Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

RONALD JAMES, ET AL.

Appellants

vs.

ANITA VALTIERRA, ET AL.

Appellees

Docket No. 154

Place Washington, D.C.

Date March 3, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

RONALD JAMES, ET AL.,

Appellants

vs

No. 154

ANITA VALTIERRA, ET AL.,

Appellees

The above-entitled matter came on for argument on Wednesday, March 3, 1971, at 2:20 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

DONALD C. ATKINSON, ESQ.
412 City Hall
San Jose, California 95110
On behalf of Appellants

ARCHIBALD COX, ESQ.
Cambridge, Massachusetts
On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 154: James against Valtierra.

Mr. Atkinson I think you may proceed now.

ORAL ARGUMENT BY DONALD C. ATKINSON, ESQ.

ON BEHALF OF APPELLANTS

MR. ATKINSON: Mr. Chief Justice and may it please the Court:

This matter comes to the Court on appeal from a three-judge court sitting in California, United States District Court, Northern District of California. The matter comes up from a summary judgment; the summary judgment was in two parts. The first part was a declaratory judgment, ruling that Article 34 of the State of California Constitution was violative of the 14th Amendment Equal Protection Clause. The second part, permanent injunction against the Defendants in the case, of availing themselves or relying on the provisions of Article 34 as a reason for not proceeding with the acquisition, construction or development of low-rent housing.

The Supreme Court has jurisdiction of this case under 28 USC 1253, an appeal from a permanent injunction by a three-judge court against an enforcement or obedience to the provisions of the state constitutional provision.

The cases before the Court are really two. The first is James versus Valtierra and the second is Hayes versus

the Housing Authority. In the first case Plaintiffs Valtierra and others similarly situated, on behalf of the class, people who were eligible for low-rent housing, brought action against the members of the city council of the City of San Jose to have Article 34 -- be unconstitutional.

In Hayes versus the Housing Authority and also in that action joined as defendants were the members of the Housing Authority of the City of San Jose. In Hayes versus the Housing Authority plaintiffs, Gussie Hayes and others similarly situated brought the same type of action against the Housing Authority of San Mateo County.

In the James case an answer was filed; in the Hayes case an answer was not filed. The actions were consolidated for purposes of argument and the decision obtains as to both cases.

The provisions of Article XXXIV which are at issue before the Court basically provide that no state public body shall acquire, construct or develop low rent housing unless a majority of the people, the electors, qualified to vote in the locality in which the low-rent housing is to be constructed by a majority vote in favor of such low-rent housing.

Q Mr. Atkinson, what, in your view, is the purpose of Article XXXIV?

A The purpose of Article XXXIV, Mr. Justice Blackmun, was to fill a gap in the referendum procedure in

California. Under Article IV of the State of California Constitution only legislative actions were referendums. An opinion of the State Supreme Court: Housing Authority versus the Supreme Court of Humboldt County in 1950 ruled that actions of the Housing Authority operating under the low-rent housing procedure, were administrative rather than legislative in character, and therefore could not be reached by a referendum.

Shortly thereafter, in 1950, Proposition 10 was placed before the voters of the State of California. That proposition is and was adopted as Article XXXIV. So that in response to your question, the immediate purpose of Article XXXIV was to protect the people, to give the people the right to determine whether or not they wanted to extend low-rent housing to the people in their particular area.

Q Well, Article XXXIV is somewhat different from the normal referendum provision; isn't it?

A Mr. Justice White, it depends on what referendum procedure you are talking about.

Q Well, you said it filled a gap in the referendum laws --

A Yes; that type of -- since that was the original type of referendum that people thought they had in that area in order to build that gap. However --

Q It did something more than that; didn't it?

A Well, it's a prior automatic referendum, if that's what you're referring to.

Q Well, every legislative action in California is not subject to referendum, I wouldn't think; is it? I mean not automatic referendum.

A No; every --

Q -- where the legislature and city council is --

A No; this would -- basically most legislative acts are subject to referendum by petition.

Q That's right. This one doesn't work that way; does it?

A No; it does not.

Q This is automatic.

A That's correct.

Q Now, if the general referendum provision had been applicable, I don't suppose XXXIV would have been passed; is that the point?

A I wouldn't think so.

Q Well, what was the purpose then of making it automatic instead of subject to petition?

A Of course I can't really answer that question because I had nothing whatsoever with passage of the Article. I can only surmise that the people felt that this was a legitimate approach to protect their rights in a referendum

area, and I was attempting to point out there are other types of referenda in California which are subsequent -- pardon me -- are prior automatic referenda. There are some initiative measure; there are some sur-type annexation and consolidation procedures; the City Charter of San Jose, with which I am quite acquainted, has a provision for a prior automatic referendum in the area of the sum and parts.

And there are other types of prior automatic referenda. But, I don't feel that merely because we have a prior automatic referendum that that of itself lends any odious color to the procedure. The people, as long as they are dealing in an area where they have the right to reserve something, as long as they treat the area that they restore uniformly and without treating any other similar area in a different manner, I feel there is no unconstitutional treatment.

The classification here in Article XXXIV is precisely limited to one small area of low-rent housing. It deals with that area because, as I pointed out before, that was the area that the Supreme Court of California ruled was not referendable. So that it certainly made sense for the people to strike out and to pick out that precise area as the subject of their referendum procedure.

The Proposition 10 itself, when it was passed, the articles pro and con, are absolutely neutral. They are all directed to the right of the people to reserve their voice in

an area where they have a concern. There is no allusion to race; there is no allusion to poverty per se.

Q Has this issue ever gone through your state court system?

A No, Mr. Justice Harlan, it has not.

The - it's our contention that the article is, as I pointed out before, fills a gap that it's not an unconstitutional classification. It's not unconstitutional on its face; it's not unconstitutional as applied. It's not a classification based on race nor color in that it does not violate the supremacy clause.

In the first place the article merely deals with low-rent housing and nothing else. It treats everyone in the area of low-rent housing the same. And as such, it meets the tests that if a new formula laid down with reference to the test that the court applies in determining whether or not state legislative action is violative of the Equal Protection Clause.

The case of Hunter versus Erickson was cited as a precedent in the lower court and I submit that Hunter versus Erickson on its facts, is not this case at all. In Hunter versus Erickson we were dealing with a situation where the people of Akron had a referendum procedure right across the board. They also had a fair housing ordinance which had a procedure set up to -- people had been hired, categories had been established and it was actually under operation.

The enactment of the referenda procedure in the Hunter case, in effect, rescinded or repealed the existing low-rent housing ordinance, fair housing ordinance and built a prior referendum procedure on top of a regular referendum procedure. So that in Hunter it could not have been argued that there was no referenda procedure available and that therefore a new referenda procedure was necessary.

Secondly, the court in Hunter specifically mentions the background of the referenda procedure, the fact that it repealed an existing fair housing ordinance; the fact that it was racially motivated; in fact in the opinion there are references that it is an explicitly racial classification. In fact, Mr. Justice Harlan and Stewart, as I recall, in a concurring opinion, indicated that the provision has the clear purpose of making it more difficult for religious and racial minorities to achieve legislation that is in their interest.

So, I submit that the case before you now is not the Hunter case and the Hunter case should be distinguished, and to try the Hunter case here seems to me to be placing the Court as a superlegislative body, second-guessing the people in dealing in legislative areas, social concern areas, that the Court in Dandridge versus Williams said was their right.

Q What do you say about Reitman and Mulkey?

A Reitman and Mulkey was a case again where the State Supreme Court of California had indicated that we had

racial discriminationhere on a statewide basis. The state had entered the field; it had not only encouraged, but actually almost put forward racial discrimination.

The Supreme Court, as I recall it in the Mulkey case, took the finding of the California Supreme Court and made it its own and went on from there.

Q Supposing this went through the State; do you think it's possible that the Supreme Court might say the same thing about this statute?

A It is certainly possible.

Q But it's never been before it?

A It's never been before the California Supreme Court.

Q Or any California court, I take it.

A It's never been in any California court; that's correct.

The -- as I indicated before, it's not discriminatory on its face. There is no racial classification in the constitutional provision; race is not even mentioned. The police here indicate: Well, we know as a matter of fact that most of the poor people are Black or Spanish-speaking, et cetera. I submit that this may or may not be true. However this does not, per se make a statute or a constitutional provision which affects a minority, it doesn't make it into a racial classification.

As a matter of fact, I am sure you will find that as far as numbers go there are more poor whites than poor Blacks. But that really is not relevant, I don't feel, to the issues here.

Q Mr. Atkinson, my recollection isn't too certain, but could have made, have said the same thing about Proposition 14 in Reitman against Mulkey?

A Reitman against --

Q That on its face it didn't seem to be racially motivated?

A Reitman versus Mulkey is quite distinguishable in this regard and very like Hunter. Reitman versus Mulkey again repeals a fair housing procedure, a nondiscriminatory procedure which had been set up in the State of California.

The Court does know the background and the purpose and certainly the Court was very, very interested in that. just as it was in the Hunter case. There is nothing of this sort in the case before the Court now. There is nothing in the arguments pro and con, as I said before; it fits right into the context of the necessity of the referendum procedure.

The only conceivable argument, it seems to me, that can be raised against the constitutionality of XXXIV is the fact that it's a prior automatic referendum, as distinguished from a subsequent petition referendum. And I submit

that that is not crucial because they are both referendum procedures. This is an area where the state has a legitimate concern and the Court should not intrude its own judgment in place of the legitimate concerns of the state people.

Q What are the state interests involved here?

A The state interests here are both fiscal and the fact that low-rent housing per se, may be dead. The fiscal considerations are far from the fact that under the low-cost housing procedure the local public body takes the property which is a low-rent housing project off the tax rolls in return for ten percent of the rents.

Now, that means that also the people are required to provide certain municipal or county or what have you -- whatever government we are dealing with -- services for the project, including possibly schools, parks and improvements of that nature which they wouldn't normally have to provide if the low-rent housing project did not go in a particular area.

The other consideration is the fact that low-rent housing is not a blassing right across the board. The experts in the low rent housing disagree among themselves as to whether or not it's good or bad; there are all kinds of argument about how large the housing should be; when it should be acquired, constructed and developed; when it should be and questions of that nature.

The -- in fact there has been some history here. I point out the housing in St. Louis, which was an absolute fiasco. In the past most of these housing projects have been mammoth in nature; they have led actually, to internal segregation; they have led to isolation, ghetto isolation and some of them, have, as I say, fallen flat on their face.

As I recall in St. Louis, over 50 percent of that project is now vacant. Realizing that the people are only getting back ten percent of the rents in return for taking property which might be extremely valuable in terms of tax returns, off the rolls, if a project fails the people certainly should have the right to consider that aspect before they want a low-cost housing project built anywhere.

Because, ten percent of the project, 100 percent set full is certainly not the same as ten percent of the rents of the project only 40 or 50 percent full.

Q How many of these referenda have there been since the XXXIV went into effect?

A There have been -- I don't have the exact number, Justice Harlan, but I will point this out -- that brings up a very interesting area for discussion. Actually, XXXIV has not been discriminatory as applied. As a matter of fact, most of the elections have been voted in favor of the low-rent housing. The reason that it's even close in terms of units is because in Los Angeles, as I recall in 1952, a

10,000 unit low-cost housing project was turned down.

But, as I understand it that was never resubmitted to the people. There is nothing in XXXIV that prohibits low-cost housing from going in, but merely requires a vote. And I submit that it is nothing any different than any other type of vote: school bond or what have you. If that is turned down the people still have the right to come back. The city council can again put it before the people and perhaps that's a blessing.

If there is something wrong with the project, that gives everybody an opportunity to come back and think about it. It may have been poorly planned; the education of the electorate may not have been proper; the proponents may not have done their homework.

And I submit that it's quite interesting that as I recall between 1968 and '70 the percentage of referenda that have been approved are actually going up, not down. But we are not dealing in an area where discrimination is running rampant.

I also want to touch upon the points that were brought up in the Appellees' brief. They attempt to bring in the full classification into the invidious classification, a suspect classification, classification for the traditionally disfavored. And I submit that this is not the kind of a classification which fits any of thosetests. Most of the cases

-- the Harper case, for example, which mentioned that wealth and race were suspect classifications. The question of wealth really was not relevant to relevant to that case at all. The only reason that it was important was because who were poor were being deprived of the right to vote. And the right to vote is a fundamentally constitutionally guaranteed right. And unless the Court here is willing to extend its tests of fundamentally guaranteed rights to low-rent housing I think it would be extremely dangerous to uphold the District Court in this area.

Neither is this case a criminal case where someone is asking for the right of a transcript on appeal or anything like that.

I submit that this Article XXXIV is neutral in purpose, completely undiscriminatory on its face and as applied and I submit that again it would seem to me that if the Court branches out in this area and strikes down XXXIV it would seem rather difficult to determine where the line will be drawn. If a constitutional provision like this can be stricken down by this Court there is no end to the intrusion of the judiciary into the legitimate concerns of the legislative enactment of the people.

So that again, I would submit that Article XXXIV should be deemed to be constitutional and that the decision of the lower court be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Cox.

ORAL ARGUMENT BY ARCHIBALD COX, ESQ.

ON BEHALF OF APPELLEES

MR. COX: Mr. Chief Justice and may it please the Court:

In the Appellees' brief we have canvassed a number of grounds on which we believe that Article XXXIV of the California Constitution violates both the 14th Amendment and the Supremacy Clause.

In our argument I intend to confine myself to the essence of our argument under the Equal Protection Clause of the 14th Amendment. And it, very briefly, is this: it's that Article XXXIV violates the Equal Protection Clause because it builds into the very structure of government, of local government in California an explicit discrimination against the poor.

In the words of the statute: "Against persons of low income who are" -- I should say in the constitution, Article XXXIV, who are defined as persons whose income is insufficient to provide them with safe, decent and sanitary housing without overcrowding."

The discrimination here, as in Hunter against Erickson, consists of putting the poor, the disadvantaged class, putting before them a special obstacle which they must surmount in order to secure government action in their behalf

which faces no other group seeking government actions in its behalf.

Hunter and Erickson held that that very kind of discrimination is unconstitutional where it ran against racial minorities; our contention is that it is equally unconstitutional where it runs explicitly against the poor and for the most part in practice, also against racial minorities.

Q What would you say about a constitutional provision that provided that all public housing be submitted for referendum.

A Well, I think that would -- I'm not quite sure, Mr. Chief Justice, what you mean by "public housing." If it said --

Q Put in the context: subsidized by the Federal Government or --

A If it said "all subsidized housing" by the Federal or State Government then I think we would have a somewhat different case, because here there clearly is discrimination between subsidized middle income and upper income housing, which is subsidized by the Federal Government and low rental housing by the poor.

But I'm not sure that there wouldn't still be an argument that the poor, who would be still the chief ones in need of housing and the chief beneficiaries of housing, were the victims of the discrimination.

universe and looking at kinds of local government action more broadly, as the Court did, indeed, as all justices did in Hunter and Erickson.

But, for our purposes, that case can be left to another day. Indeed, I think here, and as I shall try to show a little farther on, whatever comparison you take there is no neutral principle that will explain this discrimination.

Q I realize that this is hypothetical, too. Suppose the prohibition or the referendum requirement applied that allmultiple housing projects over 50 units?

A Let me change Your Honor's hypothetical just a little bit, because there is one that occurred to me that's more like it; and that is if the zoning laws required that all housing above certain numbers of units be submitted to referendum then we would have a very different question. That would cover high-rise apartments for middle income and the well to-do and it would certainly arguable that there was some neutral principle. But, I think that case is really very different from mine.

I plan to develop the argument which I just sketched in four steps: the first is that Article XXXIV unquestionably, I think, directs a special obstacle in front of persons of low income in seeking to have their need for government action to fulfill one of their greatest necessities, in having the government act to fulfill it as compared with any

other group.

In order to get any housing project -- public housing project under way in California, quite apart from Article XXXIV, there must either have been or must be in existence four principal steps. The first would be state legislation empowering the municipalities to accept the benefits of the Federal Housing Act of 1937 and constituting local housing authorities. That step has been taken.

The next step is the passage of a resolution by the county government, or the city government, as the case may be, activating its housing authority; and that step has been taken, in both San Mateo County and in the City of San Jose, the two units involved in these cases.

Then the third step is a preliminary application for funds to prepare the drawings and get the estimates and to take the other steps to get the housing project under way. And that application must be approved by the Board of Supervisors for the county or by the city council for the city by a resolution in the same manner as local government action is normally taken.

And at that time, too, by a resolution the local subdivision must enter into an agreement of cooperation with the Federal Housing Authority. So, we have municipal action according to the normal channels at that step.

Then the fourth step, of course, would be

approving the time for the project and approving the bonds and the various other mechanics for carrying it out and I would emphasize that under California law at that step again the local legislative body is required to approve the particular project.

Now, what Article XXXIV does is to say, in addition to those things persons of low income who are seeking this kind of government action in relief of their needs, must go automatically to a referendum in which they secure popular approval of the program. This is an additional stub(?) to what would be required for any other effective kind of action by the local government, with the exception of issuing some general revenue bonds, which I will deal with a little later.

The disadvantage which is expressly put on the poor by Article XXXIV, is exactly the same I find out as the disadvantage under which the ordinance in Hunter and Erickson put those who were interested in fair housing legislation. Enacted, as in San Jose there was a general provision for a referendum on the petition of a stated number of citizens, but the charter amendment in the Akron case called for an automatic referendum and the court said there that the difference was enough to constitute a denial of Equal Protection.

The differences here are exactly the same and we say that it, too, constitutes a denial of Equal Protection.

Some argument is made in the brief and was made

a few minutes ago by counsel, to the effect that Article IV, Section 1 of the California Constitution provides for a referendum and thus there is no discrimination in this case.

I point out that there are three major differences. First, Article IV, Section 1, does not provide for an automatic referendum; it provides for a referendum only on petition of a stated number of votes: 5 percent or 8 percent, depending on the area we're talking about.

Second, the normal referendum in California comes after the subdivision or the legislature has acted. And the action is effective unless vetoed by the voters. Here the referendum must be held before anything effective can be done. And the third and very important point is that Article XXXI sets up a one-way street. It may be used to defeat housing; but it may never be used to obtain housing, whereas the normal initiative and referendum are linked together and they may operate both ways.

And we submit that these three differences make a clear-cut disadvantage of such a kind as denies equal protection of the law.

Q Just how would you take that kind of submission, Mr. Cox, to have it a two-way street?

A Well, I would suppose we would have a very different case, Mr. Chief Justice, if what Article XXXIV did was to subject a public housing project to the normal

initiative and referendum provisions of the California constitution.

Did you ask how would I phrase the referendum?

Q No; I'm trying to get the structure, the submission --

A To the voters?

Q -- to the voters. Should it be done before anything was done and if they approve it then would it be mandatory that it be executed? I assume that --

A I suppose -- yes, it would. "Shall the local housing authority be authorized and directed to enter into contracts with the Federal Government for such and such a number of units of housing."

Q In a particular place?

A And it could even say at a particular place or particular places, since the housing is now in chiefly smaller blocks than some of the housing projects that were described to us.

I would point out in addition, that this not only operates as a disadvantage against the poor, as in Hunter and Erickson, but that there is no neutral principle which can be invoked to justify it. I said a moment ago, my argument does not challenge the right of the voters of California to reserve housing and other like questions for popular approval, provided that it is done in accordance with some neutral principle.

And then one gets the problem of defining the class that I was discussing in answer to the Chief Justice's question.

All important characteristics and consequences of publicly owned housing projects of a low-cost variety, other than the involvement of persons of low income attach to other species of government action. If California does not treat any of them as a cause for requiring an automatic referendum.

For example: Federal financing isn't the reason for an automatic referendum, in any number of contexts. Urban renewal projects, highways, airports, hospitals, other things of that kind. Effect upon land use isn't otherwise treated as a need for a referendum. The zoning laws can be changed in ways that permit shopping centers, industrial plants, high-rise apartments that will change the character of the land for generations. Indeed, public ownership of projects that will affect the character of the land for generations is not generally treated as a reason for requiring mandatory popular vote.

Again: airports, sewage disposal plants, educational buildings and urban renewal are examples.

Nor, can it be said fairly, I think, that the possible increased demand for municipal services resulting from a publicly owned housing project is a neutral reason for requiring a referendum because there are plenty of other changes attendant upon municipal laws which will create a need for

additional services but they are not made the basis for a mandatory referendum: universities, medical complexes, sports stadiums, hospitals, universities and the like.

The lessening of tax revenues is suggested by the Appellants as a neutral principle, but certainly not everything that takes land off the tax rolls even for public ownership is submitted to referendum in California.

In California there are only two, so far as I know, kinds of mandatory referendums. One is a change in political boundaries or the structure of local government. Article XXXIV makes such a change but the vote taken under it on housing projects isn't a vote on the change in the political structure or political boundaries.

The other mandatory referendum is required in the case of the issuance of bonds which are -- bonds of the state, county, city or other subdivision of government and which constituts an obligation paid out of general tax revenues.

The California Supreme Court pointed out that there are two important differences here between general municipal obligation and the bonds of the housing authority. One is that the housing authority's bonds are not obligations of the city, county, state or other public subdivision as required in the California constitution. Second and most clearly they are not obligations which must be paid out of general tax revenues. The bonds are carried by the Federal Government and,

to some small extent, by any surplus of the rents over the cost of maintenance of the building. Usually there are none, so, in fact, these bonds are obligations of the Federal Government and are paid by the Federal Government.

In sum, I think that the indisputable purpose and effect of Article XXXIV is to erect a special obstacle in the path of the poor when they seek government action, which does not confront any other group when it is seeking political or governmental action in its behalf.

Our second main point which I will develop tomorrow, is to emphasize that Article XXXIV builds its unique bias against the poor into the very structure of the political system. Persons of low income seeking government assistance are told, in effect: "Well, you stand differently before your government than anyone else stands when he is seeking government assistance.

I emphasize this because this is not a case like, say, Dandridge and Williams, where they were dealing with substantive government policies and where the Court said there was greater latitude in social and economic matters. Here we are dealing with the structure of government itself.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cox. We will resume in the morning.

(Whereupon, at 3:00 o'clock p.m. the argument in the above-entitled matter was recessed to be resumed at 10:00 o'clock a.m. on Thursday, March 4, 1971)