In the

Supreme Court of the United States

RUTH J. JEFFERSON, et al.,

Appellants,

vs.

BURTON G. HACKNEY, et al.,

Appellee.

No. 70-5064

Washington, D. C.
February 22, 1972

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Washington, D. C.,

Tuesday, February 22, 1972.

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STEVEN J. COLE, ESQ., Center on Social Welfare Policy and Law, 401 West 117th Street, New York, New York 10017; for the Appellants.

PAT BAILEY, ESQ., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in No. 70-5064, Jefferson against Hackney.

Mr. Cole, you may proceed whenever you're ready.

ARGUMENT OF STEVEN J. COLE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. COLE: Mr. Chief Justice Burger, may it please the Court:

With the Court's permission I would like to save five minutes of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

MR. COLE: The State of Texas provides public assistance to four groups of its needy residents, and receives over $350 million a year from the United States for this purpose.

The four groups are: the children deprived of parental car and support, because of the absence, death, or incapacity of the parent; persons over age 65; the disabled; and the blind.

These are the persons both Congress and the State of Texas have identified as needing financial assistance because they do not have a breadwinner in the household.

Texas has established a welfare program covering all four groups in its Public Welfare Act of 1941, pursuant to a single provision of the Texas Constitution.

There are two separate issues presented by this

appeal.

The first is whether the equal protection clause and Title VI of the 1964 Civil Rights Act permits Texas to pay AFDC recipients, eight-ninths of whom are black and Mexican-American, 50 percent of the amount Texas has determined to be their minimum required need, while it pays all other welfare recipients, those receiving aid under the Old Age, Aid to the Blind, and Aid to the Disabled programs, three-fifths of whom are white, 95 or 100 percent of the same minimum need.

The statutory issue presented today is whether Texas may, consistent with the Social Security Act, as construed by this Court in Rosado vs. Wyman, determine eligibility for AFDC and the amount of AFDC payments by subtracting outside income from 50 percent of the standard of need, rather than from the standard of need itself.

Both issues must be decided by the Court, since a victory on either one for the appellants would still leave the other in dispute.

The starting point for understanding both issues is the standard of need. This has been referred to by the Court in Rosado as the yardstick for determining who is eligible for public assistance. The standard is a dollar amount which represents the State's judgment as to what is necessary to provide a subsistence level of living in that particular State.

In Texas, the items included in the standard are:

personal needs, which include food, clothing, and personal incidentals; shelter cost; and a few special need items.

Texas uses a single standard for all welfare recipients in the State regardless of the category under which the recipient receives his assistance.

Q In other words, children under the AFDC have the same standard of need as blind adults or disabled adults or people over 65?

MR. COLE: No, that's not exactly right, Your Honor. What happened is Texas has a standard budgetary allowance. So, for example, shelter needs are budgeted according to the household size and not according to the category. Similarly, personal needs are budgeted according to age. Adults in the ADC program, the caretaker, the mother caring for her children, receive the same budgeted needs -- not receive, but are budgeted for the same needs as adults in the Aid to the Blind program or Old Age Assistance program.

Children, be they dependents of an Old Age recipient or dependents of an ADC mother, are budgeted for the same amount in each program.

Texas has made a judgment, and we do not challenge it in this case. The children require less per month than an adult to survive the same minimum needs. But we have not challenged that in this lawsuit.

An example of how this works is at page 41 and 42 of

our brief, and it might be helpful if I refer to that.

In Table I we have set forth an aged couple, both receiving Old Age Assistance -- that's at page 41 -- and the State has determined that for each month that couple needs $172 per month for personal and shelter needs.

On page 42, at Table II, is a mother and three children who receive AFDC from the State of Texas. Their monthly needs have been defined by the State of Texas now to be $182 a month, or just slightly more than the two-person family receiving OAA.

Now, these amounts for both families are approximately $2100 a year, and we ask the Court to bear in mind that this standard is far from generous. The United States defined the official poverty level is about $3900 a year for a family of four, and the Bureau of Labor Statistics Lower Living Budget is over $6500 a year.

In any case, we are not challenging in this lawsuit the fact that Texas defines the need of a family of four, with three children, to be only slightly greater than the needs of a family of two. We accept that judgment. Texas has made it. We are not questioning it.

We also are not questioning the fact that that standard for both of those families is defined so inadequately. That's not at issue in this lawsuit. We again accept that judgment.

Our position is that having determined the subsistence needs of both families, Texas may not discriminate in the percentage of those needs it chooses to meet for the various groups of recipients.

In practical terms, what has happened is that Texas has told the family in Table I that since they are needy and since they are dependent because they are old, the State will guarantee them whatever they need to purchase a subsistence diet and adequate shelter, according to Texas's judgment in any case, while at the same time the State has told the children in Table II that since their equal need and their dependence is caused by the death or absence or incapacity of their father, the State will only help them purchase 50 percent of what the State says they need to survive.

At the outset we wish to make clear for the Court that the discrimination in the percent of needs paid is not related to any differences in the requirements of the various recipients. As we have mentioned, the percentage reduction is applied after the standard of need is computed.

Therefore, if there were any differences in needs in these particular families, for instance economies of scale because there were more members of the household, or maybe a blind recipient needs a seeing-eye dog, and of course an AFDC family normally would not, those would be reflected in the

standard of need before the percentage is applied.

We're dealing with families that Texas has said, after it computes the standard, are equally needy.

As the Department of Health, Education, and Welfare pointed out in a brief in the District Court of Alabama, which I submitted to this Court, in Whitfield vs. King, the percentage reduction as applied is essentially a fiscal measure, it is unrelated to the needs of the various recipients.

We also ask the Court to bear in mind that the percentage reduction in this case has nothing to do with the availability or non-availability of other sources of income. When income is actually available to a particular recipient, whether it be an OAA recipient or an AFDC recipient -- for example, child support for the ADC mother, social security benefits for the OAA family -- that income is subtracted from the grant. There aren't any double benefits we're contending with here, so the percentage reduction has nothing to do with that.

In fact, the way Texas applies the percentage reduction to the AFDC family actually operates as a work disincentive. Unlike Maryland, in the Dandridge vs. Williams case, involving family maximums, that this Court decided, Texas does not encourage an AFDC recipient to seek non-welfare sources of income, since it's impossible for the Texas AFDC family to use that income to get closer and closer to the

standard of need. Because the way Texas applies the percentage reduction is that it applies it to the standard first, and then it subtracts outside income. No AFDC family in Texas could ever end up with more than 50 percent of its needs.

So it does not have that work incentive feature of the Maryland family maximum, and indeed the Supreme Court of California unanimously decided, in the case of Villa vs. Hall?, which we've also supplied to this Court, the Court noted that this, too, was a work disincentive feature and specifically referred to the Texas budgetary method, which is similar to California's.

It is this aspect of the percentage reduction as used by Texas which gives rise to our Social Security Act claim. And with the Court's indulgence, I'd like to finish the statement of the case with the facts that gave rise to our statutory claim and then return to the argument.

Prior to May '69 the family described in Table II, receiving AFDC, was determined by Texas to need approximately $165 per month under the Texas standard of need.

Since at that time Texas used that standard to determine the amount of payment and eligibility for payment, all four-person families with income less than this amount received some benefits. The precise amount depended on whether or not their budget deficits, their standard of need minus their available income, exceeded the maximum grant level then

in effect in Texas. If it did, they only received the maximum.

Effective May 1, 1969, consistent with one of the mandates of Section 402(a)(23), which is the subject of the Court's Rosado decision, Texas adjusted its standard of need by 11 percent. The cost of living increase since that standard was last priced in 1965.

We are not challenging the adequacy of that adjustment in this case.

As a result, the family in Table II now is determined by Texas to need $17 per month more, or now $182 per month. Additional families, therefore, those with income below this new standard of 182 but above the pre-May '69 standard of $165 have now been determined by the State of Texas to be in need of public assistance.

But on that date Texas stopped using its standard of need as the AFDC yardstick against which income would be compared, and it was --

Q Are you saying that before 1965, when the standard, I believe, was $165, a family of four received 165?

MR. COLE: No, I'm not, Your Honor. The family of four before May '69 received -- when they changed to the new policy and adjusted the standard -- received the full difference between their standard of need and their available income.

Q That is, if one earned $100 a month, and the standard of need was 165, they got $65?

MR. COLE: They got $65, right. The only limitation was there was a family maximum on grant, which in Texas at that time was $123. So if their budget deficit was greater than 123, they only received 123. That was the system that was upheld in Dandridge vs. Williams.

Q Now, what's the difference, where you said they would get 65, the difference between 100 and 165; what's the situation today where one still earns 100?

MR. COLE: Okay. Now the standard has been raised, the standard now is $182.

Q Yes.

MR. COLE: But at the time the suit was brought, the percentage factor was 50 percent. So let's use that figure. The 50 percent is multiplied against the 182, which results in an item which Texas calls "recognizable needs", even though the standard of need is 182. And that recognizable need is 91.

The family with income of 100 now receives no benefits. Not only does it receive no benefits, but the family, since it's not receiving a cash welfare grant, loses complete Medicaid coverage, because Medicaid in the State of Texas and in half the States is conditioned on the receipt of public assistance.

Q And this change, you say, was made in 1969?

MR. COLE: It was made May 1, 1969. And it was the policy that's now being challenged by the amended complaint in

this lawsuit.

By the way, the Medicaid consequences, which I referred to, are not minimum. The Solicitor General has told the Court that for the average AFDC family it amounts to about 50 to 60 dollars per month.

Q And why is it, did you say, they lose those benefits?

MR. COLE: Congress has mandated, in Title 19 of the Social Security Act, that Medicaid assistance be provided only to those persons receiving aid under one of the cash welfare programs. And since that person is now -- is still needy, they're not receiving the dollar grant, then they lose Medicaid eligibility.

Q That is, the one who earns the 100, entitled only to 91, gets nothing?

MR. COLE: Right.

Q And therefore he also gets no Medicaid?

MR. COLE: That's exactly right.

Q Whereas back in -- where you have the 100 and 165, where they got 65, they'd also get Medicaid?

MR. COLE: Yes.

Your Honor, we are not maintaining in this lawsuit that Texas must pay full needs. I'd like to make that clear. Texas could establish any percentage reduction it wishes under the Rosado decision, as long as it pays some benefits to those

families with a need. That is, if it wants to pay only ten percent to benefits, but it applies that to the budget deficit after it subtracts the income, then the Medicaid consequences would not attach, because the family would get some dollar benefit.

What happened in Texas, beginning May '69, is that 2500 families who were previously receiving AFDC became ineligible by the operation of the new system. That was stipulated by the State. And of course the new families who were rendered needy by the adjustment to the standard of need, those marginal income families, were kept off the rolls.

It is this that gives rise to our statutory claim, since Texas managed to cancel out the one practical effect.

Q Well now, in my hypothetical family earning 100 now entitled to nothing, it would be better for them, I gather, simply to quit work and then get the 91 plus Medicaid; is that it?

MR. COLE: Yes, sir. Absolutely. Or at least only earn 90, if they could manage that, or only receive 90.

Q Yes.

MR. COLE: There are other factors other than work. Fathers deciding whether to support their families. Every dollar of support goes to the State treasury as opposed to helping their family reach this standard of need.

You must remember, the standard of need is what

Texas defined as the basic requirement for subsistence living to families below that standard.

Q The Medicaid for your family in Table II you said runs to about 50 to 60 dollars a month?

MR. COLE: The Solicitor General has told the Court that the average AFDC family receives 50 to 60 dollars a month Medicaid. I don't think I have to belabor the point that medical care could mean life itself. And we are dealing, after all, with families who don't even have enough to supply, under Texas's own terms, enough food, clothing, and shelter to their families.

Q Mr. Cole, I believe the respondent in his brief makes the point that all of the parties appellant presently in the case have not lost their eligibility as a result of what you claim to be Texas's violation of the statute. Mrs. Davila having been dismissed as an appellant in October '69. What is your answer to that contention?

MR. COLE: Mr. Justice Rehnquist, first of all, this is a class action, and there's a stipulation that 2500 families in Texas, eligibility was affected by this. That's No. 1. Mrs. Davila was a plaintiff in a consolidated case.

The reason she did not appear, was not available to me, I don't know the reason; it's perhaps because the Jefferson plaintiffs appealed and she thought she was protected.

But, more important than that, one of the appellants

that is before the Court, Mr. Vasquez, is presently earning income, he was not when the complaint was filed. He is now receiving some disability benefits. Now, while they weren't enough to defeat his eligibility, the matter of computing the payments affects him seriously, because if the percentage were applied after his income is subtracted, he would receive a much higher grant.

It's our contention that Mr. Vasquez, even if you don't want to consider the unnamed members of the class who are not before the Court now, that Mr. Vasquez has an interest in the computation method, and he's raising the eligibility consequences, since, if the Court agrees with us on that point, we'll have to strike the Texas method and he will get an increased grant as a result.

Q So you say his interest is sufficient to enable you to raise the point?

MR. COLE: Yes, sir.

I'd like to conclude on this factual statement by pointing out that this effect of making these additional needy families eligible was precisely what Mr. Justice Harlan referred to in the Rosado opinion as the one practical effect of the statute under which we're litigating, to make these marginal needy families eligible for the care and training provisions of the Act.

With respect to our equal protection claim, our

position is that the District Court incorrectly measured the discrimination against AFDC recipients according to the traditionally lenient equal protection test.

Frankly, we believe that the treatment of AFDC recipients is a basic purpose to it.

In light of the enormous racial imbalance and the various local categories, a long history of restrictive measures against AFDC recipients in Texas, which have borne most heavily on blacks in the program, the State's decision to allocate funds as it has leaves little room for any other inference. This is particularly so when appellee's own frivolous explanations are added to the picture.

I'd like to discuss them in a moment.

Our case, however, does not depend on this Court finding a racial purpose in discrimination.

In Dandridge, the Court said that even if the State welfare regulation is not drawn on its face in racial terms but is shown to have a racially discriminatory effect, it will be inherently suspect and subject to a strict judicial review by the Court.

This is just such a case.

I'd first like to set out very briefly the report of the racial impact of what Texas has done, and then review the explanations put forth and the huge disparities.

Of a total of 389,000 welfare recipients in the

State, 46 percent of them are white, 54 percent of them are black or Mexican-American. In comparison, the racial and ethnic distribution within each category is striking. In AFDC it's not 54 percent black or Mexican-American, it's 87 percent black and Mexican-American. The old age program is --

Q Divided how?

MR. COLE: I'll have to refer to the record, Your Honor.

Q Well, just -- I don't care exactly, but are they about half and half, or --

MR. COLE: I have it right here, at page 72 of the record. The AFDC program is -- yes, it's about 45, 44.6 percent black, 40 percent Mexican, of the 85 or 86 percent, yes. So it would be blacks and Mexicans are evenly divided, yes, sir.

Q Thank you.

MR. COLE: The OAA program is not a majority black or Mexican, as we might have expected, but it's 63 percent white.

In setting its payment levels, Texas has selected the one classification that enables the most whites to be benefitted by the State's allocation, while, at the same time, the greatest number of blacks and Mexicans are disadvantaged.

Q Are there other States that have followed this Texas pattern?

MR. COLE: Yes, sir. In the Appendix to our brief,

we have set forth two charts: one as of October '70, which is the latest published information we had from the Department of Health, Education, and Welfare, we list about 20 States that have the percentage disparity.

In Appendix B we have selected those States where the disparity is the greatest, Texas was 25 percent as of today.

Q What page is this?

MR. COLE: 1b of our brief; it's the very last page of the brief.

And if you'll notice, of those seven States whose percentage disparity is as great as Texas's, five of those States present a racial disparity very similar to Texas.

With this racial impact in mind, we ask the Court to consider Texas's justification for selecting the AFDC recipients to bear the sole brunt of the State's fiscal limitations. We think the justifications are so rational that the Court could decide this case in our favor using the traditional test.

There are three sets of explanations. There's a practical one in the record. There's a lawyer's justification; and the one the District Court used.

The practical justification is this: the three-judge court below asked counsel whether there was anything in the record that would support this discrimination. The Attorney General's response was, and I quote from page 71 of the oral argument: We've got just so much money in each of

these programs to spend.

Well, this is undoubtedly true. But what we're challenging here is the legislature's allocation to minors. Now, that begs the question before the Court. And we remind the Court that since 1965 the Texas Constitution has given the Legislature complete flexibility in appropriations; it has only a total ceiling.

Q Well, are you suggesting that if they wanted to spend no more than they now spend, they can level out the percentage for all four categories, say at 60 percent?

MR. COLE: Yes, sir; and I don't think it would have to be at 60 percent.

Q Well, whatever it may turn out to be.

MR. COLE: The reason I say that, Your Honor, is because there are twice as many Old Age recipients as AFDC recipients. There's --

Q But I gather your premise is it would not be 100 percent across the board, but would be something less than that.

MR. COLE: Unless the Texas Constitution were amended, it would not be 100 percent across the board.

But they do have that flexibility. Before '65 they didn't. The Texas Constitution said a certain limited amount for ADC and a certain limited amount for Old Age Assistance. That is no longer the case.

Q Mr. Cole, you're not challenging on Federal constitutional grounds the over-all Texas ceiling?

MR. COLE: No, sir.

Q Then, if you prevail, basically the AFDC people will get more out of a common fund, and the other categorical grants would get less; is that right?

MR. COLE: If the Texas Constitution stays as it is, that would be the result, yes.

Q You're not challenging the Texas Constitution?

MR. COLE: No. But, frankly, Your Honor, we do believe this is not a legal judgment to be made either by us or the Court; that if that question is put to the Texas people, the constitutional ceiling would be raised.

Q I take it --

MR. COLE: But it's true that if we win we're not requiring the State to spend more money, it will be a reallocation.

Q I take it from the stipulations on file that this would result in a lowering ofthe benefits received from the categorical -- in the other categorical grants, the Old Age Assistance, blind assistance?

MR. COLE: Right. The stipulations make clear that Texas is fully spending its appropriations in the other categories, and that the money will have to come from somewhere.

Q And that no effort was made, either by the respondent or by you, to join any representative members of these other classes who would suffer if your contention prevails?

MR. COLE: We did not, no.

Q Do you have any position as to whether under Rule 19 they should have been joined?

MR. COLE: Your Honor, my position would be that they stand in the same position as the favored class in almost every equal protection case that's before the Court.

I think the thing that's troubling you is that we're dealing here with a pot of money, not eligibility for public housing or regulation of business; but it's always true that the favored class stands to lose its favored treatment if the disfavored class wins the lawsuit.

And under Rule 19 I don't think this Court has ever required the disfavored class to be brought before the Court.

Q However, in this case you have all the aspects of a common fund, it seems to me, a limited amount of money that you haven't had in some of those other cases.

MR. COLE: I suppose that's right, to the extent that the Texas Constitution limits the amount -- the present Texas Constitution limits the total expenditure. I would say this, Your Honor, that the suit obviously had widespread precedents, the State of Texas was well known in the State of

Texas, and I think it would be wrong to say that the suit would come as a surprise if the appellants before this Court should win, would come as a surprise to the Old Age Assistance in the State.

Q Well, how can you say that? This is a group scattered widely over Texas, not represented by anyone, so far as we are informed on this record.

MR. COLE: Your Honor, that is really one of the points that goes to the heart of why Texas has done what they've done. Twenty-five percent of all the people over 65 in the State of Texas receive Old Age Assistance. That's an astounding figure.

The appellants have testified quite candidly that it was their political class that has basically encouraged the Legislature to appropriate as it has. Mr. Bond, the chairman of Public Welfare, testified that OAA touches nearly every home; AFDC doesn't touch as many people. And the OAA people have the vote.

Now, I would think the Legislature has been responsive to them, and they must have some input into the process. I point out that the AFDC children represent less than 3 percent of the State's population of children under 18, compared to the OAA percentage.

I really have no other response to the fact that they have not been brought before the Court.

I will point out that the State of Texas never made an motion to bring them before the Court, either. For whatever that's worth.

I'd like to point out that the record shows that the welfare officials would equalize if the Legislature appropriated a lump sum. Mr. Bond's deposition again indicated that.

But there's no welfare-related reason for this. The welfare expert says: If you give me a lump sum, that's what I would do. I'd have a percentage across the board.

But they haven't given him a lump sum, even though the Constitution permits it.

The lawyer's justification was that the discrimination is justified because AFDC children and mothers, while today unemployable, are more likely to become employable in the future. And also because they're more likely to get support from relatives.

Well, future employability potential obviously has no bearing on the rationality of current payment disparities. The welfare programs are designed to meet current needs, and maybe that would justify if they were running training programs for AFDC recipients, but it certainly wouldn't justify cutting current AFDC grants.

In short, in Texas we suggest that paying 50 percent of needs in OAA would be fair in light of the fact that a majority of OAA recipients receive social security. This has

nothing to do with the question before the Court.

The District Court viewed the program as completely separate programs. Whatever you do in OAA you don't have to do in AFDC, because they're separate, because we see an agency whose purpose is to strengthen family life, and the purpose of the other program is self care.

The fact is the Texas Constitution and the Texas statute makes no such distinction. The purposes are single-minded financially in rehabilitative services.

Now, I would suppose that a blind person may need a different kind of social service than an ADC mother whose husband just passed away. But I would suggest that those differences don't justify a difference in the financial assistance you give to the family.

With respect to the statutory claim, Section 402(a)(23) required each State by July '69 to adjust the amounts used in that State to determine the family need for AFDC. And also to proportionately adjust any maximum that the State may have.

Before this Court, in Rosado vs. Wyman, the petitioners argued that the section contemplate an increase in all AFDC payments by July 1969. They urged that any other construction would render the statute a meaningless bookkeeping exercise.

Q Mr. Cole, let me interrupt you. You said you wanted to reserve five minutes, but you've used up three minutes of your five which you were reserving already. If you want to

reserve any, you have just a little over two minutes left.

MR. COLE: Okay. I will finish the statutory claim, and if I have the time left I will get back to it.

MR. CHIEF JUSTICE BURGER: Mr. Bailey.

ORAL ARGUMENT OF PAT BAILEY, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BAILEY: Mr. Chief Justice, and may it please the Court:

I think counsel has stated that there are initially two questions presented in this case: Your first, a constitutional question involving the equal protection clause of the Fourteenth Amendment.

This is based upon the manner in which the Texas Legislature has allocated the money available between the various categories of welfare assistance in Texas: the aged, the blind, the totally diabled, and the dependent children.

The statutory claim deals with one of the allocations of the money between these categories by the Legislature violates the Civil Rights Act of 1964.

Also, the further statutory issue of whether the Texas method of determining eligibility violates the Social Security Act, and in particular 42 U.S.C., Section 602(a)(23).

Also I think we have in this case an additional issue other than those raised by the appellants; and that is whether there is justiciable controversy between the appellants and

appellees as to the statutory grounds alleged.

I think that it would help the Court somewhat if we looked a little into the background of these welfare programs in Texas.

The Texas Constitution prohibits gifts to individuals. These welfare programs that Texas has have been authorized by amendments to the Constitution, which allows these grants to be made to needy individuals. These amendments have always -- which authorize these grants -- have always put a limit upon how much money the Legislature of Texas could appropriate to pay these grants.

In fact, up until 1965, they even put a limit on how much they could appropriate for various ones of the program. However, in 1965, this was done away with, to where the Legislature could appropriate different varying sums, as they saw fit, between the various categories that were in operation.

Q But you say there's a constitutional limitation on the --

MR. BAILEY: Yes, sir.

Q -- on the total now since 1965?

MR. BAILEY: When this suit began, it was $60 million.

Q Yes.

MR. BAILEY: During the course of the litigation, in fact shortly after the initial judgment was entered, the

people of the State raised the ceiling to $80 million. The bulk of which went to the AFDC program.

Q And that's in this State Constitution, that $80 million?

MR. BAILEY: Yes, sir.

Now, --

Q As a figure; it's not a formula, is it? It's a figure of $80 million?

MR. BAILEY: Yes, it's an actual figure, and it's been gradually going up, somewhat stopped at times, and it's -- oh, well, I believe the last attempt before the one that was passed was defeated. So these have not always passed the vote of the people.

Q This is done by referendum?

MR. BAILEY: It's just on general election, --

Q It's a popular vote?

MR. BAILEY: -- the Legislature's constitutional amendments to the people, and they vote on them, either passing them or rejecting them.

Q The majority vote will pass them?

MR. BAILEY: Yes, sir.

Now, the Legislature in Texas meets only every two years, except in Special Sessions. And normally the money is appropriated on a two-year basis, for a two-year period. Now, the constitutional amendments can only be submitted pursuant to

a regular session, which means that if we get in a crisis financialwise we can't call a Special Session, submit a constitutional amendment and get more money. We're on sort of a two-year basis.

Now, Texas in the late Sixties, and starting really about 1968, like many of the other States had various regulations dealing with items like: man in the house, maximum grants, certain resident requirements.

The court decision that began to come about in this period of time resulted in a dramatic increase in the welfare rolls, mainly in AFDC, the category that this litigation is directed at.

Now, the resultant consequence of this was that we had a constitutionally fixed amount of money to spend, we had a two-year appropriation to work with. There was no way to rapidly amend the State Constitution,or any assurance that the voters would, to make more money available. There was no way -- or there is no way to transfer appropriations between these categories unless the Legislature does it.

The only thing that could happen was that grants in some of the categories had to be lowered, the ones that the rolls were raising rapidly in. We had the added problem at this time, that the cost-of-living increase required by the Social Security Act became effective July 1, '69. Texas, faced with this problem, went to the solution that some States were

using and one that the Department of HEW was authorizing, that of going to a ratable reduction method, where we recognize this standard-of-living increase but we can only pay a percentage of this.

Texas had to reduce some of the grants as a result of using this ratable reduction system. And it was because of this, either the reduction of some of the individual grants or the fact that they did not increase, that actually triggered this lawsuit.

Now, let's initially look at the constitutional claim. They are complaining that the allocation that the Legislature of Texas has made between these various categories is in violation of the Fourteenth Amendment.

It's really a twofold thrust, I think, in here: One, is that we are not paying the same percentage of need between the various categories, and they say there should be no variance.

Now, in the aged program we pay 100 percent; as to the blind and the disabled, 95 percent; at the time of this lawsuit 50 percent in AFDC. This is about --

Q Who fixed those percentages?

MR. BAILEY: The Welfare Department, Your Honor, on the basis that they had to figure how much money they had and how much they were going to pay out.

Q Well, did the Legislature say that AFDC shall

have X dollars out of $80 million; Old Age, X dollars out of $80 million. Is that the way it was done?

MR. BAILEY: The Legislature did this, and the Welfare Department, of course, then has to take the money that's in the program and say: We've got so many people, 24 months --

Q So that the Legislature said: out of the 80 million, 40 million shall go to AFDC. What you're telling us is, I gather, that they could not pay more than 50 percent of need and stay within the 40 million?

MR. BAILEY: Within the budget, yes, Your Honor.

Q I see.

MR. BAILEY: Now, this, because of the constitutional amendment that was passed, raising the 60 million to 80 million, we have since been able to increase the percentage from 50 percent to 75 percent at the present time, and was shortly after this suit commenced.

Q But the others stayed at 100 percent, did they?

MR. BAILEY: No, sir. They stayed -- the blind and disabled stayed at 95, and the Old Age Assistance remained at 100.

Q At 100.

MR. BAILEY: The appellants have also raised the allegation that this allocation of funds between the categories has some form of racial motivation or effect. Now, as to these contentions, the court below has twice rejected it. I think

as to this initial argument that King v. Smith and Dandridge v. Williams have already decided this initial issue adversely to the appellants. The Court has recognized in these cases that the States have considerable latitude in allocating their AFDC resources. I think this Court has said that each State is free to set its own standard of need, and to determine the level of benefits by the amount of funds it devotes to the program.

I don't believe that the Court could make it much clearer that the States can use their discretion as to what particular problem in the welfare area that the State wants to concentrate upon and use their limited funds to do the best job they can.

I think the court below recognized this when they saw that Texas only had a limited amount of money, and they felt that it was the duty of the Legislature of the State to use its judgment in the manner and amount the available money should be divided.

I think that the court below possibly looked to this Court's warning in Dandridge v. Williams, where the Court stated that the Constitution does not empower the Court to second-guess State officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

We feel that to do otherwise would really put the court then in the position of exercise a legislative rather

than a judicial function.

I think that without commenting at length upon them, there are numerous reasons which are constitutionally sufficient for spending less in one program, and let's just look at it, the AFDC program, as opposed to certain of the other programs.

The courts have long recognized that these are different programs with different objectives.

Secondly, the aged, the blind, and the disabled are not likely going to improve their condition; in many cases it will only worsen. These people are also quite frequently the recipients of larger amounts of drugs or medical needs.

I think that this is one that the Legislature could have considered is wanting to devote more of their energy, more of the available funds in this area as opposed to another; not necessarily feeling that the child or the blind or someone else should suffer, but realizing that they couldn't create a Utopia either, with the money that they have.

Q You're talking about more of the public funds for the aged or for the blind or for the disabled; in fact, is that true? How much of the $80 million goes to AFDC now?

MR. BAILEY: About 23 million, a little over $23 million. So it would be somewhere around close to 30 percent I would reckon, --

Q About 23 million goes to AFDC, --

MR. BAILEY: -- out of the 80, I believe, in the last

appropriation.

Q -- and about how much goes to each of the others?

MR. BAILEY: Ah, --

Q About, I don't --.

MR. BAILEY: I would have to look, Your Honor.

I believe there is around 50 million goes to the Old Age Assistance program. The blind program is rather small.

Q There's not many people involved?

MR. BAILEY: Yes, sir.

Q Right.

MR. BAILEY: And the APTD is also -- has risen some, but not too much. Although this is rapidly growing. But the remainder of the money, about $7 million, approximately, remaining is divided between the blind and the disabled.

Q Yes. And so that 50 million out of the 80 goes to Old Age Assistance?

MR. BAILEY: Yes, sir.

Q And the fact is, as your brother said, I guess, that -- what -- about 25 percent of everybody over 65 in Texas gets Old Age Assistance?

MR. BAILEY: I think this would probably be correct. I haven't --

Q One out of every four people over 65, then.

MR. BAILEY: Now, the --

Q Mr. Bailey, you've been making, I guess this is

your constitutional --

MR. BAILEY: Yes, sir.

Q -- that there's no constitutional violation. Are you going to get to the statutory?

MR. BAILEY: Yes, I am.

Q Because I gather if this system conflicts with any requirement of the Federal statute, then it can't stand; is that correct?

MR. BAILEY: This is correct, sir, either one of them.

Now, the appellants in this case have also questioned the use of the traditional equal protection test by the court below rather than the compelling interest test. I think that Dandridge v. Williams decides the question that unless there is some showing in the rule or regulation that there's a racial motivation or effect, that the compelling interest test should not come into play unless this is shown.

This, I think, brings us both to this question and to the civil rights question. The appellants have contended that this allocation is because of some racial intent.

I think the undisputed facts in the record before this Court show that this allegation is without merit, and the court below has, on two occasions, so held. I think we have to look at a little bit of the facts in here. There's never been a reduction in AFDC programs.

The amount of increases over the last 28 years have

almost been equal from the standpoint of every time some of the adult categories were raised in money, so was the AFDC program.

Q Now, you say there's never been a reduction in AFDC, are you talking about on total money appropriated?

MR. BAILEY: Yes, sir, in total.

Q But there has, has there not, -- or am I mistaken -- been a reduction in the percentage given to --

MR. BAILEY: To AFDC?

Q -- to units based on percentage of standard of need. There has been a reduction in that, hasn't there?

MR. BAILEY: Yes, Your Honor. There have been, over the history of these programs, reductions in practically every one of them at one time or another.

Q Yes.

MR. BAILEY: Either by the Legislature not appropriating money and the programs growing, there have had to be some reductions from time to time.

Q Yes.

MR. BAILEY: But never in the total amount of money --

Q Total money, yes.

MR. BAILEY: -- spent for the programs.

Since 1943, the AFDC program has been growing about twice as fast as the adult programs. The majority of the families receiving actually an increase under this ratable reduction theory that Texas went through in '69 were actually

large families which were predominantly Negro and Mexican-American.

Under this proposed amendment which was passed, to increase the money available some $20 million, of the amount that was appropriated by the Legislature the AFDC got almost 12 million out of the 15 million available. Also the court, in looking at the depositions of the Welfare Department officials, said that these people didn't even know what the racial makeup of the various categories was until after this suit commenced and they were required to do certain studies and come up with certain statistics.

Another thing that we get into here, we talk about leveling this out. If we took -- and these are stipulations in this case -- if we took this money and leveled it out, it would not have a racial effect as the appellants seem to contend. It would mean that practically an equal amount of racial groups in the adult programs, the Aid to the Blind and the Disabled, would have their grants lowered to in turn raise about the same amount to individuals in these ethnic groups in the AFDC program.

Now, if this was not the case, there might be some merit to appellants' contention. But leveling this out has no racial connotation, because there are going to be as many people in the Mexican-American and the Negro that will have their grants lowered in these other programs, it will have them

raised in AFDC. And I think this itself shows the lack of merit in appellants' contention.

Q Mr. Bailey, you're speaking in terms now of absolute numbers, are you not, rather than percentages?

MR. BAILEY: Yes, sir.

Q I take it that the appellants' response would be that, although the absolute numbers might be the same, the percentages are a good deal different.

MR. BAILEY: I have -- am not aware in the record, nor have I really looked to see what the percentage differences would be. But when we're talking about people, you're having about as many hurt as you are having helped, among the ethnic groups.

I think that King and Dandridge show us that the States have a lot of latitude in the way they allocate this money. We submit, also, that there was no racial motivation or effect in what has been done in the allocation. There are some four other cases, the Lampton case out of Louisiana, the Ward case in Mississippi, the Goodwin case out of New York, the Stanley case out of Virginia, which all have percentages about the same, or very strikingly similar.

And to date I am not aware of the Court saying that this showed racial effect or motivation.

Now, as to the statutory question, the initial attack in this case was that the ratable reduction, of paying only a

percentage of this recognized need, was bad. However, before this case reached this Court, the issue was resolved by Rosado. Now, there were no pleadings or proof or allegations in the trial or on the first appeal about anything that Texas was doing wrong in its method of determining eligibility. It was only after the Court, this Court, sent the case back for the entry of a new judgment and after the Court had entered a judgment denying both the constitutional and statutory ruling sought by the appellants that they raised, for the first time, the question of whether or not Texas was properly determining eligibility.

There were no amended pleadings or efforts to amend their pleadings. None of the appellants before this Court were affected by the way eligibility was determined. The only party which could have been affected was the party Davila, but she didn't even appeal from the first judgment entered by the court, and was no longer a party to the case when it was sent back for the entry of a new judgment, or when this issue as to determining eligibility was first raised in a motion to amend the judgment entered by the court.

Q Now, what's the respect in which it suggested that eligibility has not been determined as required by the Federal statute?

MR. BAILEY: Well, Your Honor, we feel that none of these people in this case --

Q No. What do you understand the appellants to say is the defect in the determination of eligibility, in light of the Federal requirement?

MR. BAILEY: All that I can understand by what they have said here, Your Honor, is that the possibility that some day in the future this person might become ineligible. This shows no controversy. The only thing that I believe counsel said is that if the Court could let this issue get in here, this person might have a --

Q But does it possibly relate to the ineligibility for Medicaid by reason of the operation of the new Constitution?

MR. BAILEY: None of these particular appellants, Your Honor, are ineligible for any of the medical assistance programs in Texas.

And this is the issue that we've raised here, is that we feel that none of these people have been, in any way, affected.

Q Well, how about the class? I gather the suggestion is that --

MR. BAILEY: None of them, none of the class, Your Honor, that they represent has been affected. And I think that counsel and the appellants are in a most unusual position here. They are arguing for a position which, if granted by this Court, will actually lower their benefits.

Now, this is a most strange position, I think, for the appellants to be in, because if a great many more people were put on the welfare rolls in Texas, these particular appellants would have to have their benefits reduced; and I think this is a somewhat unique situation for the appellants to come into court arguing.

Q You mean the actual dollar amount would be reduced?

MR. BAILEY: Yes, sir. As a result of --

Q Not the percentages, but the dollar amount?

MR. BAILEY: Their dollar amounts would have to go down, because if we have more people on the rolls, we're going to have the same amount of money, it's going to have to go further; so every one that's an appellant in this case would have their grants --

Q But, still, I gather, they'd be getting percentagewise, if they prevailed, the same percentage as the other categories of need?

MR. BAILEY: This might be true, Your Honor, but I think we come back again to the fact that there's really no controversy as to this issue between the parties before this Court. What they're really doing is this: They've lost their -- Rosado caused them to lose their statutory issue on this ratable reduction, and the only thing they've got left now, that they've tried to jump in at the last minute here on, is

the fact that this -- the way we're determining eligibility is something that was never in the case until the second judgment was entered. They've got an issue --

Q But do you understand the appellants' statutory claim to be limited to a claim that eligibility determinations contravene the eligibility determination requirements under Federal law?

MR. BAILEY: Yes, sir. What they're saying in here is that what Texas does, they apply this ratable reduction factor to the standard of need. Let's just say it's 75 and there's $100 worth of need. It would be $75, for a particular individual.

If they have income of more than $75, then they're ineligible.

What the appellants would like to have happen here would be for their eligibility to be determined on the full recognized need. This would in turn put them showing a small amount of unmet need. This would then put them on the welfare rolls at a small grant, opening up certain other benefits.

Q Opening up Medicaid particularly?

MR. BAILEY: Yes, Your Honor.

Now, I think that one of the problems that we run into here when we do this is that we are letting, or putting on the welfare rolls certain people who are very marginally eligible to get certain benefits. But the result is that we're

having to penalize the people who need the help the most, because it's the people that have no outside income, who have larger needs, that are going to ultimately have to have their grant reduced to put these marginally needy people on the rolls.

Now, I do not think that it was the intent of Congress in this Act to penalize the most needy.

Q Mr. Bailey, on the case or controversy point, I understood Mr. Cole to say that appellant Vasquez was sufficiently affected by the eligibility determination so as to enable them to properly raise that with the actual parties they had before this Court.

MR. BAILEY: I don't see how, Your Honor, because he is receiving a welfare grant, and he is receiving medical benefits. Now, if he was not, if he had been terminated and no longer could get a grant, could no longer get the medical assistance, then I think, Your Honor, they would have a proper party before this Court; but they don't have one yet. They wanted to change horses here, but they haven't got anybody to fit the saddle of this new horse that they've got.

I think that, really, that they have tried, the appellants have tried to read into this portion of the Social Security Act, that portion requiring this cost-of-living adjustment, a whole lot more than Congress ever intended to put there.

The Court, in Rosado, recognized that the purpose of

this was to make the States recognize that the cost-of-living increases had occurred, that the State should adjust to them, that, in turn, it might prod the States to spend more money in this area.

But I think that, really, what they're asking here is that something new be read into this, that the eligibility requirements be changed, the way the States determine eligibility. And I think that if Congress had intended this to be the purpose, they would have written in a whole lot clearer than this and not left it up to a hope that some litigant might discover this hidden among this statute, that this was the purpose of it.

I think that, in conclusion, that the question of whether to help the more are the cost of the many really -- and this is the argument that they are making in this case -- is the business of the Legislative Branch not the Judicial. I think that the arguments and hopes of the appellants in this case are ones that should be pursued in the Legislative and Congressional Halls rather than in the courts.

I think that really what they would like to do is, when you strip all the argument and the rhetoric and the cliches that are used, is that they would really like the Court, this Court, to judge the wisdom and the propriety of the way the Legislature of Texas has decided it would spend the money it had available in the welfare area, and turn these appellants'

dissatisfaction with this plan, and possibly if they can get the Court to agree with them, into some form of constitutional or statutory prohibition.

I think that the path of this Court is clear, and that is to sustain the judgment of the court below.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bailey.

Mr. Cole, you have one minute left.

REBUTTAL ARGUMENT OF STEVEN J. COLE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. COLE: Your Honor, first of all, I would like to remind the Court that there are 2500 families that Texas has stipulated whose eligibility has been terminated as a result of the method used here.

Secondly, Mr. Valquez, whose eligibility has not been terminated, has lost approximately $40 a month by the method of computation which, if stricken because of its eligibility consequences, he would gain $40 per month.

In Rosado, the Court said, at page 413, that 402(a)(23) has the effect of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard need as computed in light of economic realities, and to place them amongst those eligible for the care and training provisions of the Act.

The Court said this because HEW came to the court and told the court that's what 402(a)(23) meant. And if you will

look at the amicus brief of the Solicitor General in Rosado, you will find those words. The Solicitor General in this case says that: yes, the Court said it, but that was dictum, and you didn't really mean to say it.

And I think if the Court looks at the basis of the decision in the New York case in widening out New York's program, you will realize that it wasn't dictum at all.

Thank you.

Q Mr. Cole --

MR. COLE: Yes, sir.

Q -- can I ask you one, hopefully final question about something Mr. Bailey raised. At least a couple of your clients here, Mrs. Jefferson, Mrs. Gipson, are presently eligible under this Texas standard, and, as I understand his contention, you're arguing that these eligibility standards should be broadened in such a way that more people would become eligible for what is a fixed amount of money, and therefore that these particular clients of yours would not gain but lose financially, if your contention is sustained. What's your response to that?

MR. COLE: There are competing interests amongst the class which was, when the suit was brought, to find all AFDC recipients in the State. The original contention in the suit were indeed that payment had to increase for everybody. That was rejected in Rosado. Of course, when payments had to increase

so did eligibility, that flowed with it.

On remand, when the payments-increase question was no longer a viable question, because of Rosado, there was diverging of claims, I suppose, and this --

Q No thought was given to getting separate counsel?

MR. COLE: Your Honor, I can't -- I personally can't respond to that, because I was not at the District Court level in this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cole.

Thank you, Mr. Bailey.

The case is submitted.

[Whereupon, at 11:03 o'clock, a.m., the case was submitted.]

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