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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 293

WEST COAST HOTEL COMPANY, a Corporation, *Appellant*,

v.

ERNEST PARRISH AND ELSIE PARRISH, his wife, *Appellees*.

Appeal from the Supreme Court of Washington.

APPELLANT'S ANSWER TO BRIEF OF AMICI CURIAE.

The brief of the Attorney General for the State of Washington was not received by appellant until just as counsel was leaving Seattle, and therefore no opportunity has been had to answer it prior to argument. We therefore submit herewith summary of our oral argument which constitutes our answer to the brief of the Attorney General.

DEFINITION OF ISSUES.

This case brings up for consideration the constitutionality of legislation by a State authorizing the fixing of minimum wages for women. It involves no new type of legislation of the minimum wage class, but is similar in principle and in essential detail to that held invalid in the case of *Adkins* v. *Children's Hospital,* 261 U. S. 525. The Washington Act here in issue was passed in 1913, before the decision in the Adkins case. It does not contain the factual background of the New York Act, considered in the Tipaldo case in 1936, 80 L. Ed. Adv. Op. 921, nor does it predicate the fixing of wages in part or in whole upon any consideration of the value of the services rendered. Later I shall in detail distinguish the New York Act and show the substantial identity between the Washington Act and the District of Columbia Act construed in the Adkins case and the statutes of Arizona and Arkansas, all of which were held invalid. First, however, I shall give the facts and explain the issues in the case at bar, as shown by the record, so as to leave no doubt that the sole question before the Court is whether it wishes to reconsider and overrule the Adkins case. The West Coast Hotel Company case, now in argument, must be reversed and the Washington statute declared invalid unless the Adkins case is to be expressly overruled.

ANALYSIS OF WASHINGTON ACT.

Section one of the Washington Minimum Wage Act contains a short declaration that women should be protected from conditions of labor which have a pernicious effect upon their health and morals, and that inadequate wages exert such effect. Section two provides that it shall be unlawful to employ women at wages not adequate for their maintenance. Section three provides that a commission shall establish such standards of wages as shall be

> "held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

The words "held hereunder to be reasonable" refer to the provisions of Sections 10 and 11 prescribing how the Commission shall arrive at the minimum wages. It has no reference to value or the consideration to be given, but solely to what the Commission deems to be necessary for proper living expenses. Section 10 provides that the Commission shall call a conference to recommend a

> "minimum wage adequate in the occupation or industry in question to supply the necessary cost of living, and to maintain the workers in health."

Section 11 provides that if the recommendation of the conference is approved, the Commission shall specify it as the minimum wage for women in the occupation affected, and the standard conditions of labor for said women, and that after such order it shall be unlawful for any employer to employ adult women at less than said rate of wages. Under Section 19 questions of fact shall be determined by the Commission and there shall be no appeal therefrom, but either party may appeal to the Superior Court on questions of law. The Commission has no power to consider value of services in determining the wage. It is mandatory upon the Commission to fix a wage

> "adequate in the occupation or industry in question to supply the necessary cost of living, and maintain the workers in health."

This analysis establishes the identity of the Act with that of the District of Columbia, and in principle with those of Arizona and Arkansas, all of which are described in appellant's brief.

ANALYSIS OF FACTS AND HISTORY.

During the depression, and while the N. R. A. was in operation, the appellee, Elsie Parrish, was employed as a chambermaid in a hotel in Wenatchee, Washington, owned by the appellant. Wages were agreed upon and paid in the

agreed amount. After 18 months she brought this suit for the difference between what she received and the amount specified by the Washington committee.

The Superior Court of Chelan County held that the case was controlled by the Adkins decision, with which also the Court said he agreed in principle. Upon appeal the State Supreme Court of Washington reversed the Superior Court and held the statute constitutional, and directed judgment for the appellee. The decision of the Washington Supreme Court was based solely upon the validity of the statute in question and the power of the Industrial Welfare Committee to fix a minimum wage. The decision of said Court had no relation to any other matter whatsoever. The findings of the trial court were undisturbed. From the judgment of the Washington Supreme Court, the highest tribunal in that State, the appellant has appealed to this Court under Rule 46. All requirements have been complied with, the appeal allowed and jurisdiction accepted; and, as previously stated, the sole issue is the validity of the Washington statute.

The Attorney General's brief amici curiae erroneously states that there are no findings of fact, and that the judgment here should be affirmed because there was nothing in the record to show that the wages actually prescribed by the Commission under the Minimum Wage Act were other than were reasonable or agreed upon. The Attorney General inadvertently was in error in that statement, because he did not have the record when his brief was prepared. Findings of fact were made and are set out in the printed transcript, page 18, and expressly show that appellee worked at an agreed wage, and that this was paid to her, except the final salary of $17, which was tendered to and refused by her. The findings of the lower court (Tr. 19) further show that appellee's contention that she should have been paid at the wages fixed by the Industrial Welfare Commission "is unsound, is not sustained by the evidence," and in violation of the rights guaranteed by the 14th Amendment to the Federal Constitution.

I have heretofore outlined the Washington statute and compared it with the District of Columbia statute involved in the Adkins case. This I could do in more detail were it necessary, but I do not believe that my statement will be challenged that the two statutes are substantially identical in purpose, in principle, in the absence of factual declarations and findings, in administration, in procedure, and in detail.

ANALYSIS OF ADKINS CASE.

While the Adkins case has so recently been before the Court that its pronouncements are familiar to you, yet a brief summary may be useful. That case involved a similar statute of the District of Columbia, with respect to which Congress has legislative jurisdiction and the same police powers that the legislature of a State has within its jurisdiction. The statute was attacked upon the ground that it authorized an unconstitutional interference with the freedom of contract included within the guarantees of the due process clause o fthe Fifth Amendment, just as we attack the Washington statute because it is in violation of the due process clause of the Fourteenth Amendment. The majority opinion holds that the right to contract is a part of the liberty of the individual protected by this clause; that an interference with this liberty must be deemed to be arbitrary unless it be supported as a reasonable exercise of the police power of the State; that there is no such thing as absolute freedom of contract, but that freedom is the general rule and restraint the exception. The Court divided the decisions where interference was permitted into four classes:

1. Those dealing with statutes fixing rates to be exacted by businesses impressed with a public interest, and held that these decisions were inapplicable.

2. Cases involving statutes relating to contracts for the performance of public work. These were also held inapplicable.

3. Cases dealing with statutes prescribing the character, method and time for the payment of wages. These statutes have been sustained in a number of decisions by this Court. The Court said in the Adkins case:

> "In no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes."

4. Decisions relating to statutes fixing hours of labor. These statutes were sustained as a legitimate exercise of the police power, on the ground that the legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting this determination, the decision of the legislature in that respect was beyond the reviewing power of the Federal courts. These decisions were likewise held inapplicable by the majority opinion, which quotes from other decisions to the effect that the mere assertion that the subject relates, though but in a remote degree, to the public health does not necessarily render the enactment valid. The Act must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate before an act can be held to be valid which interferes with the general right of an individual to be free in his power to contract in relation to his own labor. The statute involved in *Bunting* v. *Oregon,* 243 U. S. 426, was held to regulate hours of labor rather than wages, and the contention that it was an attempt to fix wages was rejected, and said law and others constituting regulation of hours and conditions were upheld as a proper exercise of the police power. The Court held that the District of Columbia statute was to be differentiated from all those referred to in the four named classes; that it does not prescribe hours of labor or conditions of working, but was simply "a price fixing law". It held that

> "the price fixed by the Board need have no relation to the capacity or earning power of the employee, or the number of hours which may happen to constitute the

> day's work. While it has no other basis to support its validity than the presumed necessities of the employee, it takes no account of any independent resources that she may have. * * * The standard furnished by the statute for the guidance of the Board is so vague as to be impossible of practical application with any reasonable degree of accuracy."

It held that the law compelled the employer

> "to pay at least the sum fixed in any event because the employee needs it, but requires no service of equivalent value from the employee"

and that

> "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work to be done under it, is so clearly the product of a naked, arbitrary exercise of power, that it cannot be allowed to stand under the Constitution of the United States."

The bench and bar generally have accepted the Adkins case as controlling statutes like that of the District of Columbia, including the Washington statute. This even may be inferred from the Washington order fixing minimum wages. The Washington statute was passed in 1913. It was upheld by the Washington Supreme Court in 1918. The order fixing the minimum wages here in question was adopted August 5, 1921 (Tr. 49). The Adkins case was decided in 1923. Appellee still relies on the order of 1921, although the intervening years have seen the greatest boom and most severe depression in history, with a corresponding fluctuation in wage scales and living costs. Nothing more is needed

to show that both from a social and constitutional viewpoint the statute and the proceedings under it are fanciful, arbitrary and impotent to accomplish the declared purpose. A statute fixing minimum wages upon the basis of value of services, applicable to all individuals in a given class, permitting reasonable flexibility under changing conditions, may accomplish a social service and be a reasonable exercise of the police power. That is for this Court to decide if a clear case is presented to it, as for instance in the Ohio statute. But an Act such as the Washington statute, which looks at one side of the problem only, and attempts to fix wages upon the basis of necessity rather than earning power, is arbitrary, an improper exercise of the police power, and utterly impractical to help the people it is designed to benefit. The police power of a State should be upheld in a proper case, but it accomplishes no social or economic relief to uphold statutes based on extreme or illogical applications of the police power. To do so invites other legislation equally unjustifiable from a constitutional viewpoint. If we sustain every act of a legislature because it is within the general range of subjects embraced by the police power, regardless of how arbitrary are the means employed, we nullify the Constitution, abandon our duty to uphold it, and in effect surrender to the legislature the exclusive and sole power to decide when the police power exists, how and by what means it is to be exercised and whether the end is a proper one, and the means appropriate to that end. In history, that has not been the traditional policy of this Court. If and when such a policy is adopted, and acts with good purpose but inappropriate and arbitrary means are sustained, the liberties guaranteed by the Constitution are gone.

ANALYSIS OF TIPALDO CASE.

We now pass to the Tipaldo case, not with any view of debating the correctness of the opinions therein filed, but to show that the dissenting opinion of Mr. Chief Justice

Hughes was based upon his belief that the New York statute provided a substantially different standard than the District of Columbia Act, in that it provided that the fair value of services was to be taken into consideration in fixing a minimum wage. No such situation exists in the Washington case. The element of reasonable value of services is not involved. Our case is governed solely by the Adkins case and the subsequent cases in conformity with its holding.

The majority opinion of this Court in the Tipaldo case holds that the construction of the New York statute by the highest court of that State was binding upon it, and that that court could see no distinction between the Adkins case and the Tipaldo case. Quoting from the New York court, it said:

> "The Act of Congress had one standard, the living wage; this State Act had added another, reasonable value. The minimum wage must include both. * * * One of the elements therefore in fixing the fair wage is the very matter which was the basis of the Congressional Act."

I interpret this to mean, if the New York court is right, that under that Act the Board must in any event fix a living wage, and that the employee gets more if he earns it. Or, to state it another way, that they shall fix the fair value, but the minimum must be a living wage.

This Court further held in the Tipaldo case that it has always recognized the essential difference between the fixing of hours and working conditions and the fixing of wages; that with respect to the Adkins case

> "the decision and the reasoning upon which it rests clearly show that the State is without power, by any form of legislation, to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."

The majority further held with respect to the Adkins case that

> "That decision was deliberately made upon careful consideration of the oral arguments and briefs of the respective parties, and also the briefs submited in behalf of States and others as amici curiae." * * *
>
> "We have adhered to the principle there applied and cited it as a guide in other cases." * * *
>
> "That States having similar enactments have construed it to prevent the fixing of wages for adult women."

It is therefore clear that the majority in the Tipaldo case have expressly reaffirmed the Adkins case and the principle there laid down with respect to any attempt to take away the right of contract with respect to wages. The chief applicability of the Tipaldo case in the present litigation is that Mr. Chief Justice Hughes pronounced a distinction in the Tipaldo case from the Adkins case, but the element upon which the supposed distinction exists is not present in the case at bar. There is no attempt whatever in the Washington statute to predicate the minimum wage upon the reasonable value of the service nor upon a factual background concerning which so much is made in the Tipaldo case.

While we are discussing the Tipaldo case may we respectfully refer to the other dissenting opinion by Mr. Justice Stone, because he plainly implies that he does not agree with the pronouncements of the majority in either the Tipaldo case or the Adkins case. Since the case at bar is controlled by the Adkins case, it is permissible for us to respectfully set forth what we conceive to be erroneous reasoning by Honorable Mr. Justice Stone. He said:

> "No one has yet attempted to say upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and condi-

> tions of labor of women * * * and of men * * * and of the time and manner of payment of wage, * * * but that the regulation of the amount of the wage passes beyond the constitutional limitation, or to say upon what theory the amount of a wage is any the less the subject of regulation in the public interest than that of insurance premiums, * * * or the commissions of insurance brokers, * * * or of the charges of grain elevators, * * * or of the price which the farmer receives for his milk, * * * or the wage earner pays for it."

I have omitted the citations which he employs. The argument is forceful, but is completely answered by the reasoning in the several cases which he cites. In each of the cases mentioned the end was legitimate and the means reasonable and appropriate to that end. In the case at bar, whether the end is appropriate or not, the means employed are arbitrary, unreasonable, confiscatory, and bear no fair relation to the end sought to be obtained. If the District of Columbia minimum wage statute was based upon fair value of services rather than a living wage, Mr. Justice Stone's criticism would be more pertinent; but since the method of fixing the minimum wage is purely arbitrary and has no relation to value, then the Adkins case cannot be criticized on the authority of the cases he cites.

NEBBIA CASE.

This is well illustrated in the *Nebbia* case, *Nebbia* v. *New York*, 281 U. S. 502, where the price which the farmer and the dealer were to receive and which the public was to pay for milk was authorized by statute to be fixed by an Administrative Board. This was upheld as a proper exercise of the police power. The statute was predicated upon a factual investigation lasting for a year and embraced a thorough and detailed study of an economic problem vitally affecting the welfare of the whole people. It was not a loosely drawn statute, such as we are here concerned with.

But the *Nebbia* case has no analogy to the present situation or possibly even to the Tipaldo case, because there is one vital difference of fact, and that consists in the wording of the statute. The statute involved in the *Nebbia* case says: "The Board shall ascertain * * * what prices for milk will best protect the milk industry * * * and insure a sufficient quantity of pure and wholesome milk * * *."

In the case at bar the statute makes it mandatory to fix wage price not based upon value but solely upon the necessities of a living wage. The element of reasonable return to the producer was included in the Nebbia statute. The element of fair value received is excluded in the Washington statute. That, in our opinion, makes a complete and conclusive distinction between those cases.

By some of the Judges of this Court the subject of fixing a minimum wage upon proper standards is considered as being within the police power of the State. To those who take this view and consider that the *Nebbia* case in any way affects the case at bar, I point out the above significant difference in statutes and in factual considerations. I can hardly imagine that this Court would have sustained the statute in the *Nebbia* case had it required the Board to fix a price for milk less than the cost of production, or arbitrarily so high as to be beyond the reach of those who were paying for it. If the statute in the *Nebbia* case had arbitrarily commanded the Board to exclude from consideration the cost of production or the fair value of the merchandise, this Court would have had no hesitation in holding the statute void. This is precisely what was done in the District of Columbia statute in the Adkins case and in the Washington statute under consideration. And no sympathy with the social objects of a minimum wage law should blind us to the fact that no good is accomplished by endeavoring to promote a legitimate end by inappropriate, unconstitutional means. In truth, the minimum wage statute here involved should not bear that name at all. The word "wage"

implies service of value, and has the implication of fair consideration for the money received. A statute fixing a minimum wage upon any other basis simply imposes confiscatory burdens upon the employer and actually prevents employees from securing employment, particularly in times of economic stress.

ANSWER TO APPELLANT'S ARGUMENTS.

I now pass to a consideration of the arguments presented by the Washington Supreme Court and by the appellee and by the Attorneys General as amici curiae in support of the Washington statute. Without regard to where found, I will state these arguments in order:

1. It is claimed that the Adkins case is not binding, since the Act involved was an Act of Congress; that the Federal Congress did not have the same police power in the District of Columbia that a legislature has in a State, and that the power of the State with reference to police power in its own jurisdiction is supreme. It is clear, however, that the police power of Congress within the District of Columbia is as broad as that of a legislature within a State. In *Capital Traction Company* v. *Hoff*, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873, the Court said:

> "It (the Congress of the United States) may exercise within the District all legislative powers that the legislature of a State might exercise within the State."

Other authorities to the same effect are found in our opening brief. The argument of appellee and the Washington Supreme Court goes to the full extent of saying that the Supreme Court of the United States has no power to protect an individual citizen against the encroachment upon his individual rights by the State under the guise of the police power. That is not the law. The holding in the

Arizona and Arkansas cases so prove. I point out that in the Arizona case Mr. Justice Holmes concurred in holding the statute invalid on the authority of the Adkins case, although he himself dissented from the Adkins decision. The fact that Congress has expressly provided for appeals in situations like this disproves the contention. The act of February 13, 1925, chapter 229, in substance provides that a final judgment in the highest court of a State may be reviewed by the Supreme Court where the validity of a statute of the State is drawn in question. It should be noted also that in the Adkins case and the Tipaldo case various Attorneys General for different States filed briefs. It makes no difference whether the decision of the State court is in favor of or against the validity of the statute, the Supreme Court has jurisdiction to review it, once the conflict between the State statute and the Federal Constitution is brought in question. It is true that the construction of the State court of a State statute will be binding upon the United States Supreme Court, but in the instant case that statute is construed by the Washington Supreme Court precisely as I have indicated here, namely, that it is mandatory upon the Commission to fix a wage without regard to reasonable value.

2. The second contention is that the State legislature could deprive a person of his constitutional rights under a State statute by merely stating that the enactment is an exercise of the police power for the correction of an existing evil, and that the Supreme Court of the State by upholding the Act thereby makes a fact determination which precludes a different determination by the United States Supreme Court. This contention, however, was disposed of by several cases cited in our opening brief. We would have an intolerable situation if that contention were true. The same statute might be enacted in different States and held constitutional in some and unconstitutional in others as respects the United States Constitution. State lines give

no excuse for interpreting our Federal Constitution differently as applied to the same Act in different States. In *Buchanan* v. *Warley*, 245 U. S. 60, the Court said:

> "Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

3. The brief of the appellee really raises no other or different point. It says that we have correctly stated the issues, and that the issue to be determined is

> "whether this legislative act is a valid and reasonable exercise of the police power of the State of Washington. The Constitution does not prohibit states from regulating matters pertaining to public welfare, but simply requires those matters be exercised in a manner reasonably tending to that end."

The real point of appellee's brief, however, is the contention that because the Washington Act received the approval of the Supreme Court of Washington it is *ipso facto* entitled to approval by this Court, and that the presumption of constitutionality must prevail in the absence of any factual foundation in the record for declaring the Act unconstitutional. No such factual foundation is necessary. If a State Act, for instance, provided that one could be imprisoned without a trial, it would not be necessary to produce any factual evidence to show the invalidity of the statute. It would be necessary only to show the fact of imprisonment and the terms of the statute. The Washington minimum wage statute itself carries upon its face all of the factual evidence necessary for its condemnation. It

provides, and the Supreme Court of Washington has construed it to mean, that a minimum wage must be established without regard to the value of services rendered. That condemns it beyond question.

4. The brief of the Attorney General is in part based upon the erroneous statement that there were no findings of fact, and a considerable part of the discussion it contains is therefore not material. However, it seizes upon the use of the word "reasonable" in the statute; but, as above pointed out, that word, as expressly defined, related to what was reasonable for living purposes, not what was a reasonable consideration in services for the money received. The brief also says that no effort was made to show that a reasonable and fair rate was either more or less than the rate established by the Welfare Committee; but the findings expressly show that an agreed rate was in force and this will be presumed to be a reasonable rate as having been agreed upon by the parties to be the consideration to be paid. The brief also says that it is difficult to understand why minimum wages may not be fixed without violating due process, if prices can be so fixed, and that both interfere with the liberty of contract. That has been answered by the repeated decisions of this Court already discussed. The distinction is that in those cases where the right to fix prices has been upheld there was a legitimate end to be attained, and appropriate and reasonable means adopted. In the case at bar the means at least were arbitrary. We do not, as asserted by the Attorney General's brief, contend that any attempt to fix a minimum wage in industry would be arbitrary and discriminatory. That is not necessary to this decision. We do say that a statute of the type here involved, which operates without factual background and which imposes a mandatory duty to disregard the element of fair consideration, is by its own terms invalid and a complete overriding of the Constitution. When a statute of that character comes before this Court it needs neither evidence nor facts to condemn it. The language of the Act itself plainly shows that

it is an attempt to override the individual liberties which are safeguarded by the Constitution. Reference is made in the Attorney General's brief to the upholding of this statute by the previous cases of *Larsen* v. *Rice,* 100 Wash., 642, and *Spokane Hotel Company* v. *Younger,* 113 Wash., 359. Both of these decisions, however, were long prior to the Adkins case, and ceased to be an authority immediately upon its decision, and are of no force and effect whatever upon this Court in determining whether the provisions of the State statute contravene the United States Constitution. In the Tipaldo case Mr. Chief Justice Hughes quoted the definition of an oppressive and unreasonable wage under the statute as one

> "which is both less than the fair reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health."

The Washington statute contains no such element of reasonable value. The brief of amici curiae asserts that there is no evidence showing that the rate fixed by the Commission was unreasonable. That is not necessary. The evidence shows that there was an agreed rate and that the Supreme Court set that aside because the Commission fixed a minimum rate based solely

> "upon the estimate of the Conference of the minimum wage adequate to supply the necessary cost of living and to maintain such employees in health and comfort." (Tr. 50.)

Appellant had a contract relating to wages. The contract price was paid. The evidence shows there was a going rate. That going rate was paid. After accepting this agreed wage for eighteen months, the appellee seeks to obtain more solely because the Commission under the Act fixed a rate which the order itself shows had no reference to the value of the services.

CONCLUSION.

In conclusion we contend that the issue before this Court is simply whether the Adkins case is to be reconsidered and reversed or whether its authority is to be sustained. We believe the considered judgment of the American people is that the majority opinion in that case was right. There may be authority that a minimum wage act based upon fair value of services might be upheld. That view, however, gives to the appellee no support in this case, because the Washington statute was passed prior to any decision on the minimum wage statutes, and is of the type held arbitrary, unreasonable and unconstitutional in the Adkins case and in the Tipaldo case. It follows that the judgment of the Supreme Court of the State of Washington must be reversed and the judgment of the Superior Court of Chelan County, Washington, set out in the record herein, affirmed.

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