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In the

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Supreme Court of the United States

Marcel Youakim, Et Al.,

Appellants,

v.

Jerome Miller, Individually and
as Director of the Department of
Children and Family Services, et al.,

Appellees.

No. 73-6935

Washington, D. C.
December 8, 1975

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

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 MARCEL YOUAKIM, ET AL., :
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 Appellants, :
 :
 v. : No. 73-6935
 :
 JEROME MILLER, Individually and :
 as Director of the Department of :
 Children and Family Services, et al., :
 :
 Appellees. :
 :
 -----X

Washington, D. C.

Monday, December 8, 1975

The above-entitled matter came on for argument at
 10:04 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:

PATRICK A. KEENAN, ESQ., DePaul Law Clinic, 23 East
 Jackson Boulevard, Chicago, Illinois 60604, for
 the Appellants.

PAUL J. BARGIEL, ESQ., Assistant Attorney General,
 160 North La Salle Street, Suite 800, Chicago,
 Illinois 60601, for the Appellees.

I N D E X

R 2

ORAL ARGUMENT OF:

Page

PATRICK A. KEENAN, ESQ., for the Appellants

3

PAUL J. BARGIEL, ESQ., for the Appellees

20

REBUTTAL ARGUMENT OF:

PATRICK A. KEENAN, ESQ.

44

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Youakim against Miller.

Mr. Keenan, you may proceed whenever you're ready.

ORAL ARGUMENT OF PATRICK A. KEENAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. KEENAN: Mr. Chief Justice, may it please this honorable Court:

The Illinois Foster Care Payment Scheme denies the Federal Foster Care Payments to children who are placed in foster homes maintained by their relatives.

The issues in this case are:

First, whether the denial by the State of Illinois violates the Social Security Act and the supremacy clause; and

Second, whether that denial violates the equal protection.

The best evidence that the Illinois Foster Care Payment Scheme is in violation of the Social Security Act is found in the position of the Department of Health, Education, and Welfare, the department charged with the stewardship of administration of the Social Security Act.

Twice, first in a brief filed on behalf of the Department by the Solicitor General in response to this Court's invitation, and second in a program instruction issued as recently as October of 1974, the Department of Health, Educa-

tion, and Welfare has unequivocally taken the position that such payments must be afforded to related foster parents.

QUESTION: Is that program instruction out of line with the existing regulations?

MR. KEENAN: That program instruction is consistent with the existing regulations, Mr. Justice, in the plaintiffs' view.

QUESTION: It's consistent with it?

MR. KEENAN: It is consistent with it. There is nothing -- the regulations do not speak directly to the question of whether or not the payments can be made. But I respectfully cite this Court to its ruling in Townsend vs. Swank in the test therein contained, which states that absent clear evidence on the face of the statute, or in the legislative history, that the States have the option to withhold the payments from a particular group of otherwise eligible citizens, that those payments should be afforded.

I would also respectfully cite this Court to its recent decision in the case of Philbrook vs. Glodgett. In that case the State of Vermont attempted to exercise the option on behalf of the State to tell its citizens that they had to accept eligibility for the lower of two levels -- the lower of two categorical assistance programs for which they might be eligible.

The State of Illinois here is trying to do essentially

the same thing.

QUESTION: Mr. Keenan, did I read somewhere, perhaps among these voluminous papers, that the HEW has since amended or revised the applicable or pertinent regulations?

Since this case was filed here.

MR. KEENAN: It is not contained in the regulations, Mr. Justice Brennan. It's contained in an October 1974 program instruction, which is set out in the Appellants' brief at page 27 and the pages following.

QUESTION: Well, is that revision pertinent to the issue we have?

MR. KEENAN: I think it is not a revision, Your Honor.

QUESTION: I see.

MR. KEENAN: I think that it is a revision of HEW's -- of one position that had been previously taken by one regional administrator of HEW. But prior to this very clear program instruction, I think that the Washington Legal Department of HEW had not rendered a specific opinion on this.

I think in 1974, after this case had been filed before this Court, after the district courts in South Dakota and Ohio had decided this identical question the same way the plaintiffs now urge upon this Court, then HEW saw fit to clarify what it regarded to be confusion on the parts of Illinois and certain other States.

QUESTION: And does this support your position?

MR. KEENAN: It does, indeed, Your Honor.

QUESTION: Mr. Keenan, as I read the district court's opinion, they didn't pass on any statutory question, they simply treated the equal protection contention and ruled against you.

MR. KEENAN: I think they -- I think the district court, the three-judge district court entertained the statutory contention to the following extent:

The three-judge court specifically stated that it found the Illinois Foster Care Scheme to be consistent with rather than in conflict -- the purposes of the Illinois Foster Care Scheme to be consistent with rather than in conflict with the federal statutes, as the plaintiffs had urged in their arguments and briefs below, and in oral argument.

QUESTION: Where do you find that in the district court opinion?

Is it that section on page 59 of the Appendix?

MR. KEENAN: Yes, Your Honor. "Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it."

And then it footnotes it and cites the Illinois "exception to policy" scheme. And I think that is about the only extent to which the district court entertained the statutory interpretation question.

QUESTION: Yes, if you take from page 55 of the

Appendix, where the district court has its opinion headed "The Merits" to page 60, they simply conclude at the end, "The Illinois scheme does not deny plaintiffs equal protection of the laws. Summary judgment is entered in favor of defendants."

I think you are somewhat hard-pressed to show that they squarely addressed any statutory contention.

MR. KEENAN: Well, I would candidly admit to Your Honor that the issue of whether or not the Illinois Scheme violates the Social Security Act or is inconsistent with the Social Security Act was much more fully briefed in the appeal, and that's the case for several reasons. First, it's just the way the case came up in the district court, and I will admit that I have learned a considerable amount about statutory interpretation laws since this complaint was originally filed some three years ago, Your Honor.

QUESTION: Did you allege in the complaint that there was a conflict between the federal statute and the State?

MR. KEENAN: We alleged that it violated the purposes of the federal Act, and it violated the purposes of the State law, which must be consistent with the federal law, because, in order to participate in the categorical assistance programs under Title IV, the purposes of the State law must be consistent with the purposes of the federal law.

And that -- and the overriding purpose which the plaintiffs allege is violated is that the law must be administered

and executed in order to maintain and strengthen families. And the Illinois Foster Care Payment Scheme, as now written, creates an economic disincentive to that, it pulls families apart, as happened to the plaintiffs in this case.

QUESTION: Well, tell me, Mr. Keenan, in light of our colloquy earlier, on this clarification as you term it, if you did raise the issue of inconsistency with the federal statute, rather than reach the constitutional question, ought we not remand this for reconsideration in light of the clarification?

MR. KEENAN: I think it more proper, Your Honor, that this Court retain its jurisdiction and decide the issue on the merits.

QUESTION: The constitutional issue?

MR. KEENAN: No -- well, whatever issue this Court decides, of course; but this Court traditionally entertains the statutory interpretation issue and seeks grounds for decision other than the constitutional one --

QUESTION: Provided the statutory issue is before us.

MR. KEENAN: Provided the statutory issue is before it; and I think it is sufficiently raised by the allegation in the complaint, first, that the Illinois Foster Care Payment Scheme violates the purpose of the federal law, and second, by that language in the district court opinion which specifically -- which I would call a finding to the effect that the Illinois

Foster Care Payment Scheme does not -- is not inconsistent with the federal law, but it rather parallels it. I think that was error on the part of the district court to make that as a finding.

QUESTION: Now, this clarification, if that was the right word for it, was issued two years after your lawsuit started, was it not?

MR. KEENAN: Yes, Your Honor.

QUESTION: And on page 28, about eight lines from the bottom -- beginning about nine lines from the bottom, what does that language mean, "the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative"? Is that now binding on all the States?

MR. KEENAN: The plaintiffs believe it is, Your Honor, and I think that it is clear that the position of the Department of HEW thinks that it is.

QUESTION: Well, then, if we sent the case back, wouldn't that dispose of it?

If we remanded the case along the lines Mr. Justice Brennan just hypothesized to you?

MR. KEENAN: I would urge that this Court should not.

QUESTION: Well, did we decide matters that are not necessary for decision here?

MR. KEENAN: I believe this matter is necessary for decision, Mr. Chief Justice, because the only method the Depart-

ment of Health, Education, and Welfare has to enforce, what it regards to -- what is, absent an opinion by this Court, merely an opinion by counsel, which will obviously be disagreed with by the Attorneys General of the States which have a scheme similar to Illinois, the only method they have, that HEW has of enforcing this is conducting a compliance hearing.

Now, compliance hearings have been, oh, I would say, quite unsuccessful in securing immediate compliance. I have no -- it is no secret that the Illinois Foster Care -- that the Illinois Child Welfare Payments Scheme, in general, is fraught with confusion.

I would expect that to be the case in other States. I think that if this Court were to retain its jurisdiction, that the policy of securing uniform national administration of the Social Security Act, particularly Title IV of the Social Security Act, would be much better served than by leaving it with the Department of Health, Education, and Welfare. I believe if this Court were to remand, with instructions to the State of Illinois, that they should follow this new program instruction, that the Attorney General would advise the officials of the State along the lines that he has urged in his brief. That is, that we don't -- this is the State speaking. The State of Illinois does not believe this to be a binding advisement or a binding policy on the part of HEW --

QUESTION: How do we know that?

MR. KEENAN: Because they say so in their brief, Your Honor.

QUESTION: But if it were remanded for reconsideration in the light of this new directive, might that not have something to do with their view of the matter?

MR. KEENAN: It might indeed, Your Honor, but I respectfully submit that question is not before the Court, and that the purposes of, first of all, efficiency and national administration, and the speedy justice would be much better served if this Court were to retain its jurisdiction and to decide the case on the merits.

This case is about three and a half years old already, Your Honor, and the named plaintiffs and the members of the plaintiff class have -- if their contention is correct, they have suffered a violation of their rights to categorical assistant payments under the Social Security Act.

If this Court sees fit to remand and then sends it back to the district court, two of the judges of which are no longer available to sit -- one of the judges, of course, being Judge Stevens -- then it's going to be another lengthy and complex process before the case can be resolved.

I think if this Court were to retain its jurisdiction and decide the case on its merits, that would avoid the problem of -- the possibility of Illinois and other States continuing their conflicting interpretation, continuing

their position that this October '74 program guideline is not binding, is not an accurate representation of what the Social Security Act requires.

QUESTION: Mr. Keenan, in your prayer for relief, on page 16 of the Appendix, consisting of a number of paragraphs, (a), (b), (c), (d), (e), and (f), looking at paragraph (e) you ask "That the three-judge court enter a final judgment permanently enjoining the State Director ... agents, et cetera, acting in concert ... from enforcing, applying, or executing Illinois Revised Statutes ... and Illinois Family Services Placement Management, as written, because said statutes and regulations violate equal protection of the law as guaranteed by Plaintiffs by the Fourteenth Amendment of the Constitution of the United States."

Now, that's the only thing I can find in your prayer for relief that suggests a basis for invalidating those statutes. And that is strictly a constitutional claim.

MR. KEENAN: That is correct, Your Honor. I would respectfully ask this Court to entertain the rule of construction of pleadings that's particularly on cases that are decided in summary on a motion to dismiss or on a summary judgment, as this case was, that if the well pleaded facts of the complaint set out any basis on which the trial court can grant relief, that the Court should grant that relief whether or not that issue is raised upon the law. The facts

EM of the complaint were well pleaded. There were affidavits filed on both sides. We respectfully urge that for purposes of this Court's jurisdiction, that the district court should have, notwithstanding the failure to pray for an injunction on strictly statutory interpretation grounds in the prayer, that the district court should have recognized that issue, seized it, and granted the relief. In other words, the law is the law. If the Illinois scheme is in fact in violation of the Social Security Act, then first the trial court, and then I would respectfully ask that this Court recognize that and enter the appropriate judgment.

I would respectfully ask this Court to consider the effects of reversal. The State may take the position that increased expenditures will be the result if the present foster care payment scheme in Illinois is invalidated. We respectfully urge upon this Court that that would not follow. What would in fact happen if relatives were available for foster care placement, that first there would be a movement of children who are now placed in strangers' homes into the homes maintained by their relatives. That would mean two things:

First, there would be a number of already licensed, already recruited, and already available foster homes maintained by strangers that Illinois could place its wards in.

Second, I think there would be a movement of these children out of institutional placements into placements with

relatives.

A third possible effect would be that the process of recruiting foster homes would be much simplified. Under the present scheme the placement worker does not look first to the relatives for a place in which to put the child, even though the Federal law requires that, even though the State law requires it. The Federal law is unquestionably clear that if it is at all possible for a ward of the State to live with relatives, that that would be the best placement for the ward.

QUESTION: Why don't they do it?

MR. KEENAN: They don't do it, your Honor, because of the scheme which precludes licensing of relatives, and in the placement worker's mind that prevention of licensing means, that they simply don't look first at the relatives; they look first at strangers, and the result is that as soon as the child is declared a ward of the juvenile court, the placement worker, who has a heavy case load and is under pressure to move the child from the home that the court has, of course, ordered the child removed from, must find a place quickly. And the first place they look is an already licensed foster home, because that has been the practice in the State and because that's the way the statute is set up.

Too often placement workers have approached a relative and said, "Can you take in this child who is a ward of the court?"

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The relative said, as did the plaintiffs in this case, "We would like to, but we cannot afford it, we cannot afford to subsidize what is clearly the State's obligation."

QUESTION: Do you say it is irrational for a State to proceed on the assumption that kinfolk, if we may call them that, have a greater obligation to take care of their relatives than strangers?

MR. KEENAN: Plaintiffs respectfully urge that what is illegal cannot be rational in terms of equal protection jurisprudence.

QUESTION: Well, that doesn't answer the question.

MR. KEENAN: I think it would not be rational because such a position on the part of the State of Illinois would be based on a mistake of law.

QUESTION: Has it not been the tradition, going back not just to the history of this country, but to all civilized people, that people take care of their own?

MR. KEENAN: It is, of course, a tradition, your Honor.

QUESTION: Well, that tradition, you say, cannot form a rational basis for legislative action.

MR. KEENAN: That tradition cannot form a rational basis for legislative action in the United States in 1970, your Honor, particularly when the Illinois legislature has stated that the only persons who are responsible for the care of

children are the natural and adopted parents. The Illinois legislature by enacting that law recognized that willing as the relatives might be to discharge their moral duty, if the Court please, and to take in and take care of their relatives, that it is simply not economically feasible. And I would respectfully say to the Court once again what occurred in this case. The Youakims subsidized the State's obligation as heavily as they could. They took in two of the children and kept them for as long as they can, but they couldn't take in the other two because they couldn't afford two further.

The State has the obligation to maintain those children. Congress has recognized that they are more expensive to maintain than children who are kept in the homes of parents or caretaker relatives. It seems that in light of the clear expression by the Congress that these children should be placed with relatives, enactment by the Congress of the economic tools in which to arrange it, and the statement by the Illinois legislature that no one save the natural or adopted parents or the State guardian has the legal duty to take care of it, that then it is not rational for the State to proceed on that assumption given the economic realities of the State of Illinois right now.

QUESTION: When they go into the home of a person who is related, there are no standards -- I will put that as a question. Are there any standards by which the environment

R 5

can be measured by the State, as distinguished from going into the home of a licensed foster parent?

MR. KEENAN: The standards which are imposed upon the plaintiff related foster parents are identical to the standards imposed upon all other foster homes. The duties of the plaintiff related foster parents are identical to the duties of all foster parents in the State of Illinois. The expense of maintaining a larger home, one that has a separate bedroom for the foster child, or maintaining a clean home, of maintaining higher standards of child care, of maintaining a better family environment according to the detailed regulations set out in the requirements for foster homes in Illinois, are all imposed upon the plaintiffs. The only thing that doesn't come along with the package is the financial assistance to the child which the child needs to stay in such a home.

It costs the same, and I think the State should concede that it costs the same, to maintain a child in a foster home maintained by his relatives as it costs to maintain a child in a foster home maintained by strangers. Certainly they have to comply with the same standards, certainly they have to submit to the same amount of government intervention, they have to file the same reports, the parents have the same duties.

Yet, only in the case of the plaintiff children does the State say to the children, "We will not pay your

expenses, and unless your relatives are willing to subsidize part of my" -- that is, the State's -- "guardianship obligation to support you, you may not live in what the Congress has declared to be the best possible placement for you."

QUESTION: Were you aware of this program instruction when the case was in the district court?

MR. KEENAN: The program instruction was issued after the district court's opinion was written, your Honor. The district court filed its opinion in --

QUESTION: January of '74?

MR. KEENAN: January or February of '74, your Honor. And the program instruction issued in October.

QUESTION: October. And then you took your notice of appeal?

MR. KEENAN: In April of '74. So the record was closed and the case was pending before this Court at the time the program instruction issued.

I also note, your Honor, and I think it may be important, that this Court invited the Department of Health, Education, and Welfare to address itself in an amicus brief to this. That invitation issued to the Solicitor and thence, I presume, over to the Department of Health, Education, and Welfare in October of 1974. I think it not unreasonable to conclude that this clarification resulted from the legal research, the considerable legal research that was done in the

Solicitor's office as a result of this Court's invitation.

QUESTION: May I suggest, though, Mr. Keenan, the Solicitor filed, in response to our invitation, his memorandum on February 18. That's four or five months after the promulgation of the instruction, and I don't find any reference to the instruction in what he filed. And he has not filed a brief on the merits. This was in response to our invitation at the time that your appeal was pending, jurisdictional statement, before we noted probable jurisdiction.

MR. KEENAN: Yes, your Honor. It is speculative on my part that there is interlocking causation between those two events.

QUESTION: Why do you suggest there is no reference to the instruction and the Solicitor did file in February?

MR. KEENAN: Mr. Justice Brennan, I didn't write the brief for him, is the only answer I can possibly make.

I would, if the Court please, if there are no question --

QUESTION: I take it from what you say you certainly wouldn't object from a decision on your behalf based on the statutory ground, whether the decision issued in the district court or here.

MR. KEENAN: I would not, your Honor. I urge that if the --

QUESTION: You would like to get it over with.

MR. KEENAN: I certainly would, and certainly a decision from this Court would have a much quicker effect on giving national uniform execution to title IV --

QUESTION: Don't you agree, now that the statutory ground has emerged clearly and you insist that it is in the case, don't you agree that that has to be reached first?

MR. KEENAN: I do, your Honor, and I am respectfully urging that this Court reach that ground first and, if proper, decide this case as it did the Townsend case, as it has decided a series of other social security cases.

QUESTION: What if the statutory ground had been reached in the district court first and it had been decided in your favor? The case could never have gotten here directly.

MR. KEENAN: That is correct, your Honor.

If there are no further questions at this time, I would respectfully reserve about 5 minutes of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

MR. KEENAN: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Bargiel.

ORAL ARGUMENT OF PAUL J. BARGIEL ON

BEHALF OF APPELLEES

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

My name is Paul Bargiel; I am Assistant Attorney

General in the State of Illinois, and I represent the Illinois Department of Children and Family Services in this matter.

I would respectfully suggest that the controversy as presented involves two different aspects. The first of those is can a relative under the Social Security Act ever be a foster parent? And, secondly, if a foster parent is paid additional assistance over and above what a relative is paid to care for a needy and dependent child, can that violate the equal protection clause?

I would like to direct myself to the first aspect of the case at this time.

We would respectfully submit that the plain meaning of the provisions of title IV of the AFDC program support the conclusion that relatives are not foster parents and are not eligible for aid under the provisions of section 608. The basic AFDC program set out in title IV defines essentially three classes of needy or dependent children who are eligible for aid. Section 606 defines the first class and says that a dependent child is one who is deprived of parental support for certain specified reasons and lives with a relative specified in section 606.

QUESTION: Is this what the district court decided?

MR. BARGIEL: Your Honor, the district court decided that there was no denial of equal protection and it made the determination that the Illinois welfare scheme rather than

running contrary to the Federal statute, parallels the Federal statute.

QUESTION: You didn't present this argument to the district court?

MR. BARGIEL: We presented the argument -- or we took the position that the Illinois welfare scheme was -- to the extent that it was presented, we took the position that the Illinois welfare scheme was consistent with the Federal statute.

QUESTION: I understand that, but did you make this argument that you are making now to the district court?

MR. BARGIEL: Well, I did not make the argument to the district court. The argument was made that --

QUESTION: This argument takes you farther than the district court took you, doesn't it?

MR. BARGIEL: That's true, I agree with you, Mr. Justice Rehnquist.

QUESTION: The State would be getting more relief if we decided in your favor on this ground than it got in the district court.

MR. BARGIEL: I suppose that's conceivable in that the Federal district court only decided the equal protection question. But I think it certainly implied that the Federal district court would have, had it considered, or had it made specific findings with regard to the question of the consistency of the Illinois welfare scheme to the Federal scheme, would

have found that in fact, or impliedly found, that there was no inconsistency.

QUESTION: That could be argued the other way, I take it. Since it did reach the constitutional question, it must have been on at least the premise that the construction is contrary to the one you reached the equal protection on.

MR. BARGIEL: No, I would assume, your Honor, that the district court, had it considered the statutory construction question, would have had to determine the statutory construction question in our favor, that is, that there was no difference between the two. It would have reached the --

QUESTION: Is the construction you urge consistent with this so-called clarification? Does the HEW, in other words, agree with you on that?

MR. BARGIEL: No, I think that's quite clear the HEW does not agree with us. And that is again one of the reasons that we are urging this position. That, in addition to the memorandum which was filed which Mr. Keenan referred to by the Solicitor General.

QUESTION: Are you going to follow this or not?

MR. BARGIEL: Are we going to follow what, your Honor? The new program instruction?

QUESTION: Yes.

MR. BARGIEL: Uh--

QUESTION: Have you taken any steps to do it?

MR. BARGIEL: To my knowledge, no steps have been taken at this particular --

QUESTION: What have you done? Just ignored it?

MR. BARGIEL: I don't know. I don't think that the State of Illinois is going to ignore it, but I certainly think that the position of the Department of Children and Family Services, as of the last time that I checked and currently, is that the program instruction of HEW is erroneous and does not --

QUESTION: In other words, that it erroneously construes the statute.

MR. BARGIEL: That is correct, your Honor.

QUESTION: The proper construction is the one you urge, and if you are right, then Illinois does not have to follow the construction.

MR. BARGIEL: That is correct, your Honor. That is our current position. At least it's current as of the time I came here.

QUESTION: And if you are right, then, as my Brother White has suggested, you get more than is accorded to you by the district court, because there is nothing in the district court opinion that says that it would be improper or unconstitutional for Illinois to pay related foster parents the same as unrelated foster parents are paid. That decision of the district court simply says it is not unconstitutional

to pay them less. But your argument now, your statutory argument would be that it would be contrary to the statute to even consider related foster parents as foster parents.

MR. BARGIEL: That is basically correct.

QUESTION: Or at least you say the State, under the social security Act, doesn't have to pay them anything. Related foster parents.

MR. BARGIEL: No, that's not our position. Our position --

QUESTION: That's what I --

MR. BARGIEL: No, your Honor. Our position is that related persons under the Social Security Act are not foster parents. By definition those two categories are mutually exclusive.

QUESTION: So they are not foster parents.

MR. BARGIEL: That is precisely correct. We don't say --

QUESTION: But they are parents for purposes of AFDC.

MR. BARGIEL: They are relatives for purposes of AFDC and eligible under section 606.

QUESTION: Not as foster parents.

MR. BARGIEL: Right. But not as foster parents. Our position is not that we don't have to pay them anything but that they are not eligible for categorical assistance under section 608. My position was initially that I would think that

I would think, had the court considered, or if it did, and I don't know except from the opinion, it would have impliedly had to come to the conclusion that the position we had taken was consistent with the Social Security Act before it got to the equal protection portion, or that traditionally is what they should have done.

QUESTION: It's opinion didn't show any evidence of that, and perhaps responsive to what my Brother Rehnquist has pointed out, the complaint really doesn't make a statutory claim.

MR. BARGIEL: I in all candor have to agree with that. The question -- I came to that realization as of a couple of days ago, as a matter of fact. It's clear that the complaint raises only an equal protection ground, and it's clear that the prayer for relief only asks for relief on that basis, and the three-judge court's opinion only makes one small reference to the comparison between the Illinois welfare scheme and the statutory scheme.

At any rate, that position was argued by the appellants, and I certainly did not want to be remiss in responding to it.

If I may, then, I will very briefly move along and say that our position with regard to the Social Security Act is that section 606 sets out certain specified relatives and says that children who live with these relatives are eligible

for aid. In father and mother, one of the specified relatives, section 608, if you move along, defines a dependent child as one who may, notwithstanding section 606(a) of this title, shall also include a child who would meet the requirements of this section 606(a), that is, that he would be living with a certain specified relative, except for his removal after April 30, 1961, from the home of a relative specified in section 606. And then if you drop down to --

QUESTION: Where are you?

MR. BARGIEL: I'm sorry. I apologize, your Honor. I'm reading from the supplement to our brief, appendix, it's A-9, and it sets out section 608 of the Social Security Act.

If I may, I will start again.

QUESTION: I hope before you finish this discussion, you will tell us why we should ignore the contrary interpretation of HEW. Ordinarily an agency's interpretation of a Federal statute is something to which we give considerable respect, isn't it?

MR. BARGIEL: That is very definitely true. I certainly don't mean to be disrespectful in urging that that particular program instruction is erroneous, but --

QUESTION: What are the principles that entitle us to ignore it?

MR. BARGIEL: Well, I think, first this Court has on occasion certainly more than once come to the conclusion

that an HEW interpretation of a statute was erroneous. I think Burns v. Alcola was such a case.

Our position here is first that the Court ought to look to the plain meaning of the words employed by the Congress in the statute and attempt to discern the intent of the Congress in enacting a particular section of the statute, and if the intent can be discerned in that fashion, then it ought to be followed.

And we are suggesting that section 608 defines a class of needy dependent children. It does so in terms which are so unambiguous with reference to the Act, that only one conclusion is possible, one conclusion is apparent. And that is that relatives are not foster parents.

And I say, if I may very briefly refer the Court to the language employed there, it says at the beginning:

"the term ' dependent child' shall, notwithstanding section 606(a) of this title, also include a child who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative as a result of a judicial determination."

And we submit that that part clearly indicates that section 608, the definition of dependent child is to be applied notwithstanding any specified relative in section 606, and it's also to include a new category -- the employment of the words "also include" indicates that this is a creation of a

new class. And then it further defines the class as children who are removed from the home of a specified relative.

And then if you drop down to about five lines from the bottom to what is designated (a)(3) it says, "who has been placed in a foster family home or child-care institution as a result of such determination."

So we are suggesting there that the Congress has employed the term "foster family home or child-care institution" and above they have talked about removing a child from the home of a relative. And we would suggest that "foster family home or child-care institution" means something other than the home of a relative, because a child is removed from the home of a relative and put into a foster family home or child-care institution.

So we would suggest that that language indicates that Congress intended that a foster family home was a non-related home. And if you go on in that very same provision, if you go to page All, which continues the reproduction of section 608, and you go to part (f), part (f) requires that any State who intends to employ the foster care program also have a plan which, in my language, the provision indicates, in my language, is to rehabilitate the home from which the child came so that hopefully the child can go back there. And the language here says that it must include a provision for --

QUESTION: What part of 11? A-11 now?

BARGIEL: Yes. A-11, (f), your Honor. I am reading from (f).

It says that the State plan must include a provision for development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606.

And we submit that this provision, this requirement on the State has no meaning whatsoever once the child is already in the home of a relative. These children came, at least as I understand it, from foster family homes where people were unrelated to them, or they came from child-care institutions. And this provision in the Social Security Act has no meaning to the States, it has no meaning whatsoever if the purpose of the provision is to require the State to enable these children or enable the home from which they came, which was an unrelated home, to be such that the children can go back.

I agree with counsel that the children are in the home which is best suited for them, and they are not receiving foster care any more. I think that's the clear indication of these provisions.

I think this provision also indicates that foster care is temporary care, by definition. It's not intended to be a permanent place for any child. And yet if you consider the complaint which was filed in this particular case on behalf of the plaintiffs and all the necessary inferences and implications which come from that, they suggest that they are in the best home which is possible for them, and the care which they are receiving is not intended, at least on their part, to be temporary care, but permanent care.

So we would submit that that also indicates that these people are not foster parents, the children are not foster children, and they are not receiving foster care, certainly not under the terms of the Social Security Act.

That, in a nutshell, is our position with regard to the Illinois welfare scheme as it comports to the Social Security Act, and therefore the supremacy clause of the United States Constitution.

We would also suggest that with regard to the equal protection argument which is raised, that the distinction between relatives and nonrelated foster parents is based upon differences which are rationally related to the foster care program.

Now, it's clear that the statute which creates the Illinois Department of Children and Family Services has as its overriding purpose the care of all the neglected children of the

State of Illinois. And that purpose is also reflected in the Aid to Families with Dependent Children program.

QUESTION: What would happen to them in the case -- I gather all these children were sent to relatives because conditions at the foster home were not what were desired. Is that right?

MR. BARGIEL: I don't know if there is any generalization which can be drawn --

QUESTION: Well, whatever the reason was, they were in foster homes, nonrelated, were they not?

MR. BARGIEL: Right.

QUESTION: And they then went to the homes of relatives.

MR. BARGIEL: Yes. I don't think that we can assume from that, your Honor --

QUESTION: Whatever the reason may be. Now suppose the relatives say, "We simply can't afford without this help to keep them." Then what happens to the children? Do you have to take them back and put them back in foster homes?

MR. BARGIEL: There are two things that can happen, your Honor. One of the things which has not been expressed to this point but appears in the brief is that although we contend, and I do feel, that foster parents are not the same as relatives and Congress would permit us to pay more money because they also in the Social Security Act appropriate more

money for foster care, the State of Illinois has a policy which is an exception to the rule whereby a related person who cares for a child, who can prove that he has need of money in order to continue to care for that child, can receive up to the full amount of foster care. That is, a child --

QUESTION: (Inaudible)

MR. BARGIEL: These plaintiffs in this particular case as a matter of fact, are receiving the \$105 payment. It's true that when they brought this case they were receiving \$63 per month, which was the AFDC provision. They subsequently made application, or they made application at some time --

QUESTION: They are now getting -- these are the named plaintiffs?

MR. BARGIEL: Yes. They are getting -- that is correct. They are getting from the State --

QUESTION: They are getting the foster home payment?

MR. BARGIEL: They are not getting the foster home payment. They are getting \$105 as a result of --

QUESTION: How does that compare with the foster home payment?

MR. BARGIEL: It's the same thing as. They are not --

QUESTION: How and why are they getting it?

MR. BARGIEL: Illinois -- pardon?

QUESTION: They met the burden of showing that they needed it.

MR. BARGIEL: That's right. Illinois has a policy whereby a relative who cares for a needy and dependent child who can show that he has special need and requires more money can get more money up to the same amount that one would receive for foster care. And if I am not mistaken, I was told by the chief counsel of the Illinois Department of Children and Family Services that this additional money, the difference between the \$63 and \$105 is not matched by Federal funds but comes from State funds.

QUESTION: As I take it, your friend's position is that the denial of equal protection arises out of the fact that the true foster care category gets the \$105 without any showing, and his clients had to make a showing of need to get the difference between \$63 and \$105. Is that right?

MR. BARGIEL: That very well may be. Yes, I assume that's true, your Honor, but if there is a --

QUESTION: He wouldn't have any other -- the facts being what they are now, that they are receiving the full \$105, he would have no other basis, would he?

MR. BARGIEL: I would agree. We think not. But I would say if there is a fault with that, in response to your Honor's question, in that position of my adversary, if there is a fault with that, then it's with the Social Security Act, because the Social Security Act does not -- the Aid to Families with Dependent Children program -- and the three-

judge court recognized this -- does not consider the need of the parent in determining whether or not a child is eligible for aid.

QUESTION: If your adversary is right that there is a conflict here, that your interpretation of the Federal statute is in error, and that you are obliged to pay under the Federal statute, then instead of coming out of State funds, the foster payment would in part at least come out of Federal funds?

MR. BARGIEL: I think that that's certainly true, given --

QUESTION: May I ask, though, if they are in fact receiving it, does the State make any claim here there is no controversy, at least as to these named plaintiffs and others -- Was it certified as a class action?

MR. BARGIEL: Yes, it was certified. The three-judge court found that there was a proper class.

QUESTION: And yet all the named plaintiffs, you understand are now receiving the full \$105.

MR. BARGIEL: That is correct.

QUESTION: As to them is there still any controversy?

MR. BARGIEL: As to the named plaintiffs. Well, certainly there is no controversy in the sense that they have anything to gain by this litigation.

QUESTION: What about our Sousner decision then?

MR. BARGIEL: I'm sorry, your Honor, I'm not --

QUESTION: On whether or not there is still the class action for us to decide if all the named plaintiffs are without --

MR. BARGIEL: Well, now, I'm not sure whether I am familiar with that or not. I would suggest that --

QUESTION: We could send it back to the trial court to find out whether they are actually getting the money or not?

MR. BARGIEL: I think that's clear. There is no controversy as to whether or not they are getting the money. I had submitted to the Court some xerox materials a couple of months ago which indicate that the named plaintiffs are receiving the extra money, and they have never contested that.

QUESTION: What if you won here, would they continue to get it?

MR. BARGIEL: I think without question, your Honor. I don't think -- I realize, of course, that they received the additional money after this litigation was started. I frankly don't think that that had anything to do with their receiving the money. As a matter of fact, there were affidavits filed in the lower court --

QUESTION: Is that the way the State is treating all children living with relatives?

MR. BARGIEL: According to an affidavit which I believe was filed by one of the parties for plaintiffs' counsel.

there were 1500 relatives who care for children who are related to them, and of those 1500 140 are receiving the full amount pursuant to this exception policy, which is about 10 percent of the entire class as designated by them of all these persons. And it's not clear that the entire 1500 have asked for additional aid or attempted to show any need. So certainly they are not the only people --

QUESTION: There are other members of the class, you can see there are other members of the designated class other than the named plaintiffs.

MR. BARGIEL: Oh, unquestionably. That's true, yes.

QUESTION: Well, even these named plaintiffs are in a different position from the foster home people in that if the relatives cannot continue to maintain their showing of need, they might go back down to \$63 hypothetically.

MR. BARGIEL: That's conceivable, yes. It certainly is. I wouldn't --

QUESTION: So there is a difference in the burden.

MR. BARGIEL: I am sorry, I'm not sure I --

QUESTION: Difference in the burden in the sense that they must show a need, the relatives must show a need above \$63.

MR. BARGIEL: Unquestionably. I say that's true. But again let me direct myself to the question that your Honor first asked. I don't think there is any difficulty with

that on an equal protection basis because the Federal Act, the Social Security Act itself, does not require, has nothing to do with the need of the custodian who cares for the child. It doesn't deal with that question at all under section 606 or 608 or 607. Eligibility is determined by the need of the child, and under section 608 it has to do with the home from which the child is removed.

Under section 608, an unrelated millionaire could take in a neglected child, and that family would be eligible for AFDC under section 608 if the home from which the child was taken had been previously eligible.

So what I am saying is that need is not provided for, at least need of the custodian, in the Social Security Act, and it seems to me that there would be no difficulty with the State saying in order to qualify for additional benefits which are not yours to begin with you must show a need as a custodian.

I will attempt to finish up very quickly. I would say here, too, that the plaintiffs, with regard to the equal protection argument that is raised, the plaintiffs asked the court to consider the plight of relatives who live with people who are related to them who cannot afford to maintain those children if they don't receive the full foster care benefit.

On the other hand, I think their argument ignores the fact that there are many neglected children in the State of

Illinois and in every State that don't have relatives to take care of them, there just aren't any, or there are relatives who don't consider or would not consider taking care of these children.

Now, it's quite clear, as your Honor points out, that people -- it's been traditionally true that people take care of their own, people take care of their kin, and so on. If the State of Illinois is going to be deprived of money --

QUESTION: I didn't say they do so. I said is that not the tradition?

MR. BARGIEL: Well, I think that is the tradition. At least I think that it's fair to recognize that it's more likely to happen than it is in a case where there is no blood relation.

But at any rate if what counsel suggests is to happen and the State of Illinois will be deprived of funds, certainly everything won't be raised to the \$105 benefit. The amount of money is going to stay the same and that will be equalized probably somewhere between \$63 and \$105.

QUESTION: You mean all foster homes will get something less than \$105.

MR. BARGIEL: Right. In all probability that is what's going to occur. And then conceivably relatives will be able to receive more money.

QUESTION: Doesn't foster care arise when the State

has made the child a dependent of the State?

MR. BARGIEL: Well, under the definition, a child would have to be removed from the home of a relative and adjudicated a ward of the State. Yes, that's true. The specific language is that he would have to be removed from the home of a relative pursuant to a judicial determination.

QUESTION: And Illinois' practice has been that even when that happens, when we remove the child from the home of a relative and then place the child with another relative, you have not treated that relative as a foster parent at all.

MR. BARGIEL: That is precisely correct, your Honor.

QUESTION: What is the degree of relationship?

MR. BARGIEL: The degree is the same -- I believe the State statute is the same as the Federal statute. I'm quoting now from page 11 of our brief. Section 606(a) says that the following relatives are eligible for assistance: That's father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece. That's the Federal statute.

Now, the State statute, which is, the pertinent part is reproduced on page 13 of our brief in footnote 2. That specifies that the child or children must be living with the grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other

relative approved by the Department.

So it seems to me there is a direct parallel between the State and Federal law.

QUESTION: The Federal law certainly wouldn't require the State to pay foster care amounts to a a mother.

MR. BARGIEL: The Federal law?

QUESTION: Yes.

MR. BARGIEL: No. I agree with you.

QUESTION: Or a grandfather. It would only be when the State adjudicates the person a foster child, or makes him a dependent of the State.

MR. BARGIEL: No --

QUESTION: Well, that's what the definition says that you read us.

MR. BARGIEL: I'm sorry. Maybe I misunderstand your Honor's question. It says -- the Federal law defines in section 606 a certain class of relatives. And as a matter of fact, your Honors --

QUESTION: I understand that.

MR. BARGIEL: OK. And that class of relatives includes father and mother.

QUESTION: I understand.

MR. BARGIEL: And what I would suggest is that if a sister in this case, when you consider section 606 and section 608, if a sister can be a foster mother and her

brothers and sisters can be foster children, then there is no reason why you can't ultimately get to a situation where you have a chain of events which leads a child back to his father or mother and have a natural father or mother be --

QUESTION: Do you understand your opponent's position to be that the Federal law requires foster care payments to relatives even though the State has not adjudicated the child and made it a dependent of the State?

MR. BARGIEL: Oh, no. You have to have -- that I agree with.

QUESTION: All right. As long as the State does not and need not declare the child a foster child, its only requirement is to pay AFDC?

MR. BARGIEL: Yes, I certainly agree with that. As long as that doesn't happen and the child lives with a relative, that is true.

QUESTION: But your point is that the ultimate extreme of your brother's argument could be that a foster child, i.e., a child who had been made a ward of the State, ends up in the home of his own mother or father and she gets not AFDC payments, but she gets paid as a foster parent.

MR. BARGIEL: That is precisely correct.

QUESTION: You know that the only time that child is removed from the family is for some reason. Now, what reason would it be? It wouldn't be just to give them more

money. It would be because the child isn't being cared for properly. Now, the State isn't about to put it back in that home that is declared to be unfit.

MR. BARGIEL: No, but it does have --

QUESTION: Not for a long time.

MR. BARGIEL: It has an obligation to determine or to see that that home can be --

QUESTION: I know, but they find another home, not that home. Right?

MR. BARGIEL: Well, certainly it --

QUESTION: So it isn't going to end up then in the home from which it was removed.

MR. BARGIEL: I think that it's conceivable that it ultimately could at some time in the future.

QUESTION: Does it happen often? I mean, if a mother has been declared unfit or a father declared unfit, for that reason the child has been removed from their care, is it very likely that you are going to commit that child to that mother and father again?

MR. BARGIEL: I don't know whether it's likely or not, it's certainly conceivable. The Act --

QUESTION: Does it happen?

MR. BARGIEL: Your Honor, I don't know. I'm not an expert. I don't know what the statistical information is.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Keenan, you have about six minutes left.

REBUTTAL ARGUMENT OF PATRICK A. KEENAN

ON BEHALF OF APPELLANTS

MR. KEENAN: Once again, Mr. Chief Justice, and may it please the Court:

First, with respect to the suggestion of mootness, three of the four named minor plaintiffs began receiving the exception-to-policy payments which they considered to be foster care payments, and 28 months after the suit was filed, I think, as Mr. Justice Brennan said, the Sizenor case, and I would also say this Court's recent opinion in Gerstein v. Pugh and the Federal rule that says the State must apply to the district court if it wishes to moot the case.

Second, with respect to the State's contention that the plaintiff related foster parents are not foster parents, first I would cite the district court's opinion where it named them, the district court said they were foster parents.

Second, citing this Court to the Federal foster care blueprint section, 408, of the Act, foster care payments can be made to children placed in the home of any individual.

Now, under this Court's opinion in the Shea case, I think any means any, and had Congress meant any individual to mean any individual other than relatives, it would have in section 408 -- if Congress had meant those payments to be denied

relatives, it would have set out in section 408 the enumerated relatives in section 606(a). It did not. When Congress said foster care payments can be made to children who are wards of the State placed in the home of any individual, it meant precisely what it said.

The interpretation urged by the State of Illinois, I think, is a tortured one, and I think the one urged by the plaintiffs is a simple one. Congress examined children who had been removed from the home of their parents or a relative, most usually their parents, and who are declared wards of the State. And it recognized that those children were more expensive to care for, and it further recognized in section 401 of the Act that the best possible placement for those children was with a relative.

I think it not relevant whether or not the child was removed from the home of his parents or from the home of his relatives. I think with respect to the question -- let me go back to that.

I think it not relevant the nature, whether or not he was removed from his parents or his relatives, because he meets the criterion, the characteristics of need, which the Congress declared in order to make him eligible for the categorical assistance payments under section 408.

QUESTION: You concede that he certainly has to be removed from the home of a relative and be made a foster child?

MR. KEENAN: Absolutely, your Honor. Absolutely.

QUESTION: And the Social Security Act nor you can force that to be done except for good cause.

MR. KEENAN: Only at the discretion of the State's Attorney in Illinois and on the judgment of the juvenile court judge.

And the suggestion that foster care payments would go down, the plaintiffs simply don't understand. I think this Court's opinion, or the decision in this case one way or another is not going to have any effect on the number of dependency and neglect petitions that are filed in juvenile courts in the State of Illinois. And those foster care payments are federally subsidized to the extent of \$100. I don't see how it is going to cost any more money one way or the other.

All that's going to happen is that these children will not be placed in the homes of strangers, which the Congress disapproves, but they will be placed in foster homes maintained by their relatives, which would serve the purposes of the Act and it would serve the purposes of the State law to maintain its strength in families.

QUESTION: Could I ask you before you are through where the order certifying the class action is to be found.

MR. KEENAN: Yes, your Honor, it is at page 54 of the appendix, which is the --

QUESTION: And there are members of that class still

around even though the named plaintiffs may not have --

MR. KEENAN: Yes, indeed, there are, your Honor.

It's the plaintiffs' position that the controversy exists by the way between them and the State because --

QUESTION: The named plaintiffs and the State?

MR. KEENAN: Absolutely.

QUESTION: Still?

MR. KEENAN: Still. Because the exception-to-policy payments are discretionary and can be withdrawn at any time. Congress meant those categorical assistance payments to be made because of the nature, because of the characteristics of the child, that is, that he was removed from the home --

QUESTION: You suggest if the State won it might terminate the State --

MR. KEENAN: It could tomorrow. Yes. Yes.

With respect, finally, to the Chief Justice's question about the tradition, it's true that traditionally relatives take care of their own, but a lot of traditions in this country were changed in the thirties when the Social Security Act was passed, and they have been continually changing in light of the economic realities. I think Congress recognized those realities when it said that any child who was removed from the home in which he was living and declared to be a ward of the State has a right to categorical assistance payments under the foster care scheme.

The district court found that the named plaintiffs are such children. This Court should recognize that they are such children and it should secure them the rights and eligibility for those foster care payments. It should do so because -- I respectfully urge that it should do so because that is required by the Social Security Act, by the policy of the Federal and State laws, and by the equal protection clause.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:03 a.m., oral argument in the above-entitled matter was concluded.)