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IN THE

# Supreme Court of the United States

October Term 1970

## No. 609

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare,
State of Arizona,

Appellant,

versus

CARMEN RICHARDSON, et al.,

Appellees.

Jurisdictional Statement filed August 28, 1970.
Probable Jurisdiction Noted December 14, 1970.

## APPELLANT'S BRIEF

Appellant appeals from the amended judgment of the United States District Court for the District of Arizona granting the appellees' motion for summary judgment declaring Arizona's United States citizenship requirement as well as the fifteen (15) year durational residency requirement provided by Arizona Revised Statutes unconstitutional and enjoining appellant from enforcing these provisions.

## OPINION BELOW

The opinion of the District Court is reported at 313 F.Supp. 34 (1970). It is set out in The Appendix at pp. 44-48.

## JURISDICTION

This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

In their first amended complaint, appellees, who are resident aliens lawfully admitted to the United States, sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, Title 42 United States Code §§ 1981, 1983, 2000(d) and 2000(e); the United States Constitution, in particular, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of Article I, § 8, Cl. 3; and the Federal Social Security Act providing for Aid to the Permanently and Totally Disabled persons, Title 42, United States Code § 1351 et seq.

A three-judge court was convened pursuant to Title 28 United States Code §§ 2281 and 2284. Thereafter, on May 27, 1970, the three-judge court issued its decision granting appellees' motion for summary judgment and denying appellant's motion for summary judgment. The amended judgment appealed from was issued on June 26, 1970. The text of the order is set forth at pages 49-50 of the Appendix. Appellant's notice of appeal to this Court was filed in the United States District Court for the District of Arizona on July 9, 1970 (Record, item 19). Appellant's Jurisdictional Statement was filed on August 28, 1970. This Court noted probable jurisdiction on December 14, 1970.

## STATUTORY PROVISIONS INVOLVED

"A.R.S. § 46-233. *Eligibility for general assistance*

"A. No person shall be entitled to general assistance who does not meet and maintain the following requirements:

"1. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

"A.R.S. § 46-272. *Eligibility for blind assistance*

"Assistance shall be granted to any person who meets and maintains the following requirements:

"4. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

"A.R.S. § 46-252. *Eligibility for old age assistance*

"Assistance shall be granted under this article to any person who meets and maintains the following requirements:

"2. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

## QUESTIONS PRESENTED

42 U.S.C. § 1352(b)(2), Aid to the Permanently and Totally Disabled, gives the Secretary (of Health, Education and Welfare) authority to approve any welfare plan which fulfills conditions specified in subsection (a) of that act, except he shall not approve any plan imposing any citizenship requirement which excludes any citizen of the United States. There are similar provisions for Old Age Assistance, 42 U.S.C. § 302(b)(3); Aid to the Blind, 42 U.S.C. § 1202(b)(2); Aid to the Aged, Blind, or Disabled, 42 U.S.C. § 1382(b)(2). Pursuant to 42 U.S.C. § 1302 the Secretary has published a Handbook of Public Assistance Administration which Part IV §§ 3720 and 3730 read as follows:

> "A state plan under titles I, X, XIV and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States. . . .
>
> "Where there is an eligibility requirement applicable to non-citizens, state laws may, as an alternative to excluding all non-citizens, provide for qualifying non-citizens, otherwise eligible, who have resided in the United States for a specified number of year."

The questions presented are:

1. Whether, in its application to these appellees, Arizona Revised Statutes §§ 46-233.A.1, 46-252.2, 46-272.4, enacted pursuant to federal law are violative of the United States Constitution in that they constitute:

A. An undue burden on appellees' right to travel; and

B. An infringement of the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

Carmen Richardson, the named appellee, is a lawfully admitted alien. She has been a continuous resident of the State of Arizona for thirteen years. Mrs. Richardson was sixty-four years and nine months of age at the time of the filing of the complaint. Prior to the District Court decision she was eligible for benefits under the Aid to the Permanently and Totally Disabled (APTD) or Old Age Assistance (OAA) but for the U. S. citizenship requirement or, in lieu of U. S. citizenship, the fifteen year residency requirement for aliens provided by Arizona law.

Appellee brought this as a class action attacking the constitutionality of these provisions of Arizona welfare laws: (1) General Assistance, (2) Assistance for the Blind, and (3) Old Age Assistance (*supra*). The claimed infirmity in all the Arizona statutes mentioned *supra* is the U. S. citizenship requirement or, in lieu of U. S. citizenship, the fifteen year residency requirement for aliens violates the constitutional right to travel, *Shapiro v. Thompson,* 394 U. S. 618 (1969), and the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution.

Both parties moved for summary judgment before a three-judge District Court convened pursuant to 28 U.S.C. §§ 2281 and 2284. Jurisdiction was conferred upon the Court by 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1983.

On May 27, 1970 the Court filed an opinion granting appellees' motion and relying on *Shapiro v. Thompson, supra., Dandridge v. Williams,* 397 U.S. 471 (1970), and *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948) held that Arizona Revised Statutes §§ 46-233.A.1, 46-252.2 and 46-272.4 violate the Equal Protection Clause of the Fourteenth Amendment and constituted an impermissible burden on appellees' constitutional right to travel.

On July 30, 1970 the three-judge court ordered the amended judgment of June 26, 1970 stayed, excluding the named appellee, pending judicial review to this Court. Appendix p. 69.

## ARGUMENT

### POINT I

### THE EQUAL PROTECTION GUARANTEE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION DOES NOT PROHIBIT A STATE FROM FAVORING CITIZENS OVER ALIENS IN THE DISTRIBUTION OF WELFARE BENEFITS.

The validity of Arizona's statutes restricting welfare benefits to aliens is challenged as denying the appellee equal protection of law guaranteed under the Fourteenth Amendment. The alien appellee, being a resident of the United States, is entitled to the protection vouchsafed by these guarantees. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1885). She, along with citizens of the United States, has the right of seeking a livelihood. Primarily, she has the same right and privilege as citizens under similar conditions to engage in gainful employment — unless they pertain to the regulation or distribution of the public domain, the common property or resources of the state, the devolution of real property, public works, or benefits accruing from public monies. *McCready v. Virginia,* 94 U.S. 391, 396 (1876); *Patsone v. Pennsylvania,* 232 U.S. 138, 145-146 (1914); *Hauenstein v. Lynham,* 100 U.S. 483 (1879); *Blythe v. Hinckley,* 180 U.S. 333, 341-342 (1901); *Heim v. McCall,* 239 U.S. 175 (1915).

The Fourteenth Amendment does not prevent a state from distinguishing citizens and aliens if the distinction bears a reasonable relationship to a legitimate state objective. Class legislation must be reasonable in purpose and method and apply alike to all persons within the class. *Muller v. Oregon,* 208 U.S. 412 (1908). The standard the Supreme Court uses when determining whether a statute violates the Equal Protection Clause is set forth in *McGowan v. Maryland,* 366 U.S. 420 (1961). Simply stated,

statutory discriminations will not be set aside if any state of facts may reasonably be conceived to justify them.[1]

Certain provisions of the United States Constitution are couched in such unqualifiedly prohibitory terms that aliens can and do invoke their protection. However, the rights which are capable of protection are those which are regarded as fundamental. For example, the appellee would be entitled to relief by Writ of Habeas Corpus, *Yick Wo v. Hopkins, supra;* protection from the passage of Bills of Attainder or Ex Post Facto Laws, *Chinese Exclusion Case. Chae Chan Ping,* 36 F. 131 aff'd. 130 U. S. 581 (1889); from being made to answer for a capital or otherwise infamous offense without presentment of indictment. *Fong Yue Ting v. U. S.,* 149 U.S. 698, 739 (1893); and from being compelled to give self-incriminatory testimony, *Wing Wong v. United States,* 163 U.S. 228 (1896).[2]

Welfare benefits are discretionary with the states and since the program can be legislated away at any time, such benefits cannot be considered a constitutionally protected right. In *Truax v. Raich,* 239 U.S. 33 (1915), this Court struck down an Arizona statute which required restricted hiring of alien employees. The Court recognized the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction; but that power cannot be so broadly conceived as to bring it into the domain of exclu-

[1]"The standard under which this proposition is to be evaluated has been set forth many times by the Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the State a wide scope of discretion in enacting laws which attack some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, they result in some inequalities. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland, supra* at p. 425. Also see, *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911).

[2]An authoritative annotation on the rights of aliens may be found at 68 L. Ed. 255 (1925).

sive federal control. The Court noted that the power to control immigration is vested solely in the federal government and that the states may not deprive properly admitted aliens of their right to earn a livelihood, reasoning that such a policy would be tantamount to denying their entrance and abode.

The same rationale was followed by the Court in *Takahashi v. Fish and Game Commission, supra.* In that case a California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship" which classification included resident alien Japanese and precluded them from earning their living as commercial fishermen in California's coastal waters was invalidated. *Id.,* p. 413. The Court found this an impermissible impediment noting that the law denied these people the opportunity of earning a living as fishermen and, therefore, interfered with their right of residing where they chose.

These cases are easily distinguishable from the case at bar. The State of Arizona does not interfere with an alien's opportunity to work. It cannot be said that a qualifying period before an alien may receive welfare benefits constitutes a prohibitive interference with an alien's right of seeking employment.

A legitimate state interest exists. For example, a state has a substantial interest in preventing residents lacking the desire to become citizens from holding high elective offices, serving as judges and attorneys or working in positions sensitive to state or national security. A state may restrict an alien's opportunity for employment in certain instances. *Crane v. New York,* 239 U.S. 195 (1915); *Heim v. McCall, supra.* No reason is shown why a different constitutional rule should obtain in the area of welfare benefits. (This proposition is fully explored in Point Heading III.)

Judicial notice should be taken that states have been experiencing great difficulty in the administration of their welfare programs. The resources available for this type of program are very limited. It is, therefore, not unreasonable for a state to favor

citizens over aliens in the allocation of this fund. This Court's words in *Dandridge v. Williams, supra,* are illuminating.[3] The Court noted that states have wide discretion in the distribution of welfare benefits and classifications made by state law. Distribution of benefits will not be set aside if they have some reasonable basis.

For the Court to hold the state's alien restriction invalid would undermine the spirit of cooperative federalism implicit in the joint federal-state administration of welfare. *King v. Smith,* 392 U.S. 309 (1968).

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[3]"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland,* 366 U.S. 420, 426.

"To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different Constitutional standard. See *Snell v. Wyman,* 281 F.Supp. 853 aff'd. ..... U.S. ..... It is a standard that has consistently been applied to State legislation restricting the availability of employment opportunities. *Goesaert v. Cleary,* 335 U.S. 464; *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552. Also see *Flemming v. Nestor,* 363 U.S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic social policy." *Dandridge v. Williams, at pp.* 485-486.

## POINT II

## THE RIGHT TO TRAVEL DOES NOT EXTEND TO ALIENS PLACING THEM ON A PARITY WITH CITIZENS IN THE SHARING OF THE WEALTH OF THE NATION OR THE STATE.

Right to travel cases regardless of where the right was conceived to be grounded have, on their facts and in their holdings, extended only to the United States citizens.[4] Clearly, an alien cannot claim this protection. Even if aliens were accorded this protection, it is not impinged on the facts of this case. Aliens are free to travel through, reside and work in Arizona. Were this not the case the Arizona Civil Rights Act, A.R.S. § 41-1441 et seq., would not exist. The fact that they are not eligible for welfare without meeting a national residency requirement has a no more chilling effect on immigration to the State than the summer heat.

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[4]*Cornfield v. Coryell,* 6 Fed Cases 546, 552 (1823). The right of free interstate passage springs from the Privileges and Immunities Clause embracing all United States citizens; *Passenger cases,* 7 How. 283 (1849). Unencumbered movement between states is a right of national citizenship emanating from the Commerce Clause; *Paul v. Virginia,* 8 Wall. 168, 180 (1868). Privileges and Immunities Clause confers citizens with uninhibited ingress and egress between the several states; *Ward v. Maryland,* 12 Wall. 418 (1870), citizens are guaranteed passage through the States by the Privilege and Immunities Clause; *Crandall v. Nevada,* 6 Wall. 35, 44 (1867), free movement throughout the nation is implicit in national citizenship; *Edwards v. California,* 314 U.S. 160 (1941), the right to travel is integral to national citizenship and flows from the Commerce Clause. (Douglas, J. concurring, joined by Black and Murphy viewed the right to travel incidental to "national citizenship" and protected by the Privileges and Immunities Clause of the Fourteenth Amendment, *supra* 178); *Kent v. Dulles,* 357 U.S. 116, 125-9 (1958), couched the freedom to travel in Fifth Amendment Due Process terms and extending to all national citizens; in *United States v. Guest,* 383 U.S. 745, 757-8 (1966), Mr. Justice Steward was content to recognize a constitutional right to travel "fundamental to the concept of our Federal Union." Likewise, in *Shapiro v. Thompson,* 394 U.S. 618, 629-30 (1969) and *Oregon v. Mitchell,* 400 U.S. ..... (1970), the citizens' unfettered rights to travel without identifying a specific constitutional rationale was upheld.

Restrictions on indigent aliens are an integral part of the Congressional scheme. Title 8 U.S.C. § 1182(a)(7) prevents admitting ill aliens whose conditions will diminish their earning power. Title 8 U.S.C. § 1182(a)(8) bars pauper aliens. Aliens likely to become public charges may be excluded. Title 8 U.S.C. § 1182(a)(15). Aliens may also be required to post bond before admission in case they later become public charges. Title 8 U.S.C. § 1183. They may even be deported if it appears entry was gained with the intention of becoming a public charge. Title 8 U.S.C. § 1251. Since Congress requires aliens to have a viable earning potential, it is unreasonable to think that the states would be required to adopt a contrary policy.[5] The right to earn

[5]This policy is also articulated by the Social Security Act, 42 U.S.C. §1352; 42 U.S.C. §302(b)(3); 42 U.S.C. §1202(b)(2); 42 U.S.C. §1382(b)(2). Under 42 U.S.C. §1302 the Secretary of Health, Education, and Welfare is charged with making rules and regulations necessary for the efficient administration of the Social Security Act. Pursuant to this section, the Secretary of Health, Education, and Welfare has promulgated §201.3(d), Title 45, Code of Federal Regulations, which reads as follows:

> "Determinations as to whether State plans . . . originally (sic) meet, or continue to meet, the requirements for approval are based on relevant Federal statutes and regulations and *the requirements and policies set forth in the Handbook of Public Assistance Administration* and other official issuances to the States." (Emphasis added.)

Sections 3720 and 3730, Part IV, of the Handbook read respectively as follows:

> "A State plan under Titles I, X, XIV (aid to permanently and totally disabled) and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States." (Expression in parentheses added.)
>
> "Where there is an eligibility requirement applicable to noncitizens, *State* plans *may,* as alternative to excluding all noncitizens, *provide for qualifying noncitizens otherwise eligible, who have resided in the United States for a specified number of years.*" (Emphasis added.)

The congressional and agency scheme is clearly etched by the above statutes and regulations to the effect that the states are authorized to impose restrictions upon the conditions of granting welfare to aliens. Whatever doubt may remain vanishes in light of the committee report accompanying the Social Security Bill of 1935, H.R. Rep. No. 615, 82d Cong., 1st Sess. (1935) p. 18, §(b)(3), to the effect that "a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens for a specific period of time." (Appendix p. 38).

(Continued on next page)

a living is not here imposed upon as it was in *Truax v. Raich, supra,* and *Takahashi v. Fish and Game Commission, supra.* Neither can it be said that eligibility for welfare rises to the dignity of the opportunity of earning a living. Employment Act of 1946, 15 U.S.C. 1021 et seq.; *Truax v. Raich, supra.*

This Court has frequently recognized the state's power of excluding aliens from many types of jobs. *Crane v. People of the State of New York, supra.* Admitting that the elemental necessity of being able to seek a livelihood can be partially withheld from aliens but asserting that welfare eligibility must be extended to them shows the spurious analysis of the appellees' argument and its lack of foundation either in reason or in the decisions of this Court.

Pursuing appellees' reasoning full circle requires some rather bizarre results. Were the state to abolish welfare completely, this would offend appellees' conception of the Supremacy Clause of the U. S. Constitution by preventing aliens from living in the jurisdiction because of the unavailability of welfare payments. Under Appellees' theory welfare would be required for aliens. The anamolous situation of extending benefits to aliens that are denied to citizens would be styled a denial of Equal Protection. The State would therefore be obligated by the Fourteenth Amendment to extend welfare to citizens. The underlying conclusion which must be drawn from these propositions is that welfare benefits are secured to all *persons* on the basis of the Immigration and Naturalization Act, 8 U.S.C. § 1101 et seq. and the Supremacy Clause.

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Further, it is incumbent on an administrative agency to scrupulously adhere to its own regulations. *Pacific Molasses Company v. F. T. C.,* 356 F.2d 386 (1966). Likewise, it is axiomatic in administrative law that the regulations of the administering agency be given due deference by the courts. *Red Lion Broadcasting Co., Inc. v. F.C.C.* 395 U.S. 367, 381 (1969). Here the plaintiff is asking the court not only to ignore explicit congressional intent but also the established policy of the administering agency.

## POINT III

## ARIZONA HAS THE RIGHT TO DISTRIBUTE ITS WEALTH BY LIMITING THE ENJOYMENT THEREOF TO U. S. CITIZENS AS AGAINST ALIENS.

This Court has recognized the right of the state to husband its common property or resources for the use of its citizens. Upholding a New York law prohibiting hiring aliens on public works projects, the Court found that aliens are not members of the state as a corporate body, and for this reason state monies may be reserved for the benefit of its citizens. Neither does such a restriction contravene Due Process because of the state's right to prefer citizens. *Crane v. People of the State of New York, supra.* In the lower court opinion, *People v. Crane,* 108 N.E. 427, 429 (1915) *aff'd.,* 239 U.S. 195 (1915) Judge Cardozo noted that the state "may discriminate between citizens and aliens in its charitable institutions, or in other measures for relief of paupers. . . ." *Id.* at p. 429. "In its war against poverty, the State is not required to dedicate its own resources to citizens and aliens alike." *Id.* at p. 430. *Heim v. McCall, supra* is to the same effect. These cases related, on their facts, to the exclusion of aliens from employment on public works, but the premise that aliens need not be accorded all rights of citizens without contravening their rights of Equal Protection or Due Process has long been recognized.[6] By way of dicta this Court has recognized the state's power to set a hierarchy of needs excluding aliens from sharing in the special property of the state. *Truax v. Raich, supra* at 39-40.[7]

[6]This author is aware of no case extending any substantive due process rights to aliens. *Griswold v. Conn.,* 381 U.S. 479 (1965); *Shapiro v. Thompson,* 394 U.S. 618 (1969).

[7]The discrimination defined by the act [preventing aliens from engaging in occupations common in the community thus impeding their migration into the jurisdiction and impinging the exclusive federal control of emigration] does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states." *Truax v. Raich,* pp. 39-40.

Similarly in *Takahashi v. Game and Fish Commission, supra,* the Court stated that restrictions on the rights of aliens are permissible where the restrictions relate to actual differences and are reasonably in pursuance of legitimate statutory purposes. This is true even if the restraints do not cover the full field of involvement. *Patsone v. Pennsylvania, supra* at 144. The state's concern in being allowed to allocate tax dollars in the manner dictated by the exigencies of local conditions falls explicitly within the purview of special state interest. Speaking to this problem in the context of Substantive Due Process, this Court reasoned that the "requirements of due process are a function not only of the extent of the governmental restriction imposed (citing cases), but also of the extent of the necessity for its restriction." *Zemel v. Rusk,* 381 U.S. 1, 14 (1964).

The maelstrom of chronic social problems requires each state to satisfy those needs that local experience shows to be the most pressing. Recognizing that this process imposes harsh results on some, *Dandridge v. Williams, supra,* found that, in spite of this fact, each state must be accorded considerable discretion in the allocation of its welfare resources. Arizona is confronted with a Hobson's choice: *which* of the needy will it feed? Unfortunately, it cannot be assumed that because social problems exist the state has the capacity to remedy them.

## CONCLUSION

The decision below should be reversed. The permanent injunction vacated. Appellant's motion for summary judgment should be granted, and the complaint should be dismissed.

January 28, 1971

Respectfully submitted,

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