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Supreme Court of the United States

October Term, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

v.

VIVIAN THOMPSON,
Appellee.

No. 1134

WALTER E. WASHINGTON, *et al.,*
Appellants,

v.

MINNIE HARRELL, *et al.,*
Appellees.

No. 1138

ROGER A. REYNOLDS, *et al.,*
Appellants,

v.

JUANITA SMITH, *et al.,*
Appellees.

On Appeal from the District Courts of Connecticut, District of Columbia and the Eastern District of Pennsylvania

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BRIEF OF AMERICAN JEWISH CONGRESS, COUNCIL OF JEWISH FEDERATIONS AND WELFARE FUNDS, INC., NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U. S. A. and SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., AS *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

Each of these three cases involves an appeal from a decision by a three-judge District Court holding unconstitutional a state or Federal statutory provision imposing a residency requirement for eligibility for aid under the Federal program for Aid to Families with Dependent Children (hereinafter referred to as "AFDC") (Section 17-2d of Chapter 302 of the General Statutes of Connecticut; Section 3-203(a)(b) (1967) of the District of Columbia Code; and Section 432(6) of the Public Welfare Code of Pennsylvania).

With one exception,* each of the plaintiffs-appellees in the three cases are children, and the adults upon whom those children depend for maternal care, who have been denied benefits under AFDC solely on the ground that they have not resided in the respective state or the District of Columbia long enough to comply with the particular residency requirement. The District of Columbia and Pennsylvania cases (Nos. 1134 and 1138) are class actions.

In each of the cases, the defendants-appellants are officials responsible for administration of the AFDC program in their jurisdictions.

AFDC programs provide relief "[f]or the purpose of encouraging the care of dependent children in their own

* This brief is limited to the question of residency requirements under AFDC programs. Therefore, we do not address ourselves to the case of the one appellee in the District of Columbia case (Vera A. Barley) who challenges a residency requirement denying her relief under another categorical aid program, Aid for the Totally and Partially Disabled.

homes or in the homes of relatives by enabling each state to furnish assistance and rehabilitation and other services, * * *'' [42 U.S.C.A., Section 601]. Based upon a complicated formula set forth at 42 U.S.C.A., Section 603, qualifying AFDC state programs are reimbursed by the Federal Government in amounts varying between 50% and 80% of their payments.

Although the residency requirements differ in detail, the rejected applicants suing in each of the three cases would be required to reside within that state or the District of Columbia for one year before being eligible for AFDC benefits. In none of the cases does the respective government suggest that an alternative form of government relief is available to the rejected AFDC applicant, short of placing the child applicants in orphanages.

Although the facts with regard to each particular rejected applicant suing herein differ, the following generalizations can be made:

Appellees were denied relief because of failure to comply with residency requirements without regard to whether they had any alternative means of obtaining the necessities of life. Each of the appellees is unable to work for reasons independent of her having moved to the state, such as sickness, need to stay home to take care of very young children and, in the case of the child applicants, age.

Nothing in the records indicates that any of the rejected applicants suing here entered the respective state or the District of Columbia for the purpose of receiving higher welfare benefits than they received in the place they previously resided. In fact, Minnie Harrell and her family moved to the District of Columbia from an area where

relief payments were higher, Nassau County, New York. Nor is there anything in the records to indicate that the applicants attempted to obtain relief they would not be entitled to but for the fact that they did not reside in the state for the necessary period of time. The records indicate that most of the rejected families moved to the state or the District to be near relatives who at times provide some, albeit inadequate, support.

Interest of the *Amici*

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews, to implement Jewish values and to promote the principles of democracy. The sacredness of human life is a foundation stone of Jewish ethics. It requires us to give aid to the poor not only as a charitable act motivated by pity, but as an obligation, an act of justice toward the recipient, who is entitled to it as a right by virtue of his common humanity with the giver. This is reflected in the fact that there is no word for charity in Hebrew; its nearest translation is "tzedakah" which translates into "righteousness" or "social justice." We believe that this fundamental concept of public responsibility to provide for the poor is embodied in the concepts of due process and equal protection.

The Council of Jewish Federations and Welfare Funds, Inc. is a national association of 222 central Jewish community organizations serving 800 communities representing 95% of the Jewish population of the United States. The Council is governed by an annual General Assembly, composed of delegates selected by the member community

organizations, which sets its policies and elects the Board of Directors and officers. In the area of health and welfare, it provides its members with consultation and information on community organization, planning for services to people, budgeting and fund raising. Direct services to member communities include help with representation of the organized American Jewish communities in collaboration with religious bodies and other public interest groups concerned with the provision of adequate, equitable and dignified public welfare services to people in need.

The National Conference of Catholic Charities was established in 1910 and is the coordinating body of the social service program of the Catholic Church in the United States. It seeks to integrate modern technology with the traditional concept of charity among Catholic workers, both professional and volunteer. The Conference provides consultation and planning assistance to local administrators, conducts research projects dealing with the present and future needs in the field, and furnishes information concerning current developments relating to welfare services. It represents the philosophy of Catholic social service to other professional groups, to national coordinating agencies, to the national Congress, and to Federal government offices.

The National Council of the Churches of Christ in the U. S. A. is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the co-operative agency of thirty-four Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 throughout the United States. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every rela-

tion of life." Since 1960 it has been its policy "to work for availability of adequate public assistance for all needy people; the elimination of state and local residence requirements for public assistance * * *."

The Scholarship, Education and Defense Fund for Racial Equality, Inc. (SEDFRE) is an independent national organization formed in 1962 to assist local community organizations and civil rights groups. Its services include scholarship assistance, specialized legal action and information activities on welfare and related government assistance. SEDFRE helps disenfranchised and deprived Negroes and poor whites to meet needs ranging from voting rights and improved schools to street lights and paved streets. It also seeks a better way to acquaint welfare clients with their rights under the law and encourages them to take the necessary steps to make sure that their rights are respected.

These organizations join in this brief because they have become increasingly concerned with the deepening gulf between the great majority of Americans who enjoy the benefits of our unparalleled affluence and the minority who have been denied the opportunity to share in our abundance. We believe that the concepts of human dignity embodied in our Constitution and Bill of Rights must be asserted in this area to prevent this society from abandoning its poor.*

* We have been authorized by the National Board of the Young Women's Christian Association of the U. S. A. to inform the Court that it supports the position taken in this brief. The National Board of the Young Women's Christian Association of the U. S. A. is a corporation organized in 1907 pursuant to the laws of the State of New York and is entrusted with the continuing work of the Young Women's Christian Association of the U. S. A., an organization of autonomous member Associations. As present it is composed of 421 community and 443 student Associations with 1,439,372 members and 878,666 additional participants.

Questions to Which This Brief is Addressed

1. Are children who are denied relief under the AFDC program solely because of noncompliance with a residency requirement deprived of their right to due process of law, in violation of the Fifth and Fourteenth Amendments?

2. Does such denial of relief under the AFDC program impose an unconstitutional burden on freedom to travel?

Summary of Argument

IA. Children who starve because our government fails to provide them with relief are deprived of due process of law in violation of the Fifth and Fourteenth Amendments. The concept that government has an obligation to provide for persons in need is deeply imbedded in our governmental system. It was embodied in Sixteenth Century statutes that formed the basis of subsequent legislation adopted by the American colonies and states. The Social Security Act of 1935 implicitly acknowledged that the obligation to assist the poor extends to the national government.

B. Historically, the obligation has not been accompanied by recognition of the right of the poor person to demand assistance. One result has been widespread denial of assistance, in part through "settlement laws," the forerunners of residency requirements. Residency requirements have the effect of denying relief even where there is no alternative escape from starvation.

C. The resulting denial of assistance is a deprivation of property. Where it leaves children to starve, it must be regarded also as a deprivation of "life" as that term is used in the Fifth and Fourteenth Amendments. As shown below in Point II, the justifications for that deprivation are without merit. Hence, the deprivation is a denial of due process.

D. Our constitutional system requires recognition of an individual enforceable right to poor relief. Absent such a right, the Due Process Clauses cease to be a protection for the poor as well as the rich.

IIA. This Court has repeatedly upheld the right to travel as one based on the Constitution. It has specifically held that the States may not exclude indigents.

B. Residency requirements place a burden on the right to travel because those poor who would travel face the threat of starvation.

C. The right to travel is closely related to the constitutional rights of free expression and therefore cannot be restricted except for compelling reasons. No such compelling reasons appear here. The reasons usually given hardly rise higher than considerations of covenience. Moreover, residency requirements deal with the asserted evils by a blunderbuss technique that is constitutionally impermissible.*

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* This brief is not addressed to a third basis for challenging residency requirements, that they constitute a deprivation of equal protection of the laws. We believe that that challenge is also valid because of the absence of rational justification for the requirement.

ARGUMENT

POINT I

Children who starve because government fails to provide relief are deprived of due process of law, in violation of the Fifth and Fourteenth Amendments.

It is our position that a denial of AFDC assistance because of a residency requirement which may cause starvation and loss of life is a violation of the constitutional requirement of due process of law. Such a denial withholds assistance regardless of the reason for the applicant's presence in the state. Such an action is an arbitrary denial of property and, not inconceivably, of life, without due process of law.

A. The Obligation of Government to Provide for Persons in Need is Deeply Imbedded in Our Governmental System.

1. The test of what constitutes due process of law

In *Powell* v. *Alabama,* 287 U. S. 45, 65 (1932), this Court said:

> One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political condition of our ancestors by having been followed in this country after it became a nation.

Another test of the scope of the constitutional due process guarantees, probably the same in effect, is the requirement that government conform to "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." *Breithaupt* v. *Abram,* 352 U.S. 432, 436 (1957). Due process bars governmental action which "shocks the conscience." *Rochin* v. *California,* 342 U.S. 165, 172 (1952). It requires protection of those rights that are "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Id.* at 169, citing *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934); see also *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937).

We submit that, by either of these tests, a statute that exposes children to the risk of starvation deprives them of due process of law.

2. The British antecedents

Provision for the basic needs of the poor has been recognized as a duty of society since biblical times.[1] For four hundred years this need has been recognized by Anglo-American law as an obligation of temporal government.

In 1572, Parliament passed a law (14 Elizabeth c. 5) which was a landmark in the development of governmental assistance to the poor.[2] It established as national policy

1. BIBLE (KING JAMES VERSION), *Deuteronomy* 14:28, 29, 26:12; Matthew 25:31-46.

2. English law on the subject of poor relief is relevant here not only because it illuminates the due process concept but also because American laws for relief of the poor were shaped by the English antecedents. Riesenfeld, "The Formative Era of American Public Assistance Law," 43 *Calif. L. Rev.* 175, 177 (1955).

that the poor must be provided for through monies raised by public taxation.[3] Revision in 1597 (39 Elizabeth c. 3) and, more important, in 1601 (43 Elizabeth c. 2) did much to establish the character of poor relief. tenBroeck, Jacobus, "California's Dual System of Family Law: Its Origin, Development and Present Status," Part I, 16 *Stanford L. Rev.* 257, 258 (1964).[4]

Professor tenBroeck described the salient feature of that period (at 262):

> The central concept and great achievement of the Elizabethan poor law was the firm establishment of the principle of public responsibility to maintain the destitute. Through it, the final step was taken, permanently shifting a part of the burden to relieve economic distress from the ecclesiastical, private, and voluntary to the civil, public and compulsory. The assumption of responsibility, moreover, was made by the nation and its application was nationwide.

3. *Id.* at 180 *et seq.*

4. The principal section of 43 Eliz. c. 2 provided:

> That the churchwardens of every parish, and four * * * substantial householders there * * * shall be called overseers of the poor of the same parish; and they * * * shall take order from time to time, by and with the consent of two or more * * * justices of peace * * * for setting to work all such persons, married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by: and also to raise * * * (by taxation of every inhabitant * * * and of every occupier of lands, houses * * * or saleable underwoods in the same parish * * *) a convenient stock of flax, hemp, wool, thread, iron and other necessary ware and stuff, to set the poor on work: and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such others among them, being poor and not able to work, and also for the putting out of such children to be apprentices * * *. (As modernized by Professor Riesenfeld, *id.* at 178.)

The obligation of government to insure survival and the role of the judiciary in providing relief to the poor is reflected in Gilbert's Act of 1782, summarized by Sidney and Beatrice Webb as follows (Webb, S. & B., ENGLISH LOCAL GOVERNMENT. English Poor Law History, Vol. 1, Longmans Green & Co. Ltd. (1927) at 171):

> * * * any applicant who could not get employment in the ordinary way should by the Poor Law Guardians —without explaining how—be provided with it and be fed and lodged until it could be given. Failing such relief, any Justice of the Peace was expressly empowered, after inquiry upon oath, to order "some weekly or other relief."

In sum, the government duty to provide for the poor was so firmly implanted that, towards the end of the 18th century, Blackstone could state in his COMMENTARIES (page 95, American Editions of J. B. Lippincott & Co. from the 19th London Edition, page 131, 12th ed., London, 1793):

> The law not only regards life and member and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor.

This statement appears in Book I, entitled "Of the Rights of Persons," Chapter 1, entitled "Of the Absolute Rights of Individuals."

This "law of the land" was not confined to the homeland. An indication of England's concern that her colonial

governments provide for the needs of the poor is reflected in the request of the Committee for Trade and Foreign Plantations of the English Privy Council in 1680 for information as to provisions made in Connecticut for "relieving poor, decayed and impotent persons." Capen, HISTORICAL DEVELOPMENT OF THE POOR LAW OF CONNECTICUT (Columbia U. Press, 1905) at 22.

3. The American antecedents

A history of the reception of the English poor law into the thirteen original colonies, particularly with regard to government obligation to provide for the poor and the law of settlement is set forth by Riesenfeld (*op. cit. supra* at 203, *et seq.*). The early laws of the Massachusetts Bay Colony and New Plymouth clearly imposed the obligation on government officials (*Id.* at 204-208).

A detailed history of the development of the poor law in Connecticut is obtained in Capen, *op. cit. supra, passim.* (See also Riesenfeld, *supra,* at 209-212, 226-228.) As early as 1640, the colony of New Haven had provided for its poor (Capen, *op. cit. supra* at 22-23). The two colonies of Connecticut and New Haven had been united in 1665. In 1673, the general court ordered as follows:

> * * * every town within this colony, shall maintain their own poor. * * * If any person come to live in any town in this government, and be there received and entertained three months, if by sickness, lameness or the like, he comes to want relief; he shall be provided for by that town wherein he was so long entertained, and shall be reputed their proper charge, unless such person has within the said three months been

> warned by the constable, or some one or more of the selectmen of that town, not there to abide without leave first obtained of the town, and certify the same to the next court of assistants who shall otherwise order the charge arising about him according to justice. (Capen, *supra,* at 29-30, referring to Law No. 57 of 1673.)[5]

This public responsibility to support the destitute was also recognized in those states organized west of the Allegheny Mountains. Abbott, PUBLIC ASSISTANCE, AMERICAN PRINCIPLES AND POLICIES, Vol. 1 (1940), pp. 3-35. To give only one example (*Id.* at 5), Kansas acknowledged this government responsibility in its first constitution in 1859 by providing, in Article vii, sec. 4:

> The respective counties of the State shall provide as may be prescribed by law for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the sympathy and aid of society.

Thus England, the American colonies and the states regarded themselves as being legally obligated to provide for the poor. Justice Brewer was speaking of a principle by then fundamental to the entire country when he said, in *State ex rel. Griffith* v. *Osawkee Twp.,* 14 Kan. 418, 421 (1875), prior to his elevation to this Court:

> The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized.

5. For developments in Pennsylvania, see Beitel, TREATISE ON THE POOR LAWS OF PENNSYLVANIA (T. & J. W. Thompson & Co., Pa. (1899)); Heffner, HISTORY OF POOR RELIEF LEGISLATION IN PENNSYLVANIA, 1682-1913, Holzapfel Publishing Co. (1913).

With the adoption of the Social Security Act of 1935, the involvement of government in providing basic needs assumed new dimensions. "The law established the individual's immediate welfare as a matter of national concern entitled to consideration in the deployment of national resources." Wedemeyer, J. M. and Moore, Percy, "The American Welfare System," 54 *Calif. L. Rev.* 326, 347 (1966). Adoption of the Act constituted recognition that participation of the national government was inevitable "* * * if the people were not to starve." *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 586 (1937).

B. The Absence of an Indvidual Right to Enforce the Governmental Responsibility Results in Large-Scale Evasion of the Responsibility.

1. The denial of an individual right

While British and Anglo-American law thus recognized a governmental obligation toward the poor, it must be conceded that it did not recognize an individual right to enforce that obligation. As the Webbs pointed out, "What was enacted was not a right at all, but an obligation." *Op. cit. supra,* p. 401. Poverty was treated as a public nuisance, subject to abatement by public officials (*ibid.*).

Similarly, in this country, the obligation of the government to provide for the poor was not regarded as vesting a right in the individual poor person to compel government to meet its obligation through recourse to the courts.

> The English law has perhaps again influenced our American statutes and their interpretation on this point. In England it has long been an established

> legal principle that the duty of the local authority to relieve the poor is "a duty owed to the public and not to the poor person himself," and that "no action can be brought * * * by the poor person if relief is refused him, or if an officer is negligent in giving relief." (Abbott, *op. cit. supra,* p. 20, citing W. Ivor Jennings, THE POOR LAW CODE (London, 1930), p. lxxvi.)

Cf. Reich, C., "The New Property," 73 *Yale L. J.* 733 (1964); Reich, C., "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

2. The resulting denial of aid to the poor

The isolation of the obligation of government from the development of corresponding rights and duties has had disastrous results. Without enforcement of individual rights by court action, local administrators were free to limit relief in almost any way they saw fit. Chief among the limitations were the settlement laws, the direct ancestors of the present day residency requirements. tenBroeck, *op. cit. supra,* at 263. The resulting evils, from Elizabethan times to the present, are described by Professor tenBroeck (*Id.* at 265):

> Only those who had been born in a community or had long lived there were eligible. Other poor persons were kept out or removed to the place of their settlement. The size of the taxing and paying unit thus was determinative. From the community's point of view it supported only its own. From the pauper's point of view, he was bound to the place of his misfortune, restricted in his free movement and his personal opportunity. From society's point of view, the economy was fragmented, rendering more difficult the solution of

economic problems that were regional and national. All of this is true today.[6]

Residency requirements are applied regardless of whether the rejected recipients have any alternative source of support for staying alive. As far as the state is concerned, these people are left to starve to death. If they are fortunate, they may obtain relief from a voluntary charity of an amount the charity feels it can afford. No voluntary organization is required to provide such relief. And when there are no private agencies or no money, people not receiving public relief may actually starve or freeze to death.

Thus, implicit in the defense of these three states to their right to use residency requirements as an absolute bar to AFDC payments, no matter how great the need of the applicant, is the proposition that the state may let children residing within its boundaries die for lack of such necessities as food and shelter.

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6. For other evils see Riesenfeld and Maxwell, MODERN SOCIAL LEGISLATION, 709 (1950):

> The need for or the actual receipt of assistance created * * * a veritable *"pauper status."* Thus the pauper was required to wear a badge with the letter P, a practice which was first given statutory sanction by the Pennsylvania Poor Law Amendment Act of 1718, 3 Pa. Stat. at L. 1712-1724, 221 (1896); he was required to be farmed out to the bidder at public auction, see, *e.g.,* Indiana Poor Law of 1807 * * *; he could be thrown into the poor-house against his will, see, *e.g., Harrison* v. *Gilbert,* 71 Conn. 724, 43 Atl. 190 (1899) (denying a writ of habeas corpus); he could and apparently still can, without violation of his constitutional guarantees, be forcibly removed to his place of settlement; *Lovell* v. *Seeback,* 45 Minn. 465, 48 N.W. 23 (1891); he lost the right to vote and still does under the constitution of Massachusetts, Mass. Const. Art. of Amendments III, and Texas, Tex. Const. Art. VI, Sec. 1.

AFDC is a last resort. The hardship which regularly results from its denial because of failure to meet residency requirements is aptly illustrated by the desperate situation Minnie Harrell and her three children face (one of the families in the District of Columbia case). Ill with cancer, unable to work, unable to continue staying at the small home of her brother (who has a wife and six children he is trying to support on wages of $1.60 per hour as a tire changer), the Child Welfare Division of the Department of Public Welfare of the District of Columbia can only suggest that Minnie Harrell consider placing her children in an orphanage.

Nowhere in the record of any of the three cases is there any suggestion that denial of AFDC benefits is dependent upon the availability of alternative relief programs for which the rejected AFDC applicants are eligible. The extent of the failure of AFDC to meet the needs of the one child out of every five children in this country who lives below the poverty line is implicit in the following statement (Orshansky, "Counting the Poor: Another Look at the Poverty Profile," *Social Security Bulletin,* U. S. Dept. of Health, Education and Welfare, January, 1965, pp. 15-16):

> In contrast to this total of 15.6 million needy children, in December 1963 only 3.1 million children were receiving assistance in the form of aid to families with dependent children, the public program designed especially for them.

Children are kept off the welfare rolls and denied AFDC payments for many reasons. One of them is because such children fail to meet residency requirements.

C. The Denial of AFDC Relief Because of Residency Requirements Results in a Denial of Life and Property.

In 1964, there were 34.1 million Americans, of whom almost 15 million were children, whose income was below the poverty line.[7] Orshansky, "Recounting the Poor—A Five-Year Review," *Social Security Bulletin,* U. S. Dept. of Health, Education and Welfare, April 1966, pp. 12, 13. For these people, each day requires a choice between an adequate diet of the most economical type and some other necessity because there is not enough money for both. Of the 15 million children living below the poverty line in 1964, 5.7 million were under age six (*ibid.*).

Whether one regards the benefits provided pursuant to the categorical assistance programs of the Social Security Act as "rights" or "privileges," they must be recognized as basic to human survival. Unlike many other benefits provided by government, the Social Security Act programs provide only for needs basic to life and usually less than that. Although states establish minimum standards of health and decency the Act only requires assistance be furnished "as far as practicable under the conditions in such State." 42 U.S.C.A. Section 601. As a result many states pay only a percentage of their own minimum standard. The survival which these payments permit is commonly one in which the beneficiaries are ill housed, ill clothed and

7. The poverty line is defined in Orshansky, "Counting the Poor," *op. cit. supra,* pp. 5-13. It is based on an "economy" food plan prepared by the Department of Agriculture for "temporary or emergency use when funds are low" (at p. 6) and allows an average of 70 cents per day per person for food and an additional $1.40 per day per person for all other items, including housing, medical care, clothing and carfare (p. 4).

ill fed. As we have just been told by the National Advisory Commission on Civil Disorders (U. S. Riot Commission Report, Bantam Books ed. (1968), p. 458):

> This sum [an average of about $36 monthly for each recipient of AFDC] is well below the poverty subsistence level under any standard. The National Advisory Council on Public Welfare has commented:
>
> "The national average provides little more than half the amounts admittedly required by a family for subsistence; in some low-income states, it is less than a quarter of that amount. The low public assistance payments contribute to the perpetuation of poverty and deprivation that extend into future generations."

We submit that the poor are plainly deprived of "property" when government withholds the relief it is responsible for supplying. The deprivation of life itself, however, is of greater concern. As we have shown, the residency requirement is imposed by the states without regard to the consequences to the individual family or its children. They are literally left to starve. Even if they escape death the resulting impairment of both mental and physical health must be viewed as a deprivation of "life" as that term is used in the Fifth and Fourteenth Amendments.[8]

We recognize, of course, that it is not enough to show that there has been a deprivation of life or property. The deprivation must be "without due process of law." Here, it is argued that the deprivation is not without due process because the residency requirement is reasonably designed

8. See *New York Times,* March 25, 1968, p. 47, "Hunger and Sickness Affect Mississippi Negro Children"; *New York Post,* March 27, 1968, p. 2, "Secret Report: 10 Million Go Hungry in U.S."

to achieve proper public objectives. The various justifications given for the requirement are dealt with below (Point IIC) in the discussion of the restraint on the right to travel. The remaining point to be made here is that the denial of due process may not be upheld on the ground that the individual poor person has no right to obtain enforcement of the governmental responsibility.

D. Our Constitutional System Requires Recognition of an Individual Enforceable Right to Poor Relief.

We believe we have shown that the obligation of government to provide poor relief is so fundamental and of such long standing as to be regarded as part of the basic "law of the land" which is incorporated in the due process concept. It would be inconsistent with our system of law to recognize this responsibility while denying those who would benefit from it the right to enforce it.

Absent such a right, the Federal and state governments and their agents are free to adopt any rule they may choose to limit their performance of their recognized responsibility. This Court said in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 23-24 (1935):

> * * * to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy.

See also Justice Brandeis concurring in *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 84 (1936); Justice Jackson concurring in *Youngstown Sheet & Tool Co.* v. *Sawyer,* 343 U. S. 579, 646 (1952).

The Due Process Clause has stood as a guarantee of the liberties of Americans largely because of its expanding enforcement of purely procedural rights. The fact that the right of the individual poor person to claim his due has not been recognized up to now is not a barrier to present recognition, if in fact the right is essential to assuring "decency and fairness." As this Court said in *Wolf* v. *Colorado,* 338 U.S. 25, 27 (1949):

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

See also *Frank* v. *Maryland,* 359 U.S. 360, 371 (1959). It is particularly appropriate that due process develops so as to protect the poor. As stated in *Wolf, supra,* 338 U.S. at 27:

> This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of ordered liberty" (citing *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937)).

POINT II

Residency requirements place an unconstitutional burden on the right to travel.

Government cannot bargain with the poor so as to buy up basic rights of citizenship in exchange for the necessities of life. Residency requirements in effect take from the poor the right to travel, the right to make the most of job opportunity and freedom to associate with relatives and loved ones.

A. The Right to Travel

In *United States* v. *Guest,* 383 U.S. 745, 757 (1966), this Court said:

> The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

Again at page 759, this Court said:

> Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvas those differences further. All have agreed that the right exists.

The importance attached by the Court to the right to travel is also reflected in cases dealing with international travel. *Kent* v. *Dulles,* 357 U. S. 116, 126 (1958); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505 (1964).

The right to travel includes the right to settle in a state. In *Edwards* v. *People of the State of California,* 314 U.S. 160 (1941), this Court held that a law making it a misdemeanor to assist in bringing into the state any indigent person who is not a resident of the state was unconstitutional. The defendant Edwards had assisted his indigent brother-in-law to enter California for the purpose of residing there. California argued that it could not bear the financial burden resulting from the migration of indigents to the state (at 168):

> Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions,

> and the care of the criminal, the indigent sick, the blind and the insane.
>
> Should the States that have so long tolerated, and even fostered, the social conditions that have reduced their people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges, upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State.

This Court rejected that argument (at 173):

> The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not consider it our function to pass upon the wisdom, need, or appropriatness of the legislative efforts of the States to solve such difficulties [citing cases].
>
> But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across the borders.

Thus, this Court has made it clear that the poor have the right to travel as well as the rich. As Justice Jackson said, concurring in *Edwards* (at 185):

> Any measure which would divide our citizenry on the basis of property into one class free to move from

> state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but it is also a shortsighted blow at the security of property itself.

See also the concurring opinion of Justice DOUGLAS (at 177).

B. The Burden on the Right to Travel Imposed by Residency Requirements

Residency requirements impair the right to travel when they burden its exercise by compelling forfeiture of government benefits. Here, as in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the citizen is forced to choose between the exercise of basic rights (there, the free exercise of religion) and the forfeiture of government benefits. The citizen is subjected to "a choice between the rock and the whirlpool." *Frost & Frost Trucking Company* v. *Railroad Commission,* 271 U.S. 583, 593 (1926).

This is precisely the predicament faced by AFDC recipients. The pressure to forego their right to travel is unmistakable. Denial of the basic benefits involved here derives solely from the exercise of the constitutionally protected right to travel.

This Court has consistently rejected distinctions based on the fact that the potential beneficiary is not prevented from exercising his basic rights, but merely deterred or inhibited. "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Aptheker, supra,* 375 U.S. at 516, citing *NAACP*

v. *Button,* 371 U.S. 415 (1963). Even a "chilling effect" on the exercise of basic rights is sufficient to condemn restrictive action. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

This is true where the benefits derivable from the state are far less valuable than those in question here. Indeed, even where the benefits are completely gratuitous and even ephemeral, they may not be subjected to conditions which "deter or inhibit" the exercise of basic rights. *Speiser* v. *Randall,* 357 U.S. 513 (1958) (a tax exemption conditioned on a loyalty oath).

The travels of the poor are already sufficiently encumbered by the fact of their poverty. As we show below in Point IIC, the poor travel for reasons far more basic than their affluent contemporaries.

It should be remembered that AFDC benefits are given only when the family has no alternative means of support. 42 U.S.C.A. §602(7). AFDC families cannot, in many cases, choose to forego the benefit and exercise the liberty to travel. Practically speaking, conditioning welfare benefits on residency tends to tie the poor to the place of their misfortune in the same manner as the English statutes regarding settlement and removal of the poor in the 18th Century. Those who do succeed in moving out of unsatisfactory circumstances often find themselves in a shocking position.

1. Some American citizens are stateless, having lost residence in one place without gaining it in another, and ineligible for assistance anywhere. Some of

these people can never become eligible because in certain states they cannot gain residence unless they are self-supporting.

2. Others are sent back to their place of residence even when their return is undesirable from the point of view of the individual or the community. Simons, Saville H., "Services to Uprooted and Unsettled Families," in *Social Welfare Forum* (National Conference on Social Welfare, 1962, pp. 165, 171).

C. The Restrictions Placed on the Right to Travel by Residency Requirements Are Not Justified by Compelling Necessity.

Like most constitutional rights, the right to travel is subject to restriction in the public interest. Yet, this Court has made it plain that restrictions may not be lightly imposed or sustained.

This Court has frequently referred to "the preferred place given in our scheme to the great freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). As stated in *Thomas,* "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" (323 U.S. at 530). In such cases, the "subordinating interest of the State must be compelling." *National Association for the Advancement of Colored People* v. *Alabama,* 357 U.S. 449, 463 (1958), quoting Justice FRANKFURTER concurring in *Sweezey* v. *New Hampshire,* 354 U.S. 234, 265 (1957). See also *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts,* 321 U.S. 158, 164 (1944).

In *Aptheker,* this Court placed freedom to travel in the same category, saying (378 U.S. at 517):

> Similarly, since freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel.

While residency requirements are not direct limitations on travel, when the choice is possible starvation if one does travel, the effect is little different from a direct prohibition.

Leeway may be given, presumably, for regulation by the states in areas of direct concern. When a state conditions the right to vote, or to become a member of the bar, on minimum residency, it can be concluded that, on balancing the indirect limitation on travel against the interest of the state, the state is legitimately protecting its electoral process or the functioning of its courts. Familiarity with conditions in the state is reasonably related to voting and familiarity with local law and court processes is reasonably related to the attorney function. In each case, the small limitation on travel is justified. But where, as here, the asserted interest of the state is balanced against the very life of a person, that interest must yield.

Moreover, we are dealing here with a national program, laid down in a national statute and funded primarily by the national government. The states that impose residency requirements are saying, in effect, that the benefits of this national program will be made available to those families

who stay in their home states but not to those who exercise their right to travel—to obtain jobs, to rejoin families or for any other reason, good or bad. We submit that this cannot be made a feature of a Federal program by the participating states. Not even the fact that the limitation may have been authorized by Congress (see 42 U.S.C.A. §602(b)) can immunize it against the constitutional right to travel from state to state.

In considering whether the residency limitation on freedom to travel is justified by compelling public interests, it should be noted, first, that it does not further but rather frustrates the purpose of the Federal statutory scheme. The purpose of the AFDC program is set forth in the Federal statute creating the program and authorizing Federal contributions to its financing:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. Social Security Act of 1935, § 401, as amended, 42 U.S.C.A., § 601.

Residency requirements bear no relationship whatever to this purpose. In fact, failure to provide assistance pay-

ments for one year will frustrate the purpose of the statute, often resulting in the break-up of homes prior to the time the family can become eligible for welfare. For example, the Harrell family in the District of Columbia case has been advised that since Mrs. Harrell and her three children are not eligible for AFDC payments, Mrs. Harrell should consider breaking up her home and placing her children in an orphanage. (See letter dated April 20, 1967 from Mrs. Jane Berry, Supervisor, D.C. Department of Public Welfare, annexed to the complaint in No. 1134 as Exhibit A.) The three-judge court in Delaware, recently holding that the AFDC residency requirement in Delaware is unconstitutional, said:

> It is evident to us that as to these families living in Delaware for less than one year the denial of public assistance fails to carry out the stated purposes for the Public Assistance Code. It in fact tends to frustrate them. The residency requirement prevents prompt assistance to some of the State's needy and distressed and to that extent is the antithesis of "humane." It also necessarily results in pressure on the solidarity of the family unit. Nor given these circumstances is it an acceptable answer to say that until they are here one year such persons are not a part of the state's needy and distressed. The discrimination based on length of residency thus finds no constitutional justification in the purpose declared in the statute itself. Green v. Department of Public Welfare, 270 F. Supp. 173, at 177 (D. Del., 1967).

What, then, are the justifications offered for residency requirements? They appear to be as follows: (1) the need to discourage poor persons from coming into the state or remaining in the state; (2) the need to make it unprofit-

able to come to a state to obtain higher AFDC benefits; (3) the need to provide an objective test of whether there is an intent to become a permanent resident of the state; and (4) the need to obtain certainty in preparing state budgets.

The first of these justifications is squarely in conflict with this Court's decision in the *Edwards* case. The direct holding of that case was that states may not exclude indigents.

The claim that residency requirements are needed in order to facilitate budgeting demeans our system of constitutionally protected rights. It is sufficient to say, as this Court said in *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965), that "States may not casually deprive a class of individuals" of a valuable right (there, the right to vote) "because of some remote administrative benefit to the State."

The other two justifications are dealt with in detail in the decisions of the courts below in these three cases, as well as in decisions by other three-judge District Courts in cases now pending. We make but a few points here.

The legislative history of most if not all residency provisions reveals an assumption that indigents move from state to state to achieve higher welfare benefits and a further assumption that a residency requirement will halt or impede such movement (see Opinion of the court below in No. 813, App. 26a). Not only is the premise that people move to a state for the purpose of obtaining welfare assistance demonstrably false, but also the purpose of deter-

ring movement fails completely. As Simons wrote several years ago (*op. cit. supra,* p. 174):

> All evidence shows this not so. People move primarily to secure employment, to be with relatives, sometimes to find a more favorable climate, or in order to cope with emotional problems. California, Arizona and Florida have the highest residence requirements permitted, but they continue to have the highest in-migration in the country. On the other hand, in New York State even before the Anti-Abuse Law went into effect, when there was no legal residence requirement for public assistance, less than 2 per cent of the cases receiving assistance had been in the state less than one year, even though New York has high assistance standards and is surrounded by states that make lower payments.

Simon's statements are supported by statistics compiled by Robert J. Lampman from 1950 and 1960 census figures. "Population Change and Poverty Reduction, 1947-1975," in Fishman, L.(ed.), POVERTY AND AFFLUENCE (1966), pp. 36-37. Moreover, there is no indication from states that have repealed residency statutes of any increase in the number of in-migrants seeking a welfare bounty.

The simple fact is that poor people move for a variety of reasons. By far the largest population shift of recent decades has been that of the Southern Negro. That shift has been due primarily to the displacement of Negroes from Southern agriculture and increases in industrial employment in the North, as the National Advisory Commission on Civil Disorders made clear in its recent Report (*op. cit. supra,* pp. 236-242). See also, Myrdal, AN AMERICAN DILEMMA, pp. 188-9, 191, 193-6, 251 (1944).

Undoubtedly, *some* people move to obtain higher welfare benefits, but it should be noted that this is not true of any of the plaintiffs before this Court or in other cases challenging residency requirements in lower courts. For example, Vivian Thompson (in No. 813), Gloria Jean Brown, Clay Mae Legrant, Minnie Harrell (in No. 1134) and Mrs. Loretta Ramos (*Ramos* v. *Health & Social Service Board,* 276 F. Supp. 474 (E.D. Wisc. 1967)) and their children came to the respective jurisdictions to be near to or live with relatives. Mr. Green (*Green* v. *Dept. of Public Welfare, supra*) came to take a job as a construction laborer.

In any event, the residency requirement punishes not only those who may conceivably move for higher welfare payments but also the family looking for work and even the man who comes to the state having a job which ends for reasons beyond his control. The good are thus punished in order to get to the few bad. This blunderbuss technique is not constitutionally permissible, particularly where rights of freedom are involved. *Elfbrandt* v. *Russell,* 384 U.S. 11, 18-19 (1966); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), and cases there cited. As this Court said in *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 438:

> Broad prophylactic rules in the area of free expression are suspect. [Citations omitted.] Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

We submit that the various justifications given for the residency requirement do not reveal that "compelling" interest of the state which alone can justify curtailment of constitutional freedoms. *N.A.A.C.P.* v. *Alabama, supra.* For that reason, the requirement must be held invalid.

Conclusion

It is respectfully submitted that the judgments below in each of these cases should be affirmed.

Respectfully submitted,

HOWARD M. SQUADRON
JOSEPH B. ROBISON
Attorneys for American Jewish Congress

CARLOS ISRAELS
Attorney for Council of Jewish Federations and Welfare Funds, Inc.

WILLIAM POLKING
Attorney for National Conference of Catholic Charities

WILLIAM S. ELLIS
Attorney for National Council of the Churches of Christ in the U. S. A.

CARL RACHLIN
Attorney for Scholarship, Education and Defense Fund for Racial Equality, Inc.

Amici Curiae

LESTER GREENBERG
STEPHEN NAGLER
Of Counsel

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307 BAR PRESS, Inc., 132 Lafayette Street, New York 13 – WO 6-3906

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