

THE WHITE HOUSE
WASHINGTON

November 9, 1998

WR =
Legal Challenges

MEMORANDUM FOR THE PRESIDENT

FROM: Charles F.C. Ruff
Bruce Reed
Elena Kagan
Robert Weiner

RE: Anderson v. Roe

This memorandum describes the issues presented by Anderson v. Roe, which is in the briefing stage before the Supreme Court. The case involves the question whether, during the first year new residents live in California, the State can limit their welfare benefits to the level available in the state of their prior residence. Relying on the Supreme Court's decision in Shapiro v. Thompson, 394 U.S. 618 (1969), the Court of Appeals for the Ninth Circuit upheld a preliminary injunction against the California law because it interfered with the constitutional right to freedom of travel. Thirteen states have similar limitations, including Florida, Illinois, New Jersey, New York, Pennsylvania and Wisconsin.

The Court in Shapiro struck down Connecticut, Pennsylvania and District of Columbia statutes that limited or denied welfare benefits to new residents for up to a year. Acknowledging the State's interest in the fiscal integrity of its programs, the Court held that "the purpose of inhibiting migration by needy persons in the State is constitutionally impermissible," and that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." 394 U.S. at 631. The Constitution, in the Court's view, requires that "all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement." Id. The State has to demonstrate a compelling interest to justify any impairment of this right. Id. at 636. The Supreme Court has repeatedly reaffirmed the right to travel, but last addressed the issue in 1986.

Based on these precedents, at least nine state and federal courts have invalidated welfare residency requirements. It is a fair assumption that the Supreme Court took this case to reconsider the constitutional right to travel. The Court granted review of this issue once before, in 1995, but found that the case was not ripe because California did not have a federal waiver necessary to implement its provision. Anderson v. Green, 513 U.S. 557 (1995). Since then, Congress passed PRWORA, which resolves the ripeness problem and allows a state

"to apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State

from the other State and has resided in the State for less than 12 months.”

The United States is not a party to the case, and the PRWORA provision -- given that it is merely permissive -- is not under direct challenge. However, if the Supreme Court were to strike down California's statute under a standard of strict scrutiny, it could essentially nullify the federal law.

The Solicitor General is considering whether to file a brief in this case and, if so, what position to take. In light of the federal statute and the peril to the constitutional right to travel, there are significant federal interests at stake. The Supreme Court has not invited our participation, but would think it unusual for the United States not to file a brief. The last time this issue was before the Court, in Anderson v. Green in 1995, the U.S. did not participate. Although that was before enactment of the federal statute, there is no imperative that we file. If we do not file, no one else may offer the Court a moderate option that could preserve the right to travel.

The policies behind the federal statute are reasonable. Granted, in individual cases it may be unfair to limit a family migrating from Mississippi to Mississippi's level of benefits -- even if they did not receive benefits there -- while they have to sustain California's much higher cost of living. But in the aggregate, if welfare recipients can flock to the states with the highest benefits, there could be a "race to the bottom," as high benefit states seek to minimize disparities in benefit levels to avoid becoming welfare meccas. Moreover, we sought in PRWORA to give states more latitude to experiment with welfare solutions.

In addition to defending the federal statute, then, we believe our primary goal ought to be the preservation of Shapiro. The constitutional right to travel is important, and we generally should seek to safeguard the civil liberties of our citizens. Moreover, we have placed great emphasis on stare decisis in other contexts, from abortion to affirmative action. There are strong policy reasons not to undermine that doctrine. The Solicitor General believes that the best way to preserve Shapiro is to defend the statute and distinguish this case from the Shapiro line of precedent.

The Solicitor General therefore intends to file a brief tomorrow arguing that the federal provision quoted above is a reasonable measure designed to further the welfare reforms of 1996, to ensure that the state variations in welfare benefits encouraged under PRWORA do not create artificial incentives to travel, and to avoid state reductions in benefits given the fixed block grants states receive. Although no state may in its parochial interest seek to "fence out" poor people, the national legislature, when dealing with the right to travel -- a right of national citizenship -- can authorize states to effectuate a federal purpose. Because of the Congressional authorization here, and because California does not deny benefits as in Shapiro, instead adopting a "choice of law" approach for setting benefit levels, this case is distinguishable from Shapiro. The California statute thus need not satisfy strict scrutiny. But minimum rationality is too lax a standard to review impositions on the fundamental right to travel. Accordingly, the SG will urge intermediate scrutiny of California's law, a standard that would require California to show that its statute bears a substantial relationship to the goals articulated by Congress. In other words,

California would have to demonstrate that the statute is narrowly tailored.

California probably cannot meet that burden, although other states could well do so. California's statute is overbroad. Its limitation on benefits was enacted before PRWORA and is not limited only to those who received welfare in their state of prior residence, or who were eligible to receive welfare, or who traveled for the purpose of obtaining higher benefits. While the SG will argue that California should have the right to make further showings on remand, given the balance of hardships between current recipients of benefits and the state's policy, as well as the likelihood of success, he will contend that the preliminary injunction should stand.

We believe that this approach fulfills the SG's obligation to defend the federal statute, provides the Justices a way to preserve Shapiro, and fairly reflects the balance of policy concerns at stake.

OSG DRAFT -- 11/8/98

No. 98-97

WR - Legal Challenges

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ELOISE ANDERSON, ET AL., PETITIONER

v.

BRENDA ROE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 404(c) of the Social Security Act, 42 U.S.C. 604(c) (Supp. II 1996), authorizes any State that receives a block grant under the federal program for Temporary Assistance for Needy Families (TANF) to "apply to a family the rules (including benefit amounts) of the [TANF] program * * * of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." Section 11450.03 of the California Welfare and Institutions Code provides, in turn, that cash benefits paid by the State to "families that have resided in [California] for less than 12 months shall * * * not * * * exceed the maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code § 11450.03 (West Supp. 1998). The question presented is:

Whether Section 11450.03, as authorized by Section 404(c), impermissibly burdens an aid recipient's federal constitutional right to establish residence and citizenship in a new State.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 134 F.3d 1400. The opinion of the district court is reported at 966 F. Supp. 977.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1998. A petition for rehearing was denied on April 10, 1998. The petition for a writ of certiorari was filed on July 9, 1998, and granted on September 23, 1998. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. California has for many years participated in a variety of cooperative federal-state welfare programs that provide, among other benefits, cash grants to eligible families. Until 1996, such grants were provided primarily through a program known as Aid to Families with Dependent Children (AFDC), under which the federal government provided States with funds for distribution, in combination with state funds, under state plans that were required to comply with detailed federal requirements and to be approved by the Secretary of Health and Human Services. See 42 U.S.C. 601, 602(a)-(b), 603(a) (1994). Among other requirements, the Social Security Act provided that the Secretary was not to approve any state plan that denied aid "with respect to any child residing in the State (1) who ha[d] resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child [was] living ha[d] resided in the State for one year immediately preceding the birth." 42 U.S.C. 602(b) (1994). A federal regulation went further in this regard, generally prohibiting a participating State from denying benefits to "any individual who is a resident of the State." 45 C.F.R. 233.40; see also, e.g., 45 C.F.R. 233.20(a)(2)(iii) (program must apply uniformly throughout State).

In 1996, as part of a comprehensive revision of various federally sponsored welfare programs, Congress replaced AFDC with a new program known as Temporary Assistance for Needy Families

(TANF). Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, tit. I, 110 Stat. 2110, enacting provisions codified at 42 U.S.C. 601 et seq. (Supp. II 1996).¹ Designed to "increase the flexibility of States in operating" programs to assist needy families while encouraging self-reliance and family stability, see 42 U.S.C. 601(a), the TANF program eliminates any individual entitlement to benefits (§ 601(b)), sets out certain common goals and general requirements (§§ 602, 607-608), and provides for block grants (§ 603) that participating States may generally use "in any manner that is reasonably calculated to accomplish the purpose[s] of" the federal program (§ 604(a)). Thus, for example, a participating State is not required to provide any particular level of cash benefits (or, indeed, to provide cash benefits at all). Each State instead has broad discretion to use its TANF grant to provide whatever mix of cash payments, child care, job training, or other benefits it believes will most effectively advance the statutory goals of promoting the care of children in their own homes; encouraging parental self-sufficiency through job preparation, work, and marriage; reducing out-of-wedlock pregnancies; and encouraging the formation and maintenance of two-parent families. See 42 U.S.C. 601(a), 604.

¹ Unless otherwise noted, references to the provisions of Title 42 of the United States Code are to the 1996 Supplement, reflecting the amendments made by PRWORA.

Although most aspects of particular TANF-funded programs are left to the discretion of participating States, federal law imposes some specific requirements and conditions. With some exceptions, for example, States must require that recipients of benefits engage in "work activities" (including participation in educational or job training programs) once they have received assistance for 24 months or are "ready to work." See 42 U.S.C. 602(a)(1)(A)(ii)-(iii), 608(b)(2). If a recipient fails to comply with applicable work requirements, his or her family's benefits may be reduced or terminated. See 42 U.S.C. 607(e), 608(b)(3). In addition, a given family generally may receive assistance for no more than five years. See 42 U.S.C. 608(a)(7). Moreover, the level of the block grants provided to participating States is fixed through fiscal year 2002. See 42 U.S.C. 603(a). This not only allows participating States to "make long-term plans without concern that Federal funds will be reduced," but also "provides States with an incentive to help recipients leave welfare because, unlike [under the AFDC program], States do not get more money for having more recipients on the welfare rolls." H. Rep. No. 651, 104th Cong., 1st Sess. 1332 (1996). A State may also lose some of its federal grant if the percentage of welfare recipients engaged in work activities falls below minimum percentages specified by Congress. See 42 U.S.C. 607(a), 609(a)(3).

Federal law also contains a number of specific authorizations relating to state use of TANF funds. In particular, as relevant here, the 1996 Act provides that "[a] State operating a [TANF]

program * * * may apply to a family the rules (including benefit amounts) of the [TANF] program * * * of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. 604(c). The plan that a State must submit to the Secretary in order to establish its eligibility for a TANF grant must "indicate whether the State intends to treat families moving into the State from another State differently than other families under the program, and if so, how the State intends to treat such families under the program." 42 U.S.C. 602(a)(1)(B)(i). So long as the Secretary finds that a submitted plan "includes" all of the elements specified by the 1996 Act, however, the TANF program, unlike AFDC, does not require any further certification or approval by the Secretary before a State becomes eligible for a TANF grant. Compare 42 U.S.C. 602(a), 603(a)(1)(A) (Supp. II 1996) with 42 U.S.C. 602(b), 603(a) (1994).

2. In 1992, California sought to undertake a five-year experiment in welfare reform that would have included both a work incentive program (combining decreased cash aid with an increase in the amount of income that a recipient could earn without losing benefits) and a residency-based limitation, under which an otherwise eligible family could receive, for its first 12 months of residency in California, no more cash aid than the maximum that would have been paid by the AFDC program of the State where the family previously resided. See Beno v. Shalala, 30 F.3d 1057,

1060-1061 (1994).² Because both aspects of the experiment would have violated requirements of the AFDC program, the State sought and received from the Secretary a waiver of inconsistent federal law and rules. See Beno, 30 F.3d at 1061-1062; Pet. App. 46-48.

The State's residency limitation on AFDC benefits was in effect only briefly, because a federal district court enjoined its application pending resolution of a suit brought by three individuals who sought AFDC benefits within 12 months of having established California residency, and who claimed that limitation of their benefits on that basis violated their rights to equal protection and to free interstate migration. Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993). Relying on this Court's decisions in Shapiro v. Thompson, 394, U.S. 618 (1969), Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and other cases, the district court held that California's residency limitation "must be invalid" because it "place[d] a penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents." 811 F. Supp. at 521. Rejecting the State's arguments that the limitation did not penalize the right to migrate because it did not render recent arrivals ineligible for benefits, provided them with as much cash aid as they could have received from their State of prior residence, and

² Section 11450.03 of the California Welfare and Institutions Code (West Supp. 1998) provides that otherwise eligible "families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with" the State's ordinary benefit formula, "not to exceed the maximum aid payment that would have been received by that family from the state of prior residence."

had not, in fact, deterred the plaintiffs from moving to California, the court concluded that the State could advance no "compelling" governmental purpose for the limitation, that a purpose "to deter settlement into the state of persons who need welfare and seek a higher benefit" would be constitutionally impermissible, and that "stripped of the unconstitutional purpose of deterring migration, the measure lack[ed] a rational design." Id. at 521-522.

The court of appeals affirmed the entry of a preliminary injunction in Green "for the reasons stated in the district court's order." Green v. Anderson, 26 F.3d 95 (9th Cir. 1994). This Court granted the State's petition for certiorari, but it ultimately concluded that the case had become moot because of the intervening invalidation, on other grounds, of the waiver of federal requirements on which California's ability to enforce its residency limitation depended under the AFDC program (and under California law). Anderson v. Green, 513 U.S. 557 (1995). The Court accordingly vacated the judgments below and ordered the case dismissed. Id. at 560.³

3. In August 1996, the President signed the PRWORA. As discussed above, that Act replaces the AFDC program with TANF, and expressly authorizes any State that receives a TANF grant to "apply

³ The Secretary later granted a new waiver to permit California to proceed with other aspects of its welfare-reform experiment, but she declined to renew the waiver that would have permitted implementation of the residency limitation imposed by Section 11450.03. See Pet. App. 16, 49-52.

to a [recipient] family the rules (including benefit amounts) of the [TANF] program * * * of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. 604(c); see also Pet. App. 16-17. That change removed any impediment under the Social Security Act to California's implementation of Section 11450.03.⁴ The TANF plan that California subsequently submitted to the Secretary noted, in accordance with 42 U.S.C. 602(a)(1)(B)(i), the State's intention to limit the cash benefits payable under its program during the first 12 months of state residence, and the State instructed its administrators to begin implementing Section 11450.03 on April 1, 1997. See Pet. App. 7 n.3.

Respondents represent a class of benefit applicants who would be affected by California's implementation of Section 11450.03. See Pet. App. 7 & n.4. Respondent Roe was a resident of Oklahoma until early 1997, when she and her husband moved to Long Beach, California. *Id.* at 19. When she applied for welfare benefits in California, she was informed that, until she had been a California resident for 12 months, she would be limited to the Oklahoma grant level of \$307 per month instead of a full California grant of \$565

⁴ As this Court noted in *Green*, 513 U.S. at 559, Section 11450.03 itself provides that it "shall not become operative until the date of approval by the [Secretary] necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for * * * Title IV of the federal Social Security Act [42 U.S.C. 601]." The State's petition represents, however, that apart from the preliminary injunction entered in this case "nothing now prevents California from fully implementing section 11450.03," Pet. 10-11, and we have no reason to question that representation as to the correct interpretation of state law.

per month. Ibid. Respondent Doe was a resident of Washington, D.C., until she moved to Los Angeles, where she became eligible for cash assistance in April 1997, at the six-month point of her pregnancy. Ibid. Doe was similarly advised that she would temporarily receive cash benefits at the District of Columbia level of \$330 per month rather than at the otherwise applicable California level of \$456 per month. Id. at 19-20.

The district court promptly restrained implementation of Section 11450.03, and shortly thereafter entered a preliminary injunction. Pet. App. 13-31; see id. at 7-8, 20. After discussing the parties' preliminary factual contentions (id. at 21-26) and concluding that implementation of Section 11450.03 would lead to "disparities, even significant disparities, among California [benefit] recipients as between newcomers and recipients who have resided in the state for one year" (id. at 25), the court largely "adopt[ed] its discussion in Green of the Supreme Court's right of migration and equal protection cases" that "set aside as unconstitutional distinctions drawn among residents of a state -- all of whom are bona fide residents -- based on the incipiency or duration of their residency" (id. at 27). Conceiving the "central analytical dispute" in the case to be "whether the appropriate comparison" for constitutional purposes "is between new residents of California and the residents of their former states or between new residents and other longer term residents of California," the court again rejected the State's argument that "so long as the benefit provided to new residents of California is the same as that

provided to residents of their former states, there is no penalty on migration and no violation of equal protection." Id. at 28; see id. at 28-30. And although it recognized that Congress considered a temporary benefit limitation "appropriate" (as, in the court's view, a "cost saving measure"), the court observed that, "[f]acing a similar congressional permission in Shapiro," this Court "held that 'Congress may not authorize the States to violate the Equal Protection Clause.'" Id. at 30. The court accordingly concluded that Section 11450.03 "must be found unconstitutional." Ibid.

The court of appeals affirmed. Pet. App. 1-12. Noting that it would not decide the case on the merits in reviewing the grant of a preliminary injunction (see id. at 4, 12), the court held that its previous affirmance in Green nonetheless remained "persuasive authority" (id. at 9), and it agreed with the district court that the passage of the PRWORA could "not affect the constitutional analysis" (ibid.). Concluding that the "apparent purpose" of the challenged provision was "to keep poor people out of the state," the court found itself "satisfied" that respondents had "demonstrated a probability of success on the merits." Id. at 10. Like the district court, the court of appeals also rejected the State's argument that a court should compare "the 'position of newcomers before and after travel to California,'" and it held that a benefit reduction, "even * * * of a relatively small magnitude," would "impose irreparable harm on recipient families." Id. at 10-11. The court accordingly concluded that the district court "did not abuse its discretion in granting the preliminary injunction."

Id. at 12. The court expressly declined to render any more definitive ruling "before the district court has had a chance to address the underlying merits upon a fully developed record." Id. at 12.

SUMMARY OF ARGUMENT

ARGUMENT

I. Congress Authorized Individual States To Impose Some Temporary Benefit Limitations Based On Changes In State Residency When It Comprehensively Reformed The Nation's Welfare Laws In 1996

By enacting the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress sought to "put[] in place the most fundamental reform of welfare since the program's inception." H.R. Rep. No. 725, 104th Cong., 1st Sess. 261 (1996). As we have explained (see pages , supra), the Act eliminated the familiar program of individual AFDC "entitlements" and replaced it with a new program based on block grants, subject to limited federal requirements, that was intended to "restore[] the States' fundamental role in assisting needy families." Ibid. In signing the Act, the President described it as bipartisan legislation that provided "an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family." 32 Weekly Comp. Pres. Doc. 1487 (Aug. 26, 1996).

In setting the limited federal parameters for its new program of Temporary Assistance to Needy Families, Congress specifically considered the question of temporary benefit limitations based on changes in state residency. The provisions added by PRWORA include both 42 U.S.C. 604(c), which specifies that in operating a TANF program a State "may apply to a family the rules (including benefit amounts) of the program funded under [TANF] of another State if the family has moved to the State from the other State and has resided in the State for less than twelve months," and its companion provision, 42 U.S.C. 602(a)(1)(B)(i), which requires that any such differential treatment of "families moving into the State from another State" be highlighted in the state TANF plan submitted to the Secretary. Those provisions on their face import a general congressional authorization to participating States to impose temporary benefit differentials of the sort established by California's Section 11450.03.

The nature and purpose of that authorization are clarified by PRWORA's legislative history. The House Budget Committee's report on the legislation notes both that existing law "forbids the Secretary to approve a plan that denies AFDC eligibility to a child unless he has resided in the State for 1 year" (see 42 U.S.C. 602(b) (1994)) and that this Court "has invalidated some State laws that withheld aid from persons who had not resided there for at least 1 year." H.R. Rep. No. 104-651, 104th Cong., 1st Sess. 1337 (1996). The report goes on to observe, however, that the Court "has not ruled on the question of paying lower amounts of aid for

incoming residents." Ibid.; see also H.R. Rep. No. 725, supra, at 272-273 (conference report). The report then explains Congress's reasons for including in PRWORA the provision now codified at 42 U.S.C. 604(c):

States are allowed to pay families who have moved from another State in the previous 12 months the cash benefit they would have received in the State from which they moved because research shows that some families move across State lines to maximize welfare benefits. Furthermore, States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States.

H.R. Rep. No. 651, supra, at 1337.

From this discussion, including the reference to "the question of paying lower amounts of aid for incoming [state] residents," it seems clear that Congress was aware both of this Court's decision in Shapiro v. Thompson, 394 U.S. 618 (1969), and of the Court's inconclusive consideration, only the year before, of the very California statute that is again at issue in this case. See Anderson v. Green, 513 U.S. 557 (1995). Notwithstanding acknowledged uncertainty concerning the scope of applicable constitutional constraints, Congress determined that it was desirable, as a matter of federal statutory welfare policy, to authorize each participating State to adopt at least some form of temporary limitation on the benefits made available to new state residents, should the State deem it necessary to do so in designing its own system of benefits within the federal TANF program.

As the explanation offered by the House Report makes clear, at least two related grounds underlie that congressional judgment. First, Congress was concerned that "some families move across State

lines to maximize welfare benefits." H.R. Rep. No. 651, supra, at 1337. Because Congress was fashioning a national social welfare program that would, nonetheless, depend heavily for its success on the full and committed participation of the several States, it could properly be concerned to avoid having that federal program introduce real or perceived distortions into the ordinary patterns of interstate migration that would have prevailed in the absence of federal intervention. See, e.g., States' Perspective on Welfare Reform: Hearing before the Senate Comm. on Finance, 104th Cong., 1st Sess. 9 (1995) (statement of Sen. Graham) (noting that one argument in favor of completely federalizing the welfare program was that "with unequal standards, you could create incentives for populations to move from one State to another in order to access the higher benefits. * * * That is not in the nation's interest to be trying to stimulate that kind of population movement.").

That concern would have been particularly acute in the context of the new TANF block grants, which were explicitly designed to encourage experimentation by the States, which could lead to a high degree of variation in state anti-poverty programming. Because TANF programs will typically be more complex than simple cash grants to needy families, featuring a mixture of benefits (such as child care and job training) and positive incentives (such as time limitations on the availability of benefits) designed to move recipients into the workforce, they may become significantly more difficult to implement successfully as a population becomes more transient. Because TANF programs will also typically demand from

each recipient a substantial commitment to work toward bettering his or her own situation (see, e.g., 42 U.S.C. 608(b), which allows States to require recipients to sign "individual responsibility plans" and to reduce benefits for noncompliance), the varying state aid-and-incentive structures encouraged by the federal block-grant program could also produce new and undesirable incentives for interstate relocation on the part of recipients who might seek to avoid those new responsibilities or otherwise to take advantage of the variable rules operative in different jurisdictions within the system. In any event, a benefit recipient's movement from State to State within such a system may reasonably be regarded as presenting unique and potentially problematic choice-of-law-type questions, because the origin State and the destination State both may have sufficient contact with a recipient, for a limited transition period, that Congress could allow the latter to apply the standards of the former to the recipient's continued participation in the overall federal program for that period.⁵ Finally, in its effort

⁵ Under TANF, for example, States A and B might each have a limited portion of the federal grant -- say \$100 -- available to commit, over time, to providing cash aid to help move any one recipient from welfare to work. State A might adopt a program that provides relatively high cash benefits for a relatively short time -- say \$50 per year for two years -- so as to free recipients to focus on job training, while giving them an incentive to move quickly toward independence. State B might adopt a different approach, providing lower cash benefits but for a longer period of time -- say \$25 per year for four years. While the real-world variables are obviously complex, a recipient who sought to maximize cash benefits would have some incentive to reside in State A for two years, collecting a full \$100 and exhausting eligibility under the State's program, and then to move to State B for the succeeding two years, collecting another \$50. Free mobility within the overall federal program, but from one state program to the next, would thus both

to encourage the development of new and effective ways to break the cycle of long-term welfare dependency, Congress in PRWORA chose to eliminate any individual entitlement to benefits and to give the States positive incentives by providing them with stable but generally non-increasing annual grants for an extended period. See 42 U.S.C. 603(a) (fixing grant levels through 2002); H. Rep. No. 651, supra, at 1332 (system "provides States with an incentive to help recipients leave welfare because, unlike [under the AFDC program], States do not get more money for having more recipients on the welfare rolls"); see also 42 U.S.C. 607(a), 609(a)(3) (authorizing reduction of State grants if percentage of welfare recipients engaged in work activities falls below specified percentages). In short, much of the thrust of the 1996 Act was to give both the States and welfare recipients themselves the ability and responsibility to address the issue of moving needy families from welfare to work. In the context of that effort, it was reasonable for Congress to seek to mitigate any incentive for interstate migration, and to accommodate any choice-of-law interests, that might be created by the decentralized structure of the federal TANF program itself.

(i) reduce the intended incentive effect of State A's time limit and (ii) allow the recipient to receive still further funds from State B (and, indirectly, from the federal taxpayer) under that State's lengthier pay-out period. For present purposes, the most important point is that the incentive to move would have been unintentionally but effectively created by the decentralized structure of the federal program, which not only allowed, but encouraged, States A and B to adopt different program approaches.

The second, and related, reason set out in the legislative history for authorizing States to impose temporary residence-related benefit limitations is that "States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 651, supra, at 1337. That statement expresses concern over a phenomenon often referred to as the "race-to-the-bottom": In a system in which (i) each State sets its own benefit levels, (ii) the State's total resources available for welfare benefits are limited, and (iii) there is no restriction on interstate migration, each State has some incentive to set its benefit level at or below the level selected by every other State, so as to avoid attracting an influx of benefit-seeking migrants. See, e.g., Zubler, The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike, 31 Val. U. L. Rev. 893, [929-935] (1997); see also States' Perspective on Welfare Reform, supra, at 9 (statement of Sen. Graham) (suggesting concern that a State might also have an incentive to reduce its benefit level below the level in other States in order to encourage emigration of benefit recipients). On this model, no State is necessarily motivated by an invidious desire to "fence out" the poor, or at least any individual poor person. Rather, from the State's perspective, it is unfortunate but evident that, although each needy immigrant may act on the expectation that the State's present (relatively high) benefit level will continue to be available after his move, the inevitable effect of many such individual choices to

immigrate, given limited resources (and a limited time frame), will be to depress the level of benefits the State can pay to each recipient -- perhaps even to a level below that which prevailed in an immigrant's original State of residence. Conversely, allowing the imposition of reasonable restrictions that have the effect of eliminating or mitigating any given individual's perceived incentive to move in search of higher benefits may, paradoxically, increase not only the stability of the system, but the average level of benefits offered by States throughout the program (if the promise of stability encourages States to commit greater resources to the program, or to set and maintain higher benefit levels on the expectation that they will prove sustainable, over time, within the limits of the State's resources).

As in the case of other incentives to move potentially created by the federal welfare benefits program, this race-to-the-bottom concern may have been exacerbated by the 1996 reforms. Unlike AFDC, in which federal payments to a State were generally based on the number of benefit recipients within the State in any given period, thus offsetting a substantial portion of the additional cost to the State of any welfare-eligible immigrant, TANF bases the amount of state grants on a base period and generally provides for no increase in the commitment of federal funds over an extended period. See 42 U.S.C. 603(a)(1). The new program thus significantly increases the degree to which the amount available to a State for the payment of cash benefits is fixed, and correspondingly increases the effect on average sustainable benefit

levels of the arrival of any new benefit recipient. Particularly in light of that change introduced by PRWORA, it was reasonable for Congress to address the potential problem of interstate migration that might be caused by the existence of a federal system of variable state benefit programs by authorizing individual States to include in their programs, should they feel the need to do so, reasonable temporary restrictions on a new resident's ability to receive welfare benefits more generous than those provided by his or her former State.

It is important to observe, however, that Congress's action in this regard is permissive, not mandatory, and that the federal authorization, although it sets some limits on the restrictions a State may impose, does not purport to specify what particular limitations may be appropriate or otherwise permissible in the context of a particular state program. Those characteristics of the federal action are consistent with PRWORA's overall approach of establishing relatively general federal parameters for the TANF program and leaving individual States substantially free to design their own benefit programs in accordance with local conditions and legislative judgments. Moreover, like all legislation, the federal authorization is bounded to some extent by the purposes that underlie it. For those reasons, the reasonableness of Congress's general decision to authorize some residency-based benefit limits does not resolve -- although, as we explain below, it is highly relevant to -- the question whether any particular benefit restriction adopted by a State pursuant to that authorization falls

within the independent limits imposed on the State's action by the federal Constitution.

II. The Particular Benefit Restriction Imposed By California Must Be Examined To Determine Whether It Is Substantially Related To The National Governmental Purposes That Underlie Congress's General Authorization Of Such Limitations In The Context Of The TANF Program

The courts below determined that California's Section 11450.03 would likely be held unconstitutional on the basis of this Court's decisions in Shapiro v. Thompson, 394 U.S. 619 (1969), and other cases involving burdens allegedly imposed by state legislation on "the constitutional right to travel, or, more precisely, the right of free interstate migration." Attorney General v. Soto-Lopez, 476 U.S. 898, 902 (1986) (plurality opinion); see Pet. App. 9-10, 26-30. That position has considerable force. Through Section 11450.03, the State seeks to treat some of its citizens differently from others solely on the basis of how recently they became residents of the State.⁶ This Court's cases make clear that any state legislative classification drawn on that basis is constitutionally problematic. See, e.g., Soto-Lopez, 476 U.S. at 902-905 (plurality opinion) (describing previous cases).

Although we think that the doubt concerning Section 11450.03's constitutionality is sufficient to sustain the district court's entry of a preliminary injunction, we agree with the State that the

⁶ The lower courts proceeded on the basis that the respondent class consists of bona fide, albeit recently arrived, residents of California (see Pet. App. 7 n.4, 8, 27-28), and we do not understand the State to contest that point. See also Green v. Anderson, 811 F. Supp. at 517.

district court erred in concluding (id. at 30), at the outset of the present proceedings, that Section 11450.03 "must" be held unconstitutional. Because Congress has affirmatively authorized the imposition of some limitations of this type in the context of the nationwide, federally funded TANF program, the constitutional question in this case cannot be properly resolved without a serious examination of whether the particular limitation adopted by California is sufficiently tailored so that it may fairly be characterizes as "substantially related" to the national governmental interests that underlie that authorization. While we question whether the California provision, enacted four years before PRWORA, will be able to fully satisfy that standard, the State should have the opportunity to demonstrate on remand that it does.

1. In some cases, this Court has held that particular lines drawn by state legislatures on the basis of length of residency in the State simply bore no rational relationship to any legitimate state purpose. See Zobel v. Williams, 457 U.S. 55, 61-64 (1982); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 618-623 (1985); see also Soto-Lopez, 476 U.S. at 912-916 (Burger, C.J., concurring in the judgment), 916 (White, J., concurring in the judgment). The same might be true in this case if, as the lower courts essentially assumed, Section 11450.03 reflected nothing more than a unilateral State purpose "to deter migration of poor people to California." Pet. App. 9; see Shapiro, 394 U.S. at 631; compare Romer v. Evans, 517 U.S. 631-636 (1996); City of Cleburne v.

Cleburne Living Center, 473 U.S. 432, 446-447 (1985) ("[S]ome objectives -- such as 'a bare . . . desire to harm a politically unpopular group,' -- are not legitimate state interests.") (citation omitted). It is not, however, appropriate simply to assume such a state purpose in this case.

Unlike the state laws at issue in the Court's prior cases (including Shapiro, see 394 U.S. at 638-640), Section 11450.03 is a provision of a type that Congress has clearly authorized States to enact in the specific context of their participation in a nationwide but decentralized federal benefits program. That distinction is critical, because the national governmental purposes that we have described in connection with Congress's enactment of the authorization in 42 U.S.C. 604(c) also serve to support implementing state legislation. . . . Compare Pet. App. 9, 30 (dismissing the enactment of PRWORA as irrelevant). Those federal purposes -- avoiding the creation, through a federal program, of unnecessary or distorted incentives for interstate migration by benefit recipients, accommodating the unique choice-of-law-type issues may reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules, and mitigating any tendency, in such a program, toward a "race to the bottom" in the State-by-State establishment of benefit levels -- are plainly legitimate, whether or not an individual State could ever have valid reasons for distinguishing new citizens from old in allocating benefits under a program designed and funded solely by the State. And there can

be little doubt that some temporary limitation on benefits payable to new residents, as authorized by Section 604(c), is calculated to advance those national ends.⁷

2. In other cases, including of course Shapiro, the Court has invalidated state classifications akin to Section 11450.03 on the ground that they unduly burdened the federal constitutional right of citizens of the United States "to enter and abide in any State of the Union." Dunn v. Blumstein, 405 U.S. 330, 338 (1972); see Soto-Lopez, 476 U.S. at 901-913 (plurality opinion); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro, *supra*; see also Zobel, 457 U.S. at 65-71 (Brennan, J., concurring); Hooper, 472 U.S. at 624 (same). In Shapiro and Dunn, the Court indicated that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro, 394 U.S. at

⁷ The ultimate strength of the connection between ends and means largely depends, of course, on the proposition that individuals are or may be influenced, in their decisions about interstate migration, by the perceived availability of higher welfare benefits in a destination State. Although respondents dispute that proposition as an empirical matter (see, e.g., Pet. App. 23-24), there is evidence to support it. See *id.* at 25 (citing Peterson et al., Welfare Magnets (Brookings Inst. 1990)); Zubler, 31 Val. U. L. Rev. at 933-935; Moffitt, Incentive Effects of the U.S. Welfare System: A Review, 30 J. Econ. Lit. 1, 34 (1992). In the case of a judgment made by Congress in fashioning an integrated national program of state participation like TANF, we do not believe that more is required to support the governmental interest. Compare Turner Broadcasting Sys. v. Federal Communications Comm'n, 512 U.S. 622, 665 (1994) ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable."); cf. FCC v. Beach Communications, Inc., 508 U.S. 307, 313-315 (1993).

634; see Dunn, 405 U.S. at 338-343. As the Court subsequently observed, however, although "any durational residency requirement impinges to some extent on the right to travel," some such impingements may not rise to the level of "penalties"; and the Court's cases have not made entirely clear "[t]he amount of impact required to give rise to the compelling-state-interest test." Memorial Hosp., 415 U.S. at 256-257, 258-259; see also Soto-Lopez, 476 U.S. at 903-906 & n.5; id. at 921 (O'Connor, J., dissenting); Sosna v. Iowa, 419 U.S. 393 (1975) (upholding durational residency requirement for invoking jurisdiction to obtain divorce, without expressly addressing applicable standard of review); Vlandis v. Kline, 412 U.S. 441, 452-453 & n.9 (1973) (acknowledging permissibility of reasonable durational residency requirements to establish entitlement to in-state tuition at public university).⁵

We in no way question the correctness of Shapiro's holding that an absolute one-year bar on welfare eligibility was unconstitutional. Nor do we believe that there is any occasion

⁵ In recent cases, some justices have suggested that claims based primarily on the right to interstate migration should be evaluated under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution. Zobel, 457 U.S. at 71-81 (O'Connor, J., concurring in the judgment); see also Soto-Lopez, 476 U.S. at 918-924 (O'Connor, J., joined by Stevens and Rehnquist, JJ., dissenting); id. at 916 (White, J., concurring in the judgment). On that analysis, a State may not draw any legislative distinction on the basis of an individual's exercise of the "fundamental" right "to establish residence in a new State" unless (i) there is "something to indicate that non-citizens [including the new residents affected by the challenged classification] constitute a peculiar source of the evil at which the statute is aimed," and (ii) there is "a 'substantial relationship' between the evil and the discrimination practiced against the noncitizens." Zobel, 457 U.S. at 76 (O'Connor, J., concurring in the judgment).

here to reconsider the rationale of Shapiro or subsequent cases addressing durational residency requirements that are adopted by the State on the basis of state authority alone, to identify a single source of the freedom of interstate migration, or to articulate an over-arching theory for resolving the constitutionality of all state measures that are alleged to burden the freedom of interstate migration. For in our view the constitutional calculus must change somewhat in the unusual circumstance in which Congress has considered and passed on a question affecting the right of interstate migration, in the unique context of structuring a decentralized national benefit program, and has authorized the States to adopt not an outright bar, but rather a specialized choice-of-law rule that calls for application of the laws of the prior State of residence for a limited period. In that context, judicial review must take full account of the effect of the congressional action -- here, the authorization contained in Section 604(c).

That federal authorization is of central importance in part because the freedom of interstate migration allegedly burdened reflects the national interest in interstate commerce (see Edwards v. California, 314 U.S. 160, 172-173 (1941), which Congress has express power to regulate, as well as the nature of a national union, in contradistinction to a federation of independent States. The federal authorization is also important because insofar as interstate migration is a fundamental personal right, as well as an attribute of the national union, it is in important respects a

right of national citizenship, as to which Congress stands in a different relation to individual citizens than do the legislatures of the several States. See, e.g., Soto-Lopez, 476 U.S. at 902 (plurality opinion) (noting "the important role that the principle has played in transforming many States into a single Nation"); Zobel, 457 U.S. at 73 (O'Connor, J., concurring); The Passenger Cases, 48 U.S. at 492 ("For all the great purposes for which the Federal government was formed, we are one people, with one common country."); see also Edwards v. California, 314 U.S. at 167 (Of the limits on State legislation, "none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders."); cf. U.S. Const. Art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to * * * provide for the * * * general Welfare of the United States.").

The form in which Congress has acted -- by authorizing a specialized choice-of-law rule, rather than an outright ban -- is also significant. In the first place, under that approach (unlike in Shapiro), there is a built-in assurance that a person certainly will not be worse off after moving than before. More fundamentally, under a national program such as TANF, Congress may reasonably determine, for example, that when a family was receiving TANF benefits in the prior State of residence, that place of residence at the time of initial eligibility retains a sufficient

connection to the family's continued receipt of benefits for a period of one year that its law may properly be considered along with the law of the State of destination. Compare Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-823 (1985) (Due Process Clause allows forum State to apply its law if it has significant contacts to the subject of the litigation); Restatement (Second) of Conflict of Laws § 9, comment g (1971) (noting corresponding limitation on the application of another State's laws by the forum State). In these circumstances, the family would not become fully eligible under the new State's laws until after completion of the period of transition. Compare Sosna, 419 U.S. at 404-410. Ordinarily, of course, there presumably would be little justification for one State, in the administration of its own public benefits laws for its residents, unilaterally to apply the standards of another State's laws. But where the program is established by federal law and is of a multi-State character, Congress may reasonably determine that the laws of more than one State may properly be regarded as relevant in some circumstances when a person who is eligible for benefits in one State moves to another State.

We do not mean to suggest that Congress may "authorize the States to violate the Equal Protection Clause" (Shapiro, 394 U.S. at 641), or that the right to travel may be "eliminated by Congress" (Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 n.7 (1993)). Plainly neither proposition is supportable. There is, however, a salient difference, in this regard, between state legislation that

is purely local in character, and state legislation that seeks to implement a national policy explicitly articulated by Congress in the federal law that creates a nationwide benefit program. When a State acts unilaterally, there is a risk that it seeks to limit the allocation of its resources in ways that may properly be condemned as parochial and based on nothing more than a desire to exclude persons from out-of-State. That risk is substantially lessened when Congress acts, because the congressional constituency includes, by definition, all citizens of the United States. Moreover, as we have suggested, the creation of a decentralized benefit program may also create both new incentives for movement and new problems of how to determine what rules should apply when an individual moves from program to program within the system -- issues that Congress must be able to address. Thus, when Congress acts to structure and protect a nationwide program, in which it wishes to enlist the willing cooperation of the several States, a court should not lightly hold that state action implementing that program, under an express congressional authorization, impermissibly burdens a right of interstate migration that has at its core a concept of national citizenship, and that presupposes the existence of a Union and a Government of the United States in which Congress has the legislative power.

The rationale for taking account of congressional authorization in this context also suggests, however, limits to the principle. Thus, first, severe deprivations of the sort that this Court has already held penalize the right to travel, such as a

State's complete (even if temporary) denial of all welfare benefits to all new residents because of their recent arrival, as in Shapiro, or of any ability to exercise the right to vote, as in Dunn, might well remain subject to strict scrutiny even if they had been specifically authorized by Congress. Second, the right to change state citizenship is an important personal liberty, and a state law that substantially burdens that right will always warrant more than minimal constitutional scrutiny, even if it has been authorized by Congress in the context of a national benefit program. Finally, the effect of any legislative action, including a congressional authorization, is appropriately limited, to some extent, by the purposes that underlie it. When, as in PRWORA, Congress delegates to the States substantial authority to implement an overall federal program in State-specific ways, it necessarily does so in relatively general terms. Accordingly, although it is appropriate to recognize that a State that legislates pursuant to a specific federal authorization is acting in part on behalf of national interests, when an individual alleges that the State has unduly burdened the right to migrate, it is also appropriate for a court to assure itself that the State's action in fact is designed -- and sufficiently tailored -- to serve the purposes of the authorization.

In light of these considerations, we believe a state statute that does not clearly impose a "penalty" on the right to migrate under Shapiro and subsequent cases, and that implements a specific congressional authorization within the context of a nationwide but

decentralized federal benefits program, should be subject to an intermediate form of constitutional review. That degree of heightened scrutiny is normally described as requiring that a statutory classification be "substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1988). Because the premise for applying less-than-strict scrutiny in this class of cases is that Congress has specifically authorized a general type of state classification in the limited context of a cooperative federal-state benefits program, it should normally be clear, as we think it is here, that the goals of achieving coordination, preventing the distortion of incentives, and promoting the effectiveness of the federal program are important ones. Accordingly, the dispositive question will normally be whether a State's particular implementation of the general federal authorization is "substantially related" to the purposes of that authorization. That inquiry will generally focus on whether the State's chosen means are sufficiently tailored so as to promote the supporting important federal governmental ends, without unreasonably burdening the affected class's important federal individual right to interstate migration.⁹

⁹ Under the Privileges and Immunities Clause analysis discussed in note 8, supra, the federal purposes of the general congressional authorization in Section 604(c) could presumably be attributed to the State for purposes of determining that non-residents, or new residents, are a "peculiar source" of the problem that California's legislation seeks to address. Zobel, 457 U.S. at 76 (O'Connor, J., concurring in the judgment). The additional inquiry suggested in the text, concerning how well the State's particular benefit limitation serves the purposes of the federal authorization, would be essentially the same as the second inquiry under the Privileges

3. In this case, as the State argues (and as Congress recognized in enacting Section 604(c)), the burden that Section 11450.03 imposes on respondents is not one that the Court's prior cases have clearly identified as sufficient to constitute a "penalty" on the right to migrate. Unlike the eligibility waiting-period struck down in Shapiro, California's limitation on benefits for new arrivals does not completely bar all new residents from establishing eligibility for welfare benefits. Rather, pursuant to congressional authorization, it adopts a specialized choice-of-law rule that calls for the application of the law of the recipient's prior State of residence with respect to one aspect of the benefit determination -- the amount of cash benefits to be paid. It follows as well that all families that are otherwise eligible under the California TANF program will receive some level of benefits. Even that limitation may, of course, cause hardship in individual cases; but the California provision on its face by no means completely "denie[s] welfare aid upon which may depend the ability of the [recipient] families to obtain the very means to subsist." Shapiro, 394 U.S. at 627; see also Memorial Hosp., 415 U.S. at 269. Nor does this case, like Dunn, involve even the temporary deprivation, on the basis of interstate migration, of the ability

and Immunities test -- whether there is a "substantial relationship" between that problem and the discrimination at issue. Ibid.; see also, e.g., Supreme Court of New Hampshire v. Piper, 479 U.S. 274, 284 ("The [Privileges and Immunities] Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.").

to exercise another fundamental right. And nothing in Section 11450.03 creates a class of state residents whose rights are permanently inferior to those of longer-term inhabitants, as could be said of the employment-preference, tax-benefit, and revenue-sharing schemes the Court struck down, on a rational-basis analysis, in Soto-Lopez, Hooper, and Zobel. This case is therefore an appropriate one in which to apply intermediate rather than strict scrutiny.

The district court accordingly erred in concluding that Section 11450.03 "must" be unconstitutional (Pet. App. 30), because it reached that conclusion without acknowledging the importance of the federal authorization contained in 42 U.S.C. 604(c), and without evaluating whether the California provision is sufficiently tailored to be "substantially related" to the advancement of those purposes. The proper answer to the latter inquiry is not, in our view, clear on the present record. California's benefit limitation was, however, first enacted four years before Congress enacted Section 604(c), and it appears to be overbroad as a means of addressing the federal purposes of eliminating distorted incentives, accommodating choice-of-law issues created by the federal program, and preventing a "race to the bottom." So far as appears, the State has made no effort to limit the application of its rule to categories of recipients who are most likely to have moved in search of higher or additional federal benefits, or whose cases present the need to resolve conflicts between the rules of the TANF programs in the origin and destination States. The

State's limitation apparently is not, for example, limited to applicants who received (or were eligible to receive) benefits in their prior State of residence at the time they moved. See Pet. App. 17-18 (describing State's implementation of Section 11450.03). Nor does the State appear to allow any applicant the opportunity to receive an exemption from the across-the-board limitation rule by demonstrating that he or she did not come to California for the purpose of seeking higher (or any) welfare benefits. Ibid.

The apparent overbreadth of Section 11450.03 in relation to the national purposes behind Section 604(c) raises a substantial question about its constitutionality under intermediate scrutiny. Because the balance of harms in this case also appears to favor respondents (see Pet. App. 10-11, 30-31), the court of appeals correctly concluded that the district court did not abuse its discretion in entering a preliminary injunction. That was the only issue resolved by the judgment below, see Pet. App. 11-12, and that judgment should accordingly be affirmed. On remand, however, the State should be afforded the opportunity to demonstrate that its benefit restrictions are substantially related to the purposes of the federal authorization -- perhaps, for instance, because they are in fact better tailored than they appear, or perhaps because the costs of administering any more discriminating rule would be prohibitive. In any event, before entering its final judgment the district court should evaluate, on the basis of the record presented by the parties, whether Section 11450.03 is substantially

34

related to the important federal governmental purposes that underlie Congress's enactment of 42 U.S.C. 604(c).

CONCLUSION

The decision of the court of appeals should be affirmed, and the case should be remanded for further proceedings in the district court.

Respectfully submitted.

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