In the

# Supreme Court of the United States



CYNTHIA HAGANS, et al.,

Petitioners,

v.

ABE LAVINE, Commissioner of New York State Department of Social Services, et al.,

Respondents.

No. 72-6476



Washington, D. C.
December 11, 1973

Pages 1 thru 47



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Washington, D. C.

Tuesday, December 11, 1973

The above-entitled matter came on for argument at 1:44 p.m.

BEFORE:

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

APPEARANCES:

CARL JAY NATHANSON, ESQ., Nassau County Law Services Committee, Inc., 285 Fulton Avenue, Hempstead, New York 11550, for the Petitioners.

MICHAEL COLODNER, ESQ., Assistant Attorney General of New York, 2 World Trade Center, New York, New York 10047, for the Respondents.

# I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 72-6476, Hagans against Lavine.

You may proceed whenever you are ready, Mr. Nathanson.

ORAL ARGUMENT OF CARL JAY NATHANSON ON

BEHALF OF THE PETITIONERS

MR. NATHANSON: Mr. Chief Justice and may it please the Court, the Second Circuit did not determine this case on the merits. The court concluded that because the complaint failed to plead a substantial constitutional question, the District Court was without pendent jurisdiction to determine as it did that the New York welfare regulation violated the Social Security Act. Because of the procedural posture of this case, therefore, two questions are presented to this Court.

The first question is a narrow one: Were the pleadings raised nonfrivolous --

QUESTION: Let me get this straight. You state the question in pendent jurisdiction terms? Tell me the question that you want to be penaent?

MR. NATHANSON: The pendent question was whether or not the New York welfare regulation violated the Social Security Act.

QUESTION: You think that's -- why do you need to resort to pendent jurisdiction?

MR. NATHANSON: I don't think you need to resort to

pendent jurisdiction.

QUESTION: Why do you say so then? Why do you call that pendent? Isn't that a Federal question in itself?

MR. NATHANSON: The lower court determined that the district court lacked jurisdiction to pass upon that pendent claim because of the absence of a substantial constitutional claim.

QUESTION: I know, but you say it was a pendent claim. It isn't pendent at all, is it;if you don't need a constitutional claim, it isn't pendent, is it?

MR. NATHANSON: It would not be pendent, your Honor.

QUESTION: If you need a constitutional claim, you just can't consider it/whether it is pendent or not.

MR. NATHANSON: Your Honor, before the court can determine whether or not it's correct to characterize that as a pendent claim, it would first have to pass upon the second aspect of our argument --

QUESTION: Which is what?

MR. NATHANSON: Which is that absent a constitutional claim, the district court had jurisdiction under 1343(3) and 1343(4) of an action founded on 1983 of the Civil Rights Act to determine the Social Security Act claim without regard to whether or not --

QUESTION: You think any statutory claim, any claim that a State law conflicts with a Federal statute is pendent

to the constitutional claim, is that it?

MR. NATHANSON: I think that any time --

QUESTION: If there is a constitutional claim, the only basis for considering the statutory claims is pendent jurisdiction?

MR. NATHANSON: No, your Honor, I don't. I believe there is independent Federal jurisdiction for determining that claim.

QUESTION: You claim that the Federal Social Security statute, then, is in effect one of the laws described by section 1343 as enacted to protect civil rights.

MR. NATHANSON: I contend, your Honor, that the Social Security Act is one of the laws described by section 1983, and when a State acts to deprive a citizen of Federal rights under color of State law, therefore, this jurisdiction to hear that remedy under 1343(3) and 1343(4).

QUESTION: Not because of the constitutional supremacy clause, but just because a Federal right is conferred by Federal statute.

MR. NATHANSON: Yes, your Honor.

QUESTION: Why isn't it a constitutional claim in itself under the supremacy clause?

MR. NATHANSON: It would be a constitutional claim.

QUESTION: You just said it isn't for the purposes of a three-judge court statute.

MR. NATHANSON: We didn't raise it in terms of a supremacy clause being the constitutional basis, although in fact that is true, that is a basis, but we didn't raise --

QUESTION: We can't strike down a State statute except on constitutional grounds, can we?

MR. NATHANSON: No, your Honor, except --

QUESTION: Well, if we strike it down because it's in conflict with a Federal statute, it's because the Constitution requires it.

MR. NATHANSON: Under the supremacy clause.

In 1971,the New York State Department of Social Services promulgated regulation 352.7(g)(7) of title 18 of the New York Code of Rules and Regulations. That regulation was submitted to HEW for approval. HEW, on several occasions, notified New York that that regulation failed to satisfy Federal requirements. Notwithstanding such noncompliance, New York State continued to give the regulation statewide application and continues to receive Federal funds.

The regulation is known as the recoupment regulation. It permits the local Department of Social Services --

QUESTION: Mr. Nathanson, let me ask you one question. Do you think 1983 reaches every Federal statute that confers a right on someone?

MR. NATHANSON: I think 1983 was intended to grant that type of remedy where States deprive one of a Federal right,

that 1983 covers the full gamut of Federal rights and was intended, unless Congress expressly limited the jurisdiction of the courts to hear that type of claim, your Honor.

QUESTION: You mean Federal rights whether they derive from the Constitution or Federal statutes, treaties, and so forth? 1983 reaches all of those?

MR. NATHANSON: Constitution and laws, your Honor.

QUESTION: Can you think of any right under a Federal statute that would not be within the reach of 1983 absent a declaration by Congress excluding it? It takes an affirmative exclusion, is that your position?

MR. NATHANSON: Yes, your Honor.

The recoupment regulation permits a local Department of Social Services to provide a duplicate rent payment to a recipient of public assistance who is threatened with eviction for nonpayment of rent, but mandates that that duplicate rent payment be recouped over the next 6 months in equal amounts. In very practical terms, the rent recoupment regulation solves the immediate crisis, but creates a far more serious crisis since during the period of the recoupment, the family is deprived of the very means to sustain themselves, to feed, clothe, or house themselves.

The State argues that this rent recoupment regulation is designed to deter mismanagement. As the record demonstrates, the recoupment regulation does not turn on mismanagement.

Petitioner Hagans and her two children reside in a county with an acute housing shortage. The State has conceded petitioner was able to secure housing within the rent schedule. Petitioner received a shelter allowance from the local Department of Social Services in the amount of $165. She was unable to find housing at that allowance. She then found housing at the amount of $200 a month. The local agency approved that housing. She was simply unable to continue making the rent payments with the monies intended for other basic needs, and over a period of time fell into arrears. She was evicted. She was rehoused by the Department in a neighboring county. The money used to rehouse her was then deducted in full from the next month's rent, leaving a family of three with $17 for the entire month's needs.

QUESTION: Was she rehoused at her request?

MR. NATHANSON: She was homeless, your Honor. She found the housing.

QUESTION: But she wanted the State agency to do that, I take it.

MR. NATHANSON: Yes, she did.

The recoupment regulation is implemented with or without the consent of the recipient. In the case of two of the named petitioners, local Department of Social Services paid rent directly to the landlord to forestall a nonpayment proceeding without the prior consent or even knowledge of the

recipient, and then recoup the money from the subsequent month's grant. So it doesn't really turn on the consent of the recipient or the knowledge of the recipient either. And in those two cases, the recipients had not paid rent -- in one of those cases the recipient had not paid rent because she was protesting the failure of the landlord to make repairs. In effect, the recoupment regulation deprived her of an opportunity to even assert that defense.

In the complaint filed in the district court, petitioners asserted three basic claims: They asserted an equal protection claim alleging that the rent recoupment regulation irrationally creates two classes of needy dependent children in New York State. Children whose parents require an emergency rent payment are deprived of their right to have their grant determined in accordance with the State standard of need, while other children who receive assistance under the program have their assistance determined in accordance with State needs.

The petitioners also contended that the regulation invidiously discriminates against the needy dependent children because it punishes them for conduct over which they have no control. They in no way were guilty of mismanagement or in no way created the crisis at hand.

QUESTION: Would the same thing possibly be true if the rent allotment were taken out to buy three color television

sets and the money all used up? Would you then make this same dichotomy of classes that the children of parents who went out and bought three television sets were treated differently from the children of parents who were more prudent?

MR. NATHANSON: The intended beneficiary of the entire State's program which is financed by the Federal Government is to provide financial protection for the needy dependent children.

QUESTION: Would you make the same argument, that is my question.

MR. NATHANSON: Those children who were deprived of assistance for a period of six months on the basis of parents' conduct, your Honor, I would make the same argument.

QUESTION: Yet the payment is made to the parents, is it not?

MR. NATHANSON: The State chooses to whom the beneficiary -- or as one lower court characterized it, the conduit of the assistance is going to be. The State can choose the parent, or it can choose some other relative or responsible person to disperse the money on behalf of the intended beneficiary, which is the child.

QUESTION: You feel this doesn't parse itself into family units as such? You want to keep the children separate and distinct from in some instances mismanaging parents?

MR. NATHANSON: I think the sole aim of the assistance

program was to protect the dependent child.

As further evidence of that, your Honor, Congress has recognized mismanagement can be a problem. We don't argue for a moment that everybody who requires a duplicate rent payment has in fact mismanaged a grant. We say that it doesn't necessarily require that and the facts show that. But Congress has said mismanagement is a problem and has established nonpunitive measures to provide with that problem, one being a restricted check, that the parent is not free to spend a check any way they choose, but has to use it for intended purpose.

QUESTION: Mr. Nathanson, if you should prevail here, what is the likely result in the New York system? Is it a likelihood that they will then do away with advances to prevent eviction?

MR. NATHANSON: Your Honor, there is,and HEW has said so in a brief they filed as an amicus in a lower court, HEW said there is ample provision for New York State to deal with this particular crisis without resort to recoupment regulation. And that remedy is emergency assistance which doesn't require repayment on the part of the parent. It can be given only once in a 12-month period to resolve a crisis.

QUESTION: Who pays the emergency assistance then?

MR. NATHANSON: The assistance would be paid by the State with reimbursement by the Federal Government. In fact,

it's a measure that Congress particularly enacted, I think it was in 1966, because they were concerned, too, with the problem of mismanagement and wanted to deal with it in a rehabilitative way rather than a punitive way. This regulation, I feel, is a punitive measure that deals with the problem.

QUESTION: Punitive just because it gets back what it ultimately paid out?

MR. NATHANSON: Punitive because, again, if we are to assume that the intended beneficiary of the payment is a child, a dependent child, because it penalizes the child for conduct over which the child has no control.

QUESTION: But the child would have suffered if there had actually been an eviction and there had been no home to move into, wouldn't it?

MR. NATHANSON: Yes, certainly a family disrupted would suffer.

QUESTION: So the State's action was really to prevent that sort of harm to the child.

MR. NATHANSON: Curiously under the New York State -- and the record indicates -- where a family is actually evicted and rehoused by the State in a motel, the State -- because they haven't paid their rent -- they are rehoused in a motel, the State doesn't exact recoupment from the recipient. The motel cost is paid in full. That in effect is duplicate payment. And the family continues to receive the full benefits

of their grants. So the State hasn't even treated all who they allege have mismanaged the same way.

QUESTION: Let me go back to my question. I take it it's your position then, that if you prevail here, you are in no way affecting adversely the very children that you are intending to benefit by being here.

MR. NATHANSON: To answer your question, they will not be adversely affected by determination that the regulation is in violation --

QUESTION: You will not dry up other sources of assistance?

MR. NATHANSON: No, your Honor. And HEW has said that in their brief.

QUESTION: I must say I then misunderstand wholly what the case is about. I thought that if you prevailed here, all that would happen would be that the case would go back to the district court for trial. I thought this was only a jurisdictional question before us.

MR. NATHANSON: The district court has determined the Social Security Act claim on the merits. The district court never addressed itself to the merits of the constitutional claim beyond merely finding that it was substantial.

QUESTION: And the only questions presented, as I read them in your brief and as I understood them, and I have read these briefs at some length last Sunday, were jurisdictional

questions.

MR. NATHANSON: Jurisdictional questions, correct.

QUESTION: What do you mean if you prevail here, somebody is going to have to pay some money? If you prevail here, it is going back to the district court for trial, isn't it?

MR. NATHANSON: I thought Judge Blackmun's question meant if we ultimately prevail, what would be the impact on New York State?

QUESTION: That's not here.

MR. NATHANSON: No, that's quite true.

QUESTION: All we have here is jurisdiction, unless I quite misread and misunderstood the briefs.

MR. NATHANSON: No, you haven't misunderstood the briefs. Perhaps I misunderstood the question. I thought you were referring to what would happen if this regulation was ultimately struck down, what would the significance of it be.

QUESTION: Did you argue in the Court of Appeals thatunder 1983 and 1343 a supremacy clause argument, namely, a claim that a State statute is in conflict with a Federal statute and therefore invalid? Did you argue that that kind of a claim is a constitutional claim within the meaning of 1983?

MR. NATHANSON: In the circuit court the argument centered around whether or not the equal protection claim was

a nonfrivolous claim for jurisdictional purposes.

QUESTION: Again, how about answering that question. Did you argue that or not, that this conflict supremacy matter was a constitutional claim within the meaning of 1983?

MR. NATHANSON: No, your Honor, I did not.

QUESTION: Why not?

MR. NATHANSON: The lower court had found jurisdiction--

QUESTION: I don't care about the lower court. Jurisdiction was challenged in the Court of Appeals, wasn't it?

MR. NATHANSON: There was a first panel of the Court of Appeals which unanimously found jurisdiction under 1343(3) as a basis for jurisdiction in Carter v. Stanton. The State attacked the jurisdiction on the basis of a lack of a substantial constitutional claim, and we responded on that basis, your Honor.

QUESTION: And what did the Court of Appeals hold?

MR. NATHANSON: The Court of Appeals, the second Court of Appeals panel?

QUESTION: Yes.

MR. NATHANSON: The second Court of Appeals --

QUESTION: The decision you are wanting reviewed here.

MR. NATHANSON: The second Court of Appeals panel determined that on the facts as disclosed in the pleading failed to present a substantial constitutional claim.

QUESTION: Did you argue in response to the State's

claim that there is a constitutional issue here, namely, one of supremacy? Did you argue that?

MR. NATHANSON: No, your Honor.

QUESTION: Your very opening sentence in your complaint, page 4, is that you seek a declaration that title 18 of the New York Code is in violation of the Social Security Act and also the equal protection clause.

MR. NATHANSON: Yes, your Honor.

QUESTION: What does that first sentence mean? It's in violation of the Social Security Act; isn't that a supremacy clause allegation?

MR. NATHANSON: We allege that there was jurisdiction under 1343(3).

QUESTION: We are arguing on your side right now, remember that.

(Laughter.)

Do you know of any cases in this Court that say that a substantial supremacy clause argument is not a constitutional question within the meaning of 1983?

MR. NATHANSON: No, your Honor.

QUESTION: Well, let's assume that it is, isn't this case over?

MR. NATHANSON: That would be the end of the case.

We argue that the court below erroneously concluded by an erroneous application of the standard for determining

substantiality of a constitutional claim that this claim was frivolous. This Court has repeatedly held constitutional claims are frivolous only if so attenuated as to be without merit or its unsoundness so clearly results from the previous decisions of this Court so as to foreclose the possibility that it could be a subject of controversy. Recently, in the case of Goosby v. Osser, this Court interpreted the phrase "wholly without merit" in the context of prior decisions and determined that constitutional claims are frivolous only if they are inescapably foreclosed by prior decisions of this Court. The court below cited no controlling authority that forecloses this constitutional claim. The court appears to have based its finding that the equal protection claim was insubstantial on the basis of this Court's holding in Dandridge v. Williams. We submit that the case of Dandridge v. Williams is not dispositive of the threshold question of jurisdiction. Dandridge determines the appropriate standards to apply to an equal protection challenge in the area of social welfare legislation.

The State argues that Dandridge should be given a broad, sweeping application so as to foreclose any equal protection challenges in the area of social welfare legislation. Recent decisions of the Court suggest that no such broad, sweeping application has in fact been given to Dandridge or should be given. The case of Carter v. Stanton is a case in point. In Carter v. Stanton, the plaintiffs challenge the

Indiana welfare statute on both statutory and equal protection grounds. The district court found that the equal protection argument was foreclosed by this Court's holding in Dandridge. On appeal this Court found jurisdiction at citing Dandridge in support of its finding of constitutional substantiality. We maintain that whether or not the district court properly concluded that the constitutional claim is insubstantial, that there is independent jurisdiction to determine the Social Security Act claims under both 1343(3) and 1343(4)since this action was founded on a violation of section 1983 of the Civil Rights Act.

Section 1983 is an act of Congress providing for equal rights of citizens within its meaning on two bases: That 1983 is an act providing for the protection of civil rights within the meaning of 1343(3) and that 1983 is an act providing for equal rights within the meaning of 1343(4). Section 1983 provides for civil action to redress deprivations under color of State law of any right, privilege, or immunity secured by the Constitution and laws. In this case petitioners seek to redress rights that have been secured by Federal law, namely, the Social Security Act. And while petitioners may have a right in some absolute sense to a level of benefits or any benefits at all, they do have a right so long as New York State continues to receive Federal funds to have their eligibility determined in accordance with Federal standards.

QUESTION: Mr. Nathanson, may I ask you a question? Is the only reason that title 28 of the United States Code, section 1331, is inapplicable here is because of the want of the requisite jurisdictional amount?

MR. NATHANSON: 1331 --

QUESTION: Do you understand my question?

MR. NATHANSON: Yes. I don't think it would satisfy the monetary requirements of 1331.

QUESTION: Is that the only reason?

MR. NATHANSON: It was never raised as a defense or --

QUESTION: Well, in your submission, why is it you have to argue about 1343(3) and (4)? Wouldn't 1331 be available to you?

MR. NATHANSON: It would be available, if we could demonstrate that we satisfy the monetary requirements.

QUESTION: Then the answer to my first question is yes, that's the reason and the only reason?

MR. NATHANSON: We cannot satisfy the monetary requirements.

QUESTION: Right, because of the jurisdictional amount.

MR. NATHANSON: Yes, sir.

QUESTION: That never came through too clearly. I guess it's implicit all through these briefs. That is the sole reason, is it, that 1331 is not available?

MR. NATHANSON: That is correct.

QUESTION: Thank you.

MR. NATHANSON: 1343 -- this Court has often observed judicial construction of a statute begins by looking at the words of the statute itself. The words of 1343(4) are clear and leave no room for doubt, we believe, that claims brought under 1983 were intended to be covered by 1343(4). In Lynch v. Household Finance Corp., this Court held that Congress intended to give broad, sweeping protection to basic civil rights by the enactment of 1983, the right to enjoy property being one of those rights, whether that property be a home, a savings account, or even a welfare check. Just as a right not to be deprived of property without due process of law is a right secured by the Constitution, we maintain so then the right to receive benefits provided by the Social Security Act is a civil right within the meaning of 1343.

The Court has recently recognized in Moor v. County of Alameda that 1983 is an act which protects civil rights within the meaning of 1343(4). Other courts specifically addressing themselves to this question have reached the same conclusion. Only the Second Circuit has rejected 1343(4) jurisdiction, but has done so without any rationale or reasoning for its determination. In the court below, the court concluded that there was no 1343 jurisdiction and dismissed the case on the basis of Almenares v. Wyman. Almenares v.

Wyman, a Second Circuit case, determined that there was jurisdiction because of a substantial constitutional claim, but rejected 1343(4) jurisdiction, citing McCall v. Shapiro. McCall v. Shapiro did discuss 1343(4) jurisdiction, found no basis for jurisdiction, but did so on the basis of the personal liberties property rights distinction, which this Court later rejected in Lynch v. Household Finance. Thus, it is clear that the Second Circuit has yet to come up with any convincing rationale for rejecting 1343(4) to 1983 suits.

The State argues that the one roadblock to jurisdiction, to 1343(4) jurisdiction, is a brief description in the House report accompanying the bill which described it as merely a technical amendment to a preceding section of law. We submit that that limited view is not accurate, since the preceding section of law to which it refers was specifically eliminated by floor amendment and was not enacted into law. Even had that section been enacted into law, its clear, plain words of 1343(4) go beyond the ascribed purpose of the committee. Congress surely intended the act to mean something. The Senate would not have passed the section of law to refer to a preceding section it had knowingly rejected.

Some further indication of the purpose of 1343(4) can be gleaned from the very title itself which is an Act to strengthen civil rights enforcement. It's only with the interpretation that we suggest be given to it that it can be

considered an act enlarging and enhancing Federal civil rights enforcement. This Court has already interpreted 1343(4) as expansive of Federal jurisdiction. In the case of Jones v. Alfred H. Mayer, a private corporation was sued for discrimination in refusing to sell a home to a person because he was a Negro. 1343(4) was the only statute available to provide jurisdiction over a private suit. The suit was brought under 1982. This Court found jurisdiction under 1343(4).

If the State is correct that 1343(4) is too technical a provision to provide jurisdiction to 1983, it surely would be too technical to provide jurisdiction for 1343(4).

We submit further 1343(3) provides an independent basis for jurisdiction. 1343(3) and 1983 were intended, so the legislative history shows, to be coextensive in scope and that Congress never intended to create a gap between the two. Moreover, 1983 is an act that protects equal rights since it guarantees a Federal forum -- equal access to a Federal forum to secure those rights secured by Federal law.

QUESTION: Mr. Nathanson, are you familiar with the treatment in the opinions in the Rachel and/or Peacock cases of almost identical language in the removal statute?

MR. NATHANSON: Yes, sir.

QUESTION: Where we held, as I remember, that an act of Congress providing for equal rights of citizens meant just that, meant what it said. It didn't mean any act of

Congress or any constitutional provision either.

MR. NATHANSON: I think, your Honor, in response to your question, that Congress often uses different language in the same Act to have different shades of meaning.

QUESTION: My question was, were you familiar with the language in Peacock v. Greenwood, that was my question.

MR. NATHANSON: Yes, I am. I think that the equal rights language is not limited to suits involving racial equality.

QUESTION: Let me first -- yes, you are familiar with that language.

MR. NATHANSON: Yes, sir.

QUESTION: Do I recollect correctly that it was held in those cases that similar or identical language meant legislation providing for equal rights. It didn't even include, for example, the First Amendment.

MR. NATHANSON: Yes, you are correct in your recollection of the case.

QUESTION: Now, how would you distinguish that?

MR. NATHANSON: Georgia v. Rachel involved 1443 -- 1443 was a removal statute. Removal statutes' origin can be traced to the 13th Amendment which was an act to eradicate the badges of slavery. 1983, on the other hand, has its origin in the 14th Amendment, which has not been interpreted and limited solely to racial discrimination cases, but given an

interpretation far beyond that. The Court construed 1443(1) in a narrow way because the removal section divests and removes a case from the State court system. It deprives the court of the power to decide a case. It's a source for a possible friction between two sovereignties. That being so, the Court gave it a narrow construction. We submit that the legislative history of 1983 doesn't require and certainly demands a more expansive interpretation, as this Court has already interpreted 1983 to apply to a full gamut of Federally protected rights, not just those limited in terms of racial equality.

QUESTION: That's 1983. I was referring to 1343(3).

MR. NATHANSON: 1343(3) and 1983 derive from the same statute. At the very outset there was intention on the part of Congress to create Federal jurisdiction over all 1983 actions without distinction. I think it's because of the history of the two sections together that we make the argument that it should be given coextensive application. There was no intention on the part of Congress to create a gap between the creation of a Federal right and a forum where that right can be heard.

QUESTION: Is the language of 1443(3) the relevant language substantially identical with that of the removal statute dealt with in Rachel and Peacock?

MR. NATHANSON: Substantially identical, yes.

MR. CHIEF JUSTICE BURGER: Mr. Colodner.

ORAL ARGUMENT OF MICHAEL COLODNER ON

BEHALF OF THE RESPONDENTS

MR. COLODNER: Mr. Chief Justice, and may it please the Court, at issue in this case is a regulation of the New York State Department of Social Services in which the State makes an additional rent payment to welfare recipients that is over and above the regular shelter allowance which the recipient should receive, and then recoups it over a period of six months.

The requirements for this regulation are that the recipient, for whatever reason, misallocates his or her regular shelter allowance. The recipient then becomes threatened with eviction. The Department then steps in at the request of the recipient and offers them an opportunity to remain where they are living and therefore receive a duplicate rent payment. But if they choose this option, they will have to repay this extra amount over the course of the next six months.

Now, the petitioners in this case challenged this because they claimed it is a denial of equal protection, because those who are subject to recoupment are in some manner being treated differently from those who are not subject to this recoupment, even though this other class never received the extra payment.

The Second Circuit found this claim to be insubstantial and, as such, found that there was no jurisdiction to decide the pendent statutory claim which involves whether the New York

State regulation at issue violates the Social Security Act.

QUESTION: Why is it pendent? Maybe you can help enlighten me why a claim that the State statute violates the Federal statute isn't a substantial constitutional question in itself within the meaning of 1983 and 1343.

MR. COLODNER: I would suggest, your Honor, that the 1983 and 1343 deal with a specific Amendment, they deal with the 14th Amendment to the Constitution. It's the civil rights statute. The wording of those statutes are such that it deals with rights protected by the Constitution and laws or laws protecting equal rights.

QUESTION: You mean all of our cases -- First Amendment rights aren't covered by 1983?

MR. COLODNER: First Amendment rights would probably be covered by 1983.

QUESTION: That isn't a 14th Amendment thing, is it?

MR. COLODNER: Well, it depends on how broadly you would read 1983. 1983 was passed specifically to enforce the 14th Amendment, which is not a self --

QUESTION: You say anyway -- your short answer is that just by the construction of 1983, the constitutional claims it's referring to are more limited than the Federal Constitution, and that certainly it doesn't include the supremacy clause claims.

MR. COLODNER: I suggest that in any event it could

not include the supremacy clause because there would be no reason for Congress to put in jurisdiction for"and laws"or laws protecting equal rights if in fact Constitution --

QUESTION: Oh, no; oh, no; oh, heaven's no. No. I wouldn't think so. You could constantly be asserting claims under a Federal statute that a State might be interfering with without having a State statute being in conflict with it.

MR. COLODNER: Yes, that is correct. But I would think that in terms of what Congress meant when they established jurisdiction to hear claims under the Constitution using the supremacy clause argument, they established 1331 which is the general --

QUESTION: Do you know of any cases that deal expressly with this issue?

MR. COLODNER: I do not know of any cases.

QUESTION: But that issue is here, isn't it?

MR. COLODNER: I don't believe it's here because it was never raised --

QUESTION: I know, but if we are dealing with jurisdiction, I suppose we have some freedom that we normally don't have in terms of issues.

MR. COLODNER: That could be, your Honor.

QUESTION: And if the issue is here or is open, as far as you know, it would be the first time that this Court has ever decided the supremacy clause issue is not a constitutional

issue within the meaning of 1983 and 1343.

MR. COLODNER: This Court has never really decided that type of issue at all. I am aware of the decision, I think it was last year, of the scope of the three-judge court statute which held that --

QUESTION: Was that Swift v. Wickham?

MR. COLODNER: Well, Swift v. Wickham was more than last year, which held, if my recollection is correct, that the supremacy clause does not include within a three-judge court statute.

QUESTION: 2281.

MR. COLODNER: 2281, that's correct.

QUESTION: That's Swift v. Wickham.

MR. COLODNER: That's correct.

QUESTION: That's for three-judge court cases.

MR. COLODNER: Insofar as the question that your Honor has asked, I am not aware of any case that ever reached that question.

I point out that in this case --

QUESTION: Why couldn't this action have been brought under 1331?

MR. COLODNER: Because there is no monetary amount to $10,000 in dispute.

QUESTION: That's the only reason?

MR. COLODNER: It seems to me that you can always

bring a claim. 1331 is general Federal question jurisdiction. This is a claim arising out of a Federal statute. 1331 says arising out of Federal statutes, there would be no reason why it couldn't be brought.

QUESTION: Why is it arising out of a Federal statute if you bring a declaratory judgment action to have a State statute stricken down? What kind of a 1331 claim is that? Under a Federal statute?

MR. COLODNER: It's a right arising under the Constitution or laws of the United States.

QUESTION: Well, which?

MR. COLODNER: It depends on how the plaintiffs frame their --

QUESTION: Let me frame it for you. The complaint says the State statute says so and so; the Federal statute says so and so. I want a declaratory judgment action that the State statute is unconstitutional because it is in conflict with a Federal statute. Now, is that a constitutional claim or a claim under a Federal statute?

MR. COLODNER: I think that presupposes your initial question is where does constitutionality come into this. With the supremacy --

QUESTION: You know it has to have constitutional authority to strike down a State statute.

MR. COLODNER: I would think that if a Federal statute,

a State statute conflicted with a Federal statute.

QUESTION: Why? Why is that then unconstitutional?

QUESTION: The Federal statute prevails.

QUESTION: Why?

MR. COLODNER: .. supremacy clause.

QUESTION: It has to be.

MR. COLODNER: I think if you go back to the history of the Civil Rights Act here, there was no indication that it was ever meant to include this type of broad panoply of including every single State law that is perhaps contrary to every single Federal law. There is nothing in the history of the Civil Rights Act that leads to that conclusion. And while you can make a verbal argument to that effect, I don't think that the history bears it out.

Now, insofar as the --

QUESTION: Nothing said in our cases in the last four or five or six years is in conflict with your position on that?

MR. COLODNER: I think, your Honor, that if you take the cases of the last four or five years, that there really is not a conflict, with the exception, perhaps, of some dicta in one or two cases because 1983 -- and let's get right into 1983 -- the claim of the petitioners here is that it provides a remedy for all Federal statutes. And they look to the language which says all rights secured by Constitution and laws, and they claim laws includes the Social Security Act

and therefore they have a right to come into Federal court at least to allege a Federal cause of action under 1983. But the 1871 Act, which is the basis for 1983, did not mention rights secured by law; it only mentioned rights secured by the Constitution. The change that occurred in the 1871 Act came during the revision when the 1866 the 1870 and the 1871 Acts were all codified together and clarified and put into one provision, and here the reviser put in the words "and laws." And I think that since there was no explanation as to why the reviser put this in, it would appear that he was referring to the laws that were included in that whole civil rights package which were in essence the 1866 Civil Rights Act and the 1870 Civil Rights Act. There is no basis in the history of the Civil Rights Act that Congress ever intended to create a Federal cause of action for every conceivable Federal statute that would ever come into existence, aside from statutes that enforced the 13th or 14th Amendments. In fact, the only Supreme Court case that ever considered this issue as to what the scope of "and laws" was was a 1900 Supreme Court case, and it held that this language did not apply, at least to a patent rights case, holding that 1983 applied to civil rights only, at least showing that the Supreme Court in 1900 believed that 1983 was a fairly narrow statute.

Now, when this Court has spoken of 1983 in terms of the rights that it protects, it has spoken of the protection

of constitutional rights, and this Court has never held 1983 to its literal language as witness the case of Tenney v. Brandhove.

I think it is important to note that when Congress passes a Federal statute, they generally provide their own remedy within the statute. The Social Security Act when it was passed provided no remedy in Federal court for recipients of AFDC benefits, and I would suggest that there was no reason why Congress,which always provides its own remedies when it passes any new statute,would pass a statute which creates a Federal cause of action as to every conceivable future Federal law in any field whatever -- banking tax -- it makes no difference, simply because State action might be involved. There is just no reason why Congress would pass this statute and there is no reason to give the language of "and laws" in 1983 the broad interpretation that petitioners want to give it and that this Court has stated in dicta might apply.

I would suggest that even if 1983 is as broad as petitioners say it is and if it includes every single Federal law, it is clear that Congress did not provide jurisdiction in the Federal courts to hear this cause of action because the language of 1343(3) is narrow. It says deprivation of rights secured by the Constitution and of any Act of Congress providing for equal rights.

Now, the history of that clause also is very unclear. In the 1874 codification the district court had jurisdiction

over rights secured by any law, the circuit court on the other hand had rights secured by any law providing for equal rights. These were probably meant to be concurrent because the basis of this was the same 1866 Act which did provide concurrent jurisdiction. I have shown in my brief that there is a draftsman's note on the circuit court provision that shows it was intended to be narrowly applied to equal rights statutes. In 1911 Congress explicitly chose the equal rights language which shows the full intent of Congress that it at least believed that the original jurisdiction was limited to equal rights provisions.

Now, it's very interesting that the petitioners have come to this Court and have really changed the whole structure of their argument, because in the lower court they were arguing that the Social Security Act was the Act of Congress providing for equal rights, or the Act of Congress providing for civil rights. Now they have changed the argument. They say that 1983 itself is such an Act. And I would suggest that this is really a bootstraps argument, because 1983 is a procedural statute. It creates a cause of action where someone is deprived of rights that are enumerated somewhere else. It is, in the words of 1343, the civil action authorized by law to be commenced. That's right on the first line of 1343. It is not the substantive Act providing for equal rights. If, in fact, 1983 were an equal rights Act, there would be a lot of problems

just on the language of the statute itself. Number one, it would be inconsistent to say that 1983 is the authorizing law and at the same time is a substantive law. Number two, you would have a complete redundancy here if 1983 is an equal rights Act, because 1343(3) refers to rights secured by the Constitution, which means that the language of 1343(3) would be redundant if it includes 1983 which already refers to rights secured by the Constitution. All Congress would need have done would just be to say there is jurisdiction under any equal rights statute. There would be no reason even to mention the Constitution if 1983 is brought down into the jurisdictional provision.

And thirdly, I would say, and incongrously, if 1983 is an equal rights Act, its language"and laws" is much too broad to encompass itself in that narrow definition.

I think the key to this case is the decision in Georgia v. Rachel because there, dealing with the same language in the removal statute, this Court held that the term "any law providing for equal rights" was narrow. It meant laws dealing with historic equal rights, and specifically said it did not mean 1983. That's within the language of that opinion.

I think it's very interesting to note that both 1443, which is the removal statute, and 1343(3) which is the statute at issue here, derive from the very same provision of

the 1866 Civil Rights Act, which is subsection (3), the very same provision. It would seem that if 1443 was that narrow, 1983 which was codified the exact same year as 1443 must have the same meaning.

I would also suggest that Congress was so concerned about passing 1343(4) 90 years later just to add the right to vote, they evidently also considered the phrase "equal rights" to have a very narrow meaning. And in fact, I would point out that the history of 1343(3) shows that the "and laws" language of 1983 was probably meant to be more limited than this Court had hinted it might be.

Now, the petitioners also argue that somehow or other in 1957 Congress passed a new jurisdictional provision to the Civil Rights Act, 1343(4), which somehow changed the course of all civil rights jurisdiction. The jurisdictional provision there is an Act of Congress providing for the protection of civil rights, including the right to vote.

What does this really mean? Civil rights including the right to vote. And if you look to see what Congress was really trying to do here, you will see essentially that what was at stake in 1957 was a voting rights act. The House report called this particular provision a technical amendment. The House debate only dealt with what they called civil rights and specifically included,by rulings of the House chairman, economic rights, of which we are obviously dealing with here.

The Senate debate is even more interesting, because it limited itself solely to voting rights, because of a very strong reaction on the part of those Senators favoring States' rights that this particular Civil Rights of 1957 might be too broad because historically this would be the first Civil Rights Act that was passed since Reconstruction.

The provision to keep in what became 1343(4) was proposed by Senator Case of South Dakota, and he throughout the debate states that the reason he wants this provision in is because it deals wholly -- and he says that -- wholly with the establishment of the jurisdiction of Federal courts to entertain suits relating to the right to vote and just the right to vote.

I think what you have here with 1343(4) is an Act which creates jurisdiction in the Federal courts to hear suits relating to the right to vote. Congress was very uncertain as to what the jurisdictional limits of 1343(3) were and they were clarifying it. In fact, the caption is very interesting here. The caption of 1343 just says "Civil Rights." When 1343(4) was added in 1957, the caption was amended to say "civil rights and elective franchise." That was all that was added. So what you have here essentially when you deal with civil rights in 1343(4) is the same rights that were in 1343(3), except that it includes the right to vote.

Now, it is true that 1343(4) does not include --

QUESTION: You don't think 1343 included the right to vote?

MR. COLODNER: Whether I think it or the Congress thought it?

QUESTION: That's in a whole lot of cases.

MR. COLODNER: I don't believe that Congress felt sure whether it did or whether it did not. And since they were dealing in the Civil Rights Act, they wanted to make sure that there would be no jurisdictional contradiction in the statutes between the jurisdiction set forth in 1343 and the jurisdiction --

QUESTION: Do you agree that those Civil Rights Acts were after the 13th, 14th, and 15th Amendments?

MR. COLODNER: Excuse me, your Honor?

QUESTION: After the 13th, 14th, and 15th Amendments? Weren't they to enforce those three Amendments?

MR. COLODNER: That's correct.

QUESTION: And it didn't include the right to vote?

MR. COLODNER: I would think, your Honor --

QUESTION: You can't take that position.

MR. COLODNER: Your Honor, I would think that --

QUESTION: Or do you know what the 15th Amendment is?

MR. COLODNER: The 15th Amendment, your Honors, provides for the right to vote. But Congress was already concerned about the fact that what did the equal rights statute mean, and also 1343(4) provides for a right of action

not under color of State law because 1971, the Voting Rights Act, which was amended,provided for the Attorney General to bring suits against private individuals acting under color of State law or not under color of State law. And this was one of the reasons why they had to put in some different provision to allow for these suits to be brought into Federal court without a jurisdictional amount not under color of State law.

But I don't believe there is anything in the history of 1343(4) which suggests that the subject matter of the Civil Rights Act was being expanded any more than debate indicated. I would suggest that the rights of 1343(4) are no greater than the rights of 1343(3), and that Congress never intended that the Federal courts have jurisdiction over suits that arise under the AFDC provisions of the Social Security Act. It's very interesting that when the Social Security Act was passed in 1935, there was jurisdiction provided in the Federal courts for claims arising under the Old Age provision but not under the Aid to Dependent Children provision. This evidences an intent on the part of Congress that the Federal courts were not going to hear every single minor AFDC claim outside of the general Federal question jurisdiction of 1331 which is not at issue here because there is no claim that $10,000 is in dispute.

Now, I would like to point out that because there is no jurisdiction under the Social Security Act per se and

Congress never intended there to be jurisdiction under the Social Security Act per se, that the only issue left in this case is whether this Court, by virtue of this claim being pendent to a substantial constitutional right, and that was the issue which the Second Circuit decided when they held, no, that constitutional claim is not substantial and therefore we don't have jurisdiction to decide this pendent claim.

The standard that obviously applies here was the test of obviously without merit. This Court has used it all the time. The standard did not change with Goosby v. Osser but was reaffirmed there. I think if you look at the equal protection violation here, it's frivolous. What are they claiming? They are claiming that they are getting more money one month and less money the next month and that somehow or other they are being treated as a violation of equal protection. But the essence of equal protection is equal treatment and they are being treated exactly equally. They receive a duplicate payment to which they are not entitled and to which nobody else gets, and the subsequent month or the subsequent six months they pay back this duplicate payment to be put in the exact same effect as any other welfare recipient. In fact, I would suggest that if this is a constitutional claim of any substance and if petitioners were to prevail here, it would be just as substantial for any other recipient who did not get the recoupment claim to bring a civil rights action in this Court

and claim a denial of equal protection because they don't get extra payments and they have to live within a tight budget.

I think that the Second Circuit clearly determined this to be frivolous because, as the Second Circuit says, the purposes of equal protection are served by treating all alike without granting special favors to those who have misappropriated their rent allowance.

Now, since this claim is obviously without merit, as it must be, there is obviously on any minimal, rational basis test a stake in allocating its limited funds so that every recipient receives an equal share. We don't put this thing in to encourage mismanagement or discourage mismanagement. That's not the issue here. The issue is that we are trying to treat all of these recipients equally. We are not required to give them this extra rent allowance; we could allow them to be evicted. There is no Federal constitutional or even statutory requirement that we say to these people, "Look, if you choose to stay in the same house and not go through the vicissitudes of eviction, we have to do this for you." We don't have to do it. But we are doing it because we feel that eviction is a very traumatic experience for welfare recipients. But we only have limited funds at the same time and there is certainly nothing unreasonable about this sort of approach to give people extra money to help them out and then to take the money back so that we can in effect treat them the same as

any other welfare recipient.

QUESTION: I suppose there is one remedy which the State could follow if you do not prevail here, a drastic remedy. They could simply refuse to make these payments.

MR. COLODNER: That's absolutely right, your Honor, and in fact I would suggest that that is a very real alternative. If in fact we are not allowed to make these payments because we have to make them to everybody else, is what it comes down to, we will not make them.

QUESTION: Is there any other way that you could ward off the equal protection claims of all the other recipients?

MR. COLODNER: I would say that --

QUESTION: Or else increase everybody, give everybody a bonus.

MR. COLODNER: We would have to give everybody a bonus, or if we were forced to pay this back, we would have to give a ratable reduction to everybody else. We are only dealing from a pool of finite funds. If we start giving more to one group, we are going to have to start giving less to the other group. As a result everyone's grants would be cut, as the Supreme Court has said we can do in Rosado, we can give a ratable reduction, and that would ultimately probably be the result of this. But it would probably be more realistic to assume that if we could not recoup, we just would not give these duplicate rent payments.

QUESTION: This is a question I asked your opponent, of course, and he rather brushed it aside by saying that there were other emergency measures that could be utilized by the State. You disagree with his answer?

MR. COLODNER: I disagree with his answer to this extent: Yes, there are other measures that can be utilized, but I don't think any of the other measures really solve the problem. And this is a very sticky problem. What do you do to people who misallocate the money that they are paid? Well, you can say, give them protective payments, but the Federal Government says you can't give more than 10 percent of all recipients protective payments. The Federal Government, in fact, doesn't even want us to use these protective payments because one of the objects of the Social Security Act is to in fact make people self-sufficient. One court suggested that we sue them, which is absurd. These are people who have no funds. They suggest, well, if the parent can't manage, take the children out of the home. That's certainly more drastic than having them recouping money over six months.

Now, petitioners have said, well, there is this emergency assistance. The New York courts have held that in cases of destitution, where destitution can be shown, they will order the Social Services Department to pay under the emergency assistance provision. But this is a level that you have to reach down to a certain level, and it does not deal with what

would be an ordinary recoupment case. It might or might not occur. There are alternative remedies; there are remedies which have policy implications in all sorts of directions, and New York State has chosen a remedy which allows the person to forestall eviction, forestall being thrown out on the street, being sent to live in a motel somewhere, but at the same time protecting the monies of the State. And I would respectfully submit that this particular choice of New York is entirely rational and is in no way any violation of the Constitution.

QUESTION: You mentioned a motel. Is that true if you go to a motel, you would pay the bill and they don't pay you back?

MR. COLODNER: The State pays the bill at motels.

QUESTION: And the recipient doesn't have to pay it back?

MR. COLODNER: No, the recipient doesn't have to pay that back, but they didn't get the benefit of the extra payment which allowed them to stay.

QUESTION: That's got me in trouble. If you move somebody into a house that is $60 -- well, let's be realistic -- $300 a month, and you pay that, they have to pay the $300 back. Right?

MR. COLODNER: That's right.

QUESTION: If you move them into a motel and pay $300, you don't have to pay that back.

MR. COLODNER: That's right.

QUESTION: And the reason being?

MR. COLODNER: The reason being that it's the State's decision that it is more beneficial to keep the family where they are living rather than to throw them out and force them to live in some motel somewhere away from where they are living with perhaps greater detriment to the children involved.

QUESTION: You mean that some motels in New York are worse than the houses people live in?

MR. COLODNER: I would think that this would require individual --

QUESTION: You don't have any rule about standards of motels, do you?

MR. COLODNER: There are rules for standards on both housing and motels. I would respectfully suggest, your Honor, that living in a motel is not to be preferred to living in a residential community.

QUESTION: I agree on that, but your State decided they would pay the motel bill, I guess, because it's the only way out.

MR. COLODNER: New York State, your Honor, happens to guarantee housing. It's the humane decision on the part of the State. Most States don't.

QUESTION: I'm not talking about humane decisions or what have you. I just have difficulty in understanding that

if you have a family of a husband and wife and two children and you put them in an apartment, they have to pay the money back; if you put them in a two-room motel, they don't have to pay the money back.

MR. COLODNER: You are assuming, your Honor, the question of putting. We are not putting these people in an apartment. We are keeping them in the apartment in which they are used to living. We are not evicting them. And that is a definite difference.

QUESTION: Mr. Colodner, was the argument made to the Court of Appeals for the Second Circuit that's being made here, i.e., that quite apart from what has been called here pendent jurisdiction, that there is independent jurisdiction of this so-called statutory claim, this preemption claim under 1343(3) and 1343(4)?

MR. COLODNER: I would say the argument was made to this extent: That was the jurisdictional basis cited in the complaint, 1343.

QUESTION: Because I have before me here Judge Hays' opinion, and he seems to say that the basic constitutional claim was premised upon that jurisdictional statute, 1343(3), and then he goes on to say that to establish jurisdiction under this statute, a substantial constitutional claim must be advanced, and then he says, for the reasons that you have just told me, this equal protection claim is not a substantial

constitutional claim. And then he ends very abruptly because no substantial constitutional claim was presented, the district court was without jurisdiction to consider the statutory claim urged by plaintiffs, the statutory claim presumably being the preemption claim, which doesn't seem to respond, at least to the argument that is being made in this Court with respect to the independent grounds for jurisdiction of the so-called statutory claim. I wonder if the argument was made to the Court of Appeals.

MR. COLODNER: The argument was made to the extent that 1343 was mentioned in the petitioners' complaint and to the extent that the State's brief,in showing that there was no jurisdiction once there was an insubstantial constitutional claim, set forth the fact that there would be no jurisdiction under 1343.

QUESTION: And the court apparently accepted it without any analysis.

MR. COLODNER: Evidently. I would assume so because it is not in the decision of the court.

QUESTION: The court took the view that once they decided the constitutional claim was not a substantial one, then what they would call the statutory claim automatically fell with it without any consideration at all of any independent jurisdictional basis for the so-called statutory claim. Is that right?

MR. COLODNER: I can only read the opinion as your Honor has read the opinion. I do not know what was in the minds of the judges. I do know what was presented to the court, that the decision is what it says.

QUESTION: But this precise argument, I gather from what you say, was not presented to the Court of Appeals. At least not in the way it's being presented here.

MR. COLODNER: Not in the detail that is presented here, but we did present this argument in response to the fact that there would be no jurisdiction in the Federal court for a claim arising under the Social Security Act if there was not a substantial --

QUESTION: Unless it were pendent to a substantial constitutional claim.

MR. COLODNER: That's correct.

QUESTION: And the Court of Appeals apparently wholly accepted your thesis.

MR. COLODNER: Apparently.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:44 p.m., the oral argument in the above-entitled matter was concluded.)