ORIGINAL

In the

Supreme Court of the United States

JEROME MILLER, ETC., ET AL.,
APPELLANTS,
V.
MARCEL YOUAKIM, ET AL.,
APPELLEES.

No. 77-742

Washington, D. C.
October 30, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

JEROME MILLER, ETC., ET AL., Appellants,	:	
v.	:	No. 77-742
MARCEL YOUAKIM, ET AL., Appellees.	:	

Washington, D. C.
Monday, October 30, 1978

The above-entitled matter came on for argument at 1:56 o'clock, p.m.

BEFORE:

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

APPEARANCES:

PAUL J. BARGIEL, ESQ., Assistant Attorney General, State of Illinois, 160 North LaSalle Street, Suite 800, Chicago, Illinois 60601, on behalf of the Appellants.

ROBERT E. LEHRER, ESQ., Legal Assistance Foundation of Chicago, 343 S. Dearborn, Room 800, Chicago, Illinois 60604, on behalf of the Appellees.

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 next in 77-742, Miller against Youakim.

Mr. Bargiel, you may proceed.

ORAL ARGUMENT OF PAUL J. BARGIEL, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case began in January of 1974 when the Plaintiffs filed their complaint against the Department of Children and Family Services of the State of Illinois in the Federal District Court for the Northern District of Illinois.

The complaint challenged the Illinois policy of refusing foster care payments to persons who cared for children who were related to them and to the children themselves. Illinois based its policy of refusing foster care payments to relatives upon its determination first, that assistance had always been provided to related persons and to children under the basic AFDC program contained in Section 406 of the Social Security Act, and, secondly, upon the determination that Section 408 of the Social Security Act defined those eligible for foster care benefits as caretakers and children who were unrelated to each other.

The Plaintiffs in this case are caretakers and children who are related to each other and, thus, are denied

foster care benefits under Illinois policy. Their complaint alleged a cause of action that the Illinois scheme was in violation of their Fourteenth Amendment rights of Equal Protection. The Department of Children and Family Services filed a motion to strike and dismiss the Plaintiff's complaint which the three-judge court, which was impaneled to hear this case, treated as a motion for summary judgment. The three-judge court held that the Illinois policy of denying foster care benefits to children who are related to their caretakers was not a denial of equal protection. That case was appealed directly to this Court and the Plaintiffs, in their jurisdictional statement, urged in addition to their equal protection claim, for the very first time, that the Illinois policy or scheme of denying benefits was inconsistent with the Federal Social Security Act, and therefore there was a violation of the Supremacy Clause of the United States Constitution.

Because this claim had not previously been presented to the three-judge court, this Court reversed the three-judge court's decision and remanded the case to the three-judge court for consideration of this issue. On remand, the single judge of the District Court found that the Illinois scheme of denying foster care benefits to related caretakers was inconsistent with the Social Security Act, and therefore a violation of the Supremacy Clause.

The Department of Children and Family Services

appealed this decision to the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals affirmed the District Court's determination. The Department of Children and Family Services then filed a notice of appeal to this Court and subsequently its jurisdictional statement urging that its policy of denying foster care benefits to related persons was consistent with the Social Security Act, and this Court noted probable jurisdiction on the 21st of February 1978.

QUESTION: Mr. Attorney General, are there many other states that follow Illinois' lead here?

MR. BARGIEL: There are other states which follow Illinois lead. I believe that the briefs indicate that there are six or seven states who are doing this. I believe, however, that the majority of states who are involved in the program now take the contrary position, that is, that foster care may be related care.

The issue in this case, I think, may be simply stated. It is are children who are related to their caretakers, are the children, themselves, eligible for foster care assistance under Section 408 of the Social Security Act?

It is our position that this case involves, essentially, a question of statutory construction. And it is also our position that Section 408 of the Social Security Act, by its clear terms, indicates that foster care means unrelated care. Since our case turns entirely upon a proper reading of

the statute, I would like to devote the remainder of my time to a reading of the statute to show the Court what we believe to be the clear indication in the statute itself that foster care is unrelated care.

The statute is contained in an Appendix to our Jurisdictional Statement. It is Appendix A. In Section 608, it is contained at page A6 of that Appendix. And that is what I want to devote my argument to, if I may.

Section 608 is entitled, "Payment to States for Foster Home Care of Dependent Children, Definitions." Now, paragraph A defines the term "dependent child." It reads as follows: "The term 'dependent child' shall notwithstanding Section 606(a) of this title also include a child."

I would like to focus, if I may, on two words in one of the phrases that are used in those two lines. The first word is the word "notwithstanding." Notwithstanding, according to its common useage means, in spite of. So the term "dependent child" in Section 608 is going to be a child who in spite of Section 606(b) of this title. -- I am sorry, in spite of Section 606(a) of this title.

Now, Section 606(a) is the regular AFDC program, and it provides that children will be eligible for assistance if they live with a specified relative. If Section 608, which defines the term "dependent child" as one that is a child in spite of the definition contained in Section 606(a), it must

indicate an intention on the part of Congress to create a class which is different than the class which was already created in Section 606. We read that, of course, since the child who was eligible in 606 was a child who was living with a specified relative -- We read that as being -- the Section 608 child as being someone who is not living with a specified relative.

Congress also chose the word -- chose to include the word "also." That is after the term "dependent child shall notwithstanding Section 606(a) of this title," they said "it shall also include a child. . ." Now, the word "also," as it is commonly used, means in addition to besides or as well as.

So, the definition in 608 of "dependent child" is a definition in addition to or besides or as well as the definition in 606(a). Again, since the definition in 606(a) requires a dependent child to be living with a specified relative, the definition in 608 must be something different. And we contend again that that is further indication that the difference is that the child is going to be unrelated to his caretaker in 608.

Paragraph 1 indicates that "the term 'dependent child' shall notwithstanding Section 606(a) of this title also include a child who would meet the requirements of such Section 606(a) except for his removal from the home of a relative specified in Section 606(a)."

So, under paragraph A-1, a dependent child is a child who notwithstanding the provisions of Section 606 shall include also a child who would be eligible under Section 606 but for his removal from the home of a specified relative.

We submit that this is, again, an indication of the fact that Congress intended to create a new class of persons here under Section 608, and that new class of persons who are going to be eligible for care are persons who are unrelated to the persons for whom -- or by whom they are given care.

QUESTION: You are saying that the language, "except for his removal from the home by judicial decree," suggests that 606(a) would exclude those people, and that 608 would put them back in.

MR. BARGIEL: That is correct, Your Honor. That is precisely our position.

One of the reasons we take that position is that children who were removed from the home of a relative pursuant to a judicial determination that that home was no longer fit were always children who were eligible for assistance under the basic AFDC program contained in Section 606. Congress did not need to pass Section 608 in order to provide eligibility for children who were removed from the home of one relative pursuant to a judicial determination and placed in the home of another relative. Those kind of children were always covered under the basic AFDC program.

It is our position then, since Congress didn't need to do that, it must have been their intention to create a new class of persons who would be eligible for assistance. That new class of persons, of course, are persons who are unrelated to their caretakers because they were never eligible for assistance under the basic AFDC program.

I might add Congress, too, throughout the definition of dependent child here, has contrasted the definition of dependent child in Section 608 with the definition of dependent child in Section 606. I think that contrast was intended to demonstrate that the class of children who are going to be eligible for assistance under Section 608 is a different class than the one in Section 606.

Now, on page A7 of the brief, at paragraph B, the Congress has also defined the term "aid to families with dependent children." They do that in the same fashion as they have defined the term "dependent child" in paragraph A. They say "the term 'aid to families with dependent children' shall, notwithstanding Section 606B of this title, include also foster care in behalf of a child described in paragraph A."

The term "aid to families with dependent children" in Section 606(a), which is the basic AFDC foster program, means aid to a family who is taking care of a child who is related to that family. If Section 608, which is the new program, foster care program, is created notwithstanding

Section 606(a), again, it must be another indication that Congress intended to create a new class of persons. And, again, that new class of persons are families who are not related to the children that they live with.

Now, I think, too, that the Plaintiffs recognize, in this case, that that language notwithstanding -- notwithstanding Section 606(a) or notwithstanding Section 606(b) in the term also -- presents a problem to their interpretation of the statute. I would say that because they define Section 608(b) -- that is, they define the term "aid to families with dependent children" at page 35 of their brief. I think it is interesting to note the way they do that. Page 35, at the bottom, of Appellees' brief, quotes from Congress' statute, Section 608(b). They say it is given a specific meaning, and the meaning they give it reads as follows: They say, "the term, 'aid to families with dependent children,' shall include foster care in behalf of a child described in paragraph (a) of this section."

What is significant about that is that they have deleted the very language which I think indicates Congress' intention to create a new class of children. It reads, "the term 'aid to families with dependent children' shall," and then the phrase, "nothwithstanding Section 606(b)," is deleted.

QUESTION: But this also on A7 includes child care institutions, too, which are not involved in this at all.

MR. BARGIEL: That is correct, Your Honor.

QUESTION: It also includes 606(a)(1). What is this, just a hodge-podge, here?

MR. BARGIEL: I am sorry, Your Honor, I don't --

QUESTION: That's my problem. I don't understand it. You understood it,

MR. BARGIEL: Well, our position is that eligibility is defined in Section 608, in terms of a dependent child or a family with whom that child is living. Once that child is eligible, that child may be eligible for foster care in a family home or may be eligible for foster care in a child care institution. What I am focusing on and what this case is all about, in my estimation, is who is eligible for the benefits which are provided for in 608. And I am saying the Congress defined who is eligible when they defined the term "dependent child" and when they defined it as being a new definition notwithstanding the old definition, which was contained in the basic AFDC program.

I would like to point out again the Plaintiffs exclude in their reading of that definition --

QUESTION: Why is it that in this case this is not included in all of this language on page A6 and A7, which I don't understand?

MR. BARGIEL: Why is what not included, Your Honor?

QUESTION: The Respondents in this case.

MR. BARGIEL: I am sorry, I do not --

QUESTION: You say you will not pay these people that are in this case, right?

MR. BARGIEL: That is our position. Our position is that --

QUESTION: My question is: Why? W-h-y?

MR. BARGIEL: Our position is we will not pay them because Congress did not define them as a class which was eligible for assistance under Section 608 of this program. They are eligible for assistance under Section 606 by its literal terms, and they have always been eligible under Section 606 by its literal terms. Congress created a new class of persons in Section 608, a class of persons who were formerly ineligible to receive any benefits. Before 608 was created, any child who was unable to live with a relative specified in Section 606 was ineligible for AFDC, could receive no benefits whatsoever, no matter --

QUESTION: What about 607?

MR. BARGIEL: Well, 607 requires that a child live with a specified relative again, and be deprived of parental support because his father is on unemployment. That's precisely our point. Under those programs a child would be eligible for assistance if he had the ability to live with a specified relative. But children who could not live with a relative were not eligible for any assistance at all. And

when Congress passed this program, it is our position that they did it with the intention of benefiting a class of children who were previously ineligible for any kind of assistance at all.

As the Solicitor General points out in his brief, too, I might add, there was no controversy in this case until the monetary benefits for foster care were increased beyond what the basic AFDC program provided for. But when this program was initially enacted in 1961 -- that is the foster care program -- when it was initially enacted in 1961, the benefits, as I understand it, were precisely the same for the basic program as they were for the foster care program. Now, it seems to me, if the benefits were the same when the program was created and they weren't increased until 1967 -- if the benefits were the same, that must indicate that Congress intended at that time to benefit a new class of persons, one who had been previously without any kind of assistance at all, because the benefits were precisely the same.

At any rate, my point is that the only way that the Plaintiffs can wind up being eligible for assistance under this program is to exclude the language which I have said, as they have done at page 35 of their brief.

In order to be eligible for foster care or in order for the state to be able to receive matching benefits for foster care, they have to -- Under Section 608(f), they have

to provide a program which is designed to improve the conditions in the home from which the child was removed, or to otherwise make possible its being placed in the home of a relative specified in Section 606(a) of this title.

It is our position that if the state has to provide a program which will put a child -- take a child out of foster care and put him in the home of a specified relative, that has no significance or no meaning if the child is already in the home of a relative, because the goal of Section 608 is not satisfied. That is to say that a child -- there is no purpose or point in taking a child out of the home of one relative and putting him in the home of another relative. This language of Congress in Section 608(f), in our view, has no significance whatever. If the statute is interpreted to permit foster care by relatives, it has no meaning.

Based upon our reading of the statute and the reading which I have attempted to engage in here before the Court, it is our position that foster care means unrelated care. It is clear, even if it is implicit, in the statute.

QUESTION: Do you think it means that in the ordinary vernacular?

MR. BARGIEL: Do I think it means unrelated care in the ordinary vernacular?

QUESTION: Yes.

MR. BARGIEL: I did until --

QUESTION: Until you read the statutes.

MR. BARGIEL: No, no, until I read the dictionary definitions, not until I read the statutes. It is clear in my mind that Congress intended foster care to be unrelated care because of the way they defined the terms "dependent child" and "aid to families with dependent children."

I think that the term "foster care" may vary from person to person or individual to individual. As the Plaintiffs point out, "foster" may imply the relationship between a child and his caretaker, that is anyone who provides what the mother or father would provide would be considered to be a foster parent. I will concede that that's true, but I don't think that our case turns on that understanding. We rely on the plain language that Congress used in the Social Security Act. And it is our position that based upon that language and our reading of it, which I think is not a selective reading, but a fair reading, foster care means unrelated care.

In order for the Plaintiffs to include themselves in this category, to make themselves eligible, they have to engage in a selective reading of the statute. They have to read out words and phrases, because they can't read them consistently and make all the terms and all of the provisions of the foster care statute have significance or make sense.

I would like to reserve whatever time I have left

for rebuttal. I would simply ask the Court that they reverse the judgment on order of the Seventh Circuit Court of Appeals.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lehrer.

ORAL ARGUMENT OF ROBERT E. LEHRER, ESQ.,

ON BEHALF OF THE APPELLEES

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

This case presents the question of whether a neglected or abused child judicially taken from his own home may be deprived of Federal foster care benefits solely because his state then places him in the home of his relatives.

The Department of Health, Education, and Welfare, with the children here, says the Congress intended no such deprivation. Illinois says the Congress intended precisely that deprivation. By affirming the Court of Appeals' decision here, this Court will effectuate Congress' intent these neglected or abused children be cared for under the Federal foster care program, which is intended to insure these children the most suitable out-of-home care for them.

The state Defendant says the benefits here are the same and tries to make the program sort of the duplicate of the assistance programs. The programs do not provide duplicate assistance today and they did not provide it in 1961. Section 408 provides, in Section (f) and in the Service Component to

the Licensing Standards, a range of social services which is specifically designed to meet the needs of neglected or abused children who have been removed from their own homes and made state wards. These services are provided to assure the child proper care in the foster family home or child care institution in which he is placed, and also are provided to the child and to the parent from whom he was taken, in order to effect a reunification of the family.

QUESTION: Doesn't 608(f), in the very language you just quote, suggest that Congress was thinking about two different classes of children in 608 and in 606?

MR. LEHRER: No, Your Honor. With all due respect, I don't believe that is the case. The character of the services applies to a class of children who have been abused or neglected in their own homes, not just to abused or neglected children who have been placed in the homes of nonrelatives. The required services under the Federal Act require an individualized social service plan to assure the child proper care in the home in which he is placed, and also provide for services to, not only him, but to the parent in the home from which he was removed in order to effectuate a reunification in the family. The character of those services is no less applicable to children who are placed with relatives then those placed with nonrelatives.

There is just as much a need to remedy the neglect

and deprivation of children placed with relatives by effecting a reunification of the family as the children placed with non-relatives. So, the service component here, which is not only reflected in (f), but also reflected in the licensing or approval standards, is responsive to the abuse or neglect and it doesn't go alone to children who are placed in nonrelated homes.

For instance, the service component of the license standards, which all states, under (f), are required to apply to eligible children and which Illinois applies to related homes here --

QUESTION: But your definition of "eligible children" comes from 606(a), doesn't it?

MR. LEHRER: Well, the definition of "eligible children" comes from 606(a) but it turns -- at least, in part -- eventually on the last paragraph of 608(a). Because the state's contention here is, as the Court of Appeals noted and the state says in its brief, "turns on the statutory definition of 'foster family home'." In Section 608(a), this --

QUESTION: Doesn't it also turn on the definition of "dependent child" in 608(a)?

MR. LEHRER: Most certainly, Your Honor. And what Section 608(a) is doing is defining, establishing a new program and setting forth new eligibility standards which a child may meet and be a dependent child. It is redefining the

term, "dependent child."

QUESTION: What do you make of the language that your opponent relies on in the first part of 608(a)(1) there, that "a dependent child shall also include a child who would meet the requirements of Section 606(a) or Section 607, except for his removal from the home of a relative"? Does that suggest to you that a child who is removed from the home of a relative by judicial decree would not, except for 608, meet the requirements of 606 or 607?

MR. LEHRER: No. If I understand your question properly, the language that Defendant makes so much of is language that supports the conclusion that the children here are eligible.

What Section 608 is doing -- Section 408 of the Act is doing is to make irrelevant the definition in 606. That's what "notwithstanding" suggests, that here, notwithstanding the definition of "dependent child" in 406, here is a new set of eligibility criteria, which --

QUESTION: Then you get all your rights from Section 608?

MR. LEHRER: From Section 608, oh, yes, except, I think, as Defendants take pains to point out, that this statutory definition does have to be interpreted in the context of its statutory environment, particularly Section 601. Section 42, USC, Section 601, which provides that the primary purpose

of the program -- one of the primary purposes of all the AFDC programs is to encourage the care of dependent children in their own homes or in the homes of relatives.

It does -- our rights -- straightforward we do have to turn on Section 608, but it has to be interpreted in the light of Section 401. It is the state's policy here which frustrates the primary purpose of all the AFDC programs. What's happening here is you have Congress in 1956 amending the Social Security Act to state specifically that one of the primary purposes of all the AFDC programs is to encourage the care of dependent children in their own homes or in the homes of relatives.

The import of the state's position is that five years later Congress establishes a new AFDC program which frustrates precisely those goals. And it frustrates it in precisely this way. The state's policy serves as a disincentive, in the first instance, for relatives to care for dependent children, as happened in this case.

As happened in this case, the Youakim's were discouraged from taking care of children who were related to them. That's the first way it discourages the primary purpose of the AFDC programs.

The second way is that even if that disincentive is overcome and the children are, as they were here, placed in the homes of relatives, then the state policy denies them the

services specified in Section 608(f), designed precisely to reunify the family, that is, place him back in his own home.

It is most unreasonable to read Section 408 of the Act to frustrate what Congress five years previously had said were the primary purposes of all the AFDC programs.

So, it was not true in 1961 and it is not true today that the programs provide duplicate assistance. Although, as Defendant points out, there was no higher Federal matching rate in 1961 for these benefits -- In fact, all the states, immediately, even though there was no higher Federal matching rate, immediately began paying substantially higher benefits. And this reflects a recognition by the state that what was meant here was a program to care for children who needed special remedial care, who needed more benefits.

Now, in 1967, when the matching rate was increased, what Congress said in providing those increased matching benefits, was that the benefits were necessary because foster care was more costly than care in a child's home, and also that it was responsive to the needs of the child.

And that's what's going on here. Congress established a new program to meet the needs of these children, these children who have been especially -- have grown up in unsuitable environments and have been subject to abuse or neglect. It is a remedial program. This is not simply a program for children who don't happen to have a relative to live with.

In fact, as Defendant's argument would suggest, most children who don't have relatives to live with aren't eligible for the foster care program. This was not a new comprehensive program to take care of children who didn't happen to have a relative to live with. What it was was a new program to take care of children who have been subject to abuse or neglect in their own homes. It is a small program especially designed to meet the needs of children unfortunate enough to have grown up in those sorts of environments.

In Illinois, for instance, there are over 500,000 children eligible for regular AFDC benefits, but the entire AFDC foster care program includes only 4,000 children. So, we are talking about a small group of children here.

Now, Defendants place great reliance on the statute. We think they are proper to place great reliance on the statute, but they draw the wrong conclusions for it. The statute, very persuasively, as the Solicitor points out, supports the conclusion that the children here are eligible for foster care benefits.

We discussed the statute at length in our brief, but there are four points that merit emphasis here. First, is the statutory definition of "foster family home." Second, is the specification that AFDC shall include foster care to an eligible child in the foster family home of any individual. Third, is the provision within the statutory definition that

foster family homes in which eligible children are placed may be approved as meeting licensing standards. This is a provision which is specifically applicable to states in which relative homes are not licensed. And fourth is Section 402 (a)(19)(f), the related provision of the Act which constitutes a specific Congressional recognition of a relative home as a foster family home.

First, the statutory definition of foster family home. Defendant dismisses the significance of this because of the statutory definitions' repetition of the defined term, "foster family home," in the definition itself. Reading now from the last paragraph of Section 408: "In fact, the repetition of the term suggests a Congressional wariness that any paraphrase of that term might be read to restrict the state's authority to place a child in the home in which it might be most suitable."

Thus, the only restrictions on foster family homes are those that the state places upon the home itself, in terms of the home's suitability. But, that aside, --

Mr. Justice White, you look a bit confused --

MR. JUSTICE WHITE: I do. That's just normal.

MR. LEHRER: I am sorry. I thought you wanted to ask a question.

The use of the defined term, "foster family home," is no reason to stop reading the definition. The definition

goes on to say that a foster family home must at least be a home for children and it must be licensed or approved by the state. The purpose of the licensing or approval requirement was to assure that the homes in which eligible children were placed met state qualitative standards and state standards which must govern their suitability.

In Illinois, as in all states, caretakers of state foster children and their homes are required to and do meet the same qualitative standards as apply to homes caring for nonrelative foster children. These qualitative standards, which I have reviewed summarily before, mandate that the home meet specified safety and health standards and prescribed minimum safety requirements, and the caretakers themselves must meet certain -- must pass inspection as to their health and their overall fitness to care for these children.

In short, except for purposes of AFDC foster care eligibility, Illinois deems the related caretakers here to be foster parents just in the same manner as it does unrelated caretakers. Defendants continually kind of group the related caretakers here with relatives under the regular AFDC program. But, in fact, the relatives here and the homes here just aren't any relatives and they aren't any homes. These are relatives and homes which have been especially approved by the state under state law to be suitable for the care of children who have been abused or neglected in their own homes and then

taken from those homes and made state wards. So, the grouping the Defendants try to effectuate is belied by its own law and its own practice and policy.

Mr. Chief Justice Burger, in this context and in the context of the statutory definition of foster family home, which is the determinantive term in the case -- in that context, the state's argument really rests upon a proposition that Congress meant to simply exclude them -- exclude foster relative homes from the meaning -- exclude relative homes from the meaning of foster family homes, in the first instance.

As in Mr. Chief Justice Burger's question, counsel conceded that, in fact, the ordinary use of the word may often carry with it, and usually does carry with it, as we discussed at length in our brief, the meaning of relative care. As a matter of fact, in this Court's previous opinion in this case, it used the term "related foster care" and "related foster parents" or "related foster home," without any apparent ease or strain associated with that term. That's the common ordinary meaning of that term, and that's the meaning which Congress attributed to it in the foster care statute.

The second point of the statute which I emphasize is Section 408(b) which refers to the AFDC, "the term AFDC shall notwithstanding Section 606(b) of this Title include also foster care in behalf of the child described in (a) in a foster family home of any individual." The term "of any

individual" explicates the term "foster family home." It demonstrates what is otherwise clear from the legislative history and from the logic of the statute that Congress meant to include any individual the state might deem to be a suitable caretaker for its foster children as AFDC foster parents.

What individuals might be AFDC foster parents? Section 408(b), when read with the statutory definition, says that any individual may be, so long as the state deems them suitable under its licensing standards, which Illinois does for relatives.

Finally, there is the -- or third, there is the approval provision, Section 4 -- in the last paragraph of Section 408, which provides that a foster family home may be either licensed or approved as meeting licensing standards. The legislative history does not indicate specifically why this approval procedure was included -- alternate approval procedure -- was included in the statute. But, we do know that in 1961, as today, several states exclude relative homes from licensing in the first instance. And, in that light, it is most logical to read that insertion of the approval procedure as Congress' effort -- Congress' mandate that children placed in such homes, that those homes meet the same standards as were applied to homes which were licensed under state law.

In this context, the approval requirement emerges

as Congress' means of insuring that the children placed in those homes -- the relative homes -- would receive the same benefits as children placed in homes which weren't licensed. But there obviously would have been no reason for Congress to include that alternate provision unless it intended that children placed in relative homes would be eligible for the foster care program.

The fourth point in the statute which I would emphasize -- We do discuss others in our brief, but the fourth point in the statute I would emphasize is Section 402(a)(19)(f), which we discuss at length in our brief and I won't review that in detail here. That does constitute a specific Congressional recognition of a relative home as a foster family home.

QUESTION: Probably not relevant, but suppose a child was placed in one of the institutions, and the institution was run by the grandmother of the child. How would that enter into it, as distinguished from a private home of the grandmother? It is an institution where they've got 40 or 50 children, or 150, but happens to be run by the grandmother of the particular child.

MR. LEHRER: Well, the state is given authority, under its licensing standards, to approve certain classifications of individuals as suitable caretakers or not. And this -- You are precisely right, Mr. Chief Justice Burger -- is precisely not the question presented in this case. A state

might decide that, for purposes of institutional care, it might not be appropriate to have a grandmother or any relative care for that child in that setting because she might show favoritism, maybe against the child or maybe for the child. The question is not presented in this case about whether a state might deem relatives to be not suitable caretakers. Illinois does deem relatives to be suitable caretakers.

I hope that has answered the question.

But Section 402(a)(19)(f), which we discussed at length in our brief, refers specifically to continuing either protective payment or foster care payment to a child in the home -- in a home of a relative who refuses to cooperate in the WIN program, didn't mean to suggest, in the brief, that the state might not make other alternative dispositions with respect to a child in the home of a noncooperating relative, but the provision does limit the state's remedial action to a dependent child to either continuing foster care in the home of a relative or if it is going to continue on AFDC outside the home, limiting it to foster care. Which must mean that it must be continued in any home in which the child is placed. And that does constitute a specific Congressional recognition of a relative home as a foster family home.

Finally, HEW's administrative interpretation of the statute unequivocally supports the conclusion that the children here are eligible for federal foster care benefits.

We have not emphasized it here because it emphasizes itself. It is the interpretation by an agency which is charged with enforcing the foster care statute and, indeed, was -- At least, cooperated in proposing and establishing the foster care program in the first instance. Moreover, this interpretation has been a matter of public record, prominently so, for over four years.

QUESTION: How many years elapsed between enactment of the statute and the promulgation of the regulations?

MR. LEHRER: Fourteen years. And I think the reason why there was a lapse, why there was not an articulated policy prior to 1974, though the Solicitor notes the operative policy was, in fact, in effect prior to '74 -- The reason why that is, supports again the conclusion that the children here are eligible is precisely because the fact of whether children were placed in relative homes or nonrelative homes is really irrelevant to the foster care program in the sense that the states are given the placement authority. The Congress in the foster care statute delegates to the states the right to make that placement which it deems to be in the best interest of the child.

So, the Federal Government wasn't reviewing these individual placement decisions. This is not like the ordinary situation which sometimes comes up in AFDC cases where in the state plan, one must specify your not providing benefits to

children, let's say, between 18 and 21. There is no necessity or need for the state to make that specification, so there would have been no HEW review of those kinds of decisions. And it only came to light, I think, following two District Court decisions -- Federal District Court decisions in early 1971 which brought this fact that a few states were not considering children placed in related care to be eligible. And, at that point, HEW very promptly issued an instruction mandating what the proper interpretation of the Act in its own regulations was.

In conclusion, Section 408, in common sense -- common sense in terms of what Congress must have intended in the light of the primary purposes of the AFDC program, and in light of the traditional suitability of relative care in our society, which the state policy here frustrates and deters -- the statute itself, in common sense, points decisively toward that reading of Section 408, making the children here eligible for foster care and decisively against the conclusion that Congress meant to discourage the care of neglected or abused children by their relatives and deny them the higher benefits and specialized social services which were necessary to remedy the abuse and neglect to which they had been subject.

The Department of Health, Education, and Welfare says that that reading of the statute, making the children here eligible, is the correct reading. It is the correct

reading. And it is for that reading that the Court of Appeals' decision should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Bargiel?

REBUTTAL ORAL ARGUMENT OF PAUL J. BARGIEL, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BARGIEL: I would like to make one brief comment in rebuttal.

I would simply like to reaffirm that our position that unrelated persons are not eligible for foster care is based upon the plain meaning of the language employed by Congress in the statute.

Eligibility is defined in terms of a dependent child or families with dependent children, not in terms of foster care. Foster care is the thing that a dependent child or an eligible family are eligible for. And that's the thing that the Plaintiffs overlook.

I would like to point out, if I may, one thing that the Plaintiff's reading of this statute could result in, which Congress obviously never intended.

Section 606, which provides a specification of certain relatives, includes as a relative, a specified relative, a mother or a father. That is, a child can be living with his mother or father, or certain other relatives, and be

eligible for basic AFDC assistance. If a brother or a sister can be a foster parent, under Section 408, then there is no reason that a mother or a father cannot be a foster parent, if they otherwise meet the eligibility criteria, because they are also one of the specified relatives contained in Section 606, which Section 608 is written notwithstanding or in spite of.

So, I would suggest to the Court that the Plaintiff's construction of this statute would result in at least that foolish result. And I would again respectfully request that the Court reverse the determination of the 7th Circuit Court of Appeals.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:40 o'clock, p.m., the case was submitted.)