticut is con-  
13 cerned, they had a three-year residency, but this year they  
14 reduced it to one year to show that they are --

15 MR. JUSTICE BLACK: It might shock somebody's conscience  
16 might it not?

17 MR. CANNON: Well, that is true; it might be cruel and  
18 unusual punishment.

19 (Laughter)

20 MR. CANNON: Thank you, Your Honor.

21 MR. CHIEF JUSTICE BURGER: Mr. La France, do you have  
22 anything further? You have about two and a half to three  
23 minutes.

24 MR. LA FRANCE: If I may pick up, Mr. Chief Justice,  
25 three points rather quickly. The first is that Mr. Cannon has

1 suggested that the Appellants should have brought a declaratory  
2 judgment proceeding in Connecticut so that the Connecticut  
3 Supreme Court will have had an opportunity to rule properly on  
4 the issues posed in this case.

5 All I can say is that we submitted an application to the  
6 Superior Court for New Haven County and then pursued it to the  
7 Administrator of the Courts of the State of Connecticut, who is  
8 a Supreme Court Justice. Not only were we not given an oppor-  
9 tunity to present this issue, and argue it; our papers were  
10 simply sent back, for failure to pay the filing fees. I

11 If we had brought a declaratory judgment proceeding the  
12 same fees would have been required and our papers presumably,  
13 there would have been sent back.

14 MR. JUSTICE BRENNAN: It would have been \$45 for a  
15 declaratory judgment?

16 MR. LA FRANCE: Yes, the \$45 -- I would have to check  
17 the statutes again, Your Honor. There is certainly an entry  
18 fee attached to all proceedings brought in the Superior Court --

19 MR. JUSTICE BRENNAN: I mean, to bring a negligence  
20 action to the Supreme Court would cost \$45?

21 MR. LA FRANCE: I believe so. There is a flat \$45 entry  
22 fee required for filing proceedings. There are some exceptions,  
23 as Mr. Cannon noted, but a declaratory judgment proceeding I  
24 do not believe would be one of them.

25 MR. JUSTICE STEWART: That has nothing at all to do with

1 any further or other expenses or costs that there might be for  
2 service, and so on? As I read it, on the bottom of Page 3 of  
3 your brief, this \$45 is what it says, for each civil cause.

4 MR. LA FRANCE: Yes.

5 MR. JUSTICE STEWART: Now, how ever else that is defined  
6 elsewhere in your statates, I don't know, but that's --

7 MR. LA FRANCE: The service would be in addition to the  
8 \$45.

9 MR. JUSTICE STEWART: in every civil case you have to  
10 pay \$45 quite apart from any additional expenses?

11 MR. LA FRANCE: Yes; that is correct.

12 The second point that I would like to pick up quickly  
13 is, simply, that there is no justification in Connecticut for  
14 imposing this requirement of filing fees. It does not dis-  
15 courage frivolous litigation. The wealthy can bring that liti-  
16 gation if they choose to do so. What is achieved by these  
17 filing requirements is that the poor may not bring frivolous  
18 litigation. We submit, then, that this is the denial of equal  
19 protection under the laws.

20 MR. CHIEF JUSTICE BURGER: But does that assume that  
21 there is a constitutional right to bring frivolous litigation,  
22 as you have defined it?

23 MR. LA FRANCE: No, it does not. It does assume --

24 MR. CHIEF JUSTICE BURGER: It sounds like the predicate  
25 for your argument.

1 MR. LA FRANCE: It does assume that there is a constitu-  
2 tional right to bring on behalf of the poor the same kind of  
3 litigation which the wealthy can bring.

4 MR. CHIEF JUSTICE BURGER: But you defined this in your  
5 hypothesis as frivolous. You say because a rich man can bring  
6 frivolous litigation that a poor man must be guaranteed by the  
7 constitution that he might.

8 MR. LA FRANCE: Perhaps I should -- well, I would argue  
9 that, but I would also contend that the fee requirement in  
10 Connecticut has the futher effect of discouraging meretorious  
11 litigation by the poor; in other words, it bars all litigation  
12 by the poor, whether frivolous or not, and matters of consequence  
13 which we feel denies constitutional rights.

14 MR. JUSTICE BLACK: Your argument would require, as I  
15 understood it, that the state pay a lawyer for the person who  
16 wanted a divorce.

17 MR. LA FRANCE: I'm sorry; am I contending that?

18 MR. JUSTICE BLACK: Are you not? Afe you arguing that  
19 because a rich man can hire a lawyer to get a divorce, the state  
20 must supply a lawyer for a poor woman or poor man who wants to  
21 get a divorce?

22 MR. LA FRANCE: No, I'm not.

23 MR. JUSTICE BLACK: Well, how could you keep from doing  
24 that if you made them pay the cost.

25 MR. LA FRANCE: Because the State of Connecticut does not

1 require a person to come into court with a lawyer. It requires  
2 a person to come into court with the money to pay filing fees.

3 MR. JUSTICE BLACK: But the case on which you are relying  
4 was a lawyer; wasn't it? Griffin? Wasn't that a lawyer?

5 MR. JUSTICE BLACK: Griffin against Illinois.

6 MR. LA FRANCE: That was transcript on appeal, Your  
7 Honor.

8 MR. JUSTICE BLACK: But you wouldn't say that they would  
9 be required to supply a lawyer? How could a poor person try a  
10 case without a lawyer?

11 MR. LA FRANCE: All he would have to do, I suppose, in  
12 the instance of divorce, would be to go to Meredian, Connecticut  
13 and sit and watch the informal proceedings on which divorces  
14 are granted, present his two witnesses, usually consisting of a  
15 lawyer and a neighbor.

16 MR. JUSTICE BLACK : Suppose they litigated and the other  
17 fellow had a good lawyer?

18 MR. LA FRANCE: IN that case the state of Connecticut  
19 has provisions for the husband to be assessed for the cost of  
20 providing counsel. I do not contend here that counsel is not --

21 MR. JUSTICE BLACK: Suppose the husband was the one  
22 who was trying to get the divorce and he was the poor person?

23 MR. LA FRANCE: Your Honor, I do not contend that a  
24 person without counsel is as well off as a person with counsel  
25 to litigate in court. All I do contend is that what is required

1 by the constitution is that a person be given an opportunity  
2 to get into court. The constitution does not require that the  
3 state will go farther and provide counsel.

4 MR.CHIEF JUSTICE BURGER: I think your time is up, Mr.  
5 France. Thank you for your submission and thank you, Mr.  
6 Cannon, for yours. The case is submitted.

7 (Whereupon, at 11:58 o'clock p.m. the argument in the  
8 above-entitled matter was concluded)

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