The Solicitor General

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NL/rem

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Reitman v. Mulkey

I recommend that we PARTICIPATE AMICUS CURIAE IN SUPPORT OF RESPONDENTS.

I

1. This may well be the most important civil rights case of the decade. The Court has granted certiorari to review the judgment of the California Supreme Court which struck down, as violative of the Fourteenth Amendment, a State constitutional provision, enacted by initiative, which prohibits the State from abridging, in any manner, the right of a private individual or corporation (and, in some circumstances, the right of the State) to discriminate in the sale, lease or rental of real property. The fact that the Court took the unusual step of granting certiorari when, consistently with its usual support for civil rights positions, it could easily have let the State court judgment stand, is a bad omen; it foreshadows a substantial possibility that those who espouse a narrow view of "state action" under the Fourteenth Amendment (see Bell v. Maryland, 378 U.S. 226, 318 (dissenting opinion)) may prevail. If they do, and the decision below is reversed, it will doubtless throttle the last hopes for fair-housing legislation in this country. If the 89th Congress was unwilling to act, it seems clear that neither the present Congress nor any foreseeable future one is likely to pass federal legislation in this area. And if the California constitutional provision ("Proposition 14") is sustained, it will become a model for similar initiative measures in States throughout the Union.

It seems painfully obvious that legislatures are usually more advanced on the subject of minority rights than the people they represent. The fact that California had passed a fair-housing statute ("the Rumford Act") before Proposition 14 was approved is

sufficient indication of that. So I would confidently predict that if the Supreme Court reverses this case and holds that a constitutional provision such as that enacted by California is permissible under the Fourteenth Amendment, it will not be long before similar provisions appear on ballots, and are adopted, wherever initiative is permitted. I dare say that even the State of New York, with its much ballyhooed record of liberalism -- indeed, even New York City itself -- will turn out a majority for such a constitutional provision. The recent demise of the Civilian Police Review Board in New York City -- notwithstanding its support by liberal legislators of every political persuasion -- is not uninstructive in this regard.

That is why this case appears to me of far more importance in its potential consequences than all the "sit-in" and "protest" cases rolled into one. The civil rights movement could have survived the jailing or fine of some of its protesters; maybe it would even have made its cause all the more poignant. It will be struck a devastating blow if the decision here sets off a wave of referenda aimed at enshrining in State constitutions the "home-is-the-castle" slogan. It is plainly our responsibility to prevent that result, if we can.

2. I think we can, but the most important first step is to jettison the opinion of the California Supreme Court. I have little doubt that its outrageous flim-flammery contributed substantially to the granting of certiorari. It waves a red flag in the faces of the dissenters in Bell (and some of those who joined Justice Brennan) to suggest -- as the opinion appears to do -- that the repeal of a prohibition upon racial discrimination is, in and of itself, impermissible State encouragement of racial discrimination. If Proposition 14 is vulnerable -- as I think it is -- it should be equally vulnerable whether or not the State had previously enacted fair-housing or civil rights legislation. It is, in other words, equally bad in California and Alabama, in New York and Mississippi. It is bad not because it repeals what the State had previously done but because it accomplishes an unconstitutional result. 1/

1/ The prior State statute does, however, add one thing in this case. It gives the respondents standing to challenge Proposition 14. See infra.

Nor, I think, would it be safe or advisable to rely on any application of the logic of State action as defined in Shelley v. Kraemer or even in Evans v. Newton. If we can pull this case out of the fire -- and I think we are sorely needed to do it -- we can do so only by offering the Court a reasonably narrow ground for affirmance which does not extend the "state action" principle beyond its present bounds.

3. Just to add one more prefatory word, I think it does not matter much what ground the Supreme Court ultimately uses to invalidate Proposition 14; the important thing, so far as aborting any nation-wide efforts towards this end, is to prevent Proposition 14 from being used as a model. Even if adept lawyers who read the opinion carefully are able to draft and propose a less vulnerable amendment in some other State, it will not have nearly the support (largely because of constitutional doubts) that a prototype provision -- with the seal of approval of the Supreme Court -- would have.

II

1. Now to the merits. Proposition 14 violates the Equal Protection Clause of the Fourteenth Amendment, I submit, because it sweeps too broadly; it disables State agencies and instrumentalities from carrying out the obligations which the Fourteenth Amendment imposes upon them.

2. Consider the most important clause of the constitutional provision:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

It is the "absolute discretion" of "any person" which Proposition 14 secures, and "person" is defined as follows:

> "Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

The remaining definition in Proposition 14 concerns "real property," and that is defined as follows:

> "Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

It is quite clear that Proposition 14, on its face, means that no State agency may take affirmative action to prevent racial discrimination in any of the following situations:

a. A building corporation constructs a large housing project with State-financed loans. It refuses to sell homes or lease apartments in the project to Negroes.

b. The city condemns its downtown area for a municipally planned urban redevelopment project. It spends State and city funds to beautify the area and sells tracts to private developers who refuse to permit Negroes to live in the apartment houses or homes they construct in the area.

c. The State or a city is declared a trustee of a large charitable low-income project, title to which remains in the hands of the donor. The donor imposes the condition that only white residents be permitted to live there.

d. The State leases a segment of a State park to a private developer who builds cabins which are rented on a yearly basis. The developer refuses to rent to Negroes.

e. The State has owned and operated a racially segregated low-income project. It leases the project to a private corporation on the condition that it continue to be used for low-income housing, and the private operator continues the racially discriminatory policy.

In illustrations (a), (b), (d) and (e), Proposition 14 would prevent State interference with the private "person's" discriminatory decision. In illustration (c), Proposition 14 would appear to apply because the discrimination, albeit by the State, does not affect the "sale, lease or rental of property owned by it" (emphasis added).

But it is clear that in each of these cases the discrimination would be held, in and of itself, to constitute "state action" in violation of the Fourteenth Amendment. With respect to illustration (a), see Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 929 (C.A. 4), certiorari denied, 376 U.S. 958; Eaton v. Grubbs, 329 F. 2d 710 (C.A. 4). For illustration (b), see Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M.D. Tenn.), affirmed, 336 F. 2d 630 (C.A. 6). Illustration (c), compare Pennsylvania v. Board of Trusts, 353 U.S. 230. Illustration (d), see Burton v. Wilmington Parking Authority, 365 U.S. 715. And for illustration (e), see Hampton v. City of Jacksonville, 304 F. 2d 320 (C.A. 5); Wimbish v. Pinellas County, 342 F. 2d 804 (C.A. 5); cf. Evans v. Newton, 382 U.S. 296. The five hypotheticals are by no means exhaustive. There are certainly many other conceivable factual settings in which the degree of State involvement in otherwise private housing discrimination is substantial enough to raise serious questions as to whether it has become "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299. Compare Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. 2d 541, certiorari denied, 339 U.S. 981; Barnes v. City of Gadsden, 174 F. Supp. 64, affirmed, 268 F. 2d 593 (C.A. 5), certiorari denied, 361 U.S. 915. What Proposition 14 does is to prevent California State agencies and instrumentalities from taking any action to insure that discrimination of this kind does not occur.

3. Assuming then that Proposition 14 laps over, by its own plain terms, into the area where racial discrimination is forbidden by the terms of the Fourteenth Amendment itself, does the prohibition in a State constitution against abridgment of such discrimination by the State's own subdivisions or agencies also violate the Fourteenth Amendment? I think it plainly does.

Consider, for example, the easiest case. Would it be constitutional for a California State court -- an obvious "subdivision or agency" of the State (see Shelley v. Kraemer, 334 U.S. 1, 20) -- to dismiss a suit brought by a Negro to enforce a clear Fourteenth Amendment right on the ground that the State is under no obligation to afford an affirmative remedy for violation of such a right? The fact that the Negro could go to a federal court for vindication of that right because Congress has conferred that jurisdiction on federal district courts does not, I submit, entitle the State court to withhold its relief if the Federal Constitution has been violated. Proposition 14, however, has precisely that effect with respect to each of the illustrations I have listed above; it disables the California courts from enforcing federal constitutional rights in the area of quasi-public housing discrimination. The right of the apartment-house owner to reject a tenant in his absolute discretion, even though the house was built with a State loan and is located in a municipally financed redevelopment area, is plainly "limited or abridged" when a State court directs him to accept a Negro applicant.

4. That is not all. Proposition 14 is unconstitutional even if its prohibitions are not read as extending to judicial relief because there can be no doubt that where State and private control are so "entwined" (Evans v. Newton, 382 U.S. 296, 299, 301) that they are subject to Fourteenth Amendment limitations, the State has an affirmative duty to see to it that the private authority does not conduct its business in violation of Fourteenth Amendment standards. The Court said as much in Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-725 (emphasis added):

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class

> citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. * * * By its inaction, the Authority, and through it the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. * * *

Indeed, the holding of the Court in Burton was that in the circumstances of that case, "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." 365 U.S. at 726. Can there be any real doubt after Burton that the State has a constitutional duty to do precisely that -- to incorporate "binding covenants [not to discriminate] * * * into the agreement itself." But that is exactly what Proposition 14 forbids, because a clause to that effect, inserted at the request of a State agency or under one of its regulations, would "deny, limit or abridge" the private right which Proposition 14 shields against any "direct or indirect" infringement. Consequently -- assuming, for a moment, that there were no federal civil rights act -- if facts identical to Burton arose in a State having a provision like Proposition 14 applicable to public accommodations, a municipal agency like the Wilmington Parking Authority be prohibited by the California constitutional provision from doing precisely what the Court in Burton held to be a responsibility which it could not "effectively abdicate" by "inaction." Or, to take a more realistic illustration, the California Housing Authority may not, under Proposition 14, include a nondiscrimination clause in leases or contracts with private developers who construct housing developments which are subject to the principles announced in

Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 929 (C.A. 4), certiorari denied, 376 U.S. 958, and Smith v. Holiday Inns of America, Inc., 336 F. 2d 630 (C.A. 6). That is, I submit, an unconstitutional disablement.

In brief, the above argument is that Proposition 14 is unconstitutional because it forbids State agencies from doing what they have a federal constitutional obligation to do. 2/ There is, in other words, no real difference, for federal constitutional purposes, between Proposition 14 and a hypothetical State constitutional provision which would forbid the State, or any subdivision or agency thereof, from supplying an attorney for any party in a lawsuit. Gideon v. Wainwright has held that the State has a duty, under the federal constitution, to supply a lawyer for an indigent defendant who has been charged with a felony. The above State constitutional provision would plainly fall as inconsistent with the affirmative duty imposed on the State by the Sixth Amendment.

5. This, of course, leaves the question whether Proposition 14 is invalid pro tanto or in its entirety. It is possible to argue, of course, that a constitutional or statutory provision whose defect is that it disables too broadly should be declared invalid only insofar as it is too broad, and that it otherwise should be sustained. In the hypothetical assistance-of-counsel provision set out above, it could be argued, for example, that notwithstanding its plain invalidity with respect to criminal felony cases, the provision should disable the State from providing a lawyer to a plaintiff or defendant in a civil suit. Here too, it might be argued that Proposition 14 is unconstitutional only to the extent that it affects situations in which the State has an affirmative Fourteenth Amendment obligation, and that it should be sustained insofar as it limits the power of the State to intervene in cases involving conduct which is entirely private. This argument could be supported by reference to the severability clause which Proposition 14 expressly contains.

2/ Somewhat analogous is Mr. Justice Frankfurter's observation in Cooper v. Aaron, 358 U.S. 1, 21, that what was done by Governor Faubus vis-a-vis Little Rock was "that the power of the State was used not to sustain law but as an instrument for ~~the wartime~~ THWARTING law. The State of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty."

There are two answers to this argument:

(a) The first and simplest is that severability is, in the first instance, a question of State law, and the State's highest court has held in this case that Proposition 14 is not severable. In considering whether Proposition 14 could be saved in those applications where it is not unconstitutional (i.e., on the California court's theory, in cases where the discrimination is not racial), the court quoted its own 1965 decision in Franklin Life Ins. Co. v. California, 63 Cal. 2d 222, 404 P. 2d 477, where it said that a partially invalid statute would not be sustained where it might be validly applied "if such enforcement entails the danger of an uncertain or vague future application of the statute." Pet. App. 54-55. The court also quoted language from its decision in In re Blaney, 30 Cal. 2d 643, 184 P. 2d 892, where it said that a severability clause would be given effect only where "the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase or even single words" -- otherwise "the void part taints the remainder and the whole becomes a nullity." Pet. App. 55-56.

Proposition 14 fails both State tests of severability. Nothing in it makes it "mechanically severable" in the sense that it could provide a definite guide as to when nondiscrimination is enforceable by the State and when it is prohibited. And the varying fact situations which are likely to arise makes it quite clear that Proposition 14, if sustained in part, is destined for "an uncertain or vague future application." Hence, under State standards, Proposition 14 is inseverable; its unconstitutional prohibitions taint it all.

(b) Entirely apart from State grounds, it would be intolerable to allow Proposition 14 to stand as constitutional in part. I've attempted to demonstrate that its constitutional vice is that it forbids State agencies to act affirmatively when they have a constitutional obligation to do so. The evil is, in other words, that the State will sit by and not take the steps it should to ensure to its Negro citizens equal protection in the housing field in those circumstances where they are entitled, by reason of the Fourteenth Amendment, to be treated equally. So long as Proposition 14 is in the California constitution and public officials of the State swear

to uphold that document as well as the Federal Constitution, they will necessarily be influenced in their judgments by the language of Proposition 14. Although it may be unconstitutional in part, it will have an in terrorem effect on the State's public officials; in cases of doubt, they will not fulfill their federal constitutional obligations. The consequences are likely to be substantial deprivations of federal constitutional rights.

In other words, there is added reason to reject severability when the continued partial validity of a disabling provision is likely to confuse State officials and "chill" their decisions in close cases. To return momentarily to the assistance-of-counsel prohibition hypothesized above, public officials would be deterred in that case from affording counsel in misdemeanor cases and in collateral challenges to convictions. Those are gray areas around the Gideon decision; apart from State law principles of severability, it might be sounder to strike such a constitutional provision in its entirety than to permit it to cast its shadow over an entire area of State concern.

III

The above theory invalidates Proposition 14 without reference to any history of State legislation and without examining the motives of those who proposed or voted for it. 3/ The prior legislation is relevant only because it gives the plaintiffs in the cases now before the Court the standing to challenge the constitutionality of the provision. If Proposition 14 is invalid, they have rights under the predecessor statutes, and they are, therefore, directly affected by the State constitutional provision. If there were no prior enactment, I guess only an individual who had encountered discrimination in a publicly assisted development or in some other circumstances where State action is involved would be able to bring suit to declare the constitutional provision invalid in toto. In such a case, the court might duck the question of

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3/ The rule that Proposition 14 is invalid if it violates a federal constitutional protection notwithstanding its approval by the electorate is more than adequately established by Lucas v. General Assembly, 337 U.S. 713.