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.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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POINT I

APPELLEES MAY NOT RAISE A NEW ISSUE TO SUSTAIN THE LOWER COURT'S DECISION NOT PRESENTED TO OR CONSIDERED BY THE LOWER COURT

Appellees present a new theory to sustain the Lower Court's decision by relying upon the Charter of the Organization of American States, 2 U.S.T. 2394, and the United Nations Charter, 59 Stat. 1031. The record of the Court below clearly indicates the Appellees did not raise the invalidity of the statutes in question as being in violation of or contrary to the foregoing Treaties of the United States Government.[1/] This

1/See Appellees' First Amended Complaint, A. pp.5-9; Appellees' Motion for Summary Judgment and Memoranda, A. pp.13-24 & 35-43; the Opinion and Order, A. pp.44-48; and Reporter's Transcript of Proceedings of February 27, 1970, R. item 25.

Court has refused to entertain on appeal issues not properly raised in the Lower Court. Walters v. City of St. Louis, 347 U.S. 231 (1954); Yakus v. United States, 321 U.S. 414 (1944); Herndon v. Georgia, 295 U.S. 441 (1935).

Assuming the above mentioned treaties are applicable to this case, they cannot be interpreted by this Court to strike down Arizona's legislative policy for the reason public assistance has never been construed to be a fundamental right. In Wyman v. James, October Term 1970, No. 69, decided January 12, 1971, ___ U.S. ___, Mr. Justice Blackman characterized public assistance as public charity.

> "One who dispenses purely private charity naturally has an interest in and expects to know how his

> charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same."

This Court should not implement the proposed foreign policy of the Appellees by its decisions. This is a matter for the Congress to perform by positive legislative enactment under the power granted to it by the Constitution. United States Constitution, Article I. Furthermore, Appellees exhibit great concern over what they construe to be America's treaty obligation and feel that allowing Arizona to continue enforcing its national residence requirement "would make mockery of the United States in the eyes of other nations." The flaw in such a position is that public assist-

ance is not the touchstone of this country's governmental institutions or the criteria by which its foreign policy should be measured.

POINT II

ARIZONA'S ALIEN RESTRICTIONS DO NOT VIOLATE 42 U.S.C. § 2000(d)

The statutes in question do not violate 42 U.S.C. § 2000(d) for the reason they apply equally to all persons notwithstanding their national origin. This situation is analagous to the case of Lassiter v. Northampton County Board of Election, 360 U.S. 45 (1959) where this Court upheld North Carolina's literacy test since it was applied equally to all races. Equal treatment is not a violation of equal protection.

POINT III

ARIZONA'S CITIZENSHIP REQUIREMENTS DO NOT VIOLATE EQUAL PROTECTION, DUE PROCESS, OR ANY OTHER PROVISION OF THE UNITED STATES CONSTITUTION

Appellees conclude that the existence of a fifteen (15) year durational residency requirement conflicts with federal law and unconstitutionally denies indigent aliens entrance to Arizona. However, Appellees do not set forth any reasons why the durational residency requirement for aliens operates in this manner. Arizona restricts no one from entering or abiding in the United States or the State. Nor does the law impede their free movement or job opportunities. It merely imposes a national residency requirement which operates after entry and thus has no effect on immigration.

The hypothetical results complained of can only occur by a restriction on admission or a denial of rights after entrance. There is clearly no restriction on entering the State. The national residency provision has no effect on the post-entry requirement or the opportunity for residing or earning a living within the State.

Decisions of this Court that constitutionally permit prohibiting of aliens from certain public works surely must be precedent to permit the favoring of citizens over aliens in the dispensation of welfare benefits. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915). A state has the power to exclude from enjoyment of its re-

sources those who are unwilling or unable to become citizens. Terrace v. Thompson, 263 U.S. 197 (1923); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Truax v. Raich, 239 U.S. 33 (1915). Unless this Court is prepared to overrule a long line of cases which established the special state interest doctrine, the statutes at bar must stand. Even the case of Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) recognized this doctrine but the Court found no "special state interest" of the State of California in conserving the fish off its coast. In the case at bar, Appellees do not contest this doctrine recognizing that the State of Arizona does have a very important interest in allocating its

limited resources as determined by its people to care and feed its needy citizens.

The Federal Government has never pursued a policy of equal treatment of aliens and citizens.[2] As pointed out in Appellant's Brief, citizens have rights superior to those of aliens in the ownership of land and in utilization of natural resources. No doubt Congress as a matter of immigration policy could place aliens on a parity with citizens, but until Congress speaks the judiciary must respect its "silence."

[2] The United States limits the rights of aliens as compared to citizens in the following areas: Land ownership in its territories, 48 U.S.C. §§ 1501-1508; in employment, 5 U.S.C. § 3301; in disposition of mineral lands, 30 U.S.C. § 181; of public lands, 43 U.S.C. § 161; and in engaging in coastwise trade, 46 U.S.C. §§ 11, 13.

CONCLUSION

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

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Respectfully submitted,

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