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(9th Cir. 1995) United States Court of Appeals for the Ninth Circuit**

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AMERICAN-ARAB ANTI-DISCRIMINATION v. RENO
70 F.3d 1045 (9th Cir. 1995)
United States Court of Appeals for the Ninth Circuit

I. FACTS

The Immigration and Naturalization Service ("INS") arrested six resident aliens¹ after initiating deportation proceedings against them. The aliens were charged pursuant to the ideological provisions of the McCarran-Walter Act of 1952² ("the Act"), which provided for the deportation of aliens who advocated or who were affiliated with any organization advocating communism.³ The charges targeted their membership in the Popular Front for the Liberation of Palestine ("PFLP"), an alleged communist organization. The aliens were also charged with non-ideological immigration violations.⁴ Initially, they challenged the constitutionality of the statute. They claimed that the statute was overbroad, in violation of their First Amendment rights. Prior to the district court's hearing on a motion for a preliminary injunction, the INS dropped the ideological charges against the plaintiffs⁵ but retained the non-ideological violation charges. At trial, the government argued that aliens do not enjoy First Amendment rights in the deportation setting.⁶ The district court disagreed, noting the long history of case law affording aliens within the United States First Amendment protection.⁷ Furthermore, depor-

tation did not limit these rights.⁸ In determining whether the McCarran Act was overbroad, the district court considered whether it reached a substantial amount of constitutionally protected speech.⁹ The challenged provisions of the McCarran Act proscribed the writing, publishing, circulating, distributing, printing, displaying, and possessing material advocating or teaching the prohibited doctrines.¹⁰ The court could not equate these prohibited actions with advocacy of imminent unlawful action.¹¹ Therefore, the court concluded that the McCarran Act unlawfully reached speech protected by the First Amendment.¹²

The INS appealed the district court's decision. On review, the Ninth Circuit held that although the aliens had standing to challenge the McCarran-Walter provisions, their constitutional challenges were not ripe for review.¹³ Because the aliens no longer faced charges under the challenged provisions of the McCarran Act,¹⁴ they would not suffer hardship if judicial determination were delayed. Furthermore, the court was faced with many unknown facts.¹⁵ For example, the court did not know whether the aliens were actually members of the PFLP or the nature of the specific acts they had committed in violation of the challenged provisions.¹⁶ The

¹ Aiad Barakat, Naim Nadim Sharif, Bashar Amer, Ayman Obeid, Julie Mungai, and Amjad Obeid were collectively referenced as "the Six". Because of practical constraints, this case comment will address only the selective enforcement claims of these six petitioners. The case also held that the use of undisclosed classified information in legalization proceedings violated due process.

² 8 U.S.C. §§ 1251(a)(6) (D), (F-H) (1988).

³ 8 U.S.C. §§ 1251(a)(6) (D), (F-H).

⁴ 8 U.S.C. §§ 1251(a)(2, 9).

⁵ *American-Arab Anti-Discrim. Com. v. Reno*, 70 F.3d 1045, 1053 (9th Cir. 1995). The ideological charges were dropped for tactical reasons.

⁶ *American-Arab Anti-Discrim. Com. v. Meese*, 714 F. Supp. 1060, 1063 (C.D. Cal. 1989).

⁷ Aliens "within" the United States include nonimmigrant aliens as well as permanent resident aliens. *Id.* at 1074-1075. In fact, the Court of Appeals for California has held that aliens within the United States enjoy the benefits of the First, Fifth, Sixth and Fourteenth Amendments. *Id.* at 1074 (citing *Bridges v. Wixon*, 326 U.S. 135 (1945)) (Murphy, J. concurring). Congress' plenary power over immigration is not dispositive. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). In that

case, the Supreme Court conceded the Government's plenary immigration power in the substantive due process area, but it refused to accord the same deference in the First Amendment field.

⁸ *American-Arab Anti-Discrim. Com.*, 714 F. Supp. at 1063.

⁹ *Id.* According to *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the government may only prohibit advocacy directed toward inciting or producing imminent lawless action which is likely to incite or produce such action.

¹⁰ *Id.* at 1063.

¹¹ *Id.* at 1083.

¹² *Id.* at 1083-84.

¹³ *American-Arab Anti-Discrim. Com. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991).

¹⁴ *American-Arab Anti-Discrim. Com.*, 970 F.2d at 512. The INS dropped the ideological charges against the six petitioners but retained the non-ideological charges. In fact, the government expressly disavowed any intention of filing future charges against appellees under the challenged provisions.

¹⁵ 970 F.2d at 510-511.

¹⁶ *Id.* at 511.

United States Supreme Court has indicated that, without proper factual development in the record, its exercise of jurisdiction is inappropriate.¹⁷ Courts should avoid deciding important and difficult constitutional issues devoid of a factual context.¹⁸ Similarly, a judicial determination should be withheld until it is clear that the suing parties are within the scope of an act.¹⁹

In addition to the scant factual record, there existed no previous interpretation or application of the challenged provisions.²⁰ Neither the INS nor the courts have had the opportunity to interpret these provisions or to establish a policy implementing them.²¹ In essence, the Ninth Circuit would have to interpret the statute, *sua sponte* and without the aid of guiding principles, to determine whether the aliens' membership in the PFLP was triggered by the Act. To adjudicate the aliens' claims would undermine the basic premise of the ripeness doctrine: "the court would become entangled in an abstract disagreement over administrative policy and would interfere before any INS decision was made affecting the parties in any concrete way."²² Therefore, the issues were not fit for judicial determination.

Following the Court of Appeal's decision, the aliens brought selective enforcement claims²³ in district court. They claimed that the INS had singled them out for selective enforcement of the immigration laws because of their membership in an allegedly communist organization.²⁴ The district court granted summary judgment on the selective enforcement claims.²⁵ The court also preliminarily enjoined further deportation proceedings against the aliens, and the government appealed.²⁶

II. HOLDING

The Ninth Circuit affirmed the district court's preliminary injunction enjoining deportation proceedings against the aliens. The Court of Appeals agreed that the aliens had presented a *prima facie* claim of selective enforcement. To establish a *prima facie* case of selective enforcement, claimants must

prove that (1) others similarly situated have not been prosecuted or "disparate impact" and (2) the prosecution is based on an impermissible motive or "discriminatory intent."²⁷ The aliens proved that others similarly situated had not been prosecuted. Therefore, the immigration laws were being enforced against them discriminatingly. They also proved that their prosecution was based on an impermissible motive—retaliation for the constitutionally protected freedom of association.

III. ANALYSIS/APPLICATION

The Ninth Circuit had to determine whether the district court abused its discretion when it issued the preliminary injunction and whether the circumstances of the case warranted the preliminary injunction.²⁸ A preliminary injunction is considered appropriate "where plaintiffs show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in their favor."²⁹

The Ninth Circuit Court of Appeals found that the district's court issuance of the preliminary injunction was based on sound legal standards and findings of facts. The aliens satisfied both elements of a selective enforcement claim. Crucial to the analysis was the establishment of the appropriate control group. The district court selected as a control group those aliens who had either violated non-ideological provisions or were associated with terrorist organizations whose views the government tolerates. The control group consisted of people similarly situated, in all respects, to aliens except for the attribute on which their claims rested—affiliation with governmentally disfavored political views. The government's evidence included prosecution of individuals who had actually committed terrorist acts, rather than persons merely associated with terrorist organizations.³⁰ In essence, the court heard no evidence that the INS had ever prosecuted persons similarly situated to appellees. Therefore, the district

¹⁷ *Id.* (citing *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 312 (1967)).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *American-Arab Anti-Discrim. Com. v. Reno*, 70 F.3d at 1052. A selective enforcement claim is the immigration equivalent of a criminal selective prosecution claim.

²⁴ 70 F.3d at 1054.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1062 (citing *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989)).

³⁰ *Id.* at 1063. Appellees have never been charged with participating in terrorist activity.

court's conclusion that the aliens presented *prima facie* evidence of disparate impact was not clearly erroneous.³¹

The second element of a selective enforcement claim requires proof of an impermissible motive. Evidence of the government's impermissible motive included former FBI director William Webster's testimony to Congress.³² He testified that the aliens were arrested because of their membership in the PFLP.³³ Webster also stated that if these individuals had been United States citizens, they could not have been arrested; for citizens are permitted to belong to unfavorable organizations like the PFLP.³⁴ "[The] Government cannot deny rights and privileges solely because of a citizen's association with an unpopular organization."³⁵ Therefore, prosecuting aliens for membership activity, lawfully exercised by citizens, constituted an impermissible motive.

The court used the *Brandenburg*³⁶ test as the guiding principle for determining the lawfulness of the government's prohibition on appellees' First Amendment rights.³⁷ However, the government did not attempt to illustrate the aliens' satisfaction or failure of the *Brandenburg* standard. Rather, the government expounded its view that First Amendment rights did not extend to aliens residing in the United States who are subject to deportation proceedings.³⁸ The government failed to convince the Ninth Circuit.³⁹ The court relied on *Bridges v. Wixon*⁴⁰ and

other cases⁴¹ to illustrate this country's long standing practice of affording aliens within the United States First Amendment protection.⁴²

In *Bridges*, the Court reversed a deportation order of plaintiff Harry Bridges, allegedly affiliated with the Communist Party.⁴³ The court believed that the deportation order erroneously rested on two factors. First, the government misconstrued the term "affiliation" within the statute under which Bridges was charged.⁴⁴ The government gave "affiliation" a meaning broader than the statute permitted.⁴⁵ Second, Bridges was subject to an unfair hearing before the order was issued.⁴⁶ In a concurring opinion, Justice Murphy focused on the court's history of intolerance of inequitable treatment of resident aliens.⁴⁷ Justice Murphy thought that once an alien had lawfully entered and resided in this country, he was protected by the First and the Fifth Amendments and by the Due Process Clause of the Fourteenth Amendment.⁴⁸ These constitutional provisions apply to all "persons" and guard against any encroachment by federal or state authority.⁴⁹ In a later case, *Kwong Hai Chew v. Colding*,⁵⁰ the Court stated that resident aliens were, indeed, entitled to constitutional protection under the First, Fifth and Fourteenth Amendments and that these provisions make no distinction between citizens and resident aliens.⁵¹ Currently, Justice Murphy's *Bridges* concurrence is the majority view with respect to resident aliens' rights.

³¹ *Id.*

³² *Id.* at 1053.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1063.

³⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (delimiting the standard for what constitutes permissible and impermissible speech).

³⁷ *American-Arab Anti-Discrim.*, 70 F.3d at 1063.

³⁸ *Id.*

³⁹ *Id.* at 1064-66.

⁴⁰ *Bridges v. Wixon*, 326 U.S. 135 (1945).

⁴¹ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97 (1953).

⁴² *American-Arab Anti-Discrim.*, 70 F.3d at 1064.

⁴³ *Bridges*, 326 U.S. at 138. Bridges was charged under 8 U.S.C. § 137. The statute defined as deportable any alien who was "at the time of entering the United States, or has been at any time thereafter" a member of or affiliated with an organization of the character attributed to the Communist Party.

⁴⁴ *Bridges v. Wixon*, 326 U.S. at 144.

⁴⁵ *Id.* The record showed that the government defined "affiliation" such that it encompassed neutral mem-

bership activities, for example, assisting in the enterprises of an organization and securing members for it. *Id.* The proper construction of affiliation requires an adherence to or a furtherance of the purposes or objectives of the proscribed organization. *Id.* "Affiliation," in the Court's opinion, was distinguishable from mere cooperation with the organization's lawful activities. *Id.*

⁴⁶ *Id.* at 150-51. Highly incriminating statements appeared in therecord about Bridges' membership in the Communist party. Even though government regulations made these statements inadmissible and Bridges repeatedly objected to their admissibility, they were, nonetheless, admitted as substantive evidence.

⁴⁷ *Id.* at 161.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1952).

⁵¹ 344 U.S. at 596. Kwong Hai Chew, was an alien and lawful permanent resident of the United States. He was detained while returning from a voyage as a seaman on a vessel of American registry. The Attorney General ordered his detention and temporarily excluded him from the United States. Chew was deemed an alien whose entry was prejudicial to the public interest. Petitioner was ordered permanently excluded without notice of the

The government set forth a series of arguments to rebut the Ninth Circuit's finding that the resident aliens were entitled to the full range of First Amendment rights.⁵² Their most compelling argument was that Congress' plenary power over immigration matters allowed limiting the First Amendment protection of aliens facing deportation.⁵³ The court recognized that Congress and the President possessed virtually unfettered discretion to regulate aliens' admission into this country.⁵⁴ At the same time, however, Congress' power to deport a resident alien was a more restrained power, subject to constitutional constraints.⁵⁵

The United States Supreme Court has consistently distinguished between aliens within the United States and those attempting to enter from outside the country.⁵⁶ "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."⁵⁷ The Court has acknowledged this longstanding distinction between resident aliens and those seeking entry, characterizing it as a difference between unprotected status at the threshold of admission and the protected status within the national community.⁵⁸ Although use of summary processes and procedures is appropriate in an exclusion determination, the same is not true of a deportation proceeding. The government's argument failed because the appellees in this case were resident aliens facing deportation, not exclusion. Hence, they were entitled to the full protection of the First Amendment even in the face of deportation.⁵⁹

After a review of the district court's decision to issue a preliminary injunction against the government, the circuit court found that the district court did not base its decision on an erroneous legal standard or on clearly erroneous findings of fact. The aliens' First Amendment rights were subject to irreparable harm because of the government's unavail-

ing attempt to prosecute them.⁶⁰ Furthermore, petitioners had a strong likelihood of success on their claim that the INS had selectively enforced the immigration laws in retaliation for their exercise of their right to associate.⁶¹ Thus, the circuit court held, the district court did not abuse its discretion in preliminary enjoining deportation proceedings against the aliens.⁶²

IV. CONCLUSION

Aliens within the United States are afforded protection under the First Amendment and the Due Process Clause of the Fourteenth Amendment. These rights are applicable even in the deportation context. Neither the Constitution nor the courts have ever made entitlement to these protections dependent on an individual's legal status as an alien or a citizen. This court, along with its predecessors, assumes that aliens physically within the borders of our country want to remain in the United States, not only to reap the benefits of a democratic society, but to contribute to it as well. In fact, "[t]he Framers explicitly recognized that aliens within this country participate in a reciprocal relationship of societal obligations and correlative protection."⁶³

The United States is viewed as a melting pot, and this image continues as the number of incoming aliens grows. Having diverse cultures within our country is an attribute important to American culture. Throughout the opinion, the Ninth Circuit made several references to our "national community," reflecting a general desire and acceptance of people of different cultures who want to contribute to and be a part of our society. Perhaps courts like the Ninth Circuit are trying to undo the past wrongs consistently and unfairly visited upon aliens.⁶⁴ The judiciary's vehement intolerance for alien discrimination can be equated to the same intolerance it has for racial discrimination. Blacks, like aliens, have been subjected to private as well as governmental discrimination. The longtime and consistently inequitable

charges against him and without the opportunity to be heard. The Court held that his detention was unlawful. *Id.* at 603.

⁵² *American-Arab Anti-Discrim.*, 70 F.3d at 1064-1066.

⁵³ 70 F.3d at 1065.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Bridges*, 326 U.S. at 161.

⁵⁸ *American-Arab Anti-Discrim.*, 70 F.3d at 1065.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1066.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1065.

⁶⁴ *Id.* Aliens have been subjected to intolerant and harassing conduct in our past, particularly in times of crises. For example, Congress authorizes the President to expel "all such aliens as he shall judge dangerous to the peace and safety of the United States". See Alien Enemies Act of 1798, Act of June 25, 1798, ch.58, 1 Stat, 570, 571.

treatment of blacks resulted in the creation of comprehensive federal and local anti-discrimination models, such as Title VII and affirmative action programs. These programs, some of which protect against alien discrimination, are pervasive in our society. The Ninth Circuit in this case simply followed precedent and ensured that our national community remains intact. In light of the United States Supreme Court's unfettered insistence on affording aliens physically within our borders core constitutional rights, the legislation recently passed which expedites deportation proceedings is likely to encounter significant resistance.

Summary and Analysis Prepared by:

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