

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ELOISE ANDERSON, DIRECTOR, CALIFORNIA
DEPARTMENT OF SOCIAL SERVICES, ET AL.,
Petitioners v. DESHAWN GREEN, DEBBY
VENTURELLA AND DIANA P. BERTOLLT, ETC.

CASE NO: 94-197

PLACE: Washington, D.C.

DATE: Tuesday, January 17, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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ELOISE ANDERSON, DIRECTOR, :
CALIFORNIA DEPARTMENT OF :
SOCIAL SERVICES, ET AL., :
Petitioners :
v. : No. 94-197
DESHAWN GREEN, DEBBY VENTURELLA :
AND DIANA P. BERTOLLT, ETC. :

- - - - - X
Washington, D.C.
Tuesday, January 17, 1995

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

THEODORE GARELIS, ESQ., Deputy Attorney General of
California, Sacramento, California; on behalf of the
Petitioners.
KATHLEEN M. SULLIVAN, ESQ., Stanford, California; on
behalf of the Respondents.

C O N T E N T S

| | | |
|----|------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | THEODORE GARELIS, ESQ. | |
| 4 | On behalf of the Petitioners | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | KATHLEEN M. SULLIVAN, ESQ. | |
| 7 | On behalf of the Respondents | 30 |
| 8 | | |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-197, Eloise Anderson v. DeShawn Green, et
5 al.

6 Mr. Garelis. Is that the correct pronunciation
7 of your name?

8 MR. GARELIS: Garelis, Your Honor.

9 CHIEF JUSTICE REHNQUIST: Garelis. Mr. Garelis.

10 ORAL ARGUMENT OF THEODORE GARELIS

11 ON BEHALF OF THE PETITIONERS

12 MR. GARELIS: Thank you. Mr. Chief Justice and
13 may it please the Court:

14 California is seeking review of the summary
15 affirmance by the Ninth Circuit of an order granting a
16 preliminary injunction. That order was made by the
17 district court in this matter. California asks this Court
18 to reverse the judgment of the Ninth Circuit and remand
19 this case with instructions that the preliminary
20 injunction be dissolved.

21 QUESTION: Would that make any difference?

22 MR. GARELIS: Yes, it would.

23 QUESTION: What would you do if the injunction
24 were dissolved? Would you enforce the statute by
25 restricting the benefits at the Oklahoma level?

1 MR. GARELIS: At the moment, Your Honor, we
2 could not do so. As noted in our brief, California is
3 restricted from implementing the statute until a Federal
4 waiver, which was invalidated by the Ninth Circuit in a
5 related Ninth Circuit case, is restored.

6 QUESTION: Why is that, Mr. Garelis?

7 MR. GARELIS: Because State law, the statute
8 here in question, absolutely requires, by its own terms,
9 that California have that waiver.

10 QUESTION: Well, I realize it says it has to
11 have the waiver. I'm looking on page 3 of your brief --

12 MR. GARELIS: Yes.

13 QUESTION: -- which sets forth -- it says, this
14 section shall not become operative until the date of
15 approval by the United States Secretary of HHS. I take it
16 at one time the Secretary did approve --

17 MR. GARELIS: Yes, Your Honor, the Secretary --

18 QUESTION: -- and so the thing became operative
19 then.

20 MR. GARELIS: Yes, it did.

21 QUESTION: Well, the statute doesn't say
22 anything about becoming nonoperative if the approval is
23 revoked, does it?

24 MR. GARELIS: Well, the -- no, it does not, that
25 is true, but we hav always --

1 QUESTION: Has it been construed by the
2 California courts on that point?

3 MR. GARELIS: No, I do not believe it has, but
4 we've always taken that position.

5 QUESTION: Isn't Federal law relevant, too? I
6 mean, you couldn't put -- could you put this law into
7 effect without the Federal approval, as a matter of
8 Federal law?

9 MR. GARELIS: As a matter of Federal law, yes,
10 we could.

11 QUESTION: You'd just lose a lot of Federal
12 money.

13 MR. GARELIS: If the operative actions were
14 taken by the Secretary of Health & Human Services to
15 restrict our funding on California's Medi-Cal program,
16 yes, that's --

17 QUESTION: Would California put a law, this law
18 into effect without the matching Federal dollars?

19 MR. GARELIS: Yes, it could.

20 QUESTION: It could, theoretically?

21 MR. GARELIS: It could theoretically, but it
22 would run the risk of losing a good deal of Federal
23 matching funds.

24 QUESTION: But your submission to us is that you
25 would not implement it without the waiver?

1 MR. GARELIS: No, we would not -- we have always
2 interpreted this section as a mandate by the California
3 legislature that we would not implement this particular
4 statute without the waiver.

5 QUESTION: Have you applied for the, or
6 reapplied for the waiver?

7 MR. GARELIS: Yes, we have. I believe it was on
8 August 25th my client submitted an augmented waiver
9 request to the Secretary of Health & Human Services.

10 QUESTION: Is there some indication that the
11 Department has denied waivers submitted from other States
12 that contain this provision?

13 MR. GARELIS: I believe the Secretary has done
14 that recently, yes, Your Honor.

15 QUESTION: If the cases had come up in a
16 different order -- suppose you had been -- the Beno case
17 had come up first, so you -- the Federal permission was
18 not there, and then these plaintiffs, the Green
19 plaintiffs, had begun this lawsuit, wouldn't you be taking
20 the position that their lawsuit was premature because you
21 in effect had no law in effect?

22 MR. GARELIS: Yes, we would.

23 QUESTION: So isn't that really where we are
24 now, that this suit has in effect not become moot, but
25 become not ripe?

1 MR. GARELIS: No, I don't believe so, Your
2 Honor, because the case -- the questions here are
3 persistent. The case in -- the questions of
4 constitutional validity of our statute are certainly --

5 QUESTION: But if you say that you don't have
6 any law in force at the moment other than the old law
7 under which the newcomer gets the full benefits, then
8 you're asking us to decide a hypothetical case about a law
9 that is not yet in being.

10 MR. GARELIS: Well, the law was -- the approval
11 of the waiver was obtained. The statute did come into
12 effect.

13 The statute was then -- the district court by
14 means of the preliminary injunction refused to allow us to
15 implement the statute, then the next year -- and that was
16 all in 1993, in 199 -- in late '92, excuse me, and then in
17 early '94, earlier this year, while we were still in the
18 process of appealing the preliminary injunction to the
19 Ninth Circuit, the Ninth Circuit in the Beno case did,
20 indeed, take away the waiver.

21 It invalidated the Federal waiver, and what that
22 did was under State law made it so that, once the
23 constitutionality of this statute is settled in the --
24 California's favor, then we -- until we get the waiver
25 back, we could not enforce the statute.

1 QUESTION: And in effect you have no law of the
2 kind that the plaintiff is challenging. The law in force
3 in California now is the law that you pay full benefits.

4 MR. GARELIS: Well, we did have the approval,
5 and as soon as we get the waiver back we would be able to
6 implement it, but it is true at the moment we would --

7 QUESTION: And is there any reasonable basis to
8 predict that you'll get it back when the Federal
9 Government has turned down such applications by other
10 States with the identical law?

11 MR. GARELIS: Well, perhaps one of the reasons
12 why the Secretary has turned down such waivers is because
13 of lack of guidance from this Court that our statute
14 should, indeed, survive a constitutional challenge.

15 QUESTION: But we don't sit to give advice to
16 the Secretary or anyone else. We sit to decide cases
17 involving law that is in force --

18 MR. GARELIS: Well --

19 QUESTION: -- and now the law that you're trying
20 to defend is not yet law in being.

21 MR. GARELIS: Well, the Ninth Circuit
22 invalidation was on procedural grounds. It was on a
23 preliminary injunction. It was all very preliminary, so
24 it certainly has not been adjudicated on the merits.

25 QUESTION: The invalidation of the waiver,

1 you're talking about.

2 MR. GARELIS: Yes, that is true.

3 QUESTION: If you get your approval back,
4 there's no risk of there being an evasion of review on the
5 analogy with the mootness flaw, is there?

6 MR. GARELIS: No, but this is -- what we're
7 arguing is that this is a continuing question.

8 QUESTION: Well, it may be a continuing
9 question, but right -- but it is not a continuous question
10 right at the moment. It seemingly is not a practical one,
11 and if it does become a real one again, it can be reviewed
12 then, can it not? There's no risk of evasion of review.

13 MR. GARELIS: Well, no, but I believe it would
14 be wise policy to have this question settled. Many States
15 are currently trying to enforce such statutes. Many
16 States are very interested in implementing such statutes.
17 The question of the constitutionality will be there. It
18 is in front of this Court at this time. We will all have
19 to come back and revisit this again. The Court has
20 granted certiorari. If we get the waiver back, and the
21 Court does not address it at this time, we will be back
22 here. I'm sure that plaintiffs will challenge the statute
23 again on exactly the same grounds.

24 QUESTION: Well, if I could ask one more
25 question about the administrative process --

1 MR. GARELIS: Yes.

2 QUESTION: Is there an indication in the
3 administrative record that the reason the agency has
4 denied the waiver is because of its interpretation of the
5 constitutional minimum standards that it has required, or
6 is it also plausible to surmise, or to interpret the
7 agency's action as being simply the agency's determination
8 that this is somehow inequitable as a matter of welfare
9 policy?

10 MR. GARELIS: I really cannot answer that
11 question. I don't know why the -- what grounds the
12 Secretary used --

13 QUESTION: Not clear from the record.

14 MR. GARELIS: The waiver we have was approved,
15 and it was invalidated by the Ninth Circuit, so --

16 QUESTION: Mr. Garelis, are you still litigating
17 the invalidation of the earlier waiver? Is that still in
18 litigation?

19 MR. GARELIS: The invalidation of the previous
20 waiver was accomplished by the Ninth Circuit. We did not
21 petition for a writ of certiorari in that case. The order
22 of the Ninth Circuit was that the matter be remanded with
23 instructions that an augmented waiver request be presented
24 to the Secretary of Health & Human Services --

25 QUESTION: So that is done. That is completed

1 and final.

2 MR. GARELIS: Well, we have --

3 QUESTION: The elimination of the prior waiver.

4 MR. GARELIS: It is currently invalidated by
5 means of the preliminary injunction.

6 QUESTION: Not currently, it is finally
7 invalidated. Once and for all, it's done, right? Not
8 currently, it is finally invalidated.

9 MR. GARELIS: That was only under a preliminary
10 injunc --

11 QUESTION: I don't care what it was under. Is
12 it final, is all I'm asking?

13 MR. GARELIS: I would say no, it is not.

14 QUESTION: Why is it --

15 MR. GARELIS: Because --

16 QUESTION: You haven't appealed it, but it's not
17 final?

18 MR. GARELIS: It was invalidated by a
19 preliminary injunction, and --

20 QUESTION: What was the --

21 MR. GARELIS: -- we can still address the
22 merits.

23 QUESTION: What was the basis on which it was
24 invalidated?

25 MR. GARELIS: It was invalidated on the basis

1 that the Secretary of Health & Human Services had not
2 adequately considered the opposition of -- of those who
3 were opposed to the statute at that time, that the
4 administrative record did not reflect an adequate review
5 of the opposition.

6 QUESTION: And what was the dis -- that it was
7 to be sent back to the Secretary?

8 MR. GARELIS: The instructions were that -- I
9 can't quote them exactly, but it was that the matter was
10 to be remanded to the district court with instructions
11 that it be remanded to the Secretary for additional
12 consideration. That's as close a quote as I can --

13 QUESTION: I really don't understand why the
14 State has enough interest to bring this case here but did
15 not have enough interest to continue to litigate that
16 issue, to just roll over and say, the waiver's dead, and
17 we'll let it die.

18 MR. GARELIS: I believe California thought that
19 the best we would be able to do is simply to -- is get a
20 remand. We did ask the Ninth Circuit to rehear the matter
21 so to -- as to order a remand without an invalidation.

22 QUESTION: Well, wouldn't the Secretary have had
23 to have chosen, because the injunction -- it was the
24 Secretary's action that was invalidated in that Beno case,
25 wasn't it?

1 MR. GARELIS: Yes, it was.

2 QUESTION: And so the Secretary didn't have
3 adequate notice and comment, and so -- and the Secretary
4 chose not to appeal.

5 MR. GARELIS: Yes, that's true.

6 QUESTION: So --

7 MR. GARELIS: But we also would have had -- we
8 also had the ability to petition for writ of certiorari, I
9 believe, because we were a party to that action also, and
10 it was our waiver.

11 QUESTION: But if the Secretary says, they said
12 I didn't have adequate notice and comment, maybe I didn't,
13 you would be in a pretty -- you'd --

14 MR. GARELIS: It was hard to argue it when the
15 Secretary was not going to join with us.

16 QUESTION: But is that issue still under
17 litigation -- that issue? Are you still claiming, in that
18 proceeding, that the Secretary did have adequate notice
19 and comment?

20 MR. GARELIS: Yes, I believe that's still under
21 litigation, because the decision --

22 QUESTION: It is?

23 MR. GARELIS: -- was only made on a --

24 QUESTION: I realize it was made on a pre --
25 this is a preliminary injunction.

1 MR. GARELIS: Yes.

2 QUESTION: Many decisions are made on
3 preliminary injunction. What I want to know is whether
4 California is saying still in that proceeding, by the way,
5 the Secretary did have adequate notice and comment, and we
6 insist that this matter still be litigated, and we're
7 going to appeal it again.

8 MR. GARELIS: Well, we're going to have to wait
9 and see what the Secretary's resolution is, and we have no
10 other plans of litigating except for that.

11 California statute is a benefit reduction
12 statute, and therefore California submits that the
13 constitutionality of the statute should therefore be
14 determined as with any other benefit reduction statute,
15 that is, by rational basis, because our statute does not
16 impact either a suspect class, does not penalize a
17 fundamental right, therefore the proper analysis is the
18 rational basis.

19 Here at issue the benefit reduction statute is
20 implemented by a two-tier system of payment levels. This
21 Court has previously approved two-tier systems in the
22 context of domestic relations, and it has certainly
23 approved them in the context of out-of-State tuition
24 differentials. We believe that this rationale is on point
25 here.

1 Furthermore, even the Shapiro case acknowledges
2 that not all waiting periods are penalties. Others have
3 tried to distinguish these cases on the grounds that
4 neither domestic relations nor public higher education
5 involves the necessities of life, and that public
6 assistance does. However, we would submit that this
7 misstates the issues.

8 A benefit reduction is not necessarily limiting
9 the necessities of life. If so, we believe Dandridge,
10 your result in Dandridge would be inexplicable.

11 QUESTION: If your theory is right, how long
12 could California maintain this differential? It's now
13 for -- in the statute that was, and that perhaps will be
14 again, it was -- what, 1 year?

15 MR. GARELIS: Yes, that is true, Your Honor.

16 QUESTION: Could they do it for 2 years?

17 MR. GARELIS: We would maintain that we could do
18 it for a year. We have not addressed the issue of more
19 than that, but certainly a year is a temporary amount, and
20 we would submit a year. We would submit at some point,
21 I'm sure, above a year, that would not be temporary any
22 more, but we have not taken a position on what that higher
23 amount would be.

24 QUESTION: On your reasoning, could California
25 also adopt a law that would say, if you move into

1 California from a State that has a higher income tax --
2 that might be hard to imagine, but maybe there is one --

3 (Laughter.)

4 QUESTION: -- that has higher taxes, then you
5 pay -- you pay to us the higher taxes till you've been
6 here for a year?

7 MR. GARELIS: We believe California could do so
8 with a rational basis, and we believe that that statute
9 would be adjudicated under the rational basis standard.

10 QUESTION: Why isn't the right to travel
11 implicated here?

12 MR. GARELIS: The right to travel is not
13 implicated to the extent necessary to become a penalty,
14 because the statute is very carefully drafted to maintain
15 the recipient's level of receipt of benefits.

16 QUESTION: Is it possible that the cost of
17 living is higher in California than, let's say, Louisiana?

18 MR. GARELIS: That may be, but --

19 QUESTION: Does California's scheme make any
20 adjustment for the higher cost of living?

21 MR. GARELIS: No, it does not.

22 QUESTION: Well, so in a very real sense the new
23 residents are worse off in real terms than they would have
24 been due to the cost of living increase, aren't they?

25 MR. GARELIS: Well --

1 QUESTION: It's not as though they are just as
2 well off, in real terms, as if they stayed in Louisiana.

3 MR. GARELIS: We would submit, Your Honor, that
4 an examination of real terms goes against the AFDC program
5 as it is set up. The AFDC program requires that each
6 State set up a standard of need, and then the State sets
7 up its benefit payments, and the two yardsticks don't have
8 to meet each other at all. In fact, California's benefit
9 levels are under the --

10 QUESTION: Well, but for purposes of knowing
11 whether there's a violation of any constitutional
12 protection given to the right to travel and establish a
13 new residence in a new State, perhaps it does permit that
14 kind of an inquiry.

15 MR. GARELIS: Well, when a person comes from a
16 State with a higher benefit level to California, that
17 person is restricted to the California benefit level even
18 in the absence of our statute, and that is constitutional,
19 so there's no reason why a person coming from a State with
20 a lower --

21 QUESTION: But there, of course, California's
22 extending the same level of benefits both to long-term
23 residents and to new residents, and in these circumstances
24 California has a two-level benefit scheme, a lower level
25 for new residents and a higher level for residents of some

1 duration.

2 MR. GARELIS: That is true, but --

3 QUESTION: That's the difference.

4 MR. GARELIS: Yes, but when you're talking about
5 analyzing whether or not there's a penalty, you're looking
6 at a strict scrutiny analysis. Since there's no penalty,
7 we would submit, you evaluate our two-tier system under
8 the same rational basis standard that you would do any
9 equal protection challenge to a statute.

10 QUESTION: Well, I was just suggesting in real
11 terms there may well be a penalty.

12 MR. GARELIS: Okay, but you see there's nothing
13 to guarantee that that person had a benefit level in the
14 prior State that met the necessities of life in that
15 State, either. The necessities of life really don't have
16 a whole lot to do with the setting of the benefit levels,
17 and this Court acknowledged this in Dandridge.

18 QUESTION: Could you tell me the -- you answered
19 Justice Ginsburg that perhaps 2 years would be an
20 impermissible waiting period, if I interpret your answer
21 correctly. What is the legal standard that you apply to
22 determine that the 2-years or 3-year waiting period might
23 be inappropriate? Does it become a penalty at that time?
24 Was that your reasoning, or --

25 MR. GARELIS: Well, if I did suggest that a

1 certain amount -- I did so in error, and I apologize. Any
2 amount above a year is not at issue in our statute. We
3 believe a year is permissible, based upon the Sosner case,
4 which allowed a year -- I believe a year's residency.

5 QUESTION: Well, perhaps I was reading too much
6 into your answer, and you didn't make that concession, but
7 let me ask you, would a 3-year waiting period raise
8 problems that this statute doesn't?

9 MR. GARELIS: I believe amounts over a year
10 would raise more problems. It would raise progressively
11 more problems.

12 QUESTION: Why is that, if it's not a penalty,
13 it's not a penalty?

14 QUESTION: Under what constitutional standard?

15 QUESTION: Yes.

16 MR. GARELIS: Pardon?

17 QUESTION: Under what constitutional standard?
18 What constitutional rule would be violated?

19 MR. GARELIS: Well, it would be a penalty at
20 that point. It would impact more on a right to travel at
21 that point.

22 QUESTION: So the longer the disability, the
23 more it impinges on the right to travel?

24 MR. GARELIS: I think we would have to admit
25 that, yes.

1 QUESTION: And -- but then you are conceding
2 that an infringement or a burden on the right of travel is
3 impermissible?

4 MR. GARELIS: No. Almost anything would have an
5 effect on the right to travel. The question is, is that
6 effect of a magnitude such as to constitute a penalty?
7 California submits that our statute does not constitute
8 that magnitude.

9 QUESTION: So you posit -- you take as your
10 opening premise that there is a right to travel --

11 MR. GARELIS: Yes, we do.

12 QUESTION: -- and there cannot be a penalty
13 imposed upon that.

14 MR. GARELIS: Yes, we do.

15 QUESTION: So we're just arguing here about
16 whether or not that's a penalty?

17 MR. GARELIS: What we're arguing is, is our --
18 is the effect of our statute on the right to travel of a
19 magnitude to constitute an impermissible penalty?

20 QUESTION: It's a penalty, you're saying, but
21 not enough of a -- you're acknowledging it's a little bit
22 of a penalty, because otherwise multiplying it by three,
23 three times zero is zero. You must be acknowledging it's
24 at least a little bit of a penalty, but you're saying it's
25 not enough to run afoul of the Constitution, is that

1 right?

2 MR. GARELIS: What -- the way I would interpret
3 it, Your Honor, is that we possibly have some deterrence
4 effect on travel. We have crafted our statute very
5 carefully to avoid that, but to the extent we have some
6 deterrence effect on travel, it is not of a magnitude to
7 constitute a penalty, and we would look at the tuition
8 cases, we would look at --

9 QUESTION: But is the length of the period the
10 measure of the deterrence on travel? Supposing that the
11 payment differential is the difference between \$400 and
12 \$395, and you say, 3 years of that differential would be
13 unconstitutional, but 1 year of the difference between
14 \$400 and \$75 would not be a penalty. Is that your point?

15 MR. GARELIS: I would -- I believe I would agree
16 with the thrust of your question, Your Honor. You have to
17 look at our entire statute.

18 What we are offering is the same amount of
19 benefit levels as the recipients had in their prior State
20 of residence. We are offering, through related programs,
21 increases in the ability of a recipient to earn more money
22 and keep -- a working recipient to earn more money and
23 keep more of that income. We are also allowing a person
24 to work more hours than is customarily allowed and still
25 keep their benefit levels.

1 QUESTION: Well, you're suggesting that the
2 magnitude of the differential and real impact on the
3 person's livelihood is what we should look at, rather than
4 just the length of time.

5 MR. GARELIS: Yes, I am.

6 QUESTION: But then, if it were true that -- in
7 one State there was a very dramatic difference of -- I
8 can't remember the figures, but there was, from one of
9 these States there was a rather dramatic difference in the
10 amount of money. Would that perhaps justify a different
11 result as to people coming from some States as opposed to
12 people coming from other States?

13 MR. GARELIS: No, I don't believe it would,
14 because --

15 QUESTION: No matter how dramatic the
16 difference?

17 MR. GARELIS: Because the amount, Your Honor,
18 that was received by that recipient in the prior State is
19 a constitutionally permissible amount.

20 QUESTION: In that State.

21 MR. GARELIS: In that State, and that should
22 carry over to California --

23 QUESTION: But --

24 MR. GARELIS: -- because, as I stated before,
25 any concepts of standard of need are not necessarily

1 related to the setting of benefit levels. The setting of
2 benefit levels --

3 QUESTION: No, but your test before, you were
4 suggesting that at a certain point the burden becomes a
5 penalty and interferes with the right to travel, and I'm a
6 little puzzled as to why the magnitude of the differential
7 is irrelevant to that analysis, but the period of time is
8 critical.

9 MR. GARELIS: Well, let me try to restate it for
10 a second, because I don't believe I stated it clearly
11 enough.

12 I believe one has to look at the entire statute
13 as a whole, and the statute in effect has many provisions,
14 because there are related provisions -- the program has
15 many provisions. It has increases in some benefits, and
16 it has decreases --

17 QUESTION: Would you statute be constitutional
18 if it did not have those offsetting benefits in it?
19 Supposing all you had was this one naked differential in
20 the amount of the benefits for 1 year, and it's a couple
21 of hundred dollars difference a month, and that's the only
22 difference between the two States.

23 MR. GARELIS: We would submit that because
24 California is offering a constitutionally permissible
25 amount to all recipients, because eligibility is not in

1 question, as it is in a lot of other cases that have come
2 before this Court, for those reasons, our statute is
3 constitutionally permissible and does not constitute a
4 penalty on the right to travel.

5 QUESTION: I'm not quite sure whether you're
6 saying yes or no to my question. If there were no
7 difference between your statute -- between your treatment
8 of people, recent arrivals and old-time residents, other
9 than a rather substantial difference in the dollar
10 payments that they got each month for 1 year, no matter
11 how dramatic the difference, would that be permissible,
12 without any offsetting --

13 MR. GARELIS: I would answer yes with one
14 proviso, that I understand that your question includes
15 something that is in our statute, which is that the
16 recipients are receiving a constitutionally permissible
17 amount in their State of prior residence --

18 QUESTION: What does that mean?

19 MR. GARELIS: -- yes.

20 QUESTION: Does the Constitution require welfare
21 benefits? Have we said that? What case did we say --

22 MR. GARELIS: No, it does not, but certainly --

23 QUESTION: Well, what is this phrase you're
24 coming up with, they are receiving a constitutionally
25 permissible amount? Where does that come from? Where do

1 I look to to find out what a constitutionally permissible
2 amount of welfare benefits is?

3 MR. GARELIS: Because those are the amounts that
4 are being paid in the prior State of residence that have
5 not been challenged.

6 QUESTION: Zero is a constitutionally
7 permissible amount, isn't it?

8 MR. GARELIS: In effect, Your Honor, you are
9 correct, because --

10 QUESTION: So then why drag in this
11 constitutionally permissible amount? I mean, because --

12 MR. GARELIS: Because what is being challenged
13 here --

14 QUESTION: -- it doesn't exist.

15 MR. GARELIS: -- is whether or not California's
16 amount is constitutionally permissible --

17 QUESTION: Right.

18 MR. GARELIS: And I want to encourage this Court
19 to look at the fact that the amount that we are offering
20 people is constitutionally permissible.

21 QUESTION: But again, where do you get the term,
22 consti -- the reason that -- the constitutional challenge
23 here isn't to the amount in the abstract but to the fact
24 that you pay California residents a different amount than
25 you pay arrivals who have been there less than a year, and

1 that constitutional challenge is based on the right to
2 travel, but certainly you're not suggesting that someone
3 back in Nevada, or wherever they may have come from, could
4 challenge their welfare payment on the grounds that it
5 wasn't enough to live on?

6 MR. GARELIS: No, but what we are offering
7 people is an amount that is -- is offered by another State
8 but is not challengeable and, therefore, California ought
9 to be able to offer a like amount to that person
10 temporarily.

11 QUESTION: Is there any scheme like this
12 where -- I know some differences between residents and
13 nonresidents, but here the variation is -- depends on the
14 State you come from, so if you come from New York to
15 California, you're better off than if you come from
16 Louisiana to California.

17 Is there any other scheme that takes the
18 newcomer and treats that newcomer differently, instead of
19 just making a distinction between old-timers and
20 newcomers, makes a distinction between newcomers from New
21 York, treated rather well, newcomers from Mississippi
22 treated not so well?

23 MR. GARELIS: I don't believe so, unless you
24 look at the circumstance of someone coming from a State
25 with a higher benefit level coming to California and

1 getting a decrease in their benefit level, which is not
2 challengeable.

3 QUESTION: Isn't the reason for your concession
4 to Justice Kennedy on the 3 years that when you take the
5 3-year hypothesis there would be no basis upon which you
6 could reasonably argue that the individual was not a
7 resident and I presume, indeed, a citizen of the State of
8 California, so that it would follow that the correct
9 comparison was between that particular citizen or resident
10 and all other California residents, and once that
11 comparison is made, there is a penalty? Isn't that the
12 reason for your concession?

13 MR. GARELIS: No. I still don't believe that
14 I've made a concession that 3 years would be a penalty.
15 I'm saying that there would be some amount at some point
16 which, when added to all other factors, would imply a
17 penalty.

18 QUESTION: Well, it might not be a penalty, but
19 I -- didn't you concede that under the 3-year hypothesis
20 you would have some constitutional problem?

21 MR. GARELIS: I believe what I said, we would
22 have -- under a factual record it would be more of a
23 problem, yes, but California has --

24 QUESTION: Why would it be more of a problem?

25 MR. GARELIS: Because --

1 QUESTION: If the distinction does not turn on
2 obviousness of residence, or some such thing as that, why
3 is it more of a problem?

4 MR. GARELIS: It would be more of a problem
5 because that person would be getting a rate that was not
6 the California full-level rate --

7 QUESTION: So what?

8 MR. GARELIS: -- for a longer period of time.

9 QUESTION: So what, on your theory? If, in
10 fact, the -- it is not required to compare California
11 residents with California residents, why should the
12 differential be any more problematic after 3 years than
13 after 1?

14 MR. GARELIS: Because, as with any factual
15 distinction, it might be more problematic. We are not
16 conceding --

17 QUESTION: But I don't understand why.
18 Problematic assumes that there is some reason for its
19 being problematic, and I don't know what your reason is.

20 MR. GARELIS: Because I believe in order to
21 establish whether there's a penalty, one ought to compare
22 what one received in one State compared to what one is
23 getting in the other State, what one is getting in the old
24 State --

25 QUESTION: Well, let me ask you the question

1 directly which keeps coming up. Why is it inappropriate,
2 on your theory, to compare one California resident, i.e.,
3 the one who has moved in from Oklahoma with intention to
4 stay, with all other California residents for the purpose
5 of determining, on whatever level of scrutiny, whether
6 there's an equal protection problem? Why is that an
7 inappropriate comparison?

8 MR. GARELIS: I don't believe that's an
9 inappropriate comparison. I believe that at that point
10 you use a rational basis standard, and examine whether
11 California has a rational basis for the two different
12 tiers.

13 QUESTION: And your rational basis is saving
14 money?

15 MR. GARELIS: Yes, the rational basis is saving
16 money.

17 QUESTION: If the rational basis is saving
18 money, they say you'd save \$22-1/2 million, about \$1 per
19 recipient, if you cut it across the board. What's the
20 rational basis that instead of cutting it \$1 across the
21 board, you decide to take a separate group of people and
22 cut it by \$400?

23 MR. GARELIS: Because California did many things
24 at that time. It did cut benefit levels, it did raise
25 fees at universities, et cetera, the legislature made the

1 determination of resource allocation, and that is the
2 legislature's prerogative to do so, and I believe this
3 Court in Dandridge acknowledged that fact.

4 QUESTION: Thank you, Mr. Garelis.

5 MR. GARELIS: Thank you.

6 QUESTION: Ms. Sullivan, we'll hear from you.

7 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

8 ON BEHALF OF THE RESPONDENTS

9 MS. SULLIVAN: Mr. Chief Justice and may it
10 please the Court:

11 The California statute is antithetical to
12 fundamental structural principles of our Federal Union.
13 There are no degrees of State citizenship.

14 QUESTION: Well, do you think the issue is ripe?

15 MS. SULLIVAN: No, we do not, Your Honor. We do
16 not think there is a live case or controversy before this
17 Court. The case is moot, or, alternatively, as Justice
18 Ginsburg suggested, whatever case might come to be has not
19 come to be and the case is not yet ripe.

20 QUESTION: And I take it you're willing to
21 follow the consequence of that, which they suggested that
22 you wouldn't, that then you'd go back to square one. The
23 decree would be vacated, the injunction and so forth, and
24 you'd be back at square one, having to bring your case
25 later if that turned out to be necessary.

1 MS. SULLIVAN: That's correct, Justice Breyer.

2 The State concedes that the waiver required to
3 put the statute into effect was invalidated in Beno. It
4 did not appeal to this Court, the Secretary did not appeal
5 to this Court, and the State then resubmitted an augmented
6 waiver, a different waiver. We do not have that statute
7 before us.

8 But if you should reach the merits nonetheless,
9 we urge you to affirm the district court, because the
10 California statute does very much violate the
11 Constitution.

12 QUESTION: Well, we do have a statute before us,
13 and it seems to me it's not at all clear, simply reading
14 the statute, that the State is -- State's argument is
15 correct. It seems to me one could read the statute to say
16 that once the waiver has been given, the statute comes
17 into effect, and it says nothing about later revocation of
18 a waiver, but the fact that the State says the State
19 doesn't plan to do anything, it seems to me, is what makes
20 the case moot or not ripe, rather than the statute.

21 MS. SULLIVAN: That is correct, Mr. Chief
22 Justice. It is the State's concession that it cannot
23 effectuate the statute without the waiver that has been
24 invalidated that puts the case before you.

25 QUESTION: Because it wants Federal money, isn't

1 that right?

2 MS. SULLIVAN: That's correct, Your Honor.

3 QUESTION: And it could put in its own welfare
4 program without Federal dollars, but the likelihood of
5 that is not great?

6 MS. SULLIVAN: Very unlikely, Your Honor. If it
7 ever did with this provision, that would be a different
8 case, which, as you pointed out, is not yet ripe, is not
9 before us.

10 Should you reach the merits, however, the
11 California statute that has been invalidated plainly
12 violates most fundamental structural principles. When a
13 person crosses over the State border from Louisiana or
14 Oklahoma or Mississippi to California and becomes a bona
15 fide resident there, that person is entitled to be treated
16 equally with other citizens of the State of California --

17 QUESTION: I don't read any --

18 MS. SULLIVAN: -- as Justice O'Connor suggested
19 before.

20 QUESTION: Why do you have to put that
21 limitation in, and becomes a bona fide resident? I mean,
22 if there's a freedom to travel, I assume it's freedom to
23 travel whether you choose to become a bona fide resident
24 or not, isn't that right?

25 MS. SULLIVAN: That is correct, Justice

1 Scalia --

2 QUESTION: But that --

3 MS. SULLIVAN: -- you're free to travel, but
4 you're not -- nonresidents are not required to be treated
5 equally in all respects by a State which they are merely
6 visiting, but in a State where one is a citizen, and the
7 Fourteenth Amendment's citizen clause makes us all
8 citizens of the State in which we reside, one is entitled
9 to be equally treated with all other citizens of the State
10 in which we reside.

11 Now, Justice Souter raised the point earlier
12 that perhaps sometimes durational residency requirements
13 might be acceptable in order to test the real bona fides
14 of residency in cases where there's reason to suspect that
15 perhaps someone is coming to a State and not really
16 intending to reside there.

17 QUESTION: Well, we've upheld durational
18 residency requirements for State -- in-State tuition, not
19 just for testing, but simply categorically.

20 MS. SULLIVAN: Your Honor, you've summarily
21 affirmed decisions upholding durational residency
22 requirements for in-State decision --

23 QUESTION: Which are decisions on the merits.

24 MS. SULLIVAN: Correct, Your Honor, but they are
25 entirely different from this case, because as this Court

1 noted in Zobel, as in Vlandis, the reason for making a
2 student wait a year to get the benefits of in-State
3 tuition is that a student is likely to be
4 characteristically transient in a way that no welfare
5 recipient is.

6 A student, unlike a welfare recipient, is likely
7 to come to a State, take the benefit of the low-cost
8 public education, without an intention to remain
9 indefinitely. Bona fide residence turns on an intention
10 to stay in the State to which one has migrated.

11 QUESTION: Well, could a State set up any sort
12 of a time limit and say that you don't become a bona
13 fide -- you cannot become a bona fide resident until
14 you've at least been here 30 days.

15 MS. SULLIVAN: Yes, it could, Your Honor. The
16 States have latitude to set up the terms for bona fide
17 residency, but as the Court --

18 QUESTION: A year is too long, in your view?

19 MS. SULLIVAN: A year is generally too long,
20 unless there is special reason to fear that a certain
21 population is going to come into the State on a transient
22 basis to procure a benefit from that State and then leave.
23 That, after all, was the justification in Sosner for
24 upholding the durational residency requirement for someone
25 seeking a divorce.

1 QUESTION: Am I supposed to take judicial notice
2 that students are more apt to move than welfare
3 recipients? I mean, how do I know that?

4 MS. SULLIVAN: Your Honor, welfare recipients
5 are unlike students or divorce-seekers for several
6 reasons. First, the State here concedes that all the AFDC
7 recipients in this case are bona fide residents of
8 California, and with good reason, because California
9 investigates the bona fides of residents in order to
10 determine whether these persons are eligible for welfare
11 in the first instance.

12 As Justice Scalia suggested for the Court in
13 Smith v. Employment Services, this is a case in which
14 there is already in place a procedure in-State for
15 individualized determinations of eligibility.

16 QUESTION: So I take it at no point in the
17 litigation has the State raised this -- a challenge to the
18 bona fides of the residents?

19 MS. SULLIVAN: That is correct, Justice Souter.
20 Bona fide residence is not at issue in this case. There's
21 no benefit which these AFDC recipients can come into the
22 State and procure and then leave with, such as the degree
23 in the tuition cases or the decree in the divorce cases --

24 QUESTION: Is there --

25 MS. SULLIVAN: -- because the money is spent as

1 soon as it's received.

2 QUESTION: In your view, Ms. Sullivan, is there
3 some Federal rule that determines how we find out whether
4 someone is a bona fide resident?

5 MS. SULLIVAN: No, Your Honor. What we
6 suggest -- that is a matter of State law. What we are
7 suggesting here is that bona fide residency cannot be a
8 justification in this case. The State cannot use the test
9 of bona fide residency as a justification for treating new
10 State citizens differently, which is a presumptive
11 violation of the Constitution.

12 QUESTION: What about the State using -- I
13 understand that we have a general rule about freedom of
14 travel, and a State cannot penalize people for moving into
15 the State, but it seems to me entirely reasonable for a
16 State to object, if it wants -- especially a State that
17 wants to have a generous welfare program, to want to
18 preserve the funds that it's expending in that program by
19 not becoming an attraction to people who move to that
20 State for no reason except to get the increased welfare.

21 It seems to me so reasonable to say, we're being
22 very generous, more generous than most States, but our
23 system will self-destruct if it attracts people from other
24 States. Why shouldn't we make that kind of an exception?

25 And that's what they're trying to do here. I

1 don't -- you know, saving money is not the justification.
2 The justification is, we don't want to attract welfare
3 recipients from other States by our generous benefits.
4 That's what's going on here, but why isn't that
5 reasonable?

6 MS. SULLIVAN: Justice Scalia, if that is the
7 State's justification, the statute is still
8 unconstitutional and unreasonable. That is a --

9 QUESTION: I knew you were going to say that.
10 (Laughter.)

11 MS. SULLIVAN: Let me explain why. First, that
12 is an impermissible end. The mechanism here is de jure
13 facial discrimination against new State citizens.

14 Of course a State may hoard some of its State-
15 created resources as against nonresidents of the State,
16 those who -- the very definition of State sovereignty
17 entails that a State may reserve its resources for its own
18 people, but when someone crosses the border into the State
19 and becomes a citizen of that State, the State may not say
20 to that person, we will now treat you as a second-class
21 citizen.

22 Imagine that a State were to say, well, you've
23 moved from Massachusetts to New Hampshire, New Hampshire
24 doesn't have an income tax, but New Hampshire's going to
25 take your money at the Massachusetts rate.

1 Imagine if a State were to say, well, you've
2 just moved to town, your kids can go to school, you're
3 bona fide residents, but they'll have to go to a special
4 classroom until you've lived here for a year with peeling
5 paint and fewer textbooks.

6 If you called 911 in the new State within the
7 first year, would they say, well, you have to wait an hour
8 for an ambulance because that's how long you had to wait
9 in Mississippi?

10 QUESTION: But they can say you pay a different
11 tax rate. They can say you pay a different tax on your
12 home.

13 MS. SULLIVAN: In Nordlinger v. Hahn, Your
14 Honor? But, Your Honor, that was a case, Justice Stevens
15 in which you did not reach the question whether there was
16 any violation of the right to travel, because the
17 plaintiff in that case had simply moved intrastate from
18 Los Angeles to another place in California.

19 We're arguing here that where there is facial de
20 jure discrimination against new State residents -- that
21 is, those who are defined as a class by virtue of having
22 recently migrated across State lines -- then your concern
23 for the structural principles of the Constitution is
24 triggered as it need not have been in Nordlinger.

25 And, indeed, in other cases, such as Williams v.

1 Vermont, you've said that residents and non -- recent
2 residents may not be treated differently from longer-time
3 residents, even with respect to the assessment of a tax,
4 in that case an excise tax.

5 QUESTION: Well, what if California in this
6 case, Ms. Sullivan, said nobody shall get the California
7 benefits but they'll get lower for 60 days, and it's not
8 to allow us to investigate, but we simply don't recognize
9 anybody as a resident or citizen of California who has not
10 been physically present here for 60 days?

11 MS. SULLIVAN: We would have no objection to
12 that, Your Honor. If the State were asserting, as it does
13 not, that it was testing bona fide residence here by a
14 durational residency requirement, then the principle --

15 QUESTION: Well, it's -- no, it's not testing
16 bona fide residence at all under my hypothesis. The
17 person who has not yet been there 60 days could take the
18 stand after 30 days and say, I left my former domicile, I
19 have no intent to ever leave California, I plan to leave
20 here indefinitely. So as far as conflicts of law, that
21 type of thing, one would meet the traditional residency
22 test, but California says no, that's not enough. Here,
23 it's got to be 60 days.

24 MS. SULLIVAN: Your Honor, we would concede that
25 that is constitutional. A State may not define who is a

1 citizen. A citizen becomes a citizen of the State upon
2 residence, but it may define residency so long as its
3 definition is reasonable. A year is far too long to be
4 reasonable in a case --

5 QUESTION: What is the voting -- the time that
6 one must live in California to register to vote?

7 MS. SULLIVAN: I'm not certain of that, Your
8 Honor. It's certainly less than a year, but it is not
9 inconsistent --

10 QUESTION: Is it your point that in the Chief
11 Justice's example it would be all right provided they gave
12 the person nothing, not just a lesser benefit?

13 MS. SULLIVAN: Yes, Your Honor. If the test is
14 for bona fide residency, or if the test -- if the State is
15 trying to say, we are worried that you're not really here
16 to stay, and so before we share our benefits with you we
17 want to make sure, that would be acceptable, if there was
18 reason to think that this population was in danger of
19 moving out of the State.

20 That is not the case with welfare recipients.
21 It is not the case, as with divorce-seekers in Sosner who
22 might have misrepresented their attachment to the State
23 and then dragged it into collateral attacks on its
24 judgments in other States thereafter. There's nothing the
25 welfare recipient takes with them.

1 QUESTION: Well, why isn't it reasonable to
2 think, if California pays a good deal more in welfare
3 benefits that other States do, that people who are
4 receiving those benefits in other States will be attracted
5 to California?

6 MS. SULLIVAN: Your Honor, there is absolutely
7 no evidence in the record that California's relatively
8 higher grant levels attract poor people at higher rates
9 than they would be attracted otherwise by the prosperity
10 or other features of the State, but even if that were so,
11 you have in the past consistently said that a State may
12 not make itself attractive to insiders but discriminate
13 against newcomers in order to keep an influx of newcomers
14 from coming into the State.

15 You said it in Shapiro, you said it in Maricopa
16 County, it's implicit in Zobel. Had Alaska been permitted
17 to make itself less attractive to newcomers, it could have
18 discriminated in handing out its oil bounties based on the
19 length of residency in the State.

20 But there's good reason for that, as -- there is
21 good reason for saying, we will not inquire into the
22 motives why people move across State lines, and that is
23 because the very principle of the Federal Union, one of
24 political unification, the very principle of enjoying the
25 benefits of Federalism, involved the freedom for people to

1 cross State lines in order to go where their tastes are
2 best satisfied. If they are attracted by better public
3 services, or lower tax rates, or better schools, to moving
4 to another State, this Court has always said in the past
5 that we cannot say they are less deserving because they go
6 to use that public resource.

7 But even if -- even if you were to depart from
8 that line of precedent and say now, for the first time,
9 that if someone crosses State lines in order to use a
10 public service that's better in the new State than they
11 deemed it in the old, this statute would not be narrowly
12 tailored, or even remotely tailored to that goal.

13 This statute, if it's trying to fence out those
14 who come for higher welfare benefits, as the Chief Justice
15 hypothesizes, if it were aimed at that goal, it doesn't
16 fit it.

17 QUESTION: Well, if it's a rational basis test,
18 it doesn't really need tailoring, does it?

19 MS. SULLIVAN: Your Honor, if it's a rational
20 basis test, it must still not serve a forbidden purpose,
21 or it still must be logically related to its distinctions.

22 That is, you have said in *Heller v. Doe* that a
23 statute need not be empirically proven by the State to
24 rest on a rational basis, but surely it remains the case
25 that it must logically relate to the distinction it draws,

1 and there is no logical relationship between the first 12
2 months of residency and welfare-seeking.

3 This statute applies even if one comes to
4 California to start a job, comes, starts working, works
5 for 8 months, and loses one's job, and suddenly and
6 unexpectedly needs to seek AFDC benefits.

7 QUESTION: Well, that's true if you look at it
8 on a purely individualized basis, but there is a rational
9 argument, I suppose, to the effect that California or any
10 State simply cannot afford to provide a generous welfare
11 scheme if the magnet is going to be so great that there
12 are going to be a lot of short-term "transients" taking
13 advantage of it -- I use transient in quotes -- so that in
14 fact the only hope for raising the level for everybody is
15 to do it under circumstances in which the short-term
16 attraction is going to be mitigated, otherwise, nobody can
17 afford it.

18 So that an argument is being made that a good
19 system cannot exist without some kind of limitation like
20 this. That's a rational argument, isn't it? If we're on
21 a rational basis test or if we were starting at square one
22 and construing what is an undue burden on the right to
23 travel, wouldn't that be a relevant argument?

24 MS. SULLIVAN: Justice Souter, you have long
25 said that the purpose you have just described is a

1 forbidden purpose, or an impermissible one.

2 QUESTION: Well, I'm not questioning you about
3 precedent.

4 MS. SULLIVAN: Yes.

5 QUESTION: I'm simply questioning you about, if
6 we were starting at square one, that would qualify as a
7 rational argument, wouldn't it?

8 MS. SULLIVAN: Justice Souter, if you were
9 starting at square one and ignoring the admonition in
10 Shapiro that the goal to fence out needy people is an
11 impermissible one, the statute would still not be
12 logically tailored to that goal.

13 And the reason is that California is able,
14 through its existing individualized investigations of
15 welfare eligibility, to determine, if it wished to, what
16 are the reasons that people come to California.

17 And if it wished to fence out those who have
18 come not to escape being battered, as did the named
19 plaintiffs here, not to rejoin family, as did the named
20 plaintiffs here, not to come for a job, which one
21 unfortunately lost because of structural economic
22 problems, as is often the case these days in California,
23 if someone in the California welfare system determined
24 that one had not come for any of those reasons to become a
25 Californian, but had simply come to get higher benefits

1 because they'd read that they were higher there, then
2 California could screen those people out with no
3 additional expense beyond what it is already incurring
4 through individualized investigations, but the very fact
5 that --

6 QUESTION: You don't concede that that would be
7 constitutional, do you?

8 MS. SULLIVAN: Not at all, Your Honor. We do
9 not concede that would be constitutional, because we think
10 if States can begin to investigate the motives people move
11 in-State, whether it's for better schools or lower taxes
12 or a better way of life --

13 QUESTION: But then we're slipping away from the
14 argument about whether or not this isn't, leaving
15 precedent aside, a rational policy for the State of
16 California, who wants to have an intact, sound welfare
17 program. That's where we began.

18 MS. SULLIVAN: I'm sorry, Your Honor.

19 QUESTION: Then you ended up by saying you could
20 screen, and I just don't -- I don't see the relation
21 between the two arguments.

22 MS. SULLIVAN: Justice Kennedy, we argue that it
23 is impermissible to treat new State citizens unequally
24 merely because they have come to get higher welfare
25 benefits. The Court said that's a perfectly permissible

1 reason for crossing State lines in --

2 QUESTION: With respect, I probably wasn't clear
3 on that, but that wasn't the hypothesis that I was making.
4 The State simply says, as a necessity for maintaining this
5 laudably generous system, no one, whatever their motives
6 may be, will get this higher benefit until, let's say, a
7 year has passed, or something of that sort. There's no
8 screening, there's no inquiry into motive, just saying,
9 look, the system won't work if we have to pay this to
10 everybody who comes in during the first year.

11 MS. SULLIVAN: Your Honor, as Justice Breyer
12 pointed out before, that argument is scarcely credible in
13 a case where the State could save the same amount of money
14 by reducing benefits 76 cents across the board. This is
15 not a case in which the State is on the brink of financial
16 disaster if it does not seek some alternative means of
17 achieving the same savings.

18 If it were the case that the States were unable
19 to offer generous benefits without encouraging an influx
20 of indigents, Congress could remedy the problem by setting
21 uniform benefit levels or some such thing, but that
22 financial question is not an excuse for abrogating the
23 fundamental structural postulate that new State citizens
24 must be treated equally with citizens who've resided in
25 the State for a longer time.

1 QUESTION: Surely there's a difference in
2 treating somebody differently by -- I mean, let's say
3 we're not going to give you library privileges in the
4 State, or you can't use the State tennis courts, or you
5 can't use the State schools for a certain period. All of
6 those have nothing to do with whether the individual, like
7 most residents, is supporting the system whose benefits he
8 is using.

9 Whereas in the case of a welfare recipient who
10 moves there in order to obtain welfare, you know from the
11 start that this is a person who's going to be deriving
12 these benefits of the State never having contributed to
13 the tax base of the State from which those benefits are
14 derived.

15 Surely that's a different situation, and it
16 seems to me you should be able to have a different rule.

17 MS. SULLIVAN: Justice Scalia --

18 QUESTION: And it's only the case with welfare.
19 Nobody else you -- in none of the other areas can you say
20 for sure that this person will not be contributing to the
21 tax base from the time that the person arrives, and yet
22 will be deriving this particular benefit.

23 MS. SULLIVAN: Justice Scalia, with respect, the
24 statute is not limited to those who will be on welfare
25 from the time they arrive. This statute forbids grants of

1 AFDC at California levels to anyone who has moved to the
2 State within the past 12 months, even if she comes in with
3 a job, but even if it were the case that it were limited
4 to that population, it remains invidious.

5 You have said in many other contexts that even a
6 small difference, when it has an impact on some
7 fundamental distinction between persons, is enough to
8 trigger heightened review. It would not be enough to give
9 \$1 less to blacks than whites, it would not be enough to
10 give \$1 less to Democrats than Republicans, and new State
11 citizens and old State citizens are in that same position.

12 So with respect to library privileges or fishing
13 licenses, you haven't reached those questions, but it
14 might be the case that even as to those benefits,
15 distinctions between new State and old State citizens are
16 either invidious or they're irrational, but this is not a
17 fishing license case.

18 QUESTION: Well, but I think you're putting too
19 much of an absolute construction on some of our other --
20 the in-State tuition cases, I mean, it isn't just a total
21 refusal to allow the States to make any distinction
22 between old and new residents. They're allowed to do it
23 in the case of in-State tuition.

24 MS. SULLIVAN: Your Honor, as you've suggested,
25 both the opinion for the Court and the concurring opinion

1 in Zobel suggested the reason for that in the tuition
2 cases, as in the divorce cases, is a fear that there will
3 be a characteristically transient population that will
4 misrepresent its intent to stay in the State a long time.

5 QUESTION: Yes, but all I'm saying is that there
6 have -- the cases have gone the other way. Your
7 tendency -- I believe you're stating that this is just
8 never permissible.

9 MS. SULLIVAN: Not at all, Your Honor. It is --

10 QUESTION: I thought --

11 MS. SULLIVAN: -- hardly ever permissible.

12 QUESTION: Well --

13 MS. SULLIVAN: We're not saying it's never
14 permissible. We're saying that it is hardly ever
15 permissible. There's hardly ever going to be a good
16 reason for distinguishing new State residents from old
17 State residents. When you're worried that the new State
18 residents are really nonresidents in disguise, then there
19 is a good reason, but this is not such a case.

20 QUESTION: Anything other than the genuineness
21 of the residency that would be a legitimate basis for
22 distinction?

23 MS. SULLIVAN: Perhaps --

24 QUESTION: In both Sosner and Vlandis, those
25 situations, it's that you distrust the claim that I really

1 am a Californian.

2 MS. SULLIVAN: That's one situation, Justice
3 Ginsburg, and there may be others. For example, it might
4 be permissible for the State to require that someone live
5 in the State for a set period of time before he or she
6 runs for Governor, or State office.

7 We have a residency requirement in the
8 Constitution for the President and Members of Congress,
9 and perhaps a State could impose a requirement that one
10 reside in the State for a certain period in order to
11 develop the attachment and loyalty that high office
12 requires, and there may be other instances which we don't
13 need to reach today.

14 But the point in this case is that there is no
15 good reason for the distinction California has drawn here.
16 Either, as Justice Scalia suggests, the real reason is to
17 fence needy people out of the State, or to keep the State
18 from being swamped by an influx of indigents seeking
19 welfare. Well, if that's the reason, then you would have
20 to reverse a quarter of a century of precedent to say that
21 it was permitted. That is a forbidden purpose under our
22 law.

23 But if, as the State now claims, the purpose is,
24 rather, to save money, then it draws an impermiss -- it
25 uses an impermissible means. The end of saving money is

1 of course permitted, but it bears no logical relation, no
2 rational relation, no conceivably rational relation, to
3 the distinction between new and old State residents.

4 New State residents are not in any way a
5 peculiar source of evil in California. There are no
6 differences between the population of new State residents
7 and old State residents with respect to their needs, with
8 respect to their probability of working, with respect to
9 the likelihood that they'll stay on the rolls or get off
10 them. They are identical in every other respect except
11 the timing of their migration to the State.

12 QUESTION: Ms. Sullivan, was there any showing
13 in this record, or is there any discussion in the
14 literature with a statistical survey to show that people
15 do or do not move for higher welfare benefits?

16 MS. SULLIVAN: There is no such showing in this
17 record, Justice Kennedy. The State has adduced no
18 evidence in this case that people do or do not move for
19 higher welfare benefits, and that thesis very much in
20 doubt in all the leading literature.

21 The statute either seeks a forbidden end, or
22 employs a forbidden means. It either seeks to fence new
23 residents out of the State, and it's been a half-century
24 since Edwards that the Court has said a State can't do
25 that even if the new folks are poor, or it uses a

1 forbidden means. It distinguishes between new and old
2 State residents when that distinction is not rationally
3 related to any purpose, fiscal purpose or any other.

4 I would point out also the State has argued here
5 that somehow its ability to experiment with welfare
6 reform, its hands will be tied, and that under rationality
7 review you don't tie the hands of the State in solving its
8 economic problems.

9 Well, with respect, an affirmance in this case
10 will in no way tie the hands of the State to engage in
11 every sort of experiment in welfare reform, be it time
12 limits, or work incentives, or any other distinction among
13 recipients of public assistance, except for a distinction
14 that distinguishes new State residents from old State
15 residents. The State has left a lot of latitude here.

16 The reason why new State residents and old State
17 residents can't be treated unequally has a lot to do with
18 the fact that they can't protect themselves in State
19 politics. This is quite different from a case under
20 ordinary rationality review, where a State might be
21 permitted to distinguish between optometrists and
22 ophthalmologists, or truckers and trains.

23 This is a case in which the new State residents
24 are precisely those who could not protect themselves in
25 the political process because they weren't there at the

1 time. Here the State has chosen --

2 QUESTION: Well, presumably they can get into
3 the political process, at least under your hypothesis, in
4 very short order.

5 MS. SULLIVAN: That is correct, Mr. Chief
6 Justice, but -- they can get into the process to vote, but
7 they're still likely to be a small minority, and that's
8 not the true point. The true point is that they cannot be
9 treated differently because of their new State residency
10 because of the structural postulates at stake in this
11 case.

12 Whether you look to the Privileges and
13 Immunities Clause of the Fourth Amendment, as Justice
14 O'Connor suggested in Zobel, to the Privileges and
15 Immunities Clause of the Fourteenth Amendment, to the
16 Citizenship Clause of the Fourteenth Amendment, or to the
17 Commerce Clause itself, it is clear that both to make us
18 one political union and to permit citizens to take
19 advantage of the laboratories of experiment that the
20 States represent, mobility across State lines must be
21 allowed.

22 And this Court has consistently said that that
23 means not only that States can't erect barriers at the
24 border, it also means that new State citizens cannot be
25 treated differently once they cross that border. They

1 must be treated equally unless there's a good reason, and
2 there's no good reason here.

3 In conclusion, the judgment below should either
4 be dismissed -- the case should either be dismissed
5 because the -- it is moot for the reasons explored
6 earlier, or in the alternative, if you reach the merits,
7 you should affirm, because the State has advanced no
8 permissible justification that is rationally related, much
9 less compelling -- much less necessarily related to its
10 goals.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
13 Sullivan.

14 The case is submitted.

15 (Whereupon, at 1:59 p.m., the case in the above-
16 entitled matter was submitted.)

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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. DESHAWN GREEN, DEBBY VENTURELLA AND DIANA P. BERTOLLT, ETC.

CASE NO.: 94-197

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

BY *Ann Marie Federico*-----

(REPORTER)