ORIGINAL

In the

Supreme Court of the United States

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

PETITIONERS,

V.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

RESPONDENTS.

No. 77-719

Washington, D. C.
October 2, 1978

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Washington, D.C.,

Monday, October 2, 1978

The above-entitled matter came on for argument at 11:41 o'clock, a.m.

BEFORE:

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

APPEARANCES:

DAVID H. YOUNG, ESQ., ASsistant Attorney General, P.O. Box 12548, Capitol Station, Austin Texas 78711
on behalf of the Petitioners.

JEFFREY J. SKARDA, ESQ., 2912 Luell Street, Houston, Texas 77093
on behalf of the Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in 77-719, Jerome D. Chapman against Houston Welfare Rights Organization.

Mr. Young, you may proceed.

ORAL ARGUMENT OF DAVID H. YOUNG ON BEHALF OF THE PETITIONERS

MR. YOUNG: Thank you, Mr. Chief Justice. May it please the Court:

The dispute in this case arises as a result of a March 1, 1973 conversion that the State of Texas of what was then known as the Department of Public Welfare made in the methods and procedures that it used to calculate a standard of need in the Aid to Families with Dependent Children program. States are permitted by Section 601 in Title 42--Section 401 of the Social Security Act--to define the standard of need that they will utilize in the AFDC program. This Court has frequently stated and restated since King against Smith, that states have that latitude.

Before the March 1, 1973 conversion, the state's method of determining an individual's need for AFDC went through four steps:

First, a maximum standard of need was established, which is not in dispute.

Second, a personal needs allowance, a shelter

allowance, and a utilities allowance were combined. That portion is in dispute.

Third, the percentage reduction factor was applied;

And fourth, the amount of any non-exempt income was deducted from what was referred to as the recognized need which was the product of those first three steps.

Much of that of course was outlined in your prior decision in Jefferson against Hackney.

The problem arises because of one step that Texas went through with regard to the shelter and utilities allowances that it allowed to be included in the standard of need, that word being pro rationed. The method that Texas used was to count the number of individuals in the household without regard to whether they were eligible or not, and then subtract the appropriate per capita share for those people who were determined to be ineligible.

After March 1, 1973, the Texas conversion provided for a flat grant system. There is essentially no longer any dispute in this case that Texas can handle flat grant or that other states can have a flat grant.

The shelter and utilities figures that Texas used and from which this lawsuit comes were consolidated with the personal needs figures and averaged. Neither the consolidation per se nor the averaging is in issue.

What the state did under the new system was say

that you get so many dollars per eligible recipient, rather than the former method of taking all the individuals in the household and then backing out a per capita share for those who were determined to be ineligible. I think simply I would characterize the new method as just simple addition. You add up the numbers for the eligible people there, whereas before you added up numbers for everyone and then backed out a share for the ineligibles and that's the pro ration.

QUESTION: What practical difference did that change make?

MR. YOUNG: I hope to demonstrate there is no practical difference. It has been widely assumed that there is, and that has been, in large part, the basis for the Fifth Circuit's decision that I am seeking to overturn.

It is important in that regard to keep pro ration and economies of scale as separate questions. There is no dispute that the states can utilize economies of scale in establishing needs standards. Economies of scale, by the way, is not justification for pro ration, despite the contention that occasionally occurs that economies of scale is just another way of saying the state assumes availability of income and runs contrary to everything the Court has said since King against Smith.

In the District Court, Respondents filed suit against the new system, saying (1) that it violated Section 602(a)(23),

or the cost of living increase requirement of the Social Security Act to use a flat grant, the flat grant being what I described as just the simple addition of the average numbers rather than the former method establishing a figure for individuals; and also alleged that the state's new system violated 602(a)(7) which is the provision that requires the states to deduct available income; 606(b) which has to do with whether or not the states can make restrictive payment, which we say is not in issue here; and 602(a)(23) which is the cost of living requirement. They said by including the pro rated numbers, it obscured the standard of need and therefore did not give a true cost-of-living raise as required by 602(a)(23).

The District court took jurisdiction of the alleged Social Security Act violations under 23 U.S.C. 1343(4) and Judge Bue was was required to buy the Fifth Circuit's decision in Gomez against Florida Employment Service.

The rights involved which were found to be cognizable under 1343(4) were rights that the Fifth Circuit characterized as rights of an essentially personal nature, referring to the need to have food, need to have shelter, a place to live, things such as this. But the District Court found for your Petitioners here on the merits of the case.

After the District Court entered its opinion, the Respondents here attempted to re-open and amend their case to raise a constitutional issue. They had not alleged any

constitutional issue up to the time the District Court made its decision. However, in considering their motions to re-open and motions to amend, the Court said that the demands of the docket do not allow "a party who has had its day in court to restructure and replead its case merely because it has obtained an adverse decision."

QUESTION: You would oppose any remand for the purpose of amending the complaint?

MR. YOUNG: Yes, your Honor. As I understand the general practice where effectively the jurisdictional basis of pleadings are allowed to be amended sometime during the appellate process, it is where the superior court and the appellate court is looking for an alternative means to uphold the decision of the court below that has already been made. In this case, the District Court said they not only had to raise it or brief it or argue it, but there was no proof in the record to support what the District Court took to be due process claimed which was not due process or anything else in their motion to relieve, amend or re-open.

QUESTION: You feel then if we should reach the merits, that the Van Lare case is not controlling?

MR. YOUNG: Yes.

QUESTION: There was a constitutional claim here in the sense that there was a supremacy clause, wasn't there?

MR. YOUNG: Yes, I hoped to speak to it very little.

QUESTION: Whenever the jurisdictional claim is based upon a conflict between a state's statute or policy and a federal statute, and the claim being made that the state is acting inconsistently with the federal statute, that necessarily is a supremacy clause claim, isn't it, which is a constitutional claim?

MR. YOUNG: Well, that is how it is characterized, yes.

QUESTION: Mr. Young, you say you hope to speak to it very little. As I read your petition or your brief on the merits of the first question raised in your brief on the merits, if you notice, the case set for argument after yours, is one in which that's the only question raised.

MR. YOUNG: What I meant by that, what I did in the petition for certiorari, you will notice that all that was available to me as to Gonzales against Young was a short summary in United States Law Week and my petition was based on Andrews against Maher and Randall v. Goldmark. Subsequently and prior to the preparation of my brief, I did obtain a copy of Gonzales against Young and in all candor I hope to comment on the Respondent's petition about it, but I cannot improve on or shed any additional light, I think, really, on the rationale that the Third Circuit used, and I stand on it with the State of New Jersey.

To the extent that it addresses the issue I raised, which is 1343(4), not 1343(3), and with regard to that distinction

between the two possible bases for jurisdiction, the Fifth Circuit found with the District Court that it was Subsection (4) which was the basis for jurisdiction, not Subsection (3), and they declined to find the existence of a Subsection (3) claim, even though by that time it had arguably been briefed by Respondents in the District Court and had been repeatedly urged as a method to reopen the whole case, was sought by them to be considered by the Fifth Circuit. The Fifth Circuit said that's not what we have here; we have a Subsection (4) case.

But they did on one issue on the merits overturn the Fifth Circuit on the pro ration question, and say that pro ration was an impermissible assumption of income except when the recipient lives with nondependent relatives in the latter's shelter.

My petition for certiorari was intentionally and knowingly limited to as to jurisdiction 1343(4).

I also alleged that the Fifth Circuit failed to appreciate this Court's opinion in Jefferson against Hackney, where it considered what the real requirements of 602(a)(23) were, and determined that Texas had already met them and overlooked the characterization in Rosado against Wyman and repeated in Jefferson that it was adventuresome for the courts to attempt to alter the state's ability to set a standard of need.

I did say also that the Fifth Circuit misinterpreted

this Court's decision in Van Lare because Van Lare really had to do with assumptions of income; it didn't really have anything to do with the state's proper calculation of its standard of need. I hasten to add I recognize the last paragraph of Van Lare is there, because it jumps out at you and it is quoted in the Fifth Circuit's decision, and I will get to that later. I don't think that that's controlling in this case.

The Respondents say that Subsection (3) of 1343 is also before the Court, which I do not agree, but I will have to after lunch, because it will be then, and in Gonzales against Young. But they did agree with me that the issue on the merits is whether or not the state complied with the cost-of-living increase requirement of 602(a)(23).

QUESTION: Excuse me, Mr. Young. While we are on this subject, looking at the opinion of the Court of Appeals in this case, which begins on page B-30 of your Petition for Certiorari, an initial footnote which so far as I know, is the entire discussion by the Court of this jurisdictional problem, isn't it?

MR. YOUNG: It is, yes.

QUESTION: And in that footnote the Court says, "Although other circuits disagree, . . . we have held that Section 1983 is an 'Act of Congress' providing for the protection of civil rights,' sufficient to invoke Section 1343(4) jurisdiction." Is there in fact disagreement on that general

proposition?

MR. YOUNG: As to subparagraph 4?

QUESTION: As to whether or not 1983 is an Act of Congress providing protection of civil rights, to invoke 1343 for jurisdiction. Is there any disagreement on that?

MR. YOUNG: As to the latter part, yes; not to the former. Whether it is sufficient to invoke 1343 for jurisdiction is an issue. That is an issue because--

QUESTION: I thought the disagreement was whether or not this lawsuit is within the ambit of 1343(4), or your opponents say 1343(3) or (4).

MR. YOUNG: Well--

QUESTION: Not whether a lawsuit that is within 1343 is. There is jurisdiction for such a lawsuit under 1983. I don't think there is any disagreement about that.

MR. YOUNG: Well, perhaps I wasn't following your first question.

QUESTION: In other words, what I don't follow is the footnote, and I'm asking you if you can help me in explaining it.

MR. YOUNG: Well, I think the explanation is the confusion among the effects of the supremacy clause on the one hand, 1983 on the other hand, and then the two subsections of 1343 plus the Social Security Act. These cases really arise under and depend upon interpretation of the Social Security Act,

none of the above, and they do not emanate--these programs, income transfer programs are needed ; they don't find their genesis in either the supremacy clause or the 14th Amendment, and that in a nutshell, of course, is the jurisdictional argument in this case.

I notice the clock is running and I am taking more time than I intended to. I want to get to the merits because that's where my case is different than the next one. I would assert that--

QUESTION: Nobody gets to the merits if you are right on your jurisdictional claim, isn't that correct?

MR. YOUNG: That's true but I would feel better if I didn't take that chance. And my client might say I never really appealed, anyway.

I used one example in my brief on the merits to try to show the process as it was applied in cases to distinguish between determining need, on the one hand, and determing amount of income on the other hand. I won't belabor that now but I tried to show that there is a very real difference between need and income per se.

Let me talk a little bit about establishing the standard of need and refer you to the Ortega family in this case, the original plaintiffs still in the case. They were recipients of adult assistance programs that are no longer in existence. The Ortegas had four members in the family. Two

were eligible for AFDC, one for permanently and totally disabling, one for wholly ineligible. For four people, if they had all been eligible, the shelter allowance would have been $44. That's $11 per person if they were all eligible. The petitioners here pro-rated and gave $33. The result would be the same if they had established an $11 per individual need figure and simply added enough and disregarded the ineligible person there.

Pro-ration doesn't have any effect at all unless you first assume the state is obligated to provide for the need of an ineligible person. I submit to the court if you don't first assume that, pro-ration has no effect; and of course we say the Court has never said we have to do that, and you shouldn't now.

MR. CHIEF JUSTICE BURGER: We will resume at one o'clock.

(Whereupon, at 12:00 o'clock noon, the court was recessed, to be reconvened at 1:00 o'clock, p.m. the same day.)

AFTERNOON SESSION (1:01 p.m.)

MR.CHIEF JUSTICE BURGER: You may continue, Mr. Young.

MR. YOUNG: Thank you, Mr. Chief Justice.

May it please the Court, after the consolidation took place in 1973, the shelter allowances in Texas for one to two persons were $33; for three to four persons, $44; for five or more, $50. The Ortega household had four persons, so the proper shelter allowance would be $44, if they were all eligible.

What the state did, of course, was pro-rate and come up with a shelter allowance for that household of $33. I have already attempted to discuss how that happens.

I would like to take just a moment to discuss what the Respondents wanted to have happen. There were two grants, remember, in the household: one for AFDC, one for APTD. The Respondents desire, as I believe the record reflects at page 221, that the initial $33 shelter allowance be included for the two AFDC recipients, and another initial $33 shelter allowance be included for the one APTD recipient, and of course the fourth person be disregarded. So their result would be a $66 shelter allowance for this household of three recipients as opposed to the $44 which the state would budget and which figure they don't challenge in this litigation. Had all four persons been eligible, a 50 percent increase over that amount and of course twice what the state maintains is the

proper amount, three individuals, $33.

The Fifth Circuit said the state's pro-ration policy violated the 1976 Federal Regulations because pro-ration was a presumption that income was available to the eligible recipients. That's incorrect on several bases. Need, as defined by the Social Security Act and by the state is not actual shelter cost in any given case. The Fifth Circuit also ignored the fact that there was no change in the shelter allowance for any given recipient named in this case at $11. It assumed that the state must provide shelter for ineligibles. I have already mentioned, I believe, that that's an assumption which this Court has never indulged in consciously, and I urge you not to today.

Of course not even the Respondents allege that the state has to assume the burden for providing for the personal needs of a non-recipient if he lives with the recipients; they don't assert that the state has to provide Medicaid benefits for the non-recipient, so we urge for the sake of consistency, if nothing else, that the state not be obligated to provide for the shelter and utilities of that person because they happen to live with the recipient. We certainly wouldn't have to if they did not live with the recipient.

The Fifth Circuit also of course relies on this Court's decision in Van Lare. We maintain there are several distinctions between our case and Van Lare, several things that

need to be said about Van Lare.

One, the New York policies do you mention income, and we say did treat the situation in New York as an income question as opposed to a needs question. They use the word in their policies and it has to mean something. Van Lare is remarkable in that it criticizes states for not prohibiting lodgers from being in welfare homes. I say that's remarkable because that was a case where two of the constitutional claims alleged were privacy and freedom of association.

Van Lare also criticizes the state for taking no further action other than to allegedly reduce--I would not say reduce--but allegedly reduce the amount for shelter. The only thing else the state could do is cut off the grants entirely and that would run into King against Smith and any number of your prior decisions.

The Court said that the only victim is the needy child but I have attempted to demonstrate that the amount of the shelter need allegedly for the needy child was not affected by proration.

Not even the Fifth Circuit completely ignored the implications of its holding because it did say that when the non-recipient owns the home, that the proration is permissible. How that is not an assumption of income but the other is, is not explained. That is a distinction that is not recognized in the 1977 HEW regulations upon which the Solicitor General

relies and upon which Respondents rely. But the Fifth Circuit's distinction is not challenged here because there is no petition for certiorari from Respondents.

Not incidentally, HEW prior to this time had not found any fault with proration. The record at 245, in the Appendix at 40, there are instructions from the Dallas Regional Office to Texas to include prorated figures in the consolidated amounts and it even said in the record at 253 how HEW instructed the states to include its mistakes as well as the correct amounts and not attempt to determine which is which because the object of the fair pricing and consolidation was to come up with the average amounts that the state actually paid.

Another way of saying all this is my last argument and that is the state discretion argument; 42 U.S.C. 601 clearly allows the states to set their standard of need based on the conditions of each state and provide assistance as far as practicable. That has been recognized by this Court, as I have said, from King against Smith, as recently as Quorun against Manley, right at the end of last term.

We think that states have legitimate interests in this area, such as they had in your decision in Wyman against James and De Blano against New York, Department of Social Services, and the goal in this case is not to provide shelter and utilities for people who are ineligible, wherever they live, whether it is with the recipients or not. The bottom line in

the case of course, is that there is not enough money in Texas to provide for the actual needs of these individuals. The Respondents sought to attack that by attacking proration, but to increase the needs standard in Texas by some $9 million, as would be the case if this were done, doesn't increase anything except the number of ineligibles getting benefits. It doesn't increase the state appropriation. The only result it would have is that the percentage control factor, which is now 75 percent, would have to be cut further and the money that would go to the newly created ineligible recipients would be taken out of the pockets of the people that are admittedly eligible.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Skarda.

ORAL ARGUMENT OF JEFFREY J. SKARDA, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

We take issue with Petitioners' characterization of the rent range formulas. He claims that our client was budgeted for $33 net shelter allowance, just like she was before her mother and sister moved in. What he overlooked in fact is that for a household of three and four recipients, they would have been budgeted the $44 maximum and did receive only $33. If San Juana Ortega, who was the public assistance recipient,

as well as Paula Ortega, her child, had moved in by herself without her mother, who was necessary for her to take care of her, that household would have been budgeted $44 for rent. Because the mother came in, the household was only budgeted $33 and paid 75 percent of that.

We believe this case is controlled by Van Lare versus Hurley. It involves a $9 million substantial question of which at least 65 percent is federal dollars, and we in our brief at page 46 lay out the same budgeting arguments in Van Lare next to the budgeting arguments in the instant case, and you can see that the dollar maximum works almost identical.

We would also like to note that his references regarding HEW approval. HEW approval came before this Court's decision in Van Lare versus Hurley. Since the Court decision, HEW has codified that regulation , the first two pages of our brief, and we believe there is a clear conflict between that HEW codification, this Court's decision in Van Lare versus Hurley, and the state welfare regulation on proration.

Finally I would like to make it clear that we are not alleging $66 rent allowance for the family; we are alleging that they should receive the same rent allowance for any family of three persons or a $44 rent allowance.

There is another issue regarding whether or not we can raise our arguments for jurisdiction under Section 1343(3) in addition to Section 1343(4). At our brief on page 16 we lay

out the cases of this Court that allow us, and for defending decision below, to put forth the argument which would give us the same relief and at least as to jurisdictional grounds the way we read Story Parchment Co. v. Paterson Parchment and Langnes v. Green and United States v. American Railway Express Co. are placing these issues in opposition to the petition for certiorari that brings them before this Court, and we would like to begin now our jurisdictional argument on Section 1343(3), jurisdiction authorized by 1983 to rights secured by the Constitution via the Supremacy Clause.

There is of course another argument under Section 1343(3), the "and laws" argument or co-extensive theory, and this would mean that the rights would come into the "and laws" provision through the Social Security Act of 1983. As this Court has said in Adelman v. Jordan, there is no question that Section 1983 covers the Supremacy Clause claim; the question is whether or not we get jurisdiction under Section 1343. We stress 1343 because we believe it is the narrowest argument for this Court, as this Court has held in Preiser v. Rodriquez, alternative methods for review, take precedence over Section 1983 cases.

We think it's kind of odd that this case does come before this Court in the circumstances. Here we are alleging a claim that has been held to be a violation of due process--

QUESTION: Your position is that any Supremacy Clause case is a 1983 case?

MR. SKARDA: That's correct, your Honor.

QUESTION: Any Supremacy Clause case raising actions by state officials?

MR. SKARDA: Yes.

QUESTION: Regardless of what the underlying right is that is involved, or what underlying claim is involved?

MR. SKARDA: If it involves a conflict, and let me expand on that if I may.

QUESTION: So you would say in your position that surely if you had $10,000 in controversy, you could bring your action under 1331?

MR. SKARDA: That's correct, your Honor.

May I expand on your first question. We think the reasons that the Supremacy Clause claim is somewhat narrower is that it is only where there is this clear conflict, such as here between an HEW codification , this Court's decision, and a state regulation.

QUESTION: Mr. Skarda, I am not sure I understand your position. It is for me a very difficult case because it involves so much circularity, the arguments on both sides, this jurisdictional question.

Let's assume there were no Section 1983, just assume that wasn't on the books at all. Would it be your position that 1343--28 U.S. Code 1343 would provide jurisdiction of this case, since it is based upon a conflict between federal law,

state law, and ultimately therefore upon the Supremacy Clause? Section 1343 says the District Court shall have the original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress--no, excuse me--turning to (3)--any right, privilege or immunity secured by the Constitution of the United States, and that would be the Supremacy Clause.

MR. SKARDA: That's correct, your Honor, but 1343(3) also says a civil action authorized by law, and that's been interpreted to refer back to Section 1983, for a cause of action.

QUESTION: You need 1983 for your argument? Do you?

MR. SKARDA: We believe we do.

QUESTION: Because only that section is a law that authorizes this cause of action?

MR. SKARDA: That's our argument, your Honor.

And we of course again believe that's what the Court found in Edelman v. Jordan.

I would like to mention that we don't think our Supremacy Clause cases reach every possible welfare case; we are not here alleging a direct analogy with some kind of administrative procedure act in Federal District Courts through state welfare clients.

QUESTION: Apparently you don't think that the Supremacy Clause case has to involve a law providing for equal

rights?

MR. SKARDA: No, that's correct, your Honor.

QUESTION: You think the Supremacy Clause cases that 1343(3) covers include many non-equal rights cases?

MR. SKARDA: We don't think they include a large number of non-equal rights cases, but we think they include those basic cases in conflict. They would not include, for example, just whether or not somebody was incapacitated were it not for AFDC, because there would be no conflict between state and federal law.

QUESTION: Could you conceive of a case between General Motors and General Electric under the Supremacy Clause under 1343(4)?

MR. SKARDA: Not without 1983.

QUESTION: Supremacy 1343 automatically? You don't really mean that, do you?

MR. SKARDA: We think we need Section 1983 under cover of state law provisions.

QUESTION: But you keep dropping that.

MR. SKARDA: No, we think this is a 1983 case.

QUESTION: There isn't a Supremacy Clause problem involved anyway unless the states are involved.

QUESTION: That's right, state laws and federal laws.

Usually that is a recurring instance where the Supremacy Clause is invoked. Usually where there's been an

assertion under state law.

MR. SKARDA: We agree with that, your Honor.

QUESTION: But you are saying that even though Congress seemed to say in 1343(3) that only certain kinds of statutory claims would be vindicated, through the Supremacy Clause you can reach other statutory claims?

MR. SKARDA: If we have the authorized by law provision, such as Section 1983 here. Now it's interesting in 1343(3) it does not say--it says rights secured by the Constitution; it does not say rights secured by the 14th Amendment or particular items in the Constitution, nor does it limit to certain kinds of Constitutional rights.

QUESTION: But it does limit the kinds of statutory claims it would reach?

MR. SKARDA: Yes, your Honor, we believe it does.

QUESTION: And yet through the Supremacy Clause you would say you could reach any statutory claim as long as there was a color of state law involved?

MR. SKARDA: And a clear federal conflict.

QUESTION: Well, what do you mean by a clear federal conflict? Clear or unclear, if there is a claim of conflict, you'd have jurisdiction to adjudicate it.

MR. SKARDA: We believe that it would not reach, for example, a state law provision which is identical to the federal law provision.

QUESTION: No claims just arising under, like questions about construction or--

MR. SKARDA: That's right.

QUESTION: --or facts?

MR. SKARDA: For example, in our State in Texas there is provision that they cannot delay in getting assistance; they must provide fair hearings. We are not saying a Supremacy Clause claim would reach those cases because that provision happens to be identical to the federal statutory provisions in the Social Security Act.

QUESTION: Well, wouldn't you have an "as applied" claim? In other words, even though the state and federal claims were statutorily identical, you could claim that as applied the state system was not delivering in the way the federal statute required.

MR. SKARDA: Certainly we would, Mr. Justice Rehnquist, but there is a reason why those "as applied" claims don't reach these courts, and that is because usually the states, you know, enforce their own state statutes.

QUESTION: But that's a practical reason. That's not a jurisdictional basis.

MR. SKARDA: That's correct, Mr. Justice Rehnquist.

QUESTION: Have you abandoned your suggestion of a moment ago that there has to be a clear conflict between the state rule and federal rule?

MR. SKARDA: If they are precisely the same. Unless there was a pattern of practice which meant the state rule even though written appears to be the federal rule, but it is not applied as a federal rule is intended, then we think we could make a case under the Supremacy Clause.

QUESTION: But then in every case couldn't you sue in the first instance in the federal court saying you don't think you'd win in the state court?

MR. SKARDA: Your Honor, we don't believe we could do it in every case. For example, if it is just a clear factual issue, no questions of policy involved, whether or not someone is incapacitated enough for AFDC, we could not bring that in federal district court.

QUESTION: You say as a matter of federal law you are entitled to some kind of benefit if your client is incapacitated and the state has found him not to be incapacitated but they're wrong; as a matter of federal law, why aren't you still entitled to go into 1983?

MR. SKARDA: They have the right, they administer the program, to decide incapacity unless they announce a rule which restricts the federal rule.

QUESTION: They say we apply the same rule as the federal.

MR. SKARDA: Then we don't believe that we can get into federal court--

QUESTION: How do you reconcile that with Monroe against Pape. The State of Illinois or City of Chicago has said they announced exactly the same rule as the federal Constitution requires; yet the Court here held you could right into federal court.

MR. SKARDA: But of course in Monroe v. Pape that was a due process violation for waking someone up in their home at night, breaking down the door of their apartment, and taking them to jail.

QUESTION: You think it's due to the constitutional rule and the statutory rule, is it?

You say the test is different when it's a federal statutory claim than a federal consitutional claim? I don't follow you.

MR. SKARDA: We believe under the Supremacy Clause theory that the state rule, either in practice or as written, would have to be different from the federal rule.

QUESTION: But it didn't in Monroe against Pape

MR. SKARDA: The state didn't carry out their rule in Monroe v. Pape.

QUESTION: Well, you didn't have the chance to find out whether they would or not because they said you go ahead and sue in the federal court without suing in the state court. Why couldn't you do that with a welfare claim also?

MR. SKARDA: The only welfare claims you can't do

it to is where there is no state-federal conflict, as in our example of the incapacity situation, where the state simply decides the facts in the case.

QUESTION: Tell me once more. Why is that different from Monroe v. Pape?

MR. SKARDA: It is different from Monroe v. Pape because there is no question of conflict.

QUESTION: There's no question of conflict in Monroe v. Pape, though.

MR. SKARDA: We believe that Monroe v. Pape --

QUESTION: It comes under our theory when people are beaten when they are searched.

MR. SKARDA: It comes under our theory in terms of "as applied." It is a pattern that doesn't grant the rule as written.

QUESTION: Well, 1343 independently gives jurisdiction where the claim is constitutional, doesn't it?

MR. SKARDA: 1343, again, your Honor, 1343(3) says "authorized by law," so there must be some kind of cause of action.

QUESTION: But it gives jurisdiction over constitutional claims.

MR. SKARDA: Yes, your Honor, if they are authorized by law.

QUESTION: And if they are the kind that 1983

contemplates.

MR. SKARDA: That's our position, your Honor.

Of course we would in addition say that the very reason behind the 1871 Act, Section 1983 and its 1343(3) successor was to reach those questions of weakening notions of federalism. It was a time of impeachment, there was a Freedman's Bureau which provided the same kind of grant-in-aid stuff we're talking about here, nutrition, building schools, building hospitals. And there was a notion abroad in the land of the states rights to nullify. We think those concerns in that 1871 Act regarding the controversial provisions relating to whether or not federal officers would be free to act in the scope of their duty from interference with state bodies goes right back to that kind of provision in the Freedman's Bureau where Congress was concerned whether or not these programs could be taken out.

This Court has of course held in four cases, suggested that Supremacy Clause case can be heard through Section 1343(3), for welfare cases, Yocum v. Miller, Hagans v. Lavine, Townsend v. Swank, and Carleson v. Remillard. Also they held out a system for deciding these cases in that line of cases such as Perez v. Campbell, where there was interference with the federal right to free start in bankruptcy.

QUESTION: Well, Hagans v. Levine depended on the assertion of a "substantial" constitution claim and the

statutory claim was regarded as pendant, wasn't it?

MR. SKARDA: That is correct, your Honor.

QUESTION: And wasn't the issue we're talking about now reserved in Hagans v. Levine?

MR. SKARDA: In Footnote 5 it was specifically reserved, yes, your Honor, and we believe it is now open for the Court's decision and we urge the Court to find Supremacy Clause jurisdiction through 1343(3) in this case.

This case, we must remember, is one that can't satisfy the $10,000 amount requirement. We are talking about a difference of only about $10 in the averaging of this family shelter allowance from $44 down to $33.84 in the flat grant consolidation process, and a similar $3 or $4 amount in averaging down the utility allowance, even though it means $9 million benefits, of which we think at least 60 to 65 percent is federal dollars in Texas.

QUESTION: If it did involve more than $10,000, exclusive of interests and costs, it seems to me conceded, as I understand it, that there would be jurisdiction under 1331.

MR. SKARDA: That's correct, your Honor.

QUESTION: Now, why would there be?

MR. SKARDA: Because it would be a case of rising under the constitution and laws. The laws provision of 1331 would bring us in the federal question jurisdiction, if we have $10,000.

QUESTION: Do you have some cases that say the "and laws" provision covers any kind of federal statutory claim?

MR. SKARDA: The 1331 cases we believe that were cited to this Court--of course that's not this case--

QUESTIOn :No.

MR. SKARDA: I'm running in my head what those cases seem to cite.

QUESTION: Well, never mind. I don't want to take your time. I just didn't know that these had been squarely decided here; maybe they have, that the "and laws" provision of 1983 refers to any federal statutory claim whatsoever.

MR. SKARDA: Oh, no. No. I was taking the reference to 1331. No, I will address that argument at this moment, if I may, your Honor, and of course we are making that in our brief. We believe the "and laws" provision does reach that because there are actually two references in Section 1343 to 1983, both the authorized by law provision I spoke of earlier, and the "and laws" provision. We also point to the unitary origin of 1343(3) and Section 1983. They were originally Section 1 of the 1871 Civil Rights Act, and the fact that the "and laws" provision is positive law which must be heard by this Court. In many ways it is sort of like an analogy to a private right of action but here you are doing it only with color of state law claims.

QUESTION: Mr. Skarda, on that point, when you mention the two statutes are co-extensive in a sense, would you say the words "and laws"in 1983 have the same meaning as the words "Act of Congress providing for equal rights of citizens" etc. in 1343(3)?

MR. SKARDA: We think they do, your Honor, and of course that's necessary to reach jurisdiction ? whether or not they should be read together.

QUESTION: So then the "and laws" provision has to be laws providing for equal rights in effect? Then you have to say, do you not, that the Social Security Act is an Act providing for the equal rights of citizens?

MR. SKARDA: No, we would argue only, your Honor, that you have to say that 1983 is such an Act and in fact we regard that equal rights language as a shorthand reference back to 1983, and we have cited in our briefs some reviser arguments that is indeed what has happened.

QUESTION: You just told me, though, that you do equate the words "and laws" in 1983 with the words "Act of Congress providing for equal rights" in 1343(3).

MR. SKARDA: Yes, your Honor, we think once you get back to 1983, you don't carry over the equal rights limitations.

QUESTION: They're not co-extensive, then.

MR. SKARDA: They are co-extensive in terms of 1983 only. We say if it's in 1983, then it is encompassed by 1343(3).

Because they both started out in the same place.

QUESTION: So then, going back to my question, you do not take the position that the words "and laws" in 1983 are co-extensive with the words "Act of Congress providing for equal rights" in 1343(3)?

MR. SKARDA: No, we say that then--

QUESTION: You say that 1983 provision is broader?

MR. SKARDA: No, we're saying that it's--once we get within 1983 we automatically--

QUESTION: In order to get within 1983, you must construe the word "laws" in 1983 to be broader than the concept of laws protecting equal rights.

MR. SKARDA: That is correct, your Honor.

QUESTION: Therefore you do not take the position that the two statutes are co-extensive.

MR. SKARDA: Well, we call it a kind of co-extensiveness, your Honor.

QUESTION: In a way that it helps you, but not to the extent that it hurts?

MR. SKARDA: That's correct, your Honor.

And of course our reasoning again--where that language came from in the 1875 revision. As this Court well knows, the 1875 revision wasn't particularly well laid out. In our brief we indicate they were simply trying to refer back and pick up Section 1983.

QUESTION: In 1875 Congress enacted for the first time general federal question jurisdiction, didn't it?

MR. SKARDA: That's correct, your Honor.

QUESTION: Wouldn't it have been kind of strange for them to put a $2,000 or $3,000 jurisdictional limitation on that kind of jurisdiction and still have treated as broadly as you say they do, 1343?

MR. SKARDA: Of course 1343 only refers again to our color of law claims, and we understand the 1875 legislation on general federal question, that there was no discussion of this particular point and then a relationship; that the 1875 provision is really taken out, if you would, in the absence of any reference to 1331 jurisdiction. And of course, regardless of the legislative arguments, we believe that this Court's decision in Jones v. Mayer makes it clear that--no, excuse me--I'm talking about another--

Let me move back, if I may, to the kinds of cases that we have here at this time. I pointed out that this is a $9 million question. I think I need to also point out that it means termination from AFDC assistance back in March 1973 when we filed our case, to prevent this termination of 2700 welfare recipients, of which one is in our case, the Stafford family. It also reduced benefits to 28,000, almost 29,000 welfare recipients. We believe that welfare recipients in this country need the possibility of choosing a federal forum, a

kind of unique forum mentioned in Hague and Mitchum v. Foster, a kind of forum which is more familiar with the tiers of federal regulation, the capacity to read the legislative history and have tolerance for reading the federal regulatory pronouncements; the kind of forum that can offer speed and uniformity in its decision making, and perhaps some partiality.

These are the sort of reasons addressed and the third purposes of Monroe v. Pape, whether or not these forums are available.

We also feel that it is not going to add a lot of cases to the federal caseload to adopt our Supremacy Clause argument, and so testified as Charles Wright before Congressional committees considering expanding, and taking the $10,000 requirement off 1331 jurisdiction as well as United States Court Administrative Officer.

And finally we need ask this Court whether or not its decision in Hagens has really worked and whether or not an elaborate distinction between substantial constitutional arguments and the kind of court time that has to be placed on them is exactly what this Court intended. That could be avoided by deciding this case on these grounds, and if we would, we would point to this Court's decision, to the Second Circuit decision, Andrews v. Maher which noted, and I quote, "We note the irony of having to spend so much time and effort on questions and jurisdiction when the underlying issues on the merits seem

comparatively simple.

Again we would ask this Court to find jurisdiction on our Supremacy Clause arguments as well.

I would like now to turn briefly, if I may, to the 1343(4) claim, the allegation of conduit jurisdiction.

QUESTION: Of course the Second Circuit rejects your Supremacy Clause--

MR. SKARDA: They do, your Honor.

QUESTION: Despite its having said that.

MR. SKARDA: And the labor of constitutional claims of pages and pages in many decisions.

We also feel thatin a way, some of these claims really have to be cooked up that might debase the constitutionality of these claims.

In the five minutes remaining, I'd like to turn to the conduit jurisdiction. Petitioner points in his brief to the fact that it is a tactical amendment. We have discovered and filed a supplemental brief in this case, the green brief, provisions where 1343(4) was intended to have much broader consequences as envisioned by the Justice Department before the bill was sent to Congress, and it was precisely to handle these claims. Of course only speculation would tell us what was in the mind of Congress when it said the words "laws providing for the protection of civil rights, including the right to vote."

We think in that speculation we should be aware of

the fact that in addition to our green brief and U.S. department of Justice memo, the fact that the Act itself spoke of strengthening civil rights statutes.

QUESTION: Would you claim that the Social Security Act is an Act providing for protection of civil rights or just 1983?

MR. SKARDA: Just 1983, your Honor.

And of course Emmanuel Cellers' comments also pick up this notion of breadth of jurisdiction in the debate in the 1957 Act.

QUESTION: In both of your arguments you have to go back through 1983?

MR. SKARDA: That is correct, sir. And there are Law Review articles reading Hague v. C.I.O. and Bomar v. Keyes cited in our brief, which deal with the gap problem between 1343 and 1983. We think that at least was on the mind of some of the participants in the 1957 Act, and of course--

QUESTION: What did Hague v. C.I.O. decide about anything?

MR. SKARDA: We think Hague v. C.I.O. addressed whether or not interference with the federal right and the National Labor Relations Act, and of course there were dissents on whether or not this was really a free speech and right of assembly case, and there was Justice Stone's famous dissent which has now been settled in Lynch v. Household Finance,

that there was a personal property rights distinction. But in many ways it is a kind of Supremacy Clause claim that we are arguing here, whether it's a federal right under the National Labor Relations Act, and there is a city ordinance which does not allow a discussion meeting to talk about the Act. So we think Hague supports our case and is an example of the kinds of Supremacy Clause cases that we would ask the Court to find.

QUESTION: If you are correct, Mr. Skarda, and you may be of course, the word "laws" in 1983 is somewhat broader than the concept of these rights. Does it cover every federal statute and is it therefore unnecessary for the Court to consider whether particular statutes like the Securities Act and so forth imply causes of action?

MR. SKARDA: That's why it is somewhat broader than our Supremacy Clause argument, but again 1983 is limited to state action, and so it would involve only suits against the state parties.

QUESTION: But it would apply, if I understand your concept correctly, to any federal rights given to an individual citizen as against state authority?

MR. SKARDA: Yes, your Honor.

QUESTION: And you would never have to, as we did, for example, in the Bakke case, last year, consider whether or not there was an implied cause of action under Title VI.

We would just rely on 1983. There was a federal statute there.

MR. SKARDA: Yes, and of course our reasons for that again are historical reasons, that Congress was concerned about notions of federalism at that time and passed the Act to enforce--

QUESTION: The fundamental difference is the jurisdiction amount implies to suits between private citizens and there is no reason for a jurisdictional amount when the claim is by an individual against the state.

MR. SKARDA: Exactly. And of course 1343(4) meant nothing in 1957;after this Court's decision in Jones v. Mayer it means a substantial amount for jurisdiction in 1981 and 1982 and this Court has called Section 1983 a civil rights act in as late as Moor v. County of Alameda, and as recent as Robertson v. Wegmann and Monell v. New York City Department of Social Services this last term.

QUESTION: But I suppose you would say that in view of 1983, the "and laws" provision is right. The laws of 1983 cover a lot of laws other than civil rights laws.

MR. SKARDA: It is broader, yes, your Honor, than the Supremacy Clause.

QUESTION: I wasn't asking about the Supremacy Clause, I was asking about 1343(4). It refers to civil rights.

MR. SKARDA: Again it is almost identical with the "and laws" argument in terms of number of cases because it refers back to Section 1983, which requires color of law

provision.

QUESTION: I understand that.

MR. SKARDA: So they would be somewhat identical in terms of coverage under 1983 as a civil rights statute.

QUESTION: Well, I don't know. I think there are an awful lot of federal statutes that aren't rights laws that could be covered by 1983. They wouldn't be civil rights statutes.

MR. SKARDA: Of course we are saying--it's been criticized as a chicken-and-egg circular argument--all we are saying is that 1983 is a civil rights statute. That sounds like a chicken-and-egg argument, but in answer I would point out that 1983 and the 1871 Acts started together and that the 1334 amendment was brought in to solve some of the jurisdictional problems and gap that had been developed by revised ___?___ through the years.

MR. CHIEF JUSTICE BURGER: Mr. Young, do you have anything further? You have about four minutes.

REBUTTAL ARGUMENT OF DAVID H. YOUNG, ES.

ON BEHALF OF PETITIONERS

MR. YOUNG: Thank you, Mr. Chief Justice.

May it please the Court, back to the Ortega household for just one second. Please remember the groupings of sizes of households. One to two people get $33 for shelter, three to four people get $44 for shelter, five or more get $50 for

shelter. That $11 difference between the $33 and $44 for the Ortega household is a result of that grouping of the shelter allowances between the various sizes of households; it is not a result of proration.

With regard to the new H.E.W. regulations that purport to codify this Court's decision in Van Lare, of course those were not available for considered at all by the District Court. They were promulgated prior to the Fifth Circuit's decision and the Fifth Circuit had them available at the time of its decision but it had not based its decision on them and did not cite them or make any reference to them.

I would also point out that the state's practice in this regard is of long standing; it's not something that post-dates Van Lare or those regulations. It wasn't created in perpetuity. Wherever it comes from, it's been around a long, long time. It wasn't created with regard to Van Lare and those regulations at all, and under this Court's recent decision in (Korn (?) against Manley, the correct test to see by what standard a state provision such as this should be tested, is the standard that the state says it meets. Of course in Korn against Manley, it was a switch from emergency assistance to special needs in AFDC. You say, well, the test was--they characterize it as special needs; does it meet those standards? We characterize it and did long before Van Lare as a needs standard and I suggest the proper question is whether it meets

the criteria.

The only limit that I noted in the Respondents' brief as to jurisdiction is put in Footnote 23, where they say that they recognize limits on jurisdiction when Congress specifically acts to prohibit jurisdiction, but I would submit to the Court that that is a backwards argument. Federal District Courts, unlike the State District Courts in Texas are not courts of general jurisdiction. Federal District Courts are only supposed to have jurisdiction where the Congress grants jurisdiction to them. The only broad grant I was ever aware of that was sometimes utilized to take jurisdiction in a wide variety of cases was Section 10, I believe it was, of the Federal Administrative Procedures Act. That was frequently interpreted, where the issue was addressed at all, to authorize this kind of test, and this Court in Califano v. Sanders said no, that there is no such independent basis for jurisdiction.

That was in part based on a statute that Congress had passed just prior to your decision that removed the $10,000 limit for jurisdiction against federal officials. Congress is considering such legislation at this time with regard to the states. It is my understanding that the House has passed H.R. 9622, which would remove it as to states. Of course that action of the House would be a nullity under the Respondents' theory.

With regard to their reply brief, the real legislative

history is what the Congress said, not a memo dredged up from somewhere within the Justice Department, and in that respect it is interesting to note that when the Solicitor General filed his amicus brief in this case, he says there was no independent federal interest in the resolution of the jurisdictional question. I find that a remarkable statement, having spent a good deal of the morning talking about the constitutional laws in 1983. But regardless, if it were the Solicitor General's opinion that these provisions referred to all laws, surely he would have taken the opportunity in his amicus brief to tell us so.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:44 o'clock, p.m., the case in the above-entitled matter was submitted.)

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