Supreme Court of the United States

October Term, 1974

No. 73-1046

CASPAR W. WEINBERGER, Secretary of the Department of Health, Education and Welfare of the United States,

Appellant,

v.

SANTIAGO DIAZ, JOSE A. CLARA and VICTOR CARLOS ESPINOSA, et al.,

Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR AMICI CURIAE

MIGRATION AND REFUGEE SERVICES, U.S. CATHOLIC CONFERENCE, INC.; LUTHERAN IMMIGRATION AND REFUGEE SERVICE, LUTHERAN COUNCIL IN THE U.S.A.; AMERICAN COUNCIL FOR NATIONALITIES SERVICE; CHURCH WORLD SERVICE, INC.; UNITED HIAS SERVICE, INC.; INTERNATIONAL RESCUE COMMITTEE, INC.; TOLSTOY FOUNDATION, INC.; AMERICAN FUND FOR CZECHOSLOVAK REFUGEES, INC.; TRAVELERS AID-INTERNATIONAL SOCIAL SERVICE OF AMERICA, INC.; AMERICAN CIVIC ASSOCIATION, INC., BINGHAMTON, N.Y.; INTERNATIONAL INSTITUTES OF JERSEY CITY, N.J., MINNESOTA, OAKLAND, CAL., and BUFFALO, N.Y.; TRAVELERS AID SOCIETY OF METROPOLITAN CHICAGO, incorporating IMMIGRANT'S SERVICE LEAGUE; THE AMERICAN COUNCIL FOR JUDAISM PHILANTHROPIC FUND, INC.

Amici Curiae.

EDITH LOWENSTEIN
Counsel for Amici Curiae

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Amici Curiae

The above-named agencies, as *amici curiae*, file this brief pursuant to the Court's Rule 42 and upon the written consent of the parties. The agencies, representing religious, nationality, nonsectarian, welfare, and immigration interests in the United States, have for years participated in relief and rehabilitation programs in foreign countries and have also participated in immigration and resettlement services to refugees in the United States. Some of the organizations have affiliates on the local and area levels throughout the United States, others work through parishes and churches. These organizations consider it their responsibility to eliminate all forms of discrimination, including discrimination against non-citizens residing in the United States and they are devoted to achieving the practical discharge of that responsibility in every appropriate manner. This brief is filed to urge the Court to affirm the decision of the Court below (361 F. Supp. 1, 1973).

Most of the organizations that join as *amici* in this brief had also appeared as *amici* in *Sailer et al. v. Leger et al.*, the companion case to *Graham v. Richardson*, 403 U.S. 365 (1971). They have joined again because they believe that the same principle involved in the *Graham* and *Sailer* cases is even more compelling in the *Diaz et al.* case now before this Court

Graham and *Sailer* raised the issue whether residence or citizenship should determine the right to welfare or whether denial of that right on the ground of alienage is in violation of the Equal Protection clause of the Fourteenth Amendment. This Court ruled that the rights involved there were abrogated by the States in violation of the United States Constitution.

In *Weinberger v. Diaz* the rights of the appellees are abrogated by Federal Statute.

As stated by the Court below:

> Although we cannot say that Congress may never be held to a lesser constitutional standard than the states, *but see Morris v. Richardson, supra* at 499, neither can

> we accept the view that Congress may never be held to the same standard. For example, to differentiate between citizens and aliens in regulating entry into the United States may be a presumptively proper exercise of Congressional power, whereas a like discrimination by legislatures regulating entry into the states would not: different fourteenth and fifth amendment constitutional tests might therefore be appropriate. *Cf. Graham v. Richardson, supra; Shapiro v. Thompson, supra.*

The rights at issue before this Court are of significance equal to those in the *Graham* case. The right to medical attention is basic and while only comparatively recently the United States has enacted legislation which guarantees health care to most of its population, it is believed that the denial of health care on the ground of alienage would be an unconstitutional deprivation of a vital right under the due process clause of the Fifth Amendment of the Constitution.

FACTS

The essential facts are not at issue. Two of the appellees, Diaz and Clara, are Cuban refugees, paroled into the United States by the Attorney General, pursuant to 8 USC 1182(d)(5), (Sec.212(d)(5) I&NA). They have reached the age of 65, but have not yet become permanent residents within the meaning of the Immigration and Nationality Act, nor have they fulfilled the five year residence requirement.

Appellee Espinosa is a lawful permanent resident, has reached the age of 65, but has not yet resided in the United States for five years or more. All appellees, in the opinion of the Health, Education and Welfare Administration, do not qualify for the supplemental medical insurance program under Section 1836 (2)(A)(ii) of the Social Security Act of 1935, as amended (42 U.S.C. 1395o(2)(B).

ARGUMENT

I

The statutory five year durational residence requirement for resident aliens to be eligible for supplementary medical insurance benefits for the aged (42 USC §1395o) is a denial of equal protection of the laws in violation of the Fifth Amendment.

The Court below correctly held that the five year durational residence requirement imposed on resident aliens in order to be eligible for the supplementary medical insurance benefits for the aged constitutes an invidious discrimination against resident aliens who lack five years residence and is a denial of equal protection of the law required in statutes enacted by Congress by the command of the due process clause of the Fifth Amendment. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Schneider v. Rusk,* 377 U.S. 163, 168 (1964); *Bolling v. Sharpe,* 347 U.S. 497 (1954) at 499.

In *Shapiro v. Thompson supra* this Court concluded its opinion stating succinctly:

> "For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid – the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed." (at 642)

In respect of discrimination against resident aliens by a durational residence requirement in the granting of welfare, medical or similar public benefits the decision of the Court below was virtually required by this Court's decision in *Graham v. Richardson,* 403 U.S. 365, holding unconstitutional state statutes conditioning welfare benefits upon citizenship or in

the case of resident aliens upon durational residence requirements. This Court pointed out that its prior decisions "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" and concluded that the desire to preserve limited welfare benefits for citizens and long time resident aliens was an inadequate justification for the discrimination and

> "that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violates the Equal Protection Clause."

We submit that the *Graham* decision combined with the reasoning of this Court in *Shapiro v. Thompson, supra* leads to the conclusion that this Court has in effect adjudicated the problems raised in the present case. Moreover the decisions in *Sugarman v. Dougall,* 413 U.S. 634 (1973) and in *Re Griffiths,* 413 U.S. 717 (1973) have consistently reaffirmed this Court's position and are controlling here.

The Government mistakenly argues that the concededly broad constitutional power of Congress to control admission and deportation of aliens, *Harisiades v. Shaughnessy,* 342 U.S. 580, *Galvan v. Press,* 347 U.S. 522 (1954), and the consequences of deportation, *Flemming v. Nestor,* 363 U.S. 603 (1960), in some unexplained way enlarges the power of Congress to impose discriminatory controls on resident aliens as members of the general population in respects wholly unrelated to exclusion or deportation from the country but rather related to public service programs offered to segments of the population generally – in this case supplemental medical benefits to residents over 65 years of age. The Government argues that the equal protection requirement of the due process clause of the Fifth Amendment does not give alien residents as members of our community the protection which

this Court has found is granted them by the Fourteenth amendment from state action.[1]

This sweeping generalization must be rejected on the basis of past precedent which supports the following reasoning:

1. The special and extensive power of Congress, as the legislative branch of the sovereign nation, to control admission and deportation of aliens cannot be carried over into a power to discriminate against resident aliens by withholding benefits offered to the rest of the population and unrelated to the power of exclusion and deportation.

2. Accepting the Government's position would shatter a fundamental concept of our society that apart from being subject to deportation for specific conduct provided by statute, alien residents are members of the social community living under the protection of the United States Constitution and the Bill of Rights. It would lead to what we believe is an absurd suggestion, namely, that Congress, if it felt like it, could pass legislation requiring that all aliens, regardless of any accrued rights and legal status leave the country.[2] Such reasoning would throw in doubt

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1. We do not question the authority of Congress to regulate the *admission* of aliens by creating different categories that are subject to different "conditions of admission." *Vide* the numerous classes of "non-immigrants" found in §101(a)(15) INA most of which are permitted to remain in the U.S. for definite and usually short periods of time only and who prior to visa issuance must establish to the satisfaction of the consular officer that they have a residence in a foreign country which they have no intention of abandoning.

We do not believe that the Federal statutes enumerated in the Government's brief, filed in *Hampton v. Wong*, No. 73-1596, establish that aliens have a different status from citizens except in matters of national security and foreign policy. It is in fact possible that several of the statutes enumerated, if they were attacked, might be found unconstitutional by this Court. See: *Cabrera v. Butz*, D.P.R., Civ. No. 326.

2. Appellee's brief in *Hampton v. Mow Sun Wong*, No. 73-1596 at p. 13. We believe that the issues raised before this Court in that case which is footnoted in appellee's brief in the instant case (p. 15, fn. 13), are not relevant to the present case. The issue of right to Federal employment, at least with regard to policy-making positions, can be differentiated and should not be confused with the issues in *Diaz*, regardless of the outcome of the *Hampton* case.

the authority of a long line of decisions of this Court beginning at least with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) through *Truax v. Raich*, 239 U.S. 33, and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 to *Graham v. Richardson supra* and *Sugarman v. Dougall*, 413 U.S. 634, establishing that resident aliens have been accepted as members of the community, protected by all constitutional provisions against discrimination or denial of due process of law in dealing with all branches of the Government, federal, state, local and legislative, executive and judicial. Acceptance of the Government's position would cast doubt where none should exist on the limitations on Congress in respect of a constitutional mandate of equal protection and due process of law.

3. It is desirable for the social stability of our nation which is proud of its heritage derived from immigrants and the children of immigrants, that resident aliens should be accepted completely and not set apart as a group, subject to different and discriminatory treatment and separate laws.

Naturalization has always been reserved for those who, of their free will and desire, wish to establish absolute allegiance to the United States, foregoing any ties to the past. This should not be changed in effect to the requirement that the acquisition of citizenship is the only protection against discriminatory treatment by government agencies. Such a solution would downgrade the naturalization process which is and always has been a meaningful experience to the naturalized citizen.

For the reasons stated and on the authority of this Court's decisions particularly in *Shapiro v. Thompson* and *Graham v. Richardson*, *supra*, the opinion of the Court below should be confirmed in all respects.

II

If severable, the statutory requirement that alien residents be "lawfully admitted for permanent residence" is discriminatory and unconstitutional.

The Government argues that the statutory requirement that alien residents be "lawfully admitted for permanent residence" to be eligible for the benefits of 42 U.S.C. (Supp. II) 1395o(2)(B), is a valid discrimination against the many alien residents of the United States that are technically not admitted for permanent residence, but are in fact permanent residents, known to the authorities.

The Court below recognizes the existence of this class by certifying as a subclass the appellee Cubans who were paroled into the United States under §212(d)(5) INA (8 U.S.C. 1182 (d)(5)) and who are required under the law (The Act of November 2, 1966 (P.L.89-732, 80 Stat. 1161)) to wait two years in the United States before they become eligible to apply for permanent residence. It should be noted that once their application is granted there is an additional waiting period of approximately two years before they can achieve permanent residence in a legal sense because of the back-up of Western Hemisphere applicants who need a number under the numerical ceiling placed upon Western Hemisphere immigration.

The Court below recognized the right of Appellee *Espinosa* to sue as a class and certified the class as consisting of:

> "All immigrants residing in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. sec.1395o *et seq.* (1970), because they are not aliens, lawfully admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by 42 U.S.C. sec.1395o(a)(A)(ii) (1970)."

The Court below certified a subclass as follows:

> "All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. sec. 1395j *et seq.* (1970), solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. sec. 1395o (2)(A)(ii)(1970)."

The Court below correctly held that the requirement of admission for permanent residence is not separable from the requirement of five years permanent residence and that therefore both of these requirements for alien residents to participate in the supplemental medical program are unconstitutional. The statute should be administered as if it read that those eligible for the program are residents of the United States without reference to the following qualifications that they be either citizens or aliens admitted for permanent residence with five years permanent residence.

If, however, this Court determines that the admission requirement is separate and severable and requires a separate determination of constitutionality then it is submitted that the admission requirement also is a denial of equal protection of the laws because it discriminates arbitrarily against several classes of permanent resident aliens not technically admitted for permanent residence under the Immigration and Nationality Act.

Prominent in that group are the appellees *Diaz* and *Clara*, Cuban parolees who have been recognized as a "subclass" eligible to sue. They are not unique. In 1956 more than 30,000 Hungarians were admitted under the same procedure. In 1958 they were permitted to apply for permanent residence under special legislation. (The Act of July 25, 1958, P.L. 85-559; 8 U.S.C. 1182, note.) Other persons who are permanent residents and integrated members of the American

community are refugees that were granted stays of deportation under §243(h) INA (8 U.S.C. 1253(h)), persons eligible to adjust status under the proviso of §203(a)(7) INA (8 U.S.C. 1153(a)(7)), long term residents who are eligible for suspension of deportation, §244 INA (8 U.S.C. 1254) and some lawful long term residents with working permits who are technically nonimmigrants but have been lawfully in the United States for many years.

Such persons are treated as permanent residents in all respects, including the obligation to pay income and social security taxes as well as military obligations. It is arbitrary for Congress to make them eligible for some social security benefits and deny them the supplemental medical assistance here involved. The question arises whether it is actually necessary to use the definition of "lawful permanent resident" as it is defined by the Immigration and Nationality Act. Among the many government agencies which do not always do that is the Appellant himself.

In 1972 the Social Security Act was amended (P.L. 92-603) and for the first time it was required that applicants for social security cards had to reveal their immigration or citizenship status to avoid issuance of social security cards to persons not permitted to work under the I&NA. The 1970 amendment, among other things, provided that the Secretary of Health, Education and Welfare should issue social security cards.

> "(I) to aliens at the time of their lawful admission to the United States either for permanent residence or under other authority of law, permitting them to engage in employment in the United States and to other aliens at such time as their status is so changed as to make it lawful for them to engage in such employment." (sec. 205(b)(i) as amended by P.L. 92-603, 92nd Congress, H.R. 1, October 30, 1972).

In implementing the provision of the statute the Social Security Administration quickly found that in addition to lawful permanent residents within the limited technical definition are aliens who, for various reasons, either of law or of administrative interpretation of law, are permitted to remain in the United States for an indefinite period of time and are authorized to work, but who do not fall within the definition of "immigrant" as defined by the Court in its footnote 8.

On October 30, 1972 an amendment to sec.205(c)(2) of the Social Security Act provided that:

> "(B)(i) In carrying out his duties under subparagraph (A), the Secretary shall take affirmative measures to assure that social security account numbers will, to the maximum extent practicable, be assigned to all members of approximate groups or categories of individuals by assigning such numbers (or ascertaining that such numbers have already been assigned):
>
> "(I) to aliens at the time of their lawful admission to the United States either for permanent residence or under other authority of law permitting them to engage in employment in the United States and to other aliens at such time as their status is so changed as to make it lawful for them to engage in such employment;"

The Social Security Act recognizes that not only permanent resident aliens, but other aliens may be entitled to work, and enter the Social Security system including the obligation to pay Social Security contributions which are substantial. It is only reasonable that persons who are obligated to pay into it, should also benefit from the Social Security laws to the fullest extent.

On March 19, 1974 the Social Security Administration issued regulations implementing the statute. The regulations (20 C.F.R. sec.105(d), as amended March 19, 1974; 39 *Fed.*

Reg. No. 54, pp. 10238-10242) require that aliens who apply for a Social Security number must submit to the Social Security office issuing the number an Alien Registration Receipt Card (Form I-151) or an Arrival-Departure Record (Form I-94), at which time the official in the Social Security office must determine whether the type of nonimmigrant characterized in Form I-94 is authorized to work.

In view of the fact that there are many categories of aliens authorized by law to work in addition to the permanent residents, and are obligated by law to pay social security, a proper determination as to which of these aliens should be given Social Security cards would burden clerks, handling the issuance of the cards with the need for expert knowledge of the Immigration and Nationality Act. Recognizing that fact and on the basis of the representations made in connection with a proposed rule making, the Administration inserted sec. 42.104a in the finalized regulations as follows:

> *Sec. 42.104a Presumption of authority of nonimmigrant alien to accept employment* – "The nonimmigrant visa classifications assigned by the Department of State shall be used to determine whether a nonimmigrant alien is authorized to engage in employment. (See 22 CFR 41.12 for these classifications.) Permission to engage in employment shall not be presumed in the cases of an alien who has not been issued a visa or whose visa shows any one of the following classification symbols: B-1, B-2, B-1 and B-2, C-1, C-2, C-3, F-2, H-4, and L-2. Holders of visas bearing other classifications will be presumed to have authorization to work."

Thus it may be seen that the same agency that is the appellant in this case, in connection with another one of its functions, found it impossible to use the definition of "immigrant" interchangeably with the technical definition of "permanent resident" as found in the Immigration and Nationality Act to define the group entitled to the use of Social Security cards.

The Court below recognizes this in its Footnote 18 pointing to a recent amendment of the Social Security Act which makes benefits available to an otherwise qualified individual who is

> "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law* (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act). 42 U.S.C. § 1382c (a)(1)(B) (Supp. II, 1973) (emphasis added).

We believe that the above definition of "lawful permanent resident" is in the spirit of the United States Constitution and the American history which has always been to welcome the newcomer with open arms, because this is a country of immigrants, many of whom arrived long before immigration restrictions existed and all of whom have been proud of their origins and sympathetic with those who came later because their parents were not as venturesome.

The Court below in its "Conclusion" expressed doubt as to the constitutionality of the permanent residence requirement but felt that it was not necessary to make a finding on it. We agree with the Court in that respect and also with its conclusion that

> "to the extent this nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens."

CONCLUSION

Whereby it is respectfully prayed that the decision of the Court below be affirmed.

Respectfully submitted,

Migration and Refugee Services, U.S. Catholic Conference, Inc.

Lutheran Immigration and Refugee Service, Lutheran Council in the U.S.A.

American Council for Nationalities Service

Church World Service, Inc.

United Hias Service, Inc.

International Rescue Committee, Inc.

Tolstoy Foundation, Inc.

American Fund for Czechoslovak Refugees, Inc.

Travelers Aid-International Social Service of America, Inc.

American Civic Association, Inc., Binghamton, N.Y.

International Institutes of Jersey City, N.J. Minnesota, Oakland, Cal., and Buffalo, N.Y.

Travelers Aid Society of Metropolitan Chicago, incorporating Immigrant's Service League

The American Council for Judaism Philanthropic Fund, Inc.

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