In the

Supreme Court of the United States

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, et al.,

Petitioners,

vs

JOHN JORDAN, et al.,

Respondents.

No. 72-1410

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SUPREME COURT, U. S.

Washington, D. C.
December 12, 1973

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JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, et al., Petitioners,	:	
v.	:	No. 72-1410
JOHN JORDAN, et al., Respondents.	:	

Washington, D. C.,

Wednesday, December 12, 1973.

The above-entitled matter came on for argument at 11:47 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:

ROBERT J. O'ROURKE, ESQ., Deputy Attorney General of Illinois, 160 North La Salle Street, Chicago, Illinois 60601; for the Petitioners.

SHELDON ROODMAN, ESQ., Legal Assistance Foundation of Chicago, 64 East Jackson Boulevard, Chicago, Illinois 60604; for the Respondents.

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 next in No. 72-1410, Edelman against Jordan.

You may proceed whenever you're ready, Mr. O'Rourke.

ORAL ARGUMENT OF ROBERT J. O'ROURKE, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. O'ROURKE: Mr. Chief Justice, and may it please the Court:

John Jordan, the plaintiff-respondent in this case, filed a complaint in the United States District Court for the Northern cistrict of Illinois, individually and as representative of a class, seeking injunctive relief and damages for violations of the federal welfare regulations against former directors of the Illinois Department of Public Aid in the State of Illinois, and other county officials charged with administrating the welfare program.

Specially, the plaintiffs allege that certain sections under the Illinois Categorical Assistance Manual were invalid, being inconsistent with the thirty-day and the sixty-day determination requirements as defined by the regulations of the United States Department of Health, Education, and Welfare.

The defendants in this matter denied the allegations, the material allegations of the complaint.

The welfare program involved is the Aid to the Aged, Blind and Disabled and is one of the categorical assistance programs that is administered by the Illinois Department of Public Aid, under the Illinois Public Aid Code.

The program is funded fifty percent by the State, and the other fifty percent is provided by the Federal Government under the Social Security Act.

The Illinois Department of Public Aid issued regulations pursuant to statute, setting up eligibility and payment requirements, and the Department of Health, Education, and Welfare, which administers the welfare program for the Federal Government, promulgated regulations pursuant to to the Social Security Act, setting up time limitations for the determination of eligibility and the payments of benefits.

The plaintiffs in this action contended that the Illinois Department of Public Aid was required to process all applications for welfare assistance for the aged and the blind within thirty days, and for the disabled within sixty days of the initial application.

Having failed to process such applications within the specified time, so plaintiffs contended, the plaintiff class was entitled to monetary award, commencing on July 1st, 1968, which is the date that the Federal regulations

went into effect, to be computed by the amount of money the members of the class would have received had the applications been processed within the thirty- and the sixty-day requirement.

Now, the defendants never claimed that all such applications were processed within the thirty and the sixty days. Indeed, the defendants pointed out that some applications take longer to process than others, because of various factors which must be determined in order to establish eligibility for the particular applicants.

The District Court granted summary judgment for the plaintiffs, and entered a judgment that provided, among other things, that the Illinois Department of Public Aid be permanently enjoined from failing to make a determination of eligibility and payment within the thirty days of initial application for aid to the aged and blind, and within sixty days of the initial application for the disabled under the Illinois Aid to the Aged, Blind and Disabled program.

The District Court also found for the plaintiffs on the monetary award question. It required the defendants to make all payments not made to the applicants who had applied to the Illinois Department of Public Aid for benefits between July 1st, 1968, the day the Federal regulations went into effect, and April 16th, 1972, the date that the District Court entered a preliminary injunction

mandating the Illinois Department of Public Aid to make the payments within the thirty days.

For the aged and the blind applicants who did not receive their initial benefit check within thirty days from the date of application, the order provided for the payment of a sum of money equal to the assistance they would have received for the period beginning on the thirtieth day from the date of application up to the date their entitlement became effective.

For the disabled there were two different dates, because of the fact of the change of the regulations during the course of this cause of action. But, in effect, the order provided for the payment of money equal to the assistance they would have received for the period beginning either with the forty-fifth day or the sixtieth day, depending upon the date of the entitlement or the date of the application, to the date that they actually received their first benefit.

Appeal followed in the Court of Appeals, and this appeal was based substantially on the same grounds that are raised in the instant petition for a writ of certiorari to this Court.

In particular, it was pointed out that an action for a monetary aware filed against State officials in their official capacity, the award to be discharged out of the

General Revenue Fund of the State of Illinois, could not be maintained in the Federal District Court in view of the provisions of the Eleventh Amendment to the United States Constitution.

The Seventh Circuit Court of Appeals rejected this contention, and found that a retroactive money award given to welfare recipients did not contravene the prohibitions of the Eleventh Amendment to the United States Constitution.

It is respectfully submitted that a suit seeking payment of a money award from the General Revenue Fund of the State by a class of welfare recipients sounding in equity, whether it be characterized as restitution or damages, is within the clear meaning of the Eleventh Amendment, and hence the judgment of the United States District Court for the Northern District of Illinois, and the opinion and mandate of the Seventh Circuit, as they apply to the monetary award, should be reversed by this Court.

QUESTION: Mr. O'Rourke, --

MR. O'ROURKE: Yes, sir.

QUESTION: -- of course in recent years there have been a lot of cases in the desegregation area, where school districts have been compelled to take steps to desegregate, which necessitate the expenditure of funds. I'm thinking of busing, and other things.

MR. O'ROURKE: Yes, sir.

QUESTION: Do you think those are within the Eleventh Amendment area?

MR. O'ROURKE: No, sir, I do not, and this Court has so held, I believe. Because of the fact that there is a prospective application of the law, the prospective application of the monetary award; but particularly those claims were brought under the due process and equal protection clauses of the Constitution.

We have a situation here that is a clear violation of the Constitution, those provisions.

Here we have a violation, if any, of the regulations of the Social Security Administration, which are statutory regulations, which would require the payment of retroactive benefits.

QUESTION: Then there is another area developing of late, and that's where attorney's fees are allowed in civil rights cases.

MR. O'ROURKE: Yes, sir.

QUESTION: Do you feel this is also distinguishable from this case?

MR. O'ROURKE: I really don't feel it is distinguishable, I believe that the Court has never addressed itself to the Eleventh Amendment prohibition for the awarding of these fees. I believe there was one case, and I can't think of the name of it right now, but it was

awarded as a deterrent to the defendants in that case, because of the fact that they had complicitly, did not obey the court's order. But there had been a contempt citation.

QUESTION: Mr. O'Rourke, are you suggesting that this Court has complicitly said the Eleventh Amendment was repealed or limited in some way by the Fourteenth?

MR. O'ROURKE: No, I'm not. There is an argument to that effect, of course, and the respondents, I believe, will make that argument. But I believe that the Eleventh Amendment, of course, as it applies to the States but not as it applies to individuals, would not be circumvented.

QUESTION: That's in the NAACP brief, particularly, is it not?

MR. O'ROURKE: Yes, sir, it is.

The whole NAACP brief, amicus in this case, goes into the reconstruction statutes. It indicates that there has been a superseding of the Eleventh Amendment by the Thirteenth, Fourteenth and Fifteenth Amendments.

QUESTION: Well, hasn't this Court affirmed some retroactive welfare payments?

MR. O'ROURKE: Yes, sir, they have summarily affirmed.

QUESTION: But I suppose you suggest that the issue was never raised or flushed with respect to the Eleventh Amendment? I thought they were.

MR. O'ROURKE: These were raised in briefs, but the Court had never addressed itself to the question.

QUESTION: Well, we just summarily rejected the Eleventh Amendment arguments --

MR. O'ROURKE: Yes, sir.

QUESTION: -- at least two or three times.

MR. O'ROURKE: Yes, sir, that's correct.

QUESTION: So your argument, I don't recall your brief, is that really they're not precedents at all?

MR. O'ROURKE: I'm sorry, Your Honor, I didn't hear you.

QUESTION: I think your argument, I don't recall your brief, is that summary affirmance is no precent for anything.

MR. O'ROURKE: Well, --

QUESTION: It's like a denial of certiorari.

MR. O'ROURKE: It's a denial of certiorari, yes, sir. And there's arguments on both sides of that question, of course. Rothstein vs. Wyman, which is a Second Circuit Court opinion. Many of the jurisdictions hold the fact that this Court did not entertain certiorari in that case sets a precedent that the Eleventh Amendment argument is a valid argument.

The other side we've argued in our case, due to the fact that the Seventh Circuit has rejected the Eleventh

Amendment argument.

Rothstein vs. Wyman is a, bring it up, is a Second Circuit case, which dealt with the same subject matter that was involved here. Yet, contrary to the decision of the Seventh Circuit Court in this case, the Second Circuit, in Rothstein, held that the Eleventh Amendment barred an action in the United States District Court for the release of benefits supposedly wrongfully withheld.

There the Second Circuit went into a long examination of this Court's opinion in Rosado vs. Wyman, and the fact that pursuant to Rosado vs. Wyman the only remedy afforded by the Social Security Act was the withholding of Federal funds from the State, in that it was not a personal thing to the welfare recipients. And the Second Circuit held, on that basis, that there was an improper exercise of equity jurisdiction by the lower court in awarding retroactive benefits.

The State, however, in the appeal, raised the Eleventh Amendment, which provides that a federal judicial power did not extend to suits against the State, and the Court, in Rothstein vs. Wyman, held that the point was well taken, that in so far as retroactive payments are concerned, it is in truth a suit against the State of New York, which the State of New York had never consented to.

The Court, in the Rothstein case, then stated, and

I quote: "It is one thing to tell the Commissioner of Social Services that he must comply with Federal standards for the future, if the State is to have the benefit of Federal funds in the programs he administers, it's quite another thing to order the Commissioner to use funds to make reparation for the past.

"The latter, it would appear to us, would fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived as having any present force." That is the end of my quotation.

The respondents argue in their brief that the petitioners in this cause of action failed to raise the Eleventh Amendment argument on the defense in the trial court, and only alleged it for the first time in the Seventh Circuit.

Now, the Seventh Circuit did not find this argument sufficiently sound so as to preclude its own analysis of the applicability of the Eleventh Amendment argument.

It is admitted by your petitioners that it did not raise the Eleventh Amendment defense in the trial court, but contends that there was no language in respondents' complaint from which the Eleventh Amendment defense could be anticipated as the thrust of the plaintiffs' complaint was for declaratory and injunctive relief.

Now, it would have been futile for Illinois to have raised the Eleventh Amendment argument with respect to the application of the law.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. O'Rourke, you may resume.

ORAL ARGUMENT OF ROBERT J. O'ROURKE, ESQ.,

ON BEHALF OF THE PETITIONERS [Resumed]

MR. O'ROURKE: Mr. Chief Justice, and may it please the Court:

At the recess I was just indicating to the Court that the thrust of the plaintiffs' complaint in this cause of action was for declaratory and injunctive relief. We maintain that it would have been futile for the State of Illinois to have raised the Eleventh Amendment argument with respect to prospective applications of the law.

The application of the fiction of Ex Parte Young was and is quite clear. Clearly, the Eleventh Amendment does not prohibit Federal Courts from ordering State officials to bring their conduct into conformity with the federal law.

Therefore, no question was entertained about this District Court's jurisdiction to enter a declaratory judgment or a mandatory injunction compelling future conformity with the administration of the Illinois Public Welfare Program with the Federal Statutes and the Federal Regulations.

Furthermore, the Illinois Assistant Attorney General who appeared on behalf of the Illinois Department of Public Aid in the trial court as a matter of law could not waive the Eleventh Amendment argument. This follows through with the Sovereign Immunity doctrine, and in our State the law is quite clear, both case law and through the Constitution, that the only one that can waive these arguments are the State Legislature itself.

In Ford Motor Company vs. the Treasury Department of the State of Indiana, Justice Reed, in delivering the opinion of the Court, stated:

"The objection to Petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on the Federal judicial power of such compelling force that this Court will consider the issue arising under this amendment in this case even though urged for the first time in this Court." End of quote.

What is in controversy in this case are the limitations of the application of the Ex Parte Young fiction.

It is submitted that if a suit seeks to declare a liability which must be met from the General Revenue Fund of the State, which is mandated by its own constitution, of matching its cost with its anticipated revenue, then

Federal courts are without jurisdiction to entertain a suit without the express consent of the State.

This Court recently stated, in Employees vs. Missouri Public Health Department, that it was not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown in vast proportions in its application, desired silently to deprive the State of an immunity which they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of an immunity from suit in a federal form. I end the quotation.

Similarly there is no language in the Social Security Administration Act that either expressly or impliedly shows the intend on the part of Congress to deprive the States of their immunity under the Eleventh Amendment.

There is also nothing in the compact between the Illinois Department of Public Aid and the United States Department of Health, Education, and Welfare that expressly conditions Illinois' participation in the federally assisted programs on its waiver of immunity under the Eleventh Amendment.

Consistent with the Eleventh Amendment, Congress enacted an apparently exclusive remedy in the form of the

cutoff of future funds when a State failed to conform with federal law. And this is found in 42 United States Code 604.

There was nothing in this statutory enactment that provides for an express or an implied right to payment of retroactive assistance. The remedy provided is the cutoff of future funds, no mention being made of a right to welfare assistance to retroactive payments.

The United States Department of Health, Education, and Welfare recently sought legislation in the Second Session of the 91st Congress that would have granted the right of retroactive assistance to welfare recipients. This legislation was never enacted, which makes it clear that Congress never intended to give, and now has rejected legislative giving, welfare recipients a right to retroactive assistance.

As was pointed out in this Court in Employees vs. Missouri Public Health Department,"it is not easy to infer that Congress in legislating . . . desired silently to deprive the States of an immunity they have long enjoyed."

In Rothstein vs. Wyman, again the Second Circuit Court case, the Second Circuit advanced three basic reasons why retroactive assistance should not be granted.

The first relates to the fundamental principle of welfare legislation, that of satisfying present ascertained needs of impoverished people.

Recognizing that federal standards are designed to insure that those needs are equitably met, the Court properly observed that the passage of time makes such payments compensatory rather than remedial since the coincidence between the ascertained and existing need becomes less clear.

The second reasons or interest noted by the Rothstein Court was that of assuring a proper use of federal funds. The Second Circuit Court found that the interest was not a personal interest to the welfare recipient since Congress provided that the cutoff of federal funds was the appropriate remedy.

The third and most compelling reason for implying a right to retroactive assistance was found to be a wilful deterrence of State violations of federal laws. None was found in the Rothstein context, and we submit that none may be found in the Illinois context.

QUESTION: You mentioned earlier, Mr. O'Rourke, that sometimes, and in certain cases, it takes more time than perhaps thirty days to make the necessary factual determination.

MR. O'ROURKE: Yes, Your Honor.

QUESTION: I don't recall whether in your briefs you focussed especially on newly arrived residents who would make claims for relief or other aid under the Shapiro

holding.

MR. O'ROURKE: No, sir, we did not.

QUESTION: But I should think it might be a special problem on people who move from Southern California to New York, or, more likely, from New York to Southern California, to find out the status of their financial condition and whatnot.

MR. O'ROURKE: There are such problems as the Chief Justice points out. There are other problems, of course, too, particularly with the disabled and the blind assistance. There there is a matter of determining the extent of the disability and whether or not the person is disabled.

QUESTION: Well, then what was the purpose of Congress, as you see it, to fix these rather short time limits? Is that just hautitory, advisory?

MR. O'ROURKE: No. If the Court please, the Congress did not set the times, Congress merely indicated that the determination of the eligibility and the payment must be reasonably prompt, or determined with reasonable promptness. The Department of Health, Education, and Welfare, in formulating the regulations, then made the determination --

QUESTION: I meant to refer to their regulations.

MR. O'ROURKE: Yes, sir.

Subsequently, if the Court please, the determination of time for disabled persons has been extended. Originally it was forty-five days, then it's been extended to sixty days. On October 17th, this year, the Department of Health, Education, and Welfare promulgated new regulations that give now forty-five days for the aged and the blind, but make the payment to go back to the thirtieth day after the initial application.

There are problems, and they have been recognized. We do submit in the Appendix various graphs that -- not graphs, but charts that show the length of time that Illinois has had to process some of these applications.

QUESTION: Well, do you think this retroactive provision of the regulation on aid to the blind is in conflict with the Eleventh Amendment?

MR. O'ROURKE: No, sir, not when we have an effective application of it, and we are complying, Illinois is complying with that at the present time.

QUESTION: But when the determination is made, let's assume that the determination is not made for ninety days, as conceivably might happen, it's effective back to the thirty-first day, is it not?

MR. O'ROURKE: Back to the thirtieth day, yes, sir. Under the present regulation.

There we're able to provide, the State is able,

and according to the injunction that was entered in this matter originally on April 16th, we have been complying with going back; we're able to budget our appropriations with that in mind.

What we are talking about is the money award for the benefits that were withheld in the past.

QUESTION: But you are taking the position that the specified-day provision is not consistent with the statute?

MR. O'ROURKE: Yes, sir, we are. We maintain that that's unreasonable regulation, that we are having difficulty in living with it, in making the determination of the eligibility.

The respondents in their brief urge that, or impliedly urge that Illinois impliedly consented to waive the Eleventh Amendment immunity as a result of participation in the federally funded assistance program.

According to the Seventh Circuit, the theory advanced in Parden vs. Terminal Railway should necessitate a finding that Illinois had indeed waived its immunity.

The Seventh Circuit, in citing Parden, found that Illinois surely left the sphere that was exclusively its own when it began its participation in the Federal-State Welfare Program and thereby waived its immunity. However, the decision of the Seventh Circuit, in holding this way, runs counter to this Court's holding in Employees vs.

Missouri Department of Health and Welfare.

The respondents have contended in their brief that the Eleventh Amendment issue is not properly joined in this cause because the Constitution of the State of Illinois has abolished the doctrine of Sovereign Immunity.

An examination of the history of the doctrine of Sovereign Immunity in our State establishes its continued existence and its viability.

In 1970 the people of the State of Illinois ratified a new constitution. At the time that this suit was filed, Illinois was functioning under the Constitution of 1870.

Article IV, Section 26 of the Illinois Constitution of 1870 provided that "The State of Illinois shall not be made a defendant in any court of law or equity."

Now, recognizing that persons might have legitimate claims against the State of Illinois which ought to be paid, the Illinois General Assembly passed a Court of Claims Act, pursuant to the grant of authority contained in the 1870 Constitution.

In effect, that Act was to provide that persons with certain types of claims against the State of Illinois, which would otherwise be barred by Article IV, Section 26 of the Constitution, could be brought in the Court of Claims.

Decisions made by the Court of Claims are mere

recommendations to the State Legislature, which must take affirmative action to appropriate funds to pay the claims found by the Court of Claims to be just.

It is true that Article 13, Section IV, of the Illinois Constitution of 1970, which became effective January 1st, 1972, altered the old rule of Sovereign Immunity by providing: "Except as the General Assembly may provide by law, Sovereign Immunity in this State is abolished."

The General Assembly then enacted to restore Sovereign Immunity by enacting Section 801, Chapter 127 of the Illinois Revised Statutes. That Act became effective on January 1st, 1972, the same date that the 1970 Constitution took effect by the transition schedule.

That particular Act provides:

"Except as provided in 'An Act to Create the Court of Claims,' filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court."

In other words, Section 801 restored Sovereign Immunity in Illinois, but reaffirmed the rights of persons to bring claims against the State of Illinois in its Court of Claims.

If the Court please, I'd like to reserve my remaining time.

QUESTION: May I ask one question?

MR. O'ROURKE: Yes, sir.

QUESTION: Can you logically say that this case is controlled by the decision here in Missouri-Employees? Isn't there a distinct factual difference in that there the State was in the hospital business --

MR. O'ROURKE: Yes, that's correct.

QUESTION: -- long before the FELA requirements went in; whereas here that is not so. And I suppose there's another factual difference and that was that the Secretary there could bring suit.

MR. O'ROURKE: Yes, that's correct.

QUESTION: And perhaps here there is no alternative provision.

I just wonder if Missouri-Employees is so conclusive as you intimate it is.

MR. O'ROURKE: We maintain it is, Mr. Justice Blackmun, if the Court please. There the similarities are very, very alike. There there was the interpretation of a statute, here there's an interpretation of a statute. We also have the situation that the STate of Illinois has been in the public aid business for many, many years before the regulation as to the thirty and sixty days took effect. And we had the right to believe that we were operating properly and correctly, such as the State had

the right to believe that they were operating the hospitals pursuant to their prior authority.

I believe that there's a number of similarities.

QUESTION: Absent the Eleventh Amendment argument, you still contend that back pay, so to speak, is not an appropriate remedy?

MR. O'ROURKE: Yes, sir, we do. That there the Federal Courts --

QUESTION: But about all you say in that regard is that it isn't expressly provided for.

MR. O'ROURKE: That's correct, neither expressly nor impliedly.

QUESTION: But do you think the Court is therefore wrong to order back payments?

MR. O'ROURKE: I think so, if the Court please. This Court so held in Rosado vs. Wyman, that the sole remedy for the -- against the State for failure to comply would be the cutoff of federal funds.

We believe that any action would actually sound in the Federal Government, rather than an action for retroactive benefits.

QUESTION: Well, a sole remedy except an injunction, as far as the future is concerned.

MR. O'ROURKE: We agree with the injunction, yes, sir.

QUESTION: Well, then, it isn't the sole remedy, is it?

MR. O'ROURKE: No. That's correct. Nor was it in Rosado vs. Wyman.

QUESTION: Right.

QUESTION: Then, arguably, Rosado didn't mean to foreclose back payments.

MR. O'ROURKE: We maintain that, sir.

QUESTION: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Roodman.

ORAL ARGUMENT OF SHELDON ROODMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

In this argument I would first review the Eleventh Amendment defense of the Illinois Department of Public Aid Director, and then secondly review the reasons why upholding the relief granted by the court below is necessary to effectuate compliance with the requirements of the Social Security Act.

I would also ask the Court to bear with the cough that I have at this time throughout the argument. I apologize for it.

QUESTION: I think we all have it!

MR. ROODMAN: The first defense, and the principal

defense of the Director of the Illinois Department of Public Aid is that the Eleventh Amendment bars the equitable restitution relief in this case.

This defense is raised in a setting, in a factual context, in which it has not previously been presented to this Court. This suit against the Director of the Illinois Department of Public Aid, they concede, is properly in Federal Court.

They concede that the suit against the Director of the Illinois Department of Public Aid and the relief which orders him to process it, every future application in the entire State of Illinois, within thirty days or sixty days, respectively, is not barred by the Eleventh Amendment.

They further concede that the portion of the provisions of the judgment which require that assistance shall be effective as of the last day of the respective time periods for all future applicants, even those that extend beyond the prescribed time period, even in those cases that relief is not barred by the Eleventh Amendment.

However, with respect to the incidental equitable relief of restitution, they claim that the Eleventh Amendment bars the Federal Court from granting such relief.

The Director claimed that such relief is barred by State Immunity from suits. Consequently, he must be claiming that in denying members of the plaintiff class their

equitable entitlement, and their statutory entitlement, and he concedes that John Jordan and all other members of the plaintiff class were entitled to these benefits in the first instance; that is conceded in this case.

But it is argued that the incidental relief of granting those benefits is barred by the State's Immunity from suit. However, this Court, in Ex Parte Young, reasoned that when a State officer acts in violation of paramount federal law, that he acts without the authority of the State. The language of Ex Parte Young is that he acts without the authority of the State, that his actions are simply an illegal act, that the State has no power to impart to its officers immunity from responsibility to the supreme authority of the United States.

It is that doctrine that encompasses the entire relief in this case.

Once this case is in Federal Court, the Eleventh Amendment,which applies to suits and not to types of relief, no longer is applicable.

The question then becomes: whether the relief is appropriate; but not whether such relief is barred by the Eleventh Amendment.

In interpreting Ex Parte Young, there is no basis that was offered by the petitioners in order to bifurcate that doctrine. The doctrine applies to injunctive relief,

it applies to all relief that is necessary and appropriate.

The suggestion that there is a distinction between constitutional -- that constitutional cases are different ignores the reality that in this case we have a violation of the supremacy clause. We have a situation where the Illinois Director has violated the federal requirements and, in turn, the supremacy clause.

QUESTION: Is it your plan to bring a 1983 action for damages against the petitioner here?

MR. ROODMAN: Your Honor, if that relief -- if the Federal Court believed that such relief was necessary and appropriate and incidental to the other relief in this case, yes, I think that, No. 1, certainly the Eleventh Amendment would not bar that relief. We are already in Federal Court. The Court has already ruled on the merits of the case, and it has heard the case. And as an incident to that, the Court, if it deemed it necessary and appropriate to effectuate compliance with the Act, it could grant that relief.

QUESTION: I'm thinking not so much of the Eleventh Amendment as the general notion that an agent of the State, though he may be enjoined from violating the Constitution, is ordinarly not thought to be personally liable on damages for his action. Probably on the analogy to a private employee of a private employer.

MR. ROODMAN: If the Court is suggesting under 1983 causes of actions against public officials, this Court has held, is permissible and the officials are personally liable, in those situations.

QUESTION: In damages?

MR. ROODMAN: Personally liable in damages.

QUESTION: Aren't those tort cases, though?

MR. ROODMAN: That's correct, Your Honor.

In this case there are two theories in terms of the cause of action that would apply here. One is that of equitable relief, is that there is a right to the statutory entitlement and that the Court, in exercising its equitable powers, is merely exercising the traditional powers of the Court to grant appropriate and complete relief to the parties before the Court.

Now, under 1983, it would be possible for the -- it is our position that the Court, exercising its equitable power, may order State officials to make restitution.

Now, the more difficult case, if you're suggesting -- and that restitution is no different than the relief that orders State officials, in connection with civil rights cases, the school cases, or the reapportioning of legislatures.

Does that answer the question now, Your Honor?

QUESTION: I think so, yes.

MR. ROODMAN: The Eleventh Amendment position of the defense, then, has, for two reasons, is not a bar to the relief granted in this case.

First, the language of the amendment itself. The language of the amendment uses the specific word "suit". But they concede that this suit -- it says the judicial power of the United States shall not be construed to extend to any suit.

But they concede that this suit against the Director is properly in Federal Court under the doctrine of Ex Parte Young.

Thus, this Court would have to distort the language of the amendment itself in order to reach the conclusion as offered by the petitioners.

And secondly, the doctrine of Ex Parte Young, as we have indicated, the rationale is that when a State officer violates paramount Federal law, he is stripped of his official or representative capacity. He is acting without the authority of the State, and the State has no power to impart to him any immunity from responsibility.

In this case in particular we have a situation where, and I would refer the Court to the facts, they are set out in the Appendix, pages 85 through 89 --

QUESTION: Specifically, what federal law do you say the State of Illinois, the officers were violating?

MR. ROODMAN: They were violating, Your Honor, both the statutory provision which requires applications to be processed with reasonable promptness and the federal regulations pursuant thereto. The federal regulations which require the processing of applications within maximum time periods.

QUESTION: Mr. Roodman, suppose the authorities had voluntarily come into compliance with the federal statute and regulations before this action were brought, and then these plaintiffs wanted to get retroactive payments. What kind of action would they bring?

MR. ROODMAN: If the suit -- at that point, Your Honor, they would bring a suit in equity and a 1983 action in the Federal Court for restitution of benefits wrongfully denied.

QUESTION: So that would be an independent equitable action for restitution?

MR. ROODMAN: That's correct, Your Honor.

QUESTION: And the case would be no different than this, as far as the Eleventh Amendment is concerned?

MR. ROODMAN: That's correct, Your Honor.

QUESTION: Only because -- why?

MR. ROODMAN: Because, for the plaintiffs who were wrongfully denied their benefits in the past, as a result of illegal acts of that State Director, he would at that time

be stripped of his authority and, as this Court has held, he is not permitted to claim the immunity of the State when acting in violation of federal law.

QUESTION: Does the concept of an equitable cause of action for restitution require that there be someone in a corollary sense unjustly enriched?

MR. ROODMAN: Your Honor, the doctrine of equitable restitution involves situations in which one person should make an accounting to the other for either of two reasons: one, because one person would be unjustly enriched; or, conversely, one person would unjustly suffer loss.

This case has both of those elements. In particular, we --

QUESTION: Who is unjustly enriched here?

MR. ROODMAN: Your Honor, in this case, in connection with the unjustly enriched aspect, the Illinois Department of Public Aid saved the expenditure of State funds that they were required to make, under the law, as a result of a violation of law.

QUESTION: Then you think that's unjust enrichment?

MR. ROODMAN: Well, I would certainly rest the stronger part of my case upon the argument that John Jordan, and others like him, should not unjustly suffer loss.

The restatement of restitution provides, or states,

as one of the guiding principles, that a person should not profit by his wrong at the expense of another.

I would like to explain the facts, Your Honor, with respect to your previous question.

It is not just the fact that some cases took longer than thirty and sixty days. First, there are specific exceptions to those rules that are not at issue in this case, and under certain circumstances it is permissible under the federal rules to take longer than the prescribed period.

The class of plaintiffs that we're talking about in this case are only those persons who are eligible and did not fall within that special category. Only those persons who are eligible and the delays were not as a result of their fault or any special circumstances with respect to determining their eligibility.

QUESTION: An independent action for restitution, jurisdictionally, would rest on what section?

MR. ROODMAN: Your Honor, jurisdiction would rest (a) on 1331 --

QUESTION: If there's ten thousand.

MR. ROODMAN: If there's ten thousand.

QUESTION: And there is only one named plaintiff here?

MR. ROODMAN: There is one named plaintiff.

QUESTION: And you think there's more than ten thousand in it?

MR. ROODMAN: The circumstances of the named plaintiff were that he did not have sufficient funds for the basic necessities of life. In the affidavit attached to the complaint on the TRO, the 63-year-old, mentally disabled man was ill, he was ill, No. 1, and malnourished.

Secondly, he was in a position where he did not have vision in one eye and needed glasses.

If his application had been processed, he would have had, as an incident to the rights of AABD recipients, a medical card which would entitle him to free medical -- comprehensive medical care.

We would maintain, (a) that that ten thousand dollars was at stake for this individual; secondly, we would have jurisdiction under 1343(3).

QUESTION: Although you alleged here only a claim based on the federal statute, no constitutional claim?

MR. ROODMAN: There was a second count, Your Honor, that's not before this Court. There was a sound count that does involve constitutional claim, that the Seventh Circuit ruled upon, that has not been appealed to this Court.

QUESTION: Then you did assert a constitutional claim?

MR. ROODMAN: That's correct, Your Honor.

QUESTION: What was that, an equal protection claim?

MR. ROODMAN: That's correct, Your Honor.

QUESTION: How did the Seventh Circuit dispose of that?

MR. ROODMAN: Of the --

QUESTION: Did that go to, did the constitutional claim go to the Seventh Circuit?

MR. ROODMAN: Yes, it did, Your Honor. The Seventh Circuit ruled against the plaintiffs on the equal protection claim, on a separate issue.

I would like to point out to the Court that the fact that -- that the delay is not the essence of this case, the fact that applications were delayed in processing is not the essence of this case. The essence of the deprivation in this case is the Illinois Regulation, Section 8255, which provided that assistance could not be provided for any month prior to the month in which the application was approved.

For example, with respect to John Jordan, who applied in September 1970, his application was not acted upon, as of the date of the filing of this lawsuit. The suit was filed in January of '71, four months later. The lower court ordered his application to be processed. He was determined eligible and was given assistance effective

January 1 of '71. That's the month in which his application was approved.

As a result of the Illinois regulation which barred assistance for any month prior to the month in which the application was approved.

But for this regulation, even though his application was illegally delayed, he would have received assistance effective November 1, 1970. So it is the two months, November and December 1970, that he was -- his statutory entitlement, that's conceded in this case. And this Illinois regulation barred him from receiving those benefits.

So that in all cases, for all members of the plaintiff class, they were entitled to these benefits and it's this regulation which barred them from receiving it.

Now, with respect to this regulation, the established facts are in this case, and I would refer the Court to the Appendix, at pages 85 through 89. The established facts are -- I'm reading from paragraph 5 on page 87 of the Appendix:

"From July 1, '68 to the present, Harold O. Swank, wilfully and in gross disregard of the rights of eligible AABD applications, knew that substantial numbers of eligible AABD applications were being deprived, contrary to the requirements of federal law, of their full AABD entitlements

effective thirty days from the date of their application, or, with respect to disability applicants, forty-five days from the date of their application, by reason of the operation, implementation and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual."

The facts are, then, that the Director knew, from July 1, '68 throughout the relevant period, that the regulation for the Department of Public Aid was contrary to federal law, and deprived members of the plaintiff class of their statutory entitlements.

QUESTION: You have to get over the hurdle, of course, that the regulations are consistent with the statute, don't you?

MR. ROODMAN: Your Honor, that argument was not raised before the trial court at all. It is not properly preserved for appeal. That's the ruling of the Seventh Circuit. It was not presented at all to the lower court.

Even if we were to consider it on the merits, Your Honor, the other, all of the other courts that have considered the question of whether the thirty-day and sixty-day maximum time standards, have held them to be reasonable. This Court, and I would emphasize, in the case of Rodriguez vs. Swank, which is the related case that involved AFDC recipients in Illinois, raised that question and the question was summarily affirmed in this Court.

Certainly, Your Honor, even on the merits, though, the question of providing assistance to people who are needy and, by definition, do not have sufficient funds for the necessities of life within thirty days, we maintain is not an unreasonable judgment.

QUESTION: Well, you have all the sentiment with you, but I take it from your argument you're saying that HEW could do almost anything it wanted to, and if it wasn't within a month, we have not gone along with an HEW regulation.

MR. ROODMAN: Our argument, Your Honor, is not that they could do anything; our argument is that the judgment was not arbitrary and capricious, and that is the standard that the petitioners must establish in this case. We maintain that that is a reasonable exercise of the judgment of the HEW officials. It is a standard that prevails since 1951, Your Honor; for seventeen years that standard of thirty days has prevailed.

Secondly, the standard, in and of itself, --

QUESTION: But it's been just changed to forty-five, hasn't it?

MR. ROODMAN: It has been, Your Honor; just changed.

QUESTION: So it hasn't prevailed consistently, then, up to --

MR. ROODMAN: Well, it has prevailed up until this time, Your Honor.

I would maintain also, Your Honor, I would suggest to the Court, that the regulation itself has a specific exception provision for unusual circumstances. So that the regulation does have an escape hatch in certain situations.

But that is not before us. In this case we're talking about people who, by definition, were eligible for those benefits, and who, through no fault of their own, whose applications were delayed in processing; and even if, and really the heart of the deprivation is that this regulation of the Illinois Department of Public Aid, 8255, which barred assistance for any period prior to the month in which the application was approved, it is that regulation that, had that not existed John Jordan would have received his full entitlement as of the time when his application was finally approved, in January '71.

So that one right of his would have been violated, it would have taken too long; but he would have received everything he would have been entitled to.

QUESTION: Mr. Roodman, --

QUESTION: Aren't there some forms of need which could be demonstrably imperative in five days or ten days, but you don't challenge the right to have, now, forty-five

days to examine?

MR. ROODMAN: Your Honor, we do not -- we accept the notion, we accept the principle that eligibility for public assistance requires time; we accept the principle that thirty days is a reasonable judgment for what that time should be.

There are circumstances in which people have need at the moment that they apply. There are special provisions for emergency assistance in those cases. But we should defer, in this case, to the judgment of HEW over seventeen years. And again I will point out that the issue is not even before the Court properly, it was not raised in the court below, in the District Court.

QUESTION: Mr. Roodman, am I correct in understanding, from what you've been saying about the Illinois regulation, that it is your position that the element relied upon, one of the three elements relied upon by the Second Circuit in Rothstein, namely, that the federal law was wilfully disregarded, is met in this case? In other words, you've taken the position that Illinois wilfully, by virtue of the regulation, disregarded the federal regulation.

MR. ROODMAN: Your Honor, yes is the answer to that. I think the established facts, as set out in pages 85 through 88 of the Appendix, establish that the Director of the Illinois Department of Public Aid knew that the

regulation was contrary to federal law.

Even if, Your Honor, it's not considered wilful, it's clear that he understood that his regulation was in violation of federal law. If he had, and from July 1, '68 and forward, if there was any question in his mind as to the legality of those regulations, the Director could have filed a suit for declratory judgment. Instead, he continued to receive federal funds for all of the period, knowing that his actions were in violation of federal law.

But, Your Honor, I would point out that what we are interested in, and the remedy of restitution affords, is that it is a remedy designed to deter all violations of law. We are not concerned only with wilful violations, but we are concerned with deterring all violations of law.

The remedy of restitution, in this case, and it is within the panoply of equitable remedies that a federal court, sitting as a court of equity, has in order to grant appropriate relief to the parties.

This Court has held, in Porter and Mitchell, that are described in detail in our brief, that unless a statute otherwise restricts the powers of equity, that court retains all of its traditional equitable powers.

In Porter, the question was whether restitution of excess rents charged in violation of the Emergency Price Control Act were -- a federal court had authority to grant

restitution. The Court said yes.

In Mitchell, the question was whether an employee who was discharged in violation of the Fair Labor Standards Act, whether the court had the equitable power to grant restitution of back wages in that case.

In each case the Court reaffirmed the principle that a court of equity may grant restitution, unless the statute otherwise restricts.

In this case, Your Honor, remedy of restitution is necessary in order to bring about compliance with the Social Security Act.

I think it's worth pausing for a moment to reflect on the situation that occurs without a remedy of restitution. Without a remedy of restitution, the director of any public aid office learns the value of the lesson that any federal provision under the Social Security Act that is mandatory may be ignored with impugnity, that savings in welfare budgets may be brought about by violating the law, because there is no effective sanction. Any requirement that is considered onerous or unfair may be disregarded, because there is no sanction.

QUESTION: Well, you refer to that as a savings. What is that going to be, general tax, along with the general tax revenues, then?

MR. ROODMAN: Your Honor, for example, with

respect to John Jordan, he was entitled to benefits for November and December 1970. The position there taken -- and he was deprived those benefits. And according to the law of Illinois, each additional month that they would have delayed, they would have saved the State's share of payments to John Jordan.

So, had we not brought this suit, and his application has remained unacted upon for January, for February, for March, the State would have saved welfare payments for each of those months.

It is our position that that -- there must be incentives not to save money by violating the law. There are, the Social Security Act provides legitimate means for the States to control the expenditures in public assistance programs. This Court has so held, that if the State sets its own standard of need and they pay less than the full percentage of need, that is the reasonable, that is the legitimate way of States controlling public assistance expenditures.

On the other hand, the State Directors of public aid need some incentives to pay careful attention to federal requirements, whenever they are enforcing, whenever they are adopting their regulations and taking positions in the Social Security Act.

I would point out to the Court that the present

remedies of an injunction, prospectively only, is not a deterrent, and certainly the remedy of a total cutoff of federal funds is not a deterrent. It is only the remedy of restitution that provides a deterrent and, conversely, provides an incentive to comply with federal law.

We would, at the very least, in this cooperative scheme of federalism, the States agree to comply with the law; that is the central condition upon which the federal government provides to the States billions of dollars.

The States agree that we will conform to federal law. And that's their only part of the bargain.

If cooperative federalism is to work, it must work under a scheme where State officers respect the supremacy clause and supremacy of federal requirements.

If there is not -- if this Court were to reverse, on the grounds that the remedy of restitution was inappropriate, it would provide a valuable lesson to State welfare officials that there is no sanction for violating the law. And particularly in this case, given the established facts, that the Director was aware that the Illinois regulations were contrary to federal law, there is no basis for reversing the decision.

QUESTION: I suppose if State regulations have been approved by the, or a State plan been approved by HEW, there might be some argument that there shouldn't be

retroactive payments just because a court decided that the State regulations were contrary to Social Security Act?

MR. ROODMAN: Your Honor, that is one of the equitable considerations that a court would take into account.

In this case, I would point out that in fact the Director does not argue that on the equities the lower court abused its discretion.

QUESTION: They would make an argument that the judgment that the regulations were contrary to -- that the manual was contrary to HEW regulations --

MR. ROODMAN: Yes.

QUESTION: -- should be given only prospective effect.

MR. ROODMAN: Well, I think that's a different doctrine than the one that --

QUESTION: No, but it really says, it really argues to a great extent that there's no equity in applying the decision retroactively.

MR. ROODMAN: Well, if the court would -- that argument seems to be that, yes, we knew that we were violating the law, but now that we're caught, we ought not to have to provide the statutory entitlements that we were obligated to make in the first place and that we agreed to make in the first place.

With respect to the question, answering the question, in conclusion, with respect to wilful violations and whether HEW approved it, we think that's one factor that the Court would consider.

But, of course, what we are interested in is deterring the violation of all laws. And if the Court rules that a State provision is contrary to the Social Security Act and the supremacy clause, we must remember that the plaintiffs then are being deprived of -- were deprived of their statutory entitlement, and all that a remedy of restitution does is it places them in a position that they would have been in but for the violation of law.

And that's the classic goal of restitution.

Thank you.

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

Mr. O'Rourke, do you have anything further?

REBUTTAL ARGUMENT OF ROBERT J. O'ROURKE, ESQ.,
ON BEHALF OF THE PETITIONERS.

MR. O'ROURKE: Just one or two short items, if the Court please.

I think the Court, in questioning, Mr. Chief Justice, Mr. Roodman relative to the question about unjust enrichment hits upon the point. They keep characterizing their relief as equitable restitution, and we maintain that as an establishment of equitable restitution there must be

unjust enrichment of someone.

Certainly the Director did not receive any money, the STate of Illinois did not receive any money. As a matter of fact, our appropriations for welfare for all of the years in question were completely exhausted. Not one cent was returned to the Treasury of the State of Illinois.

QUESTION: What about the assertion, or was there a finding below that the Director knew that the Manual was contrary to HEW regulations?

MR. O'ROURKE: That was pursuant to an affidavit filed by the plaintiffs, which was never responded to by the defendants. It's true that we knew that the regulations were inconsistent in the State of Illinois with the regulations of HEW. That was --

QUESTION: Then you were aware of that?

MR. O'ROURKE: Yes, we were, Your Honor. As a matter of fact, the respondents, in their brief, makes also a point that we were being sued at this present time in Rodriguez vs. Swank, with the Aid to Dependent Children program, on much the same type of thing.

We contend that this is not necessarily fallible that we showed bad faith, that there was wilful violation of this, because what we were doing was we were pursuing a legal remedy we felt we had, or a legal theory we had.

And we respectfully submit that it's improper to

allege that the exhaustion of one's appellate remedies in any way indicates bad faith.

The question of the magnitude of the job that the State of Illinois, as other States throughout the Union, has to do in the welfare program in determining eligibility; the number of people that were on welfare in 1967 was 424,665 people in the State of Illinois. This has gone now to, at the present time, 983,600.

In just one year, the year 1967 -- or 1971, 397,281 people were added to the welfare rolls. So that we do have a problem of having peak periods and having low periods as to determining eligibility.

Counsel points out two cases that he relies upon rather heavily, the Porter case, relative to the payment of retroactive -- retroactive payments of rents that were withheld, and also the Mitchell case, relative to wages. Neither one of these cases, we submit, was a case against a State. And in both of those cases we believe that the principle of equitable restitution was a proper one. There had been unjust enrichment, both in the landlord that charged the over-amount rents, and also in the employer that had not paid the wages according to the Fair Labor Standards Act.

With that, if the Court please, we will rest. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:52 o'clock, p.m., the case in the above-entitled matter was submitted.]