

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ELOISE ANDERSON, DIRECTOR, CALIFORNIA
DEPARTMENT OF SOCIAL SERVICES, ET AL.,
Petitioners v. BRENDA ROE AND ANNA DOE, ETC.

CASE NO: 98-97 *02*

PLACE: Washington, D.C.

DATE: Wednesday, January 13, 1999

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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. 98-97

BRENDA ROE AND ANNA DOE, ETC. :

- - - - -X

Washington, D.C.

Wednesday, January 13, 1999

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:05 a.m.

APPEARANCES:

THEODORE GARELIS, ESQ., Deputy Attorney General of
California, Sacramento, California; on behalf of
the Petitioners.

SETH P. WAXMAN, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; for the United States, as
amicus curiae, supporting the Petitioners in part and
the Respondents in part.

MARK D. ROSENBAUM, ESQ., Los Angeles, California; on
behalf of the Respondents.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 98-97, Eloise Anderson v. Brenda
5 Roe and Anna Doe.

6 [The opinion in this case is captioned RITA L.
7 SAENZ, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL
8 SERVICES, ET. AL., Petitioners v. BRENDA ROE AND
9 ANNA DOE, ETC. to reflect a change in the
10 Director's name between the time of argument and
11 handing down of the opinion]

12 Mr. Garelis.

13 ORAL ARGUMENT OF THEODORE GARELIS

14 ON BEHALF OF THE PETITIONERS

15 MR. GARELIS: Mr. Chief Justice, and may it
16 please the Court:

17 We are here today because California has been
18 stymied and hampered in its efforts to exercise
19 flexibility implementing a nationwide congressionally
20 authorized program of welfare reform.

21 California is merely asking that its statutes be
22 judged under the traditional, appropriate, rational basis
23 analysis standard and not under strict scrutiny which is
24 unduly restrictive. Strict scrutiny, as we all know, is
25 appropriate only in an equal protection context --

1 QUESTION: Well, when -- when you -- when you
2 have a -- an alleged invasion of the right to travel, the
3 right to move to another State freely and enjoy the
4 benefits there as a new resident, we have applied
5 something other than rational basis scrutiny to test that
6 invasion. And you're telling us that we -- we should
7 abandon that --

8 MR. GARELIS: I think what --

9 QUESTION: -- stricter test.

10 MR. GARELIS: I am not asking you to abandon the
11 stricter test. What I'm asking you to recognize is that
12 our statute does not either impact a fundamental right to
13 travel or suspect class or any other right. Our statute
14 is --

15 QUESTION: Well, certainly we have some
16 authority from this Court that durational residence
17 requirements do affect the right to travel.

18 MR. GARELIS: Except that our durational
19 residency requirement, because it affects only a benefit
20 level decision -- it does not affect eligibility -- is not
21 therefore a penalty. A penalty would be something, in the
22 context of this, where someone moving --

23 QUESTION: Well, I -- I think you'd be hard
24 pressed to tell a family that is forced to live on welfare
25 that instead of getting California's, let's say, \$600 a

1 month, it has to live on \$300 a month for a year, that
2 that's not a penalty. I mean, this is -- this has grave
3 consequences for that family.

4 MR. GARELIS: Because our statute is carefully
5 crafted to avoid the considerations that you're talking
6 about, Your Honor, our statute is carefully crafted to be
7 a temporary level, a temporary level of 1 year, and the
8 family is eligible for all of California's welfare
9 benefits. The family is eligible for cash aid. It's just
10 a benefit-setting adjustment for a period of 1 year.

11 QUESTION: Well, just on that standard of -- of
12 review point, if we were to find -- and I know you -- you
13 disagree with this, but if we -- if we thought that the
14 right of travel were implicated here, were affected here,
15 would the standard then be strict scrutiny?

16 MR. GARELIS: Yes, it would be if -- if the --
17 if our statute touched on the right to travel more than
18 just incidentally and remotely, and at best our statute
19 impacts upon that right remotely and incidentally. Any
20 change in benefits level or any change in life condition
21 upon somebody's move obviously affects somebody's decision
22 to move. People move from one State to the other based
23 upon a wide variety of reasons. This is just --

24 QUESTION: But, Mr. Garelis, I thought that was
25 the whole point of this line of cases, that the newcomer,

1 unless there's a reason to suspect that they're going to
2 take the benefit and run -- that the newcomer should be
3 treated like the long-term residents, that that is the
4 genius of the United States, that people can pick their
5 States and States can't pick their people.

6 MR. GARELIS: California is not picking its
7 people, and people are fully able --

8 QUESTION: It's making a distinction between
9 longer-term residents and the person who is a newcomer.
10 And that runs through all of these cases, that you can't
11 -- well, perhaps you have some precedent in mind that's
12 not in the front of my head. But I don't know in that
13 line of cases that distinguishes new residents from older
14 residents, that there has any -- been any one other than
15 the two where there's reason to suspect that the claim of
16 residence is not genuine. Are there any such cases?

17 MR. GARELIS: But the cases that discuss this do
18 it in terms of cases like Shapiro and Memorial Hospital
19 where there's an absolute denial of benefits, and we do
20 not have an absolute denial of benefits. Our newcomers --

21 QUESTION: Well, I suppose you could think of
22 the Maricopa County as not a denial of benefits because
23 they were given emergency care, so it wasn't they couldn't
24 get any benefits.

25 MR. GARELIS: But there was a complete denial of

1 non-emergency care, and we don't have that in our case.
2 What we have is people are entitled to benefits. States
3 are entitled to set benefits at the rate that they believe
4 is consistent with their budgetary constraints.

5 QUESTION: But I'm puzzled why you say that that
6 -- that that is not -- does not impact the right of
7 travel. I thought the whole purpose of this was to
8 discourage migration for higher welfare benefits. I
9 thought that was the objective of the statute.

10 MR. GARELIS: No.

11 QUESTION: That's not the objective of the
12 statute. What is it?

13 MR. GARELIS: No. The objective of the statute
14 is clear on the face of the statute: number one, to save
15 money; number two, to help reform the welfare system by
16 removing a possible incentive to move to a higher benefit
17 level State.

18 QUESTION: All right. Well, then -- then it
19 does affect the right of travel.

20 MR. GARELIS: There is an impact on the right of
21 travel, but it's not sufficient. It is only remote and
22 incidental at best.

23 QUESTION: Well, it's -- it's the second of the
24 two purposes you offered to explain the statute. I -- is
25 50 percent substantial?

1 MR. GARELIS: I'm sorry. I don't understand.

2 QUESTION: Well, you said that there were two
3 objectives of the statute. One was to save money and the
4 other was to deter migration. And I said, well, isn't
5 that -- migration for purposes of higher welfare benefits
6 -- I said isn't that a -- a substantial impact. It's --
7 at least one-half of the purposes that you've offered
8 affects travel.

9 MR. GARELIS: No, it isn't because, as I stated,
10 we're making a very careful distinction here. We're not
11 trying to deter travel in any way, shape, or form.
12 Because our statute is carefully crafted for a temporary
13 limit and people are given the rate that is the maximum
14 made payable in their prior State of residence and it's
15 only one part of our panoply of welfare benefits, it is
16 not a deterrent. We are merely neutralizing one factor
17 that somebody might care to consider when moving to
18 California. That is not --

19 QUESTION: You're saying that the elimination of
20 an incentive is not necessarily a deterrent.

21 MR. GARELIS: That's correct.

22 QUESTION: I don't understand this. I mean, if
23 I have -- Shapiro I guess -- Shapiro, for whatever theory
24 of it, I mean, it holds, doesn't it that a State cannot
25 say no welfare for a year, and the reason a State wanted

1 to do that is so people wouldn't come to get a higher
2 welfare benefit. Well, you say not no welfare, but
3 reduced welfare for a year, and the reason we're doing
4 that is so you don't move here to get a higher welfare
5 benefit.

6 I mean, what's the difference? The only
7 difference is you're more generous but not really that
8 much more. I mean, somewhat more generous. What's the
9 difference in the -- in the -- in the theory of it?

10 MR. GARELIS: Well, in -- under Shapiro, the
11 people affected by those statutes were not eligible for
12 benefits. Here people are eligible for benefits.

13 QUESTION: No, I understand that. You're -- but
14 -- but you're -- you're going to save money by the means
15 of not providing an incentive to move, say, from
16 Mississippi to California. Now, if you were trying to
17 save more money by not giving them anything so they
18 wouldn't move to California, it's clearly unconstitutional
19 under Shapiro. So, why is it constitutional just because
20 you're trying to save a little less money?

21 MR. GARELIS: It's constitutional because our
22 statute should be judged under the rational basis
23 standard. Under Shapiro, they used strict -- your -- this
24 Court used strict scrutiny, and under our statute, because
25 we have a temporary benefit setting level and because

1 people are entitled to welfare at a State mandated rate,
2 to cash aid welfare, and they're entitled to all other
3 welfare benefits, our statute does not impact on the right
4 to travel to the extent that was prescribed by Shapiro --

5 QUESTION: So, you -- you acknowledge it's a
6 matter of degree.

7 MR. GARELIS: And I believe this Court has
8 acknowledged that in the footnote in Shapiro which states
9 that not all waiting periods are penalties because our
10 statute --

11 QUESTION: They said that -- well, I mean, they
12 could have said that not all waiting periods are penalties
13 simply because some of them may be made to assure that the
14 -- a person coming into the State genuinely wishes to
15 become a resident. Isn't that the tenor of that
16 qualification?

17 MR. GARELIS: I don't -- I don't believe in --
18 in terms of the footnote in Shapiro, that it makes that
19 qualification. This Court has stated that in terms of the
20 Sosna case and the cases on tuition, but we believe that
21 our case where people our -- are eligible for welfare
22 benefits, they -- they receive welfare benefits. The only
23 thing is that they're receiving them at a State mandated
24 rate. And whenever somebody moves to another State,
25 people do get different rates of welfare and that has not

1 been -- of cash aid. And that has not --

2 QUESTION: Is it a part -- does the same
3 principle apply at the other end? Suppose I move to a
4 State that has a lower State income tax than the State
5 from whence I came or a lower property tax. Could State
6 2, my State of new residence, say, well, for 1 year you're
7 going to pay the higher tax that you paid in the State
8 from whence you came? It seems to me that that would
9 follow, would it not?

10 MR. GARELIS: Well, I don't believe so. I think
11 the tax situation is a different situation because you
12 have so many -- it has so many different impacts. You'd
13 have to look at and see --

14 QUESTION: Well, but your tax standards are
15 generally rational basis. So, it seems to me you have a
16 stronger argument there to say we'll collect the higher
17 tax from the non-resident because we don't want to give
18 him all these public services. You know, the -- the
19 incentive to move to the State is the lower tax rate.

20 MR. GARELIS: Well, whenever people move from
21 one State to another, there are differences -- changes in
22 all forms. What we're merely saying is that none of those
23 differences, et cetera are customarily judged to be
24 restrictions on the fundamental right to travel.

25 QUESTION: So, I just want to know where -- how

1 far this principle goes. Are you now saying, yes, you can
2 treat a person moving into your State as though that
3 person still belonged from the State from whence he came
4 for 1 year, whether income tax, say, unemployment
5 compensation, or is it -- is there any limit to this? Is
6 there something special about welfare that distinguishes
7 it from other kinds of benefits?

8 MR. GARELIS: There's something very different
9 and distinct about what California is doing because
10 California has carefully limited what it's doing to merely
11 the benefit level, and States have the prerogative and do
12 have different benefit levels --

13 QUESTION: Well, I can understand that in terms
14 of, say, workers' compensation or unemployment
15 compensation. The same thing. Suppose California said,
16 we have higher benefits, but you're a newcomer, so you get
17 the lower benefits till you've been with us 12 months.

18 MR. GARELIS: I think what you have to look at,
19 the analysis that would have to be done is you look and
20 see whether or not there has been a detriment to the
21 person who has moved. Is there a difference between what
22 that person was receiving in the prior State compared to
23 what they're receiving in California. Our statute is
24 carefully crafted --

25 QUESTION: I'm giving you the concrete example

1 of unemployment compensation, workers' compensation.

2 MR. GARELIS: Okay.

3 QUESTION: You get less -- you got less in your
4 original State. California is more generous. Yes or no?
5 Is the same principle applicable?

6 MR. GARELIS: Since it's -- since it's a
7 benefit, since -- I would say the answer is it would be
8 the same. You would judge it under the rational basis
9 scrutiny.

10 QUESTION: How about a car registration? Let's
11 say my State of origin charges more annually -- less --
12 more annually -- right -- more annually to -- to register
13 my car. Can State 2 say, we -- we need money, because you
14 said money is the driving force here, so we're going to
15 charge you the higher registration that you would have
16 paid in the State from whence you came?

17 MR. GARELIS: If it's an easily quantifiable
18 amount and you can tell that the person is receiving no
19 detriment upon moving, if it's --

20 QUESTION: It's a hundred dollars. I have to
21 pay a hundred dollars in the State from whence I came, and
22 California charges \$50.

23 MR. GARELIS: I would tend to say that it would
24 probably be judged under the rational basis scrutiny.

25 QUESTION: Could California then say, for 1 year

1 you pay a hundred dollars?

2 MR. GARELIS: If it's temporary and if there is
3 no detriment to the person when they cross the border --

4 QUESTION: Well, tell me. Is there?

5 MR. GARELIS: I -- I don't see that detriment,
6 no.

7 QUESTION: You say it's -- it's judged under the
8 -- under the same test. You wouldn't necessarily have to
9 say that it passes the test --

10 MR. GARELIS: No. I --

11 QUESTION: -- the way this one does.

12 MR. GARELIS: I believe --

13 QUESTION: People generally don't move to get a
14 lower license fee, and it is thought that people do move
15 to get higher welfare benefits.

16 QUESTION: Yes, but they move to get lower tax
17 rates all the time.

18 QUESTION: Well, and that -- that one may well
19 come out the other way.

20 MR. GARELIS: What we are merely suggesting is
21 that rational basis would be the correct scrutiny. It
22 does not impact on a fundamental right --

23 QUESTION: Mr. Garelis --

24 QUESTION: I'm writing this opinion under --
25 under your view. I begin by saying there is a -- less of

1 an impact on travel in this case than in Shapiro.
2 Therefore, rational basis, not strict scrutiny applies.
3 But what could I cite for that then? What case do we have
4 where the degree of impact affects the -- the level of
5 scrutiny? That seems to me a very new principle.

6 MR. GARELIS: Well, I believe the Sosna case
7 leads you towards that direction. This Court's footnote
8 in the Shapiro case, which was taken up in the Memorial
9 Hospital case, where waiting periods have not been
10 regarded as absolutely a penalty. I believe that this
11 precedent of this Court would fully support that. In
12 Sosna, in the tuition cases, there have been acknowledged
13 that there is maybe an impact on travel but it is not
14 strong enough. It does not meet the -- the standards that
15 are set out --

16 QUESTION: Mr. Garelis, I thought when we
17 discussed those two cases before, you recognized --
18 perhaps you didn't -- that there is in both a genuine
19 suspicion the person has come into the State to get a
20 benefit and then go. In the welfare situation, that's not
21 the case. The likelihood is the person has come there to
22 stay, not to -- there isn't a suspicion about the
23 genuineness of the claim of residence, and that's what
24 distinguishes Starns and -- and --

25 MR. GARELIS: I recognize that, but on the other

1 hand, the question was has it been determined that a -- by
2 this Court that a waiting period that does not impact --
3 that waiting periods don't necessarily impact the
4 fundamental right to travel absolutely. What this Court
5 has determined, that not all waiting periods impact the
6 right to travel. And we are simply saying that our
7 statute does not impact the right to travel sufficiently
8 to trigger strict scrutiny.

9 QUESTION: If I --

10 QUESTION: If we were to disagree with you,
11 would the congressional statute make a difference? Are
12 you going to argue that Congress can somehow permit what
13 otherwise would not be allowed under the -- our right of
14 travel cases?

15 MR. GARELIS: The congressional authorization is
16 important because it shows that the concerns underlying
17 the right to travel are met and have been considered by
18 this program because the right to travel -- the point of
19 this -- of -- of this Court's concerns and all of our
20 concerns about the right to travel is whether it breaks up
21 our country. Does it vulcanize various States? The
22 Federal authorization shows that these concerns are
23 greatly minimized by Congress' action.

24 QUESTION: How are they minimized? I mean, how
25 are they minimized by the fact that Congress may come

1 along and say, go ahead and vulcanize?

2 MR. GARELIS: Congress is not saying go ahead
3 and vulcanize. Congress is simply saying that nationwide
4 we have a determination, we have a policy that -- that we
5 will reduce this particular incentive to -- that may
6 impact on a person's decision to travel.

7 QUESTION: Right. We will -- we will induce --
8 we will induce the incentive to travel for the sake of
9 better welfare benefits, and that in the past has -- has
10 not been regarded as a legitimate governmental purpose.
11 How does it become a legitimate governmental purpose
12 simply because Congress has said it's okay?

13 MR. GARELIS: It's a legitimate purpose because,
14 number one, Congress has shown that the concerns
15 underlying the right to travel are greatly minimized in
16 this case and it -- and it also --

17 QUESTION: Well, but that -- that has nothing to
18 do with whether Congress says so or not. They're either
19 minimized or they're not minimized.

20 If in fact we believe the proper analysis of
21 this case is that a -- a determining objective of the
22 statute is to eliminate the incentive to travel for better
23 welfare benefits, then is there anything that Congress can
24 do, in effect, to take the poison out of that -- the
25 constitutional poison out of that objective? I would have

1 thought not, but --

2 MR. GARELIS: Well, I -- I think the point
3 really here is that nobody is being denied welfare
4 benefits.

5 QUESTION: Well, they're being denied whatever
6 the differential is. I mean, that's -- we're playing with
7 words. They're going -- for the -- for the 1-year period,
8 they're going to be denied whatever the -- whatever the
9 differential is. Right? Okay. So, they're being denied
10 those benefits.

11 MR. GARELIS: They're being denied those
12 benefits and those benefits simply are not substantial
13 enough to trigger strict scrutiny.

14 QUESTION: You're saying they're de minimis?

15 MR. GARELIS: Basically, yes.

16 QUESTION: All right. Let me --

17 QUESTION: How can you say that if there's a
18 differential in the cost of living between two States. If
19 \$600 is adequate in California and nothing less is
20 adequate, how can \$300 be adequate?

21 MR. GARELIS: Because the --

22 QUESTION: If it was adequate in Mississippi,
23 it's got to be adequate in California? Is that your
24 position?

25 MR. GARELIS: There's no guarantee that the

1 amount of cash aid is adequate in either the State that
2 someone is coming from or the State --

3 QUESTION: Well, but the State legislature in
4 California has made a judgment that \$600 is the adequate
5 minimum for ever -- whatever class of beneficiary you
6 have, which is -- and anything less than that, I would
7 assume, the -- even though it may be adequate in another
8 State is not adequate in California. That's what the
9 California judgment is.

10 MR. GARELIS: I would beg to differ with Your
11 Honor on one point. There's been no determination by the
12 State of California's legislature, when it set the cash
13 aid benefits, that that amount met any basic standard or
14 anything. It was simply the amount that that legislature
15 determined --

16 QUESTION: Determined to --

17 MR. GARELIS: -- budgetary constraints of the
18 State of California.

19 QUESTION: They may just have decided that's all
20 we want to spend on it.

21 MR. GARELIS: I believe that's exactly what it
22 is. The -- the rate, the level of benefits is not keyed
23 or tied into or reflective of any certain standard of
24 living.

25 QUESTION: Well, but if your objective is to

1 save money, which you say, why don't they just cut them in
2 half for everybody? There's obviously some reason behind
3 setting the levels they do set.

4 Let -- may I ask another question about --

5 MR. GARELIS: Sure.

6 QUESTION: You mentioned the fiscal
7 justification for it. Does the record tell us what
8 percentage of the California budget for this program would
9 be affected by a different result in this case?

10 MR. GARELIS: No, I don't believe -- I'm -- I'm
11 not aware of what the record states the whole impact on
12 the budget. We set out in our petition the amount of the
13 expected cost savings for this program. But really, the
14 point is, is that the legislature determined that this was
15 an adequate cost savings amount to justify --

16 QUESTION: Without knowing what it is?

17 MR. GARELIS: Excuse me?

18 QUESTION: Do they -- do they know what the cost
19 saving is for the program as a whole. That's what I'm
20 asking you?

21 MR. GARELIS: Yes. Yes, they do.

22 QUESTION: And can you tell us what it is?

23 MR. GARELIS: As --

24 QUESTION: As a percentage of the total budget.

25 MR. GARELIS: I'm not aware of the percentage --

1 QUESTION: Of the total welfare budget I mean.

2 MR. GARELIS: I -- I -- I'm not aware of those
3 figures.

4 QUESTION: Mr. Garelis, do you --

5 QUESTION: What's the absolute figure? I'm
6 interested in the absolute figure. Never mind the right
7 -- I mean, you know. A billion dollars is a billion
8 dollars. I don't care what it's a percentage of.

9 MR. GARELIS: As stated at page appendix 37 of
10 our petition, paragraph 6, for the '97-'98 fiscal year,
11 the California Department of Social Services projected,
12 because we haven't been able to implement the statute --
13 projected that the implementation of the statute would
14 reduce total AFDC, now TANF, expenditures by \$22.8
15 million, and of that total reduction, California general
16 fund expenditures would be reduced by \$10.9 million.

17 QUESTION: Well, you can't just use -- you can't
18 save money just by, I mean, randomly selecting people to
19 pay less, can you? I mean, we'll save \$10 million next
20 year by not paying money to anyone whose name begins with
21 Q or reducing their -- you couldn't do that, could you?

22 MR. GARELIS: Well, if -- if that does not
23 impact the fundamental right and does not impact a suspect
24 class, then that program would be adjudicated under a
25 rational basis --

1 QUESTION: How about 5 years?

2 QUESTION: That is -- well --

3 QUESTION: Could -- could you -- this is 1 year.
4 Would your answer be the same if it were for 5 years
5 you're treated like you were in the State from whence you
6 came?

7 MR. GARELIS: I think my answer would be
8 different for a variety of reasons, Your Honor.

9 QUESTION: A different standard of review?

10 MR. GARELIS: I think very probably so, Your
11 Honor. I think you have to perform the analysis and see
12 whether or not a -- a program that's different than what
13 California has impacts sufficiently on the fundamental
14 right to travel strict scrutiny. A --

15 QUESTION: So, if you say 5 years, the answer
16 would be different than 1 year.

17 MR. GARELIS: Anytime you increase the -- the
18 disability under which the person is impacted, obviously
19 you're getting closer and closer to something in Shapiro
20 and Memorial Hospital, which is an absolute denial. But
21 because California has chosen very carefully the period of
22 1 year, which is a period that this Court has recognized
23 in, as I've stated before, the Sosna case, this did not in
24 that case implicate the right to travel sufficiently. 1
25 year would appear to be an amount that would not -- a time

1 period that would not sufficiently impact.

2 QUESTION: So, even under the rational basis
3 test, if it were, say, 2 years, that would be no good, but
4 the 1 year is all right.

5 MR. GARELIS: At every point where you increase
6 the time period, the temporary time period, I think you're
7 getting closer and closer to a permanent. I don't know
8 where 2 years would be. 5 years sounds like an awful lot,
9 especially in consideration of the fact that people are
10 entitled to welfare eligibility in California for 5 years,
11 which is the maximum amount allowable under Federal law.
12 So, 5 years would definitely seem to me to be a real
13 problematic situation if I was trying to argue rational
14 basis. But we're not.

15 QUESTION: Why did the State pick 1 year?

16 MR. GARELIS: Why did the State pick 1 year?

17 QUESTION: Yes.

18 MR. GARELIS: 1 year --

19 QUESTION: What's the justification for 1 as
20 opposed to another number?

21 MR. GARELIS: 1 year would appear to be an
22 amount that -- that does not sufficiently implicate the
23 right to travel. It's not that long a time --

24 QUESTION: In other words, it was as much as
25 they thought they could get away with.

1 (Laughter.)

2 MR. GARELIS: I think they thought it was the
3 amount that was -- would be constitutionally appropriate.

4 QUESTION: Look, what I'm trying to get at --
5 let me just -- suppose you cut 30 percent from everybody
6 whose name began with Q. All right? I say, why are you
7 doing that? You say, to save money. Is that rational?

8 MR. GARELIS: That would not appear to be
9 rational, and I'm not going to argue that it is rational.
10 However, our statute would appear to be rational.

11 QUESTION: Thank you, Mr. Garelis.

12 MR. GARELIS: Thank you.

13 QUESTION: General Waxman, we'll hear from you.

14 ORAL ARGUMENT OF SETH P. WAXMAN

15 FOR THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE PETITIONERS IN PART AND

17 SUPPORTING THE RESPONDENTS IN PART

18 MR. WAXMAN: Mr. Chief Justice, and may it
19 please the Court:

20 What distinguishes this case from the other
21 interstate migration cases that this Court has decided is
22 the presence of an explicit Federal authorizing statute
23 part as a -- part of a comprehensive national --

24 QUESTION: I just don't understand how if it
25 impacts on the right to travel -- I don't see how the

1 Federal Government can do it any more than -- than a
2 State.

3 MR. WAXMAN: Well, Justice --

4 QUESTION: And I'd like you to explain that to
5 us.

6 MR. WAXMAN: I -- I would like to explain it and
7 I hope to explain it.

8 It's our submission that with respect to
9 interstate migration, which is both a right of national
10 citizenship and a structural feature of the national
11 union, Congress stands in a position that is fundamentally
12 different than any State legislature.

13 In Shapiro v. Thompson and Maricopa County, this
14 Court said --

15 QUESTION: Are you saying Congress can authorize
16 burdens on the right to move from State to State?

17 MR. WAXMAN: Congress cannot eliminate the --
18 the right of --

19 QUESTION: If you could tell me the answer to
20 that question.

21 MR. WAXMAN: Congress can regulate interstate
22 movement and to some extent it can define the --

23 QUESTION: But can it just -- can it pass
24 something specifically intended to discourage movement
25 from one State to another?

1 MR. WAXMAN: I don't know whether it could do it
2 purely for that purpose, but just as Congress but not the
3 States can regulate and burden interstate commerce,
4 Congress can also define to some extent the incidence of
5 -- the incident of national citizenship that constitutes
6 the interest in migration.

7 QUESTION: Why?

8 MR. WAXMAN: And I suggest --

9 QUESTION: Why? I mean, your -- I think your
10 argument is because Congress has great power under the
11 Commerce Clause, it in effect can -- has some definitional
12 role with respect to the right to travel, and I don't see
13 why that is so.

14 MR. WAXMAN: Well, I think, Justice Souter, it's
15 important when one talks about the right to travel, which
16 is an enormously inarticulate phrasing of essentially an
17 interest that encompasses both a prohibition or a
18 restraint against direct impediments to move from one
19 State to another and a prohibition against the States
20 treating some of their residents less well than others
21 because of recent migration, in effect, putting a penalty
22 on people for recent migration.

23 The national legislature unlike any -- a State
24 legislature acts properly to pursue its own interests and
25 the interests of its citizens counter to, and perhaps at

1 the expense of, other States and the citizens of other
2 States. And this Court, starting from Chief Justice Taney
3 in the Passenger Cases, through Edwards and many other
4 cases, has recognized that in that respect, a State
5 legislature stands in a different position --

6 QUESTION: No, but you're supposed to be
7 answering a question about where Congress gets the power
8 to do all this.

9 MR. WAXMAN: Well, Congress -- for example, in
10 Shapiro, the Court said a State may not act to fence out
11 poor people or may not act to fence out --

12 QUESTION: Does that imply that Congress can
13 fence people out?

14 MR. WAXMAN: The Congress is not fencing anybody
15 out. Congress is the legislative body that represents all
16 of the people of the United States. All of the indigent
17 people of the United States are here. And in Edwards, for
18 example, this Court found it significant that California
19 could not impose a burden because it was imposing a burden
20 on people who were not represented by that State
21 legislature.

22 QUESTION: No, but the argument here is that
23 California is treating its own citizens based upon -- in a
24 -- in a differential fashion. And where in the Commerce
25 Clause or anywhere else does Congress have the authority

1 to affect a State's right to discriminate among its own
2 citizens?

3 MR. WAXMAN: I don't think it does per se.
4 What's a little bit confusing about this case is we
5 neither have a pure State program such as was at issue in
6 this Court's prior cases, nor do we have a pure Federal
7 program in which Congress says, okay, we're going to treat
8 welfare like Social Security.

9 QUESTION: General Waxman --

10 QUESTION: But the State is the determinant of
11 the terms of the program.

12 MR. WAXMAN: I'm sorry. I didn't --

13 QUESTION: The State, as I understand it, has
14 sole authority to determine the term of its program.

15 MR. WAXMAN: Well, the -- within broad limits --

16 QUESTION: Congress did not mandate the
17 differential is all I'm getting at.

18 MR. WAXMAN: There is -- this is a national
19 program. This is not the State's --

20 QUESTION: Well, there's a national welfare
21 program, which leaves the terms of the program with any --
22 within any given State up to the States.

23 MR. WAXMAN: Within limits -- within limits
24 defined by Congress and with respect to the authorization
25 that's in question in this case.

1 QUESTION: And the authorization, if accepted
2 here, I take it, is an authorization by Congress to States
3 to treat its citizens in two different classifications
4 depending on their residence.

5 MR. WAXMAN: The authorization in this case is
6 that States may pursuant to a -- a comprehensive national
7 program for an important purpose that Congress
8 articulated, allow States to apply a transitional choice
9 of law rule that Congress thought would be important.

10 QUESTION: Choice of law rule. That -- that
11 really astonished me that you used the term, choice of
12 law. We're not choosing the law of any other State. It's
13 this California law. California has two sets of law: one
14 for newcomers, one for oldcomers. Choice of law refers to
15 there are two States that might supply the governing rule.
16 Either one, one could argue, is appropriate. The form
17 uses choice of law principles to pick between potentially
18 regulating rules, but the old State has no interest, no
19 claim to regulate anymore. That's over and done. These
20 are two -- California law is the only law that's being
21 chosen.

22 MR. WAXMAN: Well, the question is -- as a
23 strict matter, Justice Ginsburg, you're correct. I've
24 used it in an analogic sense or descriptive sense because
25 a -- Congress has allowed a State to say, assuming that it

1 isn't -- that it tailors its implementation to the
2 purposes that Congress had, which I -- I would -- I hope
3 I'll be able to describe, to apply the benefit levels of a
4 prior State.

5 And both California and the prior State, because
6 of the way TANF works, do have an interest in that
7 happening. The prior State has an interest because it
8 will be penalized.

9 The 1996 act envisions a mutual commitment
10 between States and welfare recipients. The States have a
11 commitment to provide indigents with individualized
12 support, training, and opportunities they need to get a
13 job within a fixed period of time, and it obligates
14 recipients to commit to participate in and to stick with a
15 particular State's program so that it has a chance to
16 work.

17 Now, what section 604(c) does is to permit
18 States to neutralize artificial incentives that the act
19 itself produces for both States and individuals to act in
20 ways that may diminish the efficacy of the Federal program
21 itself.

22 QUESTION: So, the first State, the State from
23 whence the person came, has much better day care and much
24 better job training, but lower cash benefits. Then the
25 person moves to State number 2. State number 2 can lower

1 the benefits, but must give that person the higher
2 training, the more expensive day care than in State 1?

3 MR. WAXMAN: Well, California has not
4 interpreted the Federal authorization that way, and we
5 don't think that it has to. That is, we think that the
6 statute permits a -- a State in -- the new State to apply
7 either all the benefit levels of the prior State for a
8 year, that is, to choose to apply that State's rule.

9 QUESTION: Well, I'm just suggesting that your
10 rationale about, well, they have a commitment to State
11 number 1, so they have to stay with that benefit package,
12 it's not much of a commitment if you say that they can't
13 -- as far as the good is concerned, they leave that
14 behind, but the bad they carry over.

15 MR. WAXMAN: Justice Ginsburg, let -- let me be
16 perfectly clear. We are not suggesting here that the
17 presence of a comprehensive Federal system and the
18 presence of a Federal authorization makes this or any
19 other law okay. Our submission is that if a State acts to
20 implement the authorization under 604(c), that
21 implementation ought to be tested under a level of
22 scrutiny in which it should be upheld if the State can
23 show that it has reasonably tailored its implementation to
24 the important Federal purposes of the -- purposes of the
25 Federal statute.

1 QUESTION: Well, you know, how -- how has the --
2 how has California tailored it at all if people have moved
3 to California for reasons that have nothing to do with
4 welfare --

5 MR. WAXMAN: That's exactly -- and we --

6 QUESTION: -- relatives living there or health
7 reasons or whatever, and having moved there, want welfare
8 benefits?

9 MR. WAXMAN: In our --

10 QUESTION: How have they tailored it?

11 MR. WAXMAN: In our brief, Justice O'Connor, we
12 have suggested that it appears to us that California has
13 not, in fact, tailored it, and therefore the Court ought
14 to affirm the preliminary injunction.

15 If you look at what other States have done,
16 Illinois, for example, has one of these residency
17 requirements or two-tier systems, but it won't apply
18 unless the new resident was obtaining welfare benefits
19 from the prior State.

20 You could also tailor it by saying that it won't
21 apply to people who come to the State, as at least one of
22 these plaintiffs did, for a job and then lose it because
23 those kinds of people Congress wanted to -- it's clear
24 Congress wanted to encourage people to move in order to
25 obtain work.

1 QUESTION: It's not in the congressional -- the
2 congressional authorization just says -- gives permission
3 to States for the 1 year. Isn't that right?

4 MR. WAXMAN: May -- may I answer?

5 QUESTION: Yes.

6 MR. WAXMAN: The congressional authorization
7 simply sets the outer bounds of what Congress will permit
8 a State to do, but it does not give them a free pass
9 through the constitutional test.

10 QUESTION: Thank you, General Waxman.

11 Mr. Rosenbaum, we'll hear from you.

12 ORAL ARGUMENT OF MARK D. ROSENBAUM

13 ON BEHALF OF THE RESPONDENTS

14 MR. ROSENBAUM: Mr. Chief Justice, and may it
15 please the Court:

16 The California durational residency requirement
17 is antithetical to core structural and liberty-producing
18 values of our Federal system of joint sovereigns. As
19 Justice Ginsburg's comment indicated, the genius of our
20 Federal system is that citizens are free to vote with
21 their feet. They are free to migrate to and settle in
22 whatever State they choose based on whatever needs or
23 tastes they have.

24 QUESTION: They're free to travel, and I assume
25 travel includes I have just as much a right to go to

1 another State temporarily and enjoy the protections of
2 that State temporarily as I do to go and migrate there.

3 MR. ROSENBAUM: That's correct, Your Honor.

4 QUESTION: And yet, when I go to another State,
5 am I entitled -- and I'm there just temporarily, am I
6 entitled to send my children to the State schools?

7 MR. ROSENBAUM: Well, that would be an Article
8 IV question, Your Honor, but that -- that's not the --

9 QUESTION: Why isn't the right to travel
10 affected?

11 Or when I go there, am I treated like other
12 citizens of the States for purposes of hunting and
13 fishing, for example? Don't I have to pay an out-of-
14 State fishing and hunting license fee?

15 MR. ROSENBAUM: Your Honor is referring to a
16 nonresident. Is that right?

17 QUESTION: A nonresident, but exercising --
18 exercising his constitutional right to travel.

19 MR. ROSENBAUM: The answer, Justice Scalia, was
20 most recently stated in this Court's opinion in Bray at
21 page 277, and that is, we are at a point in the
22 jurisprudence that the right of free interstate migration
23 includes not only protection against the erection of
24 actual barriers, but it means that interstate travelers
25 are treated no differently than intrastate travelers.

1 The same point that --

2 QUESTION: I -- I don't understand. Try it
3 again.

4 MR. ROSENBAUM: The -- the problem with --

5 QUESTION: It seems to me my right to travel is
6 certainly being affected, but it seems to me not
7 significantly. And it seems to me that what's involved is
8 a State benefit, and therefore we say it's okay.

9 MR. ROSENBAUM: I don't -- don't agree with
10 that, Your Honor.

11 QUESTION: All right. Tell me why it's
12 different then.

13 MR. ROSENBAUM: Because the second part of the
14 equation with respect to the liberty producing values that
15 we're talking about is that once an individual chooses to
16 move to a State for whatever reason she chooses,
17 establishes bona fide residence, the Constitution creates
18 a relationship between the citizen and the State.

19 QUESTION: But there is a difference between a
20 bona fide resident, someone who's there to stay, and a
21 temporary visitor.

22 MR. ROSENBAUM: It certainly is. As Justice
23 Scalia pointed out --

24 QUESTION: Not -- not so far as the right to
25 travel is concerned. I -- I thought it's the right to

1 travel not the Equal Protection Clause that we're dealing
2 with. I agree that once you're a citizen of the State,
3 you have to be treated like other citizens unless there's
4 a rational basis for treating you differently. But that's
5 not -- you're not arguing before us the equal protection
6 rational basis test. You're arguing that -- that somehow
7 the right to travel entitles you to something more than a
8 -- than a rational basis in -- in how you're treated.

9 MR. ROSENBAUM: Your Honor --

10 QUESTION: And I don't see why that doesn't
11 apply to the situation when I'm traveling without desiring
12 to establish permanent residence just as it applies when
13 I'm traveling to establish permanent residence.

14 MR. ROSENBAUM: It may well be, Your Honor, that
15 -- that an individual who -- who is not a bona fide --

16 QUESTION: I'm glad to learn that because I
17 would like to be able to get Louisiana hunting licenses at
18 -- at Louisiana resident rates.

19 MR. ROSENBAUM: Your Honor, we're -- in the
20 circumstances that you're describing where we're not
21 dealing with a bona fide resident, sure the State can make
22 all sorts of distinctions. This Court said so in Martinez
23 v. Binen.

24 QUESTION: Yes, but why?

25 MR. ROSENBAUM: The problem in -- in this --

1 QUESTION: The question is why. If the -- if
2 the right to travel is what you're urging here --

3 MR. ROSENBAUM: Because --

4 QUESTION: -- and not the Equal Protection
5 Clause, why should that be?

6 MR. ROSENBAUM: Because the right of interstate
7 migration, the right of free interstate migration, has two
8 components not just against actual barriers themselves,
9 but when an individual establishes bona fide residence,
10 that individual becomes the State's own. And the State
11 cannot --

12 QUESTION: You're just restating it. You're not
13 giving me a reason for it.

14 MR. ROSENBAUM: The reason --

15 QUESTION: The one, just like the other,
16 involves the constitutional right to travel.

17 MR. ROSENBAUM: No, Your Honor. The right --
18 the right to travel that we're talking about is a right
19 not to be discriminated against based upon the length of
20 residence. Why is that? Because if a -- if a State could
21 discriminate based upon the length of residence for a bona
22 fide residence, then it would radically revise the Federal
23 system. It would mean --

24 QUESTION: Where do you locate that right?

25 MR. ROSENBAUM: Your Honor?

1 QUESTION: In the Privileges and Immunities
2 Clause or where?

3 MR. ROSENBAUM: I'm sorry.

4 QUESTION: Where do you locate the so-called
5 right to travel? Is it found in the Privileges and
6 Immunities Clause or someplace else?

7 MR. ROSENBAUM: Your Honor, there are four
8 sources, in addition to the logic and structure of the
9 constitutional scheme itself. First, as Your Honor stated
10 and as Your Honor specifically described in the Zobel
11 concurrence and in Your Honor's dissent in Soto-Lopez,
12 Article IV, Section 2. In addition, the Fourteenth
13 Amendment, through the Citizenship Clause, the Privileges
14 or Immunities Clause, and the Equal Protection Clause.

15 Those four provisions of the Constitution create
16 a principle. The principle is that a State may not negate
17 a national citizen's right of choice of State of residence
18 by classifying newcomers so as to deny them the same
19 rights --

20 QUESTION: What -- what do you do with the
21 tuition cases?

22 MR. ROSENBAUM: The tuition cases are just as
23 Justice Scalia indicated, Your Honor. The issue in the --
24 the tuition cases, like the Starns case, as this Court
25 explained in -- in the Zobel case and in Vlandis, the

1 issue there was, was an individual in fact a bona fide
2 resident? Of course, a State may preserve its State
3 resources for State citizens.

4 QUESTION: But in -- in Dunn v. Blumstein, where
5 we're talking about a waiting period for voting, the Court
6 said you can't require a 1-year waiting period. So, why
7 in the tuition cases were they allowed to employ a 1-year
8 waiting period?

9 MR. ROSENBAUM: Let me answer that in two ways,
10 Your Honor.

11 First, in -- in the school tuition cases
12 themselves, as the Court indicated at Vlandis at pages 253
13 and 254, the concern was with a population that was
14 characteristically transient and, as Justice Ginsburg
15 said, coming in to take the benefit and run, a concern
16 that, in fact, we have a permanent attachment, a genuine
17 attachment.

18 In Dunn, while the Court said, sure --

19 QUESTION: Wait, wait. Let's pursue that. The
20 concern was that someone was coming into the State to go
21 to the college there for only 1 year --

22 MR. ROSENBAUM: No, Your Honor.

23 QUESTION: -- and then transfer out to another
24 college?

25 MR. ROSENBAUM: No. The concern was --

1 QUESTION: Then what good does the 1-year
2 residency assure? What good does that do --

3 MR. ROSENBAUM: Because --

4 QUESTION: -- if it -- if it simply requires the
5 college freshman to stay there until he's a sophomore?

6 MR. ROSENBAUM: I -- I'm -- perhaps I'm not
7 communicating clearly, Your Honor. The problem in Starns
8 and the school tuition cases is that a State has a -- has
9 a compelling interest, has an absolutely appropriate right
10 to say before we give some of our basic resources that we
11 would otherwise reserve to our State citizens, we want to
12 make sure that this individual is in fact a bona fide
13 resident, has some sort of permanent attachment. That's
14 why the case -- and -- and with students, peculiarly a --
15 a characteristically transient population, there was
16 reason to be suspicious of the motives of the individuals
17 coming in.

18 Compare that to this State. As the State has
19 conceded, as recently as pages 17 and 18 of its reply
20 brief, there's no question that we're dealing with bona
21 fide residents in this case. Indeed, the State concedes
22 that it could not -- an individual could not get any sort
23 of benefit whatsoever --

24 QUESTION: Students are characteristically
25 transient after 1 year?

1 MR. ROSENBAUM: No.

2 QUESTION: I mean, I can understand a -- a 6-
3 year residency requirement to make sure that somebody
4 doesn't come here simply to get the -- get the lower
5 college tuitions by being resident in the college town
6 while he's there and then leave. But a 1-year residency
7 requirement to -- to guarantee?

8 QUESTION: Was that the limit --

9 MR. ROSENBAUM: Your Honor, that's --

10 QUESTION: I -- I don't remember Starns well
11 enough, but is it just that you have to stay for 1 year,
12 or was there a requirement that you had to be -- establish
13 residency before you started college?

14 MR. ROSENBAUM: It was that you had to be either
15 an established resident or that you demonstrate that you
16 will -- in fact, are a bona fide resident for the 1 --

17 QUESTION: Right. Being married to somebody
18 from in-State or --

19 MR. ROSENBAUM: Yes, and it may well be that --
20 that 1 year or 5 years would be too long. That was the
21 problem in Dunn, Chief Justice Rehnquist. The problem in
22 Dunn was that the 1-year requirement, if in fact intended
23 to establish bona fide residence, was too long. In fact,
24 this Court also said in Dunn that the 3-month county
25 requirement was too long. But that's a different issue.

1 That's the issue of how long can a State say it's
2 appropriate before bona fide residence is established.

3 QUESTION: What -- what -- what would you say?
4 Imagine that the Federal Government, not the State, were
5 to set up some special, say, innercity development program
6 and it were to say, now, we want this program available to
7 present residents, not future residents of the innercity,
8 for we fear that our program will make that innercity so
9 attractive to a large number of people who are in worse
10 conditions that they will move there, destroying the
11 program. And this is experimental, et cetera. Now, can
12 -- can the Federal Government do that?

13 I.e., I'm trying to focus -- you to focus on the
14 -- what I take is the SG's argument that Congress says,
15 what we're trying to do is to negate an incentive to move
16 to the extent that our own program creates it. We want to
17 leave that incentive where we find it.

18 MR. ROSENBAUM: And -- and in your hypothetical,
19 Justice Breyer, newcomers are being locked out of the
20 program. Is that right?

21 QUESTION: Yes. They say, this is experimental.
22 Our program won't work if everyone moves to the innercity
23 to take advantage of it. It's an experimental program.
24 We want to work with the residents who are now there, not
25 new residents. And all we're trying to do is to negate

1 the incentive to move that our very own Federal program
2 itself creates --

3 MR. ROSENBAUM: I --

4 QUESTION: -- which I take is a very -- I'm
5 trying to do a variation on -- you can -- I'm trying to
6 make it more poignant, you see.

7 (Laughter.)

8 MR. ROSENBAUM: I'm very moved, Your Honor.

9 (Laughter.)

10 MR. ROSENBAUM: Let me answer that in -- in two
11 ways, Your Honor. For the reasons that Justice O'Connor
12 and Justice Kennedy and Justice Souter indicated, the
13 answer is no. Congress could not do that.

14 Why can't Congress do it? Well, first, this
15 Court has said so. This Court said so at page 642 of
16 Shapiro and this Court said so recently in the Bray case,
17 that the right of interstate migration in footnote 7,
18 doesn't come from a negative Commerce Clause. It's a
19 right that derives from rights that cannot be eliminated
20 by Congress.

21 But even without that as part of the record,
22 what would it mean to our Federal system if Congress could
23 do that? This Court has never held that a State could
24 defend the unconstitutionality of one of its statutes
25 denying individual rights by resort to authorization from

1 Congress, the same reason Congress can't violate those --
2 those sorts of individual rights.

3 And if I understand, Justice Kennedy, your
4 concurring opinion in Thornton, the principle here is that
5 this structural relationship is created by the
6 Constitution. It is part of the unique genius of the
7 system, that each of the joint sovereigns has a
8 relationship with the citizens. What would it mean if
9 Congress could come in and sever the relationship, cause a
10 State, in the words of the Hooper case, to renege on its
11 obligation to treat citizens as their own?

12 QUESTION: Mr. -- Mr. Rosenbaum, what if
13 Congress were simply to take over the entire welfare
14 system in the country -- the States are no longer paying
15 anything -- and just leave it as it is? The -- in
16 Mississippi, you get 140; California, you get 600. And
17 the California -- there's a prohibition against receipt of
18 different welfare requirements for a year. So, it isn't
19 the State at all. It's Congress doing it on a national
20 basis. Do you think that would be bad?

21 MR. ROSENBAUM: Do I think it would be
22 unconstitutional, Chief Justice Rehnquist?

23 QUESTION: Yes.

24 MR. ROSENBAUM: I think it would be. I think
25 that the concerns that we have been talking about this

1 morning, the liberty producing concerns and the State
2 citizenship concerns -- it may well be in your
3 hypothetical, if I understand it correctly, that some --
4 that the -- the relationship between the State and the
5 citizen -- that would not be necessarily affected if it is
6 the Federal Government that is running an exclusive
7 program.

8 But in terms of the other element of the right
9 itself, the liberty producing element, that citizens --

10 QUESTION: Where do you -- where do you get the
11 term liberty producing element? Has that been in any of
12 our cases?

13 MR. ROSENBAUM: I -- I'm trying to take it, Your
14 Honor, from the decisions in **New York v. United States**,
15 the term limits case, the **United States v. Lopez**. The
16 notion which I believe absolutely saturates this -- this
17 Court's doctrine with respect to the right of interstate
18 migration, as Justice O'Connor stated at pages 76 and 77
19 of the **Zobel** concurrence, that the liberty-producing
20 element is that citizens are free to vote with their feet,
21 to act on whatever their needs or tastes are in terms of
22 the selection of the State in which they live.

23 QUESTION: Mr. Rosenbaum, I understand that, and
24 I would make it broader and our opinions have made it
25 broader than a right to immigrate. It's -- it's -- it's a

1 right of travel. And -- and as I've explained, I don't
2 understand why we treat immigrants differently from people
3 traveling just intermittently.

4 What I don't understand is this: why -- how and
5 why you can convert the right of travel to a right to
6 equal protection. Once the immigrant arrives in
7 California and is a resident of California, he is entitled
8 to equal protection of the laws with the other residents,
9 and all you would apply against him is a rational basis
10 test.

11 Now, before he becomes a resident, he has the
12 right to travel there. Why does that right to travel
13 there entitle him to equal protection of the laws as
14 opposed to simply not the imposition upon him of a
15 significant deterrent to his right to travel?

16 MR. ROSENBAUM: Your Honor, I --

17 QUESTION: You -- you say it's not just a
18 significant deterrent, he -- he is entitled to be treated
19 equally.

20 MR. ROSENBAUM: I -- I agree with that. In
21 fact --

22 QUESTION: Now, why? Why is he entitled to be
23 treated equally? I don't see that that follows from the
24 right to travel. It follows from the Equal Protection
25 Clause once he has become a resident.

1 MR. ROSENBAUM: I understand Your Honor's
2 question. Let me see if I can --

3 QUESTION: Okay.

4 MR. ROSENBAUM: -- do my best to explain it.

5 Justice Scalia, as this Court stated in -- in
6 Zobel, the equal protection analysis, one of the four
7 sources that -- that I identified earlier, is really a
8 particular application of the right of interstate
9 migration. Why is it significant here? I don't agree
10 that rational basis is the test, but the -- the notion of
11 comparing citizens, Your Honor, is what emerges from the
12 right itself because once the individual initiates the
13 move, for whatever reason that she chooses to move, then
14 it is the State's responsibility, its constitutional
15 obligation, to treat all States the same. And that's why
16 the Equal Protection Clause is an appropriate measuring
17 tool. It doesn't matter if we're talking about Article IV
18 or the Privileges or Immunities Clause or the Citizenship
19 Clause. The principle that is generated is that citizens
20 must be treated equally by their State when it comes to
21 length of residence or State of prior residence.

22 QUESTION: Why just citizens? I mean, I agree
23 with you that the State cannot -- cannot deter the right
24 to travel, but in the case of not -- not migration but
25 simply traveling in California, we do not think that

1 denying the traveler every incident of citizenship amounts
2 to a deterrent to the right of travel. We -- we apply
3 some -- you know, some significance standard.

4 Why is it not appropriate to do the same when
5 you're dealing not just with temporary travelers, but with
6 people who want to immigrate? It seems to me it's not a
7 violation of their right to travel unless you place a
8 significant impediment upon their ability to move to that
9 State.

10 MR. ROSENBAUM: The answer, Your Honor, is
11 really what this case is about, and that is what is the
12 nature of citizenship. How must citizens be treated by
13 their States?

14 And the reason why it would be appropriate for
15 the State in some -- on some instances to treat citizens
16 differently than just residents -- vacationers, travelers
17 for hunting licenses, is that the State owes a
18 responsibility, an obligation to its citizens with respect
19 to certain of its resources or programs. This Court has
20 stated in *Martinez v. Binen* --

21 QUESTION: Once you're in the citizen situation,
22 the right of travel thing is behind you and -- and you're
23 entitled to equal protection of the laws. And I'm -- I'm
24 fully willing to -- to judge this case on that basis, but
25 if you judge it on that basis, all you can demand of the

1 State is a rational basis.

2 MR. ROSENBAUM: I disagree with that, Your
3 Honor. This -- this right, as Court stated in Guest at
4 page 728, is a right that is a necessary concomitant to a
5 stronger union. Justice O'Connor described it in Zobel as
6 a right that is essential to the union. That --

7 QUESTION: Well, if you -- if you -- you have to
8 at some point decide what test or standard you're going to
9 apply to test a law to see if it penalizes the right to
10 travel. And I haven't heard anybody here today suggest
11 what that test might be, and depending on what the test
12 is, we'll learn whether a particular law is valid or
13 invalid.

14 MR. ROSENBAUM: Your Honor --

15 QUESTION: Do you have a suggestion in that
16 regard?

17 MR. ROSENBAUM: I do, Your Honor. If the
18 analysis is under the Equal Protection Clause or the
19 Citizenship Clause or the Privileges or Immunities Clause,
20 then strict scrutiny is required because this is a
21 fundamental right and because a durational residency
22 requirement --

23 QUESTION: Well, I -- I thought we had said if
24 there's a Privileges and Immunities Clause violation, that
25 we ask whether the people alleging they're discriminated

1 against or a peculiar source of the evil --

2 MR. ROSENBAUM: I -- I'm sorry.

3 QUESTION: -- and whether there's a substantial
4 relationship of the remedy to the evil.

5 Now, that's -- that's not what I would call
6 ordinarily strict scrutiny. It's some different sort of a
7 -- an inquiry.

8 MR. ROSENBAUM: Your Honor, I may have been
9 imprecise in my words. When I said privileges or
10 immunity, I was referring to the Fourteenth Amendment.

11 If it is under any of the Fourteenth Amendment
12 clauses, then I believe strict scrutiny applies because it
13 is a fundamental right because it negates the liberty-
14 producing values.

15 I completely agree with Your Honor for the
16 reasons stated in the Zobel concurrence. If it is an
17 Article IV analysis, then the first question is, are
18 newcomers the peculiar sense -- peculiar source -- the
19 first question is, do we have a fundamental right? And of
20 course, we have a fundamental right. It's the right to --
21 to migrate to and settle in a State.

22 Then the next question is, do we have with
23 newcomers a peculiar source of evil? And in -- in this
24 case, Your Honor --

25 QUESTION: Or travelers. Now, I suppose in the

1 case of out-of-State fisher -- people who fish or hunt,
2 you might say, yes, they're a peculiar source of the evil
3 because they're taking all the fish and game.

4 MR. ROSENBAUM: No offense to Justice Scalia,
5 but -- but with respect to the -- the right you're talking
6 about --

7 QUESTION: I don't take that much. I'm sorry.

8 (Laughter.)

9 QUESTION: If -- if that's the test, I ought to
10 get in-State rates.

11 (Laughter.)

12 MR. ROSENBAUM: Then we've just established the
13 Scalia exception to Article IV.

14 (Laughter.)

15 MR. ROSENBAUM: Your Honor, with respect to --
16 to -- to that sort of -- of right, I think Your Honor is
17 quite correct. First, I don't think we have a fundamental
18 right if it's not for commercial reasons, but in any case
19 it would not be implicated in the same way that the right
20 to migrate and settle is.

21 Then the next question under Article IV is, are
22 the newcomers the peculiar source of evil? Newcomers
23 aren't the peculiar source of evil. Frankly, they are not
24 empirically in any sense. In this case, to answer the
25 question that was asked earlier by Justice Stevens, the

1 percent of the budget that is implicated in this case --
2 of the welfare budget -- is .38 percent of that budget.

3 QUESTION: But you can say -- you can say the
4 same thing about fishermen or hunters. It may be that
5 out-of-State hunters or fishermen are not a peculiar
6 source of -- maybe just 5 or 10 percent of the hunters,
7 say, in a particular State are out-of-State.

8 MR. ROSENBAUM: But in -- but the -- the issue
9 is different in this case, Your Honor, because we are
10 dealing with a fundamental right, the right to migrate, to
11 settle.

12 The only way that newcomers could be considered
13 the peculiar source of the evil is if an impermissible
14 purpose is added, and that is, we don't want them here.
15 We don't want needy people coming into the State, which is
16 precisely, Justice Kennedy, what the district court and
17 the circuit court found in this case with respect to the
18 purpose in the situation.

19 And then the last question, Justice --

20 QUESTION: I don't know why you -- why you --
21 you say that the right to migrate is a fundamental right
22 and somehow less fundamental than the right to travel.
23 Frankly, I'm -- I'm -- I'm much more interested in my
24 right to travel to California than my right to live there.

25 (Laughter.)

1 MR. ROSENBAUM: That -- that pretty much trumps
2 my argument, Your Honor.

3 (Laughter.)

4 QUESTION: Yes, but your -- your -- when you say
5 the right to migrate, you mean the right to obtain
6 citizenship, don't you?

7 MR. ROSENBAUM: That is correct, Your Honor.
8 And -- and the Court has used different phrases, right of
9 interstate -- free interstate migration, right of travel,
10 right to settle and migrate. But we're talking about the
11 same thing. We're talking about coming to a State for
12 whatever need or taste, picking that State that's best
13 suited, and then settling in that State.

14 Now, let me conclude with the last point of the
15 test, Your Honor, with respect to Article IV. I think
16 California flunks the test when it comes to are newcomers
17 a source of evil. It also flunks the test, Your Honor,
18 with respect to whether or not the relationship can be
19 explained, whether or not there's a substantial
20 relationship between the discrimination itself and the
21 evil that is intended. Well, as I said, there is no evil
22 here with respect to newcomers unless we radically change
23 the nature of our Federal -- Federal system so that
24 newcomers can be boxed out of States so that even
25 newcomers coming for particular purposes can be boxed out

1 for particular reasons, which this Court has specifically
2 said --

3 QUESTION: May I ask you --

4 QUESTION: In Justice Breyer's hypothetical, or
5 if we can imagine in this case a finding that if the
6 congressional policy and California's policy were
7 implemented, welfare rates across the Nation would rise,
8 would that be -- would those hypotheticals meet a rational
9 basis standard?

10 MR. ROSENBAUM: Your Honor, first, I don't
11 believe rational basis is -- is to be applied here.

12 But the answer is -- is -- is still no, Your
13 Honor, for some of the reasons that Justice Breyer
14 indicated with his Q example, whether or not you could
15 exclude people who are -- are -- have the name starting
16 with Q. And that is because, first, Your Honor, newcomers
17 have no less burdens, they are no -- no more likely to be
18 able to deal with the cuts in -- in welfare, here up to 78
19 percent, than longer-term residents.

20 Moreover, this statute, unlike any statute that
21 has ever been before this Court, also discriminates based
22 on the State of residence. It treats citizens as if they
23 crossed the border wrapped in State flags. And there is
24 no reason to -- to assume that a individual from
25 Mississippi has 80 percent less needs than an individual

1 from Alaska. So, it would -- it would flunk the rational
2 basis test as well, Your Honor.

3 Moreover, Congress itself would have other means
4 to deal with it, as it has dealt with it in other
5 situations. If Congress was really concerned about it,
6 Congress could subsidize those States that were subject to
7 large numbers of individuals coming in.

8 But the basic principle, what this case is
9 involved with, is that States -- citizens select States.
10 States cannot select citizens, and States may not make
11 priority judgments based upon the length of residence or
12 the State of prior residence.

13 QUESTION: Was there a figure --

14 QUESTION: Let me ask you whether you think the
15 -- a State's purpose of discouraging people on welfare
16 from coming to the State would be a legitimate State
17 interest?

18 MR. ROSENBAUM: It would not, Your Honor. This
19 Court in -- in Shapiro at page 639 --

20 QUESTION: So that if this statute is motivated
21 by that interest and no other interest, it would flunk the
22 rational basis test.

23 MR. ROSENBAUM: It would, Your Honor. It would
24 be an impermissible purpose --

25 QUESTION: Why is that? Is there some clause of

1 the Constitution that says you cannot have that as a State
2 purpose?

3 MR. ROSENBAUM: Yes, Your Honor. The logic and
4 structure, plus the four clauses that I discussed.

5 QUESTION: What provision is it?

6 MR. ROSENBAUM: The Article IV and the -- the
7 Citizenship Clause and the Privileges or Immunities Clause
8 of the Fourteenth Amendment, Equal Protection generate a
9 right that States cannot negate choices of citizens or
10 can't pick and choose choices. That's not -- that may be
11 a question for the Federal Government to ask --

12 QUESTION: But that wasn't the question. I
13 mean, you -- you say there is some special prohibition,
14 that whatever other motives States may have for
15 legislation, they may not have the motive of -- of
16 deterring people from entering the State in order to get
17 on the State's welfare rolls.

18 MR. ROSENBAUM: And I think --

19 QUESTION: And you say that independently is an
20 invalid purpose.

21 MR. ROSENBAUM: That is correct. That is the
22 second reason why this statute is unconstitutional. And,
23 Your Honor, that --

24 QUESTION: But why is it a variation of that,
25 that if Congress says, look, we want to discourage the

1 incentive that we have created -- well, I don't know. You
2 may be repeating yourself.

3 MR. ROSENBAUM: May I answer your question?

4 QUESTION: Yes.

5 MR. ROSENBAUM: It is -- it is because of the
6 means that would be chosen and that is making the
7 discrimination based upon the length of residence or the
8 State of prior residence. That's what makes it
9 impermissible.

10 QUESTION: Thank you, Mr. Rosenbaum.

11 MR. ROSENBAUM: Thank you, Your Honor.

12 CHIEF JUSTICE REHNQUIST: The case is submitted.

13 (Whereupon, at 11:05 a.m., the case in the
14 above-entitled matter was submitted.)
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The United States in the Matter of:

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL
SERVICES, ET AL., Petitioners v. BRENDA ROE AND ANNA DOE, ETC.
CASE NO: 98-97

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