APPENDIX

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

JURISDICTIONAL STATEMENT FILED AUGUST 28, 1970
PROBABLE JURISDICTION NOTED DECEMBER 14, 1970

LIST OF CONTENTS

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1969	
Jul. 30	1. File Complaint.
Jul. 31	2. File copy of Notification and Certificate of the formation of three judges.
Aug. 18	3. File copy of Order Designating Honorable Gilbert H. Jertberg, Honorable James A. Walsh and Honorable C. A. Muecke.
Sep. 4	4. File Affidavit of Waiver of Process and Acceptance of Service.
Sep. 12	5. File Answer of Defendant.
Sep. 23	6. File plaintiffs' Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment.
Oct. 6	7. File Defendant's Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.
1970	
Jan. 26	8. File Motion of Center on Social Welfare Policy and Law for Leave to File Brief Amicus Curiae and Statement of Interest of the Amicus.
Feb. 2	— MINUTE ENTRY: It is ordered that the respective motions of the parties for summary judgment are set for hearing on February 27, 1970, at 10:00 a.m., at Tucson.
Feb. 2	— Mail copies of minute entry to Judges Jertberg and Muecke and copies to Anthony B. Ching and Sandra D. O'Connor.
Feb. 20	— MINUTE ENTRY: It is ordered that the respective motions for summary judgment, set for February 27, 1970, at ten a.m., shall be heard at 8:30 a.m.

Date 1970	PROCEEDINGS
Feb. 20	— All judges being advised, resp. counsel advised of change of time of hearing on 2/27/70 by Judge Walsh's office.
Feb. 25	9. File Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment.
Feb. 27	— MINUTE ENTRY: Motions of Respective Parties for Summary Judgment on for hearing before Judges Jertberg, Walsh and Muecke. Anthony B. Ching, Esq. and Jonathan Weiss, Esq., appear on behalf of pltf. Andrew W. Bettwy, Esq. and Michael Flam, Esq., appear on behalf of deft. Hearing is had. Order grant motion of Center on Social Welfare Policy and Law for leave to file brief as Amicus Curiae. Order grant pltf. leave to file amended complaint with amendments limited to advice given to Court. Order counsel to furnish Court with Memorandum as to legislative history on 42 USC 1352, in 15 days. Matter submitted upon receipt of Memo of pltf.
Mar. 12	10. File Plaintiffs' Response to Defendant's Supplemental Memorandum of Law.
Mar. 12	11. File First Amended Complaint.
Mar. 19	12. File defendant's Answer to First Amended Complaint.
May 27	13. Enter and file Opinion and Order granting plaintiffs' motion for summary judgment praying for a preliminary injunction and declaratory relief.
May 27	— Mail conformed copies of Opinion and Order to Anthony B. Ching and Michael Flam, Ass't. Atty. Gen.
June 11	14. File Defendant's Objections to Form of Judgment.

Date 1970	PROCEEDINGS
June 15	— MINUTE ENTRY: It is ordered by the Court that defendant's objections to the form of judgment proposed by plaintiffs are overruled.
June 15	15. Enter and file Judgment in favor of the plaintiffs and against the defendant, declaring fifteen-year durational residency requirement in the United States as unconstitutional and permanently enjoining defendant and his successors, agents and employees from enforcing the fifteen-year durational residency requirement as to the plaintiffs.
June 15	— Copies of Judgment mailed to Judge Jertberg and Judge Muecke by Judge Walsh.
June 17	— Copies of Judgment mailed to: Michael S. Flam, Spec. Asst. Atty. General, and Andrew Bettwy, Asst. Attorney General and to Anthony B. Ching, Esq.
June 26	16. File Stipulation that judgment entered June 15, 1970, be vacated and that Proposed Amended Judgment be signed and entered.
June 26	17. Enter and file Amended Judgment.
June 26	— Copies of Stipulation and Amended Judgment mailed by Judge Walsh to Judge Jertberg, Judge Muecke, Anthony B. Ching, Esq., and Attorney General of State of Arizona.
July 6	18. File defendant's Motion to Stay Enforcement and Execution of Judgment and Memorandum of Points and Authorities.
July 9	19. File defendant's Notice of Appeal to the Supreme Court of the United States.
July 9	20. File plaintiffs' Opposition to Motion to Stay Enforcement and Execution of Judgment.

Date 1970	PROCEEDINGS
July 9	21. File Memorandum of Points and Authorities in Support of Opposition to Motion to Stay.
July 20	22. File defendant's Reply to Opposition to Motion to Stay Enforcement and Execution of Judgment.
July 20	23. Enter and file Order Staying Enforcement and Execution of Judgment as to all parties plaintiff other than Carmen Richardson.
July 20	— Copies mailed to Judges Jertberg and Muecke by Judge Walsh's office.
July 20	— Mail copies of Order Staying Enforcement and Execution of Judgment to Anthony B. Ching, Esq. and Michael S. Flam, Special Ass't. Attorney General.
July 30	24. Enter and file Amended Order Staying Enforcement and Execution of Judgment.
July 30	— Mail copies of Amended Order Staying Enforcement and Execution of Judgment to Anthony B. Ching, Esq., and Michael S. Flam, Special Ass't. Atty. Gen.
Aug. 31	25. File Reporter's Transcript of Proceedings of February 27, 1970.
Oct. 1	— Transmit Record on Appeal to the Supreme Court of the United States.
Oct. 1	— Mail copies of Clerk's Certificate and Index to Record on Appeal to Anthony B. Ching, Esq. and Michael B. Flam, Special Assistant Attorney General.
Oct. 12	26. File Receipt of record on appeal. (Supreme Court Case No. 609).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — FIRST AMENDED COMPLAINT

COME NOW plaintiffs and allege as follows:

I

That this action is brought by plaintiffs under Title 42, subchapter (i), United States Code, and particularly § 1983 of said Title, and under Title 28, United States Code, §§ 1343, 2201, 2202, 2281 and 2284, seeking injunctive relief and a declaration that Title 46, Article 3, § 46-233(A)(1) of the Arizona Revised Statutes, as amended, is in violation of the Constitution of the United States, particularly the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution and the commerce clause of Article I, § 8, cl. 3, as well as being in conflict with and contrary to the federal Social Security Act providing for Aid to the Permanently and Totally Disabled Persons. That the state statute is also contrary to and is in conflict with 42 U.S.C. § 1981, as well as 42 U.S.C. § 2000(d) and § 2000(e) of the 1964 Civil Rights Act.

II

That plaintiff CARMEN RICHARDSON is a resident alien, having the status of a permanent resident residing in the State of Arizona. That she is and has been continuously a resident of the State of Arizona for a period of thirteen years. That prior to

making her residence in the State of Arizona, she resided in Mexico. She is presently 64 years and 9 months of age.

III

That defendant is the Commissioner of the Department of Public Welfare, State of Arizona, and is charged by law with the duty of administering the laws pertaining to Public Welfare, including the Aid to the Permanently and Totally Disabled Persons program, pursuant to the applicable federal Social Security Act and state law in the State of Arizona.

IV

That the plaintiff CARMEN RICHARDSON is a permanently and totally disabled person, and that she is entitled to receive benefits under the Aid to the Permanently and Totally Disabled Persons (APTD) program, administered by the defendant, but for the fact that Arizona Revised Statutes § 46-233(A)(1) requires that she must, as a condition of eligibility, have resided in the United States a total of 15 years.

V

That this action is brought on behalf of the plaintiff, as well as on behalf of each and all other persons similarly situated, who are alien residents lawfully admitted as permanent residents in the United States and who reside in the State of Arizona, and who are otherwise eligible to receive welfare benefits under the welfare laws of the State of Arizona, as well as the federal Social Security Act, to-wit: General Assistance (APTD), under Arizona Revised Statutes, Title 46, Chapter 2, Article 2; Old Age Assistance (OAA), Title 46, Chapter 3, Article 3; Assistance to the Blind (AB), Title 46, Chapter 2, Article 4, but who are denied said assistance and benefits by the defendant under the residency requirement statutes, to-wit: Arizona Revised Statutes, § 46-233(A)(1), § 46-252(2) and § 46-272(4), as amended, respectively. This class action is brought for the reason that such other persons in the class are so numerous as to make it impracticable to bring them all before the Court, and the right of the plaintiff,

which is the subject matter of this action, is typical to all of these persons, and the plaintiff will adequately and fairly represent and protect the interests of all such persons, and that questions of law or fact are common to plaintiff and all such persons; that further, the party opposed to the class, the defendant herein, has acted on grounds generally applicable to plaintiff and to all such persons as a class.

VI

That as a result of the action of the defendant, the plaintiff and all others similarly situated as the plaintiff, have suffered and will suffer irreparable injury, loss and damages, and that said irreparable injury, loss and damages will be suffered by plaintiff and those persons similarly situated as the plaintiff unless temporary and permanent injunctive relief is granted by this Court.

VII

That over the past several years, plaintiff CARMEN RICHARDSON has made repeated efforts to apply for APTD benefits at the Department of Public Welfare in Pima County in the City of Tucson; that her applications were repeatedly denied, solely on the basis of the requirement that she must have resided in the United States for a period of 15 years.

VIII

That the operation of Arizona Revised Statutes, § 46-233 (A)(1), as amended, as to the plaintiffs, is in violation of the due process of law and the equal protection of law guaranteed to them under the Fourteenth Amendment to the United States Constitution, as well as being in conflict with and contrary to the federal Social Security Act, providing for categorical welfare assistance.

WHEREFORE, plaintiffs pray as follows:

1. That a three-judge District Court be convened pursuant to 28 United States Code, § 2281 and § 2284.

2. That a date and time be set by this Court for hearing on plaintiffs' request for preliminary injunction.

3. That upon a hearing on plaintiffs' request for preliminary injunction, a preliminary injunction shall issue out of this Court, restraining and enjoining defendant from denying assistance to the plaintiffs.

4. That Titles 46-233(A)(1), 46-252(2) and 46-272(4), as amended, of the Arizona Revised Statutes, requiring a durational residency requirement in the United States as to plaintiffs, be declared unconstitutional as violative of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as being contrary to and in conflict with the federal Social Security Act providing for categorical welfare assistance, and that the defendant be permanently enjoined from enforcing said unconstitutional and illegal statutory provisions.

5. That monies plaintiffs are entitled to receive under the welfare laws of the State of Arizona and the federal Social Security Act, which are unconstitutionally withheld from them, be awarded to them.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: ANTHONY B. CHING
Anthony B. Ching
Chief Trial Counsel
112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

ANTHONY B. CHING, being first duly sworn, upon his oath deposes and says: That he is the attorney for the plaintiffs in the above-entitled matter; that he has read the foregoing First Amended Complaint and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated on information and belief, and as to those matters, he believes it to be true.

ANTHONY B. CHING
Anthony B. Ching

SUBSCRIBED AND SWORN TO before me this 11th day of March, 1970, by ANTHONY B. CHING.

JUDITH BASMAJIAN
Notary Public

My commission expires:
August 1, 1972

Copy of the foregoing mailed this
12th day of March, 1970, to:

Andrew Bettwy, Esq.
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — ANSWER TO FIRST AMENDED COMPLAINT

Defendant, JOHN O. GRAHAM, answers this complaint herein as follows:

I

Defendant admits the allegation in paragraph I of the Complaint that the action is brought by Plaintiffs under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343, 2201, 2202, 2281 and 2284, seeking injunctive and declaratory relief, but denies that ARS § 46-233 (A)(1) is in violation of the Constitution of the United States, or in conflict with and contrary to, the Federal Social Security Act; or in conflict with and contrary to, 42 U.S.C. §§ 1981, 2000(d) and 2000(e) of the 1964 Civil Rights Act.

II

Defendant admits the allegations of paragraphs II, III, IV, V, and VII of the Complaint, except that defendant alleges that he is charged with the duty of administering the laws of the State of Arizona pertaining to public welfare subject to control and direction of the Arizona State Board of Public Welfare.

III

Defendant denies the allegations of paragraphs VI and VIII of the complaint.

IV

Defendant denies each and every allegation of the complaint not specifically admitted herein.

WHEREFORE defendant prays that the complaint be dismissed and for such other and further relief as may be proper.

GARY K. NELSON
The Attorney General

/s/ Michael S. Flam
Michael S. Flam, Special
Assistant Attorney General

/s/ Andrew W. Bettwy
Andrew W. Bettwy
Assistant Attorney General
Attorneys for Defendant

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

JOHN O. GRAHAM, being first duly sworn, upon oath, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing Answer to First Amended Complaint and knows the contents thereof, and that the matters and things therein alleged are true except those matters alleged upon information and belief, and as to those matters, he believes them to be true.

/s/ John O. Graham
JOHN O. GRAHAM

Subscribed and sworn to before me this 17th day of March, 1970.

/s/ Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972

Copy mailed this 17th
day of March, 1970 to:

Anthony B. Ching
Chief Trial Counsel
Legal Aid Society
112 West Pennington Street
Tucson, Arizona 85701
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — MOTION FOR SUMMARY JUDGMENT

COME NOW plaintiffs and pursuant to Rule 56 of the Federal Rules of Civil Procedure move this Court for summary judgment against the defendant for the reason that there is no controversy as to any material fact at issue, and that as a matter of law plaintiffs are entitled to relief.

The within memorandum of points and authorities, more fully stating the legal points relied upon by plaintiffs, is incorporated herein by reference as part of this motion.

DATED this 23rd day of September, 1969.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: /s/
Anthony B. Ching
Chief Trial Counsel
112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing mailed this
23rd day of September, 1969, to:

Sandra D. O'Connor
Assistant Attorney General
State of Arizona
State Capitol Building
Phoenix, Arizona 85007
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

FACTS

Examination of the pleadings filed herein shows that all the material facts alleged in the Complaint are admitted by the defendant. Thus, there remains but the determination by this Court, after the convention of a three-judge court under 28 U.S.C. 2281 and 2284, whether, as a matter of law, the plaintiffs are entitled to the relief prayed for in their Complaint.

Briefly, the undisputed facts are as follows:

The named plaintiff, CARMEN RICHARDSON, is an alien lawfully admitted to the United States under the laws of the United States. She has been continuously a resident of the State of Arizona for 13 years. Mrs. Richardson is 64 years and 9 months of age at the time of the filing of the Complaint. She will have fulfilled the age requirement for Old Age Assistance (OAA) in October of 1969. Presently she is permanently and totally disabled and would be eligible for assistance under the Aid to the Permanently and Totally Disabled (APTD) program but for the lack of fifteen year residency required under Arizona law. She is suffering irreparable injury as a result of her ineligibility to receive APTD assistance as presently she has no income whatsoever and exists on charity on the part of neighbors and friends.

ARGUMENT

I

ARIZONA'S STATUTE REQUIRING FIFTEEN YEARS DURATIONAL RESIDENCY IN THE UNITED STATES VIOLATES EQUAL PROTECTION OF LAWS AS TO INDIGENT RESIDENT ALIENS.

Arizona requires United States citizenship, or alternatively 15 years residence in the United States to qualify for OAA, AB, APTD, MAA and General Assistance.

A.R.S. § 46-233 A 1.

> "A. No person shall be entitled to general assistance (which includes APTD) who does not meet and maintain the following requirement:
>
> 1. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

The cites for the other programs are: for MAA, § 46-262.02 (2); for AB, § 46-272(4); and for OAA, § 46-252.

The Equal Protection Clause of the Fourteenth Amendment protects aliens as well as citizen. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). The scope of equal protection extends to a guarantee that the state will not legislate across-the-board inequalities in economic opportunity and private employment. In *Truax v. Raich,* 239 U.S. 33 (1915), the Court struck down an Arizona law attaching criminal penalties to the employment of more than a fixed percentage of non-citizens in a business, arguing that this denied equal protection of the right to work.

In *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948), the United States Supreme Court struck down a 1943 California law denying fishing licenses to aliens ineligible for American citizenship (the law first read "alien Japanese"—the effect was the same), quoting extensively from *Truax v Raich.* The Court recognized the right of states to exclude aliens from certain occupations and acitivities (sic) where a "special public

interest" was involved, but invalidated the law before it on a combination of grounds including equal protection. Whether the purpose of the statute was fish conservation or to discriminate against the Japanese, the Court held that there was no reasonable basis for the classification. The Court said (at pp. 418-19):

> "It does not follow . . . that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."

California also claimed that it was protecting its fish, of which the citizens of the state were collectively the owners.

> "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." (At p. 421)

Another very helpful case has just come out of the California Supreme Court. In *Purdy & Fitzpatrick v. California,* 38 U.S.L.W. 2073 (Calif. Sup. Ct. 7/1/69), 455 P.2d 645, a state statute barring employment of aliens on non-emergency public works projects was held invalid. The Court relied on equal protection and federal preemption grounds; rejected state arguments based on protecting citizens from economic competition, use of public funds, and proprietary power in employment; and found no relationship between the classification and the area of public works employment.

On the other hand, the use and allocation of public wealth and resources is an area in which discrimination against aliens has been sustained on the basis of reasonable classification. The line of cases begins with early holdings that the states may restrict the enjoyment of their natural resources to their own citizens. *McCreedy v. Virginia,* 94 U.S. 391 (1876) (only Virginia citi-

zens could plant oysters in a Virginia tidewater river by state law); *Patsone v. Pennsylvania,* 232 U.S. 138 (1914) (a state could bar aliens from hunting game to conserve game for citizens). These precedents have been weakened considerably. See *Takahashi, supra.*

Another group of cases involves state laws restricting the right of aliens to own land. The power of states to control the devolution and ownership of real property even to the extent of barring certain aliens has been upheld. *Terrace v. Thompson,* 263 U.S. 197 (1923). The power has, however, since been weakened, *Oyama v. California,* 332 U.S. 633 (1948), and is questioned in *Takahashi* at 422. These cases are in any event based on "reasons peculiar to real property." *Takahashi* at 422.

One argument which may be raised as a possible reason for discrimination against aliens is that they have not made as great a contribution to the state as have the citizens.

The answer to this argument is in large measure provided in *Shapiro v. Thompson,* 394 U.S. 618 (1969), invalidating state residency requirements for welfare recipients. The Court pointed out that long-term residents are not making a greater present contribution to the state economy than short-term residents who are equally in need of public assistance, and that even if it could be factually shown that long-term residents had made a greater past contribution to the state economy, such considerations are equally invalid as a basis for welfare eligibility as for receiving public services such as education, parks, and fire and police protection. While this case deals with discrimination among state citizens, the same considerations apply to aliens who are equally entitled to public services and are protected under the Equal Protection Clause. *Thompson* also disposed of the argument that the states may erect residence requirements in order to discourage immigration to the state for the purposes of receiving higher welfare benefits; the Court argued that the statutes before it were not sufficiently tailored to that objective, which of itself is probably unconstitutional. In the case of aliens, it may be argued that the

federal government, in its control of immigration, provides the appropriate safeguards against an influx of immigration for the purposes of collecting public assistance, and that the states are therefore not justified in creating what amounts to a nonrebuttable presumption that any resident alien, or one who has been in the United States for less than fifteen years, has entered solely for this purpose.

It is important to note in this regard that the public funds used to pay for public assistance are not necessarily received only from citizens. In Arizona, state taxes earmarked for welfare assistance are payable by aliens as well as citizens. Moreover, aliens pay taxes to the federal government, which pays a very substantial percentage of the cost of public assistance. The dubious rationale of conserving the state's resources to state citizens certainly should not extend to empowering the states to deny to some residents the benefit of federal resources.

In *Purdy & Fitzpatrick, supra,* the California Supreme Court explains:

> "May the state simply favor its own citizens in the disbursement of public funds? First, since aliens support the State of California with their tax dollars, any preference in the disbursement of public funds which excludes aliens appears manifestly unfair. Second, Section 1850 prevents aliens from receiving the federal funds which largely support the construction of our highways and other projects; the state can urge no claim to a "proprietary interest" in such federal funds. Finally, any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis. The citizen may be a newcomer to the state who has little "stake" in the community; the alien may be resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state."

The Court reversed a prior decision, which upheld Section 1850 —partially on the basis of *Crane v. New York,* 239 U.S. 195 (1915):

". . . for two reasons: first, the case of *Takahashi v. Fish and Game Comm.* . . . has cast doubt upon the vitality remaining in these earlier decisions; and second, developments in the law of equal protection requires us to reexamine the bases underlying the holdings of those cases."

The right to travel freely within the United States without restriction or limitation is a fundamental right of U. S. citizens. *Passenger Cases,* 7 How. 243 (1849); *U. S. v. Guest,* 383 U.S. 745 (1966). Legislation designed to chill this right is unconstitutional. *U. S. v. Jackson,* 390 U.S. 570 (1968). Along with equal protection, the right to travel plays an important role in *Shapiro v. Thompson, supra,* which, along with *Edwards v. California,* 314 U.S. 160 (1941), holds that a state may not seek to discourage the in-migration of indigent persons simply because they are indigent. This is the effect of the residence requirements struck down in *Shapiro v. Thompson.*

The same principle may be applied to aliens. So far as special residence requirements for aliens are concerned, it may be argued that such requirements not only deny equal protection as between citizens and aliens, but also constitute a residence (as opposed to citizenship) requirement which exceeds the maximum permissible under the Social Security Act prior to *Shapiro v. Thompson.* More generally (and exclusively where an absolute citizenship requirement is imposed), the argument goes like this: the federal government has broad and exclusive power to regulate immigration and the conditions under which aliens may reside within the United States; the states may neither add to nor alter the regulations of the federal government in this area; and any state which enacts a provision making it especially difficult (or impossible) for indigent aliens to receive public assistance is restricting their freedom to move to that state in contravention of the right, conferred by the federal government in admitting resident aliens, to travel and live in any state in the Union.

II

THE FIELD OF REGULATING ALIENS IS PRE-EMPTED BY THE FEDERAL GOVERNMENT.

Takahashi at 415-16 says of *Truax v. Raich*:

> "This Court . . . declared that Raich, having been lawfully admitted into the country under federal law, had a federal privilege to enter and abide in 'any State of the Union' and thereafter under the Fourteenth Amendment to enjoy equal protection of the laws of the state in which he abided."

This included the right to work.

> " 'The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.' " *Truax v. Raich* at 42.

The Court, in *Takahashi,* continued (at 419):

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, ... 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. . . ."

Federal immigration law provides 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. Provision is also made for deporta-

tion where a person was admitted although actually excludable; among the classes of excludable aliens are those "likely at any time to become public charges." 8 U.S.C. §§ 1182, 1251. These provisions provide the basis for numerous arguments: (1) Any state legislation is superfluous, if not an invasion of a federally pre-empted area; (2) any state requirement above five years is a clear invasion of an area of federal legislation and an interference with it; (3) with respect to aliens who become public charges due to reasons arising after their immigration, any residence requirement would be in conflict with the design of the federal immigration laws; (4) States may not be heard to argue that citizenship requirements are designed to discourage immigration for the purpose of collecting welfare benefits, since admission as resident aliens implies a federal determination that immigrants are not likely to become public charges; and (5) the federal provision may be a basis for setting five years as a "reasonable" residence requirement for aliens.

III

ARIZONA'S FIFTEEN YEAR DURATIONAL RESIDENCY REQUIREMENT FOR ALIENS VIOLATES THE SOCIAL SECURITY ACT.

The purpose of APTD is to "furnish financial assistance . . . to needy individuals . . . who are permanently and totally disabled etc." 42 U.S.C. § 1351.

On its face, this purpose is not served by excluding from the benefits of APTD needy individuals solely because they are not citizens of the United States (and have not resided in the United States for fifteen years). Rather, this purpose is defeated with respect to needy individuals who fall within the disfavored classification.

42 U.S.C. § 1352(b) prohibits (1) any state residency requirement of more than five years during the immediate nine preceding years, and (2) any citizenship requirement.

The prohibition as to the citizenship requirement apparently was intended to eliminate distinctions between native-born and naturalized citizens and therefore is irrelevant for the discussion here. Whether or not the reference to the five-year residency requirement was indirectly answered by *Shapiro v. Thompson, supra,* (in discussing a similar provision — AFDC),

> "On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education and Welfare not to disapprove plans submitted by the States because they include such a requirement.... But even if we were to assume, *arguendo,* that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself Sec. 402(b) has no absolutely restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question. Finally, even if it could be argued that the constitutionality of Sec. 402(b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson,* 394 U.S. at ....., 89 S.Ct. 1334, 1335.

Assuming, in arguendo, that a durational residency requirement is not repugnant to the Equal Protection Clause, it is plain that Congress, under the Social Security Act, does not permit the fifteen years in the United States requirement that is imposed by Arizona. The State statute being in conflict with the federal law, it must fail and is null and void. *King v. Smith,* 392 U.S. 309 (1968).

DATED this 23rd day of September, 1969.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: /s/ .....
Anthony B. Ching
Chief Trial Counsel
112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing mailed this
23rd day of September, 1969, to:

Sandra D. O'Connor
Assistant Attorney General
State of Arizona
Capitol Building
Phoenix, Arizona 85007
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, Plaintiff, vs. JOHN O. GRAHAM, Defendant.	NO. CIV-69-158-TUC. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Defendant moves this Court to deny the Plaintiff's Motion for Summary Judgment herein and moves this Court for summary judgment against the Plaintiff for the reason that there is no controversy as to any material fact at issue, and that as a matter of law Defendant is entitled to relief.

The Defendant's Memorandum of Points and Authorities is attached hereto and incorporated herein in support of Defendant's counter Motion for Summary Judgment and as and for his Response to Plaintiff's Motion for Summary Judgment.

DATED this 3rd day of October, 1969.

GARY K. NELSON
The Attorney General

/s/ SANDRA D. O'CONNOR
Assistant Attorney General
Attorneys for Defendant

COPY of the foregoing mailed this
3rd day of October, 1969, to:

Mr. Anthony B. Ching
Chief Trial Counsel
Legal Aid Society of the
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Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FACTS

Defendant does not dispute the Plaintiff's statement of facts as set forth in her Memorandum, except that Defendant denies that Plaintiff is suffering irreparable injury as a result of her ineligibility to receive APTD assistance.

ARIZONA'S STATUTORY DURATIONAL RESIDENCE REQUIREMENTS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE AS TO INDIGENT RESIDENT ALIENS

Most of Arizona's categorical welfare assistance statutes extend eligibility for welfare assistance only to citizens of the United States to persons who have resided in the United States a total of fifteen years. A.R.S. § 46-252(a), old age assistance; A.R.S. § 46-272(4), aid to blind; A.R.S. § 46-233(A)(1), aid to permanently and totally disabled; A.R.S. § 46-261.02(2), medical assistance to the aged.

The United States Supreme Court declared unconstitutional durational residence requirements for certain classes of welfare assistance recipients in *Shapiro v. Thompson,* 394 U.S. 618 (1969). (This Court, based on the *Shapiro* decision, held unconstitutional A.R.S. §§ 46-233(A)(2), 46-252(3). *Porter v. Graham,* No. Civ-2348 Tucson). However, the Supreme Court rested its decision on the fundamental right of interstate movement. The Court stated, at pp. 629, 633:

> "The court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all *citizens* be free to travel throughout the length and breadth of our land. . . .
>
> "We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance,

public education or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its *citizens.*" (Emphasis added.)

Thus, the language of the *Shapiro* majority opinion is to the effect that it rested on the fundamental right of *citizens* to travel.

As pointed out in Plaintiff's Memorandum of Points and Authorities, the Supreme Court has held that a state may restrict the distribution of the public domain and the public resources to the citizens of the state, even though it cannot prohibit or restrict the economic right of aliens to earn a living. *Truax v. Raich,* 239 U.S. 33, at pp. 39, 40 (1915).

See also *McCready v. Virginia,* 94 U.S. 391 (1876), upholding state law restricting right to plant oysters in state waters to state citizens; *Patsone v. Pennsylvania,* 232 U.S. 138 (1914), upholding state law barring aliens from hunting game; *Terrace v. Thompson,* 263 U.S. 197 (1923), upholding state limitations on rights of aliens to inherit real property.

Even though the equal protection clause of the Fourteenth Amendment extends to all persons, including aliens, the cases cited above and the case of *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952), demonstrate that some areas of disparity remain. Aliens are not treated as citizens in certain areas and respects. Thus, as stated in the *Harisiades* opinion at pp. 586, 587,

"Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . .

"Footnote 9. This Court has held that the Constitution assures him a large measure of equal economic opportunity, *Yick Wo v. Hopkins,* 118 U.S. 356; *Truax v. Raich,* 239 U.S. 33; he may invoke the writ of habeas corpus to protect his personal liberty, *Nishimura Ekiu v. United States,* 142 U.S. 651, 660; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, *Wong Wing v. United States,* 163 U.S. 228; and, unless he is an enemy alien, his property cannot be taken without just compensation *Russian Volunteer Fleet v. United States,* 282 U.S. 481.

"Footnote 10. He cannot stand for election to many public offices. For instance, Art. I, § 2, cl. 2, § 3, cl. 3, of the Constitution respectively require that candidates for election to the House of Representatives and Senate be citizens. See Borchard, Diplomatic Protection of Citizens Abroad, 63. The states, to whom is entrusted the authority to set qualifications of voters, for most purposes require citizenship as a condition precedent to the voting franchise. The alien's right to travel temporarily outside the United States is subject to restrictions not applicable to citizens. 43 Stat. 158, as amended, 8 U.S.C. § 210. If he is arrested on a charge of entering the country illegally, the burden is his to prove 'his right to enter or remain'— no presumptions accrue in his favor by his presence here. 39 Stat. 889, as amended, 8 U.S.C. § 155(a)."

As stated in 69 Yale L. J. 262, 281, "The implicit assumption underlying the entire *{Harisiades}* opinion was finally stated explicitly: constitutionally, permanent residence short of naturalization is merely temporary residence." If this be true, neither *Shapiro v. Thompson* nor *Porter v. Graham* can be interpreted as requiring the state to extend welfare benefits to temporary residents of the state.

THE FEDERAL GOVERNMENT HAS NOT PREEMPTED THE FIELD

Despite the suggestion in *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948), that the federal government has the sole and exclusive power over aliens, the Social Security Act appears to give congressional consent to the states to adopt restrictive welfare eligibility statutes as to aliens. Thus, the various provisions of the Social Security Act, setting forth the requirements of state plans for categorical assistance programs, provide that the Secretary of Health, Education and Welfare shall not approve any state plan which imposes as a condition of eligibility "any citizenship requirement which excludes any *citizen* of the United States." (Emphasis added). 42 U.S.C. §§ 302, 602, 1202, 1353, 1382.

This case appears to be one of first impression. To hold that Arizona cannot impose its statutory durational residency requirement as to aliens will only serve to further dilute the already limited amount of funds available for welfare benefits. The older cases dealing with rights of aliens have indicated that states have certain powers to exclude aliens from sharing in the public resources belonging to the citizens of the state. Although some more recent decisions have weakened the earlier cases, they have not been overruled. Plaintiff's Motion for Summary Judgment should be denied and judgment entered for the Defendant.

Dated this 3rd day of October, 1969.

Respectfully submitted,

GARY K. NELSON
The Attorney General

/s/ SANDRA D. O'CONNOR
SANDRA D. O'CONNOR
Assistant Attorney General
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant respectfully submits the following Memorandum of Points and Authorities as a supplement to the Memorandum previously attached to and incorporated in Defendant's Motion for Summary Judgment in the above captioned matter:

Alien affairs is an area over which Congress has exclusive and complete power:

". . . Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government . . ." *Galvan v. Press,* 347 U.S. 522 (1954).

42 U.S.C. § 1352 provides in part as follows:

". . . (The Secretary) shall not approve any plan for which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan . . .

"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). How-

ever, there is no citizenship provision for Aid to Families with Dependent Children set forth in the Social Security Act. Accordingly, there is no citizenship provision under state law.

In that same chapter of the United States Code, the following section appears:

> ". . . (T)he Secretary of Health, Education and Welfare . . . shall make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which . . . (he) . . . is charged under this chapter." § 1302, U.S.C.

Pursuant to its duties under § 1302, *supra,* the Secretary of Health, Education and Welfare has published § 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)

The Handbook of Public Assistance Administration is published by a division of the Department of Health, Education and Welfare. The Handbook states that it is "the official medium for issuance of interpretations and instructions concerning requirements of the public assistance titles of the Social Security Act and recommendations for the administration of State public assistance programs;" and the United States Supreme Court has indicated that the state plans of public assistance "must conform with the several requirements of the Social Security Act and with the rules and regulations promulgated by HEW." *King v. Smith,* 88 S.Ct. at 2133.

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 an 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)

As evidenced by the policies outlined in the above-quoted statutes and regulations, Congress BY ITSELF AND THROUGH THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (the government agency designated to administer the provisions of the Social Security Act) has authorized the states to require citizenship as a basis for eligibility for welfare benefits.

Plaintiff has cited to this Court numerous decisions in which state eligibility requirements on the basis of citizenship have been declared violative of the United States Constitution, particularly the Equal Protection Clause of the 14th Amendment; it should be noted in those cases, however, that no congressional authorization for the particular state legislation was present as in the case now before this Court.

In addition to the specific congressional authorization for a citizenship eligibility requirement, the United States Supreme Court has long recognized the power and duty of the states to regulate the distribution of the public wealth. *Truax v. Raich,* 239 U.S. 33; *Shapiro v. Thompson,* 89 S.Ct. 1322 (1969).

> ". . . The discrimination defined by the act 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, supra.*

The need to preserve fiscal integrity in public assistance programs in the case of noncitizens, an area exclusively within congressional control, involves serious questions of national security.

Respectfully submitted this 24th day of February, 1970.

GARY K. NELSON
The Attorney General

/s/ Michael S. Flam
Michael S. Flam, Special
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Copy mailed Air Mail
Special Delivery this
24th day of February,
1970 to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW

Research into the legislative history of 42 U.S.C. § 1352 (b)(2), by counsels for both sides, indicated that there was no reference as to the Congressional intent concerning this paragraph during the adoption of the APTD program in 1950. The language of this paragraph is similar to a comparable paragraph found in 42 U.S.C. § 302(b)(3), as passed by Congress in 1935 when the Social Security Act was first adopted. House Report No. 615, concerning the Social Security Act in its relevant portion, indicates that the intent was that states may choose whether or not they wish to assist aliens (see attached Exhibit 1).

It is important to note that the same House Report permits states to impose moral character as a factor in determining eligibility. This, we know, was found to be no longer the Congressional intent when one examines the historical development of our welfare program since 1935, *King v. Smith,* 392 U.S. 309 (1967). The same is true here, since the disappearance of the notion of "worthy poor" as outlined in *King v. Smith* applies with equal force to all the federally assisted categorical assistance programs under the Social Security Act.

The above argument is strengthened by the fact that the case of *Takahashi v. Fish and Game Commission,* 334 U.S. 410, was decided in 1948, some 13 years after the original enactment of

the Social Security Act. As we learn in reading *Takahashi,* the Supreme Court held in that case that a state may not discriminate against a resident alien in the sharing of its wealth under the equal protection clause. A fortiorari, it can be concluded that had Congress known in 1935 that the equal protection clause applies to the question of wealth, it would not have permitted the discrimination against resident aliens.

Therefore, the reliance by defendant on the Social Security Act is unfounded. As Mr. Justice Brennan said in *Shapiro v. Thompson*:

> "Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. *Katzenbach v. Morgan,* 384 U.S. 641, 651, n. 10 (1966)."

DATED this 12th day of March, 1970.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: ANTHONY B. CHING
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Copy of the foregoing mailed this
12th day of March, 1970, to:

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Attorneys for Defendant

EXHIBIT 1

74th Congress *1st Session*

HOUSE OF REPRESENTATIVES

Report No. 615

THE SOCIAL SECURITY BILL

April 5, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. Doughton, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H. R. 7260]

The Committee on Ways and Means, to whom was referred the bill (H. R. 7260) to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws, to establish a Social Security Board, to raise revenue, and for other purposes, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

PART I. GENERAL STATEMENT

CONTENTS OF BILL

This bill provides for various grants-in-aid to the States; establishes a Federal old-age benefit system and a Social Security Board; and imposes certain taxes, hereinafter described.

Title I: Grants-in-aid are to be made to the States for old-age pensions to persons who have reached the age of 65. In making these grants the Federal Government will match what the States put up, within certain limits.

Title II: A system of Federal old-age benefits, payable to people who have reached the age of 65, will begin in 1942. These benefits are to be measured by wages, and are payable wholly regardless of the need of the recipient.

Title III: Grants-in-aid are made to the States, to pay the administrative costs of State unemployment compensation systems. The . . . .

18 THE SOCIAL SECURITY BILL

(b): Liberality of certain eligibility requirements:

(1): A person shall not be denied assistance on the ground that he is not old enough to be eligible for it, if in fact he has reached the age of 65 years. Until 1940, however, a State may set the age limit as high as 70 years.

(2): A person shall not be denied assistance on the ground that he has not been a resident long enough, if in fact he has lived in the State for 1 year immediately preceding his application, and for any 5 years out of the 9 years immediately preceding his application. Thus, if the plan is administered by counties, it may impose requirements as to county residence; but no county residence requirement may result in denying assistance to an otherwise qualified person who has resided in the State for the period just mentioned. Even if the county residence requirements are stricter than those allowed under this section, such a person must be entitled to assistance under the plan, presumably directly from the State. (No State is required to give assistance to nonresidents of the State.)

(3): A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen. This means that a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens or on their having been naturalized citizens for a specified period of time.

The limitations of subsection (b) do not prevent the State from imposing other eligibility requirements (as to means, moral character, etc.) if they wish to do so. Nor do the limitations of sub-

section (b) mean that the States must adopt eligibility requirements just as strict as those enumerated. The States can be more lenient on all these points, if they wish to be so.

PAYMENT TO STATES

Section 3: The Federal Government will match what the States put up for old-age assistance, by paying quarterly to each State one-half of the total amount paid as assistance to people in the State who are at least 65 years old and who are not inmates of public institutions. (If the State wishes to pay pensions with respect to aged people over 65 in private institutions, the Federal Government will match those payments; but it will not match payments to persons less than 65, or to persons in public institutions.) Federal payments with respect to any person, however, will not be more than $15 per month. If the State gives a pension of $20 the Federal Government will pay half of it; of $30, the Federal Government will pay half of it; of $40, the Federal Government will match only the first $15 put up by the State, so that the Federal share will be $15 and the State will put up the other $25. Federal payments shall be made on a prepayment basis, on the strength of estimates by the State and the Board, with later adjustments if the actual expenditures differ from the estimates. The Federal Government will also help the States to meet administrative costs, paying therefor an additional amount equal to 5 percent of the regular quarterly payment to the State. All these payments, and all other payments under this bill, are to be made without a prior audit by the General Accounting Office; but there will be a postaudit. It is understood by the committee that, in the case of grants to States, the General Accounting Office, in making . . . .

Additional case cited in open court at hearing on February 27, 1970.

[¶ 9385] Paul Guzman, Plaintiff v. Polich and Benedict Construction Company, Inc., Defendant.

United States District Court, Central District California. No. 69-1802-F. January 12, 1970.

Title VII — Civil Rights Act of 1964

Discrimination on Basis of National Origin — Public Works — State Law Barring Hiring of Aliens.— Provisions of the California Labor Code that make it unlawful for contractors and subcontractors to knowingly hire any alien to work on any public works projects deprive resident aliens of liberty and property without due process of law in violation of the Fourteenth Amendment to the federal Constitution and the California Constitution, and are superseded by Title VII of the 1964 Civil Rights Act which bars job bias on the basis of national origin. Accordingly, an employer's action in refusing to hire aliens because of the requirements of the state law constituted discrimination against aliens based on place of national origin and was an unlawful employment practice within the meaning of Title VII of the 1964 Civil Rights Act.

Back reference. — ¶ 1220.

Anthony Michael Glassman, Miller, Glassman & Browning, for Plaintiff.

Theodore P. Polich, Jr., Morris & Polich, for Defendant.

[*Nature of Case*]

FERGUSON, D. J.: The instant proceeding involves a civil action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5.

I. Plaintiff, the assistant representative of Laborer's International Union of North America, Local Union No. 652, filed this action on his own behalf and on behalf of all other persons whom he represents and who are similarly situated pursuant to Rule 23, Federal Rules of Civil Procedure. Plaintiff alleged that acting in the above mentioned capacity he referred four alien members of his Local No. 652 to Defendant company for employment. Plaintiff also alleges that all four members of said local were refused employment by Defendant company because they were not citizens of the United States and that if Defendant company were to hire said aliens they would be in violation of Section 1850 of the Cali-

fornia Labor Code which provides that contractors and sub-contractors shall not knowingly employ or cause to be employed any alien on any public works project.

Employment Practices Cases

Guzman v. Polich & Benedict Construction Co., Inc.

[*Conclusions of Law*]

The Defendant, having admitted by stipulation to the truth of the factual allegations contained in the Complaint on file herein, the Court makes the following conclusions of law:

1. The Court has jurisdiction of this action pursuant to the provisions of Section 706(f) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-5(f).

2. Defendant company is an employer within the meaning of Sections 701(b) and 703(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000e and 2000e-2).

3. Plaintiff has complied with all procedural requirements under the Civil Rights Act of 1964 necessary for the commencement and maintenance of this action.

4. This action presents an actual controversy between the parties hereto as contemplated by 28 U.S.C. Section 2201.

5. Defendant company, in refusing to hire said aliens because of the requirements of Sections 1850-1854 of the California Labor Code, discriminated against said aliens and deprived them of an equal employment opportunity.

6. The California Labor Code Sections 1850-1854 which dictated Defendant's course of action deprive Plaintiff and all others similarly situated of liberty and property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and the California Constitution.

7. Said statutory provisions are declared to be unconstitutional under the authority of *Purdy & Fitzpatrick v. State of California,* 71 A.C. 587 (1969).

8. California Labor Code Sections 1850-1854 are declared to be superseded by the later enactment by the United States Congress of the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e. Title VII supersedes all inconsistent State laws. *Rosenfeld v. Southern Pacific Company,* 293 F. Supp. 1219 (C.D. Cal. 1968); *Richard v. Griffith Rubber Mills,* [60 LC ¶ 9243] 300 F. Supp. 338 (D. Ore. 1969).

9. All aliens residing within the United States are declared to be within the protection of the national origins provisions of Title VII.

10. Defendant company shall not be barred by the doctrine of res judicata or collateral estoppel, or otherwise, from defending against any legal action by Plaintiff or the class represented in this action by reason of these conclusions of law or by the following judgment.

[*Judgment*]

Wherefore, Plaintiff is entitled to judgment against Defendant company as follows:

(a) Declaring that Sections 1850-1854 of the California Labor Code are unconstitutional and are contrary to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e);

(b) Declaring that California Labor Code Sections 1850-1854 are superseded by Title VII of the Civil Rights Act of 1964;

(c) Declaring that Defendant company's action in refusing to hire said aliens because of the requirements of Sections 1850-1854 of the California Labor Code constituted discrimination against said aliens based on place of national origin and is an unlawful employment practice within the meaning of Title VII of the Civil Rights Act of 1964;

(d) That Plaintiff and all other persons similarly situated shall be considered for any position sought by them without regard to place of national origin or any limitations imposed by employers under or pursuant to Sections 1850-1854 of the California Labor Code or any administrative regulations issued pursuant thereto;

(e) That Defendant company, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, be forever restrained and enjoined in the conduct of its employment practices with respect to Plaintiff, and all others similarly situated from relying upon, or acting under, the provisions of California Labor Code Sections 1850-1854 or any administrative regulations issued under or pursuant thereto;

(f) Declaring that all aliens residing within the United States of America are declared to be within the protection of the national origins provisions of Title VII; and

(g) Declaring that Defendant company shall not be barred by the doctrine of res judicata or collateral estoppel, or otherwise, from defending against any legal action by Plaintiff or the class represented in this action by reason of these conclusions of law or by the following judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiff, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — OPINION AND ORDER

MUECKE, D. J.

The undisputed facts are:

The named plaintiff, Carmen Richardson, is an alien lawfully admitted to the United States under the laws of this country. She has been continuously a 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. She fulfilled the age requirement for Old Age Assistance (OAA) in October of 1969. Presently, she is permanently and totally disabled and would be eligible for assistance under the Aid to the Permanently and Totally Disabled (APTD) program but for the fifteen-year residency requirement of Arizona law. By reason of this law, she is ineligible to receive APTD assistance and suffers irreparable injury, as presently she has no income whatsoever and exists on charity on the part of neighbors and friends.

Plaintiff, in this class action, attacks the constitutionality of three provisions of Arizona welfare law: (1) General assistance;[1] (2) Assistance for the blind;[2] and (3) Old age assistance.[3]

[1]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 requirement:

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

(Continued on Page 45)

The Court has jurisdiction of this action by virtue of 42 U.S.C. § 1983 (Civil Rights Act of 1871), 28 U.S.C. § 1343 (Civil Rights), 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgments Act), and 28 U.S.C. §§ 2281 and 2284 (Three Judge Courts).

The claimed infirmity in all the Arizona statutes is that a fifteen-year residency requirement for resident aliens violates the constitutional right to travel, *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); the Social Security Act; and, even though Congress may have empowered the states to act in this area, the equal protection clause of the Fourteenth Amendment. It is also argued that the field of regulating aliens has been preempted by the federal government.

42 U.S.C. § 1352(b)(2) provides that "[t]he Secretary [of Health, Education and Welfare] shall approve any welfare plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to the permanently and totally disabled under the plan . . . [a]ny 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).

In the same title of the United States Code, § 1302, Congress authorized the Secretary of Health, Education and Welfare to make such rules as may be necessary to the administration of the Welfare Act. Pursuant to this authority, the Secretary has pub-

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[2]A.R.S. § 46-272. *Eligibility for blind assistance*
Assistance shall be granted to any person who meets and maintains the following requirement:
4. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

[3]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 requirement:
2. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

lished a Handbook of Public Assistance Administration.[4] Sections 3720 and 3730, Part IV of this 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."
>
> "Where there is an eligibility requirement applicable to noncitizens, State laws may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specified number of years."

Relying on the statutes and the regulations cited, the State herein argues that Congress by itself and through the Department of Health, Education and Welfare has authorized the States to require citizenship as a basis for eligibility for welfare benefits. In other words, the State takes the position that either no welfare benefits need be given resident aliens or else a residency requirement may be imposed as is the case here.

Buttressing this view, according to the State, is the United States Supreme Court decision in *Traux v. Raich,* 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed 131 (1915), wherein it is stated:

> ". . . The discrimination defined by the act 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 citizens of other states. . . . *"Traux v. Raich,* 239 U.S. at 39, 36 S.Ct. at 10, 60 L.Ed at ."

Responding to such argument by the State, we hold that nothing in the explicit language of 42 U.S.C. § 1352(b)(2) and the related statutes authorizes any residency requirement such as is at issue here to be imposed by the states upon aliens. Insofar as the language of 42 U.S.C. § 1352(b)(2), 42 U.S.C. § 302(b)(3), 42 U.S.C. § 1202(b)(2), and 42 U.S.C. § 1382(b)(2) is

[4]See § 201.3(d), Title 45, Code of Federal Regulations.

construed to mean that the State is empowered to impose a fifteen-year residency requirement before an alien lawfully resident in the United States can receive aid, we further hold that such a construction is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The quoted paragraph from *Traux v. Raich, supra,* is dicta not necessary to the decision in that case, and the language is too general to serve as authority to support the residency restriction here imposed. In any event, later decisions of the United States Supreme Court make clear the course to be followed in this case.

In *Shapiro v. Thompson, supra,* the Supreme Court discussed the equivalent provisions for Aid to Families with Dependent Children [§ 402(b)] which dealt with a one-year residency requirement.

> On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement . . .
>
> But even if we were to assume, *arguendo,* that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402(b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.
>
> Finally, even if it could be argued that the constitutionality of § 402(b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. *Shapiro v. Thompson, supra,* 394 U.S. at 639, 89 S.Ct. at 1334, 22 L.Ed.2d at . (emphasis in original).

No compelling state interest is argued which would mitigate in favor of a different result. Petitioner pays taxes into the coffers of the State. The "privilege" v. "right" argument does not answer the constitutional challenge. *Thompson, supra,* n.6, 394 U.S. at 627, 89 S.Ct. at 1327, 22 L.Ed.2d at . The "purpose of inhibit-

ing migration by needy persons into the State is constitutionally impermissible." *Thompson, supra,* 394 U.S. at 629, 89 S.Ct. at 1329, 22 L.Ed.2d at . Although the "State has a valid interest in preserving the fiscal integrity of its programs . . . it may not accomplish such a purpose by invidious distinctions . . ." *Thompson, supra,* 394 U.S. at 633, 89 S.Ct. at 1330, 22 L.Ed.2d at . *See also Dandridge v. Williams,* U.S. , 90 S.Ct. , L.Ed.2d , slip opinion at 13 (No. 131, April 6, 1970).

In light of *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) and *Shapiro v. Thompson, supra,* it necessarily follows that the Arizona statutes previously cited[5], imposing a fifteen-year residency requirement, are violative of the equal protection clause of the Fourteenth Amendment.

Accordingly, plaintiff's motion for summary judgment praying for a preliminary injunction and declaratory relief is granted.

DATED this 27 day of May, 1970.

GILBERT H. JERTBERG
Gilbert H. Jertberg, Circuit Judge

JAMES A. WALSH
James A. Walsh, District Judge

C. A. MUECKE
C. A. Muecke, District Judge

---

[5]A.R.S. 46-233, 46-272, and 46-252.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiff, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — AMENDED JUDGMENT

This action came on for hearing on plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment before the Court, Honorable Gilbert H. Jertberg, Circuit Judge; Honorable C. A. Muecke, District Judge; and Honorable James A. Walsh, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered on May 27, 1970,

IT IS ORDERED AND ADJUDGED as follows:

(1) That pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the action is to be maintained as a class action, all in accordance with Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

(2) That the class of plaintiffs is described as follows:

Those persons residing in the State of Arizona, who are not United States citizens, but who are lawfully admitted to the United States as permanent residents by the Federal government, who are otherwise eligible for old age assistance, general assistance, blind assistance and aid to the permanently and totally disabled public welfare programs under the laws of Arizona, but are precluded from obtaining these benefits solely because of

their being non-citizens and the lack of a total of fifteen years residency in the United States.

(3) That judgment be rendered in favor of the plaintiffs and against the defendant.

(4) That as to the plaintiffs, the United States citizenship requirement, as well as the fifteen-year durational residency requirement in the United States, as provided for in Arizona Revised Statutes §§ 46-233(A)(1), 46-252(2) and 46-272(4), as amended, are declared unconstitutional as violative of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(5) That defendant and his successors, agents and employees are hereby permanently enjoined from enforcing the United States citizenship requirement, as well as the fifteen-year durational residency requirement, as to the plaintiffs.

DATED this 26th day of June, 1970.

GILBERT H. JERTBERG
Gilbert H. Jertberg, Circuit Judge

JAMES A. WALSH
James A. Walsh, District Judge

C. A. MUECKE
C. A. Muecke, District Judge

APPROVED AS TO FORM:

GARY K. NELSON
The Attorney General

By: MICHAEL S. FLAM, 6/16/70
Michael S. Flam
Special Assistant Attorney General
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — MOTION TO STAY ENFORCEMENT AND EXECUTION OF JUDGMENT

Now comes the Defendant, by and through his attorneys, and moves this Court for an Order Staying the Enforcement and Execution of the Amended Judgment entered herein on the 26th day of June, 1970 pending appeal; or alternatively for an Order Staying the Enforcement and Execution of the Judgment as to the class pending appeal.

RESPECTFULLY submitted this 3rd day of July, 1970.

GARY K. NELSON
The Attorney General

MICHAEL S. FLAM
/s/ Michael S. Flam
Michael S. Flam, Special
Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

MEMORANDUM OF POINTS AND AUTHORITIES

The propriety of the issuance of a stay is dependent on the circumstances of the particular case. The factors to be considered by the Court in the granting of a stay are as follows:

1. Whether appellant is likely to prevail on the merits of the appeal;
2. Whether, without such relief, Appellant will be irreparably injured;
3. Whether the issuance of the stay will substantially harm other parties interested in the proceedings;
4. The public interest involved.

36 C.J.S. Federal Courts 294(3).

In Federal law, a stay is granted, if substantial questions are presented and if denial of a stay may result in irreparable damage to the applicant. *Winters v. U.S.,* 89 S.Ct. 57, 21 L.Ed. 2d 80. Where question is whether an injunction should be granted, the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue, and the same considerations obtain where the issue is whether an injunction should be lifted or stayed. *Breswick v. New York,* 75 S.Ct. 912.

In *King v. Smith,* 88 S.Ct. 841, 19 L.Ed. 2d 970, Justice Black was confronted with a situation similar to the present case. The Federal District Court held unconstitutional a regulation of the Alabama Department of Pensions and Security which made certain children ineligible for welfare assistance whenever their mother is cohabiting with a man other than her husband. 277 F.Supp. 31. The District Court's decree ordered immediate restoration to the welfare rolls of all children who had been disqualified solely because of the "substitute father" regulation. Justice Black granted a stay since the District Court decree would require the state to pay out substantial sums of money which could never be recovered in the event of reversal. Justice Black later vacated the stay because of a Congressional amendment changing the considerations involved in his previous decision that are not here relevant.

A stay is reasonably necessary to protect appellant from serious injury in case of a reversal. It does not appear that appellee will sustain disproportionate injury in case of affirmance. If the stay is not granted, the State may be compelled to pay out substantial sums of money with little likelihood of recovery in case of reversal. See affidavit of John Sustek hereto attached as Exhibit "A". In that affidavit, Mr. Sustek estimates that between 2,600 and 3,900 resident aliens are eligible for welfare assistance of which the annual cost is estimated to be between $726,700.00 to $1,090,000.00 in State funds and total State and Federal funds between $2,457,600.00 and $3,686,-400.00. The State will have to bear the added expense of processing claims and the expense of attempting to recover such claims in the event of reversal. If the stay is granted, in the event of ultimate affirmance, relief for plaintiff and the class they represent would only have been postponed.

When a Federal District Court has declared unconstitutional a state statute enacted pursuant to a Federal Law, that Court should accord sufficient deference to the State's law to grant a stay of judgment when an intention to appeal has been indicated.

The stay granted by Justice Black in *King v. Smith, supra* prevented recipients who were receiving ADC benefits from being *restored* to the welfare rolls pending Supreme Court determination. If a stay were granted in the instant case it would only prevent *potential* recipients, who had never qualified for welfare benefits, from receiving benefits, pending decision by the United States Supreme Court. There is a better reason for granting a stay of judgment here than in *King v. Smith, supra,* because plaintiff has not grown accustomed or dependent upon the monthly welfare stipend in the case at bar.

Defendant meets all the criteria mentioned herein for the Court to grant him an order staying enforcement and execution of the judgment. Courts should act with a view towards doing

substantial justice between the parties. Justice may be best served in light of the public interest involved by granting Defendant's Motion to Stay.

Copy mailed this 3rd
day of July, 1970 to:

Anthony B. Ching, Esq.
Chief Trial Counsel
Legal Aid Society
55 West Congress Street
Tucson, Arizona 85701
Attorney for Plaintiffs

EXHIBIT "A"

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss

I, John Sustek, being first duly sworn upon oath, depose and say:

That I am the Director of Assistance Payments Division of the Arizona State Department of Public Welfare and previous to becoming the Director of Assistance Payments was, for six years, in charge of Research and Statistics for the Department of Public Welfare;

That I have a B.S. degree in Business Administration and a M.B.A. degree in Business Administration, of which twelve hours consisted of statistics;

That, based upon a letter directed to Mr. Michael S. Flam from the Department of Immigration and Naturalization, a copy of which is attached to this Affidavit, the following analysis regarding potential resident alien recipients is made.

CITIZENSHIP-RESIDENCE RULING

In making the attached estimates, 3 major assumptions about the 46,173 permanent aliens were made:

1) that the majority of the alien group was of Mexican origin,
2) that the group would exhibit the same general age characteristics as the total population,
3) that, being aliens, they were less likely to have extensive Social Security coverage and therefore that average grants would be a conservation basis.

Computation Basis:

A) Total population of Arizona 1.75 million, of which 8% or 140,000 are age 65 or over and 50% or 875,000 are between 21 and 64.

B) The OAA population in Arizona of 13,600 persons is 9.7% of all persons 65 and over.

C) The "all other" welfare population of 10,200 represents 11.7% of all persons under age 65.

Estimates:

A) OAA—9.7% of 46,173 (8%)=358 potential recipients because of the lower Social Security potential and the conservative nature of the average grant the final estimate was 400-600, potential recipients.

B) Other—11.7% of 46,173 (50%)=2,701 potential recipients because of the lower Social Security potential and the conservative nature of the average grant the final estimate was 2200-3300, potential recipients. (Note: I am not sure of the 50% estimate of the population age group 21-64; therefore, I dropped the low end of the final estimate.)

			ANNUAL BASIS	
Program	No.	Av. Grant	Total Cost	State Share
OAA	400	$72.00	$ 345,600.00	$ 91,500.00
"	600	"	518,400.00	137,200.00
Other	2,200	$80.00	2,112,000.00	635,200.00
"	3,300	"	3,168,000.00	952,800.00
TOTAL—Low			$2,457,600.00	$ 726,700.00
—High			3,686,400.00	1,090,000.00

Summary:

Only adult cases were considered since the ruling did not affect ADC cases.

JOHN SUSTEK
John Sustek, Director
Assistance Payments Division
Arizona State Department of Public Welfare

Subscribed and sworn to before me this 3rd day of July, 1970.

Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
230 North First Avenue
Phoenix, Arizona 85025

June 8, 1970

Mr. Michael S. Flam, Special
Assistant Attorney General
Office of the Attorney General
State Capitol
Phoenix, Arizona 85007

Dear Mr. Flam:

Reference is made to your letter of June 5, 1970, requesting statistics regarding the alien population of Arizona.

The answers to your questions 1 and 2 are as follows:

1. Number of resident aliens living in the State of Arizona: 46,173 permanent resident aliens reported their address in Arizona in January 1970.

2. Number of temporary aliens in the State of Arizona: 3,130 temporary aliens reported during January 1970.

We do not break down the alien registration cards by age and, inasmuch as we have in excess of 50,000 aliens registered in the State, to attempt to do so would require several weeks. We do not have the personnel to accomplish this task.

Please do not hesitate to advise if we can furnish any additional information which will be of use to you in presenting your case.

Sincerely,

/s/ ROBERT L. JARRATT
ROBERT L. JARRATT
DISTRICT DIRECTOR

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

Michael S. Flam, being first duly sworn, deposes:

That he served the attorney for the Plaintiffs in the foregoing case by forward an exact copy of Defendant's Motion to Stay Enforcement and Execution of Judgment in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Mr. Anthony B. Ching
Chief Trial Counsel
Legal Aid Society
55 West Congress Street
Tucson, Arizona 85701

this 3rd day of July, 1970.

/s/ Michael S. Flam

Michael S. Flam

Subscribed and sworn to before me this 3rd day of July, 1970.

/s/Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972

LEGAL AID SOCIETY
Anthony B. Ching
55 West Congress Street
Tucson, Arizona 85701
623-6260
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — OPPOSITION TO MOTION TO STAY ENFORCEMENT AND EXECUTION OF JUDGMENT

Plaintiffs oppose defendant's Motion to Stay Enforcement and Execution of Judgment, the amended judgment, for the reason that this case represents the kind of case where a stay should not be granted.

Dated this 9th day of July, 1970.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION
By: /s/ Anthony B. Ching
Anthony B. Ching
Chief Trial Counsel
55 West Congress Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing
mailed this 9th day
of July, 1970, to:

Michael S. Flam, Special Assistant
Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

LEGAL AID SOCIETY
Anthony B. Ching
55 West Congress Street
Tucson, Arizona 85701
623-6260
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158 TUC. — MEMORANDUM OF POINTS AND AUTHORITIES

I. *The Standards for the Granting of a Stay Pending Appeal*

The standards for the granting of a stay pending appeal have been succinctly set forth in four questions in *Virginia Petroleum Jobbers Assoc. V.F.P.C.,* 259 F. 2d 921, 925 (D.C. Cir. 1958), cited favorably in

In re Permian Basin Area Rate Cases, 390 U.S. 773 (1968):

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
> (2) Has the petitioner shown that without such relief it will be irreparably injured?
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . Relief saving one claimant from irreparable injury, at the expense of similar harm caused another might not qualify as the equitable judgment that a stay represents.
> (4) Where lies the public interest?

A fifth consideration is that where constitutional rights are involved, judgments regarding stays are to be made in favor of the party that stands to lose vital, tangible benefits protected by those rights. This is particularly true when the order sought to be stayed is based upon an opinion in which the trial court fully considered the constitutional issues and balanced the interests of each party when granting relief. See, e.g., *Kale v. Egan,* 80 Sup. Ct. 33 (1959); *Board of Education v. Taylor,* 82 Sup. Ct. 10 (1961).

II. *Application of the Standards to this Case*

A. "Has the Petitioner made a strong showing that it is likely to prevail on the merits of its appeal?"

Defendant's motion and supporting affidavit makes no showing at all that it is likely to succeed upon the merits. Indeed, the subject has not even been considered. Defendant's affidavit merely purports to estimate the cost of providing welfare benefits to those who are unconstitutionally denied these benefits. The only "reason" put forth for by the defendant is the unsupported speculation that if the Supreme Court reversed this case the state would suffer the loss of money.

The total omission from defendant's papers of discussion on the merits is not accidental. The unanimous opinion of this court clearly showed that neither precedent nor logic supported defendant's position. Every possible argument proposed in favor of the statute in question was considered and found wanting.

No showing of irreparable injury to the defendant has been made. At most, the supporting affidavit claims only that effectuation of the order will involve "a substantial expenditure of funds." For that reason, and that reason alone, the affidavit concludes that the case involves questions of "great importance to the State, and will have a great impact on the State's administration of its welfare programs." However, such an expenditure does not qualify defendant for a stay.

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.

Virginia Petroleum Jobbers Assoc. V.F.P.C., supra, 259, F. 2d at 925.

The administrative impact of the order will be minor. While some time will be required to service new clients, that time will be much less than the time saved already by denying the clients' original applications for assistance. In *Kelly v. Wyman,* 294 F. Supp. 893 (S.D.N.Y. 1968), the order required implementation of a new system of person review hearings prior to termination of assistance, with counsel, confrontation of witnesses and disclosure of evidence. Yet both the three-judge district court and Mr. Justice Harlan, on January 10, 1969, refused to stay the order pending appeal.

> B. "Would the issuance of a stay substantially harm the other parties interested in the proceedings?

The plaintiffs in this case will suffer substantial irreparable injury if a stay is granted. If they are eligible for welfare they have no source of income. If these grants are not forthcoming, they are left totally dependent upon the charity of relatives and friends, most of whom are probably also indigent. Each individual in the class of plaintiffs will be unable properly to feed and clothe themselves.

It is equally important that the judgment be implemented at this time. An appeal to the Supreme Court, if it should be heard, might well take six months to over a year to be decided. These cases involve people who are now without any support. In equity, the burden on the State will be comparatively small but the burden on the individual class members will be incalculable.

Finally, it should be noted that in other residency cases, Supreme Court justices have refused to stay orders pending appeal because of the enormous and irreparable harm to the recipients.

See e.g., *Green v. Department of Public Welfare,* Sept. 1, 1967 (J. Black); *Harrell v. Tobriner,* Dec. 29, 1967 (J. Brennan); *Smith v. Reynolds,* Jan. 4, 1968 (J. Brennan); *Burns v. Montgomery,* May 10, 1968 (J. Douglas). In each of these instances, of course, the three-judge district courts had previously refused a stay.

Conclusion

For the reasons stated above, it is respectfully requested that the defendant's motion for a stay be denied.

Dated: This ..... day of July, 1970.

Respectfully submitted,

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

BY: ANTHONY B. CHING

Anthony B. Ching
Chief Trial Counsel
55 West Congress Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing
mailed this ..... day
of July, 1970, to:

Michael S. Flam, Special Assistant
Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

MICHAEL S. FLAM, Special
Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158 TUC. — REPLY TO OPPOSITION TO MOTION TO STAY ENFORCEMENT AND EXECUTION OF JUDGMENT

It is not the purpose of an application for stay to reargue the merits of the case. However, the event of a reversal by the Supreme Court is not mere speculation. It is clear aliens do not occupy the same position as citizens. See *McCreaty v. Va.,* 94 U.S. 391; *Patsone v. Penn.,* 232 U.S. 138; *Terrace v. Thompson,* 263 U.S. 197 (1923); *Harisiades v. Shaugnessy,* 343 U.S. 580 (1952).

Arizona's alien eligibility requirements have not been promulgated at the mere whim of the state legislature. They have been subject to constant federal scrutiny. These requirements are worthy of at least one appellate review and a stay of orders pending that review.

The District Court opinion relies heavily on *Shapiro v. Thompson,* 394 U.S. 618 (1969), citing the constitutional right to travel.

It is interesting to note that all cases referring to the right to travel make specific reference to citizens. *Passenger Cases,* 7 How. 283; *Kent v. Dulles,* 357 U.S. 116, 125 (1958). Courts have also based the right to travel on the privileges and immunities clause Art. IV § 2 of the Constitution, see *Corfield v. Corgell,* 6 Fed. Cases 546, 552; *Paul v. Virginia,* 8 Wall 168, 180 (1869); *Ward v. Maryland,* 12 Wall 418 (1871). The privilege and immunities clause, however, explicity refers to citizens.

Plaintiff cites no cases on point for the proposition that a stay should not issue in this case. *Board of Education v. Taylor,* 82 Sup. Ct. 10 (1961) cited by Plaintiff was a school desegration case. The issues were far different than the case at bar. Indeed, language in that case support Defendant's position:

> "We see no occasion to grant a stay of the decree, the board is called upon for no public expenditures and will suffer no loss, while the school children will be prejudiced by what will soon be necessarily a years delay at this crucial period in their education."

As stated in the Defendant's Motion for Stay, the state will be called upon for vast expenditures with little chance of recovery in the event of reversal.

Kelly v. Wyman, 294 F.Supp. 893 (S.D.N.Y. 1968) relied on by Plaintiff is also inapposite. In that case the court stated:

> "Clearly the state must see to it that assistance goes only to those that are entitled to it. However the issue here affects only the *continuation* of benefits, while a claim of ineligibility is disputed." (emphasis ours)

At the end of that opinion the court intimated a stay would be granted in the event of appeal.

> ". . . if defendants desire a stay pending appellate review their proposed order should so provide."

In refusing to grant a stay in *Virginia Petroleum Job Ass'n. v. Federal Power Comm.,* 259 F.2d 921, the court stated:

> "We note that congress has charged the commission with administering the Natural Gas Act in the public interest . . . .

> We must hesitate before we say what the commission may find necessary and convenient, and we must be and are reluctant to interfere with administrative proceedings."

In the instant case the court has struck down important statutes affecting certain administrative regulations pertaining to eligibility for public assistance. If the court has the required reluctance to interfere with state administrative proceeding the least that can be expected is a stay pending ultimate review.

Kake v. Egan, 80 Sup.Ct. 10 (1961) is clearly distinguishable on its facts. It may be helpful to the court for the proposition that when a state enacts a statute which is contrary to a federal regulation and the Federal District Court sustains that statute, a stay will issue pending appellate review. In the present case a state statute was enacted *pursuant* to a Federal regulation. Similarly, a stay should issue pending review.

Different considerations prevail when welfare recipients are about to be terminated. *Kelly v. Wyman, supra.* However, in this case Plaintiff is seeking to receive welfare for the first time. There are similar cases pending in other jurisdictions. *Leger v. Saler,* No. 69-2869 (D.C.-Penn.); *Gonzales v. Shea,* No. C-1920 (D. C.-Colo.); *Nikolits v. Bax,* (D.C.-S.D.Fla.) No.....

In view of the possibility of conflict in the different circuits on the precise question presented a stay should be granted pending a decision by the United States Supreme Court laying the issue to rest.

Statutes providing for appeals directly to the U. S. Supreme Court are intended by Congress as a procedural protection against an improvident statewide doom by a Federal court of a state's legislative policy. This Court should provide the necessary procedural protection by granting a stay pending appellate review by the U.S. Supreme Court.

RESPECTFULLY submitted this 17th day of July, 1970.

GARY K. NELSON
The Attorney General

/s/ Michael S. Flam
Michael S. Flam, Special
Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

Michael S. Flam, being first duly sworn, deposes:

That he served the attorney for the Plaintiff in the foregoing case by forwarding an exact copy of Defendant's Reply to Opposition to Motion to Stay Enforcement and Execution of Judgment in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Mr. Anthony B. Ching
Chief Trial Counsel
Legal Aid Society
55 West Congress Street
Tucson, Arizona 85701

this 17th day of July, 1970.

/s/ Michael S. Flam
Michael S. Flam

SUBSCRIBED and sworn to before me this 17th day of July, 1970.

/s/ Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiff, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — AMENDED ORDER STAYING ENFORCEMENT AND EXECUTION OF JUDGMENT

On motion of defendant, and the Court having considered the motion and the opposition thereto, and good cause appearing therefor,

IT IS ORDERED that enforcement and execution of the Amended Judgment entered herein on June 26, 1970, is stayed as to all parties plaintiff other than Carmen Richardson pending appeal of said Amended Judgment to the Supreme Court of the United States.

DATED: July 30, 1970.

GILBERT H. JERTBERG
United States Circuit Judge

JAMES A. WALSH
United States District Judge

C. A. MUECKE
United States District Judge