In the

Supreme Court of the United States

Gregory Norton, Jr., etc.,

Appellant,

v.

F. David Mathews, Secretary of Health, Education, and Welfare,

Appellee.

No. 74-6212

Washington, D. C.
January 13, 1976

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GREGORY NORTON, JR., etc., Appellant, v. F. DAVID MATHEWS, Secretary of Health, Education, and Welfare, Appellee.	No. 74-6212

Washington, D. C.,

Tuesday, January 13, 1976.

The above-entitled matter came on for argument at 1:00 o'clock, p.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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

C. CHRISTOPHER BROWN, ESQ., Legal Aid Bureau, Inc., 341 N. Calvert Street, Baltimore, Maryland 21202; on behalf of the Appellant.

KEITH A. JONES, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 6212, Norton against Mathews.

Mr. Brown.

ORAL ARGUMENT OF C. CHRISTOPHER BROWN, ESQ.,

ON BEHALF OF THE APPELLANT

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

Counsel for all parties in this case and the next case, Mathews vs. Lucas, have discussed the following matter and we agreed to suggest to the Court that during the Norton hour we discuss jurisdictional issues and during the Lucas hour we discuss the merits. And we will, if there is no objection to that.

MR. CHIEF JUSTICE BURGER: We'll try not to have any questions that cross that division.

You may proceed, Mr. Brown.

MR. BROWN: All right. Thank you.

In 1969 Gregory Norton, Jr., then age 5 years old, applied for child's insurance benefits to the Social Security Administration.

Title II of the Social Security Act allows children whose fathers have become disabled, have reached a certain age, or who have died, and whose fathers worked and were covered by Social Security employment for a requisite number of quarters,

to receive death benefits -- at least death benefits in the Norton case -- upon their death.

Gregory Norton applied for these benefits. He applied for these benefits after his father was killed in the Vietnam War.

Gregory is illegitimate. His mother and his father were not married.

Now, the Act is so structured -- and I'll just touch on this briefly, because it's not totally relevant to the jurisdictional argument -- but the Act is so structured that most other children who are applying for child's insurance benefits have to, in addition to several not very controversial prerequisites, have to establish that they indeed are the son or the daughter of the wage-earner; i.e., have to establish paternity.

Now, Gregory Norton's class has to establish another fact. They also have to establish, in addition to paternity, that they were either living with or supported by the deceased wage-earner at the time he died.

Gregory Norton filed a cause of action in the federal district court to challenge the constitutionality, under the Fifth Amendment equal protection concepts, of that provision.

The suit was filed in the United States District Court for Maryland. In that suit there were various juris-

dictional bases asserted: 28 U.S.C. 1331, APA jurisdiction; mandamus jurisdiction, 1361; and also jurisdiction under the Statutory Review Procedures, 42 U.S.C. 405(g).

The suit was also classed or stated to be a class action.

The United States District Court, in its initial opinion, held in its opinion that a class was to be certified. But on the merits it ruled against the Norton claim by a three-to-nothing vote; a three-judge district court.

An appeal was then taken from that adverse decision to this Court. This Court -- shortly after this Court decided the Jimenez case, Weinberger vs. Jimenez, or Jimenez vs. Weinberger, actually -- remanded this case back to the three-judge court for reconsideration in light of the Jimenez case.

On remand, the three-judge court, this time by a two-to-one vote, upheld the constitutionality of the statutory provision that Gregory Norton is attacking.

An appeal was then brought again to this Court, and that's where we are today.

Incidentally, there is another issue that has now been waived by Gregory Norton, and that is an issue that he indeed was in fact supported, and therefore met the prerequisite of the Act. That decision was decided adversely to Gregory Norton. He waives. He has not appealed that issue. His only issue in this case, in addition to the jurisdictional issue,

is whether or not the Act is constitutional.

Because if it's not, then he does not have to establish that he was either supported by or resided with the deceased wage-earner father.

This case can only come to this Court if it comes from a properly convened three-judge court, in the District of Maryland.

We are alleging jurisdiction in this Court now pursuant to 28 U.S.C. 1253. That statute requires, in turn, that review can only be had from decisions of a properly convened three-judge district court granting or denying injunctive relief.

Accordingly, we are properly here if the three-judge court in this case properly had the power to issue an injunctive relief, and a kind of injunctive relief that would seek to stop enforcement of the statute.

This, we contend, it did have the power to do, and this basically is the core argument on the jurisdictional issue in this case.

We have two major routes by which we think this Court, through either one of which this Court could get to the final solution that there indeed is injunctive power in the district court.

One route is by looking at Section 205(g) of the Social Security Act, which is 42 U.S.C. Section 405(g), and

that's the provision of the Act which was highlighted in this Court's recent decision in Weinberger vs. Salfi; either by looking at that statute itself and getting it from the words of that statute, or from how that statute should be interpreted in light of the general statutory interpretation rules that apply in the situation.

Or, secondly, if 205(g) cannot do it by itself, we contend that the APA gives the power to -- for a Federal District Court, if not given the power explicitly by the Statutory Review statute to injunctive relief, sort of is an ancillary remedy to what is provided by the Statutory Review section.

QUESTION: But in order to get in under the APA you have to show that the statutory remedy otherwise provided is inadequate, don't you?

MR. BROWN: That is true.

That is true, and I hope to be able to point that out today.

First, the general presumption which seems to run throughout the cases that this Court has decided this century is that,barring an explicit declaration by Congress to the contrary, there is a general presumption of reviewability.

Now, also, I think the cases can be read to establish there's a general presumption that a District Court, which is an equity court, has broad equitable powers.

Now, admittedly, each case that has been decided thus far deals with a specific agency, and, as would be expected, the words of each statutory review provision for each other agency are not the same as we encounter in this case.

Accordingly, I admit that there is no case right on point. But there are many cases which seem to not be limited in any way and accordingly would be applicable to this situation.

So, basically, we are beginning our argument on the assumption that there is a general presumption that a court of equity, which the United States District Court is now, a combination of law and equity, can grant all relief that is necessary to make the parties whole; unless Congress has specifically said that they cannot.

205(g) of the Social Security Act, as is pertinent to this case, merely says the following: That the district court, after certain prerequisites have been met, which Gregory Norton has met in this case, the district court shall have the power to affirm, modify, or reverse the decision of the Secretary.

And we contend that there is nothing in those three words which in any way indicates a congressional intent to negate injunctive relief in this case. If anything, perhaps the word "reversal" could be read to include the power to issue reverse by injunctive relief.

QUESTION: Well, isn't, though, perhaps the more accurate question to ask is whether the injunctive authority that, as you say, is generally available to the district courts, is in any way necessary to carry out what a statute -- what this statute requires the district court to do?

I mean, can't it fully accomplish what Congress has intended that it do by simply setting aside the decision of the Secretary?

MR. BROWN: Okay. I'll move on to that point right now, Your Honor.

If we look at how the Act works and how, in practicality, the needs of people litigating in this area, the needs of claimants who are attempting to obtain Social Security benefits, we see on two different levels that there are very many practical needs as to why a claimant actually does need injunctive relief as opposed to any other kind of relief.

Now, I think if we look at those needs and imagine what Congress must have imagined -- indeed, Congress has not said very much on this issue; we are basically not working with any explicit statutory history -- we look at the needs for injunctive relief, I would submit that Congress could in no way have intended to not allow a court, an equity court, to issue injunctive relief.

First of all, on the individual basis -- I look at

this on an individual basis and on a classwide baside -- on an individual basis, when an individual claimant receives a benefit, there is no necessary guarantee that he is going to be paid that benefit in a proper fashion, and indeed there may be cases when that individual may want to be able to get benefits before a final judgment is issued; i.e., he may want to apply to a court for preliminary injunction or something such as that, to give benefits, before the District Court has finally decided the ultimate merits of the case.

Here's an example where that could be very helpful.

In this Lucas case, for instance, the oldest Lucas daughter, past the age of eighteen -- she's now past the age of eighteen; you cannot get these benefits if you're past eighteen unless you're still in school -- now, in her case, she couldn't still be in school unless she had the money not to have to work. So in many individual cases there may be an instance in which the prerequisities of a preliminary injunction have been met by an individual party; and, for instance, in this situation, where you have someone who has strong need for the benefits, it could very clearly be a situation in which they could establish the various equities and so forth to get a preliminary injunction. That would be one kind of injunctive relief.

But, admittedly, that would not be the kind of injunctive relief you need in order to have a three-judge court.

That wouldn't enjoin enforcement of the statute.

QUESTION: Well, would that injunction be very useful if the case was on review? Isn't it very likely that if we decided to take the case, that that would be enough, also, to suggest the likelihood of a stay of the injunction until the merits were decided?

So, how would that get any money in the pocket of the recipient?

MR. BROWN: Well,then the government would have to come in and either -- and fight against the preliminary injunction motion, and they would balance the equities in that situation; they'd either win or they'd lose.

Or, if the decision was issued favorably to the individual claimant, the way normal cases work, that claimant gets the fruits of their victory at that point; unless the other side comes in and requests a stay pending appeal.

QUESTION: Well, isn't that very often the case?

MR. BROWN: Indeed, that is the case.

QUESTION: Yes.

MR. BROWN: But, for instance, another case that was here on summary affirmance is Griffin vs. Richardson. In that case the three-judge court held another provision of the Social Security Act unconstitutional, as violating illegitimate children's rights.

The government came in and asked for a stay pending

appeal. They said $50 million was going to have to be paid out; that's too much. Let's wait and see what the Supreme Court does.

The three-judge court unanimously denied their request for stay pending appeal, and,Mr. Justice Burger, you affirmed that denial.

Benefits were paid out by the Social Security Administration, or at least the process was begun before this Court summarily affirmed that decision.

Now, that's just one situation, and each case would have to be decided on its own individual merits.

I think there's even more. The more important reasons --

QUESTION: Well, isn't that because when the stay application is presented at this level, that an evaluation is made of the probabilities?

MR. BROWN: Indeed. You'd have to show a strong lack of --

QUESTION: It's a little difficult to generalize about this, isn't it?

MR. BROWN: Oh, indeed; indeed. You'd have to meet a strong likelihood of success on the merits; the irreparable harm would have to be significant; and the public interest would have to be in one's favor; and it would have to not be of significant harm to the government.

I'm assuming that those could be met. I mean, this is -- we're talking now about why injunctions are needed, and we can't specifically talk about this case or that case.

We lost below in this case. We were in no position to --

QUESTION: Incidentally, may I ask -- I gather what -- this is an argument, that there is this equity power in the district court --

MR. BROWN: This is correct.

QUESTION: -- and that affirm, reverse, or modify in no way reduced that power.

MR. BROWN: That's correct.

QUESTION: Or curtailment. Is that it?

MR. BROWN: That's correct.

QUESTION: You're not making an argument that one may construe "affirm", "modify" or "reverse" -- although you did say earlier something about a reversal might, in some instances, be tantamount to injunction --

MR. BROWN: Yes.

QUESTION: But this is not an argument that any of those words should be interpreted as embracing a power.

MR. BROWN: You're correct, Your Honor. Right now I'm saying -- I'm about to go to the policy reasons that Congress would have had to go through themselves if --

QUESTION: Yes, but I just want to understand what

you're saying is that the power that one usually has in an equity court has not in any wise been curtailed by the language used in 405(g).

MR. BROWN: That is correct.

QUESTION: All right.

MR. BROWN: That's my argument.

And when the language says nothing, we try to look to other reasons as to what Congress might mean. And now, looking at these various actual needs the claimants might have, I think this helps expose some of the reasons why Congress would not have wanted to preclude injunctive relief.

The most important aspect of any case such as this is an attempt to make everyone whole who has suffered under an unconstitutional provision -- in this case the Social Security Act. There's a need for prompt perspective enforcement -- or unenforcement as the case may be, in this situation of the illegal provision of the Act. There's a need for retroactive benefits to be paid, or at least the court would be asked for that.

QUESTION: I presume you're speaking with respect to people who are parties to the litigation?

MR. BROWN: I'm speaking -- well, with respect to retroactive benefits, I'm talking about the parties, the named plaintiffs in the litigation, as well as a class.

QUESTION: A class consisting of people who had made

claims to the Secretary and who had made them within sixty days?

MR. BROWN: That's correct, Your Honor. Who have applied for benefits, who have been denied benefits solely because of this specific provision that the rest of the class is litigating, and who have filed their request for benefits or their appeal to the district court no later than sixty days, or perhaps we would contend later on that there's a tolling effect, and that Gregory Norton in effect tolled the statute of limitations for this class.

QUESTION: Well, even if they hadn't applied for benefits within sixty days, if they were to be members of a class, I suppose the class member filing might be tantamount to a filing for them. But at least the class couldn't embrace people whose claims had been denied by the Secretary more than sixty days before the class member filed.

MR. BROWN: That's correct, Your Honor. That's exactly correct. And we don't ask for anything broader than a class that would be defined as you just defined it.

Without injunctive relief, there's really nothing that can be done in terms of making everyone whole. The Act itself is now structured so that the individual claimant can be made whole. But there's nothing which makes everyone whole. All those illegitimate children in this case who have applied for benefits, but have been denied benefits because

they couldn't meet the specific requirements of the Act that are being challenged in this case.

I think Congress -- I cannot imagine that Congress would have wanted to preclude any district court from making the whole class whole, after a court had decided that the provision under which the whole class was denied benefits was unconstitutional.

QUESTION: But can't the court make that whole class whole simply by setting aside an order of the Secretary with respect to each member of the class?

MR. BROWN: Well, what would be -- you're saying there's another word, other than "injunction", that would be used to define what the district court would do. And that would be setting aside?

QUESTION: Well, an injunction says to the Secretary, as I conceive it: this provision is unconstitutional and you are barred from enforcing it, period.

Now, it may be enforcible only by people who are parties to this action. But a setting aside is, at least I would read 405 -- would say: your order in this case is invalid because it relied on an unconstitutional section of the statute. Therefore this claimant should be awarded benefits.

MR. BROWN: But could the court also say that the whole class of claimants should be awarded benefits in the

same manner?

QUESTION: Well, certainly, if the class were uniform, properly a class, the court could say that the awards in each of the cases are set aside.

MR. BROWN: Okay. I would have no difficulty -- the words "set aside", I don't believe are in the statute, just as the word "injunction" is not in the statute.

QUESTION: But that does involve -- the basic jurisdictional question of this Court is that presumably that could be done by a single judge in a Federal District Court.

MR. BROWN: I understand that, Your Honor. I understand --

QUESTION: Now, on the other hand, if the holding were, as my brother Rehnquist suggests, that the statutory provision upon which the Secretary relied was unconstitutional, then I suppose there would still be direct appeal to this Court under the other statutory provision -- 1252, wouldn't there?

MR. BROWN: That's correct, and that's one of the --

QUESTION: But, of course, in this case, the holding was the opposite way: on the merits.

MR. BROWN: That's correct.

QUESTION: Unh-hunh.

MR. BROWN: Now, the problems that I have with getting relief, making the class whole by something not called

an injunction, but, instead called setting aside the decisions of the Secretary for a whole class, are as follows:

There's often a need to assure some degree of promptness in what the Social Security Administration does. Social Security does not necessarily act as promptly as perhaps they ought to act. An injunction is something which enables people to act a bit more promptly and enables the attorneys for the people who have received the favorable order to assure that prompt action will be carried out.

Also, I think that, many times, clarifications are needed. The Secretary does not wilfully disobey orders, but sometimes there's an ambiguity as to what an order means.

Experience has at least shown me that if you have an injunction, which is ordering anybody to do something, that much more readily assures prompt resolution of any ambiguity that might arise.

Another factor which would compel that there be an injunction,rather than, say, just a setting aside or nothing at all, is that with something that would be termed just setting aside the decision of the class, you ineffect are assuming that the Secretary has lost and the claimant class has won, are giving the Secretary an automatic stay pending appeal.

I don't think Congress would have intended that the Secretary necessarily gets an automatic stay pending appeal.

QUESTION: Well, why do you think Congress then chose this particular language affirming, modifying or reversing the order of the Secretary as the method by which the Secretary's decision were to be judicially reviewed?

MR. BROWN: Well, I'm not -- it seems to be the primary method by which the Secretary's decisions are to be reviewed. I have argued in my brief that there can be other methods also. For instance, we're talking about the Act, 205(h) talks about decisions of the Secretary. And there could be a very good argument that this is not a decision of the Secretary that we're challenging, but it's a decision of the Congress, citing Johnson vs. Robison. And --

QUESTION: Well, weren't a lot of these doubts that you're suggesting pretty well resolved in the Salfi opinion? And didn't -- I haven't got it before me, but didn't the Salfi opinion say just that, that this is the method by which Congress has chosen that the Secretary's decisions be reviewed, and that a decision such as this is the decision of the Secretary, not of the Congress -- of the Secretary, within the meaning of the statute?

MR. BROWN: Let me say this: It appears as if -- I've read Salfi ad nauseum -- it does not seem to have anything --

QUESTION: How many readings did that take?

[Laughter.]

MR. BROWN: Salfi does not indicate, in any way --

except with one slight exception, which I'll touch upon -- that, for instance, there is no way in which you can get injunctive relief. Salfi didn't need to decide that issue, because Salfi had a different circumstance.

Salfi says nothing that -- for instance, part of the APA, Section 703 and 704 of the APA give ancillary power to issue injunctive relief. Salfi doesn't touch upon that.

I don't think -- even if we assume that 205(g) is the only way that we can get review in this case -- that does not preclude injunctive relief, because that does not preclude relying upon the ancillary APA remedial powers.

There is nothing in Salfi, and there is nothing in 205(g) or 205(h) which in any way precludes that, to the best of my knowledge.

And there is language in 205(h) which says: In order to get review under this Social Security provision, you have to follow all the portions of the Act.

And by the class that I have suggested be defined, the class, by definition, would have followed all portions of the Act. We are exhausting -- which is one of the things Salfi requires -- we will file an application -- which Salfi requires. I can see nothing inconsistent with what we're asserting here and Salfi.

QUESTION: Well, you don't -- you aren't suggesting, though, that the district court would have power to enjoin the

operation of the Act of Congress generally, against anybody. Isn't it enough for you to say that it is not inconsistent with the judicial review provisions for the Court to, in effect, enjoin the operation -- to set aside the award or to set aside the denial of the award on the ground that the Act is unconstitutional?

You are enjoining the operation of the statute to that extent.

MR. BROWN: Well, that's all I --

QUESTION: Isn't that enough for -- that's all you need to say, isn't it?

MR. BROWN: That is enough. I'm talking about these hypotheticals merely to try to dispel the notion that Congress could have intended there to be no injunctive power at all. I'm not -- these hypotheticals are not necessarily in this case, but what you said is correct.

QUESTION: But do you think that the setting aside a judgment of the Secretary is -- on the ground that the Act he acted under is unconstitutional; does that amount to an injunction?

MR. BROWN: I think it amounts to an injunction if there's the same bite that that order would have which an injunction has, which means that something has to begin happening now. Payments have to start to be made now. And payments would have to be made to the whole class.

If that's what the setting aside entails and implies, I think it's tantamount to an injunction.

QUESTION: Well, what does it imply?

MR. BROWN: Well, I presume -- Justice Rehnquist has suggested this, and I -- it would seem that if you use the words "set aside" and treated them like an injunction, there are cases that this Court established that you have to then have a three-judge court.

We don't -- you generally look at what the remedy does as opposed to the name attached.

QUESTION: Well, the Secretary acts under a statute and says your claim is denied, because the statute bars you. The Court says that statute is unconstitutional, you cannot bar him for that reason. Your order is set aside.

Now, the Act of Congress is not being -- the Court is refusing to apply an Act of Congress in that particular case, I take it; and is telling the Secretary, "don't enforce that statute."

MR. BROWN: You're saying an individual order to set aside a case would in effect be stopping the enforcement of an Act?

QUESTION: Well, I mean the statute says an injunction restraining the enforcement or the operation of a statute as well as the --

MR. BROWN: I understand your point, and I would

agree with that point.

QUESTION: The term "set aside" is probably unfortunate. I think "reverse", which is the statutory language, would accommodate the same questions.

MR. BROWN: That's quite probable.

My suggestion would be that that would be tantamount to an injunction.

QUESTION: Well, wait a minute. Now you're saying "reversed" is tantamount to what?

MR. BROWN: Your Honor, I think -- if pressed to my hardest argument, I would say that "reverse" includes to give injunctive relief or that kind of --

QUESTION: All right.

MR. BROWN: I don't think I'm pressed to that point.

QUESTION: Well then, does it follow that a three-judge court would be required to do it?

MR. BROWN: Yes, Your Honor. If the reversal was tantamount to an injunction and operated like an injunction, and restrained enforcement of the statute, a three-judge court would be required.

This is a unique way of approaching it, and I had approached it under conditional ways which would make it a little clearer as to what was happening, and therefore whether a three-judge court was necessary or not.

I'd like to reserve whatever time I have left, if

that's possible.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jones.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE APPELLEE

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

The United States takes the position in this case that this Court lacks jurisdiction to hear this appeal.

Our contentions in this regard may be summarized by the following five points:

First, appellant's individual claim for relief did not require the convening of a three-judge district court.

Second, the district court lacked subject matter jurisdiction over the class designated by the appellant.

Third, although the district court may have possessed subject matter jurisdiction over a far more narrowly defined class of claimants, a suit on behalf of that class would not be cognizable under the Federal Rules of Civil Procedure.

Fourth, even if such a class action were cognizable under the Rules, the class would nevertheless have been unable to assert a substantial claim for injunctive relief, and, therefore, under no circumstances would a three-judge court have been required to hear that case.

And fifth, finally, since a three-judge court was not required, this Court lacks jurisdiction over the appeal.

I will now elaborate upon those points.

I begin the analysis by distinguishing between Appellant's individual claim and the claim for class relief.

I will first take up the jurisdictional aspects of appellant's individual claim for relief, and then discuss the implications of his request for certification of the action as a class action.

Appellant's suit on his own behalf was brought to review, a decision of the Secretary, denying him child's insurance benefits. As such, that suit was governed by the second sentence of Section 205(h) of the Social Security Act. That sentence provides in essence that no decision of the Secretary shall be reviewed by any court except as provided by Section 205(g) of the Act.

In turn, Section 205(g) requires exhaustion of administrative remedies by restricting the district court's jurisdiction to the review of final decisions made by the Secretary, after a hearing, and within sixty days prior to the filing of the complaint.

Now, it's conceded here that Appellant did exhaust his administrative remedies, and that the district court concededly had subject matter jurisdiction over his claim.

Our contention, however, is that the district court

did not have jurisdiction to grant Appellant's request for individual injunctive relief. Section 205(g), as has been made clear, confers on the district courts power only to, and I quote from the statute, "enter a judgment affirming, reversing or modifying the decision of the Secretary", end of quote.

QUESTION: And then it's been suggested that if an individual claimant appeals the Secretary's decision, after having exhausted his administrative remedies, asks for review of that in a district court, upon the ground that the statutory provision upon which the Secretary relied in denying the claim, is an unconstitutional provision, that that is the functional equivalent of requesting a district court to enjoin that statutory provision, and therefore a three-judge court is required.

That's what I understood the answer of your brother to be to my last question before he sat down.

MR. JONES: Well, if his argument is that a reversal of a denial of benefits on the grounds that the statutory classification was unconstitutional is in fact an injunction, --

QUESTION: It's the functional equivalent of an injunction, he told us -- he didn't use that phrase, but that's what I understood him to say.

MR. JONES: Well, it may have the same consequences as an injunction as to the individual plaintiff, but it certainly is not an injunction in the sense that Section 2282

of the Judicial Code refers to injunctions.

It does not disrupt the operation of the Act in its entirety as to all persons.

QUESTION: Well, it depends on how big the class is. At least it might disrupt it with respect to the entire class.

MR. JONES: That is a question I was going to reserve until I --

QUESTION: At least in that judicial district.

MR. JONES: -- got to the discussion on class action aspects.

QUESTION: Or for everybody in that judicial district, until it's reversed or stayed; wouldn't it?

MR. JONES: Well, the district judges in that court might disagree, but --

QUESTION: Which is all the effect that an injunction could have.

MR. JONES: But it's certainly true that if a district court or a court of appeals, exercising purely legal and non-equitable powers, holds a statute unconstitutional, that is the law for that district or that court of appeals, that circuit.

Nevertheless, that has never been considered to be the kind of injunctive relief that requires a three-judge court.

QUESTION: Well, I thought that -- I had thought that in a typical three-judge court situation that you would need a three-judge court even though you only challenge the application of the statute in a particular case. Donkey Walker.

MR. JONES: Well, I think that --

QUESTION: Is that right or not?

MR. JONES: I did not think that was right. I thought that if what was being sought was merely the provision of benefits to an individual claimant, that is the equivalent of a reversal of the denial of benefits to him, then that plainly is not.

QUESTION: Well, suppose I go into court to enjoin and claim that as applied to me, to this set of facts, this statute is unconstitutional?

MR. JONES: And like the --

QUESTION: It may be quite constitutional in every other circumstance known to man. But in this situation, it's unconstitutional.

Now, does that require a three-judge court?

MR. JONES: I think not.

QUESTION: Oh, I think it -- well, if you ask -- if he asks for an injunction.

MR. JONES: Well, he hasn't stated that yet.

QUESTION: Oh, yes.

MR. JONES: Not --

QUESTION: And he wants an injunction against its application to him.

MR. JONES: Well then, that kind of injunctive -- I guess the frank answer is that I'm not sure, Mr. Justice White.

QUESTION: Donkey Walker.

QUESTION: Unconstitutional as applied.

QUESTION: And yet if he gets a declaratory judgment expressing that precise same proposition of law, it does not require a three-judge court.

QUESTION: That's true, even if you declare it invalid on its face.

QUESTION: Yes.

QUESTION: But -- so that's not really involved.

Is this any different from the Donkey Walker situation? Where this statute has just not been permitted to be applied in this case.

MR. JONES: And the argument is that even though, as in Lucas, for example, it may be a reversal; nevertheless, it is a reversal that is equivalent to an injunction. I mean that -- one of these cases -- in one of these cases this Court lacks jurisdiction.

QUESTION: Well, the Secretary's decision goes out the window and may not be enforced because the statute is unconstitutional.

MR. JONES: As to this individual.

But that is not the kind of injunction that prevents the Secretary from -- excuse me. A decision by the district court reversing the denial of benefits, as in Lucas, is not the kind of decision that disrupts the operation of the Act as to other parties.

And our point here is that as to the individual, I'm only now discussing the individual aspect of the case, there was no power to grant injunctive relief. All that the Court could do was reverse the decision of the Secretary, and that reversal is not the kind of injunctive disruption with the operation of the Act that warrants the convening or requires the convening of a three-judge district court.

QUESTION: Well, you have restated your position.

QUESTION: Well, if you were going to analogize the reversing because the section was unconstitutional to some other form of more traditional relief than that contemplated in 405, couldn't you just as easily analogize it to a declaratory judgment as to an injunction?

MR. JONES: Well, I think it would be more accurately -- well, when there is only one plaintiff involved, really, it seems to me, we are in large part playing with words, because whether it's more closely analogizable to a declaratory judgment or an injunction or simple reversal of the denial of benefits, the effect is the same. And it seems

to me that if this Court is to construe any request to deny -- to reverse a decision of an administrative agency on the ground that it is the application of an unconstitutional statutory provision, the Court construes every such request as a request for a three-judge court injunction. And the jurisdiction of three-judge courts is going to be enormously expanded.

QUESTION: Which runs against the grain of numerous decisions of this Court, saying that that statute should be very narrowly construed? Right?

MR. JONES: That is correct, Mr. Justice Stewart.

QUESTION: Mr. Jones, am I correct in understanding -- I suppose it's obvious -- the district court here is exercising original jurisdiction rather than appellate jurisdiction, is it not?

The word "reverse" is somewhat unusual for a district court.

MR. JONES: Although there are many circumstances in which a district court, in effect, has review authority over administrative agencies.

QUESTION: But the order when it's changed is -- the district court doesn't, in effect, enter an order for the Secretary, it orders the Secretary to do something, doesn't it?

MR. JONES: Well, it reverses the decision of the Secretary denying the benefits. And I think that that is a

kind of appellate jurisdiction, although within the framework of Article III, since the administrative agency is not a court, it is, of course, original jurisdiction for those purposes.

QUESTION: Other than this statute, does the district court have jurisdiction to reverse orders? Isn't it -- aren't there traditional ways in which the district court exercises original jurisdiction when it orders somebody to do something?

MR. JONES: I am not sure what the review provision with regard to other administrative agencies is. I would suspect that this is not an extraordinary form of granting judicial review, that it is relatively common to provide for review by reversal. But I'm not positive as to that.

But to summarize our position as to the individual claimant:

First, we believe that there is no injunctive authority as such, because the statute does not embrace it.

Secondly, that if the statute does in fact embrace such injunctive authority, then, nevertheless, injunctive relief would always be inappropriate as to an individual claimant, because an individual claimant always has an adequate remedy at law in the form of reversal of the denial to benefits. The individual claimant never needs an injunction.

Opposing counsel suggested that he might need preliminary injunctive relief. I would make two comments with

regard to that.

First, such preliminary relief would be no more appropriate here than it was in Samson v. Kennedy, where it was -- excuse me, Samson v. Murray, where it was held that the back pay act prevents injunctive relief on behalf of individual federal employees who are seeking to avoid dismissal.

And secondly, as opposing counsel has conceded, preliminary relief of that kind is not the kind of relief that would entitle the claimant to a three-judge district court.

Therefore, it is our view that if appellant is to prevail in this case, he must establish that the class action was appropriate. That a three-judge court was required, if at all -- and we think not -- only if the class action was appropriate.

QUESTION: What happens, Mr. Jones, if the Secretary says, "Well, that's a fine decision, but I'm just not going to enforce it" --

MR. JONES: Well, Congress --

QUESTION: -- "and somebody will have to do something to me pretty bad before I'll live up to that decision"? Was he in trouble with the district court or not?

MR. JONES: No, certainly not. He could not be held in contempt by the district court if he refused to obey its order.

QUESTION: You have to take that position.

MR. JONES: Well, I think it's quite clear. I would think that anyone seeking to hold the Secretary in contempt for refusing to obey the decision would have a very difficult road.

QUESTION: Well, do you think he could get -- do you think the person then could get any more relief from the district court?

MR. JONES: He probably could get a mandamus, --

QUESTION: Do you think he could go back and get an order --

MR. JONES: -- probably mandamus the Secretary to do it.

QUESTION: -- he could go back and get an order ordering him to obey?

MR. JONES: Probably get a mandamus order enforcing the order if the Secretary refused to obey. But Congress --

QUESTION: Under another head of jurisdiction.

MR. JONES: -- Congress, of course, assumed that the Secretary would abide by final decisions of the courts, and determined that it would be unseemly and inappropriate and unnecessary to subject the Secretary to cursive orders.

I don't think that is a fair method of interpreting the statute here, --

QUESTION: How did it work, in fact, --

MR. JONES: -- attributing bad faith to the Secretary. Excuse me, Mr. Justice Stewart.

QUESTION: I'm sorry I interrupted you. Have you finished?

MR. JONES: Yes.

QUESTION: I was just curious. Let's assume a reversal by the district court, just on, let's say, the weight of the evidence.

Then, is that the end of the matter? Does the district court just enter a judgment granting the claimant what he's asked, or is that -- does it go back to the Secretary and for new proceedings consistent with the district court's judgment?

MR. JONES: It's remanded to the Secretary and the Secretary then pays the benefits, --

QUESTION: Does the Secretary then issue a new order?

MR. JONES: If the government does not appeal.

QUESTION: Does the Secretary issue a new order, do you know?

MR. JONES: I do not believe so. I think the payments are simply made.

QUESTION: Unh-hunh. As a result of the district court's order.

MR. JONES: That's correct.

QUESTION: It's perhaps not important; I was just curious.

MR. JONES: Let me turn now to the question of the propriety of class relief. And we being with the fundamental proposition that the district court may entertain a class action only if it has subject matter jurisdiction over the claims of the individual members of the class.

Appellant contends here that subject matter jurisdiction over the claims of the class existed under either the mandamus statute or the Administrative Procedure Act.

And we answer that contention, I believe, in full at pages 13 through 18 of our brief in this case. I would only summarize our points with regard to that aspect of the case.

We point out there that first this Court in Salfi rejected that contention. The Court held that Section 205(h) of the statute, the third sentence of that provision, forecloses all non-Social Security Act sources of jurisdiction.

Secondly, we think the Salfi decision is plainly correct, because it effectuates the clear congressional intention of restricting the -- restricting Social Security suits to cases in which the plaintiff, the claimant has exhausted his administrative remedies, as provided by Section 205(g).

And third, we point out that if the Appellant's position with respect to the mandamus statute were accepted, that would lead to results so anomalous as to be untenable, because it would provide for jurisdiction only as to those persons whose claims were the least ripe for adjudication.

Accordingly, for all these reasons, the only source, the only possible source of subject matter jurisdiction over the class was Section 205(g). But the jurisdiction conferred by Section 205(g) clearly did not extend to the claims of the class designated by the Appellant.

Section 205(g) confers jurisdiction only over suits brought to review of final decision of the Secretary after a hearing made within sixty days prior to the filing of the complaint.

The Appellant, in his complaint, and the district court in its opinion, defined the class far more broadly, to include -- and I quote here from the district court opinion -- "all of those persons otherwise eligible for child's insurance benefits who cannot qualify for such benefits, solely because they cannot meet the requirement that they be living with or supported by their father on the date of his death." End of quote.

That class embraces many individuals who had no right to sue on their own behalf under Section 205(g). And the district court plainly had no subject matter jurisdiction over the claims of that class.

Thus, our position is that here, as in Salfi, the designation of the class and the complaint was fatally deficient, the complaint contained no allegations that the class members -- and I here quote from the Salfi opinion -- "have even filed

an application with the Secretary, much less that he has rendered any decision, final or otherwise."

For the government this is probably the most important single point in this case.

The government's primary interest here is in obtaining a reaffirmance of the Salfi holding, that the district courts in Social Security cases may not award class relief to individuals who do not, themselves, have a right to bring suit under Section 205(g).

The problems faced by the Social Security Administration in administering very broad and loosely defined classes, or relief as to such classes, may in some cases be literally insurmountable. There is no statutory basis for awarding benefits to such a class, and it should not be awarded.

The impropriety of the class designation in Salfi was the end of the matter. We think it should be the end of the matter here as well.

The district court lacked jurisdiction over the class Appellant sought to represent, and therefore was without power to consider any request on behalf of that class, whether for injunctive relief or otherwise.

It follows that the three-judge court was not required to be convened, and this Court does not have jurisdiction.

Now, with that said, as I understand Appellant's

argument here, he seems to contend that the district court in fact had jurisdiction over a more narrowly defined class of claimants. And that the proper remedy, although he doesn't expressly so state, may be to vacate the decision below and remand it for recertification of the class.

I would like to take some time to explore the ramifications of that suggestion.

It is true that as a purely technical matter, Section 205(g) does appear to leave some room for possible joinder of a very narrow class of plaintiffs, permits the district courts to review the decisions of the Secretary, final decisions of the Secretary, rendered after a hearing, within sixty days of the filing of the complaint. Thus Appellant's redefined class would presumably be those applicants for child's insurance benefits whose applications were denied on the same basis, same grounds as Appellant's class, within sixty days prior to the filing of Appellant's complaint.

I would make two points with regard to such a class:

First, it is very unlikely that the certification of such a class would be permissible under Rule 23 of the Federal Rules of Civil Procedure. This is so for two reasons.

First, Rule 23(a)(1) requires the class to be so numerous as to make joinder of individual plaintiffs impracticable. This requirement is not likely to be met by Appellant's class. Indeed, Appellant may be the only member of this class.

And if there are any other members, they are very likely to be few in number.

Second, Rule 23(a)(3) requires that the individual plaintiff's claim be typical of those of the class. That is not the case here, and is not likely ever to be the case, or very likely to be the case in the Social Security context.

Most suits for review, and this is true of Appellant's suit here, may or will turn upon the substantiality of the evidence on which the Secretary's factual findings were based. Appellant, for example, contested the Secretary's finding that his father had not been living with or supporting him at the time of death.

Similar factual claims might be made by every disappointed claimant that Appellant seeks to represent.

QUESTION: But he's abandoned that.

MR. JONES: He's abandoned it here, but that does not bear upon the question of whether his class was properly certifiable under Rule 23(a)(3).

QUESTION: But couldn't all of those points be decided by the district court?

MR. JONES: Well --

QUESTION: Whether there's a sufficient number in the class?

MR. JONES: -- I would have thought --

QUESTION: Whether there's a related interest.

MR. JONES: I would have thought that since the district court could not issue, in our view, an injuction against the statute on behalf of the individual, that only if the certification of the class was proper would there be any substantial claim for injunctive relief that would have warranted the convening of a three-judge district court.

QUESTION: But I thought he was talking about that suggestion to go back to see if you can limit the claims.

MR. JONES: Well, that, it seems to me, is his suggestion. What I am suggesting to the contrary is that if you did that, if you followed that procedure, you would find that there would be no class that could be certified if --

QUESTION: How can we be sure of that?

MR. JONES: You can't be positive. But what I am suggesting --

QUESTION: Well, then, why not let the district court find out whether you are right or wrong?

MR. JONES: Well, I have -- I have no serious principaled objection to that, Mr. Justice Marshall. I think if the procedure was to require the single-judge district court to make all of these determinations ab initio before convening the three-judge court that that would be a perfectly appropriate method of dealing with these cases.

QUESTION: Well, couldn't a single district judge -- supposing the plaintiff in the position of Appellant here

files a claim, asks that it move as a class action on behalf of all those whose claims were denied within the past sixty days by the Secretary for the same reason as his was, couldn't he then, without necessarily asking for injunctive relief, simply say that he wants all of those actions of the Secretary set aside?

MR. JONES: That is my next point, Mr. Justice Rehnquist.

QUESTION: Oh, I'm sorry.

MR. JONES: That's quite all right. What I was going to say is that if you surmount all of these hurdles as to the certification of the class, nevertheless, injunctive relief is not appropriate as to that class.

What you would have is a class of a handful of applicants for Social Security benefits, all of whom had two claims, one, that the Secretary erred in finding that their father had not contributed to their support or lived with them at the time of his death; secondly, that if the Secretary's findings were correct, the statute was nevertheless unconstitutional.

And what I am suggesting is that if you had --

QUESTION: And then what you want and therefore --

MR. JONES: What I'm suggesting is that --

QUESTION: Well, I know, but --

MR. JONES: And therefore, the decision of the

Secretary in all of those cases should be reversed.

QUESTION: And not enforced.

MR. JONES: Well, Mr. Justice White, that, of course, is the result of any case in which the decision is reversed.

QUESTION: Yes, has to be.

MR. JONES: But it is not in order that it not be enforced in the same sense than an injunctive order is. Because it is not subject to enforcement in the same method as an injunctive order.

QUESTION: Mr. Jones, why do you assume the first issue would be in every one of those cases? Isn't it possible the class could be composed of persons who had admitted they were not supported by their father, and did not live with them?

MR. JONES: There are two possibilities. I guess one would be that a person who had no substantial claim to have satisfied those statutory prerequisites would, nevertheless, bring suit for review; or secondly, a person might abandon whatever substantial claim he might have.

QUESTION: As the plaintiff did here.

MR. JONES: That -- the consequence of amalgamating all of these individuals -- and there may not be very many of them -- in a single class would be, in effect, if that approach is followed, to require those individuals to waive whatever factual claims they might have.

At any rate, it's difficult to conceive of how all

those factual claims are going to be litigated in this multi-plaintiff suit for review of the Secretary's decisions.

QUESTION: I thought that was the petitioner's suggestion, that the class should be limited to those who are going to the Constitution only.

MR. JONES: I do not think he so limited it, and, if so, that would be a further constriction of the class; and I am not sure he would find -- if he had any members in the class to begin with, he would have even fewer now, I suspect.

QUESTION: Well, I, for one, can't take your word for that!

MR. JONES: That's --

QUESTION: I would much rather have the court to hear it.

MR. JONES: Well, what I was suggesting, Mr. Justice Marshall, is that there are general principles that might lead the district court to reach that determination; but, furthermore, as Mr. Justice Rehnquist points out, even if you surmount all those obstacles and certify a class composed of this small handful of plaintiffs, nevertheless, injuctive relief, as such, is not necessary, because a reversal of the denial of benefits is appropriate as to each and every one of the individual claimants.

QUESTION: Mr. Jones, just one other point: If your basic argument is correct, am I right in believing this

Court had no jurisdiction in the Jimenez case?

MR. JONES: That's correct. The Court would have erred in assuming jurisdiction in Jimenez.

QUESTION: So that would just be an advisory opinion.

MR. JONES: Well, I think it would be the law of that case, and, as a practical matter, the Secretary is going to accept it as the rule of law that's applicable in cases affecting other applicants for those benefits.

In short, to summarize very briefly, this Court lacks jurisdiction, and we ask that the appeal be dismissed.

MR. CHIEF JUSTICE BURGER: Mr. Brown.

REBUTTAL ARGUMENT OF C. CHRISTOPHER BROWN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. BROWN: The class that we ask would be defined in practically the same terms as the class that was requested and granted in the Jimenez II case, which Mr. Justice Stevens authored for the Seventh Circuit quite recently. It would be composed of people whose sole issue --

QUESTION: What did Justice Stevens do for it in the Seventh Circuit?

MR. BROWN: Authored. He wrote an opinion in a case called Jimenez vs. Weinberger, --

QUESTION: Yes.

MR. BROWN: -- which was the same Jimenez case that this Court had a couple of years ago, but on remand it's coming

back up again.

QUESTION: He altered it or authored it?

MR. BROWN: Authored. He wrote --

QUESTION: Authored, oh.

MR. BROWN: He was the author of it.

QUESTION: Oh.

[Laughter]

MR. BROWN: He didn't alter it, I don't think.

[Laughter.]

MR. BROWN: The class we're requesting in this case is the same class that was found in, well, I'll call it, Jimenez II, to be a fair a properly defined class, consists of people who would only be contesting this one constitutional basis, consists of people who have filed applications for benefits, consists of people who have met the exhaustion requirements of 205(g). As what Mr. Justice Stevens suggested, in what we call Jimenez II, the class could be tolled by the filing of the initial complaint, so there would be a broad number of people in the class. I personally have five clients who I think would be in the class right now.

It's a significant thing. If there is a factual issue as to numeracity, the best place for that to be decided is in the district court.

The district court, incidentally, did not have the benefit of this Court's Salfi opinion when it first encountered

this case.

I think it's only fair that the district court, if we win on the merits, be given another chance to comply with Salfi. It wasn't able to do so, and Salfi was a surprise in many ways.

I think this Court's decisions as to retroactivity and soth forth are such that the district court deserves a second chance to define and use the correct words in its class definition.

I have nothing further.

MR. CHIEF JUSTICE BURGER: Very well. No. 6212, Norton v. Mathews, is therefore submitted.

[Whereupon, at 1:55 o'clock, p.m., the case in the above-entitled matter was submitted.]

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