In the ORIGINAL

Supreme Court of the United States

ELVINA M. HERWEG, BY HER HUSBAND AND NEXT FRIEND, DARRELL E. HERWEG AND DARREL E. HERWEG, ETC.,

Petitioners,

v. NO. 80-60

ROBERT A. RAY, GOVERNOR OF IOWA, ET AL

Washington, D. C.

January 13, 1982

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Wednesday, January 13, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 o'clock a.m.

APPEARANCES:

NEAL S. DUDOVITZ, ESQ., Los Angeles, California; on behalf of the Petitioners.

BRENT R. APPEL, First Assistant Attorney General of Iowa, Des Moines, Iowa; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Herweg against Ray.

Mr. Dudovitz, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF NEAL S. DUDOVITZ, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. DUDOVITZ: Mr. Chief Justice, and may it please the Court, the case before you today presents this Court with familiar concepts, a federal-state cooperative program, federal regulatory issues, and specific elements of the Medicaid statute.

Petitioners are a class of poor persons from the state of Iowa who are being deprived of Medicaid benefits for nursing home care solely because Iowa has chosen to disobey federal Medicaid regulations. The heart of the Medicaid problem here involves a determination of the amount of money available to an institutionalized spouse from a non-institutionalized spouse in determining benefit eligibility. This process is called deeming, and of course it is the very same process confronted by this Court last term in its decision in Schweiker v. Gray Panthers.

Whether or not deeming is employed for spouses separated by institutionalization of course often results in critical life decisions for members of the petitioner

class. As a majority of this Court noted in Gray Panthers, many individuals in need of medical care are forced by deeming to choose between abandoning an institutionalized spouse and living in poverty. This dilemma is at the core of the present controversy.

This case, like that in Gray Panthers, revolves around the validity of the federal regulations that determine when a state such as Iowa may deem income between spouses separated by institutionalization. Contrary to the plaintiffs in Gray Panthers, petitioners in this case are not attacking the validity of the federal regulations. Instead, it is the respondent Iowa who now claims, despite their acceptance of federal moneys, that they are not bound by the Secretary's regulations.

Iowa argues it may make its own deeming rules, directly contrary to the federal regulations, and still be reimbursed by the federal government for Medicaid payments. Petitioners maintain, on the other hand, that the federal regulations are a valid exercise of the Secretary's authority granted to him by Congress, and the federal government, as stated in their amicus brief filed herein, agrees with petitioners that Iowa's Medicaid rules must be changed in order to comply with the federal regulations.

The analysis which this Court must employ in evaluating this controversy was set forth by the Court in

its decision last term in Gray Panthers. The regulations at issue in this case are promulgated under the exact same statutory authority for which the regulations of Gray Panthers were promulgated.

In the Gray Panthers case, this Court ruled that the section of the Medicaid Act under which the Secretary was acting both in Gray Panthers and here amounted to Congress's granting to the Secretary the power to make regulations that have legislative effect. The Court therefore applied its previous decision in Batterton v. Francis, in order to determine the validity of the regulations.

The Batterton test requires that the regulations be upheld unless they are either arbitrary or capricious, or beyond the authority granted the Secretary by Congress. It is important to note that neither the district court in this case nor Judge Ross writing for half of the Eighth Circuit followed the Batterton test. The only group of judges that did was the second half of the Eighth Circuit, in an opinion written by Judge McMillian, who followed the Batterton test, and came out on the same side as petitioners are herein, indicating that the regulations must stand and Iowa's rules must fall.

The practical implications of the Batterton-Gray Panther test are that this Court must focus on the

reasonableness of the Secretary's regulations. It is not the duty of this Court to interpret the statute to see if there is another way to read the statutes, nor is it the duty of this Court under Batterton and Gray Panthers to compare Iowa's interpretation or the Secretary's to determine whose might seem most reasonable.

The question is not really whether Iowa's policy is reasonable, which is what Iowa seems to want to argue to this Court. The only issue is whether the Secretary's regulations are reasonable. If they are, then they must stand, and Iowa must be forced to follow them.

The Gray Panthers decision is not, however, controlling on the ultimate merits of this case, for the reason that the regulations at stake in Gray Panthers ultimately did not apply to the state of Iowa.

Under the statutory authority of the Medicaid Act that we are concerned with, the Secretary issued, in a sense, two sets of regulations, one that applied to states which have been called the 209(b) states, and another set of regulations that apply to the SSI states. At stake in Gray Panthers were the regulations applicable to the 209(b) states; at stake here are the regulations applicable to the SSI states.

That distinction is what produces the critical difference in this case.

QUESTION: Mr. Dudovitz, did Mrs. Herweg's family apply on her behalf for SSI benefits before applying for Medicaid?

MR. DUDOVITZ: The record reflects that she did not apply before, and I think the briefs will note that there is some question about whether or not she in fact ever was an SSI recipient. However, the Court will note that attached to the appendix in this case is the decision of the Iowa Department of Social Services on the Herwegs, and they note in that decision that as of June -- they had received notice that as of June, 1977, she was going to receive SSI.

QUESTION: Is there a reason why no application was made on her behalf?

MR. DUDOVITZ: I actually do not know the answer to why she did not make an application. It is my understanding that she would have been eligible after the first month that she moved out of the home.

The difference between the 209(b) and SSI distinctions, as I said, is critical here. The 209(b) option, as this Court noted in Gray Panthers, was created by Congress essentially at the behest of the states because the states did not want to be bound by what we have called the SSI link. That link, that part of the statute, 1396(a)(10)(a), requires that a state provide Medicaid benefits to all SSI recipients. This link to categorical

programs, that is, linking Medicaid eligibility to eligibility for categorical programs, was not new. It has essentially existed in the Medicaid program from its inception.

The critical difference, though, that occurred in 1972 was the adoption by Congress of the SSI program. Prior to that time, the states were able to control many of the eligibility conditions for the categorical programs. Therefore, to link eligibility to those programs did not -- still allowed the states to have substantial control over the eligibility conditions.

By federalizing the age, blind, and disabled in SSI, Congress created the eligibility conditions for supplemental security income. That would have resulted in some states, if the link had been continued to apply to them, having to pay Medicaid benefits to people they had not paid them to before. In order to not force the states to have to do this, Congress provided the 209(b) option, which allowed states to use its eligibilty conditions that were in existence in January, 1972, rather than be bound by the SSI rules. States had a voluntary choice to make.

Iowa chose to be bound by the SSI rules. Iowa chose to follow the SSI rules for Medicaid eligibility, as, of course, did a majority of the states.

It is important to remember that the link then

assures that all SSI people, all people who are so poor that they need cash assistance, will also get corresponding medical benefits, and it attaches to Medicaid the eligibility conditions for those benefits that Congress crafted in the SSI statute.

QUESTION: Mr. Dudovitz, may I ask you a question, which is, if we were to reverse in this case, and give effect to the Secretary's regulation, would states still be able to collect money from the spouse who is not institutionalized for reimbursement to the state under some state relative responsibility law, in your view?

MR. DUDOVITZ: Yes, absolutely. The Medicaid rules here and the SSI rules say nothing about the state's powers under its relative responsibility laws. In fact, the Secretary has noted a number of times that the states are free to exercise their rights, whatever they may be, under those laws.

QUESTION: Does Iowa have such a law?

MR. DUDOVITZ: It is my understanding Iowa does have such a law.

The particular SSI eligibility rules that are being brought to the Medicaid program through the link here, the deeming rules, are simply that spouses when they live together must have their income included together, and when only one spouse is an eligible spouse, there is only one

spouse is applying for benefits, that deeming must cease after the first month. When two spouses are applying, SSI requires that their income be considered together for six months, and correspondingly, the Secretary requires that same six-month deeming in the Medicaid program.

Iowa admittedly does not follow that rule, and admits that they are directly and specifically in violation of those regulations.

The Secretary's regulations, then, in our view, when evaluated, that is, that regulation bringing the one month and six month rule over from SSI to Medicaid, when evaluated under the Batterton-Gray Panthers test which this Court has established balance the overall policies of the Medicaid program, that is, the attached -- assuring that categorical eligible people, SSI people, get Medicaid, with Section 17(b) and (d) of the Medicaid Act, that give the Secretary the power to determine what income is available and talk about the limited exception to deeming for spouses and parents to children.

The regulations recognize therefore that Section (d), the authorization for the limited deeming, and I think it is important again to note that this Court recognize that Congress generally was opposed to deeming but allowed a limited exception, recognize that (d) is such a limited exception, but it also recognized that the subsequent

enactment by Congress of the SSI program in 1972 amounted to a modification of Section (d), such that (d) could not be used to deprive SSI recipients of benefits.

QUESTION: Mr. Dudovitz, let me ask, does your class encompass both the categorically and the optional categorically needy?

MR. DUDOVITZ: Yes, it does. There is no distinction in the class between the two.

QUESTION: Does the regulation that was struck down apply only to the optional categorically needy?

MR. DUDOVITZ: It is my understanding that the regulation would apply to everyone about the SSI recipients and the optionals. It is important to recognize that as I think both our brief and the brief the federal government points out, that the optional categorical people are in effect categorical people, and that the federal government has always applied the same rules to all of them, and the Secretary has always understood that it was the intent of Congress that they be treated the same, again, recognizing that the optionals was a voluntary choice by the state of Iowa. They did not have to choose to cover those people, but that was their choice to do so.

The Secretary's regulations then are no more restrictive than the SSI deeming rules which the same states have to use, and it is in our view the only way to assure

that the SSI link has effect. Iowa, to our knowledge, is by itself in its interpretation of these rules and statutes. The only other state to our knowledge that has ever argued that they can ignore these deeming rules was the state of Florida, and as I think we noted in our briefs, in the Griswold case the federal district judge enjoined Florida from undertaking their view. The federal government has always agreed with the position of the petitioners.

Simply that -- the simple question is, if Iowa can do what it is trying to do here, if it can be an SSI state, but then pick and choose which SSI rules it wants to use in the Medicaid program, it effectively emasculates the link and deprives the federal government of any opportunity to control the Medicaid program, for which it is the primary funder.

Another interesting point in this case is that again if you look at the Department of Social Services' decision attached to the appendix in this case, you will note that there were two federal SSI rules brought over to the Medicaid program which were at stake initially in the Herweg case. One was the deeming question, and the other was the income disregards question. That is, how much of Mr. Herweg's income would be disregarded under the SSI rules.

Iowa chose to change that also initially, but in its decision on the Herwegs' case, it reversed itself. It

said, we are bound to follow the SSI income rules for the Herwegs. Therefore, we have to use the SSI exemptions, but we are not bound to follow the SSI deeming rules. Petitioners submit that makes no sense under a federal-state cooperative program.

Iowa has made a few arguments that I wish to deal with on this point. One, they have implied that there is somehow some inherent power in the state of Iowa to do deeming through the Medicaid program. As I indicated in response to Justice O'Connor's question, Iowa's inherent power to the extent it exists is found in the relative responsibility laws.

The Medicaid program is a federal-state cooperative program. Iowa doesn't have any inherent powers there. What a federal-state cooperative program does is, Congress says that these are the rules. If you want to use federal money, you have to agree to follow the rules, and Congress determines who has the power to set the rules.

It seems clear here that they have given the Secretary the power in this area. Section 17(d) is not mandatory, and again is modified by Congress's subsequent enactment of the link. I think it is again important to recognize that in evaluating federal-state cooperative programs like the Medicaid program and the AFDC program, this Court must look at the overall policy and intent of

Congress, as Justice Rehnquist noted in the Filberg case. It is not just one sentence or one word that is important here. It is the entire overall policy.

And there is no question that the overall policy is to ensure that SSI recipients receive Medicaid.

The second major point that I think Iowa tries to make is, they try to argue that the SSI program does not actually require that there be no deeming after one month, and they imply that that is in fact the Secretary's idea rather than Congress's.

In SSI, however, Congress specifically in statute set forth in great detail most of the eligibility rules. Not only did they talk about only deeming in one-month and six-month times, but in Section 1382(a)(2), where they define unearned income once people are separate, for people, or for all persons, I should say, including when people are separated, they indicated that support and maintenance can be considered unearned income only if supplied in cash or in kind.

It is not the Secretary, but it is Congress that set forth these SSI deeming rules that the Secretary has now brought over to the Medicaid program by virtue of the link and his authority under 17(b). It seems to me that it is perfectly reasonable for the Secretary, balancing all these interests, to use Congress's enacted eligibility conditions

in the Medicaid program as a way to effectuate the link.

If there are no other questions, I will save the remainder of my time for rebuttal, Your Honor.

CHIEF JUSTICE BURGER: Very well. Before you proceed, counsel, let me inform you and waiting counsel that it now appears that Mr. Justice Marshal cannot get through because of traffic conditions and snow, and he will participate in these cases on the basis, of course, of all the briefs that are filed for the record and on the tape recording of the oral argument. He reserves that right.

Mr. Appel, you may proceed when you are ready.

ORAL ARGUMENT OF BRENT R. APPEL, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. APPEL: Mr. Chief Justice, may it please the Members of the Court, in addition to responding to whatever questions you may have, I think it would be most helpful if I focus on four general areas of this case.

First, I think we have to understand precisely what the regulation under question here does. It stands for the following proposition. If I am a wealthly lawyer earning $100,000 a year, and I have a spouse who for whatever medical reason needs to be institutionalized in a skilled 24-hour a day nursing home, a person representing the Iowa Department of Social Services cannot deem my income available to the spouse that is institutionalized beyond a

one-month period. The only alternative for the state of Iowa is to use spousal responsibility statutes that Justice O'Connor referred to.

With respect to those spousal responsibility statutes, I would like to point out that the Court in Gray Panthers was rather explicit in outlining how impractical resort by administrative agencies like that Iowa Department of Social Services to spousal responsibility statutes are. There are difficulties of obtaining service, there is a protracted litigation, and it is almost not worth the -- sometimes.

QUESTION: But in the example that you are giving, of course, of the wealthy non-institutionalized spouse, that shouldn't pose such a problem, should it?

MR. APPEL: Well, except when you get a multiplicity of cases. We are not dealing with ten, fifteen. We could have quite a few. It is somewhat like the child support recovery program, which we have. Now, that is a little different, in part, because there is no federal largesse involved, and therefore we have a little higher standard. We have got to serve process, and we have got to have the court proceeding. But here we are linking it to Medicaid benefits that are actually paid.

But that is the effect of the regulation at bar here.

Secondly, I would like to clarify models of adjudication that are really -- really at issue here, and the petitioners and the state of Iowa have distinctly different models. The petitioners have a legislative effect model. Basically what they are saying is that Health and Human Services has kind of sketched in the details of the Congressional statute, and that therefore the regulation involved is entitled to legislative effect.

The theory that you are all, of course, familiar with is that specialized agencies ought to fill in those gaps. This Court doesn't sit as kind of a super-agency to review closed decision-making. But Iowa has a distinctly different model.

Iowa's model is the ultra vires model that says that the Secretary of HHS in creating this one-month iron curtain on deeming is not sketching in detail, but is totally outside the Congressional framework, and as a result of that this is an area where courts traditionally police the agencies, and since the regulation involved is invalid, it has no effect from the beginning, and Iowa is not in violation of any valid regulation promulgated by the Secretary.

So, those are the two models that I think are distinctly different, and that may give the case some focus.

Let me share with you some of the reasons why Iowa

1 believes the ultra vires model is more applicable than the
2 legislative effect model. First, we go to the statute
3 itself, Section 17(b) and (d) of the Medicaid program
4 itself.
5 Basically what this statutory framework says is
6 that the states must promulgate reasonable standards for
7 Medicaid; 17(b) notes that the state can only consider
8 available income "according to standards prescribed by the
9 Secretary", and then 17(d) talks about spousal deeming of
10 income, and basically 17(d) says that other than spouses you
11 can't deem income because consanguity isn't close enough,
12 but spouses is authorized.
13 Now, the Court in the Gray Panthers case construed
14 that provision, 17(d), and on 17(d) it said, unless we hold
15 this as express authorization for the state to deem the
16 income of spouses, it would be superfluous. It would be
17 meaningless. It is a little awkward. It doesn't expressly
18 grant the states the authority to deem spousal income, but
19 it knocks everyone else out. It knocks out brothers and
20 sisters and aunts and uncles.
21 But in Gray Panthers, if you read the case
22 carefully, it states clearly that unless you construe 17(d)
23 to mean states, you can deem spousal income, it would be
24 literally stricken from the statute.
25 Secondly, in Gray Panthers there is a gloss of

legislative history. I don't want to protract that, but one of the Senate committee reports that is cited there states that it is proper to expect spouses to support each other. I think that comports fairly with our everyday experience.

Secondly, let me point out the Secretary has not promulgated a standard, really. Iowa's position is that it is a time limitation. It has no connection at all with the availability of income, how much money the other spouse is making, what the obligations of the other spouse might be on the strength of the marriage relationship.

QUESTION: Would Iowa object to any time limitation that the Secretary might impose on deeming?

MR. APPEL: I think it would be conceivable that a time limitation would be appropriate if it could be shown that it had some kind of rational relationship with expectations of spousal support. If the Secretary in notice and comment in the Federal Register said, listen, we have decided that after six years or five years the family obligation dilutes, or practical experience shows that we just can't enforce it -- strike that. I don't mean to say that. But experience shows us that somehow the family relationship is so diluted then that you can't expect it. Then, perhaps.

For instance, in the Dandridge case, we are talking about standard of need for AFDC and the result of it as

well, and it is described by this Court as a yardstick, a measuring device, something like standard review that the court uses. You can have a stringent standard of review in First Amendment cases, or a lax standard of review as we have in agency cases where legislative effect is given to the regulation.

But what the Secretary has done is in fact set no standard, but kind of brought down a time limitation that is irrational.

QUESTION: Hasn't Congress delegated to the Secretary, though, the precise power, and doesn't that mean that the Secretary's -- Congress's directive has been effectively ignored, if you are right?

MR. APPEL: I think Congress -- Congress's delegation must be considered in the context not only of 17(b), which says standards, but 17(d) as well. I don't think that Congress intended for the Secretary to be able to use a one-month cutoff that has no relationship whatever to spousal responsibility. In effect what that does is through regulation draw a dotted line through 17(d) of the statute, and I think that is ultra vires.

The Secretary clearly has power to prescribe standards, and draw the lines. The Secretary may come in and say, listen, it is unreasonable to expect more than $300 of income deemed to the other spouse from a person who earns

$15,000, or wherever they set the line. Those lines are entitled to legislative effect. Iowa could not come before the Court and say, you know, we think it ought to be $300, not $200, or we think the upper income ought to be $50,000 instead of $40,000. Those kinds of lines are entitled to legislative effect.

QUESTION: General Appel, we haven't heard from the Solicitor General of the United States on this case, have we, on the merits? He filed a brief at the time a petition for cert was pending.

MR. APPEL: No, we have an amicus brief from HHS on the matter. The brief, if I can characterize it, basically follows the petitioner's argument.

QUESTION: Well, General, did the court below split evenly?

MR. APPEL: It did, four-four, and in fact, I think the split --

QUESTION: What do you think about it when eight judges split evenly as to whether the statute is at least ambiguous? And if it is, what about your ultra vires argument?

MR. APPEL: Well, whether or not a statute is ultra vires can be a close call, and in fact --

QUESTION: Well, if it is, do you leave any room at all for any deference to the Secretary's judgment as to

which side to choose on this ambiguity?

MR. APPEL: Not on this particular one, because I think --

QUESTION: Well, it must not be ambiguous then.

MR. APPEL: Well, the Congressional directive is pretty clear in 17(d), it seems to me.

QUESTION: But four judges below are against you. They at least thought it was sufficiently ambiguous to vote the other way.

MR. APPEL: Well, the reason for that, I think, is that they misapplied the Batterton test. The Batterton test, I would suggest, is not applicable in this precise setting. Why is it not applicable? First, in Batterton -- Batterton is an interesting case, and it somewhat tracks the case, but let me distinguish it while it is open to the Court.

Batterton, as I am sure you will recall, was a case that involved unemployment benefits, and the Health and Human Services had a regulation which allowed states to disqualify families from AFDC benefits if the father became unemployed because of illegal activity that might have disqualified the father from unemployment benefits under state law, unlawful strike, that kind of thing.

And the Batterton case made a couple of observations. First, it noted that there was no indication

in the statutory language or history that this factor could not be taken into account. That is at 430 -- 432 U. S. 425. Au contraire here, here we have the express 17(d), which has been held that it allows spousal deeming. Other than that, it is going to get stricken -- it is stricken from the statute. And so therefore it is distinguishable there.

Second, in Batterton it was conceded that the Secretary could not adopt a regulation that has no meaningful relationship to any recognized concept of unemployment or that would defeat the purposes of Medicaid. Let me put this in the context of the present case. What meaningful relationship does this one-month window have toward the availability of income of the non-institutionalized spouse to the other? Not yet in this case has that regulation been defended on the ground that it is some kind of reasonable interpretation of what is available or not.

The only ground that has been asserted is that because it is used in SSI, therefore it has to be used in SSI states under Medicaid, so there is kind of an administrative jump but nowhere is a rational relationship shown between a one-month window and deeming policy generally.

QUESTION: You agree that Batterton did hold that

the original judgment was for the Secretary, and that the court should set it aside only if it was unreasonable or irrational?

MR. APPEL: Or exceeded the statutory authority.

QUESTION: Exceeded statutory authority, not simply because the court might have thought it would come down with a different regulation if it had been entrusted with that authority?

MR. APPEL: Well, I think that the different models have to be kept in place. Sure, that is precisely what the Court said. However, it seems to me that the judgment of whether or not a regulation is outside the Congressional framework, specifically where you have the clear 17(d) authorization, is something far different than the line drawing that otherwise occurs in the guts of administrative statutes that this Court construes daily.

QUESTION: General Appel, may I ask you a question to be sure I understand your argument? Am I correct in believing that the same deeming regulation is used to determine eligibility for SSI benefits as for the Medicaid benefits? The one-month rule, and so on.

MR. APPEL: Yes, that's correct. Yes.

QUESTION: Your argument that it is arbitrary in the case of Medicaid would apply also to eligibility for SSI then, wouldn't it?

MR. APPEL: Well, not necessarily.

QUESTION: Why not? That is what I would be interested in.

MR. APPEL: Right. In the SSI statute itself, there are provisions which appear to set up the one-month window. There is a specific statutory provision of SSI -- I think it is 1382; it is cited in the briefs -- that basically says you can deem -- implies that you can deem the income when they are living -- when the spouses are living together, and HHS has said, well, that means living together. That means if they are separated we can't deem any income. Query whether that is correct, but that is the approach that has been taken by HHS under SSI.

And what the petitioners' argument is, as I understand it, is that because that is what goes on under SSI, that is what has got to happen under Medicaid.

QUESTION: But are you arguing that it is arbitrary for the Secretary to impose that requirement, but arguably with respect to SSI Congress imposed the requirement and the same standard of arbitrariness doesn't apply to Congress as it does to the Secretary? Is that the --

MR. APPEL: Well, I think that's right. I think that Congress frankly in legislating can be as arbitrary as it wants.

QUESTION: Congress can act arbitrarily, but the

Secretary can't.

MR. APPEL: Well, I think that's correct.

QUESTION: I mean, that is basically what you are saying to us.

MR. APPEL: I think that --

QUESTION: Because if it is arbitrary, I suppose it is arbitrary whoever imposed the requirement.

MR. APPEL: I am saying that in this discussion, but I don't think it is critical to the guts of Iowa's case, which again rotates around the fact that 17(d) expressly allows the states to salvage some kind of deeming policy, subject, to be sure, subject to whatever standards the Secretary might set for what is acceptable deeming.

I might note that in Norman v. St. Claire, which is admittedly a circuit court case, but it describes some of the history of what occurred prior to the passage of some of these consolidating statutes, and indeed, in all the states, under the Kerr-Mills program, you had all different kinds of formulae for deeming, and they are in all different directions, and the idea was to kind of consolidate these together and get one general parameter of where deeming was allowed. That is the standard that the Secretary should promulgate. The Secretary should come out and say, listen, again, here is a matrix, like in Dandridge -- or Rosaldo actually has the matrix. Here is a matrix of the standard

of deemability. Beyond a certain threshold, you can't deem, states. Let's get it all together.

But again, we are writing out 17(d) of the statute, out of the Medicaid statute.

I want to point out the difference, too, between Medicaid and SSI. SSI, as the Court is aware, is a federal program, totally federal funded, has a much different philosophy than Medicaid. The Medicaid is a cooperative state program. The states are entitled -- are in fact directed to establish plans with all kinds of options and discretions and so forth. That is what Section 17 is all about.

Now, by passing SSI, it seems to me Congress did not intend to take the state discretion expressly given in 17(d) for deeming out of the Medicaid program.

Let me point out this 209(b) matter that has been raised with the Court. It has been suggested in the briefs that Iowa is trying to get in the back door.

QUESTION: Well, if you win this case, I take it that Iowa couldn't change its mind and --

MR. APPEL: Iowa could go back and become a 209(b) state, yes, if it chose.

QUESTION: But as long as it is a 209(b) state, it may not -- it may not take the course the Secretary says it must take?

MR. APPEL: No. In fact, if we were a 209(b) case, I think, under Gray Panthers, we could have a much broader deeming regulation.

QUESTION: You mean, you could choose to do it the other way?

MR. APPEL: Well, if we said, listen --

QUESTION: You mean, you could choose to follow the ultra vires pattern?

MR. APPEL: No, no. No. Iowa is a so-called SSI state.

QUESTION: Yes.

MR. APPEL: It has the option of becoming a 209(b) state, which under Gray Panthers allows broader deeming, but Iowa doesn't want to do that. Why doesn't Iowa want to become a 209(b) state? A number of reasons. One, under SSI there is expanded benefits to minor handicapped children, and there is a more liberalized threshold requirement, more liberalized financial eligibility requirements.

In fact, Iowa has taken a liberal approach. To go back to 209(b) --

QUESTION: Let me ask you just a slightly modified version of Justice White's question. Supposing you remain an SSI state. Would you then agree that you could not adopt new regulations that are precisely like the Secretary's regulations?

MR. APPEL: Oh, yes. That's correct.

QUESTION: You could not do that, because that would be --

MR. APPEL: That is correct. That is correct.

QUESTION: So that every state --

QUESTION: That was my question. Thank you very much.

QUESTION: And every state in the country that has followed the federal regulation has invalid regulations?

MR. APPEL: I think that's correct. Moreover, let me --

QUESTION: That is, every SSI state that has.

MR. APPEL: That has this one month.

QUESTION: Yes.

MR. APPEL: Let me draw the Court's attention, too, to the fact that under a state's Medicaid policy, all of its standards that are set up under Section 17 must be reasonable or they get struck down. So if Iowa or any other state had some kind of Draconian deeming policy, that tried to squeeze blood out of a turnip, that would be unreasonable under the statute, and so this forced choice business of driving someone into abject poverty in order to make the -- to satisfy the deeming policy may indeed be unreasonable, and is subject to judicial attack on that ground, and again, let me make very clear, Iowa is perfectly prepared to follow

whatever standards are set by the Secretary. That is his prerogative. That is what 17(b) says, deeming according to standards. But we want to be able to deem spousal income, as we are expressly authorized. And that is what is being cut off.

Again, to put the 209(b) option in focus, we are talking about a narrow part of the Medicaid program. According to the Federal Register, only 7 percent of institutionalized persons actually have spouses. They tend to be elderly. And of those 7 percent, many of them have very little income at all. They are also eligible spouses, and so there is no deeming to be done.

We are talking about a narrow case here.

QUESTION: So it isn't going to cost the state of Iowa very much.

MR. APPEL: Well, it does, because the whole Medicaid liability in the state of Iowa is tremendous. It runs into millions and millions of dollars. I think $200 million may be near accurate. Cocounsel suggests it is. And so even a small fraction -- I don't have an accurate figure for how much this would cost the state of Iowa, because of our --

QUESTION: That was my point. This issue isn't going to cost the state of Iowa very much if you lose it.

MR. APPEL: Well, no. I am not convinced of that.

I think, though it is not going to cost -- it is not half of the $200 million in total Medicaid costs. Nursing home care is a large part of the overall $200 million, and if it costs $12 million, or $500,000, and I don't have that figure in part because Medicaid deeming is administered locally, so I don't have a centralized figure, but if it costs half a million dollars, that is a lot of service. And Iowa wishes to maintain its liberal policies.

QUESTION: That's a lot of corn, isn't it?

MR. APPEL: It sure is. Well, at these prices, not so much.

QUESTION: Doesn't that depend in part on the extent to which Iowa is willing to apply its own relative responsibility laws and recoup money?

MR. APPEL: It could.

QUESTION: I mean, it is really up to Iowa how much it loses.

MR. APPEL: Well, if we chose to pursue relative responsibility. I am not sure how much income we could get. We would have to hire new attorneys. We would have to pursue service of process. I do know that in our child support recovery operations in our own office, we have seven or eight attorneys, and they are traveling around the state, and I might point out that those attorneys under Iowa law are paid for out of the social services budget. So for

every dollar we expend on attorneys, you know, to litigate these cases, it is coming out of social services generally.

I don't know whether the expenses would be worth -- it would certainly be an administrative burden, and again, the Court in Gray Panthers I thought was rather clear on that point.

A few other miscellaneous observations, if I may. Again I want to stress the narrowness of this case. We are not challenging the whole SSI and Medicaid concept. If Congress tomorrow passes a statute that adds another category to SSI benefits generally, we are moving right along. Iowa will adopt it because it is an SSI state. If Congress adds five categories tomorrow, Iowa will move right along. It is an SSI state.

The only thing we are saying is that the Medicaid statute expressly allows us to do spousal deeming, and we want to do so in a reasonable fashion. To hold otherwise is really a repeal of 17(d) by implication, if we allow the Secretary's regulation to stand. And that, I think, is quite a dubious proposition, where there is no express statutory provision overriding it.

Let me close by saying that Iowa is interested in concentrating its resources on those most in need. That is the name of Medicaid. That is the purpose for which it was passed. And a reasonable deeming regulation does just

that. It avoids the prospect of having lawyers riding circuit across the state trying to litigate the cases that were disproved -- the process which was disproved in Gray Panthers, that provides that relatively wealthy spouses will not have an opportunity to slide out of their Medicaid obligations. It focuses our dollars. And, you know, whatever the financial impact is on this case, it is going to mean there is less money for something else.

Maybe Iowa will have to abandon its policy of having optional needy with Medicaid. Maybe Iowa goes back to a 209(b) state if the pressures get so great, which we think is an undesirable policy, because of the lowered eligibility, and because of the impact it would have on minor children. We don't want to be a 209(b) state, emphatically.

But we think that the policy adopted by the Secretary of HHS simply is contrary to the statutory framework. It is contrary to 17(d) of the statute. It doesn't make sense in terms of the general policy of deeming since family obligations continue over time. They don't change after one month. They remain the same. Administrative enforcement is the only way to go. This is a case of ultra vires action by the Secretary, not a case of line drawing -- to legislative effect.

I am open to questions.

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

ORAL ARGUMENT OF NEAL S. DUDOVITZ, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. DUDOVITZ: Yes. I would like to just clarify a couple of points, Your Honor.

I want to emphasize again that nobody has mandated anything on the state of Iowa. There ares lots of choices. And point out a point that I think was neglected a second ago, that while Iowa can become a 209(b) state, and they can have more liberal eligibility rules than they had in 1972, they just cannot have any more restrictive rules, so Iowa's 209(b) program isn't specifically mandated to be exactly as it was in 1972. It just can't be more restrictive. So if they want to add a few more people under the 209(b) program, they absolutely can.

Secondly, I would note again that Section 17(d) is not mandatory. Section 17(d) is permissive, and the problem in the Gray Panthers case was, the argument was being made that there could be no deeming in the Medicaid program. What this Court held is that the Secretary must allow at times that there be deeming.

The second important distinction is, what we were dealing with or what this Court was dealing with in the Gray Panthers decision and interpreting (b) and (d) was what

Congress intended in 1965, when it enacted the Medicaid program. Again, Congress modified the Medicaid program a number of times, particularly in 1972, when they dealt with the change of the link and how its effect is on the SSI program.

By doing that, essentially, Congress almost in some sense said that the legislative history at the time (b) and (d) were adopted did not quite have the same meaning. So even if it might have been stronger in 1965, the requirement of the link to the SSI program, which no one seems to deny here, essentially modifies it. It makes it clear the Secretary is reasonable in saying, look, you can deem sometimes. And remember, Iowa can deem sometimes. In fact, it can deem to the extent that the Congress found it reasonable to deem in the SSI program, a program for poor people, so that the wealthy spouse that my brother talked about would in fact get SSI. That what the Secretary did is make a reasonable balance between the needs of the link, the permissiveness of (d) but not the mandatory nature of (d).

And in that conjunction I want to point out again that it is not the Secretary who set up those deeming rules in SSI. It is Congress. We are not talking about a question of a Secretary so-called misinterpreting the SSI deeming rules, and I refer again to Section 1382(aa)(2)(a), which is the definition of unearned income in determining

eligibility for an SSI recipient, enacted by Congress, which indicates that you cannot consider support and maintenance unless provided in cash or in kind.

Finally, I would like to reiterate the distinct difference, I think, between the arguments that were being made in Gray Panthers and the arguments that were being made here with regard to state relative responsibility laws. What this Court was addressing in Gray Panthers when it noted the inadequacy of the relative responsibility law was the argument that the Gray Panthers had made that the relative responsibility laws are the only mechanism, and when the Court made a notation to the transcript of the oral argument that counsel had acknowledged the difficulty of getting relief to the relative responsibility, counsel was talking about those close cases where it would be just as difficult, in fact, very difficult to expect a state to order it.

In the situation of a wealthy spouse, it is not very difficult to enforce the relative responsibility laws, and the relative responsibility laws we are talking about here are in addition to, not the only remedy, and that is, a state can still do deeming under Medicaid for the one-month and six-month period, and in addition has its relative responsibility laws for remedy.

So that there is, it seems to me, a distinct

difference between the problem that this Court was referring to in its notation in Gray Panthers.

I have nothing further unless there are any other questions, Your Honor.

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

(Whereupon, at 11:03 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

ELVINA M. HERWEG, BY HER HUSBAND AND NEXT FRIEND, DARRELL E. HERWEG AND DARREL E. HERWEG, ETC., v. ROBERT A. RAY, GOVERNOR OF IOWA, ET AL

No. 80-60

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ryan Connelly