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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES (B)

LYDIA LUNA MARTINEZ, on behalf of herself and all others similarly situated, Plaintiff vs. PATRICK SULLIVAN, Secretary of State; RAY E. LEE, Registrar of Voters and Recorder of Los Angeles County, and MILTON JOHNSON, Captain, Los Angeles County Fire Department, and Deputy Registrar of Voters, in their official capacities, Defendants.	NO. 991885 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RAY E. LEE'S AND MILTON JOHNSON'S DEMURRER TO COMPLAINT

I

INTRODUCTION

Plaintiff is a legally admitted, permanent resident alien, living in California. She has resided here for more than twenty years and she has raised her family here. This is her home. She is, of course, subject to all the laws of this state and country. She must therefore stop at red lights; and she must therefore pay her taxes. Nevertheless, she has no say in the making of these

laws. She is not eligible to vote in this state or country because she is not a U.S. citizen. For her, there is taxation without representation. And this is true in spite of the fact that she has a greater stake in this community than many U.S. citizens. In Purdy & Fitzpatrick v. Calif., 71 Cal.2d 566, 582 (1969), the Court said:

> "Finally any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis. The citizen may be a newcomer to the state who has little 'stake' in the community; the alien may be a resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state."

Plaintiff believes that she should have some say in the making of the laws which affect her life. She believes she should not see her sons go to war, unless she can have a say in whether she wants this country to be at war. She believes that she should not have to pay taxes, unless she can have a say in what these taxes will be. She, in effect, wants to participate in this country's democracy.

California electoral law excludes her, however, from being a voting participant in the government because she is not

a naturalized United States citizen; and the federal naturalization law precludes her from being a United States citizen only because she does not speak, read or write English; she can speak, read and write Spanish. She has in effect been excluded from the franchise solely because she is not conversant in English, even though conversant in Spanish. This result offends Castro v. Calif., 2 Cal.3d 223 (1970), which held that persons (in that case U.S. citizens) could not be excluded from the franchise solely because they were not literate in English, if they were literate in Spanish.

Plaintiff contends that to condition the franchise on the federal status of U.S. citizenship denies her, and the class she represents, equal protection of the laws. Herein, we will show (1) that the State must establish that the electoral requirement that a person be a "United States citizen" prior to voting is necessary to support a compelling state interest and is narrowly drawn; (2) that neither the history of this country nor the political philosophy of our democracy supports the conclusion that a state has any constitutional, historic or philosophic right to exclude permanent resident aliens from the franchise; (3) that neither the XV, XIX nor XXIV Amendments exempt any state electoral requirements, including the status of U.S. citizenship, from the strictures of the equal protection and due process clauses of the XIV Amendment; (4) that the incorporation of a federal status into the state electoral laws leads to absurd consequences and violates the due process and equal protection clauses of the XIV Amendment; (5) that the incorporation of the federal status into the state electoral laws is unnecessary,

arbitrary, unreasonable and serves no compelling state interest; and (6) that this suit is properly brought as a class action.

Defendants Lee and Johnson (herein referred to as "Defendants") have not, in their Points and Authorities, suggested in what way U.S. citizenship, as a prerequisite to voting, is necessary to promote any compelling interest of the state.

II

THE STATE MUST ESTABLISH THAT THE REQUIREMENT THAT A PERSON BE A NATIVE BORN OR NATURALIZED U.S. CITIZEN BEFORE VOTING IS NARROWLY DRAWN AND NECESSARY TO SUPPORT A COMPELLING STATE INTEREST

California Constitution Article II, Section 1, provides that to be a voter in California (and thereby in the nation, U.S. Constitution, Article I, Section 2; Amendment XVII), an elector must be a native-born or naturalized U.S. citizen. Such provision, on its face, discriminates against aliens. As with all electoral requirements, and as with all state enactments which discriminate against aliens, this provision is subject to the equal protection clause of the XIV Amendment and the state must establish that the provision is narrowly drawn and necessary to support a compelling state interest.

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State electoral requirements must comply with the 'equal protection' clause of the XIV Amendment.[1] In order to meet the strictures of the equal protection clause, the state electoral requirements must be necessary to support a compelling state interest. It must also be drawn with narrow specificity. In Castro, the California Supreme Court held that the California Constitutional provision that required that a voter had to be literate in English violated the equal protection clause of the XIV Amendment. The Court, at pp. 236-237, stated that:

> "[T]he issue before us, therefore, is whether California's restriction of the right to vote to those literate in English is necessary to achieve a compelling state interest."

The Court concluded that the challenged requirement was not necessary to support such a compelling interest.

In Otsuka v. Hite, 64 Cal.2d 596 (1966), the California Supreme Court held that the California Constitutional provision that a voter could never have been convicted of an "infamous

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[1] Carrington v. Rash, 380 U.S. 89 (1965); Louisiana v. United States, 380 U.S. 145 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Evans v. Cornman, 398 U.S. 419 (1970); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Castro v. California, supra; Otsuka v. Hite, 64 C.2d 596 (1966); Westbrook v. Mihaly, 2 C.3d 765 (1970).

crime" violated the equal protection clause of the XIV Amendment as applied, and in all circumstances, unless narrowly drawn. The Court, at p. 602, stated:

> "In ruling on the validity of state-imposed restrictions on this fundamental right the United States Supreme Court has in effect tended to apply the principle that the state must show it has a compelling interest in abridging the right, and that in any event such restrictions must be drawn with narrow specificity."

In Westbrook v. Mihaly, 2 Cal.3d 765 (1970), the California Supreme Court held the California Constitutional provision that required, for the approval of local obligation bond proposals, the assent of two-thirds voting at the election, violative of the equal protection clause of the XIV Amendment. The Court, at p. 785, stated:

> "Under the strict standard applied in such cases [voting and 'suspect classifications'], the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (Emphasis in original)

The equal protection clause of the XIV Amendment and this strict standard afford protection to all persons, U.S. citizens and aliens. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Takahashi v. Fish & Game Comm., 334 U.S. 410 (1948). It is a well-established doctrine of equal protection analysis that classifications based on unavoidable accidents of birth, such as race or legitimacy are inherently suspect.[2] Similarly courts should scrutinize carefully discrimination against discrete insular minorities that cannot readily change their status.[3]

In Purdy, the Court stated that discrimination against aliens was subject to this special scrutiny because aliens were such an insular minority. In addition, the Court noted that such a standard was desirable because aliens were not permitted to vote. (Defendants' Points and Authorities, p. 5.) However, this observation can not support the conclusion that aliens could or should be excluded from the franchise. The Court did not decide this question, for it was not before it.

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[2]See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954); McDonald v. Board of Election Commissioners, 394 U.S. 802, 807 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee and Liab. Ins. Co., 391 U.S. 73 (1968).

[3]See, Hernandez v. Texas, 374 U.S. 475, 478 (1954); Karst, "Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula", 16 U.C.L.A. L. Rev. 716, 723-725, 735 (1969).

III

THE REQUIREMENT THAT A PERSON BE A NATIVE BORN OR NATURALIZED U.S. CITIZEN PRIOR TO VOTING IS A PRODUCT OF VOLUNTARY CHOICE BY THE STATE AND IS NOT MANDATED BY ANY CONSTITUTIONAL PROVISIONS

The purpose of the provision that a person be a native-born or naturalized United States citizen before voting is clear; it was to exclude aliens from the franchise. It is therefore unnecessary to elaborate further on the sentiment of the Californians instrumental in its passing. This Court need not digest the history of the law, as the California Supreme Court did in Castro, in order to determine that the provision in question was intended to exclude aliens from the franchise. In this case, an identical conclusion as that in Castro, is evident from the face of the Constitutional provision in question; it was intended to exclude aliens from the franchise.

It is instructive however, to examine the history of alien suffrage in the entire country. All too often we simply assume that U.S. citizenship and voting are complements. However, it is clear that U.S. citizenship does not confer voting rights. In Minor v. Happersett, 88 U.S. 162, 177 (1874), the Supreme Court held:

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it

conferred citizenship, did not necessarily confer the right of suffrage."

And it is equally clear that the various states have often allowed aliens to vote.

The framers of the Constitution were unable to agree on any single, uniform standard with respect to elector requirements; therefore, pursuant to Article I, § 2 and Amendment X, they vested the several states with the responsibility of determining elector requirements, both for state elections and for national elections.[4] This is still the rule, although Congress may enact remedial elector requirement legislation in circumstances in which it determines that the state rule denies persons equal protection, Katzenbach v. Morgan, 384 U.S. 641 (1966), and, according to Justice Black, with respect to national elections in circumstances in which it has become dissatisfied with the state rules, United States v. Arizona, 39 L.W. 4027 (1970).

The elector requirements established by the several states have varied considerably; for example, common elector requirements have been based, at various times, on a person's race, sex and age; less common have been requirements, for example, based on religion.[5] One of the historically most inconstant of these various requirements enacted by the several states has been the state law that a person must be a "United States citizen" before voting.

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[4] McGovney, American Suffrage Medley 29 (U. of Chi. Press 1949).

[5] Rhode Island prohibited Jews from voting until 1842. McGovney, American Suffrage Medley 18 (U. of Chi. Press 1949).

In 1789, none of the thirteen original states required that a person be a "United States citizen" before voting, in either a local or national election. Minor v. Happersett, supra. Prior to 1850, the general rule was that states permitted aliens to vote. In the late 1840's, a reaction against such a right began in the Eastern states; however at about the same time, several Mid-Western states, in an effort to induce people to settle within their boundaries, authorized aliens to vote.[6] And by 1880, eighteen states, principally in the South and Mid-West permitted aliens the right to vote.[7] Settlers were encouraged in these areas.[8]

Over the next fifty years each state gradually limited the franchise to "United States citizens". This was a product of agitation developed in the context of fear and hysteria engendered first, by the Know-Nothing Movement before the Civil War with its emphasis on a xenophobic philosophy of America for the Americans, and second, in the atmosphere of the foreign wars of the 19th and 20th centuries, which created panic lest disloyal enemy aliens be

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[6]Porter, A History of Suffrage in the United States, 113 (1918).

[7]Many of the states which permitted aliens to vote in the Nineteenth Century limited this right to aliens who had declared their intent to become citizens. However such a declaration could be made immediately upon arrival, Maxson, Citizenship, 97 (Oxford Univ. Press, New York 1930), and the fact that it was filed in no way obligated the alien to do anything. The declaration was only a formality that conferred the right to seek naturalization after the five-year residence period was completed. Porter, A History of Suffrage in the United States, 119 (Greenwood Press, New York 1918).

[8]Bingham, Strangers in the Land, 98 (Atheneum Press, New York 1963).

allowed to vote for American officials.[9]

As late as 1917 Chairman Flood of the Committee on Foreign Affairs of the House of Representatives thought it necessary to introduce a bill to prohibit aliens from voting in national elections, for at that time approximately ten states permitted aliens to vote.[10] It was not until eleven years later that Arkansas, the last state to permit alien suffrage changed its law.[11]

All states now require that an elector be a "United States citizen" prior to voting. However, and this is crucial -

> "[T]he point of emphasis here is that uniformity on this point has come about by the voluntary action of each state for itself and has not resulted from compulsion of the Constitution."[12] (Emphasis added)

As a result, it is evident that the state requirement that a person must be a U.S. citizen prior to voting is subject to the same equal protection and due process analyses as any other state electoral requirement.

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[9]Bingham, Strangers in the Land, 214 (Atheneum Press, New York, 1913).

[10]Comment, 5 Va. L. Rev., 412 (1918).

[11]Comment, 25 [illegible] (1931).

[12]McGovney, American Suffrage Medley, 49-50 (U. of Chi. Press, 1949).

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IV

THE REQUIREMENT THAT A PERSON BE A NATIVE BORN OR NATURALIZED U.S. CITIZEN PRIOR TO VOTING IS CONTRARY TO THE POLITICAL PHILOSOPHY UPON WHICH OUR DEMOCRACY IS PREMISED

As we demonstrated, in this country historically citizenship and the suffrage were not inevitably associated; aliens were permitted to vote in many colonies and states for a number of years. Similarly, in the development of early Western political thought from which our governmental institutions evolved, the ideas of citizenship and suffrage developed independently. In fact, the use of the word "citizen" was a relatively late development in Western thought, emerging in the revolutionary French society of the late eighteenth century and in American Constitutional debates as an alternative term to the word "subject" with its hated connotations of monarchy and royal despotism.[13] Not even a cursory definition of citizenship found its way into the United States Constitution until the XIV Amendment, and late eighteenth and early nineteenth century writers used the terms "citizen", "subject", and "inhabitant" interchangeably, without attaching any precise meaning to any of them.[14]

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[13]McGovney, American Citizenship", 11 Colum. L. Rev., 231, 242 (1911).

[14]See, e.g., Dudley O. McGovney, "American Citizenship", 11 Colum. L. Rev., 231, 236-242 (1911); Maximilian Koessler, "'Subject', "Citizen', 'National', and Permanent Allegiance'", 56 Yale L. J., 58, 59, 60 (1946).

To the extent that the term "citizen" has had any precise meaning in international law, it meant basically the same thing as "national" - namely, belonging to the state.[15] The term thus denoted one who owns primary allegiance to a state, and with respect to whom the state has rights and duties extending beyond its borders. Permanent resident aliens are thus nearly identical to citizens except in the matter of extraterritorial jurisdiction over them, and are, in a broad constitutional sense, members of the community in which they live and subject to its laws. Indeed, some scholars have classified aliens as citizens, in the constitutional sense of the word.

> "In the constitutional sense of the word, it is proper to denominate as a subject or citizen of a state anyone over whom the laws of that state in any wise extend. Thus, the citizens of other countries temporarily resident or permanently domiciled in a state, and the inhabitants of districts belonging to another state but temporarily under the military occupation of the state in question, are, in a strict constitutional sense, citizens of that state."[16]

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[15] See, McGovney, "American Citizenship", 11 Colum. L. Rev., 231, 231-233 (1911).

[16] W. W. Willoughby, "Citizenship and Allegiance in Constitutional and International Law," 1 Am. J. Int. L., 914, 918-919 (1907).

In short, since when the United States Constitution was drafted there was no clear, widely accepted definition of citizenship in contemporary political consciousness, but merely a loose association of the idea with concepts of nationality, the Constitutional framers had no intention of making suffrage dependent on citizenship status and in fact were not conscious of the problems and implications of such a connection.

Ideas about who should exercise the franchise were more clearcut than notions of citizenship in colonial times. Political thinkers like John Locke argued that the existence of any community depends on the consent of the individuals comprising it. He stated:

> "That which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority."[17]

The consent or majoritarian theories of Locke and similar thinkers all contained explicitly or implicitly the seeds of two ideas: that political control must be broadly based as a matter of

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[17] John Locke, Of Civil Government, Book II, § 96, quoted in Stout, "Modern Trends in the Judicial Concept of the Relation between Citizenship and the Suffrage", 38 Ky. L. J., 237, 254 (1950).

practical politics, for no society can function without popular accord; and that as a matter of natural law, power should belong to the individuals in a community and only they can delegate such power to chosen representatives.[18] These ideas formed the intellectual background for men like Thomas Jefferson as they drafted such vital documents of the American political experience as the Declaration of Independence claiming that "Governments are created among men, deriving their just powers from the consent of the governed..."

More important, ideas of government based on consent underlay much of the indignation toward England that culminated in the American Revolution; the cry that "Taxation without representation is tyranny" drew its fighting force from popular acceptance of the belief that power should properly belong to the governed.

These principles were clearly recognized by the courts in this country. In interpreting state electoral statutes the courts were adamant in insisting that a person subject to the laws should have a say in their making. In Stewart v. Foster, 2 Binn. 109 (Pa. 1809), an alien sought to vote in a local election pursuant to a state statute which limited the franchise to "inhabitants". The Court held that he could vote, explicitly rejecting the argument that since he was not a "United States citizen", the plaintiff was not entitled to vote. Breckenridge, J., stated:

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[18]Discussed in Stout, "Modern Trends in the Judicial Concept of the Relation Between Citizenship and the Suffrage," 38 Ky. L. J., 237, 252-254 (1950). The vital political treatises dealing with this subject include Grotius, Prolegomena, Kelsey's Trans. (15); Samuel Pufendorf, De Jure [illegible] (Oldfather's Trans.) (Bk. VII, Ch. II, § 8); Thomas Hobbes, Leviathan, Chap. XVII; Harrington, Oceana (Lilgearen ed); Algernon Sydney, Discourses Toland ed., p. 215).

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"The being an inhabitant, and the paying tax, are circumstances which give an interest in the borough. The being an inhabitant, gives an interest in the police or regulations of the borough generally; the paying tax gives an interest in the appropriation of the money levied. A right, therefore, to a voice mediately or immediately in these matters, is founded in natural justice. To reject this voice, or even to restrain it unnecessarily, would be wrong. It would be as unjust as it would be impolitic. It is the wise policy of every community to collect support from all on whom it may be reasonable to impose it; and it is but reasonable that all upon whom it is imposed should have a voice to some extent in the mode and object of the application. Reasons of policy may warrant the restraining the eligibility to office, but it must be a strong case of the salus populi indeed, that will warrant the restraining, much less excluding, the right of electing to office." 2 Binn. 109, 121.

Similarly, in Spragins v. Houghton, 3 Ill. 377 (1840), an alien sought to vote pursuant to another state statute which provided that only "inhabitants" could vote. The Court examined the use of the word "inhabitant" in Illinois law, relying

principally on Congressional territorial legislation: the Court concluded that an alien could vote. The Court stated:

> "The policy of the Ordinance here disclosed [Northwest Territorial Ordinance, July 13, 1787], continued to be the policy of the Congress of the United States, with various modifications in favor of the extension of the rights of suffrage in the Territories, from time to time, as its various acts of legislation disclose; and distinctly recognize and authorize aliens to enjoy the elective franchise." 3 Ill. 377, 393-394 (Emphasis added)

> "The several acts of Congress erecting and regulating the territorial government, passed from time to time, not only prescribed the qualifications of voters, but gave to aliens as well as citizens the right of electing and being elected to office." 3 Ill. 377, 394. (Emphasis added)

Recognition of the principle that persons should have a voice in making the laws which govern them has caused "a continuing expansion of the scope of the right of suffrage" in the history of this country. Reynolds v. Sims, 377 U.S. 533, 555 (1964). Feudal requirements of landholding as prerequisite to suffrage

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gave way to personal property qualifications which in turn gave way to residence qualifications.[19] Whatever the qualifications were, the articulated rationale was always to give political control to those with a real stake in the welfare of the community; to withhold the franchise from those who had little or no connection with the communal weal, or who were not viewed as being able to exercise independent judgment with respect to these matters (for example, children, women, incompetents, slaves). As the first Constitution of the state of Virginia expressed it:

> "All men having sufficient evidence of permanent common interest with, and common attachment to the community, have the right of suffrage."[20]

In the nineteenth century the growth of the humanitarian ideal gave a more individualistic emphasis to the thrust toward expansion of the franchise; the trend was to associate universal suffrage with liberty and to regard it as essential to enlightened government.[21] The so-called humanitarians or universal suffragists

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[19]This history is traced in De Grazia, Public and Republic: Political Representation in America, 1951, pp. 54-56.

[20]Stout, "Modern Trends in the Judicial Concept of the Relation Between Citizenship and the Suffrage", 38 Ky. L. J. 237, 254 (1950).

[21]See, e.g., Stout, "Modern Trends in the Judicial Concept of the Relation Between "Citizenship and the Suffrage", 38 Ky. L. J., 237, 256 (1950).

played prominent roles in the passage of the Fifteenth Amendment granting suffrage to Negroes.[22] Their arguments were also used by the feminists in working towards suffrage for women.[23]

Basic to the idea of Western democracy is the desire to broaden the participation of individuals in their society. Even more basic is the ultimate value of development of maximum human potential through permitting maximum individual liberty. The individual should be permitted to control his own destiny. As various requirements for the franchise - such as ownership of real estate or taxpaying status - were found to be unreasonable or irrelevant to social needs, these requirements were discarded in order to permit fuller participation in the society.

The requirement of U.S. citizenship as a prerequisite to the franchise, as we have noted, was not originally widespread in this country. Those states that adopted this requirement did not, by and large, do so in the same spirit that motivated consideration of other electoral requirements; namely, an examination of whether such a requirement will best further the goal of extending the franchise to persons having an interest in the community. Instead, and this is an important distinction, the "United States citizenship" requirement developed as a response to xenophobic hysteria. It was a restrictive movement, and it was not premised on furthering

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[22]John M. Mathews, The Legislative and Judicial History of the Fifteenth Amendment, 27 Johns Hopkins University Studies in Historical and Political Science, Johns Hopkins Press, Baltimore, 1909, at 329.

[23]See, generally, Stanton, Anthony and Gage, History of Woman Suffrage.

the goal of extending the franchise to persons having a stake in the country.

Of course, a loyalty test similar to that used in naturalization proceedings could have been used as a prerequisite to granting the franchise, but it was simpler to import the entire status of citizenship wholesale into the suffrage laws. Simpler, but less rational, since, as we will demonstrate, U.S. citizenship status depends on many factors irrelevant to the franchise, and many a loyal resident alien with a substantial interest in the community may nevertheless be not qualified for U.S. citizenship.

V

THE XV, XIX AND XXIV AMENDMENTS DO NOT EXEMPT THE U.S. CITIZENSHIP REQUIREMENT FROM DUE PROCESS AND EQUAL PROTECTION ANALYSIS

In Oregon v. Mitchell, 39 L.W. 4033 (1970), Justice Harlan argued that a state may exclude any person from the vote unless explicitly prohibited from doing so by the XV, XIX or XXIV Amendments. He contended that the First Section of the XIV Amendment is inapposite in voting situations. The logic of his argument would support defendants' position that the state requirement that a person had to be a "U.S. citizen" prior to voting is exempt from equal protection and due process analysis. It would even support the proposition that a state statute (if one were enacted) could limit the franchise "to all U.S. citizens, and all aliens except those of African descent."

However, as indicated in Oregon, Justice Harlan's position

has not been adopted by the rest of the court. The majority's position is that all state electoral requirements are subject to equal protection analysis. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Although the case has never been before the Court, this apparently would be true for a prerequisite of U.S. citizenship in state electoral laws.

This conclusion makes sense if the Court's reading of the relationship between the XIV, XV, XIX and XXIV Amendments is understood. In Oregon, Justice Brennan outlines the position of the majority. In 39 L.W. at 4081 he concludes that the contemporary position with respect to the XIV Amendment's application to voting situations was ambiguous (purposely) and confused. The framers had differing view on many things, and apparently at that point it was considered desirable to leave things undertain. This is consistent, as Justice Brennan points out, with the later enactment of the XV Amendment.[24] Since Negroes had been declared U.S. citizens under the XIV Amendment,[25] the XV Amendment was designed to place the prohibition against racial discrimination in voting upon a firmer foundation than mere legislative action capable of repeal or the vagaries of judicial decision.[26] 39 L.W. at 4081. The XV

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[24]The use of the term citizen in the XIX and XXIV Amendments seems to have been designed primarily out of a desire for uniformity with the XV Amendment. Crosskey, Politics and the Constitution, Vol. I, 1953, at 540.

[25]For the first time, it was constitutionally established that all persons born within the United States were citizens of the United States.

[26]Justice Brennan further maintained that the XIX and XXIV Amendments were enacted, not to restrict the scope of the XIV, but instead to assure that particular kinds of voting discrimination would not be tolerated.

Amendment was not necessarily considered an exclusive remedy for racial voting discrimination; it was merely additional assurance that Negro citizens would not be denied the vote because of their race.

As we have noted, since at least 1965 there is no doubt that the equal protection clause restricts state electoral laws.[27] The XV Amendment, and for that matter the XIX and XXIV Amendments, 39 L.W. at 4081, were not ever intended to restrict the reach of the equal protection clause. They were enacted to place the prohibition on certain types of discrimination on a surer footing. California's U.S. citizenship requirement is thus subject to the scrutiny of equal protection and due process analysis.

VI

CALIFORNIA'S INCORPORATION OF THE FEDERAL STATUS OF UNITED STATES CITIZENSHIP IN ITS ELECTORAL LAWS DENIES PLAINTIFF EQUAL PROTECTION AND DUE PROCESS

Plaintiff contends that California's incorporation of a federal status into its electoral laws denies her equal protection and due process. First, it discriminates against her because she is an alien; in their "Points and Authorities", defendants do not even suggest a compelling state interest why it is necessary to limit the franchise to U.S. citizens.

Second, the incorporation of the federal status leads to

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[27]See, fn. 1, herein.

obvious inequities. In Castro, for example, the California Supreme Court held that a person literate in Spanish, but not literate in English, could vote in California. The Court, at p. 243, stated:

> "We add one final word. We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote."

Plaintiff insists that the irony referred to by the Court has not been dispelled. If plaintiff were a U.S. citizen she could vote, even though solely literate in Spanish; however, plaintiff cannot become a U.S. citizen because she is solely literate in Spanish. 8 U.S.C.A. § 1423(1). She is thereby excluded from the franchise in spite of the thrust of Castro. The inequity is patent.

Third, the underlying meaning of U.S. citizenship changes. In fact, if it means anything at all, it means what Congress has decreed. And Congress is not restrained with respect to its power to enact nationality legislation. As the Supreme Court stated in Terrace v. Thompson, 263 U.S. 197, 220 (1923):

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"Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit."

Moreover, even if Congress' power with respect to nationality legislation were subject to some substantive due process limitations, it is evident that the legislation need not be related to state voting laws, for voting is not a privilege conferred by U.S. citizenship, Van Valkenburg v. Brown, 43 C. 43 (1872); Minor v. Happersett, supra. Indeed, Congress is precluded from passing laws with such an electoral purpose, United States v. Arizona, supra; Oregon v. Mitchell, supra, unless, of course, it finds a particular denial of equal protection in the state requirements.

California has conditioned its electoral requirements on a federal status which changes as Congress decrees, without regard to California's electoral purposes. This, in effect, is an abdication by California of its responsibility, under Article I, § 2 and the XVII Amendment to establish electoral requirements for persons within its borders. It also denies due process and equal protection to these persons.

The Supreme Court has severely criticized the use of a federal status in a state statute on precisely these two grounds: (1) that the federal status may be protean and (2) that the federal status, and the Congressional purpose defining it, may be unrelated to the state objective. In Takahashi, a California statute which prohibited the issuance of a fishing license to "alien Japanese"

had been amended (to avoid it being declared unconstitutional) to prohibit the issuance of such licenses to any "person ineligible to citizenship", which classification included Japanese. The Court stated that not only was the federal status subject to change, 334 U.S. 412, n. 1, but also California had an obligation to explain distinctions made in its law, without reference to a non-related distinction made in federal law. At pp. 418-419, the Court said:

> "It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."

Certainly the right to vote is as fundamental as the right to earn a living, and a state has no greater right to incorporate a federal status in its electoral laws than it does in the labor laws.

Moreover, this use of a federal status could, and has, led to absurd and unconstitutional results. To illustrate this, we will assume that the naturalization and nationality laws are now as they were within the last few decades,[28] and that the California

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[28] The purpose of this exercise is not to test the validity of the federal laws. If the examples used are arguably invalid today, they still illustrate the latent danger in the California scheme.

electoral law still excludes persons who are not United States citizens from the franchise.

The juxtaposition of these assumptions might lead to a situation in which a person had to be "white or of African descent" to become a naturalized citizen,[29] and a naturalized citizen to become a voter. The United States naturalization law would be valid.[30]

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[29]See Kharaiti Ram Samras v. United States, 125 F.2d 879 (9 Cir. 1942), cert. den. 317 U.S. 634.

[30]First, it would not be subject to challenge as violative of the Fifth Amendment to the Constitution, Kharaiti Ram Samras v. U.S. supra, and even if it has to be "reasonable", it could be argued that Congress has a legitimate purpose in structuring the American society to the degree possible through the exercise of its power to naturalize. Assuming that Congress should determine that a more homogeneous society would promote national harmony, it might, as a means to achieve that end, naturalize only those aliens who fit into the desired societal structure. Thus, in order to avoid an increase in the recent racial strife within the nation, perhaps Congress could reasonably and rationally decide to deny citizenship on the basis of race. While the realism and policy considerations of such a requirement could certainly be questioned, the substantive due process test is not concerned with the wisdom of the provision but with the reasonableness of and the rational connection between the means adopted and the permissible end to be achieved. If the structure sought to be achieved in a society having a unified, harmonious character, denying citizenship because of race may be reasonable if it could be established that racial differences are the cause of disharmony in society. Note, "Constitutional Limitations on the Power of Congress to Confer Citizenship By Naturalization" 50 Iowa Law Rev. 1093, 1102, n. 50 (1965).

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Now, if two aliens, one an Englishman and one an Indian, desired to vote in California and if both met all the prerequisites required by the California electoral laws except for the fact that neither was a naturalized United States citizen, neither would be permitted to vote. If both aliens then sought to be naturalized, and if both were equally qualified to become naturalized, only the Englishman would be granted the privilege of United States citizenship. The Indian would be barred by the discriminatory naturalization statute. Kharaiti Ram Samras v. United States, 125 F.2d 879 (9 Cir. 1942) cert. den. 317 U.S. 634. The Englishman could now vote in California, the Indian still could not.

In effect, California by incorporating the status of naturalized "United States citizen" into its electoral laws would have incorporated a provision which excludes persons from the franchise solely because of their race. The equal protection clause of the XIV Amendment clearly prohibits this.

Again, the juxtaposition of the assumptions could lead to a situation in which a female United States citizen could lose her citizenship status if she married a permanent resident alien[31] and a person had to be a United States citizen in order to be a voter.

What would happen if a native-born woman, who was in every way qualified to be a voter in California, married a permanent, resident alien Englishman who had lived in San Francisco for years, and who intended to remain there?

The authorities have concluded that upon marriage she is

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[31] MacKenzie v. Hare, 165 Cal. 776 (1913).

ipso facto not a United States citizen, and therefore not qualified to be a voter. MacKenzie v. Hare, 165 Cal. 776 (1913), aff'd. in MacKenzie v. Hare, 239 U.S. 299 (1915). The result is absurd; and the reasons are obvious. California did not consider the possibility that Congress would enact such an expatriation law when it incorporated the federal status into its voting law; and Congress was concerned only with foreign affairs, and not the California electoral scheme when it enacted its expatriative legislation. The result, at the least, offends the XIV Amendment in that it discriminates against women and is not supported by any compelling interest with respect to the franchise; the XIX Amendment in that it precludes citizens from the franchise because of their sex; and the penumbra of rights which protect a copule from the state's invasion of their marital privacy. Griswold v. Connecticut, 381 U.S. 479 (1965).

The MacKenzie cases can be further cited for an additional danger inherent in the California scheme. Mrs. MacKenzie filed her writ of mandate in order to vote; that was her sole objective. The California Supreme Court analyzed the problem by stating: (1) that the California electoral law had incorporated the federal status; (2) that the federal status had to be determined by federal law; and (3) that the law with respect to expatriation allowed such a federal law. The United States Supreme Court affirmed, not once mentioning that Mrs. MacKenzie was seeking the right to vote. It instead simply concluded that Congress could enact such an expatriative statute. Somewhere along the line the Courts lost sight of what was being sought; the definition of status became the end in itself. As a consequence, there was an

absurd result.

A contemporary comment, 4 Cal. L. Rev. 238 (1916), approved the decision, but did recognize the problem that what Mrs. MacKenzie had lost was the right to vote. However, its solution was for California to amend its constitution, apparently every time an undesired result follows from the incorporation of the federal status. At p. 239 it stated:

> "It is to be noted that there is no prohibition in the federal Constitution against permitting such a person as the appellant to retain the voting franchise, even though expatriated by a law of Congress. This the people of California could do by amending their Constitution, for there is no legal or constitutional obstacle to conferring the right of suffrage upon an alien."

This suggestion clearly allows the tail to wag the dog. Not only has Mrs. MacKenzie already been injured, for she has lost the right to vote, but also the burden would be on California to amend its constitution every time federal law changed.

The courts must be more vigilant in cases respecting the franchise. It is not sufficient, as the defendants seem to argue [Defendants' Points and Authorities, pp. 6-7], that the plaintiff's proper challenge should be directed to the naturalization laws. Plaintiff here seeks the right to vote.

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VII

THE U.S. CITIZENSHIP REQUIREMENT IN THE CALIFORNIA ELECTORAL LAWS MUST BE STRICKEN FROM THE ELECTORAL LAW

As we have observed, California's incorporation of a federal "status" into its electoral laws not only is an abdication of its responsibility, but also, it can, and has, resulted in some absurd and unconstitutional results. It incorporates some electoral prerequisites which make reasonable sense as related to the end of voting, and others which do not. For example, from the viewpoint of an alien in California, the requirement in the naturalization law that a person be a resident in the United States for five years before he can become naturalized makes rational sense in the California electoral scheme. A state has an obvious interest in requiring that an alien demonstrate that he has a "stake" in the country before voting. It would be improvident to allow a person who is just passing through to vote. On the other hand, from the viewpoint of an alien in California, the requirement in the naturalization laws that a person must be literate in English before he can become a naturalized citizen does not make rational sense in California voting laws, at least as applied to persons who are literate in Spanish. Castro v. California, supra.

This amalgamation of prerequisites to voting has troubled the California Supreme Court. For example, the Court has "hinted" that there may be difficulties with the incorporation of a federal status into California voting law. In MacKenzie, which has already been cited as an example of misguided reasoning, the Court indicated

that it might be more vigilant in other circumstances. The Court speculated as to whether it would permit an alien woman to vote in California, merely because she married a United States citizen. In 1913, the federal nationality law deemed her a U.S. citizen during coverture.[32] The California court was troubled; it stated that she was not a native-born citizen, nor had she been naturalized. Apparently there was more to being a voter than merely being deemed a U.S. citizen. Would the California Court have required a five year additional residence requirement of such deemed U.S. citizen? Or would the California court have required at least a loyalty oath from such deemed U.S. citizen? See, Note, 2 Cal. L. Rev. 72 (1913). The California court did not state, but it did hint that under certain circumstances it might delve beneath the status.

The logic of the Court's position is obvious (although in 1913 the California Supreme Court seemed unaware of it). If in certain circumstances the court might determine that an otherwise qualified elector and a U.S. citizen could not vote, because of the suspect nature of the federal status, then, in other circumstances it might determine that an otherwise qualified elector (except for the fact that such person was not a U.S. citizen) might be capable of voting, again because of the suspect nature of the federal status.

Defendants have suggested no compelling reason why permanent resident aliens should be excluded from the franchise. As we have suggested, the only interest plaintiff can think of is that

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[32] MacKenzie v. Hare, supra.

the California way is cheaper and more convenient. This is an insufficient basis for excluding a substantial group of persons from the franchise.

As we have observed, as viewed from the vantage point of a permanent resident alien, the naturalization laws serve as prerequisites to the franchise. Some of these prerequisites, such as a five year residency make sense in the electoral laws; and some do not, such as the English literacy requirement. California has solved the problem of administration and the difficulty of making its own determinations by incorporating the federal status and allowing the federal government to do the work. This might have worked except for the fact that the federal government's answer - that a person is or is not a U.S. citizen - is an amalgamation of factors which are partially premised on irrelevant (to the California electoral laws) considerations.

The Castro court was explicit in stating that such a convenient administrative reason for excluding person from the franchise was constitutionally insufficient. At page 242, the Court stated:

> "Avoidance or recoupment of administrative costs, while a valid state concern cannot justify imposition of an otherwise improper classification, especially when, as here, it touches on 'matters close to the core of our constitutional system.'"

California must meet its responsibility, and if necessary, it must pay for it. This is not to say that it must provide ballots, for

example, in Spanish. This would be the unnecessary expense which the Constitution does not require and plaintiff is not seeking these frills. But California cannot exclude persons from the vote because it is easier to lump the determination of how long a foreign born person has been in the United States with the determination of whether he is literate in English -- under a simple determination of status -- and leave that judgment to the federal government.

As to the class of permanent, resident aliens who only speak, read and write Spanish, this Court must invalidate the requirement that they must be naturalized citizens before they can vote. Of course, this does not mean that all permanent resident aliens have a constitutional right to vote. California can enact whatever laws it deems proper to regulate the franchise, as long as such laws, or prerequisites, are narrowly drawn and supported by a necessary and compelling interest of the state. For example, and by way of example only, California could require that in order for a person to be able to register to vote he had to be:

1. a United States citizen; and
   (i) a resident of California for thirty days;
   (ii) a resident of the county for thirty days;
   (iii) over eighteen years of age; and
   (iv) of sound mind;

or

2. a permanent resident alien; and
   (i) a resident of the United States for five years;
   (ii) a resident of California for one year;

(iii) a resident of the county for thirty days;

(iv) over twenty-one years of age;

(v) of sound mind; and

(vi) literate in either English or Spanish.

The above is obviously only suggestive, but it presents a way, and a rational way, of constructing the voting laws to assure all persons who are entitled to the vote, a chance to vote, without excluding certain persons because of the cost convenience of the state. Different standards and regulations for U.S. citizens and aliens, if supported by a necessary and compelling state interest would be constitutionally permissible.[33]

Illustrative of the approach suggested here is the American Indian problem, and several state's responses to it; this problem also presents an illustration of the dangers inherent in incorporating a federal "status" into the state electoral laws. In the early part of the twentieth century, it was considered undesirable, in many Western States to allow American Indians to vote. Arizona, which became a state in 1912, relied on the status definition of "United States citizenship" to exclude Indians from the franchise, for in 1912, the Indians in Arizona were not United States citizens.[34] However, the people of Arizona did not anticipate that the underlying meaning of this status might change; they wrongly

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[33]For example, in the 19th Century, Rhode Island required alien voters to be property holders prior to voting, while U.S. citizens did not have such a requirement. McGovney, The American Suffrage Medley, 50 (U. of Chi. Press 1949).

[34]Houghton, "Legal Status of Indian Suffrage in the United States", 19 Ca. L. Rev. 507 (1931).

believed that the concept and definition of U.S. citizenship was constant. In 1925, Congress declared, in an act unrelated to voting, that all American Indians were deemed United States citizens. In 1925, several Indians, now United States citizens, tried to register to vote.

Thus, a situation completely unanticipated by the people of Arizona was presented to the Court, for the people clearly had not wanted Indians to exercise the franchise.

To achieve the result initially anticipated by the people of Arizona, the Arizona Supreme Court in Porter v. Hall, 34 Ariz. 308 (1928), was forced to indulge in an absolutely impermissible rationale.[35] The Arizona court first stated the general principle on which Mrs. Martinez' case is based:

> "Let us consider the canon first set forth above. The theory on which democracy is founded is that every person who is bound to obey the laws should participate in making them, and, conversely, that every person who is bound to obey the laws should be subject to their jurisdiction." 34 Ariz. at 321-322.

The Court then went on, in preparation for the decision in this case:

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[35] Twenty years later, the Arizona Supreme Court in Harrison v. Laveen, 67 Ariz. 337, 345, 196 P.2d 456, 461 (1948), reversed the Porter court, calling its statutory construction "tortious".

"Nowhere, however, has the franchise been extended in literal conformity with the first proposition." 34 Ariz. at 322.

The Court then reached its conclusion that Indians could not vote, relying on the phrase in the Arizona electoral laws that "persons under guardianship, non compos mentis and insane" could not vote. In its tortious construction the Court concluded that all Indians were under guardianship, citing Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25, in which Justice Marshall, in a decision unrelated to the individual Indian and having nothing whatsoever to do with suffrage, stated: the relationship between the Indian nation and the United States "resembles that of a ward to his guardian."

A more rational voting statute could have been drafted which would have obviated the need for such judicial gymnastics. For example, Minnesota did not incorporate a federal status into its electoral laws. Its law provided that either of the following could vote: (1) citizens of the United States and(2) Indians who have adopted the customs and habits of civilization.[36]

The point of the above is evident. The incorporation of a federal status in state voting laws is ripe with difficulties; the necessary compelling interest of a state can only be protected by making narrowly drawn, rational rules related to the franchise. Different prerequisites can be enacted for different groups, if these different laws are supported by a necessary compelling state

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[36]Minnesota Const. of 1857, Art. VII, Sec. 1.

interest. In 1920, different state electoral laws for U.S. citizens and Indians made sense; and, in 1971, different state electoral laws for U.S. citizens and permanent resident aliens are appropriate. A total exclusion of all aliens, although cheap and convenient, is unconstitutional.

VII

THIS SUIT IS PROPERLY BROUGHT AS A CLASS ACTION

Defendants argue that the class allegation is improper in that the determination that a particular person is a "permanent resident" requires examination of each person's individual intent. Calif. Elec. Code Section 14282. Defendants misconstrue plaintiff's use of the term "permanent resident alien," which is a word of art in the naturalization field, and simply means an alien "lawfully admitted for permanent residence". 8 U.S.C.A. § 1101(20). It is used to distinguish illegal entries. If viewed in this light, the class allegation is clearly proper

The gravamen of plaintiff's complaint is that since she is qualified to be a California elector but for the fact that she is not a U.S. citizen and that since she is qualified to be a naturalized U.S. citizen but for the fact that she cannot speak, read or write English, she has in effect been denied the right to vote solely because she is not literate in English. Since she is literate in Spanish, Castro indicates that this denies her equal protection.

Plaintiff could, of course, have brought this action on her own behalf. However, if she prevails, the principle would have

been established that a person who is otherwise qualified to be a U.S. citizen but for the fact that he might not know English would, if he knew Spanish, be permitted to vote. The result would be a multiplicity of suits; the courts would be required to examine in each case whether an alien, who wished to vote, was otherwise qualified to become a U.S. citizen. The question of a five years residency, membership in subversive organizations and a knowledge of the government and history of this country would have to be litigated in each case.

The principal purpose of a class action is to avoid multiplicity of litigation. Plaintiff seeks to have the prerequisite that a person must be a U.S. citizen before voting deemed void as applied to her class. The discernible class is defined as those aliens who are legally in this country and who are literate in Spanish.[37] If the class should prevail, then aliens who are legally in this country (a fact which is currently easy to

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[37]Only this class could legitimately argue that they have been denied equal protection by the incorporation of the English literacy requirement into the California electoral laws. See, Castro v. Calif., supra.

It is, of course arguable that the proper class should include all permanent resident aliens, (1) regardless of their language capability or (2) who are literate in English or Spanish. The logic of No. 1 is that since the relief sought is a declaration and injunction with respect to the "U.S. citizenship" requirement, the class which will profit from the suit are all permanent resident aliens. However, plaintiff rejected this definition of a class, for another provision of the California electoral law - e.g., that a person be literate in English or Spanish, Cal. Const. Art. II, § 1; Castro v. California, supra, would still exclude said permanent resident alien from the franchise. The logic of No. 2 is that if plaintiff should win, there is no reasonable distinction between permanent resident aliens literate in English and those literate in Spanish. Both have access to adequate news media. Castro v. California, supra. However, English speaking permanent

establish) and who meet the other electoral requirements would be permitted to vote.

If California then enacts legislation which would restrict some of these persons from the franchise, because for example, they had not been in this country for five years, then it would be the duty of the registrar of voters, and not the Court, to administer the electoral code. This certainly would reduce litigation.

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resident aliens are not precluded from the status because of their inability to speak English. Therefore, as to them, the incorporation of the federal status into California electoral laws does not incorporate an element which has been held (to date) to violate the XIV Amendment.

Finally, even if either of these alternatives defined the proper class, plaintiff adequately represents them, for her class is simply a sub-class of this larger class.

DATED: January 29, 1971

Respectfully submitted,

STEPHEN E. KALISH

Attorney for Plaintiff

(VERIFICATION – 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of _____ } *ss.*

I, the undersigned, say: I am the _____

_____

_____

in the above entitled action; I have read the foregoing _____

_____

and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

_____

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on _____ *(date)* *at* _____ *(place)*, *California*

_____
(Signature)

(PROOF OF SERVICE BY MAIL – 1013a, and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of Los Angeles } *ss.*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles *employed in, over the age of eighteen years and not a party to the within action or proceeding; that my business address is* 1709 W. 8th St., Los Angeles, California 90017 ;

that on January 27, 19 71, *I served the within* Memorandum of Points and Authorities in Opposition to Ray E. Lee's and Milton Johnson's Demurrer to Complaint

on the defendants *in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at* 1709 W. 8th St.

in the City of Los Angeles, *California, addressed to the attorney of record for said* defendants *at the office address of said attorney, as follows:*

Henry G. Ullerlich
Attorney General
600 State Building
Los Angeles, California 90012

Joe Ben Hudgens, County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, Calif. 90012

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on January 27, 1971 *(date)* *at* Los Angeles *(place)*, *California*

_____
(Signature)

TERRY J. HATTER, JR.
PAUL L. McKASKLE
PAULA CHERNOFF
PETER D. ROOS
STEPHEN E. KALISH
c/o Western Center on Law and Poverty
1709 West Eighth Street, Suite 600
Los Angeles, California 90017
(213) 483-1491

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LYDIA LUNA MARTINEZ, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

PATRICK SULLIVAN, Secretary of State; RAY E. LEE, Registrar of Voters and Recorder of Los Angeles County, and MILTON JOHNSON, Captain, Los Angeles County Fire Department, and Deputy Registrar of Voters, in their official capacities,

Defendants.

NO. 991885

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PATRICK SULLIVAN'S DEMURRER TO COMPLAINT

Plaintiff incorporates by reference her entire Memorandum of Points and Authorities in Opposition to Ray E. Lee's and Milton Johnson's Demurrer to Complaint ("Plaintiff's Memorandum") and makes the following points in addition.

First as defendant Sullivan recognizes, California has adopted "the more stringent equal protection standard in

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disenfranchising legislation"[1] and that "there has been a change in the judicial attitude toward classification based upon alienage"[2] [albeit where voting rights were not involved].

Second, all the defendants have cited cases (e.g., Reynolds v. Sims, 377 U.S. 553 (1964); Harper v. Virginia State Board of Education, 383 U.S. 663 (1966); Kramer v. Union School District, 395 U.S. 621 (1969))which state, in dicta, that a state shall not deny citizens the right to a full vote because he (1) resided in a densely populated district; (2) did not pay a poll tax; and (3) neither owned property nor was a parent (school board elections) respectively. However, these cases do not, and cannot, stand for the proposition that states can constitutionally limit the franchise to U.S. citizens. In all those cases, the plaintiffs were U.S. citizens, and since the "novel" question presented here was not before the Court in those cases, the Court did not consider it.

Third, all the defendants cite federal law (e.g., Federal Civil Rights Act of 1957, 42 U.S.C.A. 1971, as amended) which assures certain "U.S. citizens" the right to vote under certain circumstances, ~~in the status~~. However, it is patent that such a law does not exempt the state requirement that a person be a "U.S. citizen" prior to voting from equal protection and due process analysis. In the first place, the statute does not provide that only U.S. citizens may vote;

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[1]Defendant Sullivan's Points and Authorities ("Sullivan's Memorandum") p. 6, ll. 5-6.

[2]Sullivan's Memorandum, p. 10, ll. 10-12; see, Plaintiff's Memorandum, p. 7.

it simply assures certain persons the vote. In the second place, Congress had no reason to consider the question presented here, for, since 1928, all states have in fact required that a person be a "U.S. citizen" prior to voting.[3] And in the third place, a Congressional statute cannot mitigate constitutional mandates.

Fourth, Gardina v. Bd. of Registrars, 48 So. 788 (Ala. Sup. Ct. 1909) is inapposite. The question before the Alabama Court was a very narrow one. Ala. Const., Art. VIII, § 1 (1875), provided that a person had to be a United States citizen or an alien who had declared his intent to become a United States citizen prior to voting. In 1901 this provision was amended to provide that a person had to be a United States citizen or an alien who had declared his intent to become a United States citizen, before the ratification of this Constitution [i.e., 1901], prior to voting; provided, however, that if such alien failed to become a United States citizen when entitled to, he lost his right to vote. Ala. Const., Art. VIII, § 177 (1901).

The Court held that an alien could not vote if he had declared his intent to become a United States citizen after 1901. The Court did not examine the constitutionality of the statutes under the XIV Amendment. Indeed, the Court believed (accurately in 1909) that only the XV Amendment, and not the XIV, limited the states' right to set electoral qualifications as they wished.

Fifth, defendant Sullivan's argument that plaintiff should have exhausted her federal administrative remedies (e.g., the naturalization process, 8 U.S.C.A. 1421, 1443, 1445, 1446 and 1447)

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[3]See, Plaintiff's Memorandum, p. 11.

and that the United States is a proper party is misguided. In this suit, plaintiff is seeking to vote; she is not seeking to become a U.S. citizen here. These two concepts are not necessarily complementary, and it has been the historical rule that a person can be a U.S. citizen and not a voter, or a voter and not a U.S. citizen.[4] It is therefore clear that with respect to achieving the right to vote, plaintiff has exhausted her administrative remedies; the United States is therefore not a proper party.

In MacKenzie v. Hare, 165 Cal. 776 (1913) aff'd. MacKenzie v. Hare, 239 U.S. 299 (1915), in which MacKenzie, an expatriated citizen, sought to vote, the defendants, in the state suit, were the members of the Board of Election Commissioners of the City and County of San Francisco, and the Board; the United States was not a defendant.

In addition, in Takahashi v. Fish & Game Comm'r., 334 U.S. 410 (1948), this same argument was raised, and rejected, by the U.S. Supreme Court. In that case, a Japanese alien sued several state officials, and not the United States, in the state Court. The state officials would not award Takahashi a fishing license because a state statute precluded the granting of such a license to "persons ineligible to citizenship".

The federal naturalization law prohibited Japanese from becoming naturalized citizens. The state officials argued that Takahashi's proper recourse was to challenge the federal statute which excluded him from the status of U.S. citizenship. The Court rejected this, stating at pp. 418-419:

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[4]See, Plaintiff's Memorandum, pp. 8-11.

"Second. It does not follow as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living. The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."

Sixth, matters of electoral requirements are matters of state concern, not federal concern,[5] unless a state has denied a person equal protection. Thus, there is no basis for arguing that the United States is a proper party in this suit.

Seventh, the crux of defendant Sullivan's argument is:

"The exclusion of resident aliens from the franchise would appear to be a fundamental, compelling classification.[6]

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[5]Plaintiff's Memorandum, pp. 8-11.

[6]Sullivan's Memorandum, p. 7, ll. 10-11.

> "Nothing would appear to be more reasonable or compelling in the voting area than denying a voice in the management in a political society to non-members of the society."[7]

However, neither of these conclusions are supported.

Defendant Sullivan points out that most aliens are subject to a foreign sovereignty. Precisely how is left unclear. Regardless, that fact misses the point here, for plaintiff is now subject to the laws of this state and country, she has in fact lived here over twenty years, and she wants her say in the California and in the United States government. It is the American community in which she has a stake.

Moreover, the concept that a national of one country can vote in a political election in another country is a principle well recognized in international law. See, Afroyim v. Rusk, 387 U.S. 253 (1967).

Defendant Sullivan also argues that aliens "as a class do not understand our customs or laws or enter into the spirit of our social organization."[8] This argument is erroneous on several grounds. First there is no evidence that it is true. For example, in Mrs. Martinez' case, she has alleged that she does understand our customs and laws and that she wishes to be a fuller participant in our government. Second, even if it were true in some cases (as

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[7]Sullivan's Memorandum, p. 8, ll. 8-10.

[8]Sullivan's Memorandum, p. 9, ll. 7-8.

undoubtedly it is also true for some U.S. citizens) such fact does not support such broad, class disenfranchisement. As the California Supreme Court said in Purdy & Fitzpatrick v. Calif., 71 Cal. 2d 566, 582 (1969)

> "Finally any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis. The citizen may be a newcomer to the state who has little 'stake' in the community; the alien may be a resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state."

If this is true for holding a public job, or for the granting of a fishing license, it is even more certainly true when a value as important as the franchise is at stake. When the vote is at issue, the conditions must be narrowly drawn. Otsuka v. Hite, 64 Cal.2d 596 (1966).

Finally, defendant Sullivan argues that an alien tourist should not be allowed to vote. Plaintiff, of course, agrees with this.[9] However, plaintiff does not agree, and this is the problem here, that California can exclude the alien tourist from

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[9]Plaintiff's Memorandum, pp. 30-39.

the franchise by incorporating such a broad federal status definition as U.S. citizenship into its electoral law; such an approach is unconstitutional, for it is not narrowly drawn and it is not necessary to support a compelling state interest.[10]

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[10]Plaintiff's Memorandum.

DATED: January 29, 1971

Respectfully submitted,

STEPHEN E. KALISH

Attorney for Plaintiff

(VERIFICATION – 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of _____ } *ss.*

I, the undersigned, say: I am the _____

_____

_____

in the above entitled action; I have read the foregoing _____

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and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

_____

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on _____ *(date)* *at* _____ *(place)*, *California*

_____
(Signature)

(PROOF OF SERVICE BY MAIL – 1013a, and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of Los Angeles } *ss.*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in a resident of the County of Los Angeles, *over the age of eighteen years and not a party to the within action or proceeding; that my business address is* 1709 W. 8th St., Los Angeles, Calif. 90017;

that on January 29, 19 71, *I served the within* Memorandum of Points and Authorities in Opposition to Patrick Sullivan's Demurrer ~~to Complaint~~

on the defendants *in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail box, sub-post office, substation, or mail route (or other like facility), regularly maintained by the Government of the United States at* 1709 W. 8th St. *in the City of* Los Angeles, *California, addressed to the attorney of record for said* defendants *at the office address of said attorney, as follows:*

Henry G. Ollerlich
Attorney General
600 State Building
Los Angeles, Calif. 90012

Joe Ben Hudgens, County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on January 29, 1971 *at* Los Angeles, *California*

_____
(Signature)