

Supreme Court of the United States

October
██████████ TERM, 1969

In the Matter of:

Docket No. 131

EDMUND P. DANDRIDGE, JR., CHAIRMAN
OF THE MARYLAND STATE BOARD OF
PUBLIC WELFARE, et al.

Appellants

vs.

LINDA WILLIAMS, et al.

Appellee

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Place Washington, D. C.

Date December 9, 1969

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C O N T E N T S

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2	George W. Liebman, Assistant Attorney General of Maryland, on behalf of Appellants	2
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4	Joseph A. Matera, Esq., on behalf of Appellees	20
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2 October

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4 EDMUND P. DANDRIDGE, JR., CHAIRMAN)
5 OF THE MARYLAND STATE BOARD OF)
6 PUBLIC WELFARE, ET AL.,)

Appellants)

7 vs)

No. 131)

8 LINDA WILLIAMS, ET AL.,)

Appellee)

10 -----
11 Washington, D. C.

December 9, 1969

12 The above-entitled matter came on for argument at

13 1:08 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. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 131. Dandridge
3 against Williams.

4 You may proceed whenever you are ready, Mr.
5 Liebmann.

6 ORAL ARGUMENT BY GEORGE W. LIEBMAN, ASSISTANT
7 ATTORNEY GENERAL OF MARYLAND, ON BEHALF OF
8 APPELLANTS

9 MR. LIEBMAN: If the Court please, this case
10 involves the validity of a Maryland regulation of the State
11 Board of Social Services which has been in effect in varying
12 forms since 1947, which limits the total benefits payable to
13 a single family under the program of Aid to Families with
14 Dependent Children, to \$250 per month, subject to certain ex-
15 ceptions, none of which are here pertinent.

16 This regulation has either been in effect or been
17 under consideration since the inception of statewide needs
18 standards under the AFDC Program in Maryland in 1944. There
19 appears at Page 116 of the record extract, a document
20 generated at the time it was first considered, imposing state-
21 wide needs standards, and the last paragraph of that document
22 indicates that the state boards will be considering the question
23 of whether the regulation should permit the setting of a maxi-
24 mum amount above which no grant can go. That appears at Page
25 119 of the Record extract.

1 Subsequently, in 1947, the first of this long
2 series of maximum grant regulations was promulgated. There are
3 extensive materials in the record here which relate to the
4 considerations which entered into the promulgation of this
5 regulation. The materials in question, minutes of state board
6 meetings and such, appear at Pages 127 through 147 of the
7 record extract. I will not undertake a detailed summary of
8 these materials here.

9 And there also appears at Page 165 of the record
10 extract, the report of an unofficial committee, a body known as
11 the Maryland Commission on Governmental Efficiency and Economy,
12 in 1948, which shed a good deal of light on the thinking which
13 entered into the promulgation of these maximum grant regula-
14 tions, beginning in 1947.

15 Basically, the thought behind the regulation, I
16 think, is summed up in an affidavit of one of the veteran
17 officials of the State Department of Social Services; an
18 affidavit which appears on page 194 of the record extract.
19 That affidavit states: "It is my recollection that a maximum
20 grant regulation has been effect in Maryland/approximately the
21 time of inception of statewide needs standards in 1944. It is
22 also my recollection that these maximum grant regulations con-
23 sistently have received Federal approval. I also recall that
24 one factor giving rise to these regulations, is a strong feeling
25 on the part of many county boards, particularly during the

1 period following adoption of statewide needs standard in 1944
2 that public assistance payments should not exceed the earnings
3 of the head of a family when off assistance. And that the income
4 of a public assistance recipient did not exceed that of his
5 employed neighbors. I recall that there were times during the
6 early years, following the introduction of the maximum grant
7 regulations, the State Department of Public Welfare secured
8 information as to wage levels from the State Employment Service
9 and that the information thus secured was utilized for establish-
10 ing the maximum grant level."

11 Now, the Maryland regulation is not unique. It
12 finds there are similar regulations in some 20-odd other states.

13 MR. JUSTICE STEWART: These two excerpts, one on
14 page 119 and the other on page 194, indicate that two quite
15 disparate foundations for this maximum; one being the matter of
16 sufficiency of funds available. That's on 119, and the other
17 quite a different and as a matter of policy, so as not to have
18 people on welfare have a higher income than people who were
19 gainfully employed off welfare; is that -- do I understand that
20 correctly?

21 MR. LIEBMANN: I think, Your Honor, that's correct
22 in one sense. I think Your Honor, that there is a problem --
23 there was a problem with insufficient funds -- I'd rather put it
24 this way, that there was a problem of insufficient funds and
25 the board was confronted with the problem of making a choice

1 between different means of carrying out a reduction and for the
2 policy reason that it thought that grants shouldn't exceed the
3 income of employed families, it chose the device of the maxi-
4 mum grant, rather than the device of a percentage reduction
5 across the board for all AFDC recipients, which is the device
6 that's been employed in some other states.

7 MR. JUSTICE STEWART: So, what you are saying is:
8 these are not independent and separate reasons, but rather
9 related reasons?

10 MR. LIEBMANN: I think that's true, Your Honor.

11 MR. JUSTICE STEWART: Given insufficient funds,
12 what shall we do about it?

13 MR. LIEBMANN: Yes. There are always insufficient
14 funds in almost any welfare program, but the question is how
15 you are going to design the benefit structure.

16 MR. JUSTICE HARLAN: How does that second aspect of
17 these reasons fit a family where there is no breadwinner?

18 MR. LIEBMANN: Your Honor, we discussed this at some
19 length in our brief and we suggest that in addition to the
20 -- we suggest that there are several considerations which can
21 support the regulations. One of them is the element of work
22 incentive; another is the undesirability of establishing bene-
23 fit levels at levels higher than prevailing wage rates in the
24 community, because of the effect that this may have on families
25 that are not on welfare, because of the possible incentive to

1 family break-up, which can be created. That, I think, is a
2 major consideration behind present discussion of welfare reform
3 which would provide benefits to employed persons, as well as
4 unemployed persons and is concerned not only with the effect of
5 the regulations on people on welfare, but a feeling that this
6 can't be divorced with consideration -- from consideration that
7 the effect of the regulation on people who are not on welfare.

8 There is another answer, I think, to your question
9 and that is that, in speaking of families that don't have a
10 breadwinner, you are speaking of some families from which a
11 male head is absent; there are other families in which the
12 male head is present, but disabled, and there are other families
13 in which the male head is present but unemployed.

14 With respect to the disabled and unemployed cate-
15 gories, I think the Court is aware of the provisions of the
16 State Unemployment Compensation and Workmen's Compensation Laws,
17 which almost invariably fix benefits for the unemployed and for
18 persons on Workmen's Compensation at levels that are a fraction
19 of actual earnings. In Maryland, I believe the fraction is
20 two-thirds. And this is done even though there are elaborate
21 procedures for insuring that people are not malingering on the
22 Workmen's Compensation rolls and not malingering on the unemploy-
23 ment rolls. And the reason is, I think, essentially a concession
24 to administrative imperfection; the feeling that if you don't
25 set benefit levels at least somewhat below the wage level, there

1 is going to be abuse, and I think that that feeling also enters
2 into the maximum grant regulation in its application to
3 families which, when you look at -- when you look at them, may
4 not appear to have a wage earner and the breadwinner may be
5 disabled or maybe unemployed.

6 I think if it's rational, really, under the Work-
7 men's Compensation and Unemployment Insurance regulations for
8 that reason, it's rational here.

9 I should point out also that the Maryland regula-
10 tion has two elements which are not present in the welfare
11 regulations in some of the other states. One of them is that
12 it's one of the highest regulations. You are dealing here with
13 a regulation that really is at least somewhat related to the
14 minimum wage rate or the average wage rate. In fact, it's
15 when the nontaxability of the benefits and when the various
16 forms of aid-in-kind that are available are considered, you are
17 talking about a level of income that is, in fact, considerably
18 higher than your minimum wage or even your average wage in
19 some forms of employment.

20 The second element that I think is worth suggesting,
21 is that the Maryland regulations, unlike those in some states,
22 such as Maine and Arizona, is a limitation only on the amount
23 of the grant, not on the amount of a welfare family's budget,
24 and that is to say: if a family has state-computed needs of
25 \$350 and the maximum of \$250 in grant is applied to it, the first

1 \$100 in earnings by a member of that family may be retained
2 without reducing the welfare grant. For this reason the
3 Maryland regulation has some rather important work incentive
4 effects which are not present in the regulations of those
5 states, such as Maine and Arizona, that have a maximum budget
6 limitation.

7 Now, the complaint in this action made three
8 claims. The first was a claim of violation of state laws. That
9 claim is contained in Paragraph Roman Number XVIII of that
10 complaint.

11 The second was a claim of violation of the preamble
12 of the Social Security Act of 1935, which was said to afford a
13 basis for a finding that this regulation was inconsistent with
14 the Social Security Act. There was no mention made in the
15 complaint of any more specific violations of the Social Security
16 Act.

17 The lower court, in its initial opinion, found a
18 violation of Section 602 (a)9 of the Social Security Act and it
19 conceded, on reargument that -- and I think I am quoting from
20 the transcript on reargument -- "the statutory argument is the
21 basis of the decision that was, relevantly speaking, devised
22 by the Court, rather than the one that was impressed on the
23 court by your and your colleagues, addressing Plaintiff's
24 counsel." That, I think, is true and on reargument the conclus-
25 ion that the statute violated that provision of the Social

1 Security Act was withdrawn.

2 The third contention was the violation of the
3 equal protection. I would like to deal with each of these
4 three claims in turn.

5 With respect to the claim of the violation of
6 state law, the state filed a motion to dismiss on grounds of
7 equitable extension. The court below declines to abstain and
8 its oral opinion on this point is found on Page 83 of the record
9 extract, and it cited the case of King versus Smith for the
10 proposition that it was proper for a Federal Court to go for-
11 ward with an adjudication on the merits, irrespective of
12 whether a state court, by state construction and state law at
13 some later date might achieve the same result. That language
14 doesn't appear anywhere in King versus Smith, because I think
15 it's fair that King versus Smith was concerned with the fact
16 that there is no Federal requirement of exhaustion of state-
17 administered remedies.

18 King versus Smith was concerned with the exhaustion
19 problem. The question of equitable abstention in favor of state
20 judicial remedies was not an issue in King versus Smith. It is
21 the state's position here that the claim that the regulation
22 was violative of state law, should have been regarded as pro-
23 viding a basis for equitable abstention in favor of a declaratory
24 judgment action in the state courts and it is, I think, clear
25 from the cases under the Maryland Declaratory Judgment Act,

1 where the general validity of a state statute or regulation, is
2 assailed as it is here; that an action in the state courts for
3 a declaratory judgment would lie.

4 The state courts, of course, could have determined
5 all three questions raised by the complaint. The Federal Court
6 was effectively limited to the two Federal questions, and the
7 reason that you have this delusion between the Federal Courts
8 and the state regulations was the failure to abstain in this
9 case.

10 With respect to the Federal statutory complaints.

11 MR. JUSTICE BLACK: Is that your complete argument
12 on the first?

13 MR. LIEBMANN: On abstention, Your Honor, yes.

14 MR. JUSTICE BLACK: Has the question been decided
15 by the Supreme Court of Maryland yet?

16 MR. LIEBMAN: Well, Your Honor, I think not in the
17 welfare context, Your Honor. I think if one applies to tests
18 announced by this Court in Harrison v. N.A.A.C.P. and Zwickler
19 versus Koota, the situation in this case, abstention would be
20 appropriate. This is one of those cases where construction by
21 the state courts of an unconstued state law would have avoided
22 the necessity of having -- might have avoided the necessity of
23 having the Federal Courts reach these questions.

24 MR. JUSTICE BLACK: Well, that would divide up one
25 lawsuit; wouldn't it?

1 MR. LIEBMANN: No, Your Honor, because it would be
2 open to them to raise the Federal question in the state courts
3 also.

4 MR. JUSTICE BLACK: Oh, your argument is that they
5 should not only abstain with respect to the state question,
6 but when it was asked for a declaratory judgment there, they
7 could decide all the issues and then bring it up to us?

8 MR. LIEBMANN: They could, Your Honor. There is no
9 reason why they couldn't. I'm not suggesting that there is a
10 requirement that they litigate the Federal issues in the state
11 court, but I am suggesting that the Federal Court should have
12 abstained.

13 With respect to the Federal statutory claim, there
14 are, I think, three points, three rather fundamental points
15 which I wish to make.

16 The first point is the obvious one and the one
17 which the lower court took note of in its opinion on reargument
18 and that is that this statute -- that the existence of the state
19 maximum grant regulations has on at least three occasions been
20 expressly recognized by Congress in legislation. And that the
21 Maryland regulation, specifically has been, on at least 20
22 occasions, accepted for incorporation into the state plan by
23 the Department of Health, Education, and Welfare. This is an
24 unremitting force of construction and I think that when one
25 looks at the fate, for example, of the regulation, a substitute

1 for the regulation involved in the case of King versus Smith,
2 when they were submitted to the Department of Health, Education,
3 and Welfare, and you had disapproval of not only the Alabama
4 regulation there in issue, but of some of the regulations in
5 other states, it is quite clear, contrary to the claim of the
6 Appellees here, that the process of approval of state plan
7 amendments by the Department of Health, Education, and Welfare
8 is not a ministerial process. It is a finding and it is re-
9 quired to be a finding of the regulation in conformity with the
10 Federal Law.

11 MR. JUSTICE BLACK: Could you state briefly here
12 so that I could understand it, what you understand to be the
13 precise issue legally, between you and the other parties?

14 MR. LIEBMANN: I think the issue, Your Honor, is
15 -- there are several issues. I think the basic issue is
16 whether the lower court acted properly --

17 MR. JUSTICE BLACK: The crucial issue.

18 MR. LIEBMANN: The crucial issue is whether the
19 lower court acted properly in invalidating this state maximum
20 grant regulation on its face, under the equal protection clause,
21 when this regulation was repeatedly valid, at least to some of
22 the people to whom it would be applied and when it was supported
23 by several rational pacings. I think if I had to --

24 MR. JUSTICE BLACK: Suppose the court was wrong,
25 on that, what do you say should be done with the case?

1 MR. LIEBMANN: I believe, Your Honor, that reversal
2 -- I believe that the decision of the lower court should be
3 reversed and the injunction dissolved.

4 MR. JUSTICE BLACK: What is the challenge to;
5 exactly in the state law?

6 MR. LIEBMANN: The challenge --

7 MR. JUSTICE BLACK: Precisely, what's it aimed at?
8 What's the aim there; what that part of the statute is aimed at,
9 or its application.

10 MR. LIEBMANN: The application of the maximum.

11 MR. JUSTICE BLACK: Maximum?

12 MR. LIEBMANN: Yes.

13 MR. JUSTICE BLACK: Does it claim that you cannot
14 have a maximum?

15 MR. LIEBMANN: It claims that you cannot have a
16 family maximum; yes.

17 MR. JUSTICE BLACK: It claims you cannot have a
18 family maximum.

19 MR. LIEBMANN: That you cannot have a family
20 maximum which gives the large family less than what its members
21 might be entitled to if payments were made to them on what might
22 be described as a per capita basis.

23 MR. JUSTICE BLACK: How much is the maximum?

24 MR. LIEBMANN: \$250 a month, as of this day.

25 MR. CHIEF JUSTICE BURGER: Well, that's on a

1 matching basis, isn't it; or what might be called a matching
2 basis.

3 MR. LIEBMANN: Your Honor, the consequence of
4 invalidation of this regulation was that in order to pay the
5 family affected by their full computed need, the additional
6 money required had to come entirely out of state funds. The
7 Federal Government matches state contributions. It constitutes
8 \$32 per recipient and in Maryland the per capita expenditure is
9 something like \$37 per pe. recipient, so that the entire addi-
10 tional cost here had to come out of state funds.

11 I should have said that the Federal matching takes
12 place, whether or not the state has a maximum, preventing pay-
13 ment of additional benefits as to --

14 MR. JUSTICE DOUGLAS: I thought there were two
15 questions. The first, I thought, was whether or not this
16 Maryland regulation conflicts with the Federal Social Security
17 Act.

18 MR. LIEBMANN: Well, Your Honor, that's a question
19 that we have in another case that's already been argued.

20 MR. JUSTICE DOUGLAS: The Rosado case; is that
21 right?

22 MR. LIEBMANN: Yes, sir. Your Honor --

23 MR. JUSTICE DOUGLAS: And the second question is
24 whether the -- if it doesn't conflict, whether the regulation
25 on its face, contravenes the Equal Protection Clause of the

1 14th Amendment. Have I misread the opinion?

2 MR. LIEBMANN: No, Your Honor, you have not. I
3 should have said the state has taken an appeal to the finding
4 that there has been a violation of the Equal Protection Clause.

5 MR. JUSTICE DOUGLAS: I understand.

6 MR. JUSTICE WHITE: But the lower court abandoned
7 this decision that there was a conflict. It withdrew its
8 decision and put its decision solely on the Equal Protection
9 basis.

10 MR. LIEBMANN: That is correct.

11 MR. JUSTICE WHITE: So, the issue here is equal
12 protection, except that the Respondents would support it on the
13 statutory grounds also?

14 MR. LIEBMANN: That's right, Your Honor.

15 MR. JUSTICE HARLAN: Well, just to follow up on my
16 Brother Douglas's question, the reason for the state court's
17 reversal of its prior and earlier decision that sustained the
18 contention of the recipients on the statutory grounds was, that
19 on reexamination it said, without more help, it could not pass
20 upon the statutory grounds; isn't that right?

21 I mean, without more background or expertise or
22 whatever you want to call it; and therefore, having reached the
23 conclusion that they couldn't decide it one way or the other
24 on more mature considerations, they went straight to the con-
25 stitutional question. Isn't that right?

1 MR. LIEBMANN: That's correct and I think it is a
2 reversal of what usually happens.

3 MR. JUSTICE HARLAN: Sort of standing Ashwander on
4 its head; isn't it?

5 MR. LIEBMANN: I think that's correct.

6 MR. JUSTICE DOUGLAS: Well, then, you are looking
7 here for the expertise that you didn't find down below; right?

8 MR. LIEBMANN: I think that, Your Honor -- I'm not
9 sure that I would put it in that way. I think our position is
10 that courts, by their very nature, can't have the expertise
11 to apply the standard of review that the Appellees here would
12 have them apply to state social and economic regulations with
13 complicated --

14 MR. JUSTICE BLACK: We do not have here, as I under-
15 stand it, any question of a contention by the state that it is
16 not able to do this; that it cannot pay this maximum. You only
17 have this question of the statutory construction and of the
18 constitutional amendment.

19 MR. LIEBMANN: Your Honor, I would not say that,
20 for this reason: this --

21 MR. JUSTICE BLACK: Well, there is no desire, is it
22 there, no effort here to getus to command the state to raise
23 the funds to pay the maximums?

24 MR. LIEBMANN: Well, the lower court, Your Honor,
25 declined in terms to command the state to pay; It issued a

1 negative injunction which presented the state with a Hobson's
2 choice of either finding an additional million dollars to pay --

3 MR. JUSTICE BLACK: You mean to make an appropria-
4 tion?

5 MR. LIEBMANN: Yes, to the -- the state either had
6 to find an additional million dollars or would have been con-
7 fronted with the alternative of a 4 percent slash in all the
8 welfare payments to the aged, the blind, disabled and other
9 families under the AFDC program.

10 MR. JUSTICE BRENNAN: Could this be caused from the
11 forfeiture of the Federal contribution?

12 MR. LIEBMANN: There was no question of forfeiture
13 of the Federal contribution here. This was because the Federal
14 Government will match only up to a certain level per recipient,
15 and it had already matched up to that level, so any additional
16 monies have to come from state funds.

17 MR. JUSTICE BLACK: Now, as you view it, do we have
18 to pass at all in this case, whatever the decision, an effort
19 to command the state to make appropriations to make these pay-
20 ments?

21 MR. LIEBMANN: Your Honor, my answer to that question
22 would be this: in many of the states where we have these
23 regulations, the fiscal effects of their invalidation are so
24 great that even where the relief granted by the District Court
25 is negative, even where it takes the form of a negative

1 injunction. In substance, it constitutes affirmative relief
2 against a state government of the type described by the 11th
3 Amendment.

4 MR. JUSTICE BLACK: You mean with reference to
5 making appropriations; having an act passed by the legislature
6 to make appropriations?

7 MR. LIEBMANN: I think, Your Honor, the nature of
8 the choice presented to the state governments by these decisions,
9 particularly, when you look, for example, to the decision in
10 California, where your fiscal effects were on the order of \$40
11 or \$50 million. The nature of the choice presented to the
12 state governments involves such a fundamental alteration in a
13 state expenditure program that this Court should take the view
14 that the grant of an injunction, even negative reform under
15 those circumstances, is, in fact, such an interference with the
16 sovereign powers of the state as to be prescribed by the 11th
17 Amendment.

18 MR. JUSTICE BRENNAN: Let me see if I understand
19 how this works, Mr. Liebmann. Is it that the invalidation
20 results that in the overall appropriation now made for welfare,
21 you now have to apply 4 percent of what would be applied to
22 other programs in order to take care of this program; is that
23 it?

24 MR. LIEBMANN: Yes, Your Honor. The state is
25 presented with the choice, either of --

1 MR. JUSTICE BRENNAN: Either doing that or
2 increasing what's now appropriated for welfare generally, by a
3 sufficient sum to take care of its total need involved; is that
4 it?

5 MR. LIEBMANN: Yes, Your Honor. I think the degree
6 of rating of other programs that has to take place as such,
7 not so much in Maryland, but in some other states --

8 MR. JUSTICE BRENNAN: Is this why you say it is a
9 Hobson's choice, that you can't raise the other programs, you
10 have to appropriate additional sums to take care of this need.

11 MR. LIEBMANN: I think that's true. It's less true
12 in Maryland than it would be, for example, in West Virginia,
13 where the traditional amount is payable, from what I understand
14 would be such that cuts would have to be much deeper 'n the
15 other programs.

16 MR. JUSTICE BRENNAN: The amount here you say is
17 a million dollars; the additional amount?

18 MR. LIEBMANN: It's a million dollars in Maryland.
19 It's a high maximum. In the states that have lower maximums,
20 and high welfare rolls, the sums are perfectly --

21 MR. JUSTICE BRENNAN: But, under the program each
22 state fixes its own needs, doesn't it?

23 MR. LIEBMANN: That's correct, Your Honor.

24 MR. JUSTICE BRENNAN: For the recipient.

25 MR. CHIEF JUSTICE BURGER: Mr. Matera, you may

1 proceed.

2 ORAL ARGUMENT BY JOSEPH A. MATERA, ESQ.

3 ON BEHALF OF APPELLEES

4 MR. MATERA: Mr. Chief Justice Burger, and Associate
5 Justices of this Court: As I listened to the various arguments
6 this morning I couldn't help but notice how too often labels
7 get put on things, including poverty lawyers, and I think it's
8 important to point out that in this particular case as well, the
9 state so often has resorted to labels and somehow covered over
10 the real issues in this case.

11 I think that it's important to point out from the
12 very beginning that the essential matters that we dealing with
13 here, are not such things as less eligibility principles,
14 economic regulations; we're dealing here with the program of
15 assistance to needy and dependent children, which is very much
16 given its guidelines, in fact, completely by the Social Security
17 Act, as implemented in each state.

18 I think it's important to point out here that this
19 maximum grant regulation, in effect, creates a class of non-
20 persons, of children who, if they are unfortunate enough to be
21 born the fourth child, the fifth child in a two-parent family
22 or the sixth child in a one-parent family, are simply ignored
23 by the state in computing their needs, that as a matter of fact,
24 the state computes their needs and then simply ignores them.

25 We have here, and I think it is important to point

1 out, two classes of individuals created by this regulation.
2 The one class are children in families of six individuals or
3 less. The State computes what their minimum subsistence needs
4 are, in accordance with their own standards and then pays their
5 full computed subsistence needs.

6 MR. JUSTICE STEWART: May I ask -- That computation
7 is rather complicated, is it not, depending upon the sex and
8 the age of the child, and upon whether or not he is the third,
9 or fourth, or fifth or sixth child, or is it simpler --

10 MR. MATERA: It is simpler, Your Honor. It is set
11 out in the appendix. You will find the state schedules in the
12 appendix.

13 MR. JUSTICE BRENNAN: Are these computations by
14 state or the Social Security standards.

15 MR. MATERA: These are computations by the state
16 creates by its own standards, and there is a diminishing rate
17 as the family grows larger.

18 MR. JUSTICE STEWART: Could you point in the appendix
19 to where those computations are published? Because I think an
20 understanding of that may have no little relevance to the issues
21 here.

22 MR. MATERA: Your Honor, these computations --

23 MR. JUSTICE STEWART: Perhaps I am quite wrong, but
24 if we are talking about equal protection here, I think it's
25 important to know what the basic computations are up until you

1 reach the maximum. Well, I don't want to unduly interrupt your
2 argument. If you could let us have it, or get it from --

3 MR. MATERA: But, in effect, these computations are
4 due to provide for the needs of each child in the family until
5 the child becomes, either the fifth child in a two-parent
6 family or the sixth child in a one-parent family, and then the
7 computations no longer provide for that child. Their needs
8 are computed but the state does not any longer provide for their
9 needs.

10 MR. JUSTICE STEWART: Could you tell me, just so I
11 can follow your argument: It is a little bit more complicated
12 than just \$28.50 per month per child, or something like that;
13 isn't that correct?

14 MR. MATERA: Not any more complicated than that,
15 Your Honor. The schedule sets out how much money a family, for
16 example, of six would get; how much a family of seven would
17 get; how much a family of eight. This schedule is contained on
18 Page 19 of the appendix, and it talks about one person with a
19 another individual or two or three, and simply computes their
20 needs and then stops at \$250.

21 MR. JUSTICE BLACK: How is your equal protection
22 argument based on the fact that where this step-up, this con-
23 tinuation in, if you go above that amount, you are giving some
24 children more than others?

25 MR. MATERA: Your Honor, the equal protection

1 argument is based on the fact that the Act itself, the Social
2 Security Act, provides that each needy individual should be
3 given subsistence needs and that these subsistence needs are
4 provided for needy dependent children in small families, but
5 that once the family gets beyond that the state completely
6 ignores those needs.

7 MR. JUSTICE BLACK: They give them less.

8 MR. MATERA: They give them nothing, Your Honor.

9 MR. JUSTICE BLACK: They give them less when they
10 are larger family, per child?and that is the equal protection
11 argument?

12 MR. MATERA: And that in denying this assistance to
13 families of five or six children or more, that in denying
14 assistance to these children they are simply treating these
15 children as nonpersons, which is a concept which this Court de-
16 nounced in both Levy v. Louisiana and in Shapiro v. Thompson.

17 I think perhaps if I turn first to the statutory
18 argument, that the matter will --

19 MR. JUSTICE WHITE: Would you say that the state
20 could give \$30 a month for the first child and \$25 a month for
21 the second child?

22 MR. MATERA: That, Your Honor -- yes, and they do.

23 MR. JUSTICE WHITE: Why?

24 MR. MATERA: Well, they do because it's clearly
25 seen that for a second, third or fourth child that because they

1 all live in the same family, it would be far less to take care
2 of that third or fourth child, because that child shares the
3 needs --

4 MR. JUSTICE WHITE: You think that they at least
5 must give them something for the second child?

6 MR. MATERA: Yes; they can completely ignore his
7 needs, as this particular regulation effects.

8 MR. BRENNAN: This is all on the premise that
9 whether it's \$30, \$25 or whatever it may be, depending on the
10 number of children, this is a bare subsistence.

11 MR. MATERA: This is correct.

12 MR. JUSTICE BRENNAN: This is what, the minimum it
13 takes for the child to barely exist at all.

14 MR. MATERA: That is correct. The minimal sub-
15 sistence needs --

16 MR. JUSTICE BRENNAN: When you cut it at \$250, then
17 you have one or two children nothing is provided and nothing
18 whatever is provided for the essentials of --

19 MR. MATERA: That is correct.

20 MR. JUSTICE BURGER: Your argument would preclude
21 any maximum; any limit, would it not?

22 MR. MATERA: My argument would only state that you
23 cannot treat a class of children in a large family any different
24 than you treat a class of children in a small family, Mr. Chief
25 Justice.

1 MR. CHIEF JUSTICE BURGER: Well, suppose they fixed
2 the limit at \$400, just hypothetically -- I don't know just
3 where the arithmetic is, but then when you got up to 12 or 15
4 children in one family you would have the same argument set out
5 here today, wouldn't you?

6 MR. MATERA: If there was a maximum based on family
7 size which neglected the later children in the family; yes, the
8 same argument would prevail. The same argument would be made by
9 us; yes.

10 MR. CHIEF JUSTICE BURGER: But, in sort, the state
11 cannot fix a maximum figure?

12 MR. MATERA: The state cannot set a maximum figure
13 which is based simply on arbitrary family size which denies
14 assistance to one classification of needy dependent children
15 while at the same time providing assistance for the second
16 class in this particular case, children of small families.

17 I think if we look at the Social Security Act it-
18 self, and Mr. Justice Douglas certainly did, I think, set out
19 the real issues in this case. We have contended from the begin-
20 ning and we have contended here that the two basic issues in
21 this case are: (1) that the maximum grant regulation does
22 violate the Social Security Act, and (2) that it does violate
23 the Equal Protection Clause of the 14th Amendment.

24 Now, in what way does it violate the Social Security
25 Act? The very underlying purpose of the Act itself, is to

1 strengthen family life and to keep families together. Congress
2 itself, saw the wisdom of seeing to it that children are allowed
3 allowed to be brought up in their own homes.

4 Now, when we turn to the stipulations of this case,
5 which are contained on Page 71 and I would ask this Court to
6 give special consideration to these stipulations, we find this
7 to be true: that the Gary family, Mr. and Mrs. Gary, according
8 to the computations of the welfare department itself, would be
9 entitled to \$331 a month and the Williams, according to the
10 computations of the welfare department would be entitled to
11 \$296 a month, but because of the maximum grant regulations
12 they are, of course, restricted to \$250.

13 However, there is a way that the Gary family and
14 the children of that family who are ignored and treated as
15 nonpersons, could receive benefits; and there is a way that the
16 children in the Williams family could receive benefits. They
17 could receive benefits simply by leaving the home, because the
18 same regulations that this welfare department provides is that
19 if the Gary family would place two children - 12 years old --
20 between the ages of six and 12, rather -- the children are
21 younger, either with eligible relatives, or in institutions,
22 each one of these children would be entitled to \$65 a month and
23 at the same time the Gary family would continue to receive the
24 maximum grant of \$250.

25 MR. JUSTICE STEWART: Now, does that \$65 a month

1 come under this same AFDC?

2 MR. MATERA: Yes.

3 MR. JUSTICE STEWART: It would; not separate?

4 MR. MATERA: At the same time, if the Williams
5 family, Your Honor, could put -- if Mrs. Williams would put
6 two or her children in there, somewhat older, over the age of
7 12, with eligible relatives or in institutions, they would be
8 entitled to \$79 a month each, And at the same time Mrs. Williams
9 would continue to receive her grant of \$250. This completely
10 undermines the very purpose of the Social Security Act, which is
11 to keep families together and to allow children to be brought
12 up in their own homes.

13 Now, this was completely recognized by the Court
14 below in their first opinion and they did not withdraw their
15 findings concerning their feelings of the statutory violation
16 in their second opinion. They felt there was not enough
17 evidence here to determine whether Congress had ever approved
18 or not, and I will address myself to that.

19 MR. JUSTICE HARLAN: There is no amicus brief from
20 the United States?

21 MR. MATERA: No, sir.

22 MR. HARLAN: Do you know whether they
23 ever were requested to file one?

24 MR. MATERA: I do not know, sir.

25 The second basic, fundamental purpose of the Social

1 Security Act that we find violated in this case is the require-
2 ment of 602(a)10, which says that all eligible individuals will
3 receive assistance. It doesn't in any way embroider any new
4 eligibility requirement to that. It says, "all eligible
5 individuals," and certainly all the children in this family are
6 eligible individuals, and this is a section of the Social
7 Security Act which this Court in King v. Smith did pass upon.

8 And perhaps Justice Douglas was talking about the
9 expertise of this Court in regard to the Social Security Act.

10 MR. JUSTICE DOUGLAS: That was supposed to be a
11 joke.

12 MR. MATERA: I think certainly I would accept that
13 opinion as showing a great deal of expertise, Justice Douglas,
14 because that opinion did point to the fact that Congress did
15 intend that all responsible individuals receive assistance.

16 Now, obviously certain eligible children of these
17 families are not receiving assistance, and for those two funda-
18 mental reasons, we feel that this Act clearly -- this regula-
19 tion does clearly violate the purposes of the Social Security
20 Act. It also violates the state act which uses the very same
21 language as the Social Security Act. It also violates what
22 HEW itself has said about the purpose of strengthening family
23 life, and we refer to that in our brief, as well. HEW has a
24 very, I think, detailed definition of what the term "strengthen-
25 ing family life," means, and we would ask the Court to look to

1 that in our appendix.

2 MR. JUSTICE BLACK: May I ask you just one
3 question?

4 MR. MATERA: Yes, sir.

5 MR. JUSTICE BLACK: Let's suppose here is a family
6 with one and a family with three and a family with eight. Is
7 it your argument that under the law that is a family of eight
8 and each child must get exactly as much as a child would that is
9 in a family of only one or three?

10 MR. MATERA: No, Your Honor. As a matter of fact,
11 as I pointed out earlier, there is a sort of diminishing amount
12 that's computed by the state as the family gets larger. That it
13 is recognized that --

14 MR. JUSTICE BLACK: I thought that was your equal
15 protection claim.

16 MR. MATERA: Well, the equal protection claim is
17 where the state cuts off completely.

18 MR. JUSTICE BLACK: Cuts off completely; I under-
19 stood it was because of the difference paid the third child,
20 whether one or three or eight. Isn't that right; isn't that
21 your claim?

22 MR. MATERA: It isn't the difference paid to the
23 child, it's the complete ignoring of the needs of the children --

24 MR. JUSTICE BRENNAN: Well, Mr. Matera, I thought
25 you answered this question Justice Black has just asked you,

1 when I asked you before. The idea is that if there is only one
2 child, the computation of what the bare minimum subsistence
3 requirement for that child is, maybe \$30, let's say.

4 MR. MATERA: Yes.

5 MR. JUSTICE BRENNAN: For two children, the bare
6 subsistence requirement for the first might be \$30, but because
7 there are two children, the bare subsistence requirement for the
8 second child may be only \$25; is that it?

9 MR. MATERA: That's correct.

10 MR. JUSTICE BRENNAN: And you go on down, \$30, \$25,
11 \$20 for the third child and \$15 for the fourth child; is this
12 right?

13 MR. MATERA: That is correct.

14 MR. JUSTICE BRENNAN: Well, once you get up to the
15 total of \$250, if there are fifth, sixth, seventh children, even
16 though they compute what the bare subsistence requirement for
17 the fifth, sixth and seventh children may be, they make no
18 provision for payment to the family for those three children.
19 Is that it?

20 MR. MATERA: Yes; that's correct.

21 MR. JUSTICE BRENNAN: And your argument is that in
22 cutting out, which is the effect of the \$250 maximum, the fifth,
23 sixth and seventh children, there is a denial of equal protection
24 as between them and the first, second and third and fourth child-
25 ren?

1 MR. MATERA: Yes, Your Honor. I'd like to get into
2 that equal protection argument --

3 MR. JUSTICE WHITE: Could I just ask you for a
4 minute on that: if there is \$30 given for the first child and
5 \$10 for the second child, isn't really the determination that
6 the minimum subsistence is \$20 for each child?

7 MR. MATERA: No, that's not true, Justice White,

8 MR. JUSTICE WHITE: And so the second child only
9 needs \$10?

10 MR. MATERA: That's not true. It's based on a
11 standard of need --

12 MR. JUSTICE WHITE: Isn't the payment just to the
13 family?

14 MR. MATERA: The payment is to the family but it is
15 based on the needs of the number of individuals in that family.

16 MR. JUSTICE WHITE: Yes; but \$30 isn't allocated to
17 A and \$10 to B or anything like that?

18 MR. MATERA: No, sir; it is dependent upon the
19 number of individuals.

20 MR. JUSTICE WHITE: So, when the state sets a
21 maximum of \$250, the money is allocable among all members of
22 the family. It doesn't mean that the state doesn't think that
23 the the seventh child is going to not share at all in the \$250?

24 MR. MATERA: I would disagree in this respect,
25 Mr. Justice White, because the state does think that, because

1 when they looked at the Gary family and the number of people in
2 that family, they said, "You need, in order to live, \$331,
3 because of the number of individuals --

4 MR. JUSTICE WHITE: I understand that. That isn't
5 the question I asked.

6 The question I asked was --

7 MR. MATERA: Of course, the welfare department, I
8 assume, would believe that the mother would take those funds
9 which already are minimal and certainly divide them among the
10 children, because she wouldn't allow certain children to starve
11 merely because their needs are not recognized, you see,

12 MR. JUSTICE BRENNAN: Which would mean that no one
13 in the family gets what the state has determined to be the
14 basic minimum essential for each person in the family.

15 MR. MATERA: That is correct.

16 MR. JUSTICE BRENNAN: Isn't that correct? No one
17 can do that.

18 MR. MATERA: That is correct, if the mother cer-
19 tainly had to dilute the entire grant, every child in the family
20 would suffer.

21 MR. CHIEF JUSTICE BURGER: Suppose, hypothetically
22 now, if I would ask a question here, that the State of Maryland
23 decided to accommodate you on this matter; on your equal pro-
24 tection argument and taking this case with eight children, is
25 it?

1 MR. MATERA: We have eight children in each family;
2 yes.

3 MR. CHIEF JUSTICE BURGER: And divided that down so
4 that they reduced the payment of families of two and three and
5 four children, so that the \$250 would not violate any conceiv-
6 able equal protection claim that you are now making; does the
7 State of Maryland have that power? as a matter of naked power?

8 MR. MATERA: Your Honor, I think certain states
9 have, as a matter of fact, instituted ratable reductions, they
10 call it, percentage reduction programs. I think these programs
11 are now under attack. I think there certainly would be a differ-
12 ent question as to their constitutionality that we have in this
13 case.

14 IN going to the constitutional question in this
15 case, I think the state was quite candid when we began this
16 case, before the first opinion; they produced one witness in
17 this case, who came in: Mr. Smith. And again, his testimony is
18 on Page 77 of the appendix, but Mr. Smith's testimony was quite
19 candid and to the point that the purpose of this maximum grant
20 regulation was to conserve state funds.

21 Now, I think my brother here referred to several
22 other people from the welfare department who testified --

23 MR. JUSTICE MARSHALL: Well, Mr. Matera, my real
24 problem is you seem to say the equal protection argument is in
25 regard to the extra children, rather than the family.

1 MR. MATERA: The equal protection argument refers
2 Your Honor to the fact that children of large families aren't
3 having their needs recognized once they become, unfortunately,
4 the fifth or sixth child in the family.

5 MR. JUSTICE MARSHALL: They'll eat right along with
6 the rest; it just means that everybody would eat less.

7 MR. MATERA: That's, in effect, what would happen;
8 yes. Because the mother would not sit there and allow -- other
9 than that, she would simply send the child out, as she can do,
10 as I pointed out, under the Act.

11 MR. JUSTICE MARSHALL: I have a great problem with
12 the equal protection argument without the first argument. To me
13 you have got to get them both. I think that you have to estab-
14 lish that this is basic subsistence and nothing less will do.
15 Otherwise, my own trouble with the equal protection
16 argument.

17 MR. MATERA: Well, Your Honor, the needs are basic
18 subsistence needs as established by the state and they are basic
19 subsistence needs for families of each computed size. And I
20 think when the state talks about their rational purposes to save
21 their regulation from falling under the equal protection case, I
22 think they used the approach that the state did use in the
23 Shapiro v. Thompson case, the same blunderbuss approach. They
24 talked, for example, that the regulation somehow encourages
25 employment, but when we look at the facts in this case, if you

1 somehow look at the less eligibility principle that was enun-
2 ciated in England, I think, in 1825, we know that we have moved
3 a long way from them. And this Court in King v. Smith, did
4 recognize that we have a much more sophisticated and enlightened
5 welfare program now which looks toward rehabilitation and re-
6 education and retraining and as a matter of fact, this 1967
7 Amendments to the Social Security Act clearly provide for this
8 kind of an approach to employment. It sets up a very compli-
9 cated scheme of a WIN program which not only requires welfare
10 recipients to seek the training but to seek employment, and
11 in this particular light the -- in light of the employment pur-
12 pose pointed out by the state, the regulation under the
13 traditional test of equal protection, and we have first argued
14 in our brief the traditional test of equal protection. This
15 purpose is grossly overinclusive, for it would clearly involve
16 people who, as our main plaintiffs, are not able to work. Both
17 of our main plaintiffs in this case are disabled. In addition to
18 that it's applied only against large families, as if to assume
19 that the heads of all large families are employable, but the
20 small families and heads of small families, somehow do not need
21 this type of encouragement to work.

22 So, it is grossly overinclusive. It is underin-
23 clusive in the sense that it does not include the small family.
24 So, it suffers from this uniqueness of being not only over-
25 inclusive but underinclusive.

1 The exhibits of the state and the state has referred
2 to some of their exhibits, point out that only 166 families on
3 the whole welfare program were assisted with employment. NOW,
4 we have at least 2500 families who are affected by the maximum
5 grant regulation. In addition to that, exhibits that have been
6 put into this appendix by the state, also indicate that even
7 if all of the jobs in Maryland were somehow to be employed for
8 welfare recipients, there still wouldn't be enough jobs.

9 So that this particular purpose really has no
10 viability in light of the amendments to the Social Security Act.

11 In addition to that, the state talks about this
12 regulation somehow acting as a family stabilizer. I think this
13 purpose is ironic, in view of the stipulations which show how
14 a family is encouraged to disintegrate, instead of stay to-
15 gether. Again, it is overinclusive.

16 An exhibit which the state itself put into evidence
17 in the court below, is contained on Page 154 of the appendix,
18 points out that only 15 percent of families on welfare are on
19 welfare because the head of the family deserted them.

20 For the purpose of encouraging heads of large
21 families only not to desert, we are going to punish 85 percent
22 of the welfare caseload. This is grossly overinclusive.

23 In addition, again it has that uniqueness of being
24 under inclusive, for it is only applied against the heads of
25 large families.

1 Thirdly, the state would talk about it being a
2 dissentive to child-bearing. Well, this Court has spoken about
3 the right to procreation in marital privacy in Skinner and
4 Griswold and Justice Douglas, I know, is quite familiar with
5 this. And so they would seek to invade this highly-protected
6 right of marital privacy and of right to procreation for the
7 purpose of this particular regulatxon, it again would affect
8 only the heads of large families.

9 So that we are talking about a purpose which would
10 begin to invade a fundamental right, the right of procreation
11 and the right to marital privacy, and this gets me into the
12 latter part of my equal protection --

13 MR. JUSTICE BLACK: Well, how did that question
14 get into this issue.

15 MR. MATERA: Well, Your Honor, in the case of Mr.
16 and Mrs. Gary, for example, all of their children were born
17 prior to the time they went on welfare.

18 MR. JUSTICE BLACK: Were before what?

19 MR. MATERA: All of them were born prior to the time
20 Mr. and Mrs. Gary were required to seek welfare assistance. The
21 same thing is true of Mrs. Williams. So, in effect, they are
22 being punished for exercising a constitutional right.

23 MR. CHIEF JUSTICE BURGER: Would it make any dif-
24 ference to your argument if these children were born after they
25 were on relief?

1 MR. MATERA: Your Honor, we would still maintain
2 that it is an invasion here of marital privacy and the right to
3 procreation. We would still have to maintain that.

4 MR. CHIEF JUSTICE BURGER: So, the time when they
5 were born, in relationship to relief, has nothing to do with
6 the case?

7 MR. MATERA: It has something to do with the case in
8 this sense, that we are punishing the parents of children for
9 an act which they had a perfect legitimate/right to exercise, even
10 prior to the time that they were required to seek welfare
11 assistance.

12 MR. CHIEF JUSTICE BURGER: Well, do I take that as
13 a suggestion that their right is different after they go on
14 relief?

15 MR. MATERA: Their right is no different, Your
16 Honor.

17 MR. CHIEF JUSTICE BURGER: Well, then --

18 MR. MATERA: It is only relevant in this case to
19 point out how it affects families who, perhaps have already had
20 their children prior to the time they go on welfare. They are
21 being punished for exercising that right, even before they
22 needed welfare assistance.

23 MR. JUSTICE BLACK: How are they being punished,
24 and who is punishing them and what is it they are being punished
25 for?

1 MR. MATERA: They are being punished, Your Honor,
2 because of the fact that because their family happens to be of
3 a certain size, certain children in that family are simply
4 considered to be nonpersons. They are not given any assistance
5 whatsoever.

6 MR. JUSTICE HARLAN: Well, the bill of attainder is
7 having been on public assistance.

8 MR. MATERA: Your Honor --

9 MR. JUSTICE BLACK: Well, is it your premise that
10 it costs exactly the same to maintain a family of eight that it
11 does a family of one, per child?

12 MR. MATERA: No, Your Honor that wouldn't be --

13 MR. JUSTICE BLACK: That is not part of your
14 argument?

15 MR. MATERA: No, it wouldn't be part of my argument,
16 at all.

17 MR. JUSTICE BLACK: You wouldn't claim that Maryland
18 couldn't make a difference between the amount per child it would
19 give to a family of eight and a family of two?

20 MR. MATERA: Not at all.

21 Your Honor, we have maintained that this regulation
22 is unconstitutional, under the traditional test; but we would
23 maintain that this Court should apply the special scrutiny or
24 compelling state interest test because of the fact that there
25 are fundamental rights involved here. I have already talked

1 the right to marital privacy and to procreate.

2 However, the regulation also creates a suspect
3 classification, a classification that was struck down by this
4 Court in Levy v. Louisiana. As soon as a child is unfortunate
5 enough, under this regulation, to be born the fifth child of a
6 two-parent family or the sixth child of a one-parent family, he
7 is at that time put in a suspect classification and that --
8 and welfare assistance is, at that point, denied to him.

9 This Court has struck down such classifications in
10 Levy v. Louisiana as well as in Shapiro v. Thompson. And we
11 would maintain that because the regulation creates a suspect
12 classification the traditional test should not be applied here,
13 but that the compelling interest for a special scrutiny test
14 should be applied.

15 MR. JUSTICE STEWART: To whom does the welfare check
16 go?

17 MR. MATERA: The welfare check, Your Honor, goes to
18 the head of the family.

19 MR. JUSTICE STEWART: If it is a single woman,
20 either because he spouse has abandoned her, or died, it goes to
21 her; and if it's a man or woman and they are both incapacitated,
22 it goes what, to the man?

23 MR. MATERA: Yes, sir; the head of the family.

24 MR. JUSTICE STEWART: So that the people who,
25 presumably -- it's not the fifth or sixth or seventh or eighth

1 child that necessarily suffers; it's the whole family's income
2 is reduced on a per capita basis --

3 MR. MATERA: That would be the practical effect,
4 because a parent would simply not let its child starve.

5 Because we feel the compelling interest test is
6 appropriate here, the state must look to less onerous alter-
7 natives; and we are fortunate here not to have to talk about
8 how the less onerous alternatives could be devised, because
9 they have already been devised. The 1967 Amendments to the
10 Social Security Act do provide for a WIN program; do provide
11 for means to find husbands and fathers who should be supporting
12 children, and they do provide for a family program of control
13 of family size.

14 So that all of these less onerous alternatives
15 already exist.

16 In closing I would just say that at this Court
17 found in King v. Smith --

18 MR. CHIEF JUSTICE BURGER: Your time is up, Mr.
19 Counsel.

20 MR. MATERA: Thank you.

21 MR. Liebmann and Mr. Matera, thank you for your
22 submissions. The case will be submitted.

23 (Whereupon, at 1:40 o'clock p.m. the argument in
24 the above-entitled matter was concluded)

25