Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 154

RONALD JAMES, ET AL.

Appellants

vs.

ANITA VALTIERRA, ET AL.

Appellees

Place Washington, D.C.

Date March 4, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

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WEBENHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

RONALD JAMES, ET AL., Appellants		
vs	)	No. 154
ANITA VALTIERRA, ET AL., Appellees		

The above-entitled matter continued argument at 10:00 o'clock a.m. on Thursday, March 4, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, 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.
San Jose, California
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: Mr. Cox, you may proceed.

ORAL ARGUMENT BY ARCHIBALD COX, ESQ.

ON BEHALF OF APPELLANTS (CONTINUED)

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

I suggested yesterday that our submission that Article XXXIV violates the Equal Protection Clause of the 14th Amendment, could conveniently be approached in four steps.

The first, which I have covered, was to show that the indisputable purpose and effect of Article XXXIV is to erect an obstacle in the path of the poor when they seek governmental action to supply their need for housing. It does not concern any other group seeking governmental action to satisfy its demands on the political system. And that the provisions for the automatic referendum cannot be explained by the consistent application of any neutral or general principle.

Our second main point is to emphasize that Article XXXIV builds its unique bias into the very structure of the political system, into the very core of government itself. I stress that point, although it's obvious, for this reason: it is quite clear that in working out substantive policies lines must be drawn by governments and sometimes those lines are very difficult ones, as in Dandridge and Williams.

It's also clear that substantive policies when developed by government sometimes operate more harshly against one class than against another. An example is the currently much-publicized litigation, though not in this Court, attacking zoning laws on the ground that they fence the poor out of the communities.

The point I'm trying to make is that we are not asking the Court to render a decision that has any impact upon those kinds of persons. Here the bias is in the way decisions are reached by the political community and it seems to us that that not only narrows the issue but that it makes the discrimination a great deal more wrong. It's a discrimination like discrimination in voting or in apportionment or even in the way one stands before the courts.

Q Is there any evidence in this case that this was racially motivated?

A I don't think one can say that there is any proof that the thinking of those who voted to put this into the constitution was -- that there was any proof that it was racially motivated, but we do know that in its operations since it bears upon the poor it bears more harshly upon minorities than it does on any other group. That's particularly true in the area of housing. I do intend to develop that point a little bit before the two arguments are over.

But, I think that this being a discrimination

b uilt into the political system that the case comes within what we said in Hunter and Erickson. The state may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than others of comparable size.

The third main point I would wish to emphasize is that on the face of this statute it singles out for separate classification, the poor, or in the words of the statute: "Persons of low income." And persons of low income are defined as persons or families who lack the amount of income which is necessary to enable them to live in decent, safe and sanitary dwellings without overcrowding.

Again, I think the explicit singling out of persons of low income narrows the issue that is here. It narrows it in several senses. In the first place there could be no doubt about the group against whom the discrimination runs.

Second, this is not in any sense a shifting group. The poor are identifiable and unfortunately, too constant, too coherent a group in a sense. It's not like Williams and Rhodes, where arguably the group came together for one purpose and then broke up later; or like Westbrook and Mihaley, the California case dealing with the two-thirds majority required for a bond issue, where one could say that the group was

temporary.

Here it is a continuing group, a group who, our experience tells us, are particularly subject to prejudice, invidious discriminations in the area of housing.

This brings the case, we think, within the principles that this Court has often noted. For example, in McDonald against Board of Election Commission. The Court observed that the discrimination against the poor was enough to render a classification highly suspect and thereby demand a more exacting judicial scrutiny.

And, in Mr. Justice Harlan's dissenting opinion in Griffin and Illinois he noted: "The states of course are prohibited by the Equal Protection Clause from discriminating between rich and poor as such, in the formulating and application of their laws." And this statute, we submit, does precisely that.

In other words, to summarize what I have said thus far: the combination of an explicit separate classification of the poor, with disadvantage in the very processes by which governmental decisions are reached, and unexplained by the consistent application of any neutral or general principle. We think if it is not enough to condemn the statute out of hand, it is certainly enough to put upon the state a very heavy burden of justification.

And I turn now, therefore, to the justifications

which I understand to have been offered, and they fall into three groups.

The first group might be said to be political; that is it has to do with the organization of government. And it said first that the interest in popular self-rule or popular sovereignty explains the line which California has drawn here. But, the difficulty is that while there is, of course, an interest in popular-type government, that interest does not explain the line that California has drawn, the discrimination it has made. There are other items that do not require this automatic referendum, in which there is exactly the same interest in popular self-government and indeed, in this respect the case is no different from Hunter and Erickson.

It said that Article XXXIV is a result of a hole that developed in Article IV, Section 1 of the California constitution. But, if Article XXXIV was a reaction, it was an overreaction, and it's the "over" part of it, if I may put it colloquially, that we say discriminates and of which we complain.

Q Mr. Cox, I don't recall whether yesterday you treated the question, the problem of the community's right to pass on what amounts to a discrimination in taxing of these projects; that is this project will not pay its fair share of tax in the minds and eyes of the small homeowner. Now, isn't that an important interest, to deserve protection, the

protection of a referendum?

A There is such an interest and these -- there will be less contribution by the government because it's limited to ten percent of the shelter rents on these projects, than there might be collected if the full value of the project was taxed as if it was privatly owned.

But, there are many instances, Mr. Chief Justice, in California where projects are undertaken; some by the government, some by charities and other private institutions, where landed buildings equally are taken off the tax rolls, and they are not subject to the referendum.

Q But those are quite different categories. A Federal Government building obviously --

A I wasn't thinking of a government building; I was thinking of a school or an airport or a university, medical complex, parks, superhighways, all kinds of things that are taken off of the tax rolls, just like this.

Q Aren't they distinguishable in that they serve everyone?

A Well, I think that to a degree, and of course this is what the Court has said in upholding public housing, that public housing serves everyone.

I would submit that this case in this respect, is very like Shapiro and Thompson; that there is an interest that the people have in asserting fiscal control. But that that

interest does not justify discriminating on invidious grounds, against a particular class. There it was a different class than here, but Mr.Justice Brennan's opinion was very explicit. It may legitimately attempt to limit its expenditures, or I would say: to take things off the tax rolls, whether for public assistance, public education or any other programs. But, the state may not accomplish such a purpose by invidious distinctions between classes of its citizens.

And I think to say while we are going to be concerned about public expenditures and handle these differently where the benefit the poor, but we are not going to concern them where the primary benefit is those who use an airpott, those who use a superhighway, those who want to go to school or those who want a hospital, is an invidious discrimination.

Q I suppose it would follow from your thesis that a state could not submit to popular referendum the question of welfare programs and welfare recipients? By definition they are only for the poor.

A Well, I would say if the only thing submitted to popular referendum on a continuing basis and it was a form of public assistance, that that would be subject to an argument very similar to ours here; yes. But again, I think it is singling out a particular class and saying: "It is your claims," if I may use the word in the loose sense, against government --"you don't stand the way anyone else does." You

don't stand the way merchants do when they want improved streets; you don't stand the way the public does when it wants superhighways or parents do when they want schools; you have to get over the additional higher hurdle. And it does seem to me that that's just wrong. It puts a brand on the poor that is just as offensive as the brand of race in other cases.

Now, there is one other set of justifications offered and those have been labeled "sociological and environmental." Mr. Atkinson yesterday raised the specter of large block public housing that goes in in places like St. Louis. We had one, unhappily, in Cambridge. That just -- if that is the rationale, then Article XXXIV is both too broad and too narrow. It's too broad because public housing is not confined tothat kind of project. It involves small housing units very similar to those built by private ownership. Indeed, there is no better illustration than the one in this record that was voted down by referendum because the proposal was to build not more than 1,000 dwelling units; not more than four such dwelling units situated in any one structure and I just finished reading this point.

Not more than one structure containing any such dwelling unit shall be situated on any one lot -- this is record 29 -- and such dwelling units shall be dispersed among various sections of the city so that not more than 24 such dwelling units -- that would be not more than -- six structures

at the most, you see -- shall be situated within a radium of 1500 feet from any other such dwelling unit.

So that what is put to referendum here is a far broader class of things -- is too broad and that kind of thing as to which the rationality is supposed to apply. Similarly, not everything to which the rationale might apply is put to referendum.

But, I say, Mr. Chief Justice, with the form of referendum that I just referred to, suggests the answer to the question you raised yesterday about how would you put the question affirmatively to the voters, because it does describe in sufficient terms the kind of project that might be put to them to require embarking on the project.

Q May I ask you just one question: I didn't quite understand your answer to the Chief Justice. Suppose California were to submit to the people a referendum to vote on whether or not there would any longer be used in the state a system of public relief payable out of tax raised funds.

Did I understand you to say that would be unconstitutional?

A I think a continuing rule requiring that appropriations for public relief be submitted to referendum when nothing else is submitted to referendum, would be discrimination against the poor and a violation of the Equal Protection Clause; yes.

Q In other words, that takes away from the people the right to decide -- to determine their policies --

A If the people wish to determine their policies, even --

Q What's fair and right?

A I think if the people, as we do where I live, determine our policies in town meetings with everyone attending, I don't think this Court could say that that is unconstitutional, because we make all our appropriations that way.

Q Suppose they would abolish all relief in those town meetings?

A In the original constitution?

Q I'm talking about now.

A As a substantive policy under a statute that abolished all relief, I don't think we could -- we certainly wouldn't make the argument we do here. That would be a substantive decision; it would not be a discrimination built into the structure of government. Whether there are other arguments, I don't know, but it wouldn't be the argument we make here.

Q At the town meeting if the populace voted to abolish all relief, you wouldn't be here either?

A No; not on the grounds we are now. If I said anything contrary to that I made a slip of the tongue.

Q In answer to Justice Black's question.

A Well, then I misunderstood, and your answer, Mr. Justice Brennan, is quite right.

Q Well, then I'm confused a little bit, Mr. Cox. Hasn't the State of California had, in effect, a town meeting and made a constitutional amendment that all low-cost housing, which is a form of welfare, must be subjected to --

A Well, I'm trying to distinguish -- perhaps I have become confused -- I'm trying to distinguish between a decision of substantive policy there should be no housing or there should be no relief, which seems to me to be one question. And a decision which builds a disadvantage into the way substantive policies are made, which I say under Hunter and Erickson, is like weighting votes or denying the vote to a particular class.

And I think this is of the utmost importance, because saying to a class of people that they don't -- and particularly to a class of people subject to invidious discrimination, if they don't stand like other people the decisions affecting them ought to be made by the same processes as the decisions affecting other people, is particularly offensive to our system of -- constitutional system of government.

Q Do you distinguish in this respect between constitutional limitations and legislative actions which would eliminate some type of welfare program or subsidy for housing?

A Well, I don't think if California were to repeal its statute providing, accepting public housing under the United States Housing Act, I think we would have an altogether different case. Because again it would not be a discrimination built into the way decisions are reached.

Q But it's impact would be entirely the same; wouldn't it?

A Yes; yes. That's true, but of course in other classes when it comes to discrimination in voting, when it comes to malapportionment, other things of that kind, we don't say that the consequences might end up the same way. Indeed, to take a silly example that occurred to me on the way up here: we don't say when a man complains that he's been put on trial without counsel: "Well, you might be a whole lot better than a lawyers," I've heard it put. It's the fact of the discrimination, the additional hurdle or obstacle and the singling out way for an oppressive brand that offends me that I think makes the issues.

Q I didn't think counsel cases were based on discrimination; I thought they were based on the constitutional provisions.

A Well, my analogy doesn't help on the discrimination; it was meant to go only to the point that to argue that it might end up the same way, isn't an answer to an

Justice Black.

Q Mr. Cox, I take it that Hunter and your argument would depend upon there being a constitutional difference between subjecting all legislation to a referendum by petition. And keep singling out some particular subject matter for automatic referendum?

A That's right; they didn't. And the cases are exactly the same in that respect; yes.

Q And I take it that if you in your town meeting where you live, suddenly decided that public housing matters would have to be passed in two counties instead of one you would have the same argument?

A Precisely; precisely. Very, very similar, indeed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cox.

Mr. Atkinson. You have about 10 or 11 minutes left.

REBUTTAL ARGUMENT BY DONALD C. ATKINSON, ESQ.

ON BEHALF OF APPELLANTS

MR. ATKINSON: Thank you, Mr. Chief Justice.

Mr. Chief Justice, and may it please the Court:

I think Mr. Cox's argument here has revealed a number of things. I believe really what he's saying is that California would have to submit everything to a prior automatic referendum for them to be able to employ a prior automatic referendum anywhere. And I don't believe that there are any

cases that he can cite that would indicate that that's the rule at the present time. And I don't think that was the rule in Hunter, Mr. Justice White.

Hunter was dealing with a situation where there was no referendum -- pardon me -- where there was a referendum right. And there was another referendum right built on top of it and the only possible reason for that as the Court indicated, was to discriminate. There you have racial classification also; the court so states.

Q Yes, but the discrimination amounted to subjecting one type of subject matter to an automatic referendum, whereas the general referendum required a petition. Here in California you have a general referendum law by petition?

A That's correct.

Q Except that this administration that was held was not subject to that; right?

A That's right.

Q And so California, in filling the void, said: "Well, we won't subject this administrative action until referendum by petition, like all other subject matters are subject to, but we will subject it to an automatic referendum; right?

A I would disagree to this extent --

Q Well, isn't that true?

A No; it is not true; there are other areas

in California where prior automatic referendum --

Q Oh, I know, but your general referendum laws is a petition referendum?

A Yes, for state and local bodies; yes.

Q Yes, yes; and here you subjected the administrative action to an automatic referendum. That's so far I'm right?

A Yes.

Q And there may be some other automatic referenda areas but -- and they might be as suspect as this one for all I know.

A I think that you are very well raising a specter which the Court then may be faced with if you decide here that XXXIV is unconstitutional I think you are going to have a rash of cases attempting to lay out the general principle that the state has to act totally across-the-board in any area in which it wishes to act.

Q Well, we already have one, so --

A In any event, it seems to me that what really is involved here is the voting rights of the majority. Does the majority of a state have the right in a purely internal matter, to make a decision as to whether or not they want to have something to which the people don't have a constitutional or fundamental right.

As far as I know, no case so far has decided that

low-rent housing is a constitutional or fundamental right in which the state cannot intrude in any way.

Mr. Cox cites the Shapiro case. Now, the Shapiro case is not relevant at all, it seems to me. The Shapiro case involves a fundamental right, or at least that's what Mr. Justice Harlan though the Court was doing; in fact, as I recall in his dissenting opinion in that case he indicated that what the Court there had done was to label the area of fundamental rights and then apply different equal protection tests on it.

And Mr. Stewart in a concurring opinion, indicated that that was not what the Court had done; they do not label this area fundamental rights. What, in fact, they had done was to say or treat an area of personal right that could not be abridged in any way. The right to travel, which has been established in a long line of cases, going way bac, before 1900.

It also calls into play the Interstate Commerce Clause, the right of a state to bridge that in any way. So, I don't think that acase is relevant at all, and I really think we would have to get back to this proposition: does a state have the right to deal with the poor one step at a time? Or does it have to deal with the poor totally across the board in every area?

What California has done here is attempt to deal

with one area relating to the poor. It treated it on a piece-meal basis; it attempted to act within the context of that one area. Now, as far as I know the cases on equal protection are uniform in stating that there is no requirement that everything be treated exactly the same as long as everything within the class is treated the same.

Now, here you have the class treated exactly the same; the record is unequivocal; there is a stipulation in the appendix which the Court can read that there are no other publicly owned low-cost housing projects in California except the type that appears within the confines of Article XXXIV.

So that what we're dealing with is a self-contained classification rationally founded because of the gap in the constitutional provisions relating to referenda in California.

Q Do you think the 14th Amendment reaches overbreadth? I mean underbreadth?

A I'm not sure I understand your question.

Q Well, I mean, don't you think the 14th Amendment requires a comparison of treatment not only within the class but between classes?

A Yes, I do. I wouldhhave very, very much difficulty in understanding what is the other class and perhaps Mr. Lasky will go into that a bit, but if we're indicating that the other class is all projects that are Federally funded, a whole range of different types of Federally-funded

projects, some of which there is no right of referendum; in fact, almost without exception there is one type or another, involving all different types of money; involving all different types of projects, then it seems to me that what the court would be doing by striking down XXXIV would be intruding its own judgment as far as reasonable minds could disagree as to whether or not these types of projects are different and to whether or not there are rational differences between them. If the Court says: "No; we as nine wise men here sit and we're saying that as a matter of law that they are all the same and have to be treated the same, then I believe that's what the thrust of the opinion would be.

Thank you.

Q Do you have in California under your constitutional laws, certain types of propositions that require more than a majority of votes in the legislature?

A We did have; I'm not quite certain about that, Justice Harlan, to be honest with you.

Q California, I suppose, could refuse to resort to the Federal Fair Housing Act?

A Well, the Federal Fair Housing Act itself indicates that local option is required and until the --

Q No compulsion, no Federal compulsion --

A No --

Q It has to accept aid? No Federal

compulsion that it has to accept aid?

A Certainly not, and that's why the Supremacy Clause, of course, is not relevant here at all. Infact, at one time the Federal statutes indicated that the people mentioned referendums specifically. Now, that is no longer in the law, but certainly there is in the law local option. The Federal scheme itself indicates that local option is not only important here, but a significant requirement.

Q I presume you still have counties?

A Yes, we have counties and we have cities and districts and so forth.

Q Under your statute that defines what class of people are entitled to have the benefits of your low-cost housing, are there any figures in the record as to what the range of income that encompasses among those who are eligible to receive low-cost housing?

A Not that I know, Mr. Justice Harlan. In fact, the --

Q It's not limited merely to indigents?

A No; it's not. The state local body, whoever is building the project makes that judgment and that can vary fromplace to place.

And one other point, if I could just mention this, Mr. Justice -- Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Yes; you have

considerable time left.

A All right.

One of the problems in this case which I haven't alluded to before is that this matter came up on summary judgment. There was no trial had; there was no evidence sent to us. There are some affidavits in the record which are found in the appendix. But the difficulty with the whole thing is that the appellants in this case did not have a sufficient amount of time to really adequately represent their clients.

The matter was filed; there had been particularly a great deal of work done on the pleadings, the research and so forth. So that this matter was filed in Santa Fe, all fully developed and fully handled, so that I would submit that there are a number of questions here.

As far as the Court knows now there is no racial discrimination on the face of the statute. There is certainly no racially-motivated -- well, I'll put it another way. There is nothing to indicate -- in fact Mr. Cox admitted that there is nothing oto indicate that XXXIV is racially motivated. So, certainly you can distinguish the Reitman case and Hunter on that ground. And that's a very significant ground, I feel.

Secondly, there is nothing here to indicate that this heretofore has been unconstitutionally applied or unfairly applied. As a matter of fact, the record indicates just the

opposite. A majority of the voting matters which have been presented to people in low-rent housing have been approved and as I pointed out to the Court yesterday, between 1968 and '79 the number of approvals has significantly increased.

Just because the people might possibly, in one area or another decide to turn down low-rent housing and that might or might not possibly affect racial minorities, there is no reason for this Court to strike down a constitutional provision of the state.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Atkinson. Number 154 is submitted.

(Whereupon, at 10:35 o'clock a.m. the hearing in the above-entitled matter was concluded)