

In the

Supreme Court of the United States

UNITED STATES DEPARTMENT
OF AGRICULTURE, et al.,

Appellants,

v.

JACINTA MORENO, et al.,

Appellees.

No. 72-534

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Pages 1 thru 42

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Washington, D. C.
Monday, April 23, 1973

The above-entitled matter came on for argument
at 1:10 o'clock p.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:

A. RAYMOND RANDOLPH, JR., Assistant to the Solicitor
General, Department of Justice, Washington, D. C.
20530; for the Appellant.

RONALD F. POLLACK, Esq., 25 West 43rd Street, New
York, New York 10036; for the Appellees.

C O N T E N T SORAL ARGUMENT OF:PAGE

A. Raymond Randolph, Jr., Esq.

On behalf of the Appellants

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Ronald F. Pollack, Esq.

On behalf of the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-534.

Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is an appeal from the judgment of the three-judge federal district court in the District of Columbia, holding Section 3 of the Food Stamp Act unconstitutional under the Fifth Amendment insofar as it limits eligibility for food stamps to related households. The court enjoined the Secretary of Agriculture from denying eligibility to households containing one or more unrelated individuals.

The issue in this case is whether Section 3 of the Food Stamp Act is so unconstitutional under the Fifth Amendment. I will first give a brief description of the Food Stamp Act and then deal with the particular facts of this case and then discuss our position.

The food stamp program was enacted in 1964 to raise the nutritional level of low-income households and to strengthen the agricultural economy. Eligibility to participate in the program is on a household basis rather than on an individual, although an individual can comprise

a household if living alone.

An eligible household exchanges an amount of money for what is termed an allotment of food stamps or coupons of a higher monetary value. The difference between what the household actually pays for the coupons and their actual value is the federal contribution to the household's increased purchasing power.

The household uses these coupons to purchase food at the prevailing price in participating retail stores. The retailer redeems the coupons through the commercial banking system. The amount of allotment per household is determined by the household size.

For example, at present, a household of four persons is allotted \$112 a month. A household of five, \$132, and so forth. New allotment levels come into effect each year, and I am told that in the 38th Federal Register, 8287, the new allotment levels effective July 1, 1973 are printed.

The amount of money a household must exchange for its coupon allotment depends on the household's monthly net income. For example, a household of four with \$250 monthly net income must pay \$71 for this \$112 allotment of coupons. If the net income of the household is \$330, the household pays \$86 for \$112 of coupons, and so forth.

The food stamp program is not a mandatory program.

It is a joint federal, state, and local government undertaking. Counties and independent cities as well states have the option whether or not to participate in the program. At present all but about one-third of the counties and cities in the country have food stamp programs. That is 2,204 out of 3,129 have food stamp programs.

Three states--Nevada, Delaware, and New Hampshire--have no food stamp program whatsoever.

While the Federal Government pays for the increased food purchasing power of the household and sets uniform national standards of eligibility, the day to day administration of the program is handled largely by state agencies who certify households as eligible, investigate applications, issue the stamps, and so forth.

A substantial percentage of the administrative costs are paid for by the state out of its own pocket.

Section 3 of the act, the state at issue in this case, defines the term "household" for eligibility purposes as "a group of related individuals or non-related individuals over age 60 who are living as one economic unit, sharing common cooking facilities, and for whom food is customarily purchased in common."

Appellees, who live with unrelated persons, claim that because Section 3(e) limits eligibility to groups of related individuals, a provision that resulted from 1971

amendments to the act, Congress has deprived them of food stamps in violation of the Fifth Amendment. They brought this class action seeking a declaration that Section 3(e) is unconstitutional and seeking also an injunction against its operation.

A three-judge court was convened. Each of the five individual appellees or groups of appellees representing a class alleges that they were denied food stamps because they did not live in related households.

Appellee Mrs. Moreno resides in Florida. She lives with another woman who has three children. Both Mrs. Moreno and her co-tenant, Mrs. Sanchez, are on public assistance. However, it appears from Mrs. Moreno's affidavit in the appendix, the brown volume, on page 24, that Mrs. Sanchez is receiving food stamps.

Appellee Mrs. Kepler lives in Oakland, California. She and her two children joined with another woman to rent a house for \$275 a month. Both Mrs. Kepler and her co-tenant are on public assistance. The record does not reveal their combined income.

Appellee Mrs. Hejny lives in North Carolina with her husband, their three children, and a young woman who is unrelated to them. Mrs. Hejny's husband is a pipe layer. Weather sometimes prevents him from working. During one month, February, which his income is reported for, he made

\$90--he brought home \$90 a week. The young woman living with them, who is now 21 years old, earned about \$20 that month babysitting. The Hejny's have very high and very substantial medical expenses.

Appellee David Durrant resides in Salt Lake City, Utah. He is a student at the University of Utah. He lives with another young man. He and his co-tenant earned \$170 doing odd jobs in January, 1972.

The remaining appellees are a group of five unrelated individuals, three men and two women, who live together in Columbia, South Carolina. One is a full time student and the others are unemployed. They joined together, their affidavit states, for economic reasons and out of personal affinity for one another. They pool all resources.

On cross motions for summary judgment, the district court held that Section 3(e), by extending food stamp eligibility only to related households, discriminates against persons and groups containing unrelated individuals, such as the appellees, in violation of the Due Process Clause of the Fifth Amendment. The court said that it was unable to perceive any rational basis for Congress's making only related households eligible and thus not including unrelated households as well in eligibility for food stamps.

In discussing this question, first of all, I would like to deal with what class exactly is it that is affected

by this, by Section 3's definition of household as a related group of individuals. On page 12 appellees define the class--page 12 of their brief, which is the white copy--as composed of persons in need of food stamps as are related household members but who live in households that include one or more persons who are unrelated to everyone else in the household. This is not an accurate description of the class that is ineligible for food stamps under Section 3(e).

First of all, for purposes of Section 3(e), the statute specifically provides that if unrelated persons 60 years old or older are living in the household, an otherwise eligible household is not disqualified.

Second, if there are children under the age of 18 but not related to any of the adult members of the household or not even legally adopted or assigned through a foster home, the household is not rendered ineligible, so long as one of the parents performs the duty or one of the adults performs the duties of a parent with respect to such children.

Third, even if a man and woman--this is again by regulations--are living together and not married or related, they can still comprise an eligible household so long as they are treated by the community as husband and wife. This regulation is sort of a federal commonlaw of marriage.

Fourth and perhaps most significant, even if none

of these examples apply, unrelated persons living together are not automatically ineligible for food stamps. As we noted in pages 9 to 11 of our reply brief, the recent decision in the district court in California in Knowles v. Butz, which the Department of Agriculture has accepted. This is page 9 to 11 we discuss this case. And it's reprinted in the appendix to our reply brief.

The Knowles decision holds that even if people live in the same house or apartment and share housing expenses, they are not necessarily one household for purposes of eligibility. Because under the act, in order to be considered a household, the group of persons must operate as an economic unit; that is, common living expenses must be shared from the income of all. The needs of all members have to be provided without regard to willingness or ability to pay.

For example, if two unrelated families move in together and share only housing expenses, they could be considered two related households instead of one unrelated household. Perhaps Mrs. Keppler might serve as an example. Her situation is reported on pages 26 to 27 of the appendix. And she alleges that she moved in with another woman in order to save housing expenses. There is no indication that there is a general pooling or sharing of all resources without regard to willingness to contribute or pay.

In our brief we drew the analogy that just simply because two lawyers, for example, share an office does not mean that they are necessarily partners, even if they both share the expenses for that. I think there are numerous other examples of this.

Q The Keppler will not fly if they had pooled all their resources?

MR. RANDOLPH: Sorry?

Q The Keppler case you just mentioned, if those two ladies pooled all of their economic resources--

MR. RANDOLPH: They would be ineligible because then--

Q They would still be ineligible.

MR. RANDOLPH: They would be then one economic unit and therefore not two separate households living together but one household and therefore unrelated.

Q Would they be eligible?

MR. RANDOLPH: No.

Q So, what is the difference?

MR. RANDOLPH: The difference is--

Q I mean, what is the difference between the fact that they did not pool their resources--if they pooled them, they still would be ineligible.

MR. RANDOLPH: But if they did not pool their resources, they would be eligible.

Q They would be eligible?

MR. RANDOLPH: Yes, because what the statute requires, Mr. Justice, is that the group of persons live as an economic unit.

Q Am I right, these are two people--

MR. RANDOLPH: No, they have children. Mrs. Keppler has two children.

Q Would the other one be the one that does not have the children--the one individual, she would not be eligible because she is not a group?

MR. RANDOLPH: An individual can comprise a household under the act. If the individual is not part of any other economic unit, it can comprise a household.

Perhaps I ought to expand on this. Under Section 3(e) the term "household" means either a single individual or a group of individuals living--related individuals--living as one economic unit.

Q But the individual is not in this case, is it? We are talking about groups in this case, are we not?

MR. RANDOLPH: We are talking about both groups and individuals. Some of the appellees are individuals. The only appellee--

Q Would Miss Keppler be qualified as an individual?

MR. RANDOLPH: She has two children. She would

be qualified as a household if she shared only housing expenses. The fact that she lives under the same roof with another woman would not mean that that was an economic unit composed of Mrs. Keppler and the other woman.

Q Is the other woman eligible?

MR. RANDOLPH: That would depend on what her income was, and I think she is on welfare. If she is, then she would be eligible too. But they would be eligible as separate households, not as one household.

Q And the difference being what, dollars-and-cents-wise?

MR. RANDOLPH: The difference would be simply zero federal contribution to food purchasing power as opposed to whatever the food purchasing power would be.

Q So, are you going to tell us why it is rationale now to make them all ineligible if they pool their living expenses?

MR. RANDOLPH: Yes.

Q All right, that is really what we are trying to decide.

MR. RANDOLPH: That is right, but I wanted to give an accurate definition of what class of people were affected by this, and it is not accurate to say that simply because two unrelated people are living together they are disqualified from receiving food stamps. That is not an accurate

description of the class. That is not necessarily so unless they are living as an economic unit, pooling all resources.

Prior to 1971, both related and unrelated households were eligible for food stamp relief. During 1969-1970, however, before the program's authorization for appropriation expired, and the food stamp program gets an authorization every year under present practice and is re-evaluated, Congress undertook a comprehensive re-evaluation of the program's operation.

As Representative Foley stated on the House floor, there was Congressional concern about participation in the program by what he termed "collections of essentially unrelated individuals who voluntarily chose to co-habit and live off food stamps."

The Congress had evidence during the hearings that at least in one food stamp jurisdiction 38.6 percent of the non-assistance households were either groups of college students living as fraternities, and 42.4 percent of the non-assistance households were groups of unrelated individuals who joined together to adopt the communal lifestyle.

The revision of Section 3(e) by the Conference Committee dealt with this problem by extending food stamp relief only to related households.

We believe this is an example of what the Court

spoke about in Williamson v. Lee Optical, in Dandridge v. Williams, in Jefferson v. Hackney, of Congress permissively selecting one phase of the problem--in this case, related households--and applying a remedy there. We submit Congress had a rational basis for doing this and therefore did not violate the Due Process Clause.

In allocating assistance among potential recipients, Congress could rationally and indeed probably must follow some scale of priorities in determining need. In following this scale of priorities, we think it was quite rational for Congress to say the communal groups, such as the kind described by Congressman Foley, would rank very low in the scale of priorities, as opposed to people that were in need out of circumstances that were not of their control. And Congress could, therefore, we believe, decide not to extend relief beyond related households because to do so would encompass the kinds of groups that Congressman Foley spoke about on the House floor; that is, communal groups and also college fraternities that were living off food stamps.

This kind of allocation, I think, is illustrated by Dandridge v. Williams where the Court said that the Constitution does not empower this Court to second-guess officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. We think there was an additional

reason why Congress could conclude that it was proper only to aid related households. Congress knew that the relative instability of groups of unrelated individuals, as compared with related households, that this could cause administrative difficulties, because household eligibility, since it is the allotment per month, must be determined on a continuing basis.

The certification of the household depends on how stable the household is. If it is a very unstable household with different income coming in, with different people living in it, there must be a constant certification of it to determine its allotment.

This increased administrative expense is something that we think additionally serves as a rational basis for Congress's classification as it did. And I refer now to page 45 of the appendix, which is a letter that appellees had included in the record. As I said before, the food stamp program is an optional program; it is not mandatory. About one-third of the counties in the country do not have a food stamp program.

At the top of page 45, the director of the program for California says--45 of the brown appendix--he says, "Counties are considering the increased cost of administration very carefully. Several counties have indicated that they are weighing the possibilities of changing from food stamp

programs to commodities, or of having no supplemental food program at all. New counties, just accepted and not yet operating, may re-evaluate their decision to come into this program."

Q That is California?

MR. RANDOLPH: That is California. Congress knew this as well as the director of the California services. And they also knew that by having related households in the program it increased administrative cost.

If rational basis means a basis derived from reasoning, we think this statute meets that test. As I said before, there are groups within the unrelated household group that Congress reasonably, I think, and certainly rationally, could conclude were not deserving of food stamps on any kind of scale of priorities that Congress could follow.

And, second of all, by including unrelated households, Congress could also conclude that it would create increased administrative expense which may, in fact, deter states or counties from adopting the program at all.

It is no answer to say this, as appellees do, while there are other ways of taking care of these problems. For example, we have criminal sanctions. And in 1971 Congress added a requirement that people must register for and accept employment as a condition to food stamp relief.

The very harshness of a criminal penalty suit for abuses suggests its disuse, and there was testimony on the House floor that it was not an effective remedy. And the work requirement, which requires adult members of the household to register for and accept employment, had just been added to the act simultaneously with the revision of Section 3(e). This was thus new and untried, and Congress was well aware of the administrative difficulties it had in controlling this nationwide program under the existing practices. It surely was not required to assume that the Constitution forbid it from extending relief only to related households because it had just added a work provision to the act which was yet untried.

This is not to say there might have been other ways for Congress to respond to these problems or that Section 3(e) is the best approach or even a wise one. But as the Court is continually reminded, the wisdom or, I might add, the unwisdom, of a particular statute is not a proper subject for judicial inquiry.

We believe Congress had a rational basis for extending relief only to related households. And the Fifth Amendment requires no more. We therefore believe the judgment below should be reversed.

Q You say the basic rationality has at least three ingredients, as I understood. First of all, their

concern was to see to it that the food stamps did not go to the so-called voluntary poor.

MR. RANDOLPH: That is right.

Q And, secondly, it also had the ingredient of saving administrative expense because of the transitory nature of so many of these non-related households. And, thirdly, to prevent fraud, which is really part of one and two, is it not?

MR. RANDOLPH: Yes, it is. Of course, if unrelated groups are eligible, then the fact that they are getting food stamps is not an abuse of the program. It is only an abuse if you could find your priorities such as to say that these are people that are very low in the scale and that we ought to concentrate our efforts elsewhere.

Q But that is it? Is there anything that I have left out?

MR. RANDOLPH: That is it.

MR. CHIEF JUSTICE BURGER: Mr. Pollack.

ORAL ARGUMENT OF RONALD F. POLLACK, ESQ.

ON BEHALF OF THE APPELLEES

MR. POLLACK: Mr. Chief Justice and members of the Court:

In determining whether the unrelated household provision here at issue violates people's protection, I think there are two useful tools for analysis. The first tool is

the traditional tool, the traditional standard. Is the provision rationally related to the purposes of the food stamp program? Is it reasonably related to some legitimate governmental purpose?

The second tool that I think is applicable in this case is a compelling governmental interest test, because the provision here at issue impinges directly upon appellees associational and privacy interest.

I would like to concentrate on the first test, however, the traditional standard, for it is my opinion that under either standard this provision does not meet the standards of equal protection.

Q In Dandridge it was argued, Mr. Pollack--I think it was Dandridge--that there was an interference with a very important right of privacy, that is, size of the family, in the sense that the regulation discouraged large families because of the limitation.

MR. POLLACK: At the very most, Your Honor, I think in that case that only had an incidental effect with relation to that. Here it is a very direct relationship with the associational and the privacy right. Here only if you associate in the confines of your home are you denied food stamps. Only for that reason. And it is a very direct impingement. There at most it was indirect.

I think, though, under any standard, whether we use

a compelling governmental interest standard or whether we use the traditional standard, you cannot find a legitimate governmental interest that is reasonably related to by this provision.

What is the real purpose for the unrelated household provision? It is very clear. It is to eliminate hippies, to eliminate hippie communes from the food stamp program. How do we glean this purpose? We glean this purpose from the Congressional history, the legislative history, of this provision. And although that legislative history is very sparse because it was not debated, it was formulated for the first time by conference committee and it was hurriedly passed by the House and the Senate thereafter, there are three different places in the legislative history that refer to this provision. And in each of those places we find reference to the anti-hippie commune purpose of the provision.

Secondly, in post-legislative history you will note that six Republican senators from the Senate Nutrition Committee indicated that this provision purely had an anti-hippie purpose to it. And, in fact, they decried the fact that this provision was not going to harm the hippies but in fact it was going to harm the poorest of the poor.

In the district court, the appellant said that the only intention that we see with regard to what was the

Congressional intention in this provision is to harm hippie communes.

Appellants, in fact, admitted to this Court in their reply brief and in their jurisdictional statement that the purpose of this provision is to deny food stamps to hippie communes.

Administrators of the program, as reflected by the California welfare director, they all call it the anti-hippie commune provision.

It seems to me that there are two reasons under the traditional equal protection test that this provision violates equal protection. The first is, it seems to me, that the purpose itself is impermissible. But even more important--

Q Could Congress have repealed the whole program for that purpose?

MR. POLLACK: I doubt it very much, Your Honor, because it did not seem to be a very pressing--

Q You must say that, I suppose.

MR. POLLACK: Your Honor, it seems to me that this was not a very substantial concern; this was not even passed by the House or the Senate. For the first time it was introduced in conference committee. So, this was not really a pressing concern of Congress.

Q Unless I misunderstand you, that cuts against

the argument you have been making for about the last three minutes, that this was the only purpose of the provision.

MR. POLLACK: That is correct. That is the only purpose that we can glean from the very sparse legislative history.

It seems to me when one looks at that purpose and you try to find how this provision rationally relates to that purpose, you find that there is no rational relationship to that purpose. And in order to find that, I think it is important to examine Knowles v. Butz, the case that was cited to by the appellants in this case.

Q Before you get onto that, let us accept your proposition that this was aimed at hippie communes.

MR. POLLACK:— Yes.

Q But let us assume that it had been described in terms of unstable establishments, that is, like the Waldorf-Astoria Hotel in the sense that there are people coming and going every day, are extraordinarily difficult to keep track of, and would lend themselves to a great deal of false registration and fraud. Would you then be making the same arguments?

MR. POLLACK: Your Honor, this provision is substantially different. And let me explain why. And I think in order to understand why, it is important to examine the decision in Knowles v. Butz. The reason is, if you look

at the decision in Knowles v. Butz, for determining what is going to be the group of people, to find out whether they are a household, three factors must be present. The first factor is that they must live as one economic unit. Secondly, they must purchase food in common. And, third, they must share common cooking facilities.

The appellants argue, in essence, in this case, that this provision does not have a harsh effect because all that people have to do in order to eliminate themselves from the harshness of this provision is to separate themselves and live a separate economic unit.

As an example, if a household was denied food stamps because there are unrelated people in there, all they have to do is divide themselves up, fractionate themselves, and therefore they can then be eligible as separate households. What I would suggest, Your Honor, is that this provision does more to make it difficult to administer the program because what it encourages is it encourages the voluntary poor people to fractionate their households, making it much more difficult to keep track of the money, making it much more difficult to administer the program.

The people who cannot fractionate their households are the poorest of the poor. As the California--

Q Once again, how is it that a hippie, as you put it, commune cannot meet those three standards?

MR. POLLACK: Your Honor, a hippie commune, if it wants to--assume you have a commune of 20--

Q My question is, Can they meet those three standards?

MR. POLLACK: Yes, they can.

Q Then what is wrong with it? If you say it is all the hippie communes that they are after, and now you say the hippie communes can meet the standards.

MR. POLLACK: What I am saying, Your Honor, is that even though the provision was directed at hippie communes, the provision in fact does not harm them. What the provision actually does harm are the poorest of the poor, those people that cannot fractionate their households, those people who cannot separate themselves as independent economic units.

Take as an example Mrs. Moreno. Mrs. Moreno is living in a household with Mrs. Sanchez. She is living there because she is extremely poor. She has merely \$75 in income. And she is a diabetic and she is a diabetic and she needs health care. The reason that she has joined together is out of brutal necessity.

Q How far has she joined together?

MR. POLLACK: She has joined together for all purposes, for economic purposes, for living arrangements. In other words, they treat themselves together as one economic unit.

Q Is not your argument right now, though, an argument for no more than the fact that the regulation or the statute might be unconstitutional as applied in some cases?

MR. POLLACK: No, Your Honor. The provision in its--

Q As applied to the communes, I thought you suggested to my Brother Marshall that there was nothing unconstitutional about its application to them.

MR. POLLACK: If they can fractionate their households, that is correct.

Q Then the regulation is not invalid on its face?

MR. POLLACK: Your Honor, on its--

Q You say it is with respect to the poorest of the poor.

MR. POLLACK: Yes, that is correct.

The provision only harms, in fact, the poorest of the poor.

Q To say something is unconstitutional on its face, if you are dealing with the rational basis standard of equal protection analysis, does that have any support in our cases?

MR. POLLACK: I am not sure I--

Q To say something is unconstitutional as

applied versus unconstitutional on its face, suggests some notion of overbreadth, I take it. And I would think that would have no application, unless you get into the compelling state or base it on some sort of First Amendment principle.

MR. POLLACK: Your Honor, what I am saying is the provision can only really operate against the poorest of the poor. The reason it can only operate against the poorest of the poor is that they are the only ones who cannot fractionate their households. If you fractionate your household, then you will be eligible for food stamp assistance. In other words, if you live as a separate economic unit.

However, if you cannot do that--and almost by definition the poorest of the poor cannot do it, they need to share living arrangements; they are the ones who are going to be harmed by this provision. By its very nature, this provision harms the poorest of the poor. It does not harm the voluntary poor, because the voluntary poor voluntarily can separate themselves from those people who live under the roof with them and therefore all of them can become individual as separate units.

Q But is not one of your arguments that the legislative motive here invalidates the thing because they were out to get the hippie commune?

MR. POLLACK: I have two arguments, Mr. Justice Rehnquist. The first argument is that the purpose itself is impermissible.

Q Even though it failed?

MR. POLLACK: Excuse me?

Q Even though the purpose failed?

MR. POLLACK: That is correct. The purpose nonetheless is impermissible. But even if you said the purpose was permissible, the purpose is not reasonably related to by this provision. Because what occurs in this situation, as the California welfare director said--and, if I might, I would refer you to page 43 of the appendix. If you look at the bottom two paragraphs, it says as follows:

"The 'related household' limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically aimed at the 'hippies' and 'hippie communes'. Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.

"In California it is common practice for the very poor to 'move in' with friends during unemployment or any type of crisis. Many of the migrant labor camps cannot be eligible on the basis of 'related household'. This section will eliminate a segment of the migrant workers who by definition are to be eligible for food stamps. We have found no way to 'interpret' so these migrants in this type of camp can be eligible."

What I am saying I think is clear, Mr. Justice Rehnquist. Number one, the purpose that Congress intended with this provision was to harm hippies. I say that that purpose is impermissible. But even if you did not agree with me, I say that that purpose is not reasonably related to by this provision. This provision in actual effect obviously must harm the poorest of the poor. They have no option whatsoever. They must join with other people when they are unemployed, when they are evicted from their household, when they are AFDC recipients, or particularly if they are migrants.

Q Is it a test under the rational basis requirement whether any reasonable person could have enacted the statute that Congress did, not whether Congress's purpose is actually carried out by the statute?

MR. POLLACK: Your Honor, I cannot find a permissible purpose that is rationally related to by this

provision. There just is no such purpose. In fact, in the district court, the appellants were asked several times what did they consider was the rationally related purpose in this provision, and they never produced a purpose whatsoever. The best they could offer in the district court--and you will find this on pages 4A to 5A of the appendix to our brief. They said it is rational to the extent that the act goes so far and no farther. They said that Congress can give food stamps to whom they want.

I submit that that is not a rational purpose. If we want to fictionalize and try to figure out some other purposes that Congress really intended, even though we know in fact Congress only intended to harm the hippies, that was their only purpose with this provision, let us try to fictionalize such other purposes.

Q I still am with my Brother Rehnquist. Now you are going one step further. The only purpose was to harm the hippies?

MR. POLLACK: Correct.

Q And they did not harm the hippies.

MR. POLLACK: Correct.

Q Where does that leave you?

MR. POLLACK: It leaves you only--

Q On your purpose argument. If that is an argument.

MR. POLLACK: Your Honor---

Q Do you agree that they did not accomplish their purpose?

MR. POLLACK: That is correct.

Q Now why do you keep arguing purpose?

MR. POLLACK: Your Honor, I am trying to find some purpose to which this provision is rationally related, and quite frankly I cannot find one. I can hypothesize some. Let us take a look at what--

Q Why not hypothesize without the hippies? Would you not be making more progress?

MR. POLLACK: Yes, Your Honor. It seems to me that it is very clear that it is the persons who are not voluntary poor, it is the persons who are not hippies, they are the ones who are harmed by this provision, and they are harmed irrationally, merely because they live with someone else to whom they are unrelated.

Your Honor, we have been told that there may be some other purposes involved which can be hypothesized as to why this provision is rational. Is it the prevention or detection of fraud? It seems clear that the denial of assistance solely as a result that people are unrelated to one another is not related at all to the question of preventing fraud. People who are intent on fraud are likely to alter their living arrangements.

In other words, if you had someone like the voluntary poor, if their intent is to defraud people in the food stamp program, they will alter their living arrangements.

Q Does an act of Congress fall because all of the evils that Congress wanted to guard against cannot be reached?

MR. POLLACK: They are not reached by this provision in any rational way.

Q Does that make it fall?

MR. POLLACK: Yes, Your Honor, because it is not rationally related--

Q What happens to our criminal code? The criminal codes do not have a hundred percent or anywhere near a hundred percent effectiveness, if we can believe the studies. Do you mean there is no rational basis for Congress to enact criminal statutes?

MR. POLLACK: No, I am not saying that at all, Your Honor. I see no correlation at all with any of the purposes that were hypothesized by the Government in this case with this provision. There is just no correlation at all. There is no reasonable, no rational, relationship between this provision and any legitimate governmental purpose. If we could figure out any legitimate governmental purpose to which this is reasonably related under the traditional equal protection test, then it would not be a violation of equal protection.

Unfortunately, Your Honor, there is no such legitimate governmental purpose to which this is rationally related. The prevention of fraud--

Q You are not arguing a Fourteenth Amendment case, are you?

MR. POLLACK: No, I am not. We are arguing a Fifth Amendment case.

Your Honor, it seems clear to me that as you held in Dunn v. Blumstein, where you said false swearing with regard to the residence requirement is not a deterrent to someone who is intent on fraud, here it is someone who is intent on defrauding people in the food stamp program will alter their living arrangements. It is very simple for them to alter their living arrangements. All they have to do is live as different economic units.

Take as an example a group of 20 people living in a commune. If those people are intent on defrauding in the food stamp program, all they need to do is fractionate their households, live as 20 separate economic units, and they can get food stamps. The poorest of the poor, they cannot do this because out of brutal necessity they must live together.

Mrs. Moreno, as an example, has merely \$75 of income of which, after she pays for her rent, after she pays for all her other housing cost, she has merely \$10 left. If she spent all of that money on food, she would merely have

33 cents a day in order to live. She must live with the Sanchez family because that is the only way she is going to survive. There is no way that she can fractionate her household.

As a result, since she is unrelated to the Sanchez family, everyone in that household is denied food stamps under this provision. The same is true with the Hejnys. The Hejnys have taken in a young girl, Sharon Sharp, who had been unwanted by her parents. She had lived in a children's home for a substantial period of time. The Sharps are very poor. The Sharps only have income when Mr. Sharp, who only has occasional employment--when he has employment, which is purely seasonal.

The Sharp family cannot kick Sharon out of the household with any due conscience. And, as a result, since Sharon Sharp is unrelated to the Hejny family, no one in that household is going to receive food stamps. They cannot fractionate their household. It is they who are going to be denied food stamps, not the hippie communes, not the voluntary poor.

Q What kind of proof does an applicant household have to make to show its eligibility for receipt of food stamps?

MR. POLLACK: There is an application--

Q With affidavits?

MR. POLLACK: There is an application. There are affidavits, and then there is a rigorous verification process.

Q What is that verification process?

MR. POLLACK: In essence, if someone says I have got X income, one has to prove that income. He has to either bring an income slip or one has to in some way prove it. It is not the word of the recipient that is taken. The recipient has to show documentation. If he fulfills that documentation, then he is eligible for food stamps.

Q How is income defined, do you know. Specifically would it include an allowance from parents?

MR. POLLACK: Yes, it does.

Q Because that is not income under the federal income tax.

MR. POLLACK: Yes, that is included as income, or welfare is included as income. Social Security benefits are income. If a person has a job, any earnings from that is included as income. All of that is--

Q So, income for this purpose is more broadly defined than income as defined in the Internal Revenue Code?

MR. POLLACK: That is correct.

Q And in making the application you have to swear to the facts?

MR. POLLACK: That is correct. And if you swore

falsely, then you are subject to penal--

Q It is a criminal offense?

MR. POLLACK: Yes.

Your Honor, I would suggest to you that this program is not going to be easier to administer. This program would not be easier to detect fraud through this provision; quite the contrary. What is going to happen is that the voluntary poor, who are going to fractionate their households, are going to multiply the applications that are necessary to get them into the program.

In other words, take the hypothetical I gave before. If there is a group of voluntary poor people, 20 people, and if they want to stay in the food stamp program, all they have to do is separate their households into 20 different groups. Instead of making the program easier to administer, quite the contrary, it will make it harder to administer.

Q Do you not have to have 20 kitchens?

MR. POLLACK: No.

Q Under the regulations.

MR. POLLACK: No, Your Honor. In order to include yourself as a--in order to get yourself excluded from the group that is considered for household purposes, all you have to do is show one of three elements are missing. Element one is that you do not live as an economic unit. Or you can show that you purchased food separately. Or you can show that you

have separate cooking facilities. So, if any one of those different factors are not present, then you are not considered a grouping for household purposes.

So, in other words, if you do not live as--

Q I thought you said that 20 groups wanted to be considered as 20 separate groups. In order to do that and meet the regulation, do they not have to have 20 separate kitchens?

MR. POLLACK: The answer to that is no, they do not.

Q Could they have one kitchen?

MR. POLLACK: They could have one kitchen. If they all live as separate economic units, then they will be treated as 20 different households.

Q And they would not have a kitchen?

MR. POLLACK: If they had even one kitchen, as long as they lived as 20 separate economic units--

Q What is your separate economic unit?

MR. POLLACK: In other words, they do not purchase food in common; they do not pay their utilities in common--

Q I do not see why the poor people cannot do that.

MR. POLLACK: It seems to me, Your Honor, that if someone has no income whatsoever or if one has the meager income that someone like Mrs. Moreno has, she is not going to be able to live on her separate income. Her income alone gives

her 33 cents a day for food. That is if she purchases no clothing, that is if she purchases no household supplies, that is if she purchases no hygienic items. She must combine with another household in order to live.

Q It seems to me the local home relief is not good enough.

MR. POLLACK: Your Honor, the problem is that in many states you cannot get relief. In order to get relief, you must show one of four factors--

Q I know enough about that, but the stamp program was not to take up the lack of some stupid city that has not get sense enough to give enough home relief.

MR. POLLACK: The food stamp program was intended to provide--

Q Supplementary.

MR. POLLACK: No, it was intended to provide people with all of their nutritional needs.

Q All?

MR. POLLACK: That is correct. If you look at Sections 201--

Q Why make them pay 71 bucks if it was to give them all?

MR. POLLACK: Because what you are actually paying, you are paying your normal expenditures for food under the program, and your coupon allotment that you receive is supposed

to provide you with nutritional adequacy. You will find that in the declaration of policy. You will find that in Section 2013(a), Section 2016(a). All of those provisions say that the coupon allotment in the food stamp program is supposed to provide you with nutritional adequacy.

Q Mr. Pollack, you describe three separate things that could be done to qualify as a separate economic unit. Do they derive from the decision in Knowles, or is there a regulation in the record here that I have not seen?

MR. POLLACK: No, Your Honor, it stems first from the statute itself, 2012(e), and Knowles actually interprets that statute.

Q Interprets the statute to say that if half a dozen of us lived in the same house, all we would have to do is buy our food separately?

MR. POLLACK: That is correct.

Q Can anybody do that?

MR. POLLACK: Can anyone do that?

Q If that is the only precondition to being a separate economic unit, why would not each member of the group just go to the supermarket separately and independently of the others?

MR. POLLACK: If you take a look, as an example, at Mrs. Moreno, she just cannot get nutritional adequacy if she used just her money. She only has--even if she does not

spend a single penny on clothing, not a single penny on household supplies, not a single penny on so many different necessities, even if she does not make expenditures for those purposes--she only has 33 cents per day for food. It defies my imagination, Your Honor, as to how one can get a nutritionally adequate diet with only 33 cents a day. So, what she does is she combines with another household and that household, when they combine, it gives them a greater opportunity to obtain an adequate nutritional diet, and it is only through that means will they be able to get something like better nutrition. If she does it alone, she is just not going to survive. As a result, out of that necessity, since she did combine, she is denied food stamps.

Q My Brother Powell's question to you was, if she bought separately, even though she is now living with the other woman, under the Knowles decision she would be eligible for food stamps. So, she would be no worse off or no better off than if she were a member of a household that was getting food stamps; would that be true?

MR. POLLACK: Your Honor--

Q Grant you, the 33 cents a day is the poverty level or below it, but food stamps are not going to remedy that. The question is whether she gets or does not get food stamps. And if she can get food stamps simply by the device of going to the market herself, then she can get them, can

she not?

MR. POLLACK: If she did not pool her resources with the Sanchez family, that is correct; then she could get food stamps. However, in order to survive, she has pooled her resources. She has lived as one economic unit--

Q They could still have a single kitchen, as you told us, and they could have one roof over their heads, be in one dwelling place, but she could become eligible for food stamps simply by doing her food shopping separately, if that is what the Knowles decision says.

MR. POLLACK: The Knowles decision says--correct. If you live as separate economic units--

Q And the facts are enough of an indicium of a separate economic unit; is that correct?

MR. POLLACK: That is one of the indicia, yes.

Q And that alone is enough, is it not, under the Knowles case, any one of these three, you told us?

MR. POLLACK: That is correct.

Q So, if she can do that, she can get the food stamps, can she not? That is the way I understood Justice Powell's question.

MR. POLLACK: Yes, that is correct. If she could do it.

Q Of course, she cannot do very much with 33 cents a day, pooling or not pooling. But why is she worse

off if she gets food stamps by doing her shopping separately, and the other member of the household would do her shopping separately, and together they will have what you claim they should have as a household, will they not?

MR. POLLACK: There are other needs that people have other than food, as well. As a result, she has got health needs--

Q She will have those with or without food stamps, will she not?

MR. POLLACK: Yes, she certainly does have those needs. However, in order to satisfy those other needs, it is important for her to combine her resources--

Q I still do not understand why, if she is eligible for food stamps, by the simple expedient of going to the market by herself, and her fellow member of the household, the other woman, can also go to the market by herself, and they can aggregate those two food stamp eligibilities.

MR. POLLACK: They cannot aggregate those food stamps--

Q They can. They can have a common kitchen. You told us that.

MR. POLLACK: Yes, they can have a common kitchen, but they cannot purchase food in common.

Q If under your system they could pool it all together and get the food stamps, how much would she get in

food stamps?

MR. POLLACK: She would get \$36 in food stamps per month.

Q Do you live any better on 33 cents than you do on a dollar a day?

MR. POLLACK: Yes, you do, Your Honor. Clearly you do.

Q Try it some time.

MR. POLLACK: My time is up.

MR. CHIEF JUSTICE BURGER: Mr. Randolph, do you have anything further?

MR. RANDOLPH: I have nothing further.

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

[Whereupon, at 2:03 o'clock p.m., the case was submitted.]

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