IN THE

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY

ALBERTA HAMILTON, individually and on behalf of all others similarly situated,	:	Civil Action No.
Plaintiff,	:	
v.	:	
JOSEPH CALIFANO, Secretary of the United States Department of Health, Education and Welfare,	:	
JAMES B. CARDWELL, Commissioner of the Social Security Administration, and	:	
ANN KLEIN, Commissioner of the New Jersey Department of Human Services,	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE.

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PRELIMINARY STATEMENT

A. Parties

Plaintiff Alberta Hamilton is a resident of New Jersey and a recipient of SSI due to disability.

Defendant Joseph Califano is the U.S. Secretary of Health Education and Welfare (hereinafter HEW) and is responsible for implementing the SSI program. He is party to the Agreement which contains Exclusion b and by which authority he implements and administers the state supplement. He is the head of the Agency which is charged by 5.U.S.C.551 et seq. with the responsibility for causing the Agreement to be published in the Federal Register.

Defendant James B. Cardwell is the Commissioner of the Social Security Administration who has been delegated the authority by the Secretary to administer and implement both the federal SSI program and the New Jersey state supplement. He is the head of the agency which is charged by the Secretary with the responsibility for publishing the Agreement in the Federal Register in proposed and final form, and for providing notice and a hearing prior to its adoption.

Defendant Ann Klein is the Commissioner of the New Jersey Department of Human Services. She is charged by N.J.S.A. 44:7-87, (1977 Supplement) with the responsibilitiy of entering into the Agreement, promulgating rules to implement the terms of the Agreement, and reimbursing the (federal) government for paying the state supplement to New Jersey residents. She is a party to the Agreement which establishes Exclusion b and has authorized the Secretary to administer and implement the state supplement. She is the head of the agency which is charged by the New Jersey Administrative Procedure Act, N.J.S.A. 52: 14B-1 et seq., with the responsibility for publishing the proposed Agreement in the New Jersey Register, providing notice and a hearing prior to its adoption and filing

the Agreement with the New Jersey Secretary of State.

B. Nature of the Proceedings

Plaintiff Alberta Hamilton initiated these proceedings on behalf of herself and all persons similarly situated for declaratory and injunctive relief, pursuant to 20 U.S.C.2201 and 2202, against the continued enforcement of Exclusion b, as a result of which plaintiff and members of the class have been denied the New Jersey state supplement. Plaintiff and members of the class also seek retroactive benefits.

Exclusion b is a provision of the agreement entered into between the United States Secretary of HEW and the State of New Jersey in which the State of New Jersey agreed to pay and the federal government agreed to administer the state supplement. Exclusion b denies the state supplement to plaintiff and members of the class solely because one or more persons, other than the spouse, lives in their households. This action is being brought under the fifth, ninth and fourteenth amendments and the Supremacy Clause of the United States Constitution, the Civil Rights Act, 42 U.S.C, 1983, the federal Administrative Procedure Act, 5 U.S.C.551 et seq., the Social Security Act, 42 U.S.C. 1381 et seq., and federal regulations promulgated thereunder, the New Jersey Supplemental Assistance statute, N.J.S.A. 44:7-85 et seq. (1977 amendment) and the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

Jurisdiction is conferred by 20 U.S.C.1331, 28 U.S.C, 1361, 42 U.S.C. 1383(c)(3) and 28 U.S.C. 1343 (3) and (4). The court has pendent jurisdiction to determine the state claims.

Plaintiff seeks an Order commanding defendants to Show Cause why a hearing on the preliminary injunction should not be heard. If a hearing cannot be held before November 14, 1977, plaintiff seeks a temporary

restraining order enjoining defendants from reducing plaintiff's benefits, pursuant to Exclusion b, until such time as a hearing can be held.

C. Statement of Facts

Plaintiff Alberta Hamilton is a disabled SSI recipient. Ms Hamilton has had severe medical problems for the past year. She was advised on July 23, 1976, by her treating physician, Dr. Jensen, that she could not live alone. On August 10, 1976, she was hospitalized at Cooper Medical Center with severe hemorrhaging from the throat. In August, her daughter, Carrie Mae Hamilton, left her home in Georgia and came to stay with her mother in New Jersey.

On February 18, 1977, plaintiff was informed by the Social Security Administration, that if her daughter continued to live with her, she would lose the state supplement ($22.20 per month) to her federal SSI benefits. In addition, she was told that her benefits would be reduced by an additional $10.00 per month in order to recoup an alleged overpayment of $133.20, due to the fact that Ms. Hamilton's daughter had lived with her since August, 1977.

Plaintiff's benefits were reduced even though she explained that her daughter had no income and made no contribution to her support.* Since plaintiff decided that she could not live on the SSI grant without the state supplement, her daughter left her home the same day.

Alberta Hamilton has requested a reconsideration and hearing based on the alleged overpayment. She has also requested a waiver of the alleged overpayment because she was without fault in incurring the alleged overpayment and because she is unable to pay it back. These are the only issues before the administrative law judge.

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*This establishes that Ms. Hamilton's countable income did not increase during the period of time her daughter resided with her and was, therefore, at all times, below the state supplementary payment level.

On August 26, 1977, after suffering a heart attack, plaintiff was placed in the intensive care ward at Cooper Medical Center. She was released from the hospital on September 13, 1977. Shortly after her release, her daughter resumed living with plaintiff in order to care for her. Dr. Jensen, plaintiff's treating physician, has informed her that she cannot live alone for the foreseeable future. Her daughter is willing to stay with her mother for as long as it is necessary for her health and well-being. As before, she makes no contribution to plaintiff's support.

On October 14, 1977, plaintiff informed the Social Security Administration that her daughter was living with her but did not contribute to plaintiff's support. On October 17, 1977, she was informed that she would lose the state supplement i.e.that her benefits would be reduced from $190.00 per month to $167.80. Plaintiff's December check will be reduced by the Social Security Administration (on November 14, 1977) unless this court acts on her behalf.

POINT I

THIS COURT HAS JURISDICTION TO HEAR THE CLAIMS OF PLAINTIFF AND MEMBERS OF THE CLASS.

A. This Court Has Jurisdiction To Hear the Claims of Plaintiff and Members of the Class Under 42 U.S.C. 1383(c)(3).

The federal district court has jurisdiction to hear a claim for benefits under Title XVI of the Social Security Act, once a final decision has been rendered by the Secretary, 42 U.S.C. 1383(c)(3), incorporating by reference 42 U.S.C. 405(g). However, the requirement that there be a "final" decision by the Secretary has not been interpreted by the Supreme Court as requiring full exhaustion of the Secretary's administrative procedures. Indeed the Court has made clear that presenting a claim for benefits so that a decision may be made by the Secretary is the only essential or non-waivable element for subject matter jurisdiction.[1] Weinberger v. Salfi, 422 U.S. 742, 764-766 (1975); Mathews v. Eldridge, 424 U.S. 319,328 (1976); Mathews v. Diaz, 426 U.S. 67, 76-77 (1976); Califano v. Goldfarb, 430 U.S. 199,203, (footnote 3)(1976).

The named plaintiff in this suit, Alberta Hamilton, has sufficiently presented her claim for benefits to the Social Security Administration. On October 14, 1977 plaintiff informed the Social Security Administration that her living arrangements had changed and that her daughter was living with her but did not contribute to her support. On October 17, 1977, the Social Security Administration informed plaintiff that she would lose the state supplement.

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1 Each plaintiff is deemed to have applied for the state supplement at the time of their application for the SSI benefit. 20 C.F.R. 416.2015(a).

Thus, Ms. Hamilton has met the non-waivable requirement that she present a claim for benefits to the Secretary so that he may make a determination. Mathews v. Eldridge, supra at 328.

Class members have also met the non-waivable requirement that a claim for benefits be presented to the Secretary, by informing the Secretary either at the time of application or subsequently that one or more persons other than the spouse lives in their households. Thereafter, the Secretary made a determination that none would receive the state supplement.

In the cases cited above the Court found jurisdiction under 405 (g), even though none of the plaintiffs had fully exhausted the prescribed administrative procedures. The Court did not focus on whether the Secretary's decision was "final" in the sense that no further review was possible under the regulations. Instead, the Court inquired into whether the Secretary's decision was reached at a sufficiently high level to satisfy his administrative responsibilities of making findings of fact and rendering decisions in conformity with existing regulations. Indeed, the only purpose of the exhaustion requirement is

> preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise and to compile a record which is adequate for judicial review. Id. at 764-765.

According to the Court, review beyond a level which would satisfy the Secretary's administrative responsibilities

> would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest. Weinberger v. Salfi, supra at 765-766.

Where the facts are uncontroverted and plaintiffs can prevail on the merits

only if a regulatory or statutory provision is declared invalid, further review would be both futile and a waste of administrative resources since the Secretary's appeal process has neither the expertise nor the authority to find a regulation of statutory provision invalid, whether for constitutional or other reasons. Indeed, the Secretary would not even be required to consider such a challenge at the administrative level, Mathews v. Eldridge, supra at 330.

The initial determination rendered in this case satisfies the requirement that there be a decision at a sufficiently high level to satisfy the Secretary's administrative responsibilities despite the absence of a hearing for the following two reasons: First, no factual dispute exists, thereby obviating the Secretary's need for further factual inquiry in order to compile a record. (With respect to the named plaintiff, the Secretary has refused even to consider any facts before making his initial determination).

Second, the Secretary's administrative appeal process is incapable of rendering a decision both favorable to plaintiff and members of the class and in conformity with the provision challenged herein, since nothing short of a declaration that Exclusion b is invalid will allow them to receive the state supplement.

Therefore, because further pursuit of administrative remedies in this case would be both futile for the claimants and a waste of administrative resources, the Secretary's initial denial of the claims of plaintiff and members of the class for the state supplement constitutes a waiver of the exhaustion requirement and satisfies the 405(g) jurisdictional requirement that there be a "final" decision by the Secretary.

Indeed, the Court has found that a "final" decision has been made by the Secretary where the Secretary has, by stipulation, admitted that:

> no facts were in dispute...the case was ripe for disposition by summary judgment and...the only issue before the district court was the constitutionality of the statute...
> Mathews v. Diaz, supra, at 76.

Such a stipulation, which attested to the inability of the Secretary's administrative process to resolve the dispute, was deemed by the Court to constitute a waiver of the exhaustion requirement, Mathews v. Diaz, supra at 76-77.

However, even assuming, for the sake of argument, that the administrative appeal process does have the authority to overturn a regulatory provision, it clearly has no power to declare Exclusion b invalid, since that could not be accomplished unless the Secretary were to unilaterally alter the terms of a contractual agreement between the Secretary and the State of New Jersey.

Indeed, the Secretary himself has admitted the futility of pursuing administrative remedies to challenge Exclusion b.

In a recent New Jersey SSI case, the Appeals Council of the Social Security Administration refused to recognize the authority of an administrative law judge to declare Exclusion b, the very provision challenged here, invalid. See Appendix A. Indeed, the Appeals Council explicitly held that neither the administrative law judge nor even the Secretary himself had the authority under the argeement to unilaterally alter its terms and that only action by the courts or by the Attorney General could resolve the issue. This admission by the Secretary constitutes a waiver and further substantiates plaintiff's claim that a "final" decision has been rendered by the Secretary, even though plaintiff has not exhausted her administrative remedies.

However, the Secretary need not stipulate or otherwise admit to the futility of pursuing administrative remedies to effect a waiver. Mathews v. Eldridge,

supra at 328. Wilson v. Edelman, 542 F2d 1960, 1272-73 (7th Cir. 1976) established that the court itself is an arbiter of whether a factual dispute exists and whether further pursuit of administrative remedies is required. The Secretary's mere assertion of plaintiff's failure to satisfy section 405(g)'s exhaustion requirement may not defeat the court's jurisdiction unless the court determines that there is a genuine material issue of fact, which could be resolved through the administrative process, Wilson v. Edelman, supra at 1273.

Finally, the Supreme Court has stated that not only is exhaustion not required, but even the failure or the refusal of the Secretary to waive the exhaustion requirement cannot defeat 405(g) jurisdiction where

> a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. Mathews v. Eldridge, supra at 330.

In the instant case, the named plaintiff, Alberta Hamilton, has three compelling reasons for having the dispute in this case resolved promptly. First, she has a serious medical condition which requires her daughter's presence in her home. Second, she is entitled to receipt of at least a subsistence level of benefits at all times, including the period of time that is required for her to pursue her remedies. Goldberg v. Kelly, 397 U.S. 254, 261-263 (1969). This program, based on need, is substantially different than the program under which Mathews v. Eldridge was decided, and requires substantially different considerations. The SSI program is--like Aid to Families with Dependent children--a program of last resort.

Third, the record demonstrates the substantial delays to which plaintiff has already been subjected in pursuing her appeal through the administrative process[2] and to which she would undoubtedly be subjected, if she were to, again,

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[2] On May 2, 1977, plaintiff requested a hearing, yet not until September 19, 1977, was a hearing scheduled.

attempt to pursue her appeal throught the administrative process. (This delay was so excessive that it violated the Secretary's regulation requiring a hearing within 90 days of the date of the request for a hearing on a non-disability issue. 20 C.F.R. 416.1455). Had plaintiff brought suit against the Secretary any time after August 2, 1977, the Secretary could not have raised plaintiff's failure to exhaust her administrative remedies as a jurisdictional bar under 405(g) since a claimant is not required to wait for a hearing beyond the statutory limits.

Indeed, it is the Secretary's delay in violation of his own regulations which has caused plaintiff to seek judicial review at this time.

For each of the above reasons, this court has jurisdiction under 42 U.S.C. 1383(c)(3) to hear the claims of plaintiff and members of the class.

B. This Court Has Jurisdiction Under 28 U.S.C. 1331.

Section 1331 of Title 28 of the U.S. Code provides for original jurisdiction in federal district court in all civil actions arising under the Constitution and laws of the United States. The instant action arises under both the Constitution and statutory law of the United States.

Therefore, in the absence of a specific statutory provision prohibiting federal question jurisdiction in district court in a suit brought to recover a claim for benefits under title XVI of the Social Security Act, this court has jurisdiction under 28 U.S.C. 1331 to determine the claims of plaintiff and members of the class.

Title XVI contains no bar to federal question jurisdiction.

The only statutory provision in the Social Security Act which has been held to bar federal question jurisdiction under 28 U.S.C. 1331 is 405 (h), contained

within Title II. Weinberger v. Salfi, supra.

By its own terms, subsection 405(h) applies only to subchapter II of the Social Security Act. Indeed, the Court's holding in Salfi, supra, that 405(h) precluded the Court from hearing a claim for benefits was specifically limited to actions arising under title II of the Social Security Act.

Here, the claims of plaintiff and members of the class are based exclusively on the refusal of defendants to provide them with the state supplement to the SSI program. The SSI program is found within title XVI of the Social Security Act. Jurisdiction to hear a claim for benefits under title XVI is provided by 42 U.S.C. 1383 which specifically incorporates the provisions of 42 U.S.C. 405(a),(d),(e),(f), and (g). Conspicuously absent from this jurisdictional grant is any reference whatsoever to 405(h).

It is a well-established principle of statutory construction ("expressio unius est exclusio alterius") that an affirmative legislative enumeration of items operates as an exclusion of those items which are unexpressed. Here, it cannot be argued that the legislature simply forgot to mention, but intended to include, 405(h) since it specifically included a number of other subsections of the very same section.

Indeed, in enacting title XVIII which provides for medicare insurance to the aged and disabled, Congress specifically incorporated by reference section 405(h) of title II. See 42 U.S.C. 1395 ii. Clearly, had Congress wished to include the provisions of section 405 (h) in title XVI of the Social Security Act, it could have done so. C.F. Maher v. Mathews, 402 F. Supp. 1165, 1173 footnote 30 (D. Del. 1975).

It can only be concluded that the failure of Congress to specifically incorporate subsection 405 (h) into 1383 reflects the clear Congressional

intent to exclude 405(h) from the SSI program.

Therefore, based on the absence of a specific statutory bar to federal question jurisdiction in the SSI jurisdicitional grant and the inapplicability of 405 (h) to the SSI title XVI program, this court is vested with jurisdiction under 28 U.S.C. 1331 to hear the claims of plaintiff and members of the class.

C. This Court Has Jurisdiction to Determine the Claims of Plaintiff and Members of the Class under 28 U.S.C. 1361.

The federal district courts have jurisdiction to require a federal official to perform a ministerial duty imposed by the Constitution, Ryan v. Shea, 525 F.2d. 268 (10th Cir. 1975), statutes, Carey v. Local Board #2, Hartford, Connecticut, 297 F. Supp. 252, 254-255 (D. Conn. 1969), or regulations, c.f. Bluth v. Laird, 435 F.2d 1065, 1071 (4th Cir. 1970), of the United States. 28 U.S.C. 1361. Plaintiff's claim for benefits is based in part upon the violation of federal constitutional, statutory and regulatory law, (See Points IV, V, infra), resulting from the refusal of defendants to comply with their clear ministerial duty to pay the state supplement to plaintiff and members of the class. 42 U.S.C. 1382 a.

Title XVI of the Social Security Act and federal regulations promulgated thereunder make clear that the Secretary has no discretion to refuse to pay the state supplement to any individual residing in New Jersey whose countable income falls below the state supplementary payment level.

Furthermore, the federal defendants have a clear ministerial duty to comply with the federal Administrative Procedure Act and the Secretary's own regulations regarding proposed rule-making procedures.

However, even assuming that plaintiff and members of the class have not shown an absolutely clear duty on the part of the federal defendants to pay the New Jersey state supplement to their federal SSI benefits, they have at

least made a substantial claim, thereby satisfying the requirement for mandamus jurisdiction. Elliot v. Weinberger, F.2d. (9th Cir. 1977), See attachment B. at 79-81.

Once a substantial claim has been show, the final decision of whether or not there was a clear duty should be decided on the merits and not on whether or not there is jurisdiction Brown v. Weinberger, 382 F. Supp. 1092, 1097 (1974).

Therefore, in the absence of an express statutory provision to the contrary within title XVI, plaintiff and members of the class are entitled to sue the Secretary under the jurisdictional grant provided by 28 U.S.C. 1361 to compel him to perform his duties.

There is no statutory provision within title XVI that bars mandamus jurisdiction under 28 U.S.C. 1361. Maher v. Mathews, supra at 1173, footnote 30.

Although title II of the Social Security Act contains a provision, 42 U.S.C. 405(h) which has been held to bar federal question jurisdiction, Weinberger v. Salfi, 422 U.S. 749 (1975), section 405(h) does not apply to actions arising under title XVI of the Social Security Act. See Point I, B supra.

However, even if this Court were to find that subsection 405(h) applies to actions arising under title XVI, 405(h) does not bar mandamus jurisdiction. Subsection 405(h) bars jurisdiction conferred by section 41 of title 28. Since mandamus jurisdiction at the time of the enactment of 405(h) was common law, c.f. Marshall v. Crotty, 185 F.2d 622, 627 (1st Cir. 1950), Congress could not have intended to bar mandamus jurisdiction by barring jurisdiction under section 41 of title 28. Elliot v. Weinberger, supra at 79-81.

Therefore, this court has jurisdiction under 28 U.S.C. 1361 to compel the federal defendants to administer the state supplement in accordance with the U.S. Constitution, the federal Administrative Procedure Act and Social Security Act and the regulations promulgated thereunder.

D. This Court Has Jurisdiction to Determine the Claims of Plaintiff and Members of the Class Pursuant to 28 U.S.C. 1343(3) and (4).

The federal district courts have jurisdiction over any civil action brought

> to redress the deprivation, under color of any state law,...[or] regulation of any right...secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens. 28 U.S.C. 1343(3).

Plaintiff and members of the class have brought this civil action to redress the deprivation of rights, pursuant to Exclusion b, secured by the fifth, ninth, and fourteenth amendments and the Supremacy Clause of the United States Constitution, the federal Administrative Procedure Act, the Social Security Act, and the Civil Rights Act. Exclusion b is a provision elected by the State of New Jersey, enforced by the federal defendants and contained in an agreement to which both state and federal governments are parties. Thus, all defendants are acting under color of state law.

Plaintiff and members of the class have presented several substantial claims of deprivation of constitutional rights (See Point V, infra), thereby exceeding, by far, the jurisdictional requirement articulated by the Court in Hagans v. Lavine, 415 U.S. 528,536 (1973),[3] that only obviously frivolous claims fail to meet this test. Therefore, this Court has jurisdiction to redress the deprivation of plaintiffs' constitutional rights.

Jurisdiction is also granted to federal districts to redress the deprivation under color of state law of any right secured by an Act of Congress providing for equal rights of Citizens. The Civil Rights Act of 1871, 42 U.S.C. 1983, has been found to be an Act of Congress providing for equal rights, Blue v. Craig,

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3. Indeed, jurisdiction under 28 U.S.C. 1343(3) is not defeated even if the constitutional claims are not reached, or if they are decided adversely to plaintiff. Hagans v. Lavine, supra at 542-543.

505 F.2d 830, 836-842 (eth Cir. 1974), Vasquez v. Ferre, 404 F.Supp. 815 (D. N.J. 1976), Gonzalez v. Young, 418 F.Supp. 366 (D. N.J. 1976).

Section 1983 of the Civil Rights Act provides a cause of action to persons who are deprived under color of state law, of rights secured by the laws of the United States. Plaintiffs have a cause of action of action under 42 U.S.C. 1983, since pursuant to Exclusion b of the federal-state administration Agreement, the defendants have deprived them of their right under the Social Security Act to receive the state supplement. (See Point IV, infra.). Therefore, this court has jurisdiction under 42 U.S.C. 1343(3) to redress the deprivation of plaintiffs' statutory right to the state supplement.

The federal district courts are also granted original jurisdiction over any action brought

> to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights... 28 U.S.C. 1343(4).

The Civil Rights Act, 42 U.S.C. 1983, is a statute providing for the protection of civil rights. Blue v. Craig, supra.; Nasquez v. Ferre, supra; Gonzalez v. Young, supra.; c.f. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

As shown above, see p.10 supra.; plaintiffs have a cause of action under 42 U.S.C.1983 to seek relief from defendants' deprivation of their statutory right to the state supplement. Therefore, this court has jurisdiction under 42 U.S.C. 1343(4) to redress the deprivation of plaintiff's statutory right to the state supplement.

E. This Court Should Exercise Its Discretion To Hear the Pendent State Claims.

The federal district court has discretion to assume jurisdiction over pendent state claims if the following three criteria are met: 1. the federal claims are substantial; 2. the federal and state claims are derived from a common nucleus of operative fact; and 3. the plaintiff's claims are ordinarily expected to be tried in one judicial proceeding. U.M.W. v. Gibbs, 383 U.S. 715, 725 (1966).

In Hagans v. Lavine, 415 U.S. 528, 536-538 (1973), the Court reaffirmed the principle that only claims found to be "essentially frivolous", "wholly insubstantial", or "absolutely devoid of merit," (citations omitted) failed to meet the first criterion. This is deliberately minimal in order to ensure that all constitutional questions of even colorable merit be litigable in a federal forum. It is clear from the constitutional, statutory and regulatory arguments set forth within this brief that the federal claims are neither frivolous nor insubstantial. See Points IV, V, infra. Defendants' refusal to pay plaintiffs the state supplement violates not only the fifth, ninth and fourteenth amendments and the Supremacy Clause of the United States Constitution, but the Social Security Act and federal regulations promulgated thereunder, and the federal Administrative Procedure Act, as well.

There can be no doubt that all of plaintiff's claims, state and federal, spring from a common nucleus of operative facts. Indeed, there is really only one operative fact in this case: the presence in the household of SSI recipients (or those who, but for their income would be SSI recipients and whose countable income falls below the state supplementary payment level) of another person, other than the spouse. That single fact, which triggered the termination of the state supplement for plaintiff and members of the class, is solely

responsible for the violation of both federal and state law.

Finally, this case satisfies the requirement that the claims would ordinarily be expected to be tried in one judicial proceeding. In making this determination, the court should consider judicial economy, and convenience and fairness to the litigants, including the possibility of repetitious litigation and incomplete relief. Rosendo v. Wyman, 397 U.S. 397, 404 (1969), citing U.M.W. v. Gibbs, supra. In the instant case, there is a substantial likelihood of incomplete relief if this court were to decide only the federal claims. First, Exclusion b is a result of both federal and state participation (Exclusion b was elected by the state and is implemented by the federal government). If this court were to hear only the federal claims, then in the unlikely event that Exclusion b were found to be valid and the federal Administrative Procedure Act to be inapplicable to Exclusion b, the issue of the failure of defendant Klein to comply with the New Jersey Administrative Procedure Act and the Supplemental Assistance statute (1977 amendment), would have to then be litigated in state court.

Therefore, because the instant case fully satisfies the triple requirements for pendent jurisdiction, plaintiff urges this court to exercise its discretion to decide plaintiffs' state claims.

POINT II

THIS SUIT SHOULD BE CERTIFIED AS A CLASS ACTION SINCE THE REQUIREMENTS OF FED.R.CIV.P. 23(b)(2) ARE SATISFIED.

Plaintiff seeks class certification pursuant to Rule 23(b)(2) of the federal rules of civil procedure which provides that an action may be maintained as a class action if

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. FED.R.CIV.P.23(b)(2).

The class plaintiff seeks to represent consists of all residents of the state of New Jersey to whom Defendant Cardwell has denied the state supplement pursuant to Exclusion b of the Agreement between Defendant Califano and Defendant Klein. By definition, then, the defendants have "acted or refused to act on grounds generally applicable to the class," and declaratory and injunctive relief with respect to the class as a whole, is appropriate. The class plaintiff seeks to represent therefore meets the specific requirements of FED.R.CIV.P. 23(b)(2).

In addition to the specific requirements of Section b(2), the federal rules set out the following four prerequisites to maintaining a suit as a class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. FED.R.CIV.P. 23(a).

Requirements (1) throught (4) are fulfilled in the instant case.

(1) Numerosity. Upon information and belief, the class which plaintiff seeks to represent consists of more than 26,000 persons. (This information was disclosed to Terry Coble during a telephone conversation with Donald E. Rigby of the Office

of Research and Statistics, Social Security Administration.) Joinder would thus be impracticable due to size of the proposed class.

Another important factor used to determine whether joinder is impracticable relates to the ability of individual claimants to litigate the issues in their own behalf, since the device of permissive joinder is really meaningful only to people who are able and willing to protect their own interests. See Donelan, "Prerequisites to a Class Action Under New Rule 23," 10 B.C. Ind. & Com. L. Rev. 527, 531 (1969). In the instant case, it is clear that the class plaintiff seeks to represent, consisting as it does of needy aged, blind and disabled persons, has neither the skills, the knowledge, the sophistication nor the financial ability to pursue this complex, difficult and time-consuming action with the necessary diligence. The impracticability requirement of FED.R.CIV.P. 23(a) is therefore met, not only by the size of the proposed class, but also by the particular inability of these class members to adequately protect their own interests.

(2) Commonality. As set forth in this brief (see Points IV, V, infra.) and in their Complaint, plaintiffs present identical questions of law arising from the failure of defendants to provide them with the state supplement pursuant to Exclusion b of the Agreement. As established in Point IV, infra, there are no questions of fact to be resolved by this Court, since under Exclusion b plaintiffs are denied state supplementation due to the mere presence in their households of one or more other persons other than the spouse, and plaintiffs do not dispute this fact. The commonality requirement of FED.R.CIV.P. 23(a) is therefore met.

(3) Typicality. The requirement of typicality under federal rules is met if the claims of the representative and the members of the class stem from a single event or are based on the same legal or remedial theory. Mersay v. First Republic Corporation of America, 43 F.R.D. 46 S (S.D.N.Y. 1968). In the instant case, the claims of the representative plaintiff and of the members of the class are clearly based on the same legal and remedial theories.

Further, to the extent that the typicality requirement is aimed at preventing class actions wherein members of the class may have antagonistic interests, plaintiffs clearly satisfy this prerequisite to maintaining a class action, since all members of the class will be benefitted and no member will be adversely affected, by a declaration that Exclusion b is invalid. The interests of members of the class are thus virtually identical, thereby far surpassing the "sufficient homogeneity of interests" requirement for maintaining a class action. Sosna v. Iowa, 419 U.S. 393, n.13 (1975). The typicality requirement of FED.R.CIV.P. 23(a) is therefore met.

(4) Adequacy of representation. Two factors are used to determine whether this prerequisite has been met. The Court must be satisfied (i) that the interests of the unnamed class members are closely aligned with those of the representative and (ii) that the representatives will put up a "real fight" on behalf of the class. City of Chicago v. General Motors Corp, 332 F.Supp. 285 (N.D. Ill. 1971), aff'd 467 F.2d 1962 (7 Cir. 1972). The representative plaintiff herein clearly meets this two pronged test.

Alberta Hamilton has a direct, substantial and immediate interest in seeing that this case is brought to a prompt and successful conclusion on behalf of herself and all persons similarly situated. Indeed, her very health and well-being are dependent on the Court's decision. There is thus every reason to believe that she will put up a "real fight" on behalf of the class.

Further, because all class members stand to gain from a successful challenge to the validity of Exclusion b, Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247-248 (3 Cir. 1975), the named plaintiff's pursuit of her own interests in this case can only result in a benefit inuring to each and every member of the class. The adequacy of representation requirement FED.R.CIV.P. 23(a) is therefore met. Because all requirements of FED.R.CIV.P. 23(b)(2) are thus met, plaintiffs respectfully request that they be allowed to maintain this suit as a class action.

POINT III

THIS COURT SHOULD ENTER A TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTIONS AGAINST THE ENFORCEMENT OF EXCLUSION B.

Issuance of a temporary restraining order and preliminary injunction rest upon a showing by the plaintiff that the following essential elements are present: 1. there is a likelihood of success on the merits; and 2. plaintiff will suffer irreparable injury unless injunctive relief is granted. In addition, the court may also consider the importance or the nature of the interests asserted, and balance this against the interests of the defendants.

Because of the clear statutory duty on the part of the defendants under Title XVI of the Social Security Act, 42 U.S.C. 1381 et.seq., the federal regulations promulgated thereunder, and the New Jersey Supplemental Assistance statute, N.J.S.A. 44:7-85 et seq., to provide the state supplement to all members of the class, (see Point IV, infra),plaintiffs have established a substantial likelihood of success on the merits.

Further, the named plaintiff herein is a recipient of public benefits under a need based program which provides only a subsistance level of income. Unless plaintiff is granted preliminary injunctive relief, she will be deprived of a portion of her monthly benefits and will thus be unable to provide for some of her basic needs of existence. Since plaintiff is generally in a extremely poor state of health, and is presently recovering from a recent heart attack (see Statement of Facts, supra), such a deprivation of her basic needs, would cause her to suffer irreparable injury.

Members of the class will also suffer irreparable injury unless this Court enjoins the enforcement of Exclusion b. Class members are, by definition, needy aged, blind and disabled individuals, who must receive the state supplement in order to be maintained at a basic level of subsistance. Because of their age, disability or blindness, they also require the care and assistance that can only

be provided through the presence of friends or relatives in their homes. Exclusion b forces these needy aged, blind and disabled New Jersey residents to "choose" between these two basic necessities to their continued health, well-being and dignity. Unless Exclusion b is enjoined, members of the class will be forced to forego either the care and assistance of friends and families, or a portion of their subsistance level of income, and will thus suffer irreparable physiological and psychological and social harm.

Finally, in balancing the nature and importance of the interests asserted by plaintiffs against the interests of defendants, it is clear that the scale tips to the side of the plaintiffs. In Goldberg v. Kelly, 397 U.S. 259, (1969), the Supreme Court found that the state had an interest in maintaining needy eligible individuals at a subsistance level of income. When this interest was added to the like interests of the needy individuals themselves, these combined needs were found to far outweigh the interest of the state in preventing fraud and unnecesary expenditures from the public fisc.

For the foregoing reasons, plaintiff and members of the class respectfully request this court to issue a temporary restraining order and grant them preliminary and permanent injunctive relief against the enforcement of Exclusion b.

POINT IV

THE ELECTION AND ENFORCEMENT OF EXCLUSION B BY THE DEFENDANTS VIOLATES THE RIGHT OF PLAINTIFF AND MEMBERS OF THE CLASS TO RECEIVE THE STATE SUPPLEMENT UNDER TITLE XVI OF THE SOCIAL SECURITY ACT AND FEDERAL REGULATIONS PROMULGATED THEREUNDER.

Introduction

Title XVI of the Social Security Amendments of 1972 created the SSI program, a new federally administered program for the aged, blind and disabled, effective January 1, 1974, to replace the previous state administered Social Security Act income maintenance programs of Aid to the Permanently and Totally Disabled (APTD), Old Age Assistance (OAA) and Aid to the Blind (AB). See P.L. 92-603, Title III, S 303(a), Oct. 30, 1972; 86 Stat. 1484, repealing titles I,X, and XIV of the Social Security Act; and P.L. 92-603, Title XVI, Oct. 30, 1972, 86 Stat. 1465, creating new Title XVI of the Social Security Act.

Although under the OAA, AB and APTD program the states could not enforce eligibility requirements in conflict with those provided by the Social Security Act, each state had been free to determine both the level of need and the level of benefits. In addition, because the old programs were administered by the states, there existed considerable variation among the states as to the degree of disability or blindness required in order to qualify for assistance. It was in part to remedy these variations in eligibility requirements, by providing nationally uniform eligibility criteria, that SSI was enacted:

> (SSI) would substantially improve the effectiveness of the adult assistance programs under the Social Security Act by providing.. for nationally uniform requirements for such eligibility factors as the level and types of resources allowed and the degree of

disability or blindness. See H.R. REP. No. 92-231 92d. Cong., 1st. Sess. 4 (1971)(hereinafter cited as House Report).

The federal benefit payment level established by the SSI program was to be higher than the benefit level provided under the old programs in some states, but lower than the benefit level in other states. House Report, at 199. Because of variations in living costs among states, the Congress in enacting the SSI program encouraged the states to supplement federal benefits up to the level of assistance provided under the old programs, 42 U.S.C. 1382e(a), by allowing a state which elected to supplement the federal SSI grants to enter into an agreement with the Secretary, authorizing the federal government to administer such payments. Id.

In return for the federal government assuming the costs of administering the state supplements, 42 U.S.C. 1382e(d), 20 C.F.R.416.2010 (c) and for holding the state harmless for any amount expended on state supplementation payments which exceeded the amount it spent in calendar year 1972 on benefits under the OAA, AB and APTD programs, 42 U.S.C. 1382e, notes; 20 C.F.R. 416.2080, the state must agree to provide the state supplement to all individuals residing in the state..who receive or who but for their income would receive federal SSI benefits, 42 U.S.C. 1382e(b), and to do so in conformity with federal rules regarding eligibility for and the amount of the state supplement, 42 U.S.C. 1382(b)(2).

* * *

The state of New Jersey has elected to supplement federal payments and to have the Secretary administer those payments. N.J.S.A. 44:7-85 et seq. (1977 supplement).

The plain language of the SSI statute provides that where there is an administration agreement between the Secretary and a state, payment of the state supplement shall be made to all recipients of federal SSI benefits:

Any agreement between the Secretary and a State

> entered into under subsection (a) of this section shall provide -
>
> (1) that such payments will be made...to all eligible individuals residing in such State... who are receiving benefits under this subchapter... 42 U.S.C. 1382e(b)(1) (emphasis added)

The intent of Congress in enacting the legislation is equally clear. In a section-by-section analysis of the bill, the House Report interprets section 2016(b) of the proposed legislation, 42 U.S.C. 1382e(b), as follows:

If the agreement provides that the Secretary will make the supplementary payments on the State's behalf, the agreement must also provide that the supplementary payments will...be made to all residents in the State who receive benefits under title (XVI). House Report, 340.

Again, in a discussion entitled "State Supplementation and Fiscal Relief," the House Report elaborates on the meaning of this section:

> If a State elects to enter into an agreement under which the Federal government administers its supplemental payments, it would have to abide by certain conditions. Supplementation would have to be provided to all individuals...who were eligible under the basic Federal assistance programs...
> House Report, at 200.

Federal regulations promulgated by the Secretary confirm that where there is an administration agreement between the Secretary and a state, all recipients of federal SSI benefits shall receive the state supplement:

> A State which elects Federal administration of its supplementation program must apply the same eligibility criteria (other than those pertaining to income) applied to determine eligibility for the Federal portion of the supplemental security income payment. 20 C.F.R.416.110(f)(1)

The federal SSI program provides for only three kinds of eligibility criteria: those pertaining to age, disability or blindness (categorical requirements), those pertaining to resources and those pertaining to income.

Clearly, all New Jersey residents who are recipients of federal SSI benefits are categorically and resource eligible for the state supplement. 20 C.F.R. 416.110(f)(1). As to income eligibility criteria, the above regulation allows the state to set the level of income below which state supplementary benefits must be paid at a point which is higher than the income eligibility criteria for the federal portion of the SSI benefits. Since all New Jersey SSI recipients meet the lower federal income eligibility requirements, then by definition they also meet the higher state supplement income eligibility criterion.

Therefore, all New Jersey SSI recipients are eligible for and must be paid the full amount of the state supplement. 20 C.F.R. 416.2025(b)(2).

In addition to being required to provide the state supplement to all SSI recipients, a state which elects federal administration may provide supplementation to all residents who would, but for the amount of their income, be eligible to receive federal SSI benefits. 42 U.S.C.1382e(b)(2), 20 C.F.R.416.2010(a)(1).

New Jersey has chosen to provide state supplementation to all residents whose income is below the state supplementary income eligibility level. N.J.S.A. 44:7-86 (1977 Supplement).

For such residents, New Jersey must apply the same eligibility criteria which are used to determine eligibility for federal SSI benefits, with the exception of income eligibility requirements. 20 C.F.R. 416.110(f)(1). Since the determiniation as to amount of income is governed by the same regulations as are used to determine amount of income for the purpose of establishing eligibility for federal SSI benefits, 20 C.F.R. 416.2025(b), the only discretion allowed New Jersey is in setting the state supplementary income eligibility level. Once it is determined that the income of such residents falls below that

level, state supplementation must be paid. 20 C.F.R. 416.2025(b)(3).

Thus, all New Jersey residents whose countable income falls below the state supplementary payment level and who, but for their income, would be entitled to receive federal SSI benefits, are eligible for and must be paid the state supplement. 20 C.F.R. 416.2010(a).

NOTE : Since it has been established that the entire class of New Jersey residents whose countable income falls below the state supplementary payment level,which includes not only federal SSI recipients but also people who but for their income would be federal SSI recipients, are eligible for the state supplement, all further references within this point to this class of people, for simplicity's sake, will be to "eligible residents".

Although the state supplement must be provided to all "eligible residents", the state has the discretion to vary the supplementary payment level in recognition of the different needs which result from, at most, five different living arrangements. 20 C.F.R. 416.2030(a). This discretion, however, has been limited by 20 C.F.R. 416.2030(b), which requires that such variations in state supplementary payment levels be based on rational distinctions between both the types of living arrangements and the costs of those living arrangements.

The provision challenged herein is clearly--by its very description in the Agreement--an exclusion, rather than a variation in payment level. Exclusion b is thus invalid because it is more restrictive than the federal requirements that all "eligible residents" entitled to the state supplement. 42 U.S.C. 1382e (b)(1), 20 C.F.R. 416.110(f); 416,2025(b)(2). Supreme Court has held that a state may not impose a more restrictive definition of eligibility for benefits under the Social Security Act than is authorized by the federal statute.

King v. Smith, 392 U.S. 309 (1968); Lewis v. Martin, 397 U.S. 552 (1970);

Townsend v. Swank, 404 U.S. 292 (1971); Carleson v. Remillard, 406 U.S. 598 (1972); Van Lare v. Hurley, 421 U.S. 338 (1975).

Even if Exclusion b is considered a variation in payment level, it is invalid because the number of variations in living arrangements in the Agreement would then exceed the maximum permitted by federal regulation. 20 C.F.R. 416.2030(a). In addition, if Exclusion b is considered a variation in payment level, it fails to meet the requirement of 20 C.F.R. 416.2030(b) that such variations be based on rational distinctions between both the types and the costs of those living arrangements.

Under Exclusion b, the amount of benefits payable to "eligible residents" is decreased if one or more other persons other than the spouse resides in the household. This decrease in benefits is only rational if, as a result of the mere presence of such person(s) in the household, the living costs of an "eligible residents" decrease, that is, if there is more money actually available to them than there would be if they were living alone.

Such an inference is not only irrational, but clearly impermissible in light of the federal definition of countable income. This definition, required to be the same for purposes of establishing eligibility for the state supplement as for federal benefits, 20 C.F.R. 416.2025(b), provides that countable income is the sum of a claimant's earned and unearned income. 20 C.F.R. 416.1115(a).

Clearly, an "eligible resident" has no earned income due to the mere presence in the household of one ore more other persons, other than the spouse. 42 U.S.C. 1382a(a)(1), 20 C.F.R. 416.1102(b). As to unearned income, only the amount actually available to the "eligible resident" may be considered. 20 C.F.R. 416.1120. The Supreme Court has consistently held that a state may not presume that income is actually available to an individual, due to the mere presence in

in the household of another person, not the spouse. King v. Smith, 329 U.S. 309 (1968); Lewis v. Martin, 397 U.S. 552 (1970); Van Lare v. Hurley, 421 U.S. 338(1975).

In recognition of this principle, the New Jersey Supreme Court in Hausman v. Department of Institutions and Agencies, 64 N.J. 202 (1974), cert. denied, 417 U.S. 955 (1974), invalidated a state regulation of the Aid to Families with Dependant Children program which mandated a reduction in benefits due to the mere presence in the household of a person not within the eligible unit on the basis that a state could not conclusively presume that a non eligible member of the household was either bearing her share of the household expenses or contributing to the support of the welfare recipient:

> To do when that is not the fact, as in this case, meant that the cost of living remains the same for the assistance recipients as when they alone comprised the household, but the benefits received are less and not enough to meet it. Hausman, supra, at 208[3]

Plaintiff and members of the class thus cannot be presumed to have additional income due to the mere presence in the household of one or more persons other than the spouse. Further, with regard to an SSI recipient, where more money is actually available, it is considered as unearned income and results in a reduced federal SSI benefit payment. 20 C.F.R. 416.2025(b)(1). Clearly then Exclusion b, which denies the state supplement to "eligible residents" due to the mere presence in their households of one or more persons, other than the spouse, is not based on a rational distinction between costs of living arrangements.

In addition, Exclusion b is not based on rational distinctions between types of living arrangements. The "eligible resident" population is composed exclusively of needy aged, blind and disabled individuals. Many of these individuals are in

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[3] See also Owens v. Parham, 350 F. Supp. 598 (N.D. Georgia 1972), which found a like provision of Georgia's aid to aged blind and disabled violative of the due process class of the U.S. Constitution, and Schultz v. Kott, 131 N.J. Super. 216, (1974), which applied this rationale to the APTD program.

need of companionship, but are precluded by their age or disabilities and their meager incomes from going out into the community to seek such companionship. The presence of other persons within their households is often the only way in which such needy aged, blind and disabled individuals can obtain meaningful social interactions.

Many of these individuals are also in need of some type of constant care, which is usually available to them only if other individuals live in their households, or at much greater state expenses, if they live in congregate care or nursing home facilities. In addition, should these needy age, blind and disabled individuals be forced by the state's regulation here in issue to forego needed care and attention from persons willing to live with and care for them, the probability is great that their medical conditions will worsen, so as to necessitate their hospitalization, at even greater state expense. Thus, in light of the needs of the SSI population, Exclusion b is an irrational distinction between types of living arrangements.

Therefore, based on each of the foregoing arguments, the election and enforcement of Exclusion b by the defendants violates the right of plaintiff and members of the class to receive the state supplement under title XVI of the Social Security Act and federal regulations promulgated thereunder.

POINT V

THE REFUSAL OF THE DEFENDANTS TO PAY THE STATE SUPPLEMENT TO PLAINTIFF AND MEMBERS OF THE CLASS, PURSUANT TO EXCLUSION B, VIOLATES THEIR CONSTITUTIONALLY PROTECTED RIGHTS.

A. Exclusion B, By Conflicting with the Eligibility Requirements of Title XVI the Social Security Act, Violates the Supremacy Clause of the United States Constitution and Is Therefore Invalid.

King v. Smith, 392 U.S. 309 (1968) and a line of cases concerning the Social Security Act firmly establish that "at least in the absence of Congressional authorization for an exclusion clearly evidenced from the Social Security Act, or its legislative history, a state eligibility standard that excludes persons eligible under the federal" standard violates the Supremacy Clause and is therefore invalid. (See Point IV, infra, for legislative history) Lewis v. Martin, 397 U.S. 309 (1968), Townsend v. Swank, 404 U.S. 229 (1971), Carleson v. Remillard, 406 U.S. 598 (1972), Van Lare v. Hurley, 421 U.S. 338 (1975).

Furthermore, not only is the legislative history clear on this point, but the plain language of the statute itself, and the federal regulations promulgated thereunder, conclusively establish that the state supplement is to be provided to all SSI recipients, and to all persons who have applied for SSI and who but for their income would be entitled to receive SSI and whose countable income falls below the state supplementary payment level established in the federal state agreement. (See Point IV, infra)

Because of its conflict with federal law, both statutory and regulatory, Exclusion b violates the Supremacy Clause and is thereby rendered unconstitutional.

B. Exclusion b Violates the Fundamental Rights of Plaintiff and Members of the Class to Personal Liberty and Privacy By Preventing Them, on Penalty of Forfeiture of a Subsistence Level Income, From Freely Choosing Their Desired Living Arrangements.

The federal constitutional right of individuals to be free from government intrusion into aspects of their lives which fall within certain areas or zones of privacy, has been upheld by the Supreme Court in a long line of decisions, Meyer v. Nebraska, 262 U.S. 390 (1922) Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parent's control over upbringing and education of their children), Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Moore v. City of East Cleveland, 45 U.S.L.W. 4550 (May 30, 1977) (living arrangements).

The instant case involves the same kind of state interference with such constitutionally protected rights as the Court deemed impermissible under the personal liberties guarantee of the fourteenth amendment and under the penumbral right of the first, fifth, ninth and fourtheenth amendments.

By denying the state supplement to New Jersey residents whose countable income falls below the state supplementary payment level solely because one or more other persons other than the spouse resides in the household, pursuant to Exclusion b, defendants are infringing upon the right of needy aged, blind and disabled individuals to choose between living along and living in the company of others.

As the case of Alberta Hamilton illustrates, these individuals are often confined to their homes by reason of their age, blindness or disability. Even when physically able to leave their homes, these individuals are often precluded by their meager financial resources from going out into their communities in order to seek the companionship of others. For these individuals, the presence

of another person in their homes often the only avenue for the exercise of this right. Exclusion b infringes on this right by forcing them to choose between enjoying such companionship or subsisting on an income which is below the level determined by the State as necessary to provide them with basic life necessities.

As illustrated herein, Exclusion b has a particularly harmful effect on the aged by discouraging family involvement in their lives -- involvements which would help diminish the sense of social isolation often found among the elderly in our age-segregated society. At a time in their lives when almost all of their meaningful ties and involvements are likely to be broken off--spouses and old friends and relatives die; jobs are lost or retirement occurs; the phyical effects of aging are felt; the psychological and emotional sense of loss and isolation are intesified and the ability to move freely within the community are cut off or impaired--to deny the aged the very means needed for their subsistence if friend or family lives with them bespeaks a callous disregard for the lives of these people.

In many ways, the aged require the same kinds of protection and concern as the young: the right to the care, compansionship and comfort of their families; assistance from others in terms of their respective handicaps with regard to travel, the need for physical protection from others or from their own weaknesses, and the support that everyone requires, but which is especially pronounced at the beginning and the end of life.

Yet, no decision is more basic to the lives of <u>all</u> the needy-the aged, the blind and the disabled-than the decision of whether to live alone or in the company of others. Consequently, the state may not force the needy aged, blind and disabled into involuntary solitude.

* * *

The right to care in the least restrictive setting possible has been recognized by the federal courts in the context of cases brought on behalf of persons confined to mental institutions. See, e.g. Lake v. Cameron, 364 F.2d 657 (D.C.C.A., 1969); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis., 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974); Wyatt v. Stickney, 344 F. Supp. 373 (N.D. Ala., 1972); Lynch v. Baxley, 386 F. Supp. 378 (N.D. Ala., 1974) Welsh v. Likins, 373 F. Supp. 487 (D. Minn., 1974); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii, 1976); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa, 1976). The basis for the right to the least restrictive setting for the treatment of the mentally ill is within the personal liberties guarantee of the fourteenth amendment. As stated by the Supreme Court in Shelton v. Tucker, 364 U.S. 479, 488 (1960):

> ...even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more reasonably achieved....

Congress has specifically legitimized this right on behalf of people who, are or who but for their income, would be entitled to receive SSI benefits, by enacting title XX of the Social Security Act, 42 U.S.C. 1397 et seq., whose statement of purpose includes the goal of "preventing or reducing inappropriate institutional care by providing for community based care, home-based care or other forms of less intensive care..." 42 U.S.C. 1397(4), 1397a (a)(1)(B).

The denial of the state supplement to New Jersey residents whose countable income falls below the state supplementary payment level, pursuant to Exclusion b, infringes on the right of needy aged, blind and disabled individuals to care in the least restrictive setting possible. Many of them are in need of some type of constant care, which is usually available to them only if other individuals

live in their households, or in the more restrictive settings of congregate care of nursing home facilities.

The state should not be permitted to force them to either subsist on an income which is below the level determined by the state as necessary to provide them with basic life necessities, in order to avail themselves of needed home care services, or to resort to the restrictive alternatives of confinement in congregate care or nursing home facilities.

Therefore, based on the infringement of the right of every individual to freely choose his or her own living arrangement and to care in the least restrictive setting possible, Exclusion b must be declared unconstitutional.

C. The Defendants' Refusal to Provide the State Supplement, Pursuant to Exclusion b, to Persons With No Less Need According to Statutory Criteria Than Persons Receiving the State Supplement, Violates the Right of Plaintiff and Members of the Class to the Equal Protection of the Laws.

The fourteenth amendment equal protection clause provides that "no state many deny to any person within its jurisdiction the equal protection of the laws.

The denial of the state supplement to plaintiff and members of the class, pursuant to Exclusion b, is within the scope of action protected by the fourteenth amendment. Exclusion b was elected by a state official, defendant Klein, and is being enforced pursuant to an agreement to which she, acting in her official capacity as the Commissioner of the Department of Human Services, is a party.

Point, B, the preceding argument, established that the choice of an individual to choose his or her own living arrangements is one that is considered fundamental under our constitutional scheme. Under a challenge to a classification based on the fourteenth amendment equal protection clause, where fundamental constitutional rights - here the right of privacy and the right to personal

liberty - are being infringed, the standard by which such classification scheme is measured is very strict. Not only must the means be reasonably and rationally related to achieving a legitimate state interest, Reed v. Reed, U.S. (197); Frontiero v. Richardson, 411 U.S. 677 (1972), but the state interest itself must be more than legitimate: it must be compelling. Shapiro v. Thompson, 394 U.S. 618 (1969), Memorial Hospital v. Maricopa County 415 U.S. 250 (1974).

The state interest herein is to provide all persons in need with a subsistence level of income, N.J.S.A. 44:7-85 et seq, that is, to provide the state supplement to all needy blind, aged and disabled persons who are categorically eligible for federal SSI benefits and whose countable income falls below the state supplementary payment level.

In fact, both the Social Security Act, 42 U.S.C. 1381 et seq., and the New Jersey Supplemental Assistance statute, N.J.S.A. 44:7-85 et seq., were enacted for that very purpose.

Yet, Defendant Klein has elected and the federal defendants are enforcing a classification system, pursuant to which an entire class of people defined as needy according to each statutory scheme, federal and state, is being deprived of the state supplement.

Indeed, the result of Exclusion b within the classificaiton system has been the creation of two sets of people who are, with respect to the statutory objective, otherwise indistinguishable:

The first set consists of all those persons whose countable income falls below the state supplementary payment level, who live alone or with a spouse, and who receive the state supplement; the second set consists of all those persons whose countable income falls below the state supplementary payment level, who live with another person or other persons not their spouse, and who therefore

are denied the state supplement.

The absurdity of such a classificaiton scheme which bears not even the most remote relationship to need is demonstrated by the facts of Ms. Hamilton's case. Ms. Hamilton is presently a federal SSI recipient. Before her daughter came to live with her, she received the state supplement. Once her daughter moved in, she was denied the state supplement. Yet it was uncontroverted that Ms. Hamilton received no income from her unemployed daughter. Her financial position when she was denied the state supplement was precisely the same as it was when she was receiving the state supplement.

Thus, with respect to Exclusion b, the criteria according to which the state supplement is provided is the number of people in the household and their relationship to the claimant - criteria wholly unrelated to the statutory objective of need.

Yet, it has consistently been held that under the equal protection clause, a state cannot legislate different treatment to different classes of people based on criteria wholly unrelated to the statutory objective. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1972).

Therefore, it is difficult to see how a state regulatory provision, in violation of both federal and state statutes with which it must be read in pari materia, can be said to further any state interest, compelling or otherwise. Instead, it actually interferes with - indeed defeats - this very interest.

However, even assuming, for the moment, that the state interest in this case is something other than providing the needy blind, aged and disabled with a subsistence income, Exclusion b would still be invalid. The only other conceivable state interests would be either administrative certainty and convenience or else fiscal integrity, neither of which has been held to be legitimate,

let alone compelling, in light of the infringement upon a person's constitutionally protected, fundamental rights. Townsend v. Swank, supra; Shapiro v. Thompson, supra.

Furthermore, even if either one of those interests could be considered legitimate or compelling in theory, that theory has no application to this case. First, the cost of both administering the system and the cost of providing the state supplement to plaintiff and members of the class is not a state interest - it is a federal interest. Under the terms of the statute and the agreement, the federal government is solely responsible for administering the system and for holding the state harmless for any amount expended beyond that which it expended for the AB, OAA APTD programs in calendar year 1972. Since the present expenditure for the state supplement exceeds that amount, any further expenditure would have to be borne by the federal government. Thus, the state has no interest - let alone a compelling interest - which would justify the existence of Exclusion b.

In addition, even the federal government lacks a rationale for the continued operation of Exclusion b. It is irrational in terms of the statutory objective of providing the state supplement to all persons who are or who but for their income would be federal SSI recipients. It is equally irrational in terms of any alleged administrative cost. Unlike the facts in Vlandis v. Kline, U.S. (19) where the state was required to establish a mechanism for determining genuine in state residency of formerly out-of-state students, the Social Security Administration has such an ongoing system in place which can be used (with respect to the state supplement) for plaintiff and members of the class. In fact, such a system has already been used for each and every one of them, to determine his or her eligibility for federal SSI benefits.

With respect to the federal SSI recipients, each is entitled to the full state supplement. Therefore, no factual determination need be made. With respect to those members of the class who, but for their income, would receive federal SSI benefits, that factual determination has - at the time of their application for federal benefits - already been made.

By withholding the state supplement only from persons living with a non-spouse, while providing it to people in other living arrangements -- living alone or with a spouse -- the state is penalizing people who make certain choices with respect to their living arrangements - choices which are constitutionally protected from interference by the state.

Thus, Exclusion b is irrational not only in terms of constitutional lofty principles of fairness and equality but, just as importantly, in terms of the federal statutory objective and the statutory and regulatory requirements in terms of the manner of determining income actually available to the claimant. (See Point IV, infra). Exclusion b defeats the state interest defined as the statutory objective under N.J.S.A. 44=7-85 et seq. of providing the state supplement to all persons whose countable income falls below the state supplementary payment level and it defeats the state interest of complying with the mandates of the Social Security Act.

Therefore, for all of the foregoing reasons, Exclusion b cannot meet the stricter "compelling state interest" standard, since it fails to meet even the "rational relationship test".

Having thereby violated the equal protection clause of the fourteenth amendment, Exclusion b must be declared invalid.

D. The Irrebuttable Presumption, Pursuant to Exclusion b, that the Aged, Blind and Disabled who Live with a Non-Spouse are Less Needy Than Those Who Live Alone or with a Spouse, Violates the Due Process Clause, Clause of the Fifth and Fourteenth Amendments.

Exclusion b constitutes the irrebuttable presumption that the aged, blind or disabled who live with a non-spouse are less needy those who choose other living arrangements. This presumption violates the due process clause of the fifth and fourteenth amendments to the United States Constitution, Stanley v. Illinois, 405 U.S. 645 (1972) Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), Vlandis v. Kline, supra, because it is not necessarily or universally true and thereby deprives plaintiff and members of the class of their rights to an individualized determination based on need.

Further, this irrebuttable presumption is so unreasonable in terms of the statutory mandate of providing the state supplement to all persons whose countable income falls below the state supplementary payment level that it also violates the equal protection implicit in the fifth amendment, Frontiero v. Richardson, supra.

The unstated presumption is that the other person living in the household contributes to the support of the eligible unit, here-the individual. Yet the Supreme Court and lower courts have definitely ruled that states may not, consistent with due process of law, so presume. Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972), Van Lare v. Hurley, supra.

Further, in Hausman v. Department of I. and A., supra, the New Jersey Supreme Court has held that such conclusive presumptions could not stand:

> a state may not, by statute or regulation, conclusively presume that a "man in the house or other non-eligible member of the household is bearing his share of the household expenses or contributing to the living costs of the welfare recipient so as to permit the reduction of benefits to them.

The essential quality of due process if fairness. If a conclusive presumption is not necessarily and universally true, then at least some people within its scope are being deprived of a right based on a generalization that does not hold true for them. In this case, an individualized hearing is required especially since important private interests - indeed fundamental, constitutional rights - are at stake:

> where private interests affected are very important and the government interest can be promoted without much difficulty by a well-designed hearing procedure, the due process clause requires the government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices, United States Department of Agriculture v. Murry, 413 U.S. 508 (1972)

In United States Department of Agriculture v. Murray the court did not preclude the state from using "general propositions serving only as rebuttable presumptions or other burden-shifting devices". The court in Hausman ruled similarly.

This case is distinguishable from both Murry, supra, and Hausman, supra, in such a way that it precludes the state from using even a rebuttable presumption with regard to Exclusion b: as to plaintiff and members of the class, Exclusion b, whether as irrebuttable or a rebuttable presumption, is universally and necessarily false. Since every person receiving SSI is entitled to receive the state supplement and since very person who has applied for and would be entitled to receive SSI but for their income, although it falls below the state supplementary payment level, is also entitled to receive the state supplement, the transformation of Exclusion b into a rebuttable presumption would serve no purpose.

Existing regulations provide that if an individual is actually receiving

support either directly or indirectly, this amount is counted as income and deducted from the federal SSI benefits; if the person is not a federal SSI recipient, it is counted as income and deducted from the state supplement.

Therefore, because, as to plaintiff and members of the class, Exclusion b is not universally or necessarily true, (or even sometimes true) but universally and necessarily false, its continued use in any form would violate the right of plaintiff and members of the class to both due process of law and equal protection under the fifth amendment.

CONCLUSION

WHEREFORE, plaintiff respectfully requests this Court to grant the relief requested.

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