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TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 609

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

Appellant,

—v.—

CARMEN RICHARDSON, for herself and for all others similarly situated,

Appellees,

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

BRIEF *AMICUS CURIAE* OF THE LEGAL SERVICES FOR THE ELDERLY POOR PROJECT OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW

Interest of the *Amicus*

The Legal Services for the Elderly Poor Project of the Center on Social Welfare Policy & Law is funded by the Office of Economic Opportunity and sponsored by the National Council of Senior Citizens. Affiliated with the Columbia University School of Law, the Elderly Project

provides assistance in research and litigation to legal services and other organizations serving the elderly.

The elderly project has appeared before this court this term in *Messer* v. *Finch,* O.T. 1970 No. 768, as *amicus* in *Richardson* v. *Perales,* O.T. 1970 No. 108. The Center on Social Welfare Policy and Law submitted a brief *amicus curiae* in *Shapiro* v. *Thompson,* 394 U.S. 618 (1967) and was counsel *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Recent statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. The elderly project has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life. The project was *amicus* in this case in the district court.

All parties have consented to the filing of this *amicus* brief.

I.

The equal protection clause forbids classifying to exclude needy individuals from benefits to which they are entitled solely on the basis of not possessing citizenship or 15 years residency.

The Arizona Public Assistance Program to provide assistance to the needy carves out an exception for resident aliens who have not resided in the United States for 15 years. Such persons are not entitled to assistance, even though they meet all other eligibility requirements for aid to the blind, aged or disabled. Such exclusion is forbidden:

> When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out this class for different treatment, not based on some reasonable, justification, the guarantees of the Constitution have been violated. *Hernandez* v. *Texas,* 347 U.S. 475, 478 (1954).

In the instant exclusion, not only is there no rational basis for this classification, but it flies in the face of common sense to favor the United States citizen who may have just arrived in Arizona over the resident alien who may have lived in Arizona for many years, paid taxes, and otherwise contributed to the growth and development of the state. Cf. *Purdy & Fitzpatrick* v. *California,* 79 Cal. Reptr. 77, 456 P.2d 645 (1969). Entitlement to benefits should be predicated not on the possession of citizenship, but on the factors of need at the minimum, and at the maximum, some type of measure of community commitment.

In fact, laws which have an adverse effect on aliens raise several problems of equal protection. Patterns and

practice in the application of laws which harm different nationalities have been held to deny equal protection and due process. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Classifications based on alienage are inherently suspect and subject to rigid scrutiny by the courts. *Takahashi* v. *Fish & Game Commission,* 334 U.S. 14 (1948).[1] In *Carrington* v. *Rash,* 380 U.S. 87 (1964) this court invalidated an exclusion of army personnel from voting. In the exclusion present in this case where appellees face the "brutal need" described in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), a striking parallel emerges. Both groups are denied fundamental and crucial rights and needs solely because of irrelevant factors. Such a classification to exclude is also drawn too broadly. See, e.g., *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

The purpose and effect of the residence requirements are to drive settled poor aliens from the state. In *Yick Wo* v. *Hopkins, supra,* the Supreme Court held that when the effect and purpose of a San Francisco law was to discriminate against a class of individuals and deprive them of all means of living or any material right essential to the enjoyment of life it was unconstitutional. In *Thornhill* v. *Alabama,* 310 U.S. 88 (1941) a unanimous Supreme Court through Mr. Justice Murphy held that the mere existence of a statute which violated free speech rights infringed freedoms and created injury to society as well as individuals. These two cases establish that where the effect, purpose and nature of a statutory provision is to infringe constitutional rights, then it must be struck down.

In *Chy Lung* v. *Freeman,* 92 U.S. 275 (1875) a California law requiring a $500 bond for arriving foreigners to

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[1] Limiting welfare expenditures alone is, of course, insufficient to sustain an otherwise invidious classification. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

indemnify all counties, towns, and cities against the possibility of having to support them was held invalid. The decision dealt mainly with the intent of obtaining money and international repercussions but concluded that such regulations must be justified by vital necessity and not carried beyond the "scope of the necessity." Just as California in 1875 was forbidden to demand money for fear of newcomers on relief rolls, so today states must be prevented from excluding and denying money for fear of aliens and aliens and newcomers on relief rolls.

Further, it is the intent of the statute to inhibit entrance into the state. In doing this, the statute seeks to inhibit the free movement of individuals. Freedom of movement is a highly regarded constitutional right, *Apthecker* v. *Secretary of State,* 378 U.S. 500 (1963). "Freedom of movement is basic in our scheme of values." *Griffin* v. *School Board,* 377 U.S. 218 (1964) (citing *Kent* v. *Dulles,* 357 U.S. 116 (1958) at 126). In *Zemel* v. *Rusk,* 381 U.S. 1, 15-16 (1965), a six man majority in the Supreme Court stated the scope and rationale of this principle:

> The right to travel *within* the United States is of course constitutionally protected, cf. *Edwards* v. *California,* 314 U.S. 160. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the areas would directly and materially interfere with the safety and welfare of the area or the Nation as a whole. So it is with international travel.

The flow of information was stated to be an important factor. (For the upholding of a standard quarantine law see *Baldwin* v. *Selig,* 298 U.S. 511 (1935).) The alien who

stays in the state creating a new environment, new contacts, new information for himself and family enters no area of pestilence and brings no diseases. See also *Edwards* v. *California,* 314 U.S. 160 (1941). The Court has held that the right to travel between states is a clear federal, constitutional right. *U. S.* v. *Guest,* 383 U.S. 745 (1965). To classify and exclude aliens who have traveled and settled goes counter to reason, is arbitrary, suspect by nature, and constitutionally infirm.

II.

The Arizona law by excluding certain resident aliens from public assistance benefits impermissibly penalizes resident aliens for the past exercise of their constitutional freedom to travel and, in seeking to drive them out, adversely affects freedom of association.

The class which is excluded is defined only by the fact of immigration by aliens sometime in the past 15 years. The freedom of travel is guaranteed under the Constitution. *U. S.* v. *Guest, supra; Kent* v. *Dulles,* 357 U.S. 116 (1958). To withhold benefits because of the results of the exercise of Constitutional freedom is forbidden. *Sherbert* v. *Verner,* 374 U.S. 398 (1964); *Shapiro* v. *Thompson, supra; Hamm* v. *Forssenius,* 380 U.S. 528 (1963).[2]

[2] It should be mentioned in passing that this exclusion and resulting departures and lessened quantity of money affects interstate commerce. See, in general, *Edwards* v. *California,* 314 U.S. 116 (1941); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *Atlanta Motel* v. *U. S.,* 379 U.S. 241 (1964); *U. S.* v. *Hill,* 248 U.S. 420 (1919); *Katzenbach* v. *McLung,* 379 U.S. 294 (1964). If taxation on a foreign corporation, which might interrupt interstate commerce, is unconstitutional, see, e.g., *Ward* v. *Maryland,* 79 U.S. 418 (1870); *Toomer* v. *Vintsell,* 334 U.S. 385 (1948), then deprivation of money to aliens which might affect interstate commerce is suspect.

As discussed, *supra,* in Point I, the purpose of the exclusion is to drive people out of communities, but the right to residence in the place of one's choice applies to resident aliens as well as citizens. The Fourteenth Amendment guarantee "to any person" of due process and equal protection of law includes aliens. *Yick Wo* v. *Hopkins, supra.* "This has been decided so often that the point does not require argument." *Wong Wing* v. *U. S.,* 103 U.S. 228 (1895). Resident aliens, like all residents, are free to live in any state and no state may impose disabilities on them for the exercise of this basic right. *Chy Lung* v. *Freeman, supra; Henderson* v. *Mayor of New York,* 92 U.S. 259 (1875). The rationale for this is the freedom of association.

When an alien moves to a state he moves for many reasons. Some of these reasons are constitutionally sacred and therefore, incapable of infringement on the part of the government. One such basic freedom which motivates movement is the desire to associate in a new community with new people, to expose oneself to new ideas, new climate and new economic opportunity.

Freedom of association is a fundamental right. *McLaughlin* v. *Florida,* 379 U.S. 184 (1964) held a statute unconstitutional on grounds of unreasonable classification which made it a crime for Negroes and whites to associate in a hotel room emphasizing the constitutional right to choose whatever companions one wants in the place of association with them. So, too, should a state be prohibited from inhibiting an alien in his choice of associates and place of association for his life and family. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) six members of this Court joined by two others held that a requirement that

an addressee request "propaganda" in writing from the post office department is unconstitutional. The government is forbidden from imposing requirements on the receipt of desired information. So, too, should a state be prohibited from actions which make it harder for an alien to continue to reside and interchange information. This court has held that prejudice and bad feelings against foreign nationals cannot stand in the way of their settling where they desire. *In Re Mitsuye Endo,* 323 U.S. 283 (1944). These cases establish that any government is prohibited from imposing conditions of any sort upon the persons with whom one desires to associate at the place of his choosing. This penalization of a past exercise of a constitutional right denies freedom of association while violating mandates of equal protection. It is, therefore, unconstitutional and invalid.

III.

The exclusive federal power to regulate aliens precludes state denial of public assistance based solely on lack of citizenship.

The regulation of aliens is invested in the federal government as part of its power over foreign commerce, to conduct foreign relations, to establish a uniform rule of naturalization and the inherent power of any national sovereign to control immigration. United States Constitution, Art. I, cl. 3. The federal power to exclude aliens is absolute. *Fong Yue Ting* v. *U. S.,* 149 U.S. 698, 705-07 (1893). State action pertaining to noncitizens, if not entirely restricted, is sharply limited:

> this legislation [Pennsylvania's Alien Registration Law] is in a field which affects international relations,

> the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . . *Hines* v. *Davidowitz,* 312 U.S. 52, 68 (1941).

Consistent with these guidelines Congress has laid down a comprehensive regulatory scheme which controls the admission, continued residence, and naturalization of aliens. Immigration and Nationality Act of 1952, as amended 8 U.S.C. Section 1101 *et seq.* Federal control over noncitizens does not abate at the time of entry. Resident aliens must notify the Attorney General of their addresses annually. 8 U.S.C. Section 1305. They may not be admitted to federal civil service competitive examinations, 5 U.S.C. Section 3301; 5 C.F.R. Section 338.101(a); yet male aliens admitted for permanent residence must serve in the armed forces. 50 U.S.C. App. Section 454(a). They may be deported after admission if at the time of entry they were excludable as "paupers, professional beggars, or vagrants," 8 U.S.C. Section 1182(a)(8), or were "likely at any time to become public charges." 8 U.S.C. Section 1182(a)(15); 8 U.S.C. §1251(a)(1). Most compelling is that lawfully admitted resident aliens face deportation if they "within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry." 8 U.S.C. Section 1251(a)(8).

The federal scheme is continuing, comprehensive, and when dealing with restrictions placed on a noncitizen's ability to provide for his livelihood and to care for himself, exclusive. The federal penalty suffered by noncitizens who

become a public charge within five years after entry is deportation, unless they can show that the cause arose after entry. 8 U.S.C. Section 1251(a)(8). Arizona increases this penalty to denial of public assistance until fifteen years after entry. This is impermissible:

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, consistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. *Hines* v. *Davidowitz, supra,* at 66-67.

Furthermore, the conflict between federal and state purposes is apparent because noncitizens are often helpless to alter their status so as to comply with Arizona's citizenship requirement. Naturalization requires at least three years, and for most noncitizens, five years continuous residence in the United States after lawful admission, and six months residence within the State in which petition for naturalization is filed. 8 U.S.C. Sections 1427(a), 1430. Arizona interferes markedly with this plan for naturalization. A lawfully admitted resident alien, otherwise eligible for public assistance, whose need results from circumstances developing after his entry, is completely barred from public assistance under any circumstance until he satisfies the federal citizenship residency requirement. When the emergency arises and he requires assistance, he is forced to emigrate from Arizona to seek assistance elsewhere, thereby *terminating* his federally required period of state residence for purposes of naturalization.

State statutes have been struck down on numerous occasions because they interfered with the accomplishment and execution of the objectives of federal regulation of aliens. *Takahashi* v. *Fish and Game Commission, supra; Hines* v. *Davidowitz, supra; Chy Lung* v. *Freeman, supra.* Recently, the California Supreme Court held that California's prohibition on public employment of aliens was invalid because it interfered with the comprehensive federal scheme enacted to regulate immigration. *Purdy and Fitzpatrick* v. *California, supra.* Certainly Arizona's complete exclusion of aliens from public assistance is more obnoxious to the federal scheme than the partial limitation on employment in California or the percentage limitation on employment overturned in *Truax* v. *Raich,* 239 U.S. 33 (1915).

It is enough that the statutes surrounding aliens "[t]aken as a whole . . . evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it." *Pennsylvania* v. *Nelson,* 350 U.S. 497, 504 (1956); *Warren Trading Post Co.* v. *Arizona Tax Commissioner,* 380 U.S. 685 (1965).

Furthermore, it is enough that a state law have some direct impact on foreign relations:

> Yet, even in absence of a treaty, a State's policy may disturb foreign relations . . . . Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. [citations omitted] If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and

> may well adversely affect the power of the central government to deal with these problems. *Zschernig* v. *Miller,* 389 U.S. 429, 441 (1968).

Arizona approaches this complete denial of admission to aliens by burdening their right to interstate travel through its exclusion of aliens from public assistance. Cf. *Shapiro* v. *Thompson, supra.* It would indeed be ironic, if not tragic, if the federal scheme of regulation of aliens were found insufficient to protect lawfully admitted resident aliens from discrimination by states in provision of their basic needs; while it protects the rights of foreign nationals residing in Communist countries to inherit property pursuant to state laws. *Zschernig* v. *Miller, supra.*

Moreover, even without a treaty it is easy to contemplate the direct impact on foreign relations of such discrimination against aliens. Foreign nations, some of whom provide even free medical care to United States travelers, must be disturbed by a United States which first welcomes foreign nationals to its shores, requiring them to undergo a rigorous admission procedure, and then inconsistently allows its states to arbitrarily deny them the means to survive. And Arizona's restriction is certain to interfere with the conduct of foreign relations because it expressly contravenes the principles of the *United Nations Charter,* 59 Stat. 1031, and the *Charter of the Organization of American States,* 2 UST 2394 (1951). One would be hard pressed, as a representative of the United States, either before a single foreign dignitary or at a meeting of the United Nations or Organization of American States, to justify or explain Arizona's restriction in light of the declared purpose of the United Nations to "develop

friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," and the principles of the Organization of American States Charter whose "Member States agree upon the desirability of developing their social legislation on the following bases: a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security." United Nations Charter, Chapter 1, Article 1, Subparagraph (2); Charter of the Organization of American States, Chapter VII, Article 29.

Congress has spoken. The Constitution is clear. Arizona may not penalize aliens in this field and in this way.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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