In the

Supreme Court of the United States

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
Appellant	)	
v.	)	NO. 81-213
GEORGE HOGAN ET AL.	)	

Washington, D. C.

March 24, 1982

PAGES 1 thru 55

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Washington, D.C.
Wednesday, March 24, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 o'clock a.m.

APPPEARANCES:

GEORGE W. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C., 20530; on behalf of the Appellant.

WILLIAM H. SIMON, ESQ., Stanford Law School, Stanford, California, 94305; on behalf of the Appellees.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Schweiker against Hogan. Mr. Jones, you may proceed whenever you are ready.

ORAL ARGUMENT OF GEORGE W. JONES, ESQ.

ON BEHALF OF THE APPELLANT

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

The issue in this case is whether differences in the financial eligibility requirements prescribed in Section 1903(f) of the Social Security Act for the two major groups of potential Medicaid beneficiaries violate the equal protection component of the Fifth Amendment.

The first group is the categorically needy. Aged, blind and disabled individuals whose income is less than the income limits established in the cash assistance programs. The second group is referred to as the medically needy, and includes aged, blind and disabled individuals whose income is greater than the cash assistance limits.

All of the appellees are in the second group. The decision in this case, however, will not only determine the constitutional validity of the differences in the income requirements, but also, the validity of Congress's decision to require participating states to

provide Medicaid coverage to the categorically needy but not to the medically needy.

The Medicaid program was established in Title 19 of the Social Security Act and provides federal financial assistance to states that choose to pay for medical treatment for certain groups of poor people. States that choose to participate in the program must provide Medicaid coverage to all individuals who are receiving benefits under one of two cash assistance programs. Either the federally-financed supplement security income for the aged, blind and disabled program, or the jointly-financed program for providing aid to families with dependent children, the AFDC program.

Participating states are not required as a general matter to provide Medicaid benefits to any other group of individuals. Therefore, a person who is not eligible for benefits under one of the cash assistance programs is also ineligible for benefits under the Medicaid program unless his state chooses to provide benefits to one of the optional categories.

The major optional coverage group is the medically needy; people who are ineligible for cash assistance only because of the amount of their income. Section 1903, however, provides that states are only

entitled to federal financial assistance for providing Medicaid benefits to a medically needy individual if he incurs medical expenses in excess of the difference between his income and the state's spend down level. The spend down level for a person with a family of a given size must not exceed 133 1/3 percent of the state AFDC payment amount for a family of the same size.

The SSI program guarantees a federal minimum benefit, but the states may supplement that amount. If the state chooses to make supplemental payments to individuals who are receiving SSI benefits or who would be eligible for SSI benefits except for the amount of their income, the state may also provide Medicaid benefits to those individuals without regard to the 133 1/2 percent limitation prescribed in Section 1903.

Massachusetts participates in the Medicaid program, provides Medicaid benefits to the medically needy, makes supplemental benefits to SSI benefit recipients or people who would be eligible for SSI except for the amount of their income, and provides Medicaid benefits to people who are eligible for supplemental payments. All of those choices are voluntary choices on the part of the state of Massachusetts.

Appellees filed this lawsuit in the United

States District Court for the District of Massachusetts challenging the maximum medically needy spend down level prescribed in Section 1903(f) as inconsistent with the equal protection component of the Fifth Amendment. Appellees also challenge the corresponding provisions of the Massachusetts Medicaid plan as inconsistent with the equal protection clause of the Fourteenth Amendment.

QUESTION: Was there a statutory argument eventually presented?

MR. JONES: No. Appellees represent a class of all present and future Social Security benefit recipients who live in Massachusetts, are disabled or older than 65 years old, are ineligible for cash assistance because of the amount of their income, and have medical expenses not subject to payment by third parties that are greater than the difference between their countable income and the cash assistance income limits.

The district court in this case held that to the extent that Section 1903(f) requires the state of Massachusetts to establish a spend down level that is less than the state supplemental payment income limits, the statute discriminated against appellees, in violation of the equal protection component of the Fifth Amendment.

The district court concluded that the time for comparing the circumstances of the medically needy including the appellees, the group to whom Section 1903(f) applies, and the circumstances of the categorically needy, to whom Section 1903(f) is not applicable, was after the medically needy had incurred medical expenses.

According to the district court, at that point there is no difference between the medically needy and the categorically needy, and consequently, no basis for distinguishing between the two groups, as Section 1903(f) does.

QUESTION: Mr. Jones, is this -- your footnote 9, is that an example of the difference? Is that in your brief, page 6, footnote 9.

MR. JONES: This is an example of --

QUESTION: How this thing works?

MR. JONES: Yes, that is right.

QUESTION: And the disadvantage in dollars between the two classes runs out to what? About $200 a month?

MR. JONES: Well, the difference in the spend down level and the income limits is about $100. It depends on the particular category the applicants fall in. Massachusetts has different income limits for an

aged couple where both individuals are over --

QUESTION: Yes, but it is this difference.

MR. JONES: Right, it is that kind --

QUESTION: Between the two classes that is the basis of the constitutional argument that that is a denial of equal protection, isn't it?

MR. JONES: That is right. And the district court -- and the argument of the appellees assumes that the medically needy will pay the medical expenses as soon as they are incurred, or at least --

QUESTION: So that if I am getting $600 a month and they pay medical expenses of $250, then they are down below the level, aren't they?

MR. JONES: That is right. But they ignore the fact that the medically needy might very well pay the expenses over a ten-month period rather than a one-month period, so that they would never end up with less money for non-medical expenses than the categorically needy.

As I mentioned, the appellees failed to raise their statutory argument in the district court. We have set out at some length the reasons we think that argument is insubstantial in our reply brief, and unless the Court has some questions, I will turn to the constitutional argument.

QUESTION: You don't suggest that the appellees are not entitled to be present it here as a ground for affirmance?

MR. JONES: We don't make that argument, although --

QUESTION: It never was raised below.

MR. JONES: That is right. In fact, the appellees argue that it was required by the statute, and the district court proceed on that assumption, that Section 1903(f) required the spend down level in Massachusetts to be equal to 133 1/3 percent of the AFDC payment amount, whether or not --

QUESTION: Well, are you suggesting we should ignore the statutory argument or meet it?

MR. JONES: Well, I am suggesting that you should reject it.

QUESTION: All right. So we should decide it on the merits.

MR. JONES: Sure.

QUESTION: And reject it and then reach the constitutional issue.

MR. JONES: And reject that as well.

QUESTION: Yes.

QUESTION: If we were to find, for some reason, that the comparability requirement applied to

the case, how could we reconcile it with the spend down provision?

MR. JONES: Which comparability requirement?

QUESTION: The statutory argument made by the appellees.

MR. JONES: The problem is that Section 1903(f) was the -- was enacted in 1967. To the extent that the 65 legislation imposed any limits on the extent to which the state could set a medically needy spend down level, Section 1903(f) clearly modified that requirement, because it states without exception -- except for the categorically needy -- that the state spend down level shall not exceed 133 1/3 percent of the amount that would be paid under the state AFDC program to a family of the same size.

Congress clearly did not believe that there was any necessary relationship between the spend down level and the cash assistance levels. Section 1903(f) is clear on its face and it makes an exception, an express exception, for the categorically needy.

QUESTION: Mr. Jones, do you know whether there is any legislation pending in Congress to overcome these fiscal anomalies that the appellees complain of?

MR. JONES: Well, last year, Representative Frank of Massachusetts -- and according to appellees, in

response to this litigation -- introduced a bill that would adopt exactly the statutory argument that appellees press on this Court. Congress did not act on it last term and I am not even sure that it has been referred to a committee. There has been no action on it, a far as we know.

Contrary to appellees' submission and contrary to the premise of the submission of amicus Massachusetts Association of Older Americans, this case does not involve any post hoc rationalization of Congress's action. When Congress enacted Section 1903(f) in 1967, its stated purpose was to reduce federal expenditures. In its view, in Congress's view, the states had been much too generous in defining who constitute the medically needy.

As the House committee clearly indicated its concern that some of the plans operated to greatly reduce the incentives for participating in the optional Medicare program, and the committee further emphasized its view that Medicaid was never intended to supplant private health insurance.

As the Senate committee observed, a tendency of some states to identify as eligibles for medical assistance under Title 19 large numbers of persons who could reasonably be expected to pay some or all of their

own medical expenses, has not only significantly increased the amount of federal funds flowing into this program, but has developed future cost projections at a level totally inconsistent with the expectations of Congress when it enacted this program in 1965.

Congress's explicit purpose was to limit federal expenditures, and to do so by limiting the state's coverage of the medically needy. By definition, the medically needy have more income than the categorically needy. As a matter of fact, that is the only difference between the two groups.

Furthermore, since the medically needy group includes anyone who would be eligible for SSI except for the amount of his income, an individual can qualify for Medicaid benefits as medically needy, no matter how much greater than the cash assistance limits his income might be.

As a class, therefore, the medically needy are plainly better able than the categorically needy to pay their own medical expenses or to take steps to assure that future medical expenses can be paid by, for example, purchasing private insurance. With few exceptions, it was plain to the members of the 90th Congress that the medically needy were less needy that the categorically needy.

All the proposals introduced in 1967 to limit federal expenditures were directed at limiting expenditures on behalf of the medically needy. As Senator Long put it, we are talking here about the people who are not on the cash public assistance rolls. That is the area in which we think savings should be made.

On this point, Senator Long spoke for an overwhelming majority of Congress. Section 1903(f) distinguishes between the medically needy and the categorically need because the medically needy are financially better able to provide for their own medical expenses. Precisely the same reasoning underlies Congress's decision to require the states or participating states to cover the categorically needy but not the medically needy. Therefore, the reason for the distinction in Section 1903(f) between the categorically needy and the medically needy is implicit in the structure of the Medicaid program itself.

Now, to the extent that -- to the extent relevant in this case, section 1903(f) distinguishes between two groups: aged, blind and disabled individuals whose income is less than the cash assistance levles, and aged, blind and disabled individuals whose income is greater than the cash

assistance levels. Accordingly, the appropriate groups, or the appropriate classifications for equal protection analysis are those two.

Appellees' status as social security benefit recipients is completely immaterial. There are social security benefit recipients on both sides and appellees don't even suggest that there are any disproportionate number of social security benefit recipients in the medically needy category.

In addition, it is inappropriate for equal protection analysis to compare aged, blind and disabled individuals whose income is greater than the cash assistance levels, but whose income net of medical expenses is less than the cash assistance levels, with the group of aged, blind and disabled individuals whose gross income is less than the cash assistance levels because Congress simply did not create that classification.

The consequences of adopting the district court's analysis and appellees' contentions in this case are quite far reaching. If, as the district court held, for purposes of equal protection analysis the income of the medically need net of medical expenses must be compared with the gross income of the categorically needy, there is no constitutional distinction between

the two groups. In fact, there is no difference at all.

QUESTION: How was the district court able to compare the two incomes? Did he have statistics before him that would have related to all of the -- the income of all of the medically needy?

MR. JONES: No. As far as I know, he did not have such data. He had the named plaintiffs --

QUESTION: Well, doesn't he recognize the fact that Congress is entitled to make general classifications in this field, and that you don't just single out a few basket cases, so to speak, to prove a point?

MR. JONES: I would have thought so, but apparently not because the district court explicitly rejected our contention that the time for comparing the two groups is before medical expenses are incurred. And if that is true, Fullington v. Shea was wrongly decided and must be overruled; two, Section 1902(a)(10) of the Act, which distinguishes between the categorically needy and the medically needy by requiring the states to cover one but not the other -- or, requiring the states to cover the categorically needy but not the medically needy, is unconstitutional. And finally and perhaps most importantly, the 20 jurisdictions that now provide Medicaid benefits for the categorically needy but do not

provide any benefits at all for the medically needy must either extend coverage to the medically needy or simply drop out of the program altogether.

The district court seemed to be completely oblivious to those consequences, and we think they are -- they simply underscore the error in his decision and the error in his analysis.

Contrary to the premise of the district court's opinion also, there is no basis at all in the legislative history of this provision for concluding that the difference in treatment of the categorically needy and the medically needy was the result of some sort of legislative accident. On its face, the statute distinguishes between those people who are eligible for cash assistance and those people who are not. The statute only applies to the medically needy.

The distinction drawn between the medically needy and the categorically needy was described on the floor of the Senate and described in the conference report, it is the 67 amendments. The information before Congress plainly indicated that in many states, the 133 1/3 percent of the AFDC amount was going to be less than the old age assistance income limits. Indeed, the Under Secretary of Health, Education and Welfare, now Health and Human Services, specifically pointed out that 133

1/3 percent of the AFDC payment amount, in some states, was even lower than the AFDC standard of need.

Although no one disputed the goal of saving money, the provision that was ultimately adopted as Section 1903(f) of the Act was repeatedly criticized on the basis that it was too low. Congressmen claimed that the provision would destroy the concept of medical indigence in the Medicaid statute.

It is unlikely in these circumstances that the congressmen -- that the entire Congress, as appellees contend, ignored or overlooked the significance of the data indicating the effect of adopting this 133 1/3 percent limitation. In our view, it is far more likely that the few people in Congress regarded the difference in treatment as -- difference in treatment of the medically needy and the categorically needy -- to be as offensive as appellees seem to think they should have. Indeed, Senator Javits expressly argued or made several policy arguments against discriminating against the medically needy.

The Senate -- Senator Javits's arguments were made in support of the Kuchel Amendment. The Senate, by a vote of more than -- by a margin of more than two to one, rejected those policy arguments and enacted the Senate Bill as the committee had proposed, with the

expression provision that discriminated against the medically needy. That is a different provision than the one that is at issue here, but it was replaced by the provision here, and it seems to us that the vote in the Senate on the Kuchel Amendment plainly indicates that at least those members of the Senate who voted on that bill did not regard discrimination against the medically needy, or a difference in treatment of the medically needy and the categorically needy as something so offensive that it could never be tolerated.

If there are no questions, I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Simon?

ORAL ARGUMENT OF WILLIAM H. SIMON, ESQ.

ON BEHALF OF THE APPELLEES

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

The issue before the Court is whether Congress has required a state Medicaid program to apply a lower subsistence standard to a group of indigent, aged and disabled people who do not depend on public assistance, lower than it applies to public assistance recipients. And if so, whether it is constitutional for Congress to do so.

Now let me begin by responding to the question

which Justice Rehnquist raised. We do not challenge the ability of a state to determine eligiblity on the basis of gross income. We do not challenge the ability of Congress or a state to draw eligibility conditions on the basis of broad, general characteristics. But that is not the way this program worked. The classification involved in this program is not a broad, general, overbroad characteristic. Massachusetts makes a precise determination of the impact of medical expenses on financial need. It does identify those members of the appellee class who are identically situation to SSI recipients by considering the additional factor of medical expenses.

This case is thus radically unlike the cases such as Fullington, for instance, or Weinberger vs. Salfi where the cases upheld over-broad classifications on the grounds of administrative convenience of administrative simplicity on the theory that a state need not consider every factor bearing on need. A program has no obligation to identify all the people who are identically situated in terms of the program's purposes.

QUESTION: Mr. Simon, is it necessary, in your constitutional argument, as I took it to be from the district court's opinion, that the federal level be

compared with the Massachusetts level?

MR. SIMON: It is necessary -- both levels that apply here, Your Honor, are Massachusetts levels. Massachusetts sets the SSI level and it sets the medically needy level, although the medically level is at the 4/3 cap.

QUESTION: Yes. Because of the federal statute.

MR. SIMON: That is correct, Your Honor.

QUESTION: Then would the district court's holding mean that the federal statute could not be constitutionally applied in Massachusetts, but that it could be in other states?

MR. SIMON: It could be applied in any state which had a medically needy program in which the 4/3 maximum was above the SSI level. That is true in the majority of medically needy states.

QUESTION: So that a law of Congress is held unconstitutional in some states and constitutional in others, under his ruling.

MR. SIMON: Well, that is correct, Your Honor. But it is important to focus on the reason. The reason is, of course, that Congress cannot authorize, through the use of its fiscal power, a state to do something which Congress could not do itself. I do not

think there is the same rule -- if Congress itself had applied two separate, radically different standards of needs to two identically situated classes, there would beno doubt that that would be a violation of equal protection.

Here Congress is using its fiscal power to force some states to set its -- to treat one class differently in a way that Congress could not, itself.

Now, I would like to return to the statutory argument. As it turns out, the statutory argument and the constitutional arguments are closely intwined. And I think it is important to emphasize to the Court the nature of the classification that is at stake here.

As Mr. Jones concedes, Massachusetts covers two groups of indigent, aged and disabled people who are identically situated in terms of the same categorical criteria of age and disability.

QUESTION: But I did not understand him to say that one group was all indigents.

MR. SIMON: That is the case, Your Honor, if indigents is measured as that program measures indigents and --

QUESTION: Yes, but the statutory classification is much broader than indigents.

MR. SIMON: I am not sure which statutory

classification Your Honor is referring to.

QUESTION: Those, the medically needy.

MR. SIMON: No, that is not correct, Your Honor. If the medically needy -- the distinctive feature of the medically needy program is that income must be determined on the basis of income -- gross income after medical expenses. That is, the way it works is this: to the extent that the individual has income in excess of the eligibility standards, the state then considers the individual's medical expenses. To the extent that the individual's medical expenses reduce his income below the public assistance standard or the medically needy standard, the individual is then entitled to Medicaid for medical expenses, for which any remaining excess income is insufficient. The individual spends the excess income for his or her own medical expenses, receives Medicaid for only those remaining expenses.

Now, the effect of that, if the medically needy standards were set at the same level as the SSI standard, would be to precisely equalize the treatment of these two groups of aged and disabled people.

QUESTION: I suppose your class actually is one that fluctuates in membership. At any given point in time a person may be rather wealthy, but if he

suddenly has a lot of medical expenses, then he becomes a member of the class.

MR. SIMON: That is unlikely to be the case, Your Honor. All members of the class are aged and disabled, and certainly, the two named plaintiffs have a permanent continuing medical need, and in view of the types of expenditures for which Medicaid tends to pay, makes it also seem unlikely. For instance, 70% of Medicaid expenditures are for nursing home care, which tends to be a very long-term affair.

In any event, it is also the case that the class of SSI recipients fluctuates, too, and there is no reason to believe that this class fluctuates anymore radically than the class of SSI recipients.

I should also point out that in order to qualify as medically needy, the applicant must satisfy an asset requirement which in this case would be $2000. So there are no millionaires getting --

QUESTION: One other question. Would your position be the same if Congress provided for Medicaid just for the categorically needy and had no provision for the medically needy?

MR. SIMON: No, we do not challenge that at all, Your Honor. We think Congress --

QUESTION: That is one thing that always

troubled me about your position.

MR. SIMON: Well, Your Honor, I think that the position in fact is quite typical of the situation in most of the welfare cases this Court has considered in the equal protection context. It is always the case that welfare benefits are optional. On the other hand, all of this Court's cases stand for the proposition that once a court undertakes to provide benefits, it assumes minimal obligations of rationality in distributing them.

QUESTION: Well, you mean once Congress does, or a legislature. My assumption is that Congress decides to give Medicaid benefits to the categorically needy, period. Now, does he have an obligation to give medical benefits to people who, because of their medical expenses, are equally needy?

MR. SIMON: No, but it is important to focus on why. The reason why is that Congress and the states have a right to determine eligibility on the basis of general criteria. They do not have to consider every factor bearing on need. When the state chooses to determine eligibility on the basis of gross income alone, there is a state interest in simplicity and convenience; there is also at least a formal equality in the way people are measured.

In this instance, however, Congress has given

Massachusetts its option and Massachusetts has accepted it, to consider an additional factor to make it a more precise determination. And when Massachusetts does that, we submit, it cannot apply a different standard of non-medical need to an identically-situated group of aged and disabled people.

Now, the relevance of the legislative history to both the statutory and the equal protection arguments is that the entire purpose of Congress in creating the medically needy option was precisely to enable the states to avoid the unfairness which results when aged and disabled people who cannot receive welfare are left with less income for their non-medical needs than they would receive if they could qualify for welfare.

Virtually identical language in both the House and the Senate reports on the original 1965 legislation indicates that Congress' entire purpose in doing this was precisely to avoid the unfairness that is involved in this situation. Congress proposed to do this through the two distinctive features of medically needy coverage. The first is the net income principle; the second is the comparability principle, which now appears in the statute in Section 1902(a)(17), and which was enacted in 1965 for the precise purpose of prohibiting a state from setting its medically needy standards below

its categorically needy standards.

QUESTION: When was Section 1903(f) enacted?

MR. SIMON: In 1967, Your Honor.

QUESTION: Why are you focus -- isn't that the one that the district court declared unconstitutional?

MR. SIMON: That is correct, Your Honor.

QUESTION: Why are you focusing, then, on 1965?

MR. SIMON: Because 1902(a)(17) is still in the statute, Your Honor, and the question is whether the 1967 amendment amended that requirement.

QUESTION: Oh, it is a question of statutory construction.

MR. SIMON: Yes, Your Honor.

Let me just draw the Court's attention to two sentences from the much longer statement in the 1965 legislative gloss on the comparability provision. They are quoted on page 13 of our brief, the last two sentence are: "In no event, however, may a state require the use of income or resources which would bring the individual's income below the test of eligibility under the state plan. Such action would reduce the individual below the level determined by the state as necessary for his maintenance."

I do not believe there can be any reasonable dispute that the 1965 legislation was intended to

prohibit what has happened in this case. The question then arises whether Congress intended when it enacted the 4/3 cap in 1967 to alter that commitment to comparability.

QUESTION: This is the statutory construction argument.

MR. SIMON: Yes, Your Honor.

QUESTION: You did not present it below?

MR. SIMON: No, we did not, Your Honor.

QUESTION: And did you take a position contrary to this?

MR. SIMON: No, we did not. The district judge at the outset of the case indicated that he was inclined to rule on the constitutional issue, and the parties focused on that issue.

QUESTION: Well, you didn't suggest there was even a statutory issue.

MR. SIMON: That is correct, Your Honor.

QUESTION: Do you think -- if you win on this, do you think it changes the relief you get?

MR. SIMON: Not at all, Your Honor, it is the identical relief. Congress, in fact, mandated precisely what the district court ordered in 1965.

QUESTION: Was there a reason it was not raised below or did you just not find the statute --

MR. SIMON: Well, there was really no reason, Your Honor, beside the fact that the district court indicated at the outset that it was going to focus on the constitutional issue.

QUESTION: Well, your -- do you think we are obligated to entertain your statutory issue?

MR. SIMON: No, I do not think the Court is obligated to. I think the Court clearly has discretion to. I think Rule 10(5) specifically gives it discretion, and we would urge the Court to do so in deference to the principle that plausible statutory construction should be adopted, which obviate reaching constitutional issues.

QUESTION: I suppose you are going to reach the positions of the United States and -- in their answer to your statutory argument.

MR. SIMON: Indeed, I am, Your Honor.

The legislative history of the 1967 amendment -- that is, the 4/3 cap -- which the Secretary asserts to require the discrimination alleged here, shows that Congress did not intend that the 4/3 cap required the medically need standards to be lowered below the categorically needy standards. Congress did intend to lower the medically needy standards; it did not contemplate that they would be lowered below the

categorically needy standards, and thus abrogate the specific commitment to equity between public assistance recipients and the retired working corps which Congress made in the comparability provision.

The legislative history of the 4/3 rule in 1967 shows that Congress was reacting to the New York program. That program had set its medically standard so high that nearly 40 to 45 percent of the entire state had been made eligible, even before consideration of medical expenses. Congress thought that New York had abused the program to make its benefits available to people whom Congress had never thought would benefit from the program, and imposed the 4/3 rule as a cap.

The sponsors of the 4/3 rule repeatedly characterized its purpose as simply to bring the New York program into line with Congress' original expectations. As one of the sponsors put it, none of the basic purposes of Title 19 have been harmed or injured in any way.

The 1967 legislation made no amendment to the comparability requirement which was specifically enacted to pevent medically needy income standards from being set below the corresponding categorical standards. And the legislation shows that if Congress had intended to alter that comparability standard, it would have done

so. In fact, in 1967, Congress did enact a provision which was intended to make a minor codification in the related comparability provision, also known as a comparability provision.

And in that instance, Congress made a separate and specific amendment to that comparability provision which appeared in the 1967 legislation under the heading "Modification of Comparability Provisions." Not a word was said under that heading about any modification intended in the comparability provision requiring medically needy standards at least as high as categorically needy standards. Nor was anything said in the debates or hearings that suggested any understanding that this result would occur.

And again, had there been any such understanding, the record indicates that there would have been such discussion. The one statutory amendment Congress did consider in 1967 which was identified as discriminating against the medically needy was severely criticized for doing so and was eliminated from the legislation as enacted. The statement from Senator Long, which Mr. Jones quoted does not refer at all to the 4/3 rule, but refers to a separate provision that was considered in the Senate that had nothing to do with income eligibility limitations and did discriminate

against the medically needy and was eliminated from the statute.

Now, Mr. Jones emphasizes there were states in 1967 in which the 4/3 maximum was below the old age standards. To be specific, there were six states with medically needy programs, six out of 22, although in only three of them was the difference at all substantial.

The important fact is that this conclusion is derived from a very elaborate and, we concede, ingenius analysis Mr. Jones has performed. It was not an analysis that was performed by an legislator in 1967.

The only medically needy program Congress discussed in anymore than a passing fashion in 1967 was the New York program, and in New York, the 4/3 maximum was well above the old age assistance levels, there was no danger that the result in this case would occur in New York.

QUESTION: It would have been so easy for Congress to say 4/3 except when it goes below the categorically needy -- it did not say that.

MR. SIMON: It did not say that, Your Honor. On the other hand, unless the comparability rule is still in place, it is possible that Congress assumed the comparability rule would control in this case, it is possible that the legislature simply never contemplated

that there would be as large a gap between the AFDC and old age standards as to permit this to be possible.

It is worth recalling that the 4/3 rule was part of an omnibus Social Security Act with massive changes in all the social security programs. The legislative record is replete with complaints by legislators that there had not been time enough to analyze the bill.

QUESTION: Well, presumably they would have voted it against it, then, but it nonetheless passed.

MR. SIMON: It did pass, Your Honor. On the other hand -- and it is the law. On the other hand, the comparability rule is also the law, so the question is which of the two inconsistent provisions will govern here.

QUESTION: Ordinarily, it is the most recently-enacted --

MR. SIMON: Well, I would dispute, Your Honor, that the Court has followed that rule in cases that involve very similar situations. In cases such as Cass versus United States, for instance, and the cases that we cite on page 30 and 31 of our brief, the court, as here, has been faced with a situation in which the literal application of a later statute would require the abrogation of a basic policy commitment reflected in

that earlier statute or earlier legislative history.

In those situations, the Court has looked to the legislative history of both statutes, and where it has found in the legislative history of the later statute no intention to alter the prior policy, it has held the earlier statute governing. That analysis applies here. Comparability was a fundamental commitment of the 1965 legislation.

QUESTION: If we sustain the statutory argument, it would only cure these cases where the level falls below?

MR. SIMON: That is the only program that we are seeking to have the Court cure, Your Honor. We do not dispute at all that Congress has a right to set a cap on medically needy income levels, and in the majority of states in which the cap would set the levels above the old age assistance standards or the SSI standards, we don't see any objection --

QUESTION: What is the impact of the district court's decision?

MR. SIMON: Excuse me, Your Honor?

QUESTION: What is the impact of the district court's decision? The same?

MR. SIMON: The impact of the district court's decision will be, all parties agree, to require that the

medically needy standards be set at no lower than the SSI standards; it would be exactly identical to what the comparability rule requires.

The effect of the Secretary's interpretation of the income maximum is, first of all, it would abridge the fundamental commitment Congress made to comparability in 1965. It is also to violate the basic equities that are expressed throughout the statute, particularly in Title II, by penalizing work and social security contributions in savings, for that is the only difference, the only significant difference between the two classes in this situation -- is that the members of the disfavored class have worked more, saved more, or made more social security contributions and now find themselves in a situation where the income they have worked for is turning into a liability that forces them to live nearly $200 below the subsistence income that Massachusetts provides SSI recipients.

We submit that the Court should not impute an intention to accomplish this result to Congress without more evidence that Congress intended it than can be found in this record.

Now, Mr. Jones, -- let me turn now to the constitutional argument. We submit that if the Court does decide that the Secretary's interpretation of the

statute is right, then the district court's analysis is entirely sound. That analysis -- that issue turns on the question of whether there is any distinction in the situation of the two classes which is rationally related to a legitimate legislative purpose.

We submit that there is no such distinction. Now, Mr. Jones refers -- Mr. Jones mentions the purpose of saving money. That, of course, as this Court has held, is not a sufficient basis for a distinction which irrationally burdens -- puts the burden of public savings disproportionately on one class and not on another identically-situated class. The issue was specifically held in Rinaldi vs. Yeager, is whether the specific classifying feature rationally determines who is to bear the burden of public savings.

Now, Mr. Jones suggests that it is possible that the medically needy have greater access to private insurance than the categorically needy. Congress never made any such determination. The references to private insurance in the 1967 legislative history are explicitly linked to working families in the middle income range, and explicitly linked to the New York program --

QUESTION: Maybe Congress did not make any express reference to it, but is it a rational argument?

MR. SIMON: No, it is not, Your Honor. There

was certainly no reason to conclude that Congress could rationally have made that decision, for two reasons.

QUESTION: I don't know whether they could, but could anybody draw that inference?

MR. SIMON: I understand your question, Your Honor, and let me try to answer it. First of all, there is no reason to think that the medically needy have any better ability to purchase private insurance. They do have more gross income but whatever advantage gross income gives them in getting insurance is precisely offset by the fact that they have medical expenses. Medical expenses are equally relevant as income to the ability to purchase insurance.

QUESTION: Well, I don't know -- an awful lot of people spend an awful lot less for medical insurance than the elderly end up paying for doctors' bills, which are paid by their insurance company.

MR. SIMON: Your Honor, it is not at all clear that an awful lot of the aged and disabled do so, and the thrust of Congress' consideration --

QUESTION: That may not be clear, but is it possible?

MR. SIMON: Excuse me, Your Honor?

QUESTION: Is it possible? Is it rationale to think that a medically needy person with a higher gross

income has greater access to medical insurance that might pay his very large medical bills?

MR. SIMON: Well, we would submit that it is not rational, Your Honor. There is no basis, either in a priori logic or in any data. Indeed, the data suggest to the contrary. In 1965, Congress considered data on the availability of insurance to the aged and disabled -- to the aged, and concluded that such insurance that was so available was so ineffective that it displaced the principal coverage that was then available with Part A of Medicare. Since that time there has been no federal policy in favor of -- encouraging the purchase of private insurance by the aged and disabled. Nor would that be rational --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Simon.

(Whereupon, at 12:00 p.m., the oral argument in the above-entitled matter was recessed for lunch, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: Mr. Simon, you may continue.

ORAL ARGUMENT OF WILLIAM H. SIMON, ESQ.

ON BEHALF OF THE APPELLEES - Resumed

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

I would like to return to the issue of assuming that a hypothetical rational basis is sufficient to sustain the classification of whether the private insurance argument is a sufficient rational basis, of course. Of course, amicus have argued in their brief that a hypothetical rational basis is not sufficient, at least under minimum rationality, but for the purposes of Justice White's question and the Chief Justice's question, I want to assume that it is sufficient.

QUESTION: Well, what is your position on that? May we consider some rational basis that you do not see in the legislative history, or anything else? Can't we imagine one?

MR. SIMON: Well, we would submit, Your Honor, that in the case of a classification which results from legislative inadvertence that is not supported by an

actual legislative judgment, that a higher standard than minimum rationale be applied.

QUESTION: Yes, well, you have not any authority for that.

MR. SIMON: Well, four members of this Court at least have subscribed --

QUESTION: Well, you haven't any authority in this Court for that, I don't think.

MR. SIMON: That is correct, Your Honor --

QUESTION: As a matter of fact, you have got authority from this Court directly to the contrary.

MR. SIMON: No, I understand that, Your Honor, and for that reason I want to raise the question of whether, in fact, there is a sufficient hypothetical basis --

QUESTION: How can you say this classification results from legislative inadvertence when Congress enacted the law? I mean, they -- it is an enrolled bill.

MR. SIMON: Well again, Justice Rehnquist, Congress enacted two laws. They are in inconsistent. There is no -- the legislative history indicates that Congress did not intend that the second statute abridge the fundamental policy.

QUESTION: Then that is really a statutory construction, isn't it, as to -- the one you were making

before lunch as to which should be applied.

MR. SIMON: That is correct, Your Honor. There is a statutory construction argument. On the other hand, the legislative history does have bearing under the analysis in, for instance, Schweiker versus Wilson, because the first place one looks when one cannot infer a rational basis from the language of the statute, is to the legislative history to see if Congress, in fact, made an explicit judgment that some purpose would be rationally served by the classification.

We submit in this case that Congress made no such judgment in this judgment here. The next question, of course, is whether the government can hypothesize a rational basis.

We would submit that a hypothetical rational basis of the sort that the government hypothesized would have to meet at least two conditions to be sufficient. First, it would have to have some consistency with the statutory framework. So much is implied in the requirement of rationality. Second, it would have to be supported either by some judicially-noticeable data, or at least by some a priori common sense plausibility.

We submit that on reflection, the private insurance argument satisfies neither of these criteria. First, with respect to statutory framework, the private

insurance argument is not only unsupported by any actual legislative judgment that the appellees have better access to insurance, or that encouraging to purchase insurance would reduce Medicaid costs; it is, in fact, contrary to the premises which Congress acted on when it created the medically needy program, which are precisely that people who have less income after medical expenses than welfare recipients are identically situated to welfare recipients and should be treated as identically situated to welfare recipients.

Now, with respect to judicially noticeable data, the only such data about private insurance that has been cited to the Court is the data we cite on pages 44 through 46 of our brief. That data consists of the data which Congress considered in 1965 with respect to the availability of private insurance to the aged when it enacted the Medicare program, and some more recent data, published data, which is entirely consistent with that data which we have cited to the court.

That data indicates two things. First, it indicates that there is no private insurance available to the aged which covers the majority of services for which Medicaid expenditure are made. 70% of Medicaid expenditures are made for private insurance -- excuse me, are made for nursing home care. Virtually no

private insurance covers the type of nursing home care for which Medicaid expenditures on behalf of the aged are made.

Second, the data indicates that where private insurance does cover expenses that Medicaid does cover, it does so at greater cost than Medicaid does because of the expenses of sales effort, advertising and profit which often exceed 80% of the total cost of the insurance.

Now, I would submit that there are two rational conclusions that one can draw from this data, and that there are no rational conclusions that one can draw from it which sustain the classification. First, the first conclusion that the data suggests is that the principal incentive effect of the discrimination in this case on people who fear ending up in the situation of the appellees, is not to encourage the purchase of private insurance but to encourage them to make efforts to reduce post-retirement income so that they can qualify for SSI, by working less, saving less or by investing their income in exempt assets such as their home or burial plots, which are exempt under Medicaid and SSI.

Secondly, I would submit that the most plausible conclusion from this data is that even if the

discrimination does encourage people who fear ending up in the situation of Mr. Hunter and Mr. Hogan to purchase private insurance, that their purchase of private insurance would increase, rather than reduce, the cost of the Medicaid program.

That is true for this reason: explicitly under the statute under Section 1902(a)(17), and under all the regulations, the Medicaid program must credit the cost of the premiums against surplus income in determining eligibility of the applicant. The effect of that is that the Medicaid program, in effect, pays for the insurance because by crediting the premiums, it in effect reduces the amount of expenses which the applicant would otherwise have to make for his own medical expenses and increases the amount that the state must pay. If the insurance is a bad buy for the applicant, it is a bad buy for the Medicaid program and it will increase Medicaid costs.

Now, of course, if Congress had made a contrary determination, we would expect this Court to defer to it. But Congress has not considered the issue. We submit that the only rational course when all of the data before the court completely contradicts the hypothetical premise of the government, is that this is not a rational basis.

Now, if I may I would like to just briefly return to the issue that I think Justice Stevens originally raised, which is the question of is there a difference in the extent to which the income of the two classes fluctuates. When I answered that question I should have pointed out that the accounting period for Medicaid eligibility is six months. That is, in order to qualify for medically needy coverage, an applicant must demonstrate that his or her medical expenses will exceed the amount of his or her surplus income for at least six successive months.

Now, both of the named appellees have, in fact, permanent conditions and indeed, it is probable that the vast majority of the class have conditions that go on for much longer than six months, and of course, they must re-establish eligibility every six months.

By contrast, the accounting period for SSI is from one to three months, so that one can establish eligibility for SSI if one has income, under those standards, for a single month; at most three months, depending on when in the quarter one applies. So that insofar as one can determine from the statute, the income of SSI recipients is more likely to fluctuate than the income of the medically needy.

Now I must say something to respond to an

argument which Mr. Jones makes in the reply brief which he has not yet made here today, but since he may yet make it, I want to anticipate it. If I understand Mr. Jones' reply brief correctly, he denies that there is any such thing as an income comparability requirement in the statute which requires comparability between medically needy and categorically needy classes.

If that is his position -- and I may misunderstand him -- it is an astonishing position, and it is contrary to Congress' clear understanding and the clear understanding of the federal courts. I just wanted to draw the Court's attention to a sentence from the conferees' report on the 1981 Medicaid amendments which appears at three places in the Congressional Record and cited on page 14 of our brief. "Moreover, it is not the intent of the Conferees to alter the requirements under Section 1902(a)(17) of the Social Security Act relating to comparable treatment of income and resources between categorically needy and medically needy programs."

QUESTION: How long after the event did Congress say what you have just read?

MR. SIMON: This was made --

QUESTION: You said 1981?

MR. SIMON: This is 1981, Your Honor, that is

correct. On the other hand, the federal courts in the numerous cases we cite on page 13 of our brief, -- and before today I would have said the Secretary himself -- have always interpreted the comparability -- well, my time is up. Thank you, Your Honor.

QUESTION: Well, let me ask you, do you think this subsequent legislative history is pretty good evidence as to what the prior law meant?

MR. SIMON: I think it is pretty good evidence that the comparability requirement requires comparability of income standards --

QUESTION: Well, at the same time, Congress did change the impact of this difference to some extent, didn't they?

MR. SIMON: No, Your Honor, it did not. There was -- and the legislation is somewhat confusing because there were numerous requirements known as comparability requirements. There was a set of requirements which required that the aged and disabled be treated the same as families. That is the so-called horizontal comparability requirement which was eliminated in 1981.

QUESTION: Do you think -- they were legislating in this area at the time, in the comparability area.

MR. SIMON: Well, Your Honor, I would say that

the purport of the sentence I read --

QUESTION: Well, they must have been -- do you think Congress by that time was aware of this distinction that you are now attacking?

MR. SIMON: No, Your Honor, it appears, at least the most recent evidence that bears directly on that indicates the contrary. In 1980, Congress did address an importantly related problem and left the record indicating that either it is not aware of the problem or it understands comparability to preclude medically needy levels below the 4/3 rule.

QUESTION: So you get flatly contrary indications from this later legislative history on the question before us now than does the Solicitor General.

MR. SIMON: The legis -- we acknowledge the subsequent legislative history is contradictory and inconclusive. On the other hand, it is clear that since 1965 not a single legislator has expressed any intention to abrogate the comparability requirement.

QUESTION: Well, the other -- your opposition says that this later legislative history indicates congressional awareness and the determination to leave this discrimination in place.

MR. SIMON: Well, the only legislative history that remotely -- first of all, I should say that the

1980 legislation clearly indicates Congress is not aware of it, or that it understands that comparability controls here. That was the 1980 amendment to the Veterans Benefit Act, which explicitly was made not applicable in medically needy states on the explicity premise that in medically needy states a person, after losing categorically needy eligibility, could be treated no worse as a medically needy person.

QUESTION: Okay, thanks.

CHIEF JUSTICE BURGER: Mr. Jones?

ORAL ARGUMENT OF GEORGE W. JONES, ESQ.

ON BEHALF OF THE APPELLANTS - Rebuttal

MR. JONES: Appellees state that the district court indicated that it was inclined to rule on the constitutional argument as an explanation for their failure to raise the statutory argument in the district court.

The complaint filed in this case does not raise the statutory argument, and focuses solely on the constitutional argument. In fact, count one of the complaint states, the statutory 4/3 limit on reimbursement requires this. The statutory 4/3 limit on reimbursement and the regulations of the Secretary --

QUESTION: Well, Mr. Jones, what if the district court had said to the plaintiff, well, I see

you don't raise any statutory construction argument, but I have read the statute and I think there is a very good one. Now, you can't make me reach a constitutional issue just by your desire not to raise the statutory issue. You would not have thought the judge was making an error, would you?

MR. JONES: If the judge had done that, I would probably agree.

QUESTION: Well, there are some other judges involved now.

MR. JONES: But this is an appellate court and not a trial court, and --

QUESTION: You mean you can make us reach us the constitutional issue if we don't -- if there is a perfectly legitimate statutory issue to be disposed of you say we must ignore it?

MR. JONES: Well, I don't think you can decide it without giving us an opportunity to respond to it. Our only opportunity to --

QUESTION: Well, you have filed a whole reply brief on it.

MR. JONES: A whole reply brief -- but we have not had an opportunity to litigate this issue in the lower courts, and we have not had an opportunity to expand on the argument. We think our reply brief is

perfectly adequate to demonstrate the insubstantiality of the statutory argument.

But I suggest that this Court should not reach that issue, or should ignore that issue, and if it does it should reject it.

QUESTION: Or if we reach it, you would say at least we ought to vacate the judgment of the district court and remand it so that you can litigate the statutory issue?

MR. JONES: Or remand it and give the appellees an opportunity to amend their complaint to raise it.

QUESTION: Well, it is raised now.

MR. JONES: Well, the complaint frames the issues in litigation as a general matter, and the complaint in this case excludes the statutory issue. And furthermore, the arguments in the district court presumed or assumed that a statutory issue was a non-issue.

The statutory argument that appellees raise now is simply an attempt to win in this court a battle that they have already lost in Congress. Appellees now rely on a statement in the 1981 legislative history, but in our brief we quote from the 1972 provision that the Senate adopted, that would have dealt exactly with this

problem and it was eliminated in conference.

There is no statutory -- cannon of statutory construction that requires Congress to state the obvious. So we don't think there is any basis at all for the statutory argument.

Now, the second point, the difference between the categorically needy and the appellees is not, is not that the appellees have worked. There are people in the categorically needy group who have worked and whose social security benefits are simply less than the cash assistance level. The difference between these two groups, the categorically needy and the medically needy, including appellees, --

QUESTION: Mr. Jones, isn't it probably true that the people in the appellees' group have worked a little harder or a little longer?

MR. JONES: No, it suggests only that they were --

QUESTION: They have higher social security benefits, quite obviously.

MR. JONES: They were paid a little more.

QUESTION: Right.

MR. JONES: And so they may not -- they may very well not be anymore hardworking than --

QUESTION: Or is it fair to assume that if

they were paid more they might have earned a -- well, never mind.

MR. JONES: Okay.

Furthermore, Mr. Justice Stevens, contrary to Professor Simon's answer to your question, if the time for comparing the medically needy and the categorically needy is after the medically needy have incurred medical expenses, and what you compare is the income net of medical expenses to the gross income of the categorically needy, there is no difference between the two groups, and all states would be required to adopt medically needy programs if they participate in the Medicaid program. I mean, there is simply no difference between the two groups other than that.

Moreover, in response to another of your questions, Professor Simon indicated that somehow the individuals in this class do not include people with average income, but it clearly does. The medically needy group includes anybody whose income -- or any aged, blind or disabled individual whose income is greater than the gross -- the cash assistance income limits. So if an individual's income --

QUESTION: Any such person whose income is at that level after he has paid his medical bills.

MR. JONES: Well, his income is the same. If

you deduct the medical expenses --

QUESTION: Well, if you treat net income as income available after medical bills.

MR. JONES: I am sorry?

QUESTION: If you treat income as income available after paying your doctor bills, then is there a difference?

MR. JONES: No. And that is exactly the point. If a state adopts a Medicaid program for the categorically needy, there is no basis for saying that there is any legitimate reason for them not to cover people whose income, net of medical expenses, is less than the income of the categorically needy.

The appellees make an argument about private insurance. They say that Congress could not have intended this. Congress clearly said the reason it was distinguishing between the categorically needy and the medically needy is because the operation of some state plans operated to discourage both the participation in the optional Medicare program, as well as to supplant private insurance. The House committee indicated that it clearly did not intend that. And the Senate committee agreed.

Now, appellees argue that the benefits provided by private insurance just would not be

sufficient, or would be worth less than the premiums that the medically needy would have to pay. That, it seems to me, is something that should be submitted to Congress, but Congress clearly believed that people with gross income in excess of the cash assistance level were better able than the categorically needy to take care of their own medical expenses, either by buying private insurance or some other means.

Throughout this case it has been assumed that the spend down level somehow indicates the amount of income that will, in fact, be left for non-medical expenses. As we tried to point out in our reply brief, the statute simply requires that an individual incur medival expenses of a particular amount. It does not require that he pay medical expenses in the particular period that the state uses. Massachusetts uses a six-month period. But if the individual pays the expenses over a ten-month period, for example, he may never end up with less money for non-medical expenses than any categorically needy person.

Appellees' entire argument depends on the proposition that incurring medical expenses somehow makes them the same as the categorically needy whose gross income is less than the cash assistance income limitations. Our submission, however, is that gross

income is a perfectly reasonable basis for distinguishing between groups of individuals in a program intended to provide medical assistance for the poor.

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

(Whereupon, at 1:10 p.m. the oral argument in the above-entitled matter was completed.)

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:

RICHARD S. WCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES vs. GEORGE HOGAN, ET AL # 81-213

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

BY Diane Hammond