

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 6-509 & 86-564

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Appellant V.
BEATY MAE GILLIARD, ET AL.; and
DAVID T. FLAHERTY, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN
RESOURCES, ET AL.; Appellants V. BEATY MAE GILLIARD, ET AL.

PLACE Washington, D. C.

DATE April 22, 1987

PAGES 1 thru 56



ALDERSON REPORTING

(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OTIS R. BOWEN, SECRETARY OF :
4 HEALTH AND HUMAN SERVICES, :
5 Appellant :
6 v. : No. 86-509
7 BEATY MAE GILLIARD, ET AL. :
8 and :
9 DAVID T. FLAHERTY, SECRETARY, :
10 NORTH CAROLINA DEPARTMENT OF :
11 HUMAN RESOURCES, ET AL., :
12 Appellants :
13 v. : No. 86-564
14 BEATY MAE GILLIARD, ET AL. :
15 - - - - -x

16 Washington, D.C.

17 Wednesday, April 22, 1987

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States
20 at 11:14 o'clock a.m.

1 APPEARANCES:

2 ALBERT G. LAUBER, JR., ESQ., Deputy Solicitor
3 General, Department of Justice, Washington,
4 D.C.; on behalf of the appellant in No-86-509.

5 MS. CATHERINE C. McLAMB, ESQ., Assistant Attorney
6 General of North Carolina, Raleigh, North
7 Carolina; on behalf of the appellants in
8 No. 86-564.

9 MS. JANE R. WETTACH, ESQ., Raleigh, North Carolina;
10 on behalf of the appellees.
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C O N T E N T S

ORAL ARGUMENT DE

PAGE

ALBERT G. LAUBER, JR., ESQ.,

on behalf of the Appellant in No-86-509

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MS. CATHERINE C. McLAMB, ESQ.,

on behalf of the Appellants in No. 86-564

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MS. JANE R. WETTACH, ESQ.,

on behalf of the Appellees

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in two consolidated cases, No. 86-509, Bowen against Billiard, and No. 86-564, Flaherty against Gilliard.

Mr. Flauber, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALBERT G. LAUBER, JR., ESQ.,
ON BEHALF OF THE APPELLANT IN NO. 86-509

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

The question here involves the validity of an amendment to the AFDC program that Congress enacted in 1984, a provision I shall refer to as the standard filing unit provision.

This amendment was one of many budget cutting steps that Congress took in that year, and it was designed to close what Congress viewed as a loophole in the AFDC scheme.

Under prior law, a family applying for AFDC could try to maximize its AFDC grant by excluding from the filing unit certain family members, typically children who had other sources of income, such as Social Security benefits, child support, or accountable earnings from employment.

1 This enabled the family to get the maximum
2 AFDC grant for the members in the unit, plus keep all of
3 the other income of the members who were left out of the
4 unit.

5 In 1984 Congress decided to eliminate this
6 benefit maximizing option by enacting the provision
7 challenged here. It requires that when a family applies
8 for AFDC, all members of the family who live together
9 must be included in the filing unit, and that the income
10 of all those family members must be added up to figure
11 out how needy the family is for public assistance.

12 Congress based this amendment on the belief
13 that family members who live near the poverty level and
14 who live together tend to share their income and
15 expenses; and that therefore the most reliable index of
16 the family's need for public assistance was the total
17 income of the family members.

18 Thus, rather than simply cutting AFDC to
19 families across the board, Congress sought to target the
20 benefit cuts in 1984 to those families that were,
21 because of the members separate income, less needy.

22 Now, appellees, of course, have no
23 constitutional right to a permanently fixed level of
24 AFDC benefits, and they therefore recognize that they
25 could not bring a constitutional challenge to a decision

1 by Congress simply to cut benefit levels without more.

2 What they argue, therefore, is that Congress
3 did not really cut AFDC benefits here, but rather took
4 property away from the children who are required to be
5 newly included in the filing unit.

6 Appellees focus on child support income, and
7 especially on the assignment provision enacted in 1975
8 which requires a mother who applies for AFDC to assign
9 to the state any right to support that she or her child
10 may have.

11 This provision was designed to improve
12 collection of delinquent child support by transferring
13 the burden of collection from the abandoned mother to
14 the state with its greater enforcement resources.

15 Now, the assignment provision by itself works
16 no hardship on the family, because for every dollar of
17 support assigned to the state, one dollar of AFDC comes
18 back to the family.

19 Moreover, a family that assigns child support
20 also receives an extra \$50 a month from the state by
21 virtue of the child support disregard provision.

22 QUESTION: Well, it comes back to the family
23 -- you say it works no hardship; it works no hardship on
24 the family.

25 MR. LAUBER: That's right.

1 QUESTION: But one of the contentions here is
2 that it does work a hardship on the child for whom the
3 support is destined.

4 MR. LAUBER: That's right. That's appellee's
5 theory, that the effect of the assignment provision is
6 to take the property of the child --

7 QUESTION: And give it to the family.

8 MR. LAUBER: -- and transmute that into AFDC
9 and give it to the whole family.

10 QUESTION: That's right. Now why is that
11 wrong?

12 MR. LAUBER: Why is their theory wrong? Well,
13 we think their theory, their taking theory, is wrong for
14 several reasons.

15 First of all, the premise of their theory --

16 QUESTION: (Inaudible) taking. Let's not get
17 into the refinement of takings.

18 Is it -- is the substance of what happens
19 wrong? Under -- can -- can a mother who receives AFDC
20 in theory distribute it among her children anyway she
21 wants?

22 Could she continue to give -- let's say she
23 gets -- she has \$250 support payment for Joey. Could
24 she get \$300 from AFDC and decide, I'm going to spend
25 \$200 of this on Joey?

1 MR. LAUBER: She could. She is required to
2 spend the money in the best interests of all her
3 children, and she could decide that --

4 QUESTION: She's required to spend it in the
5 best interest of all her children?

6 MR. LAUBER: I think the AFDC program also
7 imposes obligations on mothers with respect to how they
8 spend it.

9 QUESTION: But she's not giving \$200 to Joey
10 because she thinks that's in the best interest of all
11 her children. It assuredly isn't. She wished she could
12 spread that among all the children. But she figures
13 this \$200 is Joey's.

14 MR. LAUBER: It could be Joey, she thinks, is
15 more needy than other children.

16 QUESTION: No, that's not the reason. In
17 fact, given her druthers, she'd distribute it evenly
18 among all of them, as I think any mother would.

19 But she figures she is getting this \$200 from
20 her ex-husband for Joey, and that's been converted into
21 an AFDC payment; she is going to continue to spend \$200
22 on Joey, even though in her view that's not in the best
23 interest of all the children.

24 Would that violate the AFDC rules?

25 MR. LAUBER: I don't think it would. It would

1 depend on what the other children needed. I mean, the
2 way the mother spends the AFDC money --

3 QUESTION: It would depend on what the other
4 children needed. So if the other children needed more,
5 and she continued to give \$200 to Joey, that would
6 violate AFDC?

7 MR. LAUBER: With all probability, the money,
8 the \$200, would be going to pay things that are common
9 expenses, like rent, utilities, gas and light.

10 QUESTION: I know, but just take my
11 hypothetical. That's not the case. She gives the 200
12 bucks to Joey.

13 MR. LAUBER: I can't say that would absolutely
14 violate the AFDC law. I don't think it's clear. It
15 depends --

16 QUESTION: It could?

17 MR. LAUBER: -- on the family situation.

18 QUESTION: It isn't clear that she can do that
19 without violating the AFDC law?

20 MR. LAUBER: It is clear that some use of that
21 money could violate the AFDC reasons governing the
22 duties of the custodial parent.

23 And I don't think you can say without knowing
24 all the facts of the case.

25 QUESTION: Mr. Lauber, tell us again, now if a

1 child support payment has been ordered for one of the
2 children in the family and not the others, in the amount
3 of let's say \$200 a month, not all of the \$200 a month
4 that must be assigned to the state would come back to
5 the family, would it?

6 MR. LAUBER: No, all of it would come back to
7 the family, plus \$50 extra.

8 QUESTION: Oh, that wasn't my understanding at
9 all. I thought the \$50 came out of the child support
10 payment, and was only paid if the child support payment
11 were made.

12 MR. LAUBER: The \$200 comes to the family in a
13 different form. It doesn't come qua child support; it
14 comes qua AFDC benefits.

15 But they get the same \$200 from a different
16 source, as it were. Plus, if the state actually
17 collects the child support, they get \$50 more.

18 So the bottom line is, they have \$250,
19 although it comes from a different place, rather than
20 \$200 if they just got the child support.

21 QUESTION: I thought the \$50 was never given
22 back to the family unless the parent ordered to pay the
23 support in fact paid the support?

24 MR. LAUBER: That's correct. But of course,
25 if the parent doesn't pay, and there had been no

1 assignment, the family would have gotten nothing
2 whatsoever.

3 If the parent doesn't pay, at least they get
4 the \$200 in AFDC benefit by virtue of the assignment.

5 QUESTION: Well, they get AFDC benefits. It
6 may not be that \$200.

7 MR. LAUBER: It would be \$200 of it --

8 QUESTION: And indeed, the amount of money
9 received by, or attributed, in AFDC to the child for
10 whom the support payment was made is less than the \$200.

11 MR. LAUBER: That's correct. The child's pro
12 rata share, as it were --

13 QUESTION: I mean, if you look at the child's
14 pro rata share, it's substantially less than the \$200
15 for whom the support has been ordered?

16 MR. LAUBER: That's right. If you look at --

17 QUESTION: And the whole basis of the father's
18 support obligation in that example would be his
19 obligation to that child that he fathered, is that not
20 so?

21 MR. LAUBER: Well, that raises a question
22 under state law. And this is the first reason we --

23 QUESTION: Well, isn't that correct, that when
24 state courts order child support, that they are ordering
25 it on the basis of the father's obligation to the child

1 he fathered?

2 MR. LAUBER: That's correct. The father's
3 obligation to pay support runs to his child, and the
4 amount he pays is determined both by the child's need,
5 his ability to pay, his wealth --

6 QUESTION: Isn't under state law, in this
7 case, didn't the mother have an obligation to spend the
8 child support only on the one child.

9 MR. LAUBER: We think that's not correct.
10 That's what the other side contends.

11 QUESTION: What if it were?

12 MR. LAUBER: If the mother had an obligation
13 to pay it only --

14 QUESTION: To use the child support that's
15 given her for this child to spend it on that child; for
16 the benefit of that child.

17 MR. LAUBER: Well, for the benefit of the
18 child is different from giving him the cash.

19 QUESTION: All right.

20 MR. LAUBER: And here, the state law clearly
21 permits the mother to assign child support in order to
22 get AFDC for the entire family. So it's clear that here
23 state law does permit the mother, in the best interests
24 of that child to support -- to assign the support money
25 to the state.

1 QUESTION: Not only permits it; it seems to
2 require it.

3 MR. LAUBER: It does require it, in fact,
4 that's right.

5 QUESTION: But Mr. Lauber, you could certainly
6 have situations where a local state judge awards child
7 support on the theory, for example, that a particular
8 child needs orthodontic treatment, and orders child
9 support in an amount to cover that.

10 MR. LAUBER: Well, that would --

11 QUESTION: And the father felt obligated to
12 pay it for that purpose. Now if AFDC law requires that
13 all of that be assigned to the state, and it isn't all
14 then available for that child, why shouldn't the father
15 be able to go back to state court and say, look what the
16 federal government has done, Judge? Now, reduce my
17 child support, because what I'm paying is going to the
18 family, not Johnny, who needed the orthodontic treatment.

19 MR. LAUBER: Well, that raises a question
20 about how the support is paid. The AFDC statute permits
21 states to either include or exclude in-kind payments
22 from income for purposes of AFDC eligibility.

23 Now if the father -- in the support decree it
24 said the father would pay the dentist bills himself,
25 that would -- rather than pay money to the mother, have

1 her pay the bills, that would be treated, I think by
2 North Carolina, as an in-kind payment that wouldn't
3 count.

4 QUESTION: Well, I thought we had examples in
5 this record where North Carolina brought charges against
6 fathers for making some in-kind contributions of diapers
7 and so forth.

8 MR. LAUBER: Well, let me co-counsel respond
9 to that. I don't know all the North Carolina cases.
10 But I believe North Carolina has exercised the option
11 not to count in-kind payments as income.

12 So the key thing under North Carolina law is
13 whether the money comes in cash to the mother, to use at
14 her discretion.

15 If it does not, if it comes in kind, or if it
16 is paid to a third party by the parent, that would not
17 count as income.

18 QUESTION: Mr. Lauber, may I just follow up on
19 Justice O'Connor's example of the orthodontic special
20 need of one child for whom the support money is
21 designated?

22 Supposing it's not done in kind, but is just
23 the reason the judge fixed the support amount at that
24 amount. And then it goes through the AFDC and comes
25 back to the mother.

1 Would it violate the AFDC rules for the mother
2 to use the money for the purpose intended by the judge,
3 in other words, giving a disproportionate share to the
4 child for whom the support money was paid?

5 MR. LAUBER: I don't believe it would. I
6 think it would depend on how the -- what the judge keyed
7 the money to. If he keyed it to --

8 QUESTION: Well, it would depend on what the
9 need of the other children were. It would depend on
10 what the need of the other children was.

11 QUESTION: Say there were three children.
12 They all had the same orthodontic problem. And they'd
13 like to spend money on all three, but the money is there
14 because of the orthodontic problem of the child of the
15 father providing the money.

16 Could the mother, without violating AFDC
17 rules, prefer one of the three children who is the
18 source of the money?

19 MR. LAUBER: I think for something very
20 quasi-optional or a cosmetic thing like that, she
21 probably could prefer one child over another, as any
22 mother could in deciding which kid is going to have
23 braces.

24 QUESTION: Even though the three have the same
25 needs? That's my assumption: the three have the same

1 needs, but the need of one is what produced the money.
2 And that would not violate AFDC?

3 MR. LAUBER: I think a mother always has the
4 option of deciding how you are going to allocate a fixed
5 -- a small fixed pot of money. But beyond the AFDC --

6 QUESTION: Your answer is, it would not
7 violate AFDC law?

8 MR. LAUBER: I don't believe it would for
9 orthodontics. But beyond --

10 QUESTION: Mr. Lauber --

11 QUESTION: Well, for anything. Would it for
12 anything? Maybe we've picked a bad --

13 MR. LAUBER: It would depend on the need. If
14 it were kind of a critical life-threatening need, it
15 would be a different judgment.

16 QUESTION: Well, of all three, three critical
17 life-threatening needs, but the source of the money is
18 because of the support for the one. Could the mother --
19 would it -- is there an AFDC rule that the mother must
20 treat the needy children equally, despite the fact that
21 one of them produces the money?

22 MR. LAUBER: I don't think there's any rule
23 that she has to treat them absolutely equally. There
24 has -- there's a range of reasonableness.

25 QUESTION: Gathering from your answer to

1 Justice Stevens and Justice Scalia earlier, is there a
2 fairly elaborate AFDC code of how the mother shall
3 distribute the money to these various children?

4 MR. LAUBER: No, there is not. The whole
5 point of it is, let the mother act like a mother, and
6 any other mother, and decide how best to use this money
7 for her children.

8 And beyond the AFDC, there is also Medicaid
9 assistance available.

10 QUESTION: Mr. Lauber, I'll give you an easier
11 question that I think will make it even clearer. It
12 isn't they all three have the same orthodontic need.
13 Two of them need food, and she gets back the money from
14 AFDC. Could she use it for the orthodontic purpose for
15 which it was originally contributed by the husband
16 instead of buying food for the other two?

17 MR. LAUBER: I think she probably could not.
18 I think it would be real hard to justify that.

19 But in the case of orthodonture, I'd like to
20 point out again that the Medicaid is available to all
21 the children in the filing unit automatically. That's
22 one benefit a child receives by virtue of the
23 assignment, is that he then qualifies for Medicaid
24 immediately, and that could well cover some of these
25 medical expenses.

1 Let me get back to the Constitution. There
2 has to be some kind of constitutional problem with the
3 statute, or it cannot be declared invalid.

4 And as I point out, the first problem with the
5 other side's theory is, under state law, a child does
6 not really have an absolute property right to child
7 support.

8 What he has is a right to have the money used
9 in his best interest. State law permits, and indeed,
10 requires the assignment of support to get AFDC for the
11 family. And state law therefore contemplates that it
12 can be in the child's best interest to have his support
13 money assigned to get AFDC for the family.

14 QUESTION: Well, there may be individual
15 examples where it isn't in the child's best interest,
16 though.

17 MR. LAUBER: It's possible --

18 QUESTION: And there certainly are examples in
19 this record where the burden of this arrangement has
20 been so great that it has caused families to split up,
21 and send children to live with someone else, so that
22 they can have the benefit of that child's support.

23 That's a pretty heavy burden, isn't it?

24 MR. LAUBER: But that would follow from any
25 decision by Congress to include the -- any kind --

1 wouldn't have to supporting him -- any kind of income of
2 a child, in determining the need of the family.

3 If the child earned money working at
4 MacDonald's, and he lived with the family, that money
5 would be included as family income, and it might be
6 better to him to live with his father, and have it not
7 be included.

8 But I think it's inevitable if you have a
9 family-based grant, as AFDC is, you've got to look at
10 the income of the people who live in the family to see
11 how needy the family is.

12 And it could be that that would give an
13 incentive, an economic incentive, for people to live in
14 another way. But that's an inevitable consequence of
15 this family grant provision Congress has set up.

16 The second reason we think their taking theory
17 doesn't work is that the participation in the AFDC
18 program is entirely voluntary. If the mother does not
19 want to assign child support, she need not take part in
20 the AFDC program.

21 It is simply one of the many conditions for
22 eligibility for getting public benefits.

23 QUESTION: But they're not arguing that it's
24 being taken from the mother. It's being taken from the
25 child. It's not voluntary on the part of the child. The

1 mother says, I'm going to chuck in your child support in
2 order to get more money for the family as a whole.

3 MR. LAUBER: The Congress has made the family
4 unit the applicant.

5 QUESTION: Well, that's very nice, but it
6 doesn't say anything about whether it's a taking from
7 the child or not.

8 MR. LAUBER: But if the child doesn't want to
9 have his support assigned, he can tell his mother and
10 she cannot assign the support.

11 I mean, the children depend on their --
12 monetarily depend on their mother to make decisions in
13 their best interest.

14 QUESTION: So you say -- you suggest that if
15 the child had a guardian, secured a guardian ad litem,
16 talked to his or her uncle and said, mother is giving
17 away my child support, let's sue her, do you think they
18 could an injunction against her signing that? They say,
19 this is mine. My father is giving it to my mother for
20 me, and she is breaching her trust.

21 MR. LAUBER: We think under state law they
22 couldn't get that injunction, because it's not the
23 child's absolute property. The mother has to use it in
24 his best interest, and she can convince --

25 QUESTION: So this case really then turns on

1 the state law?

2 MR. LAUBER: I think ultimately it does.

3 QUESTION: And if -- if we thought that --
4 that this payment belonged to the child, then there must
5 be a taking.

6 MR. LAUBER: No, that doesn't follow. You
7 have to have -- first --

8 QUESTION: All right. What must there be,
9 then?

10 MR. LAUBER: Well, first there's got to be
11 property to be taken.

12 QUESTION: Yes?

13 MR. LAUBER: Okay, then beyond that, you have
14 to consider that going into the program is entirely
15 voluntary to begin with.

16 QUESTION: Well, the child say, I'm
17 involuntary. I don't want any part of the program. I'm
18 going -- the law makes my mother put me in, but I don't
19 want my mother to do it. That's part of the case.

20 MR. LAUBER: But if the child is wrong, and
21 the mother in his best interest --

22 QUESTION: What do you mean wrong? How can --
23 if under the state law it's his money, and he doesn't
24 want any part of the program --

25 MR. LAUBER: Well, if you're right about that,

1 then she could be enjoined from going into the program.

2 QUESTION: All right. And how about a taking?

3 MR. LAUBER: Well, there would be no taking if
4 she weren't in the program.

5 QUESTION: All right, so you say --

6 MR. LAUBER: Well, the point is, if he really
7 has property --

8 QUESTION: You say that the remedy is the
9 injunction?

10 MR. LAUBER: Right. If he really has property
11 and she -- but state law permits her to assign it, so
12 it's hard to see how --

13 QUESTION: The guardian ad litem didn't come
14 along until six months afterwards. So he gets an
15 injunction but he wants back pay; I mean he wants to get
16 the support back. And it's a taking, there's been a
17 taking.

18 MR. LAUBER: Well, I don't --

19 QUESTION: I mean, that seems to me what the
20 case is all about.

21 MR. LAUBER: Well, if there is -- if the child
22 does have property such as you describe --

23 QUESTION: There isn't any case at all unless
24 the child has some property under the state law.

25 MR. LAUBER: Well, that's the first problem

1 with their argument. But there are other problems
2 beyond that as we showed in our brief.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Lauber.

5 We will hear now from you, Ms. McLamb.

6 ORAL ARGUMENT OF MS. CATHERINE C. McLAMB, ESQ.,
7 ON BEHALF OF THE APPELLANT IN NO. 86-564

8 MS. McLAMB: Mr. Chief Justice, and may it
9 please the Court:

10 The State of North Carolina administers its
11 AFDC program in conformity with Federal law as explained
12 by the Solicitor General and as stated in the briefs for
13 the Appellant.

14 I would like to make two points to this
15 Court. First, the District Court below found an
16 unconstitutional taking based upon its erroneous
17 interpretation of North Carolina law regarding child
18 support.

19 Secondly, the court committed a fundamental
20 error in ordering retroactive benefits in this case.

21 QUESTION: Do we have to disagree with the
22 District Court's -- or with the court's construction of
23 North Carolina for you to prevail?

24 MS. McLAMB: No. I don't believe there is a
25 taking in this case because this is a voluntary

1 decision; this is an eligibility requirement. You don't
2 really get to the taking of property. It's a voluntary
3 decision on the mother's part.

4 QUESTION: What's the error -- what's the
5 error in North Carolina law that --

6 MS. McLAMB: In -- Judge McMillan found that
7 because these children lived together, and they must
8 apply for AFDC as a family unit, and therefore, by law,
9 assignment -- there must be an assignment of child
10 support rights.

11 He found that certain property interests were
12 taken. But the property interest --

13 QUESTION: Of the child?

14 MS. McLAMB: Of the child. The property
15 interest he explained in his opinion was that child
16 support is an exclusive property right in North
17 Carolina.

18 The other right that I could glean from the
19 opinion is that he says that the child has an absolute
20 exclusive right to enforce the obligation of the
21 custodial parent; and in this case, I'm just going to
22 use mother, that's a little easier, to enforce the --

23 QUESTION: Will we have to change that
24 interpretation that the Judge made of North Carolina law?

25 MS. McLAMB: What I would like to show you is,

1 that is an erroneous interpretation. It is not correct.

2 QUESTION: We normally of course accept the
3 interpretation of the lower Federal court on matters of
4 state law, don't we?

5 MS. McLAMB: You should, unless it is -- I
6 would not think that this Court would accept the
7 interpretation of state law if it is clearly shown to be
8 incorrect, and that is what I would like to show you
9 today.

10 QUESTION: And your opposition will show us
11 just to the contrary.

12 MS. McLAMB: They will attempt to do the exact
13 opposite.

14 The second property right that Judge McMillan
15 found was taken was, as he described it, the exclusive
16 right of the child to enforce the obligation of the
17 parent to spend child support money only on that child.

18 What our -- this is simply not the law of
19 North Carolina. What our statutes read is that child
20 support is ordered, the primary obligation is placed
21 upon the mother and the father.

22 Child support is ordered to meet the
23 reasonable needs of the child. Then child support is
24 paid to the custodial parent for the benefit of the
25 child.

1 In North Carolina, the child does have the
2 right to enforce the obligation of the mother to use
3 child support for his or her benefit. North Carolina
4 has, by statute, passed -- passed a law that deems the
5 assignment of child support rights, the obligation to
6 receive support, upon the acceptance of public
7 assistance.

8 This is a statute that has been enacted in
9 North Carolina.

10 The rationale of Judge McMillan below --

11 QUESTION: Maybe that statute was a taking?

12 MS. McLAMB: It was not so considered by the
13 legislature of North Carolina, nor the courts of North
14 Carolina, which has considered -- which has passed upon
15 this statute.

16 And I would say that this is an area of family
17 law in North Carolina.

18 The rationale of --

19 QUESTION: How did the court below deal with
20 that particular statute?

21 MS. McLAMB: The court below ignored it. It
22 was not mentioned in his opinion. It was raised --

23 QUESTION: But you had raised that with the
24 court?

25 MS. McLAMB: Pardon?

1 QUESTION: You had argued and presented to the
2 court --

3 MS. McLAMB: This was raised to the court
4 below. The briefs are in the record, the docket that
5 has been sent to you, on page 32 of the appellees'
6 memorandum for motion for further relief. This was
7 filed May 30th, 1985.

8 This very statute, the provision -- this is
9 contained in Chapter 110 of the North Carolina general
10 statutes. This was brought to the court's attention.

11 In order to reach his opinion of this
12 exclusive property right, you have to ignore that
13 statute because --

14 QUESTION: You think that whatever -- any
15 property right the child might have had was modified by
16 that statute, or it just couldn't have come about in the
17 face of that statute?

18 MS. McLAMB: You have to read the North
19 Carolina child support law in conjunction with the
20 statutes. These statutes have to be read together.

21 Judge McMillan's rationale --

22 QUESTION: Which one prevails? I mean how do
23 you read them together?

24 MS. McLAMB: There is no statute in North
25 Carolina that says, child support is an exclusive

1 property right of the child.

2 North Carolina law places primary emphasis on
3 the obligation of a parent to support his child. That
4 is the right that the child has, is to enforce that
5 obligation.

6 Reading the statutes again, the child has the
7 right --

8 QUESTION: Well, would the mother be breaking
9 the child support law if she received child support and
10 just didn't spend it on the child?

11 MS. McLAMB: And didn't -- that would be that
12 the mother was not spending the money for the benefit of
13 the child.

14 This is, to me, another fundamental error in
15 Judge McMillan's opinion.

16 QUESTION: Well, what if the mother took the
17 money and spent it on another child, all of it on
18 another child, that she thought needed it more?

19 MS. McLAMB: She is breaking -- in that case,
20 she is breaking her fiduciary to that child, if this --
21 if she is leaving her child --

22 QUESTION: But she -- you think if she was
23 receiving child support and she wasn't on AFDC at all,
24 she just received \$250 a month, and she just split it
25 three ways among her three children.

1 MS. McLAMB: And this was her only income?

2 QUESTION: No, this was child support income.

3 MS. McLAMB: In your hypothetical, is that the
4 only income that is coming into that family, is \$250
5 child support for one child?

6 In that case, the mother -- it would be within
7 the mother's discretion -- these are not easy decisions,
8 but it would be within the mother's discretion to
9 determine what is the best interest of that child.

10 She receives child support under our
11 statutes. The statute does not read, child support
12 shall be received to be spent to benefit that child.
13 Child support is received for the custodial parent to be
14 used for the minor child's benefit.

15 QUESTION: And so she can use it for the
16 benefit of all of her children?

17 MS. McLAMB: It would be a decision that would
18 be within the discretion of the mother.

19 QUESTION: Yes or no? The answer is yes, I
20 suppose.

21 MS. McLAMB: The answer is yes if she, within
22 her discretion, determines that that would best benefit
23 her child.

24 That, to me, is a fundamental problem with
25 Judge McMillan's analysis in this case, because he is

1 undermining well established law in North Carolina that
2 the custodial parent has great flexibility in
3 determining what is in the best interest.

4 A parent may not profit at the expense of her
5 child. If this is determined to be the case, an action
6 may be brought on the child's behalf in order to compel
7 the mother to act in his best interest.

8 QUESTION: Well, what if the mother believes
9 that it isn't at all in the best interests of the child
10 for whom the support is paid that her other children are
11 going to starve to death if she doesn't use that money?

12 MS. McLAMB: Then that is her choice.
13 Participation in the AFDC program is a voluntary
14 decision. This is within the discretion of the mother,
15 once again. If she decides that it is not in that
16 child's best interest that it -- for whatever reason,
17 she decides that Johnny should have every bit of that
18 money, no matter what, she has a voluntary decision that
19 she can make that she will not participate --

20 QUESTION: And starve to death?

21 MS. McLAMB: This is a decision that she can
22 make. It is a hard decision. I am not saying that
23 these are easy decisions.

24 But these are decisions that are within the
25 discretion of the parent and authorized under North

1 Carolina law.

2 Ms. Wettach, we'll hear from you now. You
3 will be able to make your entire argument. The Court
4 won't rise to lunch until this case is submitted.

5 ORAL ARGUMENT OF MS. JANE R. WETTACH, ESQ.,

6 ON BEHALF OF THE APPELLEES

7 MS. WETTACH: The actual, palpable, financial
8 loss to the plaintiff children in this case is quite
9 apparent from the evidence.

10 The two daughters of Joyce Miles, for example,
11 lost \$95 every month of their child support.

12 Similar amounts of money were lost every month
13 by other children in this case.

14 I think it would be helpful if we just walked
15 through an example of how this practice actually works
16 in North Carolina at this time.

17 For example, Joyce Miles has five children.
18 Two of them, the oldest two, are of a different father.
19 The three younger ones, they have separate fathers.

20 The two oldest girls are the beneficiaries of
21 a \$189 a month child support payment. It was ordered by
22 the state court judge, who made a decision about the
23 reasonable needs of those children and ordered this
24 father to pay.

25 Prior to 1984, when the rule was imposed, the

1 mother did not receive AFDC assistance for those
2 children; they were separated from the grant.

3 She had three younger who were not as
4 fortunate to have a father who chose to support them,
5 and she received \$244 in AFDC for those children.

6 In October of 1984 she received a letter from
7 the State Department of Human Resources, which said, in
8 order to continue receiving AFDC for those children for
9 whom you are getting it, you must add the other children
10 to the grant, and as a part of that, you must make their
11 support available to the state. The state will take
12 that money, keep the money; it will return \$50 because
13 there is now a \$50 disregard; and we'll give you AFDC
14 benefits.

15 QUESTION: And you think prior to that time
16 she was pretty careful to spend -- how much was it?

17 MS. WETTACH: She had \$189 to support the two
18 older girls.

19 QUESTION: And she used to spend that \$189 for
20 those two, and how much did she get from AFDC for the
21 other three?

22 MS. WETTACH: \$244 for the other three.k

23 QUESTION: So they got \$80 apiece, and the
24 other ones got how much apiece?

25 MS. WETTACH: \$95 apiece.

1 QUESTION: Do you think she was really careful
2 to make sure that the family's -- the child support
3 money she was getting from the husband went to those two
4 children?

5 Is it a real world we're talking about when
6 we're talking about a mother who has, let's say, five
7 children, one of whom has support money, spending that
8 money -- that allotment, on that child? Is that a real
9 world out there?

10 I mean, we have these Cinderellas in reverse,
11 one child of five, who has a lot of money, and the other
12 four don't?

13 MS. WETTACH: Well, in most of these cases,
14 the amounts of money were not significantly different.
15 In that case, as we said, the difference between \$80 and
16 \$95 is not a lot, and the evidence in the case that she
17 was spending more money on the children who were the
18 recipients of that child support.

19 She mentioned that -- those were two teenage
20 girls; she tended to spend more money on them. And --

21 QUESTION: Because they were teenagers; not
22 because that's where the support money was -- the
23 reality that Congress was addressing in this statute is
24 a reality in which a mother spends whatever money she
25 has for all of the children she's taking care of; isn't

1 that right?

2 MS. WETTACH: We don't think there's any
3 evidence to show that mothers routinely are violating
4 their court award. She has a court order. It tells her
5 that she's got to spend the money in a certain way.

6 And there's no evidence that nationwide these
7 mothers --

8 QUESTION: Do you know of any case in which a
9 parent has been sued for spending the money on the wrong
10 children? I mean, I've never even heard of such a suit.

11 MS. WETTACH: I'm not aware of any suit that a
12 mother was actually sued --

13 QUESTION: And you think that's because
14 everybody is really keeping close track of how much
15 money they're spending on each of their children?

16 MS. WETTACH: Actually, I would like to take
17 that back. There was the case from which the District
18 Court found much of its law of North Carolina, where a
19 father sued the mother for misusing the child support he
20 was spending, and the court said -- actually dismissed
21 the case because the father was the wrong party, and
22 said, the child support money belongs to the children.
23 The father could only bring the suit as next friend.
24 And implicitly authorized the father to be able to sue
25 for that reason, if there were a substantial misuse of

1 the money by the mother, then I think that would be
2 cognizable under state law, under trust theory.

3 QUESTION: What about the North Carolina law
4 on the right of the child? That case that you were just
5 talking about turns around the right of the child, I
6 take it.

7 MS. WETTACH: Yes.

8 QUESTION: Is that --

9 MS. WETTACH: We feel that --

10 QUESTION: What about that law?

11 MS. WETTACH: We feel that --

12 QUESTION: Judge McMillan thought there was a
13 property right in the child?

14 MS. WETTACH: We feel there is no reason that
15 this Court should depart from the lower court's analysis
16 of North Carolina law.

17 QUESTION: Well, I know, but what about the --
18 is there some other evidence besides the judge here as
19 to what --

20 MS. WETTACH: Well, there's certainly --
21 there's all the case law.

22 QUESTION: -- what North Carolina law is?

23 MS. WETTACH: There's the case law that Judge
24 McMillan of course relied on. There's also the
25 statutes. For the benefit of the child is not a

1 particularly difficult concept.

2 QUESTION: But how do you ignore the state
3 statute permitting the mother to make the assignment?

4 MS. WETTACH: If -- the assignment --

5 QUESTION: Doesn't that sort of undercut the
6 notion that the child has his or her own right to the
7 money?

8 MS. WETTACH: No, I don't think it does. I
9 think when -- when participation in the program
10 vis-a-vis the child who is receiving child support is
11 voluntary, the mother can certainly make the choice that
12 the child support that she is getting is inadequate to
13 meet those needs, and therefore, she would like to apply
14 for AFDC, and the condition of eligibility is that she
15 make this assignment and the state take over the
16 responsibility of collecting that support.

17 But when this involuntariness becomes a part
18 of it, that changes how that assignment provision works.

19 QUESTION: Yes, but the state statute permits
20 her to do it, but it doesn't say that when she is -- if
21 she would choose, because it's not in the best interest
22 of the child not to do it; but she can't make -- that's
23 the problem with the Federal law. It deprives her of
24 being able to voluntarily choose to apply for AFDC for
25 that child, or not apply for AFDC for that child,

1 because the assignment provision would end up not being
2 in the best interest.

3 The assignment provision doesn't change
4 anything about that -- when money is paid, it is paid
5 for the best interests of a particular child.

6 QUESTION: Your opponent I understood to argue
7 differently, that the North Carolina assignment law
8 supersedes, to the extent it's inconsistent with some of
9 the very strict you've been reciting.

10 MS. WETTACH: I think that's just incorrect.
11 When -- if the mother -- that whole provision of state
12 law was written when it was a voluntary matter to apply
13 for AFDC.

14 QUESTION: (Inaudible) voluntary, isn't it?
15 She is not forced to apply for AFDC?

16 MS. WETTACH: She is forced to apply for AFDC
17 for particular children --

18 QUESTION: By what law is she forced to apply
19 for AFDC?

20 MS. WETTACH: As a condition of getting AFDC
21 for some children, she is forced to apply for all
22 children.

23 QUESTION: Oh, it's a condition.

24 MS. WETTACH: It's a -- right. Right. She's
25 not -- of course, nobody is rounding her up and telling

1 her to apply.

2 QUESTION: (Inaudible) deal with the
3 assignment statute?

4 MS. WETTACH: Judge McMillan talked at length
5 about the assignment provision and how it is the
6 procedural mechanism by which the state --

7 QUESTION: Yes, but did he consider it in the
8 process of determining whether the child has a property
9 right?

10 MS. WETTACH: He was certainly --

11 QUESTION: He didn't consider the state law
12 that says if you assign the child support to get AFDC
13 that it's deemed to be for the benefit of the child, did
14 he?

15 MS. WETTACH: Well, of course, the assignment
16 law in state law doesn't say, and then it is deemed to
17 be in the benefit of the child.

18 The assignment provision simply says, if you
19 apply for AFDC, you are deemed to have made an
20 assignment of your child support to the state. That's
21 all it said.

22 It doesn't say anything about, for the benefit
23 of the children, or transforming the income from the
24 benefit of one to --

25 QUESTION: But if that's what the state law

1 says, doesn't that do something to the child's property
2 right?

3 MS. WETTACH: I don't see how it would in any
4 sense. When you assign your money you are allowing the
5 state to take it in, but it gives it back when you are
6 on the grant and you make the decision to -- you use the
7 assignment provision almost as a trade. You will trade
8 in your child support of \$50, because \$50 isn't adequate
9 to meet a child's needs, so that you can get \$100 in
10 AFDC back.

11 But that -- when the figures are different,
12 when they say, assign in \$100 and get \$50 back, that's a
13 very different sort of situation, and a very different
14 sort of choice.

15 QUESTION: But isn't it true that you always
16 get at least the amount you assign back, and sometimes
17 plus \$50? You example of \$189 of child support and \$244
18 they had before, a total of \$400 and something; what did
19 they get after she made the assignment?

20 MS. WETTACH: They got \$280 in AFDC and \$50 of
21 the support, so there was a net loss of \$95.

22 QUESTION: So they only got -- I see.

23 MS. WETTACH: So that's where the loss. And
24 of course, the AFDC hasn't gone done; it is the child
25 support that they --

1 QUESTION: They always get back more than the
2 child support that they're trading in; but they don't
3 get back more than the would have gotten had they had
4 the child support plus their former AFDC without that
5 child counted in?

6 MS. WETTACH: If you look at the whole family
7 as a total family unit, the mathematics work out that
8 way.

9 Of course, our position is that the
10 constitutional rights belong to the children who own the
11 money for whom it is paid.

12 QUESTION: I just want to be sure about one
13 thing. Assume there's child support for just a second,
14 and assume that the \$189 was income from working at
15 MacDonald's, and that was it, and we didn't have a child
16 support in this case at all.

17 Would it still be unconstitutional -- program
18 still be unconstitutional to require them to count all
19 the money in one pool.

20 MS. WETTACH: It depends on whose \$189 it is.

21 QUESTION: It's the teenage daughter. Two
22 teenage daughters, both work, and they earned \$189, and
23 they'd like to spend it on themselves. But under the
24 new rule, they must count that as part of the family
25 pool, and the result of it is to reduce the total

1 amounut they get.

2 Is that unconstitutional?

3 MS. WETTACH: I think you would have to look
4 at what the state law says about that type of income.
5 My recollection is that earned income under common law
6 is to be owned by the parents and at their discretion.

7 QUESTION: You think that depends as a matter
8 of -- on state law whether that program is bad or not?

9 MS. WETTACH: I think it depends as a matter
10 of state law what the nature of the \$189 is. Now, I
11 think that is a different case than when the mother
12 receives it in a fiduciary and trust capacity.

13 QUESTION: My bottom line question was, would
14 you challenge the constitutionality of this basic
15 arrangement if the child support were not a part of it,
16 if it just applied to income that the children earned?

17 MS. WETTACH: Well, that wouldn't be the
18 case. That would not be the case that is in front of
19 the Court --

20 QUESTION: Even though it might have precisely
21 the same economic consequences?

22 MS. WETTACH: Again, I think you would have to
23 look at the nature of the income that you're talking
24 aout.

25 QUESTION: Well, I don't know anything about

1 state law. I'm just looking at the economics and the
2 burden on these people who have trouble making ends
3 meet.

4 It would economically be precisely the same
5 situation. Why wouldn't it be precisely the same legal
6 situation as a matter of constitutional law?

7 MS. WETTACH: If in fact what was happening
8 was that money was being taken from a child who had no
9 obligation to support other children, then I think it
10 would be precisely the same legal situation. If the
11 money is restricted in that way.

12 QUESTION: Isn't the logic of your position
13 not only that the 1984 amendment is no good, but that
14 the whole -- even if a mother voluntarily wants to
15 include a child who is entitled to child support in the
16 AFDC program, because, let's say, the father is in fact
17 not paying it, and she'd rather have the government try
18 to pursue the father, assign it to the government and
19 get back AFDC for it, even that would be invalid,
20 wouldn't it?

21 MS. WETTACH: Not if --

22 QUESTION: She's giving away the --

23 MS. WETTACH: -- she's not losing anything for
24 the child.

25 QUESTION: Oh, but she's not -- when she gets

1 it back, she's not going to just spend it on that child,
2 she's going to have to abide by the AFDC regulations,
3 and spend it on all the children.

4 But that money should go just to that one
5 child, shouldn't it?

6 QUESTION: And if the government collects it,
7 it keeps it.

8 MS. WETTACH: It keeps it all but the first
9 \$50 of it, that's correct.

10 QUESTION: So that would be bad too, wouldn't
11 it? And so would including in the AFDC the earnings of
12 -- well, the earnings of a child that he earns all on
13 his own, and he has no obligation to support any other
14 children.

15 MS. WETTACH: That's a difficult example,
16 because those are not counted for AFDC purposes anyway
17 because --

18 QUESTION: They're not counted. Well, just
19 take the child support where the mother wants to assign
20 it to the government; you couldn't do that?

21 MS. WETTACH: If it were in -- if it were in
22 the best interests of that child, because it was only
23 coming in, say, once every six months, then spread out,
24 she's probably not violating any duty she has.

25 QUESTION: Oh, I see; one-fifth of something

1 is better than a hundred percent of nothing. I guess
2 that would be right, if she wasn't collecting a thing.

3 QUESTION: Mr. Wettach, let me ask you a
4 pragmatic question.

5 Do you know of any case in North Carolina
6 where all of this has driven the more fortunate child
7 out of the home to live elsewhere?

8 MS. WETTACH: Yes, Justice Blackmun, there is
9 an example of that exact situation among the five named
10 parties that are the moving parties in this case, where
11 a child has received --

12 QUESTION: Well, I thought there were, but I
13 haven't heard it mentioned all morning. And I --

14 MS. WETTACH: In the Medland family, there was
15 a child, and she was entitled to \$200 -- her father was
16 paying \$200 worth of child support for her, and her
17 mother and father decided, between the two of them, that
18 she should move out of the house, because otherwise she
19 would have to be included in the grant, and her standard
20 of living would go down, and they did not wish that to
21 occur.

22 QUESTION: Or if a guardian ad litem came into
23 the picture, he might well take that position?

24 MS. WETTACH: Indeed. And we think that's a
25 very serious consequence of the regulation, that that --

1 QUESTION: Where did the child move to? Did
2 she move with her father, or to somewhere else?

3 MS. WETTACH: In that particular case, she
4 moved with her father. And of course, it could have
5 been in any number of situations.k

6 QUESTION: Ms. Wettach, I suppose in your view
7 we would have to make a case-by-case determination of
8 how child support payments were used in each household
9 to know whether the Federal provision could be applied
10 or not?

11 MS. WETTACH: It seems that it would make more
12 sense for the Court and the Congress to determine -- to
13 make a presumption that people were obeying their court
14 orders, in the absence of some evidence to the contrary.

15 I mean, the presumption makes sense that
16 people obey the law, as opposed to, that people don't
17 obey the law. And if -- now, of course, under AFDC law,
18 there is an inquiry in every single case of every single
19 applicant about what money they have in the household,
20 and where it is.

21 They send in a monthly report every month, and
22 they have to describe these things. Of course, if there
23 were money being spent, then there may well be
24 accounting for that money, and that's the way it would
25 be -- really under current law, there would be that

1 situation, where if she were actually making income
2 available, it would be counted.

3 QUESTION: Ms. Wettach, wouldn't you say that
4 one of the -- one of the benefits that a child could
5 receive, and one of the purposes for which a mother may
6 use -- or a father may use the child's support money is
7 to enable the child to live with brothers and sisters?

8 I mean, let's assume -- let's assume a mother
9 is getting support money for one child, and she has a
10 couple of other children, she says, I want this child to
11 be brought up with his brothers and sisters.

12 In order to do that, rather than sending the
13 other children away to the poor house or somewhere, I'm
14 going to have to spend some of this support money for
15 them.

16 Wouldn't you think that that would be
17 considered spending that money for the benefit of the
18 child?

19 MS. WETTACH: There may be individual
20 circumstances where that might be the case. As a
21 general rule, though --

22 QUESTION: Wouldn't that be every circumstance
23 in which the mother decides to trade in the support --
24 the support money for AFDC benefits, which will be
25 slightly more than the support money and enable her to

1 keep the family together.

2 Can't that be considered to be in the benefit
3 of the child who was entitled to the support money, even
4 if he doesn't get dollar for dollar what he used to?
5 He's getting his brothers and sisters?

6 MS. WETTACH: There may well be some benefits
7 there, and there may well be circumstances. But to say
8 as a matter of law, which we have here, that the mother
9 must make that choice is the difficulty with it.

10 QUESTION: That's a different question,
11 though. That's not the takings question. That's the
12 question of whether there is excessive coercion on a
13 fundamental right or something of that sort.

14 But as to whether there has been a taking or
15 not, can't you say that indeed the mother has traded in
16 for value the child's support money? She has gotten
17 back for it the company of the brothers and sisters?

18 MS. WETTACH: Again, that may be --

19 QUESTION: The family unit as a whole.

20 MS. WETTACH: -- that would have to be made on
21 an individual basis as to what is in the best interest.
22 And perhaps somebody could prove to a court -- a state
23 court in a -- in a hearing on it that it was or it
24 wasn't in the best interest of that particular child.

25 But on its face, to take money from one child

1 and spend it on the other child takes away from the
2 state -- state court order that says, this \$200 is to be
3 used for a particular child; it takes away from the
4 father's expectation that he will support his children,
5 and not be expected to offset expenditures made by the
6 AFDC program for other children to whom he is unrelated.

7 And that disruption is a significant problem.

8 QUESTION: I don't know. I just expect that
9 if I had before me a suit involving an allegation that
10 support money wasn't being spent entirely for the child
11 for whom it was destined by the mother, and that she was
12 using some of it to buy bare necessities for the other
13 children just to keep the family together, I doubt that
14 I'd find that mother to be in violation of her trust
15 obligation.

16 MS. WETTACH: But that may be because there --
17 she's being put under this unconstitutional condition
18 that she has to do that. And maybe given an
19 unconstitutional condition on this program, once
20 decisions about what's in the best interest, may have to
21 be different.

22 But should the government be putting her in
23 the position of having to make that choice?

24 QUESTION: (Inaudible) though. That's not the
25 takings point.

1 MS. WETTACH: Well, it certainly --

2 QUESTION: I think I'm right about that. That
3 is your separate point.

4 MS. WETTACH: That is a separate -- that's
5 right. And it's another theory of liability for the
6 government.

7 QUESTION: Ms. Wettach, have you found
8 examples of state court judges who have reduced child
9 support orders because of the impact of this program on
10 the use of the money for the child for whom support was
11 originally ordered?

12 MS. WETTACH: Yes, Justice O'Connor, there was
13 one which was cited in our brief that we were aware of
14 because it was local, and the state -- it was a
15 situation where the father was providing a certain
16 amount of support, and he went in and said, look, this
17 is what's happening and what happened in that case is,
18 the state judge ordered that the family be severed for
19 AFDC purpose, and he ordered the county to continue to
20 pay AFDC for the other children, and allowed the father
21 to make in-kind payments to off -- so that they wouldn't
22 be counted.

23 And there was another situation that was
24 presented by this case where the father was paying \$200
25 a month voluntarily without a court order. When the

1 benefits were assigned, and he went -- and the county
2 brought suit against him, they reduced the amount to \$87
3 a month.

4 So that in fact, they -- when you worked out
5 the figures, he didn't lose that much by being on AFDC,
6 but of course, the father was willing and able to pay
7 much more for his support.

8 But it wouldn't have mattered. His child
9 would have stayed at the same standard of living of an
10 AFDC family, regardless of how much the father had paid;
11 and so the support was reduced.

12 The state has not talked too much about the
13 remedy that was imposed. But I'd like to say just a few
14 words about that as it is presented by this case.

15 The state has mentioned in its brief that the
16 remedy was incorrect in this case for a number of
17 reasons. We think it's quite clear from the procedural
18 posture of this case that there was a violation of an
19 injunction.

20 The injunction was entered in 1971, and it was
21 clearly -- it was to remedy the exact same thing that
22 was going on in 1971 as part of the state program. At
23 that point it did not have the cloak of Federal
24 authorization as it claims to have now. But it was in
25 fact --

1 QUESTION: There's not doubt it has that, it
2 has Federal authorization now, is there?

3 MS. WETTACH: It has Federal statutory
4 authorization under their theory of the statute.

5 QUESTION: I thought your case was purely a
6 constitutional case here, since the passage of the more
7 recent AFDC amendment.

8 Do you still claim that it's not authorized by
9 statute?

10 MS. WETTACH: We have in our brief suggested
11 that the statute can be read in a different way which
12 would not cause the constitutional problems that are
13 caused by the application as it's been given by
14 Secretary Bowen.

15 QUESTION: But the District Court didn't agree
16 with you on that point?

17 MS. WETTACH: That's correct. That's correct.
18 But in this case, there has -- there was the
19 same activity by the Welfare Department in 1971. That
20 activity was enjoined.

21 And in 1984, it was flouted by the state. The
22 injunction was simply ignored, and the state made a
23 decision to proceed as it had been before 1971, and
24 before it was enjoined.

25 The state has argued that the remedy that the

1 lower court ordered, which was to pay back all the child
2 support money that it had taken, and pay back any AFDC
3 benefits which were withheld, or for families that were
4 terminated as a result of this, would violate the
5 Eleventh Amendment.

6 We think there is no question that it would
7 not violate the Eleventh Amendment for a number of
8 reasons.

9 First of all, of course, it is --

10 QUESTION: (Inaudible).

11 MS. WETTACH: Yes.

12 QUESTION: Has this been preserved below, the
13 Eleventh Amendment?

14 MS. WETTACH: Yes. Yes, it was argued below,
15 and it was -- the theory was rejected by the lower
16 court, and we would ask this Court to affirm on that
17 issue as well.

18 What had been argued, and is argued here in
19 their briefs, is that the Eleventh Amendment would bar
20 it because this was effectively retroactive benefits.

21 The error in that position is the language of
22 Edelman v. Jordan, which says that the date for
23 determining prospective and retrospective relief is the
24 date of a court-ordered obligation to act otherwise.

25 This court order was entered in 1971. And

1 from then they had to act accordingly. That was a
2 prospective order, and that was not barred in any way by
3 the Eleventh Amendment.

4 The state's position appears to be that as
5 soon as it violated the injunction, anything that it
6 didn't pay was transformed into retroactive payments,
7 and therefore, were barred by the Eleventh Amendment.

8 And we think that that position doesn't make
9 sense, and is not consistent with this court's
10 interpretation of the Eleventh Amendment.

11 QUESTION: Ms. Wettach, before you leave, what
12 -- what would you suggest the Federal Government have
13 done instead? Assuming that its finding was correct,
14 the legislative finding, that families use all of the
15 money that they get on all of its -- on all of their
16 members for the best interests of the whole family
17 group, including money from support payments.k

18 And they -- the Federal Government says, we
19 have to -- we're -- we have to pay out less. We have to
20 reduce the amount. It makes sense to us to reduce the
21 amount to those families that have \$800 coming in.

22 And we know as a matter of fact, never mind
23 that theoretically they're supposed to be spent on only
24 two of the children; we know that that family has \$800
25 which is being used for the whole family.

1 This other family over here only has \$200
2 that's being used for the whole family. Now, I want the
3 cut to hit the family with the \$800 and not the family
4 from the \$200. How could the Federal Government have
5 done it lawfully?

6 MS. WETTACH: We think it would be quite
7 reasonable for the Federal Government, and
8 constitutional, to have looked at that family, looked at
9 the AFDC recipients, and determined how much their need
10 was actually reduced by the fact that someone else in
11 the household may have been sharing the burden of the
12 joint expenses.

13 This is particularly set out in our brief when
14 we talk about an economy of scale reduction that could
15 be made in an AFDC payment.

16 For example, if there -- well, there's a chart
17 that talks about, what's the individual's standard of
18 need in a family. And we all know that that individual
19 goes down as the household gets larger, because you need
20 -- if you have an apartment that --

21 QUESTION: But you wouldn't allow the support
22 payments to be counted in at all?

23 MS. WETTACH: It's not that they're counted.
24 They're not counted at all. All they're doing is, you
25 recognize that the need of the AFDC recipients is less

1 because they don't have to share the whole -- they don't
2 have to pay for -- for example, they don't have to pay
3 for all of the rent, or all of the utilities, the shared
4 expenses, because there's someone else with income who
5 is sharing.

6 So maybe there's a quarter of it that is paid
7 by someone who is not in the unit, so they only have to
8 pay for three-quarters of it. So their need is a little
9 bit less.

10 QUESTION: But that's not the reality that
11 Congress has found. I don't care what your chart is, if
12 you assume in theory that the mother is spending the
13 money for the house which other people use and whatnot.

14 The reality that Congress perceived was that
15 all the money that comes into the family unit is
16 distributed among all the family members on the basis of
17 how they need it, period.

18 And Congress wants to take that factor into
19 account. You just told me that there's no way that
20 Congress can do that?

21 MS. WETTACH: No, I think I told you that
22 there is a way that they can do it. And they can do it
23 in either of the two ways we suggested. Actually, they
24 can do it by an economy of scale reduction of the AFDC
25 recipients, or they can do it by an individual analysis

1 of what is going on in a family, and if money is
2 actually being transferred, they might count it.

3 Let's take an example where there are three
4 people in a household. The child support child gets
5 \$100, the other two get \$200 in AFDC. The mother uses
6 all the money the same.

7 Their need is the same. To say -- then
8 there's no transfer, and that's when Congress can't take
9 it into account.

10 But to say that these two need a little less
11 because there's a person outside the unit who is also
12 contributing is reasonable, and Congress could cut in
13 that matter.

14 And we think that's constitutional, and we
15 would have no complaints with that.

16 If there are no further questions.

17 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
18 Wettach.

19 The case is submitted.

20 (Whereupon, at 12:14 p.m., the case in the
21 above-entitled matter was submitted.)
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25

CERTIFICATION

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

#86-509 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Appellant V. BEATY MAE GILLIARD, ET AL.; and

#86-564 - DAVID T. FLAHERTY, SECRETARY OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES,

ET AL., Appellants V. BEATY MAE GILLIARD, ET AL.
and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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