Nos. 154 and 326

In the Supreme Court of the United States

OCTOBER TERM 1970

RONALD JAMES, ET AL., APPELLANTS

v.

ANITA VALTIERRA, ET AL.

VIRGINIA C. SHAFFER, APPELLANT

v.

ANITA VALTIERRA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
JERRIS LEONARD,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
DAVID D. GREGORY,
JOSEPH B. SCOTT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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The central issue in these cases is whether the equal protection clause of the Fourteenth Amendment is violated by a State's singling out governmental actions relating to the providing of housing for the poor

and subjecting them to a special and burdensome referendum requirement.[1]

Article 34 of the California Constitution (set forth in the Appendix, *infra,* pp. 19–20) prohibits the development, construction or acquisition of a low rent housing project by any state public body until such project shall have been approved at a special or general election, by a majority of the qualified electors of the city, town or county in which the proposed project is to be located. The constitutional provision defines a "low rent housing project" as federally or state assisted housing for "persons of low income," who in turn are defined as "persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

Article 34 is thus directly applicable to federal programs designed to help provide adequate housing for the poor. These programs reflect a long-standing concern of the United States with problems of housing and poverty. In 1937 Congress declared it to be the policy of the United States to assist the States and their political subdivisions "to remedy the unsafe and

[1] Inasmuch as federal legislation ought not to be construed as purporting to authorize constitutional violations, a State's imposing on a federal program a procedural impediment in violation of the Fourteenth Amendment would also seem to violate the Supremacy Clause. Since we conclude that Article 34 does constitute a denial of equal protection of the laws, we do not and need not consider further appellees' contentions based on the Supremacy Clause. Cf. *Ranjel* v. *City of Lansing*, 417 F. 2d 321 (C.A. 6), certiorari denied, 397 U.S. 980.

insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income * * * that are injurious to the health, safety, and morals of the citizens of the Nation" (42 U.S.C. 1401). And in 1949 Congress declared the national housing policy to be "a decent home and suitable living environment for every American family" (42 U.S.C. 1441). One of the stated congressional objectives was "the development of well-planned, integrated residential neighborhoods * * *" (42 U.S.C. 1441(3)). In 1968 Congress reaffirmed the goal stated in 1949 and determined that to achieve it the nation needed the construction or rehabilitation of 26 million housing units within a decade, including six million units to serve the needs of low and moderate income persons (see 42 U.S.C. (Supp. V) 1441a).

Among the specific programs Congress has enacted to implement these policies are the provisions of the United States Housing Act of 1937 which authorize the use of federal funds for the construction and operation of public housing projects (42 U.S.C. 1409–1411).[2] This is the federal program which is directly affected—and impaired—by the referendum requirement of Article 34. While it has been supplemented by other federal programs,[3] the public housing program continues to

[2] The Act's constitutionality was sustained in *Cleveland* v. *United States*, 323 U.S. 329.

[3] Several additional federal housing programs are described adequately for purposes of this case in the appellees' brief (Br. p. 7, n. 6, pp. 58–62). And see, generally, 42 U.S.C. 1450 *et seq.* (urban renewal); 42 U.S.C. (Supp. V) 3301 *et seq.* (model cities). As appellees point out, these additional programs supplement, rather than supplant, the public housing program, and in some instances serve a substantially different type of persons.

play an important role in the government's efforts to achieve the congressional housing objectives.[4] The present case is, accordingly, of significant interest to the United States.

1. In 1938, California provided for implementation in that State of the Federal Housing Act of 1937 by enacting the Housing Authorities Law, Calif. Health and Safety Code § 34200, *et seq.*, enabling local governing bodies to obtain the benefits of the federal legislation by declaring a need for low-income housing and establishing housing authorities.[5] Pursuant to the federal statute, as amended (42 U.S.C. (Supp. V) 1415 (7)), local governing bodies must approve applications, proposed by the housing authorities, for federal assistance.

In 1950, the Supreme Court of California held that these two decisions committed to local governing bodies were administrative in nature and, hence, unlike legislative enactments, not subject to review by post-referendum. *Housing Authority* v. *Superior Court,* 35 Cal.2d 550, 219 P.2d 457; see, also, *Kleiber* v. *San Francisco,* 18 Cal.2d 718, 117 P.2d 657. Subsequently in that same year, the state constitution was amended by referendum to include Article 34, prohibiting construction or acquisition of low-income

[4] Statistics compiled by the Department of Housing and Urban Development show that on June 30, 1969, 2.5 million persons, including 1.5 million minors, lived in 784,580 public housing dwellings in 3,369 localities; and on June 30, 1970, 2.8 million persons, including 1.6 million minors, lived in 866,007 public housing dwellings in 3,972 localities. During 1969 alone, local housing authorities applied for 253,650 additional public housing dwelling units.

[5] The constitutionality of the state Act was sustained in *Housing Authority* v. *Dockweiler*, 14 Cal. 2d 437, 94 P.2d 794.

housing developments without *prior* referendum approval.

In 1966, the city council of San Jose, one member dissenting, declared a need for low-income housing and established a city housing authority (A. 25–27). In 1968, the council adopted, with one member dissenting, a measure to enable the housing authority to develop or acquire a low-rent housing project (A. 28–29) and a resolution placing that measure on the ballot (A. 28–30). The proposal was defeated (A. 10, 39, 64).

The present class action was initiated in August 1969 against the city council and housing authority[6] by residents of San Jose who were eligible for but unable to obtain adequate low-income housing (A. 1–13). Plaintiffs sought a declaratory judgment that Article 34 was unconstitutional and an order enjoining defendants from enforcing or complying with its requirements. This action was consolidated with a similar action against the housing authority of San Mateo,[7] and, after discovery and stipulations, a three-judge district court granted summary judgment for the plaintiffs. Two appeals have been taken from that decision: one by the city council of San Jose (No. 154) and a second by a single member of the council (No. 226) on the ground that the city council "appealed in order to obtain this Court's approval of the

[6] Federal officials were among the defendants originally named in the complaint (A. 1, 6), but the suit was dismissed as to them because no relief was sought against them (A. 171).

[7] The housing authority in the San Mateo case declined to defend.

judgment." Brief of Appellant Shaffer at 17. Neither housing authority has appealed.

This Court noted probable jurisdiction in No. 154 on June 8, 1970 (398 U.S. 949), and in No. 226 on June 29, 1970 (399 U.S. 925).

2. In our view, the constitutional question presented in these cases, while important, is a narrow one. There is no claim here of a constitutional right, in the abstract, to adequate housing for the poor, or to public housing. The claim is, instead, that, in singling out governmental actions relating to the providing of housing for the poor and subjecting them to a special and burdensome referendum requirement, Article 34 is invidiously discriminatory.[8] We believe the district court correctly viewed that issue as governed by the principles established by this Court's decision in *Hunter* v. *Erickson,* 393 U.S. 385, and, therefore, correctly upheld the appellees' constitutional claim.

(a) In *Hunter* a city council had authority to enact ordinances pertaining to, among other matters, real estate transactions within the municipality; such ordinances would ordinarily become effective 30 days after enactment and could be repealed only by the

[8] California imposes no comparable *mandatory, prior* referendum requirement for authorization of legislation or administrative action relating to other expenditures of public funds or other governmental decisions concerning land use. Such a requirement is manifestly a more substantial hurdle to governmental action than is the generally applicable provision of Article 4, § 1 of the California Constitution for referenda to review legislation, after its enactment, upon the petition of a sufficient number of voters. See, also, California Const., Art. 13 (Cum. Pocket Part) § 40 (requiring a prior referendum for assumption of long-term indebtedness under a general-obligation bond).

council or by a majority of voters participating in a properly initiated referendum. 393 U.S. at 386, 390 & n. 6. By an amendment to the city charter adopted in a popular referendum, the council was divested of that authority with respect to one type of regulation: ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry." *Id.* at 387. No such ordinance would become effective (and previously enacted ordinances would cease to be effective) until approved by a majority of the electors voting on the question at a regular or general election. *Ibid.* A class action to compel enforcement of a suspended fair-housing ordinance by the agency established for that purpose was initiated by a Negro who, because of race, had been denied an opportunity to purchase a home. On appeal from a decision of the highest court of the State upholding the constitutionality of the charter amendment, this Court reversed.

The discrimination wrought by the charter amendment had two dimensions: first, the amendment "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," 393 U.S. at 390; and, second, "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority," for it was they who were in need of protective legislation, *id.* at 391.

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In assessing whether this distinction was nevertheless justifiable, the Court first looked to the real interest at stake of those who had been disadvantaged—the need to obtain access to decent housing (393 U.S. at 391):

> The preamble to the open housing ordinance which was suspended by § 137 recited that the population of Akron consists of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by § 137 must be assessed.

Applying the test announced in *McLaughlin* v. *Florida,* 379 U.S. 184, 194, pertaining to official distinctions based on race, the Court held that the discrimination was not justified:

> We are unimpressed with any of Akron's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of § 137, but does not justify it. The amendment was unnecessary either to implement a decision to go slowly, or to allow the people of Akron to participate in that decision. Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may

> generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. * * *

393 U.S. at 392 (footnote omitted). Accordingly, the referendum requirement, which placed "special burdens on racial minorities within the governmental process," *id.* at 391, and disadvantaged a "particular group by making it more difficult to enact legislation in its behalf," *id.* at 393, was held to constitute a denial of equal protection of the laws.

(b) For the reasons which follow, we believe the rationale of *Hunter* is, as the court below held, at least equally applicable to the present case.

(1) In the manner in which it is discriminatory, Article 34 of the California Constitution is virtually identical to the city charter amendment in *Hunter.* It singles out one kind of official decision committed by law to designated government agencies for a requirement of prior referendum approval:

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

(2) The appellees' interest at stake here[9] is also the same as in *Hunter*; namely, the need to obtain decent housing.[10] In *Hunter,* that interest, constituting the background against which the referendum re-

[9] While affirmance of the decision below will not ensure that the individual plaintiffs will actually obtain adequate housing, this consideration does not, as appellant Shaffer contends (Br. at 25–27), defeat the plaintiffs' standing. In neither *Hunter*, *Reitman* v. *Mulkey*, 387 U.S. 369, nor *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641–642, among other cases, could individual members of the disadvantaged group demonstrate that their position would in fact be ultimately improved by removal of the challenged restrictions.

[10] To be sure, the burden on those who seek "the law's protection" is somewhat different here than in *Hunter* where the burden was placed within the legislative process, "making it more difficult [for a particular group] to enact legislation in its behalf." 393 U.S. at 390, 393. In the present case, plaintiffs seek to have federal and state legislation—already enacted—carried out by those agencies properly authorized to do so, without the unique burden of an automatic, prior-approval referendum requirement. Just as this Court's citation in *Hunter* (393 U.S. at 391) of *Gomillion* v. *Lightfoot*, 364 U.S. 339, *Reynolds* v. *Sims*, 377 U.S. 533, and *Avery* v. *Midland County*, 390 U.S. 474, suggests that the principles of those cases forbidding various "forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory steps—*i.e.*, the very enactment of legislation" (Brief for the United States as Amicus Curiae at 15, *Hunter* v. *Erikson*, No. 63, O.T., 1968), so too *Hunter* would seem to apply *a fortiori* when what is in issue is whether duly constituted state agencies may exercise their authority under legislation already duly enacted. Indeed, a previously enacted fair-housing ordinance, which had been rendered ineffective by the charter amendment, 393 U.S. at 386–387, was reinstated by this Court's decision in *Hunter*; and, just as is sought here, the administrative machinery established to carry it out, *id.* at 386, was permitted to do so without prior referendum approval.

quirement could be appropriately assessed, was set forth in findings by the city council. Here similar legislative findings have been separately made by the federal, state, and local governments.

Congressional findings on the need for decent housing underlie a federal policy of long standing. In 1937 Congress found a need "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income * * * that are injurious to the health, safety, and morals of the citizens of the Nation." 42 U.S.C. 1401. In 1948 Congress declared that

> the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. * * *

42 U.S.C. 1441. That need and goal were reaffirmed by Congress in 1968. 42 U.S.C. (Supp. V) 1441a.

The California legislature has made similar findings and a declaration of policies which merit quoting at length (California Health and Safety Code § 34201):

> It is hereby declared:
>
> (a) That there exist in the State insanitary or unsafe dwelling accommodations and that

persons of low income are forced to reside in such accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities.

(b) That these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income would therefore not be competitive with private enterprise.

(c) That the clearance, replanning, and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the

public interest for the provisions of this chapter is declared as a matter of legislative determination.

In 1966 the city council of San Jose found and declared (J.S. App. 25):

(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of San Jose, California;

(b) There is a shortage of safe and sanitary dwelling accommodations in the City of San Jose, California, available to persons of low income at rentals they can afford;

(c) There is a need for a housing authority to function in the City of San Jose, California * * *.

(3) Unlike *Hunter* where the charter amendment arguably applied to all persons equally in the sense that protective legislation for any racial, religious, or ethnic class would be subject to prior referendum approval,[11] the present case involves a constitutional provision which is discriminatory on its face. By its terms, the prior-referendum requirement of Article 34 applies only to

any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.

[11] But see *Shelley* v. *Kraemer*, 334 U.S. 1, 21–22.

"Persons of low income" are defined as

> persons or families who lack the amount of income which is necessary * * * to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

These classifications embodied in Article 34 correspond closely to the classifications drawn in *Hunter,* where, from the broad class of ordinances regulating real estate transactions (like government-assisted housing developments), a smaller class was singled out for the burden of the prior-referendum requirement. Article 34 similarly singles out for a like burden a small category of the spectrum of governmental actions involving public expenditures and determining how land will be used, and more narrowly discriminates between housing developments assisted in any manner by the state or federal governments which are designed for low-income persons and publicly assisted housing designed for other residents.[12] The condition precedent of referendum approval applies only to the former. Moreover, Article 34 is openly predicated on the need of some state citizens for public assistance in obtaining minimally adequate housing facilities; since it specifies who is to bear the burden of its impact, the distinction drawn between persons who, without low-income housing, would be financially unable

[12] *1969 HUD Statistical Yearbook* indicates that numerous programs of federal mortgage and other assistance for housing not specifically designed for low-income persons are in use in California.

to obtain "decent, safe and sanitary dwellings" and all others is clear from its terms.

(4). Finally, in our view, there is no more justification for the State's discrimination in this case than there was for that in *Hunter.*

Article 34 embodies a discrimination on the basis of wealth, defined in terms of ability to obtain minimally adequate housing accommodations. It is neither "a law of general applicability that may affect the poor more harshly than it does the rich," *Douglas* v. *California,* 372 U.S. 353, 361 (Mr. Justice Harlan, dissenting), nor an "effort to redress economic imbalances," *ibid.* Rather, it falls squarely within the rule that "[t]he States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws." *Ibid.* Accordingly, the stringent standard applied in *Hunter* is equally applicable here, for not only have "lines [been] drawn on the basis of wealth * * * which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny," *McDonald* v. *Board of Election,* 394 U.S. 802, 807, but also the suspect classification burdens a highly important and favored interest—the need to obtain adequate housing.[13]

[13] See the legislative findings quoted *supra* at pp. 11–13; *Hunter* v. *Erikson*, *supra* at 391. And see *Buchanan* v. *Warley*, 245 U.S. 60; *Block* v. *Hirsh*, 256 U.S. 135, 156; *Harmon* v. *Tyler*, 273 U.S. 668; *Richmond* v. *Deans*, 281 U.S. 704; *Shelley* v. *Kraemer*, 334 U.S. 1; *Hurd* v. *Hodge*, 334 U.S. 24; *Barrows* v. *Jackson*, 346 U.S. 249; *Reitman* v. *Mulkey*, 387 U.S. 369; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229.

Article 34 cannot be justified on the ground that it neutrally enables the electorate to participate in governmental decision-making that may affect the public fisc. The classification made by Article 34 is clearly not fiscal. As the court below observed (A. 176–177), Article 34 does not apply to numerous publicly assisted projects which affect the public fisc and may be undertaken without obtaining referendum approval. It is thus as impermissibly selective as would be a provision requiring referendum approval of an individual's taking up a new residence only when the new neighborhood is populated predominantly by persons of another race. Cf. *Harmon* v. *Tyler,* 273 U.S. 668. Moreover Article 34 does not permit the electorate to initiate acquisition or construction of low-income housing projects by invoking the referendum process, but merely permits a majority of the electorate to veto an official decision to assist a minority by providing needed housing. Since the electorate has thus acquired only the right to prevent government officials from providing low-income housing in accordance with their statutory authority, Article 34 can only operate to the detriment of the low-income minority, just as in *Goss* v. *Board of Education,* 373 U.S. 683, a minority-to-majority school transfer option could only operate to perpetuate racial segregation, *id. at* 686–687; cf. *Hunter* v. *Erikson, supra* at 391; see, also, *id.* at 395–396 (Mr.

Justice Harlan, concurring). And it is also significant that the referendum requirement does not merely provide an opportunity to review decisions to provide low-income housing, but is a condition precedent to their effectiveness.[14]

Of course, the purpose of Article 34 may be precisely to enable the electorate to prevent local officials from exercising their statutory authority to provide low-income housing. But, as the Court observed in *Hunter,* that "emphasizes the impact and burden of [the provision] but does not justify it." 393 U.S. at 392.

There is, in sum, nothing to suggest that Article 34's "classifications are rooted in reason," *Griffin* v. *Illinois,* 351 U.S. 12, 21 (Mr. Justice Frankfurter, concurring), and it surely does not meet the more stringent test applicable here (see *supra,* pp. 8–9, 15).

[14] We recognize, of course, that administrative procedures and requirements of various government programs will differ, and our position is not that such differences are impermissible. But Article 34 is not an integral part of the state's statutory scheme for responding to the need for low-income housing. It is instead a condition precedent superimposed upon it by constitutional amendment. In this sense, the discrimination may be more fundamental and perhaps less justifiable, just as the constitutional amendment considered in *Reitman* v. *Mulkey,* 387 U.S. 369, went beyond mere repeal of a fair-housing statute and "constitutionalized the private right to discriminate." *Id.* at 376; see *id.* at 377, 381; cf. *Hunter* v. *Erikson, supra* (amendment to city charter).

For the foregoing reasons, the decision of the court below should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
DAVID D. GREGORY,
JOSEPH B. SCOTT,
Attorneys.

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APPENDIX

Article 34 of the California Constitution provides:

§ 1. *Approval of electors; definitions*

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the

housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

For the purposes of this article the term "state public body" shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

For the purposes of this article the term "Federal Government" shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

§ 2. *Self-executing provisions*

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

§ 3. *Partial validity*

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

§ 4. *Conflicting provisions superseded*

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)

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