In the

Supreme Court of the United States

KEVIN J. BURNS, ETC., et al.,
Petitioners,
v.
LINDA ALCALA, et al.,
Respondents.

No. 73-1708

Washington, D. C.
January 22, 1975

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v.	:	No. 73-1708
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Wednesday, January 22, 1975

The above-entitled matter came on for argument at 10:12 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

RICHARD C. TURNER, ESQ., Attorney General of Iowa, State Capitol, Des Moines, Iowa 50319
For Petitioners

ROBERT BARTELS, ESQ., Professor, University of Iowa, College of Law, Iowa City, Iowa 52242
For Respondents

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 first today in Number 73-1708, Burns against Alcala.

Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD C. TURNER, ESQ.

ON BEHALF OF PETITIONERS

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

Burns, the Commissioner of the Department of Social Services of the State of Iowa, against Linda Alcala, Jane Doe and Joan Roe is here on cert from the Eighth Circuit which upheld the decision of Judge Hanson in the Southern District of Iowa in the case of statutory construction of the Social Welfare Act that an unborn child or a mother of an unborn child is entitled to AFDC, Aid to Families of Dependent Children.

It involves Titles IV and V of the Social Security Act passed by the 74th Congress in 1935, Title IV being -- pertaining to ADC or, later, AFDC, Title V pertaining to maternal and child health care.

I would first like quote to the Court part of the relevant statute, 602 Title 42 of the U.S. Code, Section 602 (A)(10), which says that aid -- if a state has ADC and, of course, a state does not have to have a program, as I

understand it, of aid to dependent children, but all, including Iowa, do -- it must furnish with reasonable promptness -- it says that "Aid to Families with Dependent Children shall be furnished with reasonable promptness to all eligible individuals."

In this case, the Plaintiffs were three unmarried pregnant women without children and otherwise qualified for ADC. They had no employment. They were without any savings.

They made application for AFDC for their unborn children.

Then, if I may state the issues which I think are present here, first of the question is, is a pregnant woman a mother before her child is born?

Second, is she, prior to birth, a parent within the meaning of the statute?

If she has no obligation to support her child in regard to diet, nutrition and things of that kind --

QUESTION: When you say "obligation" do you mean legal obligation?

MR. TURNER: Yes, sir, the legal obligation or duty. I f she has none, King versus Smith, which pertained to a substitute father without a legal obligation, and still another decision of this Court which pertained to a stepfather who had not adopted his child and was held to have no legal obligation, was held not to be a parent.

Following that logic and then, perhaps that is stretching logic to extremes, the mother is not a parent if she has no duty to support the fetus.

Now, Justice -- Judge Pell's dissent in the case of Wilson versus Weaver, which I believe was out of the Third Circuit, involving cases from Illinois and Indiana, indicated that neither a parent -- neither mother or father is a parent before birth and that even the real father has no duty to support the unborn child before it is born.

So one of the questions here is whether, perhaps, if a woman has a right to abort her child, she can be said to have a duty to support her fetus.

But let's assume that the pregnant woman is a parent before birth. Are the woman and her fetus, together, a family?

I submit not -- not in the ordinary sense of the meaning of that word and it is families which are to be furnished this aid with reasonable promptness.

Does a needy pregnant woman derive a right to ADC from a fetus? And the ultimate question, then, here before us, is a fetus a dependent child?

Now, dependent child, in the AFDC law, is a defined term.

In Section 606, or what would be 406 of the Act, but 606 of the United States Code, when used in this part, the

term "dependent child" means a needy child, one who has been deprived of parental support or, by reason of the death, continued absence from the home or physical or mental incapacity of a parent and who is living with his father, mother, grandfather, grandmother and a whole series of relatives -- in other words, if the child is not living with one of those relatives including the father or mother -- in a residence maintained by one or more of such relatives as his or their own home, then, under the statutory definition enacted by Congress, it would appear that it is not a child.

Now, there is a far cry between a home and a womb, it seems to me and unless the child is actually in the home, according to all intents and purposes of the statute, it would appear that it is not a child.

Now, in 1971, for the first time -- in February, 1971 -- I believe this is for the first time that HEW or any social -- federal/social welfare agency actually published a rule which made it optional for states to grant payments, to allow payments or to make federal output, federal financial participation is available in payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis.

That, I contend, is the first time the public ever really realized that, the first time it was really published for general circulation.

Now, there is some evidence herein -- or some indication in the briefs that in that ADC Handbook, as far back as 1946, the Handbook, which is of limited circulation given only to local agencies but from the Federal Government and as far back as 1946, they recognized the state's optional right at its option to pay ADC for an unborn child.

And it appears that as of 1971, according to the Alcala case, some 18 states and the District of Columbia made AFDC available; 34 states and territories and jurisdictions including Iowa did not and have not made ADC available to an unborn child.

Now, immediately in the 92nd Congress, I think, upon learning for the first time of this then-published regulation, both the House and the House Ways and Means Committee and the Senate Finance Committee introduced committee bills to make it clear that unborn children were not to be considered entitled to ADC, that they were not dependent children. They were to be excluded.

Now, much is made of the fact that those bills did not pass and I'll get to that in a little bit.

Since 1972, when these bills did not pass, all of these cases have arisen. I think some 18 or I don't know how many courts, lower district courts have decided this and no less than six circuits have now ruled on it and the six circuits hold five out of six that an unborn child or

fetus is entitled to welfare payments under the law.

The one exception is the Wisdom -- the case of Wisdom versus Norton out of the Second Circuit decided in October, 1974. That case had and considered all previous cases from all the circuits and all the lower courts, had those available.

Since then, in December, the Fifth Circuit has also decided this matter but this, again, in favor of the unborn child.

Those cases arose out of Georgia and Mississippi in Parks v. Harden.

Now, Wisdom, in October, had the benefit of the four circuits holding the other way but Parks did not have Wisdom -- no pun intended -- but Parks did not consider the circuit court's decision in Wisdom which, I submit, is extremely well-reasoned.

So, in any event, the score right now for the position that I take is three judges in Wisdom who were unanimous that the fetus is not a child, two dissents coming from Wilson versus Weaver -- one of them -- Judge Pell and Judge Ainsworth in Parks v. Harden also dissented.

And then, of course, there were three district court judges, two from Florida and one from Georgia who wrote opinions. So a total of eight judges have taken the position that fetus is not a child and not entitled to ADC.

Now, what is the basis of the general holding?

I think they can be summed up into about five different categories.

The cases holding that an unborn child is a dependent child, first, they say that the Act is not helpful or clear. You can't tell from reading the Act.

Of course, I disagree, as I'll tell in a little bit.

Secondly, that there is no legislative history, that one case said that the legislative history is opaque.

Absolutely, I disagree. I think there is all kinds of legislative history in 1935.

Third, they say that the HEW interpretations of long standing are entitled to substantial weight and, of course, they are, except for one major flaw and that is, that the Government says and has maintained and an amicus brief has been filed by the Solicitor General that HEW has never really considered that the statute entitles an unborn child AFDC.

They have allowed this as an optional thing but beyond what they, themselves, considered the statute allowed.

QUESTION: General Turner, as I understand it, your opponent's contention is that if it could be allowed even as an option, it must be under the statutory grounds and, therefore, it would be mandatory.

MR. TURNER: Oh, I -- yes, sir. I think that is true. I think if an unborn child is eligible for ADC, that it must be allowed and is mandatory and that there is no optional about it. I don't agree with any optional stand at all.

QUESTION: Then you disagree with the HEW position that it is optional?

MR. TURNER: Yes, sir, I do. I agree with the HEW position that they never have agreed that the statute --

QUESTION: Well, do you agree with the Wisdom holding that the regulation is invalid because the statute does not cover a fetus as an unborn -- as a child?

Wisdom held that the regulation was invalid, did it not?

MR. TURNER: Oh, yes. I do agree that the regulation is invalid and I don't see how you can put a regulation in violation of a clear case.

Now, these cases rely on the triad of King, Townsend and Remillard, three of your cases which say that you can't read in -- you have got to -- you can't look for -- you must, there must be a clear indication of an exclusion from the class of those eligible and there I submit that one doesn't determine if an exclusion can be found until eligibility has been established and I think the courts below have seemed to miss that point and this Court indicated that,

in fact, in the Dublino case where it said, in those cases it was clear that state law excluded people from AFDC benefits from the Social Security Act expressly provided would be eligible.

Well, for example, in Townsend, that was the case where the college student was held to be able to have ADC while going to college. The Act says he can in very clear terms. It is expressed in there.

The Court here goes on to say, "The Court found no room, either in the Act's language or legislative history to warrant the state's additional eligibility requirement."

Here, by contrast, the Act allows for complementary state work incentive programs.

The Dublino case, the distinguishing case, was the one out of New York where they allowed -- they said that the WIN Program did not preempt the state work program.

So I respectfully --

QUESTION: Could we go back a minute here, Mr. Attorney General, to this option. If, from 1940 or '50 onward and currently, the Agency considered this optional, is it your view that this necessarily means that they did not read it as required under the statute?

MR. TURNER: Well, all I can say in that regard is, your HOnor, that in Wisdom, they found -- and they cited the Government's briefs and here the Government has filed an

amicus brief to --

QUESTION: Well, what I am addressing myself to is the argument that there has been an administrative interpretation that this is a rather unique form of administrative interpretation when the Agency said it was optional, by which I take it they meant it was up to the states to just -- to do it whichever way they wanted to do it.

MR. TURNER: Yes, sir. I think that the --

QUESTION: Does that necessarily, in your view, preclude an interpretation by the Agency that the statute required it? At least, they said it was optional.

MR. TURNER: Well, I suppose not. It doesn't any more -- it doesn't any more preclude that view than it does take the opposite position. I rely entirely on what the Government has said in that regard.

QUESTION: Well, the Government -- the Government thinks, perhaps, the regulation is about that regulation because it deals with -- not with whether or not the fetus is a child but whether or not there are circumstances under which a pregnant woman has to be cared for.

MR. TURNER: That's true. That's true. The Government does say that.

QUESTION: Well, you apparently disagree with that.

MR. TURNER: Yes, sir. I disagree with the part that says it is optional but I do agree with the Government

that HEW has never really determined that the statute or thought that the statute included the unborn.

QUESTION: Well, what the Government says, as I read them, is that the option was not based upon any understanding that the fetus is a child but was based only on something in favor of needy pregnant women.

I don't follow the distinction but that is what they make.

MR. TURNER: Yes, sir.

QUESTION: And I gather that the Second Circuit thought that they couldn't buy that reasoning either and that they just held that the regulation was invalid. I can't agree with --

MR. TURNER: I agree with the Second Circuit.

QUESTION: And the Government agrees with you, too, that, under the statute, the fetus is not a child and --

MR. TURNER: Yes, sir.

QUESTION: -- but nevertheless, aid can be given, as Mr. Justice Brennan suggests, for some reason.

MR. TURNER: Except that there is nothing in the statute that says that that can be done and they can't --

QUESTION: Well, you don't really care about the latter issue, do you?

MR. TURNER: Well, no, your Honor --

QUESTION: Because what you care is that Iowa

should not be forced to do it.

MR. TURNER: Well, I care in the sense that I represent the taxpayers of Iowa and they pay taxes to the Federal Government and there is no allowance for this so in that respect, yes, I do care.

QUESTION: Well, that may be, but is that --

MR. TURNER: It is not the issue here. What I --

QUESTION: -- the -- it is not the issue before us.

MR. TURNER: Perhaps not, not when it is really boiled down to it.

QUESTION: Of course, in Massachusetts against Mellon about 50 years ago we decided that a state didn't have the sort of interest on behalf of its taxpayers that enabled it to challenge a regulation of the Federal Government. That doesn't prevent you, obviously, from expressing your opinion.

MR. TURNER: Yes, sir. Very well taken, your Honor.

Now, what are my reasons why I think that this is a fallacious reasoning? I'd like to dwell on that a minute. First of all, a statute is to be construed according to its plain meaning.

In the common understanding of man, there are virtually hundreds, perhaps thousands of cases so holding cited under statutes Key number 188. I -- I blush to even mention a citation. And not every statute is open to

construction as a matter of course so you don't even look at the HEW rules and regulations if the statute is clear. Those are fundamental things.

You don't search for ambiguities that don't exist. Ambiguities that may be imagined by an acute and powerful intellect in the quiet of his law office are something that you should not look for and I think that is where those imaginings came here that this statute is unclear.

This statute is very clear. The pattern of it is clear. Just as it was clear in King when it construed what is a parent and whether a substitute parent is a parent and they said that it wasn't.

In King they looked at it, at the entire statute and they considered various sections all through it and said that they were all consistent with the fact that a parent had to be one who was legally obligated to support his trial.

Judge Pell, in our brief, we mention Judge Pell's decision on page 9 of our brief, pointed out in his dissent a good many various sections that indicated the child actually has to be living.

For example, in 42601 are the words "Care of dependent children in their own homes." And now there is a whole list of these in there.

I am not going to go through them but various places throughout the statute cover that and Wisdom versus

Norton noted that a child, when you refer to a child, you are not ever, in normal parlance, talking about a fetus and that is why it is modified by the word "unborn" when you are, or, possibly, in ventre su mere -- which means "in the womb."

The child born -- a child that has already been born is never modified by a term like post-partum, as was used in the Parks case, the most recent case.

You don't say -- one doesn't say, "I have three children," but, rather, "I have two children and one on the way."

QUESTION: But a woman can be said to be "great with child." That is a very common expression.

MR. TURNER: Yes, sir. I think that is true, but that doesn't mean, I don't believe, that the child, in ordinary parlance -- and I think that is unordinary language. I have heard it many times but it isn't common, at least not in my state, in Iowa.

QUESTION: Is it of any interest that, in relation to this, that the Court has held that a fetus, an embryo, is not a legal person?

MR. TURNER: Yes, your Honor. I am going to get to that, certainly, and I hope I --

QUESTION: In your own time.

MR. TURNER: -- I have time here to get to that.

I wanted to mention, though, that there is a legislative history and it is cited in our petition for certiorari on page 9.

There is talk of from birth to death, from cradle to grave and things of that kind.

Also, finally -- and maybe I had best, with that light on, skip to this -- Roe v. Wade held that a child is -- or fetus is not a person.

QUESTION: Within the meaning of the Fourteenth Amendment.

MR. TURNER: Yes, sir.

So I ask, how can it be held on the one hand that an unborn child or fetus is not a person, at least until the seventh month of pregnancy, and thus has no constitutional rights, even the right to life, but that on the other, as it was held in Parks v. Harden, a fetus is an eligible individual entitled to welfare, AFDC, under a mere federal statute designed to protect its health.

If, as Roe v. Wade holds, a state may not -- by an anti-abortion law, abridge a woman's constitutional right to privacy in her decision to abort her fetus, how can the Federal Social Security Law abridge that same constitutional right to privacy for health purposes?

As Judge Ainsworth pointed out in his dissent in Parks, the mother of a fetus may, in consequence, draw AFDC

for her eligible individual and then abort it at her whim.

And there is -- finally, there is an old saying, somebody once said, "To be alive has become a virtue and the mere ability to inflate the lungs entitles Citizen B to a substantial share of the laborious earnings of Citizen A."

Are we extending this right now to those who can't inflate their lungs?

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

MR. TURNER: I'll save the rest of my time, if I have any.

MR. CHIEF JUSTICE BURGER: Mr. Bartels.

ORAL ARGUMENT OF ROBERT BARTELS, ESQ.,

ON BEHALF OF RESPONDENTS

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

As Mr. Turner has recognized, this case really involves purely a question of statutory interpretation and ultimately the question comes down to whether an unborn child is a dependent child within the meaning of Title IV of the Social Security Act in a particular Section, 406(A).

Now, if, as a vast majority of the lower courts have held, an unborn child is a dependent child for purposes of the Act, then under this Court's prior decisions, the states

must make needy pregnant women eligible for AFDC assistance with respect to their unborn children.

On the other hand, if an unborn child is not a dependent child within the meaning of the Act, then no state may receive federal matching funds to make such AFDC payments because if an unborn child is not a dependent child, there simply is no authority in the Social Security Act for the Secretary of HEW to make those matching payments.

QUESTION: So you -- I take it that you agree that the present departmental regulation is invalid in either event.

MR. BARTELS: It's --

QUESTION: It either has to -- it cannot be optional, in other words.

MR. BARTELS: That is correct, your Honor. It cannot be optional.

You know, in this Court, HEW has really adopted an entirely new position, different from one that they had adopted before, at least one can go back a few months to Adams versus Huecker in the District Court in Kentucky.

Now the position of HEW is that an unborn child is not a dependent child but, under the Secretary's rule-making power, under 42 USC 1302, the Secretary has a kind of general legislative power to create whole new programs as long as he is willing to say that in some way the new

assistance is related to the provisions of the Act as drafted by Congress.

QUESTION: Under the regulation, a state that opts to pay a pregnant mother, how is the computation of payment made? As if she had a child? As if the child had been born or -- how is it done?

MR. BARTELS: Your Honor, that varies from state to state and there is nothing in the Act that requires the states to pay any set amount of assistance to anybody and certainly within the confines of Dandridge versus Williams the states would have a good deal of discretion in terms of how much to pay.

Now, in California, for example, a woman --

QUESTION: Well, what I am getting at, whatever the state program may be, how is it done? Is it done as if the child had, in fact, been born?

MR. BARTELS: Your Honor, in some states an unborn child is regarded as identical to a born child in terms of the amount of assistance.

In California, for example, however, a woman will receive a smaller amount of additional assistance with regard to the unborn child on the theory that the amount of assistance she receives for her needs is, in part, allocated to the child so that there can be some reduction.

QUESTION: Wouldn't there be some difficulties

with that under Townsend against Swank? I mean, if an unborn child is a child, can the state distinguish between unborn children and born children for purposes of the amount of aid?

MR. BARTELS: Yes, your Honor, I think they could.

This Court held in Dandridge versus Williams that the states can distinguish, if they want to, between the first five children and the sixth.

QUESTION: That is a constitutional holding. Townsend against Swank rested on notions of eligibility under the Social Security Act.

MR. BARTELS: Your Honor, in terms of eligibility for some AFDC assistance the states may not distinguish between born and unborn children but when it comes to setting the level of benefits and the standard of need, the states have very wide discretion under this Court's holdings in Jefferson and Dandridge so when we are talking about the amount of assistance, the states can make reasonable distinction amongst different groups of individuals in the AFDC program to reflect that they have different needs.

QUESTION: You do not think that the existence of the federal contribution requires a uniform treatment on this subject throughout the United States?

MR. BARTELS: No, your Honor. The states have a wide lattitude and that has been uniformly recognized by this

Court in terms of setting need standards.

QUESTION: Not in this kind of a context, however, as Mr. Justice Rehnquist suggested.

MR. BARTELS: Your Honor --

QUESTION: There is no -- is there any case which you rely on specifically, other than Dandridge, that you referred to, which is pertinent?

MR. BARTELS: Well, Jefferson versus Hackney, again says that the states have this wide latitude in terms of distinguishing amongst various groups within the welfare system in terms of the amount of assistance that is paid out again.

Where the federal eligibility standards -- or federal standards, I should say, are mandatory is when they deal with definitional eligibility under Section 406(A) of the Act.

QUESTION: Supposing you win here, Mr. Bartels, can the State of Iowa then say, well, we recognize the Supreme Court's decision and we are going to allow $50 a month for each child in essar [?] living and $1 a month for each child that is unborn.

MR. BARTELS: Your Honor, I don't think I can give a direct answer to that except to say that the state could, I think, make distinctions between, now, $1 might not be reasonable in terms of the amount of assistance that is

granted and some of the material in Addendum C to the Respondents' brief indicates that in terms of how much an unborn child needs by way of additional assistance as opposed to a born child, may not be so different so that $1 might not be unreasonable and it would just be a question for this Court as to whether that was so unreasonable as to be unconstitutional.

Nothing in the Act itself would prohibit that, no. That would be an option for the states and it would be up to the courts to decide whether that was a reasonable distinction between --

QUESTION: Mr. Bartels, does the statute say something about "reasonable?"

MR. BARTELS: No, your Honor, that would really be a constitutional question. The statute simply leaves to the states --

QUESTION: Where in the Constitution do you find something about "reasonable?"

MR. BARTELS: In the Constitution, your Honor?

QUESTION: Yes.

MR. BARTELS: In the Equal Protection Doctrine that distinctions or discriminations between groups of individuals must have a reasonable basis.

QUESTION: Well, that is not what it says.

MR. BARTELS: Pardon?

QUESTION: That is not what the Constitution says, is it?

MR. BARTELS: That is not what it says directly, your Honor, but that is what I understand to be the traditional standard of the equal protection review.

QUESTION: Mr. Bartels, I take it that the age of the fetus makes no difference in your submission.

MR. BARTELS: No, your Honor, the Agency -- the Bureau of Public Assistance -- which was HEW's predecessor -- decided rather early on that administratively the best point at which to determine eligibility for an unborn child was when conception could be proven.

The Agency could have chosen quickness or viability or something like that, but administratively that would have been difficult and in terms of the purposes of the Act, the point at which conception at least could be proven is probably the most logical point in any event because the assistance is needed at that point in order to avoid the likelihood of irreparable mental and physical damage during the post-natal period.

QUESTION: What possible justification would viability have as a point of qualification?

MR. BARTELS: Well, your Honor, I am not really sure. It seems to me that in terms of the purposes of the Act I guess I would take a somewhat stronger position that

either quickness, I guess, would have the advantage of the sort of tradition in terms of the law recognizing certain rights in children when they become quick.

QUESTION: Well, if a fetus is a child within the meaning of the statute, it is just as much so prior to quickness or prior to viability as it is after, is it not?

MR. BARTELS: Yes, your HOnor, I think that is right, although, again, the terms of the statute are admittedly ambiguous and there was room to interpret those terms within the purposes -- in light of the purposes of the statute.

QUESTION: Well, when you say "admittedly," does your opposition concede that?

MR. BARTELS: I am saying admittedly from my point of view, your Honor.

QUESTION: Professor Bartels, you are familiar, of course, with the Federal Income Tax Code.

MR. BARTELS: That is correct, your HOnor.

QUESTION: Do you get any comfort or discomfort from the fact that -- if it is a fact -- that a dependency exemption has never been allowed for a "child" prior to birth?

MR. BARTELS: Your Honor, I don't think that has much to do with this case.

QUESTION: I gather so because you don't cite it,

but on the other hand, for purposes of this sub-title, I am reading from 152 of the Code,"The term 'dependent' means any of the following individuals: A) a son or a daughter of the taxpayer," do you think this is entirely of no consequence?

MR. BARTELS: Well, your Honor, again, in interpreting this Act one has to look at the purposes of the AFDC program and those purposes are very, very different from the purposes of the Internal Revenue Code.

QUESTION: Well, the Internal Revenue Code undertakes, at least, to take into account that there are some expenses in rearing children, does it not?

MR. BARTELS: That is correct, your Honor, and --

QUESTION: And the welfare system does the same thing.

MR. BARTELS: That is correct, your HOnor.

QUESTION: Well, as Mr. Justice Blackmun has pointed out, there is a different approach in the Internal Revenue Code and the Social Security Act.

MR. BARTELS: Your Honor, I think that in terms of the distinction, there are at least a couple of points.

For one thing, as an administrative matter Congress might have decided with regard to the collection of taxes that administratively it was better to wait until the child was actually born and to avoid the situation, for example, in which the child was conceived on December 30th and then

the family would get a tax exemption from the entire year.

It may also be a reflection of Congress' judgment in passing that code that the additional expenses for an unborn child are somewhat less than those for a born child. That could be reflected in this case through a smaller level of benefits, not through cutting off eligibility all together.

The Petitioners take the view that the language of the statute is clear. I think if one looks at it, it patently is not clear and I suppose the strongest evidence for that is that -- at this stage is that the great majority of federal judges who have passed on this have not found it very clear.

One can cite dictionary definitions both ways.

One can cite Shakespeare as opposed to others, colloquial statements going either way. And in some they are really not that helpful except to indicate that a"dependent child"can reasonably be interpreted to include unborn children and it then becomes necessary to look at the statutory purposes and at long-standing HEW interpretations in this hearing.

And that is a process that this Court has gone through really typically in welfare cases to decide questions of statutory interpretation.

QUESTION: You say that HEW in some other cases in district courts has taken a position that the statute

included the fetus?

MR. BARTELS: The only other amicus brief that I am very familiar with by HEW is in Wilson versus Weaver.

I have a little bit of trouble understanding exactly --

QUESTION: What court was that?

MR. BARTELS: That was in the District Court, Northern District of Illinois, your Honor.

QUESTION: Right.

MR. BARTELS: And that brief I guess was also adopted by the -- in the Fifth Circuit in Parks versus Harden.

Now, that brief makes no mention whatsoever of 42 USC Section 1302 and HEW seems to be taking the position in Wilson versus Weaver that the term "dependent child" is n ot clear and when the term is not clear and subject to differing interpretations, then the states have an option to opt out of the broader interpretation and that is an argument that this Court has rejected in both Townsend versus Swank and Carlson versus Remillard and I suspect that is the reason that HEW now has searched around for some other arguable source of authority.

And 1302 just doesn't work. It only gives the Secretary the right to make rules and regulations necessary to the efficient administration of the Act.

What they are tying to get here in this Court is a

right to legislate broadly in the welfare area and that is something that specifically is reserved to Congress in Section 1304 of 42 USC.

QUESTION: So I gather you would agree, if the pact as written does not bear the interpretation that the f etus in included as a child, then that the regulation is invalid.

MR. BARTELS: That is correct, your Honor. If an unborn child is not a dependent child within the terms of the Act, there is simply no authority in that Act to make payments with regard to unborn children.

Now, this Court has recognized in the past that the paramount purpose of AFDC is the protection of dependent children and the legislative history makes it clear that Congress was not interested simply in children as children but also in fostering their development as independent and productive citizens.

Now, the evidence in this case is clear that there is a crucial relationship between prenatal welfare and postnatal development and, given that relationship is at least, it doesn't make very much sense for Congress to limit assistance to the postnatal period because unless adequate prenatal assistance is granted, the postnatal assistance is very often going to be simply too little, too late and they are not even going to be able to repair the damage no matter how much assistance is granted for postnatal care.

QUESTION: Are there programs developed by Congress for prenatal care?

MR. BARTELS: Your Honor, the only other program that is specifically aimed at that is Title V of the Social Security Act.

QUESTION: So that certainly suggests that they are not unaware of the problem, doesn't it?

MR. BARTELS: Well, your Honor, I think the Title V is significant in that it shows that Congress was aware that prenatal care was necessary but --

QUESTION: But being aware of it, they have not extended it in this Act, except by implication, is what you are arguing.

MR. BARTELS: Well, your Honor, two things about that. First of all, in terms of the clarity of the language, Title V doesn't talk about unborn children. It talks about mothers and children and that Act was very early on and has always been interpreted to include prenatal care.

Moreover, Title V is restricted to certain health services. It does not extend to every jurisdiction in the United States and it provides certain kinds of nutritional advice, for example, but it provides no funds to follow the nutritional advice, for example.

Now, Title V covers born children as well as unborn children and so does Title IV and as the First Circuit

recognized in Carver versus Hooker, it is a little incongruous to suppose that Congress gave both to born children and women and unborn children just the Title V assistance, so I think Title V, if anything, is further evidence of a Congressional purpose to include unborn children.

Now, that Congressional purpose, I think, becomes more clear in 1950 than it really was in 1935. One thing that is not really clear from the briefs in this case is that as of 1935, to interpret dependent child to include unborn children only meant that the states were free to provide assistance with respect to unborn children if they so desired.

It was optional then and that was because the entire program was optional. The Section 406 they simply defined a large group and the states were totally free in terms of the Act to pick and choose groups within that eligible group.

QUESTION: And back in those days it was Aid to Dependent Children, also. It wasn't Aid to Families with Dependent Children.

MR. BARTELS: That is right, your Honor. The needs of the caretaker relative were only added in to the computation in 1950.

QUESTION: Yes.

MR. BARTELS: Contemporaneously with the other

statute that has significance here and that is what is now Section 402(A)(10) of the Act which states that payments must be made to all eligible individuals. Now --

QUESTION: Even when it was Aid to Children as distinguished from Aid to Families, the payments were always made to the parents, were they not?

MR. BARTELS: Yes, that is right, your HOnor.

QUESTION: So that do you read much significance into that interpretation of the statute?

MR. BARTELS: No, your Honor, I don't think -- if anything, the addition of the caretaker relative in 1950 shows some further indication of Congress' awareness that the needs of the mother have to be met in order that the needs of the child have to be met which applies, I suppose, with particular force to the unborn child but I don't think there is any special significance about that.

Now, the addition of 402(A)(10) , as this Court has held in King and Townsend and Carleson, changed the relationship between the state and federal standards markedly. It required now that within this large group of eligible individuals that the states had to pay to everybody who was eligible.

Now, in 1946, the Bureau of Public Assistance had officially promulgated in the Handbook of Public Assistance Administration, a regulation which included unborn children

in the eligible group and the history of that regulation and its very terms make it absolutely clear that that was a matter of interpretation of Section 406(A) and that the Agency was saying for purposes of this Act, an unborn child is a dependent child.

And if HEW is implying in its brief -- and I couldn't quite tell -- that the Agency has never interpreted dependent child in that way, that simply ignores this entire eligibility.

Now, what one has then is, in 1950, when the mandatory eligibility provisions are enacted, the Agency entrusted with the administration of the Act has, for several years, in fact, earlier than 1946, declared that unborn children are within that eligible group that Congress now says must be given assistance by the state.

Now, that interpretation by the Bureau also has an independent significance quite apart from the 1950 Social Security Amendments.

This Court has held on many occasions that administrative interpretations of statutory terms are entitled to great weight, at least when they are consistent with the purposes of the statute.

Now, this interpretation of dependent child to include unborn children began at least as early as 1940 and as Addendum H to the Respondents' brief indicates, in fact,

this was a problem that was being considered really, from the very beginning of the Social Security Act.

That interpretation, then, was made roughly contemporaneously with the Act. It is an interpretation of long standing in the sense that it has arrived.

For over 30 years it survived the passage of Section 402(A)(10) and the only reason one perhaps can't say it still hasn't survived is that HEW now has come in and disavowed that history.

I think when one looks at HEW's position it is so tied with an absurd view of its powers under 1302 that it is not entitled to any weight.

Moreover, there is really no reason for the change in the interpretation by HEW except to evade the consequences of this Court's holdings in Townsend and Carleson. What --

QUESTION: The May, 1941 opinion, is that the first?

MR. BARTELS: That was the first sort of official opinion, your Honor. There were --

QUESTION: Before that, even?

MR. BARTELS: Pardon?

QUESTION: Before that, even, had the --

MR. BARTELS: It was under consideration much earlier than that and, in fact, after the passage of the Social Security Act in 1935, as of September 1st, 1936, at least five jurisdictions in the United States already

were paying AFDC.

QUESTION: Do we know whether this letter advice was acted on?

MR. BARTELS: Yes, your Honor, that was the audit exception to the Wisconsin program was overruled and one of them, the memoranda there, indicates that, although they weren't going to make a formal policy, that the Wisconsin decision would be precedent for future audits.

QUESTION: Was the -- since the addition of whatever it is, the (B)(10), there cannot be options any more, as Swank and Remillard and, I suppose, King make very clear.

MR. BARTELS: That is correct, your Honor.

QUESTION: And apparently, HEW just doesn't like that regime. They still wnat the states to have options.

MR. BARTELS: Well, they seem very insistent.

QUESTION: They are trying to find some kind of authority to give it to them.

MR. BARTELS: That is right, your Honor and I -- there simply is no authority in the Act for that kind of an optional program.

QUESTION: Do we have any idea who "A. D. Smith" was in 1941.

MR. BARTELS: He was a general counsel to the Bureau of Public Assistance, your HOnor.

QUESTION: This seems to be addressed to the

Assistant General Counsel.

QUESTION: Well, that is the Office of the General Counsel of the Department it is addressed to, I take it.

MR. BARTELS: Your Honor, I am not really sure at this point. I think that in fact, between the two memos that Mr. Smith changed jobs and became the General Counsel.

QUESTION: Mr. Smith was the General Counsel to one of the divisions or bureaus within the --

MR. BARTELS: Yes, sir, it was the Child Welfare Bureau, I think, he may have been General Counsel to, yes.

QUESTION: And this letter refers to an earlier, lengthy memorandum that he wrote. What is that?

MR. BARTELS: The lengthy memorandum, your Honor, is set out for the most part in Addendum I that follows immediately.

QUESTION: Oh, I see.

MR. BARTELS: A memo to Blakeslee.

QUESTION: That is 1939.

MR. BARTELS: Right, and in those memos is the very careful consideration by the Agency of the purposes and the language of the statute in terms of this question, the interpretation.

I would like to deal with one and perhaps two points raised by the Petitioners because I think they may create some confusion in this case.

First, the Petitioners make something, in the briefs at least, of the fact that there are alternative assistance programs available to pregnant women and they point primarily to Iowas Code Chapter 252, which is a county relief program.

The thing the Petitioners don't point out is that that program is totally discretionary on a county-by-county basis and whether any assistance at all is given and, if so, how much depends --

QUESTION: Back in '39, who administered this? We had no HEW then, of course.

MR. BARTELS: Your Honor, the Bureau of Public Assistance, which I believe was a division of the Social Security Board at that time --

QUESTION: Oh, I see.

MR. BARTELS: -- was the administrator of the Act.

Whether any assistance is paid out under this county program is totally discretionary with the individual board of supervisors in the 100 counties in Iowa.

And, in fact, the assistance that is typically paid out is not at all adequate or equivalent. Indeed, if it were equivalent, it is hard to see why the State of Iowa would be here because if they could get federal assistance for that same program, the taxpayers of the State of Iowa would be a lot better off.

Food stamps also are not a suitable alternative.

It is clear that Congress didn't mean that to be an alternative because they made AFDC recipients automatically eligible for food stamp benefits and the food stamps themselves do not cover adequately the needs of the pregnant women during the prenatal period.

Secondly, I want to come back and emphasize that the citations of cases like Jefferson versus Hackney and Dandridge versus Williams have nothing to do with this case.

This case is only involving a question of whether pregnant women and their unborn children are eligible for some AFDC assistance and the states are totally free to reset the level of assistance for everybody or to make certain kinds of reasonable distinctions within that Act.

It is only a question of eligibility and not of amount of assistance and so when you talk about financial strain on a state, it is just not a necessary consequence of any decision in this case.

The statutory purpose of the Act, the 1950 Amendments and long-standing HEW interpretations all make it clear that an unborn child is a dependent child within the meaning of the Act and therefore, Iowa must make unborn children and their pregnant mothers eligible for assistance.

QUESTION: Mr. Bartels, in Townsend against Swank this is something that you were asked about earlier during

your argument, it was held that college students were required to be included as eligible. Yet I gather from your argument that Indiana would have been perfectly free to say, sure, include it and everybody else is going to get $100 a month and college students are going to get $5 a month because we think there is a rational distinction and, in effect, just argue the same thing they argued here and were turned down on on legislative intent.

MR. BARTELS: Your Honor, I think that -- that the states could make rational distinctions amongst groups and if the needs of college students were rationally arguably less than others, then there could be a distinction made between the two groups.

QUESTION: Subject only to whatever restrictions there may be in the Fourteenth Amendment.

MR. BARTELS: Yes, your Honor.

QUESTION: Right.

MR. BARTELS: There are no restrictions apparent in the Social Security Act in terms of the states' ability to make those kinds of distinctions.

QUESTION: Well, then 402(A)(10) just means that everyone who is eligible has got to get something. They can get much different amounts even though they come under exactly the same terms that make them eligible.

MR. BARTELS: That's right, your Honor, in Dandridge versus Williams the children who were born into

the family that already has ten children are eligible and that assistance must be paid to them but this Court held that a rate of reduction or a flat grant top was all right because the needs of the 11th child are, in effect, less, because of the economies of scale within the family where the assistance is already being received by the other children.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you have about three minutes left.

REBUTTAL ARGUMENT OF RICHARD C. TURNER, ESQ.

MR. TURNER: Thank you, your Honor.

QUESTION: General, do you know what kind of money you are talking about in, say, Iowa? Is there any idea?

MR. TURNER: No, I don't, your Honor, except there is one case that indicated -- in Georgia, I think -- that it might mean as much as $6.8 million in that state.

Now, I have never tried to figure this out.

I would point out in connection with Title V that the Government there has -- the Congress has appropriated $350 million under Title V for services for reducing infant mortality and otherwise promoting health of mothers and children.

This is in Section 7 of USC. And for services for locating medical, surgical and corrective and other

services for crippled children and people like that.

Now, that --

QUESTION: That sounds primarily for --

MR. TURNER: Food?

QUESTION: Not for food or sustenance but just for --

MR. TURNER: Prenatal care.

QUESTION: Prenatal care?

MR. TURNER: Yes, sir.

QUESTION: Does that include food? Rent?

QUESTION: Rent and electricity?

MR. TURNER: I -- that I don't know, your Honor. I am not familiar enough --

QUESTION: That is very important, isn't it?

MR. TURNER: Yes. But prenatal care could also include medical service, I suppose. But $350 million would certainly be a lot of money to spend if food and clothing were not involved there.

QUESTION: It is not very much if food and clothing is included.

MR. TURNER: Yes.

QUESTION: And rent. And utilities.

MR. TURNER: Well, I again repeat that when Title V specifically speaks to matters such as prenatal care, you have to consider, it seems, in the light of Title IV which does not mention anything about prenatal -- now, Judge Hansen

did, in his opinion in Alcala make a slip. He quoted one section that specifically mentioned -- he quoted that as prenatal and what it said was "parental," in Section 601, if you note.

Now, that doesn't show up in his -- in the opinion that is in this case but he was apparently laboring under the apprehension that 601 specifically provided, in Title IV, for prenatal care and he emphasized it in his opinion.

Then he later wrote a supplemental opinion before it was printed that that was a typographical error.

If it was, I submit, why did he stress it?

Now, as to these letters --

QUESTION: You wouldn't want us to disapprove that sort of fact.

MR. TURNER: What's that, your Honor?

QUESTION: You wouldn't want us to forbid that sort of a practice, would you?

MR. TURNER: Of correcting a typographical error?

No, but to say that it played no part in his opinion seemed to me -- he stressed that in his opinion but underscoring it.

QUESTION: So you would, I take it, take exception with a judicial opinion that was based on a reading of "parental" when it turned out that the correct reading was "prenatal."

MR. TURNER: Yes, sir, but the statute says "parental" and not "prenatal," clearly and the judge recognized that.

QUESTION: That would be more than a typographical misapprehension on the part of the Court, would it not?

To confuse those two?

MR. TURNER: I can't speculate on what was in the Court's mind when he -- when that was done.

But one more point if I may, if the Court will indulge me just a minute.

These letters that are dated June, 1940 and May, 1940 for the most part pertained to an audit that had to do with the State of Wisconsin's granting of this.

There is nothing -- I don't think they were in evidence. Now, maybe they were and I suppose the Court is going to consider them.

I don't properly consider them a part of the record.

But they don't even show on their face who Peter Kasius is, who Gertrude Gates, the Chief, is or where -- indeed, where they are from or who the people are that they were addressed to. Who --

QUESTION: Was that in the record in the District Court?

MR. TURNER: I don't believe that is in the record, you Honor. I think these letters have been simply added and

thrown into the Plaintiff's brief in this case since this case and I don't think they are properly a part of the record herein.

QUESTION: Well, I suppose it is true that outside of the City of Washington and where they have no access to Congressional Records. We, nevertheless, resort to Congressional Reocrds that we have here in Washington in interpreting federal statutes, don't we?

MR. TURNER: I think you should properly do that if there is a question about the statute.

QUESTION: Well, then, may we, if these are relevant, may we rely on these?

MR. TURNER: If they are relevant, maybe. But --

QUESTION: You don't even know whether they are authenticated.

MR. TURNER: I don't, your Honor. I have no idea about that.

QUESTION: Mr. General, did you see the record in this case in the District Court?

MR. TURNER: No, sir, I have not, not to that extent and I can't say that for sure.

QUESTION: So you can't say whether or not they are in the record or not.

MR. TURNER: I cannot, your Honor.

QUESTION: Well, was there --

MR. TURNER: Not absolutely but I think --

QUESTION: You want us to find out for you?

MR. TURNER: -- I could ask Counsel, Professor Bartels. There is nothing on the face of them to indicate what they are.

QUESTION: You usually don't print things in the Appendix to a brief if they are printed in an appendix, Joint Appendix. If it is in the record and they think it is relevant, they are usually printed in an Appendix.

MR. TURNER: Yes, sir and perhaps the Court will consider -- I don't say you shouldn't necessarily consider it. They obviously are letters that were written but you shouldn't give it the weight that is accorded to a United States Senator on the floor talking about things like from birth to death and cradle to grave.

It doesn't reach that type of stature and there were six years that went by before these letters, after the Act was passed, so in a certain sense there was an administrative decision of long standing prior to this decision.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. Mr. Attorney General, if you or your friend would like to supplement and clarify that situation, you may do so by a letter to the Clerk and, of course, a copy to opposing counsel.

MR. TURNER: Thank You.

MR. CHIEF JUSTICE BURGER: All right. The case is submitted.

[Whereupon, at 11:16 o'clock, a.m., the case in the above-entitled matter was submitted.]

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