No. 24468
No. 24561

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
APPELLANT-RESPONDENT

v.

THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, ET AL.,
APPELLEE-PETITIONERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
AND ON PETITION FOR REVIEW

MEMORANDUM FOR JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, APPELLANT-RESPONDENT, IN RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF THE STATE OF ALABAMA

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We submit this memorandum in response to the Supplemental Memorandum of the State of Alabama dated June 20, 1967. In this memorandum, we deal only with the arguments raised by the State concerning the jurisdictional question before this Court, and we rely on oral presentation and on our original brief, especially on the discussion on pages 56-66 therein, to deal with the question of the responsibility of the Alabama Department with respect to third parties, an issue discussed in the section in the State's Supplemental Memorandum entitled "Brief Comments Relating to that which Transpired During the Oral Argument."

1. The Inadequacy of the Specified Statutory Remedy.

We have maintained that the exclusive forum for judicial review of the Secretary's order terminating assistance to the Alabama Department is that prescribed in the Social Security Act for similar action taken by the Secretary on other grounds - the Court of Appeals. The State has contended, however, that this specific statutory remedy is "inadequate," and that therefore under established principles and the Administrative Procedure Act review could be had in the District Court. We have consistently recognized

the right of the Alabama Department to seek review of administrative action in the District Court wherever the remedy provided by special review provisions is "inadequate;" but we reject the contention that the specific statutory remedy of the Social Security Act - direct judicial review by the Court of Appeals - is in this instance "inadequate." Thus, the principal issue that divides us on the jurisdictional question is simply: Would direct judicial review by this Court of Appeals of the Secretary's order terminating federal financial assistance be inadequate?

We believe that judicial review of the Secretary's order by the Court of Appeals is entirely adequate. A petition for review in the Court of Appeals affords the State an effective remedy - an adjudication of the legality of the HEW regulation underlying the Secretary's termination order.

In its Supplemental Memorandum the Alabama Department finds a "potential analogy" to support its contention that the remedy in this Court is inadequate in the recent decisions of the Supreme Court in Toilet Goods Association v. Gardner,

Abbott Laboratories v. Gardner and Gardner v. Toilet Goods Association, 35 U.S. Law Week 4431, 4433, and 4439 (May 22, 1967). As we understand the Memorandum, the State relies on those cases only insofar as they lend support to the following proposition:

> If the Secretary is correct in stating that he had no authority to strike down his regulation or requirement, then the administrative proceeding was palpably inadequate for deciding the issue, and such inadequacy, in our opinion, would be transferred to any specific statutory provision for a review of the Secretary's decision in a Court of Appeals. (Supplemental Memorandum, p. 8).

However, we do not read the recent Supreme Court decisions as lending any support to such a proposition. Indeed, as we read those cases, they reject that proposition, which, as a practical matter would permit a party to avoid a specific statutory review procedure (such as those vesting the Court of Appeals with exclusive jurisdiction) whenever the party sought a legal determination of the validity of the regulation underlying the administrative action, and the administrative agency considered itself bound by one of its regulations.

In the cases in question the Supreme Court repeatedly recognized that the HEW regulations being challenged did not fall within the enumerated categories of regulations which were the subject of special statutory review procedures providing direct review in the Court of Appeals. See Abbott Laboratories v. Gardner, 35 U.S. Law Week 4433, 4434 (May 22, 1967). See also footnote 4 and the pertinent text in the dissenting opinion of Mr. Justice Fortas. 35 U.S. Law Week at 4443. The implication is that for regulations falling within the statutory categories review would be had in the statutorily designated forum, even if the validity of that regulation were being challenged, and without regard to whether the administrator would consider the merits of a claim that the regulation was invalid. This, we believe, is inconsistent with the proposition the State now urges on this Court.

The proposition put forward by the State was more explicitly rejected in one of those cases, Toilet Goods Association v. Gardner, 35 U.S. Law Week 4431, involving the "access" regulation of HEW, which requires drug firms to grant access to certain manufacturing facilities and records at the threat of suspension of FDA certification. Parties subject to the regulation challenged its validity by commencing a civil action in the District Court without having first exhausted the administrative remedies, and the Supreme Court held that such a pre-enforcement challenge was inappropriate. The Court required the parties to go through the administrative process and then seek judicial review in the statutorily prescribed forum - even though, as the Court explicitly acknowledged, it was entirely possible "that the Commissioner will not entertain and consider a challenge to his statutory authority to promulgate the regulation." 35 U.S. Law Week at 4433. The Court noted that review of the Commission's decision might be in either the District Court or the Court of Appeals. 35 U.S. Law Week at 4432, footnote 3. But it was clear that the Court was of the view that

the choice of forum would turn on the construction of the special review provisions. The decision as to which forum was proper would be based upon a determination of whether the particular administrative action in question (suspension by the Commissioner for refusal of access) was encompassed in the special review provisions, and not on whether the party challenged the validity of the regulation or whether the Commissioner passed on the merits of that claim.

More generally, it could be said of the cases discussed in the State's Supplemental Memorandum that they are not at all addressed to the issue now before this Court - whether review by the specially designated forum is "inadequate" within the meaning of the Administrative Procedure Act. Instead, the Supreme Court was there concerned with an entirely different issue - under what circumstances could a judicial determination of the validity of an administrative regulation be had prior to any enforcement action by the agency. The Court held that such a judicial determination could be had if Congress did not prohibit it and if the challenge was "ripe."

And it was solely in the limited context of deciding whether the challenge was "ripe" that the Supreme Court considered, as one of the relevant factors, whether the party was challenging the statutory authority for promulgating the regulation. The Court took the view that such a challenge might be more suspectible of judicial resolution in a pre-enforcement injunctive action than in a suit whereby the party was challenging a threatened application of the regulation.

We do not believe that any useful purpose would be served by having this Court seek to determine whether the State could have maintained a pre-enforcement challenge to this regulation or whether (like the access regulation challenged in Toilet Goods Association v. Gardner) the "judicial appraisal" of the statutory purpose, of the meaning and scope of the regulation, and of the enforcement problems of the agency "is likely to stand on a much surer footing in the context of a specific application of this regulation." 35 U.S. Law Week at 4432. The fact of the matter is that this

is not a pre-enforcement suit.[1/] The administrative remedies have been exhausted, and this Court has before it a specific application of the regulation, the administrative interpretation of the regulation, and the administrative decision. It follows that the recent Supreme Court decisions discussed in the State's Supplemental Memorandum have little relevance to the jurisdictional question before this Court or, more specifically, to the question whether the remedy provided in the Social Security Act (direct review in the Court of Appeals) is adequate.

1/ On May 6, 1965, Commissioner Ruben K. King sent to Dr. Ellen Winston a telegram which stated the following: "State Board of Pensions and Security in session today authorized a suit to contest validity of regulations promulgated by . . .[HEW] under Title VI of Civil Rights Act." (See p. 170, Volume I, Appendix to Brief of Secretary Gardner.) This telegram was sent prior to the commencement by Dr. Winston of administrative proceedings for termination of the federal grants.

After the sending of the telegram, further negotiations took place. However, on September 29, 1965, Commissioner King sent Dr. King a telegram with the following message: "State Board . . . today reaffirmed authorization for testing validity of rules and regulations promulgated by . . . HEW under Title VI . . . ." (See p. 179, Volume I of Appendix.)

Nonetheless, the State Department did not bring its action in the district court until after administrative proceedings had been completed and Secretary Gardner had approved the decision to terminate the federal assistance.

We have thus far discussed the question of the adequacy of the statutorily prescribed remedy without regard to whether this Court has jurisdiction over the order as it relates to all the programs or whether it has jurisdiction only over some - for the State's argument based on the recent Supreme Court decisions does not make that consideration relevant. However, another of the State's arguments, which was made in its original brief and which has been renewed in the Supplemental Memorandum[2/] rests on the view that even if the Court of Appeals has jurisdiction to review the order as it relates to four programs (the public assistance programs - Titles I, IV, X and XIV), the District Court would have exclusive jurisdiction to review the order as it relates to the fifth program

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2/ The State, in its Supplemental Memorandum (pp. 16-17), seeks to support its contention as to the inadequacy of the Court of Appeals direct review remedy by noting that it sought to add private individuals as plaintiffs in the district court suit. The State asserts that "whatever rights they [the private individuals] have may be relevant to . . . the question of jurisdiction."

Regarding this contention, we rely upon the discussion in footnote 11 on page 34 of our original brief.

(child welfare services - Title V (Part 3)). The State contends that this limitation on the scope of the jurisdiction of this Court renders the remedy here "inadequate."

We reject the view that only the District Court has jurisdiction to review the Secretary's order as it relates to the child welfare services (see pp. 38-44 of our original brief). But we also maintain that, even on the State's view that the Secretary's Order as it relates to the child welfare services program is reviewable only in the District Court, the statutorily prescribed remedy of direct review in the Court of Appeals of the order as it relates to the other programs is nevertheless adequate. The legal question as to the validity of the order is the same regardless of which program it relates to. Whatever the Court of Appeals decides as to the validity of the Secretary's order as it pertains to Titles I, IV, X and XIV will control the decision as to the validity of the Secretary's order as it relates to Title V (Part 3) as well. As a practical matter, if the District Court took jurisdiction over

the order as it relates to Title V (Part 3), it would in all probability hold proceedings in abeyance until the Court of Appeals adjudicated the validity of the order as it related to the other four programs. The right of the Alabama Department to a judicial determination of validity would be protected, and scarce judicial resources would be conserved.

In response to this line of argument, the State, in its original brief, drew on certain language in Hillsborough v. Cromwell, 326 U.S. 620 (1946) to the effect that a remedy was inadequate unless it "covered the entire case." The State asserts that the statement was made in an "analogous context." However, we disagree. As pointed out during oral argument, the Supreme Court's statement was made in the context of rejecting a position that would have required the plaintiff to proceed in both a state court (for an adjudication of the state claim) and a federal court (for an adjudication of the federal claim). Unlike our case, where the two forums are part of the same judicial system and there is a right to appeal the decision of one forum to the other, the Court in

Hillsborough addressed itself to a situation where a decision in one forum would not necessarily dispose of the issue in the other forum and the party might be forced to actively litigate in two courts before he obtained any relief. In that instance, the Supreme Court broadened the scope of the federal court remedy to permit it to reach the state claim, thus making the federal court remedy adequate.

2. The Meaning of §603.

The Alabama Department's principal contention with respect to the jurisdictional question has been that the specific statutory review procedures, vesting exclusive jurisdiction in the Court of Appeals, are "inadequate." However, in its Supplemental Memorandum a new argument is put forward viz., that the critical language of §603 of the Civil Rights Act of 1964, stating that agency action terminating assistance for noncompliance with the requirements of that Act "shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department . . . on other grounds," does not include the review provisions under the Social Security Act,

42 U.S.C. §1316. The claim is that this language of §603 refers only to special statutory review provisions which were in existence at the time of the enactment of the Civil Rights Act of 1964 (July 2, 1964), not to review provisions such as those in the Social Security Act which were adopted subsequently (July 30, 1965).

There is no basis in the statutory language or the legislative history for such a limited interpretation of §603. The statute uses the phrase "provided by law," and not "provided by law at the time of the enactment of this Act;" and similarly the phrase used in the legislative debates and quoted in the Alabama Department's Supplemental Memorandum[3/] is "existing law," not "law existing at

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3/ The statement quoted on page 13 of the Alabama Department's Supplemental Memorandum is that of Senator Pastore, 110 Cong. Rec. 6842 (daily ed., April 7, 1964); 110 Cong. Sec. 7060-61 (permanent ed.). Just prior to the statement quoted, Senator Pastore said:

> Additional safeguards against arbitrary action are provided in section 603. Under that section any agency action taken pursuant to section 602 would be subject to judicial review to the extent and in the manner provided by existing law applicable to similar action taken by the agency on other grounds. Thus, where special statutory review procedures are available under certain statutes, those procedures should be followed.

the time of the enactment of this Act." Standard principles of statutory construction require that the general, open-ended language used in §603 be read to include both the statutory review provisions existing at the time of the enactment of the Civil Rights Act of 1964, and those that come into existence after enactment.[4/] See generally, 2 Sutherland, Statutory Construction §5102 (1943); Browder v. United States, 312 U.S. 335, 339 (1941). This principle of statutory construction was recently recognized by the Supreme Court in Georgia v. Rachel, 384 U.S. 780 (1966).

4/ It appears that, under the Alabama Department's theory, §603 would apply neither to special review provisions in acts adopted after July 2, 1964, nor to review provisions which were in effect in July, 1964, but were amended thereafter. This would mean, for example, that if Congress were to amend the judicial review provision of the Hill-Burton Act, 42 U.S.C. §291(h), to provide that review could take place only in the Court of Appeals for the District of Columbia Circuit (as opposed to the court of appeals for the circuit where the state seeking Hill-Burton funds is located), the amended provision would not be a special review provision within the meaning of §603, since the amended provision would go into effect after July 2, 1964.

In Georgia v. Rachel, the Supreme Court was called upon to construe a Reconstruction statute which provided for the removal to federal district courts of actions "against any person who is denied or cannot enforce in the court of [a] State a right under any law providing for the equal civil rights of citizens of the United States . . . ." See 28 U.S.C. §1443(1). One issue confronting the Court was whether the Civil Rights Act of 1964 could be regarded as "[a] law providing for . . . equal civil rights" within the meaning of the removal statute, since the Civil Rights Act of 1964 was enacted subsequent to the time when the phrase "any law providing for equal civil rights" was added to the removal statute.[5/] The Supreme Court held that the Civil Rights Act of 1964 is encompassed within that removal statute, stating:

5/ The original removal provision was contained in the Civil Rights Act of 1866. The language "any law providing for . . . equal civil rights" first appeared in 1874 when the Revised Statutes were compiled. See 384 U.S., at 788.

> . . . Congress' choice of the open-ended phrase "any law providing for . . . equal civil rights" was clearly appropriate to permit removal in cases involving "a right under" both existing and future statutes that provided for equal civil rights. (384 U.S., at 789.)

The general open-ended phrase of §603 similarly includes statutory review procedures existing on the date of enactment of the Civil Rights Act of 1964, and those enacted thereafter.

Not only is the Alabama Department's attempt to limit the language of §603 without basis in the legislative history, but it is inconsistent with one of the basic Congressional purposes for enacting Title VI. The practical result of the State's construction of the language of §603 would mean that if the judicial review provisions of a federal grant statute subsequently enacted are to be within the reach of §603, it would be necessary for Congress to insert an explicit reference to "discrimination under the Civil Rights Act." (See, Supplemental Memorandum, p. 15.) This would run counter to one of the basic purposes of Title VI - that of avoiding the need to consider the matter of nondiscrimination

each time a bill providing for federal aid came under consideration. Senator Pastore explained this as follows (110 Cong. Rec. 7061):

> Title VI would avoid the recurrence of acrimonious debate in the Congress as to discrimination in discussing individual Federal aid programs.
>
> Time and time again such proposed legislation has come before this body. Amendments have been sponsored to make clear in a particular program that separate but equal provisions would not do.
>
> * * *
>
> It is to avoid such a situation that Title VI would constitute as permanent policy of the U.S. Government the principle that discrimination will not be tolerated. This would eliminate all the confusion and discussion that arise every time a grant bill comes before the Senate.

It is clear that Title VI was intended to apply to programs established in the future as well as to those which were in effect in 1964, and, by the same token, there is no reason to distinguish between specific statutory judicial review provisions created after July 2, 1964 and those created before. We conclude therefore that, because of the existence of 42 U.S.C. §1316, the Court of Appeals is the proper forum for review of the order of Secretary.

CONCLUSION

As the State has said in both its briefs, "In any event, the entire case is now before this Court." (Supplemental Memorandum, p. 18; original brief, p. 45.) We urge this court to decide the substantive issues on the alternative petition for review rather than on the appeal from the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Appellant-Respondent's Memorandum in Response to the Supplemental Memorandum of the State of Alabama have been served by official United States mail in accordance with the rules of this Court to the attorneys for appellee-petitioners as follows:

Five copies to:

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