

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ELOISE ANDERSON, DIRECTOR, CALIFORNIA
DEPARTMENT OF SOCIAL SERVICES, ET AL.,
Petitioners v. VERNA EDWARDS, ETC., ET AL.

CASE NO: No. 93-1883

PLACE: Washington, D.C.

DATE: Wednesday, January 18, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ELOISE ANDERSON, DIRECTOR, :

4 CALIFORNIA DEPARTMENT OF :

5 SOCIAL SERVICES, ET AL., :

6 Petitioners :

7 v. : No. 93-1883

8 VERNA EDWARDS, ETC., ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, January 18, 1995

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:19 a.m.

15 APPEARANCES:

16 DENNIS PAUL ECKHART, ESQ., Supervising Deputy Attorney
17 General of California; on behalf of the Petitioners.
18 PAUL A. ENGELMAYER, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the petitioners.

22 KATHERINE MEISS, ESQ., Los Angeles, California; on behalf
23 of the Respondents.

24

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1 PROCEEDINGS

2 (11:19 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-1883, Eloise Anderson v. Verna Edwards.

5 Mr. Eckhart.

6 Spectators are admonished, do not talk or
7 whisper in the courtroom. If you're going to talk or
8 whisper, get outside the courtroom.

9 Go ahead, Mr. Eckhart.

10 ORAL ARGUMENT OF DENNIS PAUL ECKHART

11 ON BEHALF OF THE PETITIONERS

12 MR. ECKHART: Mr. Chief Justice and may it
13 please the Court:

14 The question presented by this case is whether,
15 everything else being equal, a State may provide the same
16 amount of AFDC benefits to a family where the dependent
17 children are all related to their caretaker, but are not
18 siblings of one another, as the State does where the
19 children are all brothers and sisters of one another.

20 California and 28 other States have adopted a
21 rule that requires the combination of assistance units
22 when there are more -- when there are two or more
23 assistance units residing in the same household with the
24 same caretaker relative. California also requires the
25 combination of assistance units if there are two caretaker

1 relatives and they are married to each other.

2 The full text of California's regulation is set
3 forth at the -- in the appendix to the petition for
4 certiorari at note 3 on page 17, note 3 in the district
5 court opinion.

6 The fundamental error committed by the Ninth
7 Circuit in this case, in the Beaton case, which was the
8 case the district court relied on in ruling in this case
9 and which the Ninth Circuit simply followed in affirming
10 the district court in this case, was to look at the
11 Federal income rules before looking at the question of
12 whether the State has the discretion and the right to
13 require AFD recipients who live together in the same
14 household to be considered one assistance unit for
15 purposes of computing the grant that they receive from the
16 State.

17 In essence, the Ninth Circuit put the cart
18 before the horse. It looked at the income availability
19 rules before looking at the State's discretion to decide
20 that assistance units and groups of AFDC recipients living
21 in the same household may be combined.

22 The rule that we are proposing that the Court
23 adopt in this case is that under cooperative federalism,
24 which this Court has recognized is the AFDC system that
25 Congress has enacted, the States have the discretion to

1 make this kind of a rule, that assistance units living in
2 the same household be combined, a part of their AFDC
3 program.

4 To put that another way, we're asking this Court
5 to hold that neither Congress nor the Secretary of Health
6 & Human Services have -- by express edict, where that is
7 the only way the State's discretion may be circumscribed
8 in the AFDC programs, have taken that discretion away from
9 the States.

10 I would like to illustrate first how the rule
11 works in -- with a practical example, and then I would
12 like to make four points. First of all, the points I
13 would like -- just briefly going through the points I
14 would like to make this morning, first of all, deciding
15 who must be in an AFDC assistance unit is largely a matter
16 of State discretion, just as the State has a right to
17 decide how poor a person has to be before they receive
18 benefits and how much AFDC benefits the State should pay
19 that person.

20 The second point, when assistance units are
21 combined, the income and resources of all the persons in
22 that household who are claiming AFDC are considered as
23 available to every other member of that unit. The
24 availability rules really relate to the situation after
25 the assistance units are combined, and determining whether

1 the individual has income available to that person such
2 that it then, because of the combination of the assistance
3 units and the operation of the Federal statute --

4 QUESTION: Does the rule only apply insofar as
5 people in the household are asking for the Federal-State
6 assistance to them? In other words, suppose you had one
7 member of any of the units involved here who won a big
8 pile of money on a lottery ticket, could that person opt
9 out of welfare benefits and the State couldn't force those
10 who remained to consider that person's --

11 MR. ECKHART: Well, Your Honor -- Your Honor's
12 question --

13 QUESTION: -- money?

14 MR. ECKHART: Your question implicates the lump
15 sum rule. First of all, the answer to your question is
16 that once the assistance unit is combined, the income and
17 resources that are available to each of those individuals
18 are considered available to the unit as a whole.

19 QUESTION: Well, can someone opt out of the unit
20 and say, I don't want assistance any more, so don't count
21 me in?

22 MR. ECKHART: Well, there are two answers to
23 that. First of all, Your Honor, there is a Federal family
24 filing unit rule in section 602(a)(38) of 42 U.S.C. which
25 provides that if the -- where Congress provided in 1984

1 that the father, mother, and brothers and sisters, all of
2 whom live in the same household, their needs and income
3 must be considered together, such that if one of those
4 individuals receives a lottery winning or a lump sum
5 income of some kind, that person, that income is deemed
6 available to all the individuals.

7 QUESTION: Let's say it is not a father, mother,
8 and their children. We have these -- a nephew or a cousin
9 or something in the household. Can somebody who receives
10 outside money opt out of the unit?

11 MR. ECKHART: Under current California
12 interpretation of Federal requirements and Federal
13 regulations, no. The -- however, that -- I would want to
14 make clear, first of all, that is not -- none of the
15 plaintiffs in this case present that set of facts. The
16 class definition does not include a plaintiff such as
17 that, such as one who has outside income, and I believe
18 the Court can decide this case without reaching those
19 income -- the lump sum rule which is provided by Federal
20 law under subdivision 602(a)(17) of the, 42 U.S.C. --

21 QUESTION: Is your answer the same even though
22 the person who hypothetically won the lottery would be an
23 emancipated adult? You know, a nephew, but perhaps a 35-
24 year-old nephew, or --

25 MR. ECKHART: Well, Your Honor, that person

1 would not be eligible for AFDC, because the persons
2 eligible for AFDC are limited to dependent children under
3 the age of 21 and their caretaker relative.

4 QUESTION: So what would happen if he lived with
5 the mother and father and dependent children?

6 MR. ECKHART: If he lived with that household,
7 his income would not be considered available to the
8 others, in the same way, Your Honor, as, for instance,
9 Mrs. Edwards, who is one of the named plaintiffs in this
10 case. She is not a needy caretaker. In other words, she
11 is not receiving AFDC on her own behalf as a caretaker of
12 her children. Her income -- if she received a lottery
13 payment, that income would not be deemed available to the
14 children in the unit.

15 Simply, we're talking about the members of the
16 assistance unit, those persons claiming AFDC, and that's
17 what distinguishes this case from the cases this Court
18 decided in the late sixties and early seventies, where we
19 were dealing with, in King, a man in the house, a
20 substitute father, or a lodger, as was the case in Van
21 Lare. Those situations involved a person who is not a
22 member of the assistance unit.

23 QUESTION: No, a care -- but the caretaker could
24 presumably have, if it's a woman, her own resources, and
25 if she takes into the household a couple of indigent

1 nephews, I take it she could apply for AFDC assistance for
2 the nephews and not herself --

3 MR. ECKHART: That's correct.

4 QUESTION: -- and California couldn't mandate
5 that she be in the unit?

6 MR. ECKHART: No, if -- as long as they're
7 nephews. If they were her children, then they --

8 QUESTION: No, I said nephews.

9 MR. ECKHART: No, Your Honor, that's correct.
10 They could not mandate that she be in the unit. She does
11 not have to apply for AFDC unless she wants to.

12 QUESTION: And you can't consider her income in
13 determining what the nephews get?

14 MR. ECKHART: That's correct.

15 The third point, which I have actually to some
16 extent already addressed, was that the rule is essentially
17 -- is a very logical rule. In other words, we're talking
18 about individuals who are all applying for AFDC, and it
19 fits the same kind of rationale and logic as the family
20 filing unit rule, which is the Federal rule that a nuclear
21 family, all individuals in a nuclear family, must be
22 considered together, and their income and resources
23 must --

24 QUESTION: Just to clarify it -- these
25 regulations are very confusing to me -- the nonneedy

1 caretaker with the two indigent nephews, and one of the
2 nephews comes into some money, they're both in the
3 assistance unit, but later one of the nephews comes into
4 some money, gets a tort claim or a lottery ticket or
5 something and has money, can that lucky nephew get out of
6 the unit?

7 MR. ECKHART: If -- only physically,
8 essentially. If the nephew went to live with another
9 family, and therefore those winnings --

10 QUESTION: No, stays right there in the
11 household, but doesn't want the benefits any more. He
12 says, count me out.

13 MR. ECKHART: If that person was in an AFDC
14 recipient -- in an assistance unit and be receiving AFDC
15 at the time, that person -- that person's income would be
16 deemed available to the other nephew.

17 I assume that's -- if it's -- assuming it's his
18 brother. If it's not his brother, then we're talking
19 about two assistance units, but if it's his brother, he
20 would be -- he would have to be -- that income would then
21 disqualify both of those individuals from receipt of AFDC
22 for such time as it takes the family to spend that money
23 down.

24 QUESTION: Suppose it's his cousin and they had
25 been in the same unit under this California whatever, unit

1 filing rule?

2 MR. ECKHART: Well, Your Honor, in that
3 situation, currently under California law and policy, the
4 individual would not be able to -- once the income was
5 received, the individuals would be deemed -- who are in
6 that assistance unit at that point would be deemed to be
7 ineligible for such time as it takes to spend the money
8 down.

9 If the family anticipates the receipt of the
10 lump sum ahead of time and can essentially send the cousin
11 to live with rich Aunt Mary instead of living in the
12 assistance unit, then that income then would not be
13 considered as available, essentially taking the person out
14 of that situation.

15 If the -- the State has not -- at this point
16 does not have any regulations governing this, and again
17 the situa -- factual situation is not presented by the
18 facts of this case and therefore it's not -- was not
19 developed in the court below. There's nothing in the
20 record dealing with the situation.

21 The -- if I could just illustrate briefly how
22 the rule works, if we consider two families living next
23 door to each other in the same town in the State of
24 California, one family headed by a single caretaker
25 relative, three minor children are in the home, and each

1 child is determined to be eligible for AFDC as being
2 deprived of support and care of one of that person's
3 parents, and let's assume for the sake of argument that
4 the children and the caretaker are all financially needy.

5 The -- in one household there's a single mother
6 and her three children. In that household, under Federal
7 law and under State law, there's only one assistance unit,
8 a four-person assistance unit because the caretaker is
9 also eligible for AFDC, and in California, currently that
10 four-person assistance unit would receive a maximum grant
11 of \$723.

12 The other household right next door, single
13 mother, one child, takes in two grandchildren. Her eldest
14 daughter has died, or is -- has abandoned the children.
15 In that household, there are two assistance units.
16 Initially, there are two assistance units, one made up of
17 the mother and her child, the other made up of the two
18 grandchildren. California's rule simply provides that in
19 that instance where there are two assistance units, one
20 relative caretaker, that the assistance units be combined.

21 If the assistance units are combined, that
22 family receives the same maximum aid payment as does the
23 first family, \$723 a month, irrespective of whether that's
24 determined to be an adequate amount for purposes of
25 support or not. That's really not the issue here. The

1 issue is, we have two families that are similarly sized
2 and essentially similarly situated, a single caretaker and
3 three minor children.

4 If there are -- if the State's rule cannot be
5 enforced and we have to have two assistance units in that
6 family, then the State has to pay out \$980 to that second
7 family because there are two two-person assistance units,
8 each of which receive, under current California law, a
9 maximum aid payment of \$490.

10 Obviously, the reason for the assistance unit
11 rule, the combination-of-assistance unit rule that we have
12 suggested, is that the State sees this as a way of
13 treating families who are similarly sized the same, and it
14 also saves money. There's no debate about that. It does
15 save money for the State of California.

16 The -- I would like to address briefly, because
17 I'd like to reserve some time for rebuttal, the -- our
18 rule is different from the family filing unit rule, which
19 is the Federal rule that mandates a nuclear family, the
20 children, the brothers and sisters, parents, step-parents
21 and -- not step-parents, excuse me. I misspoke -- the
22 parents and natural children or adopted children of that
23 family be considered together.

24 That in a sense, Congress in a sense took the
25 option away from recipients to exclude persons from the

1 assistance units that may have income that would
2 disqualify them or would disqualify the family, or result
3 in less benefits for the family. That rule forces
4 individuals into an assistance unit, and Congress can do
5 that. Congress can say, irrespective of the availability-
6 of-income principle in the regulations, we're going to
7 require that these individuals be together in an
8 assistance unit.

9 California's rule doesn't force anybody to apply
10 for AFDC. California's rule simply says, if you're going
11 to apply for AFDC, and under the circumstances of the rule
12 a single caretaker relative, all those individuals in the
13 household must be considered, their needs and resources
14 must be considered together.

15 So we're really not -- and what we're really
16 looking at then is whether the Federal regulations in some
17 way have prohibited that, and we submit that they do not,
18 that the regulations only come into play after the
19 assistance unit is formed to determine whether or not the
20 individual is -- has income and resources that are
21 available to that individual such that they would be
22 deemed available to the rest of the assistance unit.

23 I would like to reserve the remainder of my
24 time.

25 QUESTION: Very well, Mr. Eckhart.

1 Mr. Engelmayer.

2 ORAL ARGUMENT OF PAUL A. ENGELMAYER

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONERS

5 MR. ENGELMAYER: Mr. Chief Justice, and may it
6 please the Court:

7 Our position is that filing rules such as
8 California's are consistent with the regulations governing
9 the AFDC program, and that is the longstanding view of the
10 Secretary of Health & Human Services.

11 California's rule simply ensures that single
12 caretaker families with the same number of dependent
13 children and the same financial resources receive the same
14 amount of aid, otherwise, as my cocounsel has observed,
15 there would be a disparity of aid simply between two
16 families, simply because the children in one family happen
17 to be siblings and the children in the other were not.
18 Eliminating that disparity was, in our view, one of a
19 number of permissible ways that California had to allocate
20 its finite AFDC resources.

21 Under this Court's decisions in Dandridge and in
22 Jefferson, the State alternatively could have put a flat
23 ceiling on the family grant regardless of the number of
24 children in the unit, in the family, and it alternatively
25 could have reduced across the board the level of benefits.

1 California's judgment was that the approach it's
2 taken was the most fair one, and under the Social Security
3 Act, it was California's prerogative to balance those
4 equities.

5 The -- as for the availabilities rule, the
6 availability regulations, those address a different
7 situation entirely. They forbid a State from imputing
8 income either to a dependent child or a group of dependent
9 children from an outside source unless that outside source
10 has a legal duty to provide that support. They do not
11 prevent a State from assuming that children under the care
12 of the same caretaker will share amongst themselves.
13 That's clear both from the --

14 QUESTION: I take it one of the dependents is
15 not the outside source.

16 MR. ENGELMAYER: That's absolutely right,
17 Justice Kennedy.

18 QUESTION: Do the regulations make that clear?

19 MR. ENGELMAYER: I think they do. The
20 regulations are printed on pages 30 through 32 of the
21 petition appendix, and I think the dispositive language is
22 as follows: the regulations forbid a State from
23 including -- from attributing income to somebody because
24 either they are -- attributing income from a person
25 because they are either present in the same household or

1 included in the same family.

2 But California has a different basis for
3 grouping children together, and that is that in addition
4 to being included in the same household and present in the
5 same family, those children are also claiming AFDC with
6 the same caretaker. In other words, there's a different
7 triggering criterion here.

8 That's clear, for example, on page -- on
9 appendix 30, the regulation there. They refer to -- it
10 refers to support, for the support of the assistance unit,
11 making it implicitly clear that it is support from outside
12 of the group of people claiming aid.

13 I think in this respect the rule simply is
14 drawing -- what California has done is simply drawing on a
15 broader premise in the act, which is that family members
16 share. That was reflected in this Court's decision in
17 Bowen with regard to child support payments, where the
18 Court noted that the possibility that one child's use
19 of -- the use of funds earmarked for one child solely for
20 the selfish benefit of that one child is really more of a
21 theoretical than a practical --

22 QUESTION: Well, on page 30 I think that may be
23 the thrust of the regulation, but --

24 QUESTION: Page 30 of what?

25 QUESTION: Of the appendix, the appendix to the

1 petition for the writ of certiorari.

2 The phrase is "nonlegally responsible
3 individual." Why isn't the nephew who is in the unit and
4 who has the money, why isn't he a nonlegally responsible
5 individual? Suppose that his money is in a court-ordered
6 guardianship account because it's a tort claim not
7 available to him until he's 18? You would attribute that
8 money to the unit, I take it.

9 MR. ENGELMAYER: There are two answers to that,
10 Justice Kennedy --

11 QUESTION: Why isn't he a nonlegally responsible
12 individual?

13 MR. ENGELMAYER: He is a nonlegally responsible
14 individual, but he's being included with the other child
15 not solely because of his presence in the household, but
16 rather because, in addition to being in the household, he
17 has claimed AFDC with the same caretaker.

18 California is not simply saying that any nephew
19 or uncle in the household, regardless of whether they've
20 claimed aid, has that person's income attributed to
21 those --

22 QUESTION: I see, so it's the word "solely" that
23 it --

24 MR. ENGELMAYER: Or it's -- or presence in the
25 household. It's not simply presence in the household.

1 California could not, in our view, under the availability
2 regulations require that income be attributed from
3 somebody purely because they lived in the same house, even
4 if there was some --

5 QUESTION: So the difference, then, is between
6 presence in the household and, I take it, membership in
7 the unit.

8 MR. ENGELMAYER: Or, more practically, the fact
9 that that person is having aid claimed for themselves
10 under the auspices of the same caretaker.

11 QUESTION: Except California's attorney here
12 today says that someone can't opt out of the assistance
13 unit.

14 MR. ENGELMAYER: Justice O'Connor, we disagree
15 with that. Our position with regard to the lump sum rule
16 is as follows: that 602(a)(17) of the statute does
17 prohibit the assistance unit from claiming money for the
18 period of time determined by dividing the lump sum by the
19 standard of need, however many months that might be.

20 However, we believe that a person can opt out
21 both beforehand, if they anticipate the receipt of money,
22 or afterwards, either by physically leaving the household
23 or withdrawing their application in subsequent months for
24 AFDC.

25 I think otherwise you do have a problem of

1 unavailability in this respect: if the premise of the
2 rules here is -- of the availability rules is that the
3 inclusion in the household is not enough, once somebody
4 has simply said in an emancipatory -- in a way in which
5 they're essentially announcing their emancipation, I no
6 longer belong to this assistance unit, I am not longer
7 under the presence -- under the auspices of this
8 caretaker, it then becomes simply a matter of that
9 person's income being attributed purely because of their
10 presence in the household, so we would think there's a
11 problem. At the same time --

12 QUESTION: And you think California can't have a
13 different rule?

14 MR. ENGELMAYER: We don't think so, Justice
15 O'Connor. That -- we do, however, feel that that is not
16 presented by this case. It is a facial challenge. None
17 of the plaintiffs have alleged that they anticipate to
18 receive lump sum payments. To the extent --

19 QUESTION: I thought California's rule was, he
20 can pull out, but that the time at which the attribution
21 is determined and the drawdown is computed is the time at
22 which he received the entitlement to that money, so even
23 if he does get out afterwards, you have fixed the rule for
24 drawdown of that lump sum payment.

25 MR. ENGELMAYER: Justice Scalia, I think you've

1 correctly interpreted the way California applies --

2 QUESTION: And you disagree with that
3 interpretation?

4 MR. ENGELMAYER: We disagree with that. We
5 believe that there should be an opportunity to opt out for
6 those people not required by Federal law --

7 QUESTION: Not only to opt out, but to remove
8 the drawdown requirements from the rest of the unit.

9 MR. ENGELMAYER: That's right. I think it
10 simply would be a matter of --

11 QUESTION: After winning the lottery?

12 MR. ENGELMAYER: After winning the lottery for
13 successive AFDC periods, which are months. I think --
14 because otherwise you really are truly saying of the
15 nephew who is no longer claiming AFDC, purely because
16 you're present in the same household, we are going to
17 block your cousins, if you will, from receiving aid. I
18 think that does implicate the same policy concerns as the
19 availability rule, and the language of it would seem
20 squarely to speak to that issue.

21 QUESTION: It would apply to a child, too, or
22 just a nephew?

23 MR. ENGELMAYER: Well, if you're -- by child you
24 mean a direct offspring --

25 QUESTION: Yes, direct offspring.

1 MR. ENGELMAYER: Well, direct offspring, if you
2 have two siblings, then --

3 QUESTION: It's not family-friendly, if it's
4 encouraging kids who win the lottery to leave home.

5 MR. ENGELMAYER: Not to leave home --

6 QUESTION: I mean --

7 MR. ENGELMAYER: In fact, that's -- our view is
8 that the person need not leave home, but simply in this
9 next month not have AFDC claimed for themselves.

10 I think it is important --

11 QUESTION: But that would not be the case if
12 what the person got in a lump sum wasn't enough to take
13 that person off AFDC, so they would still -- then the
14 income would be attributed to everyone in the unit.

15 MR. ENGELMAYER: For that -- for that next
16 month, that's absolutely right. Now, of course, if a
17 particular child was anticipating -- if a family realized
18 that a child in the unit was going to be receiving a
19 decent amount of money that was not disregarded under the
20 act in subsequent months, such as to reduce the family's
21 old grant, California's rule permits the family not to
22 claim aid for that child in subsequent months, Justice
23 Ginsburg, and so as a result there is flexibility here.

24 All California is simply saying is, if you do
25 actually elect to claim AFDC with the same caretaker, you

1 should be grouped together much as you would be if you
2 were siblings.

3 I think in that regard it's very important just
4 to emphasize the limited impact of this rule. It doesn't
5 force anybody to apply to AFDC. Congress went further by
6 requiring the inclusion of immediate family. The State
7 here has simply said, only if you apply must you be
8 included.

9 In the second respect, I think the concerns that
10 the respondents have raised about the attribution of
11 outside income are somewhat overblown. Section
12 602(a)(8)(A) of the statute provides that the earned
13 income of any child claiming AFDC while still a student is
14 100-percent disregarded in order to ensure that there is
15 some remaining incentive for that person to continue to
16 work. In all likelihood, that's going to be the
17 overwhelming amount majority of cases where outside income
18 is being brought into the unit by a child in that unit.

19 I'd like to address briefly the court of appeals
20 rationale here. They equated the caretaker with the man
21 in the house, so-called, from King v. Smith on the grounds
22 that neither might be legally responsible under State law
23 for particular children, such as a niece or a nephew.
24 That was wrong for several reasons.

25 First of all, it's the statute, not the filing

1 rule, which puts the caretaker, an extended family member,
2 in the role of caretaker. That's in section 606(a), which
3 defines the caretaker to include aunts, uncles, nieces,
4 nephews, cousins. As a result, a rule that simply
5 consolidates two assistance units gives --

6 QUESTION: Thank you, Mr. Engelmayer.

7 Ms. Meiss, we'll hear from you.

8 ORAL ARGUMENT OF KATHERINE MEISS

9 ON BEHALF OF THE RESPONDENTS

10 MS. MEISS: Mr. Chief Justice, may it please the
11 Court:

12 The State argues that its consolidation rule is
13 a valid way to save money. We do not dispute that States
14 may, in their AFDC's plans, take into account economies of
15 scale in an effort to save money. However, California has
16 quite simply chosen the wrong method.

17 Although States do have discretion in setting up
18 AFDC, that discretion is limited by congressional action,
19 the regulations of HHS, and the decisions of this Court.
20 One such limit is that in counting income and resources,
21 the States may only count income and resources that are
22 actually available, in determining the grant and payment
23 amount, and to which an individual has a legal
24 entitlement. For the most part, the State follows this
25 principle in formulating assistance units.

1 Let me explain a little bit about how the system
2 works. If I were to take in my orphan nephew, the State
3 would pay to me a full grant of \$299 a month, and it does
4 that despite the fact that I have income of my own
5 ineligible for AFDC. The State does that because one of
6 the goals of the statute is to encourage the care of
7 children in the homes of their relatives, and also because
8 I have no legal obligation to support that child.

9 Similarly, as the State admits, if two adult
10 sisters live together, both of whom were poor, both of
11 whom had children and required AFDC, the State again would
12 pay two full grants and would set up two separate
13 assistance units, and similarly, they do this because
14 there is no legal duty to support.

15 But when it comes to the poorest people and the
16 neediest people, the State stops following this general
17 rule and forces consolidation and doesn't pay a full
18 grant. Sweeping the whole family into the assistance unit
19 is important, as counsel has noted, because once in, all
20 of the income and resources count.

21 QUESTION: The rule only applies if the
22 caretaker is also applying for assistance --

23 MS. MEISS: The consolidated --

24 QUESTION: -- is that the point?

25 MS. MEISS: -- assistance unit rule?

1 QUESTION: Uh-huh.

2 MS. MEISS: No. The rule applies whether the
3 caretaker in -- California's rule applies whether the
4 caretaker is applying or not, so in my example of the two
5 sisters, to go back to that example, and the -- let's say
6 the second sister died, the caretaker relative would be
7 the first sister on AFDC. She would be on AFDC with her
8 child, and the second unit, which they would try to
9 consolidate together, would be the orphan nephew.

10 QUESTION: So what's wrong?

11 MS. MEISS: So what's wrong is that when they
12 take that step, when California does that, what it does
13 is, it actually looks at the situation and says, we have
14 two assistance units.

15 It doesn't start out by saying there's one
16 assistance unit. It says, we have two, an assistance unit
17 of the caretaker relative and the child, and her child,
18 and an assistance unit made up of the orphan nephew, and
19 then it combines those assistance units, but since it
20 starts with two assistance units, it's clear what it's
21 doing is presuming that there's income that's being shared
22 between those assistance units, and when it does that, it
23 violates the plain language of the availability
24 regulations at issue in this case.

25 QUESTION: How does the -- it sounded to me like

1 a compromise, like the two nephews and the two children
2 are there. Okay, that's four, and there's the sister, and
3 now -- so there's one adult and there are the four
4 children.

5 MS. MEISS: Uh-huh.

6 QUESTION: So am I right, it seems to say, look,
7 for purposes of what the grant size is, we're going to
8 give you as if it were four regular children. That's --
9 we're going to treat them the same.

10 For purposes of attributing the income of this
11 adult, it can be attributed to her two real children, but
12 it can't be attributed to the nieces and nephews. Now, is
13 that right?

14 MS. MEISS: That's incorrect.

15 QUESTION: All right. So if both of those are
16 right, that doesn't sound illogical. It sounds as if it's
17 a kind of compromise: we'll treat them as one family for
18 the purposes of how much the grant is, but we'll treat
19 them as two families when we try to do the attribution,
20 the reason being that we want to encourage the aunt to
21 take in the other two.

22 MS. MEISS: But in fact that's not what is
23 happening here, and the Solicitor General's assertion that
24 with lump sum income they would allow people to simply opt
25 out is not found in any regulation or policy and is

1 clearly contrary to California's practice.

2 QUESTION: But what's wrong -- what have I said
3 that -- I'm trying to understand it. What's wrong with
4 the interpretation of the statute that I just suggested?

5 MS. MEISS: As I understand your interpretation,
6 you're suggesting that the State would only attribute the
7 caretaker's income to her children, but it doesn't just do
8 that. It also attributes her income to the nephews --

9 QUESTION: Oh --

10 MS. MEISS: -- and the other -- the nonsiblings,
11 the cousin, and what's wrong with that is that in doing so
12 they violate the plain language of the three Federal
13 availability regulations at issue in this case. Those
14 regulations prohibit the State from reducing or otherwise
15 prorating the grant to the family based on the presence in
16 the home of some other --

17 QUESTION: Ms. Meiss, you're --

18 MS. MEISS: -- nonresponsible individual.

19 QUESTION: You're always up against a hard
20 argument when you say, it violates the plain meaning, and
21 these are regulations of the HHS. They interpret them
22 differently. Twenty-eight States interpret them
23 differently. Some courts have interpreted them
24 differently, and yet you say there is only one plain
25 meaning. Are the rest of the people unreasonable, who

1 have interpreted it another way?

2 MS. MEISS: If you look at the plain language of
3 the regulations, they're clear. The language says, you
4 can't reduce or otherwise prorate based on the presence of
5 somebody in the household. It says you can't --

6 QUESTION: It doesn't say -- it says solely.

7 QUESTION: -- solely.

8 QUESTION: It says solely.

9 MS. MEISS: But that's exactly what they're
10 doing in this case. They're --

11 QUESTION: Well, but I think if you're going to
12 talk about the regulation you have to quote it accurately.

13 MS. MEISS: Mm-hmm.

14 QUESTION: It says solely, and I think that's a
15 very important word.

16 MS. MEISS: But that is the reason they're doing
17 it, Justice -- they are attributing the income because
18 these individuals live together in the same household.
19 For instance --

20 QUESTION: No, they are doing it because he's a
21 member of the unit receiving payments.

22 MS. MEISS: No, they're -- they start out --
23 this is --

24 QUESTION: I mean, that's their argument, but --

25 MS. MEISS: They're argument is -- they start

1 out, though, with two units, and then they combine those
2 two units, and it's when they take that step of combining
3 those two units that they're violating the availability
4 principle. The availability principles applies when those
5 first units were set up, but --

6 QUESTION: These are very, kind of, intricate,
7 technical provisions. I think we ordinarily defer heavily
8 to the Secretary's interpretation, and you're simply
9 saying her interpretation is flatly wrong.

10 MS. MEISS: Well, we're saying her
11 interpretation ignores the language of the regulations
12 which forbid proration or reduction, forbid assuming a
13 contribution of support, and say that you can't count as
14 available income when somebody doesn't have the legal
15 ability to make it available. That's the plain language
16 of the regulations.

17 But the drafters of the regulations went beyond
18 that and said that in addition, we mean what we say, and
19 they said that you can't force a contribution of support,
20 and that's precisely what the agency does in this case,
21 and what California does.

22 QUESTION: Why do we owe no deference to the
23 agency's interpretation of its own regulations?

24 MS. MEISS: Under the case Thomas Jefferson
25 University and other precedents of this Court, if an

1 agency's interpretation is contrary to the plain language
2 of the regulations and is inconsistent with the
3 contemporaneous interpretation that the drafters gave to
4 those regulations, then no deference should be owed to
5 them. Secondly --

6 QUESTION: Where is your evidence of a
7 contemporaneous interpretation different from the one the
8 Secretary is now advancing?

9 MS. MEISS: What they're now saying is that they
10 can force a contribution of support, and that they can
11 join these two assistance units, and if you look at
12 42 Federal Register, which we cite on page 22 of our
13 brief, it's very clear that the Secretary at that time
14 said there was no basis, no legal basis for forcing a
15 contribution of support, but that's precisely what they're
16 doing in this case is, they're forcing that contribution.

17 QUESTION: Did the Secretary ever take a
18 position that States could not combine the two units, as
19 California and 28 States do? Did the Secretary -- I
20 thought the Secretary had always accepted that that was
21 the States' option.

22 MS. MEISS: The Secretary has said that States
23 may do this. There's no dispute about that. However,
24 this current interpretation is contrary to the plain
25 language of the regulations, and the contemporaneous

1 construction put on those regulations by the drafters.

2 In addition, the -- if you look at the second
3 regulation, 233.90, which is the substitute parent
4 regulation, it says that in establishing financial
5 eligibility and grant determinations, in determining the
6 amount of the assistant payment, the income only of the
7 parent may be considered available, and that is a very
8 clear statement.

9 What the State does here is, we're not only
10 going to sweep in the parent's income, but we're going to
11 sweep in the income of the nephew, and that's clearly
12 forbidden under this.

13 And furthermore, no deference is owed, because
14 what the agency has basically done is rewrite this
15 regulation. It's amending or changing this regulation.
16 It's not really --

17 QUESTION: They're arguing that it's susceptible
18 to its reading. You are saying there's only one way to
19 read this regulation, and the Secretary is saying that
20 it's reasonable to read it our way.

21 MS. MEISS: We're saying that -- that's correct.
22 In essence, that's correct. We're saying the --

23 QUESTION: By your argument --

24 MS. MEISS: -- language of the regulations is
25 clear.

1 QUESTION: -- you have to say that this language
2 is clear and leaves no room for interpretation, even
3 though the Secretary responsible for the regulation has
4 argued otherwise. You are, in effect, asking us to reject
5 the Secretary's own interpretation and the interpretation
6 of the courts that have disagreed with the Ninth Circuit.

7 MS. MEISS: That's correct, Your Honor, we are
8 doing that. We're saying that the language is clear that
9 this kind of imputation of income -- it's the automatic
10 assumption that's forbidden in this case, and that in
11 addition to the language, the contemporaneous construction
12 put on those words by the drafters of this also suggest
13 that this -- that the HHS's position is incorrect.

14 But in addition, we're also arguing that the
15 regula -- that what they've done in adopting the action
16 transmittal is they've adopted a statement that they
17 should have -- it's basically an amendment to the
18 regulation, it changes the three availability regulations,
19 and that should have been done pursuant to the
20 Administrative Procedures Act, and for both of those
21 reasons, this is not a deference, and we feel the Court is
22 in a -- is basically -- the issue for the Court is, do
23 these regulations forbid this practice, that's correct.

24 QUESTION: We have given deference to the
25 Secretary's position even in cases where her position is

1 not stated in a rulemaking.

2 MS. MEISS: Yes, that's correct, but in this
3 case -- in this case, the plain language of the
4 regulations is -- we believe is very clear. It says, you
5 can't do this kind of automatic assumption.

6 We wouldn't have an argument with the State if
7 the State were to say, are you willing to contribute your
8 money? The State doesn't do that. The State says, simply
9 because you all live together, we're going to throw you
10 all into this one assistance unit, and essentially what
11 the State is doing is undermining the decisions of this
12 Court as well.

13 In King v. Smith and in Lewis v. Martin the
14 Court said -- in Lewis v. Martin in particular, the Court
15 said that a step-parent could -- income could not be used,
16 if they didn't owe a legal duty of support, to decrease
17 the grant to a needy child, and what the State is trying
18 to do is through the back door do the same thing by
19 saying, we'll sweep this -- they could, under their
20 rationale, sweep the step-parent in, and that clearly
21 would undermine the decision of this Court.

22 And the State wants to save money, but Congress
23 has said when States want to save money in shared housing
24 situations such as this, there is a way to do it.

25 QUESTION: Well, it isn't necessarily saving

1 money. I mean, saving it. It's redistributing it. To
2 the extent it -- more money goes to these units, less
3 money will go to other units. I mean, it isn't clear that
4 this is a net saving in welfare expenditures, is it?

5 MS. MEISS: Well, the State says that the reason
6 they do it, Your Honor, is to save money.

7 QUESTION: Well, it does save money with respect
8 to this unit, but if it didn't save that money, every unit
9 would have to get that much less.

10 MS. MEISS: Not necessarily. I mean, the --

11 QUESTION: Not necessarily no, either. I mean,
12 you really --

13 MS. MEISS: That's correct.

14 QUESTION: You really can't say the money's
15 coming out of welfare. You just don't know where it's
16 going.

17 MS. MEISS: But the State admits its purpose
18 here is to save money, and that they feel they're allowed
19 to do that because of the economies of scale that exist in
20 shared living situations.

21 And Congress has said, when States want to take
22 into those kinds of, those economies of scale in a shared
23 living situation where you have more than one assistance
24 unit -- which is the case here, as the State admits it
25 starts with two units -- the way to do that is pursuant to

1 a valid proration plan under 42 U.S.C. 612, and in that
2 plan, Congress set out a way for States to achieve these
3 same savings, or similar savings, to the one they achieve
4 through the consolidated assistance unit rule.

5 But what the State is doing here is essentially
6 an end run around the proration mechanism, the proration
7 statute, and trying to do an end run around the three
8 availability regulations at issue in this case.

9 QUESTION: And it is the three availability
10 regulations and not any statutory peg that you -- on which
11 you base your case?

12 MS. MEISS: Well, we also base our case, Your
13 Honor, on the court's interpretation of the language of
14 what income and resources can be attributed to an
15 individual under 602(a)(7)(A), which is the basis on which
16 the State says it gets its discretion to define assistance
17 units, so we also have that statutory claim, and we also
18 make -- as interpreted by this Court and the regulations
19 basically flesh out or make concrete the availability
20 principle and how it's used in this.

21 And we also say, we also claim that the policy
22 or the rule, rather, violates the intent of the AFDC
23 statute, which is to encourage the care of children in the
24 homes of their needy relatives, which is to provide for
25 maximum self-support, and to strengthen family life, and

1 that California's rule has the exact opposite effect.

2 That is, it destabilizes the lives of the
3 families the program is designed to assist, it decreases
4 the amount of money available to these families, and it
5 creates such a disincentive, as you can see from the facts
6 of one of our plaintiffs, and will for many families, that
7 they will be forced to give up these needy orphaned and
8 abandoned nephews and nieces and place them in a foster
9 care system, and house them away from their home.

10 QUESTION: But what do you do with the matching
11 inequities that the State presents to us if we were to
12 adopt your view of this -- they have it set out
13 graphically on page 39 of their brief -- and the
14 comparison that they make among units that they assert are
15 similarly situated?

16 MS. MEISS: Well, in one sense it's a false
17 issue, because the issue in this case is not just the
18 number of individuals in the home, but the legal
19 responsibility that those individuals owe to one another.

20 The State admits, for instance, that it will pay
21 two caretaker relatives -- in the example that I used in
22 the beginning, two sisters who are living together on
23 AFDC, it will be pay them two full grants, so if you had a
24 situation where you had one caretaker, a sister with two
25 children and another sister with one children, and you had

1 a unit of five, they would pay a higher amount to that
2 group of people.

3 So it's not the number of people that's
4 important, but it's their legal responsibility to one
5 another, and the State is basically saying that they want
6 to get at the fact that there are only five people here,
7 and five people -- with five people there's an economies
8 of scale, and --

9 QUESTION: Well, I gather the State is also
10 saying, and I guess the Government is agreeing, that if
11 California wanted to, it could consider that to be a
12 single unit, too.

13 They've really chosen to say, we'll treat it as
14 a single unit when there's one caretaker for everybody,
15 but I suppose their position is that they -- the
16 definition of the assistant unit is up to them, and even
17 though there are two caretakers, they could, where the two
18 caretakers choose to live together with the children, they
19 could call that a single unit, too. Isn't that their
20 position, as you understand it?

21 MS. MEISS: No. Their -- if you take their
22 position to its logical conclusion, they could sweep
23 anybody into the unit, Justice Scalia, but they -- in
24 their regulations, and their rule is that they don't do
25 that, and they don't do that because there's no legal

1 responsibility owed between the two sisters in those -- in
2 that situation, and there's no legal obligation between
3 the cousins.

4 There's --

5 QUESTION: And there's not between a brother and
6 sister, but that's by statute, I suppose.

7 MS. MEISS: That's correct. The Congress has
8 decided that in certain instances we will presume that
9 there's -- we're going to allow this kind of automatic
10 assumption that income is available, and one of those is
11 the mandatory filing unit rule, which says that nuclear
12 families can be forced to share their income and
13 resources, but this is not a nuclear family we're dealing
14 with, and so it's distinguishable.

15 There's one thing that I would like to correct
16 that's in the reply brief of the petitioners, and that is
17 a footnote on page 15 -- on page 15, footnote 5, which
18 suggests that the harmful effect or the invidious effect
19 of this regulation is muted somewhat by the fact that, as
20 they say, there's a new action transmittal which would
21 allow the extended family members in this case to get
22 foster care, and I just want to clarify that that's
23 incorrect.

24 What that action transmittal merely said was
25 that when a parent is taking care of foster children, that

1 that parent is themselves eligible for regular AFDC for
2 their own needs, and that's a change from prior law, but
3 it doesn't -- it has no effect on this case, because by
4 definition the children in this case are not eligible for
5 foster care.

6 If these children were, they would have applied
7 for it, because they would get so much more money from
8 foster care, but by definition these children don't meet
9 the complicated linkage requirements for foster care, and
10 therefore the -- and I want to point that out because the
11 effect of the policy is to create such economic insecurity
12 in families that those individuals, as happened in the
13 Moore family here, are forced to give those children up to
14 foster care.

15 QUESTION: Is there any empirical information?
16 I take it underlying their theory is that a man or a woman
17 who's looking after four children will probably treat
18 them, and life will go on roughly the same, whether those
19 four children are four direct children, or two children
20 and two nephews, and on its face you'd think -- I don't
21 know the details and facts, but probably that's by and
22 large true.

23 At least, they argue that it is, or at least the
24 State could find that. Is there any information that
25 suggests it isn't true?

1 MS. MEISS: Well, as a practical matter, the
2 children that we're dealing with are children who are
3 taken in by these relatives, are by definition abandoned
4 or orphaned, they're victims of abuse or neglect, and so
5 most of them come to the households with greater needs,
6 with far greater needs, emotional needs, and many of them
7 are simply dropped off, as happened in one of our
8 plaintiffs' case, merely with the clothes on their back
9 and nothing else.

10 And so there is a difference between a regular
11 nuclear family, I think, and this kind of a family, and
12 that is, in a nuclear family one generally plans the
13 family. They know when they're going to have children.
14 They will hang onto the crib, if they're still having
15 youngsters. But in this kind of a situation, the
16 individual is -- you didn't plan for this. Somebody's
17 died --

18 QUESTION: Well, in this situation, can the
19 caretaker be eligible under the foster care program, and
20 apply to be --

21 MS. MEISS: No.

22 QUESTION: -- the foster parent?

23 MS. MEISS: No, because --

24 QUESTION: Why not?

25 MS. MEISS: Because by definition the children

1 in this situation do not meet the foster care definition.

2 QUESTION: Why?

3 MS. MEISS: Because the foster care program
4 requires that children be removed from a home at a certain
5 point in time, that they be -- that they go through the
6 court system in order to have foster care placed, and
7 these children aren't.

8 These are children who simply came into the home
9 of a relative because somebody died. They voluntarily
10 claimed their -- basically that's --

11 QUESTION: And the caretaker couldn't go to the
12 court and say, please do what's necessary --

13 MS. MEISS: No. These caretakers and these
14 children can't by definition do that. That's why they're
15 receiving regular AFDC.

16 QUESTION: When you say "by definition,"
17 Ms. Meiss, is that by State law or Federal law, Federal
18 regulation?

19 MS. MEISS: It's both State and Federal law.

20 QUESTION: The foster --

21 MS. MEISS: And what I mean is that -- is
22 that -- yes, the foster care system is again a joint --
23 what I mean is that these individual children don't
24 qualify. They don't meet these eligibility criteria that
25 I was referring to, so their family is stuck with the

1 regular AFDC grant, and they cannot qualify for foster
2 care.

3 I'd like to talk for a minute about what it is
4 that actually occurs when the State combines the unit and
5 what actually happens to individuals, and in a minute get
6 back to this question of lump sum income.

7 First, when they combine the units, it violates
8 the regulations at issue because in so doing it
9 consolidates the unit. It reduces the grant based on the
10 fact that this individual lives with the other folks,
11 despite that there's no legal obligation of support
12 between those individuals, and perhaps the best example is
13 from our named plaintiffs, the Edwards household.

14 The Edwards household, when the child first came
15 in they mistakenly under their rule paid, but correctly
16 under our interpretation, two different units, two
17 different grants, and had two assistance units, so the
18 Edwards grant, when they consolidated, went for the
19 household from \$901 a month to \$630 a month.

20 The child, the needy niece who came into the new
21 household, her grant went from \$341 a month to \$210 a
22 month, so what they're doing in that situation is actually
23 reducing the amount of assistance payment paid to the
24 household and to the individual child based on the
25 presence of the family members and the household together,

1 even though there's no legal duty to support.

2 Secondly, in violation of the substitute parent
3 regulation, which says that you can only presume and make
4 this automatic assumption that the income of a parent is
5 going to be available, they assume that all people in the
6 household will contribute to one another, and here the
7 example that was asked -- I think it was Justice Ginsburg
8 asked about, if you were -- if the Solicitor General
9 were -- allowed the family to remove themselves from a
10 lump sum income, they couldn't do that if outside income
11 came into the home, and that's correct.

12 So in that situation, when somebody gets, for
13 instance, Social Security death benefits, which are
14 probably the largest single source of outside income in
15 the AFDC program, if an individual such as the child of
16 the caretaker relative were to receive those death
17 benefits, then not only would that -- would the -- would
18 they be attributable to the parent, the mother, and to the
19 child, but they're also attributable to the nephew, and
20 that point there's nothing --

21 QUESTION: Well, I thought the Solicitor
22 General's attorney said that person could opt out of the
23 unit.

24 MS. MEISS: That's simply incorrect, and I don't
25 think that's what he meant to say, because that is not the

1 rule. The rule is very clear that if the income comes
2 into the home, and you're in the assistance unit, then it
3 has to be attributed between the individuals within that
4 assistance unit, so once that assistance -- and this is
5 why this is important. Once that assistance unit is
6 combined, then all the income and resources that come into
7 that home are attributable to the -- to everybody in the
8 assistance unit.

9 QUESTION: I thought he could opt out of the
10 assistance unit.

11 MS. MEISS: Who could?

12 QUESTION: The one who gets the money.

13 MS. MEISS: Well, he can't if --

14 QUESTION: He can't opt out of the assistance
15 unit?

16 MS. MEISS: No. If it's the child who gets the
17 money, the child who gets the death benefit, the child of
18 the mother can't opt out of the assistance unit without
19 taking both the mother --

20 QUESTION: But the nephew could.

21 MS. MEISS: -- and the child off -- no.

22 QUESTION: If it's a nephew, the nephew can opt
23 out --

24 MS. MEISS: No.

25 QUESTION: -- according to the SG.

1 MS. MEISS: If it's the nephew that gets the
2 outside income? But that's incor -- that's correct in the
3 future, the nephew might be able to opt out.

4 But in our situation, for instance, we have
5 groups of multiple nephews, so for instance, you have two
6 sets of cousins, two cousins each, okay. If this set of
7 cousins has no income but this set of cousins over here,
8 one of the two gets outside income, that one cousin cannot
9 opt out, because that cousin is brought in because of his
10 sibling being in there, and so they're all combined, so
11 they would have to stay in the assistance unit.

12 The only way you could not count that income is
13 if both of those cousins opted out, and the problem with
14 that is that these children are needy, and need AFDC.
15 It's slightly disingenuous, I think, for the State to
16 suggest that these needy orphans or nephews need not
17 apply, or aren't mandated to apply for AFDC. They really
18 have no choice. I mean, they're in need. They're the
19 poorest of the poor, and so it's not true that you could
20 opt out in that case.

21 And similarly, as I said, it's news to me today
22 that with the lump sum income rule, it's a similar kind of
23 thing if the individual got a lottery ticket, as you
24 suggested, although the largest kind of lump sum is
25 typically Social Security death benefits awards. If the

1 individual got Social Security death benefit awards, and
2 that death benefit came to the child of the parent again,
3 the nephew could not opt out.

4 I mean, that's what the rule says now, and I'm
5 surprised by what the SG is saying. I think what the
6 Solicitor General maybe was suggesting is that if it only
7 came to the nephew, then the nephew could opt out, but
8 since the parent and the child have to be in the
9 assistance unit, they're not going to be able to do that.

10 QUESTION: Well, I guess we don't really have
11 the opt-out situation and the lump-sum question before us
12 here.

13 MS. MEISS: Well, as a matter of fact, the class
14 definition says that any individual -- it's true none of
15 our named plaintiffs received a lump-sum income, or
16 outside income, but the class definition is, any
17 individual affected by this policy, and at the time this
18 was submitted to the district court we had a joint
19 stipulation of undisputed facts, and one of those facts
20 was that outside income would be treated in the same way,
21 so I do believe the matter was before the district court.

22 To summarize, one of the basic principles in the
23 AFDC program is that only income that is actually
24 available to somebody or that they have a legal
25 entitlement to can be counted in determining the grant and

1 assistance payment amount. Congress has recognized this
2 principle, and has created certain exceptions to it. For
3 instance, the mandatory filing unit rule, which we talked
4 about earlier, 42 U.S.C. (a)(38) is one of those
5 exceptions in which it said nuclear family members must be
6 on aid together.

7 Similarly, the proration plan pursuant to 42
8 U.S.C. 612, which says that you can assume economies of
9 scale and which we say is the method which should be used
10 in this case, since you have a shared living situation
11 with more than one assistance unit. That's an exception
12 to the availability regulation, and there are other
13 similar ones, such as Congress has now allowed the deeming
14 of step-parent income.

15 But Congress has not created an exception in
16 this case, and as the State admits, it starts with two
17 assistance units and then it combines those assistance
18 units. That combination of assistance units is contrary
19 to the plain language of the regulations, and it's
20 contrary to the contemporaneous construction given those
21 regulations by their drafters when they were adopted.

22 HHS's interpretation there also ignores the
23 plain language and the contemporaneous construction and
24 was not adopted pursuant to the APA. Therefore, no
25 deference is owed to that interpretation.

1 QUESTION: Thank you, Ms. Meiss.

2 MS. MEISS: Thank you, Your Honor.

3 QUESTION: Mr. Eckhart, you have 5 minutes
4 remaining.

5 REBUTTAL ARGUMENT OF DENNIS PAUL ECKHART

6 ON BEHALF OF THE PETITIONERS

7 MR. ECKHART: Thank you, Mr. Chief Justice.

8 I would like to make a couple of points in
9 rebuttal.

10 First of all, the -- on the last point regarding
11 the combination of assistance units being a -- somehow the
12 boogie man in this case, the combination of assistance
13 units as -- the State's right to combine assistance units
14 in this instance has always been the interpretation of the
15 Department of Health & Human Services and its predecessor,
16 the Department of Health, Education & Welfare. That's
17 always been its interpretation.

18 It's true that the Department or the Secretary
19 only addressed the question of the availability
20 regulations in the most recent action transmittal, the one
21 that's reproduced in the appendix to the petition for
22 certiorari that was issued in 1994. It's true that the
23 Secretary only addressed the availability regulations at
24 that point.

25 However, the Secretary is presumed to know what

1 its -- what his or her regulations are, and the earlier
2 interpretations, which were interpretations -- not changes
3 in the rules, but interpretations, which do not need to be
4 adopted pursuant to the Administrative Procedures Act,
5 were -- are consistent, that the State has the right to
6 combine assistance units in this instance.

7 And I believe that there -- although the current
8 California rule says that only an assistance unit where
9 there's a single caretaker relative and children who are
10 not siblings of one another, or two caretakers of separate
11 assistance units who are married to each other or have a
12 child in common, if those are the only situations the
13 State has currently addressed, that does not mean that the
14 State could not address the further situation which was
15 discussed at some length by respondents' counsel, that if
16 there were two sisters living in the same house, each with
17 their own children, again we're talking about individuals
18 either one of whom could be the caretaker for her sister's
19 children, for her nieces, for her nephews.

20 In that instance, I believe it's perfectly
21 consistent with the understanding of who a caretaker can
22 be, that the State can combine those assistance units in
23 that case.

24 Secondly, I think the -- in the arguments about
25 the --

1 QUESTION: You're saying you can only combine
2 units where they are only a single caretaker, or at least
3 where everyone in the unit could be under a single
4 caretaker?

5 MR. ECKHART: I believe that is -- that would be
6 the limitation of --

7 QUESTION: Where does that limitation come from?
8 Why couldn't they --

9 MR. ECKHART: The limitation --

10 QUESTION: -- create other units as well?

11 MR. ECKHART: Well, the limitation does come
12 from the availability rules, that if you were dealing with
13 a situation of a man in the house, the mother's boyfriend,
14 who's not the father of the children, who's not applying
15 for AFDC, I think that's a limitation. That would
16 prevent -- the availability rules would prevent the State
17 from imputing the income of that person, that person who
18 is not in the assistance unit who just happens to be
19 living in the house.

20 QUESTION: So the availability rules do have
21 something to do with the formation of units. I thought it
22 was your position that the two are quite separate.

23 MR. ECKHART: Well, to the extent that all the
24 persons -- well, let me clarify. To the extent that all
25 the persons in the household are applying for AFDC, we

1 would take the position in general that they could be put
2 in the same assistance unit.

3 However, if you had an assistance unit, two
4 groups of people living in the same house, one headed by a
5 woman who is not related to another woman, also living in
6 the house, they each have their own children, we could not
7 combine assistance units in that instance, because then
8 there is absolutely no -- the two sisters --

9 QUESTION: I don't see why --

10 MR. ECKHART: The two women are not related.

11 QUESTION: -- unless you accept the theory that
12 the respondents here have been urging, that there is a
13 limitation that springs --

14 MR. ECKHART: Well, there's a limitation, Your
15 Honor --

16 QUESTION: -- from the attribution rule.

17 MR. ECKHART: There's a limitation that arises
18 out of 606(a) of 42 U.S.C., which lists those individuals
19 who can be caretaker relatives. Caretaker relatives have
20 to be related to the children that they are caring for.
21 In other words, when you have two sisters that are related
22 by means of an aunt, niece or nephew relationship, so that
23 is a difference.

24 I would like to address a question that Justice
25 Kennedy asked, that you asked earlier about the guardian,

1 the -- assuming that there was a receipt of some money by
2 an individual that was in a blocked guardianship account.

3 The family, under the lump sum rules as they're
4 currently constituted, does have the option of trying to
5 prove to the welfare department that the money is not
6 available, not actually available. They could present
7 that, and if it's not -- has nothing to do with -- it's
8 not something that's under the control of that family why
9 it's unavailable, they could go ahead and try to prove
10 that, and if it's proved to the satisfaction of the
11 welfare department they would not consider that income as
12 available to the rest of the members of the assistance
13 unit.

14 The -- I think if we look at the history of the
15 regulations in addition to their plain language, I think
16 it's very clear, if you look at this Court's decisions in
17 King and Van Lare and Lewis from the late sixties, early
18 seventies --

19 CHIEF JUSTICE REHNQUIST: Thank you,
20 Mr. Eckhart.

21 MR. ECKHART: Thank you, Your Honor.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

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

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:

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL., Petitioners v. VERNA EDWARDS, ETC., ET AL.

CASE NO.:93-1883

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)