In the

Supreme Court of the United States

CON F. SHEA, etc., et al.,
Petitioners,
v.
ASCENSION VIALPANDO

No. 72-1513

Washington, D.C.
February 26, 1974

Pages 1 thru 40

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Tuesday, February 26, 1974

The above-entitled matter came on for argument at 10:38 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, 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:

DOUGLAS D. DOANE, Esq., Special Assistant Attorney General, 104 State Capitol, Denver, Colorado 80203
For the Petitioners

TOM W. ARMOUR, Esq., Pikes Peak Legal Services, 13 East Vermijo, Colorado Springs, Colorado 80902
For the Respondent

CHARLES B. LENNAHAN, Esq., Special Assistant Attorney General, 104 State Capitol, Denver, Colorado 80203
For the Petitioners

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1513, Con F. Shea against Ascension Vialpando.

Mr. Doane.

ORAL ARGUMENT OF DOUGLAS D. DOANE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DOANE: Mr. Chief Justice, and may it Please the Court:

Colorado is here today to ask the Court to assist Colorado to remove the federal courts from the administration of the welfare program.

The facts of this case are that the Respondent, Mrs. Vialpando, was working and receiving Aid to Families with Dependent Children, and she was provided certain work expenses under the Social Security Act which requires that the state agency, in determining need for Aid to Families with Dependent Children, must take into consideration expenses reasonably attributable to the earning of income.

The statutory language is not specific as to how this is to be done and Colorado, prior to July of 1970, had a policy which provided for consideration of employment expenses by the itemization of each and every expense which the welfare recipient had and under this system, Mrs. Vialpando was able to reduce her income by a certain amount of employment expenses and under the previous system

she was able to deduct approximately $181 of her income and her income was about $281 per month so this made her eligible and made her needy under the Colorado program.

After July of 1970, however, Colorado changed its policy and provided for taking into the consideration employment expenses, expenses reasonably attributable to the earning of income by allowing deduction of mandatory deductions from income, also a $30 flat allowance which was statistically based and the way Colorado arrived at this $30 figure was to take for a period of months, during 1969 and 1970 all of the actual employment expenses of all of the recipients for Aid to Families with Dependent Children and strike an average and in our brief, in the Appendix, as indicated, these figures range from about $32 to $36.

Colorado, therefore, in its policies said, we will strike an average allowance for employment expenses at $30.

QUESTION: I have a little trouble understanding that as a matter or arithmetic. If they ranged from $32 to $36, why is the average $30?

MR. DOANE: Well, the State of Colorado felt that it was taking into consideration expenses attributable to the earning of income by basing it upon what the employment expenses were and not using the actual figures. In both of the lower court decisions, they do not pass upon

whether the $30 is an actual sufficient amount or whether it is statistically correct. What they say, in the lower courts, is that the state may not use --

QUESTION: I know that. I know, and that is the basic question, of course, in this case.

MR. DOANE: Yes, your Honor.

QUESTION: I was just wondering why an average of a low of 32 and a high of 36 turned out to be 30 in Colorado because where I went to school it doesn't.

MR. DOANE: It seemed to be sufficient, taking into consideration of expenses reasonably attributable.

In other words, they based it upon that. The statute does not, in our opinion, say that you have to allow what the actual average was. It is, I think, similar to a case the Court had previously in Rosado versus Wyman, where the Court found that you could use statistically-based averages as long as they were fairly priced and that some people would have an advantage by the use of that average, other people would be disadvantaged.

QUESTION: Well, I don't see how anybody could come out ahead on this, frankly. If it ranges from 32 to 36, how does anybody gain when he gets 30?

MR. DOANE: The person who gains is the person who does not have the $30 of employment expenses. This is not actual payment of expenses up to a ceiling of 30;

regardless of whoever walked in, whatever their expenses were, they got the full $30.

QUESTION: You mean some people have no expenses?

MR. DOANE: Some people --

QUESTION: As I understand it, those who do have expenses, their expenses range from 32 to 36. Is that it?

MR. DOANE: No, this is the average figure, your HOnor.

In our brief, or in the Appendix, rather, at page 40 it is set out how the average was determined. For example, for the month of March 1969, the average per case was $32.44. Now, the very nature of an average would mean that some persons would have expenses less than the average, others would have expenses higher than the average.

QUESTION: Which page is this on?

MR. DOANE: Page 41.

QUESTION: And your 32 to 36 range was at different times?

MR. DOANE: Yes, your Honor.

QUESTION: And it was a range of averages?

MR. DOANE: A range of averages, that's correct.

QUESTION: I see.

MR. DOANE: In other months, it would run 36. The last one, April of 1970, ran 36. But the state does not claim that the $30 is all that a work-expense allowance

should be. The State of Colorado is here today stating that the statute does not prohibit the use of an average.

QUESTION: Right.

MR. DOANE: And the lower courts seemed to feel that the statute --

QUESTION: Did prevent the use of it. Has there been any change since this case was begun? Has there been any increase in the sum allowed?

MR. DOANE: No, your Honor, it has not been adjusted, but I would assume that it would have to be adjusted upward with the cost of living.

QUESTION: Umn hmn, but it still remains the same. Incidentally, while I have already interrupted you, I presuem you have a copy of the Solicitor General's letter of February 25th addressed to the Clerk of the Court?

MR. DOANE: Yes, your Honor, I do.

The federal statute in this case provides that the states in determining need must take into consideration expenses reasonably attributable to the earning of income. Reasonably attributable would seem to require that someone has to decide how you determine what expenses are reasonably attributable.

The federal regulations in this case are, both in the Federal Register and in the form of handbook material and circulars, this type of regulation, both of which we feel

are binding upon the state, mainly restate what the statute provides. There is some statement in the federal regulations that certain items may be standardized but prior to the time Colorado implemented this standard flat expense allowance.

The federal regulations, both the Federal Register regulations and the circulars allowed for the use of a standard expense allowance.

Now, Mrs. Vialpando alleges that Colorado can only only accommodate this requirement of the statute by itemizing all expenses and that there is no other way to do it.

As I mentioned previously, in Resado, the Court did allow the use of standardizing and averaging as long as the items in the average were fairly priced.

The Court has also held in the welfare areas and, recently, in the Dublino case, that the federal law is to be looked at carefully and if there is not a specific statutory requirement or if there is not a condition of elibility being added by the state, that the states do have discretion in this difficult area and the courts are, the lower courts, have been cautioned by this Court to not get into the area of determining what might be, in its opinion, the best way to administer the welfare program.

Colorado's position is that this AFDC statute is merely a setting out of the basic state plan requirements.

It doesn't spell out every detail, period and comma to have a program which complies with this statute but there are other requirements in the statute that have to be accommodated also. One is that the states must, in a prompt manner, determine eligibility and provide benefits to those who are eligible.

The determination of employment expenses only on an item-by-item basis would have to be done every month for every welfare recipient, not only to determine eligibility but to determine the amount of assistance and the cost of administering this type of a determination would take a lot of money from the actual benefits going to the welfare recipient and use it up for administrative expenses.

QUESTION: Is that something that HEW requires?

MR. DOANE: HEW requires that the states must promptly determine eligibility for assistance and the amount of assistance.

QUESTION: Individual by individual.

MR. DOANE: No, your Honor. Their position, as stated in the Solicitor General's Amicus brief, is that averaging and standard employment allowances --

QUESTION: I am talking about this letter that Justice Stewart mentioned.

MR. DOANE: The most recent letter?

QUESTION: Yes.

QUESTION: Which we must treat as a supplement to his brief. I am sure you would agree, would you not?

MR. DOANE: Yes, your Honor.

I think the letter -- pardon?

QUESTION: It takes a different position.

QUESTION: It takes a different position but it makes it even stronger than his brief. His brief indicated that back in 1964 the Secretary took the position that you had to allow actual expenses when they exceeded the lump sum and he now tells us that they determined that in 1964 that was not the practice.

That is the way I read this letter.

MR. DOANE: Yes, your Honor, that is correct. The Solicitor was advised by the Department of Health, Education and Welfare that even that --

QUESTION: Their reasoning doesn't affect the practice here, does it?

MR. DOANE: Well, yes, your Honor, it does. We are saying that at the time Colorado implemented the standard employment allowance, it was permitted by HEW and that was their interpretation of the statute and this letter even goes further back, way back to 1964.

QUESTION: I understand. I read the letter.

MR. DOANE: Yes, your Honor.

QUESTION: Mr. Doane, the fact notwithstanding,

that may have been the HEW position, there is still a question, isn't there, of that may be their interpretation but the language of the statute is, "As well as any expenses reasonably attributable to the earning of any such income."

So there still isn't the question of conflict between the standard allowance and the statute, even though HEW apparently, from this letter, now, has approved the standard allowance as satisfying that requirement.

Isn't that so?

MR. DOANE: Yes, your Honor. The question before the Court is, does the statute allow both HEW and the state to standardize the allowances --

QUESTION: That's right.

MR. DOANE: --for instance, when this language in the statute --

QUESTION: Whether any expenses is satisifed by standard allowance.

MR. DOANE: Exactly, your Honor.

QUESTION: As I gather, this Respondent, her actual expenses were $126.11, weren't they?

And I gather that had been under the former practice in Colorado, she had been allowed that, had she not?

MR. DOANE: Yes, she had, your Honor.

QUESTION: Then I take it your point is that any expenses means any expenses but the question is whether

the statute's requirement that you take them into consideration, require that you pay them all?

MR. DOANE: Yes, your Honor. That is exactly correct.

QUESTION: I mean, it does mean any, it means just what it says.

MR. DOANE: Any means any and any would mean all and the language we think is most important is the first part that says, "The State, in determining need --" and in determining need, the State has always had large discretion as to how they do this, "shall take into consideration," and "take into consideration does not mean, "shall be ducked," because it --

QUESTION: For example, I suppose you say, under that language you could just say, "We will take into consideration and allow half the expenses, or 10 percent or 90 percent." Instead of that, you say we are going to have a standard deduction.

MR. DOANE: Well, I would question that type of an allowance.

QUESTION: Why?

MR. DOANE: Because in that case you are not really giving full consideration to the actual expenses.

QUESTION: Well, you are considering them.

MR. DOANE: It could be argued --

QUESTION: You are considering them and, certainly, for people above $30, you are not giving them full consideration in the sense that you just spoke.

MR. DOANE: Well, it depends how the state is required by the statute to take into consideration expenses.

QUESTION: All right.

MR. DOANE: And the following section of this statute, after the one that we are concerned with, talks about, "And the state shall disregard certain income."

Now, if Congress had intended the state must deduct all employment expenses, they could have very easily put this provision on deducting employment expenses down in the next section which really says, "Disregard," which means "deduct" to me.

The language is a lot different, "Take into consideration and deduct."

QUESTION: While I have got you interrupted, could I ask you -- there was a constitutional claim in this case, too, I take it?

MR. DOANE: No, your Honor, it is strictly on interpretation of statute.

QUESTION: Well, I think there probably has to be to get into federal court.

MR. DOANE: Yes, your Honor.

QUESTION: You didn't make any motion to dismiss

for jurisdictional grounds?

MR. DOANE: Well, your Honor, I think pendent jurisdiction would have allowed --

QUESTION: Well, only if the constitutional claim was worth something.

Now, the judge just moved to the statutory claim directly, I guess.

MR. DOANE: Yes, your Honor.

QUESTION: There has never been any consideration of whether there is federal jurisdiction here?

MR. DOANE: Well --

QUESTION: You wouldn't suggest there would be -- or would you? If there had only been a statutory claim that there would have been federal jurisdiction?

MR. DOANE: No, your Honor, I don't think we would have.

QUESTION: Did the complaint allege a constitutional --

MR. DOANE: Yes, it did.

QUESTION: Yes.

QUESTION: Page 14 -- there was no consideration given to it as to whether it was substantial or not?

QUESTION: I think maybe that question should be asked of the other side.

MR. DOANE: Yes, your Honor, but if the Court is

interested in that area, the --

It would appear, then, that the federal statute does provide the State of Colorado the option as to what method to select in determining and considering what expenses are reasonably attributable and that the lower court determination that there was no such discretion, that there only was one way to meet the requirement of the statute, gave no effect to the words "reasonably attributable" that the lower court should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Armour.

ORAL ARGUMENT OF TOM W. ARMOUR, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ARMOUR: Mr. Chief Justice, and may it Please the Court:

In this case, we are concerned with a particular section of the Social Security Act of 1935, in particular, section 402(a)(7) and it is the Respondent's position that the question presented in this case is whether, consistent with this section 402(a)(7), the State of Colorado may refuse to take into consideration expenses of employment which are reasonably attributable to earning of that employment but in excess of a flat $30 per month allowance.

The controlling statute, your Honors, requires states which participate in the AFDC program to disregard any expense reasonably attributable to the earning of income.

The Colorado regulation permits the disregard of $30 per month in addition to child-care expenses and mandatory payroll deductions.

We believe it is also important to state what this case is not about. The Respondent is not arguing that Colorado must allow unreasonable work expenses. In fact, it is our position that the states have a duty to inquire into the reasonableness of work expenses both as to amount and as to whether or not they are necessary for employment.

There cannot be a tenuous relationship between the particular work expense and the particular job.

The State of Colorado made that inquiry prior to July 1, 1970 and determined that in this Ascension Vialpando's case, that she had reasonable work expenses in the amount of $126.11 per month.

That has never been at issue. But, however, after July of 1970, the State of Colorado disregarded a flat $30 per month and because the State of Colorado failed to take into consideration $96.11 per month, Mrs. Vialpando, finding it difficult to make ends meet, left the job market.

So, therefore, the question before the Court is whether Section 402(a)(7) permits states to use flat amounts based on statistical averages to determine work expenses when the individual's work expenses exceed that

flat amount and we think that, properly, this analysis begins first by looking to the text of the statute and trying to determine its plain meaning.

And that statute says that a state plan must, except as may be otherwise provided in Clause 8, provide that the state agency shall, in determining need, take into consideration any other income and resources of any child or relative as well as any expenses reasonably attributable to the earning of that income.

First of all, the word "shall" is used. It mandates the state agency to look at both income and expenses of the recipient.

QUESTION: To "look at." They did look at it, didn't they?

MR. ARMOUR: Yes, your Honor, and it is our position that they did not look fully at those work expenses and they failed to disregard reasonable work expenses that were reasonably attributible to the earning of income.

It is not our position that they may simply look at or take into consideration an average of work expenses. They must disregard any expense as long as it is reasonably attributable to the earning of income.

The statute, in fact, requires them to determine need -- to determine need in the individual case.

QUESTION: Administratively, would there be any

point in determining the average and then allowing everyone the average or approximately the average, including those who had no expense at all, and then allowing supplements for those who went above this hypothetical average?

MR. ARMOUR: Well, your Honor, Judge Arraj in the trial court asked whether it made any sense to allow $30 per month to recipients who, in fact, had no expenses or less than that. But as far as administrative efficiency is concerned, we would agree that the use of the flat amount for all recipients based on a fair average, together with the right of individual recipients to demonstrate an entitlement of greater reasonable work expenses, would both meet the goals of administrative efficiency and stay within terms of the statute.

QUESTION: Would it be administratively feasible, given -- if you know -- given the number of people involved, to allow $10 a month and then such additions as people could demonstrate by vouchers or by whatever process they do it?

MR. ARMOUR: Well, your Honor, this question of administrative efficiency has never been actually litigated in the courts below. It has just been alluded to. We are not quite sure how much administrative efficiency, if any, would be generated by the use of a flat amount.

I don't believe the State of Colorado could use the figure of $10 per month because, as Mr. Justice Stewart

mentioned, three years ago in the State of Colorado, average work expenses were close to $37 per month. We would maintain that expenses have gone up since that time, so we wouldn't want to accept the use of the $10 per month. But as to the use of a flat amount, together with your right to demonstrate an entitlement to a greater amount, we accept, your Honor.

QUESTION: Well, could not the State of Colorado constitutionally allow no expense except that which was demonstrable by the same kind of evidence which this lady has produced here?

MR. ARMOUR: Your Honor, I think the State of Colorado, by its participation in the ADC program, has to follow this statute, (a)(7) and that statute requires both the recipient to demonstrate an entitlement to each and every expense and also, the State of Colorado to disregard each and every expense as long as it is reasonably attributable to the earning of income, yes.

The words of the statute"take into consideration" perhaps, in and of themselves, are flexible, as the Tenth Circuit indicated, but when you look at this particular statute in its entirety, it takes on a particular meaning.

First of all,"take into consideration" modifies the words "any other income and resources." The word "any" is used to introduce "income and resources."

The State of Colorado and the Secretary of HEW

certainly don't put forth any averaging argument for outside sources of income. The state wants to take into consideration every cent of outside income and they properly should. ADC is to be given to needy children and naturally, the state should take into consideration any outside source of income. You can't average child support payments. You certainly can't average the earnings of all employed recipients in the State of Colorado. You have got to take a look at each individual's outside income.

Now, this statute goes on and adds an expense section. It is introduced by the words, "As well as." We think it reasonable to conclude that Congress intended work expenses to be treated in the same manner and that is why they used the phrase "as well as."

And this language requires any expenses to be disregarded, not some, not an average, but any.

Section 402 of the Social Security Act in subsection (a)(8), your Honors, uses the words "other than any" when talking about the state's option to set aside earned income for the future needs of the child.

In that part of the statute, Congress has said that states may permit any -- excuse me -- all or any portion of the earned income to be set aside. I think this demonstrates that Congress knows how to use specific language and allow the states to disregard something less

than 100 percent. In that part of the statute, they use the words "any -- all or any portion."

In our section of the statute, they use the word "any."

In addition to the plain meaning of the statute, which we think supports the Respondent's position, we also think that the legislative history supports us as well.

Prior to 1962, when this part of the statute was added, it was optional for states to disregard work expenses. But the Senate Finance Committee, in reporting out the bill which amended 402(a)(7), stated that it believed it only reasonable for the states to take these expenses fully into account.

QUESTION: How many other circuit courts have given this same interpretation?

MR. ARMOUR: Your Honor, we believe that our position is supported by decisions --

QUESTION: There is no conflict, as I understand it.

MR. ARMOUR: No. There is a decision in the Second Circuit Court of Appeals, the Connecticut State Department versus HEW, which we believe supports our position. There is the decision in the Tenth Circuit and on December 23, 1973, the Eighth Circuit, in Anderson versus Graham, took the position that any expenses require states to disregard all actual expenses, so we believe that there are

three circuit opinions in point, your Honor.

QUESTION: Is that December 23 decision in your briefs anywhere?

MR. ARMOUR: Your Honor, I believe Anderson versus Graham is set out in Appendix E to the Respondent's brief.

QUESTION: Thank you.

MR. ARMOUR: Yes.

Mr. Justice Stewart has alluded in Petitioner's argument to a letter submitted yesterday by the Solicitor General. Respondents would like the opportunity to that letter in writing, briefly, if we may, your Honors.

MR. CHIEF JUSTICE BURGER: Well, we will speak to your friend, of course.

QUESTION: May I ask what the tenor of the response may be?

MR. ARMOUR: Well, your Honor, we have not carefully analyzed the contents of this letter, but we do agree that, apparently, the Secretary of HEW is now taking a position that they didn't take on October 4 when they filed their original brief.

The letter goes to sections 3140 of the Handbook and we simply think that they have misstated the Secretary's position.

QUESTION: Mr. Armour?

MR. ARMOUR: Yes, your Honor.

QUESTION: At page 14 of your Appendix, where the complaint appears, apparently at paragraph 9, you had a constitutional claim and you say "Section such and such of the Colorado Manual of Public Assistance imposes an arbitrary maximum on employment expense in violation of the Equal Protection Clause of the 14th Amendment."

Your opponent was asked about that point. Was there any particular line of cases from this Court which you were relying on for the proposition that that was a constitutional violation?

MR. ARMOUR: Your Honor, may I first answer your question by saying that Petitioner has correctly stated that this issue was not argued at any point.

QUESTION: It is jurisdictional though, I would think.

MR. ARMOUR: Yes.

QUESTION: So if we were troubled by it, we would have to address it here.

MR. ARMOUR: Well, your Honor, our complaint was filed under Title 42, Section 1983 and the jurisdictional sections that we relied upon were in 28 United States Code Section 1343. We believe that there is -- there was at the time and there remains a substantial constitutional question, and that the Court had pendent jurisdiction to decide the

statutory issue and properly should have gone to the statutory issue first but we don't think that there is a rational justification for steps from two classes of working welfare recipients, those with less than $30 per month in expenses and those with more than $30 in expenses.

I think we could establish clearly jurisdiction in the trial court and I properly agree that the courts below have also, because they have been able to decide this case on the basis of the statutory issue, not gone to the constitutional issue.

QUESTION: Well, don't they have to go to it at least to assure themselves that it is not frivolous or insubstantial?

MR. ARMOUR: Yes, your Honor.

QUESTION: Did you urge it at all upon Judge Arraj?

MR. ARMOUR: Your Honor, at the time this action was commenced, there was different counsel arguing the case but from my best knowledge, the constitutional issue was presented and we did, in fact, want to argue it. It was Judge Arraj that simply took the statutory issue. But, yes, your Honor, we did fully intend to argue that point.

QUESTION: Well, did you press it upon him in briefs or anything at all? Or orally?

MR. ARMOUR: Your Honor, it was done orally. The

first time briefs were filed were in support of motion for summary judgment which was considerably after the time of filing the action, almost a year.

So it was not urged in the actual brief writing, but it was urged orally before the court.

QUESTION: It is pretty important to you, isn't it? Otherwise, your case goes out of court.

MR. ARMOUR: Yes, your Honor, it certainly is. But we think there is a substantial constitutional issue and that this Court, I believe, in Rosado versus Wyman, which has been cited for other purposes before by Petitioners, states that this Court does have jurisdiction to decide statutory issues raised along with claims of constitutional violations.

QUESTION: Was the jurisdictional question as such brought to the attention of the District Court or to the Court of Appeals?

MR. ARMOUR: To the District Court, your Honor.

QUESTION: Was the motion to dismiss for want of jurisdiction?

MR. ARMOUR: No, not a motion that was either filed or argued.

QUESTION: And so how was it brought to the attention of the District Court?

MR. ARMOUR: At the time that Plaintiff went to

U.S. District Court in Denver to seek a temporary restraining order enjoining enforcement of the regulations. That restraining order was not granted but the -- I believe, your Honor, the issue of jurisdiction was brought up at that point. There was a hearing on a motion for preliminary injunction.

QUESTION: Umn hmn, and I think your fellow counsel may have some help for you there, on this question. No? Does the Appendix show that a question of jurisdiction was brought to the attention of the District Court?

MR. ARMOUR: The Appendix, your Honor --

QUESTION: You have answered, if I understood it correctly, that if there is a, colorably, a substantial, constitutional claim, this statutory claim is pendent to it and there can be no question of jurisdiction. But on the other hand, if the constitutional claim is frivolous, then there is a very great question about whether there is jurisdiction, under these jurisdictional statutes.

MR. ARMOUR: Your Honor, we certainly think that we have a substantial statutory argument, one that --

QUESTION: I know, but that is not enough, arguably.

MR. ARMOUR: Yes. But in addition, I mean, I think it can be well-recognized that whether you have two classifications of working welfare recipients, one with less than $30 per month work expenses and another with more than

$30 per month work expenses, I don't see the reasonable -- you know, understand that classification. I think we could sustain and, in fact, have sustained the burden of presenting a corable constitutional issue.

QUESTION: And was that, again -- I'm sure I don't mean to be repititous, but I am not sure I understand your answer. Was this question brought in any way to the attention of either the District Court or the Court of Appeals?

MR. ARMOUR: Your Honor, it was brought to the attention of the U.S. District Court judge at the time there was a hearing to determine whether injunctive relief should be granted.

QUESTION: Does the Appendix reflect that fact anywhere?

MR. ARMOUR: No, your Honor, I believe it does not.

QUESTION: The District Court opinion reported on page 44 of the Appendix has a sentence saying that the "Respondent also raises constitutional questions which are not under consideration at this time,"at the top of page 44. Is that the opinion you were talking about?

MR. ARMOUR: Yes, your Honor, that is the first memorandum opinion, I believe, of the U.S. District Court.

QUESTION: Were they considered at a later time?

MR. ARMOUR: No, your Honor, they were not.

QUESTION: Well, I gather footnote 4, Mr. Armour, suggests that -- or implies, at least, that Judge Arraj thought that there may be enough for a convening of a three-judge court, but that, in your constitutional claim, but that he wouldn't recommend that since the case could be disposed of under statutory --

MR. ARMOUR: Judge Arraj was the chief justice of the District Circuit Court.

QUESTION: Yes. But he said he couldn't convene a three-judge court -- or, would convene one, only if the case can't be disposed of under statutory grounds.

MR. ARMOUR: I think, your Honor, that clearly implies that he thought that the question was presented.

QUESTION: Was presented and justified --

MR. ARMOUR: Yes.

QUESTION: -- and in Goosby, last year, I guess we set down the standard of what kind of constitutional claims required the convening of a three-judge court.

MR. ARMOUR: Yes, your Honor.

QUESTION: And it was a non-frivolous or -- I've forgotten -- it was rather broad language.

MR. ARMOUR: Well, your Honor, we think we certainly have a non-frivolous constitutional claim, as well as a statutory argument that holds up under close analysis.

The use of averaging, we don't believe it is

permitted either by the statutory language or the legislative history. Apart from the Secretary's novel argument about the hunter and canoeist, the only other argument that he had, in essence was that this Court, in Rosado versus Wyman, sanctioned the use of averaging. We'd all believe that Rosado stands for a blanket approval of averaging without taking a look at the particular case and we think that this action can be distinguished.

This Court, in Rosado, held that Section 402(a)(23) had been violated by the State of New York in its conversion from a system of special need grants to a system of flat grants.

However, the Court did say that, in determining standard of need, the states could use a fair averaging process, but this Court, in Rosado, was concerned with Section (a)(23), not (a)(7). There is nothing in (a)(23) that requires states to meet all needs, just to make cost of living adjustments periodically.

In contrast, (a)(7) requires specifically that any expenses be disregarded. As the Petitioners have correctly stated, the states have traditionally had great flexibility in determining standards of need.

This Court, in King versus Smith 397 to 392 U.S., made that very clear. But we are not talking about a hypothetical standard of need in this particular case. We

are talking about Mrs. Vialpando's actual work expenses. And even in Rosado. I believe that this Court stated that this laudable goal of administrative efficiency may not be furthered in such a way as to violate a specific statutory command. So for this reason, we do not believe that Rosado is in point or sanctions the use of averaging in determining work expenses.

In fact, what we believe that the State of Colorado has done, with the Secretary's approval, has cut into the incentive that Congress intended for welfare recipients to go back into the job market.

It may well be that what Congress did in 1962 was wrong. We don't think so. However, if the Secretary of HEW is actually convinced that administrative efficiency is a more important policy than encouraging self-support and helping parents of needy children and relatives claiming aid to attain or retain the maximum capability for self-sufficiency then this argument should properly be addressed to the Congress of the United States.

There have been a number of proposals since 1962 before the Congress to combine the work-expense disregard found in (a)(7) with the earned income exemption found in (a)(8).

However, today, Congress has rejected those arguments. But that is a proper forum for the Secretary of

HEW to take its argument. We firmly believe that Congress intended, by the enactment of (a)(7), to give recipients a powerful and a meaningful incentive to go back into the job market.

Mrs. Vialpando has tried on three occasions to return to work.

Parents of needy children need to be able to break their cycle of poverty and one way to do this, your Honors, is to disregard all their reasonable work expenses and for those reasons, we respectfully submit that the judgment of the Tenth Circuit Court of Appeals should be affirmed.

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

Mr. Lennahan.

ORAL ARGUMENT OF CHARLES B. LENNAHAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LENNAHAN: Mr. Chief Justice, and may it Please the Court:

I'd like to comment on several aspects that have either been brought up by the Court or by Mr. Armour and I might start with this situation that existed in July of 1970 when Colorado chose to change its method of taking into consideration work expenses.

As Mr. Armour has suggested, prior to July, the method involved an itemized treatment of work expenses for

each individual recipient. The state's position is that Mrs. Vialpando did not have a vested right to that earlier regulation, or to that method and that the state, as long as they acted consistently with the Social Security Act and with the requirements of HEW, could elect a more efficient or less costly method to take work expenses into consideration.

And I would also like to bring out that we have all, at the counsel side of the case, dwelt upon the $30 aspect of the work expense allowance but it should be noted that the work-incentive purpose of the Social Security Act was accomplished not only by the $30 work expense allowance, but by the provision of the Colorado rules that permitted the deduction of mandatory payroll deductions, such as state taxes and social security and also, the actual cost of child care was deducted from income in determining need.

So this work incentive in Colorado, after July of 1970, consisted of this three-part work expense.

QUESTION: How do you view the purpose of your standard allowance rather than actual?

MR. LENNAHAN: The purpose of the standard allowance is largely to reduce the amount of time that an individual eligibility technician at the county level has to spend dealing with each case and there is a --

QUESTION: Would the other way of doing it, going to the actual expenses, also delay the starting of welfare?

MR. LENNAHAN: Unless the staff was increased considerably, we could anticipate that it would delay the processing of the individual case.

QUESTION: And, hence, the beginning of welfare payments?

MR. LENNAHAN: Right.

QUESTION: There is a fact that may not be important, Mr. Lennahan. I noticed that there are $63.80 or some such thing allowed for the payments on this lady's car.

What happens when she has got the car paid for? Is that disallowed?

MR. LENNAHAN: Under the old rule, where we would give itemized consideration, once she was no longer making car payments, they would no longer be actual work expenses and her work expense allowance would be reduced by that sum.

QUESTION: So, in effect, her claim now is that capital expenditure is one that is properly taken into account as an expense?

MR. LENNAHAN: That is correct.

QUESTION: The purchase of a car is, for these purposes, a capital item, is it not?

MR. LENNAHAN: Yes, your Honor.

This is another aspect that concerned us. This was an individual decision in an individual case in El Paso County, Colorado. The same facts could have been presented

to an eligibility technician in another part of Colorado, who would have made a decision on a rather subjective basis, equally valid, saying that the car was a personal expense, that a job was available closer to the home of the recipient or that she could use public transportation.

This is another reason why Colorado prefers to use a flat amount so that will be a more accurate and more consistent determination in each case than is possible without some type of numerical guideline on what is a reasonable work expense.

I would also like to point out that in connection with the statistical tables that appear in our Appendix, this may have been adequately brought out, but I would like to specifically point out that each of the pages, 41(a) and thereafter, consists of a printout of all of the Aid to Families with Dependent Children cases in Colorado for the particular month and Mr. Freeman, in his analysis on pages 40 through 41 of the Appendix, took the items from the left-hand column of each of these computer printouts and pulled out the general work expenses, the transportation expenses, he excluded child care because that was going to be allowed separately, took out union dues, tools, telephone and computed a 100 percent average.

The people who had more than $30 prior to July of '70 are included in each of these printouts. It's a 100

percent sample of the high as well as the low work expense allowance cases. So this is a primary part of our position that a flat amount does take into consideration, not only any type of expense, but also considers the specific amounts that were being spent in Colorado by this class of recipients.

Then I'd like to comment briefly on your question, Mr. Chief Justice, on the -- whether or not it would be permissible for Colorado to have a $30 work expense allowance and then, if a particular recipient wanted to present evidence of expenses in excess of $30 --

QUESTION: I thought my question was $10.

MR. LENNAHAN: All right, $10. This adds another touch to it.

QUESTION: It would keep it below the average.

MR. LENNAHAN: Right. What the state's position is in this case is that once the dollar amount is fixed by a reasonable statistical basis, it could, if it wanted to, pay in an excess of that average figure but it doesn't have to, that it is permissible under the Social Security Act to stick with the flat amount and I think, as Mr. Armour responded, the position of HEW and, I think, the state's response would be that if the flat amount is too low, this would present a problem that we would then take up in the district court.

QUESTION: According to the Solicitor General's letter of yesterday, at least as I read it, the next to the last paragraph on page 2, he says, "Furthermore, we are informed that no state plan containing a standard work-expense allowance has ever granted beneficiaries the alternative of itemizing."

So if I understand that --

MR. LENNAHAN: Right.

QUESTION: -- language, he is telling us that no state has ever done this, adopted the suggestion implicit in the Chief Justice's question.

MR. LENNAHAN: Correct.

QUESTION: It is either an itemization or it is a standard allowance. None has ever combined it, as I read this, no state has ever combined it.

MR. LENNAHAN: I think that is true but, none have ever done it.

QUESTION: Right.

MR. LENNAHAN: On the question of equal protection, I must apologize. We don't have the record with us today, but it is my recollection that there is a pretrial order early in the trial court record, where it was agreed by the counsel at that time for Mrs. Vialpando and by state counsel that the constitutional issue would not be litigated in the case and that, again, this is my recollection, that is the basis for

the footnote in Judge Roger's opinion saying that the constitutional question will not be taken up.

QUESTION: Well, I don't suppose the parties or the judge can stipulate the jurisdiction.

MR. LENNAHAN: I forget the exact text of the pretrial order, but I would presume that the context was that there was a constitutional question sufficient to give pendent jurisdiction and then they proceeded to handle the case on the statutory basis.

QEUSTION: Well, what is the significance of that? Was it an agreement that they would not litigate it and whoever loses on the statutory issue was not in a position to raise it constitutionally?

MR. LENNAHAN: No, I think Judge Arraj, in his footnote --

QUESTION: No, I know what he said but I want to know about your stipulation that you -- or the agreement that you referred to.

MR. LENNAHAN: Well, as I said, I do not recall the exact text. We should have included it in the Appendix. We did not. But I suggest to the Court that there is a pre-trial order in there with a provision on the constitutional issue which is the basis for that footnote in Judge Arraj's initial opinion.

QUESTION: And that provision may not be a

stipulation, but at least a tentative determination by the judge that there was a nonfrivolous constitutional question but let's go on and decide the statutory one.

MR. LENNAHAN: This is my recollection of what happened.

If this Court was to raise the constitutional issue, I believe the State of Colorado would be relying on the case of Dandridge v. Williams and pointing out that there was no invidious discrimination in the use of a flat amount. We would point out that the rational basis for the use of a flat amount would include such things as, it does encourage employment. It maintains an equitable balance, economically between people who earn low salaries and are not on public assistance programs as compared to people who are on public assistance programs.

And it does serve a purpose of helping to allocate public funds to serve a larger number of individuals.

Then I'd like to comment upon the fact that, I believe it was reflected in our Appendix, that the Department of Health, Education and Welfare has consistently permitted the use of average amounts, flat amounts for at least some types of work expenses, both prior to and after the 1962 statute that is being litigated here.

I believe our brief might be more helpful to the Court if, on page 24 of the brief for Petitioners, after that

second full paragraph, a reference were inserted to Appendix F of the Amicus brief of the State of Colorado -- or of the State of California, I'm sorry, the Amicus brief of the State of California followed in this case.

I am suggesting a reference be inserted after the second full paragraph.

QUESTION: The one beginning, "The new regulations"?

MR. LENNAHAN: Yes, we are talking about new regulations and then, this letter that I am referring to in the California Amicus brief in Appendix F is a letter from the Cpmmissioner, a memorandum from the Commissioner of the Social and Rehabilitation Service, indicating that the Handbook sections that had been previously utilized were obsolete. Because I think that bears upon the consistency of the Department of Health, Education and Welfare's interpretation of the statute --

QUESTION: Was your page reference to the California brief?

MR. LENNAHAN: It is Appendix F. It would be on page 29 in their Appendix.

QUESTION: Thank you.

MR. LENNAHAN: Because it is really not completely clear what the legal effect of the Handbook is, we are suggesting to the Court that the -- and really, I think

this is why the State of Colorado is here. Mr. Doane was saying the State of Colorado looked at the Social Security Act, back in 1970, looked at the federal regulations published in the Federal Register, looked at the letter dated September 29th of 1969 from the Commissioner of the social and rehabilitation service and that letter is printed on page 7 of the joint Appendix, clearly permitting the use of a flat work expense allowance.

Against this -- another thing I think that is involved here is that there is really no apparent legal difference between this September 26, 1969 letter in the joint Appendix on page 7 and the circular that was involved in the case of Thorpe versus the Housing Authority of Durham.

True, the circular in the Durham case was a mandatory requirement. In this case, it provides an option. But we are suggesting to the Court that the exercise of the discretion of the Department of Health, Education and Welfare is indicated by this letter and should be given effect by this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lennahan. Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:34 o'clock a.m., the case was submitted.]