

# Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

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GENEVER LEWIS, ET AL. :

Appellants. :

vs. :

ROBERT MARTIN, DIRECTOR OF THE  
STATE DEPARTMENT OF SOCIAL WELFARE  
OF THE STATE OF CALIFORNIA, ET AL. :

Appellees  
-----

Docket No. 829

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

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GENEVER LEWIS, ET AL.,

Appellants,

vs

No. 829

ROBERT MARTIN, DIRECTOR OF THE  
STATE DEPARTMENT OF SOCIAL WELFARE  
OF THE STATE OF CALIFORNIA, ET AL.,

Appellees  
-----

The above-entitled matter came on for argument at  
1:52 o'clock p.m., Tuesday, March 3, 1970.

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:

ANTHONY G. AMSTERDAM, ESQ.  
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Attorney for Appellants

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as amicus curiae)

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San Francisco, California  
Attorney for Appellees

1                                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE BURGER: Number 829, Lewis and  
3 others against Martin.

4                   Mr. Amsterdam, you may proceed when ever you are  
5 ready.

6                   ORAL ARGUMENT BY ANTHONY G. AMSTERDAM, ESQ.

7                   ON BEHALF OF APPELLANTS

8                   MR. AMSTERDAM: Mr. Chief Justice and may it please  
9 the Court: The basic issues in this welfare case have become  
10 somewhat clouded by the promulgation of new state welfare  
11 regulations since the beginning of the suit by the enactment of  
12 a new state statute since the decision below, by the promulga-  
13 tion of proposed regulations under that state statute not yet  
14 in effect, and by the variety of positions taken by the parties  
15 and the amici in this Court.

16                  For this reason, I think it useful at the outset, to  
17 describe and to distinguish several different factual situations;  
18 that is, family situations which are represented by the several  
19 plaintiffs and the plaintiff intervenors in this case.

20                  To identify the legal issues presented in each of  
21 those situations and then to describe what is and what is not  
22 still an issue in the case.

23                  Now, the Appellants in this Court include the indi-  
24 vidual plaintiffs below, the individual plaintiff intervenors  
25 below and the classes which they represent. All of these

1 persons are members of households which are eligible, or which  
2 claim eligibility to receive welfare benefits under the  
3 Federally-supported AFDC Program; that is Aid to Families With  
4 Dependent Children, established by the Social Security Act.

5 In each case the family unit which is eligible for  
6 such assistance, consists of a mother and her natural children.  
7 The children are, under both Federal and State laws, dependent  
8 children, because their natural father is continually absent  
9 from the home. It is that circumstance, that is, their being  
10 dependent children which renders them eligible for assistance,  
11 if, in addition to being dependent, they are also needy. And  
12 it is that circumstance which requires the determination of the  
13 extent of their need for purposes of determining their assis-  
14 tance levels.

15 Now, in each of these cases, each and all, California  
16 has taken account in determining need of financial factors  
17 relating to the presence in the household of a man who is not  
18 the natural or the adoptive father of the dependent children.

19 I will come shortly to the legal basis for California's  
20 action. For the present it is important simply to note that  
21 the varying relations of the male figure to the children and  
22 to the mother, creates three distinct factual situations which  
23 have differing legal import.

24 The first of these is what we will call the stepfather  
25 situation, and the stepfather situation is a case in which

1 the male in the house is ceremonially married to the mother.  
2 This is the case of the plaintiff intervenors, the Bell family  
3 and the Simms family.

4 The second situation is what is in the jargon known  
5 as the "MARS" situation. MARS is an acronym for a man assuming  
6 the role of spouse and this is a situation in which the man is  
7 not ceremonially married to the mother and is not the father of  
8 any of her children.

9 The third situation is the so-called unmarried father  
10 situation. The unmarried father situation is a case in which  
11 the man is not ceremonially married to the mother but he is the  
12 father of at least one of her children in the household. Now,  
13 that child would not be the AFDC eligible child, ordinarily,  
14 because, having both parents in the house, it would not be  
15 dependent. There are special programs and situations in which  
16 he might be, but for purposes of these cases, the AFDC child  
17 does not include that common child, but the common child is  
18 important because of the way California law treats these cases,  
19 a matter I will come to shortly.

20 The first thing I want to look at in all three situa-  
21 tions, briefly, is how Federal law and particularly the Federal  
22 HEW regulation which applies to this situation. That is:  
23 45 C.F.R. Sec. 203.1 treats these cases.

24 Under Federal law the three cases are treated exactly  
25 the same. That is to say that in all of them if there are any

1 actual contributions by the man the MARS, the stepfather, to  
2 the support of the children, to the upkeep of the house, that  
3 is considered income to the household, the what is known as  
4 FBU, FAmily Budget Unit, for purposes of computing whether or  
5 not the family is needy and the extent of the need.

6           However, no income may be assumed to be received from  
7 any of these three male figures, for purposes of determining  
8 eligibility, as needy, or for purposes of determining the ex-  
9 tent of the need. And this is so, because under the relevant  
10 Federal regulation income may be assumed to be coming to an  
11 eligible AFDC family only if it is coming to a natural or  
12 adoptive parent of the AFDC children or if it is coming to a  
13 stepparent who fulfills four criteria: that he be ceremonially  
14 married to the mother, that he be legally obligated to support  
15 the child, that that legal obligation be under a state law of  
16 general applicability and that the state law be one which re-  
17 quires stepparents to support their children to the same extent  
18 that natural or adoptive parents are required to support their  
19 children.

20           Now --

21           Q       Am I right in understanding that you have just  
22       bee describing the HEW regulation?

23           A       Exactly.

24           Q       Right.

25           A       What I am doing is to describe its effect not

1 yet with regard to California law, but to say that in each of  
2 the three sets of situations here the HEW regulation would  
3 very plainly say "no assumption of income." I am describing  
4 the terms of that regulation.

5 Q That's what I understood you to be describing;  
6 right.

7 A Now, the result, of course, is that all of  
8 these three situations are out in terms of assumption of income.  
9 The MARS and the unmarried father not ceremonially married, but  
10 the much more important aspect which also applies to stepfathers  
11 is that there is no here obligation under state law of general  
12 applicability, which is to the same extent as the liability  
13 which California puts for support on the natural father.

14 I'm going to come back and take those requirements  
15 apart in detail, because they are the nub of this case, but I  
16 want to pass to what California does with these three situations  
17 to indicate what I think is still a live issue in this Court.

18 At the time this suit was filed, California also  
19 treated all three situations the same. That is to say that in  
20 each and every case the stepfather, the MARS and unmarried  
21 father, California said that any income which he received,  
22 whether or not he actually contributed to the family, was  
23 treated as income to the family after certain deductions were  
24 taken. He was allowed certain kinds of deductions, spelled out  
25 in state law. But, once those deductions were taken,

1 California law assumed that the rest of his income was avail  
2 able to the family and either deducted that amount from the  
3 need in order to reduce the welfare grant, or if it reduced  
4 so the family was no longer needy within the definition, the  
5 family simply became ineligible.

6 Now --

7 Q As I understood California's review on this,  
8 an unmarried father were living as the husband of another  
9 woman and with 11 children of theirs, if he were an unmarried  
10 father of a child in an AFDC household, with another mother an  
11 one child in that family, his income would be attributable to  
12 that second unit?

13 A Well, not -- no, no. I may not understand the  
14 question, Mr. Justice Stewart; the unmarried father situation  
15 only exists where the man is now living in this household. He's  
16 living in this household and has one child in common with the  
17 mother in this household, then he's an unmarried father.

18 Now --

19 Q I see. It's only applicable if he's living in  
20 the house.

21 A That's right. The effect of this regulation  
22 only deals with the man that's in the house; that's the whole  
23 issue.

24 Q All right; thank you.

25 Q Well, he might be living in more than one



1 household; is that not possible?

2 A Yes, he might be --

3 Q That's partly, at least, what I suggest Mr.  
4 Justice Stewart had in mind.

5 A We had no such situations in any of these  
6 cases. That is, California -- as far as these cases go, you  
7 are dealing with a situation where a man has a stable relation-  
8 ship in this one household.

9 Now, I have some very real questions as to whether  
10 he might be living in one household, more than one household  
11 for the purposes of characterization. Obviously he couldn't  
12 be more than one kind of a stepfather. He's only ceremonially  
13 married to one woman at once, except in extreme cases which we  
14 might conjecture.

15 As far as the MARS situation goes, I think he would  
16 not meet the MARS definition, because he probably couldn't be  
17 holding himself out to be married -- again, except the extreme  
18 situation that we might conjecture, in a way that he would be  
19 treated as a MARS. A father might very well end up by living in  
20 two houses because the only thing that is required is that he  
21 live there and that he have a child in the house. And if he  
22 splits his time, then he may be in two households. We have no  
23 such situation.

24 Now, the important change in California law is  
25 reflected by the enactment, effective November 10, 1969, of a

1 new statute which is set out on page 93 of the appendix to our  
2 brief, which changes the California rules as to the MARS; that  
3 is the man assuming the role of the spouse.

4           It is no longer the case that his income, minus  
5 deductions is attributed to the family. Now he is required to  
6 make an agreement with the mother relating to the amount which  
7 he shall contribute and the statute requires that he make a  
8 contribution which is no less than what it would cost to pro-  
9 vide himself with an independent living arrangement. All of  
10 this is governed also by proposed regulation.

11           And then, the effect of the new California statute is  
12 to attribute to the family a proportion of the amount of that  
13 contribution payment which he is required to make.

14           Now, let me describe the effect of this new statute on  
15 our three sets of situations. One, as to the stepfather,  
16 absolutely no effect. We are still talking at this point in  
17 time about Section 11351, which is the statute which this suit  
18 originally challenged; it is still in full force and effect as  
19 to stepfathers, and therefore, as to all past and future  
20 matters, that is a live issue here with regard to the  
21 stepfathers, that is the plaintiff intervenors here.

22           With respect to them, what we seek in this case is a  
23 declaration of the validity of the Federal regulation under  
24 the statute. A consequent declaration by this Court of the  
25 illegality, because it is inconsistent with the statute and

1 with the Constitution of 11351 and if the Court upholds the  
2 Federal regulation there's an end of 11351, because California  
3 has admitted from the beginning of this case that it was in-  
4 consistent with the Federal regulations. The Court below so  
5 held and we think there can be no question about that.

6 And the effect of that also would be back --

7 Q That would result in permanence in those three?

8 A That would result in a reversal of the judgment  
9 below.

10 Q As respects those three, you say that the court  
11 held that --

12 A The court held the Federal regulation invalid  
13 and therefore allowed California to enforce its rules.

14 Q As respects these three?

15 A Pardon me?

16 Q As respects the group you are now talking about?

17 A Yes; yes. With respect to all parties at that  
18 time. The new statute wasn't in effect and the decision was  
19 made as to --

20 Q Are we now talking about the regulation that  
21 was promulgated after this decision was made?

22 A No; what was promulgated after the decision was  
23 made was not a new HEW regulation --

24 Q I understand.

25 A -- but a new state statute.

1 Q I understand; yes.

2 A As to that there has been no determination  
3 below and I'm not asking this court to rule on that, no.

4 Q You confuse me because you referred us to page  
5 93 of your appendix; it has that new statute in it, and I  
6 thought you were talking about that. Excuse me.

7 A No. I'm sorry. The new statute simply raises  
8 the issue which I am addressing at the moment of what's moot  
9 and what's not.

10 With regard to the old statute which is set forth in  
11 the first appendix --

12 Q I know where it is; I understand the case, but  
13 I thought that you were off on the new statute. You're not?

14 A No. I am going to come now to the effect of  
15 the new statute, which is that in the MARS situation --

16 Q Now, before you do that, Mr. Amsterdam, what  
17 weight do we give the new statute, except for purposes of  
18 possibly evaluating mootness of the case?

19 A Absolutely none. I think that we would challenge  
20 the new statute --

21 Q You are not challenging it now?

22 A We are not, and we do not, and that's exactly  
23 what I want to say: that with regard to the MARS situation there  
24 is a question as to mootness as to future relief. On the other  
25 hand, the case is not moot, because past payments which are

1 allowable under California law are still an issue up to the  
2 date of the new statute with regard even to the MARS cases.

3 And what we ask this Court to do as to the MARS  
4 statute is that after reaching the issues in this case, which  
5 are required by the presence of stepfathers, that is holding  
6 the Federal regulation valid and 11351, the state statute,  
7 invalid, simply to remand the case to the District Court to  
8 allow the parties to frame the issues under the new statute,  
9 challenge it, if they please; see how the state regulations  
10 solidify, and in effect, equitably clean up the case after this  
11 Court makes the major decision, which we think is the validity  
12 of the Federal regulation.

13 Q Well, isn't there an alternative approach to  
14 it, too, and that's to just wash the case out and let the  
15 litigation resolve itself under the new regulations and  
16 statutes?

17 A Well, this Court would have to remand, if it resolved  
18 the case by holding the Federal regulation valid; the Court  
19 would have to remand for disposition of a number of issues:  
20 the amount of back payments and that sort of thing --

21 Q When you say "we would have to," you mean it  
22 would wise to do so?

23 A Oh, it would be ordinary to do so, I think.

24 Q Usual.

25 A I think appropriate in the sense that there are

1 a number of unresolved issues that would then be cleaned up.  
2 But, I think that this Court need not entangle itself, is  
3 really what I'm saying, in any consideration of the new  
4 statute and my answers to the Chief Justice's question is  
5 precisely that that statute should have no effect here, as to  
6 mootness or anything else.

7 Q Do I understand the new legislation, your  
8 position is, has no bearing whatever in the stepfather situa-  
9 tion. That is precisely as it was when the case was brought  
10 here?

11 A Exactly.

12 Q And that that presents the question, the basic  
13 question of the validity of the Federal regulation held invalid  
14 by the District Court.

15 A Correct.

16 Q And also of the validity of the state regula-  
17 tion or statute, as the case may be, but only in the stepfather  
18 situation.

19 A Well, that's unclear. That is the one additional  
20 point I wanted to make. The regulations under the new statute,  
21 for reasons that escape me as a matter of California law, con-  
22 tinue to treat the married father as he was treated under the  
23 old law. I see no basis in California law for that and I think  
24 we've just got to wait and see. And again, this is why it's  
25 got to go back to the District Court for resolution of these

1 kinds of questions.

2 Q Well, are you going to tell us -- you've al-  
3 ready told us that in the stepfather situation we needn't be  
4 concerned with the new statute.

5 A Absolutely.

6 Q Well, now, what is there in the MARS situation  
7 and the unmarried father situation that the new statute says  
8 that makes doubtful whether those cases are here?

9 A Well, the new statute changes the entire method  
10 of California's treatment of income in those cases. It no  
11 longer is the case that the income to the male is treated as  
12 income to the family unit after deduction.

13 Now there is a new requirement, which is that he  
14 make a contribution, which is described in detail. It has to  
15 be the same that he would make to support himself independently  
16 to the family, and a percentage of that is treated as income.

17 We don't really know --

18 Q Well, now, and because of this change, I  
19 gather, there could be no conflict with the Federal regulation  
20 if the Federal regulation is valid?

21 A Oh; there may or there may not be, but until  
22 we know what the new state-proposed regulation --

23 Q We needn't deal with it? Is that it?

24 A It's not here now, because we just don't know.  
25 It simply is not right, is the answer I can --

1 Q Is any of this discussed in the written papers  
2 filed here?

3 A Pardon me?

4 Q Is any of this discussion the new  
5 statute or new regulation in the briefs?

6 A We have both the new statute in the brief and  
7 it's in the last appendix to our brief, a discussion of the  
8 effect of it; yes, but not for the purpose of having this  
9 Court decide it.

10 Now, coming briefly to two sets of questions, the  
11 validity of the Federal regulation and the constitutional  
12 issues.

13 I propose to start with the validity of the Federal  
14 regulation. I think that that is not, with all due respect to  
15 the court below, a very difficult question.

16 Let's take a look at what this regulation does and  
17 doesn't do. It does not restrict in any way state power to  
18 decide how much income a family has to have or lack before they  
19 are needy. In that sense, the determination of need is left  
20 to the state; what is needy.

21 It doesn't restrict in any way state power to limit  
22 how much of a family's need the state is going to supply. As  
23 far as this regulation goes, maximum grants and that sort of  
24 thing, are unaffected.

25 Moreover, it does not restrict in any way state power



1 to determine how much income or resources an AFDC family has  
2 for the purpose of determining whether it's needy, insofar as  
3 relates to actual income received. If any actual income is  
4 received the Federal regulation allows the state to treat it  
5 as income to the family.

6 What it does do is to deny the state to treat as  
7 income and as resources monies which are not proved to be  
8 actually available to the AFDC family, except under specified  
9 conditions which are designed to assure that the situation is  
10 one in which, even without proof of actual availability of  
11 money, meaningful economic protection of the AFDC child is  
12 important.

13 Now, I want to make very clear -- I'm going to come  
14 to the specific regulation in a moment, but a vitally important  
15 part of this case is that this particular regulation, the HEW  
16 regulation, is only one sub species, a particularized aspect  
17 of a more general HEW regulatory policy.

18 Since 1967 HEW has provided that only income and  
19 resources that are in fact, available to an applicant or a  
20 recipient for current use on a regular basis are to be taken  
21 into account in determining need and the amount of payment.

22 And for example, HEW says that in a case where a  
23 child has a support obligation under a court order, from the  
24 father, that the state may not treat as income the amount which  
25 the court has ordered paid unless it is actually paid.

1 Now, the importance of that in this case is that the  
2 ground of California's position here and the District Court's  
3 decision below, doesn't just knock out this HEW regulation;  
4 it would knock out every HEW regulation which announces the  
5 general or specific policies of nonassumption of income. Be-  
6 cause what California says it has a right to do, is to treat  
7 as an income in an AFDC family, any and every legal obligation  
8 created by state law, without proof of actual receipt.

9 Now, HEW has found over the course of many years  
10 of administering this program that it is one thing to have:  
11 a bird in the bush; you're not going to have a bird in the hand  
12 as far as an AFDC family goes. There are lots of legal  
13 obligations that just don't come off and don't come through and  
14 it is the purpose of the HEW regulation to assure that except  
15 in a limited class of cases where one can be very sure that  
16 legal obligations are, in fact, likely to come through, that  
17 states are not going to be permitted to assume income.

18 Now, we think that the position of the court below  
19 in California is wrong insofar as they purport absolutely to  
20 preclude HEW from limiting state power to treat nonreceived,  
21 theoretically available resources as income to the family.

22 Our position is that the statute, precisely, because  
23 it requires the HEW to approve state plans which are required  
24 to provide for a consideration of income and resources, allows  
25 HEW to decide what kind of income and resources are meant by

1 that and if HEW reasonably sets restrictions on what the  
2 state can assume in the way of income, those restrictions are  
3 valid.

4 Here, in light of the shortness of time, I mean to  
5 refer to only two of the restrictions and show how obviously  
6 consistent with statutes they are.

7 HEW, following King v. Smith required that before  
8 income be assumed, state law impose a legal obligation and  
9 that the legal obligation be a general one. That is, under a  
10 state statute of general applicability and the same as the  
11 father. So, let me just start with the "same as the fathers."

12 Under California law, as under most law, father's  
13 obligation is not defeasible if the father leaves the home.  
14 He can be pursued and be required to support his child any time,  
15 anywhere. The obligation imposed by this particular California  
16 law exists so long, and only so long as the man is in the home  
17 and that's true with regard to stepfathers, MARS and everybody.

18 As soon as he leaves the house the right ceases.  
19 Now, of course, HEW could require that California assure some-  
20 thing a parental obligation to support, and not the half-baked  
21 right that California has given children in the situations  
22 presented in this case, because California, HEW can insist,  
23 might give them a full-fledged right, one which, if not useless,  
24 simply because if a mother threatens to enforce it the man  
25 leaves and there is an end of the right.

1 Q I thought there was some dispute even with  
2 respect to whether, so long -- even though he was in the house  
3 so there was a legally enforceable obligation.

4 A Mr. Justice Harlan, the Government --

5 Q I was confused by the briefs, I couldn't --

6 A That's one of the issues that with more time  
7 I might have tried to clarify somewhat more. We don't take  
8 that position and candidly, it's for this reason: you've got  
9 three California judges below, the California District Court.  
10 They said it was an enforceable obligation. There is no  
11 California law one way or the other that's square on it.

12 There is a recent case that is cited in California's  
13 brief that I might give the Court --

14 Q Well, don't spend any time on that, because I  
15 understand your position is independent of that.

16 A Fine.

17 We need only rely to knock out this regulation on  
18 the proposition that the duty to support is not the same  
19 and it's not under a generally-applicable statute.

20 An additional reason why the Secretary could  
21 insist that the obligation be the same, is fairly evident from  
22 the facts of this case. It is an affirmative purpose of this  
23 statute to keep families together. If California is permitted  
24 to put in a regulation that says that income is to be assumed  
25 because a man is required to support children only when he's

1 in the home. The effect of that is to drive him out of the  
2 home and in two of these cases that's exactly what happened.

3 Now, to prevent this result and to assure economic  
4 security, HEW, it is our position, could properly promulgate  
5 this regulation. It is valid, and accordingly, the state  
6 statute inconsistent with it, invalid.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr.  
9 Amsterdam.

10 Mr. Beytagh.

11 ORAL ARGUMENT BY FRANCIS X. BEYTAGH, OFFICE  
12 OF THE SOLICITOR GENERAL, ON BEHALF OF THE  
13 UNITED STATES, AS AMICUS CURIAE

14 MR. BEYTAGH: Mr. Chief Justice, and may it please  
15 the Court: I should like at the beginning to indicate that  
16 the Government's position with respect to the significance of  
17 the new California statute and question of mootness, is as  
18 stated by Mr. Amsterdam.

19 We feel the case is not moot. The essential  
20 questions were presented to the Court when, prior to the enact-  
21 ment of the California statute, are still here. Those basic  
22 questions relate to the validity of the HEW regulation. We  
23 agree, as well, that the most appropriate course would be for  
24 the Court, as to the effect of the new California statute,  
25 assuming reversal to the decision below, to remand it to the

1 lower court for further proceedings, to determine just what  
2 that particular statute means as to those situations affected  
3 by it.

4 Q I'd like to ask you one question, Mr. Beytagh,  
5 that may give me a better background to understand some of the  
6 problems.

7 Independent of whatever right the parties have,  
8 laying that aside for the moment, can you tell us whether, in  
9 a given situation if a state program under its statute is  
10 not in compliance with HEW regulations, whether the Federal  
11 Government may terminate the grants to the state and terminate  
12 the participation in the program.

13 MR. BEYTAGH: My understanding is that the Federal  
14 Government can do that; yes.

15 Q And that would produce the result that was  
16 across the board; would it not?

17 A That's correct, and a result that, of course,  
18 is not one that is desired, either by the Federal Government or  
19 I would think, by the State Government.

20 Q Obviously it would result with a great deal of  
21 disaster involved in it, but this is the hold which the Federal  
22 program has on each of the states, basically; is it not?

23 A I think that's one way to express it; yes,  
24 Your Honor.

25 The statute clearly sets out the responsibilities of

1 the Secretary and one of those responsibilities is to pass on  
2 state plans and a very elaborate scheme is set out for the  
3 state plans and what they should entail.

4 Q Isn't that the best method of enforcement of  
5 Federal regulations, rather than piecemeal litigation by in-  
6 dividual recipients?

7 A I think it may well be a better means of  
8 effectuating that. However, the situation that we have here  
9 as the Court well knows, came out of its decision in King versus  
10 Smith. Prior to that time HEW had not felt itself in a  
11 position to enforce rigidly on the states the rules that it had  
12 promulgated. Bolstered by King versus Smith, the Alabama  
13 substitute father case, HEW has now sought to enforce those  
14 regulations, and this case, of course, came along at this time.

15 We attempted to intervene below and were not per-  
16 mitted to do so, and so therefore appear in amicus, as you know.

17 Q In this case you attempted to intervene?

18 A Yes.

19 Q Well, may I ask, Mr. Beytagh, even if the HEW  
20 regulation is valid, contrary to the conclusion of the three-  
21 judge court, do I understand your answer to the Chief Justice  
22 to mean this: that if California persists with its regulation,  
23 the only consequence is that it may forfeit its Federal contri-  
24 bution?

25 A I don't think that that's the only consequence.

1 The consequence would be that the Secretary would have the  
2 option of terminating programs --

3 Q Well, I gather --

4 A Whether he, in fact, would do that or not, I  
5 don't know.

6 Q Well, are you taking the position that it is  
7 before us, not only the question of the validity of the Federal  
8 regulation, but assuming that we conclude contrary to the  
9 three-judge court that it is valid, that we must also determine  
10 the validity of this state regulation?

11 A I don't think that's necessary, because they  
12 are so irreconcilable and necessarily in conflict in California  
13 and --

14 Q Well, I know. They may be in conflict, but  
15 does that make the California regulation invalid or does it  
16 mean only that the Secretary may then exercise the option to  
17 cut off the Federal contribution?

18 A No. The Secretary is authorized by provisions  
19 of the Act to promulgate rules and regulations to implement it.  
20 He has done this in promulgating this regulation that we have  
21 before us now.

22 And I think the District Court --

23 Q And if it's valid does that then supercede,  
24 so as to make invalid the California regulation?

25 A Yes, I think it does, under this --



1 Q Well, that goes a little further than just  
2 forfeiture of the Federal contribution, then; doesn't it?

3 A No. It seems to me that all that it results  
4 in is that California must have a program as some 40 --

5 Q Suppose California says, "We want no part of  
6 your Federal contribution?"

7 A They don't have to take it.

8 Q Well, then they can go ahead and --

9 A That's right.

10 Q Then all we -- how do we then declare their  
11 regulation invalid; that's what I'm trying to get at.

12 A If the HEW regulation is held valid by this  
13 Court then the California statute is necessarily invalid, since  
14 it's inconsistent that way.

15 Q It's not invalid if California wants to go on  
16 its own, without any Federal contributions.

17 A That's correct, but the likelihood of --

18 Q Well, then all we hold is that the  
19 Federal regulation is invalid, if we do; that, then, leaves the  
20 Secretary in a position where he could say to California: "Now,  
21 you get rid of that regulation of yours or you don't get any  
22 Federal contributions.

23 A That's correct, just as in the Alabama case.  
24 Alabama, after King versus Smith, could have, I suppose, said  
25 that it no longer wanted to have anything to do with the

1 Federal program and gone off and continued to have its sub-  
2 stitute father rule.

3 Q Well, this isn't the kind of preemption super-  
4 cession, whatever word you want to use, that we ordinarily  
5 have when there's a conflict between a Federal regulation and  
6 a state regulation, as in the avocado cases, for example.

7 A No; that's true, but I think we have to look  
8 at the thing in context. The California statute is written  
9 specifically to apply only in Federal AFDC program cases. It  
10 was obviously designed for that purpose; that's the only situa-  
11 tion in which it applies.

12 Now, California, if it didn't like the HEW regula-  
13 tion, could obviously draft another statute, entirely un-  
14 related to the Federal program for welfare assistance, but I  
15 think that the practical likelihood of that happening is very  
16 remote. The Federal assistance here is substantial, as Your  
17 Honor knows, and I think that the State simply couldn't function  
18 anywhere near a reasonable level if it didn't have Federal  
19 matching funds.

20 Q It seems to me that the long and short of what  
21 you say is that the Federal Government cannot force the states  
22 to make payments according to its regulations.

23 A I think that's correct, Your Honor. It's a  
24 program of assistance.

25 Q Well, then, how can we determine questions here

1 such as are presented in this case?

2 A Well, I think it's quite appropriate for  
3 determine --

4 Q If we determine, I suppose, that this regula-  
5 tion is valid and the state regulation is contrary to it, that  
6 whatever the state wanted to do, they cannot use Federal  
7 money.

8 A At least the Secretary has the option of  
9 cutting them off if they --

10 Q Well, if the Secretary doesn't, that as a matter  
11 of supremacy of law that the state can't use Federal money.

12 Q As a matter of Federal supremacy all he can  
13 do is to go pay these people himself; isn't it? He can't  
14 force California to mix up its funds with Federal money and pay  
15 them according to the Federal business desires.

16 A Well, the Act requires that the state be in  
17 compliance with --

18 Q Yes, if it -- but it can if it wants to.

19 A That's correct.

20 Q And that's all.

21 A That's correct. But the essence of this case is  
22 the validity of the regulation promulgated by HEW, which pro-  
23 vides in substance, that only actual support payments, actual  
24 contributions made to AFDC families should be taken into  
25 account in determining the level of need, as Mr. Amsterdam has

1 indicated.

2 Q I suppose the thrust of these various questions  
3 is that to the effect that this litigation may be premature,  
4 that not until or unless the Secretary of HEW cuts off funds  
5 to California on the basis of his regulation, would that  
6 regulation or its validity become a litigable question.

7 A I think that would be a rather harsh approach--

8 Q It would be a harsh approach and contrary to  
9 King against Smith, but certainly there is a great deal of  
10 logic in it; isn't there?

11 A Well, there's some logic in it, but if in the  
12 meantime you would have to force the Secretary to terminate a  
13 program --

14 Q You wouldn't force him. If he wants to continue  
15 to pay out the money then he's just not relying on his regula-  
16 tion.

17 A There is no way then the Secretary could get  
18 the validity of his regulation litigated.

19 Q Well, that's perfectly all right; that's up to  
20 him.

21 A Well, the Secretary doesn't think that's all  
22 right and with all respect, I don't think he should have to --

23 Q It's a very strange thing. This -- in no way  
24 did this California regulation violate Federal law, the con-  
25 stitutional question aside. It simply violates, it's alleged,

1 a condition on the payment of Federal monies. It doesn't  
2 violate anything in the Supremacy Clause or any preemptive  
3 thing. It's just a condition that it has to meet to receive  
4 Federal largesse.

5 Q The state merely refuses to go into partner-  
6 ship with the Federal Government on its terms.

7 A Your Honor, with all respect, I think that this  
8 legislation --

9 Q And it has a right to do so; doesn't it?

10 A We don't disagree with that. We agree that it  
11 has a right to do so, but as to the question of rightness, it  
12 seems to me that forcing the Federal Government to cut off  
13 funds to a state that does not want to comply with what HEW  
14 feels is a reasonable regulation, promulgated pursuant to the  
15 authority of the Act that the Secretary is charged with ad-  
16 ministering, is not a desirable way to go about handling this  
17 matter and the Court, it seems to me, decided that in King  
18 versus Smith.

19 I see that the red light is on.

20 MR. CHIEF JUSTICE BURGER: We will suspend until  
21 morning.

22 (Whereupon, at 2:30 o'clock p.m. the argument in  
23 the above-entitled matter was recessed, to reconvene at 10:00  
24 o'clock on Wednesday, March 4, 1970.