

In the

ORIGINAL

Supreme Court of the United States

BARBARA BLUM, ETC.,

Appellant

v.

JEANNE BACON, ETC., ET AL

NO. 81-770

Washington, D. C.

April 28, 1982

Pages 1 - 48

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1 IN THE SUPREME COURT OF THE UNITED STATES

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4 Appellant :

5 v. : No. 81-770

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8 Washington, D. C.

9 Wednesday, April 28, 1982

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 11:45 o'clock a.m.

13 APPEARANCES:

14 ROBERT S. HAMMER, ESQ., Assistant Attorney General of

15 New York, New York, New York, on behalf of Appellants

16 MARTIN A. SCHWARTZ, ESQ., White Plains, New York, on

17 behalf of Appellees

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Hammer, you may
3 begin.

4 MR. HAMMER: Mr. Chief Justice, and may it
5 please the Court, this case presents the question which
6 the court left open in Quern v. Mandley back in 1978,
7 namely whether a state emergency assistance law which
8 does not cover all possible emergencies and, as the
9 court below held, which conforms to the Federal Social
10 Security Act, whether this statute also conforms to the
11 Equal Protection Clause of the Fourteenth Amendment.

12 Specifically, we are dealing this morning with
13 amendments to Section 350-J of the New York Social
14 Services law, which were added by Chapter 77 of the laws
15 of 1977, Section 10, effective May 1, 1977.

16 Specifically, these amendments denied cash emergency
17 assistance to Aid to Families with Dependent Children
18 recipients and eligibles. It also denied the
19 replacement of lost, stolen, or mismanaged cash. It
20 also forbid the duplication or replacement of any
21 portion of a regularly recurring grant.

22 In the instant case, as I -- the Second
23 Circuit has upheld the statute under the Supremacy
24 Clause. However, and, we would submit, erroneously, the
25 court held these same provisions unconstitutional as

1 denials of equal protection of the law.

2 The known facts of this case are simple and
3 essentially not in dispute. Shortly after these new
4 amendments took effect, the plaintiffs, who are all AFDC
5 recipients, received their regular welfare checks. They
6 cashed them, in some cases made purchases or paid rent,
7 and then, through some unexplained course of events,
8 either the money was lost or stolen. In all of these
9 cases the thefts were reported to the local police and
10 to the Westchester County welfare officials.

11 It is assumed by both sides, and the record
12 reflects that, but for the amendments to the statute,
13 all of these individuals would have been eligible for
14 emergency assistance. They were, in fact, denied cash
15 emergency assistance on the basis of the new statute.

16 Of the main plaintiffs, Miss Bacon received a
17 special food voucher from her case worker and was
18 referred to voluntary agencies for further cash
19 assistance. The record is silent as to whether she
20 pursued this referral. Likewise, the record is silent
21 as to whether any of the other plaintiffs were referred
22 to voluntary agencies.

23 I mention this merely because that among the
24 components of emergency assistance is referral and
25 counseling. However, as I indicate, the papers in this

1 case as prepared by the plaintiffs do not indicate one
2 way or another whether resort was made to voluntary
3 assistance.

4 It's also apparent from a close reading of the
5 plaintiffs' papers that although there is in each case
6 an allegation of utter destitution and inability to get
7 along without any cash assistance, the fact remains that
8 from the time of the incident as reported to the police
9 and then as reported to welfare officials and, in one
10 case, reported to counsel even before the individual
11 went to the welfare officials, there elapsed a period of
12 an average of a week or so, in one case a little less, a
13 couple of cases a little more, from the time of the
14 incident until a temporary restraining order was
15 obtained in court.

16 I mention it because although there is the
17 allegation in the complaint and in the supporting
18 affidavits that these people were utterly destitute and
19 unable to get along without cash emergency assistance,
20 there is no allegation that somehow they couldn't
21 manage. Somehow, it would appear, at least, I submit,
22 from the silence in the plaintiffs' papers, that somehow
23 they did manage. There is no allegation that anyone
24 missed a mean.

25 QUESTION: Mr. Hammer, may I just understand

1 the thrust here? Are you challenging their standing?

2 MR. HAMMER: No, sir, I am not.

3 QUESTION: Then what is the legal point you're
4 making?

5 MR. HAMMER: The point that I'm trying to
6 make, Mr. Justice Stevens, is that the claim of
7 necessity for public cash emergency assistance which is
8 being advanced by the papers is one which is certainly
9 not totally established by the record, to say the least.

10 QUESTION: Well, will that prevent us from --

11 MR. HAMMER: It is important because ever
12 since Dandridge v. Williams, this Court has held that a
13 state or, indeed, Congress, when it appropriates its
14 portion, need not take care of each and every possible
15 need that a welfare recipient conceivably may have.

16 The thrust of these decisions --

17 QUESTION: But still what you are saying,
18 then, is these people are not being denied what they
19 seek because of their membership in the class of AFDC
20 recipients but rather for some other reason?

21 MR. HAMMER: No, sir. My point is that the
22 decisions of this Court which permit the granting of
23 less than the established needs of a welfare recipient,
24 I submit, not only demonstrates as a matter of law but
25 demonstrates as a matter of fact that it is possible in

1 such a situation as was presented here for people to get
2 by.

3 Apparently they did get by, and I think it's
4 important because --

5 QUESTION: Were they denied assistance because
6 they "got by"?

7 MR. HAMMER: No, sir. They were denied
8 assistance --

9 QUESTION: Well, if they weren't, what are you
10 arguing it for? Is it in this case? Is it?

11 MR. HAMMER: I think it forms an important
12 context, part of the context of the case, Your Honor.

13 QUESTION: Did you just think of it?

14 MR. HAMMER: No, sir, I didn't. The action as
15 brought in the district court sought to declare this
16 statute unconstitutional as a denial of the equal
17 protection of the laws. There was also a claim that it
18 violated the Supremacy Clause of Article VI of the
19 Federal Constitution. An injunction against enforcement
20 was sought.

21 In addition, there was a claim of bad faith
22 enforcement so that damages was also claimed. The basis
23 of this was the Second Circuit's decision in Lynch
24 against Philbrook, the Seventh Circuit's decision in
25 Mandley against Trainer, which was reversed sub non,

1 Quern against Mandley, and Williams against Wobemuth, a
2 similar Third Circuit case. This latter claim for
3 damages was ultimately dropped.

4 Initially, since this Court had not yet
5 decided Quern and there was room, certainly, for
6 argument at the circuit level, the District Court,
7 relying on the Second Circuit's Lynch case, held that
8 the statutes violated the Supremacy Clause. The Circuit
9 affirmed upon the decision of the District Court. At
10 this point this Court had heard argument in Quern and we
11 petitioned the Circuit for rehearing.

12 The Circuit held the petition until the
13 decision in Quern came down and they sent the case back
14 to the District Court for reconsideration in light of
15 this Court's ruling. Upon remand, the District Court
16 held, first, that the Supremacy Clause was not violated,
17 citing Quern, and that of the three subdivisions, that
18 the no cash provision violated equal protection.
19 However, the denial of replacement for lost or stolen
20 case was upheld as a reasonable means of avoiding
21 fraudulent claims and, likewise, the prohibition against
22 duplication was upheld as a reasonable means of
23 determining what emergencies were to be handled.

24 The Circuit heard the case again, this time
25 upon the appeal of plaintiffs. The Circuit upheld us on

1 Supremacy Clause grounds, but reversed the District
2 Court on the issue of lost or stolen cash, claiming that
3 there was no reasonable basis shown to treat AFDC people
4 differently from others.

5 The Circuit affirmed on the issue of the no
6 cash. This time, however, with respect to the
7 replacement provision the District Court's decision was
8 not appealed, so that the District Court decision on
9 replacement of a grant stands as the law in the case.

10 What I should like to discuss during the time
11 allotted to me is basically three points -- that under
12 the authority of decisions such as Dandridge the
13 non-duplication provisions being as they are a
14 reasonable exercise of the state's discretion as to how
15 its money should be allotted covers essentially the
16 entire issue raised by the plaintiffs.

17 To a certain extent, the statute is redundant
18 because if you say in our submission that you need not
19 duplicate a regular grant, by the same token, you need
20 not duplicate the grant because part of it was lost or
21 stolen. Likewise, you need not duplicate part of a cash
22 grant which was given to AFDC people.

23 Additionally, we view that the loss or theft
24 provisions is an appropriate prophylactic measure to
25 assure that fraudulent claims are not received or paid.

1 And, finally, we would submit from the record
2 that the lower courts simply missed the point and erred
3 in holding the AFDC people were treated substantively in
4 any different way than non-AFDC people. The only
5 evidence in the record was an affidavit submitted by the
6 state and it was never controverted by the plaintiffs in
7 any respect.

8 QUESTION: Well, I take it the Court of
9 Appeals disagreed with you.

10 MR. HAMMER: They disagreed, Your Honor, but --

11 QUESTION: And it's -- on purely a matter of
12 state law, isn't it a matter -- it's a construction of
13 the state statute.

14 MR. HAMMER: I submit, Your Honor, that
15 there's no real accurate construction on what state --

16 QUESTION: Well, you might say they made a
17 mistake, but don't we usually take the Court of Appeals'
18 word on the construction of state law?

19 MR. HAMMER: That may be true, Your Honor, but
20 the problem here is that on the face of the cases relied
21 upon both by the plaintiffs and by the Court of Appeals,
22 it is far from clear that state law is what they say it
23 is.

24 QUESTION: Well, they thought it was plain on
25 the face of the statute.

1 MR. HAMMER: Under the circumstances, Your
2 Honor --

3 QUESTION: And your answer is well, we haven't
4 construed it that way and the Court of Appeals should be
5 bound by your construction.

6 MR. HAMMER: They should, Your Honor, have
7 given more deference to the administrative
8 construction. Certainly if they had any doubts, they
9 should not have relied either on my say-so or my learned
10 friend's, but should have remanded for a hearing.

11 CHIEF JUSTICE BURGER: We will resume there at
12 1:00, counsel.

13 MR. HAMMER: Thank you, Your Honor.

14 (Whereupon, at 12:00 o'clock p.m., the Court
15 recessed, to reconvene at 1:00 o'clock p.m., the same
16 day.)

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1 ruling since Jones against Berman.

2 QUESTION: Well, the -- as I understand the
3 Court of Appeals, it says that your position is contrary
4 to the plain language of the statute. That's what it
5 says.

6 MR. HAMMER: Well, Jones against Berman -- the
7 Court of Appeals -- you're speaking now of the Second
8 Circuit.

9 QUESTION: I'm just asking you, don't you
10 understand it to have held that your position is
11 contrary to the plain language of the statute? That's
12 what it says.

13 MR. HAMMER: That's what they say, Your Honor.

14 QUESTION: Then we should --

15 QUESTION: Why should that bother you?

16 MR. HAMMER: Your Honor, it doesn't bother me
17 because I do press the point. I submit that the Court
18 of Appeals was wrong. That's why we're here. The Court
19 of Appeals was wrong because it ignored Rule 56(e).
20 They were wrong because they misread state decisional
21 law.

22 QUESTION: Well, you're saying our scope of
23 review is broader if they make an error of law than if
24 they make an error of fact.

25 MR. HAMMER: Obviously, Your Honor, and this

1 is certainly, I would submit, is an error of law, both
2 error of misinterpretation of state law and an error of
3 misapplication of Rule 56(e).

4 QUESTION: Well, how can you account for three
5 New York judges making that mistake? All three of them
6 had considerable experience with New York law, didn't
7 they?

8 MR. HAMMER: You're speaking of the Circuit
9 Judges, Your Honor.

10 QUESTION: Yes, sir -- all three of them. All
11 three of them practice right in New York City.

12 MR. HAMMER: That may be so, Your Honor, but
13 even so they are not infallible.

14 QUESTION: It may be so. That's the record.

15 MR. HAMMER: It does not mean that they are
16 infallible upon issues of interpretation of state law.

17 QUESTION: They are less fallible than you.

18 QUESTION: I suppose they were not specialists
19 in welfare law.

20 MR. HAMMER: No, sir. As of the members of
21 the Court, Judge Kerse practiced on Wall Street, Judge
22 Feinberg, the Chief Judge, has been on -- while he's had
23 a number of welfare cases upon which he has sat, and
24 Judge Adelstein. They've all had these cases, but
25 insofar as the particular point of law is concerned, I

1 think their decision has to be looked upon upon its own
2 merits, not because they may be --

3 QUESTION: I don't know of -- who on this
4 bench has practiced welfare law? I don't know either.
5 You need welfare lawyers as judges?

6 MR. HAMMER: Not necessarily, Your Honor, but
7 it is a specialty. All I am saying is not that it's
8 necessary to have a patent lawyer to decide a patent
9 case or a securities lawyer to decide a securities
10 case. All I am saying is that simply because they are
11 experienced New York judges does not make their decision
12 sacrosanct, with all due respect to them -- and I have
13 the utmost personal respect for the three individuals
14 concerned.

15 I submit they were wrong simply because they
16 misapplied a Federal rule and they misinterpreted the
17 governing -- such state decisional law as is available.

18 QUESTION: Meaning what case, counsel?

19 MR. HAMMER: They misinterpreted -- they first
20 misrelied upon Jones against Berman because it predated
21 the statute and the cases of Nazaro, of Orr v. Shang.
22 All these indicated that in administrative practice the
23 state was interpreting the language much more generously
24 than the face of the statute might suggest.

25 Maybe the welfare officials were wrong. Maybe

1 they were being too generous with the public purse, but
2 the fact remains that there seemed to be an indication,
3 at least in the lower courts, Justice O'Conner, that
4 these people and members of the class who are
5 represented here today under certain circumstances would
6 be getting emergency cash assistance.

7 QUESTION: But not if they lost the check, is
8 that right?

9 MR. HAMMER: On that I would say there is no
10 question, Your Honor, they would not get it.

11 QUESTION: And all of these plaintiffs involve
12 that situation, is that right?

13 MR. HAMMER: That's correct.

14 QUESTION: So every one of the people in the
15 class before us alleged they had lost the check or cash.

16 MR. HAMMER: They had lost the proceeds. If
17 it were simply a lost check, the piece of paper would be
18 replaced without any difficulty, but we're talking now
19 about the cash.

20 QUESTION: The proceeds, the cash. And under
21 an uncontested rule of New York law, they were
22 ineligible, then, for relief?

23 MR. HAMMER: That's correct.

24 QUESTION: And none of them ever got any
25 further than challenging that first rule about the

1 replacement of the proceeds of a check, as I understand
2 it. They didn't actually get to the point of applying
3 for cash relief?

4 MR. HAMMER: Well, they did apply for cash.
5 They applied for cash and the welfare officials turned
6 them down on the ground that the new amendment said you
7 may not replace -- you may not get cash because you're
8 an AFDC recipient and you may not get cash because you
9 are replacing part of your regular recurring grant.

10 QUESTION: So they were turned down on both
11 grounds.

12 MR. HAMMER: Plus the additional ground
13 that -- a somewhat redundant ground of subdivision (f)
14 that they could not replace a grant in general or
15 duplicate a grant.

16 QUESTION: Mr. Hammer, let me see if I
17 understand your argument. As I read the Court of
18 Appeals opinion, they said that you didn't content there
19 was a rational basis for the discrimination but, rather,
20 you said there was no discrimination.

21 MR. HAMMER: That's correct.

22 QUESTION: And you do now agree that because
23 they are AFDC beneficiaries they can't get cash.

24 MR. HAMMER: That's right.

25 QUESTION: Are you arguing that no other

1 citizen of New York gets cash?

2 MR. HAMMER: Our contention is -- and this is
3 the Hickey affidavit -- someone, because the cash that
4 is sought to be replaced is part of the regular
5 recurring grant they are treated no differently than
6 other categorical recipients or non-recipients of public
7 assistance who get -- who get cash because whatever
8 class you fall into you get it only once. You cannot
9 get it twice. This is the whole point.

10 QUESTION: But am I correct in believing that
11 some non-AFDC recipients can get cash pursuant to this
12 statute?

13 MR. HAMMER: They get cash pursuant to the
14 statute as emergency assistance because it is for an
15 emergency rather than for the replacement of the regular
16 recurring grant. This is the nub of the argument
17 against allowing AFDC recipients to get cash.

18 The AFDC recipient gets cash as part of the
19 regular grant. If the AFDC recipient were to get the
20 cash as emergency assistance on top of it, the emergency
21 assistance program would then, contrary to the intent of
22 the legislature, become a supplement to AFDC rather than
23 emergencies and this is what, as I understand the Court
24 recognize in the Quern case, that the states were free
25 to tailor the emergency assistance programs to their own

1 desires, to decide what emergencies were to be covered
2 and, indeed, the Court in its opinion alluded to the New
3 York program.

4 QUESTION: I have to confess I don't
5 thoroughly follow your argument. May I just try again
6 in a way? Are they, these people, denied cash because
7 of this statutory provision?

8 MR. HAMMER: AFDC recipients?

9 QUESTION: Yes.

10 MR. HAMMER: Yes.

11 QUESTION: And other people who are not AFDC
12 recipients may get cash.

13 MR. HAMMER: That's correct.

14 QUESTION: Now why is that not a difference in
15 treatment?

16 MR. HAMMER: It's not an invidious
17 discrimination.

18 QUESTION: Well, then, forget invidious. Is
19 there any difference at all in the treatment? Now it
20 seems to me you've said one gets cash and the other does
21 not.

22 MR. HAMMER: The --

23 QUESTION: Because if there's a difference,
24 the Court of Appeals said, if I read the opinion
25 correctly, you haven't even offered any rational

1 explanation for the difference. Your argument, rather,
2 is there is no difference, but you just admitted there
3 was a difference.

4 MR. HAMMER: What we're saying is that when
5 you compare the various categories of assistance -- and
6 this is, again, I am referring to the affidavit of Mr.
7 Hickey and I think it's at 161-A of the joint
8 appendix -- he points out that whatever the class of
9 recipient, one may get cash, the other may get services
10 in kind. To the extent that the AFDC recipient does not
11 get cash it is because the AFDC recipient has already
12 gotten cash as part of a recurring grant.

13 QUESTION: But if he was some other kind of
14 public beneficiary, he would have already gotten cash
15 pursuant to some other grant. How does that
16 differentiate it? I don't understand it.

17 MR. HAMMER: Well, in this case the statute
18 would preclude any beneficiary of public assistance,
19 whether it be home relief or aid to dependent children.

20 QUESTION: Well, now are you saying no one can
21 get cash?

22 MR. HAMMER: In essence --

23 QUESTION: A minute ago you said others could.
24 I just really don't understand your argument.

25 MR. HAMMER: The non --

1 QUESTION: You're saying, are you not, that
2 people other than welfare recipients can get cash.

3 MR. HAMMER: That's correct, because --

4 QUESTION: But no welfare recipient under any
5 categorical program can get additional emergency cash?

6 MR. HAMMER: That is correct, Your Honor. And
7 that is in keeping with the philosophy that this is for
8 emergencies and not to act as the insurance policy for
9 lost cash or a supplement to the regular recurring grant.

10 QUESTION: Can a welfare recipient not also
11 have an emergency?

12 MR. HAMMER: That's correct, of course. But
13 the emergencies that are covered are emergency
14 services. They are covered as, in some cases they are
15 covered under the AFDC program itself as advance grants,
16 in the case of special grants to avoid utility turnoffs
17 or evictions, so that what is the net result --

18 QUESTION: Are you saying basically that a
19 welfare recipient faced with an emergency, while they
20 might not get cash, can be given other forms of relief
21 to get them out of the emergency?

22 MR. HAMMER: That's quite so. They can be
23 given certain services in kind. I must say, however,
24 there are some situations where the emergency simply
25 will not be covered, just as under -- and we submit that

1 this is lawful since just as under the Dandridge and the
2 cases that followed it a state need not take care of
3 every certified need that a welfare recipient may have.

4 With the Court's permission, I should like to
5 reserve the remainder of my time.

6 QUESTION: Just one question. You can answer
7 it yes or no. Is it your position that where the
8 interests of children, minor children, are involved, the
9 state is more generous than it is where minor children
10 are not involved? Is that it? That's yes or no.

11 MR. HAMMER: I wish I could answer it yes or
12 no, Your Honor. The program -- the emergency assistance
13 program is one which deals with minor children by
14 definition

15 QUESTION: And the state -- are you arguing
16 the state is more generous with respect to them than
17 with respect to cases where minor children are not
18 involved?

19 MR. HAMMER: I think the state is equally
20 generous and equally penurious in both, with respect to
21 both classes.

22 CHIEF JUSTICE BURGER: Mr. Schwartz?

23 ORAL ARGUMENT OF MARTIN A. SCHWARTZ, ESQ.,

24 ON BEHALF OF APPELLEES

25 MR. SCHWARTZ: Mr. Chief Justice, and may it

1 please the Court, at the outset I think it's important
2 to clarify what I think may be two misconceptions. One
3 of the state statutes in this case specifically singles
4 out AFDC families that are -- those are the families
5 where there is an absent or a disabled parent with
6 children -- the automatic denial of cash emergency
7 assistance in any circumstances.

8 The restriction that is placed in the statute
9 to emergency services means that these families cannot
10 get emergency assistance in the form of cash. They
11 cannot get payments in kind. They cannot get voucher
12 payments.

13 Now, a home relief family who is also in
14 receipt of public assistance and, I might add, at the
15 same exact level of benefits as an AFDC family, are
16 eligible for emergency assistance in the form of cash or
17 services -- indeed, cash and services. These families,
18 Mr. Chief Justice, to respond to your question,
19 typically in New York consist of intact families with
20 children. So in terms of whether we are talking about
21 different treatment of families with or without
22 children, I don't see that as being a factor here.

23 I think what Mr. Hammer's argument is is that
24 AFDC families, while not eligible for cash emergency
25 assistance, are eligible for a special grant under New

1 York's public assistance program.

2 QUESTION: Are home relief families ineligible
3 for AFDC assistance?

4 MR. SCHWARTZ: They are ineligible for AFDC
5 assistance, Your Honor, but they are equally eligible
6 for the special grant under section 131 of the New York
7 Social Services law.

8 QUESTION: That's the cash grant.

9 MR. SCHWARTZ: It is a cash grant, Your Honor.
10 If one looks to the statute authorizing the
11 cash grant --

12 QUESTION: Is that because there are minor
13 children involved?

14 MR. SCHWARTZ: The statute that authorizes the
15 special grants is not limited to families with or
16 without minor children. It includes potentially all
17 welfare recipients in the State of New York.

18 QUESTION: Well, where is the disparate
19 treatment on which the equal protection rests?

20 MR. SCHWARTZ: This disparate treatment comes
21 about because this special grant statute is much more
22 limited than the emergency assistance statute.

23 The language of the special grant statute that
24 pertains to emergency situations is quite clear in
25 section 131-A, subdivision 6.

1 QUESTION: Where is it? Where is it in these
2 papers?

3 MR. SCHWARTZ: The state has set it forth in
4 their brief, Your Honor.

5 QUESTION: In the jurisdictional statement?

6 QUESTION: In the jurisdictional statement or
7 the brief?

8 QUESTION: Page five of the jurisdictional --

9 QUESTION: No, of the brief.

10 MR. SCHWARTZ: It's page --

11 QUESTION: Five.

12 MR. SCHWARTZ: Five, towards the bottom of the
13 page. The statute refers to special grants for the
14 replacement of necessary furniture and clothing and then
15 goes on, in cases of fire, flood or other like
16 catastrophe. Well, the question arose in the New York
17 State courts, what is meant by this phrase "other like
18 catastrophe." The New York Court of Appeals has
19 construed that provision as including only natural
20 events and, therefore, excluding a man-made catastrophe
21 such as a burglary.

22 The lower New York State courts have also
23 construed this provision in a similar vein as excluding
24 the intentional destruction of property. Now these are
25 events, emergency events, for which home relief and

1 non-recipient families in New York --

2 QUESTION: You mean non-AFDC recipients?

3 MR. SCHWARTZ: Non-AFDC recipient families, as
4 well as non-recipient families may receive emergency
5 assistance in New York in any form.

6 Now there's another important difference.

7 QUESTION: Under what statute is that?

8 MR. SCHWARTZ: Under 350(j), the statute that
9 authorizes emergency assistance.

10 QUESTION: Now wait a minute. 350(j) is at
11 page three of the State's brief, is that right?

12 MR. SCHWARTZ: It starts on the bottom of page
13 three, Your Honor.

14 QUESTION: All right.

15 MR. SCHWARTZ: There is no restriction in this
16 case that would make a family that was a victim of a
17 man-made catastrophe ineligible for emergency assistance.

18 Now there is a second important difference
19 between the special grant statute and the emergency
20 assistance statute. The special grant statute is
21 limited to losses of furniture and clothing. Again,
22 there is no such limitation in the state's emergency
23 assistance statute. The emergency assistance statute,
24 for example, would cover such needs as shelter, food and
25 medicine, all of which are excluded from the special

1 grant provision.

2 So all that the Circuit Court of Appeals did
3 is to look at these two provisions, look -- you don't
4 have to go much further than the plain language of them
5 and say that they are simply not co-terminous with each
6 other. Now the fact that the state submits an affidavit
7 from an official that seeks to conflict with the plain
8 language of the statute I don't think calls for a
9 different result.

10 QUESTION: Well, the interpretation put on it
11 by the official was different then the Court of Appeals.

12 MR. SCHWARTZ: It was different, Your Honor,
13 but --

14 QUESTION: And if you accepted his -- if you
15 accepted his construction, would you say there was no
16 difference between the two classes?

17 MR. SCHWARTZ: If you accepted the
18 construction that AFDC families get special grants for
19 the very same things that every other family gets
20 emergency assistance for --

21 QUESTION: There is no difference there.

22 MR. SCHWARTZ: I would say there is no
23 difference, with one important exception that was
24 pointed out by the Secretary of the Department of Health
25 and Human Services in his amicus brief in the Court of

1 Appeals. That is, the emergency assistance program was
2 enacted originally primarily to meet prompt needs. In
3 fact, the Federal regulations contain a requirement that
4 emergency assistance be provided forthwith. There is no
5 similar time requirement with respect to special grants.

6 Other than that timing difference, I would say
7 yes. If the timing was the same, I would have no
8 problem, I don't think.

9 QUESTION: Was the administrative construction
10 offered in this affidavit supported by any New York
11 cases in the --

12 MR. SCHWARTZ: Absolutely not.

13 QUESTION: In the lower courts or anyplace
14 else?

15 MR. SCHWARTZ: Absolutely not. In fact, it's
16 quite inconsistent with the decision of the New York
17 Court of Appeals in the Matter of Howard v. Wyman.

18 QUESTION: And you have cited that.

19 MR. SCHWARTZ: Which we have cited, and which
20 in a footnote in that decision specifically indicated
21 that there may well be a distinction between emergency
22 assistance on the one hand and special grants on the
23 other hand.

24 QUESTION: The Court of Appeals didn't rely on
25 that, I think. They just said it was a plain language.

1 MR. SCHWARTZ: The Court of Appeals did cite
2 the Matter of Howard v. Wyman because the term
3 "catastrophe" in the special grant statute did require
4 construction by New York's highest court and did get
5 that construction.

6 QUESTION: Mr. Schwartz, if one were to read
7 the Court of Appeals opinion as simply saying that it
8 disregarded the Hickey affidavit because the affidavit
9 was contrary to the plain language of the statute, would
10 you regard that as a holding on New York state law of
11 the kind that we ordinarily defer to a Court of Appeals?

12 MR. SCHWARTZ: Yes, I would, absolutely, Your
13 Honor. The situation as I see it comes up this way.
14 Plaintiffs are denied emergency assistance under a
15 statute which on its face singles out AFDC families for
16 the automatic denial of emergency assistance.

17 The plaintiffs here didn't get emergency
18 assistance. They also did not get a special grant,
19 which is significant. They weren't offered a special
20 grant. They went away with nothing. Now the plaintiffs
21 come into court and say that statute discriminates
22 against AFDC families in violation of the Social
23 Security Act and the Equal Protection Clause, and the
24 state comes back as a defense and says no, in fact there
25 is no discrimination because if one were to look to the

1 state law you have this other provision that covers AFDC
2 families.

3 And all the District Court did, and the
4 Circuit Court did, was say well, your reading of that
5 state special grant provision is incorrect. It
6 obviously doesn't cover everything that's within the
7 emergency assistance statute.

8 QUESTION: You are familiar, as most judges
9 are, I suppose, any number of state statutes or federal
10 statutes that haven't been ultimately administratively
11 construed just in accordance with the way they are
12 written, and I'm somewhat troubled. If that's all the
13 Court of Appeals meant is to say how can you construe
14 the statute this way, it's contrary to its plain
15 language, whether or not this Court of Appeals shouldn't
16 have given more deference to the affidavit in the
17 absence of any counter-affidavit that you submitted.

18 MR. SCHWARTZ: First of all, the affidavit, as
19 I read it, is nothing more than a self-serving,
20 argumentative point of law.

21 QUESTION: Any good affidavit is self-serving.

22 MR. SCHWARTZ: But it doesn't contain any
23 factual statements. It's a question of what the State
24 Commissioner thinks the law of the State of New York
25 is. More importantly, these --

1 QUESTION: Well, don't you ordinarily give
2 some deference to the Commissioner's view of what the
3 law is if he is charged with interpreting it?

4 MR. SCHWARTZ: You ordinarily would, Your
5 Honor, but not in a situation like this, where (a) the
6 statute is clear on its face and (b) where it has
7 already been construed by the highest court in the
8 state. And if we have a situation where we have a clear
9 state statute and the New York Court of Appeals has
10 construed it, it seems to me that the State welfare
11 commissioner can't come before the court and say well,
12 this statute simply means, in our minds, something else.

13 That would work havoc in terms of what state
14 law means and what would happen when state laws like
15 this are challenged in Federal court.

16 QUESTION: Well, you could argue, I suppose,
17 if the law were ambiguous on its face you should give
18 some deference.

19 MR. SCHWARTZ: That's exactly my point.

20 QUESTION: But the Court of Appeals said it is
21 clear as a bell.

22 MR. SCHWARTZ: Not only has the Court of
23 Appeals said it, but the District Court has reached the
24 same conclusion and for that matter, Your Honors, the
25 Secretary of Health and Human Services in their amicus

1 brief says this is an obviously discriminatory
2 provision, and they have expertise in this matter.

3 QUESTION: But if -- do you think we have to
4 defer to a Court of Appeals statement that a law is clear
5 on its face if we don't think it is -- if we don't
6 happen to agree that it is clear on its face?

7 MR. SCHWARTZ: I'm not arguing --

8 QUESTION: I don't know of any examples like
9 that.

10 MR. SCHWARTZ: I'm not arguing that the
11 analysis of the Court of Appeals is binding on this
12 Court. But --

13 QUESTION: No, no. Even if it were ambiguous
14 or anything else, it wouldn't be binding, we could
15 reverse them on that, but we normally don't.

16 MR. SCHWARTZ: I agree. We have cited Bishop
17 v. Wood and a consistent line of cases that preceeded
18 it. In fact, the decision that post-dated it, Runyon v.
19 McCrary, which stand for the proposition what where the
20 contitutional question depends for its resolution, as it
21 does here, upon the analysis of state law, and the lower
22 Federal court judges are in agreement as to what the
23 state law and, moreover, where their analysis is
24 supported by the decision of the highest court in the
25 state, the rule has been that this Court normally gives

1 deference to the construction of the state law of the
2 lower Federal court judges.

3 Now that's not an ironclad rule, but I submit
4 that it reflects a strong policy and is based on the
5 common sense proposition that lower Federal court judges
6 just simply deal with a particular state's law more
7 often and are somewhat closer to it than this Court is.

8 QUESTION: What was the concrete dispute
9 between the claimant here and the state?

10 MR. SCHWARTZ: Well, there were four
11 plaintiffs in this case.

12 QUESTION: Well, what did they want that they
13 didn't get?

14 MR. SCHWARTZ: They requested in three of the
15 cases emergency assistance to replace public assistance
16 funds which had either been lost or stolen. In the
17 fourth case -- now there's a fourth case which is
18 significant here. In the case of Plaintiff Parrish, she
19 came back from spending her day to find the family's
20 apartment ransacked and the family's public assistance
21 cash and food stolen, and she requested emergency
22 assistance to replace the stolen cash and food.

23 QUESTION: Let me pursue this. Suppose that
24 one class under the state law is given A and B and
25 another class is given A. And so there's a difference

1 in treatment and the state doesn't offer any explanation
2 and so the Court declares that there is a denial of
3 equal protection of the law.

4 Now you wouldn't say the statute is
5 unconstitutional on its face, would you? You'd just say
6 that failure to extend B to both classes is
7 unconstitutional. You certainly wouldn't strike it down
8 on its face.

9 MR. SCHWARTZ: This gets to the problem of the
10 remedy.

11 QUESTION: No, no, no, it does not. I would
12 think that it gets to the problem of the remedy if you
13 said that you can't give either class B or you give both
14 class B, but here to the extent that the AFDC people get
15 A just like the other class does, I don't understand why
16 you strike it down on its face.

17 MR. SCHWARTZ: The reason I disagree is that I
18 think the state has different options here of curing the
19 discrimination. For example, the state could say no
20 emergency assistance to anybody and that would cure the
21 discrimination. Or, the state could say emergency
22 services only to everybody

23 QUESTION: Yes, but I would think you would
24 strike down a statute -- a state statute -- only to the
25 extent of the discrimination.

1 MR. SCHWARTZ: Well, but the statute that was
2 struck down here, Your Honors, on its face reflects that
3 discrimination. The statute in two specific subsections
4 state that AFDC families are ineligible for cash
5 emergency assistance and are eligible only for emergency
6 services.

7 Now that on the face of the statute creates
8 clear discriminatory classification and the problem, if
9 there is a problem, only arises here because the state
10 commissioner comes back and says well, we know we have
11 these two subsections and they are very clear on their
12 face, but nevertheless we're going to point you to some
13 other statute which in effect operates as a defense, as
14 I see it, to the claimed unconstitutionality of this
15 statute.

16 QUESTION: Well, counsel, you would agree,
17 wouldn't you, that a state can consider the entire state
18 scheme in determining whether welfare recipients are
19 being given appropriate forms of relief. They don't
20 have to provide for everything in the same section of
21 the statute, certainly.

22 MR. SCHWARTZ: I agree, Your Honor. I agree.

23 QUESTION: So that's a fair defense, assuming
24 they are correct as to what is meant by the other
25 sections.

1 MR. SCHWARTZ: Well, I don't think in this
2 case it's a fair defense. I think it's potentially a
3 fair defense in a given case. I don't think it's a fair
4 defense in this case for two reasons. One, the scope is
5 not the same.

6 QUESTION: Well, you have been talking about
7 that.

8 MR. SCHWARTZ: Right.

9 QUESTION: Now for you to win, for your
10 clients to win, don't you have to strike down
11 subsections (c), (e) and (f) of section 350? Don't you
12 have to strike down all three because it -- subsection
13 (c) refers to the AFDC people, but subsection (f), for
14 example, refers to all people who are on public
15 assistance grants.

16 MR. SCHWARTZ: Okay. Now I agree with Your
17 Honor with respect to subsections (c) and (e), but I
18 disagree with respect to subsection (f), and the reason
19 for my disagreement is this: the district court in its
20 opinion which is annexed to the jurisdictional statement,
21 and the relevant page of the opinion that I'm concerned
22 with is 44-A of the appendix of the jurisdictional
23 statement, the District Court construed this provision
24 as having as its purpose preventing recipients of public
25 assistance from simply claiming that we have used up our

1 public assistance and we need added assistance now to
2 augment the ongoing assistance grant.

3 The District Court said this was the purpose
4 of the duplication provision. However, the District
5 Court went further and said but it's clear that the
6 duplication provision should not be read as precluding
7 emergency assistance to public assistance families who
8 are indeed faced with a crisis event or emergency
9 situation.

10 I submit that that analysis by the District
11 Court is correct. It reflects the argument that the
12 state has been making between the supplementation of a
13 grant, which the state says it's its interest in not
14 making under the emergency assistance program.

15 QUESTION: And the state hasn't challenged
16 that interpretation.

17 MR. SCHWARTZ: The state has not challenged
18 that interpretation and not only have they not
19 challenged it, but indeed they acknowledged that the
20 purpose of the restrictions is to limit emergency
21 assistance to crisis situations. And that's reflected
22 in this analysis.

23 More importantly, if you gave the duplication
24 provision a literal reading and read it to its fullest
25 extent, it would make unnecessary the loss-theft

1 provision and the cash-services provision.

2 QUESTION: As a matter of collateral interest,
3 how does the state go about determining whether the
4 alleged lost or stolen cash was used to buy lottery
5 tickets or to bet on the horses or to use in the local
6 crap game down the alley?

7 MR. SCHWARTZ: If the question is how do they
8 determine a loss or theft, whether the loss or theft
9 occurred, the state, of course, has the power to
10 investigate an application for emergency assistance.

11 QUESTION: How many such applications are
12 there a year?

13 MR. SCHWARTZ: There's nothing in the record,
14 Your Honor.

15 QUESTION: According to Mr. Califano's report
16 of some years ago, there are hundreds of thousands of
17 them. Is that right?

18 MR. SCHWARTZ: I can't say, and it's not in
19 the record. But with respect --

20 QUESTION: Realistically is there any way the
21 state can check on it?

22 MR. SCHWARTZ: Yes, Your Honor. The state,
23 for example, could insist that the recipient report a
24 claim theft to the police department as a prerequisite
25 for getting emergency assistance. The state

1 commissioner can check.

2 QUESTION: How much of a check is that?

3 MR. SCHWARTZ: The state can check the police
4 report, can interview the recipient, can make a home
5 visit, for that matter. But, Your Honor, that really
6 misses the essential argument that we make with respect
7 to the loss-theft provision, because the State of New
8 York does provide emergency assistance in cases of loss
9 or theft of every other type of income other than public
10 assistance, and that includes a wide array of public
11 benefits, including Social Security, unemployment
12 compensation, workers' compensation, public retirement
13 benefits, as well as the loss or theft of private
14 income, such as wages and support payments.

15 Now I submit to this court that the state --

16 QUESTION: Does that include the loss of a
17 private pension?

18 MR. SCHWARTZ: Yes, it does, Your Honor. Now
19 I submit, and I think it's significant, that the state's
20 ability to detect a fraudulent claim is in fact greater
21 in the case of the non-recipient who claims that a loss
22 or theft has created destitution than in the case of the
23 recipient.

24 And it's for this reason. In the case of the
25 recipient of public assistance, the Department of Social

1 Services in the ordinary process of determining ongoing
2 eligibility for public assistance and free of the crisis
3 pressure that surrounds an application for emergency
4 assistance, has already determined a large number of the
5 indicia of eligibility for public assistance, including
6 the applicant's identity, the applicant's residence,
7 available income and resources, shelter needs,
8 alternative sources of support.

9 In the case of the non-recipient that claims a
10 loss or theft has rendered me destitute, the Department
11 of Social Services must first make all these
12 determinations in the first instance. So we recognize
13 that the state does indeed have a legitimate interest in
14 preventing fraudulent claims. We could not take any
15 other position.

16 But our claim is that this disparity in
17 treatment between public assistance recipients who claim
18 a loss or theft on the one hand and non-recipients who
19 are a group of families who claim destitution and who
20 are given different treatment in that their applications
21 for emergency assistance are given individual treatment
22 is not supported by any difference in detecting fraud.

23 QUESTION: Mr. Schwartz, the District Court
24 disagreed with you about the checks.

25 MR. SCHWARTZ: The District Court disagreed on

1 this.

2 QUESTION: And they had a reason for
3 disagreeing. In the Court of Appeal, the only thing the
4 Court of Appeals really said is that we do not agree
5 with the District Court that considerations of
6 administrative efficiency are sufficiently compelling to
7 sustain the lines drawn by the statute.

8 Well, since when is the rational basis, equal
9 protection test -- since when does it require something
10 that is sufficiently compelling rather than rational?

11 MR. SCHWARTZ: That -- I agree with Your
12 Honor, but I think that that was not the basis of the
13 Court of Appeals decision, that the basis of the Court
14 of Appeals decision is found on page 18-A of the
15 appendix to the jurisdictional statement, where the
16 Court said that there is nothing in the record to
17 establish that public assistance recipients have a
18 greater propensity than others for asserting fraudulent
19 claims.

20 And, indeed, the Court of Appeals cited
21 Weinberger v. Salfi, cited Dandridge v. --

22 QUESTION: Well, isn't that a sort of -- isn't
23 that a rather factual determination by the District
24 Court as to this propensity or whatever it is? The
25 District Court found that there were considerations of

1 administrative convenience and efficiency and for
2 rational basis purposes I don't know what case around
3 here says that if the rational basis test applies
4 administrative efficiency is not enough.

5 MR. SCHWARTZ: The District Court did not make
6 any finding of fact that there would be a greater
7 administrative burden.

8 QUESTION: Well, what was the Court of Appeals
9 referring to? They read the District Court as holding
10 that.

11 MR. SCHWARTZ: The problem with the District
12 Court's decision is that it, in my opinion, is that it
13 did not focus on the two classes. The District Court's
14 opinion simply said that the -- it is a legitimate state
15 interest to seek to prevent fraudulent claims of loss or
16 theft, and we find that this is sufficient to justify
17 the automatic denial.

18 The Court of Appeals said, well, we agree.
19 The state does have a legitimate interest in seeking to
20 prevent fraudulent claims of loss or theft. It would be
21 administratively burdensome and difficult to make these
22 claims, but the same administrative burden and expense
23 lies with respect to the favored class.

24 QUESTION: Well, I think perhaps the Court of
25 Appeals really just went on to say the District Court

1 thought there was administrative efficiency
2 considerations, but we just disagree. There aren't any.

3 MR. SCHWARTZ: That's not how I read it, Your
4 Honor. I think what the Court of Appeals is saying is
5 that there are problems with respect to --

6 QUESTION: I know, but there's no more
7 administrative convenience in the one case than in the
8 other.

9 MR. SCHWARTZ: That's my point.

10 QUESTION: That's what the Court of Appeals
11 held.

12 MR. SCHWARTZ: Yes. That's my point. And the
13 District Court did not say anything to the contrary.
14 The District Court simply made a general statement that
15 the state does have an interest in avoiding
16 administrative burdens and expenses in situations like
17 this. We don't quarrel with that.

18 If I might just take the very few minutes I
19 have remaining, we have raised, in addition to the
20 constitutional claim, a federal statutory claim, and we
21 have raised it throughout this litigation. My adversary
22 has chosen not to address it, but I submit that it's a
23 significant claim and it provides a basis upon which
24 this Court can affirm the judgment of the Court of
25 Appeals without reaching the equal protection claim.

1 QUESTION: But it's still a constitutional
2 claim.

3 MR. SCHWARTZ: Well, it's a Supremacy Clause
4 claim.

5 QUESTION: Well, that's still a constitutional
6 claim.

7 MR. SCHWARTZ: I agree. In the old
8 three-judge court days it used to be referred to as --

9 QUESTION: Well, I know, but those -- that was
10 a strange doctrine anyway.

11 MR. SCHWARTZ: Well, the only point I'd like
12 to stress is that six months after this Court's decision
13 in Quern the Secretary did indeed issue an action
14 transmittal and in that action transmittal acknowledged
15 the holding in Quern, said that the states do have broad
16 discretion in shaping their emergency assistance
17 programs, but that the states must include AFDC families
18 in their emergency assistance program.

19 QUESTION: So you are saying we should -- that
20 was issued after this case was decided below?

21 MR. SCHWARTZ: No. It was issued during the
22 litigation of this case. It's been in the record all
23 along. It was submitted to the District Court. The
24 Circuit Court had the benefit of it.

25 QUESTION: The Court of Appeals found it was

1 inconsistent with Quern against Mandley.

2 MR. SCHWARTZ: Yes. The Court of Appeals did
3 come to that conclusion. We disagree with that. We've
4 argued it, I believe, fully in our brief.

5 In addition to the action transmittal, the
6 Secretary did submit a full amicus curiae brief to the
7 Court of Appeals in which the Secretary came to the
8 conclusion that under his equitable treatment regulation
9 state discrimination in the EAF program against the
10 neediest families, AFDC families, is inconsistent with
11 Federal policy and, therefore, is unlawful.

12 And it's our position that this is a
13 legitimate exercise of rulemaking by the Secretary and
14 that the judgment should be affirmed on that basis.

15 QUESTION: Mr. Schwartz, isn't it true that
16 the analysis of that issue is really pretty much the
17 same as the analysis of the constitutional issue,
18 because the bottom line is whether it's arbitrary or not?

19 MR. SCHWARTZ: That -- I disagree, with all
20 due respect, Mr. Justice Stevens, because there is no
21 reason why the equitable treatment regulation has got to
22 be interpreted in the same manner as the rational basis
23 standard under the equal protection clause.

24 QUESTION: In other words, the content of
25 arbitrariness could be somewhat broader as construed by

1 the Secretary than it would be as construed under the
2 Constitution.

3 MR. SCHWARTZ: It can be, and we have lodged
4 documents with the Clerk of the Court which we also
5 submitted to the Court of Appeals, in which the
6 Commissioner of Social Security of HHS has taken the
7 position that classifications in the emergency
8 assistance program must be tailored to the purpose of
9 the particular program and specifically rejected
10 rational basis review.

11 Our position, very briefly, is that while
12 states do indeed have broad discretion in shaping their
13 emergency assistance programs, that discretion is not
14 unlimited discretion and in many categorical programs
15 where states do have broad discretion there is still
16 room for reasonable rulemaking by the Secretary to
17 ensure that state plans do not conflict with the
18 purposes of the Federal Act.

19 CHIEF JUSTICE BURGER: Very well.

20 MR. SCHWARTZ: Thank you.

21 CHIEF JUSTICE BURGER: Do you have anything
22 further, Mr. Hammer?

23 REBUTTAL ORAL ARGUMENT OF ROBERT S. HAMMER, ESQ.

24 ON BEHALF OF APPELLANT

25 MR. HAMMER: Yes, with the Court's permission,

1 I think, Mr. Chief Justice, you have touched upon a very
2 sensitive and important point, that there is no
3 practical way of verifying an actual loss or theft,
4 whether it's with a --

5 QUESTION: Well, then why doesn't the State of
6 New York decline to do anything about any of those
7 situations?

8 MR. HAMMER: They --

9 QUESTION: Then you wouldn't have an equal
10 protection problem.

11 MR. HAMMER: That's correct. I think,
12 however, it's not unreasonable to do it in the case of
13 the public assistance recipient. Indeed, counsel --

14 QUESTION: On the theory that they are worse
15 off than other people?

16 MR. HAMMER: No, but just as the rich person
17 is going to defraud the Internal Revenue, if there is
18 going to be any larceny in the case of a poor person,
19 it's going to be directed towards the welfare system and
20 we have counsel's own admissions, which he cited in his
21 motion --

22 QUESTION: There isn't anybody else the
23 welfare recipient can defraud, really, if that's the
24 source of all his income.

25 MR. HAMMER: That's right. So that if there

1 is the potential for fraud there, it's not unreasonable
2 for the state to say let's try to prevent it, and --

3 QUESTION: Well, why do you select one group
4 of welfare recipients and not another? I mean, isn't
5 the problem the same for two different groups of welfare
6 recipients?

7 MR. HAMMER: In this case, Your Honor, no
8 distinction is made between AFDC or Home Relief.

9 QUESTION: Well, I guess that's the issue on
10 the first --

11 MR. HAMMER: In part. As for the Supremacy
12 Clause, as counsel indicated, I have not addressed it
13 specifically in my main brief. We referred to it in the
14 small reply brief to his motion to reaffirm.

15 For the reasons stated therein, we think (a)
16 it is not properly before the Court and (b) it is not a
17 meritorious claim, but in any event, I am more than
18 happy and prepared to answer any questions on that point
19 that the Court may have.

20 CHIEF JUSTICE BURGER: I think that's all.
21 Your time has expired. Thank you, gentlemen. The case
22 is submitted.

23 (Thereupon, at 1:45 o'clock p.m., the case in
24 the above-entitled matter was submitted.)

25

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:

Barbara Blum, Etc., Appellant v. Jeanne Bacon, Etc., Et Al No. 81-770

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BY *Reene Hammond*

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