In the

Supreme Court of the United States

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VIOLA N. RICHARDSON, as County Clerk, etc.,

Petitioner,

vs

ABRAN RAMIREZ, et al.,

Respondents.

No. 72-1589

Washington, D. C.
January 15, 1974

Pages 1 thru 48

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VIOLA N. RICHARDSON, as County Clerk, etc., Petitioner,	:	
v.	:	No. 72-1589
ABRAN RAMIREZ, et al., Respondents.	:	

Washington, D. C.,

Tuesday, January 15, 1974.

The above-entitled matter came on for argument at 10:30 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DUNCAN M. JAMES, ESQ., District Attorney of the County of Mendocino, P. O. Box 185, Ukiah, California 95482; for the Petitioner.

GEORGE J. ROTH, ESQ., Deputy Attorney General of the State of California, 555 Capitol Mall, Sacramento, California 95814; as Amicus Curiae supporting Petitioner.

APPEARANCES [Cont'd]:

MARTIN R. GLICK, ESQ., California Rural Legal Assistance, 1212 Market Street, San Francisco, California 94102; for the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1589, Richardson against Ramirez and others.

Mr. James, you may proceed whenever you're ready.

ORAL ARGUMENT OF DUNCAN M. JAMES, ESQ.,

ON BEHALF OF THE PETITIONER

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

First I'd like to begin by correcting two citations that appear in Petitioner's Reply brief that was filed on January 8th.

The first correction is on page 4, footnote No. 3, the citation of United States vs. Reese. The Lawyers Edition citation is used there as 28, the correct citation should be --

QUESTION: Let us have that page again, would you?

MR. JAMES: Page 4 --

QUESTION: Is that in your brief?

MR. JAMES: Of Petitioner's Reply brief.

QUESTION: Oh, I beg your pardon. Thank you.

MR. JAMES: It's said to be 28 Lawyers Edition, and it's actually Volume 23.

And on the next page, page 5, in the parentheses it says James v. Bowman, 190 U.S. 124; the correct citation is 190 U.S. 127.

Also I'd like to point out to the Court that in Mendocino County we have somewhat of an inadequate law library, and we only have Lawyers Edition, and on page 4, the citation on page 4, United States vs. Reese is referred to as being a note, and apparently this is an editor's note regarding the right of women to vote.

However, the opinion as quoted in the footnote on page 5 is a portion of the opinion of the Court.

What I'd like to do first, I think, is point out to the Court how a voter registers, at least in Mendocino County, California, being a small rural county in the northwestern part of the State.

Initially, the person desiring to register makes contact with the County Clerk or Deputy County Clerk and completes a form. That form appears in the Appendix to the Petitioner's brief.

One of the questions in the form is: Have you ever been convicted of a felony?

If that box is checked yes, the person is given another form, a portion of which is filled out by the Deputy Registrar, and a portion of which is filled out by the person who has been convicted of that felony.

The person who is convicted of the felony puts down the date of the conviction, the jurisdiction where the conviction took place, and the offense for which he or she

was convicted.

That form is then forwarded to my office, for my review. Many times I have found in the past that the individual completing the form will not give us adequate information, and so we've asked for all of that detail so I can contact, through the mail, the jurisdiction in which the person was convicted, to get a certified copy of the conviction.

After receiving the certified copy of the conviction, I then proceeded to make a determination under the California case, Otsuka vs. Hite, which is 64 Cal. 2d 594, to determine whether or not that crime is infamous, as well as taking into consideration Article II, Section 3 of the California Constitution, and Article XX, Section 11 of the California Constitution.

Under those, the case of Otsuka and those two constitutional sections, the basic crimes that we look to were murder, manslaughter, mayhem, rape, arson, robbery, burglary, larceny, embezzlement or misappropriation of public money, perjury, forgery, malfeasance in office, and bribery.

Prior to the Otsuka decision in California, any case which, or any conviction which resulted in State prison sentence was considered infamous. Otsuka modified that position.

Then, sometimes, on occasion we find that the person

has been convicted of an infamous crime, and I complete the form, indicate whether or not the person is disqualified, and I sign the form. And that form is sent back to the individual who registered.

Now, in one instance in my county, after having sent that form back, an action was brought against our County Clerk, Viola Richardson, by a fellow who happened to be named David Richardson, and it was no relation to her.

But also in that case I was sued, and so the case in the county was Richardson vs. James and Richardson, rather than Richardson vs. Richardson, because they didn't want it to look like a divorce action, and I was the cause of the divorce.

In that case, what transpired was the plaintiff proceeded under Section 350 of the California Elections Code, requesting the court make a determination as to whether or not his conviction was infamous.

QUESTION: Of what had he been convicted?

MR. JAMES: He was convicted of burglary in the second degree, and he had served a sentence in the State prison. He had spent about eighteen months in the State prison, I believe; that conviction carries an indeterminate term of six months to ten years in California.

And the court in that case decided that under the Otsuka decision that that crime was in fact infamous, and that

Mr. Richardson was in fact disqualified from the right to vote.

That case is presently pending in the California Court of Appeals. By a stipulation of counsel, it is awaiting the final determination in this case.

QUESTION: How many of these applications, how many of these people -- how many applications to register, in which it turns out that somebody has been convicted of a felony, do you get in Mendocino County in the course of a year?

MR. JAMES: Well, in Mendocino County, first let me say we have approximately 25,000 registered voters; the population of the county is around 60,000.

QUESTION: It's a relatively small county in California.

MR. JAMES: That's right.

There are about thirty counties, though, that are -- or 25 counties that are smaller than us.

QUESTION: Smaller, unh-hunh.

MR. JAMES: In the course of a year, I would imagine I receive no more than a dozen or eighteen.

QUESTION: Well, would the constitutional question be different if there was only one?

MR. JAMES: No, I don't believe so. In fact --

QUESTION: Do you have any idea how many we're talking about in the entire State annually?

MR. JAMES: That attempt to register?

QUESTION: Yes.

MR. JAMES: No, I could not tell you.

QUESTION: Well, that doesn't include all those who would register if they had known about it.

MR. JAMES: No, that's --

QUESTION: It's well known that you won't register them if they have been guilty of a crime, --

MR. JAMES: I agree --

QUESTION: -- so why bother to register.

MR. JAMES: I agree and --

QUESTION: So there's no accurate figures, I don't think, are there?

MR. JAMES: No, not -- I don't believe there are on a Statewide basis. I can only speak as to my particular county, and since we have --

QUESTION: Well, do you know how many convicted people are in your county?

MR. JAMES: Excuse me, I didn't hear the question.

QUESTION: Do you know how many people in your county are convicted and therefore ineligible to vote?

MR. JAMES: On a per-year basis?

QUESTION: Do you know how many?

MR. JAMES: We convict approximately 250 people --

QUESTION: Well, how many people move in there from

some place else?

MR. JAMES: I can't tell you, our county is full of beautiful redwoods, in which a great many people live a very simple life, and these people, we don't know who's involved or anything.

I will tell you, in Richardson, as a result of the Richardson vs. James case, as a result of the Ramirez vs. Brown case, David Richardson was able to register to vote, since there was no stay order and we had no way of knowing whether or not this Court would grant certiorari; the California decision is in effect.

QUESTION: Was that objection to register in Mendocino County?

MR. JAMES: Yes, it was.

QUESTION: Now, of these twelve to eighteen that you say you estimate you get a year, how many of these convicted felons would you estimate that you'd say fall under the exceptions in Otsuka, or at least the definition in Otsuka, that you respond by permitting them to register and vote? Half of them, or a third of them, or none of them, or what?

Otsuka, as I understand it, made the statutory definition much more flexible.

MR. JAMES: Yes, it did.

QUESTION: And gave the people in your position

considerable discretion.

MR. JAMES: Yes, it did.

QUESTION: Which is exercised differently by different district attorneys in the various counties, we're told in these briefs.

MR. JAMES: Well, let me point this out --

QUESTION: Well, first, could you try to answer my question, and then point out whatever you like.

MR. JAMES: Okay.

I would say of the amount, the people that apply to vote, maybe 25 percent fall into the crimes that aren't set forth in Otsuka, the constitutional provisions. Most of them seem to be burglary, or forgery.

In fact, the last one I had was just before I came back here, and it was a forgery conviction.

QUESTION: And either forgery or burglary, in your view, makes the man ineligible to register and vote?

MR. JAMES: Ah, --

QUESTION: In your county.

MR. JAMES: Yes, Mr. Justice. It's because of Article XX, Section 11 of the California constitution, that specifically names forgery, and it's because of footnote 10 in Otsuka that specifically names burglary.

QUESTION: Unh-hunh.

MR. JAMES: As being infamous crimes.

I'm simply looking to what Otsuka did say --

QUESTION: Right.

MR. JAMES: -- and what the Constitution did say prior to Ramirez vs. Brown decision.

QUESTION: So far as you know is a convicted -- is any -- a person convicted of either forgery or burglary permitted to vote in any county in the State?

MR. JAMES: It's my understanding from the brief filed by Respondents that, yes, some counties do permit it. What happened is Otsuka created a confusion.

QUESTION: Unh-hunh.

MR. JAMES: Throughout the county.

QUESTION: Right.

MR. JAMES: I would imagine some of the county councils did not look to, or any further than Otsuka for an interpretation. Like I did do approximately five years ago when I first became involved in this as District Attorney.

QUESTION: Otsuka was decided in what year?

MR. JAMES: I believe 1966.

QUESTION: Right. How many counties are there in your State?

MR. JAMES: There's 58 counties, sir.

Now, as I pointed out, Mr. David Richardson proceeded under Section 350 of the Elections Code, to make a determination.

In the briefs for Petitioner -- excuse me, for Respondents, they argue that there are innumerable, where there have been no violations since around 1906 or 1920, I believe.

I'd like to point out to the Court that at least accepting what Mr. Justice Mosk of the California Supreme Court said as being true, that there are over 250 violations of the Elections Code, I would submit that most of the violations in the Elections Code constitute misdemeanors and, in California of course, would not disenfranchise a person.

They point out, or Respondent points out in its brief the possibility of voter fraud is almost non-existent any more. However, in the less metropolitan counties of California, we don't have such sophisticated equipment as voting machines, where you go in and apparently you pull levers and then you pull the arm at one end, just like working a -- I hate to use the analogy, but like a one-arm bandit in Nevada.

We don't have that. We have a little marker, that is a little X, we go in and we press different little spots with our own hand.

In footnote 26 Respondents argue that even though California says that any person who is an elector under Section275 of the Government Code, says any elector in the

State of California is entitled to hold office; they say that it's fine because under our present system of politics throughout the nation, as well as throughout California, a person who has a felony conviction would be easily found.

And I'd like to set that aside for a minute, because in my county, disregarding nine justice court judges and two Superior Court judges, there are eleven elected officials.

At the last election, only two of those eleven had any opposition to office. The two that did were the sheriff and the treasurer; none of the others did. And there was no way for anybody --

QUESTION: Would this be relevant to what goes on in Los Angeles County, for example? I'm not sure I get your point.

MR. JAMES: Well, throughout California, many elected officials occasionally do have opposition, and there is basically no way to find out if a man has been convicted of a felony, because in California, under Section 1203.4, I believe, or 1203.3 of the California Penal Code, a record could be expunged, and a person is no longer checking a box that says "yes, I've been convicted of a felony"; they can now say "no".

And so they talk about it's easy to discover, and we submit that it's not as easy as they would represent it to be.

MR. CHIEF JUSTICE BURGER: Mr. Roth.

ORAL ARGUMENT OF GEORGE J. ROTH, ESQ.,

AS AMICUS CURIAE SUPPORTING PETITIONER

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

I come with what I think is a difficult case, in this respect: sociologically everything is against our position.

In California, because of the Otsuka decision, it's unquestionably true that in 58 counties you had 58 different interpretations of what was an infamous crime.

Historically, there's no question that a compelling State interest to protect the ballot box is no longer necessary, at least -- and I agree with what the Respondents have set forth.

But the one thing that I come with is the Constitution of the United States, and that's Section 2 of the Fourteenth Amendment.

Now, I think that that is really the issue here, as to whether or not this Court is going to take an area of the Constitution -- it's implied, but it's so clearly implied that it's almost direct -- and say that, this Court will say that sociologically it's good, and consequently we should say that Section 2 of the Fourteenth Amendment does not apply to this particular problem.

Now, as I see it, in reading the many pages of the globe, right in the beginning, everybody who ever mentioned the problem of "except for rebellion or other crimes" did so in a matter-of-fact way, because that was the accepted tenor of the time. But it was written into the Fourteenth Amendment. Unquestionably the Fourteenth Amendment was to prevent all discrimination because of race. I don't think there's any question of that.

But I think, as you read this, the people who worked on the Fourteenth Amendment wanted to be sure that the States still would have a little bit of leverage where criminals are concerned.

Now, in California we don't say -- they used to say in our Constitution, "let the criminal be disenfranchised forever", and our Constitution is now changed.

Justice Mosk in his opinion in the case below said that he didn't think that was too important.

But I think it is, because our Constitution now says that the Legislature shall pass laws which will disenfranchise people for certain purposes. And among those purposes named are perjury, bribery, malfeasance in office, embezzlement of public funds; and then they use language which I don't understand any more: infamous crime and high crime.

If this Court rules in our favor, in California we will be back in the position, it's true, that we were at

the time of the Otsuka case, right after it or right before -- well, right after it. We'll be in a confusion.

But --

QUESTION: Well, isn't that a confusion that the State of California can resolve for itself?

MR. ROTH: That's exactly our position, Your Honor. We believe that the State Legislature can resolve that position by defining these crimes now, that the --

QUESTION: What about the State Supreme Court?

MR. ROTH: Well, the State Supreme Court has said that the words "infamous crime" and "high crime" are practically undefinable for all purposes, as I see it, in Otsuka.

Then they went on to say that our Constitution was unconstitutional under the Fourteenth Amendment.

QUESTION: Well, under your State Constitution, if the Legislature were to define "infamous crime", would that create a problem for your California courts?

MR. ROTH: Well, --

QUESTION: Whether that definition really --

MR. ROTH: -- it might, Your Honor. Our court is a very activist court, I like to think they always are about two weeks ahead of this Court. They create problems.

Definition-wise, I think if the definitions were specific, why, if this Court upholds the constitutionality

of the principle, I don't know what our court would do. I hope they would rule that if the vote is changed, the Constitution, or if the Legislature acted under the Constitution, I hope they'd rule that they were correct.

QUESTION: Was there any doubt about the power and authority of the Supreme Court of California to define in its own way what "infamous crime" means?

MR. ROTH: No, but they haven't done it, Your Honor. And --

QUESTION: But is there any doubt about their power, that's all.

MR. ROTH: Oh, no. I believe they have the power to do it, Your Honor. I think that's clear.

QUESTION: Now, --

MR. ROTH: Yes, sir.

QUESTION: -- Mr. Roth, on looking at Exhibit 1 of the -- what is it -- to the Petition for Writ of Mandate, which appears on page 28 of the Appendix, which is a report of the Secretary of State of California regarding the right to vote of ex-felons in California, dated May 30, 1972, which indicates, as you know better than I, that there has been an extraordinarily uneven application --

MR. ROTH: No question --

QUESTION: -- in fact, in the various counties of the State. For example, the crime of murder disqualifies a

person from voting in at least four counties, but does not disqualify in at least six counties. Sale of drugs disqualifies an applicant in at least five counties, but not in at least nine counties. And so on. You're familiar, I know, with that report.

MR. ROTH: Yes, Your Honor.

QUESTION: That is part of the record in this case.

MR. ROTH: Yes.

QUESTION: So even if you're wholly correct in your understanding of the second part of the Fourteenth Amendment, and that a State could constitutionally bar all convicted felons from registering and voting, does that really answer the equal protection problem inherent in the Secretary of State's report?

MR. ROTH: No, it doesn't.

QUESTION: That California in fact has no -- that it allows -- this petitioner or this respondent was convicted of what? Burglary, was it?

MR. ROTH: Well, there's three; one is burglary, one is forgery, and one man was convicted of possession of heroin.

QUESTION: Right. And all three of those respondents would have been allowed to vote in some of the counties in California.

MR. ROTH: Correct.

QUESTION: And they have not been allowed to vote in your county. Now, regardless of the power of California to bar every convicted felon from voting, if even-handedly applied, doesn't this basic equal protection problem still exist, even if you're quite right in your interpretation of the second part of the Fourteenth Amendment?

MR. ROTH: Well, I believe, Your Honor, that we've spoken to that in the final part of our amicus brief, and that is the idea that although the application itself, as it exists at the present time, may be wrong, or it was wrong --

QUESTION: Well, it may be unconstitutional.

MR. ROTH: It may be unconstitutional. I think there's a difference between the application and what the California Supreme Court or the California Legislature may do to make it constitutional. And I think that --

QUESTION: But they haven't done it so far.

MR. ROTH: No, they have not.

QUESTION: And I mean, you don't quarrel with the facts, with the accuracy of the Secretary of State's report, do you?

MR. ROTH: No. Absolutely not.

That's why I said this was a tough case, as I started.

QUESTION: Precisely.

MR. ROTH: But I think that the accuracy is there,

I think most of the historical facts, there's no problem with, but it's a problem, as I see it, of letting our Legislature have a chance to do something, or let our State Supreme Court do something.

QUESTION: Well, they had their opportunity here, didn't they?

MR. ROTH: They did, but they didn't take it.

QUESTION: And it is true, is it not, that these respondents, all of them, would have been allowed to vote in some counties in California.

MR. ROTH: I agree heartily, Your Honor.

QUESTION: Unh-hunh.

QUESTION: Well, if there were affirmance here on that narrow ground, would that preclude your Legislature, then, stepping in and trying to work out some uniform definition?

MR. ROTH: Not if the ground was that there was no definition. No, Your Honor.

QUESTION: But that would still leave unresolved your basic power.

QUESTION: Right.

QUESTION: Unless it was just assumed that you had it. Unless we said you had it.

MR. ROTH: Well, that's right, if you say we have it. I believe we have it.

QUESTION: If we said nothing, you'd still be going by the Supreme Court of California's decision.

MR. ROTH: That's right, yes.

QUESTION: In Otsuka.

MR. ROTH: That's correct. Unless we amended our Constitution, that's correct.

QUESTION: But you can't get around the Supreme Court of California's decision by amending the California Constitution, I would think, because they said it was a federal constitutional violation.

MR. ROTH: If they said it was, and then we amend it, and the case comes up again, we might possibly get a decision a different way, Your Honor.

I'm hopeful, I don't --

QUESTION: You'd rather have it now, though, I think.

MR. ROTH: I'd rather have it now, Your Honor.

QUESTION: What do you want other than the advisory opinion from this Court? What do you want other than that?

MR. ROTH: Not very much, Your Honor. And I know the Court doesn't --

QUESTION: I mean, you're just unhappy with what your Supreme Court did to you.

MR. ROTH: That's true.

QUESTION: And does that make that our problem?

MR. ROTH: Well, only to the extent that nationally this Court should rule on whether or not Section 2 of the Fourteenth Amendment is separate and apart from Section 1, or is controlled by Section 1.

QUESTION: Well, that could come up in a clearcut case from one of the other 49 States that haven't got it all fouled up.

MR. ROTH: It could, very well, Your Honor.

QUESTION: Why should we take up this fouled-up one, where you admit that it depends on which county you're in?

MR. ROTH: That's right.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Glick.

ORAL ARGUMENT OF MARTIN R. GLICK, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GLICK: Thank you.

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

We represent Abran Ramirez, Larry Gill and Albert Sang Lee, and other persons in California who have been convicted of a crime, who have served their term in prison, who have successfully completed their parole, and, in many cases, many years ago successfully completed that parole.

Now that they've been reintegrated into society, they seek their right to participate on an equal basis in the election process in California.

As has been evident here, California has completely fenced them out of the election process, but there has not been suggested any reason why there's any State interest for having completely fenced them out of the process.

We were aware --

QUESTION: Well, when you say that California has completely fenced them out, you mean these particular three people?

MR. GLICK: And the persons they represent, Your Honor.

QUESTION: Yes.

MR. GLICK: Persons who have not been permitted to vote on the basis of their prior conviction, in spite of their having served their term and been released from parole.

Your Honors, we were aware that there would be an attempt --

QUESTION: In that respect, are you concerned only with persons such as you have just described, you're not concerned, then, with the convicted felon whose term has not yet expired?

MR. GLICK: That's correct, Your Honor. We were specific -- the decision was specifically limited only to those persons who were completely released from not only custody but parole as well.

We were aware, Your Honors, that there would be a suggestion that perhaps this disability should continue by virtue of the fact of its long existence. And so, although the State, we believe, did not justify the burden that's upon it to come forward and give reasons for the exclusion, but we went further and introduced evidence and data to, we think, clearly and affirmatively show that this restriction, which was adopted in California's frontier days, no longer makes any sense.

As is discussed in our briefs and as has been almost conceded here, while there might have been a purpose for this provision in 1849, when it was put into the California Constitution, when there was no registration, when ballots were not uniform and they could be obtained from Party Headquarters, when the ballot box itself was, as it was in 1850, simply a box that was formerly some other sort of container. And in San Francisco and Los Angeles that was the situation and in Vallejo, as is reported, the ballot box itself was an old cracker box which had a hole in the back of it, discovered years later, through which ballots could be slipped.

And so the framers of the California Constitution had good reason to be concerned about the integrity of the election process, and I think that concern was reflected by this exclusion in the Constitution.

But the process in California today could not be more different. Sixty-five percent of our counties do vote by machine, but that's not the end of the matter. In the other thirty-five counties, of course there's registration, there are uniform ballots with special watermarks. The precincts are limited to a small number of voters per precinct. The precinct officials are residents of the precinct. They know the voters who are there.

And the California Supreme Court, in reviewing this scheme, concluded that to practice election violation, election fraud, election problems in California today would require the coordinated skills of a vast squadron of computer technicians.

In other words, they found it was virtually impossible.

And the statistics in California, as unmistakably set out in that opinion, are that there has not been a reported case of vote-buying or vote-selling in California since 1908. The last reported violation in Los Angeles County, which has a third, approximately a third of California's voters, the last complaint of any voter problem was in 1926. And the head of the Bureau of Criminal Statistics in California, who's been in that position for eighteen years, stated that not one single election offense has been reported to him.

QUESTION: Could that be because of this provision being on the books?

MR. GLICK: That's why we were quite careful, Your Honor, to point out not only that there haven't been any -- although we would suggest there would be some first offenders, surely -- but that given the way the system operates, it's virtually impossible that there would be any.

In other words, not only hasn't there been in reality a danger, but the system is such that the danger is simply not present of fraud occurring. So we want to take care of both of those, both of those parts of it.

This change in the election process was paralleled by a change in California's Penal Code.

In 1850, when our Constitution was adopted in California, there were only eight misdemeanor offenses in the statute dealing with election violations.

Now, at the time this case was decided, there were over a hundred and fifty such statutes on the books, including 76 felonies, covering such things as fraudulent registration, voting twice, bribery, intimidation, and the like. So that the California Supreme Court, contrasting that situation with the situation which this Court, in Dunn vs. Blumstein, found adequate to deter against elections fraud, is a reasonable means to deal with that problem, found that, if anything, our situation was even more of a protection.

Further, as is noted in the record, at the time that I'm standing before you this keeps changing, but at the time I'm standing before you now 26 of the States either never disenfranchised at all, or automatically restore the right to vote upon the completion of sentence and either a parole or probationary type period after the sentence.

The District of Columbia does the same, according to an Act of Congress, which I believe was passed in 1971. And of course some California counties, under Otsuka, did not disqualify practically anybody -- had not disqualified anybody.

And these States, the District of Columbia, and these counties have not reported any difficulty with their election process, any parade of horribles or, in fact, any problem at all in having reenfranchise.

Your Honor, I wanted, before passing onto some of the other parts of the case, I wanted to emphasize that there is perhaps present here an unstated State interest, if you will, an implication that perhaps if someone is convicted of a crime, that this evidences anti-social behavior, or it evidences some inference of moral unfitness, or something of the kind, and therefore this person should not vote.

It's mentioned, I think, almost explicitly in some of the lower court decisions.

But we want to point out, No. 1, that in this record

there's no evidence whatever, a scintilla of evidence, in fact, that such an inference can properly be drawn as to any of these persons, let alone as to all of them.

In this country, and I think the strength of the country is that we have never limited the franchise to persons not as to whom an inference is required but to whom, openly and avowedly, claim that we should have an entirely different system of government, or no system whatsoever. These persons aren't barred from the franchise; these persons, in fact, are permitted to organize into political parties and to run candidates for office, let alone vote.

And this Court, I think, in reviewing the voting cases -- well, first, in the Bachstrom? case, this Court refused to allow an inference to be drawn from a prior conviction such that a different process for commitment for mental illness would be permitted. In the Carrington and the Cipriano and the other bond cases, in Evans, where a claim was made that persons lived at the National Institutes of Health, or because persons were in the military they might vote in a certain manner, there might be bloc voting and harmful voting, this Court said that: we don't think such inferences are proper.

Secondly, the sheer overbreadth of drawing such broad inferences as to the entire class would not be permitted, especially where we're talking about voting.

And finally, again I'd want to emphasize, Your Honor, that we're talking about persons who have completed their term in prison, whatever inferences might have been drawn during the period the State is rehabilitating its dealing with them, they've completed, successfuly completed and been released from their parole. They were reintegrated into society. They are active citizens. And as to them, continuing to draw this inference, years later -- which we don't believe would be proper even in the first instance -- we think would not be justified.

In fact, to the contrary, the real State interest that's present in this case is the interest of rehabilitation.

The entire penal system is aimed at returning persons to a productive role in society, and yet at the time they're returned, at the time when the State has passed this judgment as to release from parole, they're screened out of the most important right, or one of the most important rights, the fundamental right to vote; fundamental, because -- not only in itself but because it leads to all other rights.

QUESTION: Well, as I hear you, you're arguing the wisdom of the policy now, aren't you?

MR. GLICK: No, Your Honor, what -- as I understand it, when the right to vote or the right to participate in the election process on an equal basis is denied to citizens, the State is to come forward and demonstrate what interest

it has that it's furthering by screening these people out of the voting process.

Now, they suggested perhaps integrity of the election process in terms of fraud. The Attorney General has just stated that that problem doesn't exist in California, and the California court found so.

I wanted, before passing on, to deal with this sort of implication that perhaps there was some other State interest, called moral unfitness, or something of that description; and to point out that this Court has not permitted those sorts of inferences. And simply to dispel that notion, and to comment that -- perhaps you're right, Your Honor -- but that there is this other State interest that is present, it's one of rehabilitation, which the President's Commissions, the various President's Commissions, the ABA and the other organizations have urged.

Let me then take -- consider Section 2, because I think what we have in this case is the virtual concession that there's no State interest to deny the right; but, in argument, that Section 2 of the Fourteenth Amendment nevertheless renders Section 1 inoperable.

And the words that are relied on in this case are the words "participation in rebellion, or other crime", which are found in Section 2.

Now, I've of course reviewed the legislative

history and I've read the many articles that have been written about the legislative history of the, I believe, 39th Congress which adopted this.

There's clearly, in reading there, no one view as to -- or no one purpose of all of the persons who were working on putting that amendment together.

But we would suggest that a reading of the legislative history, first, would lead to the conclusion that "participation in rebellion, or other crime" is really meant to deal with the problem of the rebellion and not the problem of former conviction.

QUESTION: That it's limited to the participation in the War Between the States?

MR. GLICK: Yes, Your Honor.

QUESTION: And that's all?

MR. GLICK: And that's all.

QUESTION: And only crimes related to participation in the War?

MR. GLICK: Exactly, yes.

We would conclude that for two or three reasons:

First, that if one looks at the purpose of Section 2, it was a penalty provision to deal with the increase in representation that would occur, because of the emancipation of the slaves, and them being counted as a full vote instead of three-fifths of a vote as was required under Article I,

Section 2. And so the penalty provision was needed to deal with that situation.

But border States, as is indicated in our history, were concerned that they had just disfranchised large numbers of rebels, so that if the penalty provision were simply put in the way it was originally phrased, they might lose representation in the House of Representatives on account of having disfranchised these persons who participated in the rebellion.

Thus, this language relating to the rebellion came in, and we suggest that that was the purpose. Looking at Section 3, again, which deals with the right of former office holders who participated in the rebellion, to once again become office holders, indicates once again that the rebellion was of the primary concern of the drafters.

The phrase "other crime" itself is quite broad. It would clearly within its scope encompass felonies, misdemeanors, and other crimes which no State at that time was disqualifying persons for.

The term "infamous crime" was certainly well known to the framers, and might have been used.

QUESTION: Does the history show that that was the initial phraseology: except for participation in rebellion, comma, or other crime, comma?

MR. GLICK: No, Your Honor, I think the first draft,

there was no reference to "other crime" at all, and that that was added later, and there's some dispute about when the comma exactly was added. But I don't -- as I read the history, it simply does not aid us very much in terms of discussion.

QUESTION: Did this section have a legislative precedent?

Was there a statute which read this way?

MR. GLICK: There's no section, that I'm aware of, Your Honor, that read precisely in this fashion. The State statutes either referred to "infamous crime" or --

QUESTION: No, I meant a federal statute.

MR. GLICK: No, Your Honor, I'm not aware of any. Not aware of any.

We would not rest there, of course, Your Honor. We believe that that is the -- in looking at the history and what was intended, that that's the appropriate reading of the meaning of the phrase "other crime"; but even if -- even if the phrase was meant to refer not just to other crimes but to felony convictions or infamous crimes rather than "other crimes", again one looks at the purpose of the section.

The emancipated slaves -- well, it's clear from the reading of the history that they intended to put the Southern States to a choice: either emancipate -- either enfranchise the persons who have been emancipated, or suffer

a reduction in your congressional representation by not being allowed to count them at all.

That this was the purpose and that in devising a formula to accomplish this penalty, they simply placed in the clause those restrictions, some of the restrictions that were generally in effect at that time.

There's not any evidence in the debate that there was any discussion whatsoever of what would or would not be appropriate voter qualifications, why these were put in and some others were omitted, or any discussion that would lead to the conclusion that this was an attempt, or there was any intent here to make decisions about these matters.

But what I think does follow logically from the history is that they wanted to accomplish the penalty, and so they needed to state, in general, broad terms, to protect the status quo, if you will, in the North especially, so there'd be no change between those States, to simply state those -- that statement of those qualifications, and then accomplish the penalty purpose.

QUESTION: Mr. Glick, --

MR. GLICK: Yes, Your Honor. Yes, Mr. Justice Rehnquist.

QUESTION: Does your reading of history indicate whether, at the time the Fourteenth Amendment was adopted, some or most of the States had laws on this subject?

MR. GLICK: Yes, Your Honor. I believe that it would be fair to say that a majority of the States, perhaps even close to three-quarters of the States, did have on their, in their statutes voter qualifications that would restrict the franchise from those who had been convicted of infamous crimes, which was the general phraseology at the time.

Some States -- some State, however, did not. Of course, there were many other voter qualifications that existed, such as property qualifications, which I think were even more uniform in their appearance in State Constitutions.

And again I think just from the simple listing here, which is not an all-inclusive listing, and with no discussion of the, of what should and should not appear here, that it would be -- one just could not conclude that that was the intent.

And this Court, I believe quite properly, in prior cases has refused to read Section 2, which was intended as a penalty, as entirely preempting Section 1, as was the argument before this Court for some time.

QUESTION: Did I understand you to say, to suggest earlier, Mr. Glick, that the language of Section 3, "shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof" casts a gloss on Section 2?

MR. GLICK: Yes, I think it does, Your Honor. I

think that it indicates what they were concerned about.

QUESTION: Well, you mean they were not concerned about the limitation "or other crime"?

MR. GLICK: Well, Your Honor, of course it is a matter of interpretation, and there's no clear answer, and I wouldn't suggest that there is. All I'm suggesting is that by virtue of the broad phraseology "other crime", by virtue of --

QUESTION: Well, don't you think the phrase "or other crime" is quite clear?

MR. GLICK: I don't think so, Your Honor, because I think that --

QUESTION: What do you think it means, --

MR. GLICK: I think it means --

QUESTION: -- or where does the confusion lie?

MR. GLICK: I'm sorry. I think in this context it means other crimes related to the rebellion. I think they would have chosen the term "infamous crime" if that's what they meant. I don't think that that was -- there's nothing to indicate that they discussed it, and I don't think that's what they meant, although --

QUESTION: You don't think it was a recognition that three-fourths of the States already barred voting for persons convicted of "other crimes" than rebellion?

MR. GLICK: Your Honor, I want to be quite fair.

It certainly could be. I don't think that it was, and I don't think that's the best reading of the language; but it's clearly open to either interpretation.

It seems to me that the phraseology chosen, that the history indicates the concern for the rebellion, not any other concern, that the more consistent reading of it with that history is that it did not intend to embrace it.

But again, if I might emphasize to the Court, I believe that either reading which the Court would give to it would not lead to the conclusion which Petitioners urge, that the penalty provision here, which was the clear intent of Section 2 should be read as modifying or nullifying, as has been argued previously and rejected in this Court, the scope of Section 1.

QUESTION: In other words, that's an argument that whatever may be its breadth, it relates only to the diminution of representation.

MR. GLICK: We believe so, Your Honor. Yes.

QUESTION: And that leaving standing independently Section 1, on the equal protection clause.

MR. GLICK: Correct.

QUESTION: Unh-hunh.

QUESTION: I suppose your argument is helped some by the fact that the expression chosen is "participation" in crime rather than "conviction" of crime, which, I take it,

the disqualifying statutes in the States then is now spoken in terms of conviction rather than just participation.

MR. GLICK: That's correct, Your Honor. Yes.

QUESTION: Mr. Glick, this isn't your case, but it might be a case next term if you should prevail here, what about the convicted felon who's still in your State penitentiary, do you think he should have a right to vote on your general philosophy?

MR. GLICK: Well, Your Honor, we think there are significant differences in the person who is in prison. And I think it would depend on how the facts in that case, in that particular State, were set out.

But let me point out some of those differences. Of course the person in prison is under 24-hour confinement, and under a fairly regimented control of the State. Not only of the State, but I think studies have indicated that other inmates, there's a society of other inmates and certain influences that might be exerted in the prison context, which may or may not present dangers to the ballot box.

There's of course problems of access to information, to cast an intelligent ballot, which is clearly a State interest.

There might be, again taking the particular State and the particular facts, difficulty in conducting the

election in prison, or dealing with the election in prison. And of course the State has wide latitude in its effort toward rehabilitation and the conduct of its programs behind prison walls.

And so we would suggest there are many, many differences in that case, which again one would need to look at the facts in the particular State.

QUESTION: Apparently the State, in this very case, asked your Supreme Court to reaffirm, I gather, long-standing cases, holding that you could disenfranchise incarcerated felons.

MR. GLICK: That's correct, Your Honor. And there was no dispute about that below at all.

QUESTION: Did footnote 18 leave that open, or simply decline the invitation of the State authorities?

MR. GLICK: I think, in fairness, Your Honor, it was pointed out over and over again at the beginning, and the State came forward to emphasize the fact that this case simply doesn't involve the issue.

All of these petitioners are persons who have successfully completed their parole. Petitioner Ramirez is --

QUESTION: Well, I gather that's the ground on which the Supreme Court declined to --

MR. GLICK: That's right. That's right.

And in the case of Petitioner Ramirez, he successfully

completed his parole twenty years ago. He had only been incarcerated for three months, to begin with.

Finally, Your Honor, this Court has already commented, through its questions, I believe, on the second, what we believe to be independent ground on which this Court could and should sustain the decision of the California Supreme Court; and that is the fact that where one resided was determinative of whether one voted.

QUESTION: Well, is that really so, as this case gets to us can we possibly avoid -- as I read what your Supreme Court said in its conclusion: 'We conclude that it applies to all ex-felons whose terms of incarceration and parole have expired, provisions of Article II and Article XX, Section 11 of the California Constitution, denying the right of suffrage to persons convicted of the crime, together with the several sections of the Elections Code, violate the equal protection clause.

Now, can we possibly sustain this on the disparity in definition of "infamous crime" among the counties in face of that holding?

MR. GLICK: I perhaps should have been more clear, Your Honor. I think that, for California's purposes, that question needs to be reached.

What I was asserting is that even if -- because obviously we don't believe the Court should -- even if the

Court should decide adversely to us on the issue of former felons who have been released from prison and parole voting, then, nevertheless, the California scheme is unconstitutional.

QUESTION: You mean at least facially, in other words, --

MR. GLICK: Precisely.

QUESTION: -- the California Constitution provisions do not violate equal protection.

MR. GLICK: Precisely.

QUESTION: Even if we agree with that, we then have to go on and reach --

QUESTION: Well, we wouldn't, because the California court didn't deal with that question, and normally we don't review -- normally we let the State court pass on the constitutional issue in the first instance. We would remand, leaving that open, I suppose.

MR. GLICK: Your Honor, I would suggest that since the question is a federal question, since it was fully argued before the court below, it's a question to be decided solely --

QUESTION: But it wasn't decided by them.

MR. GLICK: But it rises solely -- they never decided, but --

QUESTION: It wasn't decided by them.

MR. GLICK: They did decide, Your Honor, respectfully,

under the Fourteenth Amendment that there was a violation --

QUESTION: I know, but they didn't decide this question.

MR. GLICK: That's -- they certainly did not base their decision on --

QUESTION: And under the statute we normally only review questions that have been, constitutional questions that have been decided by a State court.

MR. GLICK: I recognize, Your Honor, that this Court clearly has wide latitude as to how it would deal with the problem. I would only suggest that it is a federal question that was fully presented to the court and could be resolved by this Court.

I believe that the Court, from my understanding, is fully acquainted with the facts in regard to that argument, and so I thank you very much, and respectfully pray that -- oh, I'm sorry, Your Honor.

QUESTION: Perhaps we should carry this on in private, but we --

[Laughter.]

-- review judgments here, not opinions. And the judgment of the California Supreme Court was that this statute is invalid under the equal protection clause. And we could affirm that on the basis that it's invalid under the equal protection clause because of its wholly uneven and

rather capricious enforcement in the differing counties of the State of California, without either agreeing or disagreeing with the opinion of the Supreme Court of California.

And I'm sure you're going to say, Yes, of course we could do that, because we could do whatever five votes might find.

[Laughter.]

MR. GLICK: Your Honor, I would only point out that [sic] the three named Petitioners in this case were, are now registered, they have voted, they obviously had the concern to vote, they would be, I need not point out, certainly disappointed if it came back to the California Supreme Court for another reading; and we feel that there was a denial of equal protection here to them under the California scheme, that there was a denial in that the State -- there's simply no State interest that's been advanced, to suggest that this disqualification in California today makes any sense.

And so we would urge the affirmance of that decision.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

Let's see, you have a few minutes left, Mr. James, yes.

REBUTTAL ARGUMENT OF DUNCAN M. JAMES, ESQ.,

ON BEHALF OF THE PETITIONER.

MR. JAMES: One of the questions that was asked a few minutes ago was whether or not there was a statute, a federal statute that went along with the Fourteenth Amendment.

What I'd like to bring to the attention of the Court is 2 U.S. Code, Section 6, which is a restatement of the Fourteenth Amendment, Section 2, which provides for the disenfranchise -- well, it says you can abridge -- you cannot abridge except for a crime or rebellion.

And I don't have the legislative history to say when that section was passed. I would assume that at the time the U.S. Code section was passed that they were not under the pressures that Mr. Glick refers to.

I'd also like to comment to the Court that in reviewing the history of the Constitution, it was interesting to read some of the comments that occurred during the arguments or hearings on the Fifteenth Amendment.

During the course of the hearings on the Fifteenth Amendment, there were quite a number of proposed amendments, which included exactly the same language that we're talking about here, except for "crime or other rebellion". And I would submit that, as I believe it was, Willard Warner, a Representative from the State of Alabama, indicated that it

would seem that the States should have the right under that small limited classification to except from those persons the right to vote.

We submit that the equal protection clause does not apply, because this constitutes an exception to the equal protection clause. Section 2 clearly says "except for rebellion, or other crime" when they're talking about the reduction in representation.

Now, the equal protection clause seems to act as a protection to avoid what the last part of Section 2 says, that, if you deny the right to vote, then we're going to reduce your representation.

And what the equal protection clause is saying, at least I believe it says, is: no, we don't want to do that, the State is entitled to a full representation; so if you disenfranchise a male inhabitant, thirty years old, we're going to say that because of the equal protection clause and because of the Twenty-sixth Amendment, this is a denial of equal protection.

So I submit that, although in California, maybe as applied there, it's an unequal application, it is not a denial of the State's right to disenfranchise.

We've heard about all these people who go through the -- or who don't want to vote, or who are afraid to go register to vote because of the Otsuka decision, but yet, as

Respondents indicate, something in the neighborhood of 34,000-plus persons were released from State prison from 1968 to 1971, there is a procedure, under the California Penal Code, to get a certificate of rehabilitation, which gets back for you, when you go through the administrative judicial process and up to the Governor, to get the right to vote back, except for a person convicted twice in separate violations --

QUESTION: Is that free?

MR. JAMES: Excuse me?

QUESTION: Is that free?

MR. JAMES: Yes, it is. And in fact it provides for appointment of counsel --

QUESTION: Can a layman do it?

MR. JAMES: What?

QUESTION: Can a layman do it?

MR. JAMES: I would say that if you cannot afford counsel, one of the sections in 4852.-something, which is cited in our brief, provides for appointment of a Public Defender to give it to you, to go through the court proceedings.

QUESTION: You mean with all the work the Public Defender has, he goes through this, too?

MR. JAMES: Well, he hasn't -- he's only done it once in my county in five years; there's only been one

application for a certificate of rehabilitation.

QUESTION: Which means what?

MR. JAMES: Which is --

QUESTION: Is that good or bad?

MR. JAMES: Well, I think it's very poor.

Because the procedure is there, yet nobody wants to go through it.

Respondents here never went through it. There's no indication they applied and were rejected by the Governor. In the same period of time, '68 through '71, only 450 filed for a certificate of rehabilitation. They're told on release from prison that they are entitled to go through that procedure.

And out of those 450, --

QUESTION: So, because they don't go through it, they can't vote.

MR. JAMES: That's right.

QUESTION: So you've got an additional one now.

QUESTION: Well, your point is, they might well have prevailed --

MR. JAMES: That's correct.

QUESTION: -- in their applications for certificates of rehabilitation, and that that would be a good argument if --

QUESTION: Well, do they know --

QUESTION: -- if the Supreme Court of California had required them to exhaust that remedy before coming to the court; but the Supreme Court of California didn't, and that's a matter of State law, that's nothing for us to be concerned with, is it?

MR. JAMES: That's correct. It was just the -- the procedure is there and available for those who are disenfranchised to go through the certificate of rehabilitation. And almost 63 percent of those that did apply were granted.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:24 o'clock, a.m., the case in the above-entitled matter was submitted.]

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