TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED

Cases:

TABLE OF AUTHORITIES CITED

United States Constitution:

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,

v.

CARMEN RICHARDSON, et al.,

Appellees.

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

APPELLEES' BRIEF

QUESTIONS PRESENTED

In addition to the questions presented by the appellant, appellees submit that the following questions are also presented in this case:

1. Whether, in their application to the appellees, the Arizona statutes requiring resident aliens to have fifteen year residency in the United States as a condition to receive welfare benefits are in conflict with the Supremacy Clause, Article VI, Paragraph 2 of the Constitution, in that they:

A. Are invalid as they conflict with the Treaties made by the United States and the Public Policy of the United States?

B. Are invalid as they infringe on the Power of Congress in the field of immigration and naturalization?

C. Are invalid as they violate the Civil Rights Act of 1870 and the Civil Rights Act of 1964?

Appellees further submit that the Arizona statutes are not enacted pursuant to federal law as claimed by the appellant in their questions presented because (1) the Social Security Act does not expressly permit this type of state legislation; and (2) the Social Security Act as interpreted by HEW merely permits but does not require this type of state law.

ARGUMENT

I

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE INVALID UNDER THE SUPREMACY CLAUSE AS THEY CONFLICT WITH THE TREATIES MADE BY THE UNITED STATES AND THE PUBLIC POLICY OF THE UNITED STATES

The power of the United States to make treaties is derived from both the Constitution,[1] and that which is inherent in a sovereign nation. Any conflict between state law and the treaties must be resolved in favor of the treaties under the command of the Supremacy Clause. *Asakura v. Seattle*, 265 U.S. 332 (1924).

---

[1] Article I, Section 10 and Article II, Section 2, Clause 2 of the Constitution.

After World War II, this nation, together with many other nations, became signatory to the *United Nations Charter,* 59 Stat 1031. Prior decision of this Court indicated that it is a treaty and validly constitutes a limitation on the rights of the states under the Supremacy Clause. *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1954).

The Preamble to the *United Nations Charter,* states in part as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims.* * *"

Chapter 1, Article 1, Subparagraphs (2) and (3) of the UN Charter state, in part as follows:

> "The Purposes of the United Nations are:
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

> 3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;* * *"

Finally, *Chapter IX, Articles 55 and 56 of the Charter* state, in part, as follows:

Article 55

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United Nations shall promote;* * *
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

This *Charter,* devised and entered into by the great powers of the world at the end of World War II, indicates clearly not only the desire but the necessity that human freedoms be protected without respect to race or creed if international strife such as was suffered in World War II is to be avoided. This *Charter,* with the high and noble purposes of avoiding war and improving the lot of mankind generally, must be given the broadest and most liberal interpretation possible.

It requires no stretch of the imagination but only a plain reading of the *Charter* to realize that it was intended to prevent just such discrimination and lack of equality as presented in this case. *Article 56* above quoted specifically states that each member nation will take joint and separate

action for the achievement of the protection of human rights and freedoms without discrimination. It is therefore incumbent upon this Court to make certain that these fundamental principles are not violated within the boundaries of the United States of America.

Moreover, the named appellee is a resident alien of Mexican nationality. Both this nation and Mexico are signatories to the *Charter of the Organization of American States* (OAS), 2 UST 2394 (1951). The OAS Charter, in addition to re-affirming the principles of the United Nations Charter, declares as a principle that:

> "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex." Chapter II, Article 5, Clause j.

The *OAS Charter* further provides:

> *Chapter VII*
>
> Social Standards
>
> *Article 28*
>
> "The Member States agree to cooperate with one another to achieve just and decent living conditions for their entire populations."
>
> *Article 29*
>
> "The Member States agree upon the desirability of developing their social legislation on the following bases: a) *All human beings, without distinction* as to *race, nationality,* sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, *equality of opportunity,* and economic security; b) Work is a right and a social duty; it shall not be considered as an article of commerce; it demands respect for freedom of association and for the dignity of the worker; and it is to be performed under conditions that ensure life, health and a decent standard of living, *both during the working years and during old age, or when any circumstance*

> *deprives the individual of the possibility of working.*" (Italics added)

The argument that state laws which discriminate as to aliens may be invalid as being inconsistent with these multilateral treaties entered by the United States is not a novel one.

In *Oyama v. California,* 332 U.S. 632 (1948), where at page 673 Mr. Justice Murphy and Mr. Justice Rutledge in a concurring opinion stated:

> "Moreover, this nation has recently pledged itself, through the United Nations Charter to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."

And at pages 649, 650 Mr. Justice Black and Mr. Justice Douglas in a concurring opinion state:

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

There as here the same question can be asked. How can the United States be faithful to its pledge in solemn treaty with other countries if the states can be allowed to deprive resident aliens the barest form of subsistence which its own citizens are entitled to? To permit this would make mock-

ery of the United States in the eyes of other nations and to discredit this great nation's position as the leader of the "free" and "democratic" world. On the other hand, invalidation of the state laws here would strengthen our relationship with all foreign nations, improve our image in the weaker countries, especially in Latin-America, and to make into reality instead of mere hope, the inscription on the pedestal of the Statue of Liberty.[2]

II

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE INVALID UNDER THE SUPREMACY CLAUSE AS THEY INFRINGE ON THE POWER OF CONGRESS TO REGULATE IMMIGRATION AND NATURALIZATION

The Constitution provides that Congress shall have power to regulate foreign commerce, to establish uniform rule of Naturalization, and together with the President to make and ractify treaties.[3] Impliedly, Congress has the sole power to regulate immigration. *Fong Yeu Ting v. United States,* 149 U.S. 698, 713 (1893). Attempts by a state which infringe upon Congressional powers in this field must be declared void. *Chy Lung v. Freeman,* 92 U.S. 275 (1876).

In Takahashi v. Fish and Game Commission, 334 U.S. 410, this Court said:

> "The federal government has broad constitutional powers in determining what aliens shall be admitted

---

[2] Give me your tired, your poor,
Your huddled masses yearning to be free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me.
I lift my lamp beside the golden door!–*Emma Lazarus.*

[3] Article 1, Section 8, Clauses 3 and 4 of the Constitution. See also note 1, supra.

> to the United States, the period they may remain, regulation of their conduct before naturalization and the terms and conditions of their naturalization. See *Hines v. Davidowitz,* 312 U.S. 52, 66. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration and have accordingly been held invalid." 334 U.S. at 419.

Pursuant to that grant of power, Congress has enacted a comprehensive scheme of legislation governing immigration and naturalization. Although paupers and persons of questionable means to earn a living are disfavored and excludable under the immigration laws, Congress has recognized that circumstances may change after one's arrival in this country so as to cause him to become a public charge. This humanitarian view is reflected in the immigration laws providing for the deportation of a resident alien who becomes a public charge within five years after his entry into the United States from *causes not affirmatively shown to have arisen after his entry.*[4] Moreover, wilful deprivation of rights and privileges of an alien is a Federal crime.[5]

On the other hand, the Arizona legislation deprives an alien, who, through no fault of his own, becomes indigent after his arrival in the state, the basic means of subsistence. These aliens are denied disability, old age or aid to the blind benefits. To these unfortunate aliens who are otherwise not deportable, returning to their countries of origin

---

[4] 8 U.S.C. Section 1251 (a)(8).

[5] 18 U.S.C. Section 242.

may well be the only resort. The abandonment of residence in the United States usually results in the abandonment of residence for the purposes of naturalization. Thus, the state statutes have, not only a chilling, but a direct effect on immigration and naturalization.

Examination of Arizona's statutes in light of the immigration and naturalization laws leads to the following inevitable conclusions: (1) the fifteen year durational residency requirement is a clear invasion of a federally pre-empted area; and (2) with respect to aliens who become public charges due to reasons arising after their immigration, any residence or citizenship requirement would be in conflict with the design of the federal laws.

III

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE INVALID UNDER THE SUPREMACY CLAUSE AS THEY VIOLATE THE CIVIL RIGHTS ACTS VALIDLY PASSED BY CONGRESS PURSUANT TO THE FOURTEENTH AMENDMENT

In *Takahashi v. Fish and Game Commission, supra,* this Court citing with approval *Yick Wo v. Hopkins,* 118 U.S. 356 (1885), held that the *Civil Rights Act of 1870 (42 U.S.C. 1981)* was applicable to aliens.

> *42 U.S.C. #1981* provides: "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Court in *Takahashi* went on to say:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under nondiscriminatory laws." 334 U.S. at 420

Moreover, the *Civil Rights Act of 1870* is now butressed by the *Civil Rights Act of 1964. 42 U.S.C. § 2000(d)* of that Act provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

This section, adopted pursuant to the Fourteenth Amendment, correctly employs the word "person" and not "citizen". Unquestionably, it encompasses lawfully admitted aliens as well as citizens.

All the Arizona public assistance programs considered here fall within the language of 42 U.S.C. § 2000(d) since they are categorical assistance programs financially assisted under the federal social security act. The citizenship requirement and the fifteen year durational residency requirement constitute an exclusion from participation in and a denial of the benefits of these programs on the basis of national origin, since aliens are generally defined by their having been born outside the United States. Further, since the excluded resident aliens in Arizona are predominantly Mexican nationals the discrimination is also based on race and color.

Arizona statutes, in denying equal benefit to resident aliens, collides with the national policy enunciated by Congress in furtherance of the Fourteenth Amendment. The national law must have the right of way.

IV

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE UNCONSTITUTIONAL AS THEY OFFEND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment extends protection to "all persons" and therefore include aliens. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Truax v. Raich,* 239 U.S. 33 (1915). Discrimination on the basis of alienage, even though not one singled out against a particular race or nationality, affects a "disadvantaged minority" and is therefore subject to "strict judicial scrutiny," and confined "within narrow limits." *U.S. v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938) *Takahashi v. Fish and Game Comm'n,* 334 U.S. 410, 420 (1948).

It is beyond dispute that the Arizona statutes create two classes of needy individuals in the determination of eligibility for its adult public assistance programs. On the sole basis of alienage, resident aliens lacking the fifteen-year durational residency requirement who are unfortunate enough to become indigent due to illness, disability or old age are denied benefits which may be the very means for them to subsist. Such a classification constitute an invidious discrimination denying them equal protection of the state's laws.

Arizona urges that its statutes are justified because in the area of social welfare legislation the states are permitted wide discretion in the classifications made by its laws in the distribution of benefits as long as there exists some "reasonable basis" to sustain such classifications. *Dandridge v. Williams,* 397 U.S. 471 (1970). The *Dandridge* case is distinguishable from this case on two important grounds. First, the classification there is *not* based on race, color or nationality and thus not inherently suspect. *Takahashi v. Fish and Game Comm'n, supra.* Secondly, the state did not

exclude any particular group from the benefits—it simply limited the amount of payment per family. Since the classification here is one which is inherently suspect, "any rational basis" is not enough to sustain the classification. The state must come forth with a "compelling state interest" to justify the discriminatory statutes.

Arizona advanced the argument that its classification should be sustained because a state may, in conserving its resources, favor its own citizens at the expense of not aiding the resident aliens within its jurisdiction. In plain language, Arizona's purpose in enacting these statutes is to save money. However, the saving of welfare costs cannot be an independent ground for an invidious classification. *Shapiro v. Thompson,* 394 U.S. 618, (1969). Likewise, in *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court held that due process of law could not be denied welfare recipients simply on the grounds of fiscal consideration. 397 U.S. at 266. In fact, the *Shapiro* opinion intimated that such a basis for classification may well not meet the "rational basis" test under the traditional equal protection standards. 394 U.S. at 638.

Arizona also justified the discrimination under the theory that it is permitted to do so because of the *special public interest* a state has in preserving its money and property for its own citizens. This theory draws its support from *People v. Crane,* 214 N.Y. 154, 108 N.E. 427 (1915); aff'd sub nom. *Crane v. New York,* 239 U.S. 195 (1915); and *Heim v. McCall;* 239 U.S. 175 (1915). These cases upheld New York laws barring aliens from public works employment.

These decisions, decided some fifty-five years ago, were not based on good reason nor logic. They should not be relied on for the determination of this case. Both decisions were based largely on the antiquated premise that public employment is a privilege and not a right and that whatever is a privilege or a right may be dependent on citizenship. The privilege-right dichotomy should have no place

in the resolution of this case.[6] This Court has recently stated, "the constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'." *Shapiro v. Thompson,* 394 U.S. at 627 n. 6. In *Goldberg v. Kelly, supra,* this Court again said, "Public assistance is * * * not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.'" 397 U.S. at 265.

Additionally, the California Supreme Court recently held that the California statute which prohibited employment of aliens on public works was unconstitutional as violative of equal protection of laws. The California decision expressly rejected the *Crane* rationale relying on the later decision of this Court in *Takahashi v. Fish and Game Commission, supra. Purdy and FitzPatrick v. California,* 79 Cal Rptr. 77, 456 P.2d 645 (1969).

The "special public interest" rule, justifying the limitation of expenses by discriminating against resident aliens is logically unsound. Resident aliens in Arizona pay all state taxes as well as federal taxes. They are required to serve in the United States Armed Forces on the same basis as citizens.[7] Resident aliens such as Carmen Richardson have lived in the state for many years, worked in the state and contributed to the economic growth of the state. Yet, she is denied the disability and old age benefits. On the other hand, newly arrived citizens, who have contributed far less, can receive these benefits under this Court's decision in *Shapiro v. Thompson, supra.*

Laws discriminating against aliens and the evolution of the "special public interest" rule justifying the discrimination, are based on the ground that aliens hold allegiance to foreign nations. The lack of "national allegiance" there-

---

[6]Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 82 Harv. L. Rev. 1439 (1968).

[7]50 U.S.C. App. § 454(a)

fore makes them less deserving of rights commonly accorded to citizens. While this basis is proper to deny aliens attributes of citizenship such as the right to vote and the right to hold public office, it is not rational to use the same to deny resident aliens the right to employment or welfare benefits. Moreover, most resident aliens such as those of Mexican nationality in Arizona are illiterate or lacking an adequate knowledge of English which is a pre-requisite for naturalization.[8] To them, the lack of allegiance to the United States is not due to their own choosing.

The opinion in the court below striking down the Arizona statutes relied on this Court's prior decisions in *Takahashi v. Fish and Game Comm'n, supra* and *Shapiro v. Thompson, supra.* In *Takahashi,* this Court held that the California statute denying commercial fishing licenses to resident aliens ineligible for citizenship was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. The "special public interest" rule advocated by California was rejected by this Court in *Takahashi,* saying:

> "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." 334 U.S. at 421.

The recent case of *Shapiro v. Thompson, supra,* deserves special mention. In *Shapiro,* this Court struck down the durational residency requirements enacted by the states as a condition to receive welfare benefits. Although factually the welfare applicants in *Shapiro* and the related cases are all citizens, the *Shapiro* decision should not be limited to citizens.

---

[8] *Discrimination against Mexican aliens,* 38 George Washington Law Review 1091 (1970).

This Court held in *Shapiro* that the state's durational residency requirements had a "chilling effect" on the fundamental *right to interstate travel,* and since there was found to be no "compelling state interest" to justify these requirements, the state statutes violated equal protection of laws. Logically and historically, the *right to interstate travel* should and has been accorded to aliens and citizens alike. In his concurring opinion in *Shapiro,* Mr. Justice Stewart discussed the long established notion of the constitutional *right of interstate travel.* The 1915 decision of this Court in *Truax v. Raich supra,* was cited by Mr. Justice Stewart for the proposition that this right includes the right of "entering and abiding in any state of the Union." 394 U.S. at 642. In *Truax,* the Arizona statute requiring any employer of five or more employees to employ 80 per cent citizens was found by this Court to be a denial of equal protection of laws as to the alien employee about to be fired. Although the right to travel interstate as to aliens may be ascribed to the federal laws governing immigration rather than the Constitution, Arizona should no more be permitted to infringe upon that right which is granted by Congress than the right of interstate travel inherent in citizenship. Commands of both the *Supremacy Clause* and the *Fourteenth Amendment* pledging equal protection of laws demand that there must be a "compelling state interest" to justify the invidious discrimination.

Examination of the Arizona statute in light of the *Shapiro* decision makes it abundantly clear that the reasons advanced by the states in *Shapiro* found uncompelling by this Court should likewise be unpersuasive in their application to the discrimination as to resident aliens.

CONCLUSION

It is respectfully submitted that *Arizona Revised Statutes, (A.R.S.) Sections 46-233(A)(1); 46-272 (4) and 46-252(2),* requiring either citizenship or a fifteen year durational resi-

dency in the United States as a condition of eligibility to receive adult categorical public assistance benefits, are, as to the appellees, unconstitutional as violative of both the Supremacy Clause and the Fourteenth Amendment to the Constitution of the United States. The decision of the court below should be affirmed.

ANTHONY B. CHING

Attorney for Appellees

Special Counsel
Legal Aid Society of the Pima
County Bar Association

Harvard Law School
Cambridge,
Massachusetts 02138