

# Supreme Court of the United States

OCTOBER TERM, 1969

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Supreme Court, U. S.  
MAY 19 1970

In the Matter of:

Docket No. 896

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

*Pt. 2*

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Peter L. Strauss, on behalf of  
the United States

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REBUTTAL:

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

-----X  
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 GEORGE K. WYMAN, ET AL., :  
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 Appellants, :  
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 vs. : NO. 896  
 :  
 EDNA ROTHSTEIN, ET AL., :  
 :  
 Appellees. :  
 :  
 -----X

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

The above-entitled matter came on for further argu-  
ment pursuant to recess at 10:00 a.m.

BEFORE:

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

APPEARANCES:

PHILIP WEINBERG, ESQ.,  
 State of New York  
 New York, New York

EDWARD V. SPARER, ESQ.,  
 Counsel for Appellees  
 Philadelphia, Pennsylvania

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

2                   MR. CHIEF JUSTICE BURGER: We will resume arguments  
3 in Case No. 896, Wyman against Rothstein, et al.

4                   Mr. Strauss, you may proceed.

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

7                   Yesterday I believe I was asked at the close of the  
8 session about remand -- ought there to be a remand ought this  
9 Court finally to pass on the statutory issue here.

10                  I think that I should say that there would be a sub-  
11 stantial point in remanding it. There is no need to pass on  
12 the statutory issue finally. This is a preliminary injunction,  
13 and all that is necessary is that the Court be convinced that  
14 appellees probably will success upon their cuase of action in  
15 the court below.

16                  As I was starting to say, the State of New York in ,  
17 this most recently enacted statute, of which I believe the  
18 Court has copies, has made some policy judgments which I think  
19 go to the heart of some of the doubts that ---

20                  Q   Excuse me, Mr. Strauss. You mean that if we were  
21 to remand that we vacate the preliminary restraint.

22                  A   No   I should think not, to affirm the preliminary  
23 injunction but on the basis that appellees had shown that they p  
24 probably would succeed, that there was no abuse of discretion  
25 on the part ---

1           Q    Succeed on the constitutional issue or on the  
2 statute?

3           A    On the statute, I think this Court can pass on  
4 that issue here. It remarked with some strength in a footnote  
5 in the Dandridge case regarding the right of appellees to put  
6 forward any ground that would support the judgment which they  
7 received below. It remarked with some strength in Rosado that  
8 statutory issues should be reached before constitutional issues.  
9 I think on those basis that this Court would have no difficulty  
10 in reaching the statutory issue in making a judgment on the  
11 basis of the facts which New York has, I think, conceded.

12           Q    In Rosado did we or did we not leave open the  
13 question of what remedy should be -- leave that in the first  
14 instance to the District Court?

15           A    I think that was left open in Rosado. I think  
16 the situation in this Court in Rosado, however, was that the  
17 petitioners there had no relief before this Court.

18                Here petitioners come into this Court relief having  
19 been granted. We take the position that that relief is no more  
20 than an order of compliance with the Federal Standard, which in  
21 our view New York is, in any event, obligated to comply. We  
22 believe petitioners have made sufficient showing that New York  
23 is out of compliance with that standard to justify such an  
24 order. It leaves free to New York the choice which this Court  
25 said New York must have in Rosado; that is, the choice of

1 withdrawing entirely from the Federal program.

2           Then, the point I wanted to make on the basis of  
3 the statute is that New York has in fact made that choice. In  
4 the statute, the legislature said, and I am quoting at line 9  
5 of the first page, if you have it there, "The legislature hereby  
6 declares its intent to make provision for the State to meet all  
7 necessary Federal requirements under the Social Security Act.  
8 Again, at line 3, "It is the intent of the legislature that the  
9 Department of Social Services shall determine and establish the  
10 standards of need for public assistance in this State in con-  
11 formity with Federal requirements." Again, within the adopted  
12 amended Section 131-a itself on page 4 at line 12, "If Federal  
13 requirements make it necessary to adjust any schedule of grants  
14 and allowances or part thereof, the Department shall make such  
15 adjustments.

16           So that I think New York's judgment in this case is  
17 entirely clear, and as we set out in the rather long footnote  
18 at the end of our amicus brief, is the judgment in which all  
19 States of the Union have essentially concurred.

20           There was also the question yesterday, and I think this  
21 goes back to what I was trying to say during the short time I  
22 had then why it was the Government had put as part of its ques-  
23 tion presented whether the New York State plan improperly favors  
24 residents of New York City over residents of other areas of  
25 the State.

1           This goes, I think, to the heart of the issue. The  
2           impropriety is not in itself in the payment of more money in  
3           New York City than New York State. But, as I was trying to  
4           state yesterday, in considering that residents of New York  
5           State need services, need goods, need items which are not under  
6           any circumstances made available to residents of any other part  
7           of the State even though their need for those items might equally  
8           be made the same.

9           It seems to us that this is directly inconsistent with  
10          the statute, with the provision of the statute which in both  
11          cases Section 602(a) and Section 1382(a) provides that a State  
12          plan for aid and services must provide that it shall be in effect  
13          in all political subdivisions of the State. If administered  
14          by the subdivisions, it must be mandatory upon them. It has  
15          been since the beginning of the Act the Department's understand-  
16          ing the interpretation that that means that you cannot say within  
17          a State that people in one part of the State are entitled to  
18          goods and services -- we are not talking about amounts of money  
19          at this point -- entitled to goods and services to accounting  
20          for those goods and services which people in another part of  
21          the State simply have no access to.

22          Q    I don't quite understand ultimately what it is  
23          that you submit that the Federal statute requires in the way  
24          of uniformity. I gather the claim is that it requires the  
25          same criteria be used in establishing the standard of need

1 throughout the State, is that it?

2 A Yes, I think that is right, Justice Stewart.

3 Q But in New York City, for example, there are sub-  
4 ways and that is the way people get back and forth. Most people  
5 who live uptown and work downtown, live in Harlem and work in mid-  
6 town have, to use those subways. In a little town up around  
7 Alexandria Bay, you walk. I don't see how this can be worked  
8 out uniformly, because there is a need for a service in New  
9 York City that does not exist in Redwood or Alexandria Bay.

10 A Well, I think it is correct that it doesn't exist  
11 in Redwood or Alexandria Bay, but I don't think it can be said,  
12 on the basis of this record, that that need doesn't exist in  
13 Nassau County or in West Chester County which are crowded, con-  
14 gested areas.

15 Q I think New York City is the only city in the State  
16 that has a subway system that people have to use.

17 A Well I suppose it comes down to how particular  
18 a judgment you were to make. As I understand the New York  
19 standard of need, the list of basic needs which New York State  
20 recognizes, claims to recognize in its standard of need, doesn't  
21 include any allowance for transportation: that is at page 47 of  
22 the appendix, "Food, clothing, personal incidentals, household  
23 supplies, school expenses, utilities, laundries, and sales  
24 taxes."

25 Now, it is certainly our position that New York State

1 could, if it felt it was necessary to the residents of that  
2 State, make provision for transportation expenses to take your  
3 example. It could do so either on a basic need basis or on a  
4 special need basis. I think the Court is familiar with that  
5 difference from Rosado.

6 If it does so on a basic needs basis, that means that  
7 the cost is to be figured into the flat grant for every resi-  
8 dent of the State. In figuring that cost, the State has the  
9 option of doing it on an average basis or doing it on a local  
10 regional basis.

11 If they did it on a local regional basis, I would  
12 certainly agree that the amount for New York City would quite  
13 possibly be higher than the amount for other parts of the  
14 State. From the evidence in the record, it might also be lower  
15 than, say, Nassau County.

16 Q Then your argument really comes down to the fact  
17 that there has been a mistake in judgment here, in legislative  
18 judgment, and/or an administrative misjudgment.

19 A No, it is more than that, Mr. Chief Justice. We  
20 are talking, at least I am talking here, not about the equal  
21 protection clause with the judgments of rationality to which  
22 this Court referred in Dandridge but about Federal standards.  
23 The Federal standard I am talking about is the requirement that  
24 in deciding what it is its public assistance beneficiaries re-  
25 quire the State must reach this decision on a uniform state-wide

7  
1 basis.

2 It may cost it on a local basis, but the legislature  
3 cannot make the judgment. It is not simply a disagreement of  
4 judgment; it is a question of consistency. The legislature may  
5 not make the judgment that the people in New York City are con-  
6 clusively presumed to need transportation and people outside  
7 New York City are conclusively presumed not to need transporta-  
8 tion.

9 Q I suppose under your theory of remand that we go  
10 no further than to affirm the temporary injunction on the basis  
11 of probability of success this case would then go back to the  
12 District Court and the District Court would be free to reject,  
13 if it wished to, the HEW view of the matter, would it not?

14 A I suppose all issues would be open for trial.

15 Q They would be open.

16 A That is right.

17 Q What you are saying is that we don't have to  
18 accept at this level the HEW recommendation and decide the case.  
19 All we have to say is that the temporary injunction has got a  
20 sufficient basis and the probability of success to justify its  
21 continuance and then the case back to the District Court to sort  
22 out the problems.

23 A That is right.

24 If I can go back for a moment, because appellants  
25 raised this issue, they talk about the California differential

1 and they talk about Maryland differential. How are those dif-  
2 ferent from the situation in this case.

3 There are three situations in which HEW does recog-  
4 nize cost variances. They are all provided for in the regula-  
5 tions which begin at 34 Federal Register 1594, which we cite  
6 in our brief.

7 The first of them is the California situation, in which  
8 the State establishes a standard of need on a state-wide basis,  
9 but is unable to pay the total amount of that standard. It  
10 applies a rateable reduction or it applies a maximum. So that  
11 there is a gap between need on the one hand and actual payments  
12 on the other. In that situation, any local subdivision may fill  
13 the gap. And that is what some of the California subdivisions  
14 do. They may make payments between the level of State payments  
15 and the level of need as determined by the State under its uni-  
16 form standard. Those payments will not be counted as income  
17 of the recipient and, therefore, do go to supplement the pro-  
18 gram. Of course, those payments are not subject to Federal  
19 matching. The local subdivisions receive no funds from the  
20 Federal Government.

21 The second situation is a situation in which New York  
22 City, let us say, determined that its residents needed trans-  
23 portation and there was no provision in the New York State  
24 standard of need for transportation, as there is none. New  
25 York City could then provide those services which weren't

1 provided for in the State plan. Again, there would be no con-  
2 formity issue and there would be no reduction of payments. But  
3 again New York City's payments for transportation would not be  
4 matched by Federal payments. There would be no Federal funds  
5 involved in that.

6 The third situation is the one under which New York  
7 State seeks to justify its payments here, that there may be  
8 differences in payments where those differences are justified by  
9 differences in cost.

10 But before one can get to the question of differences  
11 in cost, and this, again, is the essential point here, there must  
12 be a uniform standard of need. That is what, we think, is lack-  
13 ing here.

14 Q Which system was being followed in Maryland in  
15 Dandridge against Williams. Baltimore, as I remember, had a  
16 maximum of \$250 a month and the rest of the State \$240.

17 A Maryland has not been called on to justify this  
18 by HEW, and what I am saying is no more than a belief of the  
19 officials in the Department as to what that is about. But the  
20 Maryland sums include sums for housing. The maximum is an all-  
21 inclusive maximum including housing expenses. Our belief is  
22 that that difference reflects a difference in the cost of urban  
23 housing.

24 Q Are staff discussions still going on in this case  
25 between the staff of HEW and the appropriate authorities in New

1 York State?

2 A My understanding is that New York has not res-  
3 ponded to the letter of November 10th.

4 Q Well, that doesn't answer my question. You say  
5 that in your brief, but then you say, "Staff discussions have  
6 not yielded any acceptable showing to support the difference."  
7 That was in your brief filed earlier this month, which implies  
8 the staff discussions have taken place. Are they still going  
9 on?

10 A I couldn't -- I don't believe people are meeting  
11 today. I think it is at the stage of a decision in the regional  
12 office whether to bring a formal conformity proceeding or not.  
13 More than that I'm afraid I simply don't know.

14 Q Mr. Strauss, a while ago you read the items that  
15 went into the New York standard of need. Those items are  
16 standard state-wide.

17 A Yes, and all evidence is that the cost of those  
18 items are standard state-wide.

19 Q Can you say that the standard, insofar as the  
20 standard is described by those items, that is the same state-  
21 wide?

22 A That is right.

23 Q And your contention is that New York has not sub-  
24 stantiated the difference in cost for those items as between  
25 the different parts of the State and that the legislature may

1 not conclusively presume that they are different.

2 A No, I think New York is trying to justify that  
3 differenc~~t~~ on a different basis. It is not saying that those  
4 items cost more in New York City.

5 Q But what is the different basis?

6 A As I understand their basis, they are saying in  
7 addition to those items New York City residents require money  
8 to apy for security locks and New York City residents require  
9 money to pay for transportation.

10 Q You mean within those broad categories making up  
11 the standard of need, like household items. They must be fitting  
12 them in somewhere.

13 A It is household supplies, I don't think, in the  
14 same sense that furniture wouldn't come within household supplies  
15 and personal incidentals. I don't believe that under the ordi-  
16 nary circumstances hardward would. I may be wrong in that.

17 As I understand this list, it doesn't provide for  
18 durables with the exception of ---

19 Q Your claim is not that the legislature has made  
20 an unacceptable judgment about costs of various items but that  
21 they want to pay for items for New York City residents that they  
22 refuse to pay for elsewhere.

23 A That is right, museums, cultural activities and  
24 so forth.

25 If I may just say in conclusion, in Rosado this Court

1 put New York under an obligation fully and realistically to  
2 reassess the recurring needs of its welfare recipients. In  
3 this case, the issue is whether the State must not do so on a  
4 uniform state-wide basis. And, we believe it must.

5 Thank you.

6 CHIEF JUSTICE BURGER: Thank you, Mr. Strauss.

7 Mr. Weinberg, you have 13 minutes left.

8 MR. WEINBERG: Thank you, Your Honor, and may it  
9 please the Court.

10 I think the short answer to Mr. Strauss' argument  
11 about albeit the District Court started off on the wrong foot,  
12 why don't we simply take it the other way and affirm the injunc-  
13 tion anyway because they are probably right about the statutory  
14 ground as well. The short answer to that is that the sweeping  
15 injunction that were granted below aren't supported by the  
16 statutory ground. This Court's decision in Rosado makes that  
17 clear, because what the Court did below was issue an injunction  
18 against inforcement of the statute at all unless it were corrected  
19 and what they thought were objective standards were imposed,  
20 which would have been a valid injunction under the equal protec-  
21 tion clause, assuming a violation of that clause had been shown.

22 The language is they are enjoined from enforcing the  
23 statute at all other than according to objective, nondiscrimina-  
24 tory standards based upon the cost of the needs of such recipi-  
25 ents.

1           Now, a statutory nonconformity as in Rosado doesn't  
2 support any such injunction. Indeed, this Court in Rosado made  
3 that clear. The most that could be done there would be a remand  
4 to the District Court to, assuming that the probabilities were  
5 that the HEW was right and we were wrong about the statutory  
6 argument, the most that could be done would be to remand the  
7 case to the District Court for a much more narrow injunction such  
8 as the one this Court discussed in Rosado.

9           Over and above that, when we took ---

10           Q    Because the District Court has never fashioned  
11 a preliminary injunction based on possible statutory invalidity.

12           A    Precisely.

13           Q    Is that your point?

14           A    Yes, they started off on the wrong foot. They  
15 aimed toward the constitutional ground and they did just what  
16 this Court in Dandridge said they shouldn't do and what we cited  
17 earlier cases suggesting that they not do; mainly, they decided  
18 the constitutional issue and let the statutory one pass.

19           Q    That may be so but what precisely would be dif-  
20 ferent in the injunction that should be entered? Just assume  
21 for the moment that New York is probably correct or that the  
22 Government is probably correct on the statutory ground. Now,  
23 what injunction on that basis should be issued?

24           A    Mr. Justice White, this Court in Rosado indicated  
25 that in a nonconformity situation, which is what that would be,

1 the most that could be fashioned would be an injunction against

2 ---

3 Q The nonconformity.

4 A Yes, against the nonconformity or against the  
5 receipt of Federal funds by the State of New York. Indeed, in  
6 Rosado, the plaintiffs wanted all along that the statute be en-  
7 joined for nonconformity. Although the Court agreed with them  
8 on the merits, the Court didn't grant such an injunction. In  
9 Rosado, it specifically sent the case back to the District  
10 Court in Brooklyn to see what the State would do in 1970, first  
11 of all, which is not applicable here.

12 But the point is even if the State remained in non-  
13 conformity, the Court's opinion in Rosado seemed to make clear  
14 that the most could be an injunction against the receipt of  
15 Federal funds, if we remained in nonconformity.

16 Q Until and unless you conformed.

17 A Precisely.

18 Q Now let's assume we decided the statutory ground  
19 here and said that New York is wrong and the Federal Government  
20 is right. Nevertheless, that is the only injunction that is the  
21 only injunction that could be entered would be against the use  
22 of Federal funds.

23 A Unless the State brought itself into conformity,  
24 assuming that the Court ruled that it was out of conformity. That  
25 is a far different sort of injunction from the injunctions that

1 were granted below.

2 Q Has New York had any conformity proceedings in  
3 the past in this area at all?

4 A Not to my knowledge. Of course, every change  
5 that is ever made or any plan for standard of need has to con-  
6 form to Federal law, and they have to be submitted to HEW.

7 Q I am speaking of the enforcement process by the  
8 Department of Health, Education and Welfare.

9 A To my knowledge, no.

10 Q Have they in any other States to your knowledge?  
11 Do you have any information on that?

12 A Again, to my knowledge, no. As I have said, as  
13 I indicated yesterday, they have permitted the Maryland and  
14 California disparities that Mr. Strauss just discussed to continue  
15 to be used.

16 Q But there is a complete procedure or a procedure  
17 provided by Congress to achieve conformity by a State as a con-  
18 dition to getting Federal grants, isn't there?

19 A Yes, indeed. They can compel that.

20 When we look at the standard of need, we see that, in  
21 fact, New York has one standard of need, and it is the same  
22 throughout the State, just as the Federal statute says it must  
23 be. This isn't a case where we have one standard of need for  
24 the City and one for outside the city, although the Government  
25 tries to paint it that way. It simply isn't so.

1           The standard of need isn't statutory in New York. It  
2 is administrative. It is prepared by Commissioner Wyman, by  
3 the Department of Social Services, and it lists the various  
4 components of that standard of need, food, household appliances,  
5 shelter, although rent is paid separately, clothing, and so on  
6 and so forth.

7           It would be simply contrary to reality to expect that  
8 every welfare recipient, or indeed any welfare recipient, adheres  
9 so precisely to that standard of need, which tells him how many  
10 razor blades he has to buy in the course of a year and how many  
11 newspapers, and so on.

12           Obviously, there is a great deal of flexibility in  
13 the standard of need. The State arrives at a figure that they  
14 consider to be an approximation of what the social realities are.  
15 Then, they give that money to a welfare recipient and he is pre-  
16 sumed to purchase with that money what he has to buy. Nobody  
17 is there to make sure that he buys a newspaper every day or a  
18 razor blade three times a week or whatever the standard of need  
19 happens to work. That is an administrative averaging process.

20           If the standard of need in New York City doesn't list  
21 buying a lock for a door or a window guard if a person lives in  
22 a bad neighborhood, or if it doesn't say anything about taxi-  
23 cabs or the fact that there is a higher sales tax in New York  
24 City, it simply flies in the fact of reality to expect that  
25 welfare recipients aren't going to, nevertheless, buy locks

1 if they need locks.

2 Q What happens to people living in the ghettos in  
3 West Chester and in Nassau Counties? And, believe me, there are  
4 some ghettos out there.

5 A I know that very well, Your Honor.

6 Q And they need gates too, don't they?

7 A Yes, they do, but the legislature was entitled to  
8 find that statistically comparing New York City with its enormous-  
9 ly high crime rate and narcotic addiction and all the rest with  
10 the rest of the State taken as a whole, and they saw fit to draw  
11 the line at that particular point.

12 Q Why not throw New York City in and draw the line?

13 A Well, they could have drawn the line to say cities  
14 over 100,000 people, or they could have thrown West Chester in  
15 with New York, but they didn't. Again, we are in the area where  
16 the legislature has to have some discretion or it doesn't have  
17 any discretion at all.

18 Q Is crime in New York City higher than in Buffalo?

19 A Well, the legislature saw fit to do so.

20 Q Did they find that it was?

21 A Yes, they did.

22 A crime isn't the only component of that, for example,  
23 the utility rate is lower in the western part of the State than  
24 it is in New York.

25 Q Is it lower in West Chester?

1 A Utilities, no.

2 Q Or Nassau?

3 A No, utilities are the same in the New York area

4 ---

5 Q And those are the two counties that are here.

6 A Yes.

7 Q So, the State of New York takes the position that  
8 you can't defend this across the board, but you have to throw all  
9 these little components in, and they slide in this way. You  
10 mentioned razor blades. Well, I assume that a hippy doesn't  
11 need one. I mean I just don't see New York's position except  
12 that for some reason unclear to me New York City was set aside  
13 from the surrounding areas of Nassau and West Chester Counties.

14 A Mr. Justice Marshall ---

15 Q You say subways. They have elaborate bus systems  
16 in those counties and I would assume the bus fare is as high  
17 as the subway fare. I would assume.

18 A The evidence in the record indicates that it is,  
19 but the legislature found that the New York City child on AFDC  
20 has a greater need to avail himself, and his partents also, to  
21 avail themselves of the municipal transportation system in tak-  
22 ing their child to a park or a zoo, which in New York City to  
23 a ghetto resident is apt not to be near where he lives.

24 Q Well, how about the Rye Beach in West Chester?  
25 They have got beaches too.

1           A    No question about it, Mr. Justice Marshall.  But  
2 this is a legislative determination based on discretion and some  
3 of these things are simply factual, such as the sales tax about  
4 which there is little dispute.  Others are perhaps more debate-  
5 able.  But as long as reasonable people can differ about them,  
6 then I don't see how the legislature can be held to have trans-  
7 gressed the equal protection clause and not have a state-wide  
8 standard of need fashioned after an objective and equitable  
9 standards.  This is what the statute says.

10           Q    Are you really trying to justify deciding the  
11 equal protection argument before the statutory argument?

12           A    We maintain, as we have throughout, that the  
13 District Court improperly went to the equal protection argument.

14           Q    Right.

15           A    The statutory argument obviously is different,  
16 and, as we have indicated, it won't support the injunction that  
17 was granted below.

18           Q    Well it may not, but you may not be in compliance  
19 either.

20           A    That is very true.  But, HEW has never said we  
21 are not in compliance except, in effect, in their brief in this  
22 Court.  The letter from their commissioner, which is the only  
23 evidence otherwise that we have, indicates that ---

24           Q    The United States says, "Yes, it looks like there  
25 is a uniform standard -- these are the items."  But apparently

1 they argue that you are giving New York City residents money  
2 for items that you won't give money to suburban residents for.  
3 Now, what is your response to that? Are you or aren't you giv-  
4 ing money for certain expenses that you won't give suburbanites?

5 A We are because -- well, let me rephrase it ---

6 Q Is it because those items aren't available in the  
7 surrounding counties, or is it because they cost more in New  
8 York City, or what?

9 A The answer to that, Mr. Justice White, varies with  
10 the item we are talking about. In the case of the locks and  
11 window guards and taxi rides and the other things that go with  
12 the higher crime rate in the New York City ghettos, -- and that  
13 is a matter of fact, there is no doubt there is crime in Buralo  
14 and Yongers. We are not going to suggest that there isn't, but  
15 statistically it is enormously greater in New York than it is  
16 in the rest of the State. If you make that division in the case  
17 of those things, no doubt a lock would cost the same wherever  
18 you bought one. If you don't need a lock living in a small  
19 town, or if you need it even less in a suburb, and you need it  
20 more in New York City, the legislature has a right to take that  
21 into account and give the New York City welfare recipients a  
22 little bit more money for that cab ride, for that lock, to pay  
23 the sales tax which concededly doesn't exist in these other places.

24 Q So, would you categorize this justification as  
25 saying in just costing out the standards it costs more in New

1 York?

2 A Precisely. Not because of any individual item,  
3 except for the sales tax costing more, but the components that  
4 go into a person's way of life simply require more money in New  
5 York City. A standard of need isn't some kind of an ironclad  
6 procrustean thing. As I tried to indicate in mentioning razor  
7 blades and things like that, the welfare recipient has to buy  
8 what he needs in order to survive. If the legislature found  
9 that it takes more in New York City, then certainly it didn't  
10 have to so find. That is debatable. But, how can it not be  
11 objective and equitable for them to so find? And, how can it  
12 be a violation of the statute saying they have to have a state-  
13 wide standard of need when they have a state-wide standard of  
14 need.

15 Q Well, then, if it is so obvious, why is there such  
16 difficulty in demonstrating this to HEW? I mean if it is just  
17 perfectly obvious about the crime rate and about the sales tax  
18 and things like this, why is there this big rumble between you  
19 and HEW?

20 A I think it is obvious that there is a higher crime  
21 rate and a sales tax in New York City. The other factors aren't  
22 so obvious.

23 Q What does HEW say to you? Why can't -- if you  
24 expect us to see this, they ought to be able to see shouldn't  
25 they, if you are right?

1           A    We never got very far in the dialog with HEW,  
2 because all that ever happened was their regional commissioner  
3 calously wrote us a letter ---

4           Q    Which you never answered.

5           A    That is true, because of the pendency of this  
6 litigation. But, as the Government indicated, lower level dis-  
7 cussions have been going on. We have never heard a definite  
8 pronouncement from HEW except for the brief that they have filed  
9 here.

10          Q    Why would you object? I guess because you don't  
11 want to have to litigate, but would you object to demonstrating  
12 this in the District Court, if you can't settle it administra-  
13 tively?

14          A    We have been trying to demonstrate it all along.  
15 We are certainly prepared to demonstrate whether before HEW or  
16 before the District Court. We have attempted to demonstrate  
17 here to the extent necessary to reverse these injunctions that  
18 these things are debatable. I am not suggesting that they are  
19 obvious. Certainly reasonable minds can differ. And, as Mr.  
20 Justice Marshall indicated in his earlier questioning that certain  
21 things may not be necessary for certain people and ---

22          Q    Yes, but the end of that argument is that you  
23 shouldn't have to litigate it at all.

24          A    We are not suggesting that we are immune to liti-  
25 gation on this point. If we had a patently arbitrary standard

1 then it wouldn't meet the statutory criterion.

2 A Yes, but you are suggesting that you come to the  
3 end of the litigation once you demonstrate a legislative judg-  
4 ment about something that reasonable minds can differ on and you  
5 want to stop at that point, don't you? You don't want to go  
6 on and say really which reasonable men might. You don't want to  
7 have to decide that in litigation.

8 Q I think that is for HEW in a conformity hearing  
9 to the extent -- but it seems to me when you look at the words  
10 "objective" and "equitable," which are employed in the HEW regula-  
11 tions, they are really imposing their own reasonable-man test.

12 Now, perhaps at a conformity hearing, they would have  
13 the last word, vis a vis the State subject to the State's appeal  
14 through the courts. But they are imposing their own reasonable-  
15 man test.

16 Special grants are an individual thing. In the Rosado  
17 case, this Court made quite a point of saying that individual  
18 special grants were important. Indeed, the Court noted that  
19 New York City lost its special advantage, which it previously  
20 had, when individual grants were eliminated in Rosado.

21 Q In this whole discussion, I think, on both sides,  
22 you tend to mix up the statutory argument, it seems to me, a  
23 non-constitutional argument with a constitutional argument.  
24 The Federal Government can condition its funds to New York on  
25 any basis it wants, any basis it wants. Therefore, what New

1 York would be entitled to do as a matter of equal protection is  
2 wholly irrelevant, it seems to me, to whether or not Congress  
3 has conditioned the use of these Federal funds on terms that  
4 HEW says is the case.

5 A I agree. All Congress said here was that there  
6 has to be a uniform state-wide standard.

7 Q The question of what New York could or could not  
8 do in drawing distinctions between out-of-city counties or not  
9 is wholly irrelevant to the statutory problem. The questions  
10 is did Congress say that they couldn't make this a non-uniform-  
11 ity.

12 A We have talked about the question of whether New  
13 York was arbitrary or within the ambit of the legislature's per-  
14 missible discretion, because the injunction we are appealing is  
15 based solely on equal protection law.

16 Q But that has nothing to do with the question, it  
17 seems to me, possibly it is the scope of the injunction, that  
18 is a different question. But the main question is on the statu-  
19 tory ground is HEW'S view of the statute the correct one?

20 A As to that, even if it is, we submit the injunc-  
21 tion still should have been reversed.

22 Q That may be, but that is a question of revamping  
23 the injunction, if that turns out to be the case, of course.

24 A Maybe that is a separate issue.

25 Q Surely.

1           A    As to the propriety of HEW'S views when their  
2 own regulations use words like "objective" and "equitable," no  
3 doubt you've got to give them the benefit of the practical  
4 construction of the statute that an administrative agency ad-  
5 ministrating a system is entitled to under the cases. Although,  
6 here it is noteworthy, as we indicated yesterday, that there is  
7 no long consistent history of construction. In fact, they have  
8 ignored this problem until this case. And, they ignored it in  
9 this case until this appeal came to this Court. They weren't  
10 heard from in the District Court.

11           Q    That may a question of whether we should deal with  
12 it up here. They have taken a flatfooted position up here rightly  
13 or wrongly that this violates the HEW regulation and the statute.

14           A    There is also, Mr. Justice Harlan, the question  
15 of whether violation of a regulation alone -- and the regulation  
16 uses the words "objective" and "equitable" -- would constitute  
17 nonconformity. That is not nonconformity with an Act of Congress,  
18 as we had in Rosado or in King against Smith. That is merely  
19 a regulation. I question, again, as we indicated in our reply  
20 brief whether that would sufficient to ground this injunction  
21 or any injunction, for that matter.

22           Q    You say this injunction was based on the equal  
23 protection clause?

24           A    Yes, sir, the injunction below was based solely  
25 on the equal protection clause.

1 Q Did they base it on the statute?

2 A No.

3 Q What do you say about the equal protection  
4 clause?

5 A We say that a legislature has to have the discre-  
6 tion to deal with these problems as it sees fit. What the  
7 court below did just as plain as day, Mr. Justice Black, was  
8 to substitute its own views on policy for what the consti-  
9 tution commands.

10 Q Wouldn't that give us quite a number of cases if  
11 we have to pass on all those exceptions from every State in  
12 the Union, wouldn't it?

13 A It certainly would, that was just our point. We  
14 have kept trying to keep in focus throughout this appeal that  
15 that was the ground upon which the court below acted.

16 Q Do you know how many counties there are in the  
17 State of Texas?

18 A I think there are 365, if I am not mistaken.

19 Q That would raise quite a problem for us to de-  
20 cide county by county, wouldn't it whether each one should get  
21 a uniform amount.

22 A I don't think it is an issue that belongs in  
23 this Court, barring some discrimination on the ground of race  
24 or some other obvious basis like that.

25 Q Legislative decisions on those points are based

1 broad approximations. Courts are supposed to be based on actual  
2 judgments based upon evidence reached after a careful conclu-  
3 sion, isn't that right?

4 A Exactly our point here. We think the legislature  
5 had a right to make a finding such as it did, that based upon  
6 certain things which are somewhat intangible in some instances  
7 and quite tangible, like a sales tax, in other instances had a  
8 right to find that the ghetto resident, the welfare recipient  
9 in New York City was entitled to a little bit extra to compen-  
10 sate for those factors. It is ironic that this litigation came  
11 up at a time when every enlightened social commentator was ask-  
12 ing people to do more about the cities and to concern themselves  
13 with the problems of the urban core.

14 Q You think if they decide to make a uniform rate  
15 for every person in Texas on the 367 counties, or whatever it  
16 is, that we would have to pass on the evidence on each one of  
17 those to see whether or not they had reached a correct conclu-  
18 sion on such difficult problems as to how much it would cost  
19 to live in that county?

20 A Mr. Justice Black, we have tried to indicate  
21 throughout that we don't think the equal protection clause reaches  
22 that far unless it were a case of something like racial discrimina-  
23 tion or just complete patent arbitrariness where the State just  
24 didn't come forward with anything at all.

25 Q But you have a District Court that took a different

1 view of the matter.

2 A Yes, they certainly did. They completely violated  
3 what this Court said in Dandridge and what this Court had said  
4 earlier in cases like McDonald, which we cited to them.

5 Q Is it your view that Congress intended the conform-  
6 ity proceedings as the primary method of solving the differences  
7 in standards between the States and the Federal Government?

8 A In the situation that we have here, yes, sir, I  
9 believe so, sir.

10 Q And that would be in a district court proceeding,  
11 would it, a single-judge district court, a regular evidentiary  
12 case.

13 A It would be an appeal from the HEW determination  
14 through the courts. It would be, I assume, a single-judge dis-  
15 trict court, although I am frankly not sure.

16 Q And then it would go to the Court of Appeals and  
17 then it would come here possibly.

18 A Yes, sir.

19 Q Instead of coming in one leap from a three-judge  
20 court.

21 A Precisely. And for all of those reasons, we sub-  
22 mit that these injunctions should be reversed for the reasons  
23 we have suggested.

24 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Weinberg.

25 Q Mr. Chief Justice, could I ask Mr. Strauss a

1 question?

2 MR. CHIEF JUSTICE: Mr. Strauss?

3 Q Mr. Strauss, I notice that on your amicus brief  
4 there is no HEW lawyer on it. Can you represent to the Court  
5 that that brief represents the views of HEW?

6 A Surely, Your Honor.

7 Q I assume it does.

8 A Our general practise is not to put lawyers --  
9 the names of the lawyers in the Department on our brief.

10 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
11 case is submitted.

12 (Whereupon, at 10:47 a.m. the argument in the above-  
13 entitled matter was concluded.)